

**IN THE CARIBBEAN COURT OF JUSTICE**  
**Original Jurisdiction**

**CCJ Application No DMOJ2022/001**

**Between**

**DCP Successors Limited**

Claimant

**And**

**The State of Jamaica**

Defendant

**And**

**The Caribbean Community**

Amicus Curiae

*Caribbean Community Law – Common External Tariff – Certificates of Origin – Safeguard Mechanism – Whether State failed to apply Common External Tariff – Whether State in breach of Treaty Obligations – Whether domestic Exemption Regime consistent with Community Law – Revised Treaty of Chaguaramas, Articles 82, 84 and Schedule III – List of Conditional Duty Exemptions.*

**SUMMARY**

This claim was brought by DCP Successors Limited ('DCPS'), a soap manufacturing company duly incorporated under the laws of Dominica. The case was heard by all seven judges of the CCJ but, regrettably, before the judgment could be delivered, Wit J retired from the Court on the ground of ill health and passed away shortly thereafter.

DCPS manufactures, in Dominica, generic soap noodles. The noodles may be produced using fatty acids from either palm (or coconut) oil or, alternatively, using tallow (or animal fats). Soap noodles manufactured by the Claimant are molded into various soap products including but not limited to laundry bar soap and bath bar soap.

Since DCPS' soap noodles and its other soap products are manufactured within the Caribbean Community ('CARICOM'), those goods are eligible for and receive preferential treatment relative to similar goods from third States. Regional importers of DCPS' products

do not pay the Common External Tariff ('CET') established by CARICOM. DCPS exports throughout the region both the soap noodles manufactured by them as well as the finished laundry and bath soaps.

The Defendant to the claim is the CARICOM Member State of Jamaica ('Jamaica'). There are soap producing enterprises also operating in the State of Jamaica. These soap producers import already manufactured soap noodles from third States such as Malaysia and Indonesia. They add fragrances, extracts of oil, moisturisers and colour to the imported noodles, reshape them into various forms and repackage them. They would distribute the final product both in Jamaica and also export it throughout the region and beyond.

Initially, the soap noodles imported by the soap producers were classified under a different tariff heading than the tariff heading properly applicable to soap and soap noodles (34.01). After some concern was raised about the classification, assistance was sought from the World Customs Organisation ('WCO') in relation to the classification. The WCO advised that the correct tariff heading was 34.01 which attracts a 40% CET.

Jamaican soap products exported to other Member States were initially exempted from payment of the CET as the relevant authorities in Jamaica considered these goods to be of community origin eligible for preferential treatment. The authorities in Jamaica later applied to the CARICOM Secretary-General for a Safeguard Certificate in respect of these goods. These applications were denied on the basis that the Jamaican soap products were not of community origin.

Soap producers of the Member State of Jamaica continued to import soap noodles from third States without paying any CET. Jamaica then justified its non-imposition of the CET on these soap noodles on provisions of its domestic law. This law, the Productive Inputs Relief Programme, established under Jamaica's Customs legislation, exempted Jamaican manufacturers from payment of the CET on certain products imported from third States where there was not available like products in adequate supply in the Community. It was argued that this law was consistent with and permissible under the List of Conditional Duty Exemptions of the Revised CET. It was also alleged that there was an inadequacy of regional

supply because DCPS' soap noodles were substandard. DCPS had previously engaged soap producers in Jamaica about supplying them with soap noodles, but the Jamaican soap producers took issue with the quality of DCPS' soap noodles.

In its originating application, DCPS sought (a) a declaration that Jamaica breached Article 82 and paragraph 18 of Schedule III (which speaks specifically to the oils and fats subsector) of the Revised Treaty of Chaguaramas ('RTC') by failing to apply the 40% CET applicable to soap noodles imported into Jamaica from non-CARICOM sources; (b) an order requiring Customs Officers in Jamaica to impose the 40% CET applicable to soap noodles unless the Council for Trade and Economic Development ('COTED') grants a suspension of the CET; (c) a declaration that Jamaica breached Article 84 of the RTC by unlawfully issuing Certificates of Origin to Jamaican soap producers in respect of soap products made from extra-regional soap noodles; (d) an order requiring Jamaica to cease issuing Certificates of Origin in respect of soap products made from extra-regional soap noodles unless the CARICOM Secretary-General has issued to the Member State of Jamaica a Safeguard Certificate; (e) compensation for breaches of provisions of the RTC, and (f) an order for costs.

In its Defence, the Member State of Jamaica contended that the matter was not one subject to this Court's jurisdiction, that there were no breaches of the RTC and that DCPS was not prevented from enjoying the benefits conferred by Article 82 of the RTC concerning supplying soap noodles. Jamaica also initially made several claims against CARICOM, which was not a party to the action, relating to their failure to grant Jamaican soap producers Safeguard Certificates.

At the case management stage, the parties initially consented to adding CARICOM to the proceedings as a Defendant. However, at a subsequent case management conference, the Member State of Jamaica indicated that it did not wish to maintain any claims against CARICOM. The Court accordingly removed CARICOM as a Defendant to the proceedings and allowed the Community to appear instead as an *Amicus Curiae*.

The Court found that Jamaica's reliance on the List of Conditional Duty Exemptions failed to consider the overarching General Note of COTED which explains how the rules regarding the List of Ineligibles under the List of Conditional Duty Exemptions must be interpreted. The Court observed that the General Note made it clear that items produced in CARICOM in quantities considered adequate to justify the application of tariff protection were ineligible for duty exemption. This ineligibility is consistent with the objectives of the RTC and in particular with Schedule III of the RTC which elaborates a special regime for oils and fats which are defined to include soap and soap noodles. Schedule III makes it clear that the Member States shall apply the rate of duty set by COTED on all imported oils, fats and their substitutes. The 40% CET established by COTED on soaps and soap noodles may be suspended by COTED where there is insufficient supply in CARICOM.

The text of the Jamaican law which provides for that Member State's Productive Inputs Relief Programme was also found to be consistent with the principle that, regarding oils and fats, Member States should first source from within the single market. That regime acknowledges and suitably caters for this principle. The Court was not convinced by the evidence that suggested that DCPS' soap noodles were rancid or otherwise unfit for purpose. The Court also found that DCPS was capable of supplying soap noodles to the entire single market of the Community.

The Court noted that the view that, notwithstanding the adequacy of regional supply, Jamaica should be entitled to import from third States soap noodles free of the CET produced a result that was at variance with the aims and objectives of the RTC and with its clear provisions. The long-term viability of the regional oils and fats industry is not enhanced by that result. Nor is the regional marketing of oils produced from indigenous raw materials thereby facilitated. As such, Jamaica was found to be in breach of Article 82 and paragraph 18 of Schedule III of the RTC by not imposing the CET on the importation of soap noodles from extra regional sources.

In relation to Jamaica's alleged breach of Article 84 of the RTC, the Court accepted the concession of counsel that there had been a breach by the Member State of Jamaica. The

Court considered a mitigating circumstance urged by the Member State. Counsel submitted that although Jamaica was in breach by initially misclassifying its soap products as being of community origin, the Member State should not be found liable for that breach because its misclassification was done in good faith as it was an innocent mistake.

The Court discussed good faith as undergirding much of international law in general and treaty law in particular. It is expected that states will act in good faith when entering into and performing treaties. States are however bound by their treaty obligations and are expected to fulfil them.

In the result, the Court found that the claims of DCPS against the Member State of Jamaica in relation to Articles 82 and 84 were made out. The Court awarded costs to DCPS and declared that a case management conference shall be held to consider the modalities for determining whether, and if so what, other possible remedies or relief are due to DCPS.

**Cases referred to:**

*DCP Successors Ltd v Trade Administrator* [2022] JMSC Civ 62, JM 2022 SC 59 (CARILAW); *European Communities - Customs Classification of Certain Computer Equipment* (5 June 1998) WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R; *State of Belize v State of Trinidad and Tobago* [2022] CCJ 1 (OJ); *Trinidad Cement Ltd v State of Trinidad and Tobago* [2019] CCJ 4 (OJ).

**Legislation referred to:**

**Jamaica** – Customs Act, Cap 89, Customs Tariff (Revision) (Amendment) Resolution 2013.

**Treaties and International Materials referred to:**

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:**

CARICOM Secretariat, ‘Revised Common External Tariff of the Caribbean Community: Based on the 2017 Edition of the Harmonised Commodity Description and Coding System (HS)’ (18 April 2018) <[https://caricom.org/documents/16273-revised\\_cet\\_of\\_caricom\\_hs\\_2017\\_revised\\_11\\_april\\_2018\\_%28for\\_link%29.pdf](https://caricom.org/documents/16273-revised_cet_of_caricom_hs_2017_revised_11_april_2018_%28for_link%29.pdf)> accessed

on 16 July 2023; Waldock H, 'Law of Treaties: Third Report on the Law of Treaties' (1964) 2 UNYB Int'l L Comm'n 5, 7.

## **THE COURT,**

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

having regard to the originating application filed at the Court on 7 October 2022, together with the annexures thereto, the defence of the State of Jamaica filed on 12 December 2022 and the annexures thereto, the amended defence of the State of Jamaica filed on 22 February 2023, the amended originating application filed on 3 March 2023, the reply to the amended defence filed on 13 March 2023, the rejoinder thereto filed by the State of Jamaica on 24 March 2023, the further amended originating application filed on 29 March 2023, the further amended defence of the State of Jamaica filed on 14 April 2023, the written submissions of DCP Successors Limited filed on 2 June 2023, of the Caribbean Community filed on 5 June 2023 and 17 July 2023, of the State of Jamaica filed on 12 June 2023, to the public hearing held on 17-18 July 2023, the submissions of the Caribbean Community filed on 18 August 2023 and the submissions of DCP Successors Limited and the State of Jamaica filed on 8 September 2023

and after considering the notes and oral observations of:

- **DCP Successors Limited**, by Mr B St Michael Hylton KC, appearing with Mr Sundiata Gibbs and Ms Timera Mason, Attorneys-at-Law
- **The State of Jamaica**, by Mr Stuart Stimpson, appearing with Ms Sherise Gayle, Attorneys-at-Law
- **The Caribbean Community**, by Ms Lisa Shoman SC, appearing with Dr Chantal Ononaiwu, Ms Radha Permanand and Mr O'Neil Francis, Attorneys-at-Law

issues on **31 January 2024** the following:

## **JUDGMENT**

### **Introduction**

[1] This claim is brought by DCP Successors Limited ('the Claimant'), a soap manufacturing company duly incorporated under the laws of the Commonwealth of Dominica (referred to in this judgment simply as 'Dominica'). The case was heard by all seven judges of the CCJ but, regrettably, before the judgment could be

delivered, Wit J retired from the Court on the ground of ill health and passed away shortly thereafter.

- [2] The Claimant manufactures, in Dominica, generic soap noodles using the saponification process. Saponification is a heat releasing chemical reaction that occurs when palm or coconut oils or fats (fatty acids) are mixed in a manufacturing process in specialised equipment with caustic soda (the base). When the fatty acids and the base are combined, a process is triggered upon completion of which soap noodles are produced. The noodles may be produced using fatty acids from either palm (or coconut) oil or, alternatively, using tallow (or animal fats). Regardless of which type of fatty acid is used, the result is the same. Soap noodles manufactured by the Claimant are molded into various soap products including but not limited to laundry bar soap and bath bar soap.
- [3] Since the Claimant's soap noodles and its other soap products are manufactured within the Caribbean Community, those goods are eligible for and receive preferential treatment relative to similar goods from third States. Regional importers of the Claimant's products are not faced with payment of the Common External Tariff or CET established by CARICOM. The Claimant exports throughout the region both the soap noodles manufactured by them as well as the finished laundry and bath soaps.
- [4] The Defendant to the claim is the CARICOM Member State of Jamaica. There are soap producing enterprises also operating in that Member State. These producers do not engage in saponification. Instead, they import already manufactured soap noodles from third States such as Malaysia and Indonesia. In the State of Jamaica, these soap producers add fragrances, extracts of oil, moisturisers and colour to the imported noodles, reshape them into various forms, repackage them and sell the final product. Initially, these goods were sold in the region, free from payment of the CET because they were classified by the Defendant as goods of community origin.
- [5] Fundamentally, the Claimant alleges that the soap products produced in the Member State of Jamaica are not eligible for community treatment when sold in the region.

Secondly, desirous of selling its soap products in Jamaica on favourable terms allegedly consistent with the provisions of the Revised Treaty of Chaguaramas ('the RTC'), the Claimant, contends that, in allowing or encouraging its producers to import extra-regionally manufactured soap noodles without imposition of the CET, the Defendant State is in breach of the RTC.

- [6] The Defendant has since conceded that the soap products of its producers are not entitled to be treated as goods of community origin, but the Defendant and its soap producers nevertheless contend that they are entitled to continue to import soap noodles from third States free from payment of the CET on condition that the finished soap products are sold only locally (ie in the State of Jamaica) and in third States. The Defendant claims that although, in some respects in the past, it was, or may have appeared to have been, in breach of the RTC by initially classifying its soap products as being of community origin, its actions in that regard were undertaken in good faith and should attract no adverse finding or consequence by this Court.
- [7] Further, the Defendant states that provided the soap products produced in the State of Jamaica are sold only in Jamaica and in third States, its producers are justified in importing extra-regionally manufactured soap noodles free from imposition of the CET firstly, because the Claimant's noodles are not of acceptable quality and secondly, because consistent with the RTC arrangements, the Defendant has put in place a special statutory regime to incentivise its local manufacturers and that this regime exempts eligible soap producers from payment of the CET on the imported soap noodles. The regime in question is encapsulated in the Productive Inputs Relief Programme established under the Customs Tariff (Revision) (Amendment) Resolution 2013 of the Customs Act of Jamaica.<sup>1</sup> Throughout this judgment this Court refers to this Programme as 'the domestic exemption regime'. The Defendant asserts that this regime is entirely consistent with the Defendant's obligations under the RTC.

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<sup>1</sup>Cap 89.



- [8] Initially, the Defendant indicated an intention to join the Caribbean Community (CARICOM) as a defendant to the action, but the Defendant subsequently resiled from taking that step. During the management of the case, however, CARICOM was added to the proceedings as an Amicus Curiae and the Court extended an invitation to counsel for CARICOM to make submissions on the matters in issue.
- [9] It was agreed by the Court that the trial of the Claimant's claims would first be held on the issue of the Defendant's liability, if any, to the Claimant. It was made clear that if the Court found that the Defendant was in breach of its obligations under the RTC and liable to the Claimant, a second hearing would be held to address the question of the relief that would be due to the Claimant. The hearing on liability was held on 17-18 July 2023. Prior to the hearing, the parties and counsel for CARICOM were invited to make written submissions on the issues of liability that were in contention.
- [10] On 17 July, the Court heard evidence from witnesses for both the Claimant and the Defendant. The Claimant called two witnesses, Mr Yvor Nassief, the Claimant's Managing Director and Mr Damien Sorhaindo, the Claimant's General Manager. The Defendant called four witnesses, Ms Lorna Brissett, Manager, Export Certification and Trade Agreements in the Export Certification Unit of the Jamaican Trade Board; Mr Orane Thompson, Monitoring Supervisor in the Incentives Unit of the Jamaica Customs Agency; Ms Shandilayne Davis, Senior Director, International and Industry Liaison of the Jamaica Customs Agency, and Mr Martin Phillips, Director of International Trade of the Jamaican Ministry of Industry, Investment and Commerce.
- [11] On 18 July 2023 the Court heard oral submissions from counsel including counsel for CARICOM. Upon conclusion of the oral submissions on 18 July, the Court reserved its judgment but, on 28 July, the Court requested the parties and counsel for CARICOM to make further written submissions on a single discrete issue. This was whether there is any tension between Schedule III of the RTC and r 5(b) of the List of Conditional Duty Exemptions under the CET with respect to any goods which fall within the definition of 'oils and fats' listed therein and, if there is such tension, which

provision should prevail and why. The Court received the last of those written submissions on 8 September 2023.

### **Factual Background and Chronology of Events**

[12] From 1995 to 2015, Colgate-Palmolive, the well-known multinational consumer products company, manufactured soap products, including soap noodles, in Dominica. Colgate-Palmolive exported finished soap products regionally. It did not export soap noodles. In 2015, Colgate-Palmolive's business in Dominica was devastated by Tropical Storm Erica and its operations in that Member State ceased. In 2017, the Claimant purchased Colgate-Palmolive's business and plant. Restoration works were completed a year later, and the Claimant commenced production of soap using tallow-based fatty acids for its saponification processes. The Claimant began exporting regionally both soap noodles and finished soap products. As the Claimant's soap noodles are manufactured within the Caribbean Community, they are naturally eligible for community treatment and so, they are exported without payment of the CET, or any other duty, being imposed.

[13] Article 82 of the RTC stipulates that -

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 [The Council for Trade and Economic Development].

COTED has determined, through its Revised Common External Tariff<sup>2</sup>, that soap noodles and laundry and toilet soaps are to be classified under tariff heading 34.01 and soap noodles imported from third States must attract a CET of 40% unless COTED suspends the tariff.

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<sup>2</sup> CARICOM Secretariat, 'Revised Common External Tariff of the Caribbean Community: Based on the 2017 Edition of the Harmonised Commodity Description and Coding System (HS)' (18 April 2018) 209 <[https://caricom.org/documents/16273-revised\\_cet\\_of\\_caricom\\_hs\\_2017\\_revised\\_11\\_april\\_2018\\_%28for\\_link%29.pdf](https://caricom.org/documents/16273-revised_cet_of_caricom_hs_2017_revised_11_april_2018_%28for_link%29.pdf)> accessed on 16 July 2023.

- [14] Schedule III of the RTC addresses specifically and in some detail the development of the oils and fats sub-sector in the Community. Soaps in the form of toilet and laundry derived therefrom are all included in the definition of 'oils and fats'. The objectives of Schedule III of the RTC are to enhance the long-term viability of the regional oils and fats industry; to facilitate the regional marketing of oils produced from indigenous raw materials; to encourage the development and marketing of a wider range of competitive value-added products especially in the less developed countries; and to encourage the role of the private sector in determining the conduct of the trade.
- [15] In or around 2018, the Claimant became aware that soap producers in the Member State of Jamaica were misclassifying as 'fatty acid pellets' extra-regionally manufactured soap noodles imported into Jamaica and were using these soap noodles in their production of soap products. This misclassification had two important consequences. The imported soap noodles were accorded a tariff heading 38.23 which attracted only a 0-5% CET. This 38.23 heading therefore permitted the soap producers of the Defendant to pay substantially less CET on the imported soap noodles. Further, the misclassification enabled these soap producers to claim eligibility for and to have issued to them under, Article 84 of the RTC, Certificates of Community Origin in respect of their finished soap products. The soap producers claimed that the imported soap noodles had undergone a process of transformation in Jamaica sufficient to prompt a change in tariff heading from the heading given to the imported 'fatty acid pellets' (tariff heading 38.23) to the heading COTED has given to finished soap products (tariff heading 34.01).
- [16] Sometime between June and August 2018, the Defendant's soap producers received samples of soap noodles from the Claimant with a view to effecting purchases of soap noodles from the Claimant. However, the Defendant's soap producers subsequently indicated to the Defendant's Ministry of Industry, Investment and Commerce that they experienced significant quality issues with respect to the samples. The concerns raised were varied. It was stated that the Claimant's soap noodles produced a pungent odour when used in the manufacturing process, that the noodles were tallow-based

while the Jamaican soap manufacturers required palm-based soap noodles, and that the moisture levels in the soap noodles were inadequate. The complaints regarding moisture levels were not brought to the Claimant's attention until four years later, in June 2022.

- [17] On 31 August 2018, the Claimant wrote to the Ministry of Finance and Public Service of the Defendant Member State regarding the misclassification of the soap noodles being imported into that Member State. The Comptroller of Customs of the Member State of Dominica also complained to the Jamaica Customs Agency ('the JCA').
- [18] On 11 and 12 April 2019, at COTED's 48th Meeting, the Member State of Dominica raised the issue of the Defendant's classification of imported soap noodles under tariff heading 38.23. The concerns expressed by the Claimant led the JCA to seek classification advice on the issue from the World Customs Organization ('the WCO'). The WCO requires the completion of a certain form whenever a State seeks such advice. On the form requesting classification advice from the WCO, the JCA was required to answer a variety of questions regarding the subject matter of their request. The JCA was required to indicate on the form whether there was any dispute with any other administration, whether there was any dispute with any importer or exporter and whether there were contrary views in other administrations on the classification of the product in question. The JCA responded in the negative to all three of these questions.
- [19] The WCO delivered an opinion dated 22 November 2019. The advice of the WCO was that the soap noodles being imported by the Member State of Jamaica should properly be classified under tariff heading 34.01, and not 38.23 as the Defendant had previously been doing. According to COTED, the tariff heading 34.01 attracts a 40% CET which should be paid by the importers of soap noodles from extra-regional sources.
- [20] By letter dated 5 December 2019, the Defendant indicated to the Customs Authority of the Member State of Dominica that it acknowledged the advice of the WCO. The

Claimant's attorneys wrote to the Defendant's Customs bodies requesting a copy of the WCO's advice and seeking confirmation that the Defendant would cease permitting the misclassification of the soap noodles being imported by their producers. The Claimant received no response to this communication.

- [21] On or around 7 January 2020, due to concerns expressed by the Defendant's soap producers about the quality of the Claimant's soap noodles, the Defendant's Minister of Industry, Investment and Commerce wrote to the CARICOM Secretariat seeking to invoke the safeguard mechanism under Article 84 of the RTC so that the Defendant could continue issuing Certificates of Origin to its soap producers. Broadly speaking, Article 84 sets out a process in relation to the manufacture of goods whose qualifying condition for being treated as being of community origin is that they should be 'wholly produced' regionally or 'produced from regional materials'. If the manufacturers of such goods are unable, by reason of circumstances beyond their control, to obtain supplies of the regional raw materials, they may obtain from the Secretary-General of CARICOM what is known as a Safeguard Certificate. This Certificate authorises the manufacturers to utilise like raw materials from outside the Community subject to such conditions as the Secretary-General may impose.
- [22] By letter dated 13 February 2020, the Secretary-General of CARICOM responded to the Defendant that there would be no need to apply for Safeguard Certificates if the products were either sourced in the region or if there was substantial transformation in Jamaica of the raw materials which resulted in a change of the tariff heading of the product.
- [23] On 13 August 2020, the Claimant's attorneys wrote to the Defendant's Customs bodies about the imposition of the CET on and the misclassification of soap noodles imported into the Member State of Jamaica. The Claimant threatened to take legal action. The Claimant's attorneys also wrote to the Defendant's Trade Board Limited about the misclassification of the imported soap noodles and the issuance of Certificates of Origin which had previously been granted by the Defendant to its soap producers. The Claimant sent multiple letters of complaint of this nature to the

Defendant's Customs and Trade bodies throughout 2020 and 2021 but there was no immediate response to any of these pieces of correspondence.

- [24] About 22 September 2020, the Defendant's Ministry of Industry, Investment and Commerce wrote to the CARICOM Secretariat ultimately accepting that goods produced from extra-regional imports of soap noodles do not qualify for community treatment. The Ministry also indicated that the Defendant's soap producers had found that the Claimant's soap noodles caused inconsistent odour in the finished products and caused damage to the machinery of the Jamaican producers.
- [25] By letter dated 14 October 2020, COTED requested that Dominica have the Claimant provide samples of its soap noodles to Jamaican soap producers for testing. On 28 October 2020, the Government of Dominica responded to indicate that the request should be made directly to the Claimant and that the Claimant was ready to provide the samples.
- [26] In December 2020, a representative of Kirk Distributors Limited ('Kirk Distributors'), a soap producer of the Defendant Member State, requested samples from the Claimant. The Claimant stated that at the time that the request was made to it, the Claimant was scheduled for maintenance shutdowns which occur annually between 18 December and 15 January of the following year. As such, the Claimant stated that it could not fulfil the request at the time that it was made. The Claimant shipped the samples to Kirk Distributors at the end of January 2021.
- [27] On 25 January 2021, the Secretary-General of the Caribbean Community issued, via Savinggram No 46/2021, an unqualified direction to the Regional Heads of Customs that soap noodles from extra-regional sources should attract a 40% CET unless COTED suspends the tariff.
- [28] At COTED's 52nd meeting held in May 2021, the Member State of Dominica advised COTED that in January 2021, samples of soap noodles were shipped to soap producers of the Defendant Member State. One of those producers was Kirk FP

Limited ('Kirk FP'). Kirk FP requested the Bureau of Standards Jamaica to analyse and test the Claimant's soap noodles.

- [29] On 23 April 2021, a representative of Kirk FP forwarded results from the tests done on the Claimant's soap noodles. The report illustrated that the moisture levels of the laundry soap noodles were within the specifications provided by Kirk FP but the moisture levels for the toilet soap noodles exceeded them. Kirk FP reported that the samples of soap noodles supplied by the Claimant did not meet the acceptable standard. Island Products Manufacturing Company Limited ('Island Products'), another Jamaican soap producer, alleged that their finished soap products using the supplied samples had a rancid smell.
- [30] Kirk FP presented a chart that juxtaposed their specifications for the soap noodles with the Certificate of Analysis provided by the Claimant and the results from the Bureau of Standards Jamaica. The chart illustrated that the Claimant's toilet soap noodles exceeded the moisture specification, but the Claimant's soap noodles had a natural palm oil odour and were not rancid as alleged by Island Products.
- [31] On 8 June 2021, the Claimant commenced an action in the Supreme Court of Jamaica against the Defendant's Trade Administrator, Trade Board Limited, Commissioner of Customs and Excise and Customs Agency and a soap producer of the Defendant Member State, Blue Power Group Limited<sup>3</sup>. In those proceedings, the Claimant claimed damages against the Defendant's Trade and Customs bodies for breach of statutory duty. The only remedy sought against Blue Power Group Limited ('Blue Power') was an order for that producer to cease classifying the extra-regional soap noodles being imported as 'fatty acid pellets' bearing the tariff heading 38.23 instead of the correct tariff heading of 34.01. Blue Power had been importing soap noodles under a tariff heading for industrial soap which attracts a 0% CET (3401.20 which is distinct from 34.01).

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<sup>3</sup> *DCP Successors Ltd v Trade Administrator* [2022] JMSC Civ 62, JM 2022 SC 59 (CARILAW).

- [32] On 9 June 2021, one day after the Claimant commenced its domestic action, the Defendant's Customs bodies responded to the Claimant's letter dated 13 August 2020. In that response, for the first time, the Defendant justified its non-imposition of the CET on imported soap noodles by reference to its domestic exemption regime. A day later, on 10 June 2021, the Defendant's Trade Board Limited ceased issuing Certificates of Origin to Jamaican soap producers.
- [33] On 23 June 2021, Island Products complained to a representative of the Ministry of Industry, Investment and Commerce, Mr Martin Phillips, that the Claimant's soap noodles had a rancid smell and that the Claimant's advocacy and protestations in relation to the issue of soap noodles had rendered the products of Island Products ineligible for duty-free export within the region. Based on the latter, Island Products claimed that it did not want to engage in business with the Claimant. The allegations made by Island Products regarding the odour of the Claimant's soap noodles contrasted with the results from the Bureau of Standards Jamaica which indicated that the Claimant's soap noodles have a natural palm oil scent and are not rancid.
- [34] Although the JCA agreed with the opinion of the WCO on the issue of how the soap noodles imported by the Defendant should be classified, soap producers from the Defendant Member State were nevertheless permitted by the Defendant, without prior notification or consultation with COTED, to continue importing soap noodles from extra-regional sources without imposing the 40% CET. The Defendant justified this course of action by reference to its domestic exemption regime as set out in Part 5 of Schedule III of the Customs Tariff (Revision) (Amendment) Resolution 1972 as amended in 2013. Under the domestic exemption regime, approved Jamaican manufacturers may receive a range of benefits, including the benefit of importing certain goods and materials free of duty. Several Jamaican companies apparently receive customs duty relief under the domestic exemption regime under which they pay no CET on certain imported raw materials. All Jamaican soap producers were granted relief under this regime from 14 September 2021 onwards.



[35] The Defendant also claimed that given the Claimant's delay in providing the samples of soap noodles and the quality concerns expressed by Jamaican soap producers, the JCA permitted the importation of soap noodles from extra-regional sources, free of customs duty in accordance with the domestic exemption regime.

[36] In these proceedings before the Caribbean Court of Justice ('CCJ') the Claimant contends that due to the Defendant's actions, it cannot fully enjoy the benefit conferred on it by Article 82 of the RTC, that as a result, it is less competitive in the Defendant Member State and that it has suffered financial loss.

[37] In the Jamaica Supreme Court, the Claimant contended that the issues before that court involved questions concerning the interpretation and application of the RTC. Since the CCJ has the exclusive authority to interpret and apply the provisions of the RTC, the Claimant accordingly made an application to the Supreme Court for a referral to this Court in accordance with Article 214 of the RTC. The Supreme Court held, on 18 August 2022, that it was at the time unable to make a determination on whether to refer the questions proposed to this Court because the proceedings were not at a stage that rendered them ripe for referral to the CCJ.

[38] It was in these circumstances that the Claimant applied to this Court for and was granted Special Leave to institute these proceedings.

## **Pleadings**

### **Originating Application**

[39] The Claimant filed its originating application on 7 October 2022, an amended originating application on 3 March 2023 and a further amended originating application on 29 March 2023. In the further amended originating application, the Claimant sought the following relief:

1. A declaration that the Respondent's agents have breached Article 82 and paragraph 18 of Schedule III of the Revised Treaty of Chaguaramas by failing

to apply the 40% Common External Tariff applicable to soap noodles imported into Jamaica from Non-CARICOM sources;

2. An order requiring the Defendant's Custom's officers to impose the 40% Common External Tariff applicable to soap unless the Council for Trade and Economic Development grants a suspension under Article 83(2) or paragraph 19 of Schedule III of the Treaty;
3. A declaration that the Defendant (through its Trade Administrator) has breached Article 84 of the Revised Treaty of Chaguaramas by unlawfully issuing Certificates of Origin to Jamaican soap producers in respect of soap products made from extra-regional soap noodles;
4. An order requiring the Respondent to cease issuing Certificates of Origin in respect of soap products made from extra-regional soap noodles unless the CARICOM Secretary General has issued a certificate pursuant to Article 84(7) of the Revised Treaty of Chaguaramas;
5. Compensation for breaches of the provisions of the Revised Treaty of Chaguaramas mentioned in 1 and 4 above; and
6. The Defendant to pay the costs of these proceedings.

### **Defence**

[40] The Defendant filed its defence on 12 December 2022, an amended defence on 22 February 2023 and a further amended defence on 14 April 2023. The Defendant contended that this matter is not one subject to this Court's jurisdiction and sought the following relief:

1. A declaration that the Defendant did not breach Article 82 of the Revised Treaty of Chaguaramas;

2. A declaration that the Defendant did not breach paragraph 18 of Schedule III of the Revised Treaty of Chaguaramas;
3. A declaration that in the administration of the Common External Tariff, the importation of soap noodles from outside of the Community, qualified at the material time to be treated by the Defendant's Customs officers as exempt from the 40% CET under Article 82 of the Revised Treaty of Chaguaramas in accordance with its Productive Inputs Relief Regime established under the Customs Tariff (Revision)(Amendment) Resolution 2013 of Jamaica's Customs Act 1941 pursuant to rule 5(b) of the Rules Governing the Application of the List of Conditional Duty Exemptions of the CET;
4. A declaration that the jurisdiction of this Honourable Court extends only to matters arising in the Community or the Caricom Single Market and Economy as the case may be;
5. A declaration that the relevant period of review is only from about 2019, to June 2021 inclusive;
6. A declaration that within the Community, the Claimant was not precluded from enjoying, or prejudiced from any benefit flowing from Article 82 of the Revised Treaty of Chaguaramas concerning supplying soap noodles, because of its unsuccessful bid to supply soap noodles to Jamaican manufacturers;
7. The Claimant's Claim is dismissed;
8. The Claimant is not awarded any compensation, including any alleged loss of revenue in respect of lost market share in Jamaica and/or Guyana as prayed, or at all; and
9. Each party must bear its costs.

[41] The Claimant filed a reply to the amended defence on 13 March 2023 and the Defendant filed a rejoinder on 24 March 2023.

## **Addition of the Caribbean Community ('CARICOM') as Amicus Curiae**

[42] In the defence filed by the Defendant dated 12 December 2022, as previously indicated, claims were made against CARICOM. By consent of the parties, CARICOM was added to the proceedings as a Defendant. However, at a case management conference of 3 March 2023, the Defendant indicated that they did not wish to maintain any claims against CARICOM and the Court permitted CARICOM to be removed as a Defendant to the proceedings and to appear instead as an amicus curiae.

### **The Evidence at Trial**

#### **(a) Mr Yvor Nassief – Witness for the Claimant**

[43] Mr Nassief is the Claimant's Managing Director. He gave uncontradicted evidence about how the Claimant assumed control over the operations of Colgate-Palmolive in the Member State of Dominica. He indicated that since 2020, the Claimant has provided soap noodles to soap processors in the Member States of Trinidad and Tobago and Guyana, and also in Curacao. He testified that none of the soap processors from those jurisdictions has ever complained about the quality of the Claimant's soap noodles as regards moisture levels or scent.

[44] This witness further testified that in December 2020, the Defendant requested samples of soap noodles from the Claimant and the Claimant sent the samples in January 2021 as they were undertaking a maintenance shutdown in December 2020. He stated that if the soap producers of the Defendant Member State were satisfied with the quality of the Claimant's soap noodles, they were to indicate whether they would engage the Claimant as their supplier of soap noodles instead of importing soap noodles from third States. In the event that the Claimant was contracted to supply soap noodles to soap producers of the Defendant Member State, the Claimant

would need at least four months lead time to procure the quantity of raw materials necessary to produce at a capacity to fulfil such a contract.

- [45] According to the witness, the samples which were shipped to the soap producers of the Defendant Member State were of the same specifications as those soap noodles which are shipped to the Member States of Trinidad and Tobago and Guyana, and also Curacao. He explained that soap producers can request that the soap noodles be produced to ensure a certain moisture level or moisture content and when they do, the Claimant will make the consequential adjustment.
- [46] Mr Nassief claimed that the first shipment of soap noodles which was sent to the Defendant's producers did not meet the latter's moisture specifications due to the packaging of the soap noodles in one-ply bags. These bags did not have sufficient internal lining to preserve the moisture levels to accommodate unforeseen shipment delays and prolonged exposure to ambient heat. This resulted in moisture being lost *in transit*. The Claimants had apologised that the soap noodles were received in the Defendant Member State in a drier condition than expected. The Claimant also indicated to Kirk FP that the Claimant would in future source new bags with an internal lining which would better retain the moisture content in the product. The second shipment of soap noodles, based on the Bureau of Standards Jamaica tests, was within the moisture specifications as three-ply bags were used for the second shipment.
- [47] Mr Nassief stated that the Claimant initially manufactured tallow-based soap as tallow was procured from the United States, and it took only about one month for the shipment of tallow to reach Dominica. He said that the Defendant's preference for palm-based soaps was not understood by the Claimant, as the same end product is produced whether tallow or palm is used in the saponification process. However, because the Claimant recognised that the Jamaican market constituted 50% of the Community's market for soap, the Claimant in 2019, and at some expense, replaced its tallow base with a palm base to accommodate the Jamaica market. The palm base

was procured from the Far East and the shipment period to Dominica was about three months.

[48] Apart from the complaints about the moisture levels of the Claimant's soap noodles, Mr Nassief stated that the soap producers of the Defendant Member State also complained that the Claimant's soap noodles 'slipped in the plodder' (a piece of machinery) during the production process. The evidence of the witness was that although the Claimant followed up with the Jamaican soap producers on the quality of the soap noodles, the slipping issue was not communicated to the Claimant so that the Claimant could give advice on the appropriate setting the producers should use on their machinery. He stated that the Claimant only became aware of this issue after the legal proceedings were commenced by it in the domestic court of the Defendant Member State.

(b) **Mr Damien Sorhaindo – Witness for the Claimant**

[49] Mr Sorhaindo is the Claimant's General Manager. He reiterated that the soap producers of the Defendant Member State made no formal complaint about the moisture levels of the Claimant's soap noodles until the Claimant commenced legal proceedings in the Supreme Court of Jamaica. He also indicated that if the Claimant had been made aware of the issues faced by the Defendant's producers in processing the Claimant's soap noodles, the Claimant could have assisted the Jamaican soap producers in resolving those issues.

[50] His evidence was that after the Claimant indicated to the soap producers of the Defendant Member State that their moisture concern was as a result of the one-ply bags initially used for the shipment of the samples of soap noodles and that the issue had been rectified, the Jamaican soap producers made no further requests for soap noodles from the Claimant.

[51] Mr Sorhaindo also gave evidence that the Claimant supplies soap noodles to other CARICOM Member States but to smaller markets than the Defendant State's market.

The Claimant's capacity to supply soap noodles to the Defendant was indicated since the time when the plant was owned and operated by Colgate-Palmolive. He stated that the Claimant has the capacity to produce 10,000 to 12,000 tonnes of soap noodles per year, but it currently operates at one-tenth of the capacity of its production. He stated that the Claimant could therefore, if necessary, increase production to satisfy the Defendant's demand, which he assessed at about 180 tonnes of soap noodles per month.

(c) **Lorna Brissett – Witness for the Defendant**

- [52] The first witness for the Defendant was Ms Lorna Brissett. Ms Brissett has been the Manager, Export Certification and Trade Agreements at the Defendant's Trade Board Limited ('Trade Board') since 2018. The Trade Board is the certified authority for the issuance of Certificates of Origin, but the Ministry of Industry, Commerce, Agriculture and Fisheries can direct the Manager to issue or cease to issue Certificates of Origin.
- [53] Ms Brissett acknowledged that while the Defendant's applications for Safeguard Certificates were pending, rather than awaiting the determination of the Secretary-General of CARICOM of these applications, the Trade Board of the Defendant continued issuing Certificates of Origin to soap producers of the Defendant Member State. The witness also conceded that in September 2020, after the CARICOM Secretary-General refused the Defendant's applications on the basis that the Jamaican soap products did not qualify for community treatment, the Trade Board continued to issue Certificates of Origin to Jamaican soap producers. This continued until June 2021 when the relevant Ministry of the Defendant Member State ultimately directed that this practice should cease.
- [54] Ms Brissett agreed that the decisions of COTED should be followed. On the classification issue, she indicated that soap noodles and finished soap products had been classified under different tariff headings as there was thought to be a change in the tariff heading when the soap noodles were transformed into finished soap

products by the soap producers of the Defendant Member State. The witness acknowledged that, after it was clarified by the WCO that there was no change in tariff heading after this ‘transformation’, the Trade Board continued to issue Certificates of Origin per the direction of the Ministry.

(d) **Mr Orane Thompson – Witness for the Defendant**

- [55] Mr Thompson is a Monitoring Supervisor in the Incentives Unit of the JCA. He is responsible for determining who may benefit under domestic exemption schemes. He indicated that Blue Power, a Jamaican soap producer, was approved for relief under the domestic exemption regime in 2021. He also indicated that other soap producers were granted relief under the domestic exemption regime, but he was unsure as to when.
- [56] Mr Thompson recognised that the Claimant is a relevant stakeholder in the Jamaican soap market as the Claimant could be considered as part of the group of manufacturers that would have been affected by the WCO’s classification opinion. He agreed that the Form documents submitted by the Jamaican soap producers in support of their application to benefit under the domestic exemption regime provided no indication that any attempt had been made to verify whether the local soap producers could source soap noodles within CARICOM.
- [57] Mr Thompson contended that soap can be exempted under the domestic exemption regime as soap appears on Part II of the List of Ineligibles appended to the List of Conditional Duty Exemptions in the Revised CET. To qualify for exemption from the CET under the domestic exemption regime, there had to be transformation of the imported product. It was his evidence that the soap noodles imported by the Defendant’s soap producers were combined with other chemical components in Jamaica to create a new and distinct product and that this process constituted more than simple mixing. In his view it constituted transformation as required by the domestic exemption regime. Under that regime, a product is considered new and distinct where it differs from the inputs going into it. In this case, he stated, there is a



chemical process which produces that difference and there is a commercial alteration. This, he stated, constituted sufficient ‘transformation’ under the domestic exemption regime and that regime need not and does not take into account the requirements for ‘substantial transformation’ posited by or under the RTC.

[58] In his evidence, Mr Thompson also indicated that he did not try to ascertain whether soap noodles were available elsewhere in CARICOM.

(e) **Ms Shandilayne Davis – Witness for the Defendant**

[59] Ms Davis is the Senior Director, International and Industry Liaison of the JCA. Ms Davis’ role includes contributing to the development of national foreign policy with respect to trade in goods, contributing to negotiations in mutual recognition agreements and trade agreements internationally and regionally, playing a representational role internationally, regionally, and locally, informing policy on Customs matters and general trade in goods, overseeing tariff classification and enforcing the Rules of Origin under the RTC. The Ministry of Finance and Public Service is the parent Ministry of the JCA.

[60] Ms Davis gave evidence about the Defendant’s domestic exemption regime. She testified that to benefit from the same, the Defendant’s Customs department would have had to verify that there was no regional supply of the exempted product. Ms Davis indicated that in determining whether there was adequate supply of soap noodles available in the region, the Customs department would normally look at the ability of suppliers to provide the requisite quantity and quality of soap noodles required by Jamaican producers. They first looked at Part I of the List of Ineligibles to see if the product was on that List and they would engage with the Ministry of Industry, Investment and Commerce to discover what was the regional status of the particular input. Dialogue was also conducted with relevant stakeholders.

- [61] The witness testified that it was brought to the attention of the Defendant's Customs department that the Claimant's soap noodles did not meet the requisite quality standards. She stated that the Defendant continues to exempt soap noodles imported from extra-regional sources from the obligation to pay the CET based on the domestic exemption regime. According to her, Blue Power was approved under the domestic exemption regime in 2016 and 2021. The relief granted was set to expire in 2019 based on the approval given in 2016. Blue Power would have had no relief under the domestic exemption regime in the gap between approvals, but the Commissioner of Customs granted extensions of approval due to the COVID-19 pandemic. The witness stated that during the period of the pandemic, Blue Power did not pay the 40% CET on imported soap noodles. She confirmed that Blue Power imported soap noodles and classified them as industrial soap attracting a CET of 0%. She conceded that this would have been a misclassification of the soap noodles.
- [62] Ms Davis agreed that the JCA should properly have indicated on the form on which it made its request for advice from the WCO, that there were other views on the classification of soap noodles. The JCA was of the view, however, that there was no dispute with any importer or exporter as the investigation into the issue of the classification of the soap noodles was being addressed by the government of the Defendant Member State.
- [63] Ms Davis acknowledged that the classification decisions of COTED are binding on Member States, but she contended that the Defendant's domestic exemption regime is consistent with the CARICOM regime as it is informed by the CET and complies with the List of Conditional Duty Exemptions. Soap is on Part II of the List of Ineligibles and therefore qualifies for the exemption without suspension of the CET. If soap were moved to Part I of the List of Ineligibles and did not qualify for exemption, a regional soap manufacturer would have to demonstrate that they could provide soap in the requisite quantity and at the technical specifications in terms of quality.

[64] It was the opinion of the witness that the Defendant, although concerned about the Claimant's ability to provide soap noodles in the requisite quantity and quality, did not need to seek a suspension of the CET as r 5(b) under the List of Conditional Duty Exemptions does not require a suspension of the CET. She was of the view that it was only in respect of goods falling under Part I of the List of Ineligibles and r 5(a) that a CET suspension would be required.

[65] Ms Davis stated that the Defendant's soap producers are entitled to determine the quality specifications they require as they have a right to produce goods at a standard determined by them and that they would normally inform the State when there is an issue with quality.

(f) **Martin Phillips – Witness for the Defendant**

[66] Mr Phillips is currently the Director of International Trade in the Trade Unit in the Ministry of Industry, Investment and Commerce. He has worked at the Ministry since 2015. In 2018, he was the Director of Commodities. He indicated that he was aware of Colgate-Palmolive in Dominica which manufactured soap noodles but was not aware that that company had the capacity to supply soap noodles regionally.

[67] Mr Phillips stated that the Jamaican soap producers had complained to the Ministry of Industry, Investment and Commerce about the moisture levels of the Claimant's soap noodles, but he accepted that he did not communicate with the Claimant about this issue or ask the Claimant to comment on the same. Mr Phillips was therefore not aware that, to ensure preservation of the moisture levels, the Claimant had changed the bags used when shipping soap noodles. Mr Phillips also was not aware that Bomber Manufacturing Limited, a Jamaican soap producer had requested from the Claimant toilet soap noodles and had tried to use the noodles supplied for this purpose to produce instead laundry bars which require a higher moisture level.

[68] Mr Philips agreed that although Island Products, a Jamaican soap producer, had complained that the Claimant's soap noodles had a rancid smell which, it was

claimed, affected their finished products, when the Bureau of Standards of Jamaica tested the soap noodles, the results indicated that the smell was not rancid. Mr Philips also accepted that, apart from Island Products, no other Jamaican soap producer had complained that the Claimant's soap noodles gave off a rancid odour. The witness did confirm that Island Products had sent him an email on 23 June 2021 (after the Defendant had ceased issuing Certificates of Origin) indicating, *inter alia*, that they had no intention of doing business with the Claimant as the Claimant's protestations throughout the region had rendered Island Products' soap products ineligible for duty-free export within the region.

### **The Issues Arising**

[69] Ultimately, the Court must determine the following issues:

- i. Whether the Defendant is in breach of Article 82 and paragraph 18 of Schedule III of the RTC by failing to require the imposition of the 40% CET applicable to soap noodles imported into the Defendant Member State from third States. This issue in turn raises the further issues of whether the Defendant's domestic exemption regime permits the Defendant to waive the CET on imported soap noodles if the goods derived from those soap noodles are sold only in Jamaica and or exported to third States.
- ii. Whether, before it ceased doing so, the Defendant was in breach of Article 84 of the RTC by issuing Certificates of Origin to its soap producers in respect of soap products made from soap noodles imported from third States.
- iii. In relation to (i) and (ii) above, if the Defendant were found to be in breach, whether
  - (a) a Defence of 'Good faith' avails the Defendant Member State and/or

- (b) on the evidence adduced, there was an inadequate supply of ‘raw materials’ regionally.

## **Submissions**

### **Submissions by the Claimant**

- [70] The Claimant submitted that misclassification of extra-regionally imported soap noodles prior to November 2019 was a breach of Article 82 of the RTC and the Defendant deliberately failed to take ‘all appropriate measures ... to ensure the carrying out of obligations arising [from the RTC]’ under Article 9 of the RTC. In relation to the Defendant’s domestic exemption regime the Claimant submitted that the manner in which the programme giving rise to the regime was drafted does not allow the JCA to waive imposition of the CET. Under the domestic exemption regime, minimal processing of an imported good cannot be regarded as ‘manufacturing’. It was further submitted that goods which the Commissioner of Customs is satisfied can be obtained in adequate supplies from a local manufacturer or a manufacturer within CARICOM cannot be exempted. The Claimant submits that they are a manufacturer of soap noodles within the Common Market area and therefore, the domestic exemption regime cannot apply to the Defendant’s importation of extra-regional soap noodles.
- [71] The Claimant further submitted that the List of Conditional Duty Exemptions appended to the Revised CET did not allow the Defendant unilaterally to exempt its soap producers from paying the 40% CET on the importation of extra-regionally manufactured soap noodles. Even if the Conditional Duty Exemptions could apply to the goods produced by the soap producers of the Defendant Member State, the Defendant’s domestic exemption regime as drafted did not allow it to waive the 40% CET and the failure to impose that tariff on soap noodles imported from third States was contrary to an express direction from COTED. Such a direction would supersede any conditional duty exemption to which the Defendant considered it was entitled.

- [72] It was further submitted that the List of Conditional Duty Exemptions did not apply because r 4(a) of the Rules Governing the Application of the List imposes a requirement that has not been met by the Defendant. To qualify for community treatment and by extension, exemption under the List of Conditional Duty Exemptions, goods must be wholly produced in the region or must be produced by a process which results in substantial transformation which is characterised by a change in tariff heading.
- [73] On the issue of whether the Defendant breached Article 84 of the RTC by issuing Certificates of Origin for soap products that did not qualify for community treatment, the Claimant submitted that the Defendant issued those Certificates of Origin knowing that doing so was contrary to Article 84 and in violation of a specific direction from COTED. Furthermore, the Claimant added, the Defendant does not satisfy the requirements under Article 84 of the RTC as the production processes of its soap producers, when applied to the imported soap noodles, do not yield any true change in tariff heading. This evidences the fact that the Defendant's soap producers are engaged in minimal processing. Additionally, although the Defendant's application for Safeguard Certificates was denied and the Defendant's soap products did not satisfy the requirements for community origin, the Defendant continued to issue Certificates of Origin in respect of the soap products of its producers.
- [74] On the issue of the quality of the Claimant's soap noodles, it was submitted that there was no cogent evidence to support the opinion that the soap noodles manufactured by the Claimant had a rancid smell or caused damage to machinery.
- [75] The Claimant submitted that it was not a defence for the Defendant to assert that it acted in good faith in misclassifying the imported soap noodles and, hence, in failing to impose the requisite CET on the soap noodles imported from third States.

### **Submissions by the Defendant**

- [76] The Defendant submitted that prior to November 2019, the JCA, in good faith, misclassified soap noodles by giving them a tariff heading of 38.23. This classification was based on comprehensive research conducted by the JCA which indicated that soap noodles are the salts of fatty acids from oils or fats of both animal and vegetable origin. The Defendant submitted that prior to 2021, there was no determination by COTED as to which tariff heading should be applied to soap noodles and so, in erroneously applying the incorrect tariff heading, there was no, or no deliberate, breach. The Defendant simply made an error which was subsequently corrected.
- [77] The Defendant submitted that its domestic exemption regime is lawful and permissible under Article 82 of the RTC and the List of Conditional Duty Exemptions and the accompanying Rules established by COTED. It therefore conforms with the RTC.
- [78] On the misclassification issue, the Defendant stated that the JCA, based on its technical analysis, formed the view that several soap producers of the Defendant Member State engage in manufacturing within the meaning ascribed under the domestic exemption regime and that their manufacturing processes involve more than minimal processing. There was no breach of Article 84 of the RTC as, prior to November 2019, the Trade Board issued Certificates of Origin to Jamaican soap producers in good faith consistent with the JCA's honest misclassification of soap noodles under tariff heading 38.23. The Trade Board, based on its technical analysis, had assessed that the soap producers of the Defendant Member State engaged in substantial transformation of the imported soap noodles thereby warranting a change in tariff heading.
- [79] The Defendant further submitted that the Claimant had demonstrated that it could not produce soap noodles to the requisite specifications. At the very least, the Claimant was not yet in a position, at the time of the insistence by the Member State of

Dominica at the COTED meetings, to supply soap noodles of the quality, specification and quantities required. The Defendant submitted that the capacity of the Claimant's plant should not be equated with the quality of the output that is being produced.

**Submissions by CARICOM (Amicus Curiae)**

- [80] Counsel for CARICOM highlighted that under Article 82 of the RTC, Member States should maintain the CET for all goods which do not qualify for community treatment. The List of Conditional Duty Exemptions sets out the goods which, when imported for the purposes stated in the List, may be admitted into the importing Member State free of import duty or at a rate which is lower than that set down in the Schedule of Rates, subject always to the approval of the relevant competent authority of the Member State.
- [81] Counsel referenced three conditions that must be satisfied under the Conditional Duties Exemptions Rules for a Member State unilaterally to exempt extra-regional inputs from the imposition of the CET. Firstly, the inputs must be items which were imported for the purposes stated in the List of Conditional Duty Exemptions which are eligible for duty exemption. Counsel emphasised that the List of Ineligibles embodies the principle that Member States should source from within the region those goods which are available. Secondly, where items are on Part I of the List of Ineligibles, they are not eligible for duty exemption or reduction if they are imported for use in industry, agriculture, forestry, fisheries, and mining, except in limited circumstances. Additionally, when items are set out in Parts I and II of the List of Ineligibles, they are not eligible for duty exemption or reduction when they are imported for other approved purposes.
- [82] Rule 4(a) of the Rules Governing the Application of the List of Conditional Duty Exemptions provides that where the goods produced by an enterprise do not meet the qualifying conditions set down with respect to those goods in Schedule I of Article



84 of the RTC, the enterprise will not qualify for exemption from duty with regard to the materials utilised in the production of those goods.

[83] On the issue of the alleged breach of Article 84 of the RTC and the Defendant's issue of Certificates of Origin premised on an application for Safeguard Certificates, counsel for CARICOM clarified that a request for a Safeguard Certificate applies only in the case of items on the 'List Of Conditions to be Complied With as provided under Article 84 of the Treaty and the Rules Regarding Community Origin' which is found at Schedule I of the RTC, for which the product's specific rule of origin is 'wholly produced' or 'produced from regional materials.' Soap does not appear on the List of Conditions to be Complied With, so the Secretary-General did not grant a Safeguard Certificate as the product specific rule of origin for soap is a change in tariff heading and not 'wholly produced' or 'produced from regional materials.'

[84] According to counsel, there is no need to seek a CET suspension if a unilateral exemption is possible under the List of Conditional Duty Exemptions.

[85] On the issue of whether available regionally produced raw materials meet the product specifications and standards of an importing manufacturer, counsel for CARICOM submitted that regional standards might be adopted by COTED based on the recommendation of CARICOM Regional Organisation for Standards and Quality ('CROSQ'). A regional standard is voluntary. Regional standards set the floor beyond which the standard should not fall, but the requisite standards do not preclude a manufacturer from opting to go beyond the requirements of the regional standard.

#### **Submissions of CARICOM on Particular Questions Posed by this Court**

[86] Through requests dated 11 and 13 July 2023, this Court requested that counsel for CARICOM file written submissions on several questions. The written submissions were filed on 16 July 2023. The first question was in what circumstances, if at all, do the CET Rules governing the Application of the List of Conditional Duty Exemptions

justify a Member State's unilateral decision to exempt extra-regional inputs from the imposition of the CET.

- [87] On this question, counsel for CARICOM submitted that under the Rules Governing the Application of the List of Conditional Duty Exemptions, a Member State has the discretion, in certain circumstances, to unilaterally exempt a good, including extra-regional inputs, from duties to which the CET would generally apply, or to apply a tariff lower than the agreed CET contained in COTED's Schedule of Rates. The unilateral exemption could be applied where the inputs are items which, when imported for the purposes stated in the List of Conditional Duty Exemptions, are eligible for duty exemption; the inputs are not precluded from duty exemption under r 5; and in the case of inputs used in the production of goods on the List in Schedule I of the RTC, the goods produced meet the qualifying conditions for Community origin prescribed in the Schedule.
- [88] The List of Conditional Duty Exemptions contains the goods which Member States may exempt from duty when such goods are imported for the purposes specified in the List such as for industry, among other purposes.
- [89] The inclusion of items on the List of Ineligibles appended to the List of Conditional Duty Exemptions is informed by the consideration of whether there exists an adequate regional supply capability. Rule 5 prescribes the circumstances under which the goods included in the List of Ineligibles are precluded from the unilateral exemption or reduction of the CET. The items set out in Part I of the List of Ineligibles are not eligible for exemption or reduction from duty when imported for use in Industry, Agriculture, Fisheries and Mining subject to exceptions provided in the List.
- [90] The items set out in Part I and Part II of the List of Ineligibles are not eligible for duty exemption or reduction when they are imported 'For Other Approved Purposes' (excluding use in rehabilitation or relief following natural disaster), unless the competent authority is satisfied that the items are gifts or have been provided on a concessional basis.

- [91] Rule 4 disallows duty exemption for extra-regional materials used in the production of goods that ‘do not meet the qualifying conditions set down with respect to those goods in Schedule I’ of the RTC. Schedule I contains the list of conditions to be complied with in order for the products specified in the List to qualify for Community origin. Rule 4 does not apply to goods produced for export to third countries.
- [92] The second question posed by this Court to counsel for CARICOM enquired as to the circumstances in which it would be necessary for a Member State to apply for a Safeguard Certificate under Schedule III, Part IV, r 19(2)(a) of the RTC. Counsel relied on two official published documents of the CARICOM Secretariat which provide a guide to the Community Rules of Origin and the working of the safeguard mechanism under those Rules namely, the Administrative Arrangements relating to the Alteration and Suspension of Rates under the CET and the Working of the Safeguard Mechanism under the Common Market Origin Rules 1992 and secondly, the Rules of Origin of the Caribbean Common Market: An Explanation of its Scope and Operational Features 1992. These documents were published before the entry into force of the RTC but are used by CARICOM as official guides on the Community Rules of Origin.
- [93] The third question posed by the Court to counsel for CARICOM concerned the process for deciding whether a product, or an input into a good, meets the criteria for the grant of a Safeguard Certificate and whether quality is one of those criteria. Counsel for CARICOM submitted that the Secretary-General of CARICOM is responsible for issuing Safeguard Certificates. Before discharging this responsibility, the Secretary-General is required to undertake investigations to satisfy herself that the application for a Safeguard Certificate received from the competent authority of the Member State requesting the Certificate justifies favourable consideration by meeting the relevant criteria. Where the qualifying condition for the manufactured good is ‘wholly produced’ or ‘produced from regional materials’, the process set out in Article 84 of the RTC is engaged.

- [94] Counsel noted that, to the extent that quality is an element of the specifications of the materials sought by the manufacturer, it may be considered as part of the criteria for the grant of a Safeguard Certificate. However, there is no specific reference in the RTC to the quality of the materials sought as a criterion independent of the specifications of those materials.
- [95] The fourth question posed by this Court enquired as to the significance of delay in supplying a requested sample of a good or input into a good to test for quality under Article 84 of the RTC.
- [96] Counsel for CARICOM submitted that Article 84 of the RTC does not refer to supplying a requested sample of a good or input in the process leading to the grant of a Safeguard Certificate. However, Article 84(4)(b) of the RTC states that, at the time of making an application for a Certificate, the competent authority of the applicant State will inform the other Member States of the inability of the manufacturer to obtain the supplies of the required materials sought from the community with respect to *inter alia*, the specifications of the materials sought.
- [97] The fifth and final question posed by this Court to counsel for CARICOM concerned the factors to be considered by the Secretary-General in determining whether to issue a Safeguard Certificate. CARICOM submitted that a key factor for the Secretary-General to consider is whether the qualifying condition for the good produced by the manufacturer is ‘wholly produced’ or ‘produced from regional materials’. If the good concerned is not on the List in Schedule I of the RTC or appears on the List but is subject to a different qualifying condition, a Safeguard Certificate should not be issued.
- [98] Provided the qualifying condition for the good concerned is ‘wholly produced’ or ‘produced from regional materials’, the Secretary-General should consider the ability of Member States to supply the materials required by the manufacturer with reference to the quantities and specifications of the materials sought and the period during which the materials are required.

### **Further Submissions**

[99] By Order dated 28 July 2023, the Court directed that the parties file written submissions specifically to address the issue of whether there is any tension between Schedule III of the RTC and r 5(b) of the List of Conditional Duty Exemptions under the CET with respect to any goods which fall within the definition of ‘oils and fats’ listed therein and, if there is such tension which provision should prevail and why.

### **Further Submissions by CARICOM (Amicus Curiae)**

[100] Counsel for CARICOM submitted that there is no tension between Schedule III of the RTC and r 5(b) of the List of Conditional Duty Exemptions under the CET with respect to goods which fall within the definition of ‘oil and fats’. According to counsel, Schedule III of the RTC elaborates on CARICOM’s trade policy for the oils and fats sub-sector. Paragraph 4 [sic] of Part II of Schedule III of the RTC provides that COTED shall, as necessary, determine the conditions for the importation and exportation of substitutes. Soaps including all soaps in block, bar, tablet or powdered form not produced within CARICOM are listed as substitutes.

[101] Counsel stated that paragraph 18 of Schedule III of the RTC should be read in the context of Chapter Five which sets out the general trade policy of CARICOM and Articles 82 and 83 of that Chapter. The List of Conditional Duty Exemptions, counsel noted, is a part of the CET structure which was agreed and implemented by a Working Group of Experts. The List allows Member States to grant exemption from the duties ordinarily payable on goods not of community origin which are imported and are to be used for certain approved purposes or by approved individuals or organisations. Counsel noted that soap is on Part II of the List of Ineligibles which is appended to the List of Conditional Duty Exemptions.

[102] Counsel indicated that COTED has included oils and fats on the List of Ineligibles and the conditions upon which Member States may exempt oils and fats from duty

accords with COTED's responsibility under Schedule III to determine the conditions for the importation and exportation of oils and fats substitutes.

### **Further Submissions by the Claimant**

- [103] In addressing the issue as to whether there exists any possible tension between paragraph 18 of Schedule III of the RTC and r 5(b) of the List of Conditional Duty Exemptions, the Claimant submits that r 5(b) is arguably not directly relevant to the issues in the claim. This is on the basis that r 5(b) states that items on the List of Ineligibles appended to the List of Conditional Duty Exemptions shall not be eligible for exemption where they are imported for 'Other Approved Circumstances' as set out in s XI of the Duties Exemption List. None of the approved circumstances listed in s XI of the list are applicable to the facts of the present case.
- [104] Counsel for the Claimant submitted that although the Defendant mentions r 5(b) in its written submissions, its primary reliance seems to be on the other rules and provisions in the conditional duty exemptions regime, particularly rr 1 and 2, r 5(a), the General Notes, the Explanatory Notes and the Duties Exemptions List.
- [105] The Claimant submits that the application of the List of Conditional Duty Exemptions to oils and fats contradicts paragraph 18 of Schedule III of the RTC and in light of this inconsistency, the provisions of the RTC should prevail. It was Counsel's opinion that there is indeed tension between the List of Conditional Duty Exemptions and the RTC.
- [106] The Claimant submits that there are provisions other than r 5(b) that may better indicate the overarching effect of the conditional duty exemptions regime. For example, the fifth paragraph of the General Note of the Revised CET allows the importation of goods free from any tariff, based on the approval of the competent authority of the Member State. The Explanatory Note which appears at the

beginning of the List of Conditional Duty Exemptions gives a similar explanation of how the conditional duty exemptions regime works. These provisions have the effect of allowing Member States to choose whether or not they will apply the CET on soap noodles used in ‘industry.’ Allowing Member States to exercise a discretion in applying the CET is an absolute contradiction of paragraph 18 of Schedule III of the RTC which uses mandatory language, according to counsel. Paragraph 18 states that Member States *shall* apply the rate of duty set by COTED on all imported oils, fats, and substitutes.

- [107] The aim of the mandatory requirement, submits counsel for the Claimant, is to ‘enhance the long-term viability of the regional oils and fats industry’ and increase ‘competitiveness of the oils and fats sub-sector.’ This aligns with the overall purpose of a customs unions generally, which is to establish a free trade area while uniformly applying external trade tariffs to safeguard industries within that free trade area. The RTC provides added protection for oils and fats by way of Schedule III of the RTC. The List of Conditional Duty Exemptions renders the application of the CET optional whereas Schedule III of the RTC makes the application of the CET mandatory.
- [108] Further, the Claimant submits that the drafters of the RTC intended that if a Member State believes there is a valid reason for lowering the CET on soap (or any other oil or fat), it is required to apply for a suspension under paragraph 19 of Schedule III of the RTC.
- [109] The Claimant further submits that special provisions supersede general provisions and that paragraph 18 of Schedule III of the RTC should prevail. The conflict arises between provisions which mandate a tariff on a specific class of goods unless there is a suspension and provisions which permit a waiver of that tariff on a general class of goods of the List of Conditional Duty Exemptions. The general provisions cannot be relied on to circumvent the specific protections in Schedule III of the RTC.

- [110] The Claimant further submits that the RTC is the primary agreement between Member States concerning trade within CARICOM. The RTC provisions bind the Defendant because of the principle of *pacta sunt servanda* and because the RTC provisions have been ratified and incorporated into local law. The COTED's Conditional Duty Exemptions regime is not a ratified treaty incorporated into local law by Member States. It represents a decision of the Ministerial Council to allow Member States to unilaterally decide whether to impose the CET it has established (subject to parameters).
- [111] While Article 82 of the RTC mentions that COTED may make determinations relating to the CET, these determinations cannot contradict the explicit terms of the RTC as that would essentially amend the RTC without adhering to the amendment process in Article 236 of the RTC. In any event, even if COTED was empowered to make a determination contradicting paragraph 18 of Schedule III of the RTC, COTED reversed that decision through an Article 29 qualified majority vote at its 51st meeting.

#### **Further Submissions by the Defendant**

- [112] On the issue of whether there is tension between paragraph 18 of Schedule III of the RTC and the List of Conditional Duty Exemptions, counsel for the Defendant submitted that the inclusion of oils and fats in Part II of the List of Ineligibles established by the COTED indicates the clear intention to extend policy discretion for Member States with respect to oils and fats and suggests that their inclusion will not frustrate the Schedule III objectives.
- [113] Further, stated counsel, r 4(a) of the Rules Governing the Application of the List of Conditional Duty Exemptions, in particular, provides appropriate protection for the oils and fats sub-sector and allows for the achievement of the Schedule III objectives. Flowing from this, counsel for the Defendant submitted that the presence of paragraph 18 of Schedule III does not preclude the application of the exemption regime established by the List of Conditional Duty Exemptions to



Article 82 of the RTC and its attendant rules, to oils and fats. Therefore, in counsel's view, there is no tension between Schedule III of the RTC and r 5(b) of the List of Conditional Duty Exemptions under the Revised CET with respect to goods which fall within the definition of 'oils and fats' listed.

[114] Counsel for the Defendant expressed agreement with the written submissions of the Amicus Curiae.

### **Analysis of Issues**

#### **Article 82 of the RTC**

[115] Article 82 of the RTC has already been set out in full at [12] above. The Defendant's position is that its exemption regime falls 'in accordance with plans and schedules set out in relevant determinations of COTED'. The most relevant and recent of such determination is the 2018 Rules Governing the Application of the List of Conditional Duty Exemptions ('the Rules')<sup>4</sup>. The contention of the Defendant State is that it is entitled to exempt its taxpayers from the Revised CET on soap noodles because:

a. Rule 5(b) of the Rules states that:

The items set down in Part I and Part II of the List of Ineligibles appended to this List of Conditional Duty Exemptions shall not be eligible for exemption or reduction of duty where they are imported for use in the circumstances contemplated in Section XI - For Other Approved Purposes (excluding 23 - Goods [including foodstuff] imported for use in rehabilitation or relief following natural disaster, as approved by the Competent Authority), except that this ineligibility will not apply where the Competent Authority is satisfied that the items are gifts or have been provided on a concessional basis.

b. Soap and soap noodles are on Part II of the List of Ineligibles under the Conditional Duty Exemption Regime in the Revised CET. By implication, this means that soap and soap noodles may be exempted where they are *not*

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<sup>4</sup> CARICOM Secretariat, *Revised Common External Tariff of the Caribbean Community* (n 2).

imported for use in the circumstances contemplated in Section XI - For Other Approved Purposes.

- c. The Defendant's use of the soap noodles is not classified in the circumstances contemplated in Section XI - For Other Approved Purposes.
- d. In consequence, the Competent Authority in the Defendant State is entitled to exempt soap noodles from the CET.

[116] This submission fails to consider the General Note<sup>5</sup> which prefaces the Rules, and which explains how the Rules regarding the List of Ineligibles must be interpreted. That General Note is overarching. It states, *inter alia*:

The List of Conditional Duty Exemptions sets out those goods which, when imported for the purposes stated in the List, may be admitted into the importing Member State free of import duty or at a rate which is lower than that set down in the Schedule of Rates, subject always to the approval of the relevant Competent Authority of the Member State. LDC Member States may apply the facility of conditional duty exemption by the inclusion in their national Customs Tariffs of a 'zero' rate, or a rate lower than that shown in the Schedule of Rates, in accordance with the decision of COTED to so reflect the duty relief. Conditional duty exemption would be accorded to all other items eligible therefore in accordance with the Rules Governing the Application of the List of Conditional Duty Exemptions.

In Part I of the List of Items Ineligible for Duty Exemption are set down those items which will not be eligible for the grant of exemption from duty (in whole or in part) where they are imported "For use in Industry, Agriculture, Fisheries, Forestry and Mining" (Section I of the List of Conditional Duty Exemptions). ...

At the same time, the items set down in Parts I and II of the List of Items Ineligible for Duty Exemption will not be eligible for the grant of exemption from duty (in whole or in part) where they are imported "For Other Approved Purposes" (Section XI of the List of Conditional Duty Exemptions), except where the items have been made available as gifts or on a concessionary basis.

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<sup>5</sup> *ibid* at 3.

*The List of Items Ineligible for Duty Exemption includes those items produced in the Caribbean Community in quantities which are considered adequate to justify the application of tariff protection. These items will not be eligible for the grant of exemption from duty (in whole or in part) where they are imported for use in Industry, Agriculture, Fisheries, Forestry and Mining (emphasis added).*

- [117] Rendering ineligible for duty exemption those items produced in the Caribbean Community in quantities considered adequate to justify the application of tariff protection is consistent with the objectives of the RTC and in particular with the treaty's Schedule III which elaborates a special regime for oils and fats. Soap and soap noodles fall squarely under the definition of 'oils and fats'.
- [118] Paragraph 18 of Schedule III stipulates that the Member States *shall apply* the rate of duty set by COTED on all imported oils, fats and their substitutes. The rate of duty set by COTED on soap noodles is 40%, as COTED reminded Member States in the course of this dispute (see [26] above). Paragraph 19 of Schedule III identifies a single circumstance in which the CET may be suspended on oils, fats, and their substitutes. That circumstance is where there is insufficient supply in the community. The reference to this circumstance is consistent with the notion that ineligibility for exemption is informed by the consideration of whether there exists an adequate regional supply capability.
- [119] The text of the Defendant's exemption regime is also consistent with the principle that, certainly regarding oils and fats, Member States should first source from within the single market. The Defendant's legislative regime acknowledges and suitably caters for this principle. Paragraph 2(b) of Part 5 of the Customs Tariff (Revision) (Amendment) Resolution 2013 of the Customs Act of Jamaica establishes the exemption regime. That provision states that goods of a type which the Commissioner of Customs is satisfied can be obtained in adequate supplies from a local manufacturer or from a manufacturer within the Common Market Area shall not be eligible for exemption from customs duty under this Part.

[120] On the evidence presented to the Court, it was manifest that, in granting exemptions from the CET on the importation of soap noodles, there was no consideration or assessment by the Defendant Member State of whether the product in question was available in adequate supply from regional manufacturers. On the other hand, the uncontroverted evidence adduced before the Court was that the Claimant is capable of supplying the entire single market with soap noodles and the Court was not convinced by evidence that suggested that the Claimant's soap noodles were rancid or otherwise unfit for purpose. On the contrary, the evidence was that in other parts of the Community the Claimant's soap noodles are utilised without complaint as to quality.

[121] The view contended for by the Defendant in these proceedings produces a result that is at variance with the aims and objectives of the RTC and with the clear provisions of the treaty. In particular, such a result would be entirely inconsistent with the objectives of Schedule III (See [13] above). The long-term viability of the regional oils and fats industry is not enhanced by that result. Nor is the regional marketing of oils produced from indigenous raw materials thereby facilitated.

[122] This Court has previously acknowledged that the CET is an important device that is utilised to achieve the objectives of the RTC. In *Trinidad Cement Ltd v State of Trinidad and Tobago*<sup>6</sup>, for example, at [75], the Court stated:

... the CARICOM CET is a fundamental pillar in the establishment of the CSME whereby the Caribbean Community would achieve 'harmonization' around a 'common rate, or common regime of rates.' The primary purpose of the CET was to encourage and promote the production of goods within CARICOM. It was one of a range of measures identified by the Member States as necessary in order to strengthen the productive sector and to accelerate the process towards making their exports internationally competitive.

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<sup>6</sup> [2019] CCJ 4 (OJ) (footnote omitted).

[123] Similarly, in *State of Belize v State of Trinidad and Tobago*<sup>7</sup>, the Court stated at [117]:

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

[124] In all the circumstances the Court finds that, in the absence of a suspension of the CET from COTED, the Defendant Member State is in breach of Article 82 and paragraph 18 of Schedule III of the RTC by failing to apply the 40% CET applicable to soap noodles imported into that Member State from third States.

#### **Article 84 of the RTC**

[125] The rules on when goods are to be treated as being of community origin and therefore entitled to the advantages specified for those goods, including community treatment, are mainly to be found in Article 84 of the RTC. The full text of the articles are set out in the Appendix to this judgment. In summary, and for the purpose of this case, goods that have been consigned from one Member State to a consignee in another Member State shall be treated as being of community origin, where the goods have been (a) wholly produced within the Community<sup>8</sup>; or (b) produced within the Community wholly or partly from materials imported from outside the Community by a process which effects a substantial transformation<sup>9</sup> of those materials. Such transformation is evidenced and characterised (i) by the finished product being classified in a tariff heading different from that in which any of those materials is classified; or (ii) in the case of the goods set out in the List in Schedule I of the RTC, only by satisfying the conditions therefore specified. Soap is not a good listed in Schedule I to the RTC.

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<sup>7</sup> [2022] CCJ 1 (OJ).

<sup>8</sup> Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 4 February 2002) 2259 UNTS 293, art 84(1)(a).

<sup>9</sup> *ibid*, art 84(1)(b).

- [126] Article 84 also speaks to the circumstances under and the process by which the Secretary-General may grant to the competent authority of a Member State a certificate authorising the use of like raw materials from outside the Community subject to such conditions as the Secretary-General may think fit to impose.
- [127] There is no dispute in this case that the Defendant was in breach of Article 84 of the RTC. The soap noodles imported by its soap producers were not wholly produced in Jamaica nor was there, effected in that Member State, any substantial transformation of the imported soap noodles sufficient to warrant a tariff heading of the finished good different from that in which the imported soap noodles are classified. As the WCO confirmed, both soap noodles on the one hand, and bath or laundry soap on the other, properly bear tariff heading 34.01. In the circumstances, the breach of Article 84 was properly conceded by counsel for the Defendant.
- [128] Counsel seeks to qualify the breach in two ways. First, counsel submits that, although the Defendant State was in breach of the RTC by initially classifying its soap products as being of community origin, it should not be found liable for that breach because it had acted in good faith in misclassifying the imported soap noodles given its understanding of the classification of tariff headings. This calls for a discussion on the significance of good faith.

### **Good Faith**

- [129] The doctrine of good faith undergirds much of international law in general and treaty law in particular. It is expected that states will act in good faith when entering into and performing treaties. States are bound by their treaty obligations and are expected to fulfil them in good faith<sup>10</sup>. If a state fails to do so, it may be considered to be in breach of the treaty, and it may face legal consequences or diplomatic repercussions. Good faith is relevant to and characterises *the manner in which a State must perform* its international obligations. The objective obligation in the treaty as well as the

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<sup>10</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 26.

manner in which that obligation is performed must be consonant with good faith although, as was stated by Waldock in the International Law Commission's Report, the obligation is 'one of good faith and not *stricti juris*.'<sup>11</sup> The object and intention of the parties are overriding, rather than a literal observation of the wording of the treaty. A good faith attempt is not usually sufficient. A breach in good faith is still a breach and implies responsibility. This means that 'good faith' may be used to expand on what would ordinarily be regarded as the normal range of international obligations, rather than to contract them.

[130] It is also the case that good faith could be relevant in the process of treaty interpretation. Article 31 of the Vienna Convention on the Law of Treaties ('VCLT') states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning...'. The exact contours of how to interpret a treaty in good faith are not fully mapped onto international relations but an element of 'reasonableness' must be inherent when an interpretation is advanced. The obligation to interpret a treaty in good faith is limited in that new obligations cannot thereby be created. Good faith interpretation may be used to clear up ambiguous wording but cannot be used as a gap-filling device to create new obligations.

[131] For the Defendant Member State to succeed on the point that good faith plays the role argued for in the interpretation of treaty obligations, they would have to establish that this interpretation was shared by contesting Member States. See *European Communities – Customs Classification of Certain Computer Equipment*<sup>12</sup> where it was stated that 'the purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty.'

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<sup>11</sup> Sir Humphrey Waldock, 'Third Report on the Law of Treaties' (1964) 2 UNYB Int'l L Comm'n 5, 7.

<sup>12</sup> *European Communities - Customs Classification of Certain Computer Equipment* (5 June 1998) WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R at [84] (emphasis added in original).

[132] More critically, it is the view of this Court that the facts and evidence of the actions of the Defendant Member State in this case, much of which was not contested by the Defendant State, do not support the submission that the Defendant Member State has acted throughout in relation to this matter in good faith. In all the circumstances the Court does not accept that the breach of Article 84 by the Defendant Member State is excusable on this basis.

### **Inadequate Supply**

[133] Article 84(3) of the RTC outlines the process by which the competent authority of a Member State may report to the Secretary-General of CARICOM on the issue of inadequate supply. Where there is an interruption or inadequacy of supplies of regional materials, and the manufacturer of goods, which must be ‘wholly produced’ or ‘produced from regional materials’, is unable, by reason of circumstances beyond their control, to obtain supplies of the regional materials, the manufacturer must inform the competent authority. This is the process that triggers an application by the competent authority for a safeguard certificate from CARICOM.

[134] In this instance, the Claimant’s ability to supply an adequate quantity of soap noodles is not being called into question. The concerns of the Defendant State, as raised in its application for Safeguard Certificates under Article 84 of the RTC, relate to the quality of the Claimant’s soap noodles.

[135] Under Article 84(5) of the RTC, the Secretary-General has an obligation to conduct enquiries of the competent authorities in other Member States to determine their ability to supply the regional materials required by the manufacturer. The application for the Safeguard Certificate includes details of the quantities and specifications of the materials sought and the period during which the materials are required. The fact that the manufacturers’ specifications for regional supplies are to be included in an application for a Safeguard Certificate under Article 84, speaks to the requirement for regional supplies to meet a certain standard, that is to say, they must comply with the specifications laid down.



[136] In this case, the Defendant claimed inadequacy of regional soap noodles on the basis that the Claimant's soap noodles were substandard and did not meet their specifications. However, on an examination of the evidence before this Court, this Court takes the view that the Defendant was unable to substantiate its claims that the Claimant's soap noodles were either of poor or unacceptable quality. The Defendant, for example, did not establish the allegation that the Claimant's soap noodles had a rancid odour and it is the determination of the Court that the moisture issues which were initially experienced by the Defendant's producers were adequately resolved after those issues had been brought to the attention of the Claimant. As the Claimant has the ability to provide soap noodles in the requisite quantity and at the specifications of the Defendant's soap producers, the Court finds that there is no inadequacy of soap noodles available regionally.

### **Conclusion and Disposition**

[137] For the foregoing reasons the Court finds that the claims of the Claimant against the Defendant in relation to Articles 82 and 84 of the RTC have been made out. The Court therefore declares that:

- a. The Defendant is in breach of Article 82 and paragraph 18 of Schedule III of the RTC by failing to apply the 40% CET applicable to soap noodles imported into Jamaica from non-CARICOM sources;
- b. Costs are awarded to the Claimant; and
- c. A case management conference shall be held to consider the modalities for determining whether, and if so what, other possible remedies or relief are due to the Claimant.

*/s/ A Saunders*

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Mr Justice A Saunders (President)

*/s/ W Anderson*

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Mr Justice Anderson

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Mr Justice Wit

*/s/ M Rajnauth-Lee*

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Mme Justice Rajnauth-Lee

*/s/ D Barrow*

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Mr Justice Barrow

*/s/ A Burgess*

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Mr Justice Burgess

*/s/ P Jamadar*

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Mr Justice Jamadar

## APPENDIX

### Relevant Provisions

This section will set out the provisions of the CET and RTC which are relevant to the determination of the issues arising and provide brief summaries on the relevant Schedules and Rules.

### Relevant Provisions of the RTC

#### **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 CET**

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 authorised 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.

## Article 84 – Community Rules of Origin

1. Subject to the provisions of this Article, goods that have been consigned from one Member State to a consignee in another Member State shall be treated as being of Community origin, where the goods:
  - (a) have been wholly produced within the Community; or
  - (b) have been produced within the Community wholly or partly from materials imported from outside the Community or from materials of undetermined origin by a process which effects a substantial transformation characterised:
    - (i) by the goods being classified in a tariff heading different from that in which any of those materials is classified; or
    - (ii) in the case of the goods set out in the List in Schedule I to this Treaty (hereinafter referred to as “the List”), only by satisfying the conditions therefor specified.
2. Goods that have been consigned from one Member State to a consignee in another Member State for repair, renovation or improvement shall, on their return to the Member State from which they were exported, be treated for the purpose of re-importation only, in like manner as goods which are of Community origin, provided that the goods are reconsigned directly to that Member State from which they were exported and the value of materials imported from outside the Community or of undetermined origin which have been used in the process of repair, renovation or improvement does not exceed:
  - (a) in the case where the goods have undergone the process of repair, renovation or improvement in a More Developed Country, 65 per cent of the cost of repair, renovation or improvement;
  - (b) in the case where the goods have undergone the process of repair, renovation or improvement in a Less Developed Country, 80 per cent of the cost of repair, renovation or improvement.
3. Where there is an interruption or inadequacy of supplies of regional materials and the manufacturer of goods, for which the qualifying condition for Community origin is that of “wholly produced” or “produced from regional materials”, is unable by reason of circumstances beyond his control to obtain supplies of the regional materials, he shall so inform the competent authority.
4. The competent authority shall:
  - (a) after receipt of information from the manufacturer, cause investigations to be made into the matter, and if he is satisfied that the representation from the manufacturer is justified, submit to the Secretary-General in the prescribed instrument an application for a certificate provided for in this Article;

- (b) at the time of making the application, inform the other Member States of the inability of the manufacturer to obtain the supplies of the required materials from within the Community with respect to quantities and specifications of the materials sought and the period during which the materials are required.
- 5. The Secretary-General shall, on receipt of the application from the competent authority:
  - (a) forthwith make the relevant enquiries by the quickest possible means from the competent authorities in the other Member States as to their ability to supply the materials required by the manufacturer; and
  - (b) request a reply to the enquiry from each competent authority within seven calendar days of the despatch of his enquiry.
- 6. A competent authority shall reply to the enquiry referred to in paragraph 5 within the time specified.
- 7. Where the Secretary-General, on the basis of his investigations, is satisfied that the application received from the competent authority justifies favourable consideration, he shall, notwithstanding that he may not have received a reply to his enquiry from one or more Member States, within fourteen calendar days after the receipt of the application from the competent authority, issue, on behalf of COTED, a certificate to the competent authority authorising the use of like materials from outside the Community, subject to such conditions as he may think fit to impose.
- 8. The Secretary-General shall inform the Member States of the issue of his certificate, including any conditions attaching thereto and that notwithstanding anything to the contrary in the provisions of this Article, goods manufactured from like materials imported from outside the Community shall be deemed to be of Community origin.
- 9. A Member State may treat as of Community origin any imports consigned from another Member State, provided that the like imports consigned from any other Member State are accorded the same treatment. Member States concerned shall promptly inform COTED of any trading arrangements concluded pursuant to this paragraph and COTED may, as it thinks fit, recommend to the Member States concerned the adoption of alternative trading arrangements.
- 10. The provisions of Schedule I shall apply to and have effect for the purposes of this Article. COTED shall keep the Schedule and, in particular, the List under continuous review, and may amend the Schedule in order to ensure the achievement of the objectives of the Community.
- 11. The issue of a certificate in accordance with paragraph 7 shall be reported by the Secretary-General to COTED at the Meeting of COTED next following the date of issue thereof.

**Schedule I – List of Conditions to be Complied with as provided for under Article 84 of the RTC and the Rules Regarding Community Origin:** a list which dictates the conditions to be complied for specified items to qualify for community origin and sets out the rules to be applied in determining the origin of goods under Article 84 of the RTC and the list at Schedule I of the RTC.

**Schedule III – Development of the Oils and Fats Sub-sector:** specifically makes provision for the development of the oils and fats sub-sector including provisions dictating the regulation of inputs in CARICOM.

### **Relevant Provisions of the CET**

#### **General Note**

The classification structure of the Schedule of Rates is based on the 2017 sixth edition Harmonized Commodity Description and Coding System, commonly known as the Harmonized System (HS). The Statistical Classification Numbers are based on the Standard International Trade Classification, Fourth Revision. The units for statistical classification are based on the metric system.

The General Rules for the Interpretation of the Harmonized System provide the principles on which classification under that System is based and are an integral part of the classification structure of the Schedule of Rates, as are the Section, Chapter and Additional CARICOM Guidelines.

The rates of duty shown in the Schedule of Rates will be applicable to imports from third countries into the Member States of the Caribbean Community as well as to goods traded among the Member States of the Caribbean Community which do not qualify for Community treatment.

In the Schedule of Rates, the letters **A, C and D** appear in the column headed rate of duty in several places throughout the Schedule. The inclusion of these letters instead of an actual tariff rate is intended to signify that reference should be made to one of the **Lists, A, C and D**, in which will be found the agreed Common External Tariff (CET) rates as well as the rates which the individual Member States will be applying pursuant to decisions taken by the Council for Trade and Economic Development.

The List of Conditional Duty Exemptions sets out those goods which, when imported for the purposes stated in the List, may be admitted into the importing Member State free of import duty or at a rate which is lower than that set down in the Schedule of Rates, subject always to the approval of the relevant Competent Authority of the Member State. LDC Member States may apply the facility of conditional duty exemption by the inclusion in their national Customs Tariffs of a 'zero' rate, or a rate lower than that shown in the Schedule of Rates, in accordance with the decision of COTED to so reflect the duty relief. Conditional duty

exemption would be accorded to all other items eligible therefor in accordance with the Rules Governing the Application of the List of Conditional Duty Exemptions.

In Part I of the List of Items Ineligible for Duty Exemption are set down those items which will not be eligible for the grant of exemption from duty (in whole or in part) where they are imported "For use in Industry, Agriculture, Fisheries, Forestry and Mining" (**Section I of the List of Conditional Duty Exemptions**).

At the same time, the items set down in **Parts I and II** of the List of Items Ineligible for Duty Exemption will not be eligible for the grant of exemption from duty (in whole or in part) where they are imported "For Other Approved Purposes" (**Section XI of the List of Conditional Duty Exemptions**), except where the items have been made available as gifts or on a concessionary basis.

The List of Items Ineligible for Duty Exemption includes those items produced in the Caribbean Community in quantities which are considered adequate to justify the application of tariff protection. These items will not be eligible for the grant of exemption from duty (in whole or in part) where they are imported for use in Industry, Agriculture, Fisheries, Forestry and Mining.

Except where the context otherwise requires, "per cent" or the symbol "%" means percentage of value.

Lists A, C and D provide as follows:

List A - A list of items on which suspension of the rates of duty in the Schedule of Rates under Article 83 of the Revised Treaty has been granted to Member States for an indefinite period subject to review by the COTED, with the rates to be applied by Member States;

List C - A list of items in respect of which minimum rates of duty have been agreed by the COTED, with the actual rates of duty to be applied by individual Member States;

List D - Parts I and II - Additional items in respect of which Suspension of the CET under Article 83 of the revised Treaty has been granted to St. Kitts and Nevis, other OECS Member States and Belize, with the actual Rates to be applied by those Member States.

### **List of Conditional Duty Exemption**

The List of Conditional Duty Exemptions contains the goods which Member States may exempt from duty under the CARICOM Common External Tariff when such goods are imported by persons, enterprises or organisations in the circumstances, or for the purposes specified in the List.

### **Rules Governing the Application of the List of Conditional Duty Exemptions**

1. A Member State may refuse to grant full duty exemption for any good eligible therefor under the List and may choose instead to apply a level of import tariff on such good not higher than that provided in the Schedule of Tariff Rates.

2. In a number of cases (for example, in connection with shipping and aircraft, for health, governmental, social and cultural purposes), while the scope of the duty exemption has been specified, each Member State is free to approve the beneficiaries (whether the individual, the institution or the organisation) of the exemption.
3. The reference in the List to goods for the use of international organisations or their personnel is understood to include inter-governmental organisations operating within the Community pursuant to an agreement in force between such organisations and the Government of one or more Member States.
4. (a) Where the goods produced by an enterprise do not meet the qualifying conditions set down with respect to those goods in Schedule I of Article 84 of the Revised Treaty, that enterprise will not qualify for exemption from duty with regard to the materials utilised in the production of those goods.
  - (b) This Rule will not apply to goods which are produced for export to third countries.
  - (c) The Rule will have effect only with regard to concessions approved following entry into force.
5. (a) The items set down in Part I of the List of Ineligibles appended to this List of Conditional Duty Exemptions shall not be eligible for exemption or reduction of duty where they are imported for use in Industry, Agriculture, Forestry, Fisheries and Mining, except:
  - when the item is imported for use in new investment or substantial expansion; or
  - when the item is provided by a country or an international institution in the context of development finance with a view to assisting the economic development of the importing Member State, and when the agreement between the importing Member State and the donor country or international institution requires sourcing from a particular extra-regional source on a concessional duty basis.
- (b) The items set down in Part I and Part II of the List of Ineligibles appended to this List of Conditional Duty Exemptions shall not be eligible for exemption or reduction of duty where they are imported for use in the circumstances contemplated in Section XI - For Other Approved Purposes (excluding 23 - Goods [including foodstuff] imported for used in rehabilitation or relief following natural disaster, as approved by the Competent Authority), except that this ineligibility will not apply where the Competent Authority is satisfied that the items are gifts or have been provided on a concessional basis.

**List of Ineligibles** sets out the conditions which determine whether items will or will not be eligible for the grant of exemption from duty (in whole or in part).