IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No OA 1 of 2012

Between

Trinidad Cement Limited **Claimant**

And

The Competition Commission **Defendant**

THE COURT,

composed of D Byron, President and A Saunders, D Bernard, J Wit and W Anderson, Judges

having regard to the originating application filed at the Court on the 1st day of February 2012 with annexures, the Defence filed on the 19th day of March 2012, the Reply to the Defence filed on behalf of the Claimant on the 3rd day of April 2012, the written submissions of the Defendant filed on the 10th day of April 2012, the Claimant's written submissions and statement of issues filed on the 24th day of April 2012, the two witness statements filed on behalf of the Claimant on the 1st and 3rd days of May 2012 and the witness statement filed on behalf of the Defendant on the 2nd day of May 2012 and to the public hearings held on 23rd and 24th days of May 2012

after considering the oral evidence submitted on behalf of the Claimant and the Defendant

and taking into account the oral observations made on behalf of:

- **the Claimant** by Dr Claude Denbow, SC appearing together with Mr Darrell Allahar, Mr Jerome Rajcoomar and Mrs Donna Denbow, Attorneys-at-law
- **the Defendant** by Mr Roger C Forde QC appearing with Ms Nargis Hardyal, Attorney-at-law

and the Court having granted leave to appear in the proceedings without the right to make written or oral submissions to:

- **the Caribbean Community**, represented by Ms Safiya Ali and Mr Bevan Narinesingh, Attorneys-at-law
- **the State of Trinidad and Tobago**, represented by Mr Ronnie Bissessar, Mr Alvin Ramroop, Ms Kamala Mohammed-Carter and Ms Avisha Panchu, Attorneys-at-law

on the **12th day of November 2012** delivers the following

JUDGMENT

Introduction

[1] This case arose from the first matter undertaken by the Competition Commission ("the Commission") in fulfillment of its role under the Revised Treaty of Chaguaramas ("the Revised Treaty" or "the Treaty") to protect and promote competition within the Community. The proceedings give rise to important questions concerning judicial review of the work of the Commission. The resolution of these questions hopefully will assist in clarifying and thus making more effective the role and function of the Commission.

[2] The proceedings have their origin in an application brought by Trinidad Cement Limited ("TCL") filed on 1st November 2011. TCL sought and obtained on 25th January 2012 special leave to commence original jurisdiction proceedings against the Commission. By its Originating Application filed on 1st February 2012, TCL claimed a declaration that the decision by the Commission to initiate an investigation of anti-competitive business conduct into the TCL Group of Companies was void and that the decision of the Commission to hold an Enquiry, ensuing from the investigation, was equally void.

[3] TCL alleged that the Commission acted wrongly in initiating and conducting the investigation in two main regards: (a) there had been no proper request for the investigation; and (b) the Commission had failed to respect the rights of TCL as "an interested party" within the meaning of Article 175 of the Revised Treaty. The Commission rejected these allegations. The Commission also contended that it was not a proper party to these proceedings in that it did not have full juridical personality under the Revised Treaty and further, that this Court lacked jurisdiction to review the actions of the Commission in relation to the initiation and conduct of the investigation.

[4] The Originating Application was heard on 23rd and 24th May 2012. During the hearing, TCL made the further allegation that the Commission had failed to disclose material documents in keeping with the Order of this Court made at the conclusion of the hearing for special leave. This allegation was also rejected by the Commission.

[5] The parties supported their various contentions by comprehensive documentary submissions and cogent oral arguments. Three witnesses gave oral evidence. TCL called Mr Alan Nobie, who has been its Manager of Investor Relations and Corporate Communications since 2003. Having been subpoenaed by TCL, Ambassador Irwin LaRocque, the Secretary-General of the Community and former Assistant Secretary-General for Trade and Economic Integration, also testified. The Commission's only witness was Ms Bertha Isidore, the Acting Executive Director of the Commission. The evidence of Ambassador LaRocque and Ms Isidore was tested in cross-examination. Mr Nobie was questioned by the Bench.

Jurisdiction and other preliminary matters

[6] Jurisdictional barriers having been alleged by the Commission, it is necessary that they be addressed at the start. The arguments raised may be broken down into three separate issues. Firstly, the Commission contends that the Court lacks jurisdiction because TCL has failed conclusively to satisfy the provisions of Article 222(a) and (b). It is said that TCL is not "an interested party" and therefore it has not established a right that was or could have been prejudiced in keeping with Article 222. Secondly, it is said that the Commission is not a proper party to these proceedings because the Commission has not been endowed with full juridical personality. The Commission contends in this regard that the proper defendant should be the Community or the Council for Trade and Economic Development ("COTED"). Thirdly, the Commission argues that this Court has no competence to review the decisions of the Commission relating to the initiation

and conduct of an Investigation. The Court shall address in turn each of these objections.

The jurisdictional content of Article 222

[7] In its Original Jurisdiction the Court's power to adjudicate derives from Article 211 of the Revised Treaty. That Article confers on the Court compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including, *inter alia*, "applications by persons in accordance with Article 222". The latter Article stipulates the conditions which must be satisfied for a person to be granted special leave to appear in proceedings before the Court, and correspondingly, for the Court to take cognizance of claims by private entities that are not otherwise authorized by the Treaty[1]. Among the several conditions mentioned are: (a) the establishment by the person that the Treaty intended that a right or benefit conferred by or under the Treaty on a Contracting Party shall enure to the benefit of such person directly, and (b) that the person concerned has been prejudiced in respect of the enjoyment of said right or benefit.

[8] The Court in previous cases has determined that when a person seeks special leave, unlike the case with the other conditions laid out in Article 222, the provisions set out in (a) and (b) are to be construed as requiring only the making out of an arguable case[2]. This determination of the Court was meant to ensure two things. First, in keeping with the Article, the Applicant is able to demonstrate at least an arguable case that a right exists and that the same has been prejudiced by the acts of the proposed Defendant, and secondly, that the Applicant is not obliged, in effect conclusively to establish its case at what fundamentally is a preliminary proceeding whose purpose is to separate among applications filed those which should and those which should not be entertained.

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[1] Article 175(12) states: "A party which is aggrieved by a determination of the Commission under paragraph 4 of Article 174 in any matter may apply to the Court for a review of that determination".

[2] See *Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana* [2009] CCJ 1 (OJ), at [33].

[9] The Court at this substantive stage does not re-visit the question whether special leave should in fact have been given. At this latter stage of the proceedings the Court is in substance concerned with discovering whether the Claimant has made out its case. The requirement conclusively to establish what is stated in Article 222(a) and (b) has in previous cases been dealt with by this Court under the heading of jurisdiction but a better doctrinal approach might be to consider this requirement as being merged in the natural obligation of a Claimant to establish the substance of his case. Be that as it may, in either case the Court must assess, as it will in this judgment, whether, in the context of this case, TCL does indeed have a right accruing to it under the Revised Treaty, and if so, whether the same has been prejudiced. It is at that point that the Court will examine in detail the Commission's argument that TCL is not an interested party and determine what consequences flow from its finding on that issue.

Is the Commission the proper party to these proceedings?

[10] On the question whether the Commission is the proper party to these proceedings, the Commission initially relied on two main arguments: the absence of any provision in the Revised Treaty granting it full juridical personality; and *dicta* in *Doreen Johnson v Caribbean Centre for Development Administration*[3], an earlier decision of this Court. During the course of the proceedings the Commission conceded this point.

[11] The Commission's concession was rightly made. Article 174 of the Revised Treaty details quite extensive powers of the Commission to suppress anti-competitive business conduct having cross-border effects within the CSME, and Articles 175(11) and 180(3) allow the Commission in its own name and right to commence legal proceedings before this Court in furtherance of those functions and powers. Article 175(12) permits a party aggrieved by certain determinations

[3] [2009] CCJ 3 (OJ)

of the Commission to apply to this Court for review of those determinations. The natural corollary is that the review proceedings are to be instituted against the Commission. Accordingly, the Revised Treaty itself contemplates suits being brought by and against the Commission before this Court. Further, the Agreement between Suriname and the Community Establishing the Seat of the Commission[4] states at Article II that the Commission "shall have full juridical personality", and in particular, full capacity to institute legal proceedings. A similar provision is to be found in the Protocol on the Privileges and Immunities of the Competition Commission[5].

[12] As to the initial reliance by the Commission on *Doreen Johnson*, the issue in that case was whether a national of Barbados could sue the Caribbean Centre for Development Administration ("CARICAD") in original jurisdiction proceedings. This Court held that, on the facts, it was not permissible to bring original jurisdiction proceedings against CARICAD, an institution of the Community. This Court accepted that where the conduct of an Organ or Body or of the Secretary-General was challenged, the proper party was the Community. Original jurisdiction proceedings could not be entertained against institutions that were not acting as agents of the Community because, "within the Community System [institutions] were not intended to be an integral part of the Community" and their acts and omissions were not necessarily attributable to the Community.

[13] In circumstances where the Commission was created by the Revised Treaty and has been invested by that instrument with important and far-reaching functions and powers, and expressly granted juridical personality allowing it to sue and be sued in its own name, this Court finds that original jurisdiction proceedings can properly be brought against the Commission to determine whether, in exercising

[4] Signed at St. Vincent and the Grenadines on 13th February 2007. Under the terms of its Article XV, the Agreement entered into force "immediately upon signature".
[5] Signed at St. Vincent and the Grenadines on 12 – 14 February 2007. Article II(1) of the Agreement provides that the "Commission shall possess full juridical personality and, in particular, full capacity to: (a) acquire and dispose of immovable and movable property; (b) contract; and (c) institute legal proceedings".

or purporting to exercise those powers, it has acted in accordance with the provisions of the Revised Treaty.

The Court's Competence to review the decisions of the Commission relating to the initiation and conduct of the investigation

[14] The Commission advanced the argument that by expressly granting the Court in Article 175(12) of the Revised Treaty the power to review "determinations of the Commission under paragraph 4 of Article 174", the Contracting Parties intended to limit the Court's jurisdiction in matters concerning the Commission. The initiation and conduct of an investigation into alleged anti-competitive business conduct of an enterprise, the Commission argued, do not qualify as determinations under Article 174(4) of the Revised Treaty. Hence, if the Court assumed jurisdiction to hear and determine these matters notwithstanding, the Court would be extending its jurisdiction beyond the limits contemplated by the Contracting Parties to the Treaty. A related argument put forward by the Commission was that Article 175(12) of the Treaty provides only for a review after (and not before) the Commission has given a determination on the issues before it.

[15] TCL's counter-argument is that the Court, as guardian of the Revised Treaty, has the power of judicial review to scrutinize the conduct and actions of Member States and the Community in order to determine whether they are in accordance with the rule of law. This, TCL submits, by extension must also apply to the actions or conduct of the Commission which is created and established by the Treaty. As to the time when judicial review should take place, Dr Denbow for TCL stated that it would be futile and or improper that TCL should be required to go to (and through) the Enquiry to complain that the investigation is void and that its rights have been violated, and hence acquiesce in the Enquiry proceeding on an illegal premise.

[16] The first point of the argument does indeed go to the jurisdiction of the Court. 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 which, as the Court has stated before[6], represents the transformation of the CSME into a "regional system under the rule of law", 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. Further, a reasonable interpretation of the concept of "determinations" within the meaning of Article 174(4) of the Revised Treaty must include not only the relevant substantive determinations but also the procedures and practices, both at the investigation and Enquiry stage, that give rise to them.

[17] The second point of the argument is quite different from the first one. It goes to the question of whether TCL should first have attended the Enquiry to have the Adjudicating Panel of the Commission decide on procedural complaints TCL wished to make about the conduct of the Investigating Panel before seeking a ruling from this Court on such complaints. Questions such as these (for example, was recourse to the Court premature, was it too late, have all internal procedures been exhausted?) are often categorized as admissibility issues. Having received no full argument on this precise point, the Court would at this stage not be in a position to give a definitive view on this matter of the admissibility of such complaints. Rule 74 of The CARICOM Competition Commission Rules of Procedure 2011[7], however, would seem to provide a proper basis for TCL to have raised with the Adjudicating Panel the issues of law which are now before this Court. Clearly, the Court can admit a claim of a targeted enterprise or "party complained of" if it would be manifestly unfair or unreasonable for that party to await the outcome of the proceedings before the Adjudicating Panel. The Court is, however, not convinced that this is the case here. Any rights TCL claims it has under the Revised Treaty, whether as an interested party or otherwise, do not

[6] See: *TCL v The Caribbean Community* [2009] CCJ 2 (OJ) at [32]
[7] The CARICOM Competition Commission Rules of Procedure 2011.

seem to have been impaired to such extent that immediate intervention in the Commission's procedure would have been required. Nor did the Commission waive its right to base its defence on the inadmissibility of TCL's claim. Given these considerations, the Court would be inclined to take the following provisional position. Where no Enquiry of the Commission has as yet been held, this Court will not ordinarily take cognizance of allegations that certain procedural steps taken by the Commission during the investigation stage are unlawful or void.

[18] Ordinarily, this would be sufficient to dispose of these proceedings, but in light of the fact that this Court is the custodian of the Revised Treaty, that its views on admissibility of claims is not yet definitive, that this is the first case of its kind, and that the arguments on the substantive merits of the claim have been addressed fully, the Court shall proceed to discuss and give a definitive view on the merits of TCL's claims.

The substantive claims made by TCL

Is TCL an "interested party" within the meaning of Article 175?

TCL's submission

[19] TCL alleged that it was an "interested party" by virtue of the fact that it was the target of the Commission's investigation and could be subjected to severe financial penalties as well as public opprobrium if found liable at the Enquiry stage. In these circumstances, TCL submitted that it was entitled to the rights of consultation and notification specified in Article 175. Cases from the European Community and academic authorities were cited to support the contention that best practices require that procedural rights of the entities targeted in competition cases must be respected in the initial stages of the investigations.

[20] In further support of its view that it was an interested party, TCL asked the Court to adopt a purposive interpretation given that the Preamble to the Revised Treaty reaffirms the centrality of private sector actors in economic growth. TCL referenced a previous occasion on which this Court made clear that it was prepared, in appropriate circumstances, to adopt a "purpose and object" approach to the interpretation of the Revised Treaty[8]. The implication was that the Court should be slow to find that private entities were not accommodated by the term "interested parties" since the private sector was to be the engine of economic development in the region.

Discussion

[21] These submissions require the Court to construe the Articles of the Revised Treaty governing Competition Policy and in particular those relating to the institution of investigations into suspected anti-competitive conduct. The Revised Treaty does not contain a definition of "interested parties" or "parties complained of". The latter term gives rise to relatively little difficulty. It obviously refers to the party against whom allegations of anti-competitive business conduct are made. In this case TCL is clearly the party complained of. Based on the context in which the words "interested parties" appear, it is possible that Member States, COTED and National Competition Commissions could all, in the peculiar circumstances of a particular case, be included in that term. TCL contends that the party complained of may also fall within the expression. Curiously, there is no definition or even mention of the expression in the Rules of Procedure 2011 adopted by the Commission.

[22] In the Court's view, consideration of the term "interested party" in the light of the object and purpose of the Revised Treaty does not necessarily assist TCL. Economic development is indeed to be private sector driven. Equally, however, the Preamble references the goal that the benefits expected from the establishment

[8] *Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana* [2009] CCJ 1 OJ, at [18].

of the CSME should not be frustrated by anti-competitive business conduct. The Court does not agree that the adoption of a purposive interpretive approach to the Preamble or the Treaty would assist one way or another in determining who, in the context of Article 175, must be included in the expression "interested parties".

[23] Article 175 prescribes the procedure to be adopted following a request from a Member State or from COTED for an investigation to be launched. The Commission first makes a preliminary assessment of whether it should proceed with the investigation. The Commission must consult with "the interested parties" and determine, normally within 30 days of receipt of the request, whether the investigation is within the Commission's jurisdiction and is justified in all the circumstances. Where the Commission decides to conduct the investigation, the Commission shall notify "the interested parties" and COTED and complete the investigation within 120 days of receipt of the request for the investigation. The Commission may extend the 120 day time period but if it does so it must notify "the interested parties". Where the Commission decides to conduct an Enquiry following an investigation, the Commission must afford any party complained of an opportunity to defend its interests. Upon conclusion of the Enquiry the Commission must notify "the interested parties" of the determination of the Enquiry and, where appropriate, require the party complained of to remove the effects of the anti-competitive business conduct.

[24] The Commission's Rules of Procedure do not appear to deal expressly with the preliminary assessment, which represents the first juncture at which "interested parties" enjoy the procedural right to be consulted. It is to be noted that at this stage the Commission is engaged in truly preliminary discussions concerning whether the potential investigation is within its jurisdiction and is justified in all the circumstances of the case. The question of whether the investigation falls within the scope of the jurisdiction of the Commission is overwhelmingly a matter on which the Commission can properly advise itself with such inputs as it considers appropriate from Member States, COTED or, possibly, National

Competition Authorities. The equivalent provision in Article 176, where the issue concerns whether the Commission or the Member State in which the targeted enterprise is located should conduct the investigation, is to be decided in consultations between the Member State and the Commission. Where there is a difference of opinion as to jurisdiction the matter is referred to COTED for a decision. Crucially, Article 176 does not anticipate that the targeted enterprise will have any role to play in consultations as to jurisdiction to initiate an investigation into the conduct of that enterprise.

[25] Although it could be said that a targeted enterprise has an interest in being able to convince the Commission that under the terms of Article 175 the proposed investigation was not justified in all the circumstances of the case, such interest is clearly outweighed by other considerations. These considerations include safeguarding the effectiveness of the investigation which should not be compromised. Moreover, the targeted enterprise suffers no obvious prejudice by not being consulted at least at this early stage.

[26] No legitimate interest of TCL has been identified which could have been impacted at the *preliminary* stage where the Commission was engaged in deciding whether the potential investigation was within its jurisdiction and was justified in all the circumstances of the case. Equally, there is no legitimate interest which would require a targeted company to be notified of the commencement of the investigation. It is true that at the *investigation* stage the Commission is entitled to exercise certain investigative powers and measures as set out in Article 174(2). These are potentially quite extensive and intrusive powers but they are to be exercised not at the international plane but instead "in accordance with applicable national laws"[9] where the targeted enterprise has the possibility of recourse to domestic courts for vindication of its rights. Finally, Article 175(8) does speak of the Commission notifying "the interested parties" of the determination of the Enquiry and this requirement is consistent with an interpretation that suggests that

[9] See Article 174(2)

"the interested parties", unlike the party complained of, are not involved in the Enquiry. In principle, therefore, the Court finds that a party complained of does not fall within the expression "an interested party" as that expression is used in the Revised Treaty.

[27] With respect to the decisions of the European Court of Justice ("the ECJ") cited by TCL[10], two points must be made. The first is that care must be taken in the use of precedents from the ECJ owing to the variance between the procedures of the European and CARICOM Competition regimes. As between the two, there are considerable dis-similarities that flow from the significant differences in the wording, nature and effect of the underlying legal instruments and the overarching governing system of law. Secondly, notwithstanding these differences it is clear that in both regimes it is not until the *inter partes* stage of the proceedings that an enterprise is able to rely on rights akin to those of a defendant[11] and that at the investigation stage the Commission must see to it and the Court would always ensure that nothing is done that would irremediably impair those rights[12].

[28] On the facts of this case, TCL hardly has ground for complaining about violation of any rights it has or may have under the Treaty. There is no evidence to suggest that the Commission exercised to the prejudice of TCL any of the Commission's intrusive investigative powers embodied in Article 174(2). The evidence is that TCL became aware of the investigation into its business conduct only when it was notified of the Enquiry. TCL has also not been able to point to anything that has impaired its right to participate fully and effectively in the Enquiry stage and there to mount a full defence to any allegations made against it. In the circumstances of this particular case therefore the Court finds that TCL has not established that it has been prejudiced in any material way by the acts of the Commission.

[10] Al-Jubail Fertilizer Co and Saudi Arabian Fertilizer Co v Council of the European Communities [1991] E.C.R. 1-3187; Case of the European Court of Justice 85/87, Dow Benelux NV v EC Commission [1989] ECR 3137
[11] See for example AC-Treuhand AG v Commission of the European Communities, Judgment of 8 July 2008; case T99/04 at [48]
[12] See Rule 3(1) of the Rules of the Commission

Was there a proper request to conduct the investigation?

[29] The circumstances surrounding the request to the Competition Commission to investigate alleged activities of anti-competitive business conduct by TCL were established in oral testimony supported by correspondence and other documentation. The Court received in evidence several pieces of correspondence and other documentation and in addition two witnesses testified on this matter, Ambassador LaRocque, the Secretary-General of CARICOM for TCL and Ms Bertha Isidore, Acting Executive Director of the Competition Commission for the Commission. The witnesses testified with candour and the Court relies on their testimony.

[30] The legal requirements governing the request are set out in Article 175 of the Treaty. Article 175(2) states that "[w]here COTED has reason to believe that business conduct by an enterprise in the CSME prejudices trade and prevents, restricts or distorts competition within the CSME and has or is likely to have cross-border effects, COTED may request an investigation referred to in paragraph 1 of Article 174". Article 175(3) defines a request: "Requests under paragraphs 1 and 2 shall be in writing and shall disclose sufficient information for the Commission to make a preliminary assessment whether it should proceed with the investigation".

[31] At the Twenty-Sixth Meeting of COTED held on 24th – 25th November 2008, COTED recalled repeated complaints of Member States about the anti-competitive conduct of TCL and the subsequent findings of an audit report on the supply capacity and demand for cement in the CARICOM region. The minutes recorded a resolution to request the Commission to "advise whether there was evidence sufficient to enable a preliminary assessment of whether there was anti-competitive business conduct by the TCL Group". To the extent that an investigation was being requested, the wording of this resolution was not consistent with the terms of Article 175(2). That provision envisaged that if

COTED had reason to believe that TCL was engaged in anti-competitive business conduct, it may request an investigation, and under Article 175(3) it was the Commission who had to receive sufficient information to make a preliminary assessment. There is no provision in the Treaty for the Commission to advise COTED in the manner stated in the resolution.

[32] The Secretary-General, who had attended the meeting in his former capacity as Assistant Secretary-General for Trade and Economic Integration, wrote the Commission giving effect to his understanding of COTED's intentions. His e-mailed letter of 30 September 2009 was not received and he sent a second letter dated 15 December 2009 entitled "Request for the CARICOM Competition Commission to Investigate the Operations of the Market for the Production and Sale of Cement in CARICOM". The letter quoted the minute of the request for advice from the Competition Commission for a preliminary assessment as to whether an investigation was warranted in the circumstances. It noted that COTED believed that the TCL Group engaged in conduct which prejudiced trade and prevented, restricted and distorted competition within the CSME based on years of complaints by CARICOM Members. It referenced and attached a copy of the audit which indicated details of TCL's operations. And then significantly, the letter stated that on COTED's behalf, the Secretary-General requested that the Commission initiate an investigation into the operations of the TCL Group to make a determination as to whether the TCL Group's conduct prejudices trade and/or prevents, restricts, or distorts competition within the CSME. The letter also invited the Commission to "take any other action the Commission deems necessary".

[33] It is at least arguable that the Secretary-General was entitled to make that request, notwithstanding the wording of the resolution, because his letter stated that COTED had reason to believe that TCL was engaged in anti-competitive conduct, which was the condition for making the request prescribed in Article 175(2).

[34] The Commission responded to the Secretary-General by letter of 10th February 2010 pointing out the ambiguity between COTED's request for advice and the Secretary-General's request for an investigation. The Commission requested clarification as to specifically what was being requested of it. The Secretary-General replied by letter of 26 March 2010 and acknowledged that COTED's request for a preliminary assessment fell short of actually requesting an investigation. The Secretary-General then dispatched a Savingram dated 13th April 2010 addressed to COTED's Ministers proposing that COTED might wish expressly to request that the Commission initiate an investigation. Before COTED did so, the Commission wrote on 16th April 2010 advising the Secretary-General that it would proceed with the investigation on the bases of (1) the clear request for an investigation contained in the Secretary-General's letter of 15th December 2009; (2) indications by this Court that issues concerning claims of abuse of dominance by TCL fell within the jurisdiction of the Commission; and (3) the Commission's authority to initiate an investigation where it has reason to believe that competition was being distorted.

[35] This letter from the Commission was not entirely satisfactory. The first reason reflected a reversal of the original position of the Commission that the original request to it was ambiguous. The other two reasons, however, were clearly inconsistent with the Treaty provisions. Although it is true that in *Trinidad Cement Limited and TCL Guyana Inc. v The Co-operative Republic of Guyana*[13] this Court made passing comments upon submissions by Guyana that the TCL Group had engaged in predatory pricing and abuse of their dominant position in the regional cement market[14], those observations could not be taken as the basis for the Commission to launch an investigation in defiance of the procedures laid down in Article 175, and although the Commission did have power to launch an investigation *proprio motu*, it could only do so after requesting a national competition authority to undertake a preliminary examination. It was clear from the evidence that this did not occur.

[13] [2009] CCJ 5 (OJ)
[14] *Ibid*, at [17].

[36] At its Thirtieth Meeting held on 17th – 18th June 2010, COTED took cognizance of the Commission's decision to investigate the TCL Group's conduct and confirmed its agreement with this course of action in accordance with Article 175(2).

[37] The Court is satisfied from the evidence that from the inception, the substantive intention of COTED was to request that the Commission investigate TCL. The conclusion of technical error in the drafting of the Conference resolution emanating from the Twenty-Sixth Meeting is irresistible. At the first meeting of COTED after the nature of the defect in its resolution was brought to its attention, COTED ratified the investigation that had been initiated by the Commission on the request formulated in the letter addressed by the Secretary-General. This ratification validated the request made by the Secretary-General. In sum, without prejudice to the position stated before (at [17] above) that TCL should have addressed its concerns about the propriety of COTED's request to the Enquiry Panel, the Court considers that the Commission was authorized to function in accordance with Article 175.

Issue of disclosure by the Commission raised by TCL

[38] In the course of the oral proceedings TCL alleged that the Commission was guilty of bad faith in failing to disclose information that was relevant to the case. Very little turns on this point but the Court addresses it in fairness to the parties and for the guidance of litigants before the Court.

[39] By Order dated 23rd November 2011, the Court required that the Commission file the Request for Investigation from COTED and the Report of the Investigating Panel on or before the 29th day of November 2011. Subsequently, by Order of 6th March 2012, the Court required CARICOM to produce three documents requested by TCL in its letter of 9th February 2012.

[40] The Commission filed the specific documents ordered. CARICOM however, not only filed the specific documents it was ordered to file, but went on to file four other documents which were referenced to the document the Commission was required to file. These four documents completed the picture of correspondence between the Commission and the Secretariat and the Preliminary Report of the Investigation. The Court notes that the information supplied by CARICOM was relevant to an important issue in the trial relating to whether the request by COTED conformed to the requirements of Article 175.

[41] TCL complained that the failure of the Commission to disclose those documents was an attempt to conceal the fact that the Commission was aware that the resolution of the Twenty-Sixth Meeting of the Council was inconsistent with Article 175(2). The Commission's response to this complaint was that it had fully complied with the Order of the Court.

[42] It is indeed open to a litigant to assert that the duty to disclose is complete once there is full compliance with what the Court actually ordered. However, the Court needs to recall Part 1.4 of the Original Jurisdiction Rules, which prescribes that the overriding objective of the Rules is to enable the Court to deal with cases fairly and expeditiously so as to ensure a just result. There is a necessary implication that the parties must assist the Court in this endeavour. The Court adopts the approach that the parties have a responsibility to seek discovery only when it is justifiable to do so, and to cooperate in giving discovery in response to a reasonable request. They should adopt a cooperative, constructive and sensible approach, which the Court must encourage, supporting it when necessary by appropriate orders for costs.

[43] Although CARICOM was not a party, it adopted the approach that the Court seeks to encourage. The additional documents it produced contributed to the fairness of the proceedings and the quality of fact finding. They disclosed

information to which the Claimant would not normally have access but which was relevant to the case. The information was available to the Claimant in time for use in the trial. This removed any complaint about unfairness from non-disclosure. It also prevented possible delays or additional costs that may have become necessary if the information was only revealed during the testimony phase of the proceedings.

[44] In the circumstances, despite sympathetic notation of TCL's submissions, the Court considers that no further orders are required.

Observations on the work of the Commission and its Rules of Procedure

[45] Article 174(7) of the Revised Treaty authorizes the Commission to establish its own Rules of Procedure. These Rules were placed before the Court during the course of these proceedings. It is axiomatic that the Rules must conform to the letter and spirit of the Revised Treaty and that this Court, as guardian of the Treaty, is entitled to pronounce on the validity of any rule that is in conflict with the Treaty. Although almost none of the Rules were specifically brought to the Court's attention, the Court considers it appropriate to comment on a few of them as they may have some bearing on the conduct of the Enquiry which the Adjudicating Panel of the Commission is now expected to embark upon.

[46] The Court notes that the Commission's Rules of Procedure do not replicate what is required by Article 175(3), (4), (5) and (8) of the Revised Treaty. Such replication is, of course, not strictly necessary, but it would seem to be useful nevertheless if only to remind the Investigating Panel of the steps it is required to take. The absence of any such reminder may perhaps serve to explain some flaws in the report of the Investigating Panel. One would expect such a report to state, for example, when the Commission received the request, which "interested parties" the Commission consulted, when these consultations were concluded, when the Commission decided to conduct the investigation, who was notified of

that decision and in what manner, when the investigation was completed, whether the time period for completion was extended and if so, why and when, and whether the "interested parties" were notified of that extension and if so, when. Given the importance of separating the investigating from the adjudicating function of the Commission, it would also seem logical and prudent to indicate in the report which of the Commissioners did in fact investigate the matter reported by them. In the circumstances of this particular case, none of these omissions would appear to cause the decision to commence an Enquiry to be void, but nevertheless, inclusion of such details is an obvious way in which the report could be improved.

[47] The Court further notes that Rules 8 and 9 of the Commission's Rules of Procedure do not seem entirely in keeping with Article 175(4) of the Revised Treaty, as they clearly suggest that the Investigating Panel should decide whether the Commission has jurisdiction to entertain the matter before them upon completion of the investigation and not, as the Treaty requires, before conducting the investigation. Whether the report of the Investigating Panel should state with reasons "whether an offence has been committed" and "the nature of that offence", as required by Rule 8, or whether the relevant criterion should rather be that "a *prima facie* case that an offence has been committed has been established", as indicated in Rule 55(1)(b), is also an issue that requires further attention. The fact is that the Investigating Panel does not appear to have used either of these criteria as the report states that the Panel has found "evidence that the TCL Group has engaged in price discrimination", and that the "formal enquiry should look into the concerns that the TCL Group may be engaging in price discrimination in terms of Article 179(1)(g) of the Revised Treaty of Chaguaramas".

[48] A final remark concerns Rule 4 of the Commission's Rules of Procedure. This rule states that "the Commission may conduct an investigation if it has reasonable grounds for suspecting that there has been an infringement of *national provisions implementing Article 177(1)(a), (b) or (c) of the Treaty*, provided the Commission

has jurisdiction in keeping with Articles 174, 175 and 176 of the Treaty". The Court notes that the Investigating Panel does not appear to have followed this Rule as its report does not allege any infringement of any national provision implementing the Treaty provisions mentioned. Instead, the report focused on possible infringement by TCL of the Treaty provisions themselves. Although the Court is not in a position to rule definitively on this issue as it has not been the subject of debate between the parties, the Court observes that it is difficult to see how an investigation of the regional Competition Commission could deal with cross-border anti-competitive business conduct by focusing on the infringement of national provisions. Moreover, this does not seem to be required by the Treaty and, indeed, the question of which national provisions to concentrate on would almost certainly arise. In all the circumstances, the Court would encourage the Commission to review its Rules so as to ensure that the same are in concert with the Revised Treaty and reflect the appropriate standards of fairness.

The orders of the Court

[49] The Court:

a. **Dismisses** the claim in the Originating Application;

b. **Refuses** the declarations and orders sought in the Originating Application in respect of the actions and decisions of the Commission; and

c. **Orders** that written submissions as to costs be filed and exchanged within 21 days of the date of this judgment.

/s/

The Rt Hon Mr Justice Dennis Byron, President

/s/	**/s/**
The Hon Mr Justice A Saunders	The Hon Mme Justice D Bernard
/s/	**/s/**
The Hon Mr Justice J Wit	The Hon Mr Justice W Anderson