

which do not pertain to commercial policy.

Thus, as regards finance, the agreement, pending the setting up of the Common Fund, recommends the financing of stocks on the part of producers and consumers, which comes within the powers of the Member States. It also appears that other fields will be dealt with by the agreement, in particular working conditions, technological assistance, the co-ordination of research programmes and consultations in tax matters. Finally and above all the main "technical" objective pursued by the negotiations is that of the stabilization of prices; however, concerted action on the international prices of a product does not constitute a direct action on the volume of trade and thus does not come under commercial policy.

(c) A further argument in favour of negotiation and signature by the Member States is provided by the fact that the agreement is to apply to "dependent territories". The French Overseas Territories, in distinction to the Overseas Departments, are not included in the

scope of the Treaty; Community powers do not extend to the overseas territories and as far as they are concerned only France is entitled to represent them. The representation of dependent territories would at the very least require that France should participate in the negotiations.

(d) The Commission's claim to have exclusive powers to negotiate the agreement on rubber has no legal basis. Furthermore, the Commission's reasoning is not free from bias: the Court is asked, first, to define the sphere of application of Article 113 so as to include in it policies which are clearly not "commercial", the purpose being to provide the basis for an exclusive competence of the Community to take part in agreements, which is, to say the least, arguable; next the Court is asked to rule that, even if the mixed-type character of the powers is incontestable, the Community alone must negotiate and conclude international agreements, and all on grounds of expediency. The Court is thus actually being asked not to apply Community law for reasons of expediency which are in any event very arguable.

The reasoning of the Court

By a request dated 13 November 1978 the Commission has asked the Court to give its opinion in pursuance of the second subparagraph of Article 228 (1) of the EEC Treaty on the compatibility with the Treaty of the draft International Agreement on Natural Rubber which is the subject of negotiations in the United Nations Conference on Trade and Development (hereinafter referred to as "UNCTAD"), and, more particularly, whether the Community is competent to conclude the agreement in question.

- 2 The Commission has taken this step following a divergence of view which has become apparent between itself and the Council on the question of the delimitation of the respective powers of the Community and of the Member States to negotiate and conclude the agreement in question. The views for which the Commission and the Council contend on this subject may be summarized as follows:

According to the Commission, the agreement envisaged comes entirely, or at least in essentials, within the context of Article 113 of the EEC Treaty relating to the common commercial policy. On that basis the negotiation and conclusion of the agreement come within the Community's exclusive powers; consequently the Community must assume, through the intermediary of its own institutions, the whole of the rights and obligations attached to its status as a Contracting Party to the agreement, must participate on the same footing as the other parties in the institutions to be set up within that framework and be entitled to vote there in its own right and to exercise such right by its own representatives alone.

According to the Council the subject-matter of the agreement falls outside the framework of commercial policy and thus calls for a division of powers between the Community and the Member States so that the agreement must be concluded, following the pattern of other similar agreements, according to the technique of the so-called "mixed-type" agreement, that is to say, by the Community and the Member States jointly. The Council takes the view that that formula, well tried in the context of association agreements, negotiations entered into in the context of the "North-South dialogue" and the commodity agreements previously concluded, have made it possible to assert the unity of the Community in a fully satisfactory manner on the international scene.

- 3 It appears from the foregoing that the right of the Community to participate in the agreement envisaged is not in itself contested. The only point of disagreement consists in determining whether the subject-matter of the agreement comes entirely within the powers of the Community or whether it may possibly give rise to a division of powers in such a way as to justify the joint participation in the agreement of the Community and of the Member States.

I — History and state of the proceedings

- 4 The participation of the Community in international commodity agreement is not entirely new. The Community is indeed a party to the International Wheat Agreements, 1967 and 1971, the International Cocoa Agreements, 1972 and 1975, the International Coffee Agreement 1976, and the Fourth and Fifth International Tin Agreements, 1970 and 1975 (for the most recent agreements in the above order see: Official Journals 1974, L 219, page 34 (wheat), 1976, L 321, page 29 (cocoa), 1976, L 309, page 28 (coffee) and 1976, L 222, page 1 (tin)). All those agreements were concluded jointly by the Community and the Member States. As regards the Community they were brought into force on the basis of Article 113 of the EC Treaty. The Community has also participated in the negotiation of international agreements on sugar and on olive oil but the last resort it did not think it expedient to accede to those agreements. It should be noted that there is also to be found in some bilateral commercial agreements concluded by the Community on the basis of Article 113 clauses relating to trade in certain commodities or similar products which may include supply guarantees.

- 5 As the negotiations which are in progress on natural rubber were undertaken within the framework of UNCTAD, it is appropriate to recall, first, certain features of the constitution of that body which were laid down by Resolution 1995 (XIX) of 30 December 1964 of the United Nations General Assembly. In the wording of that resolution the functions of UNCTAD are to "promote international trade, especially with a view to accelerating economic development, particularly trade between countries at different stages of development, between developing countries and between countries with different systems of economic and social organization", and to "formulate principles and policies on international trade and related problems of economic development". In this respect it is charged to "initiate action... for the negotiation and adoption of multilateral legal instruments in the field of trade" (II, paragraphs 3 (a), (b) and (e) of the resolution).

- 6 On the basis of those provisions the General Assembly adopted on 1 May 1974 a Declaration and Programme of Action on the Establishment of a "New International Economic Order" (Resolutions 3201 and 3202 (S-VI) and, on 12 December 1974, the "Charter of the Economic Rights and Duties of States" (Resolution 3281 XXIX)). Amongst the principles of the "New Economic Order" Resolution 3281 (S-VI) mentions the "just and equitable relationship between the prices of raw materials, primary commodities, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy" (paragraph 4 (j)).

Resolution 3202 (S-VI) requires all efforts to be made "to take measures to reverse the continued trend of stagnation or decline in the real price of several commodities exported by developing countries, despite a general rise in commodity prices, resulting in a decline in the export earnings of these developing countries", (I, paragraphe 1 (e)). The same resolution recommends the "expeditious formulation of commodity agreements where appropriate, in order to regulate as necessary and to stabilize the world markets for raw materials and primary commodities" and the "preparation of an over-all integrated programme, setting out guidelines and taking into account the current work in this field, for a comprehensive range of commodities of export interest to developing countries" (I, paragraph 3 (a) (iii) and (iv)). On the basis of those resolutions UNCTAD adopted on 30 May 1976, at the time of the Nairobi session, Resolution 93 (IV) which bears the title "Integrated Programme for Commodities" (hereinafter referred to as the "*Nairobi Resolution*").

- 7 The Nairobi Resolution, which forms the immediate reference framework of the negotiations on natural rubber, contains various indications as to the nature of the agreement envisaged. The resolution recalls that what is required is a programme for commodities whose export is of interest to developing countries and that one of the major objectives must be to reach decisions "to improve market structures" for such products. It mentions also intentions with regard to the setting up of a Common Fund extending to various commodities. It next recognizes the need to conduct international trade on the basis of mutual advantage and equitable benefits taking into account the interest of all States, particularly those of the developing

countries; finally, it emphasizes the need for "an over-all approach and an integrated programme for commodities which is a programme of global action to improve market structures in international trade in commodities of interest to developing countries, and which will be consistent with the interests of all countries, particularly those of the developing countries, and assure a comprehensive view of the various elements involved while respecting the characteristics of individual commodities" (paragraphs 7 and 14 respectively).

8 In the operative part (under I) of the Resolution, the overriding basic objective of the Integrated Programme is described as consisting in "improving the terms of trade of developing countries" and in the elimination of the "economic imbalance between developed and developing countries". Accordingly, the following objectives are agreed:

1. To achieve stable conditions in commodity trade, by maintaining prices at levels which would:
 - (a) be remunerative and just to producers and equitable to consumers;
 - (b) take account of world inflation and changes in the world economic and monetary situations;
 - (c) promote equilibrium between supply and demand within expanding world commodity trade;
2. To improve and sustain the real income of individual developing countries through increased export earnings and to protect them from fluctuations in export earnings, especially from commodities;
3. To seek to improve market access and reliability of supply for the products in question;
4. To diversify production in developing countries and promote their industrialization;
5. To improve the competitiveness of natural products as against synthetic products;
6. To improve market structures in the products concerned;

7. To improve marketing distribution and transport systems for commodity exports of developing countries.

9 In Part II the Nairobi Resolution gives a non-exhaustive list of the products concerned, namely bananas, bauxite, cocoa, coffee, copper, cotton, hard fibres, iron ore, jute, manganese, meat, phosphates, rubber, sugar, tea, tropical timber, tin and vegetable oils. A large number of those products are of interest primarily to the developing countries; as regards certain of them such as iron ore, meat, sugar and vegetable oils, the Community is also a producer. It should be noted that several of these products already form the subject of agreements in force, as is indicated above.

10 In Part III the resolution, after deciding that steps shall be taken towards the negotiation of a Common Fund, sets out the international measures to be applied in the context of the Integrated Programme, in particular:

- Setting up of international commodity stocking arrangements;
- Harmonization of stocking policies;
- Establishment of pricing arrangements;
- The adoption of supply management measures, including export quotas and production policies and, where appropriate, multilateral long-term supply and purchase commitments;
- Improvement and enlargement of financing facilities for the stabilization of export earnings of developing countries;
- Improvement of market access;
- Improvement of the infrastructure and industrial capacity of developing countries;
- Consideration of special measures for commodities whose problems cannot be adequately solved by stocking.

11 At the beginning of 1978, following a number of preparatory meetings, UNCTAD decided to open negotiations for the conclusion of an International Agreement on Natural Rubber. These were the first negotiations undertaken under the Nairobi Resolution on the "Integrated Programme".

12 For the purposes of these negotiations the Commission sent to the Council on 22 November 1977 and 24 May 1978 communications concerning guidelines for a Community position. Those documents take stock of the preparatory work performed within UNCTAD, in which the Commission had taken part, and put forward certain guidelines for the preparation of the negotiations still to be accomplished. As it was expected that the negotiations would start on 13 November 1978 the Commission on 5 October 1978 put to the Council a "recommendation" under Article 113 (3) of the Treaty, including the draft of a "Decision on the negotiation of an international agreement on rubber" and a draft of "Directives for negotiation". Under the draft decision, the Commission was to be "authorized to conduct, on behalf of the Community, . . . negotiations in accordance with the directives" laid down by the Council and "in consultation with the special committee provided for in Article 113 of the Treaty".

13 In the statement of the reasons on which its recommendation was based, the Commission put forward the following grounds for the participation of the Community in the agreement: "All the instruments of the agreement directly and substantially affect the volume and conditions of international trade in natural rubber and will therefore fall within the Community's competence on the basis of Article 113 of the Treaty of Rome. As a consequence the financial implementation of the agreement on natural rubber shall be assumed by the Community itself through a direct contribution from the Community budget."

14 After considering that recommendation the Council examined the questions relating to the participation of the Community in the agreement envisaged. At its meeting on 17 October 1978 it approved a procedural decision prepared by the Committee of Permanent Representatives entitled "Procedures for the Committee's Participation in the Conference" and worded as follows:

"The Community and its Member States must be represented in the negotiations on natural rubber by a Community delegation and by nine national delegations. As is customary, the Community delegation will be a joint one (Commission and a representative of the President of the Council, plus one official from each Member State).

Negotiations will be conducted from a common standpoint agreed in advance.

With regard to matters which come within the scope of the Community's powers, the Commission is responsible for negotiating on behalf of the Community.

With regard to other matters of particular interest to the Community, joint action will be taken throughout the negotiations.

The Commission representative will usually act as joint spokesman in accordance with the procedure laid down in the case of joint delegations. The views expressed by the Member States must be in line with the common standpoint defined in advance and must support and develop the latter.

Should difficulties arise at the Conference, the delegations must refer them to the Council in Brussels."

- 15 In the report submitted on this matter to the Council by the Committee of Permanent Representatives there is a statement to the effect that is a pragmatic formula based on the detailed arrangements already laid down for other negotiations on commodities and that it is to be understood that that formula in no way prejudices the legal positions in this matter put forward by the various delegations and more particularly by the Commission. A note to that report states that in the Commission's view the negotiation of the agreement in question comes within the Community's exclusive powers under Article 113 of the EEC Treaty. On the other hand the delegations take the view that the negotiations occupy a wider framework than that envisaged by Article 113 and some of the delegations consider that Articles 113 and 116 apply.
- 16 It was by virtue of the above-mentioned decision of the Council that negotiations were undertaken within UNCTAD on the date arranged. It should be added that on 15 November 1978 the Council, still following proposals from the Commission, adopted a "common position" for the negotiation of the agreement and it was understood that the work for the final formulation of that position would be pursued on the basis of co-ordination on the spot in Geneva and that in the event of difficulties the officers of the Council in Brussels would be apprised of the situation.

- 17 The recommendation presented by the Commission under Article 113 on the negotiation procedures was thus by implication rejected by the effect of the decision of 17 October 1978 and the Commission therefore immediately lodged with the Court a request for an opinion in pursuance of Article 228 so as to clarify the divergence of views between the Commission and the Council. The Council lodged its written observations on 19 February 1979. At the same time statements of case were lodged in support of the Council's observations by the Government of the French Republic and the Government of the United Kingdom. The Court invited the Commission and the Council to attend a hearing in closed session, which took place on 9 May 1979, at which the two institutions were enabled to give explanations with regard to their position and reply to questions put by a number of Members of the Court. The Governments of the Member States had also been informed of this hearing but none of them submitted observations on that occasion. The Advocates General were heard by the Court in closed session in accordance with Article 108 of the Rules of Procedure.

II — Analysis of the draft Agreement

- 18 The Commission referred this matter to the Court at the time when the negotiations, following prior conversations conducted within UNCTAD, were on the point of being officially opened. In these circumstances the documents submitted to the Court represented what was still a preliminary stage of the texts on which the negotiations were to take place. Two negotiating sessions took place after the lodging of the Commission's request; the first of these began as foreseen on 13 November 1978 whilst the second, for which preparations had been made in a supplementary communication from the Commission to the Council on the state of negotiations, took place during March and April 1979.
- 19 Following the latter session, the Commission sent to the Court the negotiating documents reflecting the most recent state of the texts. The most recent stage of the documents is represented by a document from the Chair of the Conference on the subject of the setting-up of a buffer stock for natural rubber, the financing of the stock and its future links with the "Common Fund", a guarantee of a regular supply for the consumer countries and of consultations on national policies regarding supply and demand for rubber. According to the information supplied by the Commission, which was not contested by the Council, this text gave rise to a

consensus between producer and consumer countries. Three other documents emanating from the Legal Drafting Committee and the other committees of the Conference reflect, apart from various subsidiary clauses relating to the operation of the buffer stock, the structural, financial and legal aspects of the agreement. Those texts still contain a number of reservations and variations but, taken as a whole, they make it possible to take cognizance with sufficient accuracy of the essential features of the agreement. For the purposes of this opinion those characteristics may be summarized as follows.

(a) The economic objectives of the Agreement

- 20 The essential purpose of the International Agreement on Rubber is to achieve a balanced growth between the supply and demand for natural rubber with a view to stabilizing its prices around their long-term trend. The function of these prices is to guarantee stable export earnings for the exporting countries whilst ensuring reliability of supplies for the importing countries at a fair price level. Whilst improving by means of this price policy the competitiveness of natural rubber as against artificial rubber and substitutes, the agreement is intended to lead to a harmonization in importing countries of production of synthetic rubber and substitutes with the importation of natural rubber. The agreement as a whole is thus intended to encourage a balanced increase both of production and consumption of natural rubber with a view to alleviating the serious difficulties arising, for the parties concerned, according to the economic outlook, either from surpluses or shortages of the product.
- 21 The objective thus described is to be realized by building up a buffer stock, the purpose of which is to purchase surpluses of rubber at a time when prices are declining and to sell the stocked rubber when prices are rising so as to contain the price within a margin of fluctuation determined in advance. One of the essential stakes in the negotiations is to determine the central reference price and the margins of fluctuation upwards or downwards, the exceeding of which will make possible or compulsory, as the case may be, the intervention of the buffer stock. The reference prices envisaged are not guaranteed prices, either minimum or maximum, but thresholds for triggering the operations of the buffer stock, the market price being determined by the operation of supply and demand. Apart from the normal buffer stock, the aggregate amount of which is fixed at 400 000 tonnes, there is envisaged

the creation of a supplementary contingency stock 150 000 tonnes, intended for intervention where the normal operations of the buffer stock prove to be insufficient to cope with an exceptional price depression.

- 22 The question of financing the operations of the buffer stock was at first the subject of differences of opinion between the delegations, some of which proposed a system of financing by levies on trade in natural rubber, whilst others preferred financing by means of public funds provided by the contracting parties by equal contributions from both the producer group and the consumer group. It appears from the most recent documents that the latter solution prevailed, it being understood, however, that each party will remain free to determine the body whose task it shall be to ensure the payment of the contributions to be provided by it. The same document shows that the International Rubber Council will avail itself of the financing facilities of the Common Fund as soon as the fund is in a position to operate.

(b) Structure of the agreement

- 23 The execution of the provisions of the agreement will be undertaken by the appointment of an "International Natural Rubber Organization". The members of that organization will be the contracting parties and it is to be understood that that expression refers both to the States and to any inter-governmental organization with responsibilities for the negotiation, conclusion and application of international agreements, in particular agreements on commodities. At the present time there is no unanimity as regards the wording of the clause relating to the second possibility; however, it appears settled that the agreement will either mention expressly the European Economic Community as being empowered to be a contracting party or else will use a generic formula which is sufficiently comprehensive to allow the Community to participate in the Agreement.
- 24 The supreme authority of the organization will be the International Rubber Council which is to be composed of all the members of the organization.

The Council is to appoint an executive director and a director of the buffer stock who will have at their disposal the necessary staff to implement the agreement. The Council is to exercise all the powers and to assume all the duties necessary for carrying out the provisions of the agreement. To this extent it will have the power to make regulations with a view in particular to determining the provisions relating to the administration of the buffer stock and the financial rules of the organization. The Council will be empowered to appoint any committee and to delegate to it some of its powers.

- 25 The adoption of decisions within the Council will be governed by provisions the operation of which is well-known in agreements of this kind. The parties are to be divided into two groups: the exporting members and the importing members. Each of these groups will have a total of 1 000 votes. Within the two groups these votes will be divided into two distinct categories; an initial portion of the available votes (from 100 to 200 according to the various versions) will be divided equally amongst the members of the relevant group; the remaining votes (that is to say 800 to 900) will be shared out in proportion to the market shares held by the parties to the agreement in the export or import of rubber as the case may be. The market shares to be taken into consideration for this purpose will be calculated by reference to the customs territory of the contracting parties, which will no doubt lead to the fixing of a market for the Community as a whole. As the Community is, together with the United States of America, one of the two biggest consumers of rubber in the world (22 to 23 % of world imports), it will have a relatively strong position in the group of importers.

- 26 The agreement envisages that the Council will take its decisions by a majority, either a simple majority (referred to as a "distributed simple majority") or a qualified majority (referred to as "a special majority"), according to voting machinery determined as follows: the group of exporting members and the group of importing members will vote separately and a decision will only be adopted if the appropriate majority (two thirds of the votes in the case of a "special majority" and half the votes in the case of a "distributed simple majority") is attained within each of the two groups.

(c) Other clauses

- 27 The draft agreement contains, apart from the usual stylistic clauses, a number of clauses relating to legal administration. These relate in particular to the constitution of the organization, to its financial rules, to complaints in the event of members' failing to fulfil their obligations and to the settlement of disputes.

In addition, mention must be made of several clauses of an economic nature regarding the tasks entrusted to the International Rubber Council as regards in particular studies relating to the improvement of the production and marketing of rubber, the collection and publication of statistical information and, according to proposals made by certain countries participating in the negotiations, social conditions in the rubber industry and the treatment for tax purposes of rubber exports.

III — Preliminary objections to the admissibility of the request

- 28 The Council has expressed doubts as to whether the request made by the Commission is not premature and does not, further, constitute an incorrect use of the procedure of Article 228 inasmuch as its aim is to obtain from the Court a solution of questions which lie outside that procedure. This view was supported by the Government of the French Republic and the Government of the United Kingdom. The French Government in particular expressed the opinion that the Commission's request was inadmissible and that it amounted to a misuse of procedure under Article 228.

As a subsidiary issue the Council has suggested that the Court should in any case stay proceedings until such time as the negotiations have reached a more advanced stage.

(a) The recourse to Article 228

- 29 According to the Council the request for an opinion lodged by the Commission is not of the type envisaged by Article 228. The opinion on which this view seems to be based is that procedure does not lend itself to the settling of questions relating to the division of powers in matters of

external relations or in particular to resolving questions of a general scope relating to the interpretation of Article 113 and to the legitimacy in the light of that provision of the practice of so-called "mixed-type" agreements. The Council adds that the difference of view which has existed for a long time between the two institutions concerning the interpretation of Article 113 of the Treaty ought to find and has hitherto found its solution in the machinery of Article 149 of the Treaty which lays down the conditions in which the Commission is to collaborate in the process of adoption of acts of the Council. The legal basis proposed by the Commission for the adoption of an act by the Council (in internal as in external matters) is an integral part of the Commission's proposal: if the Council considers that the proposed measure may not properly be founded on the legal basis proposed it may, if unanimous, amend that legal basis.

- 32 In previous decisions the Court has emphasized that under the procedure of Article 228, like that of Article 103 of the EAEC Treaty, it is possible to deal with all questions which concern the compatibility with the provisions of the Treaty of an agreement envisaged (Opinion 1/75 of 11 November 1975, [1975] ECR 1355, Part A; Opinion 1/76 of 26 April 1977, [1977] ECR 741, paragraph 10; Ruling 1/78 under Article 103 of the EAEC Treaty of 14 November 1978, [1978] ECR 2151, paragraph 5). In fact, as emerges from those decisions, a judgment on the compatibility of an agreement with the Treaty may depend not only on provisions of substantive law but also on those concerning the powers, procedure or organization of the institutions of the Community. It should also be recalled that the same idea is expressed in Article 107 of the Rules of Procedure of the Court.

- 31 Article 149, on which the Council relies, clearly indicates that where, in pursuance of the Treaty, the Council acts on a proposal from the Commission, the Council may amend that proposal on condition that it is unanimous. However, that provision cannot be interpreted, nor can that method of decision be understood, as freeing the Council in such a case from observing the other rules of the Treaty, in particular those concerning the division of powers between the Community and the Member States. It follows that in case of doubt regarding that division of powers in the matter of the negotiation and conclusion of international agreements Article 149

cannot stand in the way of the right of the Commission or, according to the circumstances, of the Council itself or of the Member States to have recourse to the procedure provided in Article 228 for overcoming such doubts.

(b) The question whether the request is premature

32 The objection as to the premature nature of the reference to the Court derives from the fact that at the time when the Commission lodged its request for an opinion the negotiations were still not in an advanced state. According to the Council there is still not an "agreement envisaged" within the meaning of Article 228 and it is not in these circumstances possible to determine what will be the subject-matter of the agreement and what the clauses of it will be with the necessary exactitude to make it possible to deal, with full knowledge of the facts, with the problem of determining the division of powers between the Community and the Member States in the agreement under negotiation. The French Government, in particular, has drawn attention to the fact that the lodging of the request at this stage might necessitate successive references to the Court according to the development of negotiations, the end of which cannot yet be foreseen. In these circumstances the Council and the Governments which support it take the view that it is necessary at least to await the end of the negotiations so that a proper assessment may be made.

33 In these circumstances the Court has had to consider whether the request for an opinion has been made at the appropriate time and has come to the conclusion that, for two reasons, the Commission's request is admissible at this stage.

34 On the one hand it follows from the reports submitted by the Commission to the Council at the time when it was attempting to define a negotiating mandate that the subject-matter of the agreement envisaged was already known at that time, that is to say before negotiations were commenced. In any event, though there are at this stage there are a number of alternatives still open and differences of opinion on the drafting of given clauses the documents submitted to the Court and the information provided at the

hearing of the parties make it possible to form a sufficiently certain judgment on the question raised by the Commission.

- 35 Secondly, it should not be overlooked that the Commission had an interest in lodging its request immediately after its disagreement with the Council as regards the question of powers to negotiate and conclude the agreement envisaged had become apparent, the more so as similar uncertainties had emerged on the subject of several prior agreements of the same category. Indeed, when a question of powers is to be determined it is clearly in the interests of all the States concerned, including non-member countries, for such a question to be clarified as soon as any particular negotiations are commenced.

IV — The subject-matter and objectives of the agreement envisaged

- 36 As the Council has indicated, the problem of competence which has been submitted to the Court must be examined from two aspects. The first question is whether the agreement envisaged, by reason of its subject-matter and objectives, comes within the concept of common commercial policy referred to in Article 113 of the Treaty. The second question — but only if the first question is answered in the affirmative — is whether, by reason of certain specific arrangements or special provisions of the agreement concerning matters coming within the powers of the Member States, the participation of the latter in the agreement is necessary.

The Court will consider first the general aspects concerning the subject-matter and objectives of the agreement.

- 37 The central question raised by the Commission's request is whether the international agreement on rubber comes as a whole or at least in essentials within the sphere of the "common commercial policy" referred to in Article 113 of the Treaty. It is common ground that the agreement envisaged is closely connected with commercial policy. The difference of views relates to the extent of the sphere of application of Article 113 so that it remains uncertain whether that provision entirely covers the subject-matter of the agreement in question.

38 The Commission is fully aware that the provisions of the Treaty relating to the common commercial policy are brief. However, it recalls that in several decisions the case-law of the Court has contributed towards interpreting those provisions; it mentions in this respect the judgments of 12 July 1973 (Case 8/73, *Massey-Ferguson*, [1973] ECR 908) and of 15 December 1976 (Case 41/76, *Donckerwolcke and Schou*, [1976] ECR 1921), in which the Court emphasized the necessity for a complete and consistent management of the Community's international trade, and Opinion 1/75 of 11 November 1975 ([1975] ECR 1355), where the Court emphasized on the one hand that the concept of commercial policy cannot have for the Community a more restricted meaning than for the States and, on the other hand, the exclusive nature of Community powers in the sphere thus defined. Having regard to these guidelines the Commission considers that a measure of commercial policy must be assessed primarily by reference to its specific character as an instrument regulating international trade, having regard to the links established by the Treaty between the removal of barriers to trade between Member States and the implementation of a common commercial policy. Any restrictive conception of the common commercial policy might, by reason of the disparity as between Member States in the use of instruments for regulating external trade from one Member State to another, entail the maintenance of some barriers to intra-Community trade. Having regard to the fact that the essential object of the agreement envisaged is to stabilize prices for natural rubber this appears to be a characteristic measure for regulating external trade and thus an instrument of commercial policy.

39 The Council, after recalling that the exclusive nature of Community powers in the matter of commercial policy is not in question and that it does not reject the idea of a gradual evolution in this sphere, emphasizes that the common commercial policy nevertheless fulfils a function of its own in the context of the structure of the Treaty inasmuch as it applies to "any measure the aim of which is to influence the volume or flow of trade". Thus Article 113 should be interpreted so as not to render meaningless other provisions of the Treaty, in particular those dealing with general economic policy, including the supply policy for raw materials which remains within the powers of Member States and for which the Council has only, under Article 145, a power of "co-ordination". According to the Council there is here a

close interrelation between the powers of the Community and those of the Member States, since it is difficult to distinguish between international economic relations and international political relations. In this connexion the Council once again draws attention to the fact that rubber is a "strategic product" so that the agreement in question impinges also on the defence policy of Member States. In these circumstances the Council takes the view that the negotiation of the agreement envisaged comes not only under Article 113 of the Treaty but also under Article 116 relating to common action by Member States within the framework of international organizations of an economic character to which they belong.

- 40 The Council also mentions that the negotiations undertaken within UNCTAD with a view to arriving at agreements on a number of commodities must be seen against "the general political background of North-South relations between the industrialized world and the developing countries". According to the Council it is obvious from the very nature of such agreements that, notwithstanding the aim of the negotiators from the consumer countries to obtain a balanced agreement, such agreements contain elements of "non-reciprocity" which are typical of "development aid". This is particularly the case with the price-fixing system provided for in the context of the buffer stock mechanism. These development aid features, which are inherent in the agreement, do not come within the field of commercial policy. The French Government has particularly emphasized this aspect in its observations. It declares that it cannot accept the statement that the whole of the substance of the rubber agreement constitutes commercial policy because, in its opinion, it is a matter of "the performance of a duty of international solidarity excluding commercial considerations".

(a) Consideration of the agreement's links with commercial policy and development problems

- 41 By its special machinery as much as by certain aspects of its legal structure, the International Agreement on Natural Rubber which it is proposed to conclude stands apart from ordinary commercial and tariff agreements which are based primarily on the operation of customs duties and quantitative restrictions. The agreement in question is a more structured instrument in the form of an organization of the market on a world scale and in this way it is distinguished from classical commercial agreements. An answer to the

question which is the subject of the request for an opinion requires a reference to the scope and consequences of these specific characteristics in relation to the concept of common commercial policy as referred to in Article 113 of the Treaty. At the same time consideration must be given to the question whether the link which exists between the agreement envisaged and the development problems to which the Council refers may perhaps exclude the agreement from the sphere of the common commercial policy as defined by the Treaty.

- 42 The Nairobi Resolution, which is the basis of the negotiations in progress on natural rubber, shows that commodity agreements have complex objectives. Whilst stressing the needs of the developing countries the resolution includes many references to mechanisms of a commercial nature and does not overlook the needs of the industrialized countries. As regards, more particularly, the interests of the developing countries, it is true that commodity agreements may involve the granting of advantages which are characteristic of development aid; it must however be acknowledged also that for those countries such agreements respond more fundamentally to the preoccupation of bringing about an improvement in the "terms of trade" and thus of increasing their export earnings. This characteristic is particularly brought out in the agreement in question, which seeks to establish a fair balance between the interests of the producer countries and those of the consumer countries. It is natural that, in negotiating an agreement of this type, the industrialized countries, whilst seeking to defend their own interests, should be obliged to recognize the situation of the producer countries which are negotiating from an economic standpoint which is very different from their own and that a reasonable compromise must be found between these points of view so as to make an agreement possible.

- 43 The link between the various agreements on commodities which were emphasized by the Nairobi Resolution must also be taken into account. As an increasing number of products which are particularly important from the economic point of view are concerned, it is clear that a coherent commercial policy would no longer be practicable if the Community were not in a position to exercise its powers also in connexion with a category of agreements which are becoming, alongside traditional commercial agreements, one of the major factors in the regulation of international trade.

- 44 Following the impulse given by UNCTAD to the development of this type of control it seems that it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A "commercial policy" understood in that sense would be destined to become nugatory in the course of time. Although it may be thought that at the time when the Treaty was drafted liberalization of trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the Community's developing a commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalization of trade.
- 45 Article 113 empowers the Community to formulate a commercial "policy", based on "uniform principles" thus showing that the question of external trade must be governed from a wide point of view and not only having regard to the administration of precise systems such as customs and quantitative restrictions. The same conclusion may be deduced from the fact that the enumeration in Article 113 of the subjects covered by commercial policy (changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade) is conceived as a non-exhaustive enumeration which must not, as such, close the door to the application in a Community context of any other process intended to regulate external trade. A restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.
- 46 Moreover, when the whole canvas of existing and planned agreements is considered it appears that as far as the Community is concerned a wide range of interests is involved in the negotiation of those agreements and that there are connexions with the most varied spheres in which the Community has undertaken responsibilities. Thus, alongside agreements dealing, like the

rubber agreement, with products with regard to which (always excepting of course the problem of substitution products) the Community appears only in the position of a consumer, there are other agreements, for example those concerning products such as wheat, oils and fats and sugar, in which the Community is interested also as a producer and by which its export policy, expressly mentioned in Article 113 as being amongst the objectives of the common commercial policy, is affected at the same time import policy. Several of the agreements belonging to this category are furthermore directly related to the execution of the common agricultural policy.

(b) The agreement's links with general economic policy

- 47 In its arguments the Council has raised the problem of the interrelation within the structure of the Treaty of the concepts of "economic policy" and "commercial policy". In certain provisions economic policy is indeed considered primarily as a question of national interest; such is the meaning of that concept in Articles 6 and 145 which, for that reason, prescribe for the Member States nothing more than a duty to ensure co-ordination. In other provisions economic policy is envisaged as being a matter of common interest as is the case with Articles 103 to 116, which are grouped together in a title devoted to the "economic policy" of the Community. The chapter devoted to the common commercial policy forms part of that title.
- 48 The considerations set out above already form to some extent an answer to the arguments relating to the distinction to be drawn between the spheres of general economic policy and those of the common commercial policy since international co-operation, inasmuch as it does not belong to commercial policy, would be confused with the domain of general economic policy. If it appears that it comes, at least in part, under the common commercial policy, as has been indicated above, it follows clearly that it could not, under the name of general economic policy, be withdrawn from the competence of the Community.
- 49 Having regard to the specific nature of the provisions relating to commercial policy in so far as they concern relations with non-member countries and are founded, according to Article 113, on the concept of a common policy, their scope cannot be restricted in the light of more general provisions relating to

economic policy and based on the idea of mere co-ordination. Consequently, where the organization of the Community's economic links with non-member countries may have repercussions on certain sectors of economic policy such as the supply of raw materials to the Community or price policy, as is precisely the case with the regulation of international trade in commodities, that consideration does not constitute a reason for excluding such objectives from the field of application of the rules relating to the common commercial policy. Similarly, the fact that a product may have a political importance by reason of the building up of security stocks is not a reason for excluding that product from the domain of the common commercial policy.

50 It is in the light of the same considerations that the the connexion between Article 113 and Article 116 must be determined in the context of the chapter of the Treaty devoted to the common commercial policy. Whilst those two provisions contribute to the same end inasmuch as their objective is the realization of a common policy in international economic relationships, as a basis for action the two articles are founded on different premises and consequently apply different ideas. According to Article 113 the common commercial policy is determined by the Community, independently, that is to say, acting as such, by the intervention of its own institutions; in particular, agreements entered into under that provision are, in the terms of Article 114, "concluded ... on behalf of the Community" and accordingly negotiated according to the procedures set out in those provisions and in Article 228. Article 116 on the other hand was conceived with a view to evolving common action by the Member States in international organizations of which the Community is not part; in such a situation the only appropriate means is concerted, joint action by the Member States as members of the said organizations.

51 In this case a problem relating to the demarcation of the sphere of application of Articles 113 and 114 on the one hand and 116 on the other hand arises from the fact that the agreements on commodities are at present being negotiated within UNCTAD. The Court has already given its views on this problem in its Opinion 1/75 which itself concerned an international agreement arrived at within the framework of an international organization (the OECD). In that opinion the Court stressed that what counts with regard to the application of the Treaty is the question whether negotiations undertaken within the framework of an international organization are

intended to lead to an "undertaking entered into by entities subject to international law which has binding force". In such a case it is the provisions of the Treaty relating to the negotiation and conclusion of agreements, in other words Articles 113, 114 and 228, which apply and not Article 116.

V — Problems raised by the financing of the agreement and by other specific provisions

- 52 Consideration must still be given, having regard to what has been stated above as regards correspondence between the objective and purposes of the agreement envisaged and the concept of common commercial policy, whether the detailed arrangements for financing the buffer stock, or certain specific clauses of the agreement, concerning technological assistance, research programmes, the maintenance of fair conditions of labour in the rubber industry and consultations relating to national tax policies which may have an effect on the price of rubber lead to a negation of the Community's exclusive competence.
- 53 As regards the question of financing, the Council and those of the governments which have supported its views state that since those negotiating the agreement have opted for financing by means of public funds, the finances of the Member States will be involved in the execution of the agreement so that it cannot be accepted that such undertakings should be entered into without their participation. The Commission, for its part, takes the view that the question of competence precedes that of financing and that the question of Community powers cannot therefore be made dependent on the choice of financial arrangements.
- 54 As regards the specific clauses mentioned above, the Council states that provisions of this kind lie in any case outside the sphere of commercial policy with the consequence that the negotiation of the agreement envisaged comes from point of view also under Article 116 relating to common action by Member States within international organization.

55 The Court feels that a distinction should be made in this respect between the specific clauses referred to by the Council and the financial provisions which occupy a central position in the structure of the agreement and which, for that reason, raise a more fundamental difficulty as regards the demarcation between the powers of the Community and those of the Member States.

56 The Court takes the view that the fact that the agreement may cover subjects such as technological assistance, research programmes, labour conditions in the industry concerned or consultations relating to national tax policies which may have an effect on the price of rubber cannot modify the description of the agreement which must be assessed having regard to its essential objective rather than in terms of individual clauses of an altogether subsidiary or ancillary nature. This is the more true because the clauses under consideration are in fact closely connected with the objective of the agreement and the duties of the bodies which are to operate in the framework of the International Natural Rubber Organization which it is planned to set up. The negotiation and execution of these clauses must therefore follow the system applicable to the agreement considered as a whole.

57 With regard to the system of financing it should be borne in mind in the first place that, in its recommendation to the Council on 5 October 1978 under Article 113, the Commission had proposed that the application of the financial clauses of the agreement on natural rubber should be effected by the Community itself with a direct contribution from the Community budget. Whilst accepting that this method of financing would be possible having regard to the financial provisions of the EEC Treaty, the Council expressed its preference for financing by the Member States. However, no formal decision has yet been taken on this question. Moreover, there is no certainty as regards the attitude of the various Member States on this particular question and its implications for the apportionment of the financial burdens.

58 Having regard to the uncertainty which exists as regards the final solution to be adopted for this problem, the Court feels bound to have regard to two possible situations: one in which the financial burdens envisaged by the agreement would be entered in the Community budget and one in which the

burdens would be directly charged to the budgets of the Member States. The Court itself is in no position, within the limits of the present proceedings, to make any choice between the two alternatives.

- 59 In the first case no problem would arise as regards the exclusive powers of the Community to conclude the agreement in question. As has been indicated above, the mechanism of the buffer stock has the purpose of regulating trade and from this point of view constitutes an instrument of the common commercial policy. It follows that Community financing of the charges arising would have to be regarded as a solution in conformity with the Treaty.
- 60 The facts of the problem would be different if the second alternative were to be preferred. It cannot in fact be denied that the financing of the buffer stock constitutes an essential feature of the scheme for regulating the market which it is proposed to set up. The extent of and the detailed arrangements for the financial undertakings which the Member States will be required to satisfy will directly condition the possibilities and the degree of efficiency of intervention by the buffer mechanism whilst the decisions to be taken as regards the level of the central reference price and the margins of fluctuation to be permitted either upwards or downwards will have immediate repercussions on the use of the financial means put at the disposal of the International Rubber Council which is to be set up and on the extent of the financial means to be put at its disposal. Furthermore sight must not be lost of the fact that the financial structure which it is proposed to set up will make necessary, as is mentioned in the documents submitted to the Court and reflecting the most recent stage of negotiations, co-ordination between the use of the specific financial means put at the disposal of the future International Rubber Council and those which it might find in the Common Fund which is to be set up. If the financing of the agreement is a matter for the Community the necessary decisions will be taken according to the appropriate Community procedures. If on the other hand the financing is to be by the Member States that will imply the participation of those States in the decision-making machinery or, at least, their agreement with regard to the arrangements for financing envisaged and consequently their participation in the agreement together with the Community. The exclusive competence of the Community could not be envisaged in such a case.

VI — Representation in the agreement of certain “dependent territories” not belonging to the Community

- 61 The French and British Governments have drawn attention to the fact that in the proposed agreement there is a clause relative to the participation of “dependent territories” of the Contracting States. The French Government has stated that it is required to represent, within the framework of the agreement or of similar agreements, the French Overseas Territories which, as distinct from the Overseas Departments, are not included in the European Community; a similar situation exists for the United Kingdom as regards the international representation of dependent territories (such for example as Hong Kong) which do not belong to the Community.
- 62 The territories in question, since they remain outside the sphere of application of the EEC Treaty, are, as regards the Community, in the same situation as non-member countries. Hence, the position of Member States responsible for the international relations of those territories must be defined, in relation to the agreement envisaged, in a dual capacity: on the one hand in so far as they are members of the Community and on the other hand in so far as they represent internationally certain dependent territories which are not part of the sphere of application of Community law. The fact that those States belong to the Community does not therefore affect their position in so far as they act as international representatives of the territories concerned. It is however in that capacity and not as Member States of the Community that they are called upon to participate in the agreement. That special position cannot therefore affect the solution of the problem relating to the demarcation of spheres of competence within the Community. It should be noted that, in the case of the North-East Atlantic Fisheries Convention, signed at Ottawa on 24 October 1978 (Council Regulation No 3179/78 of 28 December 1978, Official Journal L 378, p. 1), a similar position has already arisen with regard to the participation of the Faroe Islands, represented in the Convention by Denmark. It is in that capacity and in that capacity only that that State participates in the Convention alongside the Community.

VII — Concluding remarks

- 63 It follows from all the foregoing considerations that the envisaged International Natural Rubber Agreement, in spite of the special features which distinguish it from classical trade and tariff agreements, comes under the commercial policy as it is envisaged in Article 113 of the EEC Treaty.

The consequences of that finding as regards the exclusive powers of the Community to negotiate and conclude the agreement envisaged might nevertheless be modified having regard to the option still to be exercised with regard to the arrangements for financing the machinery of the buffer stock in the event of the financial burden's being directly assumed by the Member States.

In conclusion,

THE COURT

gives the following opinion:

1. The Community's powers relating to commercial policy within the meaning of Article 113 of the Treaty establishing the European Economic Community extend to the International Agreement on Natural Rubber which is in the course of negotiation within the United Nations Conference on Trade and Development.
2. The question of the exclusive nature of the Community's powers depends in this case on the arrangements for financing the operations of the buffer stock which it is proposed to set up under that agreement.

If the burden of financing the stock falls upon the Community budget the Community will have exclusive powers.

If on the other hand the charges are to be borne directly by the Member States that will imply the participation of those States in the agreement together with the Community.

3. As long as that question has not been settled by the competent Community authorities the Member States must be allowed to participate in the negotiation of the agreement.

Kutscher	Mertens de Wilmars	Mackenzie Stuart
President	President of Chamber	President of Chamber
Pescatore	Sørensen	O'Keeffe
Judge	Judge	Judge
Bosco	Touffait	Koopmans
Judge	Judge	Judge

Luxembourg, 4 October 1979.

A. Van Houtte

Registrar