IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No. OA 003 of 2013

Between

RUDISA BEVERAGES & JUICES N.V.
CARIBBEAN INTERNATIONAL DISTRIBUTORS INC

Claimants

And

THE STATE OF GUYANA

Defendant

THE COURT,

composed of D Byron, President, R Nelson, A Saunders, J Wit, and D Hayton, Judges

having regard to the originating application filed at the Court on the 10th June 2013, the Defence filed on the 23rd August 2013 and amended on 15th November 2013, the amended reply to the Defence filed on 2nd December 2013, the case management conferences held on the 5th November, and the 11th November 2013 respectively, the order of the Court dated 11th November 2013 granting leave to Trinidad and Tobago to hold a watching brief, the pre-hearing review hearings held respectively on the 2nd December 2013 and the 31st January 2014, the written submissions of Trinidad and Tobago filed on 2nd January 2014, the written submissions of the Claimants filed on 20th January 2014, the agreed statement of facts filed on 7th February 2014, the written submissions of the Defendant filed on 10th February 2014 and the public hearing held on 13th February 2014 at the Seat of the Court

and after considering all the written submissions, the testimony at the trial and the oral observations of:

the Claimants, by Mr Hans Lim A Po, Attorney-at-law

the Defendant, by Mr Mohabir Anil Nandlall, MP and Ms. Annette Singh, Attorneys-at-law; and

Trinidad and Tobago, by Ms. Donna Prowell and Ms. Christie A. M. Modeste, Attorneys-at-law

on the **8th day of May 2014** delivers the following

JUDGMENT

Introduction

[1] The Claimants, Rudisa Beverages and Juices N.V. ('Rudisa Beverages') and Caribbean International Distributors Inc ('CIDI,'), are CARICOM companies whose business activities involve the production, sale and distribution in Suriname and Guyana of beverages in non-returnable beverage containers. Rudisa Beverages, a Surinamese company, exports the beverages and CIDI, a Guyanese company, imports, sells and distributes them in Guyana. The Claimants have been engaged in this activity for some time. They allege that the imposition, by Guyana, of an environmental levy or tax[1] on all non-returnable beverage containers imported into that country, amounts to a violation of the Revised Treaty of Chaguaramas (the 'RTC'). They further allege that they have sustained damages as a consequence of the violation and they claim consequential relief. The State of Guyana contends that the Claimants are not entitled to the relief they claim. There is no dispute that, given the CARICOM membership of Suriname and Guyana, the containers in question qualify for Community area treatment within the scheme of the Caribbean Single Market and Economy (the 'CSME').

Jurisdiction

[2] This dispute involves the interpretation and application of the RTC in respect of which, by virtue of Article 211, the Court's jurisdiction is both compulsory and exclusive. This jurisdiction extends to applications brought by private entities (or "persons") such as the Claimants. Such persons of a Contracting Party to the RTC may, with the special leave of the Court, appear as parties in proceedings before the Court once they fulfil the test set out in Article 222 of the RTC, namely that:

> (a) there is a right or benefit conferred by or under the RTC enuring directly to the benefit of the person concerned;
> (b) the person concerned has been prejudiced in the enjoyment of this right;

[1] See: section 7A of the Customs Act of Guyana Chap 82:01.

> (c) the Contracting Party entitled to espouse the claim has omitted or declined to do so or has expressly agreed that the person concerned may espouse the Claim; and
> (d) it is in the interest of justice that the person concerned be allowed to espouse the claim.

[3] Article 222 indicates a threshold that must be met by private entities in order to achieve standing before the Court. The Article performs a gatekeeping function. The import of this Article has been examined in a line of cases,[2] the most recent being that of *Shanique Myrie v the State of Barbados*.[3] In relation to requirements (a) and (b), the persons concerned must establish at the Special Leave stage that there is an arguable case that they enjoy a right or benefit under the RTC and that they have been prejudiced in the enjoyment of the same. Once these and all the other requirements have been satisfied and special leave is granted, the Court then proceeds to the substantive hearing where the Court "does not re-visit the question whether special leave should in fact have been given"[4] but instead concerns itself "with discovering whether the Claimant has made out its case."[5]

[4] The Claimants filed their joint application for special leave on 12th December 2012. By way of a response dated 17th March 2013 the Defendant State of Guyana indicated it had no objection to the grant of leave. On 10th June 2013, the Court issued an order granting special leave to the Claimants to commence the proceedings. With no new matter having been raised in these proceedings to question the jurisdiction of the Court, and the Court itself being satisfied of its own jurisdiction to adjudicate upon the dispute, the Court can now turn to examine the merits of the application.

Factual Background

[5] To a great extent, the factual basis of the dispute is undisputed. The Claimants are part of a group of corporate entities known as the Rudisa Group of Companies ("Rudisa"). The

[2] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ), (2012) 81 WIR 247 at [8], *Hummingbird Rice Mills v Suriname and The Caribbean Community* [2012] CCJ 1 (OJ), (2012) 79 WIR 448 at [12]; *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 4 (OJ), (2009) 75 WIR 194 at [16]-[18]; *Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana* [2009] CCJ 1 (OJ), (2009) 74 WIR 302 at [33].
[3] [2013] CCJ 3 (OJ).
[4] *Ibid*, fn 2, *Trinidad Cement Limited v the Competition Commission* at [9].
[5] *Ibid*.

companies have a single shareholder, Mr Dilipkoemar Sardjoe. Rudisa Beverages is based in Suriname where it operates a processing and bottling plant which makes various beverages such as soft drinks ("RC Cola", "Thrill"), juices ("More") and water ("Diamond Blue" and "Blue Life"), all of which are packaged in non-returnable beverage containers. In 2005 Rudisa Beverages entered the export market, capitalising on the common market established by the CSME under the RTC. This common market is the principal market for Rudisa Beverages.

[6] CIDI is a subsidiary of Rudisa and operates in Guyana. CIDI acts as a distributor for Rudisa Beverages in the Guyanese market. In addition to this supplier-distributor arrangement with Rudisa Beverages, CIDI also imports beer from Suriname (Parbo beer from Surinaamsche Brouwerij NV) and St Lucia (Heineken from Windward and Leeward Brewery Ltd). The goods which are supplied by Rudisa Beverages and imported into Guyana are all packaged in non-returnable beverage containers. The beverage industry in Guyana is highly competitive with established corporate entities such as Banks DIH Ltd, Demerara Distillers Ltd, Wieting & Ritcher Ltd, Essential Supplies INC and R&P Enterprise all having a presence in the market.

[7] Guyana has enacted the RTC into its domestic law in the form of the Caribbean Community Act 2006 (No. 8). As previously indicated, Guyana imposes an environmental tax on all imported non-returnable beverage containers pursuant to section 7A of the Customs Act as amended by the Guyana Fiscal Enactments (Amendment) Act No 3/95. The effect of this tax is that the cost of each imported beverage packaged in non-returnable containers is increased by GUY$10. The manufacturers of locally made non-returnable beverage containers do not pay this tax. The tax applies only to imported containers. The taxing legislation does not contain any exemptions in relation to non-returnable beverage containers which qualify for Community treatment.

[8] Several attempts have been made under the auspices of the Council for Trade and Economic Development ('COTED') to resolve the issue of the environmental tax and in particular its discriminatory effect. At the insistence of the Surinamese government the matter engaged the attention of COTED on twelve separate occasions, but the matter was

never resolved . From the draft reports submitted by the Claimants to this Court, the chronology of events as this matter wound its way through the COTED machinery may be described as follows:

- 11th Meeting of COTED, May 22-23, 2001: the issue of the discriminatory effect of the environmental tax was raised and it was noted that Guyana has to make the necessary legislative amendments. Guyana explained that there was a delay in so doing owing to the fact that the new Parliament was only recently convened.
- 14th Meeting of COTED, January 31 – February 1, 2003: it was noted that no action had been taken by Guyana regarding the environmental tax and it was suggested that the matter be referred to the Heads of Government.
- 17th Meeting of COTED, June 16 2004: all Member States were asked to submit their Environmental Levy legislation for review by the General Counsel of COTED.
- 18th Meeting of COTED, January 5, 2005: it was noted that Guyana did submit their legislation for review. Member States were urged to remove all unauthorised trade restrictions by December 31.
- 19th Meeting of COTED, May 11-12, 2005: the General Counsel advised that the environmental levy imposed by Guyana was a violation of Article 90 of the RTC.
- 20th Meeting of COTED, January 12, 2006: Member States applying an environmental levy in violation of the RTC were advised to take urgent action to address its discriminatory effect by the 21st Meeting of COTED in May 2006.
- 25th Meeting of COTED, January 25, 2008: Guyana's commitment to taking action regarding the discriminatory effect of the environmental levy was noted.
- 26th Meeting of COTED, November 24-25, 2008: Guyana's earlier commitment to make the environmental levy consistent with the RTC was

emphasised. Guyana made a proposal for the issue to be raised at a higher level of the Community to bring closure to the issue.

- 27th Meeting of COTED, May 14-15, 2009: Guyana was given a two week deadline i.e. until May 29, 2009 to indicate when it will take the necessary legislative action.
- 32nd Meeting of COTED, May 19-20, 2011: it was again requested that Guyana take the necessary legislative action regarding its environmental levy. Member States were urged to note that they would be responsible for the consequences of non-compliance with the RTC.
- 33rd Meeting of COTED, November 17-18, 2011: Guyana was mandated to "immediately remove the discriminatory elements of its environmental levy legislation."
- 34th Meeting of COTED, March 29 – 30, 2012: the earlier commitments of Guyana were re-emphasised. Guyana advised that the matter was engaging the attention of the Cabinet and discussions were to be complete with one month. Guyana was urged to act with "all deliberate speed" to remedy the situation.

[9] The above chronology speaks for itself. The Claimants also sought to resolve the issue by having counsel write to both the Minister of Finance of Guyana in March 2011 and the Minister of Tourism of Guyana in October 2012 demanding the removal of the environmental levy as well as reimbursement of the taxes which had been paid by CIDI. Neither letter was acknowledged, nor was any response given.

[10] In 2013 the Government of Guyana attempted to resolve the issue by proposing legislation in the form of the Customs (Amendment) Bill No 2 of 2013. This enactment was, however, rejected by the National Assembly. As it stands, CIDI has paid over US$6,047,244.77 in environmental tax on the non-returnable containers which it has imported into Guyana from Rudisa Beverages since 2009.

[11] In light of the foregoing the Claimants seek the following relief:

a. a declaration that the environmental levy breaches Article 87 of the RTC (prohibition on import duties and other related charges),
b. in the alternative, a declaration that the environmental levy violates Article 90 of the RTC (prohibition on discriminatory internal taxes),
c. an order mandating the revocation and removal of the offending legislation or the removal of its discriminatory elements,
d. damages for loss caused by the payment of the environmental tax up to the date of the judgment and
e. an order restraining the imposition and collection of the environmental levy.

[12] In light of the application for a mandatory order, that is, c) above, the State of Trinidad and Tobago indicated its interest in the Claimants' application. Trinidad and Tobago is particularly interested in the mandatory orders being sought by the Claimants which seek to compel legislative action on the part of Guyana. On 11th November 2013, the Court made an order granting Trinidad and Tobago leave to hold a 'watching brief' and leave to file written submissions which it did on the 2nd January 2014.

The Law

[13] The Guyanese legislative provision under challenge, namely section 7A of the Customs Act, reads as follows:

> "(1) Notwithstanding anything in this Act or in any other written law, there shall be raised, levied and collected a tax in this section referred to as an environmental tax, at the rate of ten dollars on every unit of non-returnable metal, plastic, glass or cardboard container of any alcoholic or non-alcoholic beverage imported into Guyana and every importer of such beverage shall pay such tax to the Comptroller of Customs and Excise at the same time when any customs duties are paid.
> (2) A person liable under this section to pay tax, who fails to do so, shall be guilty of an offence and shall be liable to a fine of five thousand dollars and in addition, shall pay to the Comptroller of Customs and Excise twice the amount of the tax payable under subsection (1)."

[14] The State of Guyana boasts a proud record of attempts to address environmental degradation. The legislation in question is said to be geared at environmental protection owing to the deleterious environmental impact of non-returnable beverage containers.

Guyana also has specific legislation geared towards the protection of the environment in the form of the Environmental Protection Act 1996[6] which establishes an Environmental Protection Agency which is responsible, *inter alia*, for the "management of the natural environment so as to ensure conservation, protection and sustainable use of its natural resources."[7] The right to a healthy environment has been elevated to the status of a fundamental right by virtue of a 2001 amendment to the Constitution which brought into force Article 149(J). This provision places an obligation on the State to protect against the risk of environmental degradation by "reasonable legislative and other measures."

[15] The environmental tax as contained in section 7A, however, falls to be reconciled with Articles 78, 79 and 87 (or 90) of the RTC. These Articles are housed within Chapter Five of the RTC which sets out the trade policy under the CSME. The general purpose of trade liberalisation as achieved through the free movement of goods and services within the CSME is spelt out in Articles 78 and 79 of the RTC. The concepts there embodied are further refined in other Articles of Chapter Five. Article 87, for example, contains a prohibition against the imposition of import duties on goods of Community origin and Article 90 proscribes the discriminatory application of fiscal or internal charges on Community goods. The full text of these provisions has been included as an appendix to this judgment.

Liability for Breach of the RTC

[16] It is not disputed that section 7A of the Customs Act is inconsistent with the principles of trade liberalisation and free movement of goods as envisioned by Chapter Five of the RTC. The COTED Meetings illustrate a recognition on the part of Guyana that the environmental tax prescribed by section 7A is discriminatory and inconsistent with the RTC. Furthermore, in paragraph 1 of its skeleton submission dated 10th February 2014, headed "Breach of Articles 87 and 90 of the RTC", Guyana conceded at the outset that "the continued application of the environmental tax provisions after the coming into

[6] Act No 11 of 1996.
[7] Section 4(1)(a).

effect of the Revised Treaty of Chaguaramas (RTC) is in contravention of the RTC, but only in so far as it is discriminatory in that it does not apply to Guyanese manufacturers."

[17] The Attorney General of Guyana put forward, however, that Guyana's breach of the RTC is somehow excusable on the basis that the Government has made a good faith effort to comply with its treaty obligations but has been thwarted by the National Assembly which refused to pass the necessary amendments to address the breach of the RTC caused by the application of this to CARICOM imports. The Court cannot accede to this contention. The failure or inability of the Government to obtain legislative support for Bill No 2 of 2013, which sought to amend section 7A, has no effect on the accountability of the State of Guyana for its breach of the RTC. While democratic power is housed in the different arms of the State, the State itself is indivisible. Thus, a breach committed by any of the branches of the State engages the responsibility of the State as a whole.

[18] The argument put forward by Guyana runs counter to the well-known doctrine of *pacta sunt servanda*, codified in Article 26 of the Vienna Convention on the Law of Treaties 1969, which provides that a State must perform its treaty obligations in good faith. As a corollary, Article 27 goes on to provide that a State cannot invoke the provisions of its internal law as a justification for its failure to comply with its treaty obligations.

[19] The principle of *pacta sunt servanda* underlies Article 9 of the RTC which contains a general undertaking as to the implementation of the treaty and obliges Member States to take all appropriate measures to ensure the fulfilment of their treaty obligations to facilitate the achievement of the objectives of the Community. States are enjoined to abstain from any measures which could jeopardise these objectives. The import of the doctrine was examined in *Hummingbird Rice Mills v Suriname and the Caribbean Community*[8] where this Court observed:

> "There is no doubt that Suriname came under a legal obligation scrupulously to observe all its treaty obligations from 1st January 2006, the date of the entry into force of the Revised Treaty. From that date forward,

[8] *Ibid* , fn 2 at [17].

> the rule of *pacta sunt servanda*, enshrined in Article 26 of the Vienna Convention on the Law of Treaties 1969, became operative: "every treaty in force is binding upon the parties to it and must be performed by them in good faith". The State of Suriname was simultaneously bound by Article 9 of the Revised Treaty to take all appropriate measures to ensure the carrying out of its treaty obligations."

[20] The objectives of the RTC and in particular, the operation of the CSME require the uniform application of the trade policy as contained in Chapter Five. No State can be allowed to carve out an exception to the observance of its treaty obligations by seeking refuge in an inability to garner sufficient legislative support to repeal or amend existing national law that is or may be incompatible with the RTC. Article 9 of the RTC clearly requires Member States to take appropriate measures to carry out their treaty obligations. Indeed, in this case, it would seem that it was open to the Government of Guyana to conform to its treaty obligations by ceasing to collect the environmental tax on non-returnable beverage containers which qualify for Community treatment on the premise that s 8(1) of Guyana's Caribbean Community Act[9] had impliedly repealed the relevant provision of the Customs Act in so far as the latter applies to imports from CARICOM States. In any event, faithful observance of the provisions of the RTC is crucial to the successful operation of the single market created by the CSME, a central feature of which is the free movement of goods and the elimination of trade barriers for goods of Community origin.

[21] The Court is not unmindful of the need to balance economic development and environmental protection, and in particular the movement towards sustainable development. Indeed, Article 65 of the RTC provides that the policies of the Community must be formulated with due consideration for the need to preserve, protect and improve the quality of the environment. This cannot be taken to mean, as the Attorney-General seems to suggest, that Article 65 creates an exemption from adherence to the trade policy articulated within Chapter Five of the RTC.

[9] Act No 8 of 2006.

[22] The noble purpose served by the environmental tax, as suggested by the Attorney-General, namely the protection of the environment and conservation, does not excuse the discriminatory impact of the tax. The tax is contrary to Article 87(1) of the RTC which proscribes the imposition of import duties on goods of community origin. The tax must be considered an import duty because the definition of "import duties"[10] extends to "any tax or surtax of customs and any other charges of equivalent effect whether fiscal, monetary or exchange which are levied in (sic) imports except those notified under Article 85 and other charges which fall within that Article". There is no suggestion that the tax falls under the Article 85 exception. As conceded by Guyana the tax also has a discriminatory effect because no such penalty is applied to locally produced non-returnable containers. It must be stressed, however, that "save as provided by the RTC" there is an absolute prohibition on the imposition of import duties on goods of Community origin. This prohibition is essential to the sustainability of the internal market created by the RTC.

[23] In all the circumstances, the Court considers that the principle adopted by the European Court of Justice in *Sociaal Fonds voor de Diamantarbeiders v S.A. Ch. Brachfeld & Sons and Chougol Diamond Co*[11] is also relevant here. That case concerned Article 23 of the EC Treaty (formerly Article 9) which substantially corresponds to Article 87 of the RTC. The Article contains a prohibition on the imposition of customs duties and charges having equivalent effect within the European Community. In that case Belgium attempted to justify the imposition of customs duties on imported diamonds by demonstrating that the monies collected were paid into a fund to provide welfare benefits for workers in the diamond industry. The ECJ held that there was an absolute prohibition on the imposition of customs duties independently of any consideration of the purpose for which such duties were introduced and the distinction of the revenue obtained therefrom. Similarly, irrespective of the purpose of the environmental tax here, the Court finds that its imposition on non-returnable beverage containers which qualify for Community treatment amounts to a breach of the RTC for which the State of Guyana is liable.

[10] See Article 1 of the RTC which explicitly defines the term.
[11] Joined Cases 2/69 and 3/69 [1969] ECR 211.

Orders and Relief Sought

[24] The next issue to be resolved is the form of relief to which the Claimants are entitled. In their originating application they seek a broad spectrum of relief ranging from a mandatory order compelling Guyana to pass legislation to remedy the discriminatory impact of the environmental tax to "damages" by way of re-imbursement for the tax paid by CIDI for the period 2009 to the date of judgment.

Mandatory Orders

[25] The Claimants urge the Court to make orders compelling Guyana "to revoke and remove" section 7A of the Customs Act from its domestic laws, to abstain from the imposition and collection of the environmental tax on non-returnable beverage containers of Community origin or in the alternative to take legislative action to address the discriminatory impact of section 7A. They submit that the course of events leading up to this litigation demonstrates that Guyana has consistently failed to take action to remedy its breach of the RTC. The Claimants make much of the fact that Guyana has collected the environmental tax knowing full well that this discriminatory taxation regime violated the RTC.

[26] The Court is further urged to mark its disapproval not only by an award of "damages" but by making coercive orders against the State. Express reliance is placed on *Trinidad Cement Limited v the Caribbean Community*[12] where the Court indicated that its jurisdiction to grant relief for breaches of the RTC extends to the issuance of a coercive order. In this regard the following passage is worthy of note:

> "[42] ... as to possible remedies, it must be borne in mind that the Agreement establishing the Court has been incorporated into the domestic law of each of the CARICOM Member States. Pursuant to the Agreement and the RTC, the Court has power to prescribe interim measures. See: Article 218 of the RTC and Article XIX of the Agreement. Article XV

[12] *Ibid*, fn 2.

> of the Agreement states that Member States, Organs, Bodies of the Community or persons to whom a judgment of the Court applies, shall comply with that judgment. Further, Article XXVI of the Agreement enjoins all the Contracting Parties to ensure that all authorities of a Contracting Party act in aid of the Court and that any judgment, decree, order, sentence of the Court given in exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of that Contracting Party.
>
> [43] Given the Court's duty to enforce the rule of law and to render the RTC effective, competence to review the legality of acts adopted by Community institutions must perforce include competence to award appropriate relief to private entities that have suffered and established loss as a result of an illegal act or omission on the part of the Community. If the Court were restricted to the issuance of mere declarations, none of the enforcement mechanisms referred to in the previous paragraph would have been required. In the judgment of the Court, coercive remedies are therefore available to the Court."

[27] The Court recognises its responsibility to act as the guardian of the RTC and to ensure that States comply with their treaty obligations. The application of section 7A of the Customs Act to Community goods is wholly incompatible with Guyana's obligations under the RTC. Especially in light of the matters referred to at [8] above, it follows that Guyana must be ordered to adopt such legislative or other measures necessary to ensure that goods of Community origin are not subjected to the tax in question. Guyana's failure to do so will continue to engage its liability for damage caused to CARICOM nationals as a result of this breach of the RTC.

Relief Claimed

[28] Turning to to the issue of the relief to which the Claimants are entitled, the Court has in the past set out the test which must be met in order to justify an award of compensatory damages for breach of the RTC. In *Trinidad Cement Limited and TCL Guyana*

Incorporated v the State of the Co-operative Republic of Guyana[13] it was emphasised that a breach of the RTC does not automatically result in an award of damages. An award of damages may instead only be made if a party demonstrated that:

> (1) the provision alleged to be breached was intended to benefit the claimant,
> (2) the breach is serious,
> (3) there is substantial loss and
> (4) there is a causal link between the breach by the State and the loss or damage to the claimant.

[29] In this case, the main relief the Claimants are really seeking is the return of monies unlawfully collected from them in breach of Article 87. The statements as to damages made by the Court in the *Trinidad Cement Limited* case and referred to above are not applicable to this precise kind of claim where a re-imbursement is claimed. Based on the evidence presented, both of a documentary kind (in the form of customs receipts, shipping documents and certificates of origin) as well as the testimony from Mr Rotsburg, the Chief Financial Officer of Rudisa, and Mr Gajadhar, the Secretary of the Board of Directors in charge of the daily operations of CIDI, the Court is satisfied that the Claimants have, up to 24th October, 2013, actually paid sums totalling US$6,047,244.77 to the State of Guyana. The duties which resulted in the payment of these sums should never have been levied and in principle, a Member State cannot be permitted to retain the benefit of its own wrongful conduct. So as to preclude the State of Guyana from being unjustly enriched and in order not to weaken the effectiveness of Community law, Guyana must return these sums to the Claimants. In all the circumstances of this case the Claimants are entitled to re-imbursement of the sum of US$6,047,244.77 in respect of tax paid up to 24th October 2013 and such further reimbursement of environmental tax paid between that date and the date of this judgment.

[30] The Attorney-General submitted that no such reimbursement should be made to the Claimants because the latter must have already passed on the tax to the citizens of Guyana by a re-adjustment of the price of the beverages to consumers to account for the GUY$10 increase in unit price. This could perhaps have been an attractive submission if

[13] [2009] CCJ 5 (OJ), (2009) 75 WIR 327 at [27].

Guyana had been able to produce evidence to show that the tax had in fact been passed on to consumers and that to award reimbursement will unjustly enrich the Claimants: see for example *Société Comateb v Directeur Général de Douanes et Droits Indirects*.[14]

[31] Guyana has presented no evidence to show that the Claimants have in fact passed on the environmental tax to their customers. The mere assertion that the Claimants are motivated by profit and that the tax *must* have been passed on is not enough. Moreover, the Claimants adduced cogent evidence to the contrary on this precise issue. Both Mr Rotsburg and Mr Gajadhar testified on behalf of the Claimants that the latter devised an accounting system to enable CIDI to retain a competitive price and not pass the GUY$10 increase per unit onto their customers. They both explained that Rudisa Beverages would invoice goods to CIDI at FOB Suriname prices with Rudisa Beverages bearing the insurance and freight charges. In this way, the increased cost price occasioned by the imposition of the environmental tax would not be reflected in the price which CIDI charged its customers.

[32] The Court accepts the Claimants' evidence that, in the expectation that the tax would soon be removed, they absorbed the loss occasioned in order to retain their competitive edge in Guyana. This apparently was part of the business strategy of the Rudisa Group to enable it to retain its 50% market share. It is indeed difficult to surmise that in a highly competitive market the Group could have retained such a large market share while passing on the tax to its customers when its Guyanese competitors were absolved from the obligation to pay a similar tax. The Court notes that despite robust cross examination by the Attorney-General, the testimony of Mr Rotsburg and Mr Gajadhar on this issue remained unshaken. Quite apart from the fact that the onus on this issue would have laid on Guyana, the Court is satisfied that the Claimants' evidence is credible and the Court is satisfied that the tax has not been transferred to the consumer.

[14] C192-218/95 [1997] ECR I-165, [1997] 2 CMLR 649. See further following ECJ case law *San Giorgio*, Case C-199/82, *Dilexport*, Case C-343/96, *Metallgesellschaft and Hoechst*, Case C-410/98, *Michaïlidis v IKA*, Joint Cases C-441/98 and C-442/98, and *Mark & Spencer*, case C-62/00. See also in a domestic context *Littlewoods Retail and others v Revenue and Customs Commissioners* C-591/10 [2012] All ER (D) 267, [2012] STC 1714 and *Lady & Kid A/S and others v Skatteministeriet* c-398/09 [2012] All ER (EC) 410, [2012] STC 854.

[33] Guyana also asserted that the system devised by the Claimants whereby the value of the imported goods invoiced by CIDI did not include the amounts borne by Rudisa Beverages for insurance and freight amounted to an illegal under-valuation of the imports, contrary to relevant Customs legislation. This issue was raised belatedly and forcefully pressed by the Attorney General in the cut and thrust of cross examination. The allegation of some wrongdoing on the part of CIDI in this regard is not a matter which properly concerns this Court in these proceedings as our remit is to adjudicate the liability of Guyana for its admitted breach of the RTC and to indicate the consequential remedies available to the Claimants. The Court is not in these proceedings concerned with determining whether the customs forms submitted by CIDI or by the Claimants were an accurate reflection of the value of the imported containers. While the Court makes no definitive statement on the matter in these proceedings, the Court sees no evidence of a breach or a violation of Guyana's Customs legislation by the Claimants.

[34] The Attorney-General also submitted that an award of damages can only properly be made if the Claimants demonstrate not merely that they suffered a loss of market share but also that their Guyanese competitors benefited from a concomitant increase in market share. The Court does not agree with this submission for which, in any case, no authority was cited. Moreover, the Court is not in this case awarding *damages* as such but ordering reimbursement for the loss occasioned the Claimants by their wrongfully having to pay tax in breach of the RTC.

[35] In sum, Guyana has advanced no acceptable argument why the tax paid by the Claimants should not be refunded. The Court therefore holds that the Claimants are entitled to the return of the tax paid and collected by Guyana in the amount claimed. The evidence suggests that both Rudisa Beverages and CIDI would have sustained *some* loss as a result of the unlawful imposition of the levy but it was not clear from the evidence as to what precise proportion of the loss was borne by each claimant. The Claimants have advanced a joint claim, however, and the Court can safely leave it to them to determine, if necessary, how to apportion the refund as between themselves. Since the tax was paid by CIDI the re-imbursement should naturally be paid to CIDI.

The Claim for Interest

[36] The Claimants are in principle entitled to interest on the monies paid by them and in their Originating Application they applied for Guyana to be ordered to pay "interest on the compensation ordered at a rate to be determined by this Court, and to be compounded as of the time that the Court deems appropriate in the interest of justice." While it is for the Court to determine the claim for interest, the Court can do so only if it is provided with cogent evidence to entitle it to arrive at that determination. Among other things, such a determination would have to take into account the circumstances of the defendant who is being unjustly enriched by the receipt of a sum of money which has saved it from having to borrow. In this case no submissions were made or evidence offered to flesh out this aspect of the case. Thus, the appropriate rate of interest; the manner and circumstances in which it should be compounded, if at all; the period over which interest should run; the distinct times when each payment of tax was made; these are all matters which should have been but were not established by evidence.[15] In those circumstances, an award of interest on the sums paid cannot be properly quantified. The Claimants are, however, entitled to 4% simple interest on the judgment debt by analogy with the standard position of Guyanese law.

Conclusion

[37] The Court finds that Guyana has breached Article 87(1) of the RTC by imposing an environmental tax on imported non-returnable beverage containers which qualify for Community treatment. CIDI is entitled to the return of environmental tax paid in the sum of US$6,047,244.47 together with such further tax paid from 25th October 2013 to the date of this judgment.

[38] Member States and others to whom a judgment of the Court applies have an obligation under Article 215 RTC to comply promptly with the judgment and orders made by this

[15] See *Littlewoods Retail Ltd and Others v HM's Commissioners for Revenue and Customs*, Case C-591/10 and *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue and Commissioners for HM's Revenue and Customs*, Case C 362/12

Court. In order to ensure the protection of the Community rights of CARICOM nationals, compliance with and implementation of the Court's orders are essential. Such compliance and implementation are also required by fundamental principles of Community law, in particular the principles of access to justice, effectiveness of Community law and the rule of law itself. Community rights under the RTC would be illusory if the orders of the Court are not executed. The Court therefore has a responsibility to monitor compliance with its orders. This responsibility is reflected in Rules 29.3(3) and 29.3(4) of the Court's Rules and also in the Court's practice so far as it has allowed parties to apply to the Court in respect of matters arising out of its judgment and orders.[16]

Declaration and Orders

[39] The Court declares that the collection of the environmental tax under section 7A of the Customs Act in relation to Community goods is incompatible with Article 87(1) of the RTC.

The Court also orders the State of Guyana:

1) To cease forthwith the collection of environmental tax on imported non-returnable beverage containers which qualify for Community treatment and to adopt such legislative or other measures necessary to ensure that the said tax is not collected on goods which qualify for Community treatment;
2) To pay to CIDI the sum of US$6,047,244.47 together with such further sums paid by the Claimants by way of environmental tax from 25th October 2013 to the date of this judgment;
3) To pay interest on the sums payable by this judgment at the rate of 4% per annum from the date of the judgment;
4) To pay the costs of these proceedings to be taxed if not agreed.

[16] *Ibid*, fn 13 at [45], which led to several ancillary procedures: [2009] CCJ 6 (OJ) and [2010] CCJ 1 (OJ), (2010) 76 WIR 312.

[40] The Court further orders that if CIDI does not notify the Court that Guyana has complied with the above orders of the Court by 30th October, 2014 the State of Guyana shall file with the Court on or before 15th November, 2014 a report on its compliance with those orders. Upon the filing of the said report the parties shall have liberty to apply in respect of any matter contained in the said report.

The Rt Hon Mr Justice Sir D Byron (President)

The Hon Mr Justice R Nelson

The Hon Mr Justice A Saunders

The Hon Mr Justice J Wit

The Hon Mr Justice D Hayton

APPENDIX

THE REVISED TREATY OF CHAGUARAMAS ESTABLISHING THE CARIBBEAN COMMUNITY INCLUDING THE CARICOM SINGLE MARKET AND ECONOMY

ARTICLE 65
Environmental Protection

1. The policies of the Community shall be implemented in a manner that ensures the prudent and rational management of the resources of the Member States. In particular, the Community shall promote measures to ensure:

(a) the preservation, protection and improvement of the quality of the environment;
(b) the protection of the life and health of humans, animals and plants; and
(c) the adoption of initiatives at the Community level to address regional environmental problems.

2. In formulating measures in relation to the environment, the Community shall take account of:

(a) available and accessible scientific and technical data;
(b) environmental conditions in the Member States;
(c) the potential costs and benefits of action or inaction;
(d) the economic and social development of the Community as a whole and the balanced development of the Member States;
(e) the precautionary principle and those principles relating to preventive action, rectification of environmental damage at source and the principle that the polluter pays; and
(f) the need to protect the Region from the harmful effects of hazardous materials transported, generated, disposed of or shipped through or within the Community.

3. In performing its functions under this Treaty, COTED shall ensure a balance between the requirements of industrial development and the protection and preservation of the environment.

4. In giving effect to this Article, the Community and the Member States shall, within their respective spheres of competence, co-operate with third States and competent environmental organisations.

ARTICLE 78
Objectives of the Community Trade Policy

1. The goal of the Community Trade Policy shall be the sustained growth of intra-Community and international trade and mutually beneficial exchange of goods and services among the Member States and between the Community and third States.

2. In fulfilment of the goal set out in paragraph 1 of this Article the Community shall pursue the following objectives:

(a) full integration of the national markets of all Member States of the Community into a single unified and open market area;
(b) the widening of the market area of the Community;
(c) the active promotion of export of internationally competitive goods and services originating within the Community;
(d) the securing of the most favourable terms of trade for Community goods and services exported to third States and groups of States.

3. In order to achieve the objectives of its Trade Policy, the Community shall:

(a) undertake:

(i) the establishment of common instruments, common services and the joint regulation, operation and efficient administration of the internal and external commerce of the CSME;

(ii) where possible, the employment of common negotiating strategies in the development of mutually beneficial trade agreements with third States and groups of States;

(iii) participation and joint representation as appropriate in international and regional organisations which negotiate, establish and apply disciplines governing international and regional trade;

(b) prohibit the imposition by the Member States of new restrictions on imports and exports of products of Community origin.

4. Member States shall eliminate existing restrictions on imports and exports of goods of Community origin, other than those authorised by this Treaty.

ARTICLE 79
General Provisions on Trade Liberalisation

1. The Member States shall establish and maintain a regime for the free movement of goods and services within the CSME.

2. Each Member State shall refrain from trade policies and practices, the object or effect of which is to distort competition, frustrate free movement of goods and services, or otherwise nullify or impair benefits to which other Member States are entitled under this Treaty.

3. The Member States shall not introduce in their territories any new restrictions on imports or exports of Community origin save as otherwise provided in this Treaty.

ARTICLE 87
Import Duties

1. Save as otherwise provided in this Treaty, Member States shall not impose import duties on goods of Community origin.

2. Nothing in paragraph 1 of this Article shall be construed to extend to the imposition

of non-discriminatory internal charges on any products or a substitute not produced in the importing Member State.

3. This Article does not apply to fees and similar charges commensurate with the cost of services rendered.

4. Nothing in paragraph 3 of this Article shall be construed to exclude from the application of paragraph 1 of this Article any tax or surtax of customs on any product or a substitute not produced in the importing State.

ARTICLE 90
Internal Taxes and Other Fiscal Charges

1. Save as otherwise provided in this Treaty, Member States shall not:

(a) apply directly or indirectly to imported goods of Community origin any fiscal charges in excess of those applied directly or indirectly to like domestic goods, or otherwise apply such charges so as to protect like domestic goods; or

(b) apply fiscal charges to imported goods of Community origin of a kind which they do not produce, or which they do not produce in substantial quantities, in such a way as to protect the domestic production of substitutes which enter into direct competition with them and which do not bear, directly or indirectly, in the country of importation, fiscal charges of equivalent incidence.

2. A Member State shall notify COTED of all fiscal charges applied by it where, although the rates of charge, or the conditions governing the imposition or collection of the charge, are not identical in relation to the imported goods and to the like domestic goods, the Member State applying the charge considers that the charge is, or has been made, consistently with sub-paragraph(a) of paragraph 1 of this Article. A Member State shall, at the request of any other Member State, supply information about the application of paragraph I of this Article.

3. For the purposes of this Article `fiscal charges' means internal taxes and other internal charges with equivalent effect on goods.