Cases 82 and 83/85 R

Eurasian Corporation Ltd
v
Commission of the European Communities

Summary

1. *Application for the adoption of interim measures — Amendment of the application — Whether permissible — Conditions*
   (Rules of Procedure, Art. 83 (2))

2. *International agreements — Cooperation Agreement between the European Economic Community and the Kingdom of Thailand on manioc production — Import arrangements — Conditions for the issue of export certificates by the Thai authorities*
   (Cooperation Agreement between the European Economic Community and the Kingdom of Thailand on manioc production; Commission Regulation (EEC) No 3675/83, Art. 4 (2), as amended by Regulation (EEC) No 3283/84)

3. *Own resources of the European Communities — Repayment of import duties — Article 13 of Regulation (EEC) No 1430/79 — When applicable*
   (Council Regulation (EEC) No 1430/79, Art. 13, as amended by Regulation (EEC) No 1672/82)

ORDER OF THE PRESIDENT OF THE COURT
22 April 1985 *

In Cases 82 and 83/85 R,

Eurasian Corporation Ltd, a company incorporated under the law of the Kingdom of Thailand, having its registered office in Bangkok, represented by H.J. Bronkhorst, of the Hague Bar, with an address for service in Luxembourg at the Chambers of J. Loesch of the Luxembourg Bar,

applicant,

* Language of the Case: Dutch.

V

Commission of the European Communities, represented by its Legal Adviser, R.C. Fischer, with an address for service in Luxembourg at the office of G. Kremlis, Jean Monnet Building, Kirchberg,

defendant,

APPLICATIONS for the adoption of interim measures concerning manioc originating in Thailand which the applicant wishes to import into the Community under the conditions laid down by Commission Regulation (EEC) No 3675/83 of 23 December 1983 (Official Journal 1983, L 366, p. 41),

THE PRESIDENT OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

1 By applications lodged at the Court Registry on 2 April 1985, Eurasian Corporation Ltd brought two actions under Article 173 of the EEC Treaty, numbered 82/85 and 83/85, requesting the Court to declare void the decisions of 22 and 25 March 1985 whereby the Commission, according to the applicant, denied it permission to import certain quantities of manioc originating in Thailand into the Community under special import arrangements.

2 In two separate applications, which were also lodged at the Court Registry on 2 April 1985, Eurasian Corporation Ltd requested the Court under Article 185 of the EEC Treaty to order the Commission, as an interim measure, to take the necessary procedural steps for the purposes of importation under the aforesaid arrangements.

3 Having regard to the provisions of Article 85 of the Rules of Procedure, Article 11 was applied in view of the absence of the President of the Court.

4 The applications lodged in Cases 82/85 R and 83/85 R have the same purpose and are so closely connected that they may be dealt with in one and the same order.

5 Under a Cooperation Agreement between the European Economic Community and the Kingdom of Thailand on manioc production (Official Journal 1982, L 219, p. 53), concluded for the period from 1 January 1982 to 31 December 1986 inclusive, Thailand undertook to restrict its exports of manioc to the Community to certain specified quantities (4.5 million tonnes in 1985) and not to issue export certificates in respect of any quantities in excess of the limits specified. For its part the Community undertook to adopt the necessary provisions to ensure that import licences were issued upon submission of a valid export certificate, and it expressed the intention of limiting the levy applicable to imports of manioc covered by the Agreement to a maximum amount of 6% *ad valorem.*

6 In performance of that Cooperation Agreement, the Commission adopted Regulation (EEC) No 3675/83 of 23 December 1983 laying down detailed rules for implementing the import arrangements applicable to manioc products originating in Thailand (Official Journal 1983, L 366, p. 41). Article 4 of that regulation provides that the application for an import licence must be submitted to the competent authorities in the Member States accompanied by the original of the export certificate and that only the quantity indicated under 'shipped weight' on the export certificate is to be taken into consideration for the issue of the import licence.

7 Commission Regulation (EEC) No 3283/84 of 23 November 1984 (Official Journal 1984, L 307, p. 20) supplemented Article 4 by adding to it a second paragraph which, as far as is relevant to this case, is worded as follows:

'2. Where the quantities actually unloaded are found to exceed the total quantities stated in the export certificates allocated for the ship in question, the competent authorities designated by the Member States shall, at the request of the importer, notify the Commission by telex, in each case and without delay, of the number or numbers of the export certificates, the number or numbers of the import licences and the excess quantity recorded when unloading took place.

The Commission shall contact the Thai authorities so that new export certificates can be drawn up with a view to allowing the excess quantities to be released into free circulation as soon as possible on the basis of new import licences. In the intervening period, the excess quantities may not be put into

free circulation under the conditions laid down by the EEC/Thailand auto-limitation agreement.'

8 The facts in Cases 82/85 R and 83/85 R are concerned with two different quantities of tapioca, a product derived from manioc, both of which the applicant wishes to import into the Community under the aforesaid legislation relating to excess quantities which has been in force since 1 January 1985 by virtue of Article 2 of Regulation No 3283/84.

9 In Case 82/85 R, the applicant had a consignment of tapioca shipped to Amsterdam on the *Panamax Mercury*, a freighter which unloaded a total quantity of 52 884 533 kg in that port between 10 January 1985 and 18 February 1985. The applicant classified part of that quantity, namely 597 521 kg, as excess, as is clear from the request for the issue of a certificate in respect thereof which it submitted to the Hoofdproduktschap voor Akkerbouwprodukten [Central Board for Agricultural Products, hereinafter referred to as 'the Board'], The Hague, on 19 March 1983. The Board approached the Commission which replied on 22 March 1985 in the following telex message:

'In reply to your telex No 50 556 of 20 March 1985, we confirm that we are unable to give you an affirmative answer since your request includes a quantity of 5 101 500 kg in transit to Portugal which cannot be inspected.'

10 Case 83/85 R is concerned with the *Thalassini Ephi*, a freighter which unloaded in Amsterdam — according to the information supplied by the applicant to the Board on 20 March 1985 — between 4 December 1984 and 11 March 1985 a total quantity of 65 971 111 kg of tapioca, 1 118 332 kg of which was classified by the applicant as excess. Moreover, only 362 599 kg of the latter quantity are intended, according to the applicant, for importation into the Community. After the Board had approached it on 21 March 1985 in order to request the issue of a certificate in respect of that excess quantity, the Commission replied by telex message of 25 March 1985 that it was unable to comply on the ground that the applicant had again included in the calculation of the volume of tapioca actually unloaded a quantity that was in transit to Portugal.

11 The applicant regards the Commission's telex messages of 22 and 25 March 1985, which are contested in the main proceedings, as decisions affecting its interests. Moreover, in that regard it maintains in its applications that, without the certificates requested in respect of the excess quantities, the quantities of tapioca which are the subject of the dispute and which are at present stored in lighters, can be imported into the Community only against payment of the levy at the normal rate applicable to that kind of product, which is several times higher than the amount payable under the Cooperation Agreement. In those circumstances the applicant considers it necessary to order the Commission to contact the Thai authorities with a view to obtaining the export certificates needed for importation under Regulation No 3675/83. Having regard to the procedure laid down in Article 4 (2) of Regulation No 3283/84, the Commission should, in the applicant's view, have taken steps to that end much sooner.

12 In its defence, which was lodged at the Court Registry on 4 April 1985, the Commission claims that the applicant does not have an interest in seeking the measure applied for. It contends in that regard that, upon receipt of the contested telex messages, the Board transmitted to the Commission in both cases a new estimate of the excess quantity concerned, which the Commission considered to be in conformity with the relevant provisions. In both cases, the Commission subsequently sent a telex message on 2 April 1985 requesting the Thai authorities, through its delegation in Bangkok, to issue an export certificate in respect of the excess established by the Board.

13 In the light of that development, the applicant, by telex message of 5 April 1985, requested the Court to suspend the proceedings concerning the two applications for the adoption of interim measures. The Court acceded to that request and the oral procedure did not take place until 18 April 1985.

14 On 17 April 1985 the applicant lodged at the Court Registry supplementary applications in which it requested the adoption of a further measure. In those applications it seeks an order requiring the Commission to ensure that the Board issues import licences within the meaning of Regulation No 3675/83 in respect of the quantities of tapioca at issue, together with the provision of sufficient security equal to the difference between the normal levy charged on tapioca and the duty of 6% *ad valorem* applicable under the Cooperation Agreement.

15 The first question which arises in that connection is whether the extension of the two applications for the adoption of interim measures, which amounts to an amendment of the application for measures, may be taken into consideration. The Commission has expressed doubts in that respect, whilst acknowledging that since the initiation of the two sets of proceedings, the applicant had remained in constant touch with it and the above-mentioned extension had not been unexpected.

16 In those circumstances, there are insufficient grounds for refusing to accept the amendment requested by the applicant. That amendment is based on the fact that the situation has changed in the meantime. It reflects the next step which must be taken, according to the applicant, in order to achieve its aim, in respect of which it has left no room for doubt, namely the release into free circulation within the Community of the quantities of tapioca at issue stored in a Netherlands port. The Commission's opportunity to defend itself has not been affected by that amendment.

17 The second question is whether the measures applied for are urgent in the sense that in order to prevent the applicant from sustaining serious and irreparable damage, they must take effect before the decision on the main action. The applicant has pointed out in that regard that tapioca is not in itself a highly perishable product but that relatively large quantities have for some time been stored in lighters, pending the issue of import licences; that, in the meantime, since the end of winter, considerable fluctuations in temperature and high daytime temperatures have been or may be observed; and that this will undoubtedly lead within a short time to the fermentation of the tapioca kept in storage, thereby causing irreparable damage, whilst the relative humidity could also lead to the appearance of mould. There is no reason to question the veracity of those statements.

18 At the hearing, however, the Commission stated that some hours earlier it had been informed by Bangkok that the Thai authorities had issued export certificates in respect of the excess quantities unloaded from the *Panamax Mercury*, that is to say the tapioca forming the subject-matter of Case 82/85 R. The numbers on the certificates had been notified to the Commission.

19 Accordingly, the measures applied for in Case 82/85 R are no longer urgent. The Board will have to issue import licences for the quantities in respect of which export certificates have been granted in Thailand.

20 Admittedly, the applicant pointed out at the hearing that the quantities in respect of which export certificates had been issued, according to the information received from Bangkok, did not correspond exactly to the quantities stored in the Netherlands, but that disparity is of no importance in these proceedings. The applicant's request is addressed to the Commission which can not issue import licences or export certificates in respect of excess quantities but can only place the Thai authorities, in accordance with the procedure laid down by Article 4 (2) of Regulation No 3675/83, in a position to issue further export certificates. The Commission made a request to that end in connection with the loading of the *Panamax Mercury* and the Thai authorities took appropriate action as a result.

21 As regards the excess quantities unloaded from the *Thalassini Ephi,* that is to say the tapioca forming the subject-matter of Case 83/85 R, the Commission was unable to say at the hearing what action the Thai authorities had taken in response to its request. Accordingly, since in that respect there is no prospect of a swift settlement of this dispute, which has been in progress since December 1984, it is necessary to consider whether, in the light of the considerations of fact and of law relied upon in that regard, there is a *prima facie* case for the adoption of the measures applied for.

22 In that connection the Commission contended that the circumstances in which the *Thalassini Ephi* was loaded are not comparable to those prevailing when the *Panamax Mercury* was loaded. The former case, unlike the latter, involved a quantity of tapioca which was bound for non-member countries and which had been transported to the Netherlands solely for trans-shipment. It was only when prospects of sale to buyers from non-member countries proved to be less favourable that it was decided to market the goods within the Community. That was the sole reason for which the tapioca in question was classified by the applicant as an excess or surplus quantity. In the Commission's view, therefore, it is uncertain whether the Thai authorities still intend to issue export certificates in those circumstances.

23 In the applicant's view, the initial destination of the tapioca is not relevant in this case. The only condition laid down by Article 4 (2) of Regulation No 3675/83 is that 'the quantities actually unloaded [must be] found to exceed the total quantities stated in the export certificates allocated for the ship in question'.

24 As the Commission has rightly observed, that view is unacceptable. The standard form of the export certificate, which Thailand transmitted to the Commission at the material time and which was annexed to Regulation No 3675/83, is based on the assumption that at the time of issue the 'country of destination in EEC' and the 'first consignee' (name, address and country) are known. Export certificates are issued when the ship is loaded but before it reaches the high seas. The applicant's suggestion that an export certificate may be issued at any time, even at the time of unloading, must be rejected. If that were the case, the special arrangements embodied in Article 4 (2) of Regulation No 3675/83 would be redundant. Those arrangements were introduced precisely because hitherto export certificates could not be issued when it became apparent at the time of unloading that the quantity of manioc products actually unloaded was greater than the quantity covered by the export certificates already issued.

25 In the light of those considerations, it is necessary to proceed on the assumption that it is by no means certain that the Thai authorities will issue export certificates. Since the Commission has acceded to the applicant's initial request, that is to say, it has initiated the procedure provided for by Article 4 (2) of Regulation No 3675/83, and since the successful outcome of that procedure depends on the attitude of the Thai authorities, there is no reason to adopt interim measures concerning the issue of import licences, as is desired by the applicant.

26 That does not have the effect of placing the applicant in an exceptionally difficult position. It may import the tapioca in question into the Community independently of the special arrangements provided for manioc products originating in Thailand. Admittedly, the applicant will then be required to pay the full amount of the agricultural levy, in accordance with the arrangements applicable to cereals, instead of the rate of 6% *ad valorem* which applies to manioc products forming part of the agreed quantities which may be exported under the Cooperation Agreement between the Community and Thailand, but it will be able to recover the difference between the two amounts if the Thai authorities decide to issue further export certificates.

27 The Commission stated at the hearing that it was not entirely certain whether such an action for recovery may be brought under Community law, in particular under Regulation No 1430/79 on the repayment or remission of import or export duties, the provisions of which are applicable to agricultural levies unduly paid or overpaid. It is clear, however, from Article 13 of that regulation, as amended by Regulation (EEC) No 1672/82 (Official Journal 1982, L 186, p. 1), that in circumstances such as those of the present case, any duties overpaid must be repaid where no negligence or deception may be attributed to the undertaking concerned. Moreover, the Court held in its judgment of 15 December 1983 in Case 283/82 *(Schoellershammer* v *Commission)* [1983] ECR 4219 that Article 13 must be regarded as a general equitable provision designed to cover situations other than those which had most often arisen in practice and for which special provision could be made when the regulation was adopted.

28 The application for the adoption of interim measures must therefore be dismissed in both cases and the costs must be reserved.

On those grounds,

by way of an interlocutory ruling

THE ACTING PRESIDENT

hereby orders:

(1) The applications for the adoption of interim measures are dismissed.

(2) Costs are reserved.

Luxembourg, 22 April 1985.

P. Heim
Registrar

T. Koopmans
Judge
Acting as President