I. THE FACTS

1. The Applicant, Ms. BATE Arrah, was recruited by the African Development Bank on 4 October 1991. At the time the contested decision was taken, the Applicant was holding the position of Senior Secretary in the Financial Control Department.

   In February 2003, she was informed that she would be among 400 staff who would be designated to leave Abidjan for Tunis, within the Bank operations relocation framework. The Applicant arrived Tunis on 12 February 2003.

II. THE APPLICANT’S ARGUMENTS

2. The main reason for the Application is to contest the change of mission status pursuant to Resolution B/BD/2003/05 entitled: “Temporary Relocation of the Operations of the African Development Bank: Status and Financial Regime Applicable to Staff During the Period of Temporary Relocation” adopted by the Board of Directors of the Bank on 2 April 2003. The Applicant also contests other decisions taken in the wake of the above Resolution. Furthermore, the Applicant seeks a number of financial compensations as well as payment for material and moral damage of which she was victim following the unexpected change of regime, especially the termination of the lease contract between her and the Bank, and the resulting loss or deterioration of her personal effects.

3. The Applicant maintains that the change in regime is in violation of:

   1. The Resolution of the Board of Governors adopted in Accra on 19 February 2003;
   2. Texts in force, particularly Rule 33.03 of the Staff Rules.

Furthermore, the Applicant maintains that the change in regime breaches the principle of equality, good faith and loyalty, and damages acquired benefits.
III. THE MOTION TO DISMISS FILED BY THE RESPONDENT

4. The Respondent maintains that the main decision challenged falls outside the competence of the Tribunal since that decision is not an “administrative decision.”

5. The Respondent’s arguments may be summarized as follows:

   a) The Resolution stems from the general and special powers prescribed under Article 32 of the Agreement Establishing the African Development Bank and Article 4 (3) of the General Regulations of the African Development Bank. It is not a day-to-day administrative decision (incumbent on the President) but a general decision.

   b) According to Article III of the Statute of the Administrative Tribunal, the competence of the Tribunal with regard to staff is limited to “administrative decisions for non-observance of the contract of employment or the terms of appointment of such staff member.”

      According to the Respondent, Article II of the Statute defines “administrative decision” as follows:

      "Administrative decision means a determination by the Bank concerning the terms and conditions of employment of a staff member."

      The Respondent adds that the matter complained of is a policy decision affecting the generality of staff and not an issue of day-to-day administration.

   c) To support its argument, the Respondent recalls that the final version of Article III of the Statute of the Tribunal limited the Tribunal’s competence to decisions of management in respect of individual staff members. The final version indeed excluded from the Tribunal’s competence any review “of the regularity or legality of an administrative rule adversely affecting the staff member.” The modification of the initial text is an indication of the intention of the drafters of the Statute of the Administrative Tribunal to exclude decisions affecting the generality of staff - as in the case of the Board Resolution contested by the Applicant - from the competence of the Tribunal.

   d) The Respondent also refers to Rule 103.01 of the Staff Rules which subjects recourse to the Administrative Tribunal to prior recourse to the Appeals Committee, but specifically excludes from the Appeal Committee’s competence “a resolution or a decision of the Board of Directors or the Board of Governors of the Bank.”

   e) The Respondent recalls that in its judgment on 23 July 2004 in B. v The African Development Bank (Application No. 2002/03), the Administrative Tribunal of the African Development Bank had had occasion to pronounce on what constituted an administrative decision along the lines advocated by the Respondent.

   f) Lastly, the Respondent requests the Tribunal to expunge confidential documents presented by the Applicant from the Application and to enjoin the Executive
Secretariat of the Tribunal to no longer accept the inclusion of such documents in future applications.

**APPLICANT’S REPLY TO THE MOTION TO DISMISS**

6. In response to the motion to dismiss moved by the Respondent, the Applicant maintains in her Reply that the Board of Directors is empowered to take administrative decisions, even if such decisions affected all staff. In that regard, the Applicant refers to Judgment No. 1000 of the Administrative Tribunal of the International Labor Organization in the *Clements, Patak and Roedl* Case, which states *inter alia*:

"When impugning an individual decision that touches him directly, the employee of an international organization may challenge the lawfulness of any general or prior decision…that affords the basis of the individual one."

7. The Applicant also refers to ILOAT Judgments 1786 (*Skulikaris* Case, 6 November 1998) and 1368 (*Aymon, Ball and Borghini* Case), both of which upheld the principle according to which even if a staff may not request the direct impugnment of a general decision, he may “impugn an individual decision applying a general one.” (*Skulikaris* Case, § 5).

8. Hence, the Applicant maintains that any domain that has not been expressly excluded, falls within the competence of the Administrative Tribunal, and that the Tribunal is competent to hear an appeal concerning any decision taken by Management, the Board of Governors or the Board of Directors. According to the Applicant, pursuant to Article IV of the Statute of the Administrative Tribunal, the Tribunal may, at the request of the Board of Governors of the Bank, render an advisory opinion on any question of law concerning the general administration of the Bank. That is proof that the Tribunal has a general role to consider and determine the merits of all decisions. The Applicant continues by stating that international jurisprudence, especially Judgment 2312 of the ILO Administrative Tribunal, also supports the view of the principle of broad competence.

9. Lastly, the Applicant rejects the objection raised with regard to the confidentiality of documents, considering it not applicable to the Tribunal.

10. The Applicant further submits additional arguments on the merits of the application. However, at this juncture, the Tribunal shall limit itself to examining the motion to dismiss moved by the Respondent. Furthermore, the Tribunal finds no objection in making an interlocutory pronouncement on the matter of confidentiality.

**IV. THE LAW**

11. In fact, the substantive issue is whether the Tribunal is competent or not to adjudicate on Resolution B/BD/2003/05 taken by the Board of Directors. In other words, is that Resolution among texts over which the Administrative Tribunal, by nature, has no competence, or is it among texts over which it has jurisdiction?

12. The Tribunal echoes the Respondent when it states that the competence of the Tribunal is defined by Article III of the Statute of the Administrative Tribunal. Therefore, in defining its competence, the Tribunal cannot but refer to its constitutive text. According to the said Article III:
The Tribunal shall be competent to hear and pass judgment upon any application by a member of the staff of the Bank contesting an administrative decision for non-observance of the contract of employment or the terms of appointment of such staff member.”

13. The term “administrative decision” is defined in Article II.1 (i) of the Statute of the Tribunal as follows: “administrative decision” means a determination by the Bank concerning the terms and conditions of employment of a staff member.” This definition is repeated in toto under Regulation 1.2 (Definitions) of the Staff Rules and refers to decisions that directly affect staff rights or interests.

14. Thus, the Tribunal holds that resolutions of a general or administrative nature adopted by the Bank’s organs are not directly challengeable, pursuant to Article III, paragraph 1 of its Statute. The wording of the article clearly indicates that an applicant must demonstrate that “his/her” contract of employment or “his/her” terms of appointment were violated. The wording implies that the administrative measure challenged must affect the Applicant individually and personally.

15. Indeed, the Administrative Tribunal was established in 1998 to provide jurisdictional protection for members of staff in the event of such staff claiming violation of their rights under their contract of employment or terms of appointment. In that regard, staff members only need legal grounds to contest any decision affecting them individually before the Tribunal, more so if, as stated in paragraph 18 below, they are entitled to raise a motion of illegality with regard to the texts underlying such decisions. However, the purpose of seeking remedy from the Tribunal is not to review policies set forth by the Bank’s organs.

16. The interpretation of Article III, paragraph 1 of the Statute is confirmed by the historical background of the said provision. A draft vesting the Tribunal with competence to hear applications contesting “the regularity or legality of a regulatory decision” was rejected by the Board of Directors of the Bank. Obviously, the Board of Directors did not want any such control on the exercise of regulatory powers by the Administrative Tribunal.

17. Lastly, the above interpretation is confirmed by Rule 103.01 (c) (ii) of the Staff Rules. If the Appeals Committee is not competent to hear a direct appeal against resolutions or decisions of the Board of Directors or the Board of Governors of the Bank, the same applies ipso facto to the Tribunal. The provision expressly states that the party concerned may appeal to the Tribunal to determine if indeed the Appeals Committee correctly interpreted its lack of competence. Therefore, the Tribunal is bound to accept the motion to dismiss moved by the Respondent insofar as the application seeks to directly challenge regulatory decisions.

18. However, although the Tribunal admits that it cannot directly annul a regulatory decision of the Board of Directors of the Bank, it would be unable to fulfill its jurisdictional functions if it could not judge the legality of an individual decision of the Bank relating to the terms of appointment of staff. This interpretation is valid not only with regard to texts and decisions superior to those of the Bank, but also in the light of the general principles of international civil service law. It is one thing to cancel with full legal force an administrative decision applicable to all, and a different thing to judge the legality of such a decision with a view to drawing the legal consequences on
the specific situation of a staff member and offer redress in the event where such a decision would be legally unfounded for reasons of form, procedure or merit.

19. In her application, the Applicant prays the Tribunal to quash the decision challenged (see conclusions 1 and 2 of the application). The Tribunal disagrees with the Applicant if by that she implies the direct, full and total annulment of the decision. However, nothing opposes the annulment of the implementing texts of that decision as they apply to the Applicant’s situation, pursuant to Article XIII (1) of the Statute of the Tribunal:

“If the Tribunal declares that an application contesting an administrative decision is well-founded, it shall order the rescission of such a decision, and may order any other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.”

20. Furthermore, the Tribunal notes that the Applicant, Mrs. Bate Arrah, has presented the Tribunal with a number of other claims all intrinsically linked to Resolution B/BD/2003/05 taken by the Board of Directors on 2 April 2003, of which she contests the legality. In order to rule on those claims, the Tribunal is under obligation to rule on the legality of the decision challenged.

21. Such consideration of the legality of the decision challenged constitutes the substance of the case that the Tribunal shall examine at a subsequent stage of the procedure.

22. In addition, the Respondent raises a motion for confidentiality in connection with some documents presented by the Applicant, especially a legal opinion issued by the Respondent’s Legal Counsel to Bank Management.

This matter concerns supporting evidence submitted by the parties to the Tribunal. Indeed, the Tribunal may order the withdrawal of some documents from the application if such documents are shown to be confidential and where they could be prejudicial to the Respondent’s rights.

23. Regarding confidential legal advice given by the Respondent’s Legal Counsel to Bank Management in the normal exercise of his duties to enable the latter to act within the bounds of legality and with prudence, its use by the applicant is capable of jeopardizing the obligation of loyalty in presenting evidence before the Tribunal.

24. The Tribunal must not accept such documents not because of their confidentiality per se – since the Tribunal strictly interprets the motion for confidentiality – but because the use by the Applicant of such specific documents in a case addressing contentious legal issues could seriously breach the obligation for loyalty in presenting evidence insofar as it could lead to the Respondent pleading against itself. Such an outcome would constitute an inadmissible breach not only of the principle of equality of parties but also of the principle of loyalty in presenting evidence. In that regard and in view of the special and specific nature of legal advice in international organizations as well as the impact of such advice on the legal discourse, the Tribunal accepts the Respondent’s request and must order that confidential advice from the Legal Counsel be expunged from the application. The Respondent shall clearly state the documents whose expungement it would want the Tribunal to order.
25. Nonetheless, the Tribunal cannot issue future directives in that regard as requested by the Respondent. The Tribunal shall decide on the merits in each specific case. Moreover, the Tribunal recalls that the issue of confidentiality of some documents is regulated by Article IX of its Statute as follows:

“The Tribunal may require the production of documents held by the Bank, except that the President of the Bank may withhold evidence if he determines that the introduction of such evidence might hinder the operation of the Bank because of the secret or confidential nature of the document.”

V. THE DECISION

26. On that basis, the Tribunal:

- Accepts the motion to dismiss raised by the Respondent insofar as the application seeks to directly challenge regulatory decisions;
- Dismisses the motion with regard to all other requests made by the Applicant;
- Orders that with the Tribunal’s consent, the legal opinions of the Respondent’s General Legal Counsel as indicated by him be expunged from the case file;
- Orders the continuation of the hearing on the merits of the case; the Respondent shall submit an answer within thirty days following this judgment.

Professor Maurice GLELE AHANHANZO - President

Albertine LIPOU-MASSALA - Executive Secretary

COUNSEL FOR THE APPLICANT:
- Ms. Lynda DADIE-SANGARET

COUNSEL FOR THE RESPONDENT:
- Mr. Adesegun AKIN-OLUGBADE

With him
- Mr. Dotse TSIKATA