OPINION OF ADVOCATE GENERAL GULMANN

delivered on 2 June 1992 *

Mr President,
Members of the Court,

1. A French company, SGEEM, and its director have brought proceedings against the European Investment Bank, asking that the Bank be ordered to compensate the applicants for the loss which they claim to have suffered through its tortious conduct. The case has been brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty. The Bank has argued that the case against it should be dismissed. The Commission has intervened in support of the Bank.

The Sixth Chamber, to which the case was assigned, has found cause to apply Article 95(3) of the Rules of Procedure and has referred the case back to the full Court in order that the latter may determine whether the case is admissible.

2. The facts of the case can be summarized as follows:

The Republic of Mali planned the construction of a high-voltage electricity line between two towns and applied for financial support from the Community under the provisions of the Lomé Convention. The Community decided to finance part of the project out of the resources of the Sixth European Development Fund. Mali then requested financing from the European Investment Bank (hereinafter 'the Bank' or 'EIB') in the form of a loan of risk capital under Article 199 of the Lomé Convention. The financing contract between Mali and the EIB, acting on behalf of the Community, was signed in 1988. The project was put out to tender and the applicant company was one of the tenderers. Its tender was the lowest. The authorities in Mali had entrusted a Canadian company with the task of preparing the tender procedure and assisting in the decision as to which of the tenderers should be awarded the contract. The Canadian company initially advised against awarding the contract to the applicant company. The competent authorities in Mali nevertheless decided after a long period of consideration to award the contract to the applicant company. The Bank took note of that decision, but pointed out that it would be unable to finance the project if that company's tender were accepted. The Bank explained its view by pointing out that there were, in its opinion, a number of problems associated with the company's tender.

The authorities in Mali thereupon decided to award the contract to a company other than the applicant. The applicants in this case contend that the Bank's conduct was the reason

* Original language: Danish.

for the company's not being awarded the contract and that such conduct was unlawful.

Introductory remarks on the Court's jurisdiction to examine the substance of the case

3. Article 178 of the EEC Treaty provides that:

'The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 215.'

The second paragraph of Article 215 provides that:

'In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

The Court has not hitherto had occasion to consider whether it has jurisdiction under Article 178 and the second paragraph of Article 215 to rule in cases brought against the EIB for compensation in respect of non-contractual liability. Over the 30 years and more since the Bank came into existence, no such case has been brought before the Court nor, so far as I can ascertain, before any other court or jurisdiction.

In the circumstances it cannot be argued that the issue is one of major practical importance. However, the issue is important in principle and also because it raises the question of the Bank's special position within the system established by the Treaty, which may also have significance in other areas. The fundamental question is whether the Bank can be treated, for the purposes of Article 215, as one of the *Community institutions*, in respect of which *the Community* can thus incur non-contractual liability.

4. The parties to the proceedings and the Commission agree that that question ought to be answered in the affirmative. Such agreement is naturally persuasive, the more so since the arguments in favour of an affirmative answer are particularly strong. This agreement, however, also gives rise to certain difficulties. It is clear that the question of the Court's jurisdiction is a question which the Court must decide of its own motion and that the Court in its decision must also weigh up any arguments for an answer in the negative. It is for that reason also incumbent upon me to examine whether such arguments exist.

The parties have contended that it follows from the Court's case-law that the second paragraph of Article 215 can be interpreted in such a way that that provision also covers the Bank and that there are no significant arguments against such an interpretation, but that there exist, on the contrary, sound reasons for coming to such a decision.

5. In my opinion, it is clear that the question is not as straightforward as would appear from the procedural documents of the parties. [1] The Bank has a special position within the organizational system of the Treaty and there were fundamental reasons for that choice. As I shall discuss below, the Court has stressed the ambivalent position of the Bank within the organizational system of the Treaty, and it is a far from simple matter to determine whether the Bank should be treated, for the purpose of the second paragraph of Article 215, as a Community institution, or whether such an interpretation should be rejected. The first interpretation would have the following consequences:

(i) the Court of Justice would have exclusive jurisdiction to determine all proceedings brought against the Bank for compensation in respect of non-contractual liability, that is to say, that national courts (at least in the Member States) would have to dismiss such proceedings brought against the Bank, and

(ii) the substantive rules on the basis of which the merits of the case would have to be decided would be 'the general principles common to the laws of the Member States'.

The choice of the second interpretation would mean that:

(i) the applicant could choose to bring proceedings before the courts having jurisdiction at the Bank's address for service or before the courts for the place where the harmful event occurred, [2] and

(ii) the substantive rules for the determination of the case would be those which follow from the rules of private international law applicable in accordance with the *lex fori*.

The interpretation selected can therefore be of substantive importance not only for the Bank, but also for the natural or legal persons who believe they are entitled to compensation from the Bank.

6. The obvious point at which to begin an examination of the question is Article 29 of the Bank's Statute, which is included in a protocol to the EEC Treaty. Article 29 provides as follows:

'Disputes between the Bank on the one hand, and its creditors, debtors or any other person on the other, shall be decided by the competent national courts, save where jurisdiction has been conferred on the Court of Justice.

1 — The majority of commentators who have at all addressed the problem take the view that the Bank is not covered by the second paragraph of Article 215; see, for example, Wohlfarth in Wohlfarth and Others *Die Europäische Wirtschaftsgemeinschaft*, 1960, at page 566, and Grabitz in his Commentary on the Treaty, Note 20 *in fine* on Article 215. In Groebens and Others *Kommentar zum EWG-Vertrag*, (1983), Gilsdorf argues that the Court of Justice cannot have jurisdiction, but that the competent national courts must apply the general principles common to the laws of the Member States under Article 215 in respect of the Bank's liability to pay compensation: see Note 19 on Article 215. A few commentators take the view that the second paragraph of Article 215 must be interpreted as meaning that the Bank is covered by that provision; see, for example, Hilf *Die Organisationsstruktur der Europäischen Gemeinschaften*, 1982, page 41, and Henrion in *Les Novelles, Droit des Communautés Européennes*, 1969, page 971.

2 — The Bank is required under Article 29 of its Statute to have an address for service in each Member State.
The right of an applicant in cases relating to compensation in respect of non-contractual liability to choose between the domestic courts of the defendant and the courts for the place where the harmful event occurred follows, of course, from the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention); see OJ 1990 C 189, p. 2.

The Bank shall have an address for service in each Member State. It may, however, in any contract, specify a particular address for service or provide for arbitration.'

That provision corresponds in principle to Article 183 of the EEC Treaty, which provides that:

'Save where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.'

The basic premiss of the Treaty is therefore that the institutions and bodies established by the Treaty are not immune from suit. Proceedings may be brought before national courts, unless the Treaty provides that the proceedings must be brought before the Court of Justice.

7. The Community legal order also differs appreciably on this point from the rules which apply in the case of international organizations. It is the general practice for States, when they establish international organizations, to confer on those organizations extensive immunity from suit which applies whether the organizations act *jure imperii* or *jure gestionis*. There is in each case, however, an important exception. Immunity from suit is not conferred on international financial organizations. Proceedings against such organizations may, subject to a number of restrictions, be brought before national courts. The reason normally given for this is that such a legal arrangement is necessary in order to safeguard the confidence of the lender in the context of the raising of a loan by the financial institution. [3] Notwithstanding that reasoning, it is assumed that any type of proceedings may be brought against financial institutions, that is to say, even proceedings which do not arise from contractual relations. That is the legal position which applies, for example, to the International Bank for Reconstruction and Development ('the World Bank'), established in 1947, and the European Bank for Reconstruction and Development, which was established in 1990. [4]

It may on that basis be argued that the EIB must have the same legal status, in respect of procedure, as international financial organizations, in so far as the Bank may be sued before national courts in the same way as international financial organizations. This, however, is to overlook the fact that under Article 29 of the Bank's Statute national

3 — See, *inter alia*, J. Duffar *Contribution à l'étude des privilèges et immunités des organisations internationales*, 1982, pages 59 to 68, D. W. Bowett *The law of international institutions*, 1982, pages 345 to 353 and *R. Lavalle La Banque mondiale et ses filiales*, 1972, pages 118 and 119.

4 — Article VII(3) of the 'Articles of Agreement of the International Bank for Reconstruction and Development' (UNTS, volume 2 (1947), p. 134 et seq.) provides as follows:
'Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members ...'
Article 46 of the Agreement establishing the European Bank for Reconstruction and Development (the Agreement is annexed to the Council Decision of 19 November 1990 on the conclusion thereof: see OJ 1990 L 372, p. 1) provides as follows:
'Actions may be brought against the Bank only in a court of competent jurisdiction in the territory of a country in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members ....'.

courts may decide disputes 'save where jurisdiction has been conferred on the Court of Justice'.

8. The central question in respect of the Bank is therefore not whether its conduct is exempt from judicial review, but whether such review should be carried out by the Court of Justice or by national courts. It follows from the wording of Article 29 of the Bank's Statute that that question must be resolved on the basis of an interpretation of the EEC Treaty provisions which confer jurisdiction on the Court of Justice.

This means that an interpretation of the second paragraph of Article 215 of the Treaty is necessary in order to resolve the issue whether the Court has jurisdiction to entertain proceedings brought against the Bank for compensation in respect of non-contractual liability.

Is the Bank covered by the second paragraph of Article 215 of the Treaty?

9. The case-law of the Court provides valuable assistance for an understanding of the Bank's position in the jurisdictional and organizational system of the Community.

10. In Case 110/75 *Mills* v *European Investment Bank*, [5] the Court examined the question whether Article 179 of the Treaty, under which 'the Court of Justice shall have jurisdiction in any dispute between the Community and its servants ...', also applied to disputes between the Bank and its servants. The Court ruled in that connection that its jurisdiction to deal with such disputes was not excluded by reason of the provisions in Article 180 of the Treaty, which expressly confers jurisdiction on the Court to deal with certain disputes to which the Bank is a party. The Court ruled on that point as follows:

'This provision merely confers upon the Board of Directors of the Bank powers analogous to those conferred upon the Commission by Article 169 and renders measures adopted by the Board of Governors and those adopted by the Board of Directors subject to the same jurisdiction of the Court of Justice as that conferred by Article 173 with regard to the measures of the Council and of the Commission.

This complementary nature of Article 180 thus confirms the conclusion that when in Article 179 mention is made of the Community this does not exclude the Bank' (Paragraphs 16 and 17).

It must for the same reason be assumed that the existence of Article 180 of the Treaty also does not preclude the Bank from coming within the jurisdiction of the Court of Justice under Article 178 in conjunction with the second paragraph of Article 215.

The Court also justified its jurisdiction to deal with disputes between the Bank and its servants under Article 179 by pointing out that the Bank's servants had, under Article 22 of the Protocol on the Privileges and Immunities of the European Communities, a legal position corresponding to that which the Protocol confers on servants of the Community institutions.

5 — [1976] ECR 955.

The judgment, which is obviously correct, demonstrates a readiness on the part of the Court to apply the jurisdictional provisions of the Treaty also in respect of the Bank, at least in cases where the position of the Community institutions and the Bank are comparable in all relevant respects.

It is also important to note that the Court emphasized in the *Mills* case that the Bank is a Community body, while at the same time it stressed the distinction between the Community institutions on the one hand and the Bank on the other. The Court stated at Paragraph 14 of its judgment:

'It must thus be concluded that by the words "any dispute between the Community and its servants" Article 179 is not restricted exclusively to the institutions of the Community and their staff but also includes the Bank as a Community institution established and with a legal personality conferred by the Treaty.' [6]

It may perhaps at this point be worth mentioning that the provisions which clearly confer jurisdiction on the Court of Justice to deal with cases to which the Bank is a party, that is to say, Articles 179 and 180, deal with disputes in respect of the internal relations of the Community. The present case is the first in which the Court is called on to decide whether proceedings may be brought before the Court of Justice against the Bank in respect of its external relations, that is to say, its relations to natural or legal persons who do not come within the organizational system of the Community.

11. In its judgment in Case 85/86 *Commission* v *Board of Governors of the European Investment Bank*, [7] the Court was given an opportunity to analyse the Bank's position within the organizational and operational system of the Treaty. The case concerned the issue of whether the tax paid by servants of the Bank was to be levied for the benefit of the Bank or for the benefit of the Community. It was hardly in doubt that the relevant tax provisions were to be understood as meaning that the tax should be allocated to the Community. The Bank, however, argued that

'it is neither an institution nor a department of the Communities; rather, it enjoys autonomy vis-à-vis the Communities by virtue of its legal status, its composition and its institutional structure, as well as by virtue of the nature and origin of its resources, which are absolutely independent of the Communities' budget' (Paragraph 27).

On this point, the Court ruled, *inter alia*, as follows:

'It is true that under Article 129 of the Treaty the Bank has legal personality distinct from that of the Community and that it is administered and managed by organs of its

6 — The language of the case in *Mills* was French. The expression 'la Banque en tant qu'organisme communautaire' was somewhat unfortunately rendered in the English translation of the judgment as 'the Bank as a Community institution'. However, the judgment in Case 85/86 *Commission* v *Board of Governors of the European Investment Bank*, discussed below, alters that translation to 'the Bank [as] a Community body' at paragraph 24, where it refers to the above paragraph in *Mills*.

7 — [1988] ECR 1281.

own in accordance with its statute. In order to perform the tasks assigned to it by Article 130 of the Treaty the Bank must be able to act in complete independence on the financial markets, like any other bank. Indeed, the Bank is not financed out of the budget but from its own resources, which consist in particular of the capital subscribed by the Member States and funds borrowed on the financial markets. Lastly, the Bank draws up annual accounts and a profit and loss account which are audited annually by a committee appointed by the Board of Governors.

Nevertheless, the fact that the Bank has that degree of operational and institutional autonomy does not mean that it is totally separated from the Communities and exempt from every rule of Community law. It is clear in particular from Article 130 of the Treaty that the Bank is intended to contribute towards the attainment of the Community's objectives and thus by virtue of the Treaty forms part of the framework of the Community.

The position of the Bank is therefore ambivalent inasmuch as it is characterized on the one hand by independence in the management of its affairs, in particular in the sphere of financial operations, and on the other by a close link with the Community as regards its objectives. It is entirely compatible with the ambivalent nature of the Bank that the provisions generally applicable to the taxation of staff at the Community level should also apply to the staff of the Bank. This is true in particular of the rule that the tax in question is collected for the benefit of the Communities' budget. Contrary to the contentions of the Board of Governors, the fact that the tax is allotted to that purpose is not liable to undermine the operational autonomy and reputation of the Bank as an independent institution on the financial markets since it does not affect the capital or the actual management of the Bank' (Paragraphs 28, 29 and 30).

Of fundamental significance is the fact that the Court points out in those paragraphs that the legal position of the Bank within the system of the Treaty is ambivalent. It is, on the one hand, undisputed that the Bank is required under the Treaty (Article 130 *inter alia*) to contribute to the pursuit of Community objectives, for which purpose it is part of the Community, and on the other hand it is undisputed that the Bank has legal personality under Article 129 of the Treaty and that that legal personality is separate from that of the Community, the legal personality of which is established in Article 210 of the Treaty. The Court points out that the Bank's independent status as a legal person is based on the need to ensure that the Bank must be able to act *in complete independence like any other bank* on the financial markets, in such a way that it can fulfil the duties imposed on it by Article 130 of the Treaty. The reasoning of the Court demonstrates that it attaches importance in its interpretation of the relevant Community rules to the question whether the application to the Bank of those rules can damage its operational autonomy or its reputation as an independent institution on the financial markets.

12. Those two judgments thus make an important, but inconclusive, contribution to

the proper interpretation of the second paragraph of Article 215.

13. Of particular importance for this interpretation is the fact that the Court has considered the Bank to be a Community body. That implies, in my opinion, that *the Bank's status as an independent legal person* can hardly in itself preclude an interpretation of the second paragraph of Article 215 to the effect that the Bank can render the Community liable, subject, obviously, to the requirement that the actual manifestation of that liability, that is to say, the payment of compensation, must be made out of the Bank's own funds and not out of the Community budget.

14. More problematic is the attempt to overcome the difficulty posed by the fact that *the Community, according to the words of the second paragraph of Article 215, is liable only in respect of damage caused by its institutions* or by its servants. [8] As mentioned above, the Court assumed in the *Mills* case, correctly in my view, that the Bank is not a Community institution. The enumeration of the Community institutions in Article 4 of the Treaty does not include the Bank, and there is also at present no mention of the Bank in Part 5 of the Treaty, which deals with the institutions of the Community. The fundamental provisions governing the Bank are to be found in Articles 129 and 130 of Title IV in Part 3 of the Treaty on the policy of the Community. This distinction between the Bank and the Community institutions is a natural reflection of the Bank's special position in the organizational system of the Treaty, which is emphasized by its status as an independent legal person. That position has not been significantly modified by the amendments to the Treaty laid down in the Treaty on European Union signed in Maastricht on 7 February 1992. Admittedly, the introductory provisions in the Treaty are supplemented by a new provision in Article 4b, under which a European Investment Bank is to be established, and Articles 129 and 130 of the Treaty are transferred to Part 5 of the Treaty, which deals with the institutions of the Community. However, the Bank is still not designated as a Community institution under Article 4, and the inclusion of the Bank in Part 5 of the Treaty occurs in an independent Chapter 5 which is quite separate from Chapter 1 dealing with the institutions of the Community.

The Bank cannot accordingly be treated as a Community institution, as that concept is used in Article 4 of the Treaty, and the most obvious step is to proceed on the basis that it is in this sense that the concept is also used in the second paragraph of Article 215. [9]

8 — The Bank argued that the second paragraph of Article 215 must be applicable to it, even though it could not be treated as a Community institution. It argues that it must in any event be covered by the term '(Community) servants'. I do not believe that it is necessary to examine that submission in any greater detail. It is in my view clear that the decisive question is whether the Bank is an institution of the Community within the meaning of the second paragraph of Article 215 or whether it can be treated as one of the institutions.

9 — No major significance attaches in my opinion to the cases in which the Bank is expressly placed on the same footing as the Community institutions. One example is the above analogy between the Community institutions and the Bank in the Protocol on Privileges and Immunities of the European Communities. Another example is the analogous reference to the Bank and the Community institutions in Article 1 of the Rules of Procedure of the Court of Justice. These and other examples demonstrate that there have been reasons to draw analogies in a range of contexts. However, it is not possible to infer from this that such an analogy is correct in all cases. It may perhaps even be argued that the examples — if they are at all relevant to the case at issue — confirm, on the one hand, the distinction between the Bank and the Community institutions and, on the other, demonstrate the perceived need to state expressly that the Bank must in particular circumstances be treated in the same way as the Community institutions.

It is, however, possible, in my opinion, for the second paragraph of Article 215 to be given a wide interpretation such that the Bank may, in the context of that provision, be treated as one of the Community institutions. The Treaty provisions on the jurisdiction of the Court of Justice have to a limited extent been given an extensive interpretation in cases where the Court has identified cogent reasons for such an interpretation; one example is the Court's judgment in Case C-70/88 *Parliament* v *Council*. [10] An extensive interpretation of the second paragraph of Article 215 would therefore, in my opinion, be justified if there were convincing reasons to treat the Bank in the same way as the Community institutions and there were no pertinent arguments against such similar treatment.

15. Before I examine that question, I wish to refer to an argument put forward by the Bank in support of its contention that it is covered by the second paragraph of Article 215. It has pointed out that the following provision is added by the Treaty on European Union as a new third paragraph to Article 215:

'The preceding paragraph shall apply under the same conditions to damage caused by the ECB [European Central Bank] or by its servants in the performance of their duties.'

The Bank claims that there is no reason why the two banks should be treated differently in respect of the second paragraph of Article 215 and that it is understandable that the Member States did not expressly include the EIB in the Treaty on European Union in view of the fact that it has existed since the original Treaty was adopted and the issue of its non-contractual liability has not hitherto given rise to problems. [11]

It is in my opinion clear that the new provision cannot in any event be used as a positive argument in support of the contention that the EIB comes under the jurisdiction of the Court of Justice pursuant to the second paragraph of Article 215. The Maastricht Treaty includes Articles 4a and 4b as new provisions in the EEC Treaty; these establish respectively a European Central Bank and a European Investment Bank, which may act only in accordance with the powers conferred on them by the Treaty and their Statutes. The two banks are not included in the enumeration of Community institutions which continues to feature in Article 4. That fact presumably explains why it was felt necessary expressly to include the Central Bank in Article 215. It is worth noting that the two banks, which are treated together in the introductory provisions of the Treaty, are not so treated in Article 215. It may of course be that the reason for that situation is that which the Bank has alleged. However, the explanation may also be that the reasons which have led to the European Central

10 — [1990] ECR I-2041.

11 — The Bank has also pointed out that Article 9 of the Statute of the European Monetary Cooperation Fund, which was established with independent legal personality in 1973 by way of Regulation (EEC) No 907/73 of the Council (OJ 1973 L 89, p. 2), expressly provides that the second paragraph of Article 215 shall apply in the case of the Fund's non-contractual liability. The Bank contends that the Council cannot confer new areas of jurisdiction on the Court of Justice and that the Council therefore must necessarily have interpreted the second paragraph of Article 215 as already covering the Monetary Fund. That argument is not valid, since it is based on a false premiss. The practice of the Council shows that new areas of jurisdiction can be conferred on the Court of Justice without any amendment to the Treaty. The Court ruled in another context that that practice was lawful in its Opinion 1/91 of 14 December 1991 concerning the draft agreement on the creation of the European Economic Area [1991] ECR I-6079 (Paragraph 59).

Bank being treated in the same manner as Community institutions for the purposes of compensation were not put forward in respect of the European Investment Bank, with the result that it was considered proper to treat the two banks differently for the purposes of Article 215. The European Central Bank has been given duties and powers by the new Treaty, which, owing to their public-law nature, make it necessary to include the Central Bank in the Treaty rules relating to the jurisdiction of the Court (see the amendments to Articles 173, 175, 177 and 180 of the Treaty), and which make it natural to draw an analogy between the Central Bank and the Community institutions for the purpose of matters relating to compensation. The new Treaty does not alter the duties of the Investment Bank, which only to a limited extent, if at all, involve the exercise of public authority in a restricted sense.

Even though it is unclear how far one is entitled to interpret the existing rules in the light of a new Treaty which has not yet been ratified, it can at least be stated that it is hardly logical from the point of view of legislative technique to include a provision only on the Central Bank in Article 215 if the intention was that that provision should also cover the EIB. If the second paragraph of Article 215 is to be interpreted in the manner claimed by the EIB, it would have been desirable and appropriate in all the circumstances to have treated the two banks in the same way during the formal drafting of Article 215.

Be that as it may, my view, nonetheless, is that the interpretative contribution of the new provision in Article 215 on the Central Bank is so doubtful that it cannot be of conclusive significance for the interpretation of the existing provision with regard to the EIB.

16. In my view, decisive importance for that interpretation attaches, as outlined above, to the question whether there are positive reasons to allow the Bank to come within the Court's jurisdiction under the second paragraph of Article 215 in the light of relevant considerations based on the Bank's duties and its position in the organizational system of the Treaty, and whether any cogent arguments can be adduced against such a result.

17. The Bank has argued forcefully that an affirmative answer to the question would best guarantee its independence and is in any event desirable because it would ensure a uniform assessment of the Bank's conduct in the interest of legal certainty and would accordingly have sufficient regard for the fact that the Bank was acting as a Community body for the purpose of pursuing Community objectives.

I have already mentioned that the Court attached importance in the case between the Commission and the Board of Governors of the European Investment Bank to the issue of whether acceptance of the Commission's argument was 'liable to undermine the operational autonomy and reputation of the Bank as an independent institution on the financial

markets'. It is difficult to imagine anyone claiming that the autonomy or reputation of the Bank could be undermined if proceedings against it in respect of non-contractual liability were to be brought before the Court of Justice.

There is also, in my view, good reason to accept the Bank's additional argument that it may be appropriate to leave it to the Court of Justice to decide all cases concerning compensation in respect of non-contractual liability.

18. That, however, is not necessarily conclusive for the resolution of the problem. It cannot be ruled out that the Bank's special status within the organizational system of the Community may have been based on other, more far-reaching considerations than those discussed above; alternately, there may be arguments in favour of conferring jurisdiction on national courts.

The Court stated in the paragraphs cited above in the case between the Commission and the Board of Governors of the EIB that the Bank had to be able to act in complete independence on the financial markets, 'like any other bank'. The background to that statement was developed in the Opinion of Advocate General Mancini in the case. At point 11 of his Opinion, the Advocate General made the following statement:

'It is not a difficult question to answer [that is to say, the question why the primary legislation gave the Bank legal personality and financial autonomy] . When it came to a choice between the idea put forward at the Conference of Messina of entrusting the promotion of investment in Europe to a special fund and the proposal to pursue that aim by setting up a genuine bank, the latter proposal was successful for a number of reasons. These reasons included resistance on the part of the rich Member States which would have borne the greater part of the burden of financing the fund, the scope of the commitments assumed by the new Community, which was much larger than in the case of the ECSC, and the desire to adopt a solution for which international precedents already existed (the Bank for Reconstruction and Development, for one). However, once it had been decided to set up the European Investment Bank it was an obvious, and in some ways, an obligatory step to give it legal personality, if only to enable the new body to operate within the various Member States in the same way as any other credit institution.'

The reference to the Bank for Reconstruction and Development (the World Bank) is interesting, not least in the light of the fact mentioned above that proceedings may be brought against that bank before national courts for compensation in respect of contractual and non-contractual liability. The obvious assumption is that it was intended to treat the EIB in the same way as any other credit institution even from the procedural perspective.

Furthermore, there appears to be less need to leave it to the Court of Justice to decide disputes involving conduct of the Bank which attracts non-contractual liability. The

primary reason for conferring jurisdiction on the Court of Justice in the case of the Community institutions was probably that it is necessary to have a uniform judicial assessment of their legal measures in view of their public-law nature. [12] In accordance with its functions, the EIB operates primarily in the private-law sector, where there is not the same need for the Court of Justice to give a uniform legal appraisal of its activities in the light of the special considerations which apply within the legal system of the European Communities.

19. Finally, one cannot overlook the fact that the interests of the person suffering damage may argue in favour of allowing national courts to have jurisdiction to deal with cases involving non-contractual liability on the part of the Bank. All other things being equal, the person suffering the damage may have a legitimate interest in being able to bring proceedings against the person or body causing the damage before the courts in the place where the damage occurred.

20. In view of the foregoing, it appears to me doubtful that there are sufficiently cogent reasons to give a broad interpretation to the second paragraph of Article 215 in respect of the Bank.

On the other hand, I believe that it is both possible and appropriate for the Court of Justice to refrain from expressing an opinion on this question of principle.

It is possible, because the present case can be treated as admissible in the special context of Community law within which the Bank acted in connection with the loan to Mali.

It is also appropriate, because it can hardly be entirely ruled out that relevant new aspects may be added to the Court's reasoning in a new case where this fundamental question must necessarily be decided, which quite possibly can happen on the basis of a reference for a preliminary ruling from a national court before which proceedings for compensation have been brought against the Bank. Furthermore, the possibility cannot entirely be discounted that the issue may expressly be resolved in the context of a subsequent amendment to the Treaty, which may be desirable not least when account is taken of the express provision in Article 215 relating to the Central Bank. [13]

12 — The reason generally given for the different treatment under Article 215 of cases involving contractual and non-contractual liability is as follows:
'International organizations normally enjoy immunity from judicial proceedings in the Member States. The purpose of that immunity is to guarantee their independence. For its part, the EEC does not enjoy total immunity: so far as its contractual relations are concerned, proceedings may be brought against it before the courts of the Member States. National rules on contractual liability are sufficiently similar to dispel the fear of major differences in treatment. There is accordingly no cogent reason to deprive national courts of jurisdiction in this area. On the other hand, proceedings relating to non-contractual liability concern Community policy much more directly, since they involve an assessment of the unlawful or negligent nature of the conduct from which they originate. It was for that reason logical to remove such proceedings from the jurisdiction of national courts in order to bring them under that of the Court of Justice.': see J. Mégret and Others *Le droit de la Communauté économique européenne*, 1983, volume 10, page 266. A similar view is expressed by H. G. Schermers, *Judicial Protection in the European Communities*, 1983, page 287 et seq.

13 — If it is desired to establish the jurisdiction of the Court under the second paragraph of Article 215, that may be done through an amendment to that provision similar to that made with regard to the Central Bank. If the opposite result is desired, that can be done through a clarification of Article 29 of the Bank's Statute.

The Bank acted in the present case 'on behalf of the Community'

It was argued in particular by the Commission, but also directly or indirectly by the parties to the case, that the second paragraph of Article 215 is in any event applicable in the present proceedings if account is taken of the special legal context in which the Bank acted.

21. The Bank acted on the basis of rules set out in the first place in the Lomé Convention, [14] secondly, in an Internal Agreement on the Financing and Administration of Community Aid [15] and, thirdly, in the Financial Regulation applicable to the Sixth European Development Fund. [16] The aid, which is granted in the form, *inter alia*, of loans of risk capital, comes from Community funds. The rules referred to establish a division of functions between the Commission and the Bank with regard to the administration of the aid. The loans covered by the finance contract at issue in the present case involved risk capital, and it follows from the relevant rules that such loans are administered by the Bank on behalf of the Community. [17] It also follows expressly from the finance contract that it was entered into by the Republic of Mali and the EIB 'acting in the present contract on behalf of the European Economic Community'. It is clear from Articles 22 and 23 of the Internal Agreement that the Bank administers loans of risk capital in close cooperation with a committee consisting of representatives of the governments of the Member States.

It follows from the rules in the Lomé Convention on financial and technical cooperation that the Bank is subject to the same rules as the Commission, unless different provisions had been adopted in individual cases (see Article 193(10) of the Convention). For example, both the Bank and Commission are required to ensure that there is no discrimination in the invitation to tender dossier and that the tender selected is economically the most advantageous (see Articles 226 and 236(1) of the Convention).

22. In view of the foregoing, there are good reasons to support the view that the Bank should in the present case be treated in the same way as the Community institutions in respect of the second paragraph of Article 215. The Bank lends Community funds. The Bank administers funds on behalf of the Community, a fact which is also made clear to the outside world. The Bank administers those funds on the basis of Community rules, under which its independent decision-making competence is limited *vis-à-vis* the

14 — OJ 1986 L 86, p. 3.

15 — OJ 1986 L 86, p. 210.

16 — OJ 1986 L 325, p. 42.

17 — Article 10 of the Internal Agreement on the financing and administration of Community aid provides that loans of risk capital 'shall be administered by the Bank on behalf of the Community in accordance with its Statute and the rules laid down by the Financial Regulation referred to in Article 28.'
Article 14(2) of the Agreement provides that: 'The Bank shall undertake, on behalf of the Community, the financial execution of operations carried out with the Fund's resources in the form of risk capital. In this context, the Bank shall act on behalf and at the risk of the Community. Any resulting rights, and particularly rights as creditor or owner, shall be vested in the Community.'

competence which it has when lending its own funds on the basis of the EEC Treaty. Furthermore, the Commission and the Bank act in this area essentially on the basis of the same set of rules, and it is for that reason particularly logical that the Court of Justice should have jurisdiction to deal with proceedings concerning non-contractual liability brought not only against the Commission, but also against the Bank. That fact is, in my opinion, the determinant factor in favour of the Bank's being treated in the present context as one of the Community institutions for the purpose of the second paragraph of Article 215. [18] The Court of Justice ought for that reason to examine the substance of the present case under the second paragraph of Article 215. Even if the Bank does administer Community funds, and even if it does act on behalf of the Community, it is both necessary and possible in my opinion to interpret the second paragraph of Article 215 in such a way that the Bank, if it is ordered to pay compensation, should pay such compensation out of its own funds.

23. The substance of the case should be dealt with by the Sixth Chamber, in view of the fact that the parties in the case submitted their arguments on that question before that Chamber during the oral procedure on 23 October 1991.

Conclusion

24. I accordingly propose that the Court should rule that it has jurisdiction under Article 178 of the EEC Treaty, in conjunction with the second paragraph of Article 215 thereof, to decide the substantive issues in the present case.

18 — I find inconclusive the fact that there are provisions, such as Article 52(2) of the Financial Regulation cited above, which state expressly that the Bank acts 'for and on behalf of the Community'. No significance should be attached in the present context to the fact that the Bank may be said, in a restricted sense, to be acting with the full authority of the Community. In the first place, I find it questionable whether it is proper to apply the rules of agency existing in private law to the relationship between the Bank and the Community in the area under discussion; secondly it strikes me as doubtful whether such a position of authority, considered *in vacuo*, can render the second paragraph of Article 215 applicable.