COMMENTS ON REVIEW OF COMMON EXTERNAL TARIFF (CET) OF THE CARIBBEAN COMMUNITY ON PRODUCTS WHICH ARE INTERNATIONALLY COMPETITIVE

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In Attachment VI (the document) to the Working Document for the 28th Meeting of the Council for Trade and Economic Development (COTED), three benchmarks are suggested for review of the Common External Tariff (CET) for products which are internationally competitive, namely a comparative price analysis, export levels and percentage of world trade. There is no indication of whether all benchmarks must be met and be consistent in their results for a determination of international competitiveness. The document assumes that any one method may be used and that on the basis of previous practice and the absence of data for a comparative price analysis and percentage of world trade analysis that export levels may be used instead.

The following comment proceeds on the recommendation in the document for use of export levels as a feasible benchmark with the caveats noted in said document. The first caveat is that an arbitrary figure would have to be used to represent the proportion of international exports for a product to be designated as internationally competitive. The second caveat noted is that the product may be exported under a preferential scheme and may seem competitive but is not competitive because of access to preferential markets.

Using the proportion of extra-regional exports as a percentage of regional production for international competitiveness, the data on cement establishes that between 2001 and 2007 extra-regional exports as a percentage of regional production ranged between 1.81% and 1.45%, the figure being higher in only two years, 2002 (3.06%), and 2003 (2.96%). These figures suggest that cement is not internationally competitive, using the export levels benchmark and comparing same with the threshold figures for products regarded as internationally competitive such as natural asphalt, methanol, urea, plywood, and iron and steel.

COMMENT ON THE BENCHMARK USED FOR INTERNATIONAL COMPETITVENESS

A price benchmark is also used. It indicates that Trinidad Cement Limited's (TCL) price of $100 per metric tonne is not internationally competitive when compared with the price of other countries. It is not clear whether these prices refer to the export price or the domestic price of cement as sold in these countries.

If the prices referred to are export prices it is important to note that a comparison of TCL's prices with that of other countries may not be sufficient to establish international competitiveness. For example, it may be that the export prices are distorted or are lower than their corresponding domestic prices at levels that suggest actionable dumping or subsidization. TCL's price could therefore be international competitive even if a comparison with the prices of other countries suggest that it is not due to a marked variation; as compared with the prices of cement from other countries.

If, on the other hand, the prices refer to domestic prices then TCL's price may not be internationally competitive on the assumption that its price to extra-regional markets would be higher than its intra-regional price, and that that price would in all likelihood be higher than the export prices of the majority of those countries listed in Table 6 of the document.

Additionally, a domestic price that is by and large higher than corresponding domestic prices of a product for other countries may suggest a lack of international competitiveness where the price difference is a reflection of differences in production costs.

LEGAL CRITERIA FOR MODIFICATION OF COMMON EXTERNAL TARIFF

The legal criteria for any variation to the CET applicable to a product are set out in Article 83 of the Revised Treaty of Chagauaramas (RTC). Article 83 of the RTC provides as follows:

1. Any alteration or suspension of the Common External Tariff on any item shall be decided by COTED.

2. Where:

(a) a product is not being produced in the Community;

(b) the quantity of the product being produced in the Community does not satisfy the demand of the Community; or

(c) the quality of the product being produced in the Community is below the Community standard or a standard the use of which is authorised by COTED, COTED may decide to authorise the reduction or suspension of the Common External Tariff in respect of imports of that product subject to such terms and conditions as it may decide, provided that in no case shall the product imported from third States be accorded more favourable treatment than similar products produced in the Member States.

3. The authority referred to in paragraph 2 to suspend the Common External Tariff may be exercised by the Secretary-General on behalf of COTED during any period between meetings of COTED. Any exercise of such authority by the Secretary-General shall be reported to the next meeting of COTED.

4. Each Member State shall, for the purpose of administering the Common External Tariff, appoint a competent authority which shall be notified to COTED.

5. COTED shall continuously review the Common External Tariff; in whole or in part, to assess its impact on production and trade, as well as to secure its uniform implementation throughout the Community, in particular, by reducing the need for discretionary application in the day to day administration of the Tariff.

International competitiveness is not listed as a factor to be taken into account by COTED in the 'alteration or suspension' of the CET for intra-regional products. Article 183(5) provides for COTED to review the CET, but this discretion to review does not contemplate a suspension or alteration of the CET under this provision, but rather to assess its impact on production and trade and to secure uniform implementation. Alternatively, the review mechanism in Article 183(5) of the RTC may provide the basis on which COTED can alter or suspend the CET on a product in accordance with Article 183(2) of the RTC. That is, a review under Article 183(5) to determine the CET's impact on trade regarding a particular product can provide information that COTED

may use in exercising its discretion to alter or suspend the CET in accordance with Article 183(2) of the RTC.

Removal of cement from the list of products eligible for CET treatment may be interpreted as an alteration of the CET in respect of that product or that the effect of the de-listing from Selected Products is an alteration of the CET in respect of that product. If this interpretation is correct Article 83 of the Revised Treaty would govern any removal of a product from the list of products eligible for CET treatment.

Since a discretion exercised by COTED is subject to judicial review on administrative law principles, it is important that the exercise of the discretion in respect of removal of a product from the list of products to benefit from CET treatment be consistent with the legal criteria established.

In this regard, it is noteworthy that decisions of COTED can be examined by the Caribbean Court of Justice (CCJ), although it is doubtless that this would apply to policy directives.[1] Article 187(c) of the RTC permits suits to be brought against an organ of the Community on the ground that it has acted *ultra vires*. This power to review decisions of COTED is arguably limited to situations where COTED has exercised a discretion that requires consideration of legal criteria. (See, *Trinidad Cement Company Limited v. The Caribbean Community* [2009] CCJ 4 (OJ), para. 41.[2] Moreover, Article 211 of the RTC gives the CCJ jurisdiction to decide disputes between Member States and the Community which includes community organs. If, therefore, a Caricom Member is not in agreement with a discretion exercised by COTED, resort may be had to the CCJ to resolve the issue.

[1] The policy domain within COTED's remit includes those itemized in Article 15 of the RTC such as to 'promote the development and oversee the operation of the CSME'; 'evaluate, promote and establish measures to enhance production, quality control and marketing'; 'establish and promote measures to accelerate structural diversification of industrial and agricultural production on a sustainable and regionally-integrated basis' etc.

[2] It is noteworthy that the CCJ did not make a distinction between a discretion to be exercised by COTED that involves purely policy questions as opposed to a discretion exercised by consideration of legal criteria in accordance with the Revised Treaty. The CCJ treated the discretion to alter or suspend the CET as a policy decision. At paragraph 41 the CCJ opines that '*The ability to authorize suspension of the CET is inherently a power to cater to the kind of flexibility that is required in the carrying out of policy*.' I maintain however a distinction between the exercises of discretion that involves the evaluation of legal criteria and one that does not, regardless of whether the exercise of either discretion may be viewed as a policy decision.

Apart from Article 83 of the RTC there is no other provision that expressly governs the operation of the CET. It is arguable that removal of a product from the list of products to benefit from the CET is different from suspension or alteration of the CET in respect of a product because the latter scenario presumes that the product remains on the list irrespective of whether the application of the provision may result in a zero CET duty.

Alternatively, the word 'alteration' in Article 183 (2) of the RTC may be read as referring to a reduction of the CET and not necessarily a removal of products from a list to benefit from the CET. In *Trinidad Cement Limited v. The Caribbean Community* [2009] CCJ 2 (OJ), for example, the CCJ re-read the word 'alteration' to mean 'reduction' noting (at paragraph 5 of the judgment) that '*The power to authorize the **reduction** or suspension of the CET is vested in COTED by Article 83(2) and between meetings of COTED may be exercised by the Secretary-General on behalf of COTED*'.[3]

If this interpretation is tenable, the document referred to as the Report of the Working Group (The Report) on the Common External Tariff (October 17, 1992) can provide a basis on which to de-list products from the Selected List of Products which benefit from the CET. The Protocol on the Revision of the Treaty of Chaguaramas continues the rights and obligations of the Parties to original Treaty of Chaguaramas[4] and, as held by the CCJ in *Trinidad Cement Limited v. The Caribbean Community* [2009] CCJ 4 (OJ), at paragraph 44, documents pre-dating the RTC but which prescribe guidelines for the operation of the CET under the original treaty are to be regarded as '*being still in force so far as they are consistent with the relevant provisions of the RTC.'*

The criterion of 'a high level international competitiveness' for de-listing a product to benefit from the CET may not be viewed as conflicting with the RTC if Article 83 of the RTC is regarded as being confined to alteration or suspension, and the word 'alteration' is treated as

[3] Italics and bold emphasis are mine. See, *Trinidad Cement Limited v. The Caribbean Community* [2009] CCJ 2 (OJ), at paragraph 5. See also, *Trinidad Cement Limited v. The Caribbean Community* [2009] CCJ 4 (OJ) at paragraph 54, 'A *distinction is to be made between a suspension of a rate and the alteration (i.e. increase or decrease) of a rate*.'

[4] See Article 1 of the Protocol on the Revision of the Treaty of Chaguaramas (2002).

distinguishable from the de-listing of a product whether or not the result could be the same, that is, the application of a zero CET duty on a similar product from third states.

Additionally, the Report and the practice of Caricom Members in regard to the guidelines established therein may also be viewed as an agreement or subsequent practice for the interpretation of the RTC in regard to the general operation of the CET in accordance with Article 31(3) of the Vienna Convention on the Law of Treaties.

On this view a good can be removed from the List of Selected Goods to benefit from the CET even if it is produced in the region in sufficient quantities or satisfies the required threshold quantities that would not justify either an alteration or suspension of the CET.

CONCLUSION

There is no provision in the RTC expressly governing the *removal* of a product from the list of products that can benefit from the CET. Article 83 of the RTC which refers to the operation of the common external tariff is confined to 'alteration' or 'suspension' of the CET.

The result of the removal of a product from the list of products benefiting from the CET may be no different from an alteration of the CET to a zero rate, but it is doubtful that a similarity in the result requires an Article 83 procedure for a removal since the CCJ has read 'alteration' to mean an 'increase' or 'decrease' in the applicable rate of duty.

A high level of international competitiveness may be used as a benchmark for delisting a product to the extent that this represents the agreement of Caricom Members for de-listing a product that can benefit from the CET or represents practice for the interpretation of the RTC for the general operation of the common external tariff.

The benchmark used for cement, that is, the proportion of extra-regional exports as a percentage of regional production, does not establish that cement is internationally competitive, especially when this figure is contrasted with the threshold figures for products regarded as internationally competitive such as natural asphalt, methanol, urea, plywood, and iron and steel.

A comparative price analysis may also suggest the same result though caveats are to be noted, including the possibility that the prices for which comparisons are made can be dumped or subsidized prices.