OPINION 2/00 OF THE COURT

6 December 2001

The Court of Justice has received a request for an Opinion, lodged at the Court Registry on 27 October 2000 by the Commission of the European Communities pursuant to Article 300(6) EC, which provides:

'The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.'

Table of contents

I — Background to the request for an Opinion

A — *Convention on Biological Diversity*

The Convention on Biological Diversity (hereinafter 'the Convention') was signed on 5 June 1992 by the European Economic Community and its Member States at the United Nations Conference on Environment and Development (UNCED), the 'Earth Summit', which took place in Rio de Janeiro (Brazil), and was approved on behalf of the Community by Council Decision 93/626/EEC of 25 October 1993 (OJ 1993 L 309, p. 1). That decision was adopted on the basis of Article 130s of the EC Treaty (now, after amendment, Article 175 EC).

The objectives of the Convention, as set out in Article 1 thereof, are 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources...'.

For those purposes, the Convention imposes, *inter alia*, the following obligations on the Contracting Parties:

— to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity and to integrate those factors into relevant plans, programmes and policies (Article 6);

— to identify and monitor components of biological diversity and risk factors (Article 7);

— to adopt in situ and ex situ conservation measures (Articles 8 and 9);

— to adopt measures promoting the sustainable use of components of biological diversity, scientific research and training, public education and awareness, assessment of the impact of projects on biological diversity, access to genetic resources and technology (including biotechnology), the exchange of information and technical and scientific cooperation (Articles 10 to 18).

Article 19(3) provides:

'The Parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity.'

In addition, Article 34 states:

'1. This Convention and any Protocol shall be subject to ratification, acceptance or approval by States and by regional economic integration organisations....

2. Any organisation referred to in paragraph 1 which becomes a Contracting Party to this Convention or any Protocol without any of its member States being a Contracting Party shall be bound by all the obligations under the Convention or the Protocol, as the case may be. In the case of such organisations, one or more of whose member States is a Contracting Party to this Convention or relevant Protocol, the organisation and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention or Protocol, as the case may be. In such cases, the organisation and the member States shall not be entitled to exercise rights under the Convention or relevant Protocol concurrently.

3. In their instruments of ratification, acceptance or approval, the organisations referred to in paragraph 1 shall declare the extent of their competence with respect to the matters governed by the Convention or the relevant Protocol. These organisations shall also inform the Depositary of any relevant modification in the extent of their competence.'

B — *Cartagena Protocol*

On 17 November 1997, the Conference of the Parties to the Convention adopted decision II/5 mandating the parties to negotiate 'a protocol on biosafety, specifically focusing on transboundary movement, of any living modified organism resulting from modern biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity, setting out for consideration, in

particular, appropriate procedure for advance informed agreement'.

The negotiations led to the adoption, on 29 January 2000 in Montreal (Canada), of the Cartagena Protocol on Biosafety (hereinafter 'the Protocol'), which was opened for signature in Nairobi (Kenya) on 15 May 2000 and signed on behalf of the European Community and the Member States on 24 May 2000.

The Protocol comprises 40 articles and three annexes.

Article 1 of the Protocol states:

'In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.'

Principle 15 of the Rio Declaration on Environment and Development states:

'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

In accordance with Article 4 of the Protocol, and without prejudice to specific provisions relating to pharmaceutical products and to living modified organisms (hereinafter 'LMOs') in transit or destined for contained use (see Articles 5 and 6), the Protocol 'shall apply to the transboundary movement, transit, handling and use of all living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health'.

Article 2(2) of the Protocol provides:

'The Parties shall ensure that the development, handling, transport, use, transfer and release of any living modified organisms

are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health.'

To that end, the Protocol sets up various control procedures, in particular the 'advance informed agreement procedure' (Articles 7 to 10 and 12), the 'procedure for living modified organisms intended for direct use as food or feed, or for processing' (Article 11) and the 'simplified procedure' (Article 13).

Other provisions of the Protocol concern the assessment and management of risks associated with the use, handling and transboundary movement of LMOs (Articles 15 and 16), unintentional transboundary movements and emergency measures (Article 17) and the handling, transport, packaging and identification of LMOs (Article 18).

Article 19 of the Protocol relates to the designation of competent national authorities and national focal points and to the dissemination of that information by the Secretariat; Article 20 provides for an information-sharing system, creates a Biosafety Clearing-House and sets out its tasks; Article 21 concerns protection of the confidentiality of information submitted under the procedures laid down by the Protocol; Article 22 provides that the parties are to cooperate in the development and/or strengthening of human resources and institutional capacities in biosafety in developing countries which are parties to the Protocol; Article 23 provides that the parties are to promote and facilitate public awareness and participation; Article 24 concerns parties' relations with States which are not party to the Protocol; Article 25 deals with illegal transboundary movements and requires the parties to adopt preventive and penal measures; Article 26 allows the parties to take account of socio-economic considerations arising from the impact of LMOs on the conservation and sustainable use of biological diversity; Article 27 provides for the elaboration of international rules and procedures regarding liability and redress for damage resulting from transboundary movements of LMOs; and Article 28 concerns the Protocol's financial mechanism and the financial resources for implementing the Protocol.

The Protocol also contains institutional provisions: Article 29 relates to the 'Conference of the Parties', Article 30 to subsidiary bodies and Article 31 to the secretariat.

Article 32 of the Protocol states that, 'except as otherwise provided in this Protocol, the provisions of the Convention relating to its protocols shall apply to this Protocol'.

Articles 33 and 34 concern compliance by the parties with their obligations (reporting, approval of cooperative procedures and mechanisms). Periodic evaluation by the Conference of the Parties of the effectiveness of the Protocol is provided for in Article 35.

Articles 36 to 40 contain the final provisions relating to signature, entry into force, the prohibition of reservations, withdrawal from the Protocol and authentic texts of the Protocol.

II — The Commission's questions and the procedure before the Court

A — *The Commission's questions*

Before submitting to the Council a proposal for a decision concluding the Protocol, the Commission, represented by A. Rosas, G. Zur Hausen and M. Afonso, acting as Agents, brought before the Court, under Article 300(6) EC, a request for an Opinion relating to the choice of the most appropriate legal basis for that purpose, given the divergence in the views of the Commission and the Council which had become apparent when the decision authorising signature of the Protocol on behalf of the Community was discussed and adopted by the Council. While the Commission's proposal was based on Articles 133 EC and 174(4) EC, in conjunction with the first subparagraph of Article 300(2) EC, on 15 May 2000 the Council unanimously adopted that decision on the basis of Article 175(1) EC alone, in conjunction with the abovementioned provision of Article 300 EC.

Since the Commission considered that removal of Article 133 EC from the legal basis for the decision concluding the Protocol would undermine the external competence conferred on the Community by the EC Treaty with regard to common commercial policy, it decided to ask the Court the following questions:

'(1) Do Articles 133 and 174(4), in conjunction with the relevant provisions of Article 300 of the EC Treaty, constitute the appropriate legal basis for the act concluding, on behalf of the European Community, the Cartagena Biosafety Protocol?

(2) If the reply to the first question is in the affirmative, are the powers that the Member States retain in matters of

environmental protection — and which might justify their participation in the Cartagena Biosafety Protocol — residual powers in relation to the preponderant competence held by the Community to enter into international commitments regarding the matters dealt with by the Protocol?'

B — *Procedure before the Court*

In accordance with Article 107(1) of the Rules of Procedure of the Court of Justice, the request for an Opinion was served on the Council of the European Union, the European Parliament and the Member States. Observations were submitted by:

— the Danish Government, represented by J. Molde, acting as Agent,

— the Greek Government, represented by E. Samoni-Rantou, G. Karipsiadis and P. Patronos, acting as Agents,

— the Spanish Government, represented by R. Silva de Lapuerta, acting as Agent,

— the French Government, represented by R. Abraham, D. Colas and G. de Bergues, acting as Agents,

— the Italian Government, represented by U. Leanza and M.C. Ciciriello, acting as Agents,

— the Austrian Government, represented by H. Dossi, acting as Agent,

— the United Kingdom Government, represented by J.E. Collins, acting as Agent, and R. Plender QC,

— the European Parliament, represented by R. Passos and K. Bradley, acting as Agents,

— the Council of the European Union, represented by J.-P. Jacqué, R. Gosalbo Bono and G. Houttuin, acting as Agents.

III — Observations of the Member States and the institutions

A — *Admissibility of the request*

In order to justify the referral to the Court, the *Commission* points out that, under Article 34 of the Convention, the Community is obliged to declare the extent of its competence with respect to the matters governed by the Protocol when it deposits its instrument of approval. Consequently, the proposal for a decision concluding the Protocol, which the Commission will submit to the Council in accordance with Article 300(2) EC, will have to include a declaration regarding the Community's competence, specifying, where appropriate, the matters governed by the Protocol which fall within the Community's exclusive competence, such as matters covered by Article 133 EC.

The Commission accepts that the debate as to legal basis has no bearing on the internal procedure to be applied, *inter alia* with regard to the Parliament's participation in the procedure. Whether the decision concluding the Protocol on behalf of the Community is adopted on the basis of Article 175(1) EC or of Articles 133 EC and 174(4) EC, the Council acts by a qualified majority after consulting or possibly obtaining the assent of the European Parliament (see the second subparagraph of Article 300(3) EC). However, the Court's answer to the questions raised will ensure a framework of legal certainty for management of the Protocol, in particular when voting rights are exercised (see, to that effect, Case C-25/94 *Commission* v *Council* [1996] ECR I-1469).

The Commission adds that the exercise of shared competence is always a source of difficulty in that regard. In order that the institutions can establish the positions to be adopted on behalf of the Community in the bodies set up by the Protocol, the Member States must first acknowledge that they no longer have the power, individually or collectively, to act in the relevant matters. Article 31(2) of the Convention, applicable to the Protocol by virtue of Article 32 of the latter, provides: 'Regional economic integration organisations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Contracting Parties to this Convention or the relevant protocol. Such organisations shall not exercise their right to vote if their member States exercise theirs, and vice versa.'

The Spanish and French Governments and the Council contest the admissibility of the request in the light of the conditions laid down in Article 300(6) EC.

The *Spanish Government* submits that, according to that provision, the opinion of the Court may be obtained as to whether an agreement envisaged is compatible with the provisions of the Treaty. It follows from the Court's Opinions, first, that its compatibility may depend not only on substantive rules but also on rules relating to the powers, procedure or organisation of the institutions of the Community (see Opinion 1/75 [1975] ECR 1355, p. 1360, Opinion 1/76 [1977] ECR 741, paragraph 10, and Opinion 1/78 [1979] ECR 2871, paragraph 30), and second, that the Court's opinion may in particular be sought on questions of division of competence between the Community and the Member States (Opinion 1/94 [1994] I-5267, paragraph 9).

Here, however, the Commission is not asking the Court to rule on the compatibility of the Protocol with the Treaty or on the division of competence between the Community and its Member States under the Protocol, but simply wishes to ascertain the appropriate legal basis for adopting the Protocol.

The *French Government* also doubts that the questions asked by the Commission are really covered by Article 300(6) EC, as interpreted by the Court. The Court has held that it has jurisdiction to consider the compatibility of a treaty in light of the difficulties liable to arise from the procedure chosen for adopting the agreement in question.

As regards the first question, the Commission does not dispute either that the Community has competence to conclude the Protocol or that the Member States retain sufficient powers to justify their participation in the Protocol alongside the Community. The question relates solely to the legal basis upon which the Community may conclude the Protocol. As asked, the first question therefore does not lend itself to an adverse opinion from the Court.

It is true that an incorrect legal basis constitutes a procedural defect capable of resulting in the decision relating to the conclusion of the Protocol being held invalid in an action for annulment or on a reference for a preliminary ruling. According to the French Government, such a case seems to be covered by the concept of 'incompatibility of an agreement with the Treaty by reason of the procedure adopted for its conclusion' (Opinion 3/94 [1995] ECR I-4577, paragraph 17).

However, that cannot be so here since, even if there were more than one legal basis, the procedure under Articles 174 EC or 175 EC would be applied as it affords the most protection to the Parliament's prerogatives.

As regards the second question, the French Government submits that it merely raises a theoretical problem concerning the recognition, in Community law, of the novel

concepts of 'preponderant competence' held by the Community and 'residual powers' of the Member States. The French Government cannot see why the compatibility of the Protocol with the Treaty would be called into question by recognising, or not recognising, that the powers of the Member States are residual in nature or in what way the procedure for amending the Treaty would be concerned by any answer from the Court to that question.

The *Council* adopts a similar position. It also states that the Commission's objective is to extend to the environmental field the exclusive competence which the Community has under the common commercial policy while ignoring the specific environmental provisions in the Treaty, in order to avoid the practical difficulties resulting from the conclusion of mixed agreements. Such reasoning cannot form the basis for exclusive Community competence.

The Council then wonders whether the objective pursued by the Commission might not have been attained by an action for annulment, brought under Article 230 EC, against the decision to sign the Protocol. It is true that the Court stated in Opinion 2/92 [1995] ECR I-521, at paragraph 14, that the fact that certain questions could be dealt with by means of other dispute procedures was not such as to exclude prior examination of those questions on the basis of Article 300 EC. However, to allow the Commission's request in the present case would amount to evading the time-limit for commencing an action for annulment, which should have been brought against the decision to sign the Protocol no later than 15 July 2000, while the request for an Opinion was lodged on 23 October 2000.

The *Parliament*, on the other hand, expressly asserts that the request for an Opinion is admissible.

In the present case, the choice of legal basis affects the legal nature of the Community's powers and thereby the division of powers between the Community and the Member States. When the Commission acts under the common commercial policy its competence is exclusive, while in the field of environmental protection it is shared with that of the Member States. It is settled case-law that '[the Court's] opinion may be sought pursuant to Article [300 EC] in particular on questions which... concern the division of powers between the Community and the Member States' (Opinion 2/92, cited above, paragraph 13).

Furthermore, even if the choice of legal basis did not affect the nature of the Community's powers but only the procedure for adoption of a measure concluding an agreement, the Court would again have jurisdiction to settle the matter under Article 300(6) EC.

According to the Parliament, the choice of legal basis for an international agreement is likely to have a bearing on the agreement's compatibility with the Treaty and may therefore be considered in an Opinion given by the Court under Article 300(6) EC. It is clear that, if the Council decision concluding the Protocol were subsequently annulled on the ground that it had been founded on the wrong legal basis, that would create precisely the type of complications that the procedure for a prior opinion was supposed to prevent.

and the *Council* contend, on the other hand, that Article 175(1) EC is the appropriate legal basis. There is accordingly no need to answer the second question.

The *Parliament* also maintains that Article 175(1) EC constitutes the appropriate legal basis for the measure concluding the Protocol. However, in so far as the Protocol has significant effects on trade in LMOs, it would be appropriate also to refer to Article 133 EC.

B — *Substance*

1. Summary

The *Commission* submits, first, that Articles 133 EC and 174(4) EC, in conjunction with the relevant provisions of Article 300 EC, form the appropriate legal basis for conclusion of the Protocol on behalf of the Community and, second, that in the fields covered by the Protocol, the competence held by the European Community is preponderant in relation to the powers retained by the Member States with regard to environmental protection.

The *Governments of the Member States* which have submitted written observations

2. Arguments

The *Commission* submits that, because of its objective and content, conclusion of the Protocol essentially falls within the Community's exclusive competence under Article 133 EC. The effective defence of the common interests of the Community and therefore the interests of all the Member States require the Protocol to be concluded on the basis of that provision.

However, to the extent that the Protocol deals with certain matters which are not covered by the common commercial policy and the provisions in question cannot be regarded as ancillary within the meaning of

the Court's case-law, the Community's competence to enter into the corresponding international obligations is founded on Article 174(4) EC.

The powers retained by the Member States to enact national rules and enter into international commitments in the matters covered by the Protocol are residual in relation to the preponderant Community competence. The Member States' participation in the Protocol must therefore be understood as confined to the exercise of those powers alone. In actual fact, the only provisions covered are those concerning the application of safety conditions to the development, transport, use, transfer and release of any LMOs outside international trade, and those concerning unintentional transboundary movements of LMOs. In this connection, the Commission observes that, in accordance with Article 174(4) EC, the Community's competence to cooperate and conclude agreements with non-member countries is without prejudice to the Member States' external competence.

Thus, the Commission considers it legally justified to resort to a dual legal basis, namely Articles 133 and 174(4) EC, while not *a priori* excluding Member States' participation in the Protocol. However, it must be clear, when the declaration of powers is deposited and also in the management of the Protocol, that the Community has exclusive competence by virtue of Article 133 EC in respect of most of the matters concerned, the Member States retaining concurrent powers only for a limited number of issues, that is to say those which do not affect trade in LMOs between the Community and non-member countries.

With regard more specifically to the scope of Article 133 EC, the Commission refers to the case-law of the Court which, for a long time, has adopted a broad interpretation of the concept of common commercial policy (see Opinion 1/78, cited above, paragraph 45). The fact that provisions governing international trade in certain products pursue objectives which are not primarily commercial — such as protection of the environment or of human health, development cooperation, foreign and security policy objectives, or agricultural policy objectives — cannot have the effect of excluding the Community's exclusive competence and justifying recourse to, for example, Article 175 EC. In reality, measures regulating international trade often pursue a wide range of different objectives, but this does not mean that they must be adopted on the basis of the various Treaty provisions pursuing those objectives.

It is settled case-law that where the measures in question are intended specifically to regulate international trade and thus to govern the Community's external trade,

they fall within the field of the common commercial policy, even if they pursue multiple objectives, and the Community alone has competence to adopt them, without its being necessary to determine the prevailing objective or the 'centre of gravity' of the measures (see, to that effect, the judgments in Case C-62/88 *Greece* v *Council* [1990] ECR I-1527 (hereinafter 'the *Chernobyl* judgment'), paragraphs 17 to 20, Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraphs 16 to 20, Case C-70/94 *Werner* [1995] ECR I-3189, paragraphs 8 to 11, Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraphs 8 to 11, Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraphs 26 to 29, Opinion 1/78, cited above, paragraphs 41 to 46, and Opinion 1/94, cited above, paragraphs 28 to 31).

Article 6 EC is in full harmony with that case-law. Under this provision, environmental protection requirements must be integrated into the definition and implementation of the policies and activities referred to in Article 3 EC. Several recent Commission initiatives show the importance which that institution attaches to integrating non-commercial concerns, in particular issues of environmental protection and public health, into Community economic and commercial policy. Moreover, non-commercial considerations are already recognised in and integrated into the Agreement establishing the World Trade Organisation (hereinafter 'the WTO Agreement') and its annexes, in particular in Article XX of the General Agreement on Tariffs and Trade (hereinafter 'the GATT'), the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter 'the SPS Agreement') and the Agreement on Technical Barriers to Trade (hereinafter 'the TBT Agreement'), without the Court nevertheless rejecting, in paragraph 34 of Opinion 1/94, exclusive Community competence under Article 113 of the EC Treaty (now, after amendment, Article 133 EC) to conclude all the Multilateral Agreements on Trade in Goods.

Furthermore, the Court has already held that Article 133 EC remains the appropriate legal basis for conclusion by the Community of agreements relating to international trade in goods, irrespective of the correct legal basis for the adoption of internal measures giving effect to such commitments. Thus, internal measures which give effect to international commitments entered into under Article 133 EC concerning agriculture are based on Article 43 of the EC Treaty (now, after amendment, Article 37 EC) (see Opinion 1/94, paragraph 29). Nor does the fact that a field covered by international commitments entered into by the Community is not fully harmonised within the Community exclude recourse to Article 133 alone if the purpose of the agreement in question is to remove unnecessary obstacles to international trade in goods (Opinion 1/94, paragraphs 30 to 33).

Given the proliferation of agreements imposing restrictions on international trade

in response to non-commercial concerns, the effect of recourse to other legal bases would be to deprive Article 133 EC of its substance and to prejudice the coherence of Community policy towards its trading partners, and the overall interest of the Community, as a result of the participation of all or some of the Member States in such agreements.

Finally, with regard to the provisions of the Protocol whose subject-matter extends beyond the field of regulation of international trade in LMOs, the Commission disputes that the effect of the judgment in Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, at paragraph 43, is to require recourse to Article 175(1) EC rather than Article 174(4) EC. The latter explicitly confers competence on the Community to conclude international agreements in the environmental field. So far as concerns the applicable procedural rules, Article 174(4) EC refers to Article 300 EC.

The Member States retain competence, in accordance with Article 174(4) EC, to negotiate and conclude international agreements in the field of environmental protection only if the agreements constitute more stringent protective measures compatible with the Treaty and notified to the Commission. Strict compliance with those conditions is essential for securing the unity of the common market and the uniform application of Community law.

In conclusion, the Commission requests the Court to give affirmative answers to both questions asked by it.

The *Danish Government* contends that Article 175(1) EC, in conjunction with the relevant provisions of Article 300 EC, constitutes the appropriate and sufficient basis for conclusion of the Protocol by the Community.

It refers, citing several examples, to the past practice of the Council as to the choice of legal basis for concluding environmental agreements, although it is conscious of the fact that that does not in itself constitute a decisive argument. The Council has, except in one isolated case, systematically relied on Article 130s or Article 130s(1) of the Treaty, and rejected the Commission's various proposals.

That practice is consistent with the case-law of the Court (see the judgments in Case C-155/91 *Commission* v *Council* [1993] ECR I-939 (hereinafter 'the *Waste Directive* judgment') and in Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857), which has taken account of the main object of the measure at issue, environmental protection, whereas harmonisation of the conditions of the Community internal market constitutes the ancillary object of such a measure.

According to the Danish Government, in order to determine the appropriate legal basis for the measure concluding the Protocol, it is necessary, in accordance with the settled case-law, to establish whether, in view of both its aim and its content, the Protocol concerns above all the environmental field or whether trade aspects have an equivalent or, possibly, more important role in the Protocol.

In this connection, the Danish Government states that the Protocol forms part of a body of measures adopted by the international community to protect and preserve biological diversity. In particular, the Convention is an agreement relating essentially to the environment to which the Community acceded on the basis of Article 130s(1) of the Treaty (see, to this effect, the preamble to the Protocol and Articles 1 and 4 thereof).

While the Protocol focuses, in Article 1, on transboundary movements, that is because it was established that biological conditions vary significantly from one State to another and that differences in the level of States' development in modern biotechnology involve particular threats to biodiversity, and because regulation of risks linked to LMOs would be incomplete if there were no rules governing transboundary movements. It was accordingly not the quantity or value of LMOs subject to such movement which was determinative when the Protocol was drawn up, but the potential risks to biological diversity. It is, moreover, in the nature of a multilateral environmental agreement to focus more on transboundary aspects than national aspects. The complexity of the matter at issue also explains the large number of articles specifically concerning transboundary movements. However, that does not mean that the other provisions of the Protocol are purely ancillary in nature.

Regulation of transboundary movements of LMOs, which moreover does not have a commercial objective, therefore does not constitute the principal subject-matter of the Protocol. The Protocol is principally an environmental agreement to regulate the risks to biodiversity and human health associated with LMOs.

The Danish Government does not, for all that, deny that the Court's case-law has accorded a wide field of application to Article 133 EC and that the common commercial policy does not cover only classic instruments of commercial policy. However, instruments linked to legislation intended to promote or facilitate trade must always be in point. The fact that the Treaty, in the version currently in force, provides that environmental protection must be integrated into other Community policies cannot in any way be interpreted as meaning that its environmental provisions should be used less often than before as a legal basis for agreements which, in view of

their aim and content, are principally environmental.

The Danish Government contends that Article 174(4) EC cannot serve as a legal basis for the conclusion of international environmental agreements. It merely sets out general objectives for Community action in the field (see, to that effect, *Safety Hi-Tech*, cited above, and Case C-341/95 *Bettati* [1998] ECR I-4355). In accordance with its very wording, it only obliges the Member States and the Community to cooperate 'within their respective spheres of competence' with non-member countries and international organisations.

Finally, the Danish Government develops a more political argument against the Commission's position. It states that it does not understand why the Commission has seized this opportunity to express its hostility to mixed agreements inasmuch as the Protocol would in any event remain a mixed agreement even if the legal basis advocated by the Commission were chosen. In this instance, the Community and its Member States played a major role during the difficult negotiations on the Protocol, which were conducted specifically with a view to concluding a mixed agreement. Those negotiations clearly demonstrated that the difficulties alleged by the Commission do not prevent the Community and its Member States from playing an important role in the negotiation and conclusion of mixed agreements.

The Danish Government submits in conclusion that the Court must reply in the negative to the first question and that there is thus no need to answer the second question.

The *Greek Government* likewise contends that the Protocol clearly falls within the scope of international environmental law.

It points out that, in accordance with the Court's case-law, the choice of the legal basis for a measure must rest on objective factors amenable to judicial review, which include the aim and content of the measure as a whole (see Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 25, and Case C-268/94 *Portugal* v *Council* [1996] ECR I-6177). The mere presence of commercial policy elements in an environmental agreement cannot have the effect of transforming it into a trade agreement, just as the presence of environmental factors in an agreement which is essentially a trade agreement does not alter the agreement's commercial character.

Examination of the Protocol's objectives and of the general scheme of its provisions leads to the inevitable conclusion that it is an international agreement of a pre-eminently environmental nature.

Nor is the Commission's position consistent with the Community's overall approach to sustainable development, put forward in particular during negotiation of the Protocol. Its position fails to take account of the significance of Article 22 of the Convention, which states that 'the provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity'. The criterion of environmental protection is thus decisive when interpreting the Protocol (see, to that effect, Articles 1, 2(4), 4, 7(4), 10(6), 11(8), 15, 16(2), 17 and 26 of the Protocol). If Article 133 EC were accepted as the legal basis, according an essentially commercial character to the Protocol, the impact on the future interpretation and application of the Protocol would be 'devastating'.

The Greek Government adds that, if the Protocol were intended principally to regulate international trade, it would have been concluded within the framework of the WTO, as the United States of America indeed wished, and not of the Convention.

The Greek Government also relies on the fact that the Protocol is founded on the precautionary principle, a fundamental principle of environmental law.

The Commission's submission that Article 133 EC should not be deprived of its substance could moreover be prejudicial to the Commission's interpretation of that provision, inasmuch as it would result in a series of other provisions of the Treaty being deprived of their legislative substance.

The Greek Government also argues that, since the Protocol has Articles 17 and 19(3) and (4) of the Convention as its basis (see the second recital in its preamble), it is legally consistent for the Community to approve the Protocol on the basis of the same competence, that is to say on the basis of Article 175 EC, which is, moreover, the basis used for any environmental action.

In conclusion, the Greek Government submits that the appropriate legal basis for concluding the Protocol is Article 175(1) EC.

It adds that the distinction drawn by the Commission between the Community's preponderant competence and the Member States' residual powers is legally unacceptable and betrays a value judgment so far as concerns mixed competence, whose existence reflects the current organisation of the division of powers between the Community and the Member States. For the same reason, the Commission's arguments concerning the difficulties in concluding

and managing mixed agreements are misconceived. To accept those arguments would amount to affirming exclusive Community competence for all actions provided for in the Treaty solely because the exercise of powers jointly with the Member States would lead to difficulties in management.

The *Spanish Government* submits that the Protocol is an international agreement of essentially environmental content, so that the only legal basis for its approval is Article 175(1) EC.

In accordance with the Court's case-law, the choice of legal basis for a measure cannot depend solely on an institution's conviction, but must be based on objective factors which are amenable to judicial review (see, in particular, Case 45/86 *Commission* v *Council*, cited above, paragraph 11). Those factors include in particular the aim and content of the measure (see, in particular, Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, paragraph 14). A purely ancillary aim of a measure cannot legitimately be used to justify the choice of legal basis (see, for example, the *Waste Directive* judgment) and, where an institution's competence is founded on two provisions of the Treaty, it is required to adopt the measure in question on the basis of both unless the joint legal basis would divest the Parliament's prerogatives of their substance (see the judgment in Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, hereinafter 'the *Titanium Dioxide* judgment').

In the present case, the aim and content of the Protocol fall within the scope of a policy which is specifically environmental and the Protocol's effect on international trade in goods is only ancillary. It is apparent from Article 4 of the Protocol that the Protocol's objective is not the regulation of trade in LMOs but the adoption of measures which ensure the conservation and sustainable use of biological diversity (see also to this effect Articles 2, 17, 20, 22, 23 and 26 of the Protocol). While transboundary movement of LMOs is regulated, in the same way as their transit, handling and use, that is in order to prevent adverse effects on the conservation and use of biological diversity.

While the Court has admittedly adopted a broad interpretation of commercial policy, which takes account of the development of international trade relations, that does not in any way mean that an international agreement whose principal objective is protection of the environment or of human health must be adopted on the basis of Article 133 EC on the ground that it could have an effect on international trade, an approach which would deprive other Community policies of their substance.

Nor are difficulties associated with the management and application of a mixed agreement relevant to the question of legal basis.

Finally, the Spanish Government maintains that Article 174 EC merely defines general objectives (see Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 57, *Safety Hi-Tech*, cited above, paragraph 43, and *Bettati*, cited above, paragraph 41). It acknowledges that Article 174(4) provides for shared competence between the Community and the Member States in relation to international environmental agreements, but the procedure for the conclusion of such agreements is not laid down. It is necessary to resort to Article 175 EC for that purpose. Article 175 EC is thus the only provision which can constitute the legal basis for an environmental rule, be it internal or external.

That interpretation is borne out by settled Community practice.

The *French Government* states first of all that the Protocol is intended to implement the objectives of the Convention, which was concluded by the Community on the basis of Article 130s of the Treaty. It points out that, during the negotiations which led to the adoption of the Protocol, the Community played a very active role and there was complete cohesion between it and its Member States, enabling proper account to be taken of the European Union's objectives.

The French Government submits, in general terms, that the appropriate legal basis for conclusion of the Protocol is Article 175 EC alone and that, even if the concepts of residual powers and preponderant competence exist in Community law, they are not applicable here.

With regard to the first question, it is apparent from the Court's case-law that, where an international instrument permits the Community to take environmental protection measures and those measures have an impact on international trade without having the objective of furthering, or even regulating, such trade, Article 175 EC constitutes a sufficient basis for the adoption of an agreement of that kind. That provision should be used in conjunction with Article 133 EC only if the measures relate inseparably to environmental protection and the promotion of international trade (see, with regard to the relationship between the establishment and functioning of the internal market, on the one hand, and environmental protection, on the other, the *Titanium Dioxide* and *Waste Directive* judgments). The French Government also refers to the judgment in Case C-187/93 *Parliament* v *Council*, cited above, and to paragraphs 42, 43 and 44 of the Opinion of Advocate General Jacobs in

that case, which draw a distinction between measures contributing to achievement of the internal market, for which Article 100a of the EC Treaty (now, after amendment, Article 95 EC) should be used as legal basis, and measures having an impact on trade, for which a provision of that kind is not necessary as legal basis.

According to Advocate General Jacobs, a measure 'which defines the characteristics which goods must have in order to be able to circulate freely within the internal market' constitutes — following the *Titanium Dioxide* judgment — a measure necessitating recourse to the legal basis relating to the internal market. By contrast, only Article 175 EC enables measures to be adopted which 'provide a harmonised set of procedures whereby movements of specified goods can be prevented and controlled for environmental protection purposes'.

The French Government also refers to Community practice over the last few years, citing a number of 'multilateral environmental agreements' or internal measures implementing such agreements which were founded on Article 130s of the Treaty, to the exclusion of Article 113, although the agreements or measures clearly had an impact both on trade between Member States and on trade between the Community and non-member States.

The examples cited by the Commission in support of its argument do not concern environmental policy but development policy, the common agricultural policy and common foreign and security policy. Those policies have a link with commercial policy very different from that between international trade agreements and environmental agreements. Furthermore, it is difficult to transpose to the present case the Court's reasoning which underlies the *Titanium Dioxide* and *Waste Directive* judgments.

Examination of the aim and content of the Protocol — which constitute objective factors amenable to judicial review, upon which, in accordance with the Court's case-law, the choice of legal basis must be founded — confirms the validity of having recourse to Article 175 EC alone.

The French Government relies on a number of factors which in its submission attest the environmental objective of the measures provided for by the Protocol: the mandate given to the negotiators by the Conference of the Parties to the Convention, the Protocol's title, its preamble and Articles 1 and 4 thereof.

Nor does the mere fact that the measures concern transboundary movement of

LMOs make it necessary to use Article 133 EC as the legal basis; the inclusion of cross-border trade in the Protocol does not mean that the Protocol falls within the common commercial policy. While trade is covered, that is in order to control or even to prevent it in the light of an environmental objective. Regulation of trade in order to promote trade is not involved.

As for the Protocol's content, the French Government argues that it contains two distinct types of provision:

— first, Articles 7 to 14 prescribe the various stages of the advance informed agreement procedure applicable to LMOs and the special rules which apply to the category of LMOs intended for food or animal feed or for processing. Those provisions constitute the rules applicable to trade and to movements of a scientific nature and specify the procedure for assessing the environmental risk of proposed transboundary movements of LMOs;

— second, numerous other articles contribute to attainment of the Protocol's objectives and contain commitments distinct from those entered into under Articles 7 to 14. The articles in question contain provisions relating to risk assessment by the parties (Article 15), to their risk management (Article 16) and to unintentional transboundary movements (for example, accidental movements) and cover emergency measures which it might be necessary to take as a result of such movements (Article 17), rules on handling, transport, packaging and identification (Article 18), the creation of a Biosafety Clearing-House (Article 20), measures to prevent illegal transboundary movements (Article 25) and the initiation of international consultation relating to the setting up of a system governing liability and redress for damage caused by the transboundary movement of LMOs (Article 27).

There is therefore no justification for limiting the Protocol to the rules contained in Articles 7 to 14. Nor do those provisions justify a reference to Article 133 EC because, using the terminology of Advocate General Jacobs in Case C-187/93 *Parliament* v *Council*, cited above, the procedures which they arrange may be regarded as 'a harmonised set of procedures designed to prevent or control transboundary movements of LMOs for reasons linked to environmental protection', but not in any event as 'defining the characteristics' which LMOs must have 'in order freely to enter the Community'.

In conclusion, the aim and content of the Protocol show that the appropriate legal basis for the Protocol — which, none the less, indisputably has a significant impact on trade in LMOs — is Article 175 EC alone.

As to the SPS and TBT Agreements which the Court held, at paragraphs 31 and 33 of Opinion 1/94, cited above, could validly be concluded on the basis of Article 113 of the Treaty, the French Government maintains, first, that according to the Court, the fundamental objective of those agreements was to restrict adverse effects on, and thus to promote, trade whereas the Protocol has the objective of controlling, or perhaps even preventing trade. Secondly, those two agreements create an institutional framework designed to ensure that measures adopted to deal with a sanitary or other risk do not have an undue impact on trade, whereas the Protocol proceeds on the basis that a specific environmental risk exists which must be the subject of risk-control measures.

The French Government also submits that difficulties in applying a category of international agreements are irrelevant to the choice of legal basis. On the contrary, in the field of environmental agreements the principle of close cooperation between the Member States and the Community institutions is implemented in a satisfactory manner.

The truth is that, behind the Commission's observations concerning the dismantling of the common commercial policy lies the fear that, in implementing the Protocol, the Member States or the Community will infringe other international obligations owed by the Community, particularly the WTO Agreement. That fear appears perfectly legitimate to the French Government, but it cannot properly be dispelled by the strategy of choosing an inappropriate and unjustified legal basis.

There are other, more suitable, methods of ensuring that implementation of the Protocol does not have an adverse impact on the common commercial policy. For example, the preamble to the decision authorising the Community to conclude the Protocol could include a sentence clearly affirming that the Community will comply with all its other international commitments. Alternatively, a systematic procedure could be set up to verify that any decision taken pursuant to the Protocol is consistent with the Community's other international commitments, or special coordination measures between the various departments concerned could be laid down.

So far as concerns, finally, the choice between Articles 174(4) EC and 175(1) EC, the French Government contends that, even if the Court were to hold that the Commission's first question is admissible, this particular point would not be. The question relates in any event to a shared

competence and cannot have a bearing on procedure. The French Government finds it difficult to see why the choice of one legal basis rather than another affects the compatibility of the Protocol — and even of the decision authorising its conclusion — with the Treaty.

Even conceding that Article 174(4) EC may constitute an 'external legal basis', two bases would in any event be available to the Community for adopting instruments of international law:

— Article 174(4) EC for agreements which concern cooperation between non-member States and the Community and relate to various aspects of environmental policy;

— Article 175(1) EC for agreements of a more sectoral nature designed to apply, at international level, powers already exercised internally (see, to that effect, *Safety Hi-Tech*, cited above).

The Protocol falls rather within the latter category because it enables rules comparable to those already existing between the Member States to be applied between the Community and non-member States.

In conclusion, should the Court accept that the first question is admissible, the French Government invites it to reply as follows:

'The Community has the necessary and sufficient powers on the basis of Article 175(1)[EC] to conclude, alongside the Member States, the [Cartagena] Protocol on Biosafety.'

That being so, the second question is nugatory.

The French Government contests in any event the concept of 'preponderant competence' of the Community, which is not recognised in Community law and has not been established by the Court's case-law. The Court recognises only agreements to which the Community alone may be party, by reason of its exclusive competence, and mixed agreements which fall partly within the competence of the Community and partly within that of the Member States (see, in particular, Case C-25/94 *Commission* v *Council*, cited above, paragraph 48).

The French Government adds that, since the Commission does not dispute that the Protocol would be a mixed agreement even if it were concluded on the basis of Articles 133 EC and 175 EC, the Court's case-law should be recalled concerning the requirement for close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in implementation of the Protocol (see, in particular, Case C-25/94 *Commission* v *Council*).

The *Italian Government* submits that the Protocol contains environmental rules intended, as Article 1 indicates, to combat adverse effects on the conservation and sustainable use of biological diversity, as well as on human health, in particular those linked to transboundary movements of LMOs. It is clear from analysing the Protocol's provisions that its subject-matter and aim are the creation of a procedural legal framework applicable to intentional transboundary movements of LMOs (Articles 4 to 16) and to unintentional transboundary movements likely to have significant adverse effects on biological diversity (Article 17).

In particular Articles 10(6) and 11(8) of the Protocol take account of the environmental concerns and risks to human health, by specifying the circumstances in which the parties may take decisions restricting the import of LMOs.

While Community competence in trade matters, both internal and external, is exclusive, the trade aspect must give way to the overriding requirements, recognised by the Court, relating to environmental protection and the protection of human health.

In accordance with the Vienna Convention of 1969 on the Law of Treaties, account should be taken of the context in which the Protocol was adopted, which includes in particular, any agreement relating to the treaty to be interpreted and any relevant rules of international law applicable in the relations between the parties (Article 31(2)(a)). The Protocol was adopted within the framework of the Convention on Biological Diversity.

Accordingly, in the Italian Government's submission, the legal basis for the Council decision concluding the Protocol is to be found in the provisions relating to Community environmental policy.

Whether the decision concluding the Protocol is based on Article 174(4) EC or

Article 175(1) EC, the Italian Government maintains that the decision will in any event be adopted by a qualified majority after consultation of the Parliament.

Since competence is shared between the Community and the Member States, the latter will participate in the Protocol by assuming the obligations concerning matters for which they retain powers that are residual in relation to the Community competence. The Protocol must therefore necessarily be a mixed agreement. In that regard, the Italian Government recalls the position of the Court on the duty of close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into (Opinion 2/91 [1993] ECR I-1061, paragraph 38, and Opinion 1/94, cited above, paragraph 108).

The *Austrian Government* contends, in general terms, that, as is apparent from its history, objective and provisions, the Protocol is a multilateral environmental agreement, founded on the precautionary principle (see Article 1 of the Protocol). Its environmental objective, clearly underlined in its preamble, is moreover largely due to the initiative of the Community and its Member States, the Commission — like all of the Member States — having constantly emphasised that objective in the negotiations.

The aim of the Protocol is to ensure an adequate level of protection in the use of LMOs, in order to avoid possible adverse effects on the conservation and sustainable use of biological diversity. For that purpose, an extensive information system is created, intended to enable each Member State to take informed decisions concerning the possible use of LMOs on its territory.

The Austrian Government contests, in this connection, the Commission's view that certain articles of the Protocol — in particular Article 11 — are to be treated as provisions of principle while others are ancillary, such as the provisions concerning financing, liability, socio-economic considerations, the Clearing-House and capacity building. Without those provisions, implementation of the Protocol would be impossible, especially for developing countries.

According to the Austrian Government, the commercial-policy consequences of the Protocol can be assessed only in the light of its environmental objectives. It observes in this regard that the concept of 'transboundary movements' is moreover not to be applied exclusively to the field of trade. Specifically in the field of LMOs, transboundary movements for the purposes of scientific research constitute an essential aspect of the Protocol.

The Austrian Government adds that the reference to Article XX of the GATT is irrelevant. The GATT is clearly a trade agreement and Article XX must be regarded as a derogating provision which enables the Contracting Parties to adopt protective measures on specified grounds.

With regard more specifically to selecting the appropriate legal basis, the Austrian Government points out that, in accordance with the Court's settled case-law, that choice must be founded on objective factors amenable to judicial review. The reasons which, according to the Commission, justify recourse to Article 133 EC, in conjunction with Article 174(4) EC, namely an alleged 'legitimate concern' regarding the erosion of Community competence or the complexity of managing mixed agreements, are irrelevant when answering the questions asked.

The Austrian Government submits that Article 174 EC merely establishes the objectives and principles which are to guide implementation of Community environmental policy, but does not create any competence of its own (see *Peralta*, cited above, paragraph 57, and *Bettati*, cited above, paragraph 41). Article 175(1) EC alone constitutes the legal basis for action by the Council in order to attain the objectives referred to in Article 174 EC. Furthermore, that interpretation is borne out, first, by the fact that measures pursuant to Article 176 EC, that is to say more stringent protective measures, can be taken only if the legislation in question has been adopted on the basis of Article 175 and, secondly, by the Council's settled practice of founding international agreements on Article 175(1) EC and not Article 174(4) EC.

Finally, the Austrian Government observes that the choice of Article 175(1) EC as legal basis ensures that the Parliament, whose role is particularly important in the environmental context, exercises its power of codecision and that the Economic and Social Committee and the Committee of the Regions are consulted, whereas, under the procedure provided for in Article 133 EC, the Parliament is merely kept informed and, in that provided for in Article 174(4) EC, it is only consulted.

In conclusion, the Austrian Government considers that the Protocol does not constitute a commercial policy agreement but an environmental policy agreement. Only a few provisions of the Protocol concern trade, such as Article 11 which concerns movements of goods intended for direct use as food or animal feed or for processing. The powers of the Member States are therefore not 'residual powers'; on the contrary, the fundamental provisions of the Protocol fall within their competence.

The *United Kingdom Government* contends that the correct legal basis for the measure concluding the Protocol is Article 175(1) EC, in conjunction with the first sentence of the first subparagraph of Article 300(2) EC. Like the other Member States which have submitted observations, the United Kingdom Government relies in this regard on the Council's settled practice.

In the present case, the Protocol plainly pursues the first two objectives listed in Article 174(1) EC, namely preserving, protecting and improving the quality of the environment and protecting human health. It also pursues the third of those objectives, that is to say 'prudent and rational utilisation of natural resources', on the premiss that biological diversity is a natural resource. Patently, it also pursues the fourth objective, since it is a measure at international level designed to deal with regional or worldwide environmental problems.

The United Kingdom Government adds that the precautionary principle, referred to in Article 174(2) EC, is prominent among the aims of the Protocol (see, for example, the fourth recital in its preamble and Articles 1, 10(6) and 11(8)). Furthermore, consistently with Article 174(2) EC, the Protocol respects the principles that preventive action should be taken and that environmental damage should as a priority be rectified at source (see, for example, the fourth and seventh recitals in its preamble and Articles 3, 7 and 15 to 18); and Article 27 envisages the drawing up of rules consistent with the polluter pays principle, by providing for the elaboration of rules of public international law governing redress for damage resulting from transboundary movements of LMOs.

The United Kingdom Government also states that, consistently with Article 174(3) EC, the Protocol takes account of available scientific and technical data, environmental conditions in the territory of the Contracting Parties and the potential benefits and costs of action or lack of action. Consistently with Article 174(4) EC, it provides for cooperation with non-member countries and the competent international organisations (see, for example, the second, third and eighth recitals in its preamble and Articles 6, 10, 14 to 16, 20, 22 and 29).

Article 175 EC provides a legal basis specifically in order to attain the objectives referred to in Article 174 EC.

The United Kingdom Government also recalls the Court's case-law according to which the choice of the legal basis for a measure to be adopted by a Community institution must be founded on objective

factors which are amenable to judicial review. Those factors include the aim and content of the measure.

Here, the Protocol's environmental aim is expressed in its preamble and in Articles 1 and 2. The content of the Protocol is consistent with that aim: it establishes an advance informed agreement procedure prior to the first intentional transboundary movement of LMOs; under Article 15, risk assessments are to be carried out in a scientifically sound manner and are to be based, as a minimum, on information provided in accordance with the advance informed agreement procedure and on other available scientific evidence; in accordance with Article 16, the parties are to establish and maintain mechanisms to control risks associated with the use, handling and transboundary movement of LMOs; under Articles 20 and 22, they are to participate in a system of information sharing and the Biosafety Clearing-House, and are to cooperate in the development and strengthening of human resources and institutional capacities in biosafety.

Although the Protocol affects trade with non-member countries incidentally, its main or predominant component is the pursuit of the Community's environment programme, consistently with Article 175(1) EC. Article 133 EC therefore constitutes an inappropriate legal basis for concluding the Protocol.

The United Kingdom Government states that, by using the word 'movements', the draftsmen of the Protocol sought to encompass movements other than for trade, such as unintentional movements of LMOs, illegal transboundary movements and movements for charitable, governmental, private and other non-commercial purposes.

Indeed, the Protocol is unconnected with the abolition of restrictions on international trade and the lowering of customs barriers. In so far as it affects trade at all, it is concerned with the control or monitoring of international movements of LMOs (see Case C-187/93 *Parliament* v *Council*, cited above, where, according to the United Kingdom Government, both the Advocate General and the Court placed reliance on the fact that the measure in question did not promote the liberalisation of the trade in question, which would have allowed use of Article 113 of the Treaty as a basis).

The WTO Agreement and, in particular, the non-commercial considerations integrated into certain annexes to that agreement, notably in Article XX of the GATT, the SPS Agreement and the TBT Agreement — an

agreement which, as the Court has confirmed, the Community was entitled to conclude on the basis of Article 113 of the Treaty — do not militate in favour of Article 133 EC as the legal basis for the Protocol, since the Protocol's 'centre of gravity' is not the promotion of trade but environmental protection.

Nor does Article 174(4) EC provide an appropriate joint legal basis, since it does not confer competence to conclude international agreements. It merely imposes an obligation on the Member States and the Community to cooperate with non-member countries and international organisations 'within their respective spheres of competence'. Indeed, the second subparagraph of Article 174(4) EC expressly provides that the first subparagraph of that provision is to be without prejudice to the competence of Member States to negotiate in international bodies and to conclude international agreements.

Article 174(4) EC is confined to defining the general environmental objectives of the Community, responsibility for deciding what action is to be taken in order to attain those objectives being conferred on the Council by Article 175 EC (see *Peralta*, cited above, paragraph 57, *Safety Hi-Tech*, cited above, paragraph 43, and point 76 of the Opinion of Advocate General Léger in *Safety Hi-Tech* and *Bettati*, cited above; see also the Opinion of Advocate General Jacobs in Case C-187/93 *Parliament* v *Council*, cited above).

Nor, finally, can difficulties associated with the management and application of a mixed agreement advance the Commission's case. In any event, the Commission overstates those difficulties. Mixed agreements are 'well-known phenomena, which will no doubt continue to exist so long as the Community and its Member States retain Treaty-making capacity'. Ever since the Single European Act introduced a title on the environment into the EC Treaty, there has been an express recognition of mixed competence in this field. The Commission itself makes the point that the European Community and its Member States played a major role during the four years of difficult negotiations on the Protocol. It could scarcely have done so if the obstacles had been as great as the Commission now maintains. Furthermore, the alleged difficulties cannot be relevant for the Court, which must base its decision on objective factors which are amenable to judicial review.

In conclusion, the United Kingdom Government submits that Articles 133 EC and 174(4) EC, in conjunction with the relevant provisions of Article 300 EC, do not constitute the appropriate legal basis for conclusion of the Protocol on behalf of the European Community. That being the case, the second question does not call for an answer.

The United Kingdom Government submits in the alternative, in answer to the second

question, that the Community has hitherto enacted relatively few common rules in the field of biosafety. The principal instruments adopted in that area are Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms (OJ 1990 L 117, p. 1), as amended by Council Directive 98/81/EC of 26 October 1998 (OJ 1998 L 330, p. 13), and Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (OJ 1990 L 117, p. 15).

Neither of those directives has the objective of contributing to ensuring an adequate level of protection in the field of the safe transfer, handling and use of LMOs resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, 'specifically focusing on transboundary movements' (Article 1 of the Protocol). It is therefore impossible to establish preponderant, let alone exclusive, Community competence to conclude the Protocol, on the basis of the principle 'in foro interno, in foro externo' (see, to that effect, the judgment in Case 22/70 *Commission* v *Council* [1971] ECR 263, hereinafter 'the *ERTA* judgment', paragraph 17).

The *Parliament* notes, first of all, that the Court stated in Opinion 1/91 [1991] ECR I-6079, at paragraph 14, that, by virtue of Article 31 of the Vienna Convention on the Law of Treaties, 'a Treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose'. Where an agreement is closely linked to one or more instruments or initiatives already adopted, it is justifiable to consider that those instruments or initiatives form part of the context in which the terms of the agreement must be interpreted, a fact which should prove particularly useful here, given the close links between the Protocol and the Convention.

According to the Parliament, it cannot be maintained, in the light of those close links, that the Protocol was negotiated and signed mainly for reasons relating to international trade in LMOs. On the contrary, while it was decided to treat transboundary movements of those products as a priority issue, that was not in order to regulate their trade, but because the movements and related activities constitute a specific threat to the conservation and sustainable use of biological diversity.

The Parliament submits that the view taken by the Commission appears not to take account of the main lesson to be drawn from Opinion 1/94, cited above, especially paragraph 42 thereof, according to which, however broad it may be in principle, the scope of the common commercial policy is restricted by 'the overall scheme of the

Treaty', and in particular by the existence of more specific provisions governing the Community's powers in other areas.

Having regard to the criteria, derived from the Court's case-law, upon which the choice of the legal basis for a measure must be founded, it is apparent from the aim and content of the Protocol that it relates specifically to LMOs and not to international trade.

There can be no doubt about the Protocol's environmental aim (see Article 1 thereof).

As regards the Protocol's substance, the Parliament considers that its authors' environmental concern is reflected both in the third recital in its preamble and in its substantive provisions.

Two factors in particular demonstrate the Protocol's importance for environmental protection. First, it expressly recognises, perhaps for the first time in an international agreement, the need for specific regulation of LMOs and accepts that such products, for reasons relating to environmental protection, cannot be treated in the same way as other products. Second, the Protocol applies the precautionary principle, one of the founding principles of Community environmental policy, in a very concrete manner in establishing the precise scope of the obligations on importing countries. Both Article 10(6) and Article 11(8) provide that 'lack of scientific certainty... regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity... shall not prevent [the] Party [of import] from taking a decision, as appropriate, with regard to the import of the living modified organism in question'. As formulated in those provisions, the precautionary principle is adequate justification for a refusal to authorise importation 'in order to avoid or minimise such potential adverse effects'.

The Protocol thereby adopts the 'permissive' version of this principle, as is typical in environmental protection agreements, rather than the 'restrictive' version found in certain trade agreements, in particular Article 5(7) of the SPS Agreement. That provision seeks to limit the conditions under which a member may invoke the precautionary principle in order to impose import restrictions.

The Parliament also argues that it is possible to transpose to the present case the Court's line of reasoning in Case

C-187/93 *Parliament* v *Council*, cited above. On the other hand, the *Chernobyl* judgment, referred to by the Commission in support of its interpretation, does not support the Commission's argument since it relates to a 'classic' commercial policy measure. The regulation contested in the case which led to the *Chernobyl* judgment merely made the release for free circulation of certain agricultural products subject to compliance with maximum permitted levels of radioactivity, even though reasons relating to the protection of public health were given as justification for its adoption. The Court thus held, in paragraph 16 of that judgment, that the regulation was 'intended to regulate trade between the Community and non-member countries; accordingly it comes within the common commercial policy within the meaning of Article 113 of the EEC Treaty'. The Protocol therefore is not, as the Commission claims, 'a measure relating to international trade in LMOs' but an agreement which, with a view to preserving, protecting and improving the quality of the environment, lays down minimum standards — particularly procedural standards — for the pursuit of activities which entail certain risks for the conservation of biological diversity.

The Parliament acknowledges, however, that although the Protocol's environmental component is preponderant, the Protocol will also have an effect on trade in LMOs. In so far as it is shown that that effect is a significant additional factor over and above the environmental protection provided for in Article 175(1) EC, the Protocol could then be regarded as an instrument relating to international trade, requiring a reference to Article 133 EC in the legal basis for the measure concluding that instrument.

The Parliament maintains that it does not advocate a restrictive view of common commercial policy. In its proposals at the last intergovernmental conference, it argued, with limited success, in favour of a substantial extension of the scope of Article 133 EC. None the less, the other legal bases provided for in the Treaty, including those relating to environmental protection, must be accorded their due weight. Maintaining that an agreement which is of crucial importance to environmental protection at international level does not come within the sphere of commercial policy is not the same as 'depriving Article 133 [EC] of its substance'. Even though the Parliament can understand the Commission's desire to avoid the difficulties relating to the division of competence, such considerations cannot have any influence on the choice of legal basis. The Court stated in paragraph 107 of Opinion 1/94, cited above, that the 'resolution of the issue of the allocation of competence cannot depend on problems which may possibly arise in administration of the agreements'.

Finally, with regard to the choice between Article 174(4) EC and Article 175(1) EC, the Parliament accepts that the former, which provides that 'the Community... shall cooperate with third countries and with the competent international organisations', might be seen as a more specific justification of the Community's substan-

tive competence to conclude the Protocol than the latter. It points out, however, that the Court held, in Case C-36/98 *Spain* v *Council* [2001] ECR I-779, at paragraphs 42 and 43, that it was necessary to 'consider whether internal Community rules corresponding to the provisions of the Convention would be adopted on the basis' of Article 175(1) EC or Article 175(2) EC, since the procedure for the adoption of the measure, in particular the voting arrangements within the Council, depends on which of the two provisions is chosen. Furthermore, as stated in paragraph 9 of the judgment in Case 45/86 *Commission* v *Council*, cited above, 'explicit reference [to the legal basis] is indispensable where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis'. The Parliament accordingly cannot see the advantage of the Commission's proposed solution of using Article 174(4) EC as the sole legal basis, since the parties concerned and the Court would not know why the Council decided unanimously, rather than by a qualified majority, or vice-versa.

In conclusion, the Parliament proposes that the Court should state in answer to the questions, first, that Article 175(1) EC constitutes the appropriate legal basis for the act concluding the Protocol on behalf of the Community and, second, that in so far as the Protocol's effects on international trade go beyond the scope of Article 175(1) EC, it would be appropriate to add a reference to Article 133 EC to the legal basis for that measure.

The *Council* submits that, in accordance with the Court's settled case-law, in order to determine whether the dual legal basis of Articles 133 EC and 174(4) EC is appropriate, it must be examined whether, through its aim and its content, the Protocol concerns both the environment and trade, and both aspects are fundamental, in which case a dual legal basis would be necessary for authorising conclusion of the Protocol by the Community, or whether the Protocol has only incidental effects on environmental policy or commercial policy, in which case a single basis would be sufficient for such conclusion.

The Council notes that the Protocol refers in its preamble to Articles 19(3) and (4), 8(g) and 17 of the Convention, and to decision II/5 of the Conference of the Parties to the Convention. It thus forms part of a body of measures adopted by the international community to protect and conserve biological diversity.

The Council also refers to Articles 1 and 2(2) of the Protocol in order to underline its environmental objective.

According to the Council, the Protocol was unquestionably negotiated with the primary objective of establishing means, such as a procedure for 'advance informed agreement' as envisaged by Article 19(3) of the Convention, to control the risks to the conservation and sustainable use of biological diversity and to human health associated with the use and release of LMOs resulting from biotechnology.

Community environmental policy, whose aims are defined in Article 174 EC, fully covers the objective of the Protocol.

The Protocol's content also testifies to the predominance of the aspects concerned with the conservation of biodiversity, the trade aspects being subordinate to the provisions concerning environmental protection, such as those relating to the precautionary principle and to the carrying out of risk assessments in a scientifically sound manner.

The Council accordingly contends that, having regard to its aim and content, the Protocol and, hence, the measure for concluding it fall within the framework of Community environmental policy. Consequently, the decision relating to conclusion of the Protocol must be founded on Article 175(1) EC.

That provision is the only possible legal basis for the measure concluding the Protocol, to the exclusion of Article 133 EC, because the Protocol's main or predominant component, for the purposes of the judgment in Case C-187/93 *Parliament* v *Council*, cited above, is indeed environmental protection.

The case-law to which the Commission refers in support of a broad interpretation of the concept of common commercial policy concerns classic commercial measures (see the *Chernobyl* judgment, paragraphs 18 and 19; and Opinion 1/94, cited above, paragraph 31, in which the Court held, with regard to the SPS Agreement, that an agreement is purely commercial in nature only if its principal or predominant component relates to trade). The Council, citing several examples, points out that numerous environmental agreements incorporating aspects related to international trade were concluded by the Community legislature on the basis of Article 130s of the Treaty, or on the basis of Article 235 of the EC Treaty (now Article 308 EC) in the period when the Treaty did not provide a specific legal basis with regard to environmental protection.

As to the question whether the substantive legal basis for the decision concluding the Protocol — as opposed to the 'procedural' legal basis, namely Article 300 EC — should be Article 175(1) EC or Article 174(4) EC, the Council reiterates its doubts concerning the admissibility of the request for an Opinion. The object of the procedure provided for in Article 300(6) EC is to determine whether an agreement is compatible with the provisions of the Treaty, including issues relating to the division of powers between the Community and the Member States, but not to determine the appropriate legal basis for a decision concluding the agreement.

In any event, this question has already been settled by the judgments in *Safety Hi-Tech* and *Bettati*, both cited above.

The Council states that it finds it difficult to understand the scope and relevance of the second question submitted to the Court. Notwithstanding the problems associated with mixed agreements referred to by the Commission, that institution in any event accepts the mixed nature of the Protocol. Determination of the extent of Member State competence — whether residual or not — will depend on the extent to which internal Community legislation has advanced on the date on which the Protocol is concluded. To date, Community legislation covers only a small number of the obligations arising under the Protocol.

In conclusion, the Council asks the Court to declare the request for an Opinion inadmissible and, in the alternative, should the request be declared admissible, to state in answer to the first question that:

'Articles 133 and 174(4), in conjunction with the relevant provisions of Article 300 of the EC Treaty, do not constitute the appropriate legal basis for the act concluding the Protocol on behalf of the European Community and the act must be based on Article 175(1) in conjunction with the relevant provisions of Article 300 of the EC Treaty.'

In the further alternative, should the Court none the less answer the first question in the affirmative, the Council asks the Court:

'to declare that Member States' powers to conclude the Protocol are not of a residual nature in relation to Community competence'.

Opinion of the Court

I — Admissibility of the request

1 It is apparent from the questions that the Court is essentially asked, first, to rule on the choice of the appropriate legal basis for the measure by which the Council proposes to conclude the Protocol and, in particular, on whether the Community's consent to be bound by it should be founded on Articles 133 EC and 174(4) EC, and second, to consider whether the powers which the Member States would continue to exercise by reason of their participation in the Protocol alongside the Community are, having regard to the matters covered, residual or preponderant in relation to those of the Community.

2 According to the Spanish and French Governments and the Council, such questions fall outside the scope of Article 300(6) EC since they concern neither the compatibility of the agreement envisaged with the Treaty nor the division of powers between the Community and the Member States under the agreement.

3 At the outset, it should be remembered that the Court has consistently stated that its opinion may be obtained, pursuant to Article 300(6) EC, in particular on questions concerning the division between the Community and the Member States of competence to conclude a given agreement with non-member countries (see, in particular, Opinion 1/75, cited above, especially p. 1360; Opinion 1/78, cited above, paragraph 30; Opinion 2/91, cited above, paragraph 3; and Opinion 1/94, cited above, paragraph 9). Article 107(2) of the Rules of Procedure bears out that interpretation.

4 In the present case, neither the Commission nor the Member States which have submitted observations, any more than the Council and the Parliament, doubt that the Community has competence to approve the Protocol. Nor is the compatibility of the Protocol's substantive provisions with the Treaty put in issue before the Court. Only the basis of the Community's competence, its nature — exclusive or shared — and the definition of its scope in relation to the competence of the Member States are discussed.

5 The choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie the Protocol to a Treaty provision which empowers it to approve such a measure. To proceed on an incorrect legal basis is therefore liable to invalidate the act concluding the agreement and so vitiate the Community's consent to be bound by the agreement it has signed. That is so in particular where the Treaty does not confer on the Community sufficient competence to ratify the agreement in its entirety, a situation which entails examining the allocation as between the Community and the Member States of the powers to conclude the agreement that is envisaged with non-member countries, or where the appropriate legal basis for the measure concluding the agreement lays down a legislative procedure different from that which has in fact been followed by the Community institutions.

6 Invalidation of the measure concluding the agreement because of an error as to its legal basis is liable to create, both at Community level and in the international legal order, complications which the special procedure of a prior reference to the Court, laid down in Article 300(6) EC, is specifically designed to forestall (see Opinion 1/75, cited above, pp. 1360 and 1361, and Opinion 2/94 [1996] ECR I-1759, paragraphs 3 to 6).

7 The admissibility of the request for an Opinion must accordingly be assessed in the light of the foregoing considerations.

8 With regard to the first question, it is conceivable on an initial analysis, reading the request for an Opinion, that conclusion of the Protocol falls within the exclusive competence of the Community under Article 133 EC.

9 It must therefore be held, at this stage in the consideration of the request for an Opinion, that the first question, relating to the choice of legal basis for concluding the Protocol, concerns the very existence of exclusive Community competence, under the common commercial policy, to decide on the conclusion of such an instrument and that the answer to this question could affect the Community legislative procedure to be followed. This finding is sufficient to show that the first question is admissible.

10 The Council adds, however, that the Commission should have brought an action for annulment of the decision of 15 May 2000 relating to signature of the Protocol on behalf of the Community, to contest the legal basis adopted on that occasion, so that it is barred from pleading the same ground to challenge the measure which the Council proposes to adopt for approving the Protocol.

11 On this point, it is sufficient to observe that the measure authorising signature of an international agreement and the measure concluding it are two distinct legal acts giving rise to fundamentally distinct legal obligations for the parties concerned, the second measure being in no way confirmation of the first. Accordingly, failure to bring an action for annulment of the first measure does not preclude such an action against the measure concluding the envisaged agreement or render inadmissible a request for an Opinion raising the question whether the agreement is compatible with the Treaty.

12 In any event, it should be noted that the fact that certain questions may be dealt with by means of other remedies, in particular by bringing an action for annulment under Article 230 EC, does not constitute an argument which precludes the Court from being asked for a preliminary Opinion under Article 300(6) EC (see Opinion 2/92, cited above, paragraph 14).

13 The second question is asked on the basis that the Community is not recognised as having exclusive competence under Article 133 EC to conclude the Protocol in its entirety, but enters into commitments with the other Contracting Parties on the joint basis of Articles 133 EC and 174(4) EC. In that case, the Protocol would be concluded both by the Community, under its commercial policy and environmental protection powers, and by the Member States, under the powers which they retain in the latter field. The Commission accordingly seeks clarification regarding the effect which the extent of the respective powers of the Community and its Member States might have on management of the Protocol.

14 In the French Government's submission, this question is purely theoretical and has no bearing on the question whether the Protocol is compatible with the Treaty. It should accordingly be dismissed as inadmissible.

15 In that regard, it is to be observed that where the existence of the respective environmental protection powers of the Community and the Member States has been established, their extent cannot, as such, have any bearing on the very competence of the Community to conclude the Protocol or, more generally, on the Protocol's substantive or procedural validity in the light of the Treaty.

16 Admittedly it goes without saying that the extent of the respective powers of the Community and the Member States with regard to the matters governed by the Protocol determines the extent of their respective responsibilities in relation to performance of the obligations under the Protocol. Article 34(2) and (3) of the Convention takes account of that very consideration, in particular by requesting regional economic integration organisations which are party to the Convention or to any of its protocols to declare the extent of their competence in their instruments of approval and to inform the depositary of any relevant modification in the extent of that competence.

17 However, that consideration is not in itself such as to justify recourse to the procedure under Article 300(6) EC, which is designed, as has already been pointed out in paragraph 6 of this Opinion, to forestall the complications which could arise both at international level and at Community level where it becomes apparent, following conclusion of an international agreement by the Community, that the agreement is not compatible with the Treaty. That procedure is not intended to solve difficulties associated with implementation of an envisaged agreement which falls within shared Community and Member State competence.

18 In any event, where it is apparent that the subject-matter of an international agreement falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community (see Ruling 1/78 [1978] ECR 2151, paragraphs 34, 35 and 36, Opinion 2/91, cited above, paragraph 36, and Opinion 1/94, cited above, paragraph 108).

19 In view of the foregoing considerations, the present request for an Opinion should be held admissible only in so far as it relates to the whether the Protocol falls within exclusive Community competence or within shared Community and Member State competence.

II — Substance

20 According to the Commission, the Protocol essentially falls within the scope of Article 133(3) EC, but it does not rule out that certain matters more specifically related to environmental protection fall outside that provision. It therefore maintains that Articles 133 and 174(4) EC constitute the appropriate legal basis for concluding the Protocol.

21 That interpretation is contested by the Council and by the Member States which have submitted observations. They argue that, principally on account of its purpose and content, the Protocol can be concluded only on the basis of Article 175(1) EC. The Parliament also contends that this provision constitutes the appropriate legal basis for the measure concluding the Protocol, but it does not rule out referring in addition to Article 133 EC in so far as it is established that the Protocol's effects on trade in LMOs are a significant additional factor over and above environmental protection, which is its primary objective.

22 It is settled case-law that the choice of the legal basis for a measure, including one adopted in order to conclude an international agreement, does not follow from its author's conviction alone, but must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure (see *Portugal* v *Council*, cited above, paragraph 22, Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 43, and *Spain* v *Council*, cited above, paragraph 58).

23 If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or

predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component (see the *Waste Directive* judgment, paragraphs 19 and 21, Case C-42/97 *Parliament* v *Council* [1999] ECR I-869, paragraphs 39 and 40, and *Spain* v *Council*, cited above, paragraph 59). By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases (see, to that effect, the *Titanium Dioxide* judgment, paragraphs 13 and 17, and Case C-42/97 *Parliament* v *Council*, paragraph 38).

24 Since interpretation of an international agreement is at issue, it should also be recalled that, under Article 31 of the Vienna Convention on the Law of Treaties, 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

25 In the present case, application of those criteria amounts to asking whether the Protocol, in the light of its context, its aim and its content, constitutes an agreement principally concerning environmental protection which is liable to have incidental effects on trade in LMOs, whether, conversely, it is principally an agreement concerning international trade policy which incidentally takes account of certain environmental requirements, or whether it is inextricably concerned both with environmental protection and with international trade.

26 It is established, first of all, that the Protocol was drawn up pursuant to decision II/5 of the Conference of the Parties to the Convention, held in accordance with Article 19(3) of the Convention which calls on the parties to consider the desirability of adopting measures, in particular of a procedural

nature, 'in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity'.

27 It is not in dispute that the Convention, concluded by the Community on the basis of Article 130s of the Treaty, is an instrument falling within the field of environmental protection. It results from the United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro in June 1992. Article 1 of the Convention states, in particular, that its objectives are 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources'.

28 In accordance with Article 31 of the Vienna Convention on the Law of Treaties, it is by reference to that context relating to the Convention on Biological Diversity that it is necessary to identify the purpose and define the subject-matter of the Protocol, in whose preamble the second and third recitals refer to certain provisions of the Convention, in particular Article 19(3), and to decision II/5 of the Conference of the Parties to the Convention. Numerous provisions of the Protocol, in particular Articles 3, 7, 16, 18, 20, 22, 27 to 35 and 37, also refer to the Convention or to the Conference of the Parties to the Convention.

29 Next, as regards the Protocol's purpose, it is clear beyond doubt from Article 1 of the Protocol, which refers to Principle 15 of the Rio Declaration on Environment and Development, that the Protocol pursues an environmental objective, highlighted by mention of the precautionary principle, a fundamental principle of environmental protection referred to in Article 174(2) EC.

30 The objective of ensuring an 'adequate level' of protection in the field of the safe transfer, handling and use of LMOs also emerges clearly from the Protocol's title, which expressly refers to 'biosafety', and from the fifth to eighth recitals in its preamble, which draw attention to risks to human health from biotechnology, the need for biotechnology to be used with adequate safety measures for the environment and human health, and 'the crucial importance to humankind of centres of origin and centres of genetic diversity'.

31 Finally, as to the Protocol's content, there is a clear reflection of the Protocol's environmental aim in the fundamental obligation imposed on the parties by Article 2(2) thereof to prevent or reduce the risks to biological diversity in the development, handling, transport, use, transfer and release of any LMO.

32 It may also be inferred from Article 4 of the Protocol that the Protocol intrinsically concerns environmental protection since that article provides, with regard to the Protocol's scope, that it applies to all LMOs 'that may have adverse effects on... biological diversity, taking also into account risks to human health'.

33 Similarly, in order to enable the parties to fulfil their fundamental obligation, laid down in Article 2(2), the Protocol sets up various control procedures (see Articles 7 to 13), including the 'advance informed agreement procedure' which is a typical instrument of environmental policy (see, in relation to the introduction of a system of prior notification and authorisation concerning shipments of waste between Member States, Case C-187/93 *Parliament* v *Council*, cited above, paragraphs 23, 25 and 26). The Protocol also deals with the assessment and management of risks associated with the use, handling and transboundary

movement of LMOs (Articles 15 and 16), unintentional transboundary movements and emergency measures (Article 17) and the handling, transport, packaging and identification of LMOs (Article 18). Finally, Articles 19 to 28 of the Protocol, whose subject-matter has been outlined in the background to the request for an Opinion, apply to any kind of transboundary movement and are also essentially intended to enable the parties to comply with their fundamental obligation laid down in Article 2(2) of the Protocol.

34 It follows from the examination carried out in paragraphs 26 to 33 of this Opinion, relating to the context, aim and content of the Protocol, that its main purpose or component is the protection of biological diversity against the harmful effects which could result from activities that involve dealing with LMOs, in particular from their transboundary movement.

35 The Commission contends, however, that the Protocol essentially falls within the field of regulation of international trade. It refers in this connection to the case-law of the Court which, in its submission, has for a long time taken a broad view of the concept of common commercial policy (see Opinion 1/78, cited above, paragraph 45). The fact that provisions governing international trade in certain products pursue objectives which are not primarily commercial — such as protection of the environment or of human health, development cooperation, foreign and security policy objectives, or agricultural policy objectives — cannot, according to the Commission, have the effect of excluding the Community's exclusive competence and justifying recourse to, for example, Article 175 EC where the measures in question are intended specifically to govern the Community's external trade (see, to this effect, Case 45/86 *Commission* v *Council*, paragraphs 16 to 20, the *Chernobyl* judgment, paragraphs 17 to 20, *Werner*, cited above, paragraphs 8 to 11, *Leifer and Others* cited above, paragraphs 8 to 11, *Centro-Com*, cited above, paragraphs 26 to 29, Opinion 1/78, cited above, paragraphs 41 to 46, and Opinion 1/94, cited above, paragraphs 28 to 34). In reality, measures regulating international trade often pursue a wide range of different objectives, but this does not mean that they must be adopted on the basis of the various Treaty provisions relating to those objectives.

36 The Commission adds that non-commercial considerations have already been integrated into the WTO Agreement and its annexes, in particular in Article XX of the GATT and in the SPS and TBT Agreements, without the Court nevertheless rejecting, in paragraph 34 of Opinion 1/94, exclusive Community competence under Article 113 of the Treaty to conclude all the Multilateral Agreements on Trade in Goods.

37 As to that point, it is true that, in the very words of Article 1 of the Protocol, the 'adequate level of protection' sought concerns in particular the 'transfer' of LMOs and that the 'focus' must be placed on 'transboundary movements' of LMOs. It is also true that numerous provisions of the Protocol relate specifically to control of those movements, in particular where LMOs are intended for direct use as food or animal feed or for processing, in order to enable the national authorities to prevent or reduce the risks which they entail for biological diversity or human health. However, even if, as the Commission maintains, the control procedures set up by the Protocol are applied most frequently, or at least in terms of market value preponderantly, to trade in LMOs, the fact remains that, as is shown by the examination carried out in paragraphs 26 to 33 of this Opinion, the Protocol is, in the light of its context, its aim and its content, an instrument intended essentially to improve biosafety and not to promote, facilitate or govern trade.

38 First of all, as stated in Article 3(k) of the Protocol, the term 'transboundary movement' means 'the movement of a living modified organism from one Party to another Party, save that for the purposes of Articles 17 and 24 transboundary movement extends to movement between Parties and non-Parties'. Such a definition, which is particularly wide, is intended to cover any form of movement of LMOs between States, whether or not the movements are for commercial purposes. It encompasses not only movements of LMOs of an agricultural nature,

'intended for direct use as food or feed, or for processing', but also illegal and 'unintentional' transboundary movements, movements for charitable or scientific purposes and movements serving the public interest.

39 Likewise, the juxtaposition of the terms 'transfer', 'handling' and 'use' of LMOs in Articles 1 and 2(2) of the Protocol indicates the parties' wish to cover any manner in which LMOs are dealt with in order to ensure an 'adequate level of protection' of biodiversity.

40 Second, the fact that numerous international trade agreements pursue multiple objectives and the broad interpretation of the concept of common commercial policy under the Court's case-law are not such as to call into question the finding that the Protocol is an instrument falling principally within environmental policy, even if the preventive measures are liable to affect trade relating to LMOs. The Commission's interpretation, if accepted, would effectively render the specific provisions of the Treaty concerning environmental protection policy largely nugatory, since, as soon as it was established that Community action was liable to have repercussions on trade, the envisaged agreement would have to be placed in the category of agreements which fall within commercial policy. It should be noted that environmental policy is expressly referred to in Article 3(1)(l) EC, in the same way as the common commercial policy, to which reference is made in Article 3(1)(b).

41 Third, whatever their scale, the practical difficulties associated with the implementation of mixed agreements, which are relied on by the Commission to justify recourse to Article 133 EC — conferring exclusive competence on the Community so far as concerns common commercial policy — cannot be accepted as relevant when selecting the legal basis for a Community measure (see Opinion 1/94, cited above, paragraph 107).

42 On the other hand, it follows from all of the foregoing considerations that conclusion of the Protocol on behalf of the Community must be founded on a single legal basis, specific to environmental policy.

43 As the Court has already held (see *Peralta*, cited above, paragraph 57, and *Safety Hi-Tech*, cited above, paragraph 43), Article 174 EC defines the objectives to be pursued in the context of environmental policy, while Article 175 EC constitutes the legal basis on which Community measures are adopted. It is true that Article 174(4) EC specifically provides that the 'arrangements for Community cooperation' with non-member countries and international organisations 'may be the subject of agreements... negotiated and concluded in accordance with Article 300'. However, in the present case, the Protocol does not merely establish 'arrangements for cooperation' regarding environmental protection, but lays down, in particular, precise rules on control procedures relating to transboundary movements, risk assessment and management, handling, transport, packaging and identification of LMOs.

44 Consequently, Article 175(1) EC is the appropriate legal basis for conclusion of the Protocol on behalf of the Community.

45 It is thus also necessary to consider whether the Community holds exclusive competence under Article 175 EC to conclude the Protocol because secondary legislation adopted within the framework of the Community covers the subject of biosafety and is liable to be affected if the Member States participate in the procedure for concluding the Protocol (see the *ERTA* judgment, paragraph 22).

46 It need only be observed in that regard that, as the United Kingdom Government and the Council correctly stated, the harmonisation achieved at Community level in the Protocol's field of application covers in any event only a very small part of such a field (see Directive 90/219, Directive 90/220 and Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms (OJ 2001 L 106, p. 1), Article 36 of which repeals Directive 90/220).

47 It follows from the foregoing considerations that the Community and its Member States share competence to conclude the Protocol.

In conclusion,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric, S. von Bahr, Presidents of Chambers, C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, L. Sevón, M. Wathelet (Rapporteur), R. Schintgen and V. Skouris, Judges,

after hearing S. Alber, First Advocate General, F.G. Jacobs, P. Léger, D. Ruiz-Jarabo Colomer, J. Mischo, A. Tizzano, L.A. Geelhoed and C. Stix-Hackl, Advocates General,

gives the following Opinion:

Competence to conclude the Cartagena Protocol on Biosafety is shared between the European Community and its Member States.

Rodríguez Iglesias	Jann	Macken
Colneric	von Bahr	Gulmann
Edward	La Pergola	Puissochet
Sevón	Wathelet	Schintgen
	Skouris	

Luxembourg, 6 December 2001.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President