[2009] CCJ 1 (OJ)

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No. AR 1 of 2008

Between

Trinidad Cement Limited
TCL Guyana Incorporated

Applicants

And

The State of the Co-operative Republic of Guyana

Respondents

THE COURT,

composed of M de la Bastide, President and R Nelson, D Pollard, A Saunders, D Bernard, J Wit and D Hayton, Judges

having regard to the application for special leave under Article 222 of the Revised Treaty of Chaguaramas, filed at the Court on 3rd April, 2008 with annexures, written submissions of the parties and to the public hearings held on 30th June, 2008 and 10th November, 2008

after considering the oral observations submitted on behalf of:

- the Applicants, by Dr C Denbow SC, Attorney-at-law
- the Respondent, by Mr D Singh SC, Attorney-General

and taking into account the written submissions made on behalf of the Community and of the respective States of Barbados, Jamaica, St. Vincent and the Grenadines and Trinidad and Tobago together with the oral submissions made on behalf of:

- the Community, by Ms C Thompson-Barrow, General Counsel
- the State of Jamaica, by Mr D Leys QC, Solicitor General
- the State of Trinidad and Tobago, by Mr E Prescott SC

on the **15th day of January, 2009** delivers the following

JUDGMENT

[1] On 30th June, 2008 the Court heard the parties to this matter ("the earlier proceedings") and made an Interim Order on 22nd July, 2008. The Court continued the earlier proceedings with a public sitting held on 10th November, 2008.

[2] The Interim Order fully described the parties, the nature of the claims made by the Applicants and the respective contentions of the parties. To recap briefly, the Applicants, Trinidad Cement Limited (referred to in this Judgment as "TCL") and TCL Guyana Incorporated (referred to as "TGI"), are seeking special leave to appear as parties in an action they propose to institute before the Court. The Applicants are claiming compensation from and/or injunctive relief against the State of the Co-operative Republic of Guyana (referred to in this judgment as "Guyana"). They allege that, in breach of Article 82 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy ("the RTC"), Guyana suspended the Common External Tariff ("the CET") on cement imported into that State from third States. The Applicants allege that as a consequence of this suspension they have been prejudiced and have suffered damage.

[3] In the course of the earlier proceedings, Guyana, through its Attorney General, admitted the suspension. The Attorney also admitted that the suspension had not been authorised by the competent authority - the Council for Trade and Economic Development ("COTED"). He contended, however, that the Applicants were not entitled to bring the proceedings because they were not States Parties to the RTC and they had not satisfied the conditions laid down by the RTC for the institution of proceedings by a private entity.

[4] The question before the Court is whether the Applicants have satisfactorily complied with the requisite conditions for private entities to establish *locus*

standi. Those conditions are to be found in Article 222 of the RTC, reproduced below in full at [21].

[5] In its Interim Order, the Court identified two critical issues that arose out of the question to be determined. The first was whether for the purposes of compliance with Article 222 it is sufficient for a company to be incorporated or registered under the domestic legislation of a Contracting Party. The second was whether the Article accords to one who is held to be a person, "natural or juridical, of a Contracting Party" the right to sue that Contracting Party.

[6] The Court considered that these two issues were of great importance for the determination of the *locus standi* of persons generally. More importantly, their resolution in these proceedings would bind all the Contracting Parties[1]. Accordingly, the Court decided that it was reasonable, in this particular case, to reserve its decision on the application for special leave in order to afford the Community and the Contracting Parties not party to the proceedings the opportunity, if they so wished, to make written submissions on the two issues. By the Interim Order, the Registrar of the Court was therefore directed to serve on those Contracting Parties and on the Community appropriate Notices accompanied by relevant documentation inviting their participation in the making of such submissions.

[7] The Community along with the States of Barbados, Jamaica, St. Vincent and the Grenadines and Trinidad and Tobago responded positively to the Court's invitation. In addition, on 10th November, 2008, at the public sitting of the Court held for that purpose, the Court was pleased to receive oral submissions from the Community's General Counsel on behalf of the Community; the Solicitor General of Jamaica on behalf of that State and Mr E Prescott on behalf of the State of Trinidad and Tobago. At the conclusion of that public sitting the Applicants and Guyana were granted a period of one week to

[1] *See:* Article 221 of the treaty

enable them to make any further written submissions they desired to make. They did make such submissions.

[8] The Court records its sincere appreciation to the parties, the Community and the States that participated in the proceedings and welcomes the submissions received. The Court has found them all to be extremely useful. In this judgment the Court gives its opinion on the two issues addressed in the Interim Order as well as its judgment on the question posed by the earlier proceedings.

[9] At stake in these proceedings is the proper interpretation of provisions of the RTC that are critical to the matter of access to the Court by private entities. Before embarking upon the interpretative exercise, the Court recognises that the provisions of a treaty invariably represent the fruit of many months, sometimes years, of discussion and negotiation. Invariably, a treaty's provisions reflect a compromise of conflicting national interests and divergent perspectives. To this end, despite the best efforts of skilled drafters, the language of a treaty's text is often imprecise and sometimes deliberately ambiguous in order to accommodate politically acceptable interpretations in different jurisdictions. This is particularly the case with multilateral treaties.

[10] In this context, international law has developed principles, canons of interpretation, to guide international courts and tribunals in the interpretation of treaties. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) prescribes the general rule of treaty interpretation. Article 31(1) mandates that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32 of the VCLT addresses subsidiary rules of interpretation[2]. Accordingly, determination of the

[2] Article 32 states:"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the

application for special leave presented by the Applicants and a resolution of the two issues mentioned above at [5] require the Court to consider the following relevant issues, namely: the context, object and purpose of the RTC; the status and role of private entities accorded by the Treaty; the intention of the States Parties to the RTC; the ordinary meaning to be attributed to the language of the text of the Treaty, and the subsequent conduct of the States Parties establishing their understanding of the instrument. We shall also comment on the relevance and significance of rules that have been made pursuant to the RTC. The Court proposes to consider each of these matters though not necessarily under their respective discrete headings.

The context, object and purpose of the RTC

[11] In interpreting the RTC the Court does not intend to place undue reliance on a literal approach. Reliance on the text of a treaty to the detriment of its object and purpose is contrary to the rule expressed in Article 31 of the VCLT and does not accord with the jurisprudence of the International Court of Justice[3]. As Aust states[4]:

> "Placing undue emphasis on the text, without regard to what the parties intended; or on what the parties are believed to have intended, regardless of the text; or on the perceived object and purpose in order to make the treaty more 'effective', irrespective of the intentions of the parties, is unlikely to produce a satisfactory result."

[12] The RTC establishes the Caribbean Community including the CARICOM Single Market and Economy ("CSME") and its Preamble is an important part of its context for the purposes of interpretation. Through the Preamble one is

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meaning when the interpretation according to article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable".

[3] *See:* Aust, Modern Treaty Law and Practice, p. 185, 2006, Cambridge University Press
[4] Aust, op. cit. p. 185

made aware of the goals of the States Parties and of statements of principle by which they propose to be guided. Among the many preambular paragraphs of the RTC are the following:

> "**Recalling** the Declaration of Grand Anse and other decisions of the Conference of Heads of Government, in particular the commitment to deepening regional economic integration through the establishment of the CARICOM Single Market and Economy (CSME) in order to achieve sustained economic development based on international competitiveness, co-ordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States; …
>
> **Desirous** of restructuring the Organs and Institutions of the Caribbean Community and Common Market and redefining their functional relationships so as to enhance the participation of their peoples, and in particular the social partners, in the integration movement;…
>
> **Resolved** to establish conditions which would facilitate access by their nationals to the collective resources of the Region on a non-discriminatory basis;…
>
> **Recognising also** the potential of micro, small, and medium enterprise development to contribute to the expansion and viability of national economies of the Community and the importance of large enterprises for achieving economies of scale in the production process;…
>
> **Considering** that an efficient, transparent, and authoritative system of disputes settlement in the Community will enhance the economic, social and other forms of activity in the CSME leading to confidence in the investment climate and further economic growth and development in the CSME;…
>
> **Affirming also** that the original jurisdiction of the Caribbean Court of Justice is essential for the successful operation of the CSME;…"

[13] From these and other paragraphs of the preamble, one deduces that, in an age of liberalisation and globalisation, the Contracting Parties are intent on transforming the CARICOM sub-region into a viable collectivity of States for the sustainable economic and social development of their peoples; that the CSME is regarded as an appropriate framework or vehicle for achieving this end and that private entities, "and in particular the social partners", are to play

a major role in fulfilling the object and goals of the RTC. The CSME is intended to be private sector driven. The question arises as to the manner in which the RTC proposes to accommodate private entities.

Private entities in International Law

[14] The classic or traditional rule in customary international law was that States were regarded as subjects while individuals were regarded solely as objects of international law. This flowed from the concept that international law was seen primarily as a law between States. The individual had no place, no rights in the international legal order[5]. In its Commentaries on Article 1 of the Draft Articles on Diplomatic Protection, the International Law Commission recalled that:

> "Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself"[6].

[15] The Permanent Court of International Justice authoritatively affirmed the status of the individual as an object of international law in the *Mavrommatis Palestine Concessions* case[7] when, *inter alia*, it stated that:

> "… by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law".

[16] Notwithstanding this conception of the role and place of the individual in international law there was nothing to preclude States, as an attribute of sovereignty, from according in a Convention a right to their nationals to bring an action against any of the States Parties to the Convention including the

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[5] *See:* International Law Commission's Commentaries on the Draft Articles on Diplomatic Protection, 2006, at Article 1 (3)
[6] International Law Commission's Commentaries, op. cit.
[7] *Mavrommatis Palestine Concessions (Greece v. U.K.) P.C.I.J. Reports, 1924, Series A, No. 2, p.12*

State of nationality of the private entity[8]. Several mixed arbitral tribunals established after the World Wars accorded direct access to nationals to seek redress against their own nation states. In modern international relations, States remain the primary but are not the exclusive subjects of international law. States can and occasionally do confer directly upon individuals, whether their own citizens or aliens, international rights which the latter can enforce in their own name before international tribunals without the intervention of municipal legislation[9]. This development is particularly noticeable in the fields of human rights and economic integration agreements[10].

[17] In commenting on the history of the status of private entities under international law, the International Law Commission records[11] that:

> "Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign Governments. This has been recognized by the International Court of Justice in the *La Grand*[12] and *Avena*[13] cases."

[18] Given the important role envisaged for private economic entities in achieving the objectives of the CSME, the Contracting Parties clearly intended that such entities should be important actors in the regime created by the RTC; that they should have conferred upon them and be entitled to enjoy rights capable of being enforced directly on the international plane.

[19] This conclusion is borne out by Article 211 that confers jurisdiction on the Court in contentious proceedings. The Article states:

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[8] See: *Steiner and Gross v Polish State*, AD, 4 (1921-8) No. 188
[9] Oppenheim's International Law, Vol. 1 Part 2, p.847-848, 9th Edn, Longman, 1996,
[10] See for example: Art. 25 of the European Convention on Human Rights, Art. 230 of the Consolidated Version of the Treaty of European Union, Art. 19 of the Treaty creating the Court of Justice of the Cartagena Agreement and Art. 26 of the COMESA Treaty.
[11] *See:* Draft Articles on Diplomatic Protection with commentaries, 2006, Article 1 (3):
[12] *La Grand* case *(Germany v. United States of America) I.C.J. Reports 2001, p.466 at paras 76-77*
[13] *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) I.C.J. Reports*, 2004, p.12 at para. 40

"1. Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:

(a) disputes between Member States parties to the Agreement;

(b) disputes between the Member States parties to the Agreement and the Community;

(c) referrals from national courts of the Member States parties to the Agreement;

(d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty."

[20] It is to be noted that in Article 211, the right to approach the Court directly is vested in the Community, in Member States *and* in "persons in accordance with Article 222". Thus, a private entity's access to the Court is not expressly linked to a State's right to espouse a claim before the Court. Article 211 gives to "persons in accordance with Article 222", in their own right, qualified access to the Court. One must now turn to Article 222 to see how this right may be exercised.

Persons, natural or juridical, of a Contracting Party

[21] Article 222 is headed "***Locus Standi of Private Entities***". The Article states:

"Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:

(a) the Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and

(b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and

(c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:

(i) omitted or declined to espouse the claim, or

(ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and

(d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim."

[22] The first of the two issues identified by the Court in the Interim Judgment relates to the expression "persons, natural or juridical of a Contracting Party". The initial condition the Applicants must meet is to situate themselves within the meaning of this phrase. If they are unable so to do, then they cannot obtain special leave.

[23] The Attorney General of Guyana submitted in the earlier proceedings that in order to take advantage of Article 222 each applicant was obliged to satisfy the Court that it fell within the definition of "national" contained in Article 32 of the RTC. Article 32 lists certain conditions that must be met for a person to qualify as a "national" of a Member State. The Attorney submitted that the Applicants had failed to establish that they had met the conditions.

[24] In advancing this argument the Attorney General placed reliance on Article XXIV of the Agreement Establishing the Caribbean Court of Justice ("the Agreement"). Article 222 of the RTC replicates Article XXIV save that the opening words of Article XXIV are: "*Nationals* of a Contracting Party…" instead of "*Persons*, natural or juridical of a Contracting Party…" The Attorney next pointed to Article 1 of the RTC, which defines the term "national" to mean "a national within the meaning of paragraph 5(a) of Article 32". He concluded that when the RTC speaks of "persons, natural or juridical of a Contracting Party" the Article 32 definition of the expression "national" is to be inferred.

[25] These submissions of the Attorney-General are, in the Court's opinion, misconceived. In the first place the Court is called upon to interpret not Article XXIV of the Agreement but Article 222 of the RTC. In this context,

Article XXIV is for present purposes not entirely relevant. But even if it were, there is nothing in the Agreement or in the RTC to suggest that the word "nationals" in Article XXIV bears the same meaning as it does in Article 32 of the RTC. Indeed, there is a sound basis for differentiating between the class of private entities which may take advantage of the rights to be enjoyed by "nationals" under Article 32 on the one hand and those persons to whom is granted a qualified right of accessing the Court under Article 222.

[26] Article 32 is contained in Chapter Three of the RTC. The definition of "national" in Article 32 is expressly reserved "for the purposes of this Chapter"[14]. Chapter Three peculiarly concerns itself with issues critical for the success of an integration regime, namely, the right of establishment, the movement of labour, the right to move capital and the right to provide services. These are fundamental core rights given by the RTC and must be seen in the context of the resolve of the Contracting Parties "to establish conditions which would facilitate access by their nationals to the collective resources of the Region on a non-discriminatory basis"[15]. These core rights are not to be available to non-Community nationals merely doing business in the Community or to companies which, though incorporated in a Contracting Party, are not substantially owned or effectively controlled by Community nationals. These rights are available only to Community nationals in the restricted sense of that term as defined in Article 32(5) and are intended to ensure that strategic economic advantages remain with persons belonging to or having a close connection with the Community. By contrast, the provisions of Article 222 are intended to be available to persons of a Contracting Party, whether Community nationals, within the meaning of Article 32(5), or otherwise, who can establish injury or prejudice in the enjoyment of a right or benefit conferred on a Contracting Party which enured to their benefit directly. If the expression "persons" in Article 222 were synonymous with the expression "nationals" in the restricted sense in which the latter term is

[14] *See:* Article 32(5).
[15] See the Preamble to the treaty and [12] above

defined in Article 32, then there would be no rational basis specifically in Article 32 to confine the expression "nationals" to Chapter Three.

[27] There is yet another reason why it would be wrong to conflate the terms "nationals", in Article XXIV of the Agreement, with "persons" in Article 222 of the RTC. The Agreement and the RTC are both international instruments governed by international law. They cover in part the same subject matter and have been concluded by the same States Parties. The RTC is the later of the two instruments. In a case of this nature the earlier treaty applies only to the extent that its terms are compatible with those of the later treaty[16]. In interpreting Article 222 of the RTC incompatible provisions of Article XXIV are superseded by relevant provisions of the Treaty to the extent of such incompatibility.

[28] In the premises, the Court rejects the view that the expression "persons, natural or juridical, of a Contracting Party" as employed in Article 222 means nationals of a Contracting Party as defined in Article 32(5)(a) of the RTC. The Court holds that for a company to fall within the meaning of the phrase "persons, natural or juridical, of a Contracting Party", it is sufficient for such an entity to be incorporated or registered in a Contracting Party.

[29] TCL has established to the satisfaction of the Court that it is a limited liability company incorporated under the Companies Ordinance Chapter 31:01 of the laws of Trinidad and Tobago and continued under the Companies Act 1995. It has its registered office situated at Southern Main Road, Claxton Bay in the State of Trinidad and Tobago. TCL is also registered as an external company under the Companies Act No. 29 of 1991 of the Laws of Guyana with its registered office in that State situated at Lot 2-9 Lombard Street, GNIC Compound, Georgetown. TGI is a limited liability company incorporated under the Companies Act No. 29 of 1991 of the Laws of Guyana. Its

[16] *See:* Article 30(3) of the Vienna Convention

registered office is situated at the same location in Guyana as TCL's Guyana office. The Court therefore holds that the Applicants have established that each of them falls within the expression in Article 222 "persons, natural or juridical, of a Contracting Party".

[30] Before leaving this aspect of the judgment the Court finds it interesting to observe that the Guyana legislature, when it enacted the Agreement as the Caribbean Court of Justice Act, interpreted the expression "nationals" in relation to a company, as an entity incorporated or registered under its Companies Act 1991[17].

Conferment of a right or benefit and establishing prejudice

[31] Article 222 addresses *locus standi* of private entities. The Article does not purport to grant a substantive right of redress. Its purpose is to define the circumstances in which private entities are entitled, with the leave of the Court, to appear as parties in proceedings instituted by them before the Court. In relation to the Applicants, Article 222(a) requires the Court to be satisfied that the Treaty intended that a right or benefit conferred on a Contracting Party enures directly to their benefit.

[32] Rights and benefits under the RTC are not always expressly conferred although some of them are, for example the rights referred to in Articles 32 and 46. Many of the rights, however, are to be derived or inferred from correlative obligations imposed upon the Contracting Parties. Unless specifically otherwise indicated, the obligations set out in the RTC are imposed on Member States (or a class of Member States) collectively. Where an obligation is thus imposed, it is capable of yielding a correlative right that enures directly to the benefit of private entities throughout the entire Community.

[17] *See*: section 5(2) of the Guyana Caribbean Court of Justice Act, No. 16 of 2004.

[33] In order to institute a claim before the Court, applicants - or "persons" as Article 222 refers to them - must satisfy two conditions, namely, a) that the Treaty intended "that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly"[18] and that b) the "persons have been prejudiced in respect of the enjoyment of the right or benefit"[19]. The Treaty is silent as to the standard of proof that an applicant must attain at this stage of the proceedings where the applicant merely seeks special leave to appear as a party in order to commence a claim. The Court holds that, at this stage, it is sufficient for the applicant merely to make out an arguable case that each of these two conditions can or will be satisfied since they are substantive requirements an applicant must in any event fully satisfy in order ultimately to obtain relief. To require the applicant to meet a threshold of proof greater than "an arguable case" could prolong the special leave procedure unnecessarily and prejudice the submissions that must be made at the substantive stage of the proceedings if the application was successful and an Originating Application is ultimately filed.

[34] Article 82 of the RTC imposes an obligation on the Member States to "establish and maintain a common external tariff in respect of all goods which do not qualify for Community treatment in accordance with plans and schedules set out in relevant determinations of COTED". This obligation on Member States is of potential benefit to all legal or natural persons carrying on business in the Community having to do with any such goods. Equally, the failure by any particular Member State to fulfil this obligation is of potential prejudice to all such persons. It is common ground that at all material times cement was one such commodity and that Guyana had not obtained from COTED a waiver of the relevant obligation.

[18] *See*: Article 222(a) of the treaty.
[19] *See*: Article 222(b) of the treaty

[35] The Applicants have alleged, and it has not been contradicted, that they are engaged in the production, packaging, sale and distribution of cement throughout the Community and in particular in Guyana. They have also alleged that Guyana's unilateral suspension of the CET on cement for the period claimed by them (i.e. from January, 2007 and continuing) has caused and continues to cause them loss. They have further alleged that such loss is directly attributable to that suspension. Taking into account the response made by Guyana to these allegations, but without making any determination as to their conclusiveness, the Court holds that the Applicants have advanced an arguable case that they can satisfy the conditions laid down in Article 222(a) and (b).

Is TGI entitled to bring proceedings against Guyana?

[36] The question as to whether a private entity of a Contracting Party is entitled to bring proceedings against that Contracting Party arises from the wording of Article 222(c) of the RTC. That provision prescribes that, in addition to the private entity satisfying the conditions laid down in Article 222(a) and (b), it must further be established that "the Contracting Party entitled to espouse the claim in proceedings before the Court has (i) omitted or declined to espouse the claim, or (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled…"

[37] The thrust of Guyana's contentions on Article 222(c) is that the Contracting Party of a private entity must *always* have the option of itself bringing any proceedings that a private entity desires to bring; that since it is impossible for the Contracting Party to have that option and simultaneously be also the defendant to those very proceedings, then, as a matter of compelling inference, the entire Article must be interpreted in a way to yield the result

that, as a matter of policy, the RTC intends that a private entity cannot bring proceedings against its own State.

[38] The Court has previously indicated that it is not unusual for treaties, and multilateral treaties in particular, to contain language that is unclear and ambiguous. The Court has also alluded to the general rule of treaty interpretation to be found in Article 31 of the VCLT. A literal interpretation of Article 222(c) is indeed capable of producing the restrictive effect contended for by Guyana. But interpretation of the Article cannot cease with a literal interpretation of that provision. The Court must examine the context in which the provision appears in light of the object and purpose of the RTC and interpret the Article in a manner that renders the RTC effective. In effect the Court must adopt a teleological approach.

[39] No other provision of the RTC lends support to the restrictive interpretation contended for by Guyana. Throughout the Treaty, apart from the provisions of Article 222(c), private entities prejudiced in the enjoyment of a right that has enured to their benefit are able either to apply to this Court for special leave to commence, or to have brought, against the offending party, proceedings to vindicate the right of theirs that has been prejudiced. The interpretation of Article 222 supported by the Attorney General would place an unduly restrictive limitation on the category of persons entitled to complain about the conduct of a Contracting Party or of the Community.

[40] The Court concludes that it was not the intention of the Member States to prohibit a private entity from bringing proceedings against its own State. The Court observes three important reasons justifying this conclusion. Firstly, any such prohibition would frustrate the achievement of the goals of the RTC. It would impact negatively not only on nationals within the meaning of Article 32(5) but also on companies owned by non-nationals (including nationals of other States of the Community) who chose to incorporate in an allegedly

delinquent State. The latter could be encouraged to violate the RTC with impunity in circumstances where such persons were the only ones who suffered prejudice. Conversely, such persons would have imposed upon them a serious fetter on the vindication of rights enuring to them pursuant to Article 222(a).

[41] Secondly, Article XVIII(1) of the Agreement states:

> "Should a Member State, the Community or a person consider that it has a substantial interest of a legal nature which may be affected by a decision of the Court in the exercise of its original jurisdiction, it may apply to the Court to intervene and it shall be for the Court to decide on the application."

Nothing in the Agreement precludes a private entity that "has a substantial interest of a legal nature which may be affected by a decision of the Court" from applying to intervene in a matter in which its own State is the defendant. Subject to the decision of this Court, such a private entity is clearly entitled to appear on the opposite side of its State of nationality when intervening in proceedings before the Court.

[42] Thirdly, Article 7 of the RTC states that

> "Within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality only shall be prohibited."

If Guyana's contentions on this issue were to prevail then private entities could suffer a severe disadvantage "on grounds of nationality only". Equal access to justice, a fundamental principle of law subscribed to by all the Contracting Parties, would be compromised. Taking this case as an example, while, in relation to Guyana, a non-national private entity such as TCL would be free to seek to vindicate its rights, a person of Guyana such as TGI, for no reason other than being a person of Guyana, would be faced with an insuperable procedural obstacle. Given the emphasis the RTC lays on the role and status of private entities and on equality of treatment among Community

nationals, the Court rejects the view that Article 222 should be interpreted to produce the restrictive result contended for by Guyana.

[43] When one considers Article 222 in light of its context, the intention of the Contracting Parties and the object and purpose of the RTC, it is clear that the provisions of Article 222(c) are meant to cater to and satisfactorily resolve a particular dilemma. If, as the Court has previously held, distinct and separate rights of action against a State in violation of the RTC are given to Member States and to private entities, then a means had to be found to avoid a duplication of suits. Article 222(c) is the mechanism used. It is a procedural device to avoid a State allegedly in violation being twice vexed, once by an injured private entity and again by the Contracting Party of that private entity. Article 222(c) cannot and does not apply where the State against which proceedings are to be brought is the Contracting Party of the private entity seeking to institute such proceedings. In such a case, the private entity is not required to comply with the provisions of Article 222(c).

[44] The Court therefore holds that TGI is capable of appearing as a party against Guyana. The Court notes that TCL has provided un-contradicted evidence of its compliance with Article 222(c). Accordingly, the Court further holds that TCL has complied with the provisions of Article 222(c).

The interest of justice

[45] In light of all the material placed before the Court, the Court holds that it is in the interest of justice that the Applicants be permitted to espouse the proposed claim. This by no means should be taken as an indication that the Court has made any determination on the merits of that claim.

The relevance and significance of the Rules

[46] Before concluding this Judgment, it is necessary to make some reference to the Court's Original Jurisdiction Rules. By the combined effect of Article XXI of the Agreement and Article 220 of the RTC, Rules of Court may be made to govern the exercise of the original jurisdiction of the Court. Such Rules have accordingly been made and published. On various occasions throughout these and the earlier proceedings the Rules were cited in support of one or another proposition.

[47] It must be emphasised that the Rules were made without the advantage of hearing argument on areas of the RTC that could well turn out to be contentious. The Rules are not necessarily an authoritative aid to an interpretation or understanding of either the RTC or the Agreement. If ultimately, provisions in the Rules in their current form are not entirely in concert with the Court's interpretation of either of these two instruments then the Rules shall be amended accordingly.

ORDER

[48] For the reasons expressed the Court

i) Grants the application for special leave of each of the Applicants, and

ii) Reserves the issue of costs to a later stage of the proceedings.

/s/ M.A de la Bastide
The Rt Hon Mr Justice M. A. de la Bastide (President)

/s/ R.F. Nelson
The Hon Mr Justice Rolston Nelson

/s/ Duke Pollard
The Hon Mr Justice Duke Pollard

/s/ A. Saunders
The Hon Mr Justice Adrian Saunders

/s/ D. P. Bernard
The Hon Mme Justice Desiree Bernard

/s/ J. Wit
The Hon Mr Justice Jacob Wit

/s/ D. Hayton
The Hon Mr Justice David Hayton