JUDGMENT OF THE COURT (Second Chamber)

10 January 2006 *

In Case C-94/03,

ACTION for annulment under Article 230 EC, brought on 28 February 2003,

Commission of the European Communities, represented by G. zur Hausen, L. Ström van Lier and E. Righini, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented initially by B. Hoff-Nielsen and M. Sims-Robertson, and then by the latter and K. Michoel, acting as Agents,

defendant,

* Language of the case: English.

supported by

French Republic, represented by G. de Bergues, F. Alabrune and E. Puisais, acting as Agents, with an address for service in Luxembourg,

Kingdom of the Netherlands, represented by H.G. Sevenster, S. Terstal and N.A.J. Bel, acting as Agents,

Republic of Austria, represented by E. Riedl, acting as Agent, with an address for service in Luxembourg,

Republic of Finland, represented by T. Pynnä, acting as Agent, with an address for service in Luxembourg,

United Kingdom of Great Britain and Northern Ireland, represented by R. Caudwell, acting as Agent, and A. Dashwood, Barrister, with an address for service in Luxembourg,

European Parliament, represented initially by C. Pennera and M. Moore, and then by the latter and K. Bradley, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, J. Makarczyk, C. Gulmann, P. Kūris and J. Klučka, Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 April 2005,

after hearing the opinion of the Advocate General at the sitting on 26 May 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks the annulment of Council Decision 2003/106/EC of 19 December 2002 concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade (OJ 2003 L 63, p. 27, 'the contested decision'), in so far as it is based on Article 175(1) EC and not on Article 133 EC.

Legal background

2 The Rotterdam Convention (hereinafter 'the Convention') was adopted on 10 September 1998 and opened the next day for signature by all the States and regional economic integration organisations; according to Article 1 its objective is 'to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use'. The same article makes it clear that that objective must be attained 'by facilitating information exchange about [the] characteristics [of those chemicals], by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties'.

3 By virtue of Article 3 of the Convention, which relates to its scope, the Convention applies to 'banned or severely restricted chemicals' and 'severely hazardous pesticide formulations' but does not apply to a number of products listed in Article 3(2) of the Convention. The products covered by it are defined in more detail in Article 2 of the Convention.

4 According to Article 2(b) and (c), 'banned' and 'severely restricted' chemicals mean chemicals 'all uses of which' or 'virtually all uses of which', respectively, 'have been prohibited by final regulatory action in order to protect human health or the environment'. As for the term 'severely hazardous pesticide formulation', it is defined in Article 2(d) as 'a chemical formulated for pesticidal use that produces severe health or environmental effects observable within a short period of time after

single or multiple exposure, under conditions of use'. The procedures applicable to those two types of product are described in Articles 5 and 6 of the Convention respectively.

5 Thus, with regard to banned or severely restricted chemicals, Article 5(1) to (3) of the Convention provides, in essence, that, when a Party to the Convention has adopted a final regulatory action — defined by Article 2(e) of the Convention as 'an action taken by a Party, that does not require subsequent regulatory action by that Party, the purpose of which is to ban or severely restrict a chemical', it must as soon as possible give written notice of such action to the Secretariat established by the Convention, which must then verify whether the notification contains the information required in Annex I to the Convention, concerning in particular the identification of the chemical in question, its physical and chemical, toxicological and ecotoxicological properties and the reasons for the final regulatory action relevant to human health or the environment. If it does contain that information, the Secretariat must forthwith forward to all Parties to the Convention a summary of the information received. If the notification does not contain the required information, the Secretariat must inform the Party that submitted the incomplete notification and request it to provide the missing information without delay. In any case, Article 5(4) of the Convention provides that every six months the Secretariat is to send the Parties a synopsis of the information received by it pursuant to Article 5(1) and (2), 'including information regarding those notifications which do not contain all the information required by Annex I'.

6 Under Article 5(5) of the Convention, 'when the Secretariat has received at least one notification from each of two Prior Informed Consent ["PIC"] regions regarding a particular chemical that it has verified meets the requirements of Annex I, it is to forward them to the Chemical Review Committee. ...'. Article 5(6) provides that that Committee is to review the information in the notifications received and, in accordance with the criteria set out in Annex II — relating in essence to the basis of and reasons for final regulatory action taken after a risk evaluation, and their actual

or expected effects on human health and the environment — recommend to the Conference of the Parties whether the chemical in question should be made subject to the PIC procedure and be listed accordingly in Annex III to the Convention.

7 A similar procedure is provided for in Article 6 of the Convention with regard to severely hazardous pesticide formulations. Article 6(1) provides that 'any Party that is a developing country or a country with an economy in transition and that is experiencing problems caused by a severely hazardous pesticide formulation under conditions of use in its territory may propose to the Secretariat the listing of the severely hazardous pesticide formulation in Annex III'. The procedure to be followed in those circumstances, described in Article 6(2) to (5), is broadly similar to that described in paragraphs 5 and 6 of this judgment, which applies to banned or severely restricted chemicals.

8 Articles 7 and 9 of the Convention describe the procedure for listing or removing a chemical from Annex III, while Article 8 sets out the conditions for listing in the same annex chemicals which, before the entry into force of the Convention, were subject to the voluntary Prior Informed Consent procedure set up in 1989 by the United Nations Environment Programme (UNEP) and the Food and Agriculture Organisation (FAO). The Prior Informed Consent procedure established by the Rotterdam Convention is described in detail in Articles 10 and 11 of the Convention concerning the obligations in relation to imports and exports of chemicals listed in Annex III.

9 Under Article 10:

'1. Each party shall implement appropriate legislative or administrative measures to ensure timely decisions with respect to the import of chemicals listed in Annex III.

2. Each Party shall transmit to the Secretariat as soon as possible, and in any event no later than nine months after the date of dispatch of the decision guidance document [accompanying the listing of a new chemical in Annex III] a response concerning the future import of the chemical concerned. If a Party modifies its response, it shall forthwith submit the revised response to the Secretariat.

3. The Secretariat shall, at the expiration of the time period in paragraph 2, forthwith address to a Party that has not provided such a response, a written request to do so. Should the Party be unable to provide a response, the Secretariat shall, where appropriate, help it to provide a response within the time period specified in the last sentence of paragraph 2 of Article 11.

4. A response under paragraph 2 shall consist of either:

(a) a final decision, pursuant to legislative or administrative measures:

(i) to consent to import;

(ii) not to consent to import; or

(iii) to consent to import only subject to specified conditions; or

(b) an interim response, which may include:

(i) an interim decision consenting to import with or without specified conditions, or not consenting to import during the interim period;

(ii) a statement that final decision is under active consideration;

(iii) a request to the Secretariat, or to the Party that notified the final regulatory action, for further information;

(iv) a request to the Secretariat for assistance in evaluating the chemical.

5. A response under subparagraphs (a) or (b) of paragraph 4 shall relate to the category or categories specified for the chemical in Annex III.

...

8. Each party shall make its responses under this Article available to those concerned within its jurisdiction, in accordance with its legislative or administrative measures.

9. A party that, pursuant to paragraphs 2 and 4 above and paragraph 2 of Article 11, takes a decision not to consent to import of a chemical or to consent to its import only under specified conditions shall, if it has not already done so, simultaneously prohibit or make subject to the same conditions:

(a) import of the chemical from any source; and

(b) domestic production of the chemical for domestic use.

10. Every six months the Secretariat shall inform all Parties of the responses it has received. Such information shall include a description of the legislative or administrative measures on which the decisions have been based, where available. The Secretariat shall, in addition, inform the Parties of any cases of failure to transmit a response.'

10 Article 11, concerning obligations in relation to exports of chemicals listed in Annex III, provides as follows:

'1. Each exporting Party shall:

(a) implement appropriate legislative or administrative measures to communicate the responses forwarded by the Secretariat in accordance with paragraph 10 of Article 10 to those concerned within its jurisdiction;

(b) take appropriate legislative or administrative measures to ensure that exporters within its jurisdiction comply with decisions in each response no later than six months after the date on which the Secretariat first informs the Parties of such response in accordance with paragraph 10 of Article 10;

(c) advise and assist importing Parties, upon request and as appropriate:

(i) to obtain further information to help them to take action in accordance with paragraph 4 of Article 10 and paragraph 2(c) below; and

(ii) to strengthen their capacities and capabilities to manage chemicals safely during their life cycle.

2. Each Party shall ensure that a chemical listed in Annex III is not exported from its territory to any importing Party that, in exceptional circumstances, has failed to transmit a response or has transmitted an interim response that does not contain an interim decision, unless:

(a) it is a chemical that, at the time of export, is registered as a chemical in the importing Party; or

(b) it is a chemical for which evidence exists that it has previously been used in, or imported into, the importing Party and in relation to which no regulatory action to prohibit its use has been taken; or

(c) explicit consent to the import has been sought and received by the exporter through a designated national authority of the importing Party. The importing Party shall respond to such a request within 60 days and shall promptly notify the Secretariat of its decision.

The obligations of exporting Parties under this paragraph shall apply with effect from the expiration of a period of six months from the date on which the Secretariat first informs the Parties, in accordance with paragraph 10 of Article 10, that a Party has failed to transmit a response or has transmitted an interim response that does not contain an interim decision, and shall apply for one year.'

11 Articles 10 and 11 of the Convention refer to the obligations associated with imports and exports of chemicals listed in Annex III to the Convention and Article 12 of the Convention regulates the specific case of chemical products not listed in that annex. In essence, that article provides that where a chemical that is banned or severely restricted by a Party is exported from its territory, that Party must send an export notification to the importing Party, which must acknowledge receipt. The notification must include in particular information identifying the chemical in question and concerning precautionary measures for reducing exposure to and emissions of the chemical, together with any additional information that is available to the relevant national authority designated by the importing Party and could be of assistance to the importing Party. Article 12(5) provides that the obligation to give an export notification is to cease where the following three conditions are fulfilled: the chemical concerned has been listed in Annex III, the importing Party has

provided a response concerning future import for the chemical to the Secretariat in accordance with Article 10(2), and the Secretariat has distributed the response to the Parties in accordance with Article 10(10).

12 Article 13 of the Convention deals with the information which must accompany exported chemicals. According to Article 13(1), '[t]he Conference of the Parties shall encourage the World Customs Organisation to assign specific Harmonised System customs codes to the individual chemicals or groups of chemicals listed in Annex III, as appropriate'. Where such a code is assigned, it must be shown in the shipping document for the chemical when exported. In addition, Article 13(2) and (3) lay down an obligation for the Parties to the Convention to require chemicals listed in Annex III and chemicals which are banned or severely restricted in their territory (Article 13(2)), as well as chemicals which are, in their territory, already subject to environmental or health labelling requirements (Article 13(3)) to be subject, when exported, to 'labelling requirements that ensure adequate availability of information with regard to risks and/or hazards to human health or the environment, taking into account relevant international standards'. Article 13(4) of the Convention calls on the exporting Parties to require that a safety data sheet that follows an internationally recognised format, setting out the most up-to-date information available, is sent to each importer, at least with respect to the chemicals referred to in Article 13(2) that are to be used for occupational purposes. Finally, Article 13(5) provides that the information on the label and on the safety data sheet which accompanies the product should, as far as practicable, be given in one or more of the official languages of the importing Party.

13 Similarly, Article 14 calls on the contracting Parties to exchange all scientific, technical, economic and legal information in their possession concerning chemicals covered by the Convention and national regulatory actions substantially restricting one or more uses of the chemical, while Article 16 deals with technical assistance. In that connection, Parties with more advanced programmes for regulating chemicals

are asked to provide technical assistance to other parties to the Convention, in particular to developing countries and countries with economies in transition, to enable them to strengthen their capacities and capabilities to manage chemicals safely 'during their life-cycle'.

14 Finally, under Article 15 of the Convention, the Parties must take such measures as may be necessary for the effective implementation of the Convention, including the establishment and strengthening of national infrastructures and institutions and the adoption, if necessary, of measures such as the establishment of national registers and databases containing safety information on chemicals, the encouragement of initiatives by industry and the promotion of voluntary agreements for technical assistance. According to Article 15(2), '[e]ach Party shall ensure, to the extent practicable, that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III', whilst, according to Article 15(4), '[n]othing in this Convention shall be interpreted as restricting the right of the Parties to take action that is more stringently protective of human health and the environment than that called for in this Convention, provided that such action is consistent with the provisions of this Convention and is in accordance with international law'.

15 The subsequent provisions of the Convention relate essentially to the role and tasks of the bodies and institutions responsible for reviewing and evaluating the implementation of the Convention (Articles 18 and 19), the rules applicable in the event of non-compliance with the obligations laid down by it or disputes concerning its interpretation or application (Articles 17 and 20) and the procedure to be followed for amendments to the Convention or its annexes, or for the adoption of additional annexes (Articles 21 and 22).

16 Under Article 25(1), the Convention is subject to ratification, acceptance or approval by States and by regional economic integration organisations and is open for accession by States and by regional economic integration organisations from the day after the date on which it is closed for signature. With regard to those organisations, Article 25(2) provides that '[a]ny regional economic integration organisation that becomes a Party to [the] Convention without any of its member States being a Party shall be bound by all the obligations under the Convention'. In contrast, '[i]n the case of such organisations, one or more of whose member States is a Party to this Convention, the organisation and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention'. It is stated at the end of Article 25(2) that, in such cases, 'the organisation and the member States shall not be entitled to exercise rights under the Convention concurrently'. Under Article 25(3) of the Convention, each regional economic integration organisation is requested to indicate in its instrument of ratification, acceptance, approval or accession 'the extent of its competence in respect of the matters governed by this Convention'.

Background to the dispute

17 Following signature of the Convention on behalf of the Community on 11 September 1998 in Rotterdam (Netherlands), on 24 January 2002 the Commission submitted a proposal for a Council decision approving the Convention on behalf of the Community (OJ 2002 C 126 E, p. 274) and indicating, pursuant to Article 25(3) of the Convention, the extent of the Community's competence in respect of the matters governed by the Convention. The proposal was based on 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 and Article 2(2) of the proposal indicated that 'the Community is competent in respect of all matters governed by the Convention'.

18 After the European Parliament had been consulted pursuant to the first subparagraph of Article 300(3) EC, the Council unanimously decided however not to accept the proposal and to replace Article 133 EC by Article 175(1) EC. The contested decision was adopted without discussion at the session of the Justice and Internal Affairs Council held in Brussels on 19 December 2002 and was therefore based on Article 175(1) 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. The declaration of competence required by Article 25(3) of the Convention is set out in Annex B to the said decision and is worded as follows:

'The European Community declares that, in accordance with the Treaty establishing the European Community, and in particular Article 175(1) thereof, it is competent to enter into international agreements, and to implement the obligations resulting therefrom, which contribute to the pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment,

— protecting human health,

— prudent and rational utilisation of natural resources,

— promoting measures at international level to deal with regional or worldwide environmental problems.

Moreover the European Community declares that it has already adopted legal instruments, including Regulation (EC) No 304/2003 of the European Parliament and the Council [of 28 January 2003] concerning the export and import of dangerous chemicals [OJ 2003 L 63, p. 1], binding on its Member States, covering matters governed by this Convention, and will submit and update, as appropriate, a list of those legal instruments to the Secretariat of the Convention.

The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force.

The exercise of Community competence is, by its nature, subject to continuous development.'

19 Taking the view, in those circumstances, that the act concluding the Convention was unlawful, the Commission decided to bring the present action.

20 By order of the President of the Court of 16 July 2003, the French Republic, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Finland, the United Kingdom of Great Britain and Northern Ireland and the European Parliament were granted leave to intervene in this case in support of the form of order sought by the Council.

The action

Arguments of the parties

21 The Commission bases its action on a single plea, alleging infringement of the EC Treaty in that the wrong legal basis was chosen. In so far as the Convention is an instrument whose essential purpose is to regulate international trade in certain hazardous chemicals, it falls within the scope of the common commercial policy and not the Community environmental policy. Therefore the contested decision ought to have been based on Article 133 EC, in conjunction with Article 300 EC, and not on Article 175(1) EC, in conjunction with Article 300 EC.

22 In that connection, the Commission relies, in particular, on the object and purposes of the Convention, which clearly focus upon the will of the parties to the Convention to establish close cooperation in the field of international trade in pesticides and other hazardous chemicals, and also on the actual text of the Convention, the provisions of which unambiguously reflect the predominantly commercial purpose of that instrument.

23 That is clear, first, from the very title and from Article 1 of the Convention, which expressly mention 'international trade' in certain hazardous chemicals and pesticides and their 'import' or 'export'. It is also clear from Articles 5 to 9 of the Convention, which contain essential rules for the listing, or removal, of particularly hazardous chemicals in and from Annex III to the Convention. Finally, and most significantly, it is clear from Articles 10 and 11 of the Convention, which are of decisive importance within the scheme of the Convention, setting out the main obligations relating to imports and exports of chemicals listed in that annex and

specifically defining the main features of the PIC procedure. Those two articles are manifestly commercial in their scope since, in particular, they enable exporters, by means of the procedure for notification of responses concerning future imports of chemicals, to ascertain precisely which markets are open to their hazardous chemicals and on what conditions.

24 Likewise, the rules in Articles 12 to 16 of the Convention have an undeniable impact on trade in chemicals because they offer importing countries the tools and information they need to identify potential hazards associated with the use of such products and therefore to refuse or restrict the entry into their territory of chemicals which they have banned, severely restricted or, as the case may be, cannot manage or use in conditions of total safety.

25 The Commission submits, in addition, that the fact that reasons connected with the protection of human health or of the environment may have provided the inspiration for conclusion of the Convention is not such as to represent an obstacle to approval of the Convention on the basis of Article 133 EC since, first, it is settled case-law that the common commercial policy should, by its nature, be interpreted extensively, beyond the strict bounds of trade. That policy may therefore include measures other than customs or tariff measures and pursue objectives other than the mere regulation of trade with non-member countries, such as development aid for such States, the implementation of a foreign and security policy or, specifically, protection of the environment and of health. In that connection, the Commission refers in particular to Case 45/86 *Commission* v *Council* [1987] ECR 1493, Case C-62/88 *Greece* v *Council* [1990] ECR I-1527 (the '*Chernobyl* case'), and Case C-281/01 *Commission* v *Council* [2002] ECR I-12049, in which the Court annulled Council Decision 2001/469/EC of 14 May 2001 concerning the conclusion on behalf of the European Community of the Agreement between the Government of the United States of America and the European Community on the coordination of energy-efficient labelling programs for office equipment (OJ 2001 L 172, p. 1).

26 Secondly, it is also clear from the actual wording of the Treaty, in particular, Article 6 EC and the first subparagraph of Article 152(1) EC, that the requirements of environmental protection, on the one hand, and protection of human health, on the other, must be integrated into the definition and implementation of all the Community policies and activities referred to in Article 3 EC. An international agreement could therefore be properly approved on the basis of an article such as Article 133 EC, even though it pursued, primarily or subsidiarily, objectives of an environmental nature. In the present case, recourse to the latter article is particularly necessary since the Convention is essentially concerned with the regulation of international trade in hazardous chemicals and not national regulations governing their production or marketing, which are matters incidental to the import and export of such products. As the Court has held in connection with the abovementioned agreement concluded between the United States of America and the Community (hereinafter 'the Energy Star agreement'), the Convention is thus an instrument having a 'direct and immediate' impact on trade in hazardous chemicals, whereas the beneficial effects on human health and the environment are only 'indirect and distant'.

27 That conclusion is strongly contested by the Council and by all the interveners. The interveners contend that, in so far as the Convention does not establish any mechanism for the mutual recognition of rules on the labelling of hazardous chemicals and seeks rather to monitor, or indeed restrict, trade in such products rather than encourage it, it is closer to the Cartagena Protocol on Biosafety than to the Energy Star agreement which, for its part, was specifically designed to enable manufacturers, under a mutual procedure for the recognition of registrations, to use a common logo and, therefore, to stimulate supply and demand in energy-efficient products. When called on to give a decision, in particular, on the appropriate legal basis for concluding that protocol, which also establishes a 'prior informed consent procedure', the Court held, in paragraph 33 of its Opinion 2/00 of 6 December 2001 ([2001] ECR I-9713), that that procedure is a typical instrument of environmental policy so that Article 175(1) EC was the appropriate legal basis for conclusion of the protocol on behalf of the Community. Similar considerations apply in this case with regard to the conclusion of the Convention.

28 As regards the actual aims of the Convention, the Council and the interveners therefore refer to the numerous recitals in its preamble mentioning the hazards and harmful impact of chemicals and pesticides on human health and the environment, and to Article 1 thereof, recording the will of the parties to encourage not international trade in such chemicals but the sharing of responsibility and cooperation between the parties in the field of international trade in such products in order to protect human health and the environment against any damage, and to contribute to the environmentally sound use of those products. A reading of that article thus clearly confirms the predominantly environmental aim of the Convention, as does Article 2(f) thereof, according to which 'exports' and 'imports' of chemicals include all movements of such products between parties to the Convention, other than transit operations, whatever the purpose pursued.

29 Similarly, several important provisions of the Convention clearly highlight the primary importance of the objectives of protecting health and the environment as compared with the wish, attributed by the Commission to the parties to the Convention, to promote, facilitate or regulate international trade in the products concerned. In addition to Articles 10 and 11 of the Convention, concerning the PIC procedure properly so called, the Council and the interveners refer more particularly, in that connection, to the provisions concerning notification of national regulatory action intended to ban or severely restrict chemicals (Article 5), the procedure to be followed for listing chemicals in Annex III to the Convention or to remove them (Articles 7 to 9), the rules on the labelling of such products (Article 13), the exchange of information of all kinds on chemicals covered by the Convention (Article 14), the creation or strengthening of infrastructures and of national institutions in order to apply the Convention effectively, in particular by setting up registers and databases containing information on the safety of chemicals (Article 15) and technical assistance to be given to developing countries and countries with economies in transition (Article 16).

30 In the view of the Council and the interveners, finally, the fundamentally environmental nature of the Convention is clearly apparent from the context in

which it was adopted. The Council observes first, in that regard, that the Convention is directly built upon the voluntary prior informed consent procedure established by the UNEP and the FAO, that is to say, in a non-commercial framework, and that it was the governing councils of the UNEP and the FAO which jointly convened the parties to a conference with a view to preparing and adopting the Convention and also played an essential part in the management of the Convention since, under Article 19(3) of the Convention, '[t]he secretariat functions for this Convention shall be performed jointly by the Executive Director of UNEP and the Director-General of FAO, subject to such arrangements as shall be agreed between them and approved by the Conference of the Parties'.

31 The Council then points out that the Convention also echoes Chapter 19 of Agenda 21, adopted at the United Nations Conference on the Environment and Development, held in Rio de Janeiro (Brazil) from 3 to 14 June 1992. Entitled 'Environmentally sound management of toxic chemicals including prevention of illegal international traffic in toxic and dangerous products', that chapter refers expressly to generalisation of the PIC procedure in order to strengthen the sound management of toxic chemicals.

32 Finally, the Convention is one of the core agreements referred to at the World Summit on Sustainable Development held in Johannesburg (South Africa) from 26 August to 4 September 2002. The plan of action adopted at the end of that summit expressly calls on all the parties (in paragraph 23(a)) to promote rapid ratification and implementation of that instrument because of its beneficial effects on human health and the environment.

33 All those factors therefore clearly militate in favour of recourse to Article 175(1) EC. The Council and the interveners refer in that connection to a number of Community agreements or regulations that contain provisions of a commercial nature but are nevertheless based, because of their predominantly environmental aim, on the latter article, on Article 130s of the EC Treaty (now, after amendment, Article 175 EC) or on Article 130s of the EEC Treaty (which became, after

amendment, Article 130s of the EC Treaty). Particular cases are Council Decision 93/98/EEC of 1 February 1993 on the conclusion, on behalf of the Community, of the Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel Convention) (OJ 1993 L 39, p. 1), Council Regulation (EEC) No 2455/92 of 23 July 1992 concerning the export and import of certain dangerous chemicals (OJ 1992 L 251, p. 13), Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1) and Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ 1997 L 61, p. 1).

Findings of the Court

34 It must be borne in mind at the outset that, according to settled case-law, the choice of the legal basis for a Community measure, including one adopted with a view to conclusion of an international agreement, must be based on objective factors which are amenable to judicial review and include in particular the aim and content of the measure (see Case 45/86 *Commission* v *Council*, cited above, paragraph 11; Case C-300/89 *Commission* v *Council* (the '*Titanium dioxide* case') [1991] ECR I-2867, paragraph 10; Case C-268/94 *Portugal* v *Council* [1996] ECR I-6177, paragraph 22; Opinion 2/00, cited above, paragraph 22; and Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, paragraph 45).

35 If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component (see Case C-36/98 *Spain* v *Council* [2001] ECR I-779, paragraph 59; Case C-211/01 *Commission* v *Council* [2003] ECR I-8913, paragraph 39; and Case C-338/01 *Commission* v *Council* [2004] ECR I-4829, paragraph 55).

36 Exceptionally, if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases (see, to that effect, Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 31; C-281/01 *Commission* v *Council*, cited above, paragraph 35; and Case C-211/01 *Commission* v *Council*, cited above, paragraph 40).

37 In this case, as the Council and all the interveners have indicated in their written observations or oral submissions, it cannot be denied that the protection of human health and the environment was the most important concern in the mind of the signatories of the Convention. That objective is clearly apparent not only from a reading of the preamble to the Convention but also from its actual text, in which several provisions unequivocally confirm the importance of that objective.

38 That is true, in particular, of Article 5 of the Convention, which establishes a procedure for the exchange of information concerning actions taken by the parties to the Convention in order to ban or severely restrict the use of a chemical product on their territory, and from Article 12 of the Convention, which imposes on the same parties an obligation to send an export notification to the importing party where a banned or severely restricted chemical is exported from their territory and which, with a view to ensuring transparency, also calls on the latter party formally to acknowledge receipt of that notification. As the Advocate General observed in point 37 of her Opinion, those articles are intended, in essence, to ensure that no party, in particular a developing country, is confronted with imports of hazardous chemicals without first having had an opportunity to take the requisite precautions to protect human health and the environment.

39 Similarly, it is appropriate to mention Articles 10 and 11 of the Convention which, while setting out the obligations relating to imports and exports of chemicals listed

in Annex III to the Convention, also contain certain rules — for example in Article 10(9)(b) and Article 11(1)(c) — concerning the domestic production and management of those products, with a view to ensuring a high level of protection of health and the environment, regardless of the origin or provenance of the chemicals in question.

40 Finally, reference may also be made, in this context, to Articles 13 to 16 of the Convention, which mention, in particular, the establishment of a safety data sheet (Article 13(4)), the exchange of information of all kinds on products covered by the Convention, including information of a toxicological and ecotoxicological nature or relating to the safety of such products (Article 14(1)(a)) and access for the public to information on chemical handling and accident management and on alternatives that are 'safer for human health or the environment' (Article 15(2)). Those various provisions and, also, Article 16 of the Convention, concerning technical assistance for developing countries or countries with economies in transition, clearly draw attention to the need to ensure the safety of chemicals and to provide for healthy and sustainable management thereof. Moreover, the Convention expressly authorises the parties 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 compatible with the provisions of the Convention and is in accordance with international law (Article 15(4)).

41 A reading of the foregoing provisions thus discloses the importance of the environmental and health components in the scheme of the Convention. As the Council has rightly pointed out, such importance is also apparent in the international spheres in which the Convention was discussed or negotiated (UNEP and FAO, and also the January 1992 Rio de Janeiro conference and the 2002 Johannesburg Summit), and in discussions at Community level, swift ratification of the Convention in particular being one of the priority actions identified in

Article 7(2)(d) of Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme (OJ 2002 L 242 , p. 1).

42 Accordingly, it cannot be inferred from the foregoing paragraphs that the commercial component of the Convention is purely incidental. A reading of the provisions of the Convention and, more particularly, of its articles concerning the PIC procedure, prompts the conclusion that the Convention also contains rules governing trade in hazardous chemicals and having direct and immediate effects on such trade (see, to that effect, Opinion 2/00, cited above, paragraph 37, and Case C-281/01 *Commission* v *Council*, cited above, paragraphs 40 and 41).

43 Evidence of the presence of such rules is to be found in Article 1 of the Convention, according to which the parties affirm that their aim is to promote shared responsibility and cooperative efforts 'in the international trade of certain hazardous chemicals' and also in the decision at issue in these proceedings. The Council explicitly recognises, in the third recital in the preamble thereto, that the Convention 'is an important step in improving the international regulation of trade in certain hazardous chemicals and pesticides in order to protect human health and the environment from potential harm and to promote the environmentally sound use of such substances'. It is clearly therefore through the adoption of measures of a commercial nature, relating to trade in certain hazardous chemicals or pesticides, that the parties to the Convention seek to attain the objective of protecting human health and the environment.

44 In this context, it is also appropriate to observe that, although, as the Council and several interveners have asserted in their submissions, the informed consent procedure is in fact a typical instrument of environmental policy, its implementation under the Convention is governed by provisions which directly regulate the trade in the products that it covers. It is clear from the very title of the Convention and from

Article 5(6) thereof — read in conjunction with Annex II(c)(iv) to the Convention — that the Convention applies only to certain hazardous chemicals and pesticides which are traded internationally, that in turn being an essential precondition for the listing of such products in Annex III to the Convention and, therefore, for their being subject to the PIC procedure. Such an explicit link between trade and the environment was lacking in the Cartagena Protocol examined by the Court in Opinion 2/00, cited above.

45 Subsequent to the biological diversity convention signed by the European Economic Community and its Member States in June 1992 and approved by Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ 1993 L 309, p. 1), the main purpose of the Cartagena Protocol is in fact, as the Court observed in paragraph 34 of Opinion 2/00, the protection of biological diversity against the harmful effects which could result from activities that involve dealing with live modified organisms, in particular from their transboundary movement. Trading in such organisms is therefore merely one of the aspects governed by that protocol, whereas, within the scheme of the Convention, it constitutes the element upon which application of the PIC procedure is conditional.

46 As defined in the Convention, that procedure also involves a number of measures that must be classified as measures 'governing' or 'regulating' international trade in the products concerned and therefore fall within the scope of the common commercial policy. Reference may in particular be made, in that connection, to the obligation imposed on the parties to the Convention to establish the import regime applicable to the products that are subject to that procedure (Article 10(1) to (5)), the disclosure of the essential elements of that regime to any natural or legal person with an interest (Article 10(8)) or the obligation imposed on exporting parties to ensure compliance by exporters within their jurisdiction with the regimes laid down by the importing parties and, in particular, to prohibit, subject to clearly circumscribed exceptions, any export of the products listed in Annex III to the

Convention to a party to the Convention which has not notified to the secretariat the import regime applicable to those products or has merely notified to it an interim response not containing a decision concerning the interim import regime (Article 11(1)(b) and (2)).

47 Article 10(9) of the Convention — requiring the parties thereto that have decided not to consent to the import of a specific chemical or to consent thereto only under certain conditions, or to ban or restrict simultaneously the import of the product, whatever its provenance, and domestic production of that product — is, in that connection, particularly indicative of the close links existing, within that agreement, between the commercial and environmental policies. In so far as that article is also concerned with domestic production of the chemicals concerned, it is undeniable that it falls within the scope of the policy of protecting human health and the environment. At the same time, however, it cannot be denied that such a provision has a clear commercial aspect since a ban or restriction imposed by the importing parties must apply to any import of the products concerned, whatever their provenance. Countries that have not signed the Convention are therefore also covered by that provision, which is liable to have a direct impact on trade from or to those countries.

48 Finally, Article 13 of the Convention and, more particularly, paragraphs 2 and 3 thereof imposing an obligation of appropriate labelling when hazardous chemicals are exported may also be included among the Convention rules 'governing' or 'regulating' international trade in the products in question. Moreover, the impact of the Convention on international trade is further confirmed by Article 13(1), under which the World Customs Organisation is called on to assign to the individual chemicals or groups of chemicals listed in Annex III to the Convention specific Harmonised System customs codes, which must appear on the shipping document for the chemicals in question.

49 Those findings concerning the commercial component of the Convention cannot be called in question by the fact that the Convention tends more to restrict trade in such products than to promote it. As the Commission has rightly pointed out in its written submissions, numerous Community measures have been adopted on the basis of Article 133 EC or, previously, Article 113 of the EC Treaty (now, after amendment, Article 133 EC), even though they were explicitly designed to restrict, or indeed prohibit entirely, imports or exports of certain products (see, in that connection, in particular, Case C-70/94 *Werner* [1995] ECR I-3189, paragraph 10; Case C-83/94 *Leifer* [1995] ECR I-3231, paragraph 10; and Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 26).

50 As regards the fact, referred to by several interveners, that other similar Community agreements or regulations are based on Article 130s of the EEC or EC Treaties or on Article 175 EC, it is entirely irrelevant in the context of the present case. In fact, the legal basis for an act must be determined having regard to its own aim and content and not to the legal basis used for the adoption of other Community measures which might, in certain cases, display similar characteristics (see, in particular, Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857, paragraph 28, regarding, specifically, the choice of legal basis for Regulation No 259/93, which is relied on by the Council and a number of interveners in the present case in support of recourse to Article 175 EC).

51 Having regard to all the foregoing considerations, and as is also clear from the express terms of the eighth recital in the preamble to the Convention, according to which the commercial and environmental policies of the parties to the Convention should be mutually supportive with a view to achieving sustainable development, it must therefore be concluded that the Convention includes, both as regards the aims pursued and its contents, two indissociably linked components, neither of which can be regarded as secondary or indirect as compared with the other, one falling within the scope of the common commercial policy and the other within that of protection

of human health and the environment. In accordance with the case-law cited in paragraph 36 of the present judgment, the decision approving that Convention on behalf of the Community should therefore have been based on the two corresponding legal bases, namely, in this case, Articles 133 EC and 175(1) EC, in conjunction with the relevant provisions of Article 300 EC.

52 Admittedly, and as the Court held, in substance, in paragraphs 17 to 21 of the *Titanium dioxide* case, cited above, recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of the Parliament (see also, to that effect, Joined Cases C-164/97 and C-165/97 *Parliament* v *Council* [1999] ECR I-1139, paragraph 14, and Case C-338/01 *Commission* v *Council*, cited above, paragraph 57). In this case, however, no such consequence follows from recourse to both Article 133 EC and Article 175(1) EC at the same time.

53 First, the Convention does not fall within the category of agreements which, under Article 133(5) EC, require unanimity within the Council, so that additional recourse to Article 133 EC could not in this case have any impact on the voting rules applicable within the Council, since the latter provision provides in principle, in the same way as Article 175(1) EC, for recourse to qualified majority voting.

54 Second, recourse to Article 133 EC jointly with Article 175(1) EC is likewise not liable to undermine the Parliament's rights because, although the first-mentioned article, read in conjunction with the first subparagraph of Article 300(3) EC, does not provide for consultation of that institution prior to the conclusion of an agreement in the area of commercial policy, the second article, on the other hand, does lead to such a result. In contrast to the situation at issue in the abovementioned *Titanium dioxide* case, the use of a combination of legal bases does not therefore in this case involve any encroachment upon the Parliament's rights.

55 Finally, it is important to note that, by basing the decision approving the Convention on the dual legal basis of Article 133 EC and Article 175(1) EC, the Community is also giving indications to the other parties to the Convention both with regard to the extent of Community competence in relation to that Convention which, as has been shown earlier, falls both within the scope of the common commercial policy and within that of the Community environmental policy, and with regard to the division of competences between the Community and its Member States, a division which must also be taken into account at the stage of implementation of the agreement at Community level.

56 Having regard to all the foregoing, it is therefore necessary to annul the contested decision inasmuch as it is based solely on Article 175(1) 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.

Costs

57 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Under the first subparagraph of Article 69(3) of the same rules, the Court may nevertheless order that the costs be shared or decide that each party is to bear its own costs where each party succeeds on some and fails on other claims, or where the circumstances are exceptional. Since the Commission and the Council have each been partially unsuccessful in this case, they should bear their own costs. Pursuant to Article 69(4) of the Rules of Procedure, the Member States and institutions that have intervened in the proceedings should bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Annuls Council Decision 2003/106/EC of 19 December 2002 concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade;**

2. **Orders the Commission of the European Communities and the Council of the European Union to bear their own costs;**

3. **Orders the French Republic, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Finland, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.**

[Signatures]