OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 26 May 2005 [1]

I — Introduction

1. In these proceedings the Commission of the European Communities is in dispute with the European Parliament and the Council of the European Union over the choice of the correct legal basis for Regulation (EC) No 304/2003 of the Parliament and of the Council of 28 January 2003 concerning the export and import of dangerous chemicals [2] ('Regulation No 304/2003' or 'the Regulation').

2. While the Commission takes the view that the legal basis for the Regulation should be the common commercial policy (Article 133 EC), the Parliament and the Council defend its adoption on the basis of environmental policy (Article 175(1) EC), and are supported in so doing by three Member States.

3. In the parallel proceedings in Case C-94/03 [3] the choice of legal basis for the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade ('the Rotterdam Convention') [4] is under examination.

II — Legal background

4. Regulation No 304/2003 replaces Council Regulation (EEC) No 2455/92 of 23 July 1992 concerning the import and export of certain dangerous chemicals. [5]

1 — Original language: German.

2 — OJ 2003 L 63, p. 1.

3 — *Commission* v *Council*. See also my Opinion of today's date in that case.

4 — Text in OJ 2003 L 63, p. 29 et seq.

5 — OJ 1992 L 251, p. 13, 'Regulation No 2455/92'.

A — *Extracts from the preamble to the Regulation*

5. As may be seen from the third and fourth recitals in the preamble, Regulation No 304/2003 has two objectives. First, it transposes the Rotterdam Convention, but, second, its content explicitly goes further than the provisions of the convention:

'(3) It is appropriate that the Community should act to implement the rules of the Convention ... without in any way weakening the level of protection afforded to the environment and the general public of importing countries under Regulation (EEC) No 2455/92.

(4) With the same objective in mind, it is also necessary and appropriate to go further than the provisions of the Convention in certain respects. Article 15(4) of the Convention allows Parties the right to take action that is more stringently protective of human health and the environment than that called for in the Convention, provided that such action is consistent with the provisions of the Convention and is in accordance with international law.'

B — *Summary of the principal provisions of the Regulation*

6. Article 1(1) of Regulation No 304/2003 reads as follows:

'1. The objectives of this Regulation are:

(a) to implement the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade;

(b) to promote shared responsibility and cooperative efforts in the international movement of hazardous chemicals in order to protect human health and the environment from potential harm; and

(c) to contribute to their environmentally sound use.

They shall be achieved by facilitating information exchange about the characteristics of such chemicals, by providing for a decision-making process within the Community on their import and export and by disseminating decisions to Parties and other countries as appropriate.'

7. According to Article 1(2), the objective of Regulation No 304/2003 is also to ensure that the provisions of Community law [6] concerning the classification, packaging and labelling of chemicals dangerous to man or to the environment that are placed on the market in the European Community also apply when such chemicals are exported from Member States to Contracting Parties to the Rotterdam Convention or other countries, 'unless these provisions would conflict with any specific requirements of those Parties or other countries'.

8. Article 2(1) of Regulation No 304/2003 defines its material scope as follows:

'1. This Regulation applies to:

(a) certain hazardous chemicals that are subject to the prior informed consent (PIC) procedure under the Rotterdam Convention;

(b) certain hazardous chemicals that are banned or severely restricted within the Community or a Member State; and

(c) all chemicals when exported insofar as their classification, packaging and labelling are concerned.'

9. The most important provisions of Regulation No 304/2003 may then be summarised — in simplified form — as follows.

10. In Article 6, Regulation No 304/2003 draws a fundamental distinction between three categories of hazardous chemicals, which are listed in detail in the three parts of Annex I and overlap in part with respect

6 — Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967, p. 234) and Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ 1999 L 200, p. 1).

to the legal consequences laid down for each category. [7]

11. One of those categories (Annex I, Part 3) contains a list of certain chemicals, classified as especially hazardous, which — as provided for in the Rotterdam Convention — are subject to a procedure known as the *Prior Informed Consent Procedure* ('PIC procedure') (third subparagraph of Article 6(2) of Regulation No 304/2003). That procedure, which is described in more detail in Articles 12 and 13 of the Regulation, [8] essentially provides for the exchange of information by the Community and the other Contracting Parties to the Rotterdam Convention on their individual import practices for the chemicals concerned. The equivalent within the Community is the provision of information for economic operators on the import practices of third countries. [9]

12. The chemicals subject to the PIC procedure can be exported only if the *prior consent of the country of destination* [10] has been given; information on the existence of such declarations of consent is provided at regular intervals to all Parties by the secretariat of the Rotterdam Convention (Article 13(6)(b) of Regulation No 304/2003).

13. Prior consent of the country of destination is also required for the export of a further category of chemicals, in particular those which are not yet subject to the PIC procedure but from the point of view of the Community are *candidates for a PIC procedure* within the meaning of the Rotterdam Convention (second subparagraph of Article 6(2) in conjunction with Article 13(6)(a) of Regulation No 304/2003). The chemicals concerned are listed in Part 2 of Annex I to the Regulation.

14. For all chemicals not subject to the PIC procedure, there is an obligation of *export notification* (second and third subparagraphs of Article 6(2) in conjunction with Article 7 of and Annex I, Part 1 or 2, to Regulation No 304/2003). [11] Even for chemicals that are subject to the PIC procedure, an export notification is made where the country of destination requires this (second subparagraph of Article 7(5) of the Regulation).

7 — It should also be noted that a single chemical may also be assigned to several categories at once (first subparagraph of Article 6(2) of Regulation No 304/2003).

8 — Articles 12 and 13 of Regulation No 304/2003 closely follow Articles 10 and 11 of the Rotterdam Convention. See also the definition in Article 3(14) of the Regulation, under which 'PIC procedure' means the prior informed consent procedure *established by the Convention*.

9 — See also, for more detail in this respect, points 7 and 8 of my Opinion of today's date in Case C-94/03, cited in note 3.

10 — 'Importing Party' within the meaning of the Rotterdam Convention and the Regulation.

11 — The same applies under Article 14(1) of Regulation No 304/2003 to what are called 'articles containing chemicals listed in Parts 2 or 3 of Annex I [to the Regulation] in unreacted form'.

15. Such an export notification must include certain information, described more closely in Annex III to the Regulation, on the nature of the substance to be exported, in particular its physico-chemical, toxicological and eco-toxicological properties and any precautionary measures which may be required in connection with the substance. It is transmitted by the Commission to the authorities of the third country to which the chemical is to be exported, and in addition recorded in a public database. Conversely, the Commission publishes in its database the export notifications it receives from third countries with a view to export of chemicals to the Community, and informs the competent authorities of the Member States (Article 8 of Regulation No 304/2003).

16. Article 14(2) of Regulation No 304/2003 *prohibits* the export of chemicals and articles the use of which is prohibited in the Community for the protection of human health or the environment; these chemicals are listed in Annex V to the Regulation.

17. Article 16 of Regulation No 304/2003 states that the packaging and labelling provisions in force in the Community [12] are also to apply to the export of chemicals, and requires exporters to give certain accompanying information. Under Article 13(7) of the Regulation, chemicals must be exported at the latest six months before their expiry date. When exporting pesticides, exporters must under Article 13(8) ensure that the label contains specific information about storage conditions and storage stability under the climatic conditions of the country of destination. They must also ensure that the exported pesticides comply with the purity specifications established by Community legislation.

18. Article 15 of Regulation No 304/2003, going beyond the scope of the Rotterdam Convention, also lays down certain information obligations for the *transit* of chemicals subject to the PIC procedure through third countries.

19. Article 20 of Regulation No 304/2003 concerns the provision of technical assistance, primarily for developing countries and countries with economies in transition, in order to promote the development of the infrastructure, capacity and expertise necessary to manage chemicals properly throughout their life cycle.

20. The Regulation also includes in particular procedural rules for the Community's participation in the Rotterdam Convention, an obligation on the competent authorities

12 — Reference is made to Directives 67/548/EEC, 1999/45/EC (both cited in note 6), 91/414/EEC and 98/8/EC and to any other specific Community legislation.

to monitor imports and exports, an obligation on exporters to transmit information annually on certain exports of chemicals during the previous year, and provisions on access by the public to information on trade in chemicals.

III — Background to the case, forms of order sought and procedure

A — *Background to the case*

21. The Convention was adopted in Rotterdam on 10 September 1998 and signed on behalf of the Community on 11 September 1998. [13]

22. On 24 January 2002 the Commission submitted its proposal for a Council Regulation concerning the export and import of dangerous chemicals, basing that proposal on Article 133 EC. [14]

23. Differing from the Commission's proposal, however, the Council unanimously decided at its session of 19 December 2002, after optional consultation of the European Parliament, to replace Article 133 EC by Article 175(1) EC as the legal basis for the Regulation. The Regulation was ultimately adopted by the Parliament and the Council in the co-decision procedure (Article 251 EC).

B — *Forms of order sought and procedure before the Court*

24. By its application for annulment of 23 April 2003, the Commission asks the Court pursuant to Article 230 EC:

— to annul Regulation (EC) No 304/2003 of the European Parliament and of the Council of 28 January 2003 concerning the export and import of dangerous chemicals;

— to declare that the effects of the Regulation shall remain in force until the Council has adopted a new regulation;

— to order the European Parliament and the Council to pay the costs.

13 — As well as the European Community, most Member States of the European Union are parties to the Rotterdam Convention. See in this respect the summary of ratifications available on the internet site of the Convention at http://www.pic.int/en/ViewPage.asp?id=265 (last visited on 1 February 2005).

14 — COM (2001) 803 final (OJ 2002 C 126 E, p. 291). At the same time the Commission proposed to the Council to approve the Rotterdam Convention, on the basis of Article 133 EC in conjunction with the first sentence of the first subparagraph of Article 300(2) EC and the first subparagraph of Article 300(3) EC (OJ 2002 C 126 E, p. 274).

25. The Parliament and the Council each contend that the Court should:

— dismiss the application;

— order the Commission to pay the costs.

26. By order of the President of the Court of 15 September 2003, the French Republic, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the Parliament and the Council.

27. All the parties submitted observations in the written procedure, and the Commission, the Parliament, the Council and the United Kingdom also did so at the hearing on 7 April 2005, at which the case was heard together with Case C-94/03.

IV — Assessment

28. In its application the Commission puts forward a single ground of invalidity, namely the choice of the wrong legal basis for the adoption of the Regulation. It thereby complains of a breach of the EC Treaty within the meaning of the second paragraph of Article 230 EC.

29. The choice of the correct legal basis is of considerable practical and institutional, indeed constitutional importance. [15] It determines not only the legislative procedure applicable (rights of the Parliament to participate, unanimity or qualified majority in the Council [16]) but also whether the Community's legislative competence is exclusive or is to be shared with the Member States. [17]

A — *Criteria for the choice of legal basis*

30. According to settled case-law, the choice of the legal basis for a Community act must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure. [18]

15 — To that effect, Opinion 2/00 *('Cartagena Protocol on Biosafety')* [2001] ECR I-9713, paragraph 5.

16 — See, for example, Case C-211/01 *Commission* v *Council ('Carriage of Goods')* [2003] ECR I-8913, paragraph 52, and Case C-338/01 *Commission* v *Council* [2004] ECR I-4892, paragraph 58.

17 — See, for example, Opinion 1/94 *('WTO')* [1994] ECR I-5267 and Opinion 2/00, cited in note 15.

18 — Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 25, joined Cases C-164/97 and C-165/97 *Parliament* v *Council* [1999] ECR I-1139, paragraph 12, Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 43, Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 30, Case C-491/01 *British American Tobacco* [2002] ECR I-11453, paragraph 93, Case C-338/01 *Commission* v *Council*, cited in note 16, paragraph 54, and Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 78. A fundamental judgment as early as 1991 was Case C-300/89 *Commission* v *Council ('Titanium Dioxide')* [1991] ECR I-2867, paragraph 10.

31. If examination of a Community act reveals that it pursues two purposes or has two components, and if one is identifiable as the main or predominant one while the other is merely incidental, the act must be founded on a single legal basis, namely that required by the main or predominant purpose or component. [19]

32. This means that the approval of a Community act may be based on the common commercial policy (Article 133 EC) even if in addition to its main commercial aspect it also pursues other aims, such as aims of development policy, [20] external and security policy, [21] protection of the environment [22] or protection of health. [23] That applies all the more in that the provisions on the common commercial policy are based on an open and dynamic concept which is by no means confined to the traditional aspects of external trade. [24] With respect specifically to protection of the environment and protection of health, Article 6 EC and the first subparagraph of Article 152(1) EC are enough to show that these are cross-sectional obligations which must be taken into account in all the other policies of the Community, thus including the common commercial policy.

33. Conversely, however, Community acts whose centre of gravity lies in the environmental field may incidentally affect trade. Provided only that their environmental policy aspect is predominant, the approval of such agreements must be based on Article 175(1) EC, not Article 133 EC. [25]

34. With respect to an international agreement, the Court, to draw a line between the

19 — Case C-338/01 *Commission* v *Council*, cited in note 16, paragraph 55, and *Belgium* v *Commission*, cited in note 18, paragraph 79; see also Joined Cases C-164/97 and C-165/97 *Parliament* v *Council*, paragraph 14, *Huber*, paragraph 31, and *British American Tobacco*, paragraph 94, all cited in note 18. A fundamental judgment as early as 1993 was Case C-155/91 *Commission* v *Council ('Waste Directive')* [1993] ECR I-939, paragraphs 19 and 21.

20 — Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraphs 17 to 21. See also the Opinion of Advocate General Lenz in that case, especially point 62.

21 — Case C-70/94 *Werner* [1995] ECR I-3189, paragraph 10, and Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 26.

22 — Case C-62/88 *Greece* v *Council ('Chernobyl')* [1990] ECR I-1527, paragraphs 15 to 19, and Case C-281/01 *Commission* v *Council ('Energy Star')* [2002] ECR I-12049, paragraphs 39 to 43.

23 — To that effect, but with reference to the relationship between internal market provisions and health policy, Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraph 88, Case C-434/02 *Arnold André* [2004] ECR I-11823, paragraphs 32 to 34, and Case C-210/03 *Swedish Match* [2004] ECR I-11891, paragraphs 31 to 33. These considerations are transferable to the relationship between the common commercial policy and health policy.

24 — Settled case-law; see Opinion 1/78 *('Natural Rubber')* [1979] ECR 2871, paragraphs 44 and 45, Opinion 1/94, cited in note 17, paragraph 41, and Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 19.

25 — Thus — in the case of an international agreement — in Opinion 2/00, cited in note 15, especially paragraphs 25 and 40 to 44. The Court has similarly drawn a line between Article 95 EC (formerly Article 100a of the EEC Treaty) and Article 175 EC (formerly Article 130s of the EEC Treaty). In its view, 'the mere fact that the establishment or functioning of the internal market is affected is not sufficient for Article 100a of the Treaty to apply. It appears from the Court's case-law that recourse to Article 100a is not justified where the measure to be adopted has only the incidental effect of harmonising market conditions within the Community', see the *Waste Directive* judgment, cited in note 19, paragraph 19, and to the same effect Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857, paragraph 25.

common commercial policy (Article 133 EC) and environmental policy (Article 175 EC) as possible legal bases for Community acts, has developed the criterion of *direct and immediate effect*. [26] This consideration may also be applied to other kinds of Community act. If, then, a Community act with environmental policy aims has no direct and immediate effects on trade, that act is to be based on Article 175 EC; in the contrary case, it must be based on Article 133 EC. [27] The direct and immediate effects on trade need not necessarily consist in *promoting* or *facilitating* trade. For a Community act to be capable of falling within the scope of Article 133 EC, it suffices rather that such an act is 'an instrument intended *essentially* ... to promote, facilitate *or govern* trade'. [28]

35. With this as background, it must now be examined where in the present case the *centre of gravity* of the Regulation is, in terms of its content, purpose and context, and whether any effects the Regulation may have on trade are direct and immediate (see section B below). For the sake of completeness, it will also be discussed why the Regulation could not be based on a dual legal basis (see section C).

B — *Content, aims and context of the Regulation*

36. The parties disagree on what sphere of policy the Regulation should be allotted to, having regard to its content, aims and context. While the Commission puts forward the view that the Regulation has its centre of gravity in the scope of the common commercial policy, the Council, supported by the interveners, regards it as an instrument of a predominantly environmental policy character. Both sides thus adopt essentially the same points of view in the present case as in the parallel Case C-94/03.

37. For the correct allocation of Regulation No 304/2003 to one of those two fields of policy, a first point of importance is its close *connection* with the Rotterdam Convention, the implementation of which it serves, as stated in Article 1(1)(a) and the third recital in the preamble. As I explain in my Opinion of today's date in Case C-94/03, [29] the centre of gravity of that Convention lies not in the

26 — *Energy Star*, cited in note 22, paragraphs 40 in fine and 41 in fine. The Court had already similarly distinguished, for example, cultural policy (formerly Article 128 of the EC Treaty) and industrial policy (formerly Article 130 of the EC Treaty): Case C-42/97 *Parliament* v *Council* [1999] ECR I-869, paragraph 63.

27 — *Energy Star*, cited in note 22, paragraphs 40, 41, 43 and 48, and Opinion 2/00, cited in note 15, paragraphs 40 and 42 to 44.

28 — To that effect, Opinion 2/00, cited in note 15, paragraph 37 in fine; emphasis added. Instruments of commercial policy by no means always have the sole object of *promoting* or *facilitating* trade; rather, Article 133 EC also permits classic (protective) measures of commercial policy that may amount to restricting or even prohibiting the import or export of certain products, for instance if anti-dumping duties or a trade embargo is imposed (on the latter, see, for example, *Centro-Com*, cited in note 21).

29 — Cited in note 3; see in particular point 32 et seq.

field of the common commercial policy, but in that of environmental policy; it is an environmental agreement with commercial policy references, not a commercial policy agreement with environmental references.

38. Moreover, within the Community, the proximity of Regulation No 304/2003 to the Sixth Environment Action Programme of 22 July 2002 [30] is of importance; that programme, which for its part was based on Article 175 EC, thematically shows numerous points of contact with the Regulation [31] and includes the amendment of the previous Regulation No 2455/92 among the priority actions of the Community's environmental policy. [32]

39. This context of Regulation No 304/2003 already suggests the conclusion that it is primarily an instrument of environmental policy, not an instrument of commercial policy. That initial assessment is also confirmed on a closer examination of the Regulation's objectives and content.

40. As regards, first, the *objectives of the Regulation*, Article 1(1)(b) and (c) shows that the emphasis is on environmental policy concerns, in particular shared responsibility and cooperative efforts to protect the environment (and also human health) from potential harm caused by hazardous chemicals, and on the Community's contribution to the environmentally sound use of those chemicals. Trade [33] in hazardous chemicals is mentioned in Article 1 of the Regulation less as an autonomous objective than as a point of reference for its real environmental objectives. It is an environmental policy instrument with commercial policy references, not a commercial policy instrument with environmental references. This impression is further strengthened by the fact that the Community legislature was concerned not to reduce the existing level of protection of the environment and, for the protection of the environment and of human health, to go beyond the requirements of the Rotterdam Convention. [34]

41. It is true that — in addition to the statement of objectives in Article 1 — the *wording* of the Regulation is not without

30 — OJ 2002 L 242, p. 1.

31 — Such as risk assessment and risk management in dealing with chemicals and public access to information (Article 7(2)(b) of the Sixth Environment Action Programme).

32 — Article 7(2)(d), second indent, of the Sixth Environment Action Programme.

33 — The Regulation uses expressions such as 'international movement' and 'import and export'.

34 — Third and fourth recitals in the preamble to the Regulation.

references to commercial policy. Both the title and the preamble [35] and a number of articles of the Regulation use terms such as import and export, exporters and importers and international trade. But the wording of the Regulation discloses equally substantial references to environmental policy. Thus the preamble [36] and especially Article 1 of the Regulation concern protection of the environment and protection of human health; in other places [37] the promotion of the proper management of chemicals throughout their life cycle is mentioned.

42. *As regards content*, the Commission is admittedly correct in its view that Articles 6 to 17 of the Regulation, in which not least the PIC procedure and the export notification procedure are transposed into internal Community law, represent the nucleus of the Regulation. However, contrary to the Commission's view, a PIC procedure is by no means primarily an instrument of commercial policy but, on the contrary, as the Court has already held in Opinion 2/00, a typical instrument of environmental policy. [38] Contrary to the Commission's arguments, the assessment made in Opinion 2/00 concerning the PIC procedure in the Cartagena Protocol can be transferred to the PIC procedure in the present case. Here too, with reference to the hazardous chemicals concerned, the PIC procedure is primarily related to 'information exchange on the benefits as well as the risks associated with the use of chemicals [and is] aimed at enhancing the sound management of toxic chemicals through the exchange of scientific, technical, economic and legal information'. [39]

43. International trade in certain chemicals which the Contracting Parties to the Rotterdam Convention have agreed to classify as hazardous [40] is thus merely the external point of reference of the PIC procedure. The real subject-matter of that procedure laid down by the Rotterdam Convention is not primarily the promotion, facilitation or even the regulation of trade in hazardous chemicals but rather the exchange of information by the Contracting Parties on their import practices (Article 10(7) and (10) of the Rotterdam Convention [41]) combined with the onward transmission of the information thus obtained to the economic operators concerned (Article 11(1)(a) of the Rotterdam Convention and Article 13(1) and (3) of the Regulation).

35 — See for instance the 6th, 7th, 11th and 16th recitals in the preamble to the Regulation. The Commission further refers to the third recital.

36 — See in particular the 1st, 3rd, 12th and 17th recitals in the preamble to the Regulation.

37 — For example, Article 20 of the Regulation.

38 — Opinion 2/00, cited in note 15, paragraph 33.

39 — Thus stated in paragraph 19.33 of 'Agenda 21', introducing the section in which the PIC procedure is particularly emphasised as an instrument. Agenda 21 was adopted in 1992 at the United Nations Conference on Environment and Development — the 'Earth Summit' — in Rio de Janeiro (Brazil). The English text may be found at http://www.un.org/esa/sustdev/documents/agenda21/index.htm (last visited on 2 March 2005).

40 — These chemicals are listed in Annex III to the Rotterdam Convention.

41 — Article 5 of the Rotterdam Convention contains a further element of exchange of information.

44. The PIC procedure, like the export notification procedure for certain chemicals (Article 12 of the Rotterdam Convention and Article 7 of the Regulation), is intended above all to prevent a third country — in particular a developing country — from being confronted with the import of hazardous chemicals without first having had an opportunity to take the necessary steps for the protection of the environment and human health. [42]

45. The PIC procedure introduced by Regulation No 304/2003 can at most *indirectly*, by the abovementioned provision of information to the economic operators concerned (Article 11(1)(a) of the Rotterdam Convention and Article 13(1) and (3) of the Regulation), contribute to the increased transparency of the rules in force in the various countries and thus possibly facilitate external trade in hazardous chemicals. On the other hand, the Regulation may also make trade more expensive for an exporter, for instance if he is required to comply with the necessary formalities for an export notification (Article 7 of in conjunction with Annex III to the Regulation).

46. Apart from such indirect effects on trade, however, Regulation No 304/2003 essentially has no commercial policy rules as its subject-matter. In particular, it does follow from the Regulation whether, and if so on what conditions, the import of a specific chemical into the Community is allowed or prohibited. The Regulation does not lay down any substantive rules on this point. Instead the Community's *material* decisions on the permissibility or otherwise of imports of hazardous chemicals, to be transmitted to the Contracting Parties to the Rotterdam Convention in the context of the PIC procedure, are to be taken 'in accordance with existing Community legislation'. [43] Regulation No 304/2003 merely, in Article 12, defines the competence of the Commission to take such decisions and make declarations to the secretariat of the Rotterdam Convention. In accordance with Article 24(2) of the Regulation, the Commission is assisted in so doing by an advisory committee. [44]

47. Nor does the Regulation contain any autonomous substantive provisions on whether and on what conditions a chemical may be exported from the Community. By the Regulation the Community merely, in harmony with Article 11(1)(b) of the Rotterdam Convention, supports the other Contracting Parties to the Convention in implementing their own import policies with respect to the chemicals subject to the PIC procedure. To that end, exporters who wish

42 — In this connection, Agenda 21 (cited in note 39) says in paragraph 19.35: 'The export to developing countries of chemicals that have been banned in producing countries or whose use has been severely restricted in some industrialised countries has been *the subject of concern, as some importing countries lack the ability to ensure safe use*, owing to inadequate infrastructure for controlling the importation, distribution, storage, formulation and disposal of chemicals' (emphasis added).

43 — Second sentence of Article 12(1) of Regulation No 304/2003.

44 — This follows from the reference there to Article 3 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), also known as the 'comitology decision'.

to export such chemicals from the Community to third countries are obliged to comply with the requirements of the individual countries of destination and in particular to await their prior explicit consent (Article 13 (4) and (6) of the Regulation). [45]

48. Only Article 14(2) of the Regulation contains an *autonomous prohibition of export* by the Community. It relates to chemicals whose use within the Community is prohibited for the protection of human health or the environment. That provision thus turns intra-Community health and environment protection provisions outward in order to prevent products prohibited within the Community from causing harm outside the Community. Both the prohibition within the Community and its extension to exports from the Community are essentially of an environmental policy character.

49. If the other provisions of the Regulation are also taken into consideration, that confirms the impression that it is basically an instrument of environmental policy, not of commercial policy. Neither the exchange of information with third countries (Article 19 of the Regulation) nor mutual technical assistance (Article 20 of the Regulation) nor public access to information (Article 6(3), the fourth subparagraph of Article 7(1), Article 8(1), the second sentence of Article 9(3), the second sentence of Article 13(1) and the second sentence of Article 21(2) of the Regulation) serve the promotion, facilitation or even the regulation of trade in hazardous chemicals. As already appears simply from the wording of those provisions, their purpose is instead primarily the protection of the environment and additionally that of human health.

50. Contrary to first appearances, moreover, the provisions on labelling of chemicals and accompanying information in Article 16 of the Regulation do not primarily constitute provisions of commercial policy but of environmental policy. The directives referred to in Articles 16(1) and 1(2) of the Regulation may indeed approximate the law *within the Community* and serve the mutual recognition of product packaging and accompanying information in trade between Member States. But it is different in the relationship of the Community to third countries: here there is no question of the approximation of laws or mutual recognition for the improvement of the marketability of chemicals or their access to the market; [46] that is also shown by the second sentence of Article 16(1) and the last clause of Article 1(2) of the Regulation, [47] according to which any specific requirements of the importing Party concerning product packaging and accompanying information are not affected. Rather, Article 16(1) of the Regulation is intended only to meet the need for information of the public on

45 — This may be an individual consent (Article 13(6)(a) of the Regulation) or — in the context of the PIC procedure — a general consent (Article 13(6)(b) of the Regulation).

46 — See also point 41 of my Opinion of today's date in Case C-94/03, cited in note 3.

47 — That clause of Article 1(2) of the Regulation reads: '...unless these provisions would conflict with any specific requirements of those Parties or other countries'.

risks and dangers in connection with the chemicals concerned. The provision essentially only extends the existing labelling rules of the Community to exports, and it does not contribute to the approximation of laws between the Community and third countries or to the mutual recognition of products between them.

51. To sum up: if one considers the context, content and objectives of Regulation No 304/2003, its centre of gravity is not in the field of the common commercial policy but in that of environmental policy. The — entirely possible — effects of the Regulation on international trade in hazardous chemicals are indirect rather than direct in character. [48] In this sense I share the view of the Council, the Parliament and the interveners that it was correct to base the Regulation on Article 175(1) EC, not on Article 133 EC. [49]

52. That the scope of Regulation No 304/2003, as stated in the fourth recital in its preamble, goes beyond that of the Rotterdam Convention [50] does not alter that assessment. The Regulation essentially extends what it provides anyway for the scope of the Rotterdam Convention to the other fields it covers. In so doing it pursues the same, basically environmental, objectives. The above observations can therefore be applied to their full extent.

53. The Commission further objects that serious effects on the internal market and distortions of trade are to be feared if Article 175(1) EC rather than Article 133 EC is accepted as the legal basis. The Member States could in that case, in the absence of exclusive competence of the Community, unilaterally enact stricter provisions on the import and export of hazardous chemicals and circumvent the provisions already existing at Community level on the classification, packaging and labelling of hazardous substances.

54. In this respect, it must first be observed that in the field of environmental policy, according to the AETR line of case-law, an exclusive external jurisdiction of the Com-

48 — On the criterion of direct (and immediate) as opposed to indirect (and long-term) effects, see point 34 above.

49 — In so far as the Regulation also serves the *protection of human health*, it does not require a separate legal basis in addition to Article 175(1) EC. As follows from the second indent of Article 174(1) EC, the Community's environmental policy contributes also to the protection of human health.

50 — The Regulation also applies, for example, in relation to States which are not parties to the Rotterdam Convention (described as 'other countries') and to certain products which are not covered by the Rotterdam Convention (described as 'articles containing chemicals')

munity may very well exist. [51] Whether this was the case with respect to the conclusion of the regulation at issue in this case may be left open, however. Even in the area of shared competence, the Member States must comply with existing Community law when exercising the powers retained by them. In so doing they may not infringe existing secondary law, nor may they infringe primary law, in particular the fundamental freedoms of the EC Treaty and Article 95 (4) to (10) EC. That follows from the principle of the primacy of Community law. The Commission's objection is therefore unfounded.

55. Altogether, I therefore conclude that the Commission's application is unfounded and should consequently be dismissed.

C — *No dual legal basis*

56. It may also be observed that in the present case a combination of the two conceivable legal bases, Article 133 EC and Article 175 EC, would not have been possible, even if it were asserted that commercial policy and environmental policy aspects are represented *equally* in the Regulation and the Regulation consequently — contrary to the view taken above — cannot be assigned definitely to either of the two policies.

57. It is admittedly possible to base an act on several relevant legal bases. That is the case where exceptionally it is established that several objectives are being pursued simultaneously which are inseparably linked without one being merely secondary and indirect in relation to the other. [52]

58. However, cumulation of different legal bases is excluded if the procedures laid down for them cannot be reconciled with each other. [53]

59. That is the case here. While the Parliament is at most consulted optionally within the scope of the common commercial policy, without having any formal right to

51 — On this point, see point 18 of my Opinion of today's date in Case C-94/03, cited in note 3. The possibility of an exclusive external jurisdiction of the Community in environmental policy is also recognised by Opinion 2/00, cited in note 15, paragraphs 45 and 46.

52 — Case C-338/01 *Commission* v *Council*, cited in note 16, paragraph 56; see also *Huber*, paragraph 31, *British American Tobacco*, paragraph 94, and the earlier *Titanium Dioxide*, paragraphs 13 and 17, all cited in note 18.

53 — *Titanium Dioxide*, cited in note 18, paragraphs 17 to 21, joined Cases C-164/97 and C-165/97 *Parliament* v *Council*, cited in note 18, paragraph 14, and Case C-338/01 *Commission* v *Council*, cited in note 16, paragraph 57. It may be concluded from this case-law that the cumulation of two legal bases is possible at most where they both lay down the same legislative procedure, or at least compatible legislative procedures; see to that effect also joined Cases C-184/02 and C-223/02 *Spain and Finland* v *European Parliament and Council* [2004] ECR I-7789, paragraphs 42 to 44.

participate under the Treaty (Article 133(4) EC [54]), in environmental policy it exercises the legislative function together with the Council in the co-decision procedure (Article 175(1) EC in conjunction with Article 251 EC). Although the Council itself as a rule decides by a qualified majority in both fields of policy (Article 133(4) EC or — for the co-decision procedure — Article 251 EC [55]), the fundamental differences with respect to the Parliament's rights of participation show that the legislative procedures under Article 133 EC and Article 175 EC are not compatible with each other and cannot therefore be combined. [56]

60. That is because it is self-evident, on the one hand, that the Parliament's co-decision in the field of Article 175 EC cannot be dispensed with; since the Maastricht Treaty the co-decision procedure is one of the Parliament's most important rights of participation, and it makes an important contribution to the democratic legitimacy of Community legislation. Nor, on the other hand, could the procedure under Article 133(4) EC be abruptly supplemented by a co-decision right of the Parliament which is not provided for there. In either case there would be a danger that the decision-making process laid down in the relevant legal basis, and hence also the institutional balance laid down in the Treaty, could be distorted: a change to the legislative procedure can always also have an effect on the content of the act enacted. [57]

61. This is also a difference between the present case and the parallel proceedings in Case C-94/03. [58] In that case the combination of the two possible legal bases (Article 133 EC and Article 175(1) EC, each in conjunction with Article 300 EC) would merely lead to an — always possible and unproblematic — consultation of the Parliament in connection with the common commercial policy as well; the result of such a consultation of the Parliament is of course not binding on the Council. In the present case, on the other hand, the Council would, as a result of the extension of the co-decision procedure into the sphere of Article 133 EC, be deprived of its exclusive legislative competence and would have to share it with the Parliament. Such a result would contradict the deliberate decision of the Member States, confirmed at several intergovernmental con-

54 — That the Parliament normally has no formal right of participation in the common commercial policy is also shown, *a contrario*, from a reading of Article 133(7) EC.

55 — Exceptions where unanimity is required may be found in Article 133(5) to (7) EC for the common commercial policy and in Article 175(2) EC for environmental policy; in addition, it follows from Article 251(3) EC that in the co-decision procedure the Council must decide unanimously if it wishes to approve amendments proposed by the Parliament against a negative position of the Commission.

56 — A different conclusion was reached by Advocate General Geelhoed, who in his Opinion in Case C-491/01 *British American Tobacco* [2002] ECR I-11461, points 167 to 182, regards the co-decision procedure under Article 95 EC as capable of being combined with the procedure under Article 133 EC.

57 — In the *Carriage of Goods* judgment, cited in note 16, paragraph 52, the Court says that the replacement of a qualified majority procedure by a procedure of unanimity in the Council can affect the content of the measure adopted (similarly Case 45/86 *Commission* v *Council*, cited in note 20, paragraph 12, *Titanium Dioxide*, cited in note 18, paragraphs 17 to 21, and Case C-338/01 *Commission* v *Council*, cited in note 16, paragraph 58). That must apply all the more if the Parliament is to be allowed a right of co-decision which is not provided for in the legal basis in question.

58 — See my Opinion of today's date, cited in note 3, point 50.

ferences, on the legislative procedure in the common commercial policy. [59]

62. Neither from *Swedish Match* [60] nor from *British American Tobacco* [61] can anything to the contrary be deduced, moreover. In neither of those two judgments does the Court address more closely the various competences of the institutions laid down by the Treaty and the institutional balance in the context of the co-decision procedure on the one hand and the procedure under Article 133 EC on the other. [62]

63. Because of the incompatibility of the legislative procedures provided for in Article 133 EC and Article 175 EC, the Community legislature would thus, even if there were taken to be a balance between environmental and commercial policy aspects in the Regulation, still have had to give priority to one of the two legal bases. In view of the incompatibility of the procedures, it would not have been able to base the Regulation on the common commercial policy and environmental policy at the same time.

64. In such a situation, environmental policy would have had to prevail with Article 175 EC as the legal basis. With respect to the legislative procedure, the Parliament's right of co-decision is the norm, while legal bases such as Article 133 EC which have no formal right of participation of the Parliament constitute exceptions, as a matter of procedure. Moreover, it is consistent with the principle of transparency (Article 1(2) EU) [63] and the principle of democracy (Article 6(1) EU) if, of two legal bases which are equally possible and equally affected but not compatible with each other, in case of doubt the one is chosen with which the Parliament's rights of participation are greater.

65. Even, then, if it were supposed that commercial and environmental policy aspects are expressed equally strongly in the regulation at issue, procedural grounds would argue against the choice of a dual legal basis and in favour of the choice of a provision of environmental policy as sole

59 — In this respect it should be recalled that the scope of the co-decision procedure was extended by the Treaties of Amsterdam and Nice, and Article 133 EC was also not inconsiderably amended by those Treaties, but without the Member States making the Parliament a co-legislator with the Council in the common commercial policy. Only the Treaty establishing a Constitution for Europe (signed in Rome on 29 October 2004, OJ 2004 C 310, p. 1), in Article III-315(2) in conjunction with Articles I-34 and III-396, extends the European Parliament's right of co-decision also to the common commercial policy.

60 — Cited in note 23.

61 — Cited in note 18.

62 — Expressly stated in *British American Tobacco*, cited in note 18, paragraph 110, referring to the lack of relevance for the decision in that case. In both judgments it is ultimately stated only that, in the case of the directive at issue, the additional citation of Article 133 EC as an *irrelevant* legal basis did no harm and constituted a mere formal error of law with no effect on the procedure, since the co-decision procedure which was exclusively applicable under Article 95 EC had in fact been made use of (*British American Tobacco*, paragraph 98, and *Swedish Match*, paragraph 44).

63 — See in particular Title III, headed 'Transparency of Business', of the Rules of Procedure of the European Parliament (16th edition, July 2004, OJ 2005 L 44, p. 1), where Rule 96(2) and (3) lays down the principle that sessions are public and Rule 97 enshrines the right of access to Parliament documents.

legal basis. The decision of the Parliament and the Council to adopt the Regulation on the basis of Article 175(1) EC in the co-decision procedure would not thus be open to criticism from this point of view either.

V — Costs

66. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it should be ordered to pay the costs, as applied for by the European Parliament and the Council.

67. As an exception to that rule, it follows from Article 69(4) of the Rules of Procedure that the three Member States which have intervened in the proceedings must bear their own costs.

VI — Conclusion

68. On the basis of the above considerations, I propose that the Court should:

(1) dismiss the application;

(2) order the French Republic, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs. Apart from that, the Commission of the European Communities shall pay the costs.