IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No BBOJ2019/001

Between

Rock Hard Cement Limited **Claimant**

And

The State of Barbados **First Defendant**

And

The Caribbean Community **Second Defendant**

And

Arawak Cement Company Limited **Intervener**

THE COURT,

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

Having regard to the originating application filed at the Court on 11 November 2019, together with the annexures thereto, the defence of the State of Barbados filed on 26 November 2019 and the annexures thereto, the defence of the Caribbean Community filed on 25 November 2019 and the annexures thereto, the reply filed on 2 December 2019 and the annexures thereto, the rejoinder of the State of Barbados filed on 11 December 2019 and of the Caribbean Community filed on 6 December 2019, the statement of the Intervener filed on 6 February 2020 and the reply of Rock Hard Cement Limited thereto filed on 12 February 2020, the written submissions of Rock Hard Cement Limited filed on 21 January 2020, of the State of Barbados filed on 12 February 2020, of the Caribbean Community filed on 3 February 2020 and the reply of Rock Hard Cement Limited thereto filed on 10 February 2020, the written submissions of Arawak Cement Company Limited filed on 24 February 2020 and to the public hearing held on 3 March 2020

and after considering the notes and oral observations of:

- **Rock Hard Cement Limited**, by Mr Allan Wood QC, appearing with Ms Symone Mayhew, Attorneys-at-Law
- **the State of Barbados**, by Ms Gayl Scott, appearing with Mr Jared Richards, Attorneys-at-Law
- **the Caribbean Community**, by Dr Corlita Babb-Schaefer, appearing with Mr O'Neil Francis, Attorneys-at-Law
- **Arawak Cement Company Limited**, by Mr Eamon Courtenay SC, appearing with Mr Raphael Ajodhia, Attorneys-at-law

issues on the 10th day of June 2020, the following:

JUDGMENT

Introduction

[1] This Application, brought by the Claimant, Rock Hard Cement Limited ("Rock Hard"), largely involves the Common External Tariff ("CET") established and maintained pursuant to Article 82 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy ("the RTC"). The Application addresses three broad issues. Firstly, whether in light of circumstances that would shortly be detailed, Rock Hard should obtain an order requiring the State of Barbados to apply the 0% - 5% CET range on the product known as "other hydraulic cement". Rock Hard premised this application for relief on a claimed substantive legitimate expectation. Secondly, the nature and extent of the obligation on Member States or on the Community to consult with the private sector in respect of Community decisions to alter or suspend the CET. Thirdly, the application and further development of this Court's jurisprudence on judicial review of Community decision-making.

Factual Background

[2] Rock Hard was formerly known, until 3 March 2015, as 'Alternative Cement Limited'. It is a company duly incorporated under the laws of the First Defendant, the State of Barbados. The company imports and distributes in Barbados Rock Hard Cement, which is a blended hydraulic cement imported from Turkey. Rock Hard Cement is classified as "other hydraulic cement" under Tariff Heading 2523.90.00 of the CET. Rock Hard is also a member of a group of companies in Barbados that uses Rock Hard Cement for the manufacturing of precast concrete in their construction businesses.

[3] The Second Defendant is the Caribbean Community (referred to in this judgment as "CARICOM" or "the Community"). The Council for Trade and

Economic Development ("COTED") is the organ of CARICOM that is responsible for determining the CET in respect of all goods which do not qualify for Community treatment and the acts and omissions of COTED are therefore properly attributable to the Community.[1] The Intervener, Arawak Cement Company Limited, ("ACCL" or "the Intervener") is a limited liability company incorporated under the laws of Barbados. ACCL is engaged in the business of manufacturing and distributing cement. It is the only producer of cement in Barbados and it is a wholly owned subsidiary in the Trinidad Cement Limited Group of Companies. This Group in turn is the only manufacturer of cement in the Community.

[4] In 2001, as now, the CET range on 'other hydraulic cement' is 0% - 5% but, as a result of a "derogation" sought that year by Barbados and then obtained from COTED, Barbados was authorised to suspend the CET on that product and to levy on it instead, for an indefinite period of time, a tariff of 60%. Interestingly, Barbados gave as its reason for this request, the need to protect the local manufacturing sector 'from the competitive forces unleashed by trade liberalisation and global competition.'[2]

[5] In 2015, at Rock Hard's instance, the Government of Barbados restored the tariff on other hydraulic cement to 5%. The reduction from 60% to 5% was expressly made to support Rock Hard's investment in the establishment of a facility for the importation of bagged and bulk cement which would be mixed, packaged and distributed in Barbados. The Cabinet Note confirming the reduction explicitly indicates that the measure was 'an effort to offer assistance to a domestic company which is interested in establishing a packaging plant …[that]…would be making a substantial contribution to the local economy'. No approval from COTED was sought for the reduction. It was rightly regarded as *a restoration* of the CET on other hydraulic cement.

[6] The decision by the State of Barbados unilaterally to restore the CET on other hydraulic cement triggered a flurry of litigation involving the parties to this

---

[1] See *Johnson v Caribbean Centre for Development Administration* [2009] CCJ 3 (OJ) at [8] and [15].
[2] See: *Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados, Rock Hard Cement Limited Intervening, and Rock Hard Cement Limited v The State of Barbados and The Caribbean Community* [2019] CCJ 1 (OJ) at [38].

action, ACCL and its parent company Trinidad Cement Limited ("TCL"). The intense round of court proceedings surrounded mainly two questions. Firstly, whether Barbados was entitled, unilaterally (i.e. without notice to, far less approval from, COTED), effectively to reduce the tariff on other hydraulic cement from 60% to 5%. Secondly, whether Rock Hard cement should properly be classified as "other hydraulic cement" which, as stated earlier, attracts the CET range of 0% - 5%. This Court answered that latter question in the affirmative in what might be described as "the Classification Ruling[3]".

[7] In the consolidated judgment[4] that was ultimately handed down on the first issue ("the Derogation Ruling"), this Court noted that there was no requirement for Barbados to have received the approval of COTED for a restoration of the CET on other hydraulic cement[5]. The Court, however, spent some time adverting to a) the 'implied obligation on Member States' to serve on COTED reasonable notice of the intention to revert to the CET and b) the role of the private sector in this regard. More is said on these two matters at [44] below.

[8] Prior to the litigation among the parties, and in light of the 2015 decision by Barbados to revert to the CET on other hydraulic cement, Rock Hard did establish its cement packaging plant. The company expanded its operations and employed additional labour. It claims that it expended some US$5million in establishing the plant. In these proceedings Rock Hard grounds its claim to a substantive legitimate expectation on its alleged reliance on the notion that Barbados had undertaken that it would continue to apply indefinitely the CET of 5% on other hydraulic cement.

[9] After the Derogation Ruling, the State of Barbados, on 12 June 2019, requested i) a suspension of the CET on other hydraulic cement and (ii) for a period of five years, a rise to 35% in the applicable tariff on that product. When this request was submitted, Barbados and COTED were both still engaged in

---

[3] *Trinidad Cement Limited v The State of Trinidad and Tobago, Rock Hard Distribution Limited and Mootilal Ramhit and Sons Contracting Limited Intervening, Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados, Rock Hard Cement Limited Intervening, Rock Hard Distribution Limited v The State of Trinidad and Tobago and The Caribbean Community and Rock Hard Cement Limited v The State of Barbados and The Caribbean Community* [2019] CCJ 4 (OJ).

[4] *Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados, Rock Hard Cement Limited Intervening, and Rock Hard Cement Limited v The State of Barbados and The Caribbean Community* [2019] CCJ 1 (OJ)

[5] Ibid at [40].

litigating before this Court the issue of the proper classification of Rock Hard's cement and the consequential tariff that should be applied to it.

[10] COTED was informed by the representative of Barbados that the grounds for the request were that there was a need to support an industry in Barbados, that the product was of strategic importance to the economic development of that Member State and that there was a critical shortfall in government revenue being experienced by that Member State[6]. This request was supported by information from the State of Barbados that the retail price for cement had fallen by 35% since the tariff was reduced in 2015 to the CET rate of 5%, as well as that the domestic production of cement employed about 200 persons and had contributed about US$17 million in foreign exchange earnings. As earlier indicated, the request from Barbados was submitted to COTED on 12 June 2019. The "Rationale and Justification" for the request was provided on Friday, 14 June 2019, when the same was placed on a Documents Link and the Meeting was held and a decision taken on Monday, 17 June 2019.

[11] The only discussion of the request that is recorded in the Draft Report of the Meeting was on a) a clarification sought by the representative of Antigua and Barbuda about whether the request was for a suspension of or increase in the CET and b) the recommendation of the Secretariat of the Community that the suspension should be for two years instead of five years. The State of Barbados, which chaired the Meeting, indicated that it was a request that the CET be suspended and that a rate of 35% be applied during the period of the suspension. COTED then decided to grant the application by Barbados but only for a period of two years[7]. This decision is referenced in this judgment as "the COTED decision".

[12] No one disputed the fact that there was no prior notice to or consultation with Rock Hard regarding the application by Barbados to COTED. Nor was the fact of the request for or the making of the COTED decision mentioned either by the State of Barbados or the Community during the course of the proceedings then current before this Court. Rock Hard claims that, though it repeatedly sought

[6] Pursuant to Sub-paragraphs (d), (f) and (g) of Article 83(3).
[7] At the Eightieth Special Meeting of COTED held on 17 June 2019.

clarification on the matter from the State of Barbados, none was forthcoming until Rock Hard was invited to a meeting on 2 September 2019. At that meeting Rock Hard was informed of the suspension and the new approved rate. Rock Hard was further told that the COTED decision had already been approved by Cabinet and that the order to enact the new rate was in the process of being prepared. By a letter dated 24 September 2019, the State of Barbados confirmed that the new tariff was implemented on 9 September 2019, when the Customs Tariff (Amendment) Order 2019 was published in the Supplement to the Official Gazette No. 73. The State of Barbados subsequently published the Customs Tariff (Amendment) Order 2019[8] on 9 September 2019 stipulating the increased rate of 35% for other hydraulic cement.

Procedural Background

[13] By application dated 25 September 2019, Rock Hard applied to this Court for special leave to commence proceedings against the State of Barbados and the Community in keeping with Articles 211 and 222 of the RTC. The proposed cause of action was stated to be judicial review of the COTED decision. The application also sought interim measures to restrain Barbados from implementing the 35% tariff rate pending the determination of Rock Hard's Originating Application. The application further requested that there be an expedited hearing of the Originating Application.

[14] On 7 November 2019 this Court granted Rock Hard special leave to commence proceedings against the Defendants for judicial review and ordered that the hearing of the Originating Application should be expedited. As a result of the order for expedited proceedings, Rock Hard did not pursue its application for interim measures.

[15] By application dated 30 December 2019, ACCL sought to intervene in the proceedings pursuant to a) Article XVIII of the Agreement Establishing the Caribbean Court of Justice, Part 14 of the Caribbean Court of Justice Rules, and b) the Court's inherent jurisdiction. ACCL alleged that it had a substantial interest of a legal nature in that its cement, described as '*building cement (grey)*'

[8] In the Supplement to the Official Gazette No. 73.

under Tariff Head HS 2523.29.10 of the Harmonized System (HS) code, was a commodity of community origin, the beneficiary of the protection of the CET and attracted a zero-rated duty. ACCL further alleged that the extra-regional cement imported by Rock Hard as other hydraulic cement under Tariff Heading HS 2523.90.00, was in direct competition in the local market with the cement locally manufactured by ACCL. According to ACCL, a business model such as that of Rock Hard's, which relied solely on importation and distribution, was often significantly more profitable than one which is based on regional production. As such ACCL argued that it was placed at a severe disadvantage by the application of a 5% CET rate to other hydraulic cement imported by Rock Hard. It therefore sought to intervene in support of the COTED decision. By order dated 29 January 2020, ACCL was granted leave to intervene in these proceedings.

[16] The matter was heard on 3 March 2020. In addition to the Written and Oral Submissions of the parties there were three witness statements given respectively by: Mark Maloney, Executive Chairman of, and for, Rock Hard; Katrina Bradshaw, Chief Economist in the Ministry of Small Business, Entrepreneurship and Commerce of, and for, Barbados; and Kay Sealy, Director of foreign Trade in the Ministry of Foreign Affairs and Foreign Trade of, and for, Barbados. Mr Maloney and Ms Bradshaw also gave oral evidence and were cross-examined.

[17] In its Originating Application, Rock Hard sought judicial review to quash the 17 June 2019 grant of the suspension of the CET by the Community to the State of Barbados. Rock Hard sought an order restraining the State of Barbados from applying the tariff rate of 35% to the importation of other hydraulic cement, a further order directing the State of Barbados to apply instead the CET of 5% and such other relief as the Court considered just. Rock Hard argued that the suspension was unlawful, irrational, in breach of Rock Hard's legitimate expectation and *ultra vires*.

Rock Hard's Substantive Legitimate Expectation

[18] Rock Hard claims that it entertained a substantive legitimate expectation that the tariff rate on other hydraulic cement imported into Barbados would remain at the CET range of 0% - 5%. Rock Hard contends that its alleged substantive legitimate expectation was based on communication between itself and authorised officials of the State of Barbados that resulted in the latter reverting to the application of the CET of 5% on other hydraulic cement in 2015 to support Rock Hard in establishing its business. In support of its claim to a legitimate expectation Rock Hard cited its capital investment of US$5M to establish its business. The company alleged that this outlay was premised upon the expectation that the State of Barbados would not alter or seek an alteration of the CET of 5% on other hydraulic cement. Further, Rock Hard asserted that during the previous proceedings before this Court involving the parties,[9] the Community, and its organ, COTED, would have been made well aware of the position of Rock Hard as being the sole importer of other hydraulic cement into Barbados with a legitimate expectation that the State of Barbados would always apply the CET of 5% on such imports.

[19] The State of Barbados denied that the communications referenced by Rock Hard amounted to promises, assurances or undertakings on the part of the State of Barbados permanently to apply the CET of 5% on other hydraulic cement, or that a suspension of that rate would never be sought. If Rock Hard's view was correct, it would mean that any such promises or assurances would bind not only the Government of 2015, but successive Governments of that State from ever invoking the right afforded by Article 83 of the RTC to seek suspension or alteration of the CET. The State of Barbados also submitted, and this was conceded by Rock Hard, that Rock Hard was aware since July 2018 that Barbados had been considering the re-implementation of the previously applied tariff of 60% on other hydraulic cement[10]. That consideration had, indeed, prompted Rock Hard to initiate action in this Court[11]. The State of Barbados also contended that, even if, as alleged by Rock Hard, any legitimate expectation

[9] Resulting in the Consolidated Decisions referenced at n3 and n4 supra.
[10] At the Hearing of CCJ Application in TTOJ2018/001.
[11] CCJ Application BBOJ2018/001 – Rock Hard Cement Limited v The State of Barbados and The Caribbean Community

had been created, the State of Barbados would have been entitled to disappoint that expectation where overriding public interest considerations existed.

[20] The Community agreed with the State of Barbados that, given the evidence, no promise was made or assurance given, by Barbados, that the CET of 5% on other hydraulic cement would be maintained indefinitely. The Community submitted that, as no substantive legitimate expectation could have properly arisen, the question of a breach did not arise. The Community joined with the State of Barbados in contending that, even if a legitimate expectation arose, where an overriding public interest consideration so required, that legitimate expectation could be disappointed.

[21] The Intervener argued that Rock Hard could not be said to have derived any legitimate expectation that the tariff on 'other hydraulic cement' would remain at 5% for three reasons. The State of Barbados was not competent to make any unqualified representation to this effect that would bind the Community. COTED, the actual decision-maker, did not make any such representation to Rock Hard. And, in any event, the factual background narrative to the formation of Rock Hard's business, does not support its contention that it derived any legitimate expectation.

Legitimate Expectation in International Law Generally

[22] The doctrine of legitimate expectation is based on the notion that where a public authority represents, or promises, that it will or will not do something (which in law it is not bound to do or to refrain from doing as the case may be), a person who has reasonably relied on that representation may be entitled to relief on the basis of the representation and the detriment the person might suffer if the public authority is permitted to resile from the promise contained in the representation. In the normal case, the relief may amount to requiring the authority to follow a particular course before it may effect a change of policy. Alternatively, the court may compel the authority to make good on the promise contained in the representation. In the former case, the legitimate expectation is said to have yielded a procedural benefit as the public authority is merely asked to re-visit the process by which it arrived at the decision to alter its course of conduct to

the detriment of the representee. Usually, this procedural benefit would encompass some form of consultation with the representee before any decision is taken by the public authority adverse to the interests of the representee. The procedural benefit affords the representee an opportunity to be heard and to have their views meaningfully considered.

[23] A legitimate expectation is said to have yielded a substantive benefit where the court orders (whether because of the circumstances surrounding the promise or the extent of the reliance on it by the representee or the nature of the detriment the representee will suffer if the promise is not kept, or some combination of all three factors) that the promise be delivered by the public authority. For a legitimate expectation to arise, the representation must have been clear, unambiguous and without relevant qualification. It is often an onerous task for a litigant to obtain the benefit of a substantive legitimate expectation given the difficulty of reconciling the award of such a benefit with affording to public authorities adequate and reasonable discretion to formulate and reformulate policy.

[24] This court has accepted and applied the doctrine of legitimate expectation in its appellate jurisdiction.[12] However, in this, its original jurisdiction, the Court applies international law and a recent decision of the International Court of Justice ("ICJ") is to the effect that the doctrine of legitimate expectation has no place in general international law. In *Bolivia v Chile*,[13] Bolivia claimed that multiple declarations and statements by Chile over the years had given rise to 'the expectation' of restoring Bolivia's sovereign access to the sea and Chile's denial of its obligation to negotiate and its refusal to engage in further negotiations with Bolivia had 'frustrated Bolivia's legitimate expectations'. Chile contended that Bolivia had not demonstrated that there exists in international law a doctrine of legitimate expectations and that there was no rule of international law that holds a State legally responsible because the expectations of another State are not met. Chile argued that the legitimate expectation argument was an attempt by Bolivia 'to circumvent the requirement

[12] See e.g., *Joseph and Boyce v Attorney General* [2006] CCJ 3 (AJ).
[13] Obligation to Negotiate Access to the Pacific Ocean (*Bolivia v Chile*), Judgment of 1 October 2018 at 160-162.

of detrimental reliance necessary to establish estoppel' because it was unable to prove that it had relied on Chile's alleged representation to its own detriment.

[25] The ICJ noted that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and a host State that apply treaty clauses providing for fair and equitable treatment. However, the court concluded that it did not follow from such references that there exists in general international law a principle that would give rise to an obligation based on what could be considered a legitimate expectation. Accordingly, it held that the argument by Bolivia, based on legitimate expectation, could not be sustained.

[26] Attempts to import the domestic law doctrine of legitimate expectation in World Trade Organisation (WTO) law have largely been unsuccessful. WTO cases do use the language of 'legitimate expectations' (sometimes called 'reasonable expectations') but those cases do so in a quite different way from how the term is used in domestic law. Under WTO law, a WTO Member State may sustain an action on the basis that its benefits under GATT have been nullified or impaired, by showing that its 'legitimate expectations' were frustrated by the GATT-inconsistent actions of the defendant state. The GATT 'benefits' consist of the legitimate expectation of competitive trading opportunities arising out of relevant trade concessions made by the defendant state. For trading expectations to be legitimate, account must be taken of all measures of the party making the concession that could have been reasonably anticipated at the time of the concession: *Japan-Film case.*[14] Further the WTO's Dispute Settlement Body ("DSB") has held repeatedly that such expectation must be grounded in the interpretation of the relevant GATT agreement as interpreted in accordance with the general principles of public international law. These general principles are widely accepted to be embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT").

[14] Panel Report, Japan -Measures Affecting Consumer Photographic Film and Paper, 1050, WT/DS44/R (March 31, 1998). [hereinafter JAPAN-FILM CASE] at para. 10.61. See also: Appellate Body Report, Japan –Alcoholic Beverages II, pg 14, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996). [hereinafter JAPAN – ALCOHOLIC BEVERAGES II]. See also 1 WTO ANALYTICAL INDEX: GUIDE TO WTOLAW AND PRACTICE283 (Cambridge: Cambridge University Press, 2nd edn. 2007).

[27] The WTO Panel in *India – Patent*[15] held that India's 'mailbox rule', allowing for applications for patent for pharmaceutical and agricultural chemical products to be made by mail, was in violation of the rules relating to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). One of the reasons for that finding was that the Indian system did not protect the legitimate expectations of other WTO members. The WTO Panel sought to ground this protection of legitimate expectation in the need for certainty and predictability in international trade and the customary rules of public international law - specifically, the rule of interpreting international instruments in 'good faith'. The Panel stated that 'good faith interpretation requires the protection of legitimate expectations derived from the protection of intellectual property rights provided for in the Agreement'.[16]

[28] Whilst upholding the finding on other grounds, the Appellate Body rejected the panel's use of a legitimate expectation standard as a principle of interpretation for the TRIPS agreement. The Appellate Body proclaimed that the protection of legitimate expectations was not something that was used in GATT practice as a principle of interpretation; the panel's reliance on the Article 31 of the VCLT for its legitimate expectations interpretation was not correct because the 'legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself'. It stated:[17]

> The Panel misunderstands the concept of legitimate expectations in the context of the customary rules of interpretation of public international law. The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of the interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.

---

[15] The Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 45-62, WT/DS50/R (Sept. 5, 1997).
[16] Ibid at para. 7.18.
[17] see AB 1997-5 India - Patent Protection for Pharmaceutical and Agricultural Chemical Products Report of the Appellate Body on 19 December 1997 at Para 45.

[29] *EC - LAN*[18] involved the general customary rule of legitimate expectations in another context. There was an alleged violation of Article II of GATT 1994 that prohibits members from applying tariffs inconsistent with their schedule of concessions. The Appellate Body approved the panel's examination of the context of the object and purpose of the WTO agreement, of which the legitimate expectations of Member States are an integral part. However, the Appellate Body reversed the findings of the panel that the United States was entitled to rely on its legitimate expectations. Instead it accepted the argument by the European Community that the existence of a common intention forms the basis for the mutual consent of the signatories to be bound by an international agreement. This common intention finds its authentic expression in the text of the treaty, not in the subjective expectations of one or other of the parties to the agreement. The Appellate Body characterised legitimate expectations to be beyond the realm of the principle of good faith if such expectations were unilaterally based on the subjective interpretations of one party to a treaty, rather than an objective, ascertainable conduct of the parties. The Appellate Body stated:[19]

> 83. Furthermore, we do not agree with the Panel that interpreting the meaning of a concession in a Member's Schedule in the light of the "legitimate expectations" of exporting Members is consistent with the principle of good faith interpretation under Article 31 of the *Vienna Convention*. Recently, in *India - Patents*, the panel stated that good faith interpretation under Article 31 required "the protection of legitimate expectations". We found that the panel had misapplied Article 31 of the *Vienna Convention* and stated that: "The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.
>
> 84. The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule -- the

[18] European Communities - Customs Classification of Certain Computer Equipment - AB-1998-2 - Report of the Appellate Body 05/06/1998 WT/DS62/AB/R ; WT/DS67/AB/R ; WT/DS68/AB/R
[19] Ibid at [83] – [84].

> interpretation of which is at issue here – are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*.

Legitimate Expectation in Caribbean Community and EU Law

[30] Principle and authority alike support the applicability of 'legitimate expectation' in regional economic integration arrangements, such as the Caribbean Community and the European Union. Unlike ICJ and WTO proceedings, where only States can be disputants, and where the extent of States' rights and obligations are determined solely by their treaty provisions as interpreted in accordance with general international law principles, individuals, as well as States and Community institutions, are often parties to regional trade disputes and derive rights under Community treaty arrangements. In a case of this kind, where the Community is the ultimate decision maker, the action of the Community (and of States acting on behalf of the Community) may create a legitimate expectation in the individual which Community law will protect. Increasingly, the existence of such legitimate expectations is being linked to the requirement for legal certainty and predictability and their importance to the assertion of the rule of law such that, 'those subject to the law must know what the law is so as to plan their action accordingly'.[20] The principle of legal certainty and predictability in the European Union connotes that Rules of law must be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law.[21] The principle of legitimate expectation is related to this, being rooted in the concept of action taken in good faith induced by official representation. And enforcement of the principle promotes good governance and good public administration.

---

[20] Takis Tridimas, *The General Principle of EU Law* (2nd edn, Oxford University Press 2006) 242. See also, Hysni Ahmetai, Legal Certainty and Legitimate Expectation in the EU Law, *Interdisplinary Journal of Research and Development*, Vol (I), No.2, 2014.

[21] Judgment of 12 February 2015 in *Parliament v Council*, C-48/14, EU:C:2015:91, para. 45.

[31] In *Trinidad Cement Limited v The Community*[22] this Court affirmed the applicability of legitimate expectations in Caribbean Community law. This affirmation was in the context of, as is the case here, a decision by the Community to alter the CET in a manner that respects the rule of law. Adherence to the rule of law required that the Community not disappoint legitimate expectations it had created unless an overriding public interest consideration so required or the possibility of the adoption of a change in policy was reasonably foreseeable.[23] In so stating this Court expressly relied upon EU authority.[24]

[32] Some of the prerequisites for invoking legitimate expectation were more fully spelt out in the EU cases themselves. In *Branco v Commission* the ECJ said the following:[25]

> Three conditions must be satisfied in order to claim entitlement of the protection of the legitimate expectation. First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the community authorities. Secondly, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.

[33] The subsequent case of *Infinis Energy Holdings Limited v Her Majesty's Treasury and H.M. Revenue & Customs*,[26] and several of the EU authorities referenced therein, some of which have been highlighted by the parties in their submissions in this case, emphasized that in Community Law a party may only plead a breach of protection of legitimate expectations where an undertaking[27] or precise assurance[28] has been given prior to the adoption of a contested measure.[29] Moreover it was emphasized that, 'if a prudent and circumspect trader could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot plead that principle if the measure is adopted'.[30]

---

[22] [2009] CCJ 4 (OJ).
[23] [2009] CCJ 4 (OJ) [39].
[24] Citing *Johann Luhrs v Hauptzollamt Hamburg-Jonas*, Case 78/77 of 1978.
[25] Case T-347/03 *Branco v Commission of the European Communities* at Para 102.
[26] [2016] EWCA Civ 1030 at paras 47-51.
[27] Ibid at para 47.
[28] Ibid at paras 48 and 50.
[29] Ibid at para 47.
[30] Ibid at para 49 where the ECJ is quoted from the Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport v Ministera del Commercio con l'Estero* [2004] ECR I-6911 at para 70. Para 70 also highlights that 'economic operators

Therefore, stated in broad terms, the following are prerequisites for successfully invoking the doctrine of legitimate expectation against the Community: (i) an assurance originating from or properly made on behalf of the community given to the person concerned; (ii) the assurance must give rise to an expectation on the part of the person to whom it is addressed that they will receive or continue to receive some benefit; (iii) the possibility of the adoption of a change in policy must not have been reasonably foreseeable; and (iv) there must be no overriding public interest consideration that justifies the disappointment of the expectation. These conditions are cumulative, and the burden is on Rock Hard to establish the first three; at which point the burden shifts to the community to justify disappointment of the expectation by reference to the overriding public interest consideration.

The First Condition: Assurance Originating from or made on behalf of the Community to the Person Concerned

[34] With reference to any claim to a substantive legitimate expectation in relation to the facts of the present case, it is only necessary to examine the very first condition. Since it is only COTED that can make a decision to alter or suspend the CET[31], it was incumbent upon Rock Hard to establish that the undertakings or assurances that were allegedly made to it in or about 2015 emanated from the Community, or from the State of Barbados on behalf of the Community. The requirement that the undertaking must have been given by or on behalf of the Community is based on substantial reasons related to the very nature and scope of Community law. In the original jurisdiction proceedings, a claimant can only invoke community rights created in the RTC itself or in regional customary law or sourced from legally binding precedents of this Court since it may also be possible for this Court to use general principles to clarify and give flesh to the meaning of the rights and obligations laid out in the treaty.[32] In *Trinidad Cement Limited v The Community*, this Court expressly premised the doctrine of legitimate expectation on the duty of the Community to be accountable and to operate within the rule of law.

---

are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the national authorities in the exercise of their discretionary power will be maintained.

[31] See RTC Article 83(1).

[32] See RTC Art 221.

[35] A similar position is taken in EU law and is well illustrated in the decision of the ECJ in *Branco.*[33] Branco was a Portuguese individual engaged by a contract with the Portuguese authorities in training activities under the European Social Fund program for young adults. Under the applicable regulation it was for the national authorities to certify the trainers to be paid and for the Commission to make the payment. Branco was certified by the Portuguese authorities and submitted the request for the payment to the EU Commission. Subsequently, an investigation by Portuguese authorities found certain irregularities in relation to the contracts with Branco. The Commission refused to make the final payment to Branco and sought reimbursement of the sums already paid. Branco contested this decision claiming, among other things, that the decision was contrary to the principle of legitimate expectation due to the fact that his work had been certified by the Portuguese ministry once and he was entitled to payment. The ECJ ruled that as it was the Portuguese authorities who had given the assurance, and not the Community, the claim premised on a legitimate expectation created by the Commission could not be sustained.

[36] It is, therefore, evident that Rock Hard's assertion of a substantive legitimate expectation must flounder on the rock of the first condition. Rock Hard has not claimed to be the beneficiary of a representation emanating from COTED, which is the Community Organ that is the decision maker in this case. There is simply no evidence that the State of Barbados was authorized by COTED to make the alleged representations for or on behalf of the Community and which representations resulted in Rock Hard expending its US$5million and or establishing a packaging plant.

[37] Furthermore, the allegation that COTED was subsequently made aware, in the extensive litigation previously referenced, of the 2015 communications between Rock Hard and the State of Barbados does not assist Rock Hard in relation to a claim that it derived from COTED a substantive legitimate expectation that the CET on other hydraulic cement would be indefinitely retained. Subsequent knowledge is insufficient somehow to render COTED a party to the making of such representations as were allegedly made by the State of Barbados to ground

[33] See note 25, supra.

the legitimate expectation asserted by Rock Hard. The Court makes no comment, however, as to whether the communications between the relevant Barbadian officials and Rock Hard could give rise to a claim for substantive legitimate expectation in domestic law.

Consultations

[38] Rock Hard can, however, properly assert that when COTED considered the 2019 application from Barbados to suspend the CET, COTED would have had knowledge of Rock Hard's extensive stake in that application made by Barbados. It was if not the only, certainly the most important, company importing other hydraulic cement into Barbados. That State had, albeit without COTED's prior knowledge, previously facilitated Rock Hard in lowering the tariff and COTED would have been perfectly aware of the likely adverse impact upon Rock Hard of approval of the application made by Barbados to raise the tariff. COTED ought reasonably then to have been concerned to discover whether Barbados had notified or consulted with Rock Hard prior to making its 2019 application and received all pertinent information about how the request could affect Rock Hard. In light of all this, as this Court stated in *TCL v The Community*, a 2009 judgment,[34] in not very dissimilar circumstances, the Community could not simply 'look the other way'.

[39] The claim that Rock Hard should have been consulted (whether based on a legal right or a procedural legitimate expectation), and what this may mean, must be examined against the backdrop of the relevant provisions of the RTC, the jurisprudence of this Court and the steps taken by the Community in the wake of the pronouncements of the Court in *TCL v The Community*.

[40] Article 26 is concerned with the Consultative Process in the Community's decision-making. The Article states:

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

[34] *TCL v The Community* [2009] CCJ 4 (OJ).

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

[41] Compliance with Article 26 helps to ensure transparent decision-making, but the Article does not only exist for transparency. It is very much a key element in the ability of the Community Organs to make the right decisions when called upon to do so. Its stated purpose is 'to enhance the decision-making process in the Community'. The Article aims at achieving an effective decision-making process that is structured and, so far as is reasonable, adequately informed by input from affected stakeholders.

[42] The requirement for both efficiency and effectiveness in decision-making is embedded into the framework of the RTC as a core Community value. The RTC's Preamble, for example, speaks to the Member States being "Mindful" that establishing appropriate regulatory and administrative procedures and services is 'essential for the development of the international and intra-regional trade of Member States'. The Member States also affirm in the Preamble that they are 'Determined to enhance the effectiveness of the decision-making and implementation processes of the Community'.

[43] Article 26 imposes obligations on the Community and Member States. As such, the Article may yield a correlative right to Community nationals. This Court had previously made it clear in *TCL v Guyana*[35] that:

> Rights and benefits under the RTC are not always expressly conferred although some of them are, for example the rights referred to in Articles 32 and 46. Many of the rights, however, are to be derived or inferred from correlative obligations imposed upon the Contracting Parties. 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* [emphasis added].

[35] [2009] CCJ 1 (OJ) at [32].

[44] In the Derogation Ruling[36], the Court made the following pertinent comments with respect to notice to and the role of the private sector in the context of adjustments to the CET. The Court stated:

> [40] … 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 … 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 …
>
> [43] … 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. …
>
> [45] The question of what constitutes 'reasonable' or 'adequate' notice is a matter of fact for decision on a case by case basis …

[45] Article 26 came under the focus of this Court in 2009 in *TCL v The Community*. That case, like this one, surrounded a complaint by a private entity that the CET was altered in an arbitrary manner to the prejudice of the complaining entity. A significant difference between the circumstances of the Claimant in *TCL v The Community* on the one hand, and those of Rock Hard in this case, is that while

---

[36] See n4 at paras [40] – [45]

the affected Claimant in *TCL v The Community* was a local manufacturer and exporter of cement, Rock Hard is an importer of cement produced extra-regionally. Notwithstanding this and other important differences, Rock Hard is a "person" of a Contracting Party doing business in the Community, making investments, employing workers and presumably paying taxes, in a Member State of the Community. Rock Hard, is entitled to those rights, benefits and protections of the RTC that are applicable to it.

[46] In examining Article 26, this Court stressed in *TCL v The Community* that '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, efficient and effective'.[37] The Court said that:

> 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.[38]

[37] Ibid at [66].
[38] Ibid at [68].

[47] The emphasis on the conduct of the Secretary General was warranted by reason of the fact that in *TCL v The Community* it was a decision of the Secretary General that TCL had specifically sought to impugn. After considering all the circumstances, the Court found that the Secretary-General had failed to advert and adhere to the provisions of Article 83 in making certain decisions and that this failure should attract a declaration of the wrongfulness of his decision. The Court determined, however, that the circumstances were not of a sufficiently serious nature to warrant the annulment of his decision.

[48] After the decision in *TCL v The Community* was given, and in response to the intimations of the Court, the Member States entered into a Protocol, on 11 March 2014, to amend Article 83 of the RTC. The amended Article 83 is currently being provisionally applied pending ratification by all the Member States. The amended Article 83 states:

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. A Member State may apply to COTED for authorisation to suspend the applicable Common External Tariff on an item and, in place thereof, apply a higher or a lower tariff.

3. In its consideration of an application to suspend the Common External Tariff on an item, COTED shall, where applicable, take into account whether:

   (a) the 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;

   (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;

   (d) there is a critical shortfall in government revenue being experienced by that Member State;

   (e) there are rising cost of living issues to be urgently addressed by that Member State;

   (f) there is need to support an industry in that Member State;

(g) the product is of strategic importance to the economic development of that Member State; and

(h) the suspension of the Common External Tariff on the item is required for the support of the protection and conservation of the environment.

4. During any period between the meetings of COTED, the Secretary-General may, on behalf of COTED, authorise a Member State to suspend the applicable Common External Tariff on an item provided that the decision is based on sub-paragraph (a), (b) or (c) of paragraph 3. Any exercise of such authority by the Secretary-General shall be reported to the next meeting of COTED.

5. An application to suspend the applicable Common External Tariff on an item must be supported by information as prescribed by COTED, from time to time.

6. Any authorisation to suspend the application of the Common External Tariff on an item shall be subject to such terms and conditions as COTED, or the Secretary-General acting pursuant to paragraph 4, may decide.

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

8. 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.

9. For the purposes of this Article:

(a) "suspension" means that a Member State is exempted from applying the agreed Common External Tariff on an item for a period of time and may instead apply a higher or lower tariff as authorised;

(b) "alteration" means a change to the agreed rate of the Common External Tariff on an item by an increase or a decrease in the rate and which changed rate is applicable to all Member States.

[49] COTED also generated what is referred to as the 'Revised Procedures and Forms' for processing requests for suspension of the CET relating to the Protocol[39] ('the Revised Procedures'). The Revised Procedures were approved

[39] As contained in the Draft Summary of Recommendations and Conclusions of the Fortieth Meeting of COTED held in Georgetown, Guyana on 23-24 April 2015.

at the Fortieth Meeting of the COTED, held on 23-24 April 2015. They were intended to apply in relation to the processing of requests for suspension of the CET and they included detailed steps to be followed upon applications by Member States to suspend the CET.

[50] The Revised Procedures are divided into three Parts, A, B and C, each relating to applications for suspension of the CET of different types or in different circumstances. Parts A and B are applicable for applications made pursuant to sub-paragraphs (a), (b) and (c) of paragraph 3 of Article 83. Part A is for urgent applications made to the Secretary-General of CARICOM in between meetings of COTED, while Part B is for applications made to COTED. These two Parts (A and B) directly address the types of applications that led to the decisions reviewed in *TCL v The Caribbean Community*, and the Revised Procedures state that they 'must be adhered to' in the respective circumstances. Parts A and B are currently operational having been approved by the COTED at its Fortieth Meeting.

[51] Part C is for applications made to COTED pursuant to sub-paragraphs (d), (e), (f), (g) or (h) of paragraph 3 of Article 83. Part C provides clear guidelines for the processing of requests by Member States for suspension requested under these sub-paragraphs. They are similar to the guidelines in Parts A and B but less detailed and demanding. Three steps are prescribed. Step 1 requires that the relevant Member State include in its application information in support of the application, alternatives considered to address the concerns faced by the Member State, as well on the potential impact on an Entity, industry and/or importers. Step 2 places the responsibility on the Secretary-General to circulate the application from the Member State to other Member States for consideration prior to the Meeting of the COTED to consider the request. Step 3 requires that the Competent Authorities of the Member States notify the relevant local Entities of the request and provide to COTED any information relevant to the request.

[52] There is nothing to suggest that, in the making of either the request by Barbados or the COTED decision the need for consultation with Rock Hard was considered either by the State of Barbados or by COTED in circumstances

where both bodies were fully aware of the impact the decision would have had on Rock Hard. What transpired did not accord with the steps provided for in Part C of the Revised Procedures. The Defendants do not dispute that these steps were not followed. They submitted instead that they did not need to be followed as Part C has not yet been made operative.

[53] The Revised Procedures state that 'Part C will only become operative upon the entry into force of the Protocol'. Currently, the Protocol has been signed by all Parties to the RTC.[40] It has not, however, been ratified by the Member States and has therefore not formally entered into force.[41]

[54] The lingering and important question is, then, what procedure is to be followed when an application is made pursuant to sub-paragraphs (d), (e), (f), (g) or (h) of Article 83(3). As in 2009, the Court is once again faced with a lacuna in the procedure for processing requests for suspension of the CET.

[55] It has been 11 years since the Court's judgment in *TCL v The Community* and five years since the approval of the Revised Procedures. The failure to bring Part C (or some appropriate alternative) into force cannot mean that, in relation to applications made pursuant to sub-paragraphs (d), (e), (f), (g) or (h) of Article 83(3), there is in this realm a huge void. The Community is not entitled to ignore Article 26 or to so hollow it out that it is rendered a meaningless shell. To accept this would be contrary to good governance, the rule of law and fundamental values and principles embedded in the RTC.

[56] The failure to have a defined procedure, inclusive of consultations, for applications made under sub-paragraphs (d) – (h) must be seen as a weakness in the system. It therefore was and is the duty of the Community to correct that weakness. As long as that weakness subsists to the prejudice of rights enuring to the benefit of a private entity, the Community would be failing to carry out properly the duty imposed on it by Article 26 of the Treaty.

---

[40] Article 25 of the *Vienna Convention on the Law of Treaties* 1969 provides that a treaty, or a part thereof, is applied provisionally pending its entry into force if the treaty itself so provides or the negotiating States have in some other manner so agreed. Article II of the Protocol to Amend Article 83 provides that the Protocol shall be provisionally applied upon signature by all Parties to the RTC.

[41] Article III of the Protocol to Amend Article 83.

[57] Rock Hard has put forward a strong case to contend that it should have been consulted before the decision was made by COTED to approve the raising of the tariff. With respect to that contention, however, the following circumstances must be considered. As noted, this was an application pursuant to grounds (d), (f) and (g) of Article 83(3). Even assuming the applicability of Part C of the Revised procedures, the information that COTED needed to obtain from Barbados, according to Step 1, was as to the potential impact on entities like Rock Hard of the proposed suspension and the consequential specific tariff rise that was sought. Form 8(a), prescribed by the Revised Procedures, requires the relevant applicant (in this case Barbados) to affirm and state that, 'The Competent Authority has undertaken widespread consultations and wishes to advise that: …'. The Form requires the applicant to state, for ground (d) the basis for the shortfall in revenue; for (f) the industry for which the Member State is seeking to provide support; and for (g) the manner in which the product in question is of strategic importance to the Member State's development.

[58] The importance and value of the consultation process will vary from one case to another. In another case, the object of consultation may have been to obtain views that were unknown so that those views might be of genuine assistance to the decision maker including, very importantly, possibly influencing what decision to make or whether to make it. In this case, the proposed Revised Procedures (if they had been in force and properly followed) required COTED to be provided with information, obtained by the Competent Authority as a result of Consultation, as to the potential impact of the proposed suspension and specific increased tariff for which the State of Barbados had applied. The circumstances here indicate that neither the State of Barbados nor COTED could have had the slightest ignorance that the proposed suspension and the specific tariff increase applied for would have had a significant impact on Rock Hard. These parties were at the material time in litigation precisely on issues surrounding the tariff on other hydraulic cement. The nature, even if not the precise details of the impact on Rock Hard was obvious to all.

[59] In light, however, of the matters detailed more particularly at [12] and at [38] – [58] above, the Court finds that the defendants failed in their legal duty to ensure

that Rock Hard was consulted before the application for the suspension of the CET was made and approved and that, conversely, in these circumstances Rock Hard had a right to be so consulted. The Court further finds that in all the circumstances surrounding the request by the State of Barbados to COTED and the process followed in the making of the COTED decision the Community failed in its duty to establish and maintain an efficient system of consultations at the national and regional level. Nevertheless, the Court does not now consider that these failures should lead to the drastic measure of annulment of the COTED decision in light of a) the fact that here, the object and benefit of consultation were limited, namely, to obtain information as to the impact of the suspension and b) the context that the particular grounds on which the application for suspension of the CET was made recognized and afforded a wide discretion to the policy makers. The Court does consider, however, that the failures noted should attract appropriate declarations.

Ultra Vires for Other Purposes

[60] Rock Hard also argued that the COTED decision should be reviewed and declared *ultra vires* on a range of other grounds. There can be no doubt that the Court is entitled to review the acts and omissions of the Community. This Court has previously discussed the scope of its judicial review function, and the remedies it may grant,[42] including in respect of allegations that an organ or body of the Community has acted *ultra vires*.

[61] The grounds upon which the Court will engage in such review are not confined to such common law grounds as illegality, irrationality, improper purpose or procedural impropriety. The Court's remit is broader. The Court's overarching concern is to maintain and foster the rule of law. As a basis for review the rule of law may be utilised (i) as an interpretative tool; (ii) as a procedural lens, to assess fundamental requirements of governance such as good faith, fairness, predictability, consistency, transparency and fidelity to established rules and procedures, and (iii) as a substantive normative principle by which to judge Community acts.

[42] [2009] CCJ 4 (OJ) at [33] – [43].

[62] In *Trinidad Cement Limited v Trinidad and Tobago, and Rock Hard Distribution Limited First Intervener, and Mootilal Ramhit and Sons Contracting Limited Second Intervener et al*[43] in commenting on its judicial review function the Court stated, among other things:

> [32] … General principles of law widely accepted throughout the Community as a whole, even if not expressed identically in all Member States, could also become part of Community law on judicial review.
>
> [33] … The transformation by the RTC of the CSME 'into a rules-based system, thus creating and accepting a regional system under the rule of law,' and the compulsory and exclusive jurisdiction of the Court over disputes 'concerning the interpretation and application' of the RTC necessarily meant that there was in this Court 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. It would be 'almost impossible to interpret the RTC and apply it to concrete facts unless the power of judicial review was implicit in that mandate.'
>
> [34] The orthodoxy of judicial review by this Court has been repeated in several cases. In *Trinidad Cement Limited v Competition Commission,* the Court held that in light of (a) the compulsory and also exclusive jurisdiction of the Court to hear and determine disputes concerning the interpretation and application of the Revised Treaty and (b) the normative structure of this Treaty, no conduct or exercise of power by a Treaty-created institution (especially one charged with essential functions and endowed with relevant powers under the Treaty) should escape the judicial scrutiny of the Court.

[63] In the earlier case of *Trinidad Cement Limited v The Caribbean Community* the Court noted that:

> [39] In carrying out [its] 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, 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

[43] Ibid.

> 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 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.

[64] Rock Hard based its claim that the COTED decision was ultra vires on the following bases:

a. The increase of the tariff to 35% would completely exclude imports of cement and therefore reduce revenue from such imports.

b. The increase would create a monopoly and again lead to increase in cement prices.

c. The Intervener had twice indicated that the tariff on Rock Hard's cement should be 15%, and there was no empirical justification for a rate of 35% instead of 5%, 15% or any other rate.

d. No study was done as to Rock Hard's ability to continue in business at that rate, and the Suspension was directed at excluding Rock Hard from the market and destroying its business and was therefore sought and/or granted for an improper purpose.

[65] The Court does not consider it necessary to examine each of these submissions in minutiae, given the nature of the application made to COTED by the State of Barbados. The grounds on which that application was premised meant that the application clearly fell within a category which allows COTED a broad discretion and where the scope of judicial review is rather narrow.

[66] The State of Barbados submitted that there has been a negative impact on the domestic producer (i.e. the Intervener), as a result of the application of a CET range of 0% - 5% on imports of other hydraulic cement. Further, that between 2015 and 2018, when the CET was applied, the challenges to the local manufacturing industry included a reduction in its profitability in relation to local sales, resulting in a reduction in the number of persons employed. Furthermore, the economy of the State of Barbados had faced significant macroeconomic challenges, such as economic contraction, elevated levels of public sector debt, high fiscal deficits and a balance of payments crisis that placed downward pressure on the international reserves.

[67] The Community considered that it was not necessary for the State of Barbados to present additional material to warrant the authorisation of the suspension as it is common knowledge that Rock Hard's extra-regional cement was competing with the Intervener's cement that was produced within the Community. Though the Community admits that the procedural arrangements also provide for information on the potential impact on importers, such reference, the Community states, is insufficient to vitiate the decision of COTED.

[68] The Draft Report of the Eightieth Special Meeting of the COTED indicates that the State of Barbados had submitted a 'Rationale and Justification' in support of its Request for the derogation from the CET. The State of Barbados submitted therein, among other matters, that:

(a) Between 2015 and 2018 the retail price for packaged cement in Barbados fell by 35%.

(b) The Intervener's sales and market share declined substantially during 2016 to 2018.

(c) The domestic production of cement contributed US$17Million in foreign exchange earnings in 2017.

(d) The Intervener employed about 142 persons and serviced approximately 686 domestic suppliers in Barbados.

(e) The Intervener indicated its intention to continue its investment in the plant, remain a good corporate citizen and partner in Barbados' transition to become an energy efficient and green economy and

make a meaningful and sustained contribution to the growth and development of Barbados' economy.

(f) The plant was on its way to increasing its production capacity with regard to cement, allowing it to export 80% of the cement that it produces, thereby increasing its contribution to foreign exchange earnings.

[69] Several of these grounds appear, on their face, to support the application for suspension on the grounds put forward. Further, the State of Barbados relies on the Witness Statement of Katrina Bradshaw, the Chief Economist in the Ministry of Small Business, Entrepreneurship and Commerce in the State of Barbados since July 2018. That Statement contained a Table of the Production and Trade Data for the Intervener from 2014-2018, which roughly reflected some of the submissions made by the State of Barbados to COTED. The Table showed, among other things, that:

a. the Intervener's local sales fell from 74,400 tonnes in 2015 to 40,476 tonnes in 2018 (decrease of 45.6%) and its market share fell from 98% in 2015 to 71% in 2018 (a decrease of 27.6%)[44]and

b. export sales resulted in $16,048,172 in 2017 ($16,880,575 in 2018).[45]

[70] The Statement also annexed a Report of the Central Bank of the State of Barbados dated 10 February 2020, which spoke of the macroeconomic challenges faced by the State of Barbados as well as the importance of the cement industry to the State of Barbados. Although these did not feature in the Rationale and Justification sent to COTED to support the request for the derogation the Report did state that the financial report of Trinidad Cement Limited published for 2018 indicated that the Intervener employs 142 staff in the State of Barbados[46], or 0.1% of the total labour force. It further indicated that the Intervener reportedly laid off 40 staff in 2015 and an undisclosed amount in 2016 according to a newspaper report.[47]

---

[44] See para [68] supra at (b).
[45] Ibid at (c).
[46] Ibid at (d).
[47] Nation News, *More Job Losses at Arawak*, https://www.nationnews.com/nationnews/news/85277/job-losses-arawak

[71] The information that was placed before COTED for discussion at the Meeting appears to have been based on information that was available to the State of Barbados at the time. Though it seems that not much was said specifically in support of the factor at Article 83 (3) (d), that is in respect of a critical shortfall in government revenue,[48] the information provided definitely pointed to a need to support an industry and gave an indication as to the strategic importance of the cement industry to the State of Barbados.

[72] It was also highlighted,[49] and is evidenced by the Draft Report, that COTED did not simply grant, in the sense of rubber-stamping, the request of the State of Barbados but instead it granted the suspension for 2 years instead of the 5 years requested by the State of Barbados.

[73] The inescapable fact is that Rock Hard cement is in competition with cement locally produced by the Intervener. It is ultimately a matter of domestic economic policy whether, consistent with its development strategy, the State of Barbados wishes to promote the importation of Rock Hard cement or encourage the Intervener's local cement production. And, if one or the other, what measures it should take. In this regard, successive administrations must be permitted the policy space to take such measures as they may consider appropriate. But any such measures taken, whether by Barbados or ultimately COTED, must comply with the rule of law and should not evince any abuse of discretionary power.

[74] In the circumstances, and given the material before COTED, and the decision made at the Meeting, the Court could not reasonably come to the conclusion requested by Rock Hard either that 'COTED's decision is so wholly disproportionate as to be unconnected with the facts' or that the decision was otherwise *ultra vires*.

[48] The State of Barbados provides information in support of this in its pleadings but this was not placed before COTED
[49] See Para [11] supra

Conclusion

[75] The Court therefore concludes and declares that:

a. The Community has failed to establish and maintain an efficient system of consultations at the national and regional level.

b. The Defendants failed to ensure that the Claimant was consulted before the application for the suspension of the CET was made and approved.

c. The other claims are dismissed.

d. The Court will hear the parties on the issue of Costs.

/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

/s/A Burgess
The Hon Mr Justice A Burgess

/s/P Jamadar
The Hon Mr Justice P Jamadar