

Trinidad Cement Limited and Arawak Cement Limited v The State of Barbados and Rock Hard Cement Limited; and another Application

Citation: [\[2019\] CCJ 1 \(OJ\)](#)
Date of Judgment: 17 April 2019
Nature of Judgment: Judgment on merits
Composition of the Court: President: A Saunders
Judges: J Wit, W Anderson, M Rajnauth-Lee and D Barrow

CCJ Application No	Parties	
TTOJ2018/002	Claimants	Trinidad Cement Limited Arawak Cement Limited
	Respondent	The State of Barbados
	Intervener	Rock Hard Cement Limited
BBOJ2018/001	Claimant	Rock Hard Cement Limited
	Respondents	The State of Barbados The Caribbean Community

Counsel

- Trinidad Cement Limited and Arawak Cement Company Limited:
Mr Reginald T A Armour SC and Mr Raphael Ajodhia, Attorneys-at-Law
- The State of Barbados:
Ms Donna Brathwaite QC, Attorney-at-Law
- Rock Hard Cement Limited:
Mr Allan Wood QC and Ms Symone Mayhew, Attorneys-at-Law
- The Caribbean Community:
Dr Corlita Babb-Schaefer and Mr O’Neil Francis, Attorneys-at-Law

Nature of Dispute

This dispute was one of four which the Court eventually consolidated, concerning the importation of extra-regional cement into the Caribbean Community (CARICOM). The specific issue in the current proceedings was whether the State of Barbados (Barbados), having previously received approval from the Council for Trade and Economic Development (COTED) to derogate from the Common External Tariff (CET) and apply a higher tariff on cement products for an undefined period, nonetheless breached the Revised Treaty of Chaguaramas (RTC) by subsequently reinstating the CET on cement falling under Subheading 2523.90.00 – other hydraulic cement – without seeking and obtaining COTED’s further approval.

Summary of Legal Conclusions and Orders

- The Court found that the derogation sought and obtained by Barbados to derogate from the CET on cement products and apply a higher tariff included a derogation from the CET on “other hydraulic cement”.
- The Court found that Barbados was not required to obtain the approval of the COTED to revert to the CET on “other hydraulic cement”, but it was required to give reasonable and adequate notice of its decision to do so. In the circumstances of this case, reasonable and adequate notice was given.
- The Court found that the Interim Measures previously imposed which required Barbados to maintain a higher tariff than the CET on “other hydraulic cement” were deemed to have expired as of the date of the Court’s ruling.

Legal Provisions at Issue

- Articles 9, 26, 79, 82, 83, 222 of the RTC

Other Relevant Community Law / Material Relied on

- Protocol to Amend Article 83 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy
- The Common External Tariff of the Caribbean Community 2018

Past CCJ Case Law

- *Shanique Myrie v The State of Barbados (No 2)* [2013] CCJ 3 (OJ)
- *Tomlinson v Belize and Trinidad and Tobago* [2016] CCJ 1 OJ
- *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 4 (OJ)

Other Sources of International Law

- Article 15(3) of the European Convention on Human Rights
- Article X, XXIV of the General Agreement on Tariffs and Trade 1994
- Article 4(3) of the International Covenant on Civil and Political Rights

- *Military and Paramilitary Activities in and Against Nicaragua case (1984)*
- World Customs Organization Explanatory Notes
- World Customs Organization Harmonized Commodity Description and Coding System Nomenclature

Facts

In 2001, Barbados requested and obtained from COTED a derogation from the CET to apply a higher tariff of 60% on *inter alia* Tariff Heading 25.23 in the Schedule to the CET, which Barbados described as “Portland cement, cement fondu, slag cement, super sulphate cement, and similar hydraulic cement, [Excluding: white Portland cement (2523.31)].” Subsequently, Barbados introduced legislation imposing a 60% tariff on cement classified as “other hydraulic cement” and “building cement (grey)”. On 8 October 2015, Barbados decided it would no longer apply the derogation from the CET in relation to cement classified as “other hydraulic cement”, and re-imposed a 5% tariff on that product, consistent with the CET for Subheading 2523.90.00. While Barbados then applied a 5% duty on cement it is classified as “other hydraulic cement”, Barbados never repealed the legislation that had allowed for the imposition of the 60% tariff on that product.

Findings

Trinidad Cement Limited (TCL) and Arawak Cement Company Limited (ACCL) – regional manufacturers of cement in the Community – claimed that Barbados breached the RTC when it unilaterally reinstated the CET on other hydraulic cement, without seeking and obtaining COTED’s approval. For its part, Rock Hard Cement Limited (RHCL), an importer of other hydraulic cement into the Community, contended that there was no obligation under the RTC requiring Barbados to seek COTED’s approval to reinstate the CET. RHCL claimed, however, that Barbados breached, and remained in breach, of Article 82 of the RTC in failing to amend its domestic legislation that had provided for the imposition of the higher tariff than the CET on “other hydraulic cement”, notwithstanding that Barbados had decided to reinstate the CET.

The Court first considered whether the derogation that Barbados had obtained from COTED to apply a higher tariff than the CET on cement products classified under Heading 25.23 included cement classified as other hydraulic cement under Subheading 25.23.9. After examining the scheme of the Community’s CET and its Rules of Interpretation, as well as a report from the World Customs Organization, the Court found that any reference to Tariff Heading 25.23 includes its Subheadings. Accordingly, the Court concluded that Subheading 2325.90.00 – other hydraulic cement – was within the scope of the derogation that Barbados had obtained from COTED to apply a higher tariff than the CET.

The Court then turned to consider whether a Member State that has obtained a derogation from COTED to increase an applicable tariff to a rate beyond the CET is required to obtain the approval of COTED in order to reimpose the CET. The Court noted that, in seeking and

obtaining the approval of COTED to increase the tariff on “other hydraulic cement” to a rate higher than the CET, Barbados had thereby unilaterally undertaken greater protection for its local industries than was considered appropriate under the Community standards. Noting that this was clearly a considered national economic policy measure based upon Barbados’ own deliberate considerations, the Court considered that being greater than the protection considered appropriate by the Community, it was equally a matter for Barbados to decide when its industries were no longer in a position to require this additional protection. The Court, therefore, found that there was no requirement for Barbados to have received the approval of COTED to revert to the CET.

Notwithstanding the above, the Court further found that, in order to engender certainty and confidence in the private sector, there must be certainty in the application of extraordinary tariff rates applied pursuant to a derogation approved by COTED. The Court, therefore, considered that where no duration is specified in a derogation, the Member State has an obligation to give reasonable notice of its decision to revert to the CET, given the potential reliance by private sector entities on the derogation. Discharging this obligation of “reasonable notice” includes providing COTED with (i) the date on which the Member State no longer required the derogation; and (ii) the date on which the Member State would apply or re-apply the CET. The Court explained that this reflects good administrative practices, preserves the sovereign nature of the Member State, and ultimately enhances the overall functioning of the CSME. The Court further clarified that what constitutes “reasonable” or “adequate” notice is to be decided on a case-by-case basis. Based on the evidence on the record in the case before it, the Court found that ACCL and TCL were aware, for a significant number of years, of Barbados’s intention and decision to reduce the rate of duty on the importation of “other hydraulic cement”. Accordingly, ACCL and TCL had reasonable and adequate notice of the decision of the State of Barbados to re-impose the CET.

The Court then turned to RHCL’s claim that Barbados breached, and remained in breach, of Article 82 of the RTC in failing to amend its domestic legislation, which had provided for the imposition of the higher tariff than the CET on “other hydraulic cement”. Noting that RHCL had prevailed on the derogation issue (discussed above), the Court did not consider it necessary to rule on the question of whether Barbados was required to amend its legislation in the manner argued by RHCL. In the hope of avoiding unnecessary litigation, however, the Court reminded the parties of its view, as expressed in previous case law, that the mere existence of domestic laws apparently in conflict with RTC obligations does not necessarily constitute a breach of the State’s international obligation. Instead, much depends on how the law is applied (or not applied) in practice.

Finally, the Court noted that it had previously granted Interim Measures to TCL and ACCL requiring Barbados to maintain the higher tariff than the CET on “other hydraulic cement.” Given that the Court had affirmed that Barbados was not required to seek approval from

COTED in order to revert to the CET, the Court deemed the Interim Measures to have expired upon delivery of its ruling.

The Court reserved its decision on costs in the proceedings.

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