



## **The Suspension Continues: A Look at the Common External Tariff**

The recent case of *Trinidad Cement Limited v the Caribbean Community* provided an opportunity for the hearing of a pressing trade matter. While ultimately the Caribbean Court of Justice, in its original jurisdiction, decided that the Common External Tariff (CET) on non-regional cement had been suspended appropriately, the judgement highlighted the need for greater clarification on the ambit for a suspension of the CET.

The Revised Treaty of Chaguaramas ("the Treaty") creates a framework for the lessening of trade barriers between CARICOM ("the Community") member states. Accordingly, goods produced within the Community and which meet the specified rules of origin, will receive preferential treatment. To take advantage of the preferential treatment, the goods must be made from products which are wholly produced in the Community or if produced in whole or in part from goods outside the Community, the goods must have been substantially transformed in the Community. The Treaty goes further by requiring Member states to establish and maintain a CET in respect of goods which do not qualify for Community treatment. This highlights the heightened advantage given to Community products.

However, in recognition of the dangers of relying solely on the supply of goods from within the Community, the Treaty makes provision for a suspension or alteration of the CET in the interests of the Community. The relatively lower tariff (vis a vis the tariff applied before the suspension/alteration) allows non-regional products to be more competitive in the local market. A suspension or alteration can be ordered where one of the following requirements is fulfilled:

1. a product is not being produced in the Community;
  2. the product is being produced in the Community but does not satisfy the needs of Community;
- or
3. the quality of the product being produced is below the Community standard or a standard authorised by the Council for Trade and Economic Development ("COTED")

While the Treaty does not provide a benchmark for the suspension/alteration of the CET, it mandates that the imported good which must not be accorded more favourable treatment than the similar goods produced in CARICOM. This means that the tariff to be imposed on the imported goods must not be lower than that imposed on goods coming from the rest of the Community.

The decision to suspend or alter the CET rests with COTED, a body of Ministers with some oversight over regional trade matters. However, COTED meets three times annually and as a result, the Secretary General of CARICOM ("the Secretary-General") may exercise the power of suspension in the interim. This allows for suspension of the CET where a regional good is not able to meet an urgent demand. It is noteworthy that the Secretary General does not have the power to alter the CET given that alteration is a permanent measure necessitating the input of COTED. Further, it is COTED which retains the power to continuously review the application of the suspension and its impact on trade and production. This presumably means that COTED can withdraw the suspension of the CET on its own accord if there is no longer a need for the suspension.

The process for the suspension of the CET usually begins when a Member state (in many instances on the request of a private entity) makes an application to COTED or the Secretary

General (in the event that a meeting of COTED is not imminent). COTED or the Secretary General would thereafter enquire from the other Member states as to whether they have the ability to fulfil the demand of the particular jurisdiction. If a qualified majority vote (75%) of the member states provide no objection, then the Secretary General or COTED can proceed to suspend or alter the CET.

Early this year, Trinidad Cement Limited brought a claim against the Caribbean Community before the Caribbean Court of Justice regarding what it deemed to be the "unauthorised" suspension of the CET. TCL claimed that the Secretary-General's decision to suspend the CET in respect of cement imports into Jamaica was unauthorised. In addition, it claimed that an additional suspension by COTED of the CET in respect of cement imports into Antigua and Barbuda, Dominica, Grenada, St. Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines and Suriname was also unauthorised. While the Court found that there were procedural flaws in the decision to suspend the CET, it felt that the suspension of the CET in all the jurisdictions should continue because, amongst other things, an annulment of the decision would cause serious disruption of commercial matters. Further, the procedural flaws highlighted were not sufficiently serious to warrant an withdrawal of the decision.

In its reasons, the Court noted that applications to the Secretary-General for the suspension of the CET should only be made in matters of great urgency and that in such cases the CET must not be suspended for more than one year. In addition, the Court found that while the Secretary General had no duty to solicit information from private entities regarding the sufficiency of the demand of a product, if contradictory information comes to the attention of the Secretary-General, he must then ascertain whether the necessary consultations between a Member state and a private entity had taken place. The Court felt that the Secretary General must be satisfied as to the demand for and supply of the product before proceeding to consider whether a member state objects to the suspension. In regard to COTED's actions, the Court found that it did not act ultra vires (outside of its jurisdiction) and that the council was within its rights to look at the "supply experience" within the region so as to determine whether future supplies will be delivered in a timely manner.

Importantly, the Court made several beneficial observations. It noted that the Secretary General must be satisfied that he has received specific answers from the member state as to whether the quantity of the product is sufficient to meet the demand of the requesting state. He must also satisfy himself that the government has had consultations with the local producer of the goods. On the other hand, importers of non-regional goods must provide evidence of "...unfulfilled orders, evidence of the response of the regional producer including transportation logistics (force majeure excepted) and information showing what efforts they have made to obtain regional supplies".

The judgment has, therefore, highlighted the framework within which member states and the Community must operate in order to ensure the efficient usage of the CET. It must be remembered that the provisions under the Treaty regarding the suspension of the CET seek to balance the interests of the Caribbean consumers with those of the producers and the importers of goods. Ultimately, the dispute resolution mechanisms under the Treaty provide some recourse in the event that producers or importers feel that there is an imbalance in the application of the provisions.

Grace A. Lindo is an Associate at Myers Fletcher & Gordon and a member for the Firm's Intellectual Property and Commercial Departments. Grace may be contacted at [grace.lindo@mfg.com.jm](mailto:grace.lindo@mfg.com.jm) or through [www.myersfletcher.com](http://www.myersfletcher.com)