IN THE CARIBBEAN COURT OF JUSTICE

Original Jurisdiction

CCJ Application No TTOJ2018/001

Between

Trinidad Cement Limited	**Claimant**
And	
The State of Trinidad and Tobago	**Respondent**
And	
Rock Hard Distribution Limited	**First Intervener**
And	
Mootilal Ramhit and Sons Contracting Limited	**Second Intervener**

And

CCJ Application No TTOJ2018/002

Between

Trinidad Cement Limited &	**Claimants**
Arawak Cement Company Limited	
And	
The State of Barbados	**Respondent**
And	
Rock Hard Cement Limited	**Intervener**

And

CCJ Application No SLUOJ2018/001

Between

Rock Hard Distribution Limited	**Claimant**
And	
The State of Trinidad and Tobago	**Respondent**
And	
The Caribbean Community	**Respondent**

And

CCJ Application No BBOJ2018/001

Between

Rock Hard Cement Limited	**Claimant**
And	
The State of Barbados	**Respondent**
And	
The Caribbean Community	**Respondent**

(Consolidated by order of this Court dated the 15th day of February 2019)

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

Judges

having regard to the Orders made by the Court on the 15th day of February 2019 granting the parties and the interveners leave to file written submissions on the issue of whether the cement imported by Rock Hard Distribution Limited/Rock Hard Cement Limited into the States of Trinidad and Tobago and Barbados, as the case may be, was properly classified as "Building cement (grey)" or "Other hydraulic cement", the written submissions filed on behalf of Trinidad Cement Limited and Arawak Cement Company Limited on 16 April 2019 and 7 May 2019, the written submissions filed on behalf of Rock Hard Cement Limited and Rock Hard Distribution Limited on 16 April 2019 and 8 May 2019, the written submissions filed on behalf of the State of Trinidad and Tobago on 16 April 2019 and 7 May 2019, the written submissions filed on behalf of the State of Barbados on 17 April 2019, the written submissions filed on behalf of the Caribbean Community on 15 April 2019 and 7 May 2019, the Affidavits of Dr Corlita Babb-Schaefer filed on 5 February 2019 and 8 March 2019 annexing the Draft Decision of the Council for Trade and Economic Development on the classification of Rock Hard Cement, the Expert Reports of Dr Lebert Grierson filed on 6 July 2018 and 22 March 2019, the Expert Report of Mr Paul Brooks filed on 6 July 2018, the Expert Report of Mr Matthew R Nicely filed on 6 July 2018, the Witness Statement of Dr Patrick Antoine filed on 22 March 2019, the Witness Statement of Mr Jose Luis Seijo Gonzalez filed on 22 March 2019, the Witness Statement of Mr Yago Castro Izaguirre filed on 22 March 2019, the Witness Statement of Ms Kathy Ann Matthews filed on 6 July 2018, the Witness Statement of Mr Keith Huggins filed on 6 July 2018, the Witness Statement of Mr Mark Maloney filed on 6 July 2018, the Witness Statement of Mr O'Neil Francis filed on 30 May 2019, and the oral evidence of Dr Antoine, Mr Francis, Dr Grierson, Mr Gonzalez, Mr Nicely and Ms. Matthews given at the hearing of the consolidated matter on 11 June 2019

And after considering the written and oral submissions made on behalf of:

- **Trinidad Cement Ltd** and **Arawak Cement Company Ltd**, by Mr Reginald T. A. Armour, SC, Mr Gilbert Peterson S.C., Mr Gregory Pantin, Mr Miguel Vasquez and Mr Raphael Ajodhia, Attorneys-at-Law

- **Rock Hard Cement Ltd** and **Rock Hard Distribution Ltd**, by Mr Allan Wood QC and Ms Symone Mayhew, Attorneys-at-Law
- **The State of Trinidad and Tobago,** by Mrs Deborah Peake, SC, Ms Tamara Toolsie, Mr Brent James and Ms. Radha Sookdeo**,** Attorneys-at-Law
- **The State of Barbados**, by Ms Donna Brathwaite, QC, and Ms Gayl Scott, Attorneys-at-Law
- **Mootilal Ramhit and Sons Contracting Limited,** by Mr. Ramesh Lawrence Maharaj, SC, Mr. Jagdeo Singh, Mr Dinesh Rambally, Mr Kiel Taklalsingh and Mr Stefan Ramkissoon, Attorneys-at-Law
- **The Caribbean Community**, by Dr Corlita Babb-Schaefer and Mr O'Neil Francis

Delivers on the 6th day of August 2019, the following:

JUDGMENT

Introduction

[1] These proceedings mark the culmination of multifaceted litigation that began with the filing of an Application for Special Leave on 24 April 2018. That Application concerned the classification and tariff payable in respect of certain cement ('Rock Hard Cement') imported from outside the Caribbean Community (sometimes referred to in this judgment as 'CARICOM'). The Application spawned numerous other applications and claims which led to the delivery of five separate judgments and the prescription of myriad orders by this Court. The issue that remains for determination is the very narrow one with which this odyssey began, namely: whether Rock Hard Cement imported from Turkey and Portugal is to be classified as 'Building cement (grey)', thereby attracting a tariff of 15%, or as 'Other hydraulic cement', on which a tariff of 0-5% is payable.

[2] On 28 January 2019, the Council for Trade and Economic Development ('COTED') of the Caribbean Community agreed that it would decide the issue of classification of Rock Hard Cement by a three-quarters majority vote in accordance with Article 29 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy ('RTC'). COTED subsequently decided that Rock Hard Cement was to be classified under Tariff Heading 2523.90.00 as 'Other hydraulic cement' (sometimes referred to in this judgment as 'the COTED classification decision'). The Parties to these proceedings who are dissatisfied with the COTED classification decision argue that the decision-making process by COTED was

procedurally flawed and that COTED had placed too great reliance on advice given by the World Customs Organization ('WCO') in preference to the economic objectives of the tariff regime governing the CARICOM Single Market and Economy ('CSME').

[3] The Court must consider the propriety, juridical import and effect of the COTED classification decision and the arguments for and against its validity. However, in order to provide context and meaning to the consideration of these issues, it is necessary to set out in greater detail the procedural history of the dispute including the related decisions and some of the orders previously made by this Court in the course of this multipronged litigation.

Procedural History

[4] There are four separate cases in these proceedings which relate directly or indirectly to the issue of the classification of Rock Hard Cement and which were consolidated by this Court. The cases are indicated below in the chronological order in which they were filed.

Trinidad Cement Limited v The State of Trinidad and Tobago; Rock Hard Distribution Limited and Mootilal Ramhit and Sons Contracting Limited, Intervening

[5] The Application for Special Leave in this case was filed on 24 April 2018 by Trinidad Cement Limited ('TCL'), a cement manufacturing company based in Trinidad and Tobago. TCL claimed that the State of Trinidad and Tobago violated Articles 82 and 83 of the RTC by applying the Common External Tariff ('CET') classification of 'Other hydraulic cement', with its corresponding 0% duty, to the importation of Rock Hard Cement without consultation with COTED or the Secretary-General of the Community on behalf of COTED. TCL claimed further that Rock Hard Cement should have been classified as 'Building cement (grey)' and its corresponding duty of 15% applied. TCL alleged that the unlawful imposition of the 0% duty distorted competition, frustrated the free movement of goods and nullified benefits expected by TCL in contravention of Article 79 (2) of the RTC. TCL also claimed that the State of Trinidad and Tobago violated Article 214 of the RTC by virtue of the failure of the Trinidad and Tobago Tax Appeal Board to refer the classification of Rock Hard Cement to this Court for interpretation of the treaty. The Application for Special Leave was accompanied by an Application for Interim Measures seeking the restoration of

the 15% tariff pending final determination by this Court of the issue between the Parties. For reasons which do not require further mention, the claim of breach of Article 214 and the application for interim measures were not pursued.

[6] On 25 May 2018, this Court granted the Application for Special Leave thereby enabling TCL to bring proceedings against Trinidad and Tobago pursuant to Article 222 of the RTC. The Court also granted certain ancillary or related orders. In addition, the Court granted Applications to Intervene filed by Rock Hard Distribution Limited ('RHDL'), a company incorporated in St. Lucia engaging in the regional distribution of Rock Hard Cement[1] and Mootilal Ramhit and Sons Contracting Limited ('Ramhit and Sons'), importers of Rock Hard Cement into Trinidad and Tobago.[2] Leave was granted to TCL to amend its Originating Application and its Application for Interim Measures.[3] A timetable was set for the filings by the Parties and the Interveners and the hearing of the Originating Application was ordered for 25 July 2018. Noting the legal status and responsibilities of the Caribbean Community in respect of the technical and legal matters raised, the Court invited[4] the Community to file written submissions and to make oral submissions at the hearing of the Originating Application.

[7] At the 25 July 2018 hearing, the Court heard submissions from the Parties and Interveners supporting their respective views on the classification of Rock Hard Cement. In its submissions, the Second Intervener, Ramhit and Sons, advised the Court that it had been engaged in litigation in various courts in Trinidad and Tobago to validate its contention that Rock Hard Cement should be classified as 'Other hydraulic cement' and that importation of that cement in Trinidad and Tobago should attract a CET of 0%. The litigation included challenges to decisions of the Comptroller of Customs and Excise to levy duties on a number of its consignments of Rock Hard Cement as well as an application in the High Court seeking interim relief on and judicial review of the decision of the Comptroller to implement an allegedly unlawful policy and/or decision.

[1] Application filed with Court on 18 May 2018.
[2] Application filed with Court on 22 May 2018.
[3] Application filed with Court on 24 April 2018.
[4] By Order dated 18 July 2018. The invitation was made pursuant to Part 19 (1) (aa) of the Caribbean Court of Justice (Original Jurisdiction) Rules.

[8] The Court was also advised by the General Counsel for the Caribbean Community that a request had been made by the State of Trinidad and Tobago for COTED to 'investigate the classification of imported cement into the region' and for the review of the tariffs thereon. Ahead of the Sixth Special Meeting of the Customs Committee of COTED scheduled for 15 August 2018, Member States of the Community were specifically reminded that at its Forty-Sixth Meeting in May 2018, in consideration of the Proposal by the Government of the Republic of Trinidad and Tobago for increasing the CET on Selected Tariff Headings under HS Chapter 2523, COTED had agreed 'that the matter of the classification of Rock Hard Cement be referred to the Customs Committee for its recommendation to the Forty-Seventh Meeting of the COTED.'[5]

[9] Having heard fulsome submissions from the Parties and the Interveners, but without calling upon the expert and other witnesses tendered, the Court decided to reserve its judgment in the matter.

Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados; Rock Hard Cement Limited, Intervening

[10] On 22 June 2018, this Court granted to TCL and its subsidiary Arawak Cement Company Limited ('ACCL'), a company based in the State of Barbados which distributed TCL's cement in Barbados, Special Leave pursuant to Article 222 of the RTC to bring an Originating Application against Barbados. TCL and ACCL claimed that the State of Barbados wrongfully lowered from 60% the applicable tariff on the importation into Barbados of Rock Hard Cement from Portugal. TCL and ACCL further claimed that Barbados had misclassified the said cement contrary to Articles 9, 26, 79, 82 and 83 of the RTC. An Application to Intervene filed on 6 June 2018 on behalf of Rock Hard Cement Limited ('RHCL'), a company incorporated in St. Lucia and engaged in the importation of Rock Hard Cement, was also granted. The hearing of the Originating Application was ordered for 29 November 2018.

[11] On 6 July 2018, TCL and ACCL jointly filed an Application for Interim Measures against Barbados requiring the imposition of 60% tariff on 'Other hydraulic cement' imported into Barbados by RHCL. The Application was granted, and a judgment of

[5] Savingram NO 403/2018 of 23 July 2018.

this Court was delivered on 17 July 2018.[6] An Application by RHCL to discharge the Interim Measures was refused by this Court on 11 December 2018.[7] Upon a ruling delivered on 17 April 2019,[8] this Court, of its own motion, deemed the life of the Interim Measures to have expired.

Rock Hard Distribution Limited v The State of Trinidad and Tobago and The Caribbean Community

[12] On 14 August 2018, RHDL sought special leave pursuant to Articles 211 and 222 of the RTC to pursue claims against the State of Trinidad and Tobago and the Caribbean Community. RHDL claimed that Trinidad and Tobago had breached its RTC obligations through the actions of its Comptroller of Customs and Excise which had allegedly incorrectly applied the CET classification of 'Building cement (grey)' to Rock Hard Cement instead of classifying that cement as 'Other hydraulic cement'. In respect of the Community, RHDL argued that any attempt by COTED to classify Rock Hard Cement would be *ultra vires* the RTC as COTED, through its Customs Committee, would be exercising a judicial function which was outside its powers. Trinidad and Tobago objected to the Application but by a judgment dated 11 December 2018,[9] this Court granted RHDL Special Leave to commence its proceedings.

[13] On 23 August 2018, by Order issued on its own motion, this Court re-opened the Originating Application in *Trinidad Cement Limited v The State of Trinidad and Tobago; Rock Hard Distribution Limited and Mootilal Ramhit and Sons Contracting Limited, Intervening,*[10] that had been tried on 25 July 2018. The Court scheduled a joint Case Management Conference for 25 October 2018 for all the cases before it. That Order was thereafter varied by the Court on 12 October 2018 giving leave to the Caribbean Community to file a report of its classification determination on or before 22 October 2018.

[14] At a Case Management Conference on 25 October 2018, the General Counsel of the Community reported that COTED had met for its Seventy Sixth Meeting on 16 October

[6] *Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados, Rock Hard Cement Limited Intervening* [2018] CCJ 1 (OJ).
[7] *Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados, Rock Hard Cement Limited Intervening* [2018] CCJ 5 (OJ).
[8] *Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados Rock Hard Cement Limited Intervening and Rock Hard Cement Limited v The State of Barbados & The Caribbean Community* [2019] CCJ (OJ) 1.
[9] *Rock Hard Distribution Limited v The State of Trinidad and Tobago and The Caribbean Community* [2018] CCJ 3 (OJ).
[10] TTOJ2018/001.

2018 but had decided that the Council could not then decide the classification issue. The Parties and the Interveners raised various concerns about the competence of the Community and/or COTED to classify the cement in light of the pendency of proceedings before this Court. They asked for permission to file written submissions on COTED's jurisdiction to classify the cement in question. By Order dated 31 October 2018, this Court gave the Parties and Interveners leave to file written submissions on the jurisdiction of the Community and/or COTED to classify the cement that was the subject of the Originating Applications. Parties and Interveners were also invited to file submissions on whether it would be proper for this Court to receive and rely upon classification reports from the Community and/or COTED.

[15] The jurisdiction of the Community and COTED to classify Rock Hard Cement was the subject of a judgment of this Court delivered on 11 December 2018.[11] In coming to its decision, the Court examined the RTC provisions on the duty of COTED to promote and oversee the development of the CSME and to set out plans and schedules by which Member States are mandated to establish and maintain the CET (Articles 15 (2) and 82). The Court also referenced COTED's responsibility to alter or suspend the CET (Article 83 (1)) and to continuously review the CET to assess its impact throughout the Community (Article 83). Relying on the case of *Reparations for Injuries Suffered in the Service of the United Nations*,[12] the Court decided that these provisions permitted the application of the doctrine of implied powers applicable to international organizations and supported the proposition that COTED had competence to engage in matters which, even if they were not expressly stated in the Revised Treaty, were essential to the discharge of its functions. The Court concluded that "COTED has competence to engage in the classification of goods so as to facilitate the regional and harmonious administration of the CET"[13], and therefore its classification reports are properly before this Court. The Court further determined that relevant decisions of the WCO were admissible in proceedings before it and would normally be regarded as highly persuasive unless it was shown that there were good reasons for not relying on them.[14]

[11] *Trinidad Cement Limited v State of Trinidad and Tobago; Rock Hard Distribution Limited and Mootilal Ramhit and Sons Contracting Limited Intervening; Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados; Rock Hard Cement Limited* [2018] CCJ 4 (OJ).
[12] ICJ Advisory Opinion, 1949 ICJ 174 (April 11, 1949).
[13] Supra (n.11) at [7].
[14] ibid at [9] and [10].

Rock Hard Cement Limited v The State of Barbados and The Caribbean Community

[16] On 5 September 2018, Rock Hard Cement Limited ('RHCL') filed an Application for Special Leave to commence proceedings against Barbados and CARICOM. The proposed Defendants did not object to the Application and Leave was granted on 29 November 2018. RHCL acknowledged that Barbados had sought and obtained from COTED in May 2001 a 'derogation' from the CET which permitted Barbados to increase the applicable rate of duty on hydraulic cements (excluding white Portland cement) under tariff heading 2523.90.00 to the WTO bound rate of 60%. It was noted that the Customs Act of Barbados was amended to reflect this new tariff. Prior to commencing its business of importing Rock Hard Cement into Barbados, RHCL had sought and received notification from the Cabinet of Barbados that RHCL cement falling under tariff heading 2523.29.90 would be subject to the CET rate of 5%. RHCL argued that the right to reduce the tariff in Barbados from 60% to 5% was entirely within the prerogative of the State of Barbados and that there was no requirement for the State of Barbados to obtain the approval of COTED to do so. RHCL argued further that Barbados had breached, and remained in breach, of Article 82 of the RTC by failing to amend its domestic legislation to accord with the 5% duty on 'Other hydraulic cement' under CET Tariff Heading 2523.29.90.

[17] By a separate judgment dated 17 April 2019,[15] this Court determined the issue of whether Barbados was obliged to obtain the approval of COTED before it could depart from the 'derogated' rate of 60% and reimpose the CET of 0-5%. The Court considered that the CET was a defining and unifying characteristic of the emerging union and single economy among Member States of the Community. Individual Member States may wish to impose additional protection for their local industries and thus seek the approval of COTED to do so. Given that any such measure yielded protection that was greater than the protection considered appropriate by the Community, it stood to reason that it was equally a matter for the Member State to decide when its industries no longer required this additional protection.[16] There was therefore no requirement for Barbados to obtain the approval of COTED to revert to the CET, but there was an onus on that

[15] *Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados Rock Hard Cement Limited Intervening and Rock Hard Cement Limited v The State of Barbados & The Caribbean Community* [2019] CCJ (OJ) 1.
[16] ibid at [35] and [38].

Member State to give reasonable and adequate notice to COTED of its decision to do so.[17]

COTED's Classification Decision

[18] As previously indicated, the central issue underpinning the above cases revolves around the classification of Rock Hard Cement for purposes of the CET. The process culminating in the COTED classification decision commenced in earnest on 25 July 2018 when the CARICOM Secretariat submitted a request to the WCO for classification advice on Rock Hard Cement. On 31 July 2018, the WCO Secretariat issued its opinion that Rock Hard Cement 'should not be classified as Portland cement but as 'Other hydraulic cement' in heading 25.23 (subheading 2523.90.00), by application of General Interpretative Rules 1 and 6.' The Court was advised of the opinion of the WCO Secretariat by letter dated 17 August 2018 from the General Counsel of the Community to the Registrar of the Court.

[19] By Note dated 21 August 2018,[18] the Community formally requested the WCO's Harmonized System Committee ('HSC') to classify Rock Hard Cement as well as cements produced by TCL and ACCL. Among the documents included as attachments to the Note were the CARICOM CET breakout of HS 25.23, reports setting out the technical properties of the various cements, photographs of the products requiring consideration and the expert reports that had been tendered to the Court from Mr Paul Brooks and Dr Lebert Grierson setting out the differing views with respect to the classification of RHCL's cement. The matter was considered at the 62nd Session of the HSC in September 2018 which adopted the advice given by the WCO's Secretariat dated 29 August 2018. In the interim, the Sixth Special Meeting of COTED's Customs Committee scheduled for 15 August 2018 was postponed on account of objections taken, particularly by RHCL, to the Committee considering the matter. At the Thirty-Ninth Meeting of the Customs Committee held between 21-29 September 2018, Member States were asked to consider the classification of the cements including RHCL's cement.

[17] ibid at [38] and [39].
[18] Note No 253/2018.

[20] At its Seventy-Seventh Special Meeting on 28 January 2019, COTED sought to make a determination on the classification of Rock Hard Cement. During the meeting, there were eight affirmative votes classifying Rock Hard Cement as 'Other hydraulic cement' under sub-heading 2523.90.00 of the CET Schedule. Those votes were obtained from the Member States of Barbados, Belize, The Commonwealth of Dominica, Guyana, Jamaica, St. Kitts and Nevis, St. Vincent and the Grenadines and Suriname. Antigua and Barbuda voted to classify Rock Hard Cement as 'Portland cement – Building Cement (grey)' under subheading 2523.29.10 of the Common External Tariff of the Caribbean Community. Trinidad and Tobago abstained from the vote.

[21] The contrary vote by Antigua and Barbuda and the insufficient number of Member States at the meeting rendered COTED unable to take a decision by a qualified majority vote in accordance with Article 29 of the Treaty. COTED therefore agreed to obtain the views of those Member States that were absent and so, 'decide on the classification of cement by a qualified majority vote in accordance with Article 29 of the Revised Treaty of Chaguaramas…'[19]

[22] In implementing its decision to obtain from absent Member States their respective national positions on the classification of Rock Hard Cement, Haiti, Grenada, Suriname and St Lucia submitted national positions which supported the classification of Rock Hard Cement as 'Other hydraulic cement' under subheading 2523.90.00 of the CET Schedule. Montserrat abstained from voting.

[23] With a total of eleven affirmative votes, the Seventy-Seventh Special Meeting of COTED voted by qualified majority to classify Rock Hard cement as 'Other hydraulic cement' under subheading 2523.90.00. The consequence was that the applicable CET was 0-5%.

Consolidation of the cases

[19] *Trinidad Cement Limited v State of Trinidad and Tobago; Rock Hard Distribution Limited and Mootilal Ramhit and Sons Contracting Limited Intervening; Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados; Rock Hard Cement Limited* [2018] CCJ 4 (OJ).

[24] On 15 February 2019, this Court ordered the consolidation of the four separate cases in these proceedings related to the classification of Rock Hard Cement, namely: *Trinidad Cement Limited v The State of Trinidad and Tobago; Rock Hard Distribution Limited and Mootilal Ramhit and Sons Contracting Limited, Intervening*;[20] *Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados, Rock Hard Cement Limited, Intervening*;[21] *Rock Hard Distribution Limited v The State of Trinidad and Tobago and The Caribbean Community*;[22] and *Rock Hard Cement Limited v The State of Barbados and The Caribbean Community.*[23] Parties were required to file witness statements and expert reports on or before 19 March 2019. It was ordered that the witness statements would stand as evidence in chief, unless the Court decided otherwise. The pre-hearing review was held on 15 May 2019 and the hearing of the consolidated Originating Applications were scheduled for 11 and 12 June 2019.

Hearing of the Applications

[25] The hearing of the consolidated Applications proceeded as scheduled. The date of 11 June 2019 was dedicated to taking evidence. The witness statements of Dr Patrick Antoine, Mr O'Neil Francis, Mr Keith Huggins, Mr Jose Luis Seijo Gonzalez, Dr Lebert Grierson, Mr Yago Castro Izaguirre, Mr Mark Maloney, Ms Kathy Ann Matthews, Mr Matthew R Nicely, and Mr Ryan Ramhit, all stood as the evidence in chief of the respective witnesses. The evidence given by Dr Antoine, Mr Francis, Dr Grierson, Mr Gonzalez, Mr Nicely and Ms. Matthews was subjected to cross-examination, and to such re-examination as was considered necessary by Counsel calling those witnesses.

[26] Drs Grierson and Antoine were treated as expert witnesses. The evidence given in cross-examination by Dr Grierson was particularly helpful to the Court. Dr Grierson stated that at the time the CARICOM CET was crafted, the region only produced Portland cement. Around the year 2005, regional manufacturers began producing a different, more versatile form of cement, which is commonly referred to as 'blended cement'. Blended cement falls within the CET category of 'Other hydraulic cement'.

[20] Application No: TTOJ2018/001.
[21] Application No: TTOJ2018/002.
[22] Application No: SLUOJ2018/001.
[23] Application No: BBOJ2018/001.

In simple terms, blended cements contained Portland cement but with added materials such as fly ash, pozzolan and limestone. Dr Grierson noted that while the CET currently refers to 'Building cement' as a form of Portland cement, the term 'Building cement' is not a scientific term; it is a layman term for commonly used building cement. In his opinion, at some time in the future blended cement may eventually be referred to as 'Building cement' because of its ever-growing use within the region.

[27] Dr Grierson was also of the opinion that technical standards were important for determining the properties of each type of cement, especially for determining matters such as setting time and strength. Using technical standards ASTM 150 and EN 197-1, he found that Rock Hard Cement was not a form of Portland cement. Having regard to the WCO's report he found that it was a blended cement properly classified within the CET subheading 'Other Hydraulic Cement'. Dr Grierson was content to accept the approach to classification adopted in the WCO.

[28] Dr Antoine, on the other hand, contended that Rock Hard Cement should be classified as 'Building cement (grey)' because the CARICOM Nomenclature had a 'peculiar architecture' that mandated a commodity-based classification. Once it was found that Rock Hard Cement competed with regionally produced 'Building cement (grey)' then the tariff rating for the 'Building cement (grey)' ought to be applied to Rock Hard Cement. Competition between 'like' products was integral to the applicable tariff and therefore to the issue of classification.

[29] On 12 June 2019, the Court heard extensive oral submissions from the Parties and Interveners. These submissions were focussed on the central question of whether the decision taken by COTED on the classification of Rock Hard Cement was properly taken or should be impugned on procedural or substantive grounds. In light of these submissions the Court must now determine whether it should endorse COTED's determination that Rock Hard Cement should be classified as 'Other hydraulic cement'. On the one hand, the State of Trinidad and Tobago, TCL and ACCL have urged the Court to disapprove the COTED classification decision. The other Parties and Interveners, however, have submitted that the Court should endorse COTED's decision.

The Principles of Community Judicial Review

[30] Article 29 (1) of the RTC provides that Ministerial Councils shall take decisions by a qualified majority vote and that 'such decisions shall be binding'. The obligation of Member States to comply with the decisions of the Organs of the Community has been reiterated in several decisions of this Court.[24]

[31] In an earlier decision of the Court,[25] it was held that COTED had competence to decide issues of classification of goods but that COTED did not have compulsory or exclusive competence to determine such issues. The Court stressed that as guardian of the RTC it had a duty to judicially review decisions of COTED and to provide such guidance on the applicable legal principles as it considers appropriate.[26] Before the Court considers the challenges made by the various Parties and Interveners to the COTED classification decision, it is necessary to address briefly the scope of the judicial review which this Court may conduct.

[32] This Court has been developing the principles on which it will exercise its supervisory jurisdiction over the Organs of the Community through a series of decisions over the last decade. In *Trinidad Cement Limited v The Caribbean Community*,[27] the Court did not consider it necessary to respond to the invitation to hold that Community decisions could be reviewed on the grounds of illegality, irrationality and procedural impropriety, the common law grounds generally applied in administrative law in the Commonwealth Caribbean.[28] The Court did observe, however, that its application of applicable rules of International Law might lead to embracing the emerging customary International Law concept of *ultra vires* acts of organs of international organizations. General principles of law widely accepted throughout the Community as a whole, even if not expressed identically in all Member States, could also become part of Community law on judicial review.[29]

[33] In a subsequent decision in *Trinidad Cement Limited v The Caribbean Community,*[30] the Court rejected the submission that in the absence of a provision in the RTC similar to that contained in Article 230 of the Treaty Establishing the European Community giving the European Court of Justice ('ECJ') an express right of judicial review over

[24] See: *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 2 (OJ) and *Shanique Myrie v State of Barbados* [2013] CCJ 3 (OJ).
[25] Supra (n.11)
[26] ibid.
[27] [2009] CCJ 2 (OJ) at [40].
[28] As laid down by Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374, at 410-11.
[29] [2009] CCJ 2 (OJ) at [41].
[30] [2009] CCJ 4 (OJ).

community institutions, it had no power of review. The Court referred to Article 187 which addressed the settlement of disputes including allegations that an Organ or Body of the Community had acted *ultra vires*. The transformation by the RTC of the CSME 'into a rules-based system, thus creating and accepting a regional system under the rule of law,'[31] and the compulsory and exclusive jurisdiction of the Court over disputes 'concerning the interpretation and application' of the RTC necessarily meant that there was in this Court the power to scrutinise the acts of the Member States and the Community to determine whether they are in accordance with the rule of law. 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.'[32]

[34] The orthodoxy of judicial review by this Court has been repeated in several cases. In *Trinidad Cement Limited v Competition Commission*,[33] the Court held that in light of (a) the compulsory and also exclusive jurisdiction of the Court to hear and determine disputes concerning the interpretation and application of the Revised Treaty and (b) the normative structure of this Treaty, no conduct or exercise of power by a Treaty-created institution (especially one charged with essential functions and endowed with relevant powers under the Treaty) should escape the judicial scrutiny of the Court.

[35] The classical statement of the scope of judicial review to be conducted by the Court was made in *Trinidad Cement Limited v The Caribbean Community* where the following was said:

> In carrying out such review the Court must strike a balance. The Court has to 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. 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. It must operate within the rule of law. It must not trample on rights accorded to private entities by the RTC and, unless an overriding public interest consideration so requires, or the possibility of the adoption of a change in policy by the Community was reasonably foreseeable, it should not disappoint legitimate expectations that it has created.

[31] Trinidad Cement Ltd v Community [2009] CCJ 2 (OJ) at [32].
[32] Trinidad Cement Ltd v Community [2009] CCJ 4 (OJ) at [38].
[33] [2009] CCJ 2 (OJ).

> The Court must seek to strike a balance between the need to preserve policy space and flexibility for adopting development policies on the one hand and the requirement for necessary and effective measures to curb the abuse of discretionary power on the other…[34]

[36] These statements must be understood against the background of the nature of the COTED decision that was under review in that case: the authorization of the suspension of the CET on cement as requested by several Member States, a decision which allows COTED a broad discretion. A review of such decisions needs to be distinguished from a review of others that allow for no or little discretion. In the latter type of cases the Court's scrutiny must be more intrusive. As will be explained, a classification decision such as the COTED decision here under review belongs to the latter category.

[37] There are three fundamental grounds on which the COTED classification decision was challenged in the present case. The first was that the decision was not made with the relevant majority as required by Article 29 of the RTC. It was submitted that, on this account, the decision was not binding and therefore without legal effect. The second ground was procedural in character: that the decision was flawed as COTED had given no reasons for it. The third ground was also framed in terms of procedural review: that COTED placed too much weight on the advice from the WCO in preference to a consideration of the economic objectives of the CSME and the Community's tariff regime. Basically, however, this is a matter of substantive review as this last ground challenges the legal correctness of that advice, as wholesale adopted by COTED. The Court considers that all these challenges fall within its scope of review.

Was the COTED Decision made with the majority required by Article 29 of the RTC?

[38] The issue of whether an act or decision of a Community Organ is binding is a crucial one. If it is not binding, it will not create legal effects and there would be no need for any further review. In such a case, the decision is non-existent in law. Elementary principles of law dictate that where a procedure for taking binding decisions is specified, that procedure must be observed for the decision to be binding. The RTC requires that decisions of Ministerial Councils be taken by a qualified majority. The

[34] [2009] CCJ 4 (OJ) at [39] – [40]; see also for example: *Johann Luhrs v Hauptzollamt Hamburg-Jonas*, Case 78/77 of 1978.

Court clearly has the power and responsibility to scrutinise the procedure adopted by COTED to ensure that this requirement was complied with.

[39] Article 29 (1) and (2) of the RTC provides that:

> 1. Save as otherwise provided in this Treaty and subject to the provisions of this Article and Article 27, the Ministerial Councils shall take decisions by a qualified majority vote and such decisions shall be binding.
>
> 2. For the purposes of paragraph 1 of this Article a qualified majority vote means an affirmative vote of the Member States comprising no less than three-quarters of the membership of the Community.

[40] As noted at [20] and [21] above, COTED agreed at its Seventy Seventh Special Meeting that it would decide the classification of Rock Hard Cement by a qualified three-quarters majority vote in accordance with Article 29. Eleven (11) Member States agreed to classify Rock Hard Cement as 'Other hydraulic cement' under subheading HS 2523.90.00. The State of Antigua and Barbuda, however, voted in favour of categorizing the cement as 'Building cement (grey)' on the basis that building cement had been classified under sub-heading HS 2523.29.10 for the past forty years, that goods competing with regional production should attract the competing CET rate, and that Rock Hard Cement was competing with regional production and as such it should attract the rate of 15% payable on 'Building cement (grey)'. Trinidad and Tobago abstained from voting. In the Community's view, the 11 votes satisfied the three-quarters majority vote required by Article 29.

[41] In its written submissions filed on 7 May 2019, Trinidad and Tobago submitted that all 15 members of the Community, including The Bahamas and Montserrat, were entitled to one vote in accordance with Article 27 of the RTC. Trinidad and Tobago further contended that since three-quarters of 15 was 11.25, this had to be rounded up to 12 votes, being the next whole number. Given that only eleven (11) Member States voted in favour of classifying Rock Hard Cement under subheading HS 2523.90.00, Trinidad and Tobago submitted that the decision of COTED was not made in compliance with Article 29.

[42] At the hearing before this Court on 12 June 2019, Counsel for Trinidad and Tobago abandoned this point. The Court considers that Counsel was right to do so. There are thirteen (13) Members States who are parties to the RTC and the CSME which that Treaty establishes. An additional two (2) states, namely, The Bahamas and Montserrat,

have bilateral agreements with CARICOM which render them members of the Community but not participants in the CSME. As the General Counsel correctly pointed out in her written submissions filed on 13 May 2019, The Bahamas was not a member of the Common Market which was the predecessor of the CSME.[35] Members of that Common Market were entitled, under Article 9 of the original Treaty of Chaguaramas in 1973, to have one vote on the decisions of the Common Market. The Bahamas, not being a member of the Common Market, did not participate in the trade arrangements or trade regime under the original treaty. Further, Article 2 of the *Agreement between the Caribbean Community and the Government of The Bahamas*, entered into on 10 February 2006 provided that The Bahamas would remain a Member of the Community in accordance with the terms and conditions existing immediately prior to the entry into force of the RTC. The Agreement is further accompanied by an interpretive Declaration by The Bahamas which notes that although The Bahamas was a party to the 1973 Treaty, it had a reservation excluding its participation in the economic integration arrangements of the Community.

[43] The Article 27 right in each member of the Community to cast one vote on decisions of COTED must be read as modified by the subsequent Agreement between the Community and The Bahamas. In accordance with that Agreement, The Bahamas is and remains a Member of the Community but does not have the right to vote on matters such as that which concerned the COTED classification decision. In these circumstances, the majority vote needed was, at most, a vote of at least three-quarters of the 14 other Members of the Community, that is, at least 11 votes of the 14 member states. The decision of COTED was therefore validly made in accordance with Article 29.

COTED's obligation to give reasons for its decision

[44] Trinidad and Tobago contended that COTED did not provide reasons for its decision nor did it make available the transcript or minute of its deliberations from its 77th Special Meeting where the classification issue was voted upon. The State argues that without reasons it is not clear what legal or other principles, if any, were applied by those considering the classification issue nor is there any indication that members of

[35] See Article 2 of the Annex to the Original Treaty of Chaguaramas concerning the Caribbean Common Market.

COTED considered or addressed their minds to Trinidad and Tobago's comments on classification.

[45] Trinidad and Tobago stressed that it was incumbent on COTED to provide reasons for its decisions as reasons encouraged transparency and assisted the Court in performing its supervisory function under the RTC. In the absence of reasons, the Court and the parties were now left in a wholly unsatisfactory position of examining the Working Document prepared for the 77th Special Meeting of COTED, as well as the national positions submitted thereafter by some Member States, with a view to discerning the possible reasons or basis for COTED's decision. This, it was also argued, deprives the Court of the very assistance from COTED which was contemplated by the decision of the Court in *Trinidad Cement Ltd v The State of Trinidad and Tobago et.al*.[36]

[46] The Court notes that there is no express provision in the RTC which requires Ministerial Councils such as COTED to give reasons for their decisions. This stands in sharp contrast to the legal order within the European Union ('EU') where a general obligation on EU institutions to give reasons is anchored in the second paragraph of Article 296 of the Treaty on the Functioning of the European Union ('TFEU'). Article 296 states that, '[l]egal acts shall state the reasons on which they were based and shall refer to any proposals, initiatives, recommendations, requests or opinion required by the Treaties.'[37] According to the case-law from the European Court of Justice ('ECJ'), in order to satisfy this requirement, the EU Community measures must 'include a statement of facts and law which led the institution in question to adopt them, so as to make possible review by the Court and so that the Member States and the nationals concerned may have knowledge of the conditions under which the Community institutions have applied the [TFEU].'[38] The ECJ has also noted, however, that in some cases the legal basis for the measure may be determined from other parts of the measure and in such a case the requirement to give reasons would not be breached.[39]

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[36] [2018] CCJ 4 (OJ).
[37] Another legal basis for a general duty to give reasons is found in Article 41 of the Charter of Fundamental Rights of the European Union, which enshrines the right to good administration. This right includes 'the obligation of the administration to give reasons for its decisions'.
[38] Case 45/86 *Commission of the European Communities v Council of the European Communities* [1987] ECR 1493, 1519 at [5]; see also the decision of *Brennwein case (Germany v Commission)* Case 24/62, [1963] ECR 63 at 69 where the European Court of Justice discussed Article 296(2), the forerunner of Article 190, of the Treaty of the Functioning of the European Union.
[39] Case 45/86 *Commission v Council* [1987] ECR 1493 at [9].

[47] Notwithstanding the absence of an express Treaty provision, the obligation to give reasons may be taken to be inherent in the very notion of judicial review sanctioned by the RTC. The giving of reasons facilitates judicial review by, for example, ensuring that decision-making is not arbitrary or disproportionate.[40] The avoidance of arbitrariness and disproportionality is required by the rule of law under which the CSME now functions. An enhanced duty to give reasons may exist if there is a deviation from a constant decision-making practice or if the decision is addressed to particular Member States or Community Nationals. This legal rationale is supported by the fact that there are sound policy benefits to giving reasons including the fostering of transparency in the decision-making process and the encouragement of decision-making that is thought through and rational.[41] The Court therefore concludes that the CSME has reached the stage that a general obligation on the part of Community organs to give reasons for decisions that generate legal consequences for the Community, Member States and/or Community Nationals must now be accepted.

[48] The fact that Community acts that generate legal consequences fall under the scope of the duty to give reasons, however, must be interpreted in context. The reasons need not be lengthy or elaborate but should ordinarily reference the legal and factual considerations underlying the decision. In appropriate circumstances, the incorporation of reasons from another document may suffice provided that the referenced document can be properly and precisely identified. In all the circumstances the Court finds that there was a duty on COTED to give reasons for its decision, although the statement of reasons could have been short and succinct. No such reasons were given.

[49] Ordinarily the failure to give reasons could result in a variety of legal consequences up to and including annulment of the decision. As previously stated, however, the duty to give reasons must be interpreted and applied in context. So also, the scope of the consequences of a failure to provide reasons. Whilst not absolving COTED of the duty to formally state the legal and factual grounds on which its decision was based, it is reasonable, especially in a situation where the Council had not traditionally given reasons for its decision, to examine the full circumstances in order to determine

[40] P. Craig, *EU administrative law*, Oxford University Press 2012, p. 340–341 with references to the case law of the ECJ.
[41] P. Craig, EU administrative law (Oxford Press) 2012 at pp. 340-341; J. Schwarze European administrative law (Sweet and Maxwell, 2006) at pp. 1400-1401.

whether the reasons grounding the Council's decision are, from a practical point of view, apparent. There may even be no breach of the duty to give reasons where the reasons for decision-making are readily apparent: *Krupp Stahl AG v. Commission.*[42]

[50] This Court has traversed the history of the activities by the CARICOM Secretariat and the Community leading up to the COTED decision.[43] The Secretariat asked the WCO to provide classification advice on Rock Hard Cement and the Community formally requested the WCO's HS Committee to classify Rock Hard Cement as well as cement produced by TCL. The consistent advice of the WCO and the HS Committee was that Rock Hard Cement was to be classified as 'Other hydraulic cement'. The HS Committee went further. It also classified cement produced by TCL as 'Other hydraulic cement'. At the 77th Special Meeting of COTED, Member States were fully aware that on the material before them they were required to make a choice from two options. That is, whether they would vote to classify Rock Hard Cement as Other hydraulic cement under subheading HS 2523.90.00, having regard to the General Rules of Interpretation and the Explanatory Note to HS 2523, as well as the WCO's report and its use of applicable international technical standards, or alternatively, whether they would vote to classify Rock Hard Cement as 'Building cement (grey)' because it competed with regionally produced cement that was currently classified as 'Building cement (grey)'. Trinidad and Tobago, Barbados, TCL, ACCL, RHDL, RHCL and Ramhit and Sons knew this was the choice COTED had to make and the respective grounds on which the choice was predicated. They were invited to make submissions to COTED's Customs Committee, a committee established pursuant to Article 18 of the RTC that makes recommendations to COTED.

[51] While COTED did not provide reasons for its decision, the Court is satisfied that it is clear that, in the absence of any other relevant factors to the contrary, the COTED decision was based on the advice requested and obtained from the WCO and its HS Committee. The correspondence and documents submitted clearly suggest that WCO's interpretation and application of the General Rules of Interpretation and the Explanatory Note to HS 2523, and, most importantly, the need to ensure international harmonization, which is the ultimate aim of the WCO and its Harmonization System,

[42] In Joint Cases 275/80 and 24/81, esp. at pp. 2510-2513.
[43] See [18]-[23] of this judgment.

weighed heavily on COTED. A majority of the Members of the Community gave significant weight to the WCO's classification opinion. Apart from the exception of Antigua and Barbuda, Member States rejected the alternative method of classification suggested by TCL that classification should be determined by whether Rock Hard Cement was a 'like product' and therefore in competition with TCL's cement. Antigua and Barbuda accepted the TCL rationale and voted to classify Rock Hard Cement as 'Building cement (grey)' because of its competitive relationship with 'Building cement (grey)' produced by TCL.

[52] Accordingly, in deciding to adopt the WCO's opinion, the COTED's reasons for classification may be taken to be essentially the same as those outlined in the WCO's report, that is, that when the General Rules of Interpretation are applied to the physical properties of Rock Hard Cement, that cement ought to be classified in a particular manner and that this classification was not based on whether it competed with TCL's cement. In these circumstances, no consequences should follow from COTED's failure to provide formal reasons for its decision, if there was a breach of duty at all.

Did COTED place undue reliance on the WCO Classification advice?

[53] In the earlier decision of this Court on the jurisdiction of COTED to classify commodities,[44] this Court noted at paragraph [9] that at least one Member State of the Community was a member of the WCO, that WCO has global responsibility for the classification of goods under the widely accepted Harmonization System, and that the Harmonization System was also the basis for classification of goods for the CARICOM CET. Accordingly, the Court expressed the view that WCO decisions would normally have high persuasive value unless there were good reasons for not relying on them. It now falls to be considered whether there were any good reasons for COTED not to rely upon the advice given by the WCO.

[54] Trinidad and Tobago, TCL and ACCL contend that the WCO's report should not have been relied upon by COTED. This was because (i) Trinidad and Tobago is not a party to the 1983 International Convention on the Harmonized System (HS Convention) and so the WCO's opinion has no application to it; (ii) none of the CARICOM member

[44] *Trinidad Cement Limited v The State of Trinidad and Tobago; Rock Hard Distribution Limited and Mootilal Ramhit and Sons Contracting Limited, Intervening* [2018] CCJ 4 (OJ).

states who were parties to the HS Convention or the WCO Convention were allowed to make representations to the WCO before it rendered its opinion; (iii) the CARICOM CET, although adopting the HS model of classification, has its own history which must be borne in mind as an aid to the interpretation of the object and purpose of the RTC and the peculiar circumstances of the CET and these were not put before or considered by the WCO; and (iv) the WCO applied technical standards ASTM C150 and EN 197-1 when the CET makes no mention of those standards being relevant.

[55] The Court notes that the WCO based its decision on the application of the General Rules of Interpretation and the Explanatory Notes to HS 2523. The Explanatory Notes provide that 'Portland cement' (of which 'Building cement (grey)' is a subcategory), contains small additives of material such as fly ash, pozzolan and limestone. As both 'Portland cement' and 'Other hydraulic cement' also contain these materials, the difference between them, logically, had to be the percentage of these additives contained in the mixture. Since the Explanatory Notes were silent as to the means of determining this percentage, the WCO looked to the well accepted international technical standards, ASTM C150 and EN 197-1. As mentioned earlier, Dr. Lebert Grierson, one of the expert witnesses for TCL, testified that he agreed with the WCO's use of these technical standards. He also testified that although the CARICOM CET did not specifically mention the use of technical standards, he was of the opinion that they were a necessary part of the classification process.

[56] The Court wishes to stress the importance of the General Rules of Interpretation and the Explanatory Notes to the classification of extra-regional goods. This was a significant basis of part of its decision in *Trinidad Cement Limited et.al v The State of Barbados*.[45] On any occasion where COTED is required to determine the classification of extra-regional goods, these rules will always be relevant. They are the backbone to the widely accepted Harmonization System. Since the WCO has global responsibility for the classification of goods under the Harmonization System pursuant to these rules, a classification opinion from the WCO classifying Rock Hard Cement under a HS subheading will be highly relevant and very persuasive.

[45] [2019] CCJ 1 (OJ), [12] – [24].

[57] Indeed, this Court considers that the issue of whether COTED gave too much weight to the classification opinion of the WCO warrants the assignment of locating CARICOM within the complex landscape of regional trade agreements that is the international trade universe of the World Trade Organization ('WTO').

[58] CARICOM is primarily a regional economic integration arrangement[46] and a customs territory and the RTC is a Regional Trade Agreement ('RTA') within the meaning of the WTO.[47] An RTA defines the parameters of a regional economic bloc, or customs territory,[48] by listing (i) Member States included in the customs territory; (ii) conditions for membership; and (iii) economic benefits of membership. RTAs are by nature discriminatory in that the Member States enjoy more favourable market access conditions than non-Members. Member States in an RTA may enter the regional market with less (or zero) restrictions, as opposed to non-Members who may face high tariffs. Intra-regional production and distribution are thereby prioritized over similar foreign-based production and distribution. The uneven trade behaviour of members of RTAs is an exception to the WTO's general principle of non-discrimination (most-favoured nation clause), which is ordinarily the foundation of policymaking among WTO Members.

[59] As a RTA and customs territory within the WTO, CARICOM Member States should act in accordance with WTO rules designed to ensure that RTAs do not undermine the integrity of the international trading system.[49] An important component to these rules is compliance with WTO standards on the description of goods. Adherence to these standards is illustrated in the fact that CARICOM's CET is based on the '2017 Harmonized Commodity Description and Coding System', which is supplemented by the principles prescribed in the General Rules for the Interpretation of the Harmonized

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[46] The first line of the RTC's preamble reads: 'Recalling the Declaration of Grand Anse and other decisions of the Conference of Heads of Government, in particular the commitment to deepening regional economic integration through the establishment of the CARICOM Single Market and Economy (CSME) in order to achieve sustained economic development based on international competitiveness, co-ordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States.'

[47] See Article XXIV of the General Agreement on Tariffs and Trade 1994. The original 1973 Treaty of Chaguaramas was notified to the WTO on 14 October 1974 and the Revised Treaty on 19 February 2003.

[48] The GATT 1947 defines a customs territory as "any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories." The provisions of the GATT 1947 remain binding pursuant to Paragraph 1(a) of the GATT 1994: "The General Agreement on Tariffs and Trade ("GATT 1994") shall consist of: (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Commission of the United Nations Conference on Trade and Employment . . . as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement."

[49] World Trade Organisation, Regional Trade Agreements and the WTO: WTO Rules on Regional Trade Agreements as available at https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (23 Jul 2019).

System.[50] The HS is maintained by the WCO which is responsible for administering the technical aspects of the WTO Agreements on Customs Valuation and Rules of Origin. The system facilitates uniformity and global consistency in international trade.

[60] Whatever the precise relationship of CARICOM to the WTO,[51] it is undoubtedly the case that all Member States participating in the CSME are also Members of the WTO. These States are signatories to the Marrakesh Agreement establishing the WTO.[52] Pursuant to Paragraphs 2 and 3 of the Marrakesh Agreement, the 1994 GATT, the 1947 GATT, and the GATS are binding on all WTO members.[53] Accordingly, whether collectively or individually, the basic but central tenet of WTO law that RTAs may not raise 'trade barriers vis-à-vis third-parties'[54] or construct blatant shields between their economies and those of other States,[55] is relevant. Idiosyncratic and improper classification of a good, either for the purpose or with the effect of hindering that good's admittance into a regional market, could be viewed as unlawfully raising a trade barrier or shielding local economies.

[61] As emphasized in the GATT 1994, the WTO views the purpose of the RTA as a stepping-stone for further involvement in the multilateral trading system. From the WTO perspective, the regional trade arrangements are a tool of integration or a method to better acclimatize nations to larger economic systems before they can fully integrate into the WTO's internationalized economy under the principle of non-discrimination.[56] It would therefore be unwise to focus exclusively on the regional bloc without considering its complementary nature to and its place within the global multilateral trading system.

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[50] Revised Common External Tariff, General Note.
[51] See Article XXIV of the GATT 1947; The Enabling Clause (L/4903) is formally referenced as the WTO Decision of 28 November 1979 and has continued to apply as part of the GATT 1994 under the WTO Enabling clause (L/4903); Article V of the GATS.
[52] Agreement Establishing the World Trade Organisation, List of Signatories and Ratification Dates.
[53] Agreement Establishing the World Trade Organisation, Paragraphs 2-3.
[54] World Trade Organisation, Regional Trade Agreements and the WTO: An Introduction' as available at https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (23 Jul 2019).
[55] Article XI:1 of the GATT 1994: "No prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." There are exceptions to this rule, highlighted in Articles XI:2(a) (export restrictions applied to prevent or relieve critical shortages), XII and XVIII:B (restrictions imposed to protect the balance of payment) and XXI (national security). RTAs may create restrictions on trade, but it cannot fully end trade between WTO members without considering the listed exceptions to Article XI. The WTO Agreements Series, *General Agreement on Tariffs and Trade*, 4 fn.4.
[56] Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, Chicago Journal of International Law 11:2, January 2011, 602.

[62] A major area of disagreement among the Parties and Interveners in this case surrounded the relevance and validity of technical standards when classifying cement products. Trinidad and Tobago argued that technical standards were not incorporated in Heading 25.23 of the revised CET, and therefore could not be incorporated in cement classification procedures by CARICOM (despite explanatory notes provided by the HS Convention, as a WCO guideline for Portland cement classification).

[63] The Court considers that the *Agreement on Technical Barriers to Trade* ('the TBT'),[57] which was adopted on 1 January 1995, is relevant to this issue. All WTO Member States of CARICOM are bound by the TBT which aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade, even while also recognizing WTO members' right to implement measures to promote legitimate policy concerns such as healthcare, safety, and environmental protection. In the preamble to the TBT, parties recognize 'the important contribution that international standards and conformity assessments can make [towards] improving efficiency of production and facilitating the conduct of international trade.'[58] Pursuant to the substantive provisions in the TBT, WTO members are encouraged to base their measures on international standards to strengthen trade facilitation and create a predictable trading environment.[59] Article 2.2 of the TBT emphasizes the utility of technical regulations in the form of available scientific and technical information, related processing technology, and intended end-uses of products. Article 2.4 of the TBT also emphasizes that:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as the basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

[64] No convincing evidence was presented to this Court to demonstrate that adoption of relevant international standards by CARICOM would be an ineffective or inappropriate means of pursuing the objectives of the Community.

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[57] World Trade Organisation, Technical Barriers to Trade as available at https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (23 Jul 2019).
[58] Agreement on Technical Barriers to Trade, Preamble.
[59] Supra (n.60).

[65] Many CARICOM Members, including the State of Trinidad and Tobago, are also signatories to the *Trade Facilitation Agreement* ('TFA')[60] which was the product of the 2013 Bali Ministerial Conference and which was annexed to the Protocol amending the Marrakesh Agreement. Pursuant to Article 10 (3) of the TFA, the use of international standards is encouraged by all Members.[61]

[66] The WTO emphasized in the 2015 Tenth WTO Ministerial Conference held in Nairobi, that RTAs are not superior to the WTO's multilateral trading system. The Nairobi Ministerial Declaration stated:

> We reaffirm the *pre-eminence of the WTO* as the global forum for trade rules setting and governance. We acknowledge the contribution that the rules-based multilateral trading system has made to the strength and stability of the global economy.[62]

Also, there was a reaffirmation of 'the need to ensure that… RTAs remain *complementary to, not a substitute for*, the multilateral trade system.'[63]

[67] Finally, it is difficult to reasonably criticise the WCO approach that product classification should be determined by chemical and/or technical standards. To categorize a product requires examination (at minimum) into: (i) what the product is; (ii) how the product is created; and (iii) the product's composition. For cement, chemical composition is important for understanding how the product was developed and how it may be used. The chemical composition of cement is largely determinative of its classification.

[68] The State of Trinidad and Tobago did not accept this proposition. Instead, the State of Trinidad and Tobago submitted that

> "In so far as Dr Grierson suggests that tariff classification ought to be guided by technical standards and the Interveners rely extensively on "standard specifications for cement used internationally" to attempt to define the terms of

[60] World Trade Organization 'Trade Facilitation Agreement Facility Ratifications List' as available at https://www.tfafacility.org/ratifications (23 Jul 2019).
[61] Trade Facilitation Agreement, Article 10:3.1: "Members are encouraged to use relevant international standards or parts thereof as the basis for their import, export, or transit formalities and procedures, except as otherwise provided for in this Agreement."; see also Trade Facilitation Agreement, Article 10:3.2: "Members ae encouraged to take part, within the limits of their resources, in the preparation and periodic review of relevant international standards by appropriate international organisations."
[62] Nairobi Ministerial Declaration of 2015, Part I, Paragraph 3.
[63] Nairobi Ministerial Declaration of 2015, Part III, Paragraph 28.

> heading and subheadings in the CET, the State contends that these too are irrelevant considerations for the purpose of tariff consideration."

The argument was based on the absence of composition percentages and technical standards required for each cement Subheading under Heading 25.23, contrasted with the clear composition requirements and applicable technical standard (ASTM 86 method) provided in Subheading 2707.50.[64]

[69] CARICOM Nomenclature does not incorporate compositional percentages or specific technical standards in Heading 25.23. However, this does not negate the importance of physical composition when classifying products. The entire purpose of a Nomenclature, and a tariff in general, is to organise products within classes for domestic and international treatment. Whether or not this purpose is explicitly referenced cannot nullify this basic understanding. There is a reason why soap is not placed in the same class as cement, or organic material in the same class as inorganic material. They are different products, composed of different materials. Neither the tariff rate nor the categorisation of a product can properly be determined independently of the given product's composition, even if compositional requirements are not explicitly referenced in the relevant Nomenclature documentation.

[70] It cannot be contested that CARICOM's Nomenclature and CET determinations are premised on the WCO's HS Convention and adjoining Explanatory Notes. This is stated quite clearly: '[t]he 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 HS Convention provides Explanatory Notes for Subheadings 2523.21 ('white Portland cement') and 2523.29 ('other Portland cement'), a description of Portland cement which is different from the compositional nature of Rock Hard Cement. While the HS Convention and the Explanatory Notes are not formally binding within the Community and the CSME, they are afforded a high level of persuasiveness in accordance with their importance to the CET's development and so, cannot be disregarded in lieu of the lack of detail provided in the CARICOM Nomenclature.

[64] CARICOM Nomenclature, Heading 2707.50.

[71] The State of Trinidad and Tobago blurs the distinction between the use of technical standards in the CET, and the prevalence of compositional requirements. While Subheading 2707.50 may be the only CET section to include direct reference to an internationally recognized technical standard (ASTM 86 method), it is not the only CET heading to include percentages and/or compositional requirements for product classification. Relevant Headings of the CARICOM Nomenclature include (but are not limited to): Heading 27 (minerals), 28 (inorganic chemicals), and 34 (soap). Although there may not be a uniform technical standard used by the Community to classify these products, that does not negate the importance of product classification as a separate consideration based primarily on composition.

[72] For these reasons, therefore, this Court cannot accept the contention that COTED erred in placing too great a reliance on the WCO's classification opinion. The State of Trinidad and Tobago was not a party to the HS Convention but that State is a member of the WCO Convention and the HS Committee acts at the overall direction of the WCO.[65] Furthermore, the HS has been adopted by CARICOM in the establishment of the CET so that the HS Committee's decisions are reasonably regarded as a significant source of interpretation for the Community. The fact that no Member State made representations to the WCO also does not significantly undermine the WCO's decision. The WCO was asked to render an opinion based on the General Rules of Interpretation, not based on the peculiar circumstances of the CARICOM CET. It did this. The advice given by WCO was based on international trading arrangements to which Member States of CARICOM subscribe in one way or another and was relevant to the issue for decision by COTED.

Should the economic objectives of CARICOM influence product classification?

[73] TCL and ACCL submitted that, in lieu of having regard to the inherent composition of a new or extra-regionally produced product for classification purposes, regard should be had to whether the new product competes with an existing or regionally produced product. They argued that the economic objectives of the Community would be impaired if a competing extra-regionally manufactured product was classed differently from a regionally produced one and thereby attracted a lower tariff rate than would be

[65] See section 1 of the Terms of Reference of the HS Committee.

applicable if the foreign product was classified identically to the regionally produced good. In short, consistent with the views expressed by Dr Antoine, they contended that classification was to be informed by tariffication and not the other way around. Applying this approach, it was submitted that Rock Hard Cement was properly classified as 'Building cement (grey)' as it was in direct competition with TCL's regionally produced 'Building cement (grey)' and therefore ought to be subjected to the 15% CET. The failure to impose the protective tariff by Member States importing Rock Hard Cement from Turkey and Portugal had nullified or impaired the benefits accruing to TCL and ACCL under the RTC.

[74] Counsel for TCL and ACCL sought to bolster this contention by reference to certain Community documentation:

(a) The Report of the Working Group of Experts which was finalized at a Meeting of Officials and High-Level Experts on 12-13 October 1992. The Report was considered and approved by the Common Market Council, the precursor to COTED, at a Meeting on 14-16 October 1992. The Heads of CARICOM adopted the Report at a specially convened Meeting in Port of Spain on 28-30 October 1992 ('Report of Working Group of Experts');

(b) The preliminary work done by Member states of the Caribbean Community in developing the CET pursuant to Article 82 as reflected particularly in the 'Administrative Arrangements Relating to the Alteration or suspension of rates under the Common External Tariff' published January, 1992 ('1992 Article') and 'Common External Tariff of the Caribbean Common Market – An explanation of its Scope, Structure and Other Features' published in March, 1993 ('1993 Article');

(c) 1984 Meeting of the Heads of Government of Member States ('1984 Meeting'); and

(d) The Court's own previous decisions concerning the interpretation and application of the CET.

[75] Counsel drew attention to this Court's confirmation that 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.'[66] 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. Counsel contended that this Court in *Trinidad Cement Company Limited v The Caribbean Community*[67] had accepted that the 1992 Article and the 1993 Article are two officially published documents on the RTC's CARICOM CET and while these documents were based on the CET under the 1973 Treaty of Chaguaramas

> the two publications reflect the policies of COTED and that, until disavowed by the Community, or disapproved by this Court, the guidelines and prescriptions contained in them should be taken as being still in force so far as they are consistent with the relevant provisions of the RTC: *Trinidad Cement Company Limited v The Caribbean Community*.[68]

[76] Counsel further contended that the establishment of the CARICOM CET resulted from the formulation of guidelines, the elaboration of principles and the application of those principles to the rate structure developed by the specially convened Working Group of Experts. The basis of the CARICOM CET was to address the need for CARICOM States to strengthen the competitiveness of their industries in export markets, and to recognize, based on the new emphasis on international trade and economic relations, that appropriate measures were required to safeguard production, in view of the protection that other countries used to support their own economies. The Working Group of Experts formulated eight principles which were used to arrive at the respective tariff rates. One such principle was that the tariff would be 'commodity based'.

[77] Counsel further developed the point by reference to the Report of the Working Group of Experts which identified eleven (11) guidelines to assist in deciding the tariff structure to 'inform the development of the CET.' Relying on the 'framework of the CARICOM CET' established by the Report of the Working Group of Experts, the 1984 Report, the 1992 Article and the 1993 Article, Counsel argued that any question of classification had to be addressed by having regard to the following: (a) The Policy

[66] *Trinidad Cement Company Limited v The Caribbean Community* [2009] CCJ 4 (OJ) at [44] – [46].
[67] ibid.
[68] ibid.

of the CET was to encourage and promote production of goods within CARICOM; (b) Implementation of the Policy of the CET was to be effected through protective tariff rates where the current level of Community production of the commodity is sufficient to satisfy a minimum of 75% of regional demand or consumption; in this circumstance, products from outside the region may be deemed to be competing; (c) Determination of whether the extra-regional commodity is competing or not is based on the 'like' product test which in turn considers four factors: (i) the physical characteristics of the products; (ii) the product's end uses; (iii) the tariff regimes of the other Member States; and (iv) consideration of consumer's habits.

[78] In considering these submissions, the Court begins with its earlier observation that it is unwise for the classification regime in CARICOM to become untethered from that supported and accepted by the WTO of which all CARICOM CSME Member States are a part. The Court is therefore wary of acceptance of the blanket assertion by Counsel that the 'CARICOM CET Combined Nomenclature is distinguishable from the WCO's Combined Nomenclature.'[69] The Court has accepted the representation from the Community that the WCO's Harmonization System was the basis for classification of goods for the CARICOM CET. The General Note to CARICOM Member States confirms that the CARICOM CET is based on the '2017 Harmonized Commodity Description and Coding System,' supplemented by the principles prescribed in the General Rules for the Interpretation of the Harmonized System.[70]

[79] Emphasising that the tariff is commodity based for the purpose of then alleging that classification must take account of the competitive relationship between goods is untenable. There is no dispute that classification is based on commodities. The fundamental rule requires that classification of goods into a custom tariff complies with the Harmonized System for the description and coding of goods under general rules that apply worldwide. Regional autonomy is maintained by the power to adjust the CET rates on the various appropriately classified commodities to protect regional production, within the limits of the bound rates committed to by Member States in their WTO Schedule of Concessions.

[69] ibid., at para. [27].
[70] Revised Common External Tariff, General Note.

[80] The Court considers that the failure to distinguish between the classification and the tariff setting exercises is the fundamental difficulty with the submissions of Counsel. The nub of those submissions was that the CET represented protective tariff rates intended to safeguard regional production against competition from like foreign products. These are unimpeachable observations and the Court finds no difficulty with them. However, these observations are quite separate and distinct from the question of whether a good should be classified under one tariff heading or another. As Counsel admitted in open court, it is possible for different goods to be in competition with each other. To put the matter another way, it is possible and indeed it is frequently the case that differently classified goods compete against each other in the marketplace. Classification is therefore quite different from, and not defined by reference to, a competitive relationship. Where extra-regional goods compete with regionally produced goods it is entirely within the competence of COTED to adjust the CET to provide for the level of protection considered necessary, subject to any relevant international commitments such as the bound rates of Member States in their WTO Schedule of Concessions.

[81] In this regard, it must be remembered that Article 83 (5) of the RTC mandates that 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.' The Court was not made aware of the last occasion on which a systematic review was conducted. But the RTC makes clear that there is every opportunity for COTED to make an appropriate adjustment in the CET, within the limits of the international commitments of Member States, if COTED considers that additional protection is warranted against extra-regional competition.

[82] The reference to the 'like product test' does not advance the argument for classification based on competition. That test is usually associated, not with classification, but with the WTO's efforts to ensure that domestic products of one WTO Member State are not treated more favourably than products imported from other WTO Member States. Under Article III:2 of the 1994 GATT, likeness is considered to be 'a determination about the nature and extent of a competitive relationship between and among

products.'[71] If two products are found to be 'like' then the issue becomes whether the foreign product is treated less favourably than the domestic product or another foreign product.[72] If less favourable treatment is established, the importing Member State may be implicated in a breach of its WTO obligation against non-discrimination.

[83] Determination of likeness has given rise to complex interpretational difficulties in the ad hoc panels as well as the appellate body of the WTO. This is illustrated in the various Reports by the WTO Appellate Body in *Japan – Alcoholic Beverages II*[73]*; Korea–Alcoholic Beverages*[74]; *Chile–Alcoholic Beverages*[75]; and *Canada–Periodicals.*[76] What is clear is that the test of 'likeness' has little or nothing to do with the COTED classification decision. It cannot be reasonably argued that similarities in 'end-use' and consumer tastes should cause or encourage similarities in 'properties, nature, and quality', which then should cause or encourage similar tariff calculations. Similarities in 'end-use' and consumer tastes are just that – similarities; they are not factors that can then generate similarities in characteristics. If the regional and extra-regional products are 'like' in the sense that there is a competitive relationship between them, the 'likeness' or 'competition' may well be a reason for COTED to re-examine Community policy on the applicable tariff rates but such 'likeness' or 'competition' cannot *ipso facto* lead to an assumption of similar composition and classification.

[84] It follows that there is no wind to the sail of the argument by Counsel that there was a nullification or impairment of benefits accruing to TCL and ACCL. Counsel pointed to the decisions of this Court in *SM Jaleel & Co Ltd and Guyana Beverages Inc. v The Cooperative Republic of Guyana*[77] which repeated provisions of the RTC related to the establishing and maintaining of a sound and stable macro-economic environment that is conducive to investment and competitive production of goods and services in the Community. That decision also stressed the need to be mindful that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive conduct whose object or effect is to prevent restrict or distort competition. Counsel

[71] World Trade Organisation, Appellate Body Reports, WT/DS135/R, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products at 99.
[72] ibid.
[73]Appellate Body Report, Japan – alcoholic Beverages II, note esp. pp. 16-22.
[74]Appellate Body Report, Korea – Alcoholic Beverages, note esp. para 10.66
[75] Appellate Body Report, Chile – Alcoholic Beverages, note esp. para 7.51
[76] Appellate Body Report, Canada – Periodicals, note esp. pp. 27 ff.
[77] [2017] CCJ 2 (OJ) at [2-17].

also cited the WTO case of *EEC-Payments and Subsidies*[78] to the effect that a GATT panel held that a European Community Subsidiary that was paid to protect its own producers nullified or impaired the duty-free bindings for oilseeds and oilcakes. The Panel held that the measure impacted the competitive relationship since domestically produced oilseeds were disposed of in the internal market notwithstanding the availability of imports.

[85] The observations made in these cases are not relevant to the issue which COTED determined. Under Article 79 (2) of the RTC, Member States must refrain from trade policies and practices that, among other things, 'nullify or impair benefits to which other Member States are entitled under this Treaty.' Assuming without deciding that the correlative of this duty is a right in the affected Member States and that such a right was intended to enure to the benefit of Community nationals, Counsel would need to go further to demonstrate that the CET of 15% on Rock Hard Cement was a right to which TCL and ACCL were 'entitled'. This is not possible since the 'entitlement' was to a CET of 0-5% on Rock Hard Cement as 'Other hydraulic cement'. There was therefore no breach of Article 79 (2) by the imposition of the 0-5% tariff on the importation of Rock Hard Cement since no intended benefit was nullified or impaired.

Conclusions

[86] Whilst the Court will always accord to the Organs of the Community the policy space intended by the framers of the RTC, the Court must, nevertheless, assert and exercise its competence and responsibility to ensure that decisions of the Organs of the Community (such as COTED) are taken in accordance with both the procedural requirements and relevant substantive considerations according with the legal strictures laid down in or arising under the RTC.

[87] This Court finds that there is no procedural or substantive basis for impugning the decision made pursuant to the Seventy-Seventh Special Meeting of COTED that Rock Hard Cement is to be classified as 'Other hydraulic cement'. The decision was made by the three-quarters majority vote required by Article 29 of the RTC. The COTED classification decision should have been accompanied by appropriately drafted reasons

[78] *EEC-Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* L/6627, adopted 25 January 1990, BISD 37S/86.

and was not. However, in the circumstances, the Court finds that it was clear that the COTED classification decision was based on the advice requested and obtained from the WCO and its HS Committee and the Court finds no basis to impugn that advice on substantive grounds.

[88] The Court is of the view that COTED was fully entitled to place heavy reliance upon the advice sought and obtained from the WCO and its HS Committee, given the role of the WCO in harmonizing rules on international trade within the context of the WTO. All CARICOM Members States participating in the CSME are also Members of the WTO. It is expressly the case that the CARICOM Nomenclature and CET determinations are premised on the WCO's HS Convention and adjoining Explanatory Notes.

[89] The Court does not agree that COTED failed to give relevant weight to the fact that Rock Hard Cement competed with cement produced regionally by TCL and ACCL. Any such alleged failure may very well be relevant to tariff setting which involves an exercise that is different from classification. The latter involves placing a commodity under its proper HS tariff heading having regard to its composition and physical characteristics. It is a matter of policy for COTED to decide upon the level of protection to be given to regional production that competes with extra-regional goods, within the limits of any relevant international obligation, whatever the classification of the extra-regional goods may be. That protection may be given by adjustment in the rate of the tariff, not by adjusting the classification of the relevant goods.

General Comments

[90] The Court considers it useful to make the following general comments. First, this Court fully accepts that at the time when 'the framework of the CARICOM CET' was established by the Report of the Working Group of Experts, the 1984 Report, the 1992 Article and the 1993 Article, there could have been an eliding of considerations of classification and of protective tariffs. Portland cement, such as that produced by TCL, may have been widely considered to have a monopoly over the general market for cement in the region. Blended cements, such as Rock Hard Cement, were not in existence at that time and therefore no issue of a competitive relationship between these commodities arose or could have been conceived.

[91] The recent developments in the cement industry which has made possible similar performances by Portland cement produced regionally and by Rock Hard Cement imported from outside the region, probably makes it appropriate for a study to be done by COTED so as to assess whether the tariff rate for imported 'Other hydraulic cement' ought to be increased to accord a higher level of protection to regional manufacturers of both Portland cement and blended cements. That study would no doubt consider all relevant factors such as employment generated by the manufacturing of the regional product, security of supply, quality of product, and economy to consumers. The conduct of such a study would be entirely in keeping with the Treaty obligation on COTED to keep the tariff under review: Article 83 (5) of the RTC.

[92] A related issue deserves mention. CARICOM may wish to consider a more robust participation in WCO and similar bodies when decisions affecting the interest of the Community are being debated and made. It would appear prudent for any idiosyncratic regional position to be put forward in that context. Consideration should also be given to accommodating the views of interested private sector stakeholders in making representations to, and in participating in the deliberations of these bodies.

[93] Secondly, Member States, through COTED, should consider greater collaboration in policy making in relation to trade between the Community and the wider global community. During the hearing before this Court on 11 and 12 June 2019, it became apparent that Member States of CARICOM did not all maintain the same bound rates in their WTO Schedule of Concessions. For example, the Court was informed that the State of Trinidad and Tobago maintained WTO bound rates for 'Building cement (grey)' at 70% and for 'Other hydraulic cement' at 5%, unlike Barbados whose bound rates for both 'Building cement (grey)' and 'Other hydraulic cement' was 70%. This suggests that it may be difficult for COTED to raise the CET on 'Other hydraulic cement' beyond 5%, say up to 15% to accord that level of protection to regionally produced cements (assuming COTED considered that that level of protection was appropriate), without potentially complex and time-consuming negotiations taking place between COTED and the relevant Member State(s), and the WTO. In fact, the State of Trinidad and Tobago submitted that COTED failed to consider the impact of its decision on states like Trinidad and Tobago which had a bound rate of less than 15% for 'Other hydraulic cement'.

[94] Differentials among CARICOM Member States in the level of commitments given to the international community can reduce considerably the policy space and options available to COTED. Every attempt therefore should be made to avoid this problem by engaging in the appropriate level of communication and collaboration before undertaking extra-regional and global commitments. Alteration in unilateral levels of commitment may also benefit from the support and assistance of all CARICOM Member States.

[95] Thirdly, it may be useful for COTED to consider initiating the implementation of a project aimed at harmonizing the classification of goods based on WCO standards with the objective of enhancing CARICOM trade. This could involve a diagnostic mission to assess the existing infrastructure of Member States regarding the Harmonized System and tariff classification as well as Customs valuation. A specific goal would be to build the capacity of the various Customs Administrations in drawing up, implementing and managing their national systems of classification so as to be compliant with the HS Convention as well as with international and regional standards, and best practices.

Costs

[96] The Court awards costs to the successful parties in this matter. Several different actions were, however, consolidated in these proceedings and the quantum or percentage of costs that should be awarded may well be a matter for argument. For example, it may be contended that a particular successful party should not be entitled to receive 100% of its costs. In the circumstances, the Court considers that the parties should make written submissions on the issue of the costs to which they are entitled or for which they should be made liable as the case may be. These submissions should be made within six weeks and for each party should not exceed five pages.

Disposition

[97] Having regard to the decisions and conclusions of the Court, the following Declarations and Orders are made:

(a) The COTED Classification decision referenced in this Judgment was validly made and there is no basis on which to impugn the decision.

(b) The decision of COTED is binding on Member States pursuant to Article 29 (1) of the Revised Treaty of Chaguaramas.

(c) Rock Hard Cement is classified as 'Other hydraulic cement' on which the applicable CET is 0-5%.

(d) The Originating Application No. TTOJ2018/001 *Trinidad Cement Limited v The State of Trinidad and Tobago; Rock Hard Distribution Limited and Mootilal Ramhit and Sons Contracting Limited, Intervening* is dismissed.

(e) The Originating Application No. TTOJ2018/002 *Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados, Rock Hard Cement Limited, Intervening* is dismissed.

(f) The Originating Application No. BBOJ2018/001 *Rock Hard Cement Limited v The State of Barbados and The Caribbean Community* is granted to the extent indicated in this Judgment.

(g) The Originating Application No. SLU2018/001 *Rock Hard Distribution Limited v The State of Trinidad and Tobago and The Caribbean Community* is granted to the extent indicated in this Judgment.

(h) The Parties and Interveners shall make written submissions on costs in relation to all Orders made in these consolidated applications in accordance with the following:

i. In respect of Originating Application No. TTOJ2018/001, The State of Trinidad and Tobago, Rock Hard Distribution Limited and Mootilal Ramhit and Sons Contracting Limited shall respectively file and serve written submissions on or before the **3rd day of September, 2019**. Trinidad Cement Limited shall file and serve written submissions in reply on or before **25th day of September, 2019**;

ii. In respect of Originating Application No. TTOJ2018/002, The State of Barbados and Rock Hard Cement Limited, respectively, shall file and serve written submissions on or before the **3rd day of September, 2019**. Trinidad Cement Limited and Arawak Cement Company Limited, respectively, shall file and serve written submissions in reply, if any, on or before the **25th day of September, 2019**;

iii. In respect of Originating Application No. SLUOJ2018/001, Rock Hard Distribution Limited shall file and serve written submissions on or before the **3rd day of September, 2019**. The State of Trinidad and Tobago and the Caribbean Community, respectively, shall file and serve written submissions on or before the **25th day of September, 2019**;

iv. In respect of Originating Application No. BBOJ2018/001, Rock Hard Cement Limited shall file and serve written submission on or before the **3rd day of September, 2019**. The State of Barbados and the Caribbean Community, respectively, shall file and serve written submissions on or before the **25th day of September, 2019**.

(i) The Parties and Interveners shall have liberty to apply and, to this end, shall file and serve any applications on or before the **25th day of September, 2019**.

(j) The Hearing of any such applications and, if necessary, of the issues raised in the Affidavit sworn to by Mark Maloney on the 4th day of August 2019 and filed herein on behalf of Rock Hard Cement Limited on the 5th day of August 2019 be set down for **Friday, the 18th day of October, 2019** at 10:00am at the Seat of the Caribbean Court of Justice, 134 Henry Street, Trinidad and Tobago or by videoconference as the case may be.

/s/ A. Saunders

The Hon Mr Justice A Saunders, President

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D. Barrow

The Hon Mr Justice D Barrow