OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 23 May 1996 *

1. The Portuguese Republic is seeking the annulment of Council Decision 94/578/EC [1] approving the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development (hereinafter 'the Agreement'). [2]

2. During the proceedings, the Republic of Greece intervened in support of Portugal, while Denmark and the Commission intervened in support of the Council.

3. The application for annulment has been made on the ground that the Council adopted as the legal basis for the instrument in question Articles 113 and 130y together with the first sentence of Article 228(2) and the first paragraph of Article 228(3) of the Treaty. The applicant maintains that, because of the subject-matter they regulate, certain provisions of the Agreement should have been based on other provisions of the Treaty. More specifically: in so far as the Agreement concerns the protection of human rights (Article 1) and cooperation in the development of the energy sector (Article 7), tourism (Article 13) and culture (Article 15), its conclusion should have been approved by the Council in accordance with the procedure under Article 235 of the Treaty. The provisions laid down by the Agreement concerning intellectual property (Article 10) and drug abuse control (Article 19) affect sectors that are within the purview of the Member States and therefore required the adoption of a mixed agreement.

4. It need scarcely be said that were the application to be allowed, the effect would be to confirm that the conclusion of the Agreement should have been subject to decision-taking procedures other than those applied in this case: the use of Article 235 would in fact have required a unanimous vote in the Council; the procedure governing mixed agreements would have involved a twofold series of autonomous and parallel agreements, entered into by the Community and the Member States respectively. Should the Court decide to annul the measure complained of, however, Portugal is asking it to preserve the effects of the Agreement, as concluded.

5. The only issue the Court has to consider in the context of this application is the legal

* Original language: Italian.

1 — Council Decision of 18 July 1994 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development (OJ 1994 L 223, p. 23).

2 — The proposal for a decision, based on Articles 113 and 235 of the Treaty, was submitted by the Commission to the Council in March 1993. Parliament's favourable opinion is dated 22 April 1994. For a more detailed account of the subject-matter of the Agreement, reference may be made to points 7 and 8 of the Report for the Hearing.

basis and the consequential rules of procedure that have to be complied with in the light of the legislative content of the Agreement in this case and the objectives it pursues. A new and important issue of competence has therefore to be considered. This is the first time that the Court has been asked to rule on the application of the provisions introduced by the Treaty on European Union in the specific area of development cooperation. [3] Furthermore, the Agreement between the Community and India in many ways represents the prototype of what are described as 'third generation' agreements with the developing countries and may therefore affect the future of the whole of this increasingly important sector of external relations.

Since this is a new case with practical implications, it seems to me necessary to begin by clarifying the scope of Community competence in accordance with the provisions on which the Council deemed it necessary to base the conclusion of the Agreement. The outcome of that analysis will facilitate a detailed assessment of those provisions of the Agreement whose legal basis is in dispute.

6. Portugal and the Council interpret differently the scope of the powers conferred by Articles 113 and 130y of the Treaty. According to the applicant, Article 113 constitutes a legal basis confined exclusively to the Community action provided for therein. It confers specific powers which can apply neither to all types of Community action encompassed by the conduct of international commercial relations, nor to the adoption, externally, of any measure involving those areas which are internally a matter for the Member States or require recourse to Article 235. In the view of the Council, however, Article 113 provides the appropriate legal basis even for those provisions of the Agreement which are ancillary to others forming the main subject-matter of the rules laid down therein. That is the approach taken in the case-law of the Court. [4] It is clear from the judgments delivered in other cases that Article 113 is the appropriate legal basis for an agreement even where, as in this case, the commercial policy instrument pursues the parallel objective of promoting the development of a third country. [5]

7. Portugal and the Council likewise have conflicting views in relation to Article 130y. According to the applicant, even if read in conjunction with Article 113, that provision does not empower the Community to conclude any kind of international agreement with a developing country. Since provision is made for the Community and the Member States to have joint competence in that sector, its exercise must, it is submitted, be regulated in accordance with the principle of

3 — Namely the provisions contained in Articles 130u to 130y of Title XVII.

4 — Case C-155/91 *Commission* v *Council* [1993] ECR I-939.

5 — Case 45/86 *Commission* v *Council* [1987] ECR 1493.

subsidiarity. Compliance with that principle would have required action by the Member States rather than the Community, namely by opting for the adoption of a mixed agreement or for the application of Article 235: in both cases, the Member States would have enjoyed greater opportunities for participating in the decision-making process. That is also the view taken by Greece in its observations. The Council, however, interprets Article 130y as meaning that the Community is fully empowered to deal with development policy in accordance with the objectives laid down in Article 130u of the Treaty.

8. I shall look at both of those points of view and then go on to consider them, together with the other aspects of the dispute, in terms of the legal basis of the various provisions of the Agreement at issue in this case. It is necessary first to clarify the substance and possible scope of the Treaty provisions relevant to this case, beginning with those that have been the subject of the differing interpretations put forward by Portugal and the Council.

Analysis of the rules governing development cooperation

9. Once development cooperation had become a Community policy, it was given formal recognition in Title XVII of the Treaty and constituted an important objective of Community action even before the Maastricht Treaty was adopted. From the time of the first Yaoundé Conventions, in 1974, it has evolved in three successive stages: in the 'first generation' agreements the main focus is on Community aid; the 'second generation' agreements are basically geared to economic cooperation; and the 'third generation' agreements take into account the social structure of the developing countries as well as commercial relations.

10. Before a specific legal basis was provided, Community action was founded on a variety of provisions: Article 238 (in the case of association agreements with the ACP and Mediterranean countries); Article 235, by itself or in conjunction with another legal basis, usually Article 113 (in the case of the autonomous instruments employed in relation to the countries of Latin America and Asia).

11. At the same time, the Court had been defining the extent to which development cooperation measures could lawfully be applied in the context of the common

commercial policy. [6] That line of decisions culminated in the judgment on the so-called 'generalized customs preferences'. [7] As we know, in that judgment the Court took account of a new concept of international commercial relations which leaves substantial latitude for development objectives, by concluding that measures 'designed to set in place that system' fall within the scope of the common commercial policy and must, therefore, be adopted on the basis of Article 113 of the Treaty.

12. Even though development cooperation had acquired its own legal basis, also as a result of the place it had been assigned within the system by the Court, the legislature deemed it necessary to insert into the Treaty a specific title for it. [8] That is a decision which, among other things, meets the need properly to integrate into the legal system an activity that is in itself significant and is now, because of its importance and substance, independent of commercial activity. From that point of view, it is significant that, if we look at the objectives and scheme of powers laid down in the Treaty on European Union, the rules incorporated therein fully reflect the new substantive implications of the concept of development resulting from the third generation agreements. [9]

13. If we then consider the objectives laid down in Article 130u(1), it is clear that they reflect a complex vision of development, the product of interaction between its economic, social and political aspects, which are taken

6 — See in particular the judgment of 12 July 1973 in Case 8/73 *Massey-Ferguson* [1973] ECR 897, Opinion 1/75 of 11 November 1975 [1975] ECR 1355, the judgment of 15 December 1976 in Case 41/76 *Donckerwolcke* [1976] ECR 1921 and Opinion 1/78 of 4 October 1979 [1979] ECR 2871. Those decisions clarified the concept of an evolving common commercial policy which needed to include elements more directly linked to development cooperation policy.

7 — Judgment of 26 March 1987, cited above, in Case 45/86 *Commission* v *Council*.

8 — The insertion in the Treaty of an express reference to development cooperation policy was initially proposed by the Netherlands Government during the negotiations on the Single European Act. It maintained that Community measures in that sector were sufficient to constitute, in terms of both legal and financial instruments, an independent policy separate from commercial policy. Although that proposal was not endorsed during those negotiations, the issue was taken up again at the Rome European Council in October 1990, which stressed in its conclusions the need to attach particular importance to development policy in the context of the Community's international activities. That approach bore fruit when the Treaty was revised when, once again at the instigation of the Netherlands delegation, it was decided formally to recognize that area of Community activity. For a more detailed account, see J. Cloos, G. Reinesch, D. Vignes, J. Weyland: *Le Traité de Maastricht*, Brussels, 1994, p. 346.

9 — For an interpretation to the effect that the new rules form part of an evolving development cooperation policy, see J. Raux: 'Politique de coopération au développement et politique commerciale commune', in M. Maresceau (ed.) *The European Community's Commercial Policy after 1992: The legal dimension*, Dordrecht, 1992, p. 157: 'Gradually, development policy has evolved into a global policy. Initially conceived as an aid policy and then driven by the concept of improving trade — and exports into the Community in particular (trade not aid) — Community development policy subsequently laid emphasis on cooperation geared to independent development, with the focus on development itself, especially rural development, finally moving towards global development, in keeping with the Community's many ambitions and its objective of achieving harmonious development. That concept of development requires total commitment on the part of the Community and a large measure of consistency between the specific development objectives which the Community pursues. No longer can there be any question of expanding trade without taking into account the other aspects of cooperation, and, in consequence, the objectives of development can no longer be a matter of trade alone. Those objectives instead point to a political goal that is paramount and reveal the Community's intention to take over from its Member States and take action over the full range of its powers'. For the 'political' reasons underlying the incorporation into the Treaty of the rules in this field, see C. Flaesch-Mougin: 'Le Traité de Maastricht et les compétences externes de la Communauté européenne' in *CDE*, 1993, nos 3-4, pp. 351 396; and J. Lebullenger: 'La rénovation de la politique communautaire du développement' in *RTDE*, 1994, no. 4, p. 631: the latter specifically states that: "The formal recognition by the Treaty on European Union of a policy that dates back more than 30 years clearly carries a political message for the countries of the "South". The Community wished to convey to the developing countries that it was not going to relax its efforts on their behalf at a time when Eastern Europe is the prime focus of concern'.

into account by the most recent cooperation agreements. [10] In addition to being 'economic and social', Community policy is intended to promote a sustainable level of development that takes account of the environment. [11] The objectives considered include sustainable development as well as the smooth and gradual integration of the developing countries into the world economy and the campaign against poverty. Together with that objective, another general and overtly political objective is envisaged: Community action must contribute to 'developing and consolidating democracy and the rule of law' and to 'respecting human rights'. Democratic values are thus viewed as a crucial factor for long-term socio-economic development.

14. The scheme of powers for its part exhibits its special features as compared with the system provided for in other Treaty provisions. [12] The Community has been accorded competence equal and complementary to that of the Member States. [13] Article 130u specifically lays down to that effect: 'Community policy in the sphere of development cooperation ... shall be complementary to the policies pursued by the Member States'.

15. The applicant and Greece interpret the above provision as meaning that Community policy is subordinate to that of the individual Member States. They argue that it is the former that complements the latter and not vice versa. The specific legal basis provided by Article 130y therefore has to be interpreted restrictively. It follows that the Community cannot adopt any type of measure in this field unless there is a link between that measure and development cooperation. On that basis, given their purpose and substance, the measures of the kind provided for in the Agreement should instead be based on Article 235.

16. I cannot endorse the interpretation on which the above argument is based. Article 130u must be read together with the other articles relevant to this sector and, first and

10 — For a detailed description of the areas covered by Commission intervention in what are known as the ALA countries (which include the Republic of India) see the communication 'Guidelines on the General Framework for cooperation with the ALA developing countries'. Document COM (90) 176 fin. of 11 June 1990.

11 — In that sense, the reference to 'sustainability' must be seen in conjunction with the 'transversal' provision of Article 130r(2), according to which: 'Environmental protection requirements must be integrated into the definition and implementation of other Community policies'.

12 — To that effect, see S. Cisnal de Ugarte, C. Fernández Liesa, C. Moreiro González: *Tratado de la Unión Europea*, Madrid, 1993, p. 83.

13 — Academic writers are fully in agreement that Community policy and national policy are complementary in nature: see C. Flaesch-Mougin, op. cit., p. 364; R. Lane 'New Community competences under the Maastricht Treaty' in *CMLR*, 1993, p. 976; J. Roldán Barbero: 'La cooperación al desarrollo' in *Gaceta Jurídica de la C. E. y de la competencia*, D-18, 1992, p. 133: 'A further interesting and related aspect with regard to shared competences is the impact of the principle of subsidiarity. In my view, the predominant principle in this context is that of complementarity' (p. 166).

foremost, with the provision contained in Article 130x:

'The Community and the Member States shall coordinate *their* policies on development cooperation and shall consult each other on *their* aid programmes, including in international organizations and during international conferences' [14] (emphasis added).

The reference to coordination and consultation, inserted for reasons of effectiveness also, [15] demonstrates that the policies considered here are independent of one another and does not permit any order of precedence, even in purely functional terms, to be established between them.

17. The remaining provisions of that title confirm the conclusion I have just drawn. It is for the Council, in accordance with Article 130w, to adopt the *'measures necessary'* to further the objectives laid down in Article 130u. That implies that the Community is empowered to conduct its own development cooperation policy, also by means of instruments other than the agreements or negotiations with third countries, provided for in Article 130y, and on the basis of the procedure provided for in Article 189c. [16] Furthermore, the third sentence of Article 130x(1) provides that the Member States are to contribute if necessary to the implementation of Community aid programmes, which necessarily presupposes an independent Community policy as a vital means of furthering the objectives of the Treaty, with Member States involved in their implementation if need be. Finally, in accordance with Article 130y, the Community and the Member States are to cooperate with third countries *'within their respective spheres of competence'*, while the arrangements for cooperation may be the subject of agreements *between the Community* and such countries. It is evident that the legislature in any case intended clearly to assign to the Community the competence required to

14 — Compare in that sense the system based on 'informal' coordination provided for in Article 130(2) of the Treaty in relation to industry: 'The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination'. S. Cisnal de Ugarte, C. Fernández Liesa, C. Moreiro González, op. cit., p. 83, refer to the importance of a decision based on coordination: 'Although policy on development cooperation as set out in the EC Treaty is not, nor can ever be, a common policy, the obligation to coordinate laid down in Article 130x provides the most specific Community guarantee that other national interests will be overcome and reconciled in order to bring about a genuine concern for development'.

15 — See, for this view, C. Flaesch Mougin, op. cit., p. 360: Community policy should be coordinated with that of the individual Member States in order to maximize 'the impact of aid for the developing countries from "Europe" as a whole'.

16 I take this opportunity to comment briefly on the stance taken by the Commission concerning the legal basis of the Agreement. Both in its observations and at the hearing, the Commission maintained that an international instrument of that nature has to be based on Article 130w and not on Article 130y. However, taking the provisions of Title XVII as a whole, I consider that the case should instead be governed by the first paragraph of Article 130y. It makes express provision in that respect: 'The arrangements for Community cooperation may be the *subject of agreements* between the Community and the third parties, which shall be negotiated and concluded in accordance with Article 228' (emphasis added). Article 130w, in contrast, refers more generally to 'measures', specifying that they 'may take the form of multiannual programmes'. The relationship between the two provisions seems to me to be sufficiently clear. The purpose of the former is to determine the general parameters governing cooperation (what might be described as the frame of reference) and therefore the cooperation agreements themselves; whereas the second determines the procedures which the Community has to adopt when actually implementing what has been laid down by that frame of reference. The relationship between the two provisions being defined in those terms, I believe the Council was right to select Article 130y as the legal basis of the Agreement.

conduct a sectoral policy that is both independent and appropriate to the objectives laid down by Article 130u(1) and (2).

18. Contrary to the applicant's submission, the conclusion I have reached is not in any way contradicted by Declaration No 10, annexed to the Treaty, according to which the provisions of Article 130y do not affect the principles laid down in the judgment given by the Court in the *AETR* case. [17] As the Commission and the Council have explained, that ruling simply states that where the Community has adopted common rules for the achievement of a common policy, the Member States, which enjoy, as in this case, only complementary competence, no longer have the power, acting either individually or collectively, to undertake obligations with third countries which affect those rules or alter their scope. Far from invalidating the conclusions I have reached as to the relationship that exists between the policies of the Community and the Member States, that ruling therefore confirms them.

19. Two further points may be made here. In accordance with Article 130x(2), the Commission may take any useful initiative to promote coordination between the policies of the Member States and its own policy. Coordination in fact requires that the bodies providing it should enjoy equal standing. The Community promotes coordination and thus plays an active role, and that is certainly not compatible with the claim that its policy is subordinate to that of the Member States. [18] Furthermore, in accordance with Article 130y, the Community may adopt measures within its sphere of competence in accordance with the procedures laid down in the first sentence of Article 228(2), acting by a qualified majority on a proposal from the Commission, and, in accordance with Article 228(3), after consulting the European Parliament. That decision-making process differs from the one provided for in Article 235, formerly used for the conduct of the sectoral policy in question, because it makes it easier for the Community to act, by replacing the unanimous vote within the Council with qualified majority voting. This also confirms, for the purposes of this case, that the legislature sought to promote the full and independent development of Community policy.

20. In the light of those legislative provisions, the applicant's interpretation of the provisions at issue cannot be accepted. As the Court has held, Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be

17 — Case 22/70 *Commission* v *Council* [1971] ECR 263.

18 — Indeed a number of academic writers have pointed out that the effect of the Commission having been empowered to promote coordination between the different policies may be the reverse of that put forward by the applicant, namely the 'communitarization' of development cooperation policy. See S. Cisnal de Ugarte, C. Fernández Liesa and C. Moreiro González, op. cit., p. 83: 'the obligation to coordinate State and Community action — which often coincide in substance and scope — can to a great extent restrict the autonomy of the Member States' policy on development and cooperation'. Similarly, J. Roldan Barbero, op. cit., p. 131: 'In general terms, where the effectiveness of development cooperation is concerned, centralization rather than multiplication of initiatives is to be preferred' (p. 167).

necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. [19] In the light of that clarification, I consider that the provisions of Title XVII actually contain the 'powers' needed to pursue the objective laid down in Article 3(q) of the Treaty, obviating the need to use Article 235 as a basis for Community action in that area. I am further of the opinion that — even seeking to rely, as does the applicant, on the principle of subsidiarily — the exercise of Community competence is covered specifically and in full by the scheme of the provisions at issue. As expressly provided by the Treaty, cooperation policy has to *complement* that of the Member States: the scale of development cooperation and the effective measures it requires may be beyond the powers and resources of the individual Member States. Moreover, complementary action by the Community exists — as made clear, furthermore, in the second paragraph of Article 130y and in Article 25 of the Agreement itself [20] — alongside the unilateral action of each Member State and has to be coordinated and harmonized with it. It is thus the adoption of that criterion that prevents the risk of unwarranted interference from either side in regard to action by the Community and by the Member States. Complementary competence, as defined in this sector, is thus able to operate in a manner fully compatible with the criterion of subsidiarity.

21. This matter is, as we have seen, regulated in the Treaty. There is a specific and appropriate legal basis for development cooperation. [21] A policy independent of those applied at national level has been provided for. The Community has been given the means necessary to implement it. The contested provisions of the Agreement have therefore to be interpreted in a way that attaches due importance to the objectives pursued by this new title of the Treaty. That has a number of consequences which I shall take into account in due course in my Opinion but which I shall describe forthwith.

The first is that cooperation policy should be correctly interpreted. It must be distinguished from the common commercial policy. The Treaty keeps the two policies

19 — See, most recently, Opinion 2/94 of 28 March 1996 [1996] ECR I 1759, paragraph 29.

20 — The second paragraph of Article 130y provides that: 'The previous paragraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements'. Article 25 of the Agreement stipulates that: 'Without prejudice to the relevant provisions of the Treaties establishing the European Communities, neither this Agreement nor any action taken thereunder shall in any way affect the powers of the Member States of the Communities to undertake bilateral activities with India in the framework of economic cooperation or to conclude, where appropriate, new economic cooperation agreements with India'. See also the second sentence of Article 1 of Council Regulation (EEC) No 443/92 of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America (OJ 1992 L 52, p. 1): 'This cooperation, which shall be in addition to assistance from the Member States, shall involve financial and technical development assistance and economic cooperation'.

21 — See, to that effect, J. Raux, op. cit., according to whom, given the complex nature of the concept of development gradually defined in the various decisions of the Court: 'It is understandable that the Council of the European Communities should have thought it "necessary" to use both Article 113 and Article 235 to conclude commercial and economic cooperation agreements with the developing countries. The provisions of the EEC Treaty (Article 113) could not cover the wealth of proposed agreements, whereas they had provided an adequate basis for the conclusion of the "first generation agreements" the trade or commercial cooperation agreements. *In future, the Council will have to use the combined provisions of Article 130y and Article 228 when concluding cooperation agreements with the same objectives*' (p. 183, emphasis added).

separate, in terms both of their respective objectives and the means of attaining them. [22]

Secondly, it must be borne in mind that the powers conferred on the Community for the pursuit of cooperation policy are geared towards the wide-ranging objectives provided for in that section of the Treaty. The Community Treaties are designed to attain their objectives using effective means, as correctly pointed out on another occasion by Advocate General Lenz. [23] The instruments for Community action must be suited to the objectives to be pursued, and the new policy must be coherently structured, ensuring the effectiveness of the new rules specifically adopted in connection with it.

Finally, the area covered by development cooperation must be considered with close reference to the provisions of the third generation agreements, since this subject-area has already been consolidated in the Treaty, particularly in relation to the objectives and substance of the latter category of international instruments. [24]

Protection of human rights

22. According to Article 1 of the Agreement:

'Respect for human rights and democratic principles is the basis for the cooperation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential element of the Agreement'.

22 — In that context, I am unable to support the argument put forward at the hearing by Portugal to the effect that, in this case, the use of Article 113 is superfluous as the cooperation agreement should be based solely on the provisions contained in Title XVII. Firstly, that view is based on an interpretation of the common commercial policy which cannot be accepted in the light of the case-law of the Court of Justice, as it is unduly restrictive (see, to that effect, the judgments cited at footnote 6). Secondly, various provisions contained in the Agreement, whose legality is not, moreover, at issue, relate to matters closely linked to the common commercial policy: Article 2 (most-favoured-nation clause) and Article 3 (trade and commercial cooperation), for example. There are clearly therefore two 'concepts' underlying the Agreement, namely trade and development, and in interpreting the Agreement those concepts can and must be kept separate.

23 — Opinion of Advocate General Lenz in Case 45/86 *Commission* v *Council* [1987] ECR 1501, especially p. 1512.

24 — The need to use third generation agreements as a criterion for determining the substance of Article 130u is confirmed by the use of Article 235 as their legal basis. If that article is a 'substitute' legal basis, it follows that measures taken in accordance with the earlier agreements must, for that very reason, be deemed to be specific measures in pursuit of the Community's responsibilities in relation to the attainment of development cooperation objectives. The logical consequence, as I see it, is that the subject-matter of the measures taken in accordance with those agreements is encompassed by the new legal basis. The special features of the history of development cooperation also make any objection founded on the irrelevance of Community practices in determining the legal basis immaterial (see the judgment of 23 February 1988 in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 29). As I have concluded in my Opinion, using academic writing to support my view, the specific legal basis of Article 130y was created precisely in order to confirm the stage reached in Community action with regard to development and such action must, in my view, be founded on it. It is therefore on that basis alone that I consider the existence of similar clauses in earlier agreements to be a significant pointer to the legality of the provisions of the Agreement in terms of both the objectives pursued and their substance.

Positions of the parties

23. Portugal takes the view that the legal basis of that provision should be Article 235 of the Treaty. Although it is recognized that human rights occupy a central place in the Community legal order, this does not mean that the Community can adopt measures in that sector, either internally or externally. Nor is that provision of the Agreement justified by the express provision in Article 130u(2), according to which Community policy is to contribute to 'respecting human rights'. Portugal considers this simply to be a reference to a general objective, which should then be pursued using the means envisaged by the provisions of Title XVII. This subject-area ought therefore to be regulated by agreements concluded, within their respective spheres of competence, by the Community and the Member States. In that context, the fact that respect for human rights constitutes the 'essential element' of the Agreement is also of no relevance to the appropriateness or otherwise of the legal basis adopted. In other words, the provision at issue is merely the prerequisite for other measures which should instead be based on Article 235.

24. The Council objects, in general terms, that the applicant makes an artificial distinction between the Community action referred to in Article 130u and the instruments provided for that purpose in Articles 130y and 130w, with the paradoxical outcome that any action the objective of which is stated in Article 130u ought then to have as its legal basis Article 235. The Council also argues that the definition of respect for human rights as an essential element of the Agreement is based directly on Article 130u, effectively and lawfully empowering the Community to terminate or suspend the cooperation relationship, if the country benefiting from Community aid has committed serious violations of the rights that the Community is seeking to protect. In their observations, both the Commission and Denmark agree that the clause contained in Article 1 is wholly legitimate.

Assessment

25. The relevant case-law of the Court, as embodied in Article F(2) of the Treaty, makes respect for human rights an objective that must inform Union action as a whole. As the Court recently reaffirmed:

'fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by

international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'. [25]

26. That approach must therefore be applied in this case with reference to the rules on development cooperation. [26] Policy in this sector is to 'contribute' to the general objective ... of respecting human rights and fundamental freedoms. In other words, cooperation requires the observance of democratic principles and the guarantee of the rights that apply in the State cooperating with the Community. [27]

27. Nor does making the protection of human rights and development cooperation interdependent mark a new departure in Community action. This is a link that has been recognized in a variety of measures, dating back to the mid-1980s. I shall mention the most important of them. The first was the statement by the Foreign Ministers of 21 July 1986 affirming that respect for, development and protection of human rights constitute an important element in international relations as well as a cornerstone of European cooperation and relations between the Community, the Member States and other countries. Subsequently, in a communication to the Council of 13 March 1991, the Commission indicated the need to link development cooperation policies with respect for and promotion of human rights and support for the democratic processes in the developing countries. [28] The European Council's Resolution of 26 and 27 June 1992 reaffirmed that '*the respect, promotion and safeguarding of human rights* is an essential element in international relations and therefore one of the *cornerstones of cooperation*', attaching 'special importance to positive initiatives designed to ensure active support to those countries which are instituting democracy, improving human rights performance as well as promoting good governance'. [29] Finally, the Resolution of the Council and the Member States of 28 November 1991 on human rights, democracy and development recognized the universal nature of human rights and the duty of all the Member States to promote them, again reaffirming that balanced and sustainable development is

25 — See Opinion 2/94 (cited at footnote 19), paragraph 33.

26 — Furthermore, in order to demonstrate the significance of this subject-area for the Community legal order, paragraph 32 of Opinion 2/94 contains a specific reference to Article 130u.

27 — J. Cloos, op. cit., p. 349: 'At first sight, the form of words adopted appears merely to be a statement of fact. But it is clear that, as far as the authors of the Treaty are concerned, an element of contingency is implied here'.

28 — Communication from the Commission to the Council on human rights, democracy and development cooperation policy, Bulletin EEC 3/1991, point 1.3.41, p. 64.

29 — See the conclusions of the Lisbon European Council in Bulletin EEC 6/1992, point 1.26, p. 17 (emphasis added). See also, for an earlier, less clearly formulated precedent, the conclusions of the Luxembourg European Council of 28 and 29 June 1991, which reaffirmed the Council's belief that 'certain aspects with an important bearing on these relations (with the developing countries), such as broader-based democracy, respect for human rights, and economic reform, are bound to develop further', Bulletin EEC 6/1991, point 1.30, p. 14.

founded on respect for human rights. [30] [31] Those guidelines were finally consolidated in Regulation No 443/92, cited above. Article 2 of the regulation expressly recognizes that 'The aim of Community development and cooperation policies shall be human development' (first paragraph) and that '... the exercise of human rights and fundamental freedoms and democratic principles are preconditions for real and lasting economic and social development' (second paragraph).

28. That said, it remains to be established whether the so-called democracy clause, as formulated in Article 1 of the Agreement, may form part of an agreement concluded in accordance with Article 130y. The inclusion of a clause of that nature — now general Community practice with the advent of the third generation agreements [32] — is specifically intended to adjust cooperation policy in line with respect for human rights, in accordance with the Treaty guidelines. That is its purpose, and it is designed to allow the Community to exercise the right to terminate the Agreement, in accordance with Article 60 of the Vienna Convention, where the non-member State has failed to respect human rights within its own legal system. [33] Moreover, that, and that alone, is the significance of the reference in the Agreement to respect for human rights. What matters here is that it is unequivocally directed towards the pursuit of the objectives of development

30 — That document, which is designed to lay down guidelines for action by the Community and Member States, expressly mentions (paragraph 5) that human rights are central to development cooperation relations and, with that in mind (paragraph 6), the possibility of taking retaliatory measures against States benefiting from Community financial support where serious and continuing human rights' violations take place within those States. In fact it goes on to consider (paragraph 7) the various types of sanction that may be applied with the specific aim of protecting the interests of the population groups affected, also where direct relations with the local government are suspended. The text of the resolution appears in *Compilation of Texts adopted by the Council of Ministers for Development Cooperation*, Brussels 1992, p. 91.

31 — See also the Council guidelines of 18/19 December 1990 and February 1991 on cooperation with the ALA developing countries, paragraph 2: 'The aim of cooperation is centred on the development of the human being, which presupposes observance and promotion of all human rights. *Co-operation measures are consistent with this positive view, in which respect for human rights is regarded as fundamental to true development and co-operation itself is seen as a contribution to the promotion of these rights*' (emphasis added). And again, in the next subparagraph: 'In those cases where human rights are violated and democratic principles infringed, the Community could amend the implementation of co-operation by confining co-operation to activities of direct benefit to those sectors of the population in need.' The text appears in *Compilation of texts adopted by the Council of Ministers for Development Cooperation*, p. 115. For an informative reconstruction of the historical and political process within which this view of the link between cooperation and human rights evolved, see C. Goybet: 'Aide au développement, démocratie et droits de l'homme: premier bilan' in *RMC*, 1993, p. 785.

32 — It can be said, without fear of contradiction, that the democracy clause is accepted practice in the international agreements concluded by the Community. As well as being included in all of the association agreements with the Eastern European countries and the cooperation agreements with the ALA countries, it has also been inserted in the agreements concluded in accordance with Article 130y. See, in that connection, Council Decision 94/822/EC of 19 December 1994 concerning the conclusion of a Cooperation Agreement between the European Community and the Republic of South Africa (OJ 1994 L 341, p. 61). According to Article 1 of that agreement: 'Relations between the Community ... and South Africa ... shall be based on *respect of human rights and democratic principles which guide the internal* and international policy of the Contracting Parties and constitute an essential element of this Agreement' (emphasis added); see also Council Decision 95/129/EC of 27 March 1995 concerning the conclusion of a cooperation agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on Partnership and Development (OJ 1995 L 85, p. 32). According to Article 1 of that agreement: 'Cooperation ties between the Community and Sri Lanka and this Agreement in its entirety are based on respect for democratic principles and human rights which inspire the domestic and external policies of both the Community and Sri Lanka and which constitute *an essential element of the Agreement*' (emphasis added). Both those instruments had as their legal basis Articles 113, 130y and 228.

33 — The main requirement, within the meaning of Article 60 of the Vienna Convention, is the existence of a 'material' breach which may be lawfully invoked by one of the parties as a ground for terminating or suspending the Treaty in whole or in part. A breach of that nature, within the meaning of Article 60(3)(b), may consist in the 'violation of a provision essential to the accomplishment of the object or purpose of the Treaty'. See, on this point, R. Pisillo Mazzeschi: *Risoluzione e sospensione dei Trattati per inadempimento*, Milan, 1984, p. 93 et seq. See the third paragraph of Article 2 of Regulation No 443/92: 'In the case of fundamental and persistent violations of human rights and democratic principles, the Community could amend or even suspend the implementation of cooperation with the States concerned ...'.

cooperation policy in accordance with Article 130u.

29. The latter provision of the Treaty therefore constitutes a secure legal basis for Article 1 of the Agreement. I would go further than that. The whole of Community action in this area illustrates the importance attaching to respect for human rights in development aid policy for non-member countries. If that is properly taken into account, the democracy clause must indeed be deemed *necessary* if development cooperation policy is to be lawfully pursued. I might venture to add that it would be the *failure to adopt* a clause of that type that would compromise the legality of Community action, because compliance with the specific wording of Article 130u would no longer be guaranteed. I cannot therefore endorse the applicant's objections on that point.

Energy, tourism and culture

Article 7 provides as follows:

'The Contracting Parties recognize the importance of the energy sector to economic and social development and undertake to step up cooperation relating particularly to the generation, saving and efficient use of energy. Such improved cooperation will include planning concerning energy, non-conventional energy including solar energy and the consideration of its environmental implications'.

Article 13 provides as follows:

'The Contracting Parties agree to contribute to cooperation on tourism, to be achieved through specific measures, including:

(a) interchange of information and the carrying out of studies;

(b) training programmes;

(c) promotion of investment and joint ventures'.

Article 15 provides as follows:

'The Contracting Parties will cooperate in the fields of information and culture, both to create better mutual understanding and to strengthen cultural ties between the two regions. Such cooperation may include:

(a) exchange of information on matters of cultural interest;

(b) preparatory studies and technical assistance in the preservation of cultural heritage;

(c) cooperation in the field of media and audio-visual documentation;

(d) organizing cultural events and exchanges'.

Positions of the parties

30. The applicant submits, in relation to these three areas, that there is no specific legal base for Community competence and that Article 235 must therefore be used for the conclusion of the Agreement. Generally speaking, energy and tourism are considered in Article 3(t) of the Treaty only, while responsibility for cultural matters, assigned to the Community by Article 128(2), is purely a matter of coordination. [34]

34 — The first paragraph of Article 128(2), relating to culture, provides as follows: 'Action by the Community shall be aimed at encouraging cooperation between the Member States and, if necessary, supporting and supplementing their action ...'.

In addition, the clauses in the Agreement require the adoption of further measures — in relation to alternative energy sources, for example — for which there is no basis on which to found Community action, other than Article 235.

31. According to the defendant and the Commission, those provisions of the Agreement are instead ancillary to development cooperation, which forms the real core of the Agreement, and, moreover, are not of a prescriptive nature.

Assessment

32. In view of the argument put forward by Portugal, we also have to consider whether the subject-areas at issue may be linked to the objectives of cooperation as laid down in Article 130u and whether the provisions of the Agreement may, given their substance, fall within the range of matters covered by the agreements provided for in Article 130y.

33. The answer to the first question must, in my view, be in the affirmative. These three areas are crucially important to development and therefore clearly fall within this subject-

area, as gradually defined in a series of cooperation agreements and then consolidated in Article 130u of the Treaty. It is, moreover, significant that those economic sectors, having formed the subject of earlier Community cooperation measures, form part of the *acquis communautaire* in this field. [35]

34. So far as energy is concerned, no further assessment is needed, as the provision of the Agreement to the effect that this is an area important 'to social and economic development' is conclusive. Furthermore, Article 8(1) of Regulation No 443/92 itself provided that economic cooperation with the developing countries 'shall cover all economic, technical and scientific fields, *in particular energy*'. [36] As specified by Article 7 of the Agreement, among the various energy sources, priority attaches to alternative sources. That solution is fully consistent with the environmental principle which, as I have had occasion to point out, is linked to the concept of sustainable development and to the reference to 'industrial ecology' in Article 8 of the abovementioned regulation.

Considerations of the same kind apply to tourism. Here too we are dealing with an economic activity that is of major value to the developing countries and that, as such, given that it contributes to their economic and social development and the campaign against poverty, must be brought within Article 130u, entirely in keeping with the concept of development as interpreted by the third generation agreements.

That brings us to culture. It is useful to see here what the Treaty has to say regarding the provisions of Title IX. Article 128(4) links cultural policy to the Community's other policies: 'The Community shall take cultural aspects into account in its action under other provisions of this Treaty'. Article 128(3) provides for clear international scope for Community action in this field by laying down that: 'The Community and the Member States shall foster cooperation with third countries ... in the sphere of culture'.

Culture is therefore a 'transversal' Community objective which influences individual sectoral policies and leaves its mark on the Community's international activity, including action in the field of development cooperation.

35 — See to that effect *ex multis* Council Decision 92/509/EEC of 19 October 1992 concerning the conclusion of the framework cooperation agreement between the European Economic Community and the Republic of Paraguay (OJ 1992 L 313, p. 71; Articles 13 and 17 of the agreement); Council Decision 91/627/EEC of 7 October 1991 concerning the conclusion of the framework cooperation agreement between the European Economic Community and the United States of Mexico (OJ 1991 L 340, p. 1; Articles 30, 32 and 35 of the agreement).

36 — Regulation No 443/92 (cited at footnote 20; emphasis added).

35. The statement by the Council concerning cooperation with the developing countries of Latin America and Asia, according to which 'economic cooperation will seek to strengthen the *cultural dimension* in relations between the two regions' (emphasis added), the sixth paragraph of Article 5 of Regulation No 443/92, according to which 'The cultural dimension of development must remain a constant objective in all activities and programmes with which the Community is associated', and Community practice, typified by the inclusion of this subject in many agreements with developing countries, are all explicit in that regard. [37]

36. Hence there is no doubt that, in terms of the objectives pursued, those areas are covered by the concept of development cooperation. It is, however, necessary to take into account the substance of the provisions adopted by the Agreement. Were they to impose detailed and specific obligations on the Member States, Community competence could be called in question on account of the possible implications of its exercise for the internal market, and the measures could not then be based on Article 130y.

37. That, however, is not the case. Common to all of the provisions of the Agreement at issue here is that they are not prescriptive. In the energy sector, the parties 'undertake to step up cooperation'; in the field of tourism, they 'agree to contribute to cooperation'; in the cultural sphere, they 'will cooperate ... to create better mutual understanding and to strengthen cultural ties between the two regions'.

It is clear that these are statements of principle rather than specific obligations binding on the parties. Nor can I endorse the view of the applicant, according to which the Agreement itself provides for measures to be adopted that would require recourse to Article 235. The activities provided for (exchanges of information, studies, promotion and training activities), although general, are directly and clearly linked to cooperation in those sectors and, in view of their ancillary nature, may be founded on the legal basis adopted for the conclusion of the

37 — Council guidelines of 18/19 December 1990 and 4 February 1991 on cooperation with the ALA developing countries in *Compilation of Texts adopted by the Council of Ministers for Development Cooperation*, Brussels, 1992, p. 115. Those guidelines were then reflected in a series of agreements concluded by the Community with countries of the ALA group. See also, in addition to those already cited, Council Decision 91/158/EEC of 4 March 1991 concerning the conclusion of the Framework Agreement for cooperation between the European Economic Community and the Republic of Chile (OJ 1991 L 79, p. 1, Article 13 of the agreement) and Council Decision 92/205/EEC of 16 March 1992 concerning the conclusion of the Framework Agreement for cooperation between the European Economic Community and the Eastern Republic of Uruguay (OJ 1992 L 94, p. 1; Article 16 of the agreement).

Agreement. [38] In my view, therefore, the defendant's submission must be accepted.

Intellectual property

38. Article 10 of the Agreement provides as follows:

'The Contracting Parties undertake to ensure as far as their laws, regulations and policies allow that suitable and effective protection is provided for intellectual property rights, including patents, trade or service marks, copyright and similar rights, geographical designations (including marks of origin), industrial designs and integrated circuit topographics, reinforcing this protection where desirable. They also undertake, wherever possible, to facilitate access to the data bases of intellectual property organizations'.

Positions of the parties

39. Portugal does not consider the Community competent, on the basis of Articles 113 and 130y, to enter into such undertakings. In support of its submission, the applicant cites the judgments of the Court in this area, in which it ruled that in the absence of Community provisions harmonizing national rules, it is for the Member States to establish, in compliance with international agreements, the conditions and procedures governing literary and artistic property. [39] The rationale behind that case-law is to prevent the Community from using external agreements as an indirect means of encroaching upon areas which it is instead required to regulate in accordance with the procedural and voting arrangements laid down by Articles 100 and 100a as regards internal market harmonization measures, or by Article 235 as regards the creation of new rights taking precedence over national rights. [40] That conclusion is borne out by Opinion 1/94 in which the Court established that the Member States and the Community were jointly competent in relation to the TRIPs Agreement. [41]

38 — For an assessment of 'ancillary' in relation to clauses similar to those at issue in this case, see Opinion 1/78 (cited at footnote 6), paragraph 56. Nor can I support the objections made by the applicant at the hearing with regard to training. I am persuaded that the measures have to be viewed in terms of the objective of the Agreement and not, as the applicant would appear to view them (and not only in relation to this point), in absolute terms. In other words, we are not dealing with an agreement concerned mainly with vocational training but with measures that are clearly ancillary to the objectives of development cooperation which seem to me — and this, I think, is worth stressing — to involve aspects that concern training. Indeed, various Community instruments bear witness to that. Regulation No 443/92, for example, which provides (in Articles 5 and 7) for training measures; or the abovementioned Council guidelines (footnote 37) which include training *among the areas to which priority is to be given for cooperation measures implemented by the Community* (p. 119, paragraph 2; emphasis added).

39 — Judgment of 20 October 1993 in Joined Cases C-92/92 and C-326/92 *Phil Collins* [1993] ECR I-5145, paragraph 19; judgment of 24 January 1989 in Case 341/87 *EMI-Electrola* [1989] ECR 79, paragraph 11.

40 — As laid down by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

41 — Opinion 1/94 of 15 November 1994 [1994] ECR I-5267.

40. The Council, which has the support of the Commission, considers that the clauses of the Agreement are limited in scope and impose substantive obligations on the Republic of India. On that basis, and with reference to the view expressed by the Court in Opinion 1/94, the Council concludes that the Community was entitled to enter into the Agreement without involving the Member States, on the basis of Article 113.

Assessment

41. I too believe that this issue has to be considered on the basis of the view taken by the Court in Opinion 1/94, where it does indeed state that the Community does not enjoy exclusive competence in relation to intellectual property and that the Member States have to be accorded joint competence. This means that, in external relations, matters have to be regulated by means of mixed agreements.

42. It has to be borne in mind, however, that the Court reached that conclusion in relation to an agreement which is very broad in scope, is very detailed in substance and is designed 'to strengthen and harmonize the protection of intellectual property on a world-wide scale' where there are as yet no Community harmonization measures. [42] Those were the circumstances of the case. There were no harmonization measures. The Community had not therefore exercised the competence enabling it to regulate the matter internally and it is understandable that the Court decided not to accord the Community exclusive competence to conclude external agreements in those circumstances. [43]

43. In assessing the legality of intellectual property clauses contained in agreements entered into by the Community on the basis of Article 113, the Court has, however, identified a partial derogation from the principle set forth above. Full Community competence has been recognized in cases in which the external agreement concluded on the basis of Article 113 contains 'ancillary provisions for the organization of purely consultative procedures or clauses calling on the other party to raise the level of protection of intellectual property'. [44]

44. Let us consider this case in the light of the view taken by the Court. If we look at the terms in which it is worded, the contested clause of the Agreement cannot be equated with the provisions of the TRIPs Agreement. As far as I am concerned, given the way in which the common commercial policy has been interpreted in the case-law of the Court, the clause can instead be covered by Article 113, as both the Commission and

42 — Opinion 1/94 of 15 November 1994 (paragraph 58).

43 — Ibidem, see paragraph 60.

44 — Ibidem, see paragraph 68 and, for the precedents cited therein, paragraph 67.

the Council contend. [45] The provisions of Article 10 may, by reason of their substance, be deemed to be 'ancillary provisions' as that category is defined by the Court. [46] More specifically, the following considerations support that view.

45. First of all, the provision of the Agreement at issue here is neither intended to be nor does it have the effect of a harmonizing measure. Its wording is quite explicit. It merely establishes that suitable and effective protection of intellectual property rights is to be guaranteed in accordance with the 'laws, regulations and policies' of the contracting parties. This is not therefore an external activity of the Community which may affect the process of harmonizing rules within the internal market. If that is so, then the elements on which the Court based its decision in the *TRIPs* case do not feature in this case. [47]

46. In the second place, the obligation arising under the Agreement is no more, in my view, than an *incentive* to apply the legislation and thus, to adopt the terminology used by the Court in the abovementioned opinion, it is fundamentally an 'invitation' to the other party to the Agreement to increase the level of protection. In those terms, the obligation laid down has to be deemed a standard clause, eminently political in substance, while its legal purpose is, in any event, simply to enable the Agreement to be terminated or suspended, if the contracting party fails to honour the undertaking it has entered into to guarantee effectively the protection of intellectual property rights. It does not matter, in that regard, that the Community itself undertakes, in contrast to other cooperation agreements, to respect its own laws, regulations and policies in that area. [48] As this is not a field subject to exclusive action by the Community, the conferral on the latter of the appropriate powers will be determined and governed by the relevant rules of Community law. In other words, the Community undertaking must — and will have to — refer exclusively to those sectors in which it has exercised its powers in accordance with Articles 100, 100a and 235. [49]

47. In addition, the considerations set forth by the Court in the abovementioned opinion on the link between intellectual property and trade in products take on special significance for the economies of the developing countries. The incentive effect with which exclusive rights have to be credited constitutes a

45 — See judgment of 26 March 1987 in Case 45/86 (cited at footnote 5).

46 — See Opinion 1/78, cited at footnote 6, paragraph 56.

47 — See Opinion 1/94, cited above, paragraph 60.

48 — See, *ex multis*, Council Decision 93/407/EEC of 19 July 1993 on the conclusion of the cooperation agreement between the European Economic Community and the Republic of Slovenia (OJ 1993 L 189, p. 1; Article 27 of that agreement).

49 — Also ancillary in nature is the undertaking, contained in the second sentence of the provision at issue, 'wherever possible to facilitate access to the data bases of intellectual property organizations'. Even there, the obligation assumes what is clearly an ancillary nature as compared with the commercial policy content of the Agreement and can in many ways be equated with those 'ancillary provisions for the organization of purely consultative procedures' whose inclusion in the commercial policy agreements entered into by the Community in that field has, as we have seen, been found to be lawful by the Court in Opinion 1/94 (paragraph 68, but see also the examples given in paragraph 67).

way of achieving the kind of lasting economic and social development that is the general objective of Article 130u. Moreover, we have to bear in mind that the rules governing intellectual property are a feature of the legal systems of the economically most advanced countries. The clause at issue serves therefore to bring the Agreement into line with the objective, expressly provided for in the Treaty, of securing 'the smooth and gradual integration of the developing countries into the world economy'.

48. To conclude, Article 10 of the Agreement may — by reason of its objectives, the terms in which it is formulated and the fact that it lays down obligations which are only ancillary to the purpose of the rules contained in that international instrument — be brought within the common commercial policy. Its proper legal basis is therefore Article 113. The applicant's submission cannot be accepted.

Combating drug abuse

Article 19 of the Agreement provides as follows:

1. 'The Contracting Parties affirm their resolve, in conformity with their respective competences, to increase the efficiency of policies and measures, to counter the supply and distribution of narcotics and psychotropic substances as well as preventing and reducing drug abuse, taking into account work done in this connection by international bodies.

2. Cooperation between the Parties shall comprise the following:

(a) training, education, health promotion and rehabilitation of addicts, including projects for the reintegration of addicts into work and social environments;

(b) measures to encourage alternative economic opportunities;

(c) technical, financial and administrative assistance in the monitoring of precursors trade, prevention, treatment and reduction of drug abuse;

(d) exchange of all relevant information, including that relating to money laundering.'

Positions of the parties

49. The applicant claims that the provision at issue involves reciprocal commitments in regard to combating drug abuse. There are, however, no Treaty provisions covering drug abuse or any Community measures on the internal market capable of justifying the inclusion of provisions of that nature in the Agreement. In any event, since these relate to cooperation in justice and home affairs (regulated by Article K.1(4) and (9) of the Treaty), the contested provisions of the Agreement should have been adopted using the mixed-agreement procedure.

50. The Council, for its part, contends that there are various Community measures, whose legal basis has not been contested, [50] which regulate several aspects of the subject-area under consideration in the internal market; that would allow the Community, on the basis of the principle of parallel action, to deal with that same subject-area in external relations as well. The Commission takes a different view: the provisions of the Agreement on combating drugs must be directly linked to the pursuit of the objectives of social and economic development and thus be based on Article 130y.

Assessment

51. Combating drugs was not expressly recognized in the Community legal order until the advent of the Maastricht Treaty. The adoption of rules in this area is, however, either a matter for the Community or it is reserved, under the Maastricht system, for the common external and security policy and cooperation in justice and home affairs.

More especially, Article K.1, which governs, with reference to the Union, cooperation in justice and home affairs, includes among the sectors that the Member States are to 'regard' as 'matters of common interest' combating drug addiction (Article K.1(3)(4)), both for general purposes and in relation to judicial cooperation in criminal matters

50 — The measures referred to are: Council Regulation (EEC) No 302/93 of 8 February 1993 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction (OJ 1993 L 36, p. 1); Council Regulation (EEC) No 3677/90 of 13 December 1990 laying down measures to be taken to discourage the diversion of certain substances to the manufacture of narcotic drugs and psychotropic substances (OJ 1990 L 357, p. 1); Council Directive 91/308/EEC of 10 July 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77). The legal bases selected were Articles 235, 113 and 100a.

(Article K.1(3)(7)), customs cooperation (Article K.1(3)(8)) and police cooperation (Article K.1(3)(9)).

The relevant Community provision is, however, Article 129 which has, in a sense, 'constitutionalized' the principle of health in the Community legal order. The second paragraph of Article 129(1) provides that 'Community action shall be directed towards the prevention of diseases, in particular the major health scourges, *including drug dependence*' (emphasis added) and goes on to state: 'Health protection requirements shall form a constituent part of the Community's other policies' (third paragraph of Article 129(1)).

52. I am aware that, as the applicant points out, Community action under Article 129 involves simply coordinating the policies of the Member States. I consider, however, that the reference contained in the third paragraph of Article 129(1) is of major significance for the analysis we are conducting here. By indicating the importance that must be attached to the protection of health (and therefore combating drug dependence as well) as part of Community action, it seems to me that the provisions in questions establish the 'transversal' nature of that policy also in relation also to development cooperation measures.

53. Having made that general point, I now turn to the substance of the issue. It is my view that, in the light of its objectives, combating drugs has to be viewed as part of development policy. That approach is to be preferred, as is confirmed by the position adopted by the Community institutions on various occasions. In the first place, there are the guidelines for cooperation drawn up by the Commission [51] and approved by the Council (of Ministers for Cooperation with Developing Countries) in two statements made in 1990 and 1991, which list combating drugs among the six main areas of development aid.

On that occasion, it was pointed out that:

'Community cooperation ... in the fight against drugs will be stepped up on the basis of a dialogue *within the more general context of the economic development of the producer countries* and their cooperation with the European Community. *This cooperation will consist of action covering humanitarian aid as well as development aid.*' [52]

51 — Commission of the European Communities, *Guidelines on cooperation with the ALA developing countries*, COM (90) 176 fin., 11 June 1990, point 5.2.2.1.

52 — Council guidelines of 18/19 December 1990 and 4 February 1991 on cooperation with the ALA developing countries in *Compilation of texts adopted by the Council of Ministers for Development Cooperation*, Brussels 1992, p. 121 (emphasis added).

That approach was subsequently confirmed by Regulation No 443/92. In relation to Community action in the field of development cooperation, the regulation provides:

'Special attention must be given to measures to combat drugs. Community cooperation ... to promote the fight against drugs shall be stepped up on the basis of a dialogue within the more general context of the economic development of the producer countries and their cooperation with the European Community'. [53]

In accordance with those guidelines, the fight against drugs has since become an integral part of the 'third generation' cooperation agreements which contain provisions similar in content to the clause at issue. [54]

54. Development cooperation must therefore relate directly to the fight against drugs. [55] That is the decision of the Community institutions. The reasons are quite clear. The repercussions of an economy based on the production of narcotics — or deriving substantial revenue from narcotics production — on the structures of a developing society are bound to jeopardize the smooth integration of the country concerned into the world economy. The marginalization, the incentive to commit crime and the disruption of social structures resulting from drug use and the drugs industry are incompatible with the very concept of sustainable social development and make it impossible to create the conditions necessary for the objectives of Community policy to be attained.

55. Given its objectives, the relevant provision of the Agreement can, in my view, legitimately be considered to reflect the objectives of Article 130u. Whether its content justifies recourse to Article 130y or requires a different legal basis is another matter.

53 — Fourth paragraph of Article 5 of Regulation No 443/92 (cited at footnote 20). To emphasize the degree of importance attached to this issue, it also seems worth mentioning Article 6, according to which: 'Financial and technical assistance shall be extended to the relatively more advanced ALA developing countries, in particular in the following fields and cases: ... the fight against drugs'.

54 — See, *ex multis*, Article 11 of the Agreement (mentioned in footnote 37) with the Republic of Chile, significantly entitled: 'Cooperation in the field of social development'; Article 29 of the Agreement (footnote 35) with the United States of Mexico; and, finally, Council Decision 95/445/EC of 30 October 1995 on the conclusion of the Framework Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil (OJ 1995 L 262, p. 53; Article 22 of the agreement).

55 — For this view, see G. Estievenart: 'The European Community and the Global Drugs Phenomenon' in *Policies and Strategies to Combat Drugs in Europe* (edited by G. Estievenart), Dordrecht, 1995, p. 50, who takes the view that 'the Commission (should) start thinking now about how to "ensure consistency" between the Common Foreign and Security Policy (second pillar), development cooperation and cooperation with third countries (first pillar), and cooperation in the fields of justice and home affairs (third pillar)' (p. 89, emphasis added). See, finally, the conclusions of the Madrid European Council specifying that development cooperation must be stepped up in the fight against drug trafficking (see *Bulletin EEC 12/95*, in particular points 1.89-1.96).

56. What is the solution? The first point to note is that the obligation laid down in the first paragraph of the provision at issue amounts to a simple statement of intent. The parties merely reiterate their 'resolve' to act efficiently, in conformity with their respective competences, by applying 'policies' and 'measures', both in relation to the drugs market and by preventing and reducing drug abuse and thus, as an economist would put it, in relation to either the supply or the demand side of the product in question.

57. That said, it is clear that we would not be faced with the problem had the Community effectively covered itself by adopting harmonizing measures. No such measure has been envisaged. Nor was it necessary to make provision for such measures under the Agreement.

58. Let us now consider the individual measures. The scope of the obligation laid down in Article 19(2)(a) must be deemed to be wholly consistent with Article 130y. As well as fitting in with the 'transversal' nature of the principle of health in the Community legal order, as I have pointed out, the cooperation measures provided for in that article are directly linked to the aims of cooperation because they are specifically designed to reintegrate addicts into 'work and social environments'.

59. Similar considerations apply to the measures designed to encourage the alternative economic opportunities provided for in Article 19(2)(b). Reconversion of areas used to grow opiates is one of the 'historical' measures taken by the Community in this area. As of 1987, a specific North-South cooperation programme was created to fund that process. [56] Bearing in mind the link between such action and the 'rural' sector which, according to the Community guidelines, constitutes a priority area for Community action in the field of cooperation, the measures concerned are without doubt ancillary to the objectives pursued. [57]

60. The measures described in Article 19(2)(c) relate to two different aspects of the fight against drugs: on the one hand, monitoring the precursors trade, and, on the other, the prevention, treatment and reduction of drug abuse. As regards the latter, the points made above in relation to Article 19(2)(a) and (b) apply here also. Those measures, directly linked to the socio-economic objectives specifically concerned with development cooperation policy — and health protection, also worth stressing — are ancillary to Community action in the sector.

56 — See point 5.2.2.1 of the abovementioned Commission communication, *Guidelines for cooperation with the ALA developing countries*

57 — On these issues and, more generally, for a comprehensive review of Community activity in the fight against drugs, see G. Estievenart, op. cit., p. 55.

61. A more detailed analysis is, however, needed to assess the measures referred to in the first part of Article 19(2)(c). The Community took action in this area in the form of Council Regulation (EEC) No 3677/90 which laid down the measures to be taken to monitor trade between the Community and third countries in substances frequently used for the illegal manufacture of narcotic drugs and psychotropic substances, to prevent the diversion of such substances. That regulation, adopted on the basis of Article 113, forms part of the more general commitment on the part of the Community to take action, within the limits of its powers, in the context of international initiatives to combat drugs, the most important instance of which was the conclusion of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 19 December 1988 by the Community and the Member States. As stated in the regulation, it is in the spirit of that Convention that the Community is contributing to the efforts made by the producer countries to combat drug trafficking (seventh recital in the preamble to the regulation).

It is also on the basis of that data that the Community may, in my view, adopt measures in this field by means of cooperation agreements with non-member countries. Monitoring trade in psychotropic substances actually forms part of this global programme of cooperation to combat drugs and may, as such, inform action undertaken in pursuit of the aims of Article 130u. Action to provide assistance geared to those aims is clearly crucial if the fight against drugs is to be effective. Given that they are ancillary to the aims of cooperation, the measures in question may lawfully be based on Article 130y.

62. The latter argument and the wider context in which the Community is operating in this field must also be taken into account when assessing the measures provided for in Article 19(2)(d).

63. If it is to pursue an adequate anti-drugs policy, the Community must have available to it the necessary data, and a European Monitoring Centre for Drugs and Drug Addiction was set up for that purpose. [58] The purpose of the Centre is to provide 'the Community and its Member States ... with objective, reliable and comparable information at European level concerning drugs and drug addiction and their consequences' (Article 1(2)). The information in question does not relate to 'specific named cases' (Article 1(5)). The Centre is to collect, register and analyse information of a general nature on this issue (Article 2). [59] Among the priority sectors of information listed in the annex to the abovementioned regulation are (Part A, paragraph 5) the 'implications of the drugs phenomenon for the producer,

58 — The Monitoring Centre was established by Regulation No 302/93 (cited at footnote 50).

59 — As regards the confidential nature of the data collated, see also the provisions of Article 6.

consumer and transit countries ... including money laundering'. [60] Community competence for the collection of information on drugs is thus acknowledged within the internal market. Portugal's contention that this activity lies outside the purview of the Community must accordingly be rejected.

64. There remains the problem of the legal basis on which such action should be founded externally. In point of fact, not only does the regulation have Article 235 of the Treaty as its legal basis, it also provides that 'the Centre shall be open to the participation of those non-Community countries which share the Community's interests and those of its Member States in the Centre's objectives and work, on the basis of agreements entered into between them and the Community on the basis of Article 235 of the Treaty' (Article 13).

65. Notwithstanding those two references to Article 235, however, the clause of the Agreement at issue here may be deemed to be based on the rule contained in Article 130y in so far as it is clearly ancillary to the prime objective of the Agreement itself. That is apparent from a variety of considerations.

The first, which I have already explained and am mentioning once again here because of its importance to our analysis of the Agreement as a whole, is that similar requirements already appear in a number of 'third generation' cooperation agreements. [61]

66. That preliminary observation requires further clarification, however. The measure in question must be deemed to be linked to the general guidelines adopted by the Community to combat drugs in the context of development cooperation. According to the Community measures considered above, the drugs problem is clearly encompassed within this sphere *de plano*. The exchange of information is therefore a means of preliminary analysis, the purpose of which is to secure the adoption of the measures needed to combat drugs. That is also apparent from the seventh recital in the preamble to, and Article 2 of, the abovementioned regulation, according to which the information collected acts as a basis for Community action with a view to the adoption of measures to combat drugs. The measure provided for under Article 19(2)(d) is therefore ancillary to the objective of combating drugs pursued by means of the cooperation agreements, precisely because it provides for and permits the adoption of other appropriate measures allowing action to be taken in this sector.

67. The conclusion I have reached is all the more persuasive in the light of the clarifica-

60 — The other priority information sectors are: 1) demand for and reduction in demand for drugs; 2) national and Community strategies and policies; 3) international and geopolitical cooperation on supply; 4) monitoring the trade in narcotic drugs, psychotropic substances and precursors, as provided for by the international conventions.

61 — See, *ex multis*, Decision 91/627, cited at footnote 35 (Article 29 of the agreement).

tion provided by the Council at the hearing concerning the nature of that information. It is, in fact, general information, that is to say similar to the kind which, as I have had occasion to point out, the Community obtains from the Monitoring Centre and uses — in whatever form it considers most effective — where, as in this case, it embarks upon action likely to be covered by the fight against drugs, in the broad sense. The measures provided for in Article 19(1) of the Agreement fall therefore within the purview of the Community and do not exceed the limits of its competence. This case does not involve such areas of police cooperation as fall within the scope of cooperation in justice and home affairs.

68. My reasoning also holds good in relation to Article 13 of Regulation No 302/93, according to which non-Community countries are able to participate in the work of the Monitoring Centre on the basis of agreements entered into under Article 235. The Monitoring Centre collects data on drugs *generally*. The non-Community countries participating in that activity help collect the information *as a whole*, and may use it in its entirety. The clause under consideration here differs in scope. The information exchanged with the Republic of India is (only) 'all' that which is *'relevant'*, that is to say, which has a direct bearing on cooperation between the Community and the Republic of India. Apart from that subjective restriction on the exchange of information, there is another, as it were, objective constraint. The information forming the subject of the exchange is 'relevant', within the meaning of Art 19(2)(d), if and in so far as it *contributes to the measures provided for in Article 19(2)(a), (b) and (c)* and to pursuit of the general objective laid down in Article 19(1). The exchange of information here has been designed with a partial function in mind, that is to say, it constitutes a method that lays the foundations for the fight against drugs *exclusively* within the framework of any measures that may be adopted *in the field of development cooperation.*

The participation of non-Community countries in this case is not the same as involvement in the Monitoring Centre, for which recourse to Article 235 is required. This leads me to conclude that the Community was entitled to base on Article 130y an agreement containing a clause on combating drugs, couched in the terms set out above.

Conclusion

I therefore propose that the Court of Justice should

— dismiss the application;

— order the Portuguese Republic to pay the costs.