[2009] CCJ 4 (OJ)

IN THE CARIBBEAN COURT OF JUSTICE

Original Jurisdiction

CCJ Application No. OA 1 of 2009

Between

Trinidad Cement Limited **Claimant**

And

The Caribbean Community **Defendant**

Executive Summary

Introduction

[1] Trinidad Cement Limited ("TCL") challenged two decisions of the Community each of which resulted in authorisation being granted to suspend the Common External Tariff ("CET") on imports of grey cement into certain Member States of the Community. In each case the authorisation granted was for suspension of the CET for a period of one year. TCL claimed that each of the two decisions was *ultra vires* and should be quashed by the Court.

[2] The first of the two decisions was made by the Secretary-General on the 23rd September, 2008. It authorised suspension by Jamaica from 10th September, 2008. The quantity of cement in question was 240,000 metric tonnes. The second decision challenged was made by the Council for Trade and Economic Development ("COTED") at its 26th Meeting held in Guyana on 24th and 25th November, 2008. At that Meeting COTED authorised suspension of the CET on cement for one year for the Member States of Antigua and Barbuda, Dominica, Grenada, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines and Suriname.

[3] The Court heard TCL's claim on an expedited basis and in the process received oral testimony from His Excellency Dr Edwin Carrington, Secretary-General of the Caribbean Community and from Ms Desiree Field-Ridley, Adviser to the Secretary-General of the Community on the Single Market and Sectoral Programmes. Oral submissions were made by the parties and by

Jamaica. In light of the central importance of the CET to the Community and in particular to the CSME, quite apart from determining the specific challenges made by TCL, the Court in its judgment took the opportunity to clarify a variety of issues concerning the CET regime.

Jurisdiction, Admissibility of the Claim and relevant principles of judicial review

[4] The Court noted that TCL is a producer of cement; that TCL supplies cement throughout the region; that the maintenance of the CET on cement yields a direct benefit to TCL and that decisions to suspend or lower the CET on cement would have a prejudicial impact on that company. In light of these circumstances, the Court held that it had jurisdiction; that TCL had satisfied fully the relevant provisions of Article 222 of the Revised Treaty of Chaguaramas ("RTC") and that the claim was admissible. The Court further held that it had the power to scrutinise the acts of the Member States and the Community to determine whether they were in accordance with the rule of law. The impugned decisions to authorise suspensions in this case were therefore subject to judicial review by the Court and the Court was competent to award appropriate relief including the grant of coercive remedies.

[5] In carrying out such review the Court had to strike a balance. The Court had to be careful not to frustrate or hinder the ability of Community organs and bodies to enjoy the necessary flexibility in their management of the Community. The decisions of such bodies will invariably be guided by an assessment of economic facts, trends and situations for which no firm standards exist. Only to a limited extent are such assessments susceptible of legal analysis and normative assessment by the Court. But equally, the Community must be accountable and operate within the rule of law. The ability to authorise suspension of the CET is inherently a power to cater to the kind of flexibility that is required in the carrying out of policy. Applications for suspension must be dealt with in a principled, procedurally appropriate manner. The occasion for suspension may only lawfully arise if one of the conditions laid out for it in the RTC is present and suspension should not be sought or granted for improper purposes.

The Secretary-General's decision to authorise a suspension by Jamaica

[6] By letter of 20th August, 2008 the State of Jamaica made a formal request to the Secretary-General for the suspension of the CET on cement for the period 10th September, 2008 to 9th September, 2009. In keeping with established

practice, the Secretary-General sought from each other Member State information regarding supplies of cement available and where supplies were not currently available, an indication of if and when supplies would be available.

[7] On 3rd September, 2008 the Competent Authority in Trinidad and Tobago responded to the Secretary-General informing him that Trinidad and Tobago had "*no objections*" to the request from Jamaica. The Trinidad and Tobago Competent Authority did not otherwise respond to the request for the information specified in the Secretary-General's letter. TCL complained that it was never consulted before the Trinidad and Tobago Competent Authority responded in this manner to the Secretary-General.

[8] On the 22nd September, 2008, the Chief Executive Officer of the TCL Group wrote to the Secretary-General expressing surprise that TCL had not been contacted with respect to its ability to supply the quantities of cement demanded by Jamaica. TCL requested an explanation of what could have contributed to its not receiving this vital correspondence. The following day, 23rd September, 2008, the Secretary-General authorised the Government of Jamaica to suspend the CET on cement for one year in an amount of 240,000 metric tonnes. The Secretary-General did not admit that he had received the TCL letter before issuing his authorisation and there was no positive evidence that he did.

[9] On the above facts, the Court held that the Secretary-General, before authorising a suspension, must not concern himself with whether a Member State objects or does not object to a request for suspension. He must receive from Competent Authorities specific answers that would allow him to determine whether the quantity of the product in question being produced in the Community can satisfy the demand of the requesting State. In the circumstances, it was wrong for the Secretary-General to accept as a sufficient answer to his inquiry regarding a request for suspension by Jamaica, the response of Trinidad and Tobago that it had *"no objections"* to Jamaica's request. The Court accordingly issued a declaration to that effect.

[10] The Court, however, rejected TCL's claim to have the Secretary-General's decision quashed on this basis. The Secretary-General acted throughout in good faith and in conformity with a practice (now declared obsolete) that he inherited when he assumed office. While his procedural flaw attracted an appropriate declaration, it was not of a sufficiently serious nature to warrant the annulment of his decision. There would certainly have been a stronger basis for the Court to make such an order if it had been established clearly

that the TCL letter of 22nd September, 2008 was received by the Secretary-General before the latter issued his authorisation to Jamaica.

The COTED decision

[11] COTED's authorisation to suspend appeared to represent an unexplained *volte face* from refusals of such suspension by the Secretary-General on behalf of COTED shortly before the meeting on November 24 and 25, 2008. The point is best illustrated by the following table:

REQUESTING STATE	DATE OF REQUEST	DATE OF REFUSAL	COTED APPROVAL ULTIMATELY GIVEN
Antigua and Barbuda	September 24, 2008	October 22, 2008	60,000 MT – 1 year
St. Lucia	September 12, 2008 October 29, 2008	October 8, 2008 November 18, 2008	50,000 MT – 1 year
Suriname	September 4, 2008 October 13, 2008	November 7, 2008	175,000 MT – 1 year

[12] The applications to COTED for suspension of the CET, each for a period of two years, by the six OECS States and Suriname, were all made on the ground that those Member States had difficulty in obtaining supplies of cement from the TCL Group. At the COTED Meeting the COTED Ministers focused on the issues of the availability of a regular, consistent and timely supply of cement from TCL and on TCL's prices. There was also some discussion of alleged anti-competitive behaviour on the part of TCL. Significantly, in the course of the deliberations the Member States strongly advocated the principle that even if the authorisations were granted, their dealings in the market would follow the rule: "no matter what, we source first from within". The COTED Meeting ultimately agreed to authorise the suspensions, not for two years as had originally been requested by the respective States, but for one year.

[13] The Court held that Article 83(2)(b) of the RTC must be interpreted to mean that COTED may authorise suspension of a rate not only where the quantity of the product being produced in the Community does not satisfy the demand of the Community as a whole 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.

[14] Issues raised at the COTED Meeting as to anti-competitive conduct by the TCL were not relevant to the suspension. Within the Caribbean Community there is a forum for investigating and challenging conduct that appears to be

anti-competitive. It would be unjust and illegal for COTED to rely on unproven allegations of such behavior to support a decision to suspend the CET. Notwithstanding the concerns expressed about TCL's prices and the irrelevance of those concerns in the making of a decision as to the suspension of the CET, all the facts relating to supply and demand for cement were before COTED. The Court is unable to say that COTED in the exercise of its discretion to authorise the suspension could not rationally rely on its past supply experience and use that as a basis for being sceptical about the actual delivery of supplies of cement in a timely manner. The amount of cement in respect of which the suspensions were given and the fact that the suspensions were only for a one year duration, although suspension for two years was sought, indicates an observance of the principle of proportionality which must at all times be adhered to by COTED.

[15] The Court is not entitled to substitute its own judgment for that of COTED. The *volte face* referred to at [11] above and the reason for the same were not explored at the hearing. The Court considers, however, that the Secretary-General acted properly in refusing the requests made of him based on the information available to him at the time. It would not be proper to draw any adverse inference from the alleged *volte face*. COTED always is in a better position than the Secretary-General to assess whether a suspension of the CET should be authorised. In all the circumstances, the Court can find no basis for holding the decision made by COTED to be *ultra vires.*

Conclusion

[16] Save for the grant of the declaration referred to at [9] the Court dismissed all the other claims for relief made by the Claimant. The Court found that TCL acted properly in bringing this action. It was important not just to TCL but to the entire private sector in the region that the Court should pronounce on many of the issues discussed in the judgment. Although the only relief obtained by TCL was the making of the declaration referred to above, in all the circumstances, the Community should bear one half of the costs of TCL.