the form of the participation in the Understanding by the European Economic Community, whose decision on the subject is to be made very soon.

The Chairman thanks the Members of the Group for their spirit of cooperation in falling in with the proposal which he had made at the 22nd meeting to the effect that the Understanding should be brought into force without trying 'to solve at the present state all problems it being understood that at the end of one year the Understanding on a Standard would be reviewed and that in the meantime the Group would pursue its work regarding the unsettled questions' [cf. TC/ECG/M/74.2 (Prov.), item 5]. In accordance with the decisions taken, the Group will continue its work in this field as from its next meeting.

The Chairman thinks that it would be desirable for the Group to submit the Draft Resolution regarding the Understanding to the senior bodies as soon as possible in order that it might enter into force on 1 April 1975. With this in mind he has prepared the attached Draft Report of the Group, summarizing the main features of the Understanding and the circumstances in which approval on it was reached. In order that the report may be submitted to the Council in time, Delegations are asked to let the Secretariat have any comments on this Draft *at the latest by 24 February 1975,* at which date the Draft will — in the absence of such comments — be regarded as having the approval of the Group'.

In accordance with the second subparagraph of Article 107 (1) of the Rules of Procedure of the Court observations were submitted by:
- the Council of the European Communities;
- Ireland;
- the Italian Republic;
- the Kingdom of the Netherlands;
- the United Kingdom of Great Britain and Northern Ireland.

In accordance with Article 108 (2) of the Rules of Procedure of the Court, the Advocates-General H. Mayras, A. Trabucchi, J.-P. Warner and G. Reischl gave their views.

Discussion

The question arising from the request for an opinion prompts the following considerations:

A — Admissibility of the request for an opinion

The second subparagraph of Article 228 (1) lays down that the Council, the Commission or a Member State may request the Court for an opinion as to the compatibility with the provisions of the Treaty of an agreement to be concluded with one or more third countries or with an international organization.

The formal designation of the agreement envisaged under international law is not of decisive importance in connexion with the admissibility of the request. In its reference to an 'agreement', the second subparagraph of Article 228 (1)

of the Treaty uses the expression in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.

The Understanding in question fulfils these conditions. It contains a 'standard', that is to say a rule of conduct, covering a specific field, determined by precise provisions, which is binding upon the participants. The very fact that the standard expressly provides that derogations shall take place only in exceptional cases and under strict conditions is sufficient evidence that the Understanding is such as to bind the contracting parties and therefore fulfils the conditions of the second subparagraph of Article 228 (1) of the Treaty.

Moreover, discussions concerning the substance of the agreement are at an end and the conclusion of the Understanding in the form of a resolution of the Council of the OECD is now envisaged.

At the same time, the 'draft Report to the Council of the OECD concerning the Understanding on a Local Cost Standard' states that there only remains to be clarified 'the form of the participation in the Understanding by the European Economic Community, whose decision on the subject is to be made very soon'.

In view of these factors and bearing in mind the recommendation of the Commission concerning the 'form' of the Community's participation in the Understanding in question, it cannot be doubted that the draft Understanding constitutes an agreement 'envisaged' within the meaning of the second subparagraph of Article 228 (1) of the Treaty.

Moreover, the fact that the Commission raised the problem of the compatibility of this agreement with the provisions of the Treaty for the purpose of obtaining the opinion of the Court of Justice on the extent of the Community's powers to conclude the agreement envisaged cannot be sufficient of itself to render the request inadmissible with respect to the second subparagraph of Article 228 (1) aforementioned.

The compatibility of an agreement with the provisions of the Treaty must be assessed in the light of all the rules of the Treaty, that is to say, both those rules which determine the extent of the powers of the institutions of the Community and the substantive rules.

It is the purpose of the second subparagraph of Article 228 (1) to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community. In fact, a possible decision of the Court to the effect that such

an agreement is, either by reason of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty could not fail to provoke, not only in a Community context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries.

For the purpose of avoiding such complications the Treaty had recourse to the exceptional procedure of a prior reference to the Court of Justice for the purpose of elucidating, before the conclusion of the agreement, whether the latter is compatible with the Treaty. This procedure must therefore be open for all questions capable of submission for judicial consideration, either by the Court of Justice or possibly by national courts, in so far as such questions give rise to doubt either as to the substantive or formal validity of the agreement with regard to the Treaty.

The question whether the conclusion of a given agreement is within the power of the Community and whether, in a given case, such power has been exercised in conformity with the provisions of the Treaty is, in principle, a question which may be submitted to the Court of Justice, either directly, under Article 169 or Article 173 of the Treaty, or in accordance with the preliminary procedure, and it must therefore be admitted that the matter may be referred to the Court in accordance with the preliminary procedure of Article 228.

Similarly, the fact that discussions concerning the substance of the Understanding in question are now at an end cannot constitute a valid argument on which to base a finding that the request for an opinion is out of time, since the Treaty, by reason of the non-contentious character of the procedure contained in the second subparagraph of Article 228 (1), does not lay down a time-limit for the submission of such a request.

There is therefore no reason why the request for an opinion should not be admitted.

B — The reply to be given to the questions submitted

1. The existence of a Community power to conclude the OECD Understanding on a Local Cost Standard

Articles 112 and 113 of the Treaty must be borne in mind in formulating a reply to this question.

The first of these provisions provides that:

'... Member States shall, before the end of the transitional period, progressively harmonize the systems whereby they grant aid for exports to third countries, to the extent necessary to ensure that competition between undertakings of the Community is not distorted.'

Since there is no doubt that the grant of export credits falls within the system of aids granted by Member States for exports, it is already clear from Article 112 that the subject-matter of the standard laid down in the Understanding in question relates to a field in which the provisions of the Treaty recognize a Community power.

Furthermore, Article 113 of the Treaty lays down, in paragraphs (1) and (2), that:

'... the common commercial policy shall be based on uniform principles, particularly in regard to ... export policy ...'.

The field of the common commercial policy, and more particularly that of export policy, necessarily covers systems of aid for exports and more particularly measures concerning credits for the financing of local costs linked to export operations. In fact, such measures constitute an important element of commercial policy, that concept having the same content whether it is applied in the context of the international action of a State or to that of the Community.

Directives concerning credit insurance, adopted by the Council towards the end of 1970 and the beginning of 1971 expressly recognize the important role played by export credits in international trade, as a factor of commercial policy.

For these reasons the subject-matter covered by the standard contained in the Understanding in question, since it forms part not only of the sphere of the system of aids for exports laid down at Article 112 of the Treaty but also, in a more general way, of export policy and, by reason of that fact, of the sphere of the common commercial policy defined in Article 113 of the Treaty, falls within the ambit of the Community's powers.

In the course of the measures necessary to implement the principles laid down in the abovementioned provisions, particularly those covered by Article 113 of the Treaty, concerning the common commercial policy, the Community is empowered, pursuant to the powers which it possesses, not

only to adopt internal rules of Community law, but also to conclude agreements with third countries pursuant to Article 113 (2) and Article 114 of the Treaty.

A commercial policy is in fact made up by the combination and interaction of internal and external measures, without priority being taken by one over the others. Sometimes agreements are concluded in execution of a policy fixed in advance, sometimes that policy is defined by the agreements themselves.

Such agreements may be outline agreements, the purpose of which is to lay down uniform principles. Such is the case with the Understanding on local costs: it does not have a specific content adapted to particular export credit transactions; it merely lays down a standard, sets out certain exceptions, provides, in exceptional circumstances, for derogations and, finally, lays down general provisions. Furthermore, the implementation of the export policy to be pursued within the framework of a common commercial policy does not necessarily find expression in the adoption of general and abstract rules of internal or Community law. The common commercial policy is above all the outcome of a progressive development based upon specific measures which may refer without distinction to 'autonomous' and external aspects of that policy and which do not necessarily presuppose, by the fact that they are linked to the field of the common commercial policy, the existence of a large body of rules, but combine gradually to form that body.

2. The exclusive nature of the Community's powers

The reply to this question depends, on the one hand, on the objective of the Understanding in question and, on the other hand, on the manner in which the common commercial policy is conceived in the Treaty.

At Nos I and II the Understanding itself defines the transactions to which the common standard applies, and those which, on the other hand, are excluded from its field of application because they are directed to specifically military ends or because they have been entered into with developing countries.

It is to be understood from this definition that the subject-matter of the standard, and therefore of the Understanding, is one of those measures belonging to the common commercial policy prescribed by Article 113 of the Treaty.

Such a policy is conceived in that article in the context of the operation of the Common Market, for the defence of the common interests of the

Community, within which the particular interests of the Member States must endeavour to adapt to each other.

Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community.

In fact any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community, whatever their nationality.

It cannot therefore be accepted that, in a field such as that governed by the Understanding in question, which is covered by export policy and more generally by the common commercial policy, the Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere. The provisions of Articles 113 and 114 concerning the conditions under which, according to the Treaty, agreements on commercial policy must be concluded show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible.

To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.

It is of little importance that the obligations and financial burdens inherent in the execution of the agreement envisaged are borne directly by the Member States. The 'internal' and 'external' measures adopted by the Community within the framework of the common commercial policy do not necessarily involve, in order to ensure their compatibility with the Treaty, a transfer to the institutions of the Community of the obligations and financial burdens which they may involve: such measure are solely concerned to substitute for the unilateral action of the Member States, in the field under consideration, a common action based upon uniform principles on behalf of the whole of the Community.

Similarly, in relation to products subject to the ECSC Treaty, it is of little importance to note that the power of the Member States to conclude the Understanding envisaged is safeguarded by Article 71 of that Treaty, according to which:

'The powers of the Governments of Member States in matters of commercial policy shall not be affected by this Treaty ...'

The matter under discussion has been referred to the Court pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty. The opinion which it has been called upon to give therefore bears upon the problem of the compatibility of the agreement envisaged with the provisions of the EEC Treaty and will define the power of the Community to conclude that agreement solely in relation to those provisions.

Independently of the question whether, in view of the necessity of ensuring that international transactions to which the Communities are party should have as uniform a character as possible, Article 71 of the ECSC Treaty retains its former force following the entry into force of the EEC Treaty, that provision cannot in any event render inoperative Articles 113 and 114 of the EEC Treaty and affect the vesting of power in the Community for the negotiation and conclusion of international agreements in the realm of common commercial policy.

Accordingly,

THE COURT

gives the following opinion:

The Community has exclusive power to participate in the Understanding on a Local Cost Standard referred to in the request for an opinion.

Lecourt	Monaco	Kutscher	Donner	Mertens de Wilmars
President	President of Chamber	President of Chamber	Judge	Judge

Pescatore	Sørensen	Mackenzie Stuart	O'Keeffe
Judge	Judge	Judge	Judge

Luxembourg, 11 November 1975.

A. Van Houtte

Registrar