

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No. BZOJ2020/001

Between

The State of Belize

Claimant

And

The State of Trinidad and Tobago

Defendant

Caribbean Community Law - Common External Tariff - Whether State failed to apply Common External Tariff - Whether State in breach of Treaty Obligations - Revised Treaty of Chaguaramas Arts 9, 15, 24, 79, 82, 83, 84(7).

Caribbean Community Law- Locus standi - Whether State could commence action on behalf of private entity - Revised Treaty of Chaguaramas Arts 211, 216, 222.

SUMMARY

On 30 September 2020, the State of Belize ('Belize'), filed an Originating Application against the State of Trinidad and Tobago ('Trinidad and Tobago') pursuant to Article 211 (1)(a) and (b) of the Revised Treaty of Chaguaramas ('RTC'), Article XII (1)(a) and (b) of the Agreement Establishing the Caribbean Court of Justice, and Part 10 of the Caribbean Court of Justice (Original Jurisdiction) Rules 2019.

Belize asserted that Belize Sugar Industries Limited ('BSI'), a company incorporated in Belize, exports brown sugar to Trinidad and Tobago which participates in the Caribbean Single Market and Economy ('CSME'). Belize alleged that between November 2018 - June 2020 brown sugar from Guatemala and Honduras entered Trinidad and Tobago without payment of the 40% Common External Tariff ('CET'), resulting in reduced prices and sales of BSI produced brown sugar. Belize further alleged that Trinidad and Tobago had breached the obligation imposed by Article 82 of the RTC to apply and maintain a CET rate of 40% on extra-regional imports of brown sugar entering the CSME to strengthen the regional sugar industry and create an assured market. Belize was therefore of the view that a dispute existed

between itself and Trinidad and Tobago, under Articles 9, 15, 79, 82, and 83 of the RTC and sought declarations and damages against Trinidad and Tobago arising from this alleged failure to comply with the obligations under the RTC.

In its Defence, Trinidad and Tobago denied that it had permitted the importation of extra-regional brown sugar in a manner which was inconsistent with its obligations under the RTC. Specifically, Trinidad and Tobago denied that it had permitted the importation of extra-regional brown sugar from Guatemala and Honduras without the imposition of the 40% CET. Trinidad and Tobago further contended that BSI was not a state-owned entity of Belize, and that Belize could not present a claim for the benefit of BSI nor claim damages on behalf of BSI.

At the hearing, Belize indicated its willingness to accept, in substitution of the relief claimed, appropriately worded judicial statements of the importance of implementation and maintenance of the CET on extra-regional brown sugar. While robustly defending the case brought against it, Trinidad and Tobago offered no objection in respect of this way of proceeding.

The Court found that in international law litigation a State alleging a breach of treaty obligations by another State bears the burden of proving that allegation. The nature of the evidence that may be prayed in aid of discharging that burden will vary depending on the circumstances of the case. Specifically, in the absence of direct evidence that is solely in the power or control of a defendant State, the Claimant State may be permitted to rely on circumstantial evidence. The Court found that there were severe shortcomings in the evidence offered by Belize, in respect of the alleged failure of Trinidad and Tobago to apply the CET, that were not cured by reference to circumstantial evidence. However, given the alternative relief for which Belize opted and the absence of objection by Trinidad and Tobago the Court was not required to make findings or to rely on the evidence to make statements sought.

In its judgment the Court re-emphasised the importance of maintaining the CET especially in respect of the importation of an of extra-regional product such as brown sugar which is of demonstrable importance to a Member State such as Belize that manufactures it. The Court found that the CET does not guarantee regional brown sugar producers an assured market, but that those producers are entitled to the protection of the market that the CET is intended to provide.

The Court commented on the fact that Belize presented this claim, for its benefit, and for the benefit of BSI. The Court found that there was no doubt that under the RTC Belize was entitled to espouse this claim on behalf of BSI. The clear text of Article 222 means that the Contracting Party may espouse a claim on behalf of nationals, natural or juridical, and where they omit or decline to do so (Article 222 (c)(i)), or where the Contracting Party has expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled (Article 222 (c)(ii)) those nationals may, with the leave of the Court espouse a claim on their own behalf.

The Court ordered each State to bear its own costs.

List of Authorities

Cases referred to:

Corfu Channel Case (UK v Albania) (Merits) [1949] ICJ Rep 4; *Hummingbird Rice Mills Limited v Suriname* [2011] CCJ 1 (OJ); *Limburgse Vinyl Maatschappij NV v European Commission* ECLI:EU:C:2002:582, [1999] ECR II – 931; *Myrie v Barbados* [2013] CCJ 3 (OJ), (2013) 83 WIR 104; *Osakeyhtiö v European Commission* [1993] ECRI-1307; *Rock Hard Cement Limited v The State of Barbados* [2020] CCJ 2 (OJ); *Rudisa Beverages & Juices NV v The State of Guyana* [2014] CCJ 1 (OJ), (2014) 84 WIR 217; *Trinidad Cement Limited v The State of Barbados* [2019] CCJ 01 (OJ); *Trinidad Cement Limited v The State of Guyana* [2009] CCJ 1 (OJ), (2009) 74 WIR 302; *Trinidad Cement Limited v The State of Trinidad and Tobago* [2019] CCJ 4 (OJ); WTO, *Argentina: Measures Affecting Imports of Footwear, Textiles, Apparel and other Items* (25 November 1997) WT/DS56/R; WTO, *Canada: Measures Affecting the Export of Civilian Aircraft* (14 April 1999) WT/DS70/R; WTO, *United States: Continued Existence and Application of Zeroing Methodology* (4 February 2009) WT/DS350/AB/R; WTO, *United States: Measures affecting imports of Woven Wool Shirts and Blouses from India* (25 April 1997) WT/DS33/AB/R

Treaties and International Materials referred to:

Agreement Establishing the Caribbean Court of Justice (adopted 14 February 2001, entered into force 23 July 2002) 2255 UNTS 319; Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 4 February 2002) 2259 UNTS 293; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Legislation referred to:

Guyana – Customs Act, Cap 82:01; **Trinidad and Tobago** - Customs Act, Rev Ed 2006, Chap, 78:01.

Other Sources referred to:

Caribbean Court of Justice (Original Jurisdiction) Rules 2019; Caribbean Court of Justice (Original Jurisdiction) Rules 2021.

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 30 September 2020 together with the annexures thereto, the Notification of Agreement to discontinue Proceedings against St Kitts and Nevis filed on 21 January 2021, the defence of the State of Trinidad and Tobago filed on 10 February 2021 and the annexures thereto, the defence of the Caribbean Community filed on 11 January 2021 and the annexures thereto, the reply filed on 19 February 2021, the rejoinder of the State of Trinidad and Tobago filed on 5 March 2021, the rejoinder of the Caribbean Community filed on 5 March 2021, the Order of this Court for disclosure dated 9 March 2021, the oral application for further disclosure made by the State of Belize on 16 April 2021, the oral arguments of the State of Belize and the State of Trinidad and Tobago in respect of further disclosure on 16 April 2021, the order of the Court refusing further disclosure made on 16 April 2021, the Notice of Application of the State of Belize for Specific Disclosure filed 15 June 2021 together with supporting affidavit, the Notice of Application of the State of Belize for Specific Disclosure filed on 3 August 2021 superseding the application filed 15 June 2021 together with supporting affidavit, the Notice of Objection of the State of Trinidad and Tobago filed on 16 August 2021 together with supporting affidavit, the order of the Court dated 28 September 2021 dismissing the Notice of Application of the State of Belize for Specific Disclosure filed on 3 August 2021, the written submissions of the State of Belize filed on 1 June 2021, of the State of Trinidad and Tobago filed on 15 June 2021, of the Caribbean Community filed on 15 June 2021, and the reply of the State of Belize thereto filed on 29 June 2021, the Notice of Discontinuance of Proceedings Against the Caribbean Community filed on 28 October 2021, and to the public hearing held on 2 and 3 November 2021

and after considering the written and oral submissions of:

- The State of Belize, by Mr Andrew Marshalleck SC, appearing with Ms Samantha Matute-Tucker, Attorneys-at-Law
- the State of Trinidad and Tobago, by Mr Terrence Bharath, appearing with Ms Amrita Ramsook, Ms Coreen Findley and Ms Sasha Sukhram, Attorneys-at-Law,

issues on the 1st day of February 2022, the following:

JUDGMENT

Background

[1] On 30 September 2020, the State of Belize, filed an Originating Application pursuant to Article 211(1)(a) and (b) of the Revised Treaty of Chaguaramas ('RTC'), Article XII (1)(a) and (b) of the Agreement Establishing the Caribbean Court of Justice, and Part 10 of the Caribbean Court of Justice (Original Jurisdiction) Rules 2019 ('the CCJ Rules 2019').

[2] Article 211(1)(a) and (b) of the Revised Treaty of Chaguaramas states:

1. Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:

- (a) disputes between the Member States parties to the Agreement;
- (b) disputes between the Member States parties to the Agreement and the Community.

[3] The term "Agreement" in Article 211(1)(a) and (b) refers to the Agreement Establishing the Caribbean Court of Justice. Article XII(1)(a) and (b) of the Agreement states:

Subject to the Treaty, the Court shall have exclusive jurisdiction to hear and deliver judgment on:

- (a) disputes between Contracting Parties to this Agreement;
- (b) disputes between any Contracting Parties to this Agreement and the Community.

[4] Part 10.1 of the CCJ Rules 2019¹ states:

10.1 A Contracting Party or the Community shall commence proceedings by filing an originating application which shall be accompanied by all annexures referred to therein.

¹ See also Caribbean Court of Justice (Original Jurisdiction Rules) 2021 pt 10.4.

- [5] These proceedings are unprecedented. It is the first time since the establishment of the Court that a Member State has commenced proceedings against another Member State of the Community in the Original Jurisdiction. All previous contentious proceedings in the Original Jurisdiction were brought by community nationals against Member States and/or against the Community and were commenced pursuant to Article 222 of the RTC and Part 10.4 of the CCJ Rules 2019. No other State has applied to intervene in these proceedings pursuant to Part 14 of the CCJ Rules 2019.² No person or body has applied to intervene by way of *amicus curiae* brief pursuant to pt 15 of the CCJ Rules 2019.³
- [6] The Originating Application was originally filed against St Kitts and Nevis, Trinidad and Tobago and the Caribbean Community ('CARICOM' or 'the Community'). However, as the proceedings progressed, their scope narrowed considerably. Proceedings were discontinued against St Kitts and Nevis,⁴ and against CARICOM.⁵ Further, the relief of damages, sought against Trinidad and Tobago was discarded.⁶ And in his closing address the agent for Belize informed the Court that in lieu of the remaining claimed relief of a declaration that Trinidad and Tobago had breached RTC, Belize would be content with appropriately worded statements by this Court of the importance of implementation and maintenance of the CET by Member States of the Community.⁷

The Pleadings

Belize's Originating Application

- [7] In its Originating Application, filed with the Court on 30 September 2020, Belize asserted that Belize Sugar Industries Limited ('BSI'), a company incorporated in Belize, exports brown sugar to other States participating in the Caribbean Single Market and Economy ('CSME'). Belize further asserted that BSI's sales volumes and price for brown sugar sold within the CSME had declined in consequence of

² *ibid* pt 17.

³ *ibid* pt 18.

⁴ Notice of Agreement to Discontinue, 21 January 2021.

⁵ Notice of Discontinuance of Proceedings, 28 October 2021.

⁶ The State of Belize, 'Oral submission on behalf of the Claimant', Submission in *The State of Belize v The State of Trinidad and Tobago*, CCJ Application No BZOJ2020/001, 3 November 2021.

⁷ *ibid*.

the entry into the regional market of extra-regional brown sugar. Belize further contended that it had evidence which demonstrated that this extra-regional brown sugar was entering the markets of Trinidad and Tobago and of St Kitts and Nevis without the imposition by those States of the agreed 40% Common External Tariff ('CET'). The net result, as argued by Belize, was that BSI had not been able to sell the volumes of brown sugar that it had projected because of this distortion of the market. Belize was therefore of the view that a dispute existed between itself and Trinidad and Tobago, and between itself and St Kitts and Nevis arising from the alleged failure of those two States to comply with their obligations under Articles 9, 15, 24, 79, 82 and 83 of the RTC in respect of their CET obligations.

[8] Belize pleaded further that the procedure utilised by the CARICOM Secretary General for the issuance of safeguard certificates under the Safeguard Mechanism, as outlined in Article 84(7)⁸ of the RTC, was being abused to the detriment of BSI. Safeguard certificates issued for the importation of extra-regionally produced refined white sugar, Belize alleged, were being used by companies in the defendant States to conceal their importation of extra regionally produced brown sugar.

[9] The case against the Community was based on the allegation that CARICOM Secretariat and Member States were aware of but had failed to remedy the breaches. Belize pleaded that the CARICOM Secretariat and CARICOM trade ministers had been informed that the CET was not being maintained on extra-regional brown sugar entering the CSME by letter of 15 March 2019 written by the chairman of the Sugar Association of the Caribbean ('SAC') to the CARICOM Secretary General. In its written response of 15 July 2019, the CARICOM Secretariat requested that SAC share its evidence of non-maintenance of the CET on extra-regional brown sugar. On 2 April 2019, the Minister of Trade of Belize wrote to CARICOM Trade Ministers expressing concern about the non-maintenance of the CET. By letters dated 3 and 15 September 2019, SAC

⁸The Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 4 February 2002) 2259 UNTS 293, art 84(7).: "Where the Secretary-General, on the basis of his investigations, is satisfied that the application received from the competent authority justifies favourable consideration, he shall, notwithstanding that he may not have received a reply to his enquiry from one or more Member States, within fourteen calendar days after the receipt of the application from the competent authority, issue, on behalf of COTED, a certificate to the competent authority authorising the use of like materials from outside the Community, subject to such conditions as he may think fit to impose."

requested discussions with the CARICOM Secretariat on the CET issue, but Belize was not aware that the Council for Trade and Economic Development ('COTED') or the CARICOM Secretariat had required Trinidad and Tobago or St Kitts and Nevis to explain and substantiate their imposition of the CET.

- [10] Belize made the following further allegations, namely, that Trinidad and Tobago and CARICOM were aware that Belize had concerns that the CET was not being maintained, by virtue of discussions which had taken place in October 2019. At the 49th Regular Meeting of COTED held between 17-18 November 2019, ('the 49th COTED'), the meeting agreed that Member States must comply with their existing obligations by applying the CET to all brown sugar entering the CSME. At the 49th Meeting COTED also agreed to the establishment of a Monitoring Mechanism for all sugars ('the Monitoring Mechanism'), to determine the match of availability and demand requirements to ensure support to regional production of sugar. It was also agreed that the CARICOM Secretariat was responsible for developing the necessary Terms of Reference ('TOR') and initiating the process before the end of 2019. To date the Monitoring Mechanism had not been established. Consequently, the market for the trade in brown sugar within the CSME remained fragile and under sustained external threat.
- [11] Belize pleaded that there had been a breach of its legitimate expectation created by the clear assurances in respect of the trade in brown sugar within the CSME. Belize indicated that it had commenced this action to enforce the aforesaid provisions of the RTC so that BSI could enjoy the benefits of the assured market.
- [12] The case against St Kitts and Nevis was settled on 21 January 2021, by a Notice of Agreement to Discontinue, before written submissions were filed.
- [13] The case against Trinidad and Tobago and against the Community was elaborated in the written submissions of Belize filed with the Court on 1 June 2021. The Originating Application and the written submissions of Belize emphasised the importance of the sugar industry to its economy. BSI was the main sugarcane miller in Belize and exported sugar to the United Kingdom, United States, Canada, and the CARICOM markets. Trade in sugar accounts for an estimated 30% of the total agricultural earnings of the Claimant. The Belize Co-Generation Energy Limited (BELCOGEN), a wholly owned subsidiary of BSI, produced

renewable energy from bagasse in its stand-alone power plant, and exported home-grown energy to Belize's public power grid providing 10%-15% of the nation's needs, which was an essential component to increasing Belize's energy security. The sugar industry was also an important sector of Belizean economy in providing significant employment, foreign exchange earnings and other social and environmental benefits. Belize had invested USD30 million to ensure that the sugar it produced was to the highest health and safety standards, with the expectation that BSI would be able to market and sell its sugar in the CSME in light of the strong protections afforded by the CET.

- [14] Belize further contended that liberalisation in the world sugar market, particularly the loss of preferential access to the European market in the context of the operations of the World Trade Organization ('WTO'), had made it challenging for sugar producers in the Member States of CARICOM to compete internationally. This increased the reliance of regional sugar producers, such as BSI in Belize, on the imposition and maintenance of the CET to prevent the entry into the CARICOM market of cheap imports from extra-regional low-cost sugar producing countries.
- [15] In specific terms, Belize alleged that between November 2018 to June 2020 sugar from Guatemala and Honduras entered Trinidad and Tobago without payment of the 40% CET, resulting in reduced prices and sales of BSI produced brown sugar. In the terms of the allegation, Trinidad and Tobago had breached its obligation imposed by Article 82 of the RTC to apply and maintain a CET rate of 40% on extra-regional imports of brown sugar entering the CSME in order to strengthen the regional sugar industry and create an assured market. Belize alleged that the Community had breached its obligation under Articles 15(2)(a), 83(8) and 24 to a) promote the development and oversee the operation of the CSME, b) continuously review the CET, c) assess its impact on production and trade, as well as d) secure its uniform implementation throughout the Community, in particular, by reducing the need for discretionary applications in the day to day administration of the Tariff. In consequence of these breaches, it was alleged, the legitimate expectation of the benefits expected by the State of Belize under the RTC had been nullified and impaired.

Trinidad and Tobago's Defence

- [16] In its Defence filed with the Court on 10 February 2021, the Republic of Trinidad and Tobago denied that it had permitted the importation of extra-regional brown sugar in a manner which was inconsistent with its obligations under the RTC. Specifically, Trinidad and Tobago denied that it had permitted the importation of extra-regional brown sugar from Guatemala and Honduras without the imposition of the 40% CET. Trinidad and Tobago produced and relied upon the results of searches of its Customs Border Control System ('CBCS') for the period 2018-2020 which disclosed the imposition of the 40% CET on all importations of extra-regional brown sugar. In response to requests for pre-trial disclosure of documents, Trinidad and Tobago invoked provisions of its domestic law in the form of the Customs Act, Chap 78:01 to resist disclosure to Belize of documents and information relating to specific importers, although it was willing to make such disclosure to the Court, as it did. However, Trinidad and Tobago provided the Claimant with summaries of information generated by the searches. Information related to the weight and price of specific importations was redacted, while the Court was provided with unredacted copies of the summaries.
- [17] Trinidad and Tobago contended that there was no legitimate expectation of an assured market in respect in the trade of brown sugar. There could be no entitlement to supply a specific quantity of sugar to the Trinidad and Tobago market. The defendant State contended that companies were free to purchase brown sugar extra-regionally subject to the payment of the CET on such imports. Trinidad and Tobago agreed that extra-regional brown sugar was imported during November 2018 to June 2020 but maintained that the 40% CET was applied to all such imports. Any decline in the sales into Trinidad and Tobago by BSI did not mean that the CET was not applied to imports of extra-regional sugar; simply that importers may have sourced their supplies more cheaply than they would have from Belize. Trinidad and Tobago denied that it had abused the procedures for the processing of safeguard certificates. In addition to the aforesaid, Trinidad and Tobago denied the probative value of Belize's annexures.
- [18] Trinidad and Tobago further contended that BSI was not a state-owned entity of Belize and that, as the owners of BSI and the overall control of BSI resided within

the United States, Belize could not present a claim for the benefit of BSI nor claim damages on behalf of BSI for loss of sales. Trinidad and Tobago argued that BSI was obliged to proceed with its own case under the terms of Article 222, and that Trinidad and Tobago had no case to answer in so far as any relief was claimed by Belize on behalf of BSI.

The Community's case

[19] CARICOM in its Defence filed with this Court on 11 January 2021 contended that Belize's claim against it was premature and unfounded. The Community denied that it had failed to continuously review the CET or had failed to assess the impact of the CET on production and trade within the CSME or failed to secure the uniform implementation of the CET on imported brown sugar. The Community contended that it had not failed to act; rather it had (1) considered the matter raised by Belize, (2) taken the decision to establish the Monitoring Mechanism with respect to all sugars, (3) mandated Member States to comply with their existing obligations by applying the CET to all brown sugar entering the CSME, (4) conducted consultations with respect to the establishment of a web-service for the Monitoring Mechanism, and (5) placed the Terms of Reference before the COTED at its 51st meeting, which was held on 26 to 27 November 2020, for consideration and adoption. As Member States required more time to consult on the Terms of Reference, the COTED had agreed that a Special Meeting would be convened by 1 February 2021 to consider the adoption of the Terms of Reference including its annexes.

[20] CARICOM asserted that COTED had not failed to oversee the operation of the CSME. The Community contended that there had been no change in policy that would have resulted in a reduction or disappearance of the benefits of the CET and other protections outlined in the RTC. The Community further contended that it had acted, and was acting, to ensure, as far as such was reasonably possible, that Member States applied the CET on importations of extra-regional brown sugar. There was no need for an order directing the CARICOM Secretary-General to urgently complete the Monitoring Mechanism.

Belize's Reply

- [21] Belize, in its Reply to the Defences of Trinidad and Tobago and CARICOM respectively filed with the Court on 19 February 2021, maintained that there had been a failure by Trinidad and Tobago to impose the CET on extra-regional sugar and that CARICOM had failed to promote the development of the CSME by its failure to ensure that the CET was imposed on the importation of extra-regional brown sugar into the region. Furthermore, Belize maintained that there had been a failure by CARICOM to establish the Monitoring Mechanism.
- [22] In Reply, further, Belize asserted: (1) that the documents annexed to its Originating Application were authored by BSI and were authentic; (2) that the Ministry of Trade and Industry ('MTI') of Trinidad and Tobago had the responsibility for the maintenance of the CET on the extra-regional goods imported into Trinidad and Tobago; (3) that a clear inference could be drawn from the decline in sales of BSI that sugar was being sourced by importers of Trinidad and Tobago from outside the region without payment of the CET; (4) that the Defence contained inaccuracies about the pricing of sugar; (5) that Trinidad and Tobago could not invoke the provisions of its domestic law in order to refuse to produce documents relevant to the claim in the Originating Application; and (6) that Belize was fully entitled to advance its claim on behalf of BSI.
- [23] Belize's Reply thereafter addressed factual issues concerning its case against CARICOM pertaining to concerns raised regarding the non-application of the CET and the purported delay of the Community in rectifying these concerns. Belize asserted that the pace of the Community in addressing the concerns regarding the monitoring of the trade in sugar had increased since the filing of the Originating Application.

Trinidad and Tobago's Rejoinder

- [24] Trinidad and Tobago in its Rejoinder filed with this Court on 5 March 2021 maintained that it applied the CET of 40% on extra-regional importation of brown sugar. The defendant State acknowledged that CARICOM Member States had been working on the establishment of the Monitoring Mechanism for sugar and confirmed that on 19 February 2021 the CARICOM Secretariat had convened a

Meeting of Officials of COTED to review the Draft Terms of Reference for the Monitoring Mechanism. Trinidad and Tobago reiterated its position that the decision of the 49th COTED does not give rise to a legitimate expectation, or any expectation, as regards the application of the CET on brown sugar imports, and that Belize was not entitled to espouse a claim for damages on behalf of BSI.

CARICOM's Rejoinder

- [25] CARICOM in its Rejoinder filed with this Court on 5 March 2021 reasserted that it had not failed to continuously review the CET in respect of brown sugar, nor had it failed to assess the impact of the CET on production and trade within the CSME, and that, to the extent that it is reasonably possible, it had not failed to secure the uniform implementation of the CET throughout the Community on imported brown sugar. The Community further asserted that it had not delayed nor failed to fulfil its obligation under Article 15(2)(a) of the RTC to promote the development and oversee the operation of the CSME.
- [26] The Community asserted that only Member States have the responsibility to ensure the imposition of the CET. Any failure of Member States to ensure the imposition of the CET was not a reasonable ground for bringing a claim against the Community. CARICOM's responsibility extended to making every effort to urge Member States to impose the CET on importation of extra-regional products. The Community had urged and continued to urge Member States to adhere to the CET regime. COTED had agreed at its 49th Meeting that Member States must comply with their existing obligations by applying the CET to all brown sugar entering the CSME.
- [27] CARICOM contended that the fact that the Monitoring Mechanism had not yet been established was not, *ipso facto*, a ground on which the Community could be held liable in Community law. The realities of inter-state negotiations had to be considered. The negotiations were being undertaken in good faith and Member States were entitled to a reasonable time to conduct their internal consultations. Belize was aware that the time period between the Regular Meetings of the COTED was usually six months. It was within the power of the Claimant State to request a Special Meeting of the COTED to deal with the issue of alleged non-imposition of the CET on extra-regional brown sugar, and the Claimant State had

failed to request a Special Meeting between May and November 2019 to consider the issues of concern in its Originating Application.

The Relief claimed in the Originating Application

[28] Prior to the date of the hearing, the relief claimed by Belize in its Originating Application, the claimed relief against St Kitts and Nevis having fallen away by virtue of the discontinuation of the claim against that State, was as follows:

- A. A Declaration that contrary to Article 82 of the Revised Treaty of Chaguaramas, Trinidad and Tobago failed to apply the Common External Tariff of 40% on the imports of extra-regional brown sugar imported into its territory from Guatemala and Honduras during 2019.
- B. A Declaration that contrary to Article 83(8) of the Revised Treaty of Chaguaramas, CARICOM failed to continuously review the Common External Tariff in respect of brown sugar; failed to assess its impact on production and trade within the CSME; and failed to secure the uniform implementation of the CET throughout the Community on imported brown sugar, in particular, by reducing the need for discretionary application in the day-to-day administration of the Tariff.
- C. A Declaration that approximately 3,000 metric tons of brown sugar from Guatemala and Honduras were imported into Trinidad and Tobago in 2019 in violation of Article 83 of the Revised Treaty of Chaguaramas and the Revised Procedures for the Suspension of the Common External Tariff.
- D. An Order directing the Secretary General of the Caribbean Community to urgently complete the Monitoring Mechanism that is designed to monitor the requests for imports of sugar into the Caribbean Single Market; and to place the same before the Council for Trade and Economic Development for its consideration and approval; and to report on the adoption of the Monitoring Mechanism to this Court within three months from the date hereof.
- E. An Order that Trinidad and Tobago pay damages to the Claimant.
- F. An Order that the Defendants pay the costs of the Claimant.

Amendment to the Relief Claimed

[29] A Notice of Discontinuance of Proceedings was filed on 28 October 2021 on behalf of Belize and the Community. In the Notice of Discontinuance, Belize and CARICOM noted:

1. that at the 49th meeting of the COTED Member States agreed to the establishment of the Monitoring Mechanism and that the CARICOM Secretariat would develop the necessary TOR and initiate the process before the end of 2019;
2. the CARICOM Secretariat drafted the TOR;
3. at the 51st Regular Meeting of the COTED held on 26 and 27 November 2020, the COTED agreed that, inter alia, a special meeting of the COTED would be convened by 1 February 2021 to consider the adoption of the TOR;
4. Belize has made considerable efforts towards completing the TOR for the Monitoring Mechanism, in collaboration with other Member States, the CARICOM Secretariat and the SAC;
5. a revised TOR was presented to the Eighty-Ninth Special Meeting of COTED held on 4 February 2021, and it was agreed that Member States would meet on 19 February 2021, to discuss the concerns regarding the proposed draft TOR with the aim of arriving at a document that will be acceptable to the COTED;
6. at the 90th Special Meeting of the COTED held on 26 March 2021, having acknowledged that there were matters that remained outstanding and for which there was no consensus, the COTED agreed to establish a Ministerial Sub-Committee comprising Antigua and Barbuda, Belize, Guyana, Jamaica, St Vincent and the Grenadines and Trinidad and Tobago in order to finalise consideration of the adoption of the TOR for the Monitoring Mechanism;
7. the Ministerial Sub-Committee was able to convene twice in July 2021 and make recommendations on a draft text for the consideration of COTED; and
8. at the 97th Special Meeting of the COTED held on 12 October 2021 the COTED approved the TOR for the Monitoring Mechanism.

[30] Belize and CARICOM gave notice to this Court that the COTED having approved the TOR of the Monitoring Mechanism, Member States and CARICOM are

required to comply with the TOR of the Monitoring Mechanism, and that the objectives of the Monitoring Mechanism are to:

1. monitor the regional trade in sugar and to generate information that can be used to guide Community trade policy development in relation to the sugar industry;
2. provide a platform for the sharing of information on availability and demand for sugar within the Single Market;
3. ensure that, where regional supplies exist, information is available that allows Member States and other stakeholders to assess the extent to which there is a match between regional demand and regional supplies; and
4. enhance transparency in respect of the enforcement of the rules and procedures governing trade in sugar.

[31] Having regard to Parts 20.1 and 20.2(1) of the Caribbean Court of Justice (Original Jurisdiction) Rules 2021, this Court ordered that the proceedings by the Claimant against CARICOM be discontinued.⁹ It follows that the relief claimed in the discontinued proceedings, and the submissions made by the parties in respect of those claimed relief, are no longer relevant for consideration by this Court. Accordingly, the claimed relief outlined, *supra*, at para 28 B and D, and the submissions made by the parties in respect of that relief, are not considered in this Judgment. Furthermore, during oral submissions to this Court on 3 November 2021, the agent for Belize abandoned the relief claimed against Trinidad and Tobago outlined, *supra*, at para 28 C and E. Accordingly, these items of relief, and the arguments made by the parties in respect of them, are no longer relevant considerations for this Court.

[32] The claimed relief that remains relevant for consideration are: (1) A Declaration that Trinidad and Tobago failed to apply the CET on extra-regional importation of brown sugar during 2019, contrary to Article 82 of the Revised Treaty of Chaguaramas; and (2) Costs. The arguments advanced by the parties in respect of these items of relief must now be considered, bearing in mind, however, that, as regards the relief of the Declaration, Belize has indicated its willingness to accept, in substitution, appropriately worded judicial statements of the importance of

⁹ By Order dated 1st day of November 2021.

implementation and maintenance of the CET on extra-regional brown sugar. While robustly defending the case brought against it, Trinidad and Tobago offered no objection in respect of the way of proceeding proposed by Belize. In the circumstances, the Court considers it desirable to record in detail the various contentions of the parties contained in their respective witness statements and submissions before making the requested statements. It is proposed to first consider the preliminary issue of the duty of disclosure which occupied considerable pre-hearing time and attention.

Preliminary Issue in respect of Disclosure

[33] By order dated 9 March 2021 the Court directed that the Claimant State of Belize and the Defendant State of Trinidad and Tobago:

- a. shall each file and exchange a list of the documents they wish to have disclosed (“Request for Disclosure”) by the other party on or before 16 March 2021.
- b. shall produce and exchange copies of the documents set out in their respective lists on or before 26 March 2021, save that any document which either the Claimant or the First Defendant claims to be a confidential document shall be sent in duplicate to the Deputy Registrar, and one of the copies shall contain such redactions as the filing party considers to be reasonable.

[34] Belize filed its Request for Disclosure on 19 March 2021, asking that Trinidad and Tobago disclose:

- a. Customs documentation for the shipments of extra-regional imports of brown sugar entering Trinidad and Tobago, as noted in Annex C of the Originating Application (‘Request 1’).
- b. Documentation demonstrating that the CET was imposed and paid on the shipments of extra-regional imports of brown sugar entering Trinidad and Tobago, as noted in Annex C of the Originating Application (‘Request 2’).
- c. Confirmation of receipt of CARICOM Secretariat Savingram No 190/2019 dated 9 April 2019, which circulated the letter from the Belize Minister of Trade dated 2 April 2019.

d. The 2020/2019 email exchanges outlining communication between the Trinidad and Tobago Ministry of Trade and Industry with the Directorate General for Foreign Trade of Belize and CARICOM Secretariat regarding the convening of a bilateral meeting on the issue of Trinidad and Tobago's Legal Notice No 391.

[35] Annex C is a schedule, without indication of authorship, which purportedly shows shipments of extra-regional brown sugar entering Trinidad and Tobago during the period of November 2018 to June 2020 from Guatemala, Honduras, and Columbia. However, the Annex lacked details of the relevant port at which the shipments were allegedly discharged, the date the shipments were offloaded and name of vessel.

[36] In a letter to the Deputy Registrar dated 25 March 2021, Trinidad and Tobago supplied the Court with copies of summaries of customs declarations for the period 2018-2020 for shipments of extra-regional imports of brown sugar from Guatemala and Honduras ('the Summaries'). Trinidad and Tobago disclosed the Summaries to Belize by a Notice of Disclosure dated 26 March 2021. The Summaries were in the form of a Schedule compiled and verified by Mr Keith Huggins, Deputy Comptroller – Corporate Services, Customs and Excise Division, Ministry of Finance, and which showed that the relevant CET had been applied to raw cane sugar imported and entering from Guatemala and Honduras for the period 1 November 2018 – 30 June 2020. In the Summaries disclosed to Belize, Trinidad and Tobago redacted the names of the importers, and the codes and the net weight of their respective imports. Trinidad and Tobago claimed that the aforesaid information was confidential and that their disclosure to Belize would violate the Customs Act, Chap 78:01 of the Laws of Trinidad and Tobago. Trinidad and Tobago also claimed the specific customs declarations requested by Belize used to prepare the Summaries were confidential and that their disclosure to Belize would violate the Customs Act, Chap 78:01 of the Laws of Trinidad and Tobago. Trinidad and Tobago however disclosed unredacted summaries and the said customs declarations to the Court by the said letter dated 25 March 2021.

[37] On 13 April 2021, Belize made an oral application for disclosure of customs declarations and for unredacted documents. This application was refused by the

Court. On the 16 April 2021, the parties were ordered to file and exchange witness statements on or before 18 May 2021, to file and exchange written submissions ending on 29 June 2021, to attend a pre-hearing on 1 July 2021, and the trial was scheduled for 29 July 2021.

- [38] On 15 June 2021, Belize filed another application for specific disclosure of customs declarations evidencing the importation and application of the CET on extra-regional brown sugar imported into Trinidad and Tobago for the period 1 November 2018 to 20 June 2020. Trinidad and Tobago filed a notice of Objection on 25 June 2021. At the pre-hearing review on 1 July 2021, the determination of the application was adjourned to facilitate settlement discussions between the parties. The matter came up for pre-hearing review on 15 July 2021 and was adjourned to 29 July 2021 to again facilitate further settlement discussions between the parties, and the trial date vacated. At the pre-hearing review on 29 July 2021, Belize was given leave to file an application for further discovery. On 3 August 2021, Belize filed the application which superseded the application of 15 June 2021. Trinidad and Tobago filed a Notice of Objection on 16 August 2021.
- [39] The Court adjudicated the matter on the written submissions of the parties. By order dated 28 September 2021 the Court refused the application and ordered Belize to pay Trinidad and Tobago's costs.
- [40] The respective arguments of the parties in respect of the applicability of the Customs Act of Trinidad and Tobago to justify non-disclosure of customs declarations in relation to shipments of brown sugar entering Trinidad and Tobago from Honduras and Guatemala between November 2018-June 2020 were fully presented in the Reply of Belize, and the Rejoinder by Trinidad and Tobago.
- [41] This Court possesses compulsory and exclusive jurisdiction to resolve disputes concerning the interpretation and application of the provisions of the RTC. In the furtherance of that jurisdiction this Court may make orders for the disclosure of documentary and other evidence within the knowledge or control of parties in cases before it. Where such orders are made, those orders constitute legal obligations on the party to whom they are directed. Under Article 9, Member

States must ensure the carrying out of their obligations arising under the RTC. Article 215 imposes an obligation on Member States to whom a judgment of the Court applies, to comply promptly with the judgment.

[42] These obligations are grounded in Public International Law principles. A party may not invoke provisions of its national law as justification for failure to comply with orders to disclose. Non-compliance with such orders would be inconsistent with the doctrine of *pacta sunt servanda* codified in Article 26 of the Vienna Convention on the Law of treaties 1969 ('the VCLT'), which restates the customary law rule that a State must perform its treaty obligations in good faith. As this Court noted in *Rudisa Beverages & Juices N V v The State of Guyana*,¹⁰ as a corollary to the Article 26 provision, Article 27 of the VCLT goes on to provide that a State cannot invoke the provisions of its internal law as a justification for its failure to comply with its treaty obligations.¹¹

[43] In the premises, Trinidad and Tobago could not justify non-compliance with an order for disclosure made by this Court by reference to the Customs Act of that State. It may be, as was argued, that s 11 of Act No 6 of 2013 amended the Customs Act, Chap 78:01 to prohibit the reproduction or disclosure of the records of Customs Border Control Systems by virtue of their subjection to official secrecy. Naturally, this Court will be appropriately sensitive to legislation of this nature and not order disclosure contrary to its terms unless the justice of the case compels such disclosure.

[44] In the present case, the State of Trinidad and Tobago has complied with every order for disclosure made by this Court. It is various applications for disclosure by Belize that have been rejected by this Court on repeated occasions. In the circumstances, therefore, there was no failure by Trinidad and Tobago to make disclosure pursuant to the orders of this Court and therefore no question of breach of Articles 9 or 215 of the RTC, or of the *pacta sunt servanda* doctrine, arises on this aspect of the case.

¹⁰ [2014] CCJ 1 (OJ) (GY), (2014) 84 WIR 217.

¹¹ *ibid* at [18].

[45] The Court would simply point out that the statement of principle in *Rudisa Beverages* was made in the entirely different context where s 7A of the Customs Act of the defendant State of Guyana in that case was clearly inconsistent with the principles of trade liberalisation and free movement of goods as envisioned by Chapter Five of the RTC. That breach of the treaty obligation could not be justified on the grounds that the Government had made a good faith effort to comply with its treaty obligations but was thwarted by the National Assembly which refused to pass the necessary amendments to address the accepted breach. No like argument arises on the facts and submission in the present case.

Claimed declaration of breach of Article 82

[46] The State of Belize claims the relief of a declaration that Trinidad and Tobago breached the obligation in Article 82 of the RTC to establish and maintain the CET. Belize contends that this breach necessarily also involves breaches of Articles 9, and 79(1) & (2), and 82. These Articles are reproduced in the Annex to this judgment.

The case for Belize

[47] Belize proffered the evidence of three witnesses in support of its allegation that Trinidad and Tobago had breached the obligation in Article 82 to establish and maintain the CET on the importation of extra-regional brown sugar.

Mr Andy Sutherland

[48] Mr Andy Sutherland is the Director General of the Directorate General for Foreign Trade, which falls under the Ministry of Foreign Affairs, Foreign Trade and Immigration ('the Belize Ministry'). Mr Sutherland has held this position for three years. The Office of the Directorate General for Foreign Trade has direct responsibility for the coordination, development, and implementation of trade policy, including the CSME, as well as responsibility for International Trade Negotiations on behalf of Belize. Mr Sutherland is also the technical lead official acting on behalf of Belize at the technical level in meetings of COTED.

- [49] Mr Sutherland deposed that Belize has invested heavily in sugar production and is in a strong position to supply all the sugar needs of the entire CSME, once the necessary policies are firmly established to safeguard the regional market. He stated that it is critical to Belize that the imposition of the CET be maintained by Member States.
- [50] Mr Sutherland deposed that the sugar industry was mobilised at the regional level under the SAC, in collaboration with the Government of Belize, to pursue the creation of an integrated CARICOM market for sugar and to secure the necessary policies for the mutual benefit of all sugar producing Member States. During the collaboration the SAC conducted investigations and produced a report which provided the industry with trade statistics, leading to the conclusion that more than two-thirds of the sugar traded in CARICOM, including brown sugar, was being supplied by extra-regional sugar producers. The SAC's investigation and report also revealed that brown sugar was being imported into certain CARICOM Member States without application of the full CET rate of forty per cent (40%) and without the required COTED authorization for suspension of the CET on such imports. This information was provided by SAC, through BSI, in a report to the then Minister. Belize's then Minister of Investment, Trade and Commerce, shared the SAC's report with the Ministers of COTED for their consideration and action. The SAC's report he referred to was attached to his witness statement as AS1, which is the same as Annex C of the Originating Application.
- [51] By letters dated 2 April 2019 Belize wrote to CARICOM, addressing the Ministers responsible for trade, informing them that the CET was not being applied to brown sugar imports. Belize called on the Secretariat and all Governments to discharge their obligations by ensuring the implementation of the CET on imports of brown sugar from extra-regional sources. Belize asked the Secretary General of CARICOM to put the 'challenges facing regional trade in brown sugar' on the agenda of the 48th Meeting of COTED.
- [52] The Belize Trade Ministry and the CARICOM Secretariat held discussions about placing brown sugar on the agenda of the 49th COTED. The CARICOM Secretariat opined that the SAC's approach was accusatory without concrete evidence and advised that it would not be the best thing to do given that

discussions on the treatment of white sugar were ongoing. Belize's Trade Ministry then withdrew the request that brown sugar be placed on the COTED agenda.

[53] Belize subsequently made recommendations to the CARICOM Secretariat for the reform of trading arrangements for sugar, by requesting the development and implementation of the Monitoring Mechanism for Sugar. Under the Monitoring Mechanism, States would be required to report, inter alia, on the imports of sugar categorised by an import regime such as CET Suspension or Safeguard Mechanism.

[54] At the 49th COTED held on 18 and 19 November 2019 it was agreed that a Monitoring Mechanism for all sugars must be implemented and that states must comply with their existing obligations by applying the CET rate of 40% to all brown sugar entering the CSME.

[55] At the 51st COTED held in November 2020 it was agreed that Member States would review the proposed draft TOR for the Monitoring Mechanism and that it would commence upon approval of the TOR. Since the 51st COTED Belize had made considerable efforts towards completing the TOR for the Monitoring Mechanism in collaboration with the Community Secretariat and the SAC.

[56] Belize and the Secretariat met between 29 and 31 January 2021 and a revised TOR was presented to the 89th Special Meeting of COTED on 4 February 2021. Member States had requested additional time to consult with their stakeholders and the TOR was not approved. Trinidad and Tobago expressed willingness to participate in a Special Meeting to address the concerns expressed regarding the draft TOR and acknowledged the need for flexibility by all Member States in arriving at an agreement.

[57] Belize and Trinidad and Tobago held technical discussions at the level of Senior Trade Officials on 17 February 2021. The focus of the discussions was to rationalise the key elements of the TOR that generated concerns for Trinidad and Tobago, and to consider where flexibility could be exercised to bridge the gap between the positions of the two Member States, while also seeking to achieve

the Monitoring Mechanism that could provide accurate, timely and useful information to policy makers and economic actors in the CSME.

- [58] The outcome of this meeting was agreed to by the trade ministers of both countries on 18 February 2021. On 19 February 2021 the Member States convened a meeting of the officials of COTED to review the proposed TOR for the Monitoring Mechanism, but no consensus was reached.
- [59] A further meeting of COTED was held on 24 March 2021 to discuss the draft TOR for the Monitoring Mechanism. A further draft TOR was circulated to States on 25 March 2021 by the CARICOM Secretariat. As at the 90th Special Meeting of the COTED, held on 26 March 2021, agreement on the TOR remained outstanding. Without the Monitoring Mechanism, there was no tool available to effectively monitor the flows of sugar into the CSME. The Monitoring Mechanism, it was said, was indispensable to the future viability of the sugar industry in Belize.
- [60] Finally, Mr Sutherland deposed that as a major producer of brown sugar, Belize looked to the CSME as an assured market. It had become evident that extra-regional brown sugar was entering the CSME, and that Trinidad and Tobago had not been imposing the CET on such imports. He alleged that brown sugar from Honduras and Guatemala was ‘dumped’ and sold below cost to get rid of excess stocks. The effect of this was that Belizean-produced brown sugar was forced to compete against extra-regional brown sugar within the CSME on unfair terms.

Mr Mac McLachlan

- [61] Mr Mac McLachlan is a director of BSI. His duties include strategic oversight of all aspects of the BSI. He is responsible for engagement and lead communication with Governments and regional institutions, relations with cane farmers and service providers as well as market access development and industrial relations. He represents Belize on the SAC. This role includes addressing regional food security issues and promoting regional trade. He is very familiar with the Belize sugar industry as well as the arrangements governing the trade in sugar within the CSME and on the world sugar market.

[62] Mr McLachlan deposed that during the pre-independence era, CARICOM Member States that exported cane sugar benefitted from trade preferences. These trade preferences were solidified by the 1951 Commonwealth Sugar Agreement and were further expanded under the various Lomé Conventions with their annexed Sugar Protocols. Thus, from a systemic perspective, the CARICOM sugar industry has benefitted from European trade preferences for over a half of a century. The CET, which was crafted and implemented during this era, placed emphasis on export-led cane sugar production. The CSME was intended to be an assured market for CARICOM producers and the CET was set at 40% on extra-regional brown sugar to reflect this principle.

[63] Mr McLachlan deposed that the maintenance of the CET on extra-regional brown sugar created an assured market within the CSME for BSI and other CARICOM sugar-producing companies. CARICOM sugar producers have traditionally supplied the CARICOM market with brown sugar. This once assured regional market, however, was now under threat from the continued importation of low cost extra-regionally produced brown sugar from countries such as Guatemala and Honduras. Recent trends have demonstrated a reduction in the price of CARICOM produced brown sugar within the CSME. Brown sugar producers in Belize were now faced with competing, in a CSME under siege by cheap extra-regional imports of brown sugar. Strict compliance with the applicable Articles of the RTC, and the CET regime, as well as adequate surveillance of the CARICOM intra-regional market and adequate enforcement of current CET rules relating to brown sugar were required. In the absence of these inputs, the CET would not serve its intended purpose of assisting and strengthening the productive sector within CARICOM.

Mr Ruy Martinez

[64] Mr Ruy Martinez is the Regional Commercial Director of ASR Group, of which BSI is an affiliate. His duties include all export commercial activities of futures selling (hedging) and physical selling for export of sugars. Prior to being employed at BSI, Mr Martinez worked at London-based Sugar Trade House, Czarnikow Group Ltd for 6 years and prior thereto had worked at Cargill for 10 years.

[65] Mr Martinez deposed that he was in receipt of documentary evidence which provided a factual summary of various shipments of extra-regional brown sugar into Trinidad and Tobago. The documentary evidence he relied on was attached to his witness statement as RM1A and RM2B, which is the same as Annex C/AS1. Mr Martinez does not claim to be the author of RM1A/RM2B/Annex C/AS1: a document referenced in the witness statement of another of Belize's witnesses, Mr Sutherland, as being created by the SAC. That document stated as follows:

The Sugar Association of the Caribbean (SAC) in collaboration with Belize pursued the creation of an integrated CARICOM market for sugar and to secure the necessary policy space. During the course of research on the regional trade in refined white sugar it gained access to statistics showing that more than 2/3rds of the sugar being imported into CARICOM was being supplied by extra-regional sugar producers including brown sugar.

[66] Mr Martinez claimed that Trinidad and Tobago received multiple shipments of extra-regional brown sugar from Guatemala and Honduras for the time period November 2018 to June 2020, which amounted to a total of 7425 metric tons. He alleged that the documentation (RM1A/RM2B/Annex C/AS1) raised serious concerns that there have been actual shipments of extra-regional imports of brown sugar into the CSME. He claimed that it was known and fully established that significant metric tons of extra-regional brown sugar were imported into Trinidad and Tobago. He further alleged that BSI had noted a causal link between the importation of this extra-regional brown sugar and (i) reduced prices for CARICOM produced brown sugar in Trinidad and Tobago, as well as (ii) reduced sales of CARICOM produced brown sugar in Trinidad and Tobago. Between 2017 and 2019, there was a reduction in the volume and price of brown sugar sold by BSI to Trinidad and Tobago. Mr Martinez relied on a letter authored by the Director of Finance of BSI to substantiate his claims in respect of reduction of price and volume. The letter was attached to his witness statement as RM3. Mr Martinez asserted that between November 2018 and June 2020, Trinidad and Tobago received 7425 metric tons of extra-regional imports of brown sugar. This coincided with the notable reduction in the price paid per metric ton for brown sugar. The year 2019 featured the lowest price in the last three years and this was reflected in the lowest total amount of annual sales for 2019. The reduced 2019

price per metric ton for CARICOM produced brown sugar reflected the fact that buyers were able to source extra-regional brown sugar at a reduced or lower price than that of CARICOM produced brown sugar. This raised serious concern that the CET of 40% was not levied on the extra-regional imports of brown sugar.

[67] Mr Martinez deposed that there is a daily sugar price for raw brown sugar on the world sugar market, which is referred to as the Number 11 raw sugar price. Although the Number 11 raw sugar price fluctuated on a daily basis, the fluctuations tended to remain within a certain price range. It is the Number 11 raw sugar price that provides the base for the selling price of raw brown sugar, as other costs including the processing cost to food grade as well as freight and insurance costs are then added to ascertain the cost, insurance, and freight ('CIF') total price. To the CIF should then be added the CET of 40% to achieve the final CIF price for extra-regional raw brown sugar imported into the CSME. The low brown sugar pricing in Trinidad and Tobago, less than the Number 11 price, made it all but obvious that the CET was not being maintained on the extra-regional imports. Mr Martinez annexed to his witness statement as RM4 a table purportedly showing an overview of the daily Number 11 raw sugar price for 2019.

[68] Mr Martinez further deposed that several Trinidad and Tobago companies applied to the CARICOM Secretary General pursuant to Article 84(7) of the RTC to invoke the safeguard mechanism for refined white sugar. These companies were then granted safeguard certificates to import extra-regionally produced refined white sugar. However, according to Mr Martinez, the shipping containers used to import the specific quantities of extra-regionally produced refined white sugar also contained significant amounts of extra-regionally produced brown sugar. Mr Martinez annexed documents concerning the companies' request for safeguard certificates to his witness statement as RM6-A to RM6-H and RM7-A to RM7-C. as well as documents purportedly showing shipments of sugar with a port of loading of Puerto Quetzal, Guatemala destined for Port of Spain Trinidad and Tobago, as RM6-I and RM7-D. He alleged that the procedure utilised by the CARICOM Secretary General for the issuance of safeguard certificates under the Safeguard Mechanism, as outlined in Article 84(7) of the RTC, was being abused by Trinidad and Tobago in the context of trade in brown sugar in the CSME to the detriment of BSI.

[69] Mr Martinez deposed that to the best of his knowledge Trinidad and Tobago had not confirmed that the CET was maintained on the specified volumes of extra-regional imports of brown sugar that were documented as destined for Trinidad and Tobago.

The case for Trinidad and Tobago

[70] Trinidad and Tobago conducted a vigorous cross-examination of the witnesses for the State of Belize, and in turn, provided two witnesses in its defence.

Trinidad and Tobago Cross Examination

Mr Andy Sutherland

[71] Mr Sutherland admitted that the report he referred to, and which was attached to his witness statement as AS1, was prepared by the SAC; that there was no signatory to this document as having been prepared by an individual; and that the SAC did not give a statement in these proceedings.

[72] Mr Sutherland also admitted that the documents he relied on in respect of shipments of sugar into Trinidad and Tobago lacked particulars of the importers, the dates of shipment and the dates of arrival in Trinidad and Tobago.

[73] Mr Sutherland further admitted that the CARICOM market operates on free market principles and Member States are free to purchase sugar from any other state, including those outside of the region, subject to the rules of the Treaty to apply the CET. There is no restriction saying Trinidad and Tobago must purchase sugar from BSI. Trinidad and Tobago is not duty bound to deal with BSI.

[74] In response to questions from the bench Mr Sutherland gave evidence that BSI had a suspicion that brown sugar from Honduras in Guatemala was 'dumped' and sold below cost to get rid of excess stocks and this would be a possible explanation for low sugar prices in Trinidad and Tobago, and worth looking into. There was a pattern in 2018 to 2020 of sugar prices under world market prices and a decrease of sales to regional producers of brown sugar. Since the filing of this case there has been an uptick of sales in the Caribbean region.

Mr Mac McLachlan

- [75] Mr McLachlan admitted that there are other producers in CARICOM who supply brown sugar to Trinidad and Tobago. Mr McLachlan gave evidence that the market for brown sugar is a very competitive one within the region itself, this helps drive down the prices, which indicates that it would be impossible for extra-regional brown sugar producers, to compete with regional sugar producers if the CET is being applied properly. Virtually always, with some very few exceptions, regions and countries protect their domestic sugar supply. And that means that the price that can be obtained by domestic producers are much, much higher than they might be on the global sugar market, and the financial exposure of those producers is only for a very small amount of sugar that would then go on to the global market. The problem that BSI has confronted within the CARICOM, is that tons of brown sugar are imported from extra-regional sources. Consequently, BSI's exposure to the global market is extremely high. And that means that sugar is sold onto a global market at sometimes much lower prices than even the production cost of sugar. The reason the price tends to be lower is usually to do with supply, so if there's too much global supply and little demand, the price will go down.
- [76] Mr McLachlan admitted that the CARICOM market is a free trade market, a member of CARICOM can either choose to buy brown sugar from a CARICOM member or outside of the CARICOM region. Mr McLachlan was questioned about whether it was likely that Honduras, Guatemala, or any other country for that matter could choose to supply Trinidad and Tobago with sugar at a price, that even after the 40% CET is added is less than the price that BSI sells it for. Mr McLachlan responded that this would not be possible, as BSI would always compete. It would be economically illiterate for BSI to sell sugar at a higher price than the price for extra-regional sugar after the CET is applied. And BSI is not economically illiterate. BSI understands what the price should ordinarily be if the CET is applied. BSI also competes with other regional producers and that gives an equilibrium of price. Further Mr McLachlan gave evidence that companies would never sell sugar below the Number 11 traded price, as no company would sell a product below what it could get on the global market.

Mr Ruy Martinez

- [77] Mr Martinez admitted that save for one document attached to his witness statement, none of his documents in respect of shipping and pricing are authored and that he did include an analysis to support the projections he made in respect of BSI's loss of sales. He was questioned about whether he arrived at conclusions of fact by attaching documents to his witness statement without providing the Court with the actual or original source of the information. Mr Martinez responded by indicating that the information in his witness statement was based on information provided by entities that are government regulated, that have to keep records and information that is public knowledge. Secondly the information in his witness statement was based on the actual numbers and prices in the market.
- [78] In respect of the safeguard certificates Mr Martinez gave evidence that there were massive numbers of requests for waivers for purchases of refined white sugar from extra-regional companies, made by buyers in Trinidad and Tobago. The waivers were granted because the requisite quality and quantity of white sugar is not produced within the region. Immediately after waivers were granted, shipments of brown sugar were manifested as leaving the extra-regional territories and going to buyers in Trinidad and Tobago. When questioned whether from his own knowledge he could say that brown sugar was smuggled in with white sugar imported into Trinidad and Tobago with no CET being charged, Mr Martinez responded that he had seen it done in the past. Further Mr Martinez asserted that it was impossible to maintain the market prices for non-CARICOM origin brown sugars if the CET was being enforced.
- [79] Mr Martinez admitted that there is no document attached to his witness statement which could be construed as a bill of lading.
- [80] It was put to Mr Martinez that there was no evidence that extra-territorial sugar entered Trinidad and Tobago without any CET being charged. Mr Martinez maintained that the price in the market was the evidence. Further, the fact was that BSI were not able to sell anything, and that BSI were told that their prices were not acceptable was because the CET was not being enforced on non-CARICOM origin sugars. Mr Martinez also asserted that the export statistics from the other CARICOM producing nations indicated below normal historical

statistics for supply to Trinidad and Tobago. Mr Martinez claimed the reason for the lower export statistics was brown sugar coming from non-CARICOM companies.

- [81] Mr Martinez was questioned about whether a drought in Belize in 2019 was a possible explanation for its reduced sales. He admitted that in 2019 there was a drought in Belize and that BSI lost about 30% or less of its production. However, BSI did not lose direct consumption sugars. What BSI lost was raw sugar that was shipped to the EU.
- [82] Mr Martinez was questioned about whether BSI was entitled to a share of the regional market. Mr Martinez admitted that BSI did not have an entitlement to a share of the market. He claimed that BSI did not assume that the market was their own but expected to have a favourable commercial atmosphere where they would expect Member States to honour their trade agreements. And that was not what BSI had found with the prices that were being circulated in the market, or, with the demand that was found in the market.
- [83] It was put to Mr Martinez that he had zero evidence whether it be implied, explicit, or otherwise, to suggest that sugar from Guatemala and Honduras entered Trinidad and Tobago without the CET being charged. He responded that the statistics provided by the SAC all support his contention.
- [84] Mr Martinez gave evidence that the prices in the regional market are not reflecting that the CET is being charged and that it is impossible for non-CARICOM sugars to be sold at the prevailing prices if the 40% CET was levied. The CARICOM market was highly competitive. As regional producers are competitive amongst themselves, trying to get market share, that would support the idea that there would be even a higher barrier for non-CARICOM sugar producers to compete, if the CET was levied.
- [85] Mr Martinez was questioned about the possibility of brown sugar being sold under the Number 11 price. He gave evidence that it was not possible for sugar to be sold under the Number 11 price, because the Number 11 was the base for all pricing. The producer would never sell the sugar lower than the Number 11 price

- it would be left as raw sugar; or kept for their domestic market and carried forward as inventory for next year. It just did not make any sense to sell below the Number 11 price because the producer could always get the Number 11 price on the international market for sugar.

Trinidad and Tobago Evidence in Chief

Ms Trudy Lewis

[86] Ms Trudy Lewis is the Acting Assistant Director of Trade Promotion and Development, Ministry of Trade and Industry ('MTI') of Trinidad and Tobago. She has held this post for the past 16 months. Before this appointment, she held the position of Senior Trade Specialist from 2009 to 2014 and Senior Economist from 2014 to 2020. Ms Lewis is an economist, who holds a Master of Science degree in International Trade Policy and has been employed by the MTI for 21 years. In her current capacity as Assistant Director her duties include, but are not limited to, advising the Director, Trade Facilitation on policy matters related to trade promotion and development, assisting with the planning, organising and coordination of the activities of the Units in the Trade Directorate, providing leadership to the Secretariat of the National Trade Facilitation Committee and directing a programme of work in preparation for trade negotiations and development of national policy.

[87] Ms Lewis deposed that she is familiar with the RTC, and that Trinidad and Tobago is supplied with raw brown sugar from sugar producing CARICOM countries including Belize. During 2018 to 2020 Belize supplied Trinidad and Tobago with brown sugar. The MTI was not aware of any failure by Trinidad and Tobago to take appropriate measures to ensure the carrying out of its obligations arising out of the RTC in respect of the import of brown sugar.

[88] Ms Lewis deposed that the MTI was unable to verify the documents annexed to the Originating Application as Annex C which purported to show that shipments of extra regional brown sugar entered Trinidad and Tobago between November 2018 and June 2020 without the application of the CET. In respect of Belize's claims concerning safeguard certificates, she deposed that the Trade Licence Unit

of the MTI processes applications for safeguard certificates in compliance with Article 84 of the RTC. The issuance of a safeguard certificate was conditional on Member States indicating to the CARICOM Secretariat that they were unable to supply a particular input for which the exemption is sought. A Savingram containing the safeguard certificate is issued to the requesting Member State. The approval is then communicated to the relevant company on the Trade Licence Unit's letterhead. Safeguard certificates were granted for a specific period of time and were limited to the particular commodity specified by its H S code in the Certificate. They were administered by the Secretary General on behalf of COTED and not by the Trade Licence Unit, MTI, or CARICOM. From the perusal of the documents in the Originating Application, it had not been shown that Trinidad and Tobago abused the issuance of safeguard certificates in the trade of brown sugar. Further, the MTI was not aware of any abuse of the safeguard mechanism as outlined in Article 84(7) of the RTC.

[89] As regards Belize's claims that there was no investigation of the alleged non-application of the CET, the MTI had not been aware that there was an issue to be investigated until the initiation of this claim. Trinidad and Tobago had never been called upon by COTED or the CARICOM Secretariat to explain alleged allegations of a failure to apply the CET on brown sugar.

[90] Finally, Ms Lewis deposed that Trinidad and Tobago had been applying the CET on extra regional brown sugar imported into its territory and further, was not maintaining any regime that infringed the free movement of CARICOM produced brown sugar within the Region.

Mr Keith Huggins

[91] Mr Keith Huggins is the Deputy Comptroller Corporate Services (Ag), Customs and Excise Division, Ministry of Finance, and is responsible for, *inter alia*, administering the Customs Act, Chap 78:01 of the Laws of Trinidad and Tobago. Mr Huggins has been a Customs and Excise officer for the past 25 years.

[92] Mr Huggins deposed that the rate of duty (CET) on extra-regional brown sugar was 40%, and that the Customs and Excise Division was responsible for collection

of import duties and ensuring the proper application of the CET. The importer is required to make a customs declaration in respect of all imported goods. It is an offence to make a wrongful declaration and to pay incorrect duties. According to the records of the Customs and Excise Division there were no imports of ‘raw cane sugar’ from Guatemala and Honduras during the period 1 November 2018 – 30 June 2020 on which the CET of 40% was not applied. Trinidad and Tobago had complied with its obligations pursuant to the RTC and Customs Act and applied the CET of 40% to all extra-regional brown sugar imported into the country.

- [93] Mr Huggins prepared a Schedule dated 19 March 2021 showing ‘Raw Cane Sugar imported and Entered from Guatemala and Honduras for the period 1st November 2018 – 30th June 2020.’ (‘the Schedule’). The Schedule specified the date of import, country of origin, the tariff heading and description, the rate of duty and import duty paid. The Schedule further showed that the CET was paid on ‘raw cane sugar’ imported from Guatemala and Honduras during the period 1 November 2018 – 30 June 2020.
- [94] Mr Huggins deposed that Trinidad and Tobago had complied with its disclosure obligations and had disclosed to the Court the Form e-C82 Customs Declarations (Import/ Export) for the shipments of extra-regional imports of brown sugar entering Trinidad and Tobago from Honduras and Guatemala for the period 1 November 2018-30 June 2020, which all showed that the CET had been applied.
- [95] In response to Annex C, Mr Huggins indicated, based on the records of the Customs and Excise Division and on the searches conducted on the CBCS, that the information set out in the document was incorrect. He asserted that the documents relied on by Belize were not documents that were part of the customs regime in Trinidad and Tobago.
- [96] The State of Belize conducted a thorough and searching cross-examination of the witnesses presented on behalf of Trinidad and Tobago.

Belize Cross Examination

Mr Keith Huggins

- [97] Mr Huggins was asked whether it was possible for an importer to declare brown sugar as refined white sugar and pass a declaration in those terms in Trinidad. He responded, “if that is done, it will be a false declaration” and a criminal offence. He was asked, “Is it done?” He responded, “I have no evidence that it has been done for brown sugar”. He was asked whether he looked for any evidence and responded, “I have pulled data from the system and the data that I have pulled from the system shows that the CET was applied for brown sugar”.
- [98] Mr Huggins admitted that it was impossible for the customs computer system to disclose false declarations. However, declarations are subject to review. They are screened by the officer in charge and there is also a risk management unit. If there was an allegation of a false allegation it be investigated. There had been no specific investigation in this case.
- [99] Mr Huggins was asked, “Is there a culture in the business community of making false declarations?” He responded, “I’m unaware of any such culture.” Mr Huggins was asked whether he was aware that the government of Trinidad and Tobago had established an illicit Trade Task Force. He admitted that he was aware.
- [100] Mr Huggins was asked hypothetically about falsified declarations whereby brown sugar imported into Trinidad and Tobago was instead declared to be refined white sugar. He replied that he did not know whether the false information would turn up in any data before the Court. Officers would only discover such falsehood if relevant checks were done. He stated, “You can have possibly white sugar and tell us brown sugar. So hypothetically, of course this is something that can happen anywhere in the world”. Accuracy could only be verified with physical checks. Mr Huggins said, “Physical checks are always done, but we cannot examine [100%] due to the volume of cargo...” He did not have information on hand about how many physical checks were done, or declarations reviewed by the risk management unit.

Ms Trudy Lewis

- [101] Ms Lewis was asked whether the MTI had conducted an investigation into the allegations made by Belize in respect of the importation of brown sugar in Trinidad and Tobago in 2019 without the payment of the CET. She responded that the MTI is not responsible for the implementation of the CET; however, they sought to find out if there was any evidence and were advised that there is no evidence in support of Belize's claim. The extent of the investigation was the MTI liaising with the Customs and Excise Division and asking them if there was evidence. The Division said there was no such evidence.
- [102] Ms Lewis admitted that there have been no attempts by the MTI to reconcile the shipments of brown sugar identified by Belize in its documents. She noted from Belize's documents that while they provide a list of brown sugar imports, there was no way to link that to whether shipments were actually received, when they were received, or whether they were charged a CET. She claimed that the documents provided by Belize could not establish a link to prove its case. Ms Lewis was asked whether Trinidad and Tobago sought to discover for itself whether the alleged shipments were taking place and responded, "That's a good question, but as a representative of the Ministry of Trade and Industry we don't have the power to do such investigations".
- [103] Ms Lewis was also asked about whether Trinidad and Tobago had set up an illicit trade task force. She admitted that it had. The purpose of the task force was to reduce the incidence of illicit trade in Trinidad and Tobago through a collaborative approach by bringing together all the relevant border agencies having specific functions so there could be better coordination in the fight against illicit trade.
- [104] In respect of false declarations regarding the importation of brown sugar, Ms Lewis was asked, "Would you expect that to show within the data recovered from the customs system?" She responded, "I would not have all the information, but the Customs and Excise Division would be responsible for dealing" with that issue. She was asked about what the Ministry had done to address the allegation by Belize that there has been the importation of brown sugar without the

application of the CET. She indicated that the Ministry had reviewed the claim and the Claimant's information and had consulted with the Customs and Excise Division.

The Law

[105] It is well established in international law litigation that a State alleging a breach of treaty obligations by another State bears the burden of proving that allegation. The nature of the evidence that may be prayed in aid of discharging that burden will vary depending on the circumstances of the case. Specifically, in the absence of direct evidence that is solely in the power or control of a defendant State, the Claimant State may be permitted to rely on circumstantial evidence.

[106] In the *Corfu Channel Case (UK v Albania) (Merits)*¹² the International Court of Justice ('the ICJ') accepted that a Complainant State may adduce circumstantial evidence where that State had no access to direct evidence. The case arose out of the explosions of mines which caused damage to British warships passing through the Corfu Channel in 1946, in a part of the Albanian waters which had been previously swept for mines. The ships were severely damaged, and members of the crew were killed. In deciding on the allegation by the United Kingdom that Albania had laid or allowed a third State to lay the mines after mine-clearing operations had been carried out by the Allied naval authorities, the Court said:

“It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters *an act contrary to international law has occurred*, may be called upon to *give an explanation*. It is also true that that State cannot evade such a request by *limiting itself to a reply that is ignorant* of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof. On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers *has a bearing upon the methods of*

¹² [1949] ICJ Rep 4.

proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognised by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.” (Emphasis added).

- [107] The acceptability of circumstantial evidence in international trade relations was confirmed in *WTO, United States – Measures affecting imports of Woven Wool Shirts and Blouses from India*.¹³ There the WTO Appellate Body stated: “We agree with the Panel that it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption”.¹⁴
- [108] Similarly, in *WTO, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*,¹⁵ the Panel stated at 6.37: “We consider that when the Appellate Body refers to the obligation of the complainant party to provide sufficient evidence to establish a ‘presumption’, it refers to two aspects: the procedural aspect, i.e., the obligation for the complainant to present the evidence first, but also to the nature of evidence needed”. The Panel continued at 6.38 by stating that the “The concept of ‘presumption’ may need some elaboration. A presumption is an inference in favour of a particular fact and would also refer to a conclusion reached in the absence of direct evidence”.¹⁶
- [109] In *Myrie v Barbados (No 2)*¹⁷ this Court noted that the absence of consensus on the formulation of a standard of proof in international courts that deal with non-criminal cases may have been because the issues surrounding the standard of proof are often subsumed under the broad duty cast on litigants to co-operate with international tribunals and courts in all matters relating to proof. This Court

¹³ (25 April 1997) WT/DS33/AB/R.

¹⁴ *ibid* at [13].

¹⁵ (25 November 1997) WT/DS56/R.

¹⁶ *ibid*.

¹⁷ [2013] CCJ 3 (OJ), (2013) 83 WIR 104 at [11]-[12].

affirmed that in the Original Jurisdiction the standard of proof to be applied is lower than the standard used in a criminal case, whether domestic or international. However, the Court must ultimately be satisfied that its findings are fully supported by the objective evidence, the testimony given and the reasonable inferences that the Court is entitled to make.

[110] Belize's case is that Trinidad and Tobago is exclusively in possession of the knowledge of and information that will explain the shipments of extra-regional brown sugar that entered into its territory. Belize has asked this Court to consider the circumstantial evidence presented and to conclude that it is of sufficient weight to require Trinidad and Tobago, which is in exclusive possession of direct evidence, to answer the Claim on the allegations of breach of Articles 82 of the RTC.

[111] Belize's indirect "evidence" that the CET was not applied by Trinidad and Tobago is as follows:

1. Mr Sutherland's assertions that brown sugar from Honduras and Guatemala was being "dumped" in Trinidad and sold below cost to get rid of excess stocks in those exporting countries.
2. Mr Martinez's assertions of a causal link between the importation of extra-regional brown sugar and (i) reduced prices in Trinidad and Tobago for CARICOM produced brown sugar, as well as (ii) reduced sales in Trinidad and Tobago of CARICOM produced brown sugar. Mr Martinez's further assertions that the reduced 2019 price per metric ton for CARICOM produced brown sugar reflected that buyers were able to source brown sugar at a price below that of CARICOM produced brown sugar. Mr Martinez asserted that these claims were supported by the report purportedly prepared by the SAC (Annex C/RM1A/RM2B/AS1). The Court was asked to draw the inference that the low brown sugar pricing in Trinidad and Tobago made it all but obvious that the CET was not being maintained on the extra-regional imports given the price breakdown of how the selling price of raw brown sugar is calculated.
3. Mr Martinez's claim that the low brown sugar pricing in Trinidad and Tobago, less than the Number 11 price, was supported by the table (RM4) purportedly showing an overview of the daily Number 11 raw sugar price for 2019.

4. Mr Martinez's claims that between 2017 and 2019, there was a reduction in the volume and price of brown sugar sold by BSI to Trinidad and Tobago, supported by the letter authored by the Director of Finance of BSI (RM3). The Court was asked to draw the inference that the reduction in sales volume and price meant that Trinidad and Tobago had sourced cheap extra-regional sugar instead of purchasing from BSI.
5. Mr Martinez's claim that the procedure utilised by the CARICOM Secretary General for the issuance of safeguard certificates under the Safeguard Mechanism, as outlined in Article 84(7) of the RTC, was being abused in the trade in brown sugar in the CSME to the detriment of BSI. This claim was said to be supported by annexed documents concerning the requests by companies in Trinidad and Tobago for safeguard certificates (RM6A-6H, RM7A-C) as well as documents purportedly showing shipments of sugar with a port of loading of Puerto Quetzal, Guatemala destined for Port of Spain, Trinidad and Tobago (RM6I and RM 7D). The Court was asked to draw the inference that some of the safeguard waivers that had been granted to import extra-regionally produced refined white sugar were used by companies/manufacturers to import quantities of extra-regionally produced brown sugar.

[112] Before considering whether the evidence presented is sufficient to give rise to a presumption of breach, the Court finds it necessary to remark on the quality of the documentary evidence on which Belize relied. The Court has considered the following shortcomings:

1. The author of the document contained in Annex C/RM1A/RM2B/AS1 which purportedly shows that shipments were received from Guatemala and Honduras has not been made known. In any event these documents do not indicate that the CET was not imposed as there are no references to pricing.
2. There is no official source or author of RM 4 which purports to display an overview of the daily number 11 raw sugar price for 2019. This document is a mere table with no indication of its authorship, or its source.
3. The letter authored by the Director of Finance of BSI (RM3) which purportedly shows a loss of sales and volume is not supported by the relevant

official records to verify the figures therein. Further, the Director of Finance was not called to give direct evidence.

4. The documents concerning the requests made by companies in Trinidad and Tobago for the importation of refined white sugar under the Safeguard Mechanism (RM6A-6H, RM7A-C) do not indicate that brown sugar was secretly imported with these shipments of refined white sugar.
5. There is no indication of the sources or authors of RM6I, RM7D which purportedly show shipments of sugar with a port of loading of Puerto Quetzal, Guatemala destined for Port of Spain, Trinidad and Tobago. Further, these documents do not show that the CET was not applied, they simply show the port of loading and destination. The documents lack specificity as they do not show whether the goods actually arrived in Trinidad and Tobago, the dates of arrival and the ports of arrival.

[113] The question which arises at this point is whether the evidence presented by Belize is sufficient to give rise to the presumption of breach for which Trinidad and Tobago is then required to give an explanation. Belize has asked this Court to draw a legal inference of breach of the RTC from purely commercial considerations, primarily, market behavior based upon Belize's understanding of the role and function of international pricing for sugar in the form of Number 11. Were these considerations sufficient to make good the presumption of breach, this Court would be prepared to say that Trinidad and Tobago might not have been able to rebut the presumption by limiting itself to a reply that its customs entries reveal that the CET was imposed on consignments declared as extra-regional brown sugar. This is because, as Belize submitted in oral argument, the imposition of the CET on declared consignments of brown sugar does not by itself alone answer the allegation that brown sugar may be smuggled into Trinidad and Tobago by use of the stratagem of certificates for importation of refined white sugar. Something more would then have been required of Trinidad and Tobago to demonstrate that the State had systems and procedures in place and was actively monitoring and evaluating the efficacy of such systems and procedures, to ensure that the allegations had no merit.

- [114] The *Corfu Channel case* anticipated that allowance may be made for “the method of proof available” and that “a more liberal recourse to inferences of fact and circumstantial evidence” may be warranted in certain cases. Other international authorities confirm that the absence of direct evidence establishing an unlawful act, “does not absolve a [tribunal] from examining submitted evidence in its totality”: *WTO, United States - Continued Existence and Application of Zeroing Methodology*.¹⁸
- [115] Similar sentiments are to be found in the several authorities cited to this Court: *WTO, United States – Measures affecting imports of Woven Wool Shirts and Blouses from India*;¹⁹ *WTO, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*;²⁰ *Myrie v Barbados*;²¹ *Limburgse Vinyl Maatschappij NV v European Commission*;²² *A Ahlström Osakeyhtiö v European Commission (The Woodpulp Case)*;²³ *WTO, Canada - Measures Affecting the Export of Civilian Aircraft*.²⁴
- [116] Nevertheless, the quality of the circumstantial evidence must be such as to support the presumption of breach. This Court finds that there were severe shortcomings in the evidence offered by Belize, which have been itemised at para [112]. This Court notes that save for one letter authored by the Director of Finance of BSI (RM3), who did not give direct evidence, the documents relied on in relation to the allegations of the non-imposition of the CET are unauthored and no evidence has been provided upon which sources can be ascertained. Belize’s claim that documents were prepared by unidentified agents of BSI is insufficient. Further, as aforesaid, in addition to being unauthored the documents in respect of shipments lack specificity as they do not show whether the goods actually arrived in Trinidad and Tobago, the dates of arrival and the port of arrival. This is all highly unsatisfactory. Most importantly, as regards the lynchpin of the Number 11 pricing as representing the floor of international trade, this Court is not persuaded, in the absence of a Court recognized expert witness, that it has all the

¹⁸ (4 February 2009) WT/DS350/AB/R

¹⁹ (25 April 1997) WT/DS33/AB/R.

²⁰ (25 November 1997) WT/DS56/R.

²¹ *Myrie (No 2)* (n 17) at [11]-[12].

²² ECLI:EU:C:2002:582, [1999] ECR II - 931 at [529].

²³ ECLI:EU:C:1993:120, [1993] ECR I-1307 at [70]-[72].

²⁴ (14 April 1999) WT/DS70/R.

relevant evidence and views as to be reasonably comfortable in assessing the potency of this evidence. The circumstances in this case do not justify the appointment of an expert by the Court given the concession made by the Complainant State.

Importance of imposition and maintenance of CET

[117] This Court has had reason to affirm, repeatedly, the importance of the obligation on Member States to impose and maintain the CET on the importation of extra-regional goods. The Court considers it necessary to repeat these injunctions.

[118] In *Trinidad Cement Limited v The State of Trinidad and Tobago*²⁵ this Court noted:

CARICOM is primarily a regional economic integration arrangement and a customs territory and the RTC is a Regional Trade Agreement ('RTA') within the meaning of the WTO. An RTA defines the parameters of a regional economic bloc, or customs territory, by listing (i) Member States included in the customs territory; (ii) conditions for membership; and (iii) economic benefits of membership. RTAs are by nature discriminatory in that the Member States enjoy more favourable market access conditions than non-Members. Member States in an RTA may enter the regional market with less (or zero) restrictions, as opposed to non-Members who may face high tariffs. Intra-regional production and distribution are thereby prioritized over similar foreign-based production and distribution....

[119] In respect of the CET this Court went on to note:

... the CARICOM CET is a fundamental pillar in the establishment of the CSME whereby the Caribbean Community would achieve 'harmonization' around a 'common rate, or common regime of rates.'²⁶ The primary purpose of the CET was to encourage and promote the production of goods within CARICOM. It was one of a range of measures identified by the Member States

²⁵ [2019] CCJ 4 (OJ) at [58].

²⁶ *ibid* at [75].

as necessary in order to strengthen the productive sector and to accelerate the process towards making their exports internationally competitive.

[120] In *Trinidad Cement Limited v The State of Barbados*²⁷ this Court noted that:

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.

[121] In *Trinidad Cement Limited v The State of Guyana*²⁸ this Court noted that:

Article 82 of the RTC imposes an obligation on the Member States to “establish and maintain a common external tariff in respect of all goods which do not qualify for Community treatment in accordance with plans and schedules set out in relevant determinations of COTED”. This obligation on Member States is of potential benefit to all legal or natural persons carrying on business in the Community having to do with any such goods. Equally, the failure by any particular Member State to fulfil this obligation is of potential prejudice to all such persons.

²⁷ [2019] CCJ 01 (OJ) at [34].

²⁸ [2009] CCJ 1 (OJ), (2009) 74 WIR 302 at [34].

[122] In the present circumstances, this Court re-emphasises the importance of maintaining the CET especially in respect of a product such as brown sugar which is of demonstrable importance to Member States such as Belize which manufactures that product. No one disputes that Belize has made very significant investment in its agricultural sector in general and in sugar cultivation and production specifically. The CET does not guarantee producers of sugar in Belize an assured market, but those producers are entitled to the protection of the market that the tariff is intended to provide. The Court also urges the Community to superintend the conclusion of the Monitoring Mechanism for Sugar as quickly as possible to ensure that the benefits intended to ensure to the regional sugar producers are not frustrated and impaired.

Belize representation of BSI

[123] A final point for comment in this case arises from the fact that Belize presented this claim in its own right for its benefit and for the benefit of BSI. Belize contended that the imposition of the CET on imports of extra-regional brown sugar is intended to confer a direct benefit on BSI and the suspension and/or failure to impose it has/had a prejudicial effect on BSI, the loss of sales, and that it was entitled to bring this claim on its own behalf and also on behalf of BSI.

[124] Trinidad and Tobago submitted that Belize's attempt to present this claim for the benefit of BSI is a circumvention of the requirements for special leave for private entities in accordance with Article 222 of the RTC. Trinidad and Tobago further argued that the institution of this claim by Belize on behalf of BSI should not be permitted before the Court; this is not a case of a claim for damages for the sugar cane industry in Belize as a whole. The claim was that of a sole producer and should, like all the other line of Article 222 cases,²⁹ be brought before the CCJ by the private entity itself.

[125] In reply Belize contended that, as a Contracting Party to RTC, it is fully entitled under Article 211 to espouse a claim in proceedings before the Court asserting a breach of the RTC by Trinidad and Tobago. Nothing turns on the fact that,

²⁹ Trinidad and Tobago cites as an example *Myrie (No 2)* (n 17)

additionally, it prosecutes the Claim for the benefit of BSI. Article 222 of the RTC makes it clear that Contracting Parties may: (i) omit or decline to espouse a claim or; (ii) expressly agree that the person concerned may espouse the claim instead. Belize had opted to espouse this claim on its own behalf and for the benefit of BSI.³⁰

[126] Under Article 211 of the RTC³¹ this Court has compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including applications by persons in accordance with Article 222, concerning the interpretation and application of the Treaty. Pursuant to Article 216³² Member States have agreed that they recognise as compulsory, *ipso facto* and without special agreement, the Original Jurisdiction of the Court referred to in Article 211 and this Court's competence to determine its jurisdiction.

[127] Under Article 222 of the RTC³³ persons natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in

³⁰ Belize relies on *Trinidad Cement Limited* (n 28) at [36].

³¹ **ARTICLE 211**

Jurisdiction of the Court in Contentious Proceedings

1. Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:

- (a) disputes between the Member States parties to the Agreement;
- (b) disputes between the Member States parties to the Agreement and the Community;
- (c) referrals from national courts of the Member States parties to the Agreement;
- (d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.

³² **ARTICLE 216**

Compulsory Jurisdiction of the Court

1. The Member States agree that they recognise as compulsory, *ipso facto* and without special agreement, the original jurisdiction of the Court referred to in Article 211.

2. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be determined by decision of the Court.

³³ **ARTICLE 222**

Locus Standi of Private Entities

Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:

- (a) the Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and
- (b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and
- (c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:
 - (i) omitted or declined to espouse the claim, or
 - (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and
- (d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim.

proceedings before the Court where the Court determines that the Treaty intended that a right or benefit conferred by or under the Treaty on a Contracting Party shall enure to the benefit of such persons directly; the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit; and the Contracting Party entitled to espouse the claim in proceedings before the Court has: (i) omitted or declined to espouse the claim, or (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and (d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim.

- [128] The clear text of Article 222 means that the Contracting Party may espouse a claim on behalf of nationals, natural or juridical, and where they omit or decline to do so (Article 222 (c) (i)), or where the Contracting Party has expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled (Article 222 (c) (ii)) those nationals may, with the leave of the Court espouse a claim on their own behalf.
- [129] In *Trinidad Cement Limited v The State of Guyana*³⁴ this Court found that Article 222 was a procedural device to avoid the duplication of suits. The purpose of Article 222 is to avoid a State, allegedly in violation, being twice vexed, once by an injured private entity and again by the Contracting Party of that private entity.
- [130] In *Rudisa Beverages & Juices NV v The State of Guyana*³⁵ this Court found that Article 222 indicates a threshold that must be met by *private entities* in order to achieve standing before the Court. The Article performs a gatekeeping function which bars claims by private entities except where the conditions for the grant of leave in Article 222 are satisfied. The requirement for special leave exists only in respect of claims brought by natural or juridical person, where the Contracting Party has not espoused a claim on behalf of those persons.
- [131] In *Hummingbird Rice Mills Limited v Suriname*³⁶ in deciding whether to grant the applicant leave, the Court considered that the Contracting Party had declined to espouse the claim and found that “where the Contracting Party declines to

³⁴*Trinidad Cement Limited* (n 28) at [43].

³⁵ *Rudisa* (n 10) at [3].

³⁶ [2011] CCJ 1 (OJ) at [25] and [26].

espouse the claim of its national, it would normally be in the interests of justice that the Applicant national be permitted to advance its own cause before this Court”.

[132] There is no doubt that under the RTC, Belize was entitled to espouse this claim on behalf of BSI. In any event, in its Originating Application, Belize made it clear that it was pursuing the claim not only on behalf of BSI but on its own behalf as it was entitled to do. The State of Belize benefits substantially from the manufacture and export of brown sugar by BSI and there was nothing to preclude Belize from bringing this action both on its own behalf and also on behalf of BSI.

Orders

[133] The Court therefore concludes and orders:

1. The Originating Application is dismissed.
2. Each party shall bear its own 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 D Justice Barrow

/s/ A Burgess

The Hon Mr Justice A Burgess

/s/ P Jamadar

The Hon Mr Justice P Jamadar

ANNEX

Article 9:

ARTICLE 9

General Undertaking on Implementation

Member States shall take all appropriate measures, whether general or particular, to ensure the carrying out of obligations arising out of this Treaty or resulting from decisions taken by the Organs and Bodies of the Community. They shall facilitate the achievement of the objectives of the Community. They shall abstain from any measures which could jeopardise the attainment of the objectives of this Treaty.

Article 79:

ARTICLE 79

General Provisions on Trade Liberalisation

1. The Member States shall establish and maintain a regime for the free movement of goods and services within the CSME.
2. Each Member State shall refrain from trade policies and practices, the object or effect of which is to distort competition, frustrate free movement of goods and services, or otherwise nullify or impair benefits to which other Member States are entitled under this Treaty.

Article 82:

ARTICLE 82

Establishment of Common External Tariff

The Member States shall establish and maintain a common external tariff in respect of all goods which do not qualify for Community treatment in accordance with plans and schedules set out in relevant determinations of COTED.