OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 24 November 1987 *

Mr President,
Members of the Court,

1. The Court is called upon to consider an action brought by the Commission of the European Communities on 19 March 1986 against the Board of Governors of the European Investment Bank (hereinafter referred to as 'the Bank'). The Commission seeks a declaration annulling the decision taken by the Board of Governors of 30 December 1985 on the 'disposal of the proceeds of the income tax withheld by the Bank from salaries and pensions paid to its staff', which precluded the payment of the sums concerned into the Community budget and at the same time confirmed a practice which, albeit implemented differently, goes back to the 1962 financial year. The Commission argues that this infringes the EEC Treaty and the provisions laid down for its implementation.

The proceedings — in which recourse is being made for the first time to Article 180 (b) of the EEC Treaty — is of major importance both because the accumulated revenue of 25 years' tax amounts to a very considerable sum and because the parties' arguments are based on radically different ideas as to the legal nature of the Bank and hence necessitate in-depth reflection on the position of that important body within the institutional machinery of the Treaty. As both the parties have pointed out, the subject-matter of the proceedings is especially delicate in so far as it is liable to overflow beyond the confines of the question which has been placed before the Court. In other words, the Court's judgment could affect the claims of the Court of Auditors and the European Parliament to oversee — in accounting terms and at the political level, respectively — the operations carried out by the Bank using funds from the Community budget.

2. In order to have a better understanding of the subject-matter of the dispute it may be useful to adumbrate, albeit only summarily and with particular reference to the situation of the Bank, the history of the Community tax on remuneration.

Under the system of the European Coal and Steel Community staff were not subject to any tax at all. Article 11 (b) of the Protocol on Privileges and Immunities annexed to the Treaty of Paris provided that within the territory of each of the six Member States, members of the High Authority and officials of the Community, irrespective of their nationality, were to be 'exempt from any tax on salaries'. The members and staff of the Court of Justice were treated likewise by virtue of Articles 3, 14 and 16 of its Statute. However, that privilege — which, moreover, conflicted with the practice followed in other international bodies (see Bedjaoui, *Fonction publique internationale et influences nationales*, London, 1958, pp. 249-276) — appeared to be incompatible with the principle that citizens should be treated equally with respect to tax and immediately came in for sharp criticism of which Michel Debré was a particularly

* Translated from the Italian.

eloquent spokesman, as witness the written questions which he put to the High Authority (the first in the history of the Common Assembly: Journal Officiel 1953, 2 p. 7) and to the French Minister for Foreign Affairs (JORF, Débats, Cons. Rép., 23 March 1956, p. 528).

Prompted thereby to take a fresh look at the matter, the authors of the Treaty of Rome considered that the exemption from national tax should cease to be in the nature of a privilege and should become the mere consequence of the charging of a Community tax. This approach is evidenced by the wording of the Protocol on the Privileges and Immunities of the European Communities and in particular Article 12 thereof. Indeed the first paragraph of Article 12 establishes that 'officials and other servants of the Community shall be liable to a tax for the benefit of the Community on salaries, wages and emoluments paid to them by the Community, in accordance with the conditions and procedure laid down by the Council . . .' whereafter the second paragraph adds that the said officials and other servants shall be exempt 'from national taxes on salaries, wages and emoluments paid by the Community'.

Articles 19 and 20 extended that provision to cover members of the Commission and of the Court. In contrast, the Bank is dealt with in Article 21, which provides that the protocols as a whole shall apply 'also . . . to the members of its organs, to its staff and to the representatives of the Member States taking part in its activities, without prejudice to the provisions of the Protocol on the Statute of the Bank'. Article 21 goes on to lay down that 'the European Investment Bank shall . . . be exempt from any form of taxation or imposition of a like nature on the occasion of its constitution and of any increase in its capital and from the various formalities which may be connected therewith in the State where the Bank has its seat'. Likewise, 'its dissolution or liquidation' is not to give rise to any imposition and 'the activities of the Bank and of its organs' are not to be subject to any turnover tax provided that they are carried on 'in accordance with its Statute'.

Under Article 12 the Council should have laid down the conditions and the amount of the tax on the basis of 'proposals which the Commission shall make within one year of the entry into force of the Treaty'. However, that period turned out to be too short. The EEC and Euratom Commissions submitted their initial proposals on 22 December 1958 and it was not until 18 December 1961 that the corresponding Councils adopted the rules unanimously (Regulation No 32/61(EEC)/12/61(EAEC) laying down the conditions and procedure for applying the tax for the benefit of the European Communities pursuant to the first paragraph of Article 12 of the Protocol on Privileges and Immunities, Journal Officiel 1962, 45 p. 1461). Indeed it appears from the documents which the Commission was given leave to produce after the close of the written procedure that in the course of the drafting of Regulation No 32/61(EEC)/12/61(EAEC) the application of the tax to the salaries of the staff of the Bank was the subject of complex and, at times, lively debate.

Let us retrace its stages, which culminated in the adoption of the regulation, since they are of considerable importance in order to understand the arguments adopted by the parties in this dispute. By letter of 6 September 1960 the President of the Bank informed the President of the Committee of Permanent Representatives ('Coreper') of the view taken by the Bank's Management Committee. The latter interpreted the relevant rules of the Protocol in question as meaning that the powers vested by Article 12 in the Council and Commission, *qua* organs of the entity known as the EEC,

should have been conferred, as far as the Bank was concerned, on those organs of the Bank which corresponded to the Council and the Commission of the EEC, that is to say on the Board of Governors and on the Board of Directors. In this view the Board of Governors would have laid down the rules and determined the intended use of the tax applicable to the Bank's officials. As far as possible, that is to say making allowance for the special character of the Bank, it would, however, have endeavoured to model those rules on the rules issued by the Council.

That interpretation, based on the principle of 'entsprechende' or 'sinngemäße Anwendung' (which I shall translate somewhat freely as 'application *mutatis mutandis*'), was considered by Coreper at its meeting on 20 September 1960. It was opposed by the German delegation, which considered that the tax provided for in Article 12 was a right of territorial sovereignty which the Member States had transferred to the Community and could not be earmarked for the exclusive benefit of the institutions and organs of which the Community was composed. However, at the proposal of the Netherlands and Luxembourg delegations Coreper gave the Bank leave to enlarge on its arguments (see the memorandum submitted by the Bank on 20 October 1960) and, albeit without relinquishing the right to express its opinion, put the negotiations in the hands of the two Presidents, who were asked to conduct them at informal meetings.

At its meeting on 1 December 1960 the task of defining Coreper's point of view was given to the Secretariat of the Councils, which produced a document (Document No 1254/60, 6 December 1960) in which the Bank's view was firmly refuted. It states therein that a 'correspondence' can be discerned between the organs of the Bank and those of the EEC but only in so far as they carry out duties which are effectively similar and only in so far as there is no conflict with principles of a higher rank. Indeed, taxation may only be imposed by legislation: consequently it seems logical that the power of taxation should be exercised by the institutions, namely by the Council and the Commission of the Communities, on which the Treaty has conferred the power to legislate. It is added that although the Bank has legal personality of its own it is not peripheral to the EEC. On the contrary, provision is made for the Bank in a special title of the Treaty which established the EEC and it is therefore part of the Community machinery.

On the basis of those arguments Coreper maintained that the tax 'for the benefit of the Community' adopted by the Council should also have been applied to the Bank's staff, albeit using the procedures required by the special nature of the Bank; and there is an entry in the minutes of the Permanent Representatives' meeting held on 9 and 10 February 1961 to the effect that the two Presidents ultimately agreed on such a formula. While trusting that the Bank's officials would be given a special guarantee with regard to their pensions, the Bank's President agreed that they should be subject to the general rules of the tax and that the revenue therefrom should be included among the receipts of the Community (Document No 111/60, (RP/CRS 6), p. 11, paragraph 9a).

Regulation No 32/61(EEC)/12/61(EAEC) reflects the Bank's adherence to the Council's view. Article 9 thereof provides that 'the tax proceeds shall be entered as revenue in the budgets of the Communities' and Article 12 specifies that the regulation is to 'apply to members of the organs of the European Investment Bank, and to members of its staff and recipients of the pensions it pays, who are included in the categories

determined by the Council [of the EEC] in application of the first paragraph of Article 15 of the Protocol on the Privileges and Immunities, with regard to salaries, wages and emoluments and to disability, retirement and survivor's pensions paid by the Bank'.

These principles survived unscathed the various legislative changes which took place in the field in subsequent years. Regulation No 32/61(EEC)/12/61(EAEC) was amended initially by Regulation No 32/65(EEC)/6/65/(EAEC) of 16 March 1965 (Journal Officiel 1965, 47 p. 709) and subsequently by Regulation No 4/66/EAEC/53/66/EEC of 5 May 1966 (Journal Officiel 1966, 87, p. 1362) and finally lapsed upon the entry into force of the Merger Treaty (1 July 1967), which repealed the Protocol on Privileges and Immunities annexed to the Treaties of Rome. However, Articles 13 and 22 of the new Protocol — which came into force on 1 July 1967 although it was drawn up on 8 April 1965 and is generally cited as being of that date — were extremely closely modelled on Articles 12 and 21 of the former version. Thus the new Article 13 provides that 'officials and other servants of the Communities shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities, in accordance with the conditions and procedure laid down by the Council, acting on a proposal from the Commission', whilst the first paragraph of the new Article 22 states that 'this Protocol shall also apply to the European Investment Bank, to the members of its organs, to its staff and to the representatives of the Member States taking part in its activities, without prejudice to the provisions of the Protocol on the Statute of the Bank'.

Acting pursuant to Article 13, the Council issued Regulation No 260/68 of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (Official Journal, English Special Edition 1968 (I), p. 37). But that instrument, too, simply reproduces, with slight formal amendments necessitated by the situation following the merger of the executive bodies, the provisions of Regulation No 32/61(EEC)/12/61(EAEC). For instance, Articles 9 and 12 thereof reproduce the corresponding provisions of the former regulation almost to the letter; neither were those provisions affected by the numerous amendments which a series of subsequent decisions — most recently Council Regulation No 3580/85 of 17 December 1985 (Official Journal 1985, L 343, p. 1) — made to the new rules (for an in-depth appraisal of the basic rules see Peters, 'L'impôt communautaire sur les rémunérations des fonctionnaires et des agents des Communautés européennes', in *Revue internationale des sciences administratives*, 1968, pp. 255-267, and Drucker, *Financing the European Communities*, Leyden, 1975, pp. 135-137 and 248-251).

3. As from 1 January 1962, that is to say the date on which Regulation No 32(EEC)/12(EAEC) entered into force, the Bank withheld from the salaries and pensions paid by it a tax calculated pursuant to the aforementioned rules. But, instead of paying the sums in question into the Community budget, it has shown them each year on the liabilities side of its balance sheet under the heading 'Miscellaneous', where they were shown as totalling ECU 34 million as at 31 December 1984.

The application states, and it was reiterated at the hearing, that that practice 'went unperceived by the Commission' because of unspecified 'administrative oversights'. What aroused the Commission from its inex-

plicable slumber was, paradoxically enough, the observations raised in 1979 by the Bank's Audit Committee on the presentation of the Bank's accounts; and from then on the Commission's departments went into the attack, taking increasingly vigorous action. In particular, on 16 December 1981 a member of the Commission, Mr Ortoli, asked the President of the Board of Governors to cease acting contrary to the Treaty, and informed him that the Committee on Budgetary Control of the European Parliament was also concerned to see that the issue was swiftly resolved. Similarly worded letters were sent to the Board of Governors by the Vice-President of the Commission, Mr Tugendhat (on 23 November 1984) and by President Delors (21 November 1985), who raised the possibility of bringing the dispute before the Court of Justice. However, it does not appear from the documents before the Court that the Bank reacted to those communications.

In parallel and in connection with the preliminary draft budgets for 1983, 1984, 1985 and 1986 the Commission proposed to the Council that a new Chapter 49, Article 490, should be created in the budget as a memorandum item to account for the proceeds of the tax withheld from the salaries of the Bank's staff 'pending a decision of the Board of Governors' with regard to the disposal thereof (see, for the 1985 budget, Document No COM (84) 200, Volume 7-A/86, p. 6). However, the Council rejected those suggestions on the ground that the Bank's receipts and expenditures should be regarded as not being included in the Community budget; and, no less unexpectedly, the Parliament followed suit by refusing to propose that the aforementioned article be reinserted.

Consequently, the decision of 30 December 1985 which the Commission is asking the Court to declare void is part of an old dispute which is replete with aspects which I would describe as bizarre, to say the least. The decision's statement of reasons refers to Articles 12 and 21 of the Protocol of 17 April 1957, Articles 13 and 22 of the Protocol of 8 April 1965 and Article 9 (3) (f) of the Statute of the Bank. The first paragraph states that 'the proceeds of the income tax withheld by the Bank from the salaries, wages, pensions and emoluments of any kind paid by the Bank between 1962 and the end of 1985, entered on the liabilities side of the EIB's balance sheet under "Miscellaneous", shall be transferred to the reserves'; the second paragraph adds that 'as from [the] 1986 financial year, amounts withheld by the Bank from salaries, wages, pensions and emoluments of any kind paid by the Bank shall be accounted for each month as bank income under the heading of "Financial and other income", and entered as such on the profit and loss account'.

4. It is appropriate at this point to refer to a procedural issue which was raised in the initial stage of the proceedings. Under Article 91 of the Rules of Procedure the Bank claimed that the action was inadmissible on the ground that the application incorrectly stated the name of the party against whom it was brought and hence failed to fulfil one of the conditions laid down in that regard in Article 38 (1) of the Rules of Procedure. It was claimed that the Commission cited the 'European Investment Bank' as the defendant whereas it should have cited the 'Board of Governors'. The Bank and the Community are in fact in the same situation. The Community, too, has legal personality; however, legal proceedings may be brought only against its institutions.

By order of 3 July 1986 ([1986] ECR 2215) the Court dismissed the objection, thereby confirming the case-law according to which formal errors in designating the party against whom proceedings are brought may be corrected even after the application has been lodged and even in the judgment (see the judgment of 2 March 1977 in Case 44/76 *Milch-, Fett- und Eier-Kontor* v *Council and Commission* [1977] ECR 393, paragraph 1). The Court stated that although the opening words of the application wrongly cited the Bank, the application expressly referred to Article 180 (b) of the EEC Treaty, according to which the Commission may bring an action against decisions of the Board of Governors, and clearly indicated the purpose of the action. In the light of those factors it could be held that the application satisfactorily fulfilled the conditions laid down in Article 38 (1) and could therefore be construed as having been brought, not against the Bank, but against its supreme governing body.

5. However, the Bank did not confine itself to that unsuccessful claim. In the defence it put forward a further three, very much more complex, objections of inadmissibility. I shall consider them *seriatim*.

In the first place the Bank claims that the application is directed against an act which has no effects as far as third parties are concerned and, in any event, is incapable of having adverse effects. The contested decision was brought about by an *internal* event — the observation of the Audit Committee to which I adverted earlier — and itself also takes the form of an *internal* measure, which affects the Bank's accounts only in so far as it transfers the tax proceeds from the heading 'Miscellaneous' to the heading 'Reserves'. It is obvious therefore that it cannot impede, even less prevent, the entry of the tax in the Community budget. Moreover, the allocation to the reserves of the sums received up until 1985 serves as a guarantee *vis-à-vis* the Bank's creditors and therefore benefits the Community as a whole.

The Bank's second objection emphasizes the fact that the budget contains neither articles nor items relating to the proceeds of the tax and considers therefore that, as the body responsible for carrying out the budget, the Commission cannot seek the recovery of an item of revenue which is neither envisaged nor authorized under the relevant provisions of the financial regulation of 21 December 1977 (Article 4 and Article 1 (1) respectively, Official Journal 1977, L 356, p. 1). Under a fundamental principle of budgetary law it is prohibited to insert revenue or expenditure entries unless they are charged to an article or an item of the budget. Moreover, since it is a 'third party' in relation to the Communities, the Bank is entitled to rely on that state of affairs and hence maintain in its account the sums which have accumulated as from 1962.

The third objection is even more radical. The real target of the action — the Bank maintains — is a decision of the Council of the European Communities, namely the decision whereby, contrary to a proposal by the Commission, the Council decided not to enter the proceeds of the tax withheld from the salaries of the Bank's staff as revenue in the budget. Instead of contesting the decision of the Board of Governors, which merely drew the appropriate inferences from the Council decision, the Commission should therefore have brought its action against the Council as the author of that decision. Furthermore, and again because it is a 'third party' *vis-à-vis* the EEC, the Bank cannot be made liable in law for any infringement of the rules governing the tax which might have been carried out by the budgetary authority when it adopted the

budget: this is borne out by the judgment of 13 February 1979 (Case 101/78 *Granaria BV* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623), in which a Member State was held not to be liable for applying a Community regulation which had not yet been declared to be null and void.

6. In my view, none of those arguments deserves to be accepted. However, in assessing them I shall leave on one side the questions relating to the legal nature of the Bank and, in particular, I shall not consider whether the Bank is in actual fact a 'third party' *vis-à-vis* the Community. Although the two questions are of the utmost importance, in my opinion it is not essential to consider them in this context whereas it is more useful to discuss them in connection with the substantive problems to which the dispute gives rise.

Reversing the order in which the Bank has set out its objections, I shall deal first of all with those objections relying on concepts of budgetary law, such as the entry of an item in the budget and its possible consequences. In that regard it must be observed that as regards revenue entries the budget is essentially in the nature of a forecast. Having said this, it should be observed that failure to take due account of the so-called principle of 'dual implementation' (that is to say, budgetary, on the one hand, and legislative or administrative, on the other) may give rise to paradoxical results.

If it is argued that the conferral on the Commission of the right to ask the Court to rule on the validity of the insertion (or non-insertion) of a revenue entry causes it to lose the right to bring proceedings for the infringement of a legislative measure such as Regulation No 260/68, this ends up in practice by making the effectiveness of Community laws depend on the decisions taken by the budgetary authority. Whether that claim was intended or unconscious it is absurd. As the Commission's representative graphically pointed out at the hearing, if the shape of the rules issued by the legislature were to depend on the whims of the two bodies responsible for drawing up the budget the system would be ungovernable: especially since — as the Court is well aware — those whims are frequent and, in most cases, are purely conflictual in origin.

Admittedly, the Commission does not practise what it preaches: it contradicts itself, for instance, when it invokes the volte-faces of the Council, which refused no less than four times (1983 to 1986 financial years) to include in Article 400 the sums paid by the Bank's staff and then included them with respect to the 1987 financial year — that is to say *after* this action was brought — in order to maintain that those sums were inserted in the previous budgets. But that is not the point. If what I have stated above is correct, the point lies in the recognition that whether or not the tax was inserted in an annual budget has no bearing on the the ability to invoke the rights discussed in this case. The existence of such rights can be established only in the light of the relevant rules: the Protocol of 8 April 1965 and Regulation No 260/68.

However, let us suppose that the Bank's argument contains an element of truth; but this does not mean that we have to accept the conclusions drawn therefrom. The Bank overlooks the fact that Article 200 (1) of the EEC Treaty refers to 'other revenue'

and that that expression is sufficiently broad also to cover the proceeds of the tax on staff remuneration. And it cannot be objected that following the decision on own resources that provision may no longer be utilized. As the best academic writings point out, the Treaties of 21 April 1970 and 22 July 1975 did not formally repeal Article 200 (1) and hence it is still capable of having some effects, including certainly the effects which are of interest to us (Sacchettini, 'Dispositions financières', in *Le droit de la Communauté économique européenne*, Brussels 1982, Volume XI, p. 12 *et seq.*).

At this point there remains the objection to the effect that the contested decision cannot have effects on third parties and, at the same time, does not have adverse effects. With regard to the second aspect the Commission puts forward an argument which I find completely persuasive: no provision of the Treaty — neither Article 180, nor Article 173, to which Article 180 expressly refers — requires a measure to cause or be capable of causing adverse effects in order for it to be capable of being challenged. With regard to the first aspect it is sufficient to observe that, in the light of previous relations between the Commission and the Bank (*supra*, No 3), the decision of the Board of Governors is tantamount to a definitive rejection of the requests made by the Commission. There is therefore no doubt that, in addition to having an effect internally within the Bank, it also has effects outside the Bank in so far as it has an adverse effect on entries in the Community budget.

7. Let us now turn to the substance of the dispute, and I shall start by reviewing the arguments of the parties. As will be seen, the arguments echo those of the Bank and Coreper in the early 1960s in the course of the proceedings which gave rise to the first regulation on the tax 'for the benefit of the Community'. However, they are more complex and detailed.

I shall start with the Commission. The Commission begins by stating that, in extending *mutatis mutandis* to the Bank the rules laid down in the Protocol, Article 22 of the Protocol does not identify the Bank as being a separate body of the Community but merely extends to it (together with its members and its staff) the benefit of a series of immunities and privileges; consequently, the provision does not confer on the Bank the right to appropriate the revenue from the tax charged on the remuneration of its officials. Moreover there is much evidence for that view, starting with the wording of Article 13 which refers to 'the Communities' while not making the slightest reference to the Bank. It will be objected that that silence is of little probative value; however, in view of the pains which the drafters of the Treaty of Rome (Article 129), the Merger Treaty (Article 28) and the respective protocols took to distinguish between the two entities, it is bound to be of great relevance for the purposes of interpretation.

Furthermore, according to Article 13 officials are to pay the contested tax 'in accordance with the conditions and procedure laid down by the Council, acting on a proposal from the Commission'. If the Bank were the recipient of the sums collected by means of that tax, there would be no explanation for the reference to the Community legislature alone; unless, of course, one reads 'Board of Governors' and 'Board of Directors' wherever the article refers to the two most important organs of the Community. But the scope of the provision in question militates against such

an interpretation. By adopting that provision the Member States transferred to the EEC the crucial sovereign power of taxation; it is unthinkable that they should have intended to make such a sacrifice in favour of the Bank, which, albeit important, has an incomparably smaller institutional and political stature.

In addition, as the Commission further argues, the objective pursued by the Bank is by no means supported, whether explicitly or implicitly, by the rules — such as the Protocol on the Statute of the Bank which is appended to the Treaty of Rome — which govern the Bank's existence and operation. Neither can it be said that if it were not authorized to withhold the contested tax the Bank's own financial and commercial independence would be adversely affected. The amount of the proceeds which the Bank has accumulated since 1962 is indeed substantial (ECU 34 million) but, nevertheless, constitutes only a drop in the ocean compared with its balance-sheet total (ECU 25 000 million). Furthermore, its creditors certainly are not unaware — and it is this on which they rely above all — that numerous operations of the Bank are secured against the Community's budget.

Lastly, Regulation No 260/68 militates against the practice adopted by the Bank. The discussions prior to the adoption of the regulation which Regulation No 260/68 reproduces speak for themselves; however, what is decisive is Article 9 which states with the utmost clarity that the tax proceeds are to be 'entered as revenue in the budgets of the Communities'. Furthermore, the Bank does not have a budget in the sense intended by the regulation, that is to say a measure authorizing future income and expenditure, but rather accounts designed to record its financial situation at the time at which they were drawn up. This factor, too, shows that, although dominating the rules governing the subject-matter in this case, the principle of application *mutatis mutandis* cannot be stretched to such an extent as to make the Bank a parallel body and hence 'a third party' *vis-à-vis* the Community.

8. The series of arguments put forward by the Bank is even more abundant and no less ingenious. As was to be expected they are two-pronged, being based on the fact that numerous primary norms make a clear distinction between the Bank and the Community whereas others place them on a footing of absolute equality.

Article 129 of the Treaty of Rome separates the two bodies by giving the Bank legal personality; on the other hand they are put on an equal footing both by the preamble and Article 22 of the Protocol of 8 April 1965 and by Article 28 of the Merger Treaty, which confer on the Bank immunities and privileges in its own right and not on an ancillary basis, as would be the case if the Bank were subordinate to the Community, but definitely on an *original* basis. Hence, the EEC and the Bank are two separate legal persons under international law, which were created by the Treaty of Rome, and are on a completely equal footing in all respects (including the power to conclude agreements with non-member countries — for example, the agreement of 24 March 1972 between the Bank and Switzerland). Moreover, that state of affairs is reflected in the internal arrangements of the Bank: they differ only slightly from the structure of the EEC and are in fact just as complete, having at the apex a body which, like the Council of the European Communities, is made up of ministers of the Member States.

Manifestly, the upshot of all this is that the Bank cannot be equated with bodies like the European Foundation for the Improvement

of Living and Working Conditions or the European Centre for the Development of Vocational Training which, although they have legal personality of their own, stand, organically and financially, in a relationship of dependency *vis-à-vis* the Community. In contrast:

(a) the composition of the Bank's constituent bodies is laid down by an instrument — the Statute of the Bank — which was brought into being by the Member States and hence has the standing of the Treaty;

(b) the Bank does not appear in the Community budget but finances itself out of its own resources, in particular using capital paid in by the Member States and the proceeds of its operations.

Accordingly the Commission's argument to the effect that Article 22 of the Protocol of 8 April 1965 merely extended to the Bank, its members and its officials *the benefit* of the privileges provided for therein is flawed *ab initio*. In reality, the extension effected by that provision has as its primary aim *entitlement* to those benefits; hence it can be said that the Bank is invested with the power of taxation in exactly the same way as the Community is. The same principle, moreover, governs Article 13, in the first paragraph of which, in order to make sense, the term 'Communities' should *invariably* be replaced by the term 'Bank'. The Commission, which carries out that exercise of substitution only where it serves its purpose, interprets the provision in the following, absurd manner: officials and other agents of the Communities (including the staff of the Bank) shall be liable to a tax for the benefit of the Communities (naturally, excluding the Bank) on salaries, wages and emoluments paid to them by the Communities (which now once again includes the Bank even though the Communities do not pay the Bank's staff).

That the application *mutatis mutandis* must be interpreted broadly is further borne out by the nature of the tax on salaries. To regard that tax as a manifestation of a 'royal prerogative' which may not be transferred to the Bank owing to its modest political stature or to say that when they introduced that tax the Member States wished to create a new revenue item for the EEC budget is profoundly misleading. Like the similar taxes charged by the other international organizations, the Community tax is designed simply to put all the employees of the European organizations — of the Community on the one hand, and of the Bank, on the other — in an identical fiscal situation apart from their nationality and their place of employment. To require that the tax collected by the Bank should be paid into the Community budget means ignoring that objective and transforming the tax into an 'external' tax, thereby causing the equality of the two bodies to be breached. Neither may it be said that the Bank is not opposed to the rate of the tax being set by an 'outside' body, such as the Council. As things stand today, in fact, that circumstance is neutral; but it would cease to be so if the Bank were to lose control over the tax since then any increase in the rate would increase the Community's resources but manifestly not the Bank's.

However, the Commission does not overlook only the aim of the tax when it denies the Bank the right to withhold the sums paid by its staff. It also overlooks the fact that the Protocol which gave rise to the tax goes back to 17 April 1957 whilst the Statute of the Bank, in which its resources

are listed, bears the same date as the Treaty of Rome, that is to say 25 March 1957. Worse still, the Commission takes no heed of the discriminatory treatment and losses which the Bank would suffer if those sums were withdrawn from it.

The discrimination is obvious. It can be seen from the Community budget that the Council, the Commission, the Court and the Parliament get back the proceeds of the tax paid by their respective officials in the form of revenue and put them towards covering their administrative expenditure; yet that offsetting machinery does not apply to the Bank and hence it would be 'taxed' simply for the benefit of the Community. It is equally serious that by losing the proceeds of the tax the Bank's own operating costs would increase. In turn that would result in a diminution in the Bank's funds — over which, it should be noted, the Member States have exclusive rights — and this might necessitate calling upon the Member States to make good the difference.

Furthermore, there is a risk that the loss of the tax might blur the Bank's image as a legally and financially autonomous organization and hence reduce its ability to take up loans and gather in capital on the international market. The reasons for this link are clear. The Bank's independent status — which is made manifest above all by the fact that it is not subject to the power of taxation of Brussels or the supervision of the Court of Auditors — is the basis of the Bank's prestige and hence of the particularly favourable terms granted to it. If it were to lose its status, it would also cease to have access to those favourable terms, which shows that the aphorism of Chief Justice Marshall in *McCulloch* v *Maryland* — 'the power to tax involves the power to destroy' — continues to be fully relevant today. And this is not all. Today the Bank's involvement in the funding of a project attracts other backers because they know that the Bank acts on the basis of objective assessments and not, as often happens in the Community, because of mainly political reasons. So, a decrease in its independence would also have adverse effects on the Bank's work with regard to the granting of loans.

Lastly, the arguments which the Commission bases on Regulation No 260/68 are extremely weak. It should be stressed in that connection that not only was the Council of the Communities not entitled to pronounce on the disposal of the tax collected by the Bank pursuant to the Protocol but also it was not even empowered to define the conditions and the procedures for its implementation; that power is vested in the Board of Governors, which has not exercised it yet simply because it has preferred to have uniform rules for reasons of expediency. Furthermore, the 'travaux préparatoires' of Regulation No 260/68 are irrelevant, at least because the documents in which they are reported come from one side only, that is to say from the secretariat of the Council or from Coreper. Moreover, the President of Coreper might not have understood the exact extent to which the President of the Bank's Board of Directors agreed to his ideas: and in any event the latter had no power to bind the Bank as regards a matter affecting the rights of the Member States.

But that is not sufficient. As is obvious, Article 12 of the regulation extends its effects solely to the staff of the Bank. Consequently, when it provides that the tax proceeds are to be entered as revenue in the budgets of the Communities, Article 9 does not refer to the Bank; the relative duty is directed not to the Board of Governors but to the Community budgetary authority.

9. Shortly I shall assess the arguments which I have just summarized. For the time being I am concerned to point out that the premisses on which the Bank has based itself are amply borne out by academic writings and by practice. Let us examine both aspects.

Of the arguments put forward by learned writers, some rely on the Treaty and in particular on Articles 4, 129 and 180. Article 4 is invoked because it does not include the Bank among the institutions and ancillary bodies (Court of Auditors, Economic and Social Committee) of the Community; Article 129 is prayed in aid because it confers legal personality on the Bank in its own right which is effective even in the field of international relations (see above all Müller-Borle, *Handbuch des Europäischen Rechts*, Volume XI, Baden-Baden, 1984, Issue IA 58, p. 27, and Käser, 'The European Investment Bank: its role and place within the European Community System', in *Yearbook of European law*, 1984, p. 320); and Article 180 is relied on because, by referring to Article 169, it confers on the Board of Directors the powers vested in the Commission in the event of a failure of a Member State to fulfil an obligation. Nor does the fact that Article 180 empowers the Commission to challenge decisions of organs of the Bank argue in favour of the existence of a relationship of dependency between the Bank and the Community. At the most, it is said, this shows that the tasks assigned to the Bank are instrumental with regard to those of the Community (Mosconi, *La Banca europea degli investimenti, Aspetti giuridici*, Padua, 1976, p. 18).

Other arguments invoked refer to an assortment of different facts. For instance there is the great resemblance between the organs of the Bank and the Community institutions (the Board of Directors — according to Leanza, 'Commento all'articolo 129', in *Commentario del Trattato CEE*, Milan, 1965, Volume II, p. 999 — is simply the Council of the European Communities under a different name). Then, again, there is the fact that the Bank often acts as the agent of the Community and is therefore distinct from the Community (Mosconi, *op. cit.*, p. 15, and Henrion, 'La Banque européenne d'investissement', in *Les nouvelles, Droit des Communautés européennes*, Brussels, 1969, p. 968). Finally, there are the imperative requirements to which the Bank's activities correspond. In other words, by setting up the Bank the authors of the Treaty recognized that there was a need for an independent body, free of government intervention, managed in accordance with the rules governing the activities of the credit institutions and capable of winning the confidence of operators on the international capital market (Licari, 'The European Investment Bank', in *Journal of common market studies*, 1969-70, p. 194; Müller-Borle, *loc. cit.*; L. J. Constantinesco, 'Das Recht der Europäischen Gemeinschaften', *Das institutionelle Recht*, Volume I, Baden-Baden, 1979, p. 441 *et seq.*; Mosconi, 'La Banque européenne d'investissement', in *Le droit de la Communauté économique européenne*, Brussels, Volume VIII, 1979, p. 20).

As I have said, practice also points to the same conclusion in so far as it is true that to

date the Community bodies, the Member States and at least one non-member country have been at pains to avoid confusion arising between the Bank and the Community. For instance, the Commission has pointed out that the Bank's executive organs 'are responsible only to the Bank' (answer to written question No 288/73 by Mr Cousté, Official Journal 1973, C 106, p. 14); and in a message to the Federal Assembly on 11 August 1972 the Swiss Government stated that 'the agreement with the European Investment Bank, an institution governed by public law and independent of the European Communities [is] distinct as regards its subject-matter and institutionally from the free-trade agreement between Switzerland and the EEC'.

10. This makes it clear why one of the most important Italian jurists placed the Bank in the category of 'international undertakings/organizations', that is to say among those bodies the States set up by agreement to produce or distribute goods or services on a profit-making or non-profit-making basis (Conforti, 'Le imprese internazionali', in *Rivista di diritto internazionale privato e processuale*, 1970, p. 243); neither is it surprising that a no less authoritative German academic categorized the Bank as a *Glied* (member) of the Community, but then qualified that expression by using adjectives and nouns which were so contradictory (*weitgehend unabhängig*, that is to say 'largely independent' and *Zwitterstellung*, that is to say 'ambiguity' or, better, 'hybrid') as to make it completely meaningless in practice (Hilf, *Die Organisationsstruktur der Europäischen Gemeinschaften*, Berlin-Heidelberg-New York, 1982, p. 31 *et seq.*). And yet I am convinced that research not based on formal data but designed to capture the overall design of the founding fathers and sensitive to the manifold interests at stake invalidates the theory of a European Investment Bank which is independent and hence a 'third party' *vis-à-vis* the Community.

Let us start with an incontrovertible observation: without overestimating the importance of the title and the preamble (if any) of a piece of legislation for the purposes of identifying its most characteristic subject-matter, it is a fact that the Treaty of Rome is entitled 'Treaty establishing the European Economic Community' and that it refers in its preamble to the Community again whereas it makes no mention of the Bank. In any event, the content of Articles 1, 2 and 3 is more significant. After announcing (in capital letters) the establishment of a European Economic Community, those articles list its objectives and the 11 points in which its activities are set out. Now the 'establishment of a European Investment Bank' intended to 'facilitate the economic expansion of the Community by opening up fresh resources' appears (and in lower-case letters, at that) in the 10th of those points (letter j). Are we to take this to mean that the Bank is an instrument of the EEC? This would appear to be precisely the case; this is also borne out by the fact that the other provisions relating to the Bank (Articles 129 and 130) occur in Part Three of the Treaty, which is entitled 'Policy of the Community'; they follow the provisions dealing with economic policy and social policy and state that, in addition to the general task set out in the aforementioned Article 3 (j), the Bank has the task of contributing 'to the balanced and steady development of the common market in the interest of the Community'.

For our purposes the latter form of words seems to be particularly eloquent. It should be compared in fact with the wording of Article 2 — according to which the

Community is to aim among other things to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability — and, by way of confirmation of what I was just saying — it will be noticed that the tasks described in Article 3 (j) and in Article 2 coincide completely. The 'special nature' which is so often attributed to the Bank lies therefore — if not solely, certainly primarily — in the specific nature of the means by which it is called upon to carry out those objectives: granting loans and giving guarantees which facilitate the financing of the following projects in all sectors of the economy:

(a) projects for developing less-developed regions;

(b) projects for modernizing or converting undertakings or for developing fresh activities called for by the progressive establishment of the common market;

(c) projects of common interest to several Member States (Article 130).

But that is not the only evidence afforded by the primary legislation for the view which I am advocating. The fact that the actual Member States of the EEC make up the membership of the Bank is, for example, anything but without significance; so much so that even writers arrayed behind the opposite theory have admitted the existence of a 'one-to-one correspondence' linking the membership of a given State to the two organizations (Mosconi, *La Banca, op. cit.*, p. 19 *et seq.*). In fact the second paragraph of Article 129 should be interpreted as meaning that the members of the Bank are all the Member States of the EEC and that only such States may be members thereof. This is borne out by two circumstances: on the one hand, there is the absence in the Bank's Statute of provisions relating to the acquisition or loss of the capacity of member and theoretically capable of having a different effect than the provisions laid down in Article 237 with regard to membership of the EEC; on the other hand, there is the practice which has been followed on the occasion of each enlargement of the Community, namely the negotiation with the new Member State of appropriate protocols relating to the Statute of the Bank.

Furthermore, as we have seen, the Bank and the academics who support its argument stress the resemblance between the structure and functions of the Council of the Community and those of the Board of Governors. Considered in isolation, in fact, that argument seems to me to be neutral or to cut both ways. But it ends up by supporting my argument, if one bears in mind that: (a) under Article 10 of the Bank's Statute 'voting by the Board of Governors shall be in accordance with the provisions of Article 148 of the Treaty', and (b) where no provision is laid down in the Statute the other procedural rules laid down by the Treaty for the Council also apply to the Board of Governors (see Leanza, *op. cit.*, p. 999, Mosconi, *op. ult. cit.*, p. 75).

On an adjoining level it must also be pointed out that important organic and functional relationships exist between the Commission and the Bank. As regards the first category of relationships it is well known that one director and one alternate member of the Bank's Board of Directors are nominated by the Commission (Statute,

Article 11 (2)); as examples of the functional relationships existing between the Bank and the Commission I would point out that the Commission has a number of powers with regard to the day-to-day management of the Bank. Thus, applications for loans or guarantees may be made to the Bank through the Commission; applications not so made are to be submitted to the Commission for an opinion, with the further constraint that where the Commission delivers an unfavourable opinion, the Board of Directors may not grant the loan or guarantee concerned unless its decision is unanimous. It does not seem to me to be excessive to infer from those rules (Article 21 (1), (2) and (6) of the Statute) that the interests for which the Bank is responsible can be identified as being general interests of the Community.

11. But if this is the case there is justification for asking why the primary legislation gave the Bank legal personality and financial autonomy. It is not a difficult question to answer. 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.

Similar considerations apply with regard to the Bank's resources. It was obviously necessary that the Bank should be able to count on its own corporate capital; in any event, the Bank's need to have its own capital is explicable in the light of the difficulties which were encountered with regard to security by the financial operations of the ECSC High Authority. At the express request of its financers — the United States Government acting through Eximbank — the ECSC High Authority had to enter into an agreement termed the 'Act of Pledge' with the Bank for International Settlements. Under that agreement the borrowed funds yet to be disbursed, the claims corresponding to loans granted and the security therefor constituted a separate portfolio which, in turn, served as the common pledge for the benefit of the lenders to the High Authority and was applicable to all its creditors (Cervino, 'Commento all'articolo 51', in *Commentario CECA*, Milan, 1970, Volume II, p. 673 *et seq.*).

Accordingly, the reasons for the provisions laid down in the first paragraph of Article 129 of the Treaty and Article 4 of the Statute of the Bank are above all *technical*: they have a much lower profile than the Bank thinks and maintains. It seems to me in any case that to base the argument that the Bank is a 'third party' on those provisions is at least a risky operation. As I shall shortly argue I do not believe that the Bank is an organ of the Community in the technical sense. But even for those who do regard the Bank as being an organ of the Community — which is certainly the stance which is most at odds with the argument that it is a 'third party' — the fact that the authors of the Treaty conferred legal capacity on it is no barrier. The most authoritative academic writings have conceded

for some time that the organ of a legal person may itself possess personality and financial autonomy and that that aspect of its status may even manifest itself outside the structure of which it is a part (Mortati, *Istituzioni di diritto pubblico*, Volume I, Eighth Edition, Padua, 1969, p. 196 *et seq.*; Giannini, *Istituzioni di diritto amministrativo*, Milan, 1981, p. 114 *et seq.*; Vedel, *Droit administratif*, Seventh Edition, Paris, 1980, p. 808 *et seq.*).

12. The resultant outcome rescales, at least to some extent, the importance of the discussion concerning the classification of the Bank within the context of the Community. Nevertheless, it is necessary and appropriate to formulate a view thereon.

Let us deal with the matter in an orderly manner. In my view, the fact that the Bank is not among the 'institutions' listed in Article 4 must not be overestimated. This is shown by two findings. The first is that the term 'institutions' is not used in the German version of the Treaty, which refers to 'Organe', whereas the Bank is referred to as an 'institution' in at least three rules laid down in derived legislation: Article 1 of the Court's Rules of Procedure, which states that for the purposes of those rules ""institutions' means the institutions of the European Communities and the European Investment Bank'; Article 14 (4) of the Internal Agreement on the financing and administration of Community aid, concluded in connection with the Convention of Lomé ('where, in the course of appraisal of a project ... by the Commission or by the Bank, it is found that such project ... could not be financed by one of the forms of aid administered by the institution in question, the latter will, with the agreement of the potential recipient, transmit the request to the other institution'); Article 5 of the Decision of 8 April 1965 of the representatives of the governments of the Member States concerning the provisional installation of certain institutions and departments of the Community (Journal Officiel 1967, L 152, p. 18), from which it is completely clear that the Bank is regarded as an institution and not as a department.

But it is my second finding which clinches the matter. The term 'institution', which the Treaty uses exclusively for certain Community bodies, does not have a specific content or substance and is therefore of no assistance at the theoretical level. Once this is granted it can confidently be added that to seek out the common characteristics of the various institutions in order to construct a standard definition of an institution would be a waste of time. Imagine that that exercise has already been carried out and the results are to be applied to body X: were we to find that that body has the required characteristics but is not specified to be an institution in the Treaty, that term could not be applied to it; on the other hand it would continue to be an institution even if it lacked one or more of those features were it to be described as such in the Treaties.

However, as I mentioned earlier, neither can the problem be resolved by applying to the Bank the term 'organ', which even academic writers frequently employ (Leanza, *op. cit.*, p. 997; Barre, 'La Banque européenne d'investissement', in *Revue du Marché commun*, 1961, p. 253) and at times qualify by adding the adjective 'subsidiary' (Dupuy, Les droits des relations entre organisations internationales, in Recueil des Cours, 1960, Vol. II, p. 575), 'auxiliary' (Monaco, 'Commento all'articolo 3', in *Commentario CEE*, *op. cit.*, Vol. I, p. 45) or 'ancillary' (Vignocchi, *Le Comunità europee:* gli organi comunitari e le loro funzioni, Milan, 1963, p. 90). Why this should be so seems to me to be obvious: the Bank lacks

the fundamental characteristic of an organ, that is to say its acts are not directly imputable to the organization — the EEC — of which, according to the proposition under consideration, it should be regarded as being an integral part (Levi, 'Sulla competenza della Corte di giustizia comunitaria nelle controversie tra la BEI e i suoi dipendenti', in *Rivista di Diritto Europeo*, 1978, p. 235).

So the Bank is neither an institution nor an organ. How is it possible then to express in positive terms the conclusion which I have reached that the Bank is not a 'third party' and parallel *vis-à-vis* the Community? In my opinion, the answer is a simple one. The Bank has a functional connection with the Community; in other words, a similar relationship to the one which binds public bodies making up the so-called 'indirect administration' of the State and the State itself. This proposition — perhaps it is not brilliant but it is certainly closer than any other to the legal reality — is, moreover, supported by the case-law of the Court. What is more, in taking that line — albeit within the limits of the principle according to which *iudex iubet, non docet* — the Court could not have been more explicit.

In the first place I have in mind Joined Cases 27 and 39/59, *Campolongo* v *High Authority* [1960] ECR 391) relating to the pecuniary rights of an official of the ECSC who left to join the Bank immediately following the entry into force of the Treaty of Rome. Advocate General Roemer stated that 'the Bank is not intended to lead an independent existence but constitutes an instrument' of the EEC and 'the necessity of giving . . . [it] a statute corresponding to its commercial functions must . . . not have the effect of overlooking the . . . connection' with the EEC. The Court accepted that approach. In its judgment of 15 July 1960 it recognized 'the operational unity of the European Communities and associated institutions' and inferred therefrom that by transferring from one to another of those 'Communities or institutions' an employee is not entitled to aggregate a severance grant from one with an allowance on entry into a service from another.

Then there is Case 110/75 *Mills* v *European Investment Bank* [1976] ECR 955, which raised the question of the Court's jurisdiction in disputes between employees of the Bank and the Bank itself. Under Article 179 of the EEC Treaty 'the Court of Justice shall have jurisdiction in any dispute between the Community and its servants'; consequently the issue turned on whether the defendant Bank had to be regarded as forming part of the Community; the Court answered that question in the affirmative on the ground that Article 22 of the Protocol of 8 April 1965 provides that the immunities and privileges provided therein should also apply to the staff of the Bank. The Court stated that the staff of the Bank were placed as a result of that provision 'in a . . . situation identical to that of the staff of the institutions of the Community' and hence it must be concluded that Article 179 'includes the Bank as a Community institution established and with a legal personality conferred by the Treaty' (judgment of 15 June 1976, paragraphs 13 and 14).

Lastly, I would cite the judgment of 13 May 1982 in Case 16/81 *Alaimo* v *Commission* [1982] ECR 1559 which is very important in so far as it casts additional light on the principle laid down in *Mills'* case. Once again the dispute turned on the scope of Article 179 but this time in connection with an action brought by an official of the European Centre for the Development of Vocational Training. The Commission argued that the Court should interpret the expression 'servants of the Communities' as

referring solely to the employees of the institutions listed in Article 4 of the Treaty and of the bodies treated as such under the second paragraph of Article 1 of the Staff Regulations (Court of Auditors, Economic and Social Committee). It therefore argued that the Staff Regulations should not apply to staff of bodies which had legal personality and were distinct from the Community, whether, as in the case of the Bank, they were established directly by the Treaty or, as in the case of the European Centre for the Development of Vocational Training, they were set up in implementation of the Treaty.

The Court considered that approach to be formalistic and rejected it bluntly. For our purposes the most significant passages are the ones in which, in order to show that the Centre was part of the Community, the Court pointed out that the Protocol on Privileges and Immunities applied to it and added that the relevant privileges 'were conferred . . . as is stated in Article 28 of the [Merger] Treaty . . . in order to facilitate "the performance of . . . [its] tasks"'. Consequently those rights 'cannot apply to bodies which play no part in performing those tasks' and which do not have 'the character of a Community body' (paragraphs 8 and 9).

13. In the light of the matters considered as from point 10 above and of the conclusions rising therefrom it appears to me that there can no longer be any doubts as to the nature of the Bank: far from being an international body other than the EEC and hence similar to bodies such as the European Patent Office, the European Centre for Medium-Range Weather Forecasts and the European University Institute the Bank is a specific and autonomous segment of the organizational machinery of the Community. It should therefore not be entitled to appropriate to itself the proceeds of the tax levied on the salaries of its staff. However, in order definitively to consolidate that finding and draw the appropriate inferences with regard to the action before the Court, it is necessary to show that the numerous arguments adduced by the Bank to the contrary are unfounded.

Let us start with the Bank's interpretation of the Protocol on Privileges and Immunities and in particular of Articles 13 and 22 thereof. In my view that interpretation clearly conflicts both with Article 18 of the Protocol and, above all, with the corollary derived by the aforementioned judgment of 13 May 1982 from Article 28 of the Treaty of 8 April 1965 (or 1 July 1967, *supra*, point 2). Article 18 of the Protocol expressly states that the set of advantages provided for in the Protocol is to be accorded 'in the interests of the Communities'; and, as we have just seen, the judgment of 13 May 1982 held that the Protocol did not apply to bodies not having 'the character of a Community body'. Naturally, that which applies to the benefits (legal immunity, special currency and exchange arrangements, exemption from customs duties on personal effects and cars, exemption from national taxes, etc.) also applies to the corresponding burdens, where such are laid down, and hence to the question of being subject to the Community tax.

Hence the Bank's basic argument fails. The arguments most closely connected with it fail as well, such as the one directed against the effects — which are claimed to be discriminatory with regard to the Bank alone — of an increase in the rate of tax by the Council of the Communities. On the same lines, it is in my view irrelevant that the Protocol is of a later date than the Statute of the Bank and hence than the source in which the Bank's resources are

enumerated. Indeed, those resources do not include the tax; and if, as the Bank seems to suggest, that silence had resulted from an oversight, the Member States could have easily rectified it by amending the Statute when given the opportunity by the Merger Treaty and the three occasions on which the Community was enlarged.

Nor can different conclusions be reached on the basis of the legal nature of the Community tax. Here, it must be said, both the parties have muddied the waters. It is wrong — and disrespectful — of the Commission to state that the Bank cannot have had powers of taxation vested in it because it lacks the appropriate institutional and political stature; but the Bank, too, is mistaken when it infers from the internal nature of the tax that unless it is made 'external' it must necessarily be imputed to the Bank. Admittedly, the tax in question must without any doubt be regarded as internal. The Member States renounced their power to tax a group of their citizens pursuant to an international agreement, and by means of the same instrument, that is to say by means of a manifestation of sovereignty consisting of domestic ratification and implementation measures, they introduced a special, uniform tax for the benefit of an organization which they created (see G. Tesauro, *Il finanziamento delle organizzazioni internazionali*, Naples, 1969, p. 233 *et seq.*). But — and this is the nub — the European Investment Bank is not that organization; on the basis of what I have said so far that organization is the European Economic Community.

Let us now turn to the arguments based:

(a) on the discrimination which, being excluded from the compensatory mechanism applied to the other Community institutions, the Bank would suffer if it were no longer to receive the tax; and

(b) on the economic loss which would be inflicted on the Bank because of the increased operating costs resulting from the loss of the tax.

In order to refute the first argument it is sufficient to point out that under Community law the principle that receipts are not earmarked for a particular purpose applies; under that principle 'revenue . . . shall be used without distinction to finance all expenditure entered in the budget of the Communities' (see Article 5 of Council Decision (70/243 ECSC, EEC, Euratom) of 21 April 1970 on the replacement of financial contributions from Member States by the Community's own resources (Official Journal, English Special Edition 1970 (I), p. 224, and Strasser, *Le finanze dell'Europa*, Brussels-Luxembourg, 1979, p. 21 *et seq.*). As for the second argument, if I may adopt the mercantile logic which underlies it, I would observe that the Bank's officials are entitled to bring their employment disputes before a court which is wholly financed out of Community funds.

There is no more force in the arguments to the effect that, once it lost control of the tax, the Bank would lose prestige on the international capital market. To start with, I have the impression that in citing the famous axiom of Chief Justice Marshall the Bank is confusing the tax treatment meted out to its employees with that of its financial operations. The latter are exempt from taxation and nobody is casting doubt on this

(see Article 22 of the Protocol of 8 April 1965). In contrast, the Bank's staff are not exempt from tax; but to contend that the payment into the Community budget of the tax withheld from their salaries is capable of diminishing the Bank's ability to obtain loans and tap capital is, in my view, utterly inconceivable.

Directorate-General XVIII of the Commission (Credit and Investments) is also active on that market as an issuer of bonds. The rating of DG XVIII — that is to say its international creditworthiness — is identical to that of the Bank (triple A); yet its staff pay a tax the proceeds of which are intended to be paid into the Community budget. That fact — I would also point out — is sufficient in itself to defeat the argument to the effect that the Bank works on the basis of objective assessments whilst the Community is more or less overtly political. If that is not thought enough, it is pointed out that, not unlike the Council of the Communities, the composition of the governing organ of the Bank is quintessentially political and it takes decisions on the basis of a quorum, which is also the result of political assessments (*supra*, point 10).

We still have to consider the Bank's charge that the authors of Regulation No 260/68 had no competence to define the conditions and procedure under which the tax is applied to the Bank. In that connection I would point out first of all that these proceedings are concerned solely with the *disposal* of the tax and that the Bank has not taken up the opportunity afforded by these proceedings to claim that the regulation was inapplicable under Article 184 of the Treaty. But the weak point of the charge — and of the related argument to the effect that Article 9 does not refer to the Bank — lies elsewhere, and to be precise, in so far as it hinges closely on the Bank's untenable refusal to admit that the liability of the Bank's staff to the tax 'for the benefit of the Communities' is a principle laid down primarily by Articles 13 and 22 of the Protocol. Furthermore, Article 16 of the Protocol empowers the Council to determine the categories of staff to whom its provisions shall apply in whole or in part (see Regulation No 549/69 of 25 March 1969, Article 4 of which concerns the staff of the Bank).

To conclude, I would add a few words on the comments put forward by the Bank at the hearing with a view to minimizing the importance of the 'travaux préparatoires' of Regulation No 32/61(EEC)/12/61(EAEC). The bodies from which the documents concerned stem and their unilateral nature are of no relevance, if only regard is had to the role played by Coreper in the Community legislative process and if it is borne in mind that no primary rule makes the carrying out of implementing rules dependent upon an agreement being reached between the Council and the Bank. Furthermore, and unlike the Bank maintains, it is certain that the President of the Board of Directors has the task of representing the Bank externally, both in concluding national and international agreements and in court proceedings (Article 13 (1) and (6) of the Statute of the Bank).

14. In view of the whole of the foregoing I propose that the Court should uphold the action brought on 19 March 1986 by the Commission of the European

Communities and hence should declare void the decision adopted on 30 December 1985 by the Board of Governors of the European Investment Bank on the 'disposal of the proceeds of the income tax withheld by the Bank from salaries and pensions paid to its staff'.

Nevertheless, I would suggest that the Court should exercise the power conferred upon it by the second paragraph of Article 174 of the EEC Treaty in order to specify the effects of its judgment, in so far as the following factors should be taken into account:

(a) as witness the discussions in the textbooks and the practices to which I have referred, the questions before the Court are highly problematic. As far as its own nature is concerned, the Bank has put forward arguments which I consider can be overcome, but which, in view of their undoubted worthiness, testify to the Bank's good faith;

(b) the Commission has admitted that it did not notice the failure to pay the tax into the Community budget until the late 1970s owing to inexplicable oversights on the part of its departments; and

(c) there are blatant, and, if I may say so, mysterious, contradictions between the approach adopted by the Council in the course of the adoption of Regulation No 32/61(EEC)/12/61(EAEC), its stance between 1983 and 1985 and its attitude in 1986. In view of these factors I consider it appropriate that the Bank should be ordered to repay the tax due but not the greater sum arising from the capitalization of the interest accruing as from 1 January 1962.

For the same reasons I propose that the Court should order the parties to pay their own costs.