IN THE CARIBBEAN COURT OF JUSTICE

Original Jurisdiction

CCJ Application No TTOJ2018/002

Between

Trinidad Cement Limited &	**Claimants**
Arawak Cement Limited	
And	
The State of Barbados	**Respondent**
And	
Rock Hard Cement Limited	**Intervener**

And

CCJ Application No BBOJ2018/001

Rock Hard Cement Limited	**Claimant**
And	
The State of Barbados	**Respondent**
And	
The Caribbean Community	**Respondent**

composed of A Saunders, President, and J Wit, W Anderson, M Rajnauth-Lee and D Barrow, Judges

having regard to the Orders made by the Court on the 14th day of January 2019 granting the parties and the intervener leave to file written submissions on the issue of whether a Member State that has obtained a derogation from the Council for Trade and Economic Development to increase an applicable tariff to a rate beyond the Common External tariff is required to obtain the approval of the Council for Trade and Economic Development in order to reimpose the Common External tariff rate, the written submissions filed on behalf of Trinidad Cement Limited and Arawak Cement Limited on 28 January 2019, 1 February 2019 and 8 February 2019, the written submissions filed on behalf of Rock Hard Cement Limited on 21 January 2019, 1 February 2019 and 8 February 2018, the written submissions filed on behalf of the State of

Barbados on 28 January 2019 and 8 February 2019 and the written submissions filed on behalf of the Caribbean Community on 29 January 2019 and 8 February 2019 as well as the Affidavit annexing the Draft Decision of the Council for Trade and Economic Development on the classification of Rock Hard Cement filed on 5 February 2019

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

- **Trinidad Cement Ltd and Arawak Cement Ltd**, by Mr Reginald T. A. Armour, SC and Mr Raphael Ajodhia, Attorneys-at-Law
- **The State of Barbados**, by Ms Donna Brathwaite, QC, Attorney-at-Law
- **Rock Hard Cement Ltd**, by Mr Allan Wood QC and Ms Symone Mayhew, Attorneys-at-Law
- **The Caribbean Community**, by Dr Corlita Babb-Schaefer and Mr O'neil Francis

Delivers on the 17th day of April 2019, the following:

RULING

INTRODUCTION

[1] These proceedings interrogate the question of whether the State of Barbados (also 'Barbados' or 'the State'), which received approval from the Council for Trade and Economic Development ('COTED') in 2001 to apply a tariff rate different from the Common External Tariff ('CET'), without COTED stating an expiry date for that derogation, was obliged to obtain the approval of COTED before it could properly reimpose the CET. This question is unlikely to recur in the same manner since a Protocol was adopted in 2015 which stipulates that a Member State may be exempted from applying the CET on goods '*for a period of time.*'[1] However, the 2015 Protocol is not retroactive and therefore does not cover the 2001 derogation. Further, it cannot be guaranteed that the wording of the protocol will always be faithfully applied. Accordingly, the question of the nature and implications of a derogation granted by COTED is a live one for the consideration of this Court in this ruling.

FACTUAL BACKGROUND

[2] At the Eleventh Meeting of COTED held in Guyana from 22-23 May 2001, the State of Barbados sought to exercise its right under the World Trade Organization ('WTO') rules to increase its rates of duty up to the WTO bound rate on a range of manufactured

[1] See CARICOM's 2015 Protocol to Amend Article 83.

products. Barbados explained that this was necessary to protect the local manufacturing sector "from the competitive forces unleashed by trade liberalisation and globalisation." It therefore requested a "derogation" from the CET to apply a 60 percent rate of duty on a list of items. This list of items included Tariff Heading 25.23 in the Schedule to the CET, which Barbados described as "*Portland cement, cement fondu, slag cement, super sulphate cement, and similar hydraulic cement, [Excluding: white Portland cement (2523.31)]*." The Court notes, however, that the actual wording of Tariff Heading 25.23 in the Schedule to the CET is "*Portland cement, aluminous cement, slag cement, super sulphate cement and similar hydraulic cement, whether coloured or in the form of clinkers*."

[3] COTED agreed to grant Barbados the 60% derogation and, by the Customs Tariff (Amendment) (No. 2) Order, 2001 (Gazetted 15 November 2001), Barbados legislated a 60% rate of duty on Tariff Heading No. 25.23, which it again described as "*Portland cement, cement fondu, slag cement, super sulphate cement, and similar hydraulic cement, [Excluding: white Portland cement (2523.31)]*." Barbados subsequently, in 2004, introduced the Customs Tariff (Amendment) (No. 5) Order, (Gazetted 31 December 2004) which was followed in 2009 by the Customs Tariff (Amendment) (No. 9) Order (Gazetted 31 December 2009). Both Orders imposed a 60% rate of duty on Tariff Heading 25.23 in similar terms as the 2001 Order. Additionally, the 2004 and 2009 Orders specifically mentioned a 60% CET on cement classified as "other hydraulic cement" and "building cement (grey)." These types of cement are found in the Subheadings to Tariff Heading 25.23 in the CET Schedule. In that Schedule, subheading 2523.90.00 provides for a CET rate of 0-5% on cement classified as "other hydraulic cement" and Subheading 2523.29.10 provides for a CET rate of 15% on cement classified as "building cement (grey)".

[4] On 8 October 2015, the Government of Barbados decided it would no longer apply the derogation from the CET in relation to cement classified as "other hydraulic cement" and re-imposed a 5% rate of duty on that cement, consistent with CET for Subheading 2523.90.00. Although the 2009 Order was never repealed, the State levied a 5% duty on cement it classified as "other hydraulic cement" imported by Rock Hard Cement Limited ('RHCL'), a company incorporated in Barbados which engages in the importation of extra-regional cement into that State.

PROCEDURAL HISTORY

[5] There are currently four cases before this Court concerning disputes arising from the importation of extra-regional cement into the Caribbean Community ('CARICOM' or 'the Community').[2] Two of these cases are concerned with the issue of the derogation granted by COTED in 2001, which is the subject-matter of this ruling.

[6] In the first of these, TTOJ2018/002, the Claimants are Trinidad Cement Limited ('TCL'), a company based in Trinidad and Tobago, and its subsidiary, Arawak Cement Company Limited ('ACCL'), a company based in Barbados, both manufacturers and distributors of cement subject to Community treatment. By Order of this Court dated the 22 June 2018, the TCL and ACCL were granted special leave pursuant to Article 222 of the Revised Treaty of Chaguaramas ('RTC') to bring an Originating Application against Barbados complaining of two main breaches of the RTC, that is, that Barbados had (i) wrongfully lowered the CET from the approved 60% derogation rate to a 5% tariff on the importation of extra-regional cement; and (ii) misclassified that cement so as to levy an inappropriate rate of duty. The Claimants contended that the actions of the State were contrary to Articles 9, 26, 79, 82 and 83 of the RTC.

[7] The issues thus raised by TCL and ACCL may be conveniently referred to as (i) the classification issue, and (ii) the derogation issue. In relation to the classification issue, TCL and ACCL argue that Barbados wrongfully classified cement imported by RHCL as "other hydraulic cement" when in fact that cement ought to have been classified as "building cement (grey)". This issue is common in all four claims before the Court and is to be the subject-matter of subsequent hearing and decision.[3] As regards the derogation issue, the Claimants claimed that Barbados breached the RTC when it unilaterally reduced the 60% rate of duty on cement falling under Subheading 2523.90.00 - other hydraulic cement. Barbados took this step without consulting COTED, the Secretary General of the Community, TCL and ACCL.

[8] The derogation issue is also central to the second case, BBOJ 2018/001, in which the Claimant is RHCL. By Order of this Court dated 23 November 2018, RHCL was granted

[2] TTOJ2018/001 (Trinidad Cement Limited v The State of Trinidad and Tobago); TTOJ2018/002 (Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados); BBOJ2018/001 (Rock Hard Cement Limited v The State of Barbados and The Caribbean Community); SLUOJ2018/001 (Rock Hard Distributers Limited v The State of Trinidad and Tobago and The Caribbean Community).

[3] The hearing is set for 11 and 12 June 2019.

special leave pursuant to Article 222 of the RTC to bring an Originating application against Barbados to seek Orders that would: (1) direct Barbados to reinstate or apply the CET tariff rate of 5% in respect of the RHCL's blended hydraulic cement classified under CET Tariff Heading 2253.90; and (2) restrain Barbados from reverting to the bound rate of 60% on cement imported by RHCL classified as "other hydraulic cement" under the CET Tariff Heading 2523.90.

[9] RHCL's Originating Application also sought declarations: (i) that Barbados had breached and remained in breach of Article 82 of the RTC in failing since October 2015 to amend its domestic legislation to accord with the CET on cement classified under CET Tariff Heading 2523.90 as "other hydraulic cement"; (ii) that COTED had no authority to object where a Member State had received a waiver, suspension or "derogation" from the application of the CET and thereafter elected to apply the CET; (iii) that there was no requirement or obligation imposed on Barbados to obtain the approval of COTED when in October 2015 that State determined that it would apply the CET of 5% to imports of "other hydraulic cement" in lieu of a higher bound rate of 60% that had been approved at the 11th Meeting of COTED; and (iv) that where Barbados had received approval from COTED to apply the bound tariff rate of 60% to "other hydraulic cement" classified under the CET Tariff Heading 2523.90, the State did not require the approval or sanction of COTED to apply the tariff rate of 5% stipulated in the CET to imports of cement classified as "other hydraulic cement" under the CET Tariff Heading 2523.90.

[10] The Order of 23 November 2018 also permitted RHCL to proceed against CARICOM pursuant to the Court's supervisory jurisdiction over Organs of the Community including COTED, which was the relevant organ of the Community for purposes of the operation of the CET. Under Article 83 of the RTC these purposes include such alteration or suspension as decided by COTED.

[11] By Orders dated 14 January 2019 and 1 February 2019, this Court ordered the parties in the two claims concerning the derogation issue to file written submissions on (i) the scope of the derogation obtained by Barbados at the 11th Meeting of COTED, in particular, whether that derogation included cement classified as *other hydraulic cement*; and (ii) whether a Member State that has obtained a derogation from COTED to increase an applicable tariff to a rate beyond the CET, is required to obtain the approval of that body in order to reimpose the CET. The submissions were duly filed, and the matter heard on

12 February 2019. Based on the written and oral submissions of the parties it may be said that the derogation issue engages two related but separate questions: (i) did the derogation include "other hydraulic cement"?, and, if it did; (ii) was the approval of COTED required to re-implement the CET?

DID THE DEROGATION INCLUDE OTHER HYDRAULIC CEMENT?

[12] Tariff Heading 25.23 and its Subheadings are as follows-

25.23		**Portland cement, aluminous cement, slag cement, supersulphate cement and similar hydraulic cements, whether or not coloured or in the form of clinkers.**
2523.1	00	- Cement clinkers
		- Portland cement:
2523.21	00	- - White cement, whether or not artificially Coloured
2523.29		- - Other:
2523.29	10	- - - Building cement (grey)
2523.29	20	- - - Oilwell cement
2523.29	90	- - - Other
2523.3	00	- Aluminous cement
2523.9	00	- Other hydraulic cements

[13] TCL and ACCL submit that the derogation requested by Barbados included "other hydraulic cement" because (i) it is implied from the Revised Common External Tariff of the Caribbean Community 2018, in particular, under the section titled 'General Structure', that the Tariff Headings must be taken to include all the Subheadings; (ii) the fact that Barbados specifically mentioned the exclusion of 'white Portland cement', which is at Subheading 2523.21.00, suggests that if this Subheading was not explicitly mentioned then it would have been included in the derogation; (iii) the Customs Tariff (Amendment) (No. 9) Order 2009 expressly states that the tariff rate on "2523.90.00" (other hydraulic cement) is of 60%; and (iv) the CET has no rate of duty assigned to a corresponding Heading, only to Subheadings.

[14] In response, Barbados argued that the derogation could not have included cement classified as "other hydraulic cement" for several reasons. The State submitted that there was no express mention of "other hydraulic cement" in the list of manufactured products presented to COTED in respect of which a derogation was sought. Furthermore, in the said list, Barbados specified a 15% CET as being applicable to the listed cements. "Other hydraulic cement" could not have been reasonably included as the applicable rate of duty for said cement had always been a CET rate of 0-5%. It was also noted that prior to the request for derogation, the domestic legislation in effect, that is the Customs Tariff (Amendment) Order 1998 S.I. 1998 No. 50, specified a 5% rate of duty applicable to other hydraulic cement. In the Customs Tariff Order which immediately followed, that is the Customs Tariff (Amendment) (No.2) Order 2001, there was no express mention of other hydraulic cement; only Tariff Heading 25.23 was mentioned. The State also placed great emphasis on the fact that other hydraulic cement was first imported into Barbados in 2015 and had always attracted a rate of duty of 5%. It argued that when the Cabinet of Barbados agreed to reduce the rate of duty from 60% to 5% in 2015, it was based on the misapprehension that the applicable rate of duty on other hydraulic cement was 60%.

[15] RHCL, for its part, did not make submissions as to the scope of the derogation. Mr Wood QC and Ms Mayhew submitted that they were unable to advance a position on the issue as this was a matter within the knowledge of Barbados and COTED and all the relevant documents, including the version of the CET which existed in 2001, had not been disclosed by those parties to RHCL.

[16] In the submissions filed by the Community's General Counsel, it was noted that the goods listed as Tariff Heading 25.23 in the list of manufactured products presented to COTED by Barbados was consistent with the Harmonized Commodity Description and Coding System Code of 1996 (HS 1996) which was in place at the time the derogation was sought.

[17] According to the General Counsel, a comparison of the cement with respect to which Barbados obtained a derogation with those listed at Heading 25.23 of the HS 1996, leads to the conclusion that the derogation was in relation to the goods stated under the entire Heading. The General Counsel also suggested that the fact that the term "cement fondu" was not used in Barbados' request as stated at [2] above, was immaterial as it was the

same as "aluminous cement". She contended that the only Subheading expressly excluded from Barbados' derogation was "white Portland cement", so that it would logically follow that the derogation extended to Heading HS 25.23 and its Subheadings except for Subheading HS2523.21 - white Portland cement. As Subheading HS2523.90 - other hydraulic cement - was not expressly excluded, it must be understood as being included in the goods with respect to which Barbados obtained the derogation. The General Counsel further contended that this was also consistent with the Customs Tariff (Amendment) (No. 9) Order, 2009[4] which provides for a tariff rate of 60% for Portland cement and aluminous cement as well as other hydraulic cement.

[18] The first step in determining the scope of the derogation sought and obtained by Barbados requires that this Court refers to the World Customs Organization Harmonized Commodity Description and Coding System ("HS") which is widely used in international trade. The HS is a structured nomenclature comprising a series of 4-digit headings, most of which are further sub-divided into 5- or 6- digit subheadings, and supported by Rules of Interpretation, as well as by a network of legal notes, in order to achieve the utmost uniform classification of goods worldwide. There are about 5,000 commodity classes. The Community has adopted the HS model as found in 'The Common External Tariff of the Caribbean Community' with its latest version being published on 11 April 2018. In that document, it is said that,

> The numbering system actually begins with the Chapter, then with the four-digit Headings, then the six-digit subheadings being divisions of headings. The subheadings of the System are denoted by dashes, the one-dash subheadings being the primary divisions of a Heading, then the two-dash being the division of a one-dash subheading.

[19] The Court notes that the World Customs Organization's Explanatory Notes in respect of Heading 25.23 provides that,

> "... the heading also covers aluminous cement, slag cement, supersulphate cement (ground blast furnace slag mixed with an accelerator and calcined gypsum), pozzolana cement, Roman cement, etc., and mixtures of the above-mentioned cements.[5]
> The cements of this heading may be coloured…"

This suggests that the scope of Heading 25.23 is wider than the actual descriptive terms used in that Heading.

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[4] S.I. 2009 No. 159
[5] Emphasis added.

[20] The CET also contains six General Rules of Interpretation.[6] Rule 1 provides that "for legal purposes, classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes and, provided such Headings or Notes do not otherwise require." Rule 2 then provides that "any reference in a Heading to an article shall be taken to include a reference to that article incomplete or unfinished, and that "any reference in a Heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances" as well as "any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance." Rule 3 thereafter provides means for resolving cases for which goods are classifiable under two or more Headings. Where goods cannot be classified under Rule 3, Rule 4 provides that those goods shall be classified under the Heading appropriate to the goods to which they are most akin. Rule 5 directs the classification of containers which are presented with articles. Finally, Rule 6 provides that "the classification of goods in the Subheadings of a Heading shall be determined according to the terms of those Subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only Subheadings at the same level are comparable. For the purposes of Rule 6, the relative Section and Chapter Notes also apply, unless the context otherwise requires." Under the heading "General Rules Explained", it is further noted that Rule 6 becomes relevant only after the goods have been classified at the Heading level[7].

[21] It is evident from the General Rules of Interpretation that the process of classification under the Schedule of the CET requires first, the identification of an appropriate Tariff Heading followed by the appropriate Subheading. These Subheadings will thereafter specify the applicable CET.

[22] The Court notes further that the CARICOM Secretariat filed a request for the World Customs Organization ("WCO") to classify cement distributed by RHCL, TCL and ACCL according to the CARICOM CET's Schedule. The Community filed the WCO's report in this Court on 15 November 2018. Without expressing any views as to the

[6] See record pp. 1706 of TTOJ2018/002.
[7] Emphasis added.

correctness of the WCO's conclusion, it is important to bear in mind that the trade policy framework for CARICOM's CET is based on the tariff structure of the HS of the WCO while the rates are determined by COTED. Therefore, the interpretation of the HS structure by the WCO is informative. The WCO's report strongly supports the view that Headings and Subheadings are read together and that reference to Headings include its Subheadings. In its report, the WCO accepted that RHCL, TCL and ACCL's cements fell under Heading 25.23 and the WCO was "inclined to classify [the cements] as other hydraulic cements in heading 25.23, (subheading 2523.90)."[8]

[23] This Court finds that upon examining the scheme of the Community's CET and its Rules of Interpretation, any reference to Tariff Heading 25.23 includes its Subheadings. The strength of the submissions of TCL, ACCL and of the Community coupled with the guidance provided by the General Rules of Interpretation strongly support this approach to interpretation. It is also instructive that Tariff Heading 25.23 does not have a corresponding CET rate of duty in contrast to, for example, Tariff Heading 25.21. Therefore, Barbados could not logically have sought a derogation in respect of that Heading when there is no corresponding rate of duty for that Heading. This is also clear from the fact that the State currently provides for a 60% rate of duty on cement classified as building cement (grey). Building cement (grey) is not mentioned in the Heading 25.23 but is instead located at Subheading 2523.29.10, yet it has never been challenged that the derogated 60% tariff rating applies to this type of cement. The Court further considers that the express exclusion of Subheading 2523.21 (white Portland cement) by Barbados in its request has evidential value. The State did not make a similar express exclusion of Tariff Subheading 2325.90 - other hydraulic cement. The only logical conclusion is that Barbados would equally have made an explicit reference to Subheading 2523.90 if the intention was to exclude other hydraulic cement from the derogation.

[24] The Court accepts the submission by Barbados that there may have been a discrepancy between the listed goods in the request for derogation and tariff payable on goods listed in Tariff Heading 23.25, and further, that there may have been a misapprehension in the imposition of the 60% tariff in the Customs Tariff (Amendment) 2004 and 2009 Orders. However, the decisions and recommendations of COTED are of critical importance to the private sector which is the driving force behind the CARICOM Single Market and

[8] Emphasis added.

Economy ("CSME"). In order to effectively engage in its activities, the private sector requires certainty of governmental regulations. The sector must be able confidently to rely on legislative edicts of the various States of the Community. In this case, TCL and ACCL were fully entitled to rely on the 2009 Customs Tariff Order which, in effect, confirmed that the State of Barbados was implementing the approval from COTED that a 60% tariff be imposed upon the importation of other hydraulic cement. This entitlement subsisted until and unless Barbados made a formal public statement or declaration to the contrary. Accordingly, this Court finds that Subheading 2325.90.00 - other hydraulic cement - was included in the derogation in respect of Tariff Heading 25.23 sought and obtained by Barbados at the Eleventh Meeting of COTED.

WAS COTED'S APPROVAL REQUIRED TO RE-IMPLEMENT THE CET?

[25] In their written submissions filed 28 January 2019, TCL and ACCL submitted that the RTC envisioned and provided that the Community would deliberate through COTED on any changes made to the implementation of the CET in any specific Member State. They argued that the CET and the Combined Nomenclature in a customs union such as CARICOM are reflections of the policies and practices of the Member States of the customs union. There may be generally applied rates for specific goods, but the CET need not be one rate for all Member States but rather reflect, at any point in time, a multiplicity of rates which represented, with the concurrence of COTED, the varied policies and practices as well as the international commitments of individual Member States. To the extent that the CET represents an important tool for the achievement of the Community's objectives, it was submitted that it was not amenable to any unilateral action by any individual Member State, unless the RTC expressly so provided.

[26] They further submitted that there was no evidence that Barbados intended to apply for a 'suspension' of the CET in 2001 pursuant to Article 83 of the RTC, and it is uncontroversial that the documents before the Court did not reveal that Barbados sought to limit the 'derogation' which it sought from COTED to any period of time. Furthermore, it was submitted, even if the 2001 'derogation' was to be treated as a 'suspension', Barbados would have still been required to return to COTED for approval to return to the CET rate in the circumstance where the period of time for which the 'suspension' was to apply had not been decided upon by COTED at the time of the grant. Although there was no express provision in the RTC which requires a Member State to

return to COTED to re-impose the CET rate, the RTC permitted the doctrine of implied powers in order to interpret the provisions of the treaty in light of the object and purpose of the treaty in a manner that renders the treaty effective.

[27] In very brief submissions, the State of Barbados noted that Article 83 provided that any alteration or suspension of the CET shall be decided by COTED and therefore agreed with TCL and ACCL that where a member state sought and obtained an indeterminate derogation from COTED, the Member State ought not to reimpose the CET without obtaining COTED's prior approval. In those circumstances there may well be interested parties and Member States who wish to be heard by COTED on a proposed change. However, if the derogation was sought for a specified period, at the expiration of that period, it would not be necessary for the Member State to seek COTED 's approval as the derogation would expire by operation of law.

[28] RHCL, for its part, submitted that Article 83 only confers on COTED a power to alter or suspend the CET and that COTED has no other power by which it could suspend, relax, exempt or otherwise interfere with the operation of the CET. RHCL further submitted that the RTC contains no provision requiring the approval of COTED where a Member State decides to re-implement the CET after a suspension had been granted. In the absence of such express provisions RHCL submitted that there was no justification for requiring Member States to obtain such approval from COTED. To impose on a Member State a condition that it must obtain COTED 's approval before it can revert to the application of the CET is contrary to the sovereign act and agreement of the Member State to create and implement the CET. Such a requirement would also be contrary to the objectives and purposes that led to the creation of the CET which are to achieve trade liberalisation as a primary objective of Article 82. Essentially, to require COTED's approval before re-implementation of the CET would transfer the unconditional sovereign right and obligation of the Member State to implement the CET into an obligation that is conditional on COTED. RHCL did, however, concede that as a matter of good administration it was desirable but not required that Member States notify COTED of their decision to re-implement the CET after a decision was taken that the derogation is no longer required.

[29] The Community's General Counsel submitted that the approval of COTED to reapply the CET rate was not required but that a Member State who had received a derogation

had an implied obligation under the Treaty to provide information as to the date on which the Member State no longer required the derogation, and the date on which the Member State would apply or re-apply the CET. This would allow COTED's records to reflect that the Member State was no longer entitled to take advantage of the derogation. Until such time, or until COTED revoked the derogation or until the derogation expired assuming a duration was stipulated, a Member State is authorised to apply the rate that had been granted by COTED. The Article 82 obligation to establish and maintain the CET would not apply unless and until a Member State, that had obtained a derogation, informed COTED, or the Secretary-General on COTED's behalf, that it was in a position to apply the CET rate. The Community was of the view that the obligation to inform COTED existed regardless of whether there was a time limit stated in the derogation granted to the Member State. This general approach, according to the Community's General Counsel, was akin to certain provisions in human rights treaties, in particular the European Convention on Human Rights (ECHR)[9] and the International Covenant on Civil and Political Rights (ICCPR),[10] which expressly requires the Contracting/State Party to inform the relevant body when a derogation ceases to operate.

[30] In their Reply submissions of 1 February 2019, TCL and ACCL submitted that the ECHR and ICCPR frameworks referenced by the Community were not applicable to the present circumstances. Firstly, they are both human rights treaties and provide for an express right of derogation in the terms of the treaty itself and only apply in the case of a public emergency. It therefore makes good legal and logical sense, for any derogation from human rights protections to become immediately and unilaterally terminable once the emergency which prompted the derogation has passed, subject only to informing the competent authority that the derogation is no longer required. TCL and ACCL were of the view that that framework is not applicable to the RTC and the provisions which govern the enforcement of the CET rate and/or COTED's approvals because: (i) the RTC is not a human rights treaty[11] and there is no express power to derogate from its provisions; (ii) the RTC creates a single market and economy, so decisions taken by one Member State affect all the other Member States, unlike a decision to derogate from a human rights treaty which would affect the derogating party only; (iii) COTED has

Article 15(3) ECHR.
Article 4(3) ICCPR.
[11] Except for the treatment of safeguard measures which are not relevant in this case.

implied decision making powers,[12] which it would not be able to exercise on the basis of a mere notification; (iv) the object and purpose of the RTC and CSME would be frustrated if other concerned Member States are not allowed an opportunity to deliberate and come to a decision on matters which affect the implementation of the CET in a particular Member State; and (v) the CET as created under the RTC is never one rate but a multiplicity of rates and, therefore, a re-imposition of one CET rate on a particular good may affect other considerations under the CET tariff regime as a whole.

[31] In its Reply submissions filed on 1 February 2019, RHCL argued that the normal meaning of 'derogation' as used in international law was akin to a 'suspension' of treaty obligations as suggested by the 2015 Protocol Amending Article 83. Accordingly, a tariff resulting from a suspension granted to a Member State by COTED under Article 83(1) was not to be characterized as a CET. Article 83(5) required COTED to continuously review the CET, not the suspension of a CET and did not require COTED's prior approval where a Member State opted to apply the CET after being allowed a suspension.

[32] RHCL further argued that TCL and ACCL ignored the fact that the derogation obtained by Barbados to permit the rate of 60% on the wide range of goods (not just cement) was not an increase/alteration in the CET but was intended to permit Barbados to charge increased tariffs and was permitted for application by Barbados only. In these circumstances the 'derogation' could not confer any substantive benefit to manufacturers on a community level under the RTC. Thus, if a Member State decides to reinstate the CET rates established for the Community, COTED could not oppose the decision of the Member State to reapply the CET as this is the rate the Member State is required to maintain under the treaty. There would also be no need for any consultations by COTED with stakeholders or community manufacturers.

[33] Finally, RHCL argued that even if there had been an implied obligation to notify COTED, that notification can be given at any time and does not render it unlawful for the Member State to apply the CET. It was further argued that if this Court were of the view that notification to COTED is required for good administration, the Court should order Barbados to provide formal notification to COTED without any further delay.

[12] See Article 15(2)(a); Article 83(1); Article 83 (8) of Protocol to Amend the RTC.

[34] The Court considers that the starting point in determining the relative merits of these submissions must be the concept of the CET in the CSME. The CET is a defining characteristic of the emerging economic union and single economy among Member States of the Community. CARICOM is a customs union and a regional trade agreement area covered and protected by Article XXIV of GATT. This requires the establishment of a CET. In the words of Article XXIV:8 (b), "substantially the same duties and other regulations of commerce [should be] applied by each of the members of the union to the trade of territories not included in the union." The CET may be designed to end re-exportation, inhibit imports from countries outside the economic union, and thereby offer a measure of protectionism to industries based within the union. The level of protection considered appropriate for indigenous industries is decided by the Community through its relevant organs and processes. Thus, Article 82 of the RTC obliges Member States to establish and maintain a common external tariff in respect of extra-regional goods, 'in accordance with plans and schedules set out in the relevant determinations of COTED.

[35] Individual Member States may wish to impose additional protection for their industries and thus seek this approval of COTED. Prior to 2015, the process for approvals of specific rates was somewhat uncertain. At a meeting of COTED held in May 2011, a request from Member States for a suspension of the CET to increase selected CET rates brought into contention the authority of COTED to increase the CET under Article 83 of the RTC. The General Counsel of CARICOM provided a legal opinion to COTED in November 2011 where it was argued that in light of this Court's decision in *TCL v The Caribbean Community*[13] COTED's authority to alter or suspend the CET was limited to grounds set out in paragraph 2 of Article 83. COTED had extensive discussion on the issue whereby differing views were expressed as to the correct interpretation of the Court's ruling in *TCL v The Caribbean Community*. At the 34th Meeting of COTED in March 2012 it was agreed that "Article 83 should be amended as a matter of urgency to allow Member States the flexibility to adjust tariffs (upwards or downwards) in the context of their international obligations."

[36] The *Protocol to Amend Article 83 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy* was

[13] [2009] CCJ 4 (OJ).

concluded on 11 March 2014.[14] The Article, as amended, defines an 'alteration' as a change in the CET by an increase or decrease, 'which changed rate is applicable to all Member States'. By contrast a 'suspension' may be requested by a Member State whereby it is authorized by COTED to suspend the applicable CET on an item, and in place thereof, apply a higher or a lower tariff. An application for a suspension must be supported by information as prescribed by COTED, from time to time. COTED is required to consider several factors in its consideration of the application to suspend the CET, and authorization shall be subject to such terms and conditions as COTED or the Secretary-General acting on behalf of COTED, may decide. The Protocol specifically provides that suspension of the CET exempts the Member State from applying the agreed CET on an item 'for a period of time.'[15]

[37] The 2015 Protocol, therefore, remedied the lacunae in the original Article 83 by expressly providing that the suspension that allows the Member State to apply a rate higher than the CET must be for a specific time. The Protocol was executed on 11 March 2014 and provisionally applied upon signature by all Parties to the RTC. Thereafter, a decision by COTED regarding suspensions and alterations of the CET will be governed by the Protocol. However, the Protocol cannot be used to govern the derogation granted by COTED in 2001, nor can it apply by reasoning backwards from the Protocol to the state of the pre-existing law. For this reason, the Court cannot agree with RHCL that the 2001 derogation granted by COTED was ultra vires and void because it did not comport with the Protocol definition of a suspension. Whether an indefinite derogation is void for failure to comport with proportionality as discussed by this Court in Trinidad *Cement Limited v CARICOM*[16] was not argued before us and is not decided on this occasion. What is clear is that the Protocol remains useful in highlighting both the significance of specification of the duration of time for which the specific rates that deviate from the CET will apply, as well as the importance of collaboration and information sharing between the Member State and COTED.

[38] The question therefore remains as to the nature and duration of the derogation granted in 2001. It will be noted that Barbados sought and obtained approval to increase the rate payable on "other hydraulic cement", thereby unilaterally undertaking greater protection

[14] Concluded at Buccament, St. Vincent and the Grenadines.
[15] Article 83, (9), (a).
[16] [2009] CCJ 4.

for its local industries than was considered appropriate under the Community standards. This must be distinguished from an application to impose a rate lower than the CET, which would expose local industries to less protection from extra-regional competition than the Community considers appropriate. Barbados fully explained the reasons for its application as the need to protect the local manufacturing sector "from the competitive forces unleashed by trade liberalisation and global competition." This was clearly a considered national economic policy measure advanced by the State based upon its own deliberate considerations. Being greater than the protection considered appropriate by the Community (and assuming that an indefinite derogation was at all possible), it stands to reason that it was equally a matter for Barbados to decide when its industries were no longer in a position to require this additional protection, although as a matter of good administration it would have been expected and appropriate to inform COTED of its revised position.

[39] The Court therefore agrees with the submissions of the Community that there was no requirement for the State of Barbados to have received the approval of COTED to revert to the CET. The Court, however, also agrees that there was an implied obligation on Member States to serve on COTED reasonable notice of their intention to revert to the CET. General Counsel correctly identified some of the information which the Member State should provide when discharging this duty to inform, that is, (i) the date on which the Member State no longer required the derogation and (ii) the date on which the Member State would apply or re-apply the CET. This information would ensure that COTED's records are up to date and most importantly, enable it to discharge its functions as the regional supervisor of external tariffs. This framework reflects good administrative practices, preserves the sovereign nature of the Member State and ultimately enhances the overall functioning of the CSME.

[40] The Court considers that this information must be provided by the Member States for a separate and even more important reason. Changes in the applicable duty directly affect 'the integration of national markets into a community market area.' An increased CET provides greater protection and hence an incentive for regional manufacturers to supply this component of the regional market under a higher protective regime. Therefore, where a Member State did not seek an end date for a derogation from COTED, it can only be presumed that at the time when the authorisation was approved by COTED such derogation would be for an indefinite period, or until such time as the Member State

formally communicated to COTED that the higher protection was no longer necessary. It is inconsistent with the proper appreciation of the role of the regional private sector and their business models to expect that there could reasonably be an adjustment to the changed rate overnight. A tariff incentive, approved by COTED and implemented by the Member State, and enjoyed by regional manufacturers in that Member State cannot be unilaterally and unceremoniously pulled without giving the manufacturer reasonable time to adjust its business models and operations to the changed realities. Without reasonable and adequate notice, a regional manufacturer, supplying the regional market, would not enjoy the transparency, certainty, and predictability required for tariff regimes to be compliant with Article X of the General Agreement on Tariffs and Trade, or with the ethos of the RTC.

[41] Accordingly, the Court considers that in order to engender certainty and confidence in the private sector it is imperative that there be certainty in the application of the extraordinary rates applied pursuant to the derogation. Where no duration is specified, the importance of the potential reliance by private sector entities on the derogation within the single market, suggests that the Member State has an obligation to give reasonable notice of its decision to revert to the CET.

[42] The Court notes that the requirement for reasonable notice is a general principle of International Law, being a part of the "good faith" doctrine. Speaking in the context of good faith and the withdrawal from optional declarations on jurisdiction, Robert Kolb, in his text *Good Faith in International Law*[17], notes that,

> If a declaration is completely silent as to the circumstances in which it may be withdrawn, in particular as to when a notice to that purpose will take effect, the law provides for a 'reasonable time'. The ICJ gave a very clear answer in the *Military and Paramilitary Activities in and Against Nicaragua* case (1984):
>
> > But the right of termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable withdrawal from or termination of treaties that contain no provision regarding the duration of their validity…[18]

[43] Although these principles were expressed in relation to optional declarations, this Court finds that an analogous obligation of providing reasonable notice to COTED was

[17] Kolb Robert, Good Faith in International Law (Hart Publishing 2017).
[18] ibid, p. 232.

required in the circumstances where a Member State no longer believes the application of an approved derogation from the CET was necessary. Notice would serve two main purposes. Firstly, it would alert COTED, the regional administrator of the CET, of the status of the State's application of the CET and secondly, it would be in the best interest of private persons and other Member States which may have some interest in the Member State deciding to re-impose the CET rate.

[44] The requirement for reasonable notice is also consistent with the RTC's Preamble which mandates "restructuring the Organs and Institutions of the Caribbean Community and Common Market and redefining their functional relationships so as to enhance the participation of their peoples, and in particular the social partners, in the integration movement" recognising "that co-operation and joint action in developing trade relations with third States and in establishing appropriate regulatory and administrative procedures and services are essential for the development of the international and intraregional trade of Member States." The Preamble also expresses the Member States' desire "to enhance the effectiveness of the decision-making and implementation processes of the Community." Therefore, the potential impact that the re-imposition of the CET rate of duty on an extra-regional product could have on the private sector is a relevant consideration to be considered by Member States, and as a matter of good faith, reasonable notice of the intention to re-impose the CET was necessary.

[45] The question of what constitutes 'reasonable' or 'adequate' notice is a matter of fact for decision on a case by case basis. The Court accepts that, in the circumstances of this case, ACCL and TCL were aware, for a significant number of years, of Barbados's intention and decision to reduce the rate of duty on importation of "other hydraulic cement". In a letter dated 26 September 2008, from ACCL to the Minister of Trade, Industry and Commerce, ACCL referred to a letter received from Barbados dated 17 September 2008 where Barbados sought confirmation that ACCL was not objecting to a reduction in the bound rate. In response, ACCL stated that "it holds no objection to the reduction of the 60% bound rate on imported cement to a percentage that is equivalent to that of the CET rate of 15%". ACCL also indicated that "this position would have been shared with the Minister of Trade, Industry and Commerce...at a meeting held on 16 July 2008."

[46] On 8 October 2015, the Cabinet of Barbados took the decision to apply the CET rate of 5% to imported cement classified under Tariff heading 2523.90.00 as "other hydraulic

cement" having determined that the reasons for imposing the previous bound rate of 60% were no longer relevant or in the best interests of the State and its citizens. This decision was formally communicated by letter to Mr. Mark Maloney, Chairman of the RHCL from the Permanent Secretary of the Ministry of Industry, International Business Commerce and Small Business Development dated 14 October 2015, which stated:

> "*Please refer to your correspondence addressed to the Minister of Industry International Business Commerce and Small Business development dated May 14, 2015 requesting a reduction in the rate of duty on hydraulic cement classified under tariff number 2523.90.00.*
>
> *I am directed to inform you that the Cabinet of Barbados has agreed that the rate of duty on other hydraulic cement falling under tariff 2523.90.00 should be reduced from 60% to the CET rate of 5%."*

[47] Further, at the end of October 2015, RHCL also received a letter from the Minister of Industry, International Business Commerce and Small Business Development, confirming the decision taken by the Cabinet of Barbados as follows:

> "*Reference is made to your letter dated 14 May 2015 in respect of the rate of duty on cement falling under tariff heading 2523.29.90. This matter was considered by the Cabinet of Barbados and the new rate of duty for cement under tariff heading 2523.29.90 is now 5%.*
> *My Ministry is now in the process of formally notifying the Ministry of Finance, The Customs and Excise Department and all other stakeholders*."

[48] This decision of Cabinet was duly implemented by the Customs Department of Barbados and from November 2015 to July 2018 all imports by RHCL of "other hydraulic cement" was classified under Tariff Subheading 2523.90. This information was communicated to ACCL by at least 11 November 2015. It had been reported by the Barbados Nation News newspaper on or about 10 November 2015 that the Minister of Industry, International Business, Commerce and Small Business Development made statements to the effect that ACCL had "to compete on a level playing field" and that the State had "protected Arawak Cement Co. Ltd and Trinidad Cement Limited for years. Those days are over." Following the newspaper publication, representatives of TCL and ACCL met with the Minister on 11 November 2015. The representatives expressed the companies' concerns in relation to a reduction of the CET, however, the Minister reiterated the Government's decision to reduce the tariff. The Minister said that this was "necessary for improving

efficiencies in the cement industry and the need to ensure that consumers got better prices for much-needed raw material."

[49] The Court also notes that TCL and ACCL wrote directly to the Secretary-General of CARICOM on 23 May 2016 complaining of the unilateral reduction of the bound rate and the classification of RHCL's cement. TCL and ACCL sought the Secretary-General's urgent intervention. Their letter was acknowledged as received by the Office of the Secretary General on 25 May 2016, but there is no evidence that a substantive response followed. There is no evidence that the Secretary General or COTED made enquiries of Barbados as to that State's application of a 60% bound rate, and there is no evidence before this Court that Barbados has formally informed COTED of the re-imposition of the CET on "other hydraulic cement" and the date of that re-imposition.

Amendment of domestic law to accord with RTC obligations

[50] In its Originating Application (see [9] above) RHCL sought a declaration that Barbados had breached and remained in breach of Article 82 of the RTC in failing to amend its domestic legislation to impose 0-5% tariff in accordance with the CET on "other hydraulic cement". RHCL has obviously succeeded in the substance of its contention that Barbados was entitled to revert and did revert, from 2015, to the regional obligation to apply the CET of 0-5%. The hearing in these proceedings focussed on the derogation issue and therefore did not consider the contention that Barbados was required to amend its legislation in the way argued by RHCL.

[51] In the hope of avoiding unnecessary litigation, the Court considers it useful to remind the parties of the view it expressed in *Shanique Myrie v Barbados and Jamaica*[19] and *Tomlinson v Belize and Trinidad and Tobago*[20] that the mere existence of domestic laws apparently in conflict with RTC obligations does not necessarily constitute a breach of the State's international obligation. Much depends on how the law is applied (or not applied) in practice.[21]

[19] [2013] CCJ 3 OJ.
[20] [2016] CCJ 1 OJ.
[21] See [80] of *Shanique Myrie* and [24] of *Tomlinson*.

[52] In the circumstances of this case, and to aid certainty and predictability, which are indispensable elements of the rule of law, and thereby to create the proper environment for the operation and growth of the private sector, it is to be expected that the State of Barbados will amend its domestic legislation to bring it in line with its treaty obligation to impose a 0-5% CET on imports of "other hydraulic cement". This is, of course, without prejudice to any further changes that might be required to reflect future changes in the regional CET obligation.

Interim Measures

[53] By Order dated 17 July 2018, this Court granted the Application for Interim Measures filed on 6 July 2018, by TCL and ACCL. The Order required the State of Barbados to impose a 60% tariff on cement imported by RHCL into Barbados until either Judgment was rendered on the Originating Application or the Court varied or terminated the Order for Interim Measures[22]. An Application made on 19 November 2018 by RHCL for the removal of the Interim Measures was rejected by this Court on 11 December 2018[23]. The Interim Measures are currently in force and effect.

[54] Under the rules governing the Court's proceedings in the Original Jurisdiction, Interim Measures lapse on the date fixed in the Order and if there is no such date "they shall expire when final judgment is delivered."[24] Without prejudice to the question of the proper classification of the cement imported by RHCL, the present ruling on the derogation issue finally disposes of the dispute regarding the tariff applicable to cement imported by the RHCL into Barbados. As such the Interim Measures imposed in this case must be regarded as having expired with the delivery of this ruling.

DECLARATIONS AND ORDERS

[55] The Court hereby issues the following Declarations and Orders:

(a) The derogation sought and obtained by the State of Barbados at the 11th Meeting of the Council for Trade and Economic Development in 2001 included a derogation

[22] See the Court's Ruling at [2018] CCJ 1 (OJ).
[23] See the Court's Ruling at {2018] CCJ 5 (OJ).
[24] Rule 12.2 (5).

from the applicable Common External Tariff on "other hydraulic cement" so as to impose an increased tariff rate of 60% on such cement;

(b) The State of Barbados was not required to obtain the approval of the Council for Trade and Economic Development to revert to the Common External Tariff of 0-5% on "other hydraulic cement", but that Member State was required to give reasonable and adequate notice to the Council for Trade and Economic Development of its decision to do so;

(c) In the circumstances of this case, Trinidad Cement Limited and Arawak Cement Company Limited were, for several years, aware of the declared intention of the State of Barbados to reduce the rate of duty on "other hydraulic cement" imported on Rock Hard Cement Limited from 60% to 5% and, as such, had reasonable and adequate notice of the decision of the State of Barbados to re-impose the Common External Tariff;

(d) The Interim Measures imposed by this Court on the State of Barbados requiring the imposition of 60% tariff on "other hydraulic cement" imported into that State by Rock Hard Cement Limited are deemed to have expired as at the date of this ruling.

(e) In the execution of these orders the parties shall have liberty to apply.

(f) The determination of costs is reserved.

/s/ A. Saunders

The Hon Mr Justice A Saunders, President

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D. Barrow

The Hon Mr Justice D Barrow