

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No TTOJ2021/001

Between

Rock Hard Distribution Limited
Rock Hard Distributors Limited
Mootilal Ramhit and Sons Contracting Limited **Claimants**

And

The State of Trinidad and Tobago **First Defendant**
The Caribbean Community **Second Defendant**

And

The State of Belize **First Intervener**
Trinidad Cement Limited **Second Intervener**

Caribbean Community Law – Common External Tariff – Suspension of – Council for Trade and Economic Development (“COTED”) permitted Trinidad and Tobago to suspend Common External Tariff (“CET”) (of 5%) on other hydraulic cement and impose a tariff of 35% and 50% from 2020 to 2021, respectively – Whether decision of COTED based on required information – Whether there was proper consultation – Whether proper procedure followed – Whether decision disproportionate – Whether decision impairs or prejudices Objectives of Community – Whether COTED wrong to permit rate beyond WTO Bound Rate – Revised Treaty of Chaguaramas, Articles 6, 9, 26, 78, 82, 83.

SUMMARY

After it had been permitted by the Council for Trade and Economic Development (COTED), an Organ of the Caribbean Community, to raise its tariff for other hydraulic cement from 5% (which is the common external tariff or CET) to 35%, the State of Trinidad and Tobago requested from COTED, in November 2020, a further suspension of the CET in order to increase the tariff to 50% for the entire year of 2021. This was approved by COTED in

December 2020. Making use of that authorization, Trinidad and Tobago imposed the 50% tariff from 1 January 2021. It also imposed a quota on the import of other hydraulic cement.

The Claimants, a regional distributor, and two local importers of cement from Turkey, asserting to be seriously prejudiced by this measure, then commenced proceedings before this Court. They challenged the process by which Trinidad and Tobago had applied for the suspension and, in particular, the legality of the COTED Decision allowing the requested suspension and the increased tariff of 50%.

The Claimants alleged that the COTED Decision was flawed because: it was not based on accurate, relevant, sufficient, and timely information provided by Trinidad and Tobago; there had not been proper consultation of the Claimants; proper procedure had not been followed; the Decision was disproportionate and jeopardised expansion of trade and economic relations with third States, one of the objectives of the Community; and the Decision was given for an improper purpose. An important complaint was also that COTED had wrongly allowed Trinidad and Tobago to impose a tariff rate for other hydraulic cement far beyond their World Trade Organization (WTO) bound rate of 5%.

The defendants, Trinidad and Tobago and the Community, did not agree and made ample written and oral submissions. They were assisted in their defence by two interveners, the State of Belize and the local cement producer, Trinidad Cement Limited (TCL). At the trial several witnesses and two experts in WTO law were heard and cross-examined.

In respect to the WTO issue, the defendants and interveners argued that this Court had no jurisdiction to entertain or decide the issue of compatibility of the COTED Decision with WTO law. The Court frontally addressed this point. It ruled that it had jurisdiction to decide whether and to what extent WTO law is part of Community law, and whether and to what extent the Community, upon a proper interpretation of the Revised Treaty of Chaguaramas (RTC), would be bound by WTO law. However, the Court concluded that, in relation to the setting of the tariff rates, the Community was not so bound. A pronouncement about the WTO bound rate and the legality of a tariff duty in violation of that bound rate would therefore go beyond the limits of this Court's jurisdiction.

The Court explained that the Community must be placed in “the WTO universe” as a customs union, which provides a perspective from which the nature and possible limitations of the Community and COTED must be observed. Given that position, the Court reasoned, it is expected that COTED, certainly from a pragmatic point of view, will have regard to the WTO bound rate of Member States when called to make decisions on the suspension or alteration of the CET as already was indicated by this Court in *Trinidad Cement Limited v Trinidad and Tobago* in 2019. This, however, did not mean that the Community was legally bound by WTO law. The reasons for the conclusion that it was not so bound were that the Community, in contradistinction to its Member States, was not a member of the WTO; that WTO law is not part of customary international law; that the doctrine of functional succession, as developed by the European Court of Justice (ECJ) does not apply to the Caribbean Community; and that, even though the RTC refers in several provisions to WTO law and its possible application in the legal order of the Community, these do not cover or restrict the powers of COTED in Caribbean Community law. It was therefore not necessary for the Court to delve further into the amply discussed questions of WTO law.

With respect to the other challenges brought by the Claimants, the Court reminded the parties, referring to the foundational 2009 case of *Trinidad Cement Limited v Caribbean Community*, that, in CET matters, COTED has a broad discretion and that the Court will only interfere with such a decision if it is manifestly wrong. The Court found that on none of these bases the COTED Decision could successfully be challenged, let alone justify an annulment of that Decision.

The Court did indicate, however, that the consultation process in Trinidad and Tobago could have been more fulsome and more transparent. On the other hand, the fact that much of the information that the Claimants could have provided, was not provided, was to a certain extent due to their own fault by not taking the opportunity to engage with the competent authority of that State while they should have done so.

With respect to the procedure followed by Trinidad and Tobago and COTED, the Court first stated that Part C of the Revised Procedures and Forms, although formally not operative, should nevertheless be followed in its essence or spirit, if not to the letter. The Court reasoned that the Protocol to Amend Article 83 of the RTC, to which these procedures pertain, is provisionally applied since 2015. Further, these procedures were agreed to by the

members of COTED themselves. Moreover, the Court had already ruled in an earlier decision that good governance, the rule of law, and fundamental values and principles embedded in the RTC require a fair procedure. The Court found, though, that the prescribed procedure was basically followed, although there were some flaws. Given the circumstances, the Court found that these flaws were not sufficient to vitiate the Decision of COTED.

The Court rejected the submission that the objective of expansion of trade with third States had been prejudiced by the COTED Decision. The Court stated that this was just one of the objectives of the Community and that there were others which could conflict with that objective, such as the related pertinent, inherent objective of the Community to create a protected market for producers and manufacturers in CARICOM. The Court also pointed out that the provisions in Article 78(2)(c), (2)(d), (3)(b) and (4), for example, make clear that the expansion of trade with third countries specifically focusses on exports and that, where “imports” are mentioned, the reference is limited to the importation of goods or products of community origin. It does not cover the importation of products from third States.

None of the submissions of the Claimants having been successful, the Court dismissed the Originating Application in its entirety. The Court invited the Parties to make submissions on costs within fourteen days.

Cases referred to:

International Fruit Company v Produktschap voor Groenten en Fruit (Case C-21- 24/72, [1972] ECR 1219); *Intertanko v Secretary of State for Transport* (Case C-308/06, [2008] ECR I-4057); *Lawfulness of opt-out by a Member State pursuant to Article 27(4) of Conference Decision made under Article 46 concerning the enlargement of classes of persons entitled to move and work freely in the Community; Whether the principle of non-reciprocity enables nationals of those Member States which opt-out to derive the benefits of the enlargement Decision* (Advisory Opinion, Request by The Community) [2020] CCJ 1 (OJ) (AO); *Mootilal Ramhit and Sons Contracting Ltd v State of Trinidad and Tobago* [2020] CCJ 3 (OJ); *Rock Hard Cement Ltd v State of Barbados* [2020] CCJ 2 (OJ); *Trinidad Cement Ltd v Caribbean Community* [2009] CCJ 2 (OJ), (2009) 74 WIR 319; *Trinidad Cement Ltd v Caribbean Community* [2009] CCJ 4 (OJ), (2009) 75 WIR 194; *Trinidad Cement Ltd v State of Trinidad and Tobago* [2019] CCJ 4 (OJ); WTO, *Turkey: Restrictions on Imports of Textile and Clothing Products* – Report of the Appellate Body (1999) WT/DS34/AB/R.

Treaties and International Materials referred to:

CARICOM Secretariat, 'Revised Procedures and Forms for Processing Requests for Suspension of the CET Relating to the Protocol to Amend Article 83 of the Revised Treaty' in *Draft Summary of Recommendations and Conclusions of the Fortieth Meeting of the Council for Trade and Economic Development*, COTED/2015/40/DSRC, Georgetown, Guyana, 23 – 24 April 2015; General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force provisionally on 1 January 1948) 55 UNTS 187; Marrakesh Agreement Establishing the World Trade Organization (with final act, annexes and protocol) (15 April 1994) LT/UR/A/2; 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 as amended by Protocol to Amend Article 83 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (adopted 11 March 2014); 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.

Other Sources referred to:

Dörr O and Schmalenbach K (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012); Villiger M E, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009).

THE COURT,

composed of J Wit, W Anderson, M Rajnauth-Lee, D Barrow, P Jamadar, Judges

having regard to the originating application filed at the Court on 24 February 2021, together with the annexures thereto, the defence of the State of Trinidad and Tobago and the annexures thereto, and the defence of the Caribbean Community and the annexures thereto, both filed on 9 April 2021, the statement of the First Intervener and the annexure thereto, and the statement of Second Intervener, both filed on 16 April 2021, the written submissions of the Claimants filed on 14 May 2021, of the First Defendant, of the Second Defendant, of the First Intervener and of the Second Intervener, all filed on 28 May 2021, and the reply of the Claimants thereto filed on 4 June 2021, and to the public hearing held on 28 and 29 June 2021

and after considering the notes and oral submissions of:

- **Rock Hard Distribution Limited, Rock Hard Distributors Limited and Mootilal Ramhit and Sons Contracting Limited**, by Mr Ian Benjamin SC, appearing with Mr Jagdeo Singh, Mr Justin Phelps, Ms Karina Singh and Ms Nalini Jagnarine, Attorneys-at-law
- **the State of Trinidad and Tobago**, by Ms Deborah Peake SC, appearing with Ms Tamara Toolsie, Mr Brent James and Ms Radha Sookdeo, Attorneys-at-law
- **the Caribbean Community**, by Dr Corlita Babb-Schaefer, appearing with Mr O’Neil Francis, Attorneys-at-law
- **the State of Belize**, by Mr Eamon Courtenay SC, appearing with Ms Samantha Matute-Tucker, Attorneys-at-law
- **Trinidad Cement Limited**, Mr John Jeremie SC, appearing with Mr Raphael Ajodhia, Attorneys-at-law

issues on 2 March 2022, the following

JUDGMENT

Introduction

- [1] In 2019, the Council for Trade and Economic Development (“COTED”), an Organ of the Caribbean Community (“the Second Defendant” or “the Community”), permitted the State of Trinidad and Tobago (also “the First Defendant”) to suspend the Common External Tariff (“CET”) (of 5%) on other hydraulic cement and instead impose a tariff of 35% for the entire year of 2020. A little over one month before the expiration of that suspension, Trinidad and Tobago applied for a further suspension of the CET and the implementation of a tariff of 50% from 1 January 2021 to 31 December 2021, and this was also approved by COTED. This new tariff was implemented by Trinidad and Tobago which also imposed a quota on imports of other hydraulic cement.
- [2] These proceedings were commenced by the Claimants to challenge both the process by which Trinidad and Tobago applied for the 2021 Suspension, and the

grant of the 2021 Suspension by COTED. In the Claimants' view the COTED Decision to approve the suspension was flawed because:

- a. it was not based on accurate, relevant, sufficient, and timely information provided by Trinidad and Tobago;
- b. there had not been proper consultation with the Claimants;
- c. proper procedure had not been followed;
- d. the Decision was disproportionate;
- e. the Decision jeopardised one of the objectives of the Community, to wit expansion of trade and economic relations with third States;
- f. the Decision was given for an improper purpose; and
- g. COTED wrongly allowed Trinidad and Tobago to impose a tariff rate for other hydraulic cement far beyond their World Trade Organization ("WTO") bound rate of 5%.

The Claims

[3] In its Originating Application dated 25 February 2021 the Claimants sought the following remedies:

- a. A declaration that the Decision of the COTED granting a suspension of the CET on "other hydraulic cement" for a further period of 1 January 2021 to 31 December 2021 is ultra vires, unlawful, disproportionate, irrational, unreasonable and illegal;
- b. An order that the said Decision be remitted to COTED for reconsideration upon the basis of the guidance given by the Honourable Court;
- c. Alternatively, an Order quashing the said Decision;
- d. A declaration that, upon a proper construction of the Revised Treaty of Chaguaramas ("RTC"), one of its objects being the expansion of trade and

economic relations with third States, it is not compatible with that Treaty for Member States to act to eliminate legal competition from imports from third States which do not breach any national or regional law or previously expressed policy;

- e. A declaration that it is incompatible with the RTC for a Member State to adopt a policy of restricting trade in imports from third States on the ground only that those imports compete with an industry in the Member State;
- f. A declaration that the Member State of Trinidad and Tobago has violated Article 9 of the RTC by acting in a manner which jeopardises the expansion of trade and economic relations with Turkey;
- g. An order prohibiting Trinidad and Tobago, by the Comptroller of Customs or howsoever otherwise, from imposing the 50% rate of duty on “other hydraulic cement” or any rate of duty other than the CET fixed under Article 82 of the RTC until the hearing and determination of the Claimants’ Originating Motion or until further order;
- h. Alternatively, an interim order directing the Member State of Trinidad and Tobago to impose the rate of duty mandated by the CET set under Article 82 of the RTC from that time until the hearing and determination of the Claimants originating application or until further ordered;
- i. Damages for violation of the rights of the Claimants, express and inferred, under the RTC;
- j. A Declaration that the imposition of the 35% rate of duty for the period January 1 to 31 December 2020 is illegal, null, void and unlawful;
- k. An Order directing the reimbursement to the Trinidad and Tobago based Claimant of those duties unlawfully paid or such portion thereof as the Court shall direct;
- l. Costs; and
- m. Such further or other relief as to the Court seems just.

Preliminary Matters

- [4] At the Claimants' request the Court, by Order of 19 February 2021, imposed Interim Measures restraining Trinidad and Tobago from enforcing a rate of duty on other hydraulic cement as far as it exceeds the Common External Tariff of 5%. This was on the basis that the Claimants had established a *prima facie* case and that the case was one of urgency, such that serious harm would be caused to the Claimants if the matter was to await the determination of the originating application.
- [5] In those circumstances the Claimants, at the case management conference of 3 March 2021, did not maintain their application for relief under (g) and (h). On that occasion, the remedy claimed under (j) in respect of the unlawfulness of the 35% rate of duty was also withdrawn by the Claimants. The Court notes, for completeness, that the Interim Order was discharged by Order of this Court on 8 December 2021.
- [6] Trinidad Cement Limited ("TCL"), which initially sought to intervene following the Claimants' application for special leave, and specifically challenged the application for interim measures at that stage, and the State of Belize, both applied for and were granted leave to intervene in these proceedings. The State of Saint Lucia attended but did not participate in the proceedings.

The Trial

- [7] This matter was heard on 28 and 29 June 2021. The first day was dedicated to the giving of evidence by witnesses. The Company Director of the First Claimant, Mr Mark Maloney, and of the Second and Third Claimants, Mr Ryan Ramhit, gave evidence for the Claimants and were cross-examined by Counsel for the Defendants. Ms Ayleen Alleyne-Ovid, Permanent Secretary of the Ministry of Trade and Industry (Ag) in Trinidad and Tobago, gave evidence on behalf of the First Defendant and was cross-examined by Counsel for the Claimants.
- [8] Expert evidence was also provided to the Court, by Mr Matthew Nicely, who was called by the Claimants, and Dr Kathy Ann Brown, who was called by the First

Defendant. The experts were permitted by the Court to question and respond to each other, and they were also required to respond to questions from the Court.

- [9] On the second day, the Court heard oral submissions from the Parties, including from the two Intervenors. Both Intervenors made submissions in support of the Defendants, and the Claimants were then permitted to make submissions in reply.

The Factual Background

- [10] The First Claimant, a company incorporated in Saint Lucia, is the regional distributor of “other hydraulic cement” known as Rock Hard Cement. Rock Hard Cement is imported from Turkey into several Member States of the Community, including Trinidad and Tobago, where it has been imported and distributed by the Second Claimant. The Second and Third Claimants are both companies that are incorporated in Trinidad and Tobago.

- [11] In November 2019, at the Forty-Ninth Meeting of COTED, the Meeting heard a request from Trinidad and Tobago for a suspension of the CET and permission to apply the rate of 35% on other hydraulic cement from 1 January 2020 to 31 December 2020, pursuant to paragraphs 3(f) and (g) of Article 83 (as set out in the Protocol to Amend Article 83 (“the Protocol”) of the RTC). Paragraph 3(f) refers to a need to support an industry in the Member State, with the industry in this case being the local manufacturer of cement, TCL. Paragraph 3(g) concerns a situation where the product is of strategic importance to the economic development of the Member State.

- [12] At that Meeting, the Grenada representative raised the concern that because of the bound rate of Trinidad and Tobago at the WTO, which was set at 5%, COTED may be authorising Trinidad and Tobago to take an illegal measure if it granted the request. Trinidad and Tobago informed the Meeting that, based on past experience, it had invoked a provision (Article XXVIII in the 1994 General Agreement on Tariffs and Trade (“GATT”)) that allowed it to increase its bound rate immediately by notifying the WTO.

- [13] Though the Grenada representative indicated that its own experience was that notification was not sufficient and negotiation was required for the alteration of a bound rate, the Meeting decided to grant the request of Trinidad and Tobago. The decision noted that Trinidad and Tobago had invoked Article XXVIII and had notified the WTO.
- [14] This decision was challenged, by the Third Claimant in this case, but that matter was ended by consent of the parties. The parties agreed, as confirmed by a Judgment of this Court dated 23 July 2020, that Trinidad and Tobago failed to ensure that the Third Claimant was consulted before the application for the suspension of the CET on “other hydraulic cement” was made and approved, and that all other claims were discontinued.
- [15] One year after that decision of COTED, at the Fifty-First Meeting of COTED in November 2020, Trinidad and Tobago again applied for a suspension of the CET on other hydraulic cement. This time, it was coupled with a request for permission to apply a rate of 50%. The request was again based on paragraphs (3)(f) and 3(g) of Article 83, as outlined above. It was also based on paragraph (3)(d), which speaks to a critical shortfall in government revenue being experienced in the State.
- [16] On this occasion, Trinidad and Tobago presented the Meeting with information on the consultations it undertook prior to making the request, including with the Second and Third Claimants. The General Counsel of the Community advised the Meeting that COTED needed to be satisfied that the consultations with the Second and Third Claimants had been properly undertaken. The General Counsel therefore advised that Trinidad and Tobago could be asked to make another attempt to consult with the relevant parties before granting a suspension of the CET.
- [17] Trinidad and Tobago noted, however, that the consultation process had been started more than one month before the Meeting, that all questions posed by the Second and Third Claimants had been answered in the course of their written communication, and that virtual consultations had been rescheduled on two occasions to accommodate those Claimants and they had still not attended. Trinidad and Tobago claimed that everything that could have been done to consult with the Claimants had

been done. After representations from other States and the Secretary-General of the Community, the Meeting agreed to grant the request of Trinidad and Tobago.

- [18] Thereafter, Trinidad and Tobago implemented the 50% tariff, and then proceeded to also apply a quota on the imports of other hydraulic cement. The quota was also effective from 1 January 2021, as, according to Trinidad and Tobago, an additional measure to reduce leakages of foreign exchange, strengthen the local cement manufacturing industry, maintain employment, and build on exports.

The Legal Context

- [19] The following provisions of the RTC and WTO law have been invoked by the parties to this case and are referenced in the judgment below:

a. Caribbean Community Law

ARTICLE 6
Objectives of the Community

The Community shall have the following objectives:

...

- (d) expansion of trade and economic relations with third States;

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 26
The Consultative Process

1. In order to enhance the decision-making process in the Community, the Community Council, assisted by the Secretary-General, shall, in collaboration with competent authorities of the Member States, establish

and maintain an efficient system of consultations at the national and regional levels.

2. The system of consultations shall be structured to ensure that determinations of Community Organs and the Legal Affairs Committee are adequately informed by relevant information inputs and are reinforced by consultations undertaken at successively lower levels of the decision-making process.

ARTICLE 78

Objectives of the Community Trade Policy

1. The goal of the Community Trade Policy shall be the sustained growth of intra-Community and international trade and mutually beneficial exchange of goods and services among the Member States and between the Community and third States.

2. In fulfilment of the goal set out in paragraph 1 of this Article the Community shall pursue the following objectives:

...

- (d) the securing of the most favourable terms of trade for Community goods and services exported to third States and groups of States

In order to achieve the objectives of its Trade Policy, the Community shall:

...

- (b) prohibit the imposition by the Member States of new restrictions on imports and exports of products of Community origin.

4. Member States shall eliminate existing restrictions on imports and exports of goods of Community origin, other than those authorised by this Treaty.

ARTICLE 82

Establishment of Common External Tariff

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

ARTICLE 83¹
Operation of the Common External Tariff

1. Any alteration or suspension of the Common External Tariff on any item shall be decided by COTED.
2. A Member State may apply to COTED for authorization to suspend the applicable Common External Tariff on an item and, in place thereof, apply a higher or a lower tariff.
3. In its consideration of an application to suspend the Common External Tariff on an item, COTED shall, where applicable, take into account whether:

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

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

 - (g) the product is of strategic importance to the economic development of that Member State;
5. An application to suspend the applicable Common External Tariff on an item must be supported by information as prescribed by COTED from time to time.
6. Any authorization to suspend the application of the Common External Tariff on an item shall be subject to such terms and conditions as COTED, or the Secretary-General acting pursuant to paragraph 4, may decide.

¹ 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 as amended by the Protocol to Amend Article 83 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (adopted 11 March 2014), which is being provisionally applied.

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

b. WTO Law

GATT Article II

Schedules of Concessions

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement

GATT Article XXIV

Territorial Application – Frontier Traffic – Customs Unions and Free-trade Areas

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.
8. For the purposes of this Agreement:
 - (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
 - (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

DSU² Article 23
Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:
 - (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

The Jurisdiction of the Court

[20] The jurisdiction of the Court is set forth in the RTC. Article 211 grants this Court compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty. The Claimants argue that WTO law is part of Community law and that, in any event, it is binding on COTED when deciding upon tariff rates. Specifically, the Claimants submit that COTED was wrong in allowing Trinidad and Tobago to impose a tariff rate for other hydraulic cement far beyond Trinidad and Tobago's WTO bound rate in its Schedule of Concessions, which, despite the actions undertaken by Trinidad and Tobago before the WTO, was and still is 5%. The Defendants and Interveners, however, deny these submissions. They contend that this Court has no jurisdiction to entertain or decide this point. The Defendants note that the Court's jurisdiction is circumscribed by Article 211 of the RTC and that it is clear from Article 23 of the DSU that it is only

² Understanding on Rules and Procedures governing the settlement of disputes, Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization (with final act, annexes and protocol) (15 April 1994) LT/UR/A/2WTO Agreement.

before the WTO's Dispute Settlement Body ("DSB") that Members of the WTO can seek redress of any violation of WTO obligations.

- [21] It is undisputed that this Court has jurisdiction to entertain the question whether the COTED Decision and Trinidad and Tobago's implementation thereof was in violation of any provision of the RTC or Community law. It undoubtedly also has jurisdiction to decide whether and to what extent WTO law is part of Community law, and whether and to what extent the Community, upon a proper interpretation of the RTC, would be bound by WTO law, even though it is not a Member of the WTO. However, as will be explained hereafter, the Court has come to the view that, in relation to the setting of the tariff rates, WTO law is not part of Community law and that COTED is not bound by it. In these circumstances, any pronouncement of this Court, about the WTO bound rate and the *legality* of a tariff duty allowed by COTED and implemented by Trinidad and Tobago in alleged violation of that bound rate would go beyond the limits of this Court's jurisdiction.

The Substantive Case

Preliminary Observations

- [22] Before discussing the several planks of the Claimants' Originating Application, it is useful to reflect on some of the underlying concepts that are relevant in this respect.
- [23] The Community finds its legal foundation in the RTC. As with all treaties, the RTC must be interpreted *in good faith* in accordance with the *ordinary meaning* to be given to *the terms* of the Treaty *in their context* and in the light of their *object and purpose* (Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT")). Together with this "internal" context, there shall also *be taken into account* "any subsequent practice in the application of the Treaty which established the agreement of the parties regarding its interpretation" and "any relevant rules of international law *applicable* (that is: binding) in the relations between the parties (Article 31(3) VCLT), the "external" context.
- [24] This external context is given by the fact that the Community must be located "within the complex landscape of regional trade agreements that is the international

trade universe of the WTO.³” In that legal landscape the Community is a customs territory or a customs union and the RTC a Regional Trade Agreement (‘RTA’) within the meaning of the WTO. The Treaty has as such been notified to the WTO on 19 February 2003.⁴ All the Member States of the Community, that are part of the CSME (CARICOM Single Market and Economy) are also members of the WTO. The RTC even has some provisions that directly refer to the WTO. It is pellucidly clear, therefore, that the RTC cannot be interpreted in clinical isolation from public international law in general and WTO law in particular, even though the Community itself is not a member of the WTO.

- [25] Customs unions must have a CET for certain goods that are being imported from third States. This is also the case with respect to the Community, and it is provided for in Article 82 of the RTC.
- [26] A CET is generally meant to offer some level of protection to producers and regional traders of products of Community origin or “community goods”. But at the same time the CET is also expected to reflect a certain level of predictability and stability in trade to enable its beneficiaries, such as regional manufacturers, distributors, and importers, to make long term plans with the confidence that the tariff would not easily, arbitrarily, or suddenly and drastically be changed. This is so even though the tariff system has built in elements to cater for flexibility where such is reasonably necessary. This concept also underlies the RTC, as can be gleaned from Article 83.
- [27] Article 83 deals with the operation of the CET. It provides for the possibility of an alteration of the CET on an item by an increase or a decrease in the rate applicable to all Member States. It also provides for a (temporary) suspension of the CET by a Member State applying for such a suspension, and for that State to be permitted to impose a higher or lower tariff.
- [28] A suspension of the CET requires the authorization of COTED. This authorization can only be given on limited grounds, enumerated in Article 83(3), and shall be subject to such terms and conditions as COTED may decide (Article 83(6)).

³ *Trinidad Cement Ltd v State of Trinidad and Tobago* [2019] CCJ 4 (OJ) at [57].

⁴ See Article XXIV of the General Agreement on Tariffs and Trade 1994. The original 1973 Treaty of Chaguaramas was notified to the WTO on 14 October 1974.

It will be valid only “for a period of time.” To provide for a structured procedure, Article 83(5) stipulates that an application to suspend the applicable CET on an item “must be supported by information as prescribed by COTED, from time to time.” Most of this is to be found in the Revised Procedures and Forms⁵ (“the Revised Procedures”) approved at the Fortieth Meeting of COTED, held on 23-24 April 2015, and was extensively discussed in *Rock Hard Cement Ltd v State of Barbados*⁶.

- [29] Any alteration of the CET shall also be decided by COTED. Article 83(8) makes clear that this is not something that would happen overnight or without thorough deliberations:

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

- [30] These provisions should be understood against the background of their place in the “international trade universe of the WTO”, which is to be found in Article XXIV of GATT. Subparagraph 8(a)(ii) of that provision establishes the standard for the *trade* of constituent members of a customs union *with third countries* in order to satisfy the definition of a such a union. It requires them to apply “substantially the same” duties (and other regulations of commerce) to external trade with third countries, a *common external trade regime* relating, among other things, to duties. According to the Appellate Body of the WTO in *Turkey-Textiles*, the phrase “substantially the same” offers “a certain degree of “flexibility” to the constituent members of a customs union, but in a fairly limited way.⁷

- [31] It follows that the word “common” in the CET should be seen as prominent when applying for and allowing any temporary deviations of the tariff, and that for a

⁵ CARICOM Secretariat, ‘Revised Procedures and Forms for Processing Requests for Suspension of the CET Relating to the Protocol to Amend Article 83 of the Revised Treaty’ in *Draft Summary of Recommendations and Conclusions of the Fortieth Meeting of the Council for Trade and Economic Development*, COTED/2015/40/DSRC, Georgetown, Guyana, 23 – 24 April 2015.

⁶ [2020] CCI 2 (OJ).

⁷ WTO, *Turkey: Restrictions on Imports of Textile and Clothing Products* – Report of the Appellate Body (1999) WT/DS34/AB/R at [48] – [50].

customs union to be WTO-compliant, flexibility in the system has its limits both in scope and in time. It is clear, therefore, not only that the failure of a Member State to fulfil an obligation to maintain the CET, but equally the arbitrary, unlawful or improper grant of a waiver of the CET by COTED would be of potential prejudice to a beneficiary of the CET.⁸ It should not be forgotten that such conduct would go against the very idea of a customs union, which allows its members privileges and a shield of defence in the sometimes rough and raw trade universe in which they must try to survive.

- [32] Interpreting the terms of the RTC in their internal context requires the Court to read that Treaty as a whole. From its inception, therefore, the proceedings with respect of suspensions of the CET have been read by this Court in light of Article 26. This requires the Member States of the Community and the Community itself to adopt a proper system of consultation to ascertain the impact of a proposed deviation from the CET on the entities, industries and/or importers who are likely to be affected by any change in the application of that tariff.
- [33] Interpretation of the RTC should also be done in good faith. The bottom line of this concept, “appears to be a fundamental requirement of reasonableness qualifying the dogmatism that can result from purely verbal or, for that purpose, excessively teleological analysis... Thus, the ordinary meaning, if established in its context, must always be submitted to the test of reasonableness”.⁹
- [34] In different words, “good faith requires the parties to a treaty to act honestly, fairly and reasonably, and to refrain from taking unfair advantage.”¹⁰ It is undisputable, therefore, that the process with respect to applications for CET suspensions must be and must be seen to be honest, fair, and reasonable, as has been decided by this Court in earlier decisions¹¹ and acknowledged by the parties.

⁸ *Trinidad Cement Ltd v Caribbean Community* [2009] CCJ 2 (OJ), (2009) 74 WIR 319 at [34].

⁹ Oliver Dörr and Kirsten Schmalenbach (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 587-588.

¹⁰ Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009), 425.

¹¹ See eg *Trinidad Cement Ltd v Caribbean Community* [2009] CCJ 4 (OJ), (2009) 75 WIR 194.

[35] What does this mean in concrete and practical terms? It means that approvals of suspension of the CET and allowing a State to impose a higher or lower tariff require serious and well-informed consideration. There should be proper and timely consultations at the national level of the Member State requesting the suspension. This may or may not lead to filing, maintaining, or amending an application for a suspension. COTED should properly, accurately, timely, and transparently be informed when the Member State persists in its application. To ensure that this is done, COTED needs to have a proper process in place and it needs to apply and supervise that process in good faith. Both the Member State and COTED have an important role to play here. But at the same time, it should be remembered that the proceedings before COTED are not comparable to proceedings in a court of law. The refinements and niceties of the law of evidence and the nuances of court procedure do not form part of the workings of an Organ such as COTED.

[36] It should also be remembered that in matters of this nature COTED has a broad discretion and that the Court will only interfere with such a decision if it is manifestly wrong. The orthodoxy of judicial review has been consistently set out by this Court in several cases, including the foundational case of *Trinidad Cement Ltd v Caribbean Community*¹², where the Court said:

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

[40] The Court must seek to strike a balance between the need to preserve policy space and flexibility for adopting development policies on the one hand and the requirement for necessary and effective measures to curb the abuse of discretionary power on the other; between the maintenance of a

¹² *ibid* at [39] – [40].

Community based on good faith and a mutual respect for the differentiated circumstances of Member States (particularly the disadvantages faced by the LDCs) on the one hand and the requirements of predictability, consistency, transparency and fidelity to established rules and procedures on the other.

[37] These words were recently repeated in *Trinidad Cement Ltd v State of Trinidad and Tobago*, where this Court also said that the statements made in 2009, “must be understood against the background of the nature of the COTED decision that was under review in that case: the authorization of the suspension of the CET on cement as requested by several Member States, a decision which allows COTED a broad discretion. A review of such decisions needs to be distinguished from a review of others that allow for no or little discretion. In the latter type of cases the Court’s scrutiny must be more intrusive”¹³.

[38] The Court will now turn to consider the specific claims and allegations of the Claimants.

Was the COTED Decision Based on Accurate, Relevant, Sufficient and Timely- Provided Information?

[39] Article 83(3) requires COTED in its consideration of an application to suspend the CET on an item, where applicable, to “take into account” certain situations such as (a) whether there is a critical shortfall in government revenue being experienced by the requesting Member State (b) whether there is a need to support an industry in that Member State, (c) whether the product is of strategic importance to the development of that Member State. These situations are to be considered as *necessary conditions* for the grant of the application.

[40] The Claimants argue that the grounds on which the First Defendant’s application rested were disconnected from the conditions mentioned in Article 83(3). In their view the assertion of a critical shortfall in government revenue was not sufficient as it did not allege that there was a connection between that critical shortfall and the importation business of the Claimants. With respect to the need to support an industry point, the Claimants posited that such a need must be based and

¹³ [2019] CCJ 4 (OJ) at [36].

stated to be based on more than just the effects of legal competition from importers of cement from third States. As regards the ground that cement was a product of strategic importance, the Claimants contend that this was merely an assertion without any evidence. Accordingly, they contend that these three grounds taken separately or together were insufficient to sustain the application for this suspension.

[41] For COTED to properly grant an application to suspend the CET, it must be shown that at least one of the grounds in Article 83(3) was satisfied. However, even where this is the case, it is still a matter for COTED, weighing the several economic and policy factors specified or implicit in the RTC, to decide whether or not to grant the application. In the present case the First Defendant provided information on the reduction in government revenue, the loss of market share of the local manufacturer, a contraction in the sale of cement by the local manufacturer and the contribution of the cement industry to the economy. COTED was satisfied that it had sufficient information before it to grant the application and given the wide margin of discretion, this Court sees no grounds for interfering with this Decision.

Was There Proper Consultation?

[42] The Second and Third Claimants asserted that they were not properly consulted by Trinidad and Tobago. Although they were invited to meetings with the Ministry of Trade and Industry (MTI) which is the competent authority of Trinidad and Tobago, they did not receive the information they asked for which in their view was necessary to make a genuine contribution to those meetings. They indicate that Trinidad and Tobago inaccurately represented to COTED that it had meaningfully consulted with them while it knew it had not disclosed to the Claimants its intention to impose a quota or even the intention to request the suspension of the CET nor had it provided the claimants with non-confidential information from TCL.

[43] The First Defendant denied that its competent authority had not meaningfully consulted with the Claimants. In any event, it had made serious attempts to consult with them. At the material time, Trinidad and Tobago stated, it had not yet decided or even considered to impose a quota and it was merely considering the possibility of making a request for a suspension. The Second Defendant asserted that it was

fully aware of the situation, that not every box had to be ticked, and that the information presented by Trinidad and Tobago to COTED was sufficient to allow COTED to make a reasoned determination.

[44] Article 26 of the RTC calls for the establishment and maintenance of an efficient system of consultations at the national and regional levels. As the Court stated in *Rock Hard Cement Ltd v State of Barbados*¹⁴ (“Rock Hard 2020”), the importance and value of the consultation process will vary from one case to another. As in that case, the nature, even if not the precise details of the impact of the proposed measure on Rock Hard was obvious to all. The competent authority of Trinidad and Tobago, having the responsibility to consult with the Second and Third Claimants, seriously attempted to do just that.

[45] It is to be noted that although virtual consultations were rescheduled on two occasions to accommodate the Second and Third Claimants, they still did not attend these meetings. They did not take the opportunity to engage with the authority. They should have done so. It is true that the communication coming from the authority could be more fulsome and even more transparent, but this was no justification for not participating in the process. The maxim of *culpa in causa* applies, in that the lack of more meaningful consultations was to a certain extent due to their own fault.

Was Proper Procedure Followed?

[46] Where a Member States wishes to seek a suspension of the CET on items (d), (f) and (g) of Article 83(3), a procedure that ensures transparency and fairness is required. Part C of the Revised Procedures contains the procedural ingredients agreed by the members of COTED themselves. The Court notes that Part C “will only become operative upon the entry into force of the Protocol to Amend Article 83” and that Protocol is not yet in force. Nevertheless, as the Court stated in *Rock Hard 2020*:

The failure to bring Part C (or some appropriate alternative) into force cannot mean that, in relation to applications made pursuant to (d) (e), (f) (g), (h) of Article 83, there is in this realm a huge void. The community is

¹⁴ [2020] CCJ 2 (OJ) at [58].

not entitled to ignore Article 26 or to so hollow it out that it is rendered a meaningless shell. To accept this would be contrary to good governance, the rule of law, and fundamental values and principles embedded in the RTC.¹⁵

- [47] There are three essential steps in Part C. Step 1 requires that the relevant Member State include in its application information in support of the application, alternatives considered to address the concerns faced by the Member State, as well as on the potential impact on an Entity, industry and/or importers. Step 2 places the responsibility on the Secretary-General to circulate the application from the Member State to other Member States for consideration prior to the Meeting of the COTED to consider the request. Step 3 requires that the Competent Authorities of the Member States notify the relevant local Entities of the request and provide to COTED any information relevant to the request.
- [48] The Claimants argue that Part C of the Revised Procedures should have been followed. In relation to Step 1 the Claimants complain that the information in support of the application for a suspension did not speak to any alternatives considered to address the Member States concerns. Nor did the application address the potential impact on importers, such as the Claimants. There was no complaint as regards Step 2. In respect of Step 3 the Claimants complained that Trinidad and Tobago did not notify the Claimants that Trinidad and Tobago had made the request, giving them an opportunity to comment thereon and furnish those comments to COTED.
- [49] Trinidad and Tobago denied that Part C should have been followed but the Court notes that Trinidad and Tobago filed with COTED a Form 8(a), which is one of the forms prescribed by Part C. Be that as it may, the Court agrees with the Claimants that Part C should have been followed in its essence or spirit if not to the letter. Given that the Protocol was provisionally applied, the Court had pronounced that a fair procedure needed to be in place, such a procedure was designed by COTED itself, not applying that procedure or a similar one would, as the Court had stated,

¹⁵ *Rock Hard v State of Barbados* [2020] CCJ 2 (OJ) at [55].

“be contrary to good governance, the rule of law, and fundamental values and principles embedded in the RTC.”¹⁶

[50] In respect of the concrete complaints of the Claimants, the Court finds as follows. There was some information provided by the requesting State about the impact of the proposed increase in the tariff. In its written proposal submitted in support of its request to COTED, the First Defendant made it clear that the increased duty would incur additional cost for the importer and distributor. There was no detailed information (which would have been better) but as indicated earlier the consequence of a proposed increase of 50% tariff for the Claimants would have been obvious to all. It is true that there was no information about alternatives, but the point was not vigorously pursued by the Claimants (nor was it denied by Trinidad and Tobago). It is not clear what and how realistic these alternatives could have been. Therefore, even if this may be considered a flaw, in these circumstances it is not sufficient to vitiate the Decision of COTED. The Court does not consider that the Claimants can properly mount the case that they were not given the opportunity to comment when they chose not to engage in the consultation process. The complaint that the Claimants were not notified of the request for suspension, but of the possibility of such a request may be an instance of form above substance but, in any event, it is not of sufficient weight to justify the drastic measure of annulment. It is further to be noted that the process of consultation does not provide for the entity consulted to furnish comments to COTED.

Was the COTED Decision Disproportionate?

[51] The Claimants submit that COTED first allowed Trinidad and Tobago to raise the tariff for other hydraulic cement from 5% to 35% during the year 2020, and subsequently allowed it to raise the tariff to an even higher rate of 50% for the year 2021, which tariff was, on top of that, combined with the imposition of a quota for that year. This culmination of events, the Claimants argue, rendered the Decision to authorize the latter suspension disproportionate.

¹⁶ *ibid.*

[52] The Court has repeatedly stated that the principle of proportionality must at all times be adhered to by COTED and that a COTED decision may be set aside if it is so wholly disproportionate as to be unconnected with the facts.¹⁷ The Court finds that, in the circumstances of this case, it was not disproportionate for COTED to allow a further temporary increase of the tariff. The imports of the Claimants had been growing during 2020 despite the increase of the tariff to 35% with increased negative effects on the local cement industry. It was therefore not unreasonable to allow a further temporary increase in the tariff in an attempt to turn the tide. COTED was not made aware of the quota that Trinidad and Tobago was to impose after they received the authorization and this fact is thus not relevant to the question of proportionality as far as COTED is concerned. It follows that the COTED Decision cannot be successfully challenged on this basis.

Did the Decision Impair or Prejudice One of the Objectives of the Community?

[53] The objectives of the Community are provided for in Article 6 of the RTC. The Claimants focussed on Article 6(d) which provides that one of the objectives of the Community is to expand trade and economic relations with third States. The Claimants suggest that the COTED Decision impaired or prejudiced that objective as the cement they had been importing was from Turkey, a third State.

[54] The Court is of the view that this argument is flawed. Article 6 is not exhaustive of the objectives of the Community¹⁸. Specifically, Article 78 provides for the Objectives of the Community Trade Policy. The fundamental goal of that policy is the sustained growth of intra-Community and international trade, “and mutually beneficial exchange of goods and services among the Member States and between the Community and third States.” The expansion of trade with third States is just one of the objectives of the Community. There are others which may, and, as will be seen, in fact do, conflict with that objective. Article 78(2)(c), 2(d), 3(b) and (4), for

¹⁷ *Trinidad Cement Ltd* (n 9) at [78].

¹⁸ Lawfulness of opt-out by a Member State pursuant to Article 27(4) of Conference Decision made under Article 46 concerning the enlargement of classes of persons entitled to move and work freely in the Community; Whether the principle of non-reciprocity enables nationals of those Member States which opt-out to derive the benefits of the enlargement Decision (Advisory Opinion, Request by The Community) [2020] CCJ 1 (OJ) (AO) at [50].

example, make clear that the expansion of trade with third countries, specifically focusses on exports. Two of these provisions also mentions “imports” but the reference is limited to the importation of goods or products of community origin.

[55] A related pertinent objective of the Community is to create a protected market for producers and manufacturers in CARICOM. This is facilitated by the requirement in Article 82 for Members to establish and maintain the CET on goods which do not qualify for Community treatment. The rationale for the CET was explained in *Trinidad Cement Ltd v Caribbean Community*¹⁹ as follows:

The CET is a fundamental pillar in the establishment of a Caribbean Single Market and Economy. Its primary purpose is to encourage and promote the production of goods within CARICOM. It is but one of a range of measures identified by the Member States as necessary in order to strengthen the productive sector and *to accelerate the process towards making their exports internationally competitive...* The CET is not to be divorced from the overall aim of the implementation of a common protective policy so as to further integrate the economies of the Member States by creating an enlarged and more assured market for regional producers and manufacturers.

[56] In sum, imports from third States are not specifically encouraged by the RTC. Nor are they discouraged. Although Article 6(d) indeed declares the expansion of trade and economic relations with third States, an objective of the Community, it is more directed at exports to than imports from these states. Be that as it may, there are countervailing objectives expressed or inherent under the RTC. It is the COTED’s duty to balance these factors, although Articles 78 and 82 appear to indicate that, in principle, more weight should be given to the protection of regional producers and exporters of Community goods than to importers of goods from third States. In such a situation, the Court considers that Article 9 cannot reasonably be invoked.

Was the COTED Decision Given for an Improper Purpose?

[57] The Claimants argue that the true purpose of the increase of the tariff was to eliminate the competition it provided to TLC and to protect TCL’s market share

¹⁹ (n 11) at [46].

against legal competition. The Court finds that it does not follow from the fact that the First Defendant used the application to suspend the CET and raise the tariff to 50%, that this was done with the intention to eliminate legitimate trade with Turkey, even if in hindsight this is exactly what may have happened. An allegation of improper purpose is a serious one and the Claimants have not produced objective, relevant and consistent evidence to support this complaint.

Did COTED Wrongly Allow Trinidad and Tobago to Impose a Tariff Rate for Other Hydraulic Cement Far Beyond its WTO Bound Rate of 5%?

[58] The expert witnesses gave conflicting evidence concerning the relationship between WTO and Caribbean Community law. Mr Nicely considered that the Trinidad and Tobago was in violation of Article II of the GATT which prohibits a WTO Member from applying tariff rates higher than the tariff bindings contained in its Schedule of Concessions. He was also of the view that COTED, and by extension the Community, by acquiescing to Trinidad and Tobago's WTO-inconsistent request, was undermining the purpose and integrity of customs unions and regional trade agreements within the international trading system. On the other hand, according to Dr Brown, WTO Law was not applicable to the COTED Decision because the WTO Agreements had not become part of customary international law; the WTO dispute settlement system was a 'self-contained' regime within which violations by Member States were determined; and the consensual nature of the rules and procedures of that regime rendered it impermissible for a body such as COTED to pronounce upon WTO violations.

[59] Given its position as a customs union, it is expected that COTED, certainly from a pragmatic point of view, will have regard to the WTO bound rate of Member States when called to make decisions on the suspension or alteration of the CET. This much was indicated by this Court in *Trinidad Cement Ltd v State of Trinidad and Tobago*.²⁰ However, as the European Court of Justice ("ECJ") has stated repeatedly, "Before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by

²⁰ *Trinidad Cement Ltd v State of Trinidad and Tobago* [29019] CCJ 4 (OJ) at [80], [81], [85].

that provision.”²¹ This point is therefore the first threshold that needs to be crossed before the Court can embark on any further exploration of the WTO issues that were amply discussed by the parties and their experts. Having considered this point, the Court has come to the view that COTED is not formally or legally bound by the WTO law in respect of the altering or suspending of the CET. This is for several reasons.

[60] First, unlike the European Union, the Community is not a member of the WTO, and all parties agree that WTO law is not part of customary international law²².

[61] Second, the doctrine of functional succession as developed by the ECJ does not apply. That doctrine applies, at least in the view of the ECJ, when the Community would have fully assumed “the functions inherent in the tariff and trade policy” and thus the WTO obligations of the Member States. According to the jurisprudence of the ECJ, this assumption of functions must be complete.²³ That, however, is not the case under the RTC. Even if COTED authorizes a requesting Member State to impose a tariff higher than the WTO bound rate of that requesting Member State, the latter is still free to implement a lower rate. Moreover, the Community as such has no role to play in negotiations with respect to WTO rates of its Member States.

[62] Third, the RTC does make several specific references to the WTO. Thus, the WTO is referenced in Article 116(6) (imposition of countervailing duties); Article 148 (measures relating to the services sector); Article 157(3)(f) (technical assistance in relation to claims involving the WTO Agreement and other agreements). No such reference requires COTED to exercise its Article 83 discretion subject to WTO Agreements. Similarly, there are extensive references in the RTC to the need to apply aspects of the RTC in accordance with, without prejudice or subject to, obligations under “existing international agreements”²⁴ but these also do not cover or restrict the competence of COTED under Article 83. WTO obligations such as those dealing

²¹ Joint Cases C-21 to 24/72 *Internationale Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219 at [7]; see also C-308/06 *Intertanko v Secretary of State for Transport* [2008] ECR I-4057 at [44].

²² The Claimants’ more limited contention that compliance with the WTO bound rate regime has become customary international law among the CARICOM Member States is wholly inconsistent with the facts, as shown by the unchallenged WTO Trade Policy Reviews adduced by the Second Defendant (pp 359-374 of the Record).

²³ Joint Cases C-21 to 24/72 *Internationale Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219 at [14] – [18]; C-308/06 *Intertanko v Secretary of State for Transport* [2008] ECR I-4057 at [49].

²⁴ Articles 58 (2); 62; 67 (5) (b); 69 (2); 70 (1); 118; 131 (6).

with bound rates, therefore, do not limit the powers of COTED in terms of Caribbean Community law.

[63] Given the above, this Court does not consider it necessary to delve further into the questions of WTO law.

Conclusion

[64] For all the foregoing reasons, the Originating Application must be dismissed.

[65] The Court orders that:

- (a) the Originating Application is dismissed.
- (b) The Parties shall make submissions on costs within fourteen (14) days.

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice D Barrow

/s/ P Jamadar

The Hon Mr Justice P Jamadar