[2009] CCJ 2 (OJ)

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No. AR 3 of 2008

Between

Trinidad Cement Limited **Applicant**

And

The Caribbean Community **Respondent**

THE COURT,

composed of M de la Bastide, President and R Nelson, D Pollard, A Saunders, D Bernard, J Wit and D Hayton, Judges

having regard to the application for special leave to commence proceedings under Article 222 of the Revised Treaty of Chaguaramas filed at the Court on 11th December 2008 with annexures, the written submissions of the parties and to the public hearing held on 15th January 2009

after considering the oral observations submitted on behalf of:

- the Applicant, by Dr C Denbow, SC
- the Respondent, by Ms Safiya Ali, Attorney-at-Law

and having announced its decision on the 15th day of January, 2009 issues on the **5th day of February, 2009** the following

JUDGMENT

[1] On January 15, 2009 a Full Bench of this Court heard an application by the applicant, Trinidad Cement Limited ("TCL") for special leave to commence proceedings before this Court against the Caribbean Community ("the Community") under Article 222 of the Revised Treaty of Chaguaramas ("the Revised Treaty"). The Court received written submissions from the Community and at the hearing heard the oral submissions of both the applicant and the Community. At the conclusion of the hearing the Court granted special leave to TCL as a private entity to commence proceedings against the Community. The Court indicated then that it would give its reasons at a later date and it does so now.

The factual background

[2] TCL is a limited liability company incorporated in Trinidad and Tobago and the applicant in these proceedings. TCL is the parent company of seven companies incorporated in different parts of the Caribbean. TCL's main business is the manufacture and sale of cement. The TCL Group's principal market is the Common Market established by the Revised Treaty.

[3] The market created by the Revised Treaty is protected in some cases by the imposition of a common external tariff ("CET") against parallel imports from third countries. The main purpose of the CET is to encourage trade and production within the Community with a view to accelerating the process towards international competitiveness. In relation to the cement industry the CET on cement not qualifying for Community treatment was fixed at 15%. Cement of Community origin is exempt from customs duties and charges having equivalent effect.

[4] Part Two of Chapter Five (Trade Policy) of the Revised Treaty contains the CET régime. It is clear that any rights or benefits conferred by the CET are qualified,

and not absolute, in that the régime may be altered or suspended by the agency appointed by the Community to manage it. That agency is an organ of the Community, the Council for Trade and Economic Development (hereinafter referred to as "COTED"). For ease of comprehension the Court sets out Articles 82 and 83:

> "
>
> ***ARTICLE 82***
> ***Establishment of Common External Tariff***
>
> *The Member States shall establish and maintain a common external tariff in respect of all goods which do not qualify for Community treatment in accordance with plans and schedules set out in relevant determinations of COTED.*
>
> ***ARTICLE 83***
> ***Operation of the Common External Tariff***
>
> *1. Any alteration or suspension of the Common External Tariff on any item shall be decided by COTED.*
>
> *2. Where:*
>
> *(a) a product is being produced in the Community;*
>
> *(b) the quantity of the product being produced in the Community does not satisfy the demand of the Community; or*
>
> *(c) the quality of the product being produced in the Community is below the Community standard or a standard the use of which is authorized by COTED.*
>
> *COTED may decide to authorize 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 revise the Common External Tariff, in whole or 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."*

[5] Although the CET is required to be established and maintained by the individual Member State, the regional administration of the CET is assigned to COTED (Article 82). The power to authorize the reduction or suspension of the CET is vested in COTED by Article 83(2) and between meetings of COTED may be exercised by the Secretary-General on behalf of COTED.

[6] The CET in relation to the Community was first agreed at a special meeting of the Common Market Council in July 1990. In 1992 the Common Market Secretariat, which later became the Caribbean Community Secretariat, described in Article 23(1) of the Revised Treaty as the principal administrative organ of the Community, published a booklet entitled "Administrative Arrangements relating to – The Alteration or Suspension of Rates under the Common External Tariff…" The Court shall refer to this booklet as the "CET guidelines". The CET guidelines pre-date the Revised Treaty but are still applied to the operation of the CET under the Revised Treaty.

[7] The CET guidelines require that applications for suspension of the CET must be first made to the Trade Ministry of a Member State. An applicant for suspension must state the reasons for his request and the name of the Member State from which supplies were previously maintained as well as the efforts made to source the product from within the Community. A Member State may then take the matter to COTED.

[8] In or about May 2005 at its 19th regular meeting COTED affirmed the application throughout the Community of the 15% CET on cement. There was a further agreement to implement a régime of tariff protection for TCL for a period of 3 years in Trinidad and Tobago and Jamaica. COTED in September 2006 granted waivers of the 15% CET to several Member States including Trinidad and Tobago and Suriname. In September 2006, Guyana unilaterally suspended the CET for one year, a suspension which continues at present and is the subject of separate proceedings before this Court. The current proceedings arise out of two suspensions of the CET in relation to cement in 2008.

The suspension in relation to Jamaica

[9] In or about July 2008, Jamaica applied for a suspension of the CET in relation to cement. By letter dated September 5, 2008 the Secretary-General indicated that Barbados had the capacity to supply. Therefore suspension of the CET could not be granted "at this time". However, a few days later pursuant to Article 83(3) of the Revised Treaty the Secretary-General granted authorizations for suspension of the CET to Jamaica in respect of grey cement in the amount of 240,000 metric tonnes. The period of the suspension of the CET was from September 10, 2008 to September 9, 2009. The Secretary-General's directive was reported to the 26th Meeting of COTED at Georgetown, Guyana on November 24 and 25, 2008. The meeting took note of the Secretary-General's report.

[10] No reason was given for the Secretary-General's apparent *volte face*, and TCL was not consulted or notified.

[11] The request for a suspension of the CET in relation to Jamaica was seemingly made within one month of the TCL Jamaican subsidiary, Caribbean Cement Company Limited, commissioning 40% additional capacity at a cost of US$126 million.

[12] It further appears that COTED had available for its consideration at its 26th Meeting in Georgetown an expert report intituled *"Report on the Audit of the Supply Capacity and Demand for Cement in the Region"* (hereinafter called "the Audit Report"). The Audit Report is dated October 10, 2008 and was a working document at the 26th COTED meeting.

[13] Table 5 of the Audit Report shows that the TCL Group consistently supplied between 79% and 93% of the region's demand for cement between 2001 – 2008. The forecast was that it would supply 100% of that demand in 2009 and 93% in 2010. The CET guidelines contemplate that the CET might be suspended where production levels of goods are "insufficient to satisfy a minimum of 75% of regional demand for those goods…"

The suspension in relation to Suriname and six OECS States

[14] In 2008 Antigua and Barbuda, Dominica, Grenada, St. Lucia, St. Kitts and Nevis and St. Vincent ("the six OECS states") and Suriname sought from COTED a suspension of the CET on grey cement for a period of two years.

[15] At the 26th Meeting of COTED held in Georgetown, Guyana on November 24 and 25, 2008, COTED considered and granted to the six OECS states and Suriname a suspension of the CET for one year in certain specified amounts subject to review at the end of that year. It is not clear what prompted COTED's decision as no reasons were provided.

Impact of suspensions on TCL

[16] TCL alleges that in June 2005 the TCL Group to the knowledge of COTED entered into a US$105 million loan with the International Finance Corporation ("IFC") for the purpose of upgrading and expanding its production facilities in Jamaica and Trinidad. Before the loan was taken COTED was aware that the IFC was considering financing the expansion of TCL's production capacity. TCL

entered into the loan in reliance on the fact that COTED had affirmed the 15% CET on cement and an undertaking from the Ministry of Trade in Jamaica that the CET régime on cement would remain in place in Jamaica for at least three years. However, in September 2006 COTED authorized the suspension of the CET in Suriname, Trinidad and Tobago and the six OECS states without notifying TCL, and Guyana in the same month unilaterally suspended the CET in relation to cement.

[17] As a result of those suspensions of the CET TCL alleges that it has had to restructure its loans by borrowing a further US$25 million and extending the term of the loan from 9 years to 12 and then 15 years.

[18] TCL estimates that as a result of the suspensions of 2008 it will suffer financial loss in 2009 in the sum of some US$35 million: US$5 million from an anticipated 25% reduction in its price and US$30 million calculated by applying a weighted average contribution factor to the anticipated volume of imported non-CARICOM cement.

[19] No detailed assessment of these allegations is necessary at this stage.

The proposed proceedings

[20] By this application TCL , a private entity, seeks to obtain special leave pursuant to Article 222 of the Revised Treaty to file an originating application. TCL's proposed application seeks (1) declarations that the COTED suspension and the Secretary-General's suspension are irrational or unreasonable, illegal and null and void. (2) orders setting aside or quashing these suspensions (3) a restraining order against the Community and (4) a mandatory injunction against the Community to revoke the suspensions and notify those affected.

[21] At this stage it is only necessary to see whether TCL has satisfied the conditions for special leave set out in Article 222 of the Revised Treaty.

***Locus standi* of TCL**

[22] Article 222 of the Revised Treaty provides:

> " ***ARTICLE 222***
>
> ***Locus standi of Private Entities***
>
> *Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:*
>
> *(a) the Court determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and*
>
> *(b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and*
>
> *(c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:*
>
> *(i) omitted or declined to espouse the claim; or*
>
> *(ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and*
>
> *(d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim."*

Persons, natural or juridical of a Contracting Party

[23] TCL has established satisfactorily that it is a limited liability company incorporated in Trinidad and Tobago under the Companies Ordinance Ch. 31 No.1 of the Revised Laws of Trinidad and Tobago (1950) and that the company was continued under the Companies Act Chap. 81:01. Its registered office is in Trinidad and Tobago.

[24] Applying the decision of this Court in *Trinidad Cement Limited v The State of the Cooperative Republic of Guyana*[1] at paragraph [35], TCL is a "person, natural or juridical, of a Contracting Party". The Respondent Community has not contended otherwise. The Community has full juridical personality (see Article 228 (1) of the Revised Treaty) and can be sued for the acts or omissions of COTED, an organ of the Community (see Article 10 (2) (b) of the Revised Treaty), and those of the Secretary-General acting on behalf of COTED.

Conferment of a right or benefit

[25] This Court held in *Trinidad Cement Limited v The State of the Cooperative Republic of Guyana* (supra) that Article 82 of the Revised Treaty set out earlier in this judgment imposes an obligation on Member States to establish and maintain a common external tariff and that such obligation on Member States is of potential benefit to private entities in the Community who trade in goods to which the CET is applied viz. in this case cement.

[26] Counsel for the Community, however, contended that the right or benefit deriving from Article 82 is subject at all times to a power of alteration and suspension. Accordingly no right or benefit could accrue directly and automatically to TCL.

[27] Counsel for the Community further submitted that Article 222 dealt only with a restricted category of cases in which rights or benefits of persons under the Revised Treaty were prejudiced. She contended that TCL's case, which was that an organ of the Community was acting *ultra vires*, did not fall within that category. She urged upon the Court that Article 187 (Scope of the Chapter) in relation to Disputes Settlement had to be read with Article 211 (Jurisdiction of the Court in Contentious Proceedings). It would then be apparent that 'allegations that an organ or body of the Community has acted *ultra vires*" (see paragraph (c)

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of Article 187) are only justiciable by the Court if made in a dispute brought to the Court by a Member State.

[28] These arguments are misconceived. First, while it is true to say that a right or benefit flowing from Article 82 can be suspended or altered at the discretion of the body administering the CET, there are limitations on the circumstances in which that discretion is exercisable and arguably on the manner of its exercise. Such discretion comes into play only if the conditions set out in Article 83(2) are fulfilled. The focus of the submissions of both parties was that it had to be established that the quantity of the product being produced in the Community did not satisfy the demand of the Community. Whether that condition was established depends on the material placed before or available to COTED whether acting by itself or by its delegate, the Secretary-General.

[29] With respect to COTED's decision involving Suriname and the six OECS states, the Audit Report and the CET guidelines appear to establish that the TCL Group was meeting regional demand at above the benchmark of 75% of the demand. In the absence of reasons it appears *prima facie* that the condition required for the authorization of the suspension was not established. There has been no evidence led nor suggestion made so far in these proceedings that either of the decisions under challenge was based on the quality of the cement produced in Trinidad and Jamaica by the TCL group. As regards the Secretary-General's decision, the unexplained retraction of the refusal to authorize the suspension coupled with the Audit Report and the new increased installed capacity at Caribbean Cement Limited equally suggest that the conditions of Article 83 had not been fulfilled.

[30] Further, Article 187 does not purport to present an exhaustive statement of the types of dispute that may come before this Court. Moreover Article 211 deals with the quite different matter of jurisdiction, and when read with Article 222 gives the Court power, as a matter of procedure, to enable private entities to appear before it in all manner of disputes concerning the interpretation and

application of the Revised Treaty including allegations that a body or organ of the Community acted *ultra vires*.

[31] There was a further contention that to admit a direct challenge by a private party to the decision and process of the Community would greatly hinder the functioning of the Community and constrain the exercise of state sovereignty by Member States parties to the Revised Treaty. The Court does not agree.

[32] By signing and ratifying the Revised Treaty and thereby conferring on this Court *ipso facto* a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the Member States transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law. A challenge by a private party to decisions of the Community is therefore not only not precluded, but is a manifestation of such a system. Therefore it is not correct to say that by such challenge the functioning of the Community will be greatly hindered or that the exercise of state sovereignty by Member States parties to the Revised Treaty would be unduly constrained. The rule of law brings with it legal certainty and protection of rights of states and individuals alike, but at the same time of necessity it creates legal accountability. Even if such accountability imposes some constraint upon the exercise of sovereign rights of states, the very acceptance of such a constraint in a treaty is in itself an act of sovereignty. In the words of The Permanent Court of International Justice in the *Case of the S.S.* "*Wimbledon*"[2]:

> "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the

[2] PCIJ Reports, Series A, No. 1, at page 25 (1923); and see also the Separate Opinion of Judge Anzilotti in the *Austro-German Customs Union Case*, PCIJ Reports, Series A/B No. 41 (1931) at pages 57-58.

sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."

Further contention of the Community

[33] It was further contended by counsel for the Community that since the suspension of the CET was an act of the Member States, the proceedings should have been brought against them. This argument fails because the challenge of the applicant is to the authorization of the suspension by COTED and the Secretary-General and therefore the Community, to which there is attributable liability for the actions of COTED and the Secretary-General, is the proper defendent.

Prejudice in the enjoyment of a right or benefit

[34] The Community argued that since the right or benefit under Article 82 was subject to alteration or suspension of the CET there was no direct or automatic right or benefit conferred on TCL and hence no prejudice to such right or benefit. There was, it was contended, only a qualified right or benefit, so there could be no loss. As set out in [28] above, the premise on which this argument is based, is misconceived. This Court held in the first *Trinidad Cement* case[3] that failure by any particular Member State to fulfil an obligation to establish and maintain the CET was of potential prejudice to beneficiaries of the CET. By parity of reasoning the unlawful or improper grant of a waiver of the CET in relation to cement is of potential prejudice to a beneficiary of the CET such as TCL.

[35] The Community also submitted that TCL had not actually established that the suspension reduced the demand for or the price of its product. The Community relied on a statement in the Audit Report that regional producers of cement would not be able to supply 100% of the regional demand and that "the CARICOM

[3] Supra at [34] of that judgment.

region will continue to rely on extra-regional imports to satisfy part of its demand".

[36] The Court has already demonstrated that under the CET guidelines the suspension of the CET was only triggered by a shortfall of the CET in excess of 25% of the regional demand for cement. In any event, as indicated in [13], closer reading of the Audit Report suggests that the authors considered that TCL Group had the capacity to satisfy more than 75% of the region's demand for cement.

[37] As regards the proof of prejudice the Court has set out the allegations by TCL of projected financial loss arising out of the relevant suspensions. Having regard to the lack of any challenge to these allegations, but without making any final determination on them, the Court holds that TCL has advanced an arguable case that it satisfies Article 222(b) as regards prejudice.

Espousal of the claim by Trinidad and Tobago

[38] Counsel for TCL contends that its instructing attorney's letter dated December 2, 2008 inviting the Attorney-General of Trinidad and Tobago to espouse its claim or give permission to TCL to do so, on or before December 8, 2008 was sufficient to satisfy Article 222(c). Any reservations one might have had in this regard were dispelled by the Attorney-General's reply dated December 8, 2008, which simply stated that receipt of the letter of December 2 was acknowledged and "its contents have been noted". There was no suggestion that further time was needed, and indeed since the commencement of these proceedings on December 11, 2008 the Attorney-General has manifested no desire to espouse the claim advanced by TCL. For these reasons the Court rejects the contention of the Community that a period of six days was not enough to enable the Attorney-General to decide whether or not to espouse the claim. The Court holds that Article 222(c) is satisfied.

The interests of justice

[39] Counsel for TCL argues forcefully that his client had entered into a loan arrangement with the IFC on the faith that the CET on cement would be properly administered over the period of 2005 to 2008. TCL has alleged that it has been forced to obtain a further advance of US$25 million and to restructure the current loan. In these circumstances and in the light of the Court's preliminary conclusions as to fulfilment of the conditions of Article 83(2) in respect of both decisions to authorize the suspension of the CET, it is in the interests of justice that TCL should have an opportunity to commence proceedings against the Community and to prove, if possible, in what way it has been damnified, if at all.

The applicable law

[40] Counsel for TCL submitted that this Court should review the decisions of COTED and the Secretary-General on the grounds of illegality, irrationality and procedural impropriety as laid down by Lord Diplock in *CCSU v Minister for the Civil Service*[4]. It follows from the reasons stated earlier in this judgment that it is not necessary to deal with these submissions now. The Court, does however, wish to make the following observations.

[41] The search in the application and interpretation of the Revised Treaty is to discover Community law. In this quest the Court has to apply such rules of international law as may be applicable [Art 217 (1) of the Revised Treaty]. Part of that law is the emerging customary international law on, for example, the concept of *ultra vires* acts of organs of international organizations.[5] The Court may also consider "the general principles of law recognized by civilized nations". If one applies Article 217 of the Revised Treaty the principles of law common to

[4] [1985] AC 374, 410-11

[5] See on this subject the International Law Commission, Report on the work of its fifty-sixth session (3 May to 4 June and 5 July to 6 August 2004), General Assembly, Official Record, Fifty-ninth Session, Supplement No. 10 (A/59/10), Chapter V.

the principal legal systems of the Community are a source of law for this Court, as it is for the International Court of Justice: see Article 38(1)(c) of the Statute of the International Court of Justice. This Court may take into account the principles and concepts common to the laws of Member States. The search is for general principles of law common to Member States. It is not necessary for the principle to be expressed identically in all Member States. It is sufficient if the general principle is widely accepted: see the opinion of Advocate General Sir Gordon Slynn in *AM & S Europe Ltd v Commission*[6] and of the ECJ[7]. If the general principle is widely accepted throughout the Community and relevant it may become part of Community law. These are tests that will have to be applied if this Court is asked to strike down the decisions authorizing suspension of the CET on grounds that derive from the domestic law applicable to judicial review in common law jurisdictions.

Conclusion

[42] For the reasons stated above the Court granted special leave to the Applicant to commence proceedings before the Court as a private entity pursuant to Article 222 of the Revised Treaty and reserved the issue of costs to a later stage of the proceedings.

/s/ M A de la Bastide

The Rt Hon Mr Justice M. A. de la Bastide (President)

/s/ R F Nelson
The Hon Mr Justice Rolston Nelson

/s/ Duke Pollard
The Hon Mr Justice Duke Pollard

[6] [1983] QB 878, 909, 910
[7] [1983] QB 878, 949

/s/ A Saunders
The Hon Mr Justice Adrian Saunders

/s/ D P Bernard
The Hon Mme Justice Desiree Bernard

/s/ J Wit
The Hon Mr Justice Jacob Wit

/s/ D Hayton
The Hon Mr Justice David Hayton