Trinidad Cement Limited v The Caribbean Community

Citation:	[2009] CCJ 4 (OJ)
Date of Judgment:	10 August 2009
Nature of Judgment:	Judgment on merits
Composition of the Court:	President: M de la Bastide Judges: R Nelson, A Saunders, D Bernard and J Wit

CCJ Application No	Parties	
OA 1 of 2009	**Claimant**	Trinidad Cement Limited
	Defendant	The Caribbean Community

Counsel

- Claimant:
  Dr C Denbow SC, Attorney-at-Law

- Defendant:
  Mr A Astaphan SC, Attorney-at-Law

- The State of Jamaica:
  Mr D Leys QC, Solicitor General and Dr K Brown

Nature of Dispute

The dispute involved claims by Trinidad Cement Limited (TCL), a manufacturer and seller of grey cement in the Common Market, that the Caribbean Community (CARICOM) violated (i) its obligation to maintain the Common External Tariff (CET) in respect of cement under Article 82 of the Revised Treaty of Chaguaramas (RTC) and (ii) its commitment to the operation of the CET under Article 83(2) when, respectively, the Secretary-General of CARICOM and the Council for Trade and Economic Development (COTED) authorised the suspension of the CET in response to requests by (i) Jamaica and (ii) Suriname, Antigua and Barbuda, Dominica, Grenada, St Lucia, St Kitts and Nevis and St Vincent and the Grenadines.

Summary of Legal Conclusions and Orders

- The Court issued a declaration that the Secretary-General of CARICOM had erred in some respects, but it did not quash or revoke the decisions of COTED and the Secretary-General of CARICOM.

- The Court ordered CARICOM to bear one half of the Claimant's costs.

Legal Provisions at Issue

- Article 26, 29, 32(1), 82, 83, 163, 187(c), 211, 216(1), 216(2), 222 of the RTC

Other Relevant Community Law / Material Relied on

- N/A

Past CCJ Case Law

- *TCL v The State of the Co-operative Republic of Guyana* [2009] CCJ 1
- *TCL v The Caribbean Community* [2009] CCJ 2

Other Sources of International Law

- *Adler v Secretary-General of the UN*, Judgment No 267, UN Doc AT/DEC/267
- *Johann Luhrs v Hauptzollamt Hamburg-Jonas*, Case 78/77 of 1978

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Facts

The Claimant, TCL, is a manufacturer and seller of cement in the CARICOM market, incorporated in Trinidad and Tobago and is a parent company of the TCL Group, comprising Caribbean Cement Company Limited in Jamaica, Arawak Cement Company Limited in Barbados and TCL itself. Following concerns that TCL could not meet their national demand, (i) Jamaica and (ii) Suriname, Antigua and Barbuda, Dominica, Grenada, St Lucia, St Kitts and Nevis and St Vincent and the Grenadines applied, respectively, to the Secretary-General of CARICOM and to COTED, in 2008, to suspend the CET. In both cases, authorisation was granted for a period of one year.

Notably, the Secretary-General of CARICOM had proceeded with authorising Jamaica's request for suspension after the Competent Authority of Trinidad and Tobago had responded that it had "no objections" to Jamaica's request. With respect to the COTED authorisation, TCL complained that the authorisation to suspend represented an unexplained volte face from refusals by the Secretary-General of CARICOM shortly before the meeting at which it was approved.

Findings

TCL argued that through the acts of COTED and the Secretary-General of CARICOM, CARICOM breached (i) Article 82 of the RTC in respect of its obligation to maintain a CET on goods imported into the CARICOM region and (ii) Article 83 of the RTC by suspending the CET in circumstances where the conditions for doing so under the article were not satisfied. It therefore sought a declaration that both of the decisions were ultra vires, irrational, illegal, unreasonable, null and void; as well as injunctive relief by way of mandatory quashing orders and the reinstatement of the CET. A central argument of TCL was that it was in a position to satisfy more than 75% of regional demand for cement and that according to the applicable

rules, there was no basis for either the Secretary-General of CARICOM or COTED to authorise a suspension of the tariff.

Before turning to the specific claims, the Court reviewed (i) its power to conduct judicial review over decisions of the Secretary-General of CARICOM and COTED (ii) the operation of the CET (iii) rules governing the alteration and suspension of the CET and (iv) the procedure for the application or suspension of the CET governed by Article 83(2)(d).

With respect to its power to conduct judicial review, the Court gave special attention to Article 187 of the RTC under which claims could be brought for actions that were alleged to be ultra vires. The Court reaffirmed its compulsory jurisdiction and noted that the RTC represented a transformation of the CARICOM Single Market and Economy into a rules-based system. This means that the Court has the power to scrutinize the acts of Member States and the Community to determine whether they are in accordance with the rules of law which is a fundamental principle accepted by all the Member States, and that it would be almost impossible to interpret the RTC and apply it to concrete facts unless the power of judicial review was implicit in that mandate. The Court stated that in carrying out its review, it must strike a balance and be careful not to frustrate or hinder the ability of Community organs and bodies to enjoy the necessary flexibility in their management of a fledgling Community. It was not its role to attempt to re-evaluate matters which are properly before a competent policy making organ for a decision, and that the ability to authorise suspension of the CET is inherently a power to cater to the kind of flexibility that is required in carrying out policy. But, the Court noted, applications for suspensions must be dealt with in a principled, procedurally appropriate matter.

The Court also examined the nature of the CET regime, pointing out two official published documents– a 1992 and a 1993 document – which reflect the policies of COTED and that, until disavowed by the Community or disapproved by the Court, their guidelines and prescriptions should be taken as being still in force. The Court noted that, while they contained historical instances of departure from the CET, they offer no guidance for COTED and therefore did not create any legitimate expectation that a private enterprise would have an opportunity to make representations to the Secretary-General of CARICOM or COTED. In light of the dearth of information on the CET and its operation, the Court felt that it was important that private entities be provided with appropriate information regarding the operation of the CET and its suspension, a task it considered to be partly its own.

Turning to the current regime, the Court understood that where regional production exceeds 75% of regional demand, imports of that product from outside the Community are deemed to be competing, and regional producers are assured a certain level of protection. By contrast, if regional production does not satisfy 75%, then imports from non-Community sources are non-competing and regional producers will not have similar or any level of protection. The Court considered TCL's claim that the CET on cement should not be suspended if a supplier is in a position to satisfy in excess of 75% of regional demand. Finding that the RTC makes no such

suggestion, the Court noted that Article 83(2)(b) gives "quantity of the product being produced in the Community …[not] satisfying demand" as one of the criteria for triggering the discretion of COTED to suspend. However, for the Court, interpreting that provision in a sensible manner meant that COTED may authorise suspension not only where the quantity of the product does not satisfy demand but also where the ongoing demand of a particular Member State will not be met either on a timely basis or at all by the regional producers of the commodity.

The Court next considered the procedures relating to the application for suspension of the CET, highlighting four ways which distinguished the procedures under the Original Treaty of Chaguaramas from the RTC, the latter of which was a more transparent and efficient system. Among these was the requirement under Article 26(2) for the Secretary-General of CARICOM to engage in relevant consultations to obtain the necessary information to guide the exercise of his discretion in respect of any decision to suspend or alter the CET. On the issue of consultation, the Court noted that Member States have a duty to provide the Secretary-General of CARICOM and COTED with accurate, relevant and timely information. In turn, the Secretary-General of CARICOM has a residual responsibility not to look the other way if it comes to his attention that the consultative process has not been followed by a Competent Authority or that it is doubtful whether it has been followed. He must do what he reasonable can to ascertain whether appropriate consultation has been held and if not, to encourage it to remedy that omission.

Turning to the facts of this dispute, the Court noted that it was the Secretary-General's responsibility to discover from the Competent Authorities which, if any, has the ability to supply the commodity required. In turn, the Member States inquired of must respond and give a specific answer to the question posed. Here, the Court noted that while the Secretary-General of CARICOM has no duty to solicit information by private entities, if information comes to his attention that contradicts or casts a different light on a submission from a relevant Competent Authority, it was his responsibility to ascertain whether there had been the requisite level of consultations with all relevant producers of the commodity in question. Moreover, applications to suspend the CET should be made to the Secretary-General of CARICOM only in the context of a great urgency and authorisations granted by him for as short a period of time as practicable and generally not for more than a year. Further, the Court held that the practice of accepting as a sufficient answer that a State has "no objections" is wrong and must cease; rather before a Secretary-General exercises his discretion to authorise a suspension, he must be satisfied as to the relationship between demand and supply with respect to the commodity and not whether the Member State objects or does not object to a request for suspension.

In the circumstances of this case, the Court noted that TCL had no claimed damages. The Secretary-General had acted upon the "no objections" letter of Trinidad and Tobago in good faith and in conformity with obsolete practices. While the procedural flaw should attract an appropriate declaration, it was not in these circumstances of a sufficiently serious nature to warrant an annulment of the decision.

In respect of COTED's decision, the Court found that it had not acted ultra vires. The Court found that the relevant issues relating to supply and demand for cement and the Audit Report were before COTED and that the dominant and operative consideration was that the Member States were not prepared to treat the Audit Report supply forecast as guaranteeing them actual on time deliveries in view of their past experiences with the TCL Group. The Court was unable to say whether COTED in the exercise of its discretion could not rationally rely on past supply experience and use that as basis for being skeptical about the actual deliveries of cement in a timely manner. The Court noted that the amount of cement in respect of which the suspensions were given and the fact that suspensions were only a year duration indicated an observance of the principle of proportionality which must at all times be adhered to by COTED. The Court noted that only if COTED's decision was wholly disproportionate as to be unconnected with the facts would it be permitted to set the decision aside and the application for suspension remitted to COTED for fresh consideration. The Court also found that COTED's deliberations properly emphasised that their dealings in the market would follow the rule: no matter what, we source first from within, a principle, which the Court wholly endorsed. Finally, the Court noted that the volte face referred to and reasons for same were not explored at the hearing.

Based on the above, the Court found that the Secretary-General's authorisation of the suspension for Jamaica suffered from a procedural flaw, and therefore only issued a declaration only that it was wrong for the Secretary-General of CARICOM to accept as a sufficient answer the response of Trinidad and Tobago that it had "no objections" to Jamaica's request. The Court concluded that in the future when the Secretary-General of CARICOM takes a decision to authorise a suspension it is a good practice for his authorisation to be supported by a brief statement of the reason or reasons for arriving at his decision. As to COTED's authorisation, in all the circumstances, the Court found no basis to find the decision made by COTED to be ultra vires. The Court therefore dismissed all the other claims for relief and ordered CARICOM to pay half of TCL's costs.

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This summary should not be used as a substitute for the decision of the Caribbean Court of Justice.