[2012] CCJ 1 (OJ)

IN THE CARIBBEAN COURT OF JUSTICE

Original Jurisdiction

CCJ Application No OA 1 of 2011

Between

Hummingbird Rice Mills Ltd — Claimant

And

Suriname
The Caribbean Community — Defendants

THE COURT

Composed of R Nelson, A Saunders, J Wit, D Hayton and W Anderson, Judges

Having regard to the originating application filed at the Court on June 14, 2011 as amended, together with the annexures thereto, the Defence filed on behalf of the First Defendant on July 29, 2011, the Defence filed on behalf of the Second Defendant on July 29, 2011, the Reply filed on behalf of the Claimant to the Defences of the First and Second Defendants on October 31, 2011, the written submissions filed on behalf of the Claimant on November 18, 2011, the written submissions filed on behalf of the First Defendant on November 18, 2011, the written submissions filed on behalf of the Second Defendant on November 18, 2011 and to the public hearing held on December 14 and 15, 2011

And after considering the oral submissions made on behalf of:

- **The Claimant,** by Mr Elvis Connor, Attorney-at-Law appearing in association with Ms Linda Greene, Attorney-at-law
- **The First Defendant,** by Mr Hans Lim A Po, Attorney-at-Law
- **The Second Defendant,** by Ms Safiya Ali, Ms Gladys Young and Dr Chantal Ononaiwu Attorneys-at-Law

Ms. Christlyn Moore and Mr. Christopher Sieuchand, Attorneys-at-law, being present as representatives of the State of Trinidad and Tobago, with the leave of the Court

ISSUES on the 23rd day of February, 2012 the following:

JUDGMENT

Introduction

[1] These proceedings were commenced by an application filed at the Court Registry on 24th February 2011, by which Hummingbird Rice Mills Ltd. ("the Claimant" or "HRM") sought special leave pursuant to Article 222 of the Revised Treaty of Chaguaramas ("the Revised Treaty" or "RTC") to initiate suit against the State of Suriname ("Suriname" or "First Defendant") and the Caribbean Community ("The Community" or "CARICOM" or "Second Defendant"). A copy of the proposed originating application was annexed to the application for special leave. On 3rd June 2011, following a hearing convened for that purpose and the reading of written submissions tendered on behalf of the parties, this Court granted special leave and ordered that the costs of the application for leave abide the outcome of the proceedings.

[2] Pursuant to the Original Jurisdiction Rules of this Court the Claimant filed its Originating Application with Annexures on 14th June 2011, which was in the same form as the proposed originating application but with some amendments approved by the Court.[1] Suriname and The Community filed their respective written defences on 29th July 2011. A case management conference was held on 10th October 2011 at which directions were given regarding the preparation and presentation of the case. The Claimant subsequently filed a Reply dated 31st October 2011 and the parties thereafter filed written submissions.

[3] The Amended Originating Application was heard on 14th and 15th December 2011, at the Seat of the Court. Oral testimony was received from three witnesses: Mr. Jaiprakash Benie, the CEO and Chairman of the Claimant; Ms. Heather Camille Job, an Export/Logistic Manager of the Claimant; and Mr. Rajin Ramkissoon, a Chartered Accountant who was the External Accountant for the

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1 See: The Caribbean Court of Justice (Original Jurisdiction) Rules 2006: Rule 10 (7).

Claimant. The testimony, which was based on previously submitted written witness statements, was tested in cross-examination.

The factual background

[4] The Claimant is a limited liability company which was incorporated under the laws of Trinidad and Tobago on 24th March 1995 and which engages in the sale and distribution of flour. By virtue of section 5 of the Companies Act 1995 of Trinidad and Tobago,[2] HRM and other companies in the group controlled by the CEO and Chairman of HRM are considered to be "affiliated corporations". In 2007 the Claimant changed its name to Caribbean Flour Mills Limited and traded as such until September 2010 when it reverted to being HRM. An affiliated company, Transit Shipping Agency Limited, incorporated in 2009 but which had carried on no business activity, then changed its name to Caribbean Flour Mills Limited. The main operation of the group of affiliates is the production and sale of rice and flour. In particular, Republic Grains Investments Limited engages in the production of flour but distributes it through HRM which sold the flour in its own name and then in its new name of Caribbean Flour Mills Limited. Indeed, after changing its name in September 2010 back to HRM, sales of flour were made to persons under invoices in the name of Caribbean Flour Mills Limited, the new name of Transit Shipping Agency Limited. It is unclear whether Caribbean Flour Mills Limited was acting for itself as principal or as agent for HRM. It became apparent from the documentation and the evidence of HRM's three witnesses that in paying bills and in receipts from invoices insufficient attention was paid to the separateness of the individual companies' debts and entitlements.

[5] By reason of its acceptance of the original Treaty of Chaguaramas 1973, Suriname became a Member of the Caribbean Community in July 1995 and the Common Market in January 1996. On 10th April 1997, the Government of Suriname issued a Ministerial Order suspending for an indefinite time the levying

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[2] Act No. 35 of 1995.

of import duties on certain items including flour. As a consequence the Common External Tariff (the "CET") payable on flour was never applied.

[6] In or around 2005, a major plant expansion and modernization was commissioned and constructed in Trinidad by Republic Grains Investments Limited in affiliation with HRM to enhance and increase production capabilities. The upgrade included relocation of the plant from the Fernandes Industrial Estate to the Point Lisas Industrial Estate; construction and commission of a 240MT/24 hours flour mill; increase in exports from 20 containers to 125 containers monthly in 45kg bags; acquisition of several ERF trucks, trailers and establishing of the company's own container transport service; purchase of vessels and establishment of a shipping line (namely, Trans-Caribbean Line); commissioning of a new four (4) storey office building; construction and commissioning of a new storage bond. The Claimant estimated the cost of the upgrade at approximately $48,229,405.

[7] The suspension of the duties on flour imposed by the Surinamese Ministerial Decree of 1997 was operative throughout and subsequent to the expansion exercise and the Claimant alleged that it was disadvantaged in its efforts to export flour to Suriname by reason of the non-imposition thereon of the CET from 1 January 2006 when it ought to have been imposed. Notably, the Claimant alleged that its attempts to supply flour to Fernandes Bakery were frustrated by that bakery's importation of flour from The Netherlands without payment of the CET. Fernandes Bakery is one of the largest makers of bread in Suriname.

[8] The Claimant and its affiliated corporations caused the Ministry of Trade and Industry of Trinidad and Tobago to complain to the Secretary-General of the Community about the non-application of the CET by Suriname. The complaint is chronicled in written correspondence beginning on 23rd February 2006. The Secretary-General initiated an investigation into the grievance; this included a letter dated 20th March 2006, seeking a response from Suriname. The matter was reported to the Twenty-First Meeting of the Council for Trade and Economic

Development ("COTED") held 12-13 May 2006, at St Anns, Trinidad and Tobago, with the observation that no response had been received from Suriname. The Meeting noted, however, that Suriname was reviewing the matter and would report to the CARICOM Secretariat. Almost nine months later, by letter dated 7th November 2006, the Ministry of Trade and Industry of Suriname admitted that flour was being imported from the Netherlands without application of the CET. The Ministry indicated, however, that the flour was classified under the tariff heading 1101.00.10 as wheat or meslin flour of durum wheat which attracted the prescribed rate of 0-5% under the Harmonized Commodity Description & Coding System. The Twenty-Second Meeting of COTED held 16-17 November 2006, in Georgetown, Guyana, noted an undertaking by Suriname to investigate the issue of the classification of the imported flour. By letter dated 29th December 2006 from the Ministry of Trade and Industry of Suriname to the Secretary-General, Suriname acknowledged that the imported flour was classified under the wrong tariff heading; the correct classification was tariff heading 1101.00.90 for wheat or meslin flour other than durum wheat with a prescribed tariff of 25%. The letter, however, raised concerns related to the quality and price of regional flour and sought a suspension of the CET for a period of two years. In its written response of 24th January 2007, the Secretary-General indicated that price and cost of living concerns did not form actionable bases for the Secretary-General to authorize suspensions and suggested that requests for suspension based upon quality concerns could be brought to the attention of Member States of the Community.

[9] At the Twenty-Fifth Meeting of COTED held on 25th January 2008, in Providence, Guyana, Suriname admitted that no duty was being applied to flour from extra-regional sources and requested that flour be placed on the list of items for removal or suspension of the CET. There is no record of COTED acceding to this request; rather, the Council accepted an undertaking from Suriname to provide the Secretariat with an update within fourteen days, that is, by 8th February 2008. This timeline was not met and over four months later, on 17th June

2008, the Secretariat wrote to Suriname, reminding the Member State of its undertaking. The Twenty-Sixth Meeting of COTED held 24-25 November 2008, in Georgetown, Guyana, received representations from Suriname that cultural and taste considerations were involved in the importation of regional flour and that technical assistance was required from the CARICOM Regional Organization on Standards and Quality ("CROSQ") in assessing the quality of regional flour, though this was not followed up. Having noted that the matter of non-application of the CET had been outstanding since the Twenty-First Meeting, COTED urged Suriname to impose the CET on imports of flour from third countries. At the Twenty-Seventh Meeting held on 11-12 May 2009, in Georgetown, Guyana, COTED again considered the concerns of Trinidad and Tobago that Suriname continued to import flour from third countries without applying the CET and accepted the indication from Suriname that it anticipated becoming compliant by 31st December 2009, following its budget debate in the National Assembly. At its Twenty-Eighth Meeting dated 5-8 October 2009, COTED accepted Suriname's reiteration of its undertaking to apply the CET by 31st December 2009, on imports of flour from the Netherlands following approval of the Budget. In fact the CET was not imposed as undertaken; the Twenty-Ninth Meeting of COTED held 8-9 February 2010, received representations from Suriname that the budget debate had not yet been concluded and projections that the CET would be imposed by 15th June 2010. The Meeting accepted this new commitment.

[10] On 26th May 2010, Caribbean Flour Mills, as the Claimant was then named, filed an application in this Court seeking special leave to commence proceedings against the Community in respect of this matter.[3] Two months later, at the Thirtieth Meeting of COTED held on 17-18 June 2010, in Georgetown, Guyana, COTED received confirmation and noted that Suriname had imposed the CET on flour, with effect from 15th June 2010.

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[3] Application No AR 1 of 2010. Note: this application was subsequently withdrawn in favour of the present proceedings against Suriname as well as The Community.

[11] In the present proceedings, the Claimant alleged that it suffered financial loss by reason of the failure of Suriname to implement the CET during the period 1st January 2006 to 14th June 2010 and the failure of the Community to deal with this adequately. The Claimant sought various remedies from this Court, primarily, declarations of breach of its treaty obligations by Suriname, judicial review of the decision-making of the Community, and the award of damages.

Jurisdiction of the Court to adjudicate upon the Claim

[12] Article 211 of the Revised Treaty establishes that this Court has original jurisdiction to hear and determine disputes concerning the interpretation and application of the treaty *inter alia* upon the application by "persons" in accordance with Article 222 of the Treaty. Article 222 lays down a number of conditions that must be met by such persons for them to be allowed to appear as parties in original jurisdiction proceedings. The Order of this Court on 3rd June 2011 granting special leave to commence these proceedings determined that the Claimant, a private entity, had established that it was a "person" within the meaning of Article 222 and that it had met the requirements specified at (c) and (d) of that provision. The Court's order suggested as well that the Claimant had made out an arguable case that the conditions prescribed by Article 222 (a) and (b) were or could be met[4]. However, as this Court intimated in *Trinidad Cement Limited v The Caribbean Community*,[5] the Court must still satisfy itself at this stage, based on the evidence adduced and the submissions made, that on a balance of probabilities, the Claimant has conclusively satisfied the provisions of Article 222(a) and (b).

[13] It is significant that neither of the Defendants challenged in any frontal way, the competence of the Claimant to prosecute this claim. In the course of these

4 See *Hummingbird Rice Mills Limited v Suriname and the Caribbean Community* [2011] CCJ 1 (OJ) at [20] to [26]

5 [2009] CCJ 4 (OJ) [16] to [18]

proceedings, however, Suriname questioned whether the Claimant could properly invoke Article 222 given that the CET had been imposed some eight months *prior* to the filing of the application. In this context it is relevant that the Article speaks to persons who "*have been* prejudiced in respect of the enjoyment of the right or benefit…". In the circumstances that exist here, it cannot at all be suggested that the Claimant has slept on its rights. The Court is therefore not prepared to find that the Claimant is unable to bring itself within the scope of Article 222. The mere fact that a breach has previously been remedied does not necessarily deprive a party claiming to have been prejudiced of the right to invoke this Court's jurisdiction.

[14] The Court is also satisfied that given the facts referred to at paragraph [4] the imposition of the CET on extra-regional flour yields a direct benefit to the Claimant and suspension of the CET had a prejudicial impact on it. The Court therefore holds that the Claimant has conclusively satisfied the conditions set forth under Article 222 for the bringing of these proceedings and that the Court has jurisdiction to embark upon an adjudication of the same.

The claim

[15] The Claimant sought various declarations against Suriname for the alleged breach of its treaty obligation with regard to imposing the CET; declarations against the Community for unlawfully acquiescing in extending the time given to Suriname for application of the CET; judicial review of the failure of the Community to impose sanctions against Suriname for its failure to apply the CET for the period 1st January 2006 to 14th June 2010; and an award of damages in the amount of US$3,003,000.00.

(a) Allegation of breach by Suriname of Article 82

[16] Article 82 of the Revised Treaty is unambiguous. It requires that 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". Under the plans and schedules approved by COTED every commodity imported into the Community from Third States has a tariff rate assigned to it. It has been accepted by all the parties that the applicable tariff rate for the flour in issue in these proceedings is 25%. Accordingly, each Member State of the Community has the obligation to impose a tariff of 25% on such flour imported from extra-regional sources.

[17] There is no doubt that Suriname came under a legal obligation scrupulously to observe all its treaty obligations from 1st January 2006, the date of the entry into force of the Revised Treaty. From that date forward, the rule of *pacta sunt servanda*, enshrined in Article 26 of the Vienna Convention on the Law of Treaties 1969, became operative: "every treaty in force is binding upon the parties to it and must be performed by them in good faith". The State of Suriname was simultaneously bound by Article 9 of the Revised Treaty to take all appropriate measures to ensure the carrying out of its treaty obligations. This Suriname clearly did not do in relation to the issue in dispute. The Court therefore finds that Suriname breached its obligation under Article 82 of the Revised Treaty.

[18] Mr. Hans Lim A Po, Counsel for Suriname, did not seek to deny that Suriname had not imposed the CET during the relevant period but sought rather to present certain explanations which prevented Suriname's inaction being an actionable breach. For example, he contended that the obligation to establish and maintain the CET was a process involving changing existing suppliers of flour, price increases, the need to test regional flour for taste, smell and quality. It was a process that required legislation because flour was subsidized. Parliamentary approval had to be obtained because changes would have to be made to the subsidy in the national budget.

[19] The explanations offered by Suriname may be grouped into four categories. First, Suriname claimed that the non-imposition of the tariff was due to the unfortunate

error in classification of flour (mentioned in [8] above). However, it is worthy of note that the indefinite suspension of the duties under the 1997 Ministerial Order applied broadly in respect of all importations without reference to classification of those commodities. It is also noteworthy that the alleged error in classification was reported to the Secretary-General in the letter of 29th December 2006, yet the CET was not imposed until well over 3 years later, in June, 2010. There is therefore considerable factual difficulty in accepting this first ground offered by the First Defendant.

[20] The second group of explanations proffered by Suriname for its non-compliance were those associated with the efforts by the Government to ensure affordable pricing and availability of bread in the interest of social, economical, and political stability in the country. Suriname prayed in aid a Draft Protocol to amend Article 83 of the Revised Treaty as evidence of an emerging practice in relation to the application of the CET. The Draft Protocol seeks to expand the grounds on which COTED could invoke its power under Article 83 to suspend the CET. These additional grounds include "critical government revenue" and "cost of living issues".

[21] The Court readily and fully appreciates the sensitivity and societal importance involved in pricing and ensuring access to bread but would point out that Suriname had a four-year period prior to the definitive entry into force of the Revised Treaty to ensure the appropriate preparations to meet its treaty obligations.[6] It might have been possible for Suriname to have entered a reservation to the CET on flour given the critical importance of affordable bread to the national well-being of the Surinamese society: Article 237. What could not have been done, consistent with its treaty obligations, was for Suriname to have taken the unilateral decision not to comply with Article 82, less so given the

[6] The Revised Treaty was "provisionally" applied from 2002, see: Protocol on the Provisional Application of the Revised Treaty of Chaguaramas, Belize City, Belize, 4th February 2002.

protestations of at least one Member State of the Community and the urging of COTED. The Draft Protocol can be of no assistance to Suriname as it has not received the required signatures for entry into force and there is no suggestion that it now represents State practice such as to form a rule of regional customary law.

[22] Thirdly, it was alleged that the COTED accepted and acquiesced in the several undertakings by Suriname to impose the CET and that this gave rise to a legitimate expectation that the time-frame for the imposition had been accordingly extended. The short answer to this point is that even assuming that there was such acquiescence and assuming further that the same could provide a form of estoppel against the Community from bringing a case against Suriname, such acquiescence, if established, does not necessarily provide a defence to a claim brought by a private party against Suriname.

[23] Finally, Suriname alleged that the involvement of the Claimant in the process adopted by the Government of Suriname towards application of the CET implied its acquiescence and waiver of any possible claim for declaratory relief or damages. A series of correspondence was alluded to and specifically a letter dated 23rd December 2009 was produced, signed by Mrs. Maureen L. Habieb as representative for Caribbean Flour Mills Limited, (then the registered name of HRM before it reverted to HRM in September 2010), which suggested a willingness to allow up to 31st January 2010 for imposition of the CET. The Court notes that there appear to be internal contradictions in the letter in as much as elsewhere the author appears merely to recognize the proposal of the Government of Suriname for implementation at 31st January 2010. There was certainly no express waiver of legal rights and in his testimony Mr. Jaiprakash Benie, the CEO and Chairman of the Claimant, made clear that Mrs. Habieb was never authorized to grant such a waiver. But the overall history of this litigation is probative. The records show that from December 2005, the Claimant had waged a campaign to have the CET imposed. This campaign included the initiation of litigation in

2007[7], 2010[8], and 2011[9]. The Claimant and its affiliated corporations made efforts to ensure that the matter was kept at the forefront of the attention of the numerous meetings of COTED referenced at [8] – [10]. It must also be appreciated that there is no equality of arms in negotiations between a Member State and a private undertaking and that this inequality could well have been reflected in the wording of the letter, written with full understanding of the reality that the Government could not be compelled to do what it did not want to do, unless taken to court. In the totality of the circumstances the Court considers that the Claimant had not acquiesced in the breach so as to debar it from the remedies sought.

[24] In light of the foregoing, this Court finds and declares that Suriname was in breach of its obligation under Article 82 of the Revised Treaty to establish and maintain the common external tariff on the importation of flour from Third States during the period 1st January 2006 to 14th June 2010.

[25] In consequence of this finding the Court does not consider it necessary to pass judgment on the related allegation by the Claimant that the failure of Suriname to incorporate the CET into domestic law was unlawful. The Court is of the opinion that it suffices to reiterate the general obligation under Article 9 whereby Member States of CARICOM are required to take all appropriate measures to ensure the carrying out of obligations arising out of the treaty or resulting from decisions taken by the Organs and Bodies of the Community. The general undertaking given in Article 9 also requires that Member States abstain from any measures that could jeopardize the attainment of the objectives of the Community.

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7 The Claimant filed a claim in the High Court of Suriname which was reportedly dismissed by that court for lack of jurisdiction: see further, paragraph [27], infra.

8 CCJ Application No AR 1 of 2010; (note: this application was subsequently withdrawn in favour of the present proceedings).

9 CCJ Application OA 1 of 2011, (the present proceedings).

(b) Article 214 Referral Obligation

[26] The Court was informed that there were unsuccessful interlocutory proceedings brought by the Claimant in 2007 before the High Court of Suriname. This Court is not aware of the precise circumstances surrounding the resolution of those proceedings. It would therefore be inappropriate for this Court to criticize in any way the manner in which those proceedings were resolved. However, the Court wishes to use this opportunity to remind national courts and tribunals of their obligations under Article 214 of the Revised Treaty which states that where resolution of an issue involves a question concerning the interpretation or application of the Treaty, that court or tribunal hearing the matter must refer the question to this Court for determination before delivering judgment, if such a court or tribunal "considers that a decision on the question is necessary to enable it to deliver judgment". A national court or tribunal has, of course, a measure of discretion in considering the necessity of a referral but that discretion is a limited one.

(c) Responsibility of the Community (Secretary-General and COTED)

[27] The Claimant seeks declarations that certain actions or omissions of the Secretary-General and of COTED in relation to the four-and-a-half year non-implementation of the CET by Suriname were unlawful. It must first be observed that some of the specific allegations made were either contradictory or misconceived. The Claimant has accepted in its written submissions[10] that the Secretary-General did not formally authorize Suriname to suspend the CET under Article 83 (3). Furthermore, as can be seen from [8] and [9] there is no evidential justification for arguing that the Secretary-General could or did grant such authorization pursuant to Article 83 (3) by implication. Accordingly, it cannot now be argued that the Secretary-General made an "implied decision" to allow the non-implementation of the tariff. The allegations of dereliction of duty against the Secretary-General cannot properly be brought under Article 83 (3) but are rather

[10] Written Submission for the Claimant filed 18th November 2011, paragraphs 19, 40.

to be considered, if at all, under Article 24 relating to the broader institutional responsibilities assigned to the Secretary-General in respect of the affairs of the Community.

[28] Similarly, having accepted that the applications by Suriname pursuant to Article 83 (2) for authorization to suspend the CET had been refused by the COTED and the Secretary-General[11] it becomes well-nigh impossible to argue successfully that the acceptance by COTED of the undertakings given by Suriname constituted the wrongful exercise of COTED's discretion under Article 83. Any deficiency in the decision-making by COTED is to be judged against the exercise by that body of its authority under Article 15 to oversee the operation of the CSME and, perhaps, its obligation continuously to review and secure the uniform implementation of the CET pursuant to paragraph 5 of Article 83. These broad institutional responsibilities of COTED are not to be conflated with COTED's discretion under Article 83 to authorize a Member State to suspend the CET on a particular commodity, where different considerations are likely to apply.

[29] At best what remains is an application for judicial review of the decision-making process of the Secretary-General under Article 15 and of COTED under Articles 24, and 83 (5). The essence of the investigation is to ascertain whether the Secretary-General and/or COTED acted unlawfully in the discharge of their respective responsibilities with regard to the implementation by Suriname of the CET. In the event that unlawful conduct was found the further question arises of the competence of this Court to award damages against the Community.

Judicial review of acts of the Community

[30] The jurisdiction of this Court to engage in judicial review of the decisions and other acts of the Community was considered in *Trinidad Cement Limited v*

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[11] Written Submission for the Claimant filed 18th November 2011, paragraphs 37, 45.

Caribbean Community.[12] Based largely upon the provision of Article 187 (c) which allows for the settlement of disputes concerning allegations that an organ or body of the Community "has acted *ultra vires*" and Article 216 (1) recognizing the compulsory and exclusive jurisdiction of this Court to hear and determine disputes relating to the interpretation and application of the Revised Treaty, this Court held and now reiterates that the transformation of the CSME into a rule-based system created a regional régime under the rule of law. Accordingly this Court has power "to scrutinize the acts of the Member States and the Community to determine whether they are in accordance with the rule of law".[13] As the Court has noted before, judicial review is a fundamental principle of law accepted by all the Member States of the Community.

[31] The relevant principles of judicial review were also expounded in *Trinidad Cement Limited v Caribbean Community*[14] where the following was stated:

> "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 fledging Community. … 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 … The Court must seek to strike a balance between the need to preserve policy space and flexibility for adopting development policies on the one hand and the requirement for necessary and effective measures to curb the abuse of discretionary power on the other; between the maintenance of a Community based on good faith and a mutual respect for the differentiated circumstances of Member States… on the one hand and the requirements of predictability, consistency, transparency and fidelity to established rules and procedures on the other. It is not the role of the Court to attempt to re-evaluate matters which were properly placed before a competent policy making organ for a decision."

[32] The clear intention of the Court as expressed in this passage is to recognize and retain judicial competence to review decision-making in the organs of the Community where these are capable of legal analysis, whilst reserving the

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12 [2009] CCJ 4 (OJ) at paragraphs 38-41.

13 Ibid. paragraph 38.

14 [2009] CCJ 4 (OJ) at paragraphs 39-41.

necessary space for policy-making by those organs. The Court will not substitute its own assessment for that of the competent authority but will simultaneously insist that there be adherence to established normative standards. In the modern vernacular, a margin of discretion is reserved to the community actors. A similar approach is adopted in the context of the European Union where the ECJ noted in *Portugal v Commission* that "the Commission enjoys a wide margin of discretion, the exercise of which involves assessment of an economic and social nature which must be made within the Community context".[15]

Functions of the Secretary-General and Article 24

[33] The Claimant alleged that the Secretary-General, as the "head of CARICOM and by extension the head of all organs thereof" acted in dereliction of duty by:

(a) Failing to direct Suriname to implement the CET – particularly when refusing authorization to suspend the CET, thus indirectly legitimizing a continuing breach;

(b) Accepting the assurances of Suriname about implementing the CET when he should have acted on knowledge he had since November 7, 2006; and

(c) Not imposing sanctions on Suriname for non-implementation of the CET, thus legitimizing a continuing breach and extending the time for compliance.

[34] There is no basis for the Claimant's assertion that the Secretary-General "is the head of CARICOM and by extension the head of all organs thereof". Article 12 of the Revised Treaty makes clear that it is the Conference of Heads of Government which is the supreme organ of the Community and as such responsible for determining and providing policy directions for the Community. In the performance of its functions the Conference is assisted by subsidiary organs of the

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15 Judgment of 6 September 2006 Case C-88/03, [2006] ECR 1-17115 at [99]. See also: *European Communities – Measures Affecting Meat and Meat Products (Hormones)* - Report of the Appellate Body – WT/DS26/AB/R, WT/Ds48/AB/R (16 January 1998), paragraph 115: the Appellate Body of the WTO stated that "the standard of review… must reflect the balance… between the jurisdictional competence conceded by the Members of the WTO and the jurisdictional competence retained by the Members for themselves".

Community including the COTED. The Secretary-General is head of the staff of the Secretariat to the Community and his functions are described and circumscribed in explicit provisions in the Revised Treaty or by specific decisions of an Organ of the Community. Article 24 is dedicated to enumerating these functions which are always "subject to the determinations of competent Organs of the Community" and must be carried out "in accordance with the financial and other regulations" that may be applicable.[16]

[35] Article 24 provides that the Secretary-General is the Chief Executive Officer of the Community and subject to the limitations which the Court described in the preceding paragraph, shall perform the following functions:

> "(a) represent the Community;
> (b) develop, as mandated, decisions of competent Organs of the Community into implementable proposals;
> (c) identify and mobilize, as required, external resources to implement decisions at the regional level and undertake studies and develop decisions on relevant issues into implementable proposals;
> (d) implement, as mandated, decisions at the regional level for achievement of Community objectives;
> (e) implement, with the consent of the Member State concerned, Community decisions which do not require legislative or administrative action by national authorities;
> (f) monitor and report on, as mandated, implementation of Community decisions;
> (g) initiate or develop proposals for consideration and decision by competent Organs in order to achieve community objectives, and
> (h) such other functions assigned by the Conference or other competent Organs."

[36] The Claimant did not specify the precise function in respect of which the Secretary-General was supposed to have been in dereliction of duty and it is indeed difficult readily to identify a provision that is material. Article 24 (a), (c), (e) and (h) would, on their face, not appear to be immediately relevant. There was no suggestion that any dereliction in duty was to be attributed to the failure to fulfill the Article 24 (g) function in respect of development of proposals for

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[16] Article 24 (2).

consideration of the competent organs in order to achieve Community objectives. The Secretary-General, perhaps, could have put forward more forceful proposals for consideration by COTED in dealing with Suriname's prolonged non-compliance. The problem with this, however, is that as discussed below at [47] – [49] there was not much scope for COTED to be more definitive in dealing with breaches of treaty obligations by Member States.

[37] The provisions of Article 24 (b), (d) and (f) do not necessarily apply here since these functions would all appear to be contingent upon a mandate from the relevant Community Organ and no evidence was adduced that such a mandate had been issued. Even so it is noteworthy and commendable that the Secretary-General did in fact take some steps to actively monitor and report to the COTED on the implementation of the CET by Suriname. The broad remit of the Secretary-General under Article 24 (d) and (f) to implement, as mandated, regional decisions and to monitor and report on, as mandated, implementation of Community decisions, must be read in conjunction with the specific injunction in Articles 15 and 83 which places direct responsibility for the monitoring and implementation of the CET squarely in the hands of the COTED. Without evidence of a specific mandate from COTED, there is no basis to entertain the allegations of more detailed responsibility by the Secretary-General in relation to the monitoring and implementation of the CET.

[38] In all the circumstances of this case, the Court finds that the Secretary-General did not act in dereliction of duty in respect of the non-imposition of the CET by Suriname, as alleged by the Claimant. The Court agrees with Counsel for the Community that in the instant case the remit of the Secretary-General was to keep reminding Suriname of the decisions of the COTED requiring that Suriname impose the CET on flour, and the evidence suggests that this was done. The Court therefore dismisses the allegation of unlawful conduct by the Community in relation to the conduct of the Secretary-General.

[39] There is, however, one aspect of the submissions of the Community with which the Court does not agree. The Court finds it difficult to concur in the broad suggestion that the Secretary-General was entitled to merely rely upon the information supplied by Suriname regarding the matter of the implementation of its treaty obligation. This is altogether too passive a role to prescribe for the Chief Executive Officer of the Community. When acting pursuant to his obligations under Article 24, mere receipt and transmission of information from a Member State is not enough. The Court suggests that a much more proactive approach would be appropriate.[17]

COTED and Article 15

[40] In relation to COTED the "decisions" the Court is asked to review are:

(a) Repeated acceptance by COTED of undertakings and deadlines proposed by Suriname for imposing the CET;

(b) Deemed extension of time by COTED not specifically ordering Suriname to impose the CET; and

(c) The alleged omissions of COTED to have recourse to other means of dispute resolution such as applying for an advisory opinion of the CCJ.

[41] Under the Revised Treaty, COTED has, subject to the primacy of the Conference of Heads of Government and the Community Council of Ministers, principal responsibility for the promotion of trade and economic development of the Community. Article 15(2) lists specific responsibilities of COTED to:

"(a) promote the development and oversee the operation of the CSME;
(b) evaluate, promote and establish measures to enhance production, quality control and marketing;
(c) establish and promote measures to accelerate structural diversification of industrial and agricultural production on a sustainable and regionally-integrated basis;

[17] See further, *Trinidad Cement Limited v Caribbean Community* [2009] CCJ 4 (OJ) at paragraphs 73 and 74.

(d) determine and promote measures for the accelerated development and marketing of services;
(e) promote and develop policies and programmes to facilitate the transportation of people and goods;
(f) promote measures for the development of energy and natural resources on a sustainable basis;
(g) establish and promote measures for the accelerated development of science and technology;
(h) promote and develop policies for the protection of and preservation of the environment and for sustainable development;
(i) promote and develop, in collaboration with the Council for Foreign and Community Relations, co-ordinated policies for the enhancement of external economic and trade relations of the Community, and
(j) undertake any additional functions remitted to it by the Conference, arising under this Treaty."

[42] These functions are to be considered against the background provided by the treaty provisions specifically relating to the common external tariff.

"Article 82

Establishment of Common External Tariff

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

Article 83

Operation of the Common External Tariff

1. Any alteration or suspension of the Common External Tariff on any item shall be decided by COTED.

2. Where:
(a) a product is not being produced in the Community;

(b) the quantity of the product being produced in the Community does not satisfy the demand of the Community; or

(c) the quality of the product being produced in the Community is below the Community standard or a standard the use of which is authorized by COTED,

COTED may decide to authorise the reduction or suspension of the Common External Tariff in respect of imports of that product subject to such terms and conditions as it may decide, provided that in no case shall the product imported from third States be accorded more favourable treatment than similar products produced in the Member States.

3. The authority referred to in paragraph 2 to suspend the Common External Tariff may be exercised by the Secretary-General on behalf of COTED during any period between meetings of COTED. Any exercise of such authority by the Secretary-General shall be reported to the next meeting of COTED.

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

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

[43] These provisions make clear that COTED is entrusted with broad institutional responsibility for promotion of regional trade and economic development and specifically the promotion and overseeing of the operation of the CSME. A critical pillar for the promotion and development of the regional trade and the CSME must necessarily be the imposition of the CET on all goods which do not qualify for Community treatment. The Revised Treaty anticipates that all Member States would have applied and kept the tariff in place but grants power to COTED to suspend or alter the tariff on the grounds of particular exigencies specified in Article 83 (2). This Court has already held in *TCL v Caribbean Community (supra)* that any decision by COTED to authorize a suspension or alteration must be in accordance with the provisions of Article 83 (2) and if it is not, the decision is liable to being struck down as *ultra vires* and null and void.

[44] There is no evidential basis on which to hold that the COTED did, in fact, grant Suriname extensions for implementation of the CET. Indeed, as alluded to at [9]

and [28] of this judgment and as accepted by Counsel for the Claimant,[18] the Council appears to have taken several steps to suggest and urge application of the tariff.

[45] Reliance was also placed upon the responsibility of COTED pursuant to Article 83(5) continuously to review the CET so as to "secure" the "uniform implementation" of the tariff "throughout the Community". It is not altogether clear that this provision advances the case for the Claimant, bearing in mind that the Vienna Convention on the Law of Treaties 1969 counsels that a treaty must be interpreted in its context and in light of its object and purpose.[19] Taking account of the juxtaposition of the primary obligation in Article 82, a more plausible interpretation of Article 83(5) is that in a continuing review process COTED has responsibility for securing the harmonization of the CET. This is readily understandable in a context where as regards several categories of commodities any tariff rate within a certain range could be applied to extra-regional goods. Member States enjoy discretion as to the precise rate that is imposed. In that context Article 83(5) seems to require COTED to keep the tariff under continuous review and to take measures that would secure the *uniform* application of the tariff throughout the Community and thus eliminate the discretionary application in the day to day administration of the tariff. On the other hand before there can be any "uniform implementation" of the tariff throughout the Community in this sense, there must be *implementation* of the tariff throughout the Community. The latter aim, however, seems to be the specific province of Articles 82 and 83.

[46] There remains the issue of whether, given the terms of Article 15(2)(a), the Second Defendant failed in its broader institutional responsibility to promote regional trade and economic development and to promote and oversee the operation of the CSME. Whilst the Council did not grant extensions as such, the crucial question remains: did the Council act in this matter so as to promote regional trade and the CSME? In answering this question, the Court must adopt a

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[18] Written Submission for the Claimant filed 18th November 2011, paragraphs 19, 40.

[19] Article 31, Vienna Convention on the Law of Treaties 1969, 8 ILM (1969) 130.

realistic view of the situation taking into account the early stage that has been reached in the evolution of the Community from a voluntary arrangement into a rules-based system; the decision-making in COTED; and the need for the maintenance of a Community based on good faith. The Court has some sympathy for the arguments of the Claimant that the Council could have taken a more robust approach to its institutional responsibilities. The Court, of course, does not purport to dictate the agenda for COTED but would suggest that the Council has the obligation to make every effort to resolve a matter relating to the non-imposition of the CET as a matter of urgency. Four-and-a-half years was altogether too long a period of time for private sector entities to await the enjoyment of rights intended for their benefit by the Revised Treaty.

[47] On the other hand, the institutional limitations of the Council are relevant in that they dictate what, realistically, is reasonable to expect or to require of the Community organ. Most critical are the processes by which it takes decisions binding on Member States of the Community. Subject to submissions and proof to the contrary, it would appear that each Member State has the right to insist upon reliance on decision-making in accordance with the explicit provisions of the Revised Treaty. Article 29 provides the basic rule that decisions are taken by a qualified majority comprising no less than three-quarters of the membership of the Community. The realities of inter-state diplomatic relations suggest that it may be difficult for the Council to attain this threshold. Where the issue to be determined is "of critical importance to the national well-being of a Member State" the decision must be reached by an affirmative vote of all Member States under Article 29(4). The decision that an issue is of critical importance to national well-being requires a two-thirds majority vote under Article 29(3) but provided this is attained, each Member State has a potential veto over decision-making in the Council.

[48] In the circumstances, it is not obviously unreasonable for the Council to have taken the calculated approach that the emotional sensitivity implicated in the

assertion by Suriname that affordable pricing and availability of bread were critical to the social, economical, and political stability in the country, could quite likely have led to a finding that the issue involved critical importance to national well-being. In that event Suriname would surely have vetoed any decision which required it to take precipitate action contrary to its perceived national interest and well-being; and similarly to block other COTED actions suggested by the Claimant such as invoking the modes of settlement specified in Article 188, including litigation in the Caribbean Court of Justice. It may be said *en passant* that the existence of the possibility that natural and juridical persons may themselves seek to initiate Article 222 actions rather lessens the force of the argument by the Claimant for litigation by COTED. The conciliatory approach adopted by COTED was within the wide margin of discretion which this Court recognizes must be accorded to the organs of the Community.

Sanctions

[49] The Claimant argued that COTED and the Secretary-General should have imposed sanctions on Suriname for the non-implementation of the CET but produced no legal basis for the authority to do so. The competence of an international organization or of community actors to impose sanctions upon a sovereign state for breach of treaty obligations cannot be assumed or implied but must be stated expressly in the constituent document to which the State in question is party.

[50] The Revised Treaty contains no general provisions relating to the application of sanctions for breach of treaty provisions. The schema adopted in the treaty is for Member States in certain cases to seek authorization from COTED in order that they themselves may adopt sanctions such as counter-measures or countervailing duties (Article 98), and anti-dumping measures (Article 133). COTED is rarely empowered to impose sanctions; a rather obscure provision in Paragraph 14 of Schedule III empowers the Council to apply appropriate sanctions where it is satisfied that the action taken by a Member State in relation to the Oils and Fats

Sub-sector is not in compliance with the provisions of the Schedule and is likely to prejudice benefits likely to be derived by another Member State, but this is exceptional. There are certainly no express provisions granting COTED power to impose sanctions upon a Member State for breach of the obligation to impose the CET. There are no provisions permitting the Secretary-General power to impose sanctions upon Member States; indeed, the very assertion of such a power is startling given the historical development of the Community and the nature of the office of Secretary-General.

[51] The Court therefore concludes that the Claimant has not established a legal basis upon which COTED or the Secretary-General could have imposed sanctions upon Suriname. It follows then that they cannot be faulted for not having imposed such sanctions.

The Claims for Damages against the Community

[52] As the Court has found that there was no unlawful conduct by the Community in respect of the matters raised in these proceedings the question of the availability of an award of damages against the Community does not arise.

The Claims for Damages against Suriname

[53] The claims for damages made at paragraphs [73] – [75] of the Amended Originating Application are for:

(a) Loss arising from price suppression by the Claimant in order to compete;

(b) Loss of the hypothetical profit from the quantities of flour from extra regional sources imported into Suriname free of duty and without the CET over a period of three and a half years; and

(c) Loss from the inability to sustain the previous level of employment at its installations.

[54] In fact, of these three heads of claim only the loss of profits claim was pursued at the hearing. This claim was particularized in an exhibit RR3 adduced into evidence by the Claimant's witness, Mr. Rajin Ramkissoon, a Chartered Accountant. The document was entitled "Profit per ton schedule" and is hereinafter referred to as "the Profit Schedule". Since the Profit Schedule covers the period 2007 to 2010 it is clear that the claim is only for the 42 months from January 2007 to June 2010, presumably because it was only in January 2007 that the Claimant considered that the breach became a serious breach (on which see [58] below).

[55] In *Trinidad Cement Limited and TCL Guyana Incorporated v Republic of Guyana (No.2)*[20] this Court accepted the principle that a State may incur non-contractual liability for damages for breach of the Revised Treaty. The Court holds as it did in *Trinidad Cement Limited and TCL Guyana Incorporated v Republic of Guyana:*[21]

> "... the new single Market based on the rule of law implies the remedy of compensation where rights which enure to individuals and private entities under the treaty are infringed by a Member State. But State liability in damages is not automatic. A party will have to demonstrate that the provision alleged to be breached was intended to benefit that person, that such a breach is serious, that there is substantial loss, and that there is a causal link between the breach by the State and the loss or damage to that person."

[56] The requirement that the breach of the provision must have been intended to benefit the Claimant may be taken to be satisfied. In *Trinidad Cement Limited and TCL Guyana Incorporated v Republic of Guyana* it was not necessary to fully explore the issue of whether claims for damages could be sustained by the distributor as distinct from the producer of cement.[22] It is certainly the case that it

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20 [2009] 75 WIR 327 esp. at paragraph 27.

21 [2009] CCJ 5 (OJ).

22 Ibid., at Paragraph 34.

is easier to appreciate that the imposition of the CET under Article 82 more clearly enures directly to the benefit of persons who are producers of the commodity in respect of which the tariff is imposed and therefore that it is easier for such entities to successfully claim damages for a breach of Article 82. However, for the reasons given earlier in this judgment, this Court accepts that the establishment and maintenance of the CET on the importation of extra-regional flour provides a real and substantial benefit to the Claimant as a distributor affiliated with the producer of the flour.

[57] The question of the seriousness of the breach is an important one. As explained by this Court in the case cited in [56]:

> "the reasons for laying down conditions as to liability in damages is to prevent States from being harassed by claims for technical breaches or minor procedural defects. The range of potential breaches by a Member State may extend from minor breaches to flagrant and contumacious abuses of State power. The threshold for eligibility for damages is therefore a high one. It is not every infringement that would attract damages. The court may not consider making a monetary award for minor breaches of the RTC. The breach must be sufficiently serious to warrant the award of damages."[23]

[58] The question of the seriousness of the breach in this case is to be considered against the background of the nature of the breach, the length of time during which it subsisted, and the reasons given for non-compliance, taking account of the fact that Suriname in a letter from its Ministry of Trade and Industry to the Secretary-General dated 29 December 2006 had already accepted that it had wrongly imposed no CET on wheat or meslin flour not derived from durum wheat having misclassified it under tariff heading 1101.00.10 instead of heading 1101.00.90. The breach in question was of a provision in the Revised Treaty itself, essential to the successful operation of the CSME. Despite a four year lead into the definitive entry into force of the treaty régime and the efforts of the Claimant, the breach subsisted for four-and-a-half years. The response from

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[23] Ibid., at Paragraph 28.

Suriname was a multiplicity of explanations including misclassification of tariff headings, acquiescence by COTED, quality and taste of regional flour, established relationship with extra-regional producers, affordable pricing, and passage of the budget in the National Assembly. In all the circumstances of this case the Court has no difficulty in finding that the breach by Suriname was sufficiently serious to justify a claim in damages from January 2007 to June 2010.

[59] The real difficulty with respect to the claim for damages relates to whether the Claimant has proved that it suffered substantial loss as a result of the breach by the First Defendant. In this regard, the evidence was particularly weak in several particulars but an overarching defect related to the corporate nature of the Claimant as distinct from other corporations with which it was affiliated.[24] Article 222 recognizes persons, "natural or juridical" of a contracting party. A limited liability company is a juridical person under the laws of Trinidad and Tobago and has also been recognized as a legal entity in international law in the *Barcelona Traction case*.[25] As the juridical person bringing the claim, the Claimant is under the obligation to prove the substantial loss and damage suffered by it as distinct from Republic Grains Investments Limited with which it was affiliated. This it utterly failed to do. Each affiliated company is a juridical person legally distinct from its affiliates. The major advantage of affiliation appears to be that one set of consolidated accounts may be prepared for all affiliated companies[26] so that if they jointly brought a legal action those accounts could be used as the basis for their claim to damages. There were no arguments or authorities presented which would support any discussion of the lifting of the corporate veil to focus upon the losses of the owner-controller of the Claimant and its affiliated companies, Mr Benie, who, in any event, could not seek to recover for his reflective loss in the value of his shares when his company was suing for its losses.

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[24] A similar issue arose in *TCL and TGI v Guyana (No.2)* [2009] 75 WIR 327.

[25] *Barcelona Traction, Light and Power Co*. case, ICJ Rep. 1970, p. 3.

[26] Sections 153-156, Companies Act 1995, Act No. 35 of 1995.

[60] The insuperable problems flowing from only HRM being Claimant may be illustrated by reference to the Claimant's assertion of damages. These ranged from losses associated with the upgrade of a plant to enhance the production and sale of flour to loss of profits and loss of opportunity to make profits. Allegedly losses were sustained and/or profits were not realized by no less than four separate entities, i.e. (i) HRM, (ii) Caribbean Flour Mills Limited when HRM had taken this name from 2007 to September 2010, (iii) Caribbean Flour Mills Limited after September 2010 when an affiliated company, Transit Shipping Agency Limited, had assumed and adopted that name, and (iv) Republic Grains Investments Limited, the producer of the flour before it was distributed by the other affiliated companies. The Profit schedule and the oral evidence provided by the Claimant utterly failed to make clear the extent to which expenses incurred or profits made were those of HRM or Caribbean Flour Mills Limited in either incarnation or those of Republic Grains Investments Limited. It was thus arithmetically impossible to calculate the Claimant's separate loss of profits and not at all feasible to estimate any loss of opportunity to make profits, especially when there was no evidence of the amount of flour sold by the Claimant in Suriname from January 2007 until the CET was imposed in June 2010.

[61] After all, to establish loss of profits or the opportunity to make profits since January 2007 *if* the CET had been in force in Suriname until it was imposed in June 2010, it is necessary for the Claimant to have a base figure of the amount of profits it made in Suriname in that period ("actual profit") plus a figure for any additional profits made, in mitigation of loss, from sales that it actually made, or could reasonably have made, from selling elsewhere the flour that it would otherwise have expected to sell in Suriname ("mitigation profit"). There was no evidence of actual profit or mitigation profit. In order to have been able to demonstrate a loss of profit it would have then been necessary to set against the base figure i.e. the aggregated actual and mitigation profit, a larger figure for "hypothetical profit" representing the profit that the Claimant would have made or

would have had the chance of making if the CET had been in force in the relevant period. But there was no proper indication of the hypothetical profit.

[62] In its written submissions the Claimant asserted that its alleged loss of profits could be calculated on the basis of the turnover figure it would have derived from supplying Suriname with the amount of flour imported from The Netherlands during the forty-two month period of January 2007 to 14th June 2010. This was estimated to be 1050 metric tonnes per month (12,600 tonnes a year) with a loss per tonne of US$65 representing the dollar value which "Caribbean Flour Mills" (as the Claimant, HRM, was re-named) for the period 2007 to September 2010 realized on every metric tonne it exported to Suriname. This formula is unacceptable for several reasons. The losses were calculated as aggregate losses of the Claimant *and* Republic Grains Investments Limited and not the Claimant itself so that it is impossible to calculate what the Claimant's losses might have been. Moreover, the use of US$65 to calculate the loss per tonne was admitted in response to questions from the Bench to be a mathematical error, the true figure being US$56.89.

[63] Most pertinent, there was no sound evidential basis for the assertion that in the normal course of events the Claimant would have supplied the whole 12,600 metric tonnes of flour imported annually into Suriname from The Netherlands during the period January 2007 to June 2010. Indeed, only 1450 tonnes were exported to Suriname by the Claimant in the period June 2010 to June 2011, i.e. 64 containers (of value US$812,783), while in the period July-September 2011, 19 containers (of value US$274,916) were exported. Thereafter, as Mr Benie in his oral evidence admitted, exports to Suriname further deteriorated.

[64] Indeed, the Claimant adduced no evidence to show that its flour would have been preferred by bakeries in Suriname over that of its competitors. There *is* evidence before the Court that during the relevant period Suriname imported flour not only from various extra-regional producers but also from regional suppliers in Guyana, Jamaica, and Trinidad and Tobago. A domestic producer in Suriname, "N.V.

Meelmaatschappij de Molen", also supplied generally increasing quantities of flour during the period. There is therefore no evidential basis for finding that any increased opportunity in the market caused by the application of the CET would more likely have gone to the Claimant rather than to other suppliers.

[65] The Court accepts that the substantial upgrading of the flour-production facilities of Republic Grain Investments Limited (though the incidence of the cost thereof is unclear) enabled the Claimant substantially to increase its capacity for greater distribution of flour into the Suriname market (and elsewhere) and so make greater profits. This, coupled with the non-imposition of the CET on extra-regional supplies, leads one to think that, but for this non-imposition, the Claimant should have made significant increased profits and so ought to be able to maintain a claim for loss of profits or, rather, for the loss of an opportunity to make profits. The Claimant, however, has utterly failed to provide adequate evidence to maintain any claim for losses.

Costs

[66] In light of the findings above where the Claimant succeeded on some only of the claims made, the Court invites written submissions from the parties on the question of the appropriate orders as to costs. In respect of CARICOM a question arises as to whether there should be a general practice that no order as to costs should be made in its favour where a claim against it failed so long as the claim was not frivolous or vexatious. Alternatively CARICOM, like many states in domestic constitutional matters, might be prepared to develop a practice of not enforcing costs orders in its favour against a party who had brought a justifiable or arguable claim against it but failed. The question arises whether the bearing of such costs should, perhaps, be part of the price of developing a Community law at the centre of which is CARICOM. As between the Claimant and Suriname, bearing in mind the flexible discretion in CCJ Original Jurisdiction Rule 30.1 (3), there may be the further issue of the extent to which the Court should be influenced by the seriousness of Suriname's breach of the Revised Treaty. The

parties are expected to address these and other relevant questions on the issue of costs.

Order

[67] The Court:

(a) **Declares** that Suriname breached its obligations under Article 82 of the Revised Treaty of Chaguaramas to establish and maintain the common external tariff during the period 1st January 2006 to 14th June 2010

(b) **Refuses** all other declarations claimed in the Amended Originating Application herein

(c) **Dismisses** the claim for damages against the Defendants

(d) **Orders** that written submissions as to costs be filed and exchanged within 21 days of the date of this judgment.

/s/

The Hon Mr Justice Rolston Nelson

/s/

The Hon Mr Justice Adrian Saunders

/s/

The Hon Mr Justice Jacob Wit

/s/

The Hon Mr Justice David Hayton

/s/

The Hon Mr Justice Winston Anderson