Managing Development in a Time of Crisis: The Legal Framework for the Temporary Relocation of the African Development Bank*

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I. Introduction

In the law, the definition of a person includes both natural (physical) and legal persons. Black's Law Dictionary defines a "person" as: "(1) a human being; (2) an entity (such as a corporation) that is recognized by law as having the rights and duties of a human being; (3) the living body of a human being."[1] An international organization falls within the second category of persons, because the constitutive instruments of most international organizations provide that they shall possess full juridical personality.[2] Indeed, the recognition of international organizations as possessing legal personality has evolved since the time of Hugo Grotius and today has become one of the foundational principles of the contemporary law of nations.[3] According to Ian Brownlie, the criteria of legal personality in organizations may be summarized as follows:

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Allow me to express my appreciation and profound gratitude to Joe Norton, Heba Shams, and Iwa Akinrinsola for inviting me to share my thoughts with you within the framework of these distinguished lecture series dedicated to the legacy of one of the foremost development lawyers of the twentieth century, the late Dr. Ibrahim F.I.Shihata, former Senior Vice President and General Counsel of the World Bank. Shihata, a fellow Harvard Law School alumnus, was not only a creative and original jurist, he was a dedicated and selfless international official whose works have made a major impact in the field of international economic and financial law. I am also honoured to be included among the distinguished scholars and international officials who have preceded me in participating in these Distinguished Lecture Series.

1. Black's Law Dictionary 1162 (7th ed. 1999).

2. Ian Brownlie, Principles of Public International Law (5th ed. 2003); Agreement Establishing the African Development Bank, Aug. 4, 1963, art. 51, 510 U.N.T.S. 3 [hereinafter ADB Agreement]; and Agreement Establishing the African Development Fund, Nov. 29, 1972, art. 42, 28 U.S.J. 4547 [hereinafter ADF Agreement].

3. Nguyen Quoc Dinh et al., Droit International Public 567-634 (2d ed.). *Cf.*, A Handbook on International Organizations/Manuel sur les Organizations internationales (Rene-Jean Dupuy ed. 1988).

(1) a permanent association of states, with lawful objects, equipped with organs;
(2) distinction, in terms of legal powers and purposes, between the organization and its members; and
(3) existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.[4]

In our troubled and divided world, international organizations at times have to operate under increasingly challenging conditions. While it is true that most international institutions enjoy privileged status in their host states in line with accepted norms of international law, occasions can and do arise when civil conflicts or the breakdown of law and order would seriously jeopardize the normal conduct of operations.[5] Although it is not uncommon to read or hear about natural persons fleeing from, or escaping conflict zones to seek refuge in third countries, it is rare and most unusual for international organizations to leave their headquarters in order to escape from conflict or crises. When a situation arises where such a drastic decision has to be made, legal issues arise that have to be addressed. These include such questions as: What legal provisions will govern the process of temporary relocation? Which organs of the institution are empowered to authorize such a move? What are the implications for the rights and privileges of the institution's personnel and principal officers? What legal engineering is needed to reconcile the question of conflicting interests and to ensure the business continuity of the entity?

The topic for the Tenth Distinguished Shihata Lecture is the African Development Bank's (the Bank) experience in transferring operations from its headquarters in Abidjan, Cote d'Ivoire, in West Africa, to its Temporary Relocation Agency (TRA) in the city of Tunis, Tunisia, in North Africa.

The presentation will be in five parts. Part II will examine the temporary relocation decision in its proper historical context. Part III will present the legal framework for the temporary relocation decision and will outline and explain the specific legal issues addressed in designing the legal framework. Part IV discusses certain critical legal issues that were raised and addressed in the aftermath of the temporary relocation or transfer of operations to the TRA in Tunis in February 2003. In particular, the legal arrangements established to protect the interests of affected staff members of the institution will be examined. Part V reviews the few cases of other institutions that have had to relocate their operations in similar circumstances; notably, the Bank of International Settlements (BIS) during the Second World War in Europe (1939–1945), the Kuwaiti Fund, the PTA Bank in Eastern and Southern Africa and the African Regional Office of the World Health Organization (AFRO). Finally in Part VI, entitled "Epilogue," insights about the lessons to be learned will be outlined.

II. The Bank's Temporary Relocation Decision: The Historical Context

The Bank will celebrate its fortieth anniversary on September 10, 2004. The Bank is the second oldest of the regional multilateral development banks (MDBs), after the Inter-

4. Article 51 of the ADB Agreement provides that: "In the territory of each member, the Bank shall possess full juridical personality and, in particular, full capacity to: (a) Contract; (b) acquire and dispose of immovable and movable property; and (c) institute legal proceedings." ADB Agreement, *supra* note 2, art. 51.

5. A. S. Muller, International Organizations and Their Host States: Aspects of Their Legal Relationship (1995).

American Development Bank, which together with the Asian Development Bank, the European Bank for Reconstruction and Development, the World Bank and IMF, make up the major part of the complex edifice of international development financial institutions. On August 4, 1963, the Agreement Establishing the African Development Bank (ADB Agreement) was signed in Khartoum, Sudan, by twenty-three African governments and became effective on September 10, 1964, when twenty member countries subscribed 65 percent of the initial authorized capital stock. The Bank was initially established as an international institution owned exclusively by African nations.[6] The Bank's purpose is to contribute to the sustainable economic development and social progress of its regional (African) members, both individually and jointly.[7] The functions of the Bank are set forth in article 2 of the ADB Agreement. Article 2(3) of the ADB Agreement provides that "the Bank shall be guided in all its decisions by the provisions of articles 1 and 2 of this Agreement,"—that is by its Purpose and Functions.[8] In line with its founding mandate, the Bank has operations spanning the length and breadth of the continent of Africa, with projects in infrastructures, rural and agricultural development, education, health and social development. Over the years, it has evolved to become the leading developmental financial institution in Africa, with an authorized capital in excess of US$30 billion and cumulative disbursements of more than US$50 billion (equivalent to UA 33.22 billion) since its establishment.

In terms of its organizational structure, article 5 of the ADB Agreement provides that the Bank shall have a Board of Governors, a Board of Directors, a President, at least one Vice President and other officers and staff necessary to perform such duties as the Bank may determine. The founders of the Bank, recognizing the importance of establishing the institution at a location within its geographical sphere of operations, provided in article 39 of the ADB Agreement that the principal office of the Bank should be located in the territory of a regional (African) member state.[9] The Board of Governors will make the choice of the location of the principal office at its first meeting, taking into account the availability of facilities for the proper functioning of the Bank. The ADB Agreement also provides that the Bank may establish branch offices and agencies elsewhere. As set forth in detail later, a number of the decisions would turn on the interpretation and application of these provisions. As with the other multilateral development banks, questions of interpretation of the ADB Agreement's provisions are within the purview of the powers of the Bank's Board of Directors. Such interpretations may be formal or informal, explicit or implicit, and are usually made on the basis of the General Counsel's advice. Recourse against interpretative decisions by the Board of Directors may be taken to the Board of Governors, whose decision must be sought within a specified time period (three months), and that decision shall be final.[10] According to Shihata: "The overall purpose of an international organization and the actual challenges and needs to which . . . it is required to respond, are in practice determinant factors in interpreting its charter."[11]

6. THE AFRICAN DEVELOPMENT BANK 1964–84: AN EXPERIMENT IN COOPERATION AND DEVELOPMENT, ABIDJAN, AFRICAN DEVELOPMENT BANK (Robert K.A. Gardiner & James Pickett eds., 1984).

7. ADB Agreement, *supra* note 2, art. 2.

8. *Id.* art. 61.

9. *Id.* art. 39.

10. *Id.* art. 61.

11. IBRAHIM F. I. SHIHATA, THE WORLD BANK LEGAL PAPERS (2000) [hereinafter SHIHATA].

In November 1964, the Bank's Board of Governors decided at its first annual meeting that the Bank's headquarters would be in Abidjan, Cote d'Ivoire.[12] This decision was made on a one-member-one-vote basis, not in accordance with the normal voting rules of the institution. Article 39(2) of the ADB Agreement provides that decisions on "the choice of the location of the principal office of the Bank shall be made . . . in accordance with the conditions that applied to the adoption of [the ADB Agreement]."[13] In effect, the decision on the choice of location is a difficult one, and likely to be influenced by political considerations. Transferring the headquarters is, therefore, not a first option to be considered in a crisis situation. An agreement dated March 16, 1968, was signed between the Bank and the Government of Cote d'Ivoire and was ratified by the Board of Governors in 1968.[14]

Another important milestone event in the Bank's history was the establishment, in 1973, of the concessional window of the Bank Group, the African Development Fund (the Fund), which is an international financial institution, formed as a partnership between the Bank and mainly non-African donor countries. The objective of the Fund is to enable the Bank to make "an increasingly effective contribution to the economic and social development of the Bank's members and to the promotion of co-operation (including regional and sub-regional co-operation) and increased international trade, particularly among such members."[15] In 1976, the Bank agreed to administer the Nigeria Trust Fund as the third lending window of the Bank Group. The Nigeria Trust Fund was established with the resources provided by the Government of the Federal Republic of Nigeria, with the objective of promoting the development of lesser-developed African Countries. Although the African Development Fund is a separate international legal entity, it expressly provides in its Charter that: "the Office of the Fund shall be the principal office of the Bank."[16] The Nigeria Trust Fund is a Special Fund[17] of the Bank, and accordingly, in legal terms, forms an integral part of the Bank. A decision to relocate the operations of the Bank would therefore, *mutatis mutandis*, necessitate a relocation of the operations of these other entities of the Bank Group.[18]

In 1982, non-African countries were admitted into membership of the Bank, following a historic decision by the Bank in 1979 to open up its capital to non-African states.[19] With the implementation of the recent internal governance reforms,[20] 60 percent of the author-

12. Resolution No. 4-64 on the location of the Principal Office of the Bank adopted at the First Annual Meeting held in Lagos, Nigeria in November 1964.

13. ADB Agreement, *supra* note 2, art. 39(2).

14. Resolution No. 1-68 on the Headquarters Agreements adopted by correspondence on May 15, 1968. Under international law, an international organization can conclude an international agreement with a State. Such agreements are treaties: Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations signed on March 21, 1986.

15. ADF Agreement, *supra* note 2, art. 2. South Africa became the first African member or state participant of the ADF in 1998, although other African countries, notably Botswana had contributed earlier to replenishments of the ADF.

16. *Id.* art. 32.

17. ADB Agreement, *supra* note 2, art.8.

18. Although, the decision-making organs of the Bank made many of the principal decisions, these were considered binding on the Fund. The Boards of Directors of the Bank and the Fund made certain decisions jointly.

19. Resolution 2-78 (in particular the Annex to the Resolution which established the "African Character Principles" as the basis for the admission of non-African States and Resolution 05-79 on the Amendments of the ADB Agreement to enable non-African countries become members of the Bank.

20. REPORT OF THE EMINENT PERSONS PANEL ON GOVERNANCE OF THE AFRICAN DEVELOPMENT BANK (1996).

ized capital of the Bank is held by its African members and 40 percent by non-African members.[21] The Bank is rated AAA by all the leading international ratings agencies,[22] and actively participates as a borrower in the international capital markets.

In 1999, with heightened concerns about the security situation in its host country, the Bank decided to adopt a Business Continuity and Emergency Plan (Plan).[23] This Plan, which is modelled on the United Nations Emergency Plan, establishes a formal system of security alert phases to respond to crises situations at the Bank's headquarters. It also provides for the establishment of a temporary relocation agency in a regional member country of the Bank. The legal basis for the establishment of the temporary relocation agency can be found in article 39(3) of the ADB Agreement and article 4 of the General Regulations of the Bank.[24] Although article 39(3) refers to "the Bank" (but does not specify which of the principal organs of the Bank should make the relevant decision), the Board of Directors, following the General Counsel's advice, informally interpreted the provisions of article 39(3) as empowering the Board to establish agencies as an adjunct of its specific power to conduct the general operations of the Bank, in the same manner that the Board is empowered to authorize the establishment of field offices of the Bank. In 2002, the Board of Directors of the Bank and the Fund met and jointly selected Tunis as the site for the Bank's first TRA.[25] An agreement was subsequently signed between the Bank, the Fund, and the Government of Tunisia on the establishment of the TRA. This agreement is a hybrid international agreement or treaty, incorporating the standard provisions contained in the Bank's regional and national field office agreements, but also contains certain privileges, immunities and facilities that are usually set forth in a fully fledged Headquarters Agreement.[26]

III. Temporary Relocation Decision: Legal Framework

Following the abortive *coup d'etat* in the host country of its headquarters on September 19, 2002, and with the steady deterioration in the security situation of the host country, which had begun to adversely impact the Bank Group's activities, the Boards of Directors of the Bank and the Fund decided to declare a Security Alert Phase III, and thereby approve the voluntary relocation of dependants[27] of staff members from the host country.[28] Staff

21. The Bank currently has seventy-seven members (fifty-three African countries and twenty-four non-African countries). The non-African countries include the United States, Japan, Germany, Canada, Italy, United Kingdom, France, the Netherlands, Belgium, Brazil, Korea, China, India, Nordic Countries, and Switzerland. Nigeria is currently the largest shareholder followed by the United States, Japan, Egypt, Germany, and South Africa.

22. Standard & Poor's, Fitch, Moody's, and Japan Rating Agency.

23. The African Development Bank Group's Integrated Strategy for the Continuation of the Bank's Activities and Security of its Staff in an Emergency Situation (Document ADB/BD/WP/2001/03—ADF/BD/WP/2001/01).

24. *See* Opinion of the General Counsel dated September 8, 2000 on the Devolution of Authority in an Emergency Situation.

25. Resolution B/BD/2002/-F/BD/2002/. The Executive Director of the host country opposed the decision and requested that a formal statement by the Government of the host country be attached to the Official Records of the Boards proceedings (Summary of Decisions).

26. TRA Agreement dated April 17, 2002.

27. The concept of a dependant is common to international organizations and refers in general terms to nuclear family members or close relatives considered eligible for certain financial benefits provided by such institutions or organizations to their staff members. Typical dependants would be the staff member's spouse and children (up to a maximum number that is determined by the organization and specified in its Staff Rules).

28. Resolution B/BD/2002/23-F/BD/2002/24.

members could, at their discretion and within a specified period, opt to have their dependants evacuated from the host country at the Bank's expense. The Bank was empowered to pay monthly stipends to evacuated dependants to ease the financial burden on the staff of maintaining two households after the voluntary evacuation. A significant aspect of this Board of Directors' decision was the extension of the evacuation option to dependants of general services staff who are non-nationals of the host country. In accordance with applicable international civil service laws and the Bank's Staff Rules and Regulations (the internal law of the Bank), general services staff are recruited on local terms (i.e., exclusively among nationals of member countries lawfully resident within the territory of the host country) and, unlike internationally recruited staff, are generally not entitled to expatriate benefits, including the right to be evacuated by the international organization. However, an exception was made for dependants of non-nationals to be evacuated at the staff member's discretion, on compassionate grounds, thus setting a precedent for other international organizations in similar situations in the future.

As the crisis in the host country unfolded, with considerable anxiety and concerns about the possible adverse impact on the Bank's business and the security of its staff, certain Executive Directors wanted the Bank to make an expeditious decision and sought the advice of the General Counsel on the appropriate and legally feasible options available to the Bank. Against the backdrop of the provisions of the Bank's Charter prohibiting interference by the Bank in the political affairs of its member countries,[29], and inspired by the fundamental principle that "the client of the Bank's General Counsel is not only the Bank's Management, the Boards, or any particular member country, but the institution as whole, including all its organs,"[30] the advice had to carefully balance the many competing interests, in order to avoid any breach of the Bank's obligations under the Headquarters Agreement with the host country. The overarching considerations were, however, adherence to the rule of law and safeguarding the Bank's interest, i.e. ensuring its survival as a viable entity to enable it to continue to deliver on its development mandate.

The process of reaching a decision on the temporary relocation was as important as the substantive decisions that were eventually made. In 1998, an entity that would play a significant role in the decision-making process had been established,[31] as a forum for member states to dialogue on issues pertaining to the Bank, and development in Africa, generally, in order to increase the Board of Governors oversight functions.[32] The Governors Consultative Committee (GCC) is a subsidiary organ[33] of the Board of Governors and comprises Governors or Alternate Governors of the member states whose nationals are members of the Board of Directors.[34] In effect, the GCC is composed of eighteen Governors (the same number as Executive Directors) and membership rotates with the rotation of membership of the Board of Directors. Given that most of the principal shareholders of the institution are represented on the GCC, its deliberations are weighty and its recommendations (reached by consensus in all cases) are very persuasive, if not compelling.

29. ADB Agreement, *supra* note 2, art. 38.
30. SHIHATA, *supra* note 11.
31. By Resolution B/BG/98/06 adopted on May 29, 1998.
32. Section 1 (Purpose) of the Terms of Reference (TOR) of the Governors Consultative Committee (GCC).
33. Rule 8 of the Rules of Procedure of the Board of Governors of the Bank.
34. Section 2 (Composition) of the TOR of the GCC.

The GCC may be convened by its Chairperson, in consultation with members, by the Board of Directors, by Governors having one-quarter of the total voting power of the Board of Governors, or whenever requested by five members of the GCC.[35] Such a request was made and a meeting of the GCC was convened on December 17, 2002 in Accra, Ghana. The GCC, after reviewing the proposals before it, and considering the various options submitted for its consideration, agreed to defer making any recommendations on the proposal to activate the TRA until another meeting, scheduled for February 17–18, 2003. The Communiqué issued by the GCC at the end of its deliberations was unusually detailed, and the operative paragraph 8 stated as follows:

> Recognizing the on-going political efforts by regional Heads of State and France towards reaching settlement of the present crisis in the host country, the GCC agreed that at its meeting on 17–18 February 2003 in Accra, Ghana, it would review developments in the host country and provide guidance to the Board of Directors on the implementation of the TRA.[36]

The concluding part of the paragraph touched upon a substantive legal issue pertaining to the mandate of the GCC and the scope of its recommendations. It had been argued that as a subsidiary organ of the Board of Governors, the GCC could only make recommendations to the Board of Governors. The GCC had no authority to give directives to any other decision-making organ of the Bank (notably, the Board of Directors or the President) without transmitting such recommendations or directives through the Board of Governors. The General Counsel, Adesegun A. Akin-Olugbade considered this view to be rather restrictive and impractical. The GCC had a very broad mandate and in the discharge of its responsibilities could deliberate on matters that were within the purview of the other decision-making organs. It was imperative that its recommendations could be acted upon without necessarily first transmitting them through the Board of Governors, which meets formally only once a year, although extraordinary meetings could be convened. These meetings are, however, rare and only two have been convened in the nearly forty-year existence of the Bank.[37] In an opinion issued on the subject by the General Counsel, he stated that the recommendations and views of the GCC may contain advice that could serve as guidance to either Management or the Board of Directors; particularly on matters that are within the purview of the powers of these decision making organs of the Bank.[38] He concluded that there had been a recent precedent for the GCC providing guidance on matters within its mandate to the Board of Directors and the President. Therefore, it was possible that the GCC could provide guidance to the Board of Directors on the activation of the TRA, even though the matter was within the purview of the Board of Directors' powers. The Board of Governors, as the highest policy making organ of the Bank could review the decision of the Board of Directors if it so wishes.[39]

35. *Id.* § 3 (Meetings of the GCC).

36. *Communique of the Governors' Consultative Committee of the African Development Bank*, para. 8 (Dec. 17, 2002) [hereinafter *GCC Communique*].

37. In 1979, to consider and resolve the crises triggered by the suspension of the then President of the Bank; and in 2000 when the regular meeting was cancelled. A. Akin-Olugbade: Legal Note on Convening an Extraordinary Meeting of the Board of Governors of the African Development Bank, Sept. 12, 2002.

38. Advisory Legal Opinion dated Dec. 11, 2002, addressed to the Executive Director representing the host country.

39. Article 5 of the General Regulations allows the Board of Directors to adopt rules and regulations as are necessary or appropriate for the conduct of the general operations of the Bank. Any such rules or regulations and any amendments thereto shall be subject to review by the Board of Governors at the next Annual Meeting.

A corollary conclusion of the December GCC Meeting, which proved to be prescient, was the statement that:

> the full Emergency Plan of the Bank would be activated should the UN declare Phase IV in Abidjan or if the working environment makes it impossible for the Bank to carry out its activities, in which case the President and the Board have full powers under the Emergency Plan to take the necessary measures.[40]

The next sentence was even more revealing with the benefit of hindsight: "The GCC welcomed the statement of the Governor of the host country expressing his Government's full support in that eventuality."[41]

On the eve of the next GCC meeting which would provide final guidance to the Board of Directors on the relocation of the Bank's operations to its TRA in Tunis, the United Nations declared Phase IV in Abidjan. A meeting of the Board of Directors was convened on February 7, 2003, and the Bank's Emergency Plan was activated.[42] In accordance with the Emergency Plan, the Bank sent approximately 400 staff members to Paris (the location of the Bank's Business Continuity Site) and Tunis to ensure business continuity and the maintenance of the essential functions of the Bank.[43] The GCC meeting's conclusions were not surprising. The GCC recommended that the Bank should temporarily relocate its operations to its TRA and take as many staff as necessary to enable it to resume, as soon as possible, its operations in its regional member countries and to provide support to regional initiatives such as the New Partnership for Africa's Development (NEPAD). "The GCC stressed the importance of the Bank reconstituting itself in a short time to enable it [to] deliver on its development mandate."[44] It was also stated that, "in this regard, the GCC was guided by the advice given by the General Counsel that such action was within the purview of the Board of Directors and that the assignment of staff to any duty station was within the powers of the President of the Bank."[45]

IV. Legal Issues Raised in the Aftermath of the Temporary Relocation

A brief outline of the legal basis of the General Counsel's advice, which provided guidance to the GCC in making its historic recommendation, follows. Article 29(1) of the ADB Agreement provides that "[a]ll the powers of the Bank shall be vested in the Board of Governors."[46] It also provides that the Board of Governors may delegate its powers to the Board of Directors except certain specific powers that are enumerated in sub-paragraphs (a)-(h) of article 29(2).[47] Article 32 of the ADB Agreement provides that:

> [w]ithout prejudice to the powers of the Board of Governors as provided in article 29, the Board of Directors shall be responsible for the conduct of the general operations of the Bank

40. *GCC Communique, supra* note 36, para. 9.

41. *Id.*

42. Resolution B/BD/2003/02-F/BD/2003/01 adopted on Feb. 7, 2003, authorizing the implementation of the Bank's integrated Strategy for the Continuation of the Bank's Activities and Security of its Staff in an Emergency Situation.

43. Paragraph 3 of the *GCC Communique*, Feb. 18, 2003.

44. *Id.* para. 8.

45. *Id.*

46. ADB Agreement, *supra* note 2, art. 29(1).

47. *Id.* art. 29(2).

and for this purpose shall, in addition to the powers provided for it expressly in this ADB Agreement, exercise all the powers delegated to it by the Board of Governors.[48]

It then proceeds to list specific powers of the Board of Directors. With respect to the President, article 37(2) provides that "[t]he President shall be the chief of staff of the Bank and shall conduct, under the direction of the Board of Directors, the current business of the Bank."[49]

It is evident from the foregoing that each of the principal decision-making organs, notwithstanding the hierarchy of norms within the institution, is vested with specific powers in addition to delegated powers, such as in the case of the Board of Directors and the President. The Board of Directors' powers to conduct the general operations of the Bank must be exercised without prejudice to the powers of the Board of Governors. This prescription is amplified in article 4(1) of the General Regulations, which states, in pertinent part, that: "the Board of Directors shall not adopt any measure which is inconsistent with any measure adopted by the Board of Governors."[50] The decision on the choice of the location of the Headquarters of the Bank is a decision that rests exclusively within the purview of the Board of Governors.[51] However, at every stage in the process, the 1964 decision on the location of the headquarters of the Bank was never contested. Rather, the GCC re-affirmed that the Bank's headquarters would remain in the host country. Accordingly, the Board of Directors would not be exercising its powers or acting to the prejudice of the powers of the Board of Governors. The critical legal issue was, therefore, whether in the specific context of the provisions of the Bank Agreement the Board of Directors would exceed its powers.

In the General Counsel's submissions to the GCC, he opined that it would not. Under article 46 of the ADB Agreement, in an emergency, the Board of Directors may suspend temporarily operations in respect of new loans and guarantees pending an opportunity for further consideration and action by the Board of Governors.[52] The situation in the host country was clearly an emergency. A suspension of the Bank's operations pursuant to article 46 could have had deleterious effects and caused irreparable damage to the Bank and its reputation. Also, it could have had potentially adverse financial consequences for the Bank under contractual clauses concluded in the international capital markets (in connection with its borrowing operations) and under swap or derivative contracts with counter parties. The view expressed was that since the Board of Directors, in an emergency, has the specific power under article 46 to take such a drastic decision, it follows that it can invoke the same powers to adopt less severe measures, including temporarily transferring the operations of the Bank to a third state to avoid a suspension of the Bank's activities. Accordingly, the Board of Directors would be acting within its powers by deciding to temporarily transfer

48. *Id.* art. 32.

49. In 1997, as part of the internal governance reforms of the Bank, article 4 of the General Regulations of the Bank was amended to address any conflict arising from possible overlap of the Board of Directors' powers and those of the President in regard to the general operations of the Bank or the conduct of its business. There was an attempt to convene an extraordinary meeting, but the minimum requirement was not fulfilled (Rule 1(2)) of the Rules of Procedure of the Board of Governors. *Id.* art. 37.

50. COMPENDIUM OF THE GENERAL LAWS AND OTHER INSTRUMENTS OF THE AFRICAN DEVELOPMENT BANK (2d ed. 2002) [hereinafter COMPENDIUM].

51. ADB Agreement, *supra* note 2, art. 39(2).

52. *Id.* art. 46.

the operations of the Bank in the specific context of a threat to the security of its staff and to its institutional capacity to deliver on its development mandate. This was a matter of interpretation of the Bank's Charter and, therefore, within the purview of the Board of Directors as the primary interpretative organ of the Bank.[53]

On the basis of the GCC's final guidance or recommendation, the Board of Directors convened in Accra on February 19, 2003, and authorized the temporary relocation of the Bank's operations to its TRA in Tunis.[54] Given that the extent of the prospective temporary relocation exceeded the initial estimates projected in the Business Continuity and Emergency Plan and would include a transfer of the Board of Directors, legal advice was sought on the appropriate legal basis for the transfer of the Board of Directors to the TRA.

The issue was complicated by two considerations. First, the Board of Directors could not decide to transfer itself since this would be contrary to good corporate governance and raise concerns about abusive exercise of power and conflict of interest. Second, article 34(1) of the Bank provides that the Board of Directors shall function in continuous session at the principal office of the Bank and shall meet as often as the business of the Bank may require. In 1966, the Board of Governors decided that Executive Directors would reside at the headquarters, and accordingly, a decision had to be made consistent with the provisions of the ADB Agreement, to formally transfer Executive Directors from the headquarters to the TRA. In his advice to the Governors, the General Counsel opined that only the Board of Governors could make such a decision. Since the decision had to be expedited, it was decided that the proposal would be submitted to the Board of Governors pursuant to the provisions of article 31(3) of the ADB Agreement, and article 3 of the Bank's General Regulations, which establishes a special procedure for seeking the Board of Governors' decision by postal ballot or correspondence. Article 31(3) of the ADB Agreement provides the enabling power for the provisions contained in article 3 of the General Regulations.[55] Article 3 provides as follows:

> Whenever the Board of Directors considers that the decision on a specific question which is for the Board of Governors to determine should not be postponed until the next annual meeting of the Board and does not warrant the calling of an ad hoc meeting of that Board, the Board of Directors shall promptly transmit through the President to each member its proposals relating to that question with a request for a vote on such proposals by the Governor representing that member.[56]

In summary, the resultant legal framework is that in an emergency as declared by the competent organ of the Bank in accordance with its Emergency Plan, the Board of Directors, in lieu of exercising its powers under article 46 of the ADB Agreement to temporarily suspend the Bank's operations may temporarily transfer the operations of the Bank from its principal office to a designated third country, in this case Tunis, pending an opportunity for further consideration or action by the Board of Governors. The institution may, in the event of a crisis, lawfully depart temporarily from its headquarters to preserve its development mandate.

53. *Id.* art. 61.
54. Resolution B/BD/2003/03–F/BD/2003/02.
55. ADB Agreement, *supra* note 2, art. 31(3).
56. Compendium, *supra* note 50.

Following the decision of the Board of Directors on February 19, 2003, the remainder of the staff was asked to proceed on missions or take extended administrative leave to their home countries. They and their dependants were evacuated by charter flights with Accra, Ghana and Dakar, Senegal as the regional hubs. Many were evacuated with very short notice (within forty eight hours) and few personal belongings. Additional staff members were assigned to the TRA in Tunis, and Board members also proceeded to the TRA on mission, pending the Board of Governors approval of the resolution authorizing their formal transfer to the TRA. On arrival in Tunis, it was discovered that although the legal framework for the reception of the Bank and its officials was firmly in place,[57]the infrastructure was not ready. The office buildings were incomplete, vital records and documents were still in transit from the headquarters to the TRA, furniture and IT equipment was not delivered, and officials and Bank's staff had to be put up in hotels until such time that a decision would be made on when they could move to suitable private accommodations. Also, at that stage, staff members assigned to Tunis were not permitted to bring along their families and were, in many respects refugees, as was the Bank itself.

The legal issues that were addressed during this phase were no less complicated than those addressed previously. First, the Board of Directors had to determine the status and financial regime that applied to relocated staff, taking into consideration that the GCC recommended that cost savings be made. The Board of Directors meeting in Tunis (pursuant to specific provisions in their Rules of Procedure, permitting the Board of Directors to meet elsewhere other than at the Principal Office) decided that staff would be considered on full mission status for the first month after the temporary relocation decision, but thereafter would be entitled to certain benefits on the basis of a modified financial compensation regime. This latter regime included the payment of a fixed monthly allowance in lieu of full mission per diem.[58]

The GCC had not defined the length of the temporary relocation period, but rather agreed that the decision of the Board of Directors would be reviewed every six months. Therefore, the next review would be in August 2003, after the 2003 Annual Meeting in May. It soon became apparent, however, that the Board of Governors would conduct a preemptive review and take a definitive position on the temporary relocation before the August date. As in the past, certain Executive Directors wanting to avoid potentially divisive discussions at the 2003 Annual meeting, recommended that a GCC meeting be convened on the eve of the Annual Meeting to consider a proposal for a definition of the temporary relocation period and other incidental matters that could be endorsed formally by the Board of Governors. The Dean of the Board of Governors was designated to informally meet with the General Counsel to discuss the outlines of the proposal and inquire about its legal feasibility. Interestingly, the Executive Directors were unanimous in convening a GCC meeting before the Annual Meeting, although their motivations may have been different.

The General Counsel's informal advice to the Boards, relayed through their Dean, was that any decision for an extension of the temporary relocation period beyond the initial six months would be within the purview of the Bank's Board of Governors, and not the Bank's Board of Directors. There was no legal basis for a different and more favorable construction

57. TRA Agreement, *supra* note 26.

58. Resolution B/BD/2003/05-F/BD/2003/04 adopted by the Boards of Directors of the Bank and the Fund on April 2, 2003, concerning the Status and Financial Regime Applicable to Staff During the Period of Temporary Relocation.

of the emergency powers vested in the Board of Directors by article 46 of the ADB Agreement to temporarily suspend the Bank's operations. This opinion was initially not well received by the management, although with the passage of time, its logic and legal sense became evident. In practical terms, such a decision by the Board of Governors would provide the stability required for the Bank to conduct its operations at its temporary location, as well as avoid any disruption to its staff, thus enabling them to plan and enter into longer term contractual commitments.

The GCC met in Addis Ababa, Ethiopia on the eve of the 2003 Annual Meeting and endorsed the policy framework proposed by the Boards of Directors, containing the time frame for the temporary relocation. The GCC submitted a report to the Board of Governors, and on the basis of the its recommendations, the Board of Governors, while affirming that the headquarters of the Bank would remain in the host country, decided that:

(1) The temporary relocation of the operations of the Bank to the TRA in Tunis would be for a minimum period of two years;
(2) There would be six monthly assessments by the Boards of Directors of the security situation in the host country;
(3) The Board of Governors would conduct annual substantive reviews at each Annual meeting; and
(4) In order to avoid any precipitate return that could be disruptive of the Bank's operations and activities, if a decision is taken to return to the headquarters, the return would be implemented over a one-year period.[59]

In effect, management could plan an orderly return to the headquarters, and thereby avoid repeating some of the adverse experiences associated with the relocation. Also, the earliest the Bank could return to its headquarters would be the third quarter of 2005, assuming a favorable decision to terminate the temporary relocation was made by the Board of Governors at the 2004 Annual Meeting.

After the authoritative decision of the Board of Governors on the timeframe for the temporary relocation, it became necessary to revisit the status of the staff and to design an appropriate framework for those affected. By this time, the full complement of the Bank's staff was in Tunis, and the Bank had resumed its lending operations. On July 18, 2003, the Board of Directors considered and endorsed a management proposal on the legal and policy framework governing the status of the staff in the context of the Temporary Relocation Extended Mission Regime.[60] The Board discussed the framework within the context of the general legal principle of the separation of powers as between the Board and the President contained in article 4 of the General Regulations of the Bank, as well as the consultative provisions contained in Staff Regulation 2.1.3 adopted by the Board of Directors on March 20, 1998. Staff Regulation 2.1.3 requires that the President of the Bank should consult with

59. Resolution B/BG/2003/04 adopted by the Board of Governors of the Bank on June 3, 2003, fixing the timeframe of the temporary relocation of the operations of the Bank (the Initial Temporary Relocation Period) to the TRA.

60. Only the Board of Directors of the Bank discussed the Framework, because the ADF has no staff as such. In accordance with article 31 of the ADF Agreement, the Fund uses the officers, staff, organization, services and facilities of the Bank, and reimburses the Bank for the fair value of such use. ADB Agreement, *supra* note 2, art. 31.

the Board of Directors when making amendments to the Staff Rules, promulgated by the President pursuant to powers vested in him under Staff Regulation 2.1.3.

Since the Board of Governors decided that the headquarters would remain in Abidjan, and the definition of the staff members' "duty station" would remain the same, the legal and policy framework would have to be consistent with this decision. The General Counsel was requested to prepare a legal note summarizing his interventions during the Board of Directors' meeting on three issues: (1) the applicability or otherwise of the concept of "Duty Station" in the context of the Framework; (2) the competent authority within the Bank for approving modifications of the type contained in the Framework, (e.g., whether the proposed modifications should be approved by the Board of Directors or Management); and (3) whether the proposed modifications are consistent with the provisions on amendments contained in the Staff Regulations and the Staff Rules respectively. The legal note was submitted to the Board of Directors on September 9, 2003.[61] The Opinion confirmed that: (1) the proposals contained in the Framework Paper were consistent with the decision of the Board of Governors that the headquarters should remain in the host country; (2) the rule-making authority for deciding on modifications to the provisions of the Staff Rules to give effect to the new Framework belongs to the President, in the exercise of his independent powers as the chief of staff of the Bank, with specific authority to assign and re-assign staff; and (3) although the proposals did not amend the existing Staff Rules, they complied with safeguards that would otherwise have applied in the case of amendments.[62]

V. The Experience of Other International Financial Institutions

The temporary relocation of the operations of the Bank is unique in terms of the scale and scope of the relocation. Other international organizations faced with similar crises within their headquarters' host country have taken similar evasive measures to safeguard their operations. In May 1940, during the Second World War, when the fighting between the German and French armies was eminent, the Principle Office of the Bank of International Settlements (BIS) moved out of Basel into the mountains. The move lasted until October 1940.[63] Similarly, in 1990, after the invasion of Kuwait by the Iraqi army, the Kuwaiti Fund for International Development temporarily relocated its operations from Kuwait City for a duration of six months.

Two African regional organizations have also relocated because of crises in their host countries. In 1994, the PTA Bank relocated to Nairobi, Kenya from Bujumbura, Burundi. Although the Heads of State of the PTA member countries decided that the institution should return to Bujumbura, PTA Bank still operates out of Nairobi, because of the continued instability and insecurity in Bujumbura. The second regional organization is the African Regional Office of the World Health Organization (AFRO). Prior to the outbreak of civil hostilities in the Republic of Congo, AFRO was located in Brazzaville. However, in

61. Document ADB/BD/WP/2003/77/Add.1.

62. Adesegun A. Akin-Olugbade, Legal Note, *On the Status of Staff in the Context of the Temporary Relocation Extended Mission Regime*, Sept. 1, 2003 (on file with author).

63. Roger Auboin, *Memorandum sur les circonstances qui ont conduit au transfert de la Banque des Reglements Internationaux a Château d'Oex* (Memorandun on the circumstances that led to the transfer of the Bank of International Settlements to the Château d'Oex) (on file with author).

June 1997, internationally recruited staff members were evacuated and the office was provisionally closed. AFRO was temporarily relocated to Harare, Zimbabwe on September 1, 1997. On July 17, 1998, the temporary relocation of the AFRO to Harare was extended for two years effective from February 1, 1998. As was ultimately decided in the case of the Bank staff, relocated, AFRO staff members were maintained on travel status and not deemed to have changed their "duty station."

VI. Epilogue: Lessons to be Learned from the Temporary Relocation

We live in a world where we cannot make life entirely safe for civic communities, private firms, or international organizations. The recent experience of the Bank has important lessons from a legal as well as operational standpoint. International organizations, as subjects of public international law, sometimes find themselves operating under conditions that call for jurisprudential astuteness. While they must act within frameworks that respect established statutes, internal regulations and external obligations, such precepts have to be interpreted in such a manner as would ensure that their standing in capital markets is not compromised, and that they are able to continue operations in fulfilment of their developmental mandates and stakeholders' expectations. In such situations, prudence requires that the demands of judicial propriety be reconciled with the imperatives of good corporate governance. The successful relocation of the Bank to its TRA in Tunis could be regarded in this respect as a test case of successful business continuity in a time of crisis—a triumph of legal creativity over adverse circumstances. This success is a result, in large part, of boldness in devising an effective legal framework that ensured expeditious transfer of operations without any major encumbrances. In the emerging world of the 21st century, with its tumults and upheavals, it may indeed contain an important lesson for global governance and international order.

The Bank was able to resume its operations within three months after the unprecedented move involving over a thousand personnel and several tons of vital documents. Not only did management have to overcome challenging logistical hurdles, due care had to be taken to ensure a smooth landing for the Bank and its personnel in a new cultural environment. It is indeed remarkable that in 2003, notwithstanding the temporary relocation, the Bank was able to exceed the lending programs for the previous years and recorded gross operating income comparable to the record operating income declared for the previous year. Standard & Poor's, the only rating agency that rated the Bank's senior debt below the highest rating of AAA, since 1995, restored the Bank's AAA rating in June 2003. The Bank also successfully launched its first US$1 billion global bond in 2003.

The temporary relocation was, however, not a hitch-free exercise. It was indeed a rather expensive undertaking, involving considerable extra-budgetary expenditures.[64] Many risks were underestimated. One of the major risks was the decision to change the assumptions that informed the Business Continuity Plan. The Business Continuity Plan had been designed to provide facilities for a staff of 400 in Tunis. In the end, however, almost the entirety of the Bank's staff was forced to move to Tunis, which necessitated the identification and leasing of additional buildings, and acquisition of essential equipment and its installa-

64. Final estimates are that the relocation cost at least US$50 million.

tion. Certain functions were either over or under represented since when formulating the Business Continuity Plan, many supervisors did not appreciate the importance of such functions during a crisis. Communication with staff on mission and on administrative leave was inadequate and in some cases non-existent, causing a lot of staff anxiety. The staff's traumatic experience, abandoning their families and homes with very short notice had to be managed, and in the case of staff members who were nationals of the host country (such as the general services staff), there was also the additional burden of managing the inevitable trauma of being asked to leave one's country. The initial emphasis of the relocation and apparent priority of management appeared to have been maintaining the business continuity of the Bank, and not staff welfare. In summary, the temporary relocation was a costly exercise, both in human and financial terms.

VII. Conclusion

The temporary relocation of the Bank in 2003 was unprecedented in terms of the scale and scope of the relocation, and also on account of the complexity of the legal issues addressed both prior to and after the relocation. The guiding principle in the design of the legal frameworks for the temporary relocation was ensuring the survival of the institution as an international organization and preserving its developmental mandate. The temporary relocation was ultimately successful because the principal decision-making organs recognized the importance of the rule of law and strictly adhered to the fundamental legal principle of separation of powers.Also, the commitment and personal sacrifice of the staff of the institution played a critical role. The Bank today remains the leading development finance institution on the continent of Africa because of its capacity for survival in the face of quite daunting challenges.