International Court of Justice

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Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint against the International Fund for Agricultural Development

(Request for an Advisory Opinion)

Written Statement of the International Fund for Agricultural Development

29 October 2010

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General Part

THE REQUEST

Chapter 1. INTRODUCTION

A. Nature of this case: A case raising issues of international institutional law rather than involving a simple appeal from a ruling in an employment case

1. In 1988, the International Fund for Agricultural Development ("IFAD" or "Fund"), which is a specialized agency of the United Nations, entered into an agreement with another specialized agency, the International Labour Organization ("ILO"). Under that agreement, an Administrative Tribunal ("Tribunal" or "ILOAT"), whose statute was adopted by the International Labour Conference on 9 October 1946 (and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992, 16 June 1998 and 11 June 2008) is to act as the administrative tribunal of the Fund. In that capacity, the Tribunal is to abide by its Statute, in particular Article II and the provisions and principles concerning the procedure for dealing with cases submitted to it.

2. Under the aforementioned agreement, the Fund and the ILO also agreed that, in the event that the Fund considers that the Tribunal has failed to adhere to the foregoing terms, the Fund shall have the right to challenge the Tribunal's decision before the International Court of Justice ("Court") by means of the authority conferred upon the Fund, in the agreement with the United Nations, to request Advisory Opinions from the Court. The Fund and the ILO further agreed that both parties shall accept the findings of the Court.

3. The reason why the Fund has submitted the present Request to the Court is because it deems that the Tribunal, acting through its judges whom are appointed for a period of three years by the Conference of the International Labour Organization, caused the terms of the aforementioned agreement to be violated. Through the Request addressed to the Court on 23 April 2010, the Fund seeks the Court's confirmation that Judgment No. 2867 is not in conformity with the 1988 agreement between the two specialized agencies and must be declared invalid on the grounds set forth in this statement.

4. Accordingly, the present proceeding does not involve a simple appeal from a ruling in an employment case such as the Court has had occasion to address in the past.[1] In contrast to the *Unesco* Case, this case raises issues of fundamental importance to the Fund, as well as the many international organizations serving as housing organizations to other institutions or entities, and indeed all organizations having accepted the Tribunal's jurisdiction. As such, the outcome of this proceeding will likely determine the future of institutional housing arrangements

[1] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77.

the world over. In particular, the present case raises the following questions which the Court is asked to address for the first time:

> (i) Can an international organization which houses an entity that is separate from it incur liability for the employment decisions of the housed entity?
>
> (ii) What are the applicable criteria for attributing conduct of the housed entity to the housing organization?
>
> (iii) Based on the answers to the foregoing questions, how is one to delimit the ILOAT's jurisdiction in cases involving organizations housed by other organizations and assess the Tribunal's procedure followed in such cases?

5. These aspects elevate this proceeding above ordinary Article XII proceedings involving only the employer-organization and its employee(s). It is the view of the Fund that the Tribunal's decision which it is challenging in this proceeding is generally outside the limits imposed by law and by the instrument under which the Tribunal operates, and more specifically, it is not in accord with contemporary law concerning the responsibility of international organizations.

6. Against this background, the Fund's Request is addressed against the following decisions of the Tribunal confirming its jurisdiction and/or constituting fundamental faults in the procedure followed by it:

a) To hear complaints of an individual who was, neither at the time of the complaint introduced before the Tribunal, nor at any time before or thereafter, an official of the Fund, but rather, an employee of a separate entity housed by the Fund pursuant to an international agreement between that entity and the Fund;

b) To entertain pleas involving an examination of the decision-making by entities and bodies belonging to an organization that has not recognized the jurisdiction of the Tribunal and which therefore were not capable of being heard by the Tribunal;

c) To examine conduct and acts which according to international law are not attributable to the Fund, but to bodies and officials belonging to an organization that has not recognized the jurisdiction of the Tribunal and which therefore were not capable of being examined by the Tribunal; and

d) To hear complaints which do not allege non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of the Fund.

7. As the above summary makes clear, the Fund's Request "has nothing to do with the question whether the [Tribunal's] decision [set forth in the dispositive paragraph] is right or wrong: that is merits. It is concerned solely with the duty of

the tribunal to respect and maintain the limits imposed on its authority; the rightness or wrongness of the decision being irrelevant considerations."[2] That being said, the purpose of the Fund's Request is to have Judgment No. 2867 declared invalid by the Court.

B. Origin of the Request

8. On 26 April 2010, the Fund submitted a Request for an Advisory Opinion to the Court concerning a ruling by an administrative tribunal, the ILOAT, rendered against the Fund upon a complaint by a staff member of an institution housed by the Fund.

9. The Fund is one of the specialized agencies of the United Nations which have been authorized by the General Assembly, on the basis of Article 96, paragraph 2, of the Charter of the United Nations, to request Advisory Opinions of the Court on legal questions arising within the scope of their activities and which have accepted the jurisdiction of the Tribunal under its Statute, Article XII of which provides for special recourse to the Court by way of a binding Opinion. The Fund avails itself of Article XII in the present proceeding.

10. Ms. S.-G. ("Complainant"), a staff member of the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa ("Global Mechanism"), held a fixed-term contract of employment which was due to expire on 15 March 2006.

11. When the Managing Director of the Global Mechanism did not renew her contract upon the expiration of its fixed term, the Complainant made approaches to various organs of IFAD, which houses the Global Mechanism at its headquarters in Rome (Italy) pursuant to a special arrangement. In particular, she filed an appeal with IFAD's Joint Appeals Board challenging the Managing Director's decision. The Joint Appeals Board recommended in December 2007 that the Complainant be reinstated within the Global Mechanism for a period of two years and be paid an amount equivalent to all the salaries, allowances and entitlements she had lost since March 2006. The President of IFAD rejected this recommendation in April 2008.

12. In view of the failure of this approach, the Complainant filed a complaint against the Fund with the Tribunal on 8 July 2008. In her complaint, the Complainant asked the Tribunal to order the Fund to reinstate her, for a minimum of two years,

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[2] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, Dissenting Opinion of Judge Read, I.C.J. Reports 1956, p. 77, at 143.

in her previous post with the Global Mechanism or an equivalent post with retroactive effect from 15 March 2006, and to grant her monetary compensation equivalent to the losses suffered as a result of the non-renewal of her fixed-term contract.

13. In its Judgment No. 2867 (S.-G. v. IFAD), delivered on 3 February 2010, the Tribunal, asserting jurisdiction under the terms of Article II of its Statute over the Complainant's entire complaint against IFAD, set aside the decision of the President of IFAD. It also ordered the Fund to pay the Complainant damages equivalent to the salary and other allowances she would have received if her contract had been extended for two years from 16 March 2006, together with moral damages in the amount of €10,000 and costs in the amount of €5,000. In the proceedings before the Tribunal, the Fund presented clear and convincing evidence of the separateness of the Fund and the Global Mechanism in support of its contention that the Tribunal was not competent to hear pleas B(1)[3] and B(2)[4] comprising the core part of the complaint.[5] In a written pleading, the Complainant expressly agreed that the Fund and the Global Mechanism are "[s]eparate legal entities."[6] Notwithstanding this evidence and that record, the Tribunal supported its exercise of jurisdiction over the entire complaint by stating that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes" and that the "effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund."[7]

14. If Judgment No. 2867 were allowed to stand, it would adversely affect the development of the law concerning the responsibility of international organizations and would have a chilling effect on the housing arrangements entered into by IFAD and many intergovernmental organizations with other institutions and entities. As

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[3] In the section of the Complainant's complaint entitled "Complainant's Pleas," the first heading under "B. Merits" reads as follows: "(1) The Managing Director exceeded his authority in deciding not to renew the complainant's contract."

[4] In the section of the Complainant's complaint entitled "Complainant's Pleas," the second heading under "B. Merits" reads as follows: "(2) The approved core budget did not require elimination of complainant's post."

[5] The proceedings before the ILOAT, and the objections which IFAD raised in the course of those proceedings, centered on the first two pleas included in the complaint submitted to the Tribunal. The complaint also included the following pleas which are, however, not at issue in the present proceeding: "(3) IFAD did not exercise its duty of care towards the complainant;" "(4) IFAD did not apply its own HRPM procedures to the complainant;" and "(5) The President failed to give reasons for rejecting the Joint Appeals Board's recommendations."

[6] Complainant's Rejoinder, heading to paragraph 5 ("5. The complainant has no reason to dispute the separateness of IFAD and the Global Mechanism.").

[7] ILOAT Judgment No. 2867, Consideration 7.

such, it could potentially endanger the very concept of such arrangements, for it would confirm the Tribunal's extra-statutory exercise of jurisdiction over a housing organization and expose the housing organization to potential liability for the acts of the housed entity even in situations, as in the present case, where all parties involved agree that the housed entity is legally separate from the housing organization.

C. The Terms of the Present Request

15. The Executive Board of the Fund, by a resolution adopted at its ninety-ninth session on 22 April 2010, acting within the framework of Article XII of the Annex of the Statute of the Tribunal, decided to challenge Judgment No. 2867 of the Tribunal and to refer the question of the validity of that judgment to the Court.

16. Article XII of the ILOAT Statute reads as follows:

> "1. In any case in which the Executive Board of an international organization […] challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.
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> 1. The opinion given by the Court shall be binding."

17. The request was transmitted to the Court under cover of a letter dated 23 April 2010 from the President of IFAD's Executive Board, which informed the Court that the undersigned has been designated as the representative of the Fund for purposes of the present proceedings.

18. The Fund's request comprises the following nine questions:

> "I. Was the ILOAT competent, under Article II of its Statute, to hear the complaint introduced against the International Fund for Agricultural Development (hereby the Fund) on 8 July 2008 by Ms A.T.S.G., an individual who was a member of the staff of the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (hereby the Convention) for which the Fund acts merely as housing organization?
>
> II. Given that the record shows that the parties to the dispute underlying the ILOAT's Judgment No. 2867 were in agreement that the Fund and the Global Mechanism are separate legal entities and that

the Complainant was a member of the staff of the Global Mechanism, and considering all the relevant documents, rules and principles, was the ILOAT's statement, made in support of its decision confirming its jurisdiction, that 'the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes' and that the 'effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund' outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

III. Was the ILOAT's general statement, made in support of its decision confirming its jurisdiction, that 'the personnel of the Global Mechanism are staff members of the Fund' outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

IV. Was the ILOAT's decision confirming its jurisdiction to entertain the Complainant's plea alleging an abuse of authority by the Global Mechanism's Managing Director outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

V. Was the ILOAT's decision confirming its jurisdiction to entertain the Complainant's plea that the Managing Director's decision not to renew the Complainant's contract constituted an error of law outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

VI. Was the ILOAT's decision confirming its jurisdiction to interpret the Memorandum of Understanding between the Conference of the Parties to the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa and IFAD (hereby the MoU), the Convention, and the Agreement Establishing IFAD beyond its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

VII. Was the ILOAT's decision confirming its jurisdiction to determine that by discharging an intermediary and supporting role under the MoU, the President was acting on behalf of IFAD outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

VIII. Was the ILOAT's decision confirming its jurisdiction to substitute the discretionary decision of the Managing Director of the Global

Mechanism with its own outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

IX. What is the validity of the decision given by the ILOAT in its Judgment No. 2867?"

19. As the Court stated in its ruling in the only previous proceeding based on Article XII of the ILOAT Statute, issued in 1956, an organization such as the Fund "has the general power to ask for an Advisory Opinion of the Court on questions within the scope of its activity."[8] While the present Request in no way detracts from the Fund's general power pursuant to Article 96, paragraph 2, of the United Nations Charter to ask the same, or similar, questions decided upon by the Fund's Executive Board in a purely advisory proceeding,[9] its right to request an Advisory Opinion in this case is exercised specifically in satisfaction of the conditions laid down in Article XII of the ILOAT Statute.

D. The Court's Order of 29 April 2010

20. By letters dated 26 April 2010, the Registrar of the Court gave notice of the request for an advisory opinion to all States entitled to appear before the Court, pursuant to Article 66, paragraph 1, of the Court's Statute.

21. By an Order of 29 April 2010, the Court decided that:

"1. the Fund and its Member States entitled to appear before the Court, the States parties to the United Nations Convention to Combat Desertification entitled to appear before the Court and those specialized agencies of the United Nations which have made a declaration recognizing the jurisdiction of the Administrative Tribunal of the International Labour Organization pursuant to Article II, paragraph 5, of the Statute of the Tribunal are considered likely to be able to furnish information on the questions submitted to the Court for an advisory opinion;

2. fixed 29 October 2010 as the time-limit within which written statements on these questions may be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute;

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[8] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 99.

[9] Art. 96, para. 2, of the United Nations Charter reads as follows: "Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

3. fixed 31 January 2011 as the time-limit within which States and organizations having presented written statements may submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute;

4. decided that the President of the International Fund for Agricultural Development shall transmit to the Court any statement setting forth the views of the complainant in the proceedings against the Fund before the Administrative Tribunal of the International Labour Organization which the said complainant may wish to bring to the attention of the Court; and fixed 29 October 2010 as the time-limit within which any possible statement by the complainant who is the subject of the judgment may be presented to the Court and 31 January 2011 as the time-limit within which any possible comments by the complainant may be presented to the Court.

The subsequent procedure is reserved for further decision."

E. Structure of the Fund's Written Statement

22. The present statement is submitted on behalf of the Fund pursuant to paragraph 1 of the Court's Order of 29 April 2010.

23. This Written Statement is structured as follows:

a. A **General Part** sets out the origin of the Request and its terms of reference;

b. **Part One** addresses the questions of the jurisdiction of the Court and the propriety of the exercise of such jurisdiction in the present case;

c. **Part Two** examines the legal considerations raised by the Request and proposes answers to the questions set forth in the Request; and

d. **Part Three** contains a summary of conclusions and sets forth the Fund's Request.

Part One

QUESTIONS OF JURISDICTION AND PROPRIETY

Chapter 2. THE COURT IS COMPETENT TO GIVE THE ADVISORY OPINION REQUESTED

A. The Conditions for a Request for an Advisory Opinion

24. According to the Court's consistent jurisprudence, when seized of a request for an Advisory Opinion, the Court must first consider whether it has jurisdiction to give the Opinion requested, and should the answer be in the affirmative, whether there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it.[10] In *Legality of Nuclear Weapons (Request of the WHO)*[11] the Court considered that, in view of Article 65, paragraph 1, of its Statute and Article 96, paragraph 2, of the Charter of the United Nations, there are three conditions which must be satisfied in order for the Court to have jurisdiction when a request for an Advisory Opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter of the United Nations, to request opinions from the Court; the opinion requested must concern a legal question; and this question must be one arising within the scope of the activities of the requesting agency. The sections that follow assume that these conditions apply *mutatis mutandis* in Article XII proceedings.

B. Jurisdiction *ratione personae*: The Request was made by a duly authorized organization

25. As the Court stated in its 1956 Opinion issued in a proceeding arising under Article XII of the ILOAT Statute, an authorized specialized agency of the United Nations "has the general power to ask for an Advisory Opinion of the Court on questions within the scope of its activity."[12] The Fund is a specialized agency of the United Nations within the meaning of the relevant provisions of the Charter of the United Nations. The Fund has a general right under Article 96, paragraph 2,[13] of the

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[10] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 232, para. 10; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1982, pp. 333-334, para. 21; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 144, para. 13); *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, para. 19 -24, text available online: http://www.icj-cij.org/docket/files/141/15987.pdf

[11] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66.

[12] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 99.

[13] Art. 96, para. 2, of the UN Charter reads as follows: "Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

United Nations Charter to request an Advisory Opinion of the Court on questions within the scope of its activities. The power to formulate requests for Advisory Opinions is conferred upon the Fund by Article XIII of the Agreement between the United Nations and the International Fund for Agricultural Development of 6 April 1978.

26. The Resolution of the Fund's Executive Board adopted at its ninety-ninth session on 22 April 2010, by which the Executive Board requested an Advisory Opinion of the Court, relies specifically on Article XII of the Statute of the Tribunal as cited in the Resolution and as applicable to the Fund. The foregoing provision states that, in any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the Court. The opinion given by the Court shall be binding. Paragraph 5 of Article II, to which reference is made in Article XII, determines that the Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other intergovernmental international organisation approved by the Governing Body which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure. Furthermore, Article II, paragraph 7, of the Tribunal's Statute stipulates that any dispute as to the competence of the Tribunal shall be decided by it, subject to the provisions of Article XII. The Fund has recognized the jurisdiction of the Tribunal by making the declaration provided for in Article II, paragraph 5, of the Tribunal's Statute.

C. The requesting organization acted within its competence in adopting and submitting the Request for an Advisory Opinion

27. The questions submitted to the Court by the Fund all arose within the scope of the Fund's activities with regard to its hosting of the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification ("Convention"), and in any event arise as direct consequences of the Tribunal's Judgment No. 2867. According to the operative paragraph, or *dispositif*, of Judgment No. 2867 in the case between a former staff member of the Global Mechanism ("Complainant") and the Fund:

> "1. The President's decision of 4 April 2008 is set aside.

2. IFAD shall pay the complainant material damages equivalent to the salary and other allowances she would have received if her contract had been extended for two years from 16 March 2006, together with interest at the rate of 8 per cent per annum from due dates until the date of payment. The complainant is to give credit for wages or salary earned within that period.

3. IFAD shall pay the complainant moral damages in the sum of 10,000 euros.

4. It shall also pay her costs in the amount of 5,000 euros.

5. All other claims are dismissed."[14]

D. Jurisdiction *ratione materiae*: The questions on which the Court is asked to give its Opinion are legal questions

28. It is also for the Court to satisfy itself that each question on which it is requested to give its opinion is a "legal question" within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Court's Statute. A question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question; as the Court has remarked on a previous occasion, questions "framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law"[15] and therefore appear to be questions of a legal character for the purposes of Article 96 of the Charter and Article 65 of the Statute.[16] As explained below, the Opinion requested in the present case relates in each instance to a "legal question" within the meaning of the aforementioned provisions.

29. The Fund grounds its request for a binding Advisory Opinion of the Court on Article XII of the ILOAT Statute. The Fund submits that ILOAT Judgment No. 2867 must be declared invalid by the Court because:

a) the Tribunal was not competent to entertain pleas B(1) and B(2) set forth in the complaint submitted to it, in other words the Tribunal was

[14] ILOAT Judgment No. 2867, p. 18.

[15] *Western Sahara,* Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15

[16] *Cf. Accordance with international law of the unilateral declaration of independence in respect of Kosovo,* Advisory Opinion, para. 25, text available online: http://www.icj-cij.org/docket/files/141/15987.pdf

not "legally qualified to examine the complaints submitted to it and to adjudicate on the merits of the claims set out therein;"[17] and/or

b) the Tribunal's decision to entertain the complaint in its entirety, including pleas B(1) and B(2) thereof, constituted fundamental faults in the procedure followed by the Tribunal.

30. It will be recalled that Judge Moore of the Permanent Court of International Justice pointed out in *Mavromatis Palestine Concessions* that:

> "[T]here are certain elementary conceptions common to all systems of jurisprudence, and one of these is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has no jurisdiction ….The requirement of jurisdiction, which is universally recognized in the national sphere, is not less fundamental and peremptory in the international."[18]

31. With the foregoing in mind, in the proceedings underlying the Tribunal's Judgment No. 2867, the Fund raised four principal objections to the competence and jurisdiction of the Tribunal:

a) First, that the Fund and the Global Mechanism are separate legal entities and that the Fund's acceptance of the Tribunal's jurisdiction is limited to the Fund proper;[19]

b) Second, that the Tribunal may not entertain pleas alleging flaws in the decision-making process of the Global Mechanism;

c) Third, that the Tribunal may not entertain pleas alleging flaws in the decision-making process of the Fund if it entails examining the decision-making process of the Global Mechanism; and

d) Fourth, that acts of the Managing Director of the Global Mechanism are not attributable to the Fund.

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[17] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 84.

[18] *Mavrommatis Palestine Concessions* (1924), Dissenting Opinion of Judge Moore, PCIJ Ser. A, No. 2, p. 54, at 57-58, 60.

[19] The Tribunal correctly observed that "[t]he *argument with respect to the Tribunal's jurisdiction* is based, in the main, on the proposition that '[t]he Fund and the Global Mechanism are separate legal identities'" (Emphasis added). ILOAT Judgment No. 2867, Consideration 5.

32. In deciding to confirm its jurisdiction and to entertain all the pleas set forth in the Complainant's complaint, the Tribunal rejected the aforementioned jurisdictional objections in the following ways:

- With regard to the Fund's first objection, despite acknowledging that the Global Mechanism is an integral part of the Convention and is accountable to the Conference of the Parties of the UNCCD, the Tribunal ruled that this does not necessitate the conclusion that the Global Mechanism has its own legal identity. On that basis, it decided that the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes and considered generally that the effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund.[20]

- With regard to the other three objections raised by the Fund, the Tribunal ruled that because decisions of the Managing Director relating to staff in the Global Mechanism are, in law, decisions of the Fund, these objections also must be rejected.[21]

33. In submitting its Request for an Opinion, the Fund's Executive Board is seeking a clarification of the legal aspects of a matter with which the Fund is dealing in the aftermath, and as a direct consequence, of Judgment No. 2867.[22] The questions set forth in the Request relate to the general issue of the interpretation of the Statute of the Tribunal, in particular the question of the Tribunal's competence over complaints made against the Fund by staff members of institutions housed by the Fund, where such complaints do not invoke the grounds laid down in the Tribunal's Statute and the Tribunal adjudicates such complaints exclusively by reference to internationals instruments. The questions set forth in this request also relate to the decisions made by an entity which does not fall within the Tribunal's jurisdiction, and the application of the general rules for the attribution of conduct to international organizations for the purpose of determining international responsibility on the part of a housing organization for acts taken by an entity housed by it.

34. There is no question that, as an international tribunal, the Tribunal possesses *la compétence de la compétence.* This is a power that has been recognized by the

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[20] ILOAT Judgment No. 2867, Considerations 6-7.

[21] Ibid., Consideration 8.

[22] Cf. *Judgments of the Administrative Tribunal of the ILO upon Complaints made against the Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 84.

Permanent Court of International Justice (PCIJ),[23] and the Court itself has stated in this regard that "an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction."[24] However, unlike the Court, the Tribunal does not have the final word on the question of determining its jurisdiction.

35. In reference to the concept of "jurisdiction," it must be asked: jurisdiction to do what? [25] In answering this question, four relevant elements of jurisdiction can be identified:

- Personal jurisdiction refers to an international court or tribunal's power over a particular actor (*in personam* jurisdiction or jurisdiction *ratione personae*). If an international court or tribunal does not have personal jurisdiction over an actor, then the court cannot bind the actor to an obligation or adjudicate any act allegedly performed by such actor;

- Subject-matter jurisdiction or jurisdiction *ratione materiae*, referring to the particular types of claims and proceedings that may be brought before an international court or tribunal under the document from which it derives jurisdiction (in other words, jurisdiction over claims);

- Applicable law, meaning the law that an international court or tribunal may interpret and apply; and

- Inherent jurisdiction, referring to an international court or tribunal's intrinsic powers, derived from its nature as a judicial body.

36. In other words, there are inherent limitations to the exercise of the judicial function, which international courts or tribunals, as entities of justice, cannot ignore.[26] Thus, if an international court or tribunal is satisfied, whatever the nature of the relief claimed, that to adjudicate the merits of an application or complaint would be inconsistent with its judicial function as defined by the relevant rules, it should refuse to do so.[27] Jurisdictional clauses must be interpreted, like

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[23] See, e.g., *Interpretation of Greco–Turkish Agreement (Greece v. Turkey)*, P.C.I.J. , Ser. B, No. 16, at 20 (7 June 1928).

[24] *Nottebohm (Liechtenstein. v. Guatemala)*, Judgment, I.C.J. Reports 1953, p. 111, at 119.

[25] H. Thirlway, "The Law and Procedure of the International Court of Justice 1960–89: Part Nine," British Year Book of International Law (1998), 1, 6.

[26] Compare, *Northern Cameroons (Cameroon v. U.K.)*, I.C.J. Reports 1963, p. 15, 29 (2 Dec. 1963); see also *id.* at 64 (Sep. Op. of Judge Wellington Koo); *id.* at 100–01 (Sep. Op. of Judge Fitzmaurice).

[27] *Id.* at 37.

any other international legal instrument, in accordance with their ordinary and genuine meaning.[28]

37. The foregoing applies to international courts or tribunals possessing general jurisdiction *(jurisdiction de droit commun)*, and *a fortiori,* to those of limited jurisdiction *(jurisdiction d'attribution)*.

38. International administrative tribunals are tribunals of limited jurisdiction and not of general jurisdiction,[29] as was recognized by the Court specifically in relation to the Tribunal: "The Court recognizes that the Administrative Tribunal is a Tribunal of limited jurisdiction."[30] Consequently, the Tribunal has jurisdictional competence only to the extent that its Statute grants it power to decide disputes. The scope of its jurisdictional competence, both *ratione personae* and *ratione materiae*, is defined by Article II of the Tribunal's Statute and the limitations imposed by it restrict the exercise of jurisdiction in any given case.

39. Under Article XII of the Statute of the Tribunal, the Opinion thus requested will be "binding." In other words, the requested Opinion is relevant for the determination of the international responsibility of the Fund vis-à-vis the Complainant and potentially future complainants situated in a similar position as the Complainant.

40. In light of the foregoing, the Fund invites the Court to take note of the fact that at the outset of the proceedings, the Fund notified the Tribunal that any decision confirming its jurisdiction would trigger the situation envisaged by Article XII of the Tribunal[31]. In making this notification, the Fund sought to inform the Tribunal of the importance that the Fund attaches to this matter in light of its practice of hosting bodies of other entities. The Fund deemed it advisable that the Tribunal be on notice that its decision would be challenged, if necessary, on two grounds:[32] (1) by challenging a decision of the Tribunal confirming its jurisdiction; and (2) by challenging that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed (in short, procedural fault). In the words of the Court:

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[28] *Cf.* A. Orakhelashivili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008), p. 441.

[29] See in the same sense IMF Administrative Tribunal, Judgment No. 1999-I (*Mr. "A" v. IMF*), 12 August 1999, para. 56.

[30] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 97.

[31] Reply of the Fund, para. 30.

[32] Ibid., p. 100 ("Article XII authorizes the Executive Board to challenge those judgments, but only on the ground of lack of jurisdiction or of a fundamental fault in the procedure followed.").

> "Article XII of the Statute of the Administrative Tribunal provides for a Request for an Advisory Opinion of the Court in two clearly defined cases. The first is where the Executive Board challenges a decision of the Tribunal confirming its jurisdiction; the second is when the Executive Board considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed. The Request for an Advisory Opinion under Article XII is not in the nature of an appeal on the merits of the judgment. It is limited to a challenge of the decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. Apart from this, there is no remedy against the decisions of the Administrative Tribunal. A challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision.[33]

41. The Court's case law underscores that any question submitted to the Court must refer to one of those grounds, lest it decide that "it cannot be considered by the Court."[34] All of the questions included in the Fund's Request comply with this requirement and must, therefore, be considered by the Court. In this context, the Fund recognizes that the Court has stated as follows with regard to the character of judgments rendered by the Tribunal:

> "Under Article VI of the Statute of the [ILO] Administrative Tribunal, its judgments 'shall be final and without appeal'. However, Article XII authorizes the Executive Board [of an intergovernmental international organization having accepted the Tribunal's jurisdiction] to challenge those judgments, but only on the ground of lack of jurisdiction or of fundamental fault in the procedure followed. In case of such a challenge, it is for the Court to pass, by means of an Opinion having binding force, upon the challenge thus raised and, consequently, upon the validity of the judgment challenged."[35]

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[33] Ibid., p. 98.

[34] Ibid., p. 99. In the *Unesco* Case, the ICJ found the following questions to be outside the orbit of Article XII: "(*a*) Was the Administrative Tribunal competent to determine whether the power of the Director-General not to renew fixed-term appointments has been exercised for the good of the service and in the interest of the Organization?" and "(*b*) Was the Administrative Tribunal competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of the United Nations Educational, Scientific and Cultural Organization, ought to maintain in his relations with a Member State, particularly as regards the execution of the policy of the Government authorities of that Member State?" Ibid.

[35] Ibid.

42. Article XII has been described in the literature as "allowing for what is virtually a limited right of appeal … by means of a request for an advisory opinion from the I.C.J.,"[36] At the same time, it must be kept in mind that:

> "what is involved is not a regular appeal. Such appeals were contemplated by the delegation of Venezuela at the San Francisco Conference and would have necessitated an appropriate modification of Article 34 of the [ICJ] Statute which was formulated by that delegation in the following terms: 'As a Court of Appeal, the Court will have jurisdiction to take cognizance over such cases as are tried under original jurisdiction by international administrative tribunals dependent upon the United Nations when the appeal would be provided in the Statute of such tribunals.' This proposal was defeated. (Doc. 284, IV/1/24)."[37]

43. It also has been explained in the literature that "the scope of review is very limited"[38] in this type of case. The Court itself has observed that the:

> "[d]istinction between jurisdiction and merits is of great importance in the legal regime [of the ILO] Administrative Tribunal. *Any mistakes which it may make with regard to its jurisdiction are capable of being corrected by the Court* on a Request for an Advisory Opinion emanating from the Executive Board. Errors of fact or of law on the part of the Administrative Tribunal in its Judgments on the merits cannot give rise to that procedure. The only provision which refers to its decisions on the merits is Article VI of the Statute of the Tribunal which provides that its judgments shall be 'final and without appeal.'"[39]

44. In other words, "in the case of Article XII of the Statute of the Administrative Tribunal, the Tribunal's decision is subject to examination by the Court only with regard to the question of *jurisdiction*; the Court has no power of review with

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[36] P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001), p. 427. Indeed, the Court has observed with regard to Article XII that "[t]he advisory procedure thus brought into being appears as serving, in a way, the object of an appeal against the" ILOAT's judgment. *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, 84.

[37] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the Unesco*, Advisory Opinion, Separate Opinion of Judge Winiarski, I.C.J. Reports 1956, p. 77, at 107.

[38] C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge University Press, 2005), p. 503.

[39] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 87 (emphasis added).

regard to the merits, the Tribunal's judgments, so far as they are concerned, being final and without appeal."[40] The "question of the validity of the decision" given by the Tribunal "must … be restricted to those aspects of validity or invalidity *which result from the competence or incompetence of the Tribunal*."[41]

45. As explained in the Dissenting Opinion of Judge Badawi in the *Unesco Case*,[42] it is obvious that to enable the Executive Board of an organization which has accepted the ILOAT's jurisdiction to challenge a decision of the Tribunal confirming its jurisdiction and to request an Advisory Opinion as provided for in Article XII of the ILOAT Statute, the grounds on which the Tribunal bases its jurisdiction must, independently of the merits, be in themselves sufficient to establish the precise legal basis of its jurisdiction. It would indeed be inconceivable for the Tribunal to be able to declare itself competent on the basis of reasons not subject to legal evaluation. However, it is sometimes the case that jurisdiction can only be established by reasons which are inextricably linked to the merits. In such a case, a court or tribunal often orders the joinder of the jurisdictional objection and the merits with a view to dealing with them together, and it will first give its decision on the issue of jurisdiction before deciding on the merits. Such joinder facilitates a better ordering of the judgment and is conducive to greater clarity. Dealing with the issue of jurisdiction and the merits separately also ensures the avoidance of repetitions which are inevitable in the statement of the reasoning underlying the decision.

46. In the case of Article XII of the ILOAT Statute, the Tribunal's decision is subject to examination by the Court only with regard to the question of jurisdiction; the Court has no power of review with regard to the merits, the Tribunal's judgments, so far as they are concerned, being final and without appeal.

47. In order, however, to exercise its power of review over the jurisdiction of the Tribunal, the Court must necessarily base its review and resulting Opinion on the Tribunal's interpretation and application of the provisions of its Statute. Where an objection to the Tribunal's jurisdiction is joined to the merits, the Court will look for this interpretation and application in the reasoning as a whole. But where the Tribunal deals with the two questions of jurisdiction and merits separately, the

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[40] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, Dissenting Opinion of Vice-President Badawi, I.C.J. Reports 1956, p. 77, at 124 (emphasis added).

[41] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, Dissenting Opinion of Judge Read, I.C.J. Reports 1956, p. 77, at 144 (emphasis added).

[42] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco,* Advisory Opinion, Dissenting Opinion of Judge Badawi, I.C.J. Reports 1956, p. 77, at 123, 124-125; the text above is essentially taken from that Dissenting Opinion.

Court will confine its examination to the reasoning on which the Tribunal has based its conclusion that it has jurisdiction, even if that conclusion is not made a part of the *dispositif*. If, however, the Tribunal, while not ordering the joinder of the jurisdictional objection and the merits, fails to observe the necessary distinction between the two questions in its Judgment, the Court is bound to examine the Tribunal's judgment in its entirety.

48. In the present case, no joinder was ordered by the Tribunal, but the Tribunal, while not deciding on that course, in fact bundled together its treatment of the two separate questions of jurisdiction and merits. No part of Judgment No. 2867 is specifically devoted to jurisdiction. While the Tribunal's treatment of the issue of jurisdiction is discernable to some extent in Considerations 6 and 7 of Judgment No. 2867, the *dispositif* of Judgment No. 2867 contains no specific rulings regarding the issue of jurisdiction. One is, therefore, compelled to examine the entire Judgment in order to obtain a clearer indication of the Tribunal's pronouncements regarding its jurisdiction over the complaint introduced against the Fund.

49. What is beyond any doubt is that the Tribunal understood the objections which the Fund raised before it as pertaining to the jurisdiction of the Tribunal. In the very first Consideration of Judgment No. 2867, the Tribunal states: "A preliminary question arises as to the extent to which the Tribunal may review that earlier decision [i.e., the decision of the Managing Director of the Global Mechanism not to renew the Complainant's fixed-term contract]. The arguments [of the Fund] go to the powers and jurisdiction of the Tribunal […]." This statement and the Tribunal's subsequent considerations regarding the Fund's arguments make clear that the Fund's arguments relating to the central question of the separateness of the Fund and the Global Mechanism, and the Tribunal's decisions regarding those arguments embedded in Judgment No. 2867, fall squarely within the scope of Article XII of the ILOAT Statute.

50. While being mindful of the fact that this proceeding represents only the second time in the Court's history that an organization having accepted the ILOAT's jurisdiction has made use of the authorization granted in Article XII of the ILOAT Statute; it is against the aforementioned background that the Fund's Executive Board has carefully reviewed the decisions of the Tribunal in Judgment No. 2867 and has carefully examined the measures to be taken as a result of that Judgment before articulating the questions on which it requests the Court's binding Opinion. The answers given to these questions will affect the result of the challenge raised by the Fund's Executive Board with regard to Judgment No. 2867.[43] In this

[43] Cf. *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 84.

context, the Fund wishes to point out that the first and last questions put by the Fund in this case are similar to the ones which led the Court to give the Opinion in 1956 in the case concerning Judgments of the Administrative Tribunal of the ILO upon Complaints made against Unesco.[44]

E. Conclusion

51. For the reasons set out above, the Fund submits that its Request for an Advisory Opinion satisfies all the jurisdictional conditions pertaining to a valid request.

Chapter 3. THERE ARE NO COMPELLING REASONS PREVENTING THE COURT FROM GIVING THE REQUESTED OPINION

52. The Fund acknowledges that the fact that the Court has jurisdiction in relation to a request for an Advisory Opinion does not mean that it is obliged to exercise it in each case. The Court has repeatedly recalled in the past that Article 65, paragraph 1, of its Statute, which provides that "[t]he Court *may* give an advisory opinion .. " (emphasis added), should be interpreted to mean that the Court "has discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met."[45] The discretion whether or not to respond to a request for an Advisory Opinion exists so as to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations.[46] At the same time, the Court has underscored that it is mindful of the fact that its reply to a request for an Advisory Opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused."[47] Accordingly, the Court

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[44] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77 ("I. Was the Administrative Tribunal competent, under Article II of its Statute, to hear the complaints introduced against Unesco on 5 February 1955 by Messrs. Duberg and Leff and Mrs. Wilcox, and on 28 June 1955 by Mrs. Bernstein?"; "III. In any case, what is the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21?").

[45] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 156, para. 44.

[46] *Status of Eastern Carelia*, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5, p. 29; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1973, p. 175, para. 24; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1982, p. 334, para. 22; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, pp. 156-157, paras. 44-45; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo,* Advisory Opinion, para. 29, text available online: http://www.icj-cij.org/docket/files/141/15987.pdf

[47] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 156, para. 44.

has consistently held that only "compelling reasons" would justify the Court's refusal to give its opinion in response to a request falling within its jurisdiction.[48]

53. Despite frequent requests by States, since 1949, that it should not on a particular matter give an Advisory Opinion for reasons of judicial propriety, the present Court has never declined to give a requested Advisory Opinion through an exercise of discretion. With reference to the present Request, there would appear to be no reason, and certainly no compelling ones, for the Court to decline to play the role foreseen for it in the United Nations Charter, its own Statute, and the ILOAT Statute. Indeed, in the only previous proceeding based on Article XII of the ILOAT Statute, involving a request made by Unesco, the Court saw no reason to decline to give its Opinion in relation to a request which contained wording very similar to the Fund's request in the present case.

A. The Court has sufficient information to give the requested Opinion

54. The facts upon which the Court can rely in responding to the Fund's Request are well-documented. In order to ensure that the Court has sufficient information at its disposal in order for it to give the requested Advisory Opinion, the Fund has transmitted to the Court a file (dossier) containing the documents likely to throw light upon the questions which have been submitted to the Court for an Advisory Opinion through a resolution adopted by the Fund's Executive Board on 22 April 2010. These documents are certified in each case to be either official records or true copies thereof, or true copies of the documents submitted to the Tribunal. They were transmitted to the Court by the Fund in accordance with Article 65 of the Court's Statute.

55. Each document is identified by title and, where applicable, official symbol of the Fund, of the United Nations, or of the International Labour Organization. In addition, all documents have, for ease of reference, been numbered consecutively in the order in which they appear in the documentation.

56. This documentation consists of the following ten sections:

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[48] See, e.g., *Interpretation of Peace Treaties*, Advisory Opinion, I.C.J. Reports 1950, p. 65, at 71; *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15, at 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, p. 151, at 155; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, at 41; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 156, para. 44; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, para. 30, text available online: http://www.icj-cij.org/docket/files/141/15987.pdf

I. The Agreement Establishing IFAD;

II. Records relating to the recognition by IFAD of the jurisdiction of the Administrative Tribunal of the International Labour Organization over disputes between IFAD and its staff;

III. Statute of the Administrative Tribunal of the International Labour Organization;

IV. United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or desertification, Particularly in Africa (UNCCD);

V. Records relating to the housing arrangements convened by the Conference of the Parties of the UNCCD and the Fund regarding the hosting of the Global Mechanism by IFAD;

VI. IFAD personnel policies;

VII. Dossier of the *In re* S-.G. case before the Administrative Tribunal of the International Labour Organization;

VIII. Judgment No. 2867 rendered by the Administrative Tribunal of the International Labour Organization;

IX. Agreement between the United Nations and IFAD;

X. Resolution on the request by the Executive Board of IFAD to the International Court of Justice for an advisory opinion with respect to Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization and ensuing correspondence.

57. Section I contains the text of the Agreement Establishing IFAD in force prior to the *In re* S.-G. case before the ILOAT.

58. Section II of the dossier contains official records bearing on the recognition by the Fund of the competence of the Administrative Tribunal of the International Labour Organization. This section contains: (1) a declaration by the President of the Fund, affirming the IFAD Executive Board's decision to recognize the jurisdiction of the Administrative Tribunal of the International Labour Organization over disputes between IFAD and its staff; (2) a declaration by the Director-General of the International Labour Office affirming the Governing Council of the International Labour Office's approval of the Fund's decision to recognize the jurisdiction of the Administrative Tribunal; and (3) Resolution EB/35/R.78 of the Executive Board of IFAD dealing with the recognition of the Jurisdiction of the Administrative Tribunal of the International Labour Organization.

59. Section III of the dossier contains the Statute of the Administrative Tribunal of the International Labour Organization, adopted by the International Labour Conference

on 9 October 1946 and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992, 16 June 1998 and 11 June 2008.

60. Section IV of the dossier holds the text of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or desertification, Particularly in Africa.

61. Section V of the dossier comprises the documents relating to the housing arrangements of the Global Mechanism by IFAD. This section includes: (4) Decision 24/COP.1 of the Conference of the Parties of the UNCCD with respect to "Organization to house the Global Mechanism and agreements on its modalities"; (5) Decision 10/COP.3 of the Conference of the Parties of the UNCCD entitled "Memorandum of Understanding between the Conference of Parties of the United Nations Convention to Combat Desertification and the International Fund for Agricultural Development Regarding the Modalities and Administrative Operations of the Global Mechanism"; (6) Resolution 108/XXI of the Governing Council of the Fund entitled "Housing the Global Mechanism"; (7) IFAD President's Bulletin PB/99/10 regarding the Accounts of the Global Mechanism; (8) IFAD President's Bulletin PB/2004/01 regarding the Global Mechanism; and (9) the Position Description of the Managing Director of the Global Mechanism.

62. Section VI of the dossier incorporates the Fund's relevant personnel policies, including: (10) Resolution EB 88/33/R.19 of the Executive Board of the Fund entitled "Personnel Matters" and (11) IFAD's Human Resources Policy, as they were in force prior to the *In re* S.-G. case, enclosed in Resolution EB 2004/82/R.28/Rev.1 of the Executive Board entitled: "Human Resources Policy".

63. Section VII of the dossier contains the written submissions of the *In re* S.-G. case, as they were submitted to the Administrative Tribunal of the International Labour Organization, including: (12) the Complainant's Brief; (13) the Reply of the Defendant; (14) the Complainant's Rejoinder; and (15) the Surrejoinder of the Defendant.

64. Section VIII of the dossier gives the text of Judgment No. 2867 rendered by the Administrative Tribunal of the International Labour Organization at its 108th Session, on 3 February 2010, *In re* S.-G.

65. Section IX of the dossier contains the Agreement between the United Nations and the Fund reproducing the text of the Article dealing with the relations of IFAD with the International Court of Justice.

66. Finally, Section X of the dossier contains the following documents: (16) Resolution EB 2010/99/R.43 of the Executive Board of IFAD, adopted at its 99th Session, which concerns the request to the International Court of Justice for an advisory

opinion with respect to Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization; and (17) a letter dated 5 May 2010 by the General Counsel of the Fund addressed to the Counsel for the Complainant notifying the request for an advisory opinion to the International Court of Justice.

67. The Fund believes that the information contained in the dossier, combined with the observations made in the present Written Statement, and if necessary, any additional information to be provided at an oral hearing, should the Court so decide, provides the Court with sufficient information in order for it to give the requested Advisory Opinion.

B. The requested Opinion will assist the Fund and the Tribunal in their subsequent actions

68. Under Article XII of the Statute of the Administrative Tribunal, the Opinion requested in this case will be "binding." The Judgment challenged in the request for an Advisory Opinion is, under Article VI, paragraph 1, of the Statute of the Tribunal, "final and without appeal." However, Article XII, paragraph 1, of the Statute, in so far as it was relied upon by the Fund, confers upon its Executive Board the right to challenge "a decision of the Tribunal confirming its jurisdiction" and to seek redress against a judgment that is vitiated by a fundamental fault in the procedure followed, and it provides that the Executive Board shall submit its challenge to the Court by means of a request for an Advisory Opinion. The Executive Board has availed itself of that right by instituting the present proceeding before the Court. The proceeding thus brought into being will serve, in a way, the object of an appeal against the Tribunal's Judgment, seeing that the Court is expressly invited to pronounce, in its Advisory Opinion that will be "binding," upon the validity of the Tribunal's Judgment.

69. The Court's Opinion will assist the Fund and the Tribunal in their further dealings with the dispute that arose with regard to the non-renewal of a fixed-term contract by an institution that is hosted by the Fund and the measures to be taken as a result of Judgment No. 2867, as well as with similar disputes that the Fund and the Tribunal might face in the future, especially if Judgment No. 2867 is not declared invalid.

C. Upholding the Fund's challenge will not deprive the Complainant of her right of redress

70. The Fund wishes to point out that if the Court should consider the request for an Advisory Opinion in the present case and rule as requested by the Fund, such outcome would not mean that the Complainant would automatically be deprived of any procedural and substantive remedy against the Global Mechanism, *casu quo* the Conference of the Parties.

71. It is true that international organizations regularly enjoy immunity from suit in employment-related cases. Instead of litigating their disputes before various national courts, staff members of international organizations are expected to bring their complaints before internal grievance mechanisms and ultimately before administrative tribunals set up by the organization to which they belong. The scope of jurisdiction of such administrative tribunals largely covers the kind of staff disputes that are insulated from national court scrutiny as a result of the immunity from legal process enjoyed by international organizations.

72. The jurisdiction of administrative tribunals is usually seen as complementary to the immunity enjoyed by the respondent international organization. Because an international organization enjoys immunity in connection with disputes brought by private parties, including staff members, the organization must provide an alternative judicial or quasi-judicial recourse to justice. Thus, international organizations establish administrative tribunals or submit to the jurisdiction of existing administrative tribunals. This correlation is usually regarded as the consequence of the policy goal of providing staff members with access to a legal remedy in order to pursue their employment-related rights. But it is increasingly also seen as a legal requirement stemming from treaty obligations incumbent upon international organizations, as well as a result of human rights obligations involving access to justice (e.g. Article 6 of the European Convention on Human Rights and Fundamental Freedoms). These treaty obligations are premised on the well-recognized right, which as confirmed in the *Ambatielos* Case entails that "[…] the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of country." [49]

73. Nowadays regarded as a fundamental right that applies to all, and not being merely an international minimum standard for the treatment of aliens, the right of recourse is enforceable against international organizations as well. The policy consideration that an international organization should make provision for the orderly, judicial or quasi-judicial settlement of staff disputes was already clearly expressed in the Court's Advisory Opinion in the *Effect of Awards Case,*[50] in

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[49] *Ambatielos Case (Greece v. United Kingdom)*, 6 March 1956, UNRIAA 83.

[50] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1954, p. 47.

which it upheld the legality of the creation of the United Nations Administrative Tribunal (UNAT). The Court stated in respect of the United Nations that it would "hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals […] that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them." [51]

74. Ever since the Court made this pronouncement, the articulation of the underlying principle evolved significantly and, inspired by the case law of the European Court of Human Rights, in particular its 1999 *Waite and Kennedy*[52] Judgment, according to which the jurisdictional immunity of international organizations may depend upon the availability of "reasonable alternative means" to effectively protect the rights of staff members, more and more national courts are equally looking at the availability and adequacy of alternative dispute settlement mechanisms. Some of them have even concluded that the non-availability of legal protection through an administrative tribunal, or the inadequacy of the level of protection afforded by internal mechanisms, justifies a withdrawal of immunity in order to avoid a denial of justice contrary to human rights demands.

75. Against this background the question may be posed whether the Complainant could address her complaints to the Global Mechanism, *casu quo* the Conference of the Parties. The foregoing evolution in the attitude of the courts of a number of countries indicate that if the Global Mechanism, *casu quo* the Conference of the Parties, fails to offer reasonable alternative means to the Complainant or fails to enter into a friendly settlement with her, national courts will be prepared to entertain her claims.

76. Given that the Complainant is a resident of Italy, the attitude of the courts of that country should particularly be taken into account in this regard. In a 1999 case involving the European University Institute, an Italian court ruled that customary rules on immunity apply only to States, not to international organizations, such entities enjoying only limited international legal personality.[53] In a 2007 case, another Italian court confirmed that the immunity of international organizations

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[51] Ibid. at 57.

[52] *Waite and Kennedy v. Germany*, Application No. 26083/94, European Court of Human Rights, February 18, 1999, para. 50 (relying on *Golder v. United Kingdom*, Application No. 4451/70, 21 February 1975, Series A No. 18, [1975] ECHR 1, para. 36, and the recent decision in *Osman v. United Kingdom*, European Court of Human Rights, Application No. 23452/94, 28 October 1998, [1998] ECHR 101, para. 136).

[53] As discussed in https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP143e.pdf in reference to *EUI v. Piette*, *Italian Yearbook of International Law* (1999), p. 156.

could only be based on conventional instruments, such as headquarters agreements, and not on alleged customary international law.[54] Italy belongs to those countries the courts of which review an organization's acts in light of human rights law as enshrined in domestic law, rather than international human rights instruments. Also within this category are courts that are largely deferring to the organizations, as well as courts that are willing to pass judgment on the quality of the organization's internal complaint procedures. In Italy, the interpretation given to the relevant constitutional provision regarding the right to a remedy (Article 24 of the Italian Constitution) is very similar to the approach adopted by the European Court of Human Rights.[55] In its long-standing jurisprudence limiting the jurisdictional immunity of international organizations along the lines of a restrictive State immunity concept, the Italian courts sometimes have been expressly mindful of the constitutional law requirement, laid down in Article 24 of the Italian Constitution, "that the legitimate interests of citizens should be afforded judicial protection."[56]

77. In conclusion, it was and remains incumbent upon the Global Mechanism, *casu quo* the Conference of the Parties, as the employer of the Complainant to provide her with adequate means for dealing with any claims arising from the non-renewal of her fixed-term contract. Failure of the Global Mechanism, *casu quo* the Conference of the Parties, to do so would clear the path for the Italian courts to entertain her claims against her employer.

D. Providing the requested Opinion will not violate the principle of the equality of parties

78. The Fund is aware of the fact that in the *Unesco* Case the Court itself and several of its Members through their individual opinions expressed concerns about the ability of the Court to respect the principle of the equality of parties under the procedure foreseen in Article XII of the ILOAT Statute. In particular, they were concerned about the fact that, whereas under the Court's Statute only States and

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[54] As discussed in https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP143e.pdf in reference to: ILDC 3718 (IT 2007); ILDC 297 (IT 2005), H4 (refusing to uphold a general customary international law rule of *par in parem non habet imperium/jurisdictionem*, as exists in the law of State immunity).

[55] An older line of cases relying on the *iure imperii/iure gestionis* distinction to determine the scope of jurisdictional immunity of international organizations, such as *Branno* v. *Ministry of War*, Corte di Cassatione, Riv. dir. int. (1955), 352, 22 ILR 756; *Porru* v. *FAO*, 25 June 1969, Rome Court of First Instance (Labor Section), [1969] UNJYB 238; *FAO* v. *INPDAI,* Supreme Court of Cassation, 18 October 1982, [1982] UNJYB 234, was abandoned in *FAO* v. *Colagrossi*, Corte di Cassazione, 18 May 1992, No. 5942, 75 RivDI (1992), p. 407, where the Italian Supreme Court recognized the absolute immunity from suit of the defendant international organization.

[56] *FAO v. INPDAI*, Supreme Court of Cassation, 18 October 1982, *UN Juridical Year Book* (1982), pp. 234-235.

international organizations can participate in proceedings before the Court, individual complainants having obtained ILOAT judgments lack that right.

79. This concern might be warranted if the procedure established by Article XII is construed as an appeal properly so-called by a party to a dispute submitted to the Tribunal. Indeed, in the *Unesco* Case there was no reason for the Court to consider another dimension of Article XII of the Tribunal's Statute, one that is highlighted by the present case: if the Article XII procedure is construed as a procedure established to preserve a matter of general interest, the concerns regarding the equality of parties become less of an issue. Evidence of the fact that the Article XII procedure should not merely be regarded as an ordinary appeal by a party to an ILOAT case can be found in the requirement that the Executive Board of the organization having accepted the ILOAT's jurisdiction, rather than the organization's chief administrative officer, is the designated body to decide to refer the case to the Court. This requirement stems from the fact that recognition of the Tribunal's jurisdiction is a matter pertaining to the external relations of the organization concerned, more specifically, the understanding concerning the Tribunal's jurisdiction between the recognizing organization, on the one hand, and the International Labour Organization, on the other. By recognizing the jurisdiction of the Tribunal, a recognizing organization accepts that a subsidiary body of the International Labour Organization adopts decisions that are binding for the former in the cases narrowly defined in Article II of the ILOAT Statute and in accordance with the procedures set forth therein. In this sense, the purpose of Article XII is also to provide the recognizing organization with a means to ensure that the conditions under which it has accepted to be subject to the decisions of a subsidiary body of the International Labour Organization (i.e., those stated in Article II of the ILOAT Statute) are respected in each case.

80. In this context it is recalled that by its letter dated 4 October 1988, the Fund invited the Governing Body of the International Labour Office to approve the Fund's declaration of recognition of the Tribunal's jurisdiction and acceptance of its Rules of Procedure with effect from 1 January 1989. The Governing Body of the International Labour Office approved the Fund's declaration at its 241st session on 18 November 1988.[57] These two acts taken together constitute a consensual arrangement whereby the Fund is permitted to use the Tribunal's services and accepts its decisions as binding subject to Article XII of the Tribunal's Statute. In this sense the declaration whereby the recognizing organization accepts the Tribunal's jurisdiction is different from an Optional Clause declaration whereby a

[57] These documents are included under Tabs II(1) and II(2) of the dossier that has been provided to the Court.

State accepts the compulsory jurisdiction of the Court, the latter declaration requiring no approval by the Court or the United Nations.

81. The Tribunal itself has confirmed the foregoing characterization in one of its decisions:

> "5. According to Article II(5) of its Statute it is competent to hear a complaint only if the international organisation that employs the complainant has addressed to the Director-General of the International Labour Office a declaration of recognition in accordance with its Constitution or internal administrative rules and if the Governing Body of the International Labour Office has approved the declaration."[58]

82. The need of organizations having recognized the Tribunal's jurisdiction for the special recourse provided under Article XII of its Statute is highlighted by the present case. By virtue of Judgment No. 2867, the Fund is confronted with the following situation:

(i) The Fund has been ordered by the Tribunal to pay monetary and other damages to an individual who was not at any time an official of the Fund nor performed any functions of the Fund;

(ii) The Fund has been held liable for alleged faults in the decision-making by an international entity that is separate from the Fund;

(iii) The Fund has been held liable for alleged breaches of rules and instruments that do not pertain to "the terms of appointment" of any of its officials nor to "the Staff Regulations" of the Fund, as such terms are employed in Article II, paragraph 5, of the ILOAT Statute;

(iv) By its generic statement, in Consideration 11 of Judgment No. 2867, that "the personnel of the Global Mechanism are staff members of the Fund," the Tribunal has placed at least 22 other individuals in a similar situation as the Complainant, even though such individuals are employed by and perform work for an entity that is separate from the Fund.

83. In the present case, acts of another entity have been attributed to the Fund in disregard of the rules of international law concerning the attribution of conduct to international organizations. Accordingly, the procedure foreseen in Article XII serves as a mechanism to determine whether a specific decision by the Tribunal is in accordance with the agreement between the recognizing organization and the International Labour Organization. Given that they are third parties to that

[58] ILOAT Judgment No. 1033 of 26 June 1990.

agreement, it is understandable why no direct role is assigned to individual complainants in Article XII proceedings.

E. The Fund's Request raises issues never before presented to or addressed by the Court

84. The present case differs both procedurally and substantively from the *Unesco* Case, the only previous proceeding brought before the Court pursuant to Article XII of the ILOAT Statute.[59] From the procedural perspective, in stark contrast to the present case, no preliminary question of the Tribunal's competence was raised or featured in the *Unesco* Case: Unesco did not object to the Tribunal's jurisdiction before the Tribunal. As the record before the Tribunal shows, IFAD informed the Tribunal at the outset of the proceedings of its jurisdictional objections and put the Tribunal on notice that any decision confirming its jurisdiction notwithstanding the Fund's objections would trigger the procedure foreseen in Article XII of the ILOAT Statute.[60] For this reason, it is surprising that, in contrast to the Tribunal's Judgment of 26 April 1955 that was challenged in the *Unesco* Case, Judgment No. 2867 does not include a distinct decision "On Competence" in the *dispositif* or elsewhere. Notwithstanding this difference in formality, as explained above, Judgment No. 2867 does incorporate decisions pertaining to the Tribunal's competence and jurisdiction and which underlie the Tribunal's ultimate findings of liability against the Fund in the *dispositif*.

85. Substantively, the present case also differs sharply from the *Unesco* Case. The *Unesco* Case did not raise any question concerning the relationship between the employee of a housed entity and the housing organization, a question that is squarely at the center of the present case. Indeed, while the *Unesco* Case did not feature any extraneous aspects whatsoever, such aspects define the present case. Identifying the actual employer of the complainant-employee was not an issue in the *Unesco* Case, which was limited to dealings between the Director-General of Unesco and the complainants-employees of Unesco, whereas this question lies at the heart of the present case and is decisive for the Tribunal's jurisdiction, both *ratione personae* and *ratione materiae*. In the *Unesco* Case, the complainants submitted an appeal to the Unesco Appeals Board following an unsuccessful application to the Director-General of Unesco to reconsider his decision not to renew their fixed-term contracts, whereas in the present case the Complainant submitted an appeal to IFAD's Joint Appeals Board asking that the decision *of the Managing Director of the Global Mechanism* be rescinded—in other words, neither

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[59] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77.

[60] Reply of the Fund, para. 30.

the Fund nor its President were involved in any way. It was only after he rejected the Joint Appeals Board's recommendation that the IFAD President entered the stage—not in his capacity as IFAD President, but in his special capacity under the Memorandum of Understanding between the Conference of the Parties and the Fund.

86. In contrast to the *Unesco* Case, the Tribunal's decision in the instant case is not based on "the terms of appointment of officials and of provisions of the Staff Regulations" of the defendant-organization, as such terms are employed in Article II, paragraph 5, of the ILOAT Statute, but instead relied exclusively on (i) an international agreement, in the form of a memorandum of understanding between two international institutions, which does not belong to the employment relationship, or at least is one from which the complainant cannot derive any rights; and (ii) decisions concerning the non-extension of a fixed-term contract that are taken, not by the defendant-organization, but by a third organization which, while employing the complainant, was absent from the proceedings before the Tribunal. As a consequence, the present case raises questions which the Court was called upon to address neither in the *Unesco* Case nor in any previous case. They include in particular: (i) Can an international organization which houses an entity that is separate from it incur liability for the employment decisions of the housed entity?; (ii) What are the applicable criteria for attributing conduct of the housed entity to the housing organization?; and (iii) Based on the answers to the foregoing questions, how is one to delimit the ILOAT's jurisdiction in cases involving organizations housed by other organizations and assess the ILOAT's procedure followed in such cases?

F. Conclusion

87. For the reasons set out above, the Court is competent to give a binding Opinion in this case on the basis that the Fund is competent to request such an Opinion from the Court on the subject-matter of the request, and there are no compelling reasons preventing the Court from giving its Opinion on the questions submitted by the Fund.

Part Two

THE LAW – THE QUESTIONS IN THE REQUEST FOR AN ADVISORY OPINION

Chapter 4. QUESTION I

88. The first question put to the Court by the Fund in the present proceedings reads as follows:

> "I. Was the ILOAT competent, under Article II of its Statute, to hear the complaint introduced against the International Fund for Agricultural Development (hereby the Fund) on 8 July 2008 by Ms A.T.S.G., an individual who was a member of the staff of the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (hereby the Convention) for which the Fund acts merely as housing organization?"

89. The Fund submits that this question should be answered in the negative. The Tribunal lacked jurisdiction, both *ratione personae* and *ratione materiae*, to entertain the complaint in its entirety against IFAD, and the Tribunal's decisions to entertain the complaint as submitted and argued by the Complainant constitute a fundamental fault in the procedure followed.

90. Answering Question I as proposed by the Fund is not only dictated by the Tribunal's Statute when viewed against the wording of the complaint introduced against the Fund, it also is in accord with the Tribunal's own jurisprudence, in particular its Judgment No. 1033 of 26 June 1996.

A. Lack of jurisdiction *ratione personae*: The Complainant was not an official of the Fund at the relevant time

91. If the Complainant was not an official of the Fund, the Tribunal according to its own admission was prevented from hearing her complaint on that basis alone.[61] According to Article II, paragraph 5, of the Tribunal's Statute, the Tribunal's jurisdiction *ratione personae* is limited to "officials … of any other intergovernmental international organization" having made a declaration accepting the Tribunal's jurisdiction, which in this case must mean the Fund — the Conference of the Parties, which the Tribunal acknowledged "is the Convention's supreme body [that] established the Global Mechanism," has not made such a declaration and has, therefore, not accepted the Tribunal's jurisdiction according to the terms of Article II, paragraph 5, of the Tribunal's Statute.[62] Article II,

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[61] See ILOAT Judgment No. 2867, Consideration 9 (first sentence).

[62] See ibid, para. A. Elsewhere, the Tribunal states that the "Global Mechanism was established by the United Nations Convention to Combat Desertification in Those Countries Experiencing Severe Drought and/or Desertification, Particularly in Africa." Ibid. para. 2.

paragraph 6, of the ILOAT Statute confirms that only an "official" of the declaring organization has standing to complain before the Tribunal.[63] In connection with questions of non-renewal of fixed-term contracts, the Court has said that what is relevant is whether "at the time when the question of renewal arises the interested person is an official of the Organization and not a stranger to it."[64] In its Judgment No. 2918 dated 8 July 2010, the Tribunal held with regard to Article II, paragraph 5, of its Statute that: "[T]he consequence of that provision is that the Tribunal may hear the two complaints only if the complainant was, at the relevant times, an official of the [defendant-organization] and the [defendant-organization] has recognised the jurisdiction of the Tribunal."

92. Pursuant to the second sentence of Article I of the Memorandum of Understanding between the Fund and the Conference of the Parties, the Fund, as the housing institution, supports the Global Mechanism in performing these functions in the framework of its mandate "and policies of the Fund". One form of support provided by the Fund is providing assistance to the Global Mechanism in connection with its staffing. The Fund provides these services by acting as an agent for engaging and releasing staff of the Global Mechanism and by allowing the Global Mechanism to use (part) of the Fund's rules and policies as the framework for the employment of the staff of the Global Mechanism.[65] Thus, contrary to what is stated by the Tribunal in Consideration 10 of its Judgment No. 2867,[66] the authority to determine the conditions of employment on behalf of the Global Mechanism derives from Article I, second sentence, of the Memorandum of Understanding.

93. The Tribunal rightly observed that the Fund's "argument that the complainant was not a staff member of the Fund […], if correct, would mean that the Tribunal has no jurisdiction to entertain the complaint."[67] If the Tribunal's finding on this key jurisdictional issue were to be correct, which the Fund submits is not the case, it would merely mean that the Complainant had the right in principle to complain against the Fund before the Tribunal, but it would leave unaffected the question of the Tribunal's jurisdiction *ratione materiae*, discussed separately below.

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[63] Statute, Art. II(6): "The Tribunal shall be open: (a) to the official …."

[64] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 93 (emphasis added).

[65] It is to be noted that unlike the practice of the WHO with regard to the institutions that it hosts, the Fund's policy is not to give the status of IFAD staff members to the personnel employed at such hosted institutions. For cases involving personnel assigned by the WHO to work for its hosted entities, see ILOAT Judgments Nos. 2497 (2006) and 2310 (2004).

[66] "…the MOU confers no power on the President to determine the conditions of appointment of the personnel of the Global Mechanism and, thus, the President has authority to do so only if they are staff members of the Fund."

[67] ILOAT Judgment No. 2867, Consideration 9.

94. The Tribunal is not the only international administrative tribunal which has had to deal with the issue of separateness of entities in determining jurisdiction in specific cases. The path followed by the Tribunal in this case is fundamentally different from the approach adopted in the decisions of other administrative tribunals, and even in some decisions of the Tribunal itself.

95. The *Black* Case, decided by the Administrative Tribunal of the Organization of American States ("OASAT")[68] is a case in point. Compared to Judgment No. 2867, the difference in outcomes is remarkable. Black filed a complaint before the OASAT claiming that the Inter-American Institute for Cooperation on Agriculture (IICA) had violated certain contractual rights by not paying him a tax reimbursement in relation to a lump sum retirement distribution that he received from the IICA. Mr. Black was employed by the OAS from September 1980 through October 1987, and participated in the OAS retirement and pension system during this period. He then left his job at the OAS to take a position with the IICA, which lasted until he retired in December 1995. While working at the IICA, Mr. Black continued his participation in the OAS retirement plan, since the IICA made use of this system for its own employees. In 1991 the OAS paid over to the IICA the full amount that it calculated was owed to Mr. Black as a tax reimbursement for his period of employment with that organization, to be held in trust for future payment. When Mr. Black retired at the end of 1996, he requested and received a lump sum retirement payment for all the amounts due him from his participation in the joint retirement system during his OAS and IICA employment. However, he received a tax reimbursement only for the OAS portion of the lump sum payment paid to the IICA in trust in 1991. Tax reimbursement for the IICA portion was not made to the complainant on the grounds that the operable agreements on tax reimbursements between the IICA and the U.S. government did not permit such payments. Mr. Black therefore tried to establish that the OAS and IICA are not separate entities so that he could benefit from the tax reimbursement. As in the present case, it was necessary for the OASAT to determine the question of separateness. It held as follows in this regard:

> "13. Complainant cites a variety of ways that IICA and OAS are linked as evidence that they are not independent entities, and that his employment at IICA was therefore merely an extension of his employment at OAS, thus providing an alternative basis for establishing his status as a 'pre-1984' employee under the terms of the TRA.

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[68] OASAT Judgment No. 137 of 9 May 1997, text available online: http://www.oas.org/tribadm/catalog_test/english/hist_97/137.doc

14. Under well-established principles of international law relating to institutional status and agency, the independent or subsidiary status of an entity is determined by such factors as the legal framework for the organizations, the nature of how the organizations are directed and their policies established, and how financial obligations and expenditures are handled. Of special significance is the question whether the organization in question has a specific and separately identified juridical personality. As the material presented by the Respondent suggests, they have different constituting charters, different leadership and organizational structures, different finances, different policy-making mechanisms and different juridical personalities. They operate separately in their contacts and arrangements with constituent governments. All these facts point to the conclusion that IICA and the OAS are two entirely separate organizations.

15. The fact that these two organizations share some project activities and office space, make use (by agreement) of the same retirement system, and use common mechanisms (such as this Tribunal) to help carry out their functions, does not detract from their essential independence as separate entities.

16. As independent organizations, there is no basis for the claim that employment at IICA establishes continuity with the OAS employment period that began in 1980, so as to place the Complainant in the status of a pre-1984 employee."

96. The issue of separateness and its consequences for the jurisdiction of an international administrative tribunal has also been addressed by the International Monetary Fund Administrative Tribunal (IMFAT) in a case where a staff member attempted to impute certain acts of the staff association on the organization in an effort to establish that tribunal's jurisdiction. In declining to assume jurisdiction over that conduct, the IMFAT explained why the association that might exist between two entities does not mean that they must be treated as one for the purpose of its jurisdiction:

"113. Furthermore, it is clear from the Staff Association's constitutive documents and from its actual work that it acts independently of the Fund. While it may sometimes function in an advisory role to management, its primary purpose is to act as representative of staff (vs. management) interests. There is nothing in the circumstances of this case to suggest that its purpose was otherwise here. Indeed, even Applicant alleges that if the SAC made

> available to staff members copies of the SBF Report it did so 'in furtherance of its goals', not the goals of the International Monetary Fund. If the SAC Chairman regarded it as within the scope of his responsibilities as representative of staff interests to make the Report available to members of the staff at large, it would be difficult to treat such an act as a 'decision taken in the administration of the staff of the Fund' within the meaning of Article II of the Tribunal's Statute.
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> 114. Accordingly, the Administrative Tribunal concludes that, whatever complaint or remedy Applicant may or may not have against the Staff Association Committee for its actions with respect to the 1996 SBF Report, that complaint or remedy cannot be pursued in the Administrative Tribunal. Nor may the Administrative Tribunal entertain as part of Applicant's complaint against the Fund (for breach of the Retirement Agreement and violation of GAO No. 35) all of the alleged consequences of the Fund's circulation of the 1996 SBF Report, including the handling of the Report by the SAC after it reached its offices. Such an extension of the Tribunal's jurisdiction to acts taken by the SAC would be inconsistent with the statutory limitation on the Tribunal's jurisdiction to consideration of 'decision[s] taken in the administration of the staff of the Fund'. Hence, Applicant's allegation that the Fund is liable for acts of the Staff Association Committee in handling the 1996 SBF Report is not within the Tribunal's jurisdiction *ratione materiæ*."[69]

97. As will be explained further in the following paragraphs, there is no reason why the foregoing approach should not be followed in the present case. The present case involves two entities, each of which has its own constituent instrument. As these instruments demonstrate, each entity has its own governance and organizational structure, its own budget and financing practices, and its own policy-making mechanism. These entities operate separately in their contacts and arrangements with constituent governments. As the Complainant and the Fund expressly agreed before the Tribunal, the entities involved in this case are separate legal entities. To use the words employed by the tribunal in the *Black* Case, "[t]he fact that [the Fund and the Global Mechanism] share […] office space, make use (by agreement) of the same retirement system […], does not detract from their essential independence as separate entities."

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[69] IMFAT Judgment No. 1999-2 (*Mr. "V" v. IMF*) (13 August 1999), text available online: http://www.imf.org/external/imfat/pdf/j1999_2.pdf

98. As a matter of fact, the issue of separateness is not new to the Tribunal itself. In *Pelletier*, UNESCO successfully argued that the complainant had never been an official of UNESCO, nor had been in its service in any capacity, and that the Co-ordination Committee for International Voluntary Work Camps, a non-governmental international organisation which maintains relations with UNESCO and which receives a subvention from it in return for the execution of specified work undertaken on the basis of specific contracts, is distinct from and independent of UNESCO and is not an emanation of it, and that consequently, under article II, paragraph 5, of its Statute, the Tribunal was not competent to deal with the complainant's request.[70]

99. It is to be noted that in a case similar to the present one, the Tribunal decided that the mere fact that an organization is housed by another organization, and the fact that the latter's staff rules are applied *mutatis mutandis* to the personnel of the former, does not by itself render the Tribunal competent *ratione personae*. This case is of utmost importance because the Tribunal ruled against the housing organization's own assertion that personnel of the housed entity was its staff and that the Tribunal was competent on that basis. The case concerned a complainant who was an official of the International Union for the Protection of New Varieties of Plants (UPOV). The Union was set up under an international Convention of 2 December 1961, which was revised on 10 November 1972 and again on 23 October 1978. It has its headquarters in Geneva. The complainant submitted that the Tribunal was competent by virtue of an Agreement which UPOV had concluded with the World Intellectual Property Organization (WIPO) on 26 November 1982. The complainant maintained that WIPO's own recognition of the Tribunal's competence extends to UPOV, his employer. He pointed out that, according to Article 1(1) of the Agreement, "WIPO shall satisfy the requirements of UPOV as regards ... (ii) personnel administration, as far as the staff of the Office of UPOV is concerned"; that under Article 8(1) of the Agreement, the Staff Regulations and Staff Rules of WIPO shall apply *mutatis mutandis* to staff of the Office of UPOV; and that Article 11.2 of the Staff Regulations allows for appeal to the Tribunal. Under Article 4(1) of the Agreement, the Secretary-General of UPOV is also the Director-General of WIPO. In answer to a question from the President of the Tribunal, the Director-General replied that he endorsed the complainant's submissions regarding the Tribunal's competence. He took the view that, by virtue of Article 8 of the Agreement, the staff of UPOV are assimilated to WIPO staff and that the remedies prescribed in the WIPO Staff Regulations are available to UPOV staff as well. The Director-General added that WIPO's contribution to the costs of the Tribunal's secretariat is reckoned on the strength of a number of staff that

[70] ILOAT Judgment No. 68 of 11 September 1964.

includes UPOV officials. Still, the Tribunal declined jurisdiction *proprio motu* on the following grounds:

> "5. According to Article II(5) of its Statute it is competent to hear a complaint only if the international organisation that employs the complainant has addressed to the Director-General of the International Labour Office a declaration of recognition in accordance with its Constitution or internal administrative rules and if the Governing Body of the International Labour Office has approved the declaration.
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> 6. Under Article 24 of the Paris Convention of 1961, as amended, UPOV has legal personality of its own and the administrative arrangements provided for in its Agreement with WIPO do not impair its distinct identity. The reasons why the complainant may not appeal are that even though the WIPO Staff Regulations and Staff Rules apply to him as an employee of UPOV he is not an official of WIPO, and the organisation that does employ him has not recognised the Tribunal's jurisdiction under Article II(5).
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> 7. The conclusion is that the Tribunal is not competent to hear the complaint."[71]

100. Contrary to its aforementioned decision in Judgment No. 1033, the Tribunal concluded in Judgment No. 2867 that the "written offers [received by the complainant] and their subsequent acceptance clearly constituted the complainant a staff member of the Fund."[72] It is true that the offer and extension letters in the case of the Complainant were all issued on IFAD letterhead by IFAD officials and all of them refer to an "appointment with the International Fund for Agricultural Development."[73] The initial offer letter dated 1 March 2000, which was signed by the Director of the Fund's Personnel Division, also stated that the Complainant's "employment may be terminated by IFAD" and that she "will be required to give written notice of at least one month to IFAD" should she wish to terminate her employment during the probationary period.[74] While the two extension letters are

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[71] ILOAT Judgment No. 1033 of 26 June 1990 (Considerations 5-7).

[72] ILOAT Judgment No. 2867, Consideration 9.

[73] See IFAD's Reply, Attachments D, E and F.

[74] See ibid., Attachment D.

silent on termination and resignation, both state that "[a]ll other conditions of employment will remain unchanged."[75]

101. It should be pointed out, however, that the 1 March 2000 contract also stated as follows: "The *position* you are being offered is that of Programme Officer *in the Global Mechanism of the Convention to Combat Desertification*, Office of the President (OP), in which capacity you would be *responsible to the Managing Director of the Global Mechanism*" (emphasis added).[76] The extension letters contain identical references to the stipulation that "duties and responsibilities will continue to be those of Programme Manager, Latin America Region P-4, in the Global Mechanism to Combat Desertification."[77] Throughout her employment with the Global Mechanism, the Complainant was never charged with performing any of the functions of the Fund, nor had she been employed by the Fund or performed functions for the Fund prior to being employed by the Global Mechanism. It is undisputed that the Complainant performed functions exclusively for the Global Mechanism, and not the Fund. The Complainant was never involved in any lending operation of the Fund, directly or indirectly.

102. Based on the wording of the original contract and the extension letters, it is perhaps understandable at first sight why the Tribunal, when viewing the offer and extension letters in isolation, considered "the complainant a staff member of the Fund"[78] on a *prima facie* basis. But the Tribunal was not justified in ending its inquiry there. The Court's practice in Article XII proceedings indicates that the contract must not be examined in isolation in the context of a challenge based on jurisdiction.[79] As evidenced by the *Black* and *Pelletier* Cases and ILOAT Judgment No. 1033 discussed above, the fact that two separate entities are involved in a matter to be adjudicated demands that the adjudicatory body look beyond the "letterheads" and other indicia in order to ascertain who the actual employer is. In such circumstances it also is necessary to examine whether the person actually performed any work for the institution against which a complaint is introduced before the Tribunal. The Tribunal inexplicably failed to do so in the instant case. Moreover, as a leading treatise has explained, the law to be applied by the international administrative tribunals "generally comprises the terms of the particular contract in question *and the relevant Staff Regulations, Staff Rules and*

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[75] See ibid., Attachments E and F.

[76] See IFAD's Reply, para. 10 and Attachment D.

[77] See ibid., Attachments E and F.

[78] ILOAT Judgment No. 2867, Consideration 9.

[79] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 90-91.

Administrative Instructions," which "texts may also be supplemented, in certain circumstances, by the practice of the organisation concerned."[80]

103. In this connection, it must be pointed out that the initial offer letter also stated that "[t]he appointment will be made in accordance with the general provisions of the IFAD Personnel Policies Manual (Attachment I) and any amendments thereto, with such Administrative Instructions as may be issued from time to time regarding the application of the Manual, and with the terms and conditions specified in this letter of appointment and its attachments."[81] In 2004, the President of IFAD decided to refine and clarify the legal position of the personnel working for the Global Mechanism, underscoring the pivotal role of the issue of separateness in determining who the actual employer is. This is set out in President's Bulletin No. PB/04/01 of 21 January 2004. Based on the wording, which was incorporated by reference in the extension letters, in accepting the position in the Global Mechanism offered to her by the most recent appointment offer letter of 5 March 2004, the Complainant also accepted the terms of the IFAD President's Bulletin No. PB/04/01 of 21 January 2004. That document was in effect at the time that she accepted the 5 March 2004 offer to extend her appointment. There is no record of her rejecting those terms at the time of her acceptance, which occurred on 8 March 2004. The Complainant accepted the extension offers in each case "under the terms and conditions set forth in" the appointment letters.[82]

104. The initial offer letter referred to the appointment being made in accordance with "Administrative Instructions as may be issued from time to time regarding the application of the Manual," while each of the extension letters stated that the "appointment will continue to be governed by the Personnel Policies Manual, together with the provisions of the Human Resources Handbook regarding the application of the Manual."[83] As regards the application of IFAD Staff Regulations to the Complainant, Paragraph 2, last sentence, of the President's Bulletin No. PB/04/01 of 21 January 2004 states explicitly that it purports to clarify the existing relationship of IFAD with the Global Mechanism. According to paragraph 10 of the Bulletin, the application of IFAD's Human Resources Procedures Manual ("HRPM") to Global Mechanism personnel is subject to the limitations and conditions spelled out in paragraph 11 of the Bulletin. According to paragraph 11(c), "IFAD's rules and regulations on the provision of career contracts for fixed-term staff shall not

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[80] P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001), p. 424 (emphasis added).

[81] See IFAD's Reply, Attachment D.

[82] See ibid., Attachments E and F.

[83] See ibid.

apply to the staff of the Global Mechanism, except for those that have already received a career contract as a result of their earlier employment with IFAD." This stipulation makes clear that while Global Mechanism staff are not IFAD staff, some of IFAD's rules and regulations apply *mutatis mutandis* to Global Mechanism staff. It is beyond doubt that the Complainant was not among "those that have already received a career contract as a result of their earlier employment with IFAD."

105. Paragraph 11(f) of the President's Bulletin clearly identifies "IFAD and Global Mechanism" as "two entities." By referring to "IFAD and Global Mechanism staff" in combination with "the two entities," the Bulletin leaves no doubt about the fact that IFAD staff are separate from Global Mechanism staff and are, therefore, not to be assimilated for purposes of Article II, paragraph 5, of the Tribunal's Statute.

106. Given that the record before the Tribunal shows unequivocally that it was undisputed between the two parties that (i) IFAD and the Global Mechanism are separate legal entities;[84] (ii) the Complainant belonged to the staff of the Global Mechanism when she was informed of the impugned decision of the Managing Director of the Global Mechanism; and (iii) the Complainant had up until that time performed work exclusively for the Global Mechanism, the Tribunal could not have concluded, even on a *prima facie* basis, that it had jurisdiction under Article II, paragraph 5, of its Statute to hear the complaint as introduced against the Fund.

107. Leaving aside the offer/extension letters, the facts belie the Complainant's assertion before the Tribunal that she "was employed only by IFAD."[85] The evidence submitted by the Complainant to the Tribunal shows her as being listed among the staff of the Global Mechanism.[86] It is undisputed that the Complainant performed functions exclusively for the Global Mechanism, and not the Fund. As stated above, the Complainant admitted under the heading "Separate legal entities" in her Rejoinder filed with the Tribunal that she had "no reason to dispute the separateness of IFAD and the Global Mechanism."[87] The Complainant conceded in her complaint submitted to the Tribunal that "IFAD preferred to treat her as a Global Mechanism problem, not an IFAD obligation."[88] The Complaint even included evidence stating that "while '*FH (IFAD's Personnel Division) feels it*

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[84] See Complainant's Rejoinder, para. 5: "The complainant has no reason to dispute the separateness of IFAD and the Global Mechanism." This one-sentence paragraph is made under the heading "Separate legal entities." In other words, as stated above, the Complainant accepted that IFAD and the Global Mechanism are separate legal entities.

[85] Rejoinder, para. 34.

[86] See Complaint, Attachment 14.

[87] Rejoinder, para. 5.

[88] Complaint, para. 27.

can provide administrative support to GM staff it does not consider them the staff of IFAD.'"[89]

108. If the Complainant was listed among the staff of the Global Mechanism in official documentation and if the Global Mechanism is an entity that is legally separate from IFAD, as both parties expressly agreed before the Tribunal, the Complainant is squarely placed outside the Tribunal's jurisdiction *ratione personae* under Article II, paragraph 5, of the Statute, unless she is also a Fund official at the relevant time, *quod non*.

109. According to the Court, "[t]he question of the renewal of a fixed-term contract arises for one who is at the time a staff member of [the defendant-organization]."[90] Thus, the Complainant must have been an official of the Fund on 15 March 2006. On that date, she was a staff member of the Global Mechanism.

110. The express reference to the Fund's staff regulations and rules, as well as to any amendments thereto, in the Complainant's offer and extension letters is a factor that has been taken into account by the Court in determining whether an assertion of unlawful non-renewal of contract was "sufficiently well-founded to establish the competence of the Administrative Tribunal."[91] In an earlier case concerning the Tribunal, the Court attached significance not only to the fact that "the contract of employment expressly refers to the Staff Regulations and Rules, as well as any amendments thereto," but also to the fact that "[t]he expression 'terms of appointment,' which is used in the English text of the Statute of the Administrative Tribunal … also appears in the document relating to [complainant's] engagement."[92] While that expression does *not* appear in the offer and extension letters of the Complainant, those letters do refer to "terms and conditions of your present contract"[93] and "conditions of employment."[94]

111. In any event, the Court has stated that it "cannot admit that in order to appreciate the legal situation in the matter it is possible to attach exclusive importance to the

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[89] Ibid. (emphasis in original). IFAD's Reply drew attention to the Complainant's concession on this point. See Reply, para. 26.

[90] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 90.

[91] Ibid., p. 90. See also ibid., pp. 92 ("the Staff Regulations to which the contract expressly refers."), 94 ("the Staff Regulations and Rules to which the contract expressly makes reference and which constitute the legal basis on which the interpretation of the contract must rest.").

[92] Ibid.

[93] IFAD's Reply, Attachment D.

[94] Ibid., Attachments E and F.

letter of the contracts in question"[95] and that "in order to decide on the competence of the Administrative Tribunal, it is necessary to consider these [fixed-term] contracts not only by reference to their letter but also in relation to the actual conditions in which they were entered into and the place which they occupy in the Organization."[96] For this question, the Court has looked to the practice of the defendant-organization, which it considers "a relevant factor in the interpretation of the contracts in question."[97]

112. In sum, considering all the relevant facts, documents and rules, the Tribunal failed to recognize that the Complainant was not an official of the Fund within the meaning of Article 6, paragraph a, of its Statute and that it therefore was not competent to hear the complaint introduced by the Complainant. The Tribunal should have concluded in the same way as it did in its Judgments Nos. 68 and 1033 by declaring itself not competent to entertain the complaint introduced against IFAD.

B. Lack of jurisdiction *ratione personae*: The Global Mechanism and the Conference of the Parties of the UNCCD are separate entities from the Fund

113. Given the wording and the interpretation to be given to Article II, paragraph 5, of the Tribunal's Statute, the only situation under which the Tribunal would be authorized to exercise jurisdiction over acts of the Global Mechanism and/or the Conference of the Parties to the UNCCD or its officials, or may entertain pleas requiring the review of acts of the Global Mechanism or its officials and/or the Agreement Establishing IFAD ("Agreement Establishing IFAD"), is if the foregoing bodies were not separate entities from the Fund, but parts thereof. Therefore, the starting-point for answering the question whether the Tribunal correctly confirmed its jurisdiction to decide over acts of the Global Mechanism or to entertain pleas requiring the review of acts of the Global Mechanism and/or the Conference of the Parties of the UNCCD as separate entities from the Fund, is the consideration of the Fund's legal status under international law, as confirmed in Article 10, Section 1, of the Agreement Establishing IFAD, which states that the Fund possesses international legal personality. The decision to establish the Fund as an independent international organization possessing international legal personality, rather than as a subsidiary body of the United Nations, was carefully considered

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[95] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 90.

[96] Ibid., p. 91.

[97] Ibid.

when IFAD was established[98], upon the recommendation of the Ad Hoc Working Group[99]. The Fund is constituted primarily by the organs and bodies enumerated in the Agreement Establishing IFAD, which are:

- The Governing Council;
- The Executive Board; and
- The President and Staff.

114. Sub-organs of the Governing Council or the Executive Board as well as any subsidiary body – as opposed to separate entities created by the Fund, such as trust funds[100] – also pertain to the corpus of the Fund. Finally, officers and officials appointed or designated under or pursuant to the Agreement Establishing IFAD, such as the Governors, the Chairman of the Governing Council and his or her deputies, the representatives of Member States in the Executive Board when exercising power in or derived from the Agreement Establishing IFAD, pertain to the corpus of the Fund for the purpose of international law, including the law of the international civil service.

115. The foregoing criteria for the delimitation of what comprises the Fund imply that, unless it can be established that either the Global Mechanism and/or the Conference of the Parties are bodies established by the Governing Council or the Executive Board, or that the Managing Director of the Global Mechanism and other employees of the Global Mechanism are staff members of the Fund within the meaning of the Agreement Establishing IFAD, the Tribunal wrongly confirmed its jurisdiction to adjudicate over the acts of the Global Mechanism and/or the Conference of the Parties. For the same reason, one would have to conclude that the Tribunal wrongly decided to entertain pleas that required the review of acts of the Global Mechanism and its officials.

116. It is to be noted that the Conference of the Parties is not enumerated in the Agreement Establishing IFAD as one of the bodies of the Fund, nor has it been established by any of the Fund's organs in the exercise of powers derived from the Agreement Establishing IFAD. In this regard the Court is invited to take note of

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[98] UN WFC Doc. IFAD/CRP.11, 10 November 1975, Report of the Meeting of Interested Countries on the Establishment of the International Fund for agricultural Development, Chapter III (Legal Status of the Fund), paras. 12-21.

[99] UN WFC Doc. IFAD/CRP.1/Annex, October 1975, Report of the Ad Hoc Working Group on the Establishment of the International Fund for agricultural Development, Annex, Draft Articles on the Establishment of the International Fund for agricultural Development

[100] See on the concept of trust funds in international law: J. Gold, Trust funds in international law: the contribution of the International Monetary Fund to a code of principles, *American journal of International Law*, 1978, and I. Bantekas, *Trust Funds Under International Law: Trustee Obligations of the United Nations and International Development Banks* (T.M.C. Asser Press, 2009).

Part IV of the United Nations Convention to Combat Desertification ("Convention" or "UNCCD"), which concerns its institutions. It is clearly stated in Article 22 of the Convention that the Conference of the Parties is established by the Convention:

> "1. A Conference of the Parties is hereby established.
>
> 2. The Conference of the Parties is the supreme body of the Convention. It shall make, within its mandate, the decisions necessary to promote its effective implementation. In particular, it shall:
>
> (a) regularly review the implementation of the Convention and the functioning of its institutional arrangements in the light of the experience gained at the national, subregional, regional and international levels and on the basis of the evolution of scientific and technological knowledge;
>
> (b) promote and facilitate the exchange of information on measures adopted by the Parties, and determine the form and timetable for transmitting the information to be submitted pursuant to article 26, review the reports and make recommendations on them;
>
> (c) establish such subsidiary bodies as are deemed necessary for the implementation of the Convention;
>
> (d) review reports submitted by its subsidiary bodies and provide guidance to them;
>
> (e) agree upon and adopt, by consensus, rules of procedure and financial rules for itself and any subsidiary bodies;
>
> (f) adopt amendments to the Convention pursuant to articles 30 and 31;
>
> (g) approve a programme and budget for its activities, including those of its subsidiary bodies, and undertake necessary arrangements for their financing;
>
> (h) as appropriate, seek the cooperation of, and utilize the services of and information provided by, competent bodies or agencies, whether national or international, intergovernmental or non-governmental;

(i) promote and strengthen the relationship with other relevant conventions while avoiding duplication of effort; and

(j) exercise such other functions as may be necessary for the achievement of the objective of the Convention.

3. The Conference of the Parties shall, at its first session, adopt its own rules of procedure, by consensus, which shall include decision-making procedures for matters not already covered by decision-making procedures stipulated in the Convention. Such procedures may include specified majorities required for the adoption of particular decisions."

117. The Convention was adopted in Paris on 17 June 1994 and opened for signature there on 14-15 October 1994. It entered into force on 26 December 1996, 90 days after the fiftieth ratification was received.

118. Article 22, paragraph 2, of the Convention describes the Conference of the Parties as "the supreme body of the Convention." The Conference of the Parties is the "supreme organ in which all member states are represented."[101] According to the Web site of the Convention, which describes the Conference of the Parties as "the Convention's supreme governing body," the Conference of the Parties comprised 193 States parties to the Convention as at August 2009.[102] Thus, the Conference of the Parties is the principal or plenary organ under the Convention.[103]

119. The Conference of the Parties held its first session in October 1997 in Rome, Italy; the second in December 1998 in Dakar, Senegal; the third in November 1999 in Recife, Brazil; the fourth in December 2000 in Bonn, Germany; and the fifth in October 2001 in Geneva, Switzerland. As of 2001, Conference of the Parties' sessions were held on a biennial basis.

120. Article 22, paragraph 6, of the Convention provides that the Conference of the Parties "shall elect a Bureau" at each ordinary session." Under Article 23, paragraph 1, "[a] Permanent Secretariat is hereby established."

121. According to Article 24, paragraph 1, of the Convention, "[a] Committee on Science and Technology is hereby established as a subsidiary organ of the

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[101] H.G. Schermers and N.M. Blokker, *International Institutional Law*, 4th ed. (Boston/Leiden: Martinus Nijhoff Publishers, 2003), p. 290.

[102] See: "www.unccd.int/convention/menu.php".

[103] C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge University Press, 2005), p. 132; H.G. Schermers and N.M. Blokker, *International Institutional Law*, 4th ed. (Boston/Leiden: Martinus Nijhoff Publishers, 2003), p. 290.

Conference of Parties." Article 22, paragraph 2(c) of the Convention provides that the Conference of the Parties may "establish such subsidiary bodies as are deemed necessary for the implementation of the Convention."

122. With regard to subsidiary organs, Article 22, paragraph 2(d), of the Convention provides that the Conference of the Parties shall "review reports submitted by its subsidiary bodies and provide guidance to them." Similarly, under Section III.A.2 of the Memorandum of Understanding between the Fund and the Conference of the Parties, the Managing Director of the Global Mechanism is to "submit reports to the Conference"[104] and Section III.A.3 states that "[t]he Conference will provide policy and operational guidance" to the Global Mechanism.

123. According to Article 22, paragraph 2(g), of the Convention, the Conference of the Parties shall "approve a programme and budget for its activities, including those of its subsidiary bodies, and undertake necessary arrangements for their financing." Similarly, Section III.A.6 of the Memorandum of Understanding between the Fund and the Conference of the Parties provides that "[t]he Conference will approve the programme of work and budget of the Global Mechanism."

124. As regards the Global Mechanism, it must be noted that this entity is not enumerated in the Agreement Establishing IFAD as one of the bodies of the Fund. Also, the Global Mechanism was not established by any of the organs of the Fund in the exercise of powers derived from the Agreement Establishing IFAD.[105] In fact, the Global Mechanism was established under, and derives its mandate from, Article 21 of the Convention. As far as is relevant for the present purposes, Article 21 of the Convention provides as follows:

> "4. In order to increase the effectiveness and efficiency of existing financial mechanisms, a Global Mechanism to promote actions leading to the mobilization and channelling of substantial financial resources, including for the transfer of technology, on a

[104] Additionally, Section III.B of the Memorandum of Understanding states that "[t]he Managing Director … will submit a report to each ordinary session of the Conference on the activities of the Global Mechanism," which reports "will be submitted to the Executive Secretary of the CCD for circulation to the COP." See also Section 5 ("Reporting to the Conference of the Parties") of the Annex ("Functions of the Global Mechanism") to Decision 24/COP.1, doc. ICCD/COP(1)/11/Add.1.

[105] See for an application of this test, Judgment No. 245 of the United Nations Administrative Tribunal of 25 May 1979 (*Shamsee*), Consideration I: "It is true that the assets of the Fund are separate from the assets of the United Nations, that the Fund is governed by its own regulations, that the United Nations is only one of several organizations participating in the Fund and that the chief executive officer of the Fund is not the Secretary-General of the United Nations but the Secretary of the Staff Pension Board itself. Nevertheless the Staff Pension Fund has been established by the United Nations General Assembly, the Fund exists on the basis of its Regulations which were adopted by the General Assembly, and the Fund is a subsidiary organ of the General Assembly, admittedly of a special type."

grant basis, and/or on concessional or other terms, to affected developing country Parties, is hereby established. This Global Mechanism shall function under the authority and guidance of the Conference of the Parties and be accountable to it.

5. The Conference of the Parties shall identify, at its first ordinary session, an organization to house the Global Mechanism. The Conference of the Parties and the organization it has identified shall agree upon modalities for this Global Mechanism to ensure inter alia that such Mechanism:

(a) identifies and draws up an inventory of relevant bilateral and multilateral cooperation programmes that are available to implement the Convention;

(b) provides advice, on request, to Parties on innovative methods of financing and sources of financial assistance and on improving the coordination of cooperation activities at the national level;

(c) provides interested Parties and relevant intergovernmental and non-governmental organizations with information on available sources of funds and on funding patterns in order to facilitate coordination among them; and

(d) reports to the Conference of the Parties, beginning at its second ordinary session, on its activities.

6. The Conference of the Parties shall, at its first session, make appropriate arrangements with the organization it has identified to house the Global Mechanism for the administrative operations of such Mechanism, drawing to the extent possible on existing budgetary and human resources.

7. The Conference of the Parties shall, at its third ordinary session, review the policies, operational modalities and activities of the Global Mechanism accountable to it pursuant to paragraph 4, taking into account the provisions of article 7. On the basis of this review, it shall consider and take appropriate action."

125. As it appears from Article 21, paragraphs 4-7, of the Convention, which are included in Part III entitled "Action programmes, scientific and technical

cooperation and supporting measures" of the Convention, the Global Mechanism is an integral part of the Convention[106] and is not an organ of the Fund. The Global Mechanism was established directly under the Convention; it was not established under the Agreement Establishing IFAD. It is not suggested anywhere that the Fund was involved in any way in the establishment of the Global Mechanism or in formulating the mandate and functions of the Global Mechanism.

126. It is difficult to accurately place the Global Mechanism in the typical classification of organs under international institutional law. It was created by treaty (i.e., the Convention) and assigned its own mandate[107] and functions.[108] Its functions resemble more closely administrative functions than policy-making functions, such that the Global Mechanism could be said to be an administrative organ. But it also resembles an international secretariat, being composed of independent civil servants. In any event, the Global Mechanism is so closely linked with the Convention and its supreme governing body, the Conference of the Parties, that it must be considered an organ or body of it, and not of the Fund.

127. Whatever its exact status under the Convention and under international institutional law, the Global Mechanism is not, or not also, an organ of IFAD. The Global Mechanism is not one of the organs listed in Article 6, Section 1 ("Structure of the Fund") of the Agreement Establishing IFAD.[109] It also is not a subsidiary organ established by IFAD, given that the Tribunal acknowledged that the Conference of the Parties, IFAD's counterparty to the Memorandum of Underrstanding, "established the Global Mechanism"[110] and that it is "an integral part of the Convention accountable to the Conference."[111] To say that "[t]he Fund and the Global Mechanism are separate legal entities,"[112] as the Fund argued before the Tribunal, does not necessarily trigger the issue of international legal personality. Hence, it is difficult to understand the Tribunal's reference to

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[106] Indeed, the Tribunal itself referred to "[t]he fact that the Global Mechanism is an integral part of the Convention." ILOAT Judgment No. 2867, Consideration 6.

[107] See Article 21, paragraph 4, of the Convention.

[108] See Annex ("Functions of the Global Mechanism") to Decision 24/COP.1, doc. ICCD/COP(1)/11/Add.1.

[109] According to Section 1, entitled "Structure of the Fund," the "Fund shall have: (a) a Governing Council; (b) an Executive Board; (c) a President and such staff as shall be necessary for the Fund to carry out its functions."

[110] ILOAT Judgment No. 2867, para. A. This is actually incorrect, given that the GM was established directly by Article 21, paragraph 4, of the Convention. See also ibid., Consideration 2, where the Tribunal correctly stated that "[t]he Global Mechanism was established by the United Nations Convention to Combat Desertification …."

[111] Ibid., Consideration 5.

[112] Ibid., Consideration 5, first sentence.

"international legal personality" in this context.[113] The Tribunal mistakenly lumped together the issues of legal identity and legal personality. As a Convention body, the Global Mechanism can have its own legal identity and be legally separate from the Fund without having separate legal personality, as that term is understood in international institutional law. It is possible that the Global Mechanism could share in the international legal personality of the international organization to which it belongs.[114]

128. Article 22, paragraph 2(c), of the Convention also states that the Global Mechanism "shall function under the authority and guidance of the Conference of the Parties and be accountable to it."[115] This rule is repeated and reinforced in the Memorandum of Understanding between the Conference of the Parties and the Fund, Section III.A.1 of which states: "The Global Mechanism will function under the authority of the Conference and be fully accountable to the Conference." The word "fully," which does not appear in Article 21, paragraph 4, of the Convention, is especially significant in the context of the separateness issue. Through the words "fully accountable to the Conference" in Section III.A.1, the parties to the Memorandum of Understanding evidently intended to underscore that the Fund was not to be part of the accountability regime in the case of the Global Mechanism.

129. In carrying out its mandate under Article 21, paragraph 4, of the Convention, the Global Mechanism has been assigned certain well-defined functions by the Conference of the Parties in a separate document.[116]

130. The Memorandum of Understanding between the Fund and the Conference of the Parties describes the Global Mechanism as an entity having its own mandate and functions. The first sentence of Section I of the Memorandum of Understanding reads as follows: "In carrying out its mandate, under the authority and guidance of the Conference, the Global Mechanism will, in accordance with paragraph 2 of Decision 24/COP.1 of the Conference, perform the functions described in the

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[113] Ibid., Consideration 6.

[114] C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge University Press, 2005), p. 72.

[115] The Conference of the Parties' document describing the GM's functions also states that "[i]n accordance with the relevant provisions of the Convention, … the global mechanism shall function under the authority and guidance of the Conference of the Parties, including on policies, operational modalities and activities, and be accountable and make regular reports to it." Annex to Decision 24/COP.1, doc. ICCD/COP(1)/11/Add.1.

[116] See Decision 24/COP.1, doc. ICCD/COP(1)/11/Add.1, p. 68 (Annex, entitled "Functions of the Global Mechanism") ("2. Decides also that the Global Mechanism, in carrying out its mandate, under the authority and guidance of the COP, should perform the functions described in the annex to this decision.").

Annex to that Decision" (emphasis added). Significantly, this sentence contains no reference whatsoever to the Fund and underscores that the Global Mechanism's functions are derived from a decision of the Conference of the Parties, and not from the Agreement Establishing IFAD or any other IFAD document.

131. As is clear from the decision of the Conference of the Parties adopted pursuant to Article 21, paragraph 6 of the Convention, the role of the Fund is restricted to housing the Global Mechanism in accordance with the terms of that decision:

> "Decision 24/COP.1
>
> Organization to house the Global Mechanism and agreement on its modalities
>
> The Conference of the Parties,
>
> Recalling that the Conference of the Parties (COP), in accordance with article 21, paragraphs 5 and 6, of the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, shall:
>
> (a) identify, at its first ordinary session an organization to house the Global Mechanism established under article 21, paragraph 4, of the Convention;
>
> (b) agree with the organization it has identified upon the modalities for the Global Mechanism; and
>
> (c) make, at its first session, appropriate arrangements with the organization it has identified to house the Global Mechanism for the administrative operations of such Mechanism, drawing to the extent possible on existing budgetary and human resources,
>
> Having examined the recommendations of the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (INCD) regarding the functions of the Global Mechanism, and the criteria for selecting an institution to house it, as reflected in Appendix I of document ICCD/COP(1)/5 and in paragraphs 1 and 2 of the Committee's decision 10/3, taken at the first part of its tenth session, with the amendment contained in document ICCD/COP(1)/5/Add.1,
>
> Recalling decision 10/18 of the INCD, taken at its resumed tenth session, which, inter alia:

(a) requests the COP at its first session to consider the offers of the International Fund for Agricultural Development (IFAD) and the United Nations Development Programme (UNDP), including any suggestions they deem necessary, and to take appropriate action on the matters related to the selection of an institution to house the Global Mechanism; and

(b) requests the Permanent Secretariat of the Convention, in consultation with IFAD and UNDP, to develop proposals on administrative and operational modalities of the Global Mechanism for consideration and adoption by the COP at its first session,

Noting with appreciation the revised offer of IFAD to house the Global Mechanism, contained in Appendix II of document ICCD/COP(1)/5, as supplemented by document ICCD/COP(1)/CRP.3, prepared in response to operative paragraph 1 of INCD decision 10/18,

Also noting with appreciation the revised offer of UNDP to house the Global Mechanism, contained in Appendix III of document ICCD/COP(1)/5, as supplemented by document ICCD/COP(1)/CRP.2, prepared in response to operative paragraph 1 of INCD decision 10/18,

Noting further document ICCD/COP(1)/5/Add.2/Rev.1, which contains proposals developed by the Permanent Secretariat, in consultation with IFAD and UNDP regarding the administrative and operational modalities of the Global Mechanism,

1. Decides to select IFAD to house the Global Mechanism on the basis of criteria agreed on in Section B of the Annex to INCD decision 10/3;

2. Decides also that the Global Mechanism, in carrying out its mandate, under the authority and guidance of the COP, should perform the functions described in the annex to this decision;

3. Requests the Permanent Secretariat, in consultation with the organization to house the Global Mechanism, as well as the other two collaborating institutions referred to in decision 25/COP.1, to develop a memorandum of understanding between

the COP and appropriate body or organization for consideration and adoption at the second session of the COP;

4. Requests also the Permanent Secretariat and the organization housing the Global Mechanism, in consultation with the two other collaborating institutions, in developing the memorandum of understanding referred to in paragraph 3 above, to take fully into account document ICCD/COP(1)/5 and other related documents, including document CCD/COP(1)/CRP.1, to address, inter alia, the following:

(a) the separate identity of the Global Mechanism within the housing organization;

(b) the measures to be taken to assure full accountability and full reporting to the COP;

(c) the field office support available for Global Mechanism activities;

(d) the administrative infrastructure available to support the Global Mechanism; and

(e) arrangements for the handling of resources made available for Global Mechanism functioning and activities;

5. Further requests the organization housing the Global Mechanism and the Permanent Secretariat to work out appropriate arrangements for liaison and cooperation between the Permanent Secretariat and the Global Mechanism in order to avoid duplication and to enhance the effectiveness of Convention implementation in accordance with their respective roles in implementation;

6. Invites relevant institutions, programmes and bodies of the United Nations system, including the United Nations Food and Agriculture Organization (FAO), the Global Environment Facility (GEF), the United Nations Environment Programme (UNEP) and the World Food Programme (WFP), intergovernmental, regional and sub regional organizations and regional development banks, as well as interested nongovernmental organizations (NGOs) and the private sector, to actively support the activities of the Global Mechanism;

> 7. Urges Governments and all interested organizations, including nongovernmental organizations and the private sector, to make promptly the voluntary contributions necessary to ensure that the Global Mechanism can begin operating on 1 January 1998 on the basis of Section A of Appendix I of document ICCD/COP(1)/5 and continue effective operations on the basis of the memorandum of understanding referred to in paragraph 3 above after its adoption by the second session of the COP;
>
> 8. Reiterates that, in accordance with article 21, paragraph 7 of the Convention, the COP shall, at its third ordinary session, review the policies, operational modalities and activities of the Global Mechanism and, on the basis of this review, shall consider and take appropriate action."

132. As can be seen from paragraph 4(a) of the foregoing decision of the Conference of the Parties, one of the terms for housing the Global Mechanism in the Fund is "the separate identity of the Global Mechanism within the housing organization." In other words, it never was the intention of the Conference of the Parties to legally sever the Global Mechanism from the Convention and to collapse it into the Fund, which is referred to merely as "the housing organization." In this regard it is worth recalling that in its Judgment No. 1033, when dealing with a comparable situation involving the WIPO and the UPOV, the Tribunal held that UPOV "has legal personality of its own and the administrative arrangements provided for in its Agreement with WIPO do not impair its distinct identity."[117]

133. In its Judgment No. 2867, the Tribunal expressly acknowledged that "[t]he argument with respect to the Tribunal's jurisdiction is based, in the main, on the proposition that '[t]he Fund and the Global Mechanism are separate legal entities.'"[118] Through this acknowledgment, the separateness question, including the Tribunal's decision on that question, falls squarely within the scope of Article XII of the Statute of the Tribunal and hence is properly raised in the present proceeding.

134. Having correctly identified the Conference of the Parties as "the supreme body of the Convention", and "not an organ of the Fund," and having accepted the Fund's argument that "the Global Mechanism is an integral part of the Convention

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[117] ILOAT Judgment No. 1033 (Consideration 1033).

[118] ILOAT Judgment No. 2867, Consideration 5, first sentence.

accountable to the Conference,"[119] which the Tribunal acknowledged "established the Global Mechanism,"[120] it is difficult to understand how the Tribunal could still "treat the Global Mechanism as part of the Fund" and conclude that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes" and that the "effect of this is that administrative decisions taken by the Global Mechanism are, in law, decisions of the Fund."[121] If the Conference of the Parties is "not an organ of the Fund" and is the entity to which the Global Mechanism is accountable under Article 21, paragraph 4, of the Convention — indeed, "fully accountable" under Section III.A.1 of the Memorandum of Understanding —, the view that the Global Mechanism is part of the Fund, or that it should be assimilated to the Fund for administrative and legal purposes, is untenable.

135. The object and purpose of the Memorandum of Understanding between the Conference of the Parties and the Fund was "to facilitate the effectiveness of the Global Mechanism in assisting the Parties to implement the Convention"[122] by having the Fund serve as the "housing institution"[123] for the Global Mechanism in support of "the modalities and administrative operations of the Global Mechanism."[124] If the Global Mechanism were "part of the Fund,"[125] there would

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[119] Ibid., Consideration 5.

[120] Ibid., para. A. See also ibid., Consideration 2

[121] Ibid., Consideration 7.

[122] Memorandum of Understanding, Section IV.B. In its decision selecting IFAD to house the Global Mechanism, the Conference of the Parties also referred to the overall goal "to enhance the effectiveness of Convention implementation." Decision 24/COP.1, doc. ICCD/COP(1)/11/Add. 1, p. 68.

[123] Memorandum of Underrstanding, Section I. The Tribunal accepts that the "Global Mechanism is housed by IFAD." ILOAT Judgment No. 2867, para. A. IFAD was selected "to house the Global Mechanism" by the COP's Decision 24/COP.1. See doc. ICCD/COP(1)/11/Add.1 ("1. Decides to select IFAD to house the Global Mechanism ….").

[124] Memorandum of Understanding, title and first paragraph. The Tribunal accepts that the Global Mechanism's "modalities and administrative operations are set out a Memorandum of Understanding … signed between the Conference of the Parties and IFAD on 26 November 1999." ILOAT Judgment No. 2867, para. A. The second sentence of Section I of the Memorandum of Understanding refers to the role assumed by IFAD under the Memorandum of Understanding in the following terms: "As the housing institution, the Fund will support the Global Mechanism in performing these functions [i.e., the functions referred to in the first sentence] in the framework of the mandate and policies of the Fund." The Memorandum of Understanding clearly and repeatedly identifies the Fund as being merely "an organization to house" the Global Mechanism. See, e.g., first recital ("an organization to house"); third recital ("the organization to house"); Section I ("As the housing institution, the Fund …"). The Memorandum of Understanding in multiple places also underlines the purely supporting role that IFAD, and particularly the President of IFAD, assumed under the Memorandum of Understanding. See Memorandum of Understanding, Section III.B *in fine* ("supporting the Global Mechanism"). The Memorandum of Understanding also underscores the fact that IFAD is not the only organization supporting the Global Mechanism. See Memorandum of Understanding, third recital ("the organization to house the Global Mechanism shall, as the lead organization, fully cooperate with the United Nations Development Programme (UNDP) and the World Bank and other relevant international

have been no need for a Memorandum of Understanding between the Conference of the Parties and the Fund. It makes no sense for the Conference of the Parties to enter into an arrangement (Memorandum of Understanding) with an external "organization to house the Global Mechanism"[126] (i.e., IFAD) if the Global Mechanism is not separate from IFAD. Therefore, the Tribunal's findings on the key issue of separateness also go against the object and purpose of the Memorandum of Understanding.

136. The Memorandum of Understanding makes clear that it merely addresses "the modalities and administrative operations" of the Global Mechanism.[127] In other words, it does not deal with the legal position *per se* of the Global Mechanism other than to describe the effects of the housing arrangement for the Global Mechanism and the Fund. As a consequence, one must be careful in drawing any conclusions regarding the Global Mechanism's legal position based on the Memorandum of Understanding alone. But that is essentially what the Tribunal did in Judgment No. 2867 in order to uphold its jurisdiction over the acts of the President of IFAD taken pursuant to his special authority under the Memorandum of Understanding, and over the Fund itself.

137. Having assigned a central place to the words "an organic part of the structure of the Fund" in Section III.A of the Memorandum of Understanding in support of its key finding that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes" and that the "effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund,"[128] it is unclear why the Tribunal did not turn to IFAD's offer document[129] in support of its interpretation of the words used in Section III.A. IFAD's offer document also

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organizations"); Section III.B (referring to "UNDP and the World Bank" as "other relevant organizations … supporting the Global Mechanism."). For purposes of the separateness of IFAD and the Global Mechanism, the juxtaposition between the first and second sentences of Section I of the Memorandum of Understanding is highly significant. Whereas the first sentence refers to the Global Mechanism's mandate and functions in relation to the Conference of the Parties, the second sentence identifies IFAD merely as a "housing institution" in "support" of functions assigned to the Global Mechanism by the Conference of the Parties. IFAD is in no way charged with performing the functions assigned to the Global Mechanism by the Conference of the Parties. Under the Memorandum of Understanding, IFAD merely has pledged its support for those functions, which are extraneous to the functions assigned to IFAD and its President under the Agreement Establishing IFAD.

[125] ILOAT Judgment No. 2867, Consideration 7.

[126] Memorandum of Understanding, Preamble.

[127] Ibid., Title, Preamble.

[128] See ILOAT Judgment No. 2867, Consideration 7.

[129] Appendix II to ICCD/COP(1)/5 (25 June 1997).

refers to the separate mandate and functions of IFAD and the Global Mechanism. It states that "the host must ensure that housing the GM is compatible with its [i.e., the host's] mandate and brings synergetic effects through its own operations and those of the GM."[130] The reference to the Fund's "own operations and those of the GM" underscores the separateness of the two entities. Those words are followed by the following sentence in the offer document: "Thus, while the GM would have a separate identity and would be accountable to the COP, it would nevertheless be an organic part of the structure of IFAD." It is clear that these words in the offer document were the source for Section II.A of the Memorandum of Understanding, which reads: "While the Global Mechanism will have a separate identity within the Fund, it will be an organic part of the structure of the Fund directly under the President of the Fund." The words "directly under the President of the Fund" were added to the text of the Memorandum of Understanding and must be read in light of the object and purpose of the Memorandum of Understanding, which is an arrangement regarding "the modalities and administrative operations of the Global Mechanism." The aspect of accountability, which was referred to in the offer document immediately after the reference to the Global Mechanism's "separate identity," is dealt with separately in the Memorandum of Understanding, namely, in Section III.A. In its decision selecting the Fund to house the Global Mechanism, the Conference of the Parties requested the Permanent Secretariat of the Convention and the Fund in developing the Memorandum of Understanding "to take fully into account … the following:" "(a) the separate identity of the Global Mechanism within the housing organization; (b) the measures to be taken to assure full accountability … to the COP."[131] All of these public documents were available to the Tribunal.

138. It should also be pointed out that the Global Mechanism has its own budget separate from the Fund's. Section II.B of the Memorandum of Understanding, which deals with the "resources of the Global Mechanism," identifies the various sources of the Global Mechanism's budget, each of which has its own account: (a) the "Core Budget Administrative Account," comprising "allocations of the core budget of the Convention by the COP to meet the administrative and operational expenditures of the Global Mechanism;" (b) the "Voluntary Contributions Administrative Expenses Account," comprising amounts contributed voluntarily by various donors; and (c) the "Special Resources for CCD Finance (SRCF) Account," comprising amounts made available for the Global Mechanism's "functioning and activities from bilateral and multilateral resources through trust fund(s) and/or equivalent arrangements established by the Fund." This provision demonstrates that the Global Mechanism is primarily funded by the Conference of the Parties,

[130] Ibid., p. 20, para. 37.

[131] Decision 24/COP.1, doc. ICCD/COP(1)/11/Add. 1, p. 68.

and not the Fund. The Fund's role is limited to establishing the arrangements referred to in Section II.B(c), holding the various accounts for the Global Mechanism, and providing "a grant contribution as part of the initial capitalisation of the SRCF Account." It is the responsibility of the Conference of the Parties, not the Fund, to make "allocations of the core budget of the Convention."[132] To hold certain accounts for the Global Mechanism under an arrangement (Memorandum of Understanding) concerning "modalities and administrative operations" entered into with the Conference of the Parties, the supreme body of the Convention under which the Global Mechanism was established, does not make IFAD the "funding" organization for the Global Mechanism in addition to being its "housing" organization.

139. According to Section III.A.6 of the Memorandum of Understanding, the "Conference," not the Fund, "will approve the … budget of the Global Mechanism." Under the heading "Accountability to the Conference," Section III.A. identifies distinct, limited roles for the IFAD President and for IFAD in the preparation and approval of the proposed budget of the Global Mechanism. According to Section III.A.4, the Managing Director of the Global Mechanism will be responsible for preparing the budget of the Global Mechanism, "which will be reviewed and approved by the President of the Fund [not 'by the Fund'] before being forwarded to the Executive Secretary of the Convention for consideration in the preparation of the budget estimates of the Convention." According to Section III.A.5, the "budget estimates of the Global Mechanism … will be shown in a separate section of the Convention budget," and not IFAD's budget. Section III.A.6 provides that it is "[t]he Conference," and not IFAD or the IFAD President, that "will approve the … budget of the Global Mechanism." Section III.A.7 limits the Fund's role to providing "the Conference with an audited financial statement of the Core Budget Administrative Account in accordance with the Fund's normal audit procedures." Thus, the Fund provides the external audit for the Global Mechanism. This is not unusual in the practice of international organizations.[133]

140. In the Tribunal's view, the fact that the "President of the Fund is to review the programme of work and the budget prepared by the Managing Director of the Global Mechanism before it is forwarded to the Executive Secretary of the Convention for consideration" in Section III.A.4 of the Memorandum of Understanding must lead to the conclusion that the words "an organic part of the structure of the Fund" in Section II.A of the Memorandum of Understanding must

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[132] Memorandum of Understanding, Section II.B(a) (emphasis added).

[133] See H.G. Schermers and N.M. Blokker, *International Institutional Law*, 4th ed. (Boston/Leiden: Martinus Nijhoff Publishers, 2003), pp. 709, 710 ("In practice, each organization chooses its own auditors.").

be interpreted to mean that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes" and that "the effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund."[134] As the previous paragraph makes clear, the Tribunal misinterpreted Section III.A.4 by confusing the limited intermediary and supporting role assumed by the IFAD President under the Memorandum of Understanding with the final approval power of the Conference of the Parties, as confirmed in Section III.A.6. That intermediary and supporting role also informs the meaning of the words "on behalf of the President of the Fund" in Sections III.A.2 and III.B of the Memorandum of Understanding. Clearly, the words "on behalf of" must be read as "through:" it is through the IFAD President that the Managing Director of the Global Mechanism is to submit "reports to the Conference"[135] and "a report to each ordinary session of the Conference on the activities of the Global Mechanism."[136]

141. The fact alone that the Global Mechanism has its own budget separate from IFAD's and receives its primary funding from sources other than IFAD should have prevented the Tribunal from treating the Global Mechanism "as part of the Fund."[137]

142. If there were any doubt with regard to the budget of the Global Mechanism being separate from IFAD's, Section VI of the Memorandum of Understanding provides unequivocally that "[a]ny direct costs and associated service charges [are] reimbursable to IFAD," as "reflected in the budget of the Global Mechanism." IFAD's offer document further clarifies that "[i]t is understood that the administrative and operating budget of the GM would be financed by the Parties to the CCD, and this would be reflected in the hosting arrangement to be agreed upon with the COP" and "[t]he COP is expected to cover the costs of the GM's administrative and operating budget related to its normal activities."[138]

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[134] ILOAT Judgment No. 2867, Consideration 7.

[135] Memorandum of Understanding, Section III.A.2. This interpretation is supported by the Conference of the Parties' Decision 25/COP.1 entitled "Collaborative institutional arrangements in support of the Global Mechanism," the Annex of which provides in paragraph 17: "The GM would report to the COP *through* the Head of the Housing Organization" (emphasis added). Doc. ICCD/COP(1)/11/Add.1, p. 79.

[136] Memorandum of Understanding, Section III.B.

[137] ILOAT Judgment No. 2867, Consideration 7.

[138] "Global Mechanism: Compilation of Revised Offers of International Fund for Agricultural Development (IAF) and United Nations Development Programme (UNDP)," doc. ICCD/COP(1)/5 (25 June 1997), pp. 22-23, paras. 46-47.

143. Thus, when the Tribunal observes that "the Global Mechanism is not financially autonomous" and that "the Conference authorises the transfer of resources to the Fund for the operating expenses of the Global Mechanism,"[139] the text of Section II.B of the Memorandum of Understanding should have prevented the Tribunal from concluding that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes" and that "the effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund."[140] Section II.B, the Memorandum of Understanding's key provision concerning the budget of the Global Mechanism, should have led the Tribunal to reach the opposite conclusion. If there were any doubt about the meaning of the words "an organic part of the structure of the Fund" in Section II.A of the Memorandum of Understanding, Section II.B leaves no doubt that IFAD's role is limited to supporting "the modalities and administrative operations" of the Global Mechanism and does not replace the Conference of the Parties as the entity that is primarily responsible for the Global Mechanism under the Convention. The Memorandum of Understanding contains no wording to the effect that the Conference of the Parties was transferring its primary institutional responsibility for the Global Mechanism to IFAD under the Memorandum of Understanding. To the contrary, the Memorandum of Understanding states explicitly that the Global Mechanism carries out its mandate "under the authority and guidance of the Conference,"[141] performs the functions described in an annex to a Decision of the Conference,[142] depends for its budget primarily on "the core budget of the Convention" through allocations made "by the COP,"[143] and otherwise "will function under the authority of the Conference and be fully accountable to the Conference."[144]

C. Lack of jurisdiction *ratione personae*: The Global Mechanism and the Conference of the Parties of the UNCCD have not recognized the jurisdiction of the Tribunal

144. At this stage it is worth repeating that the competence of the Tribunal is defined in Article II, paragraphs 1 and 5, of the Statute as follows:

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[139] Ibid.

[140] ILOAT Judgment No. 2867, Consideration 7.

[141] Memorandum of Understanding, Section I.

[142] Ibid.

[143] Ibid., Section II.B(a).

[144] Ibid., Section III.A.1.

> "1. The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.
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> …
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> 5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the Governing Body."

145. By virtue of these provisions, the Tribunal is "competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the Staff Regulations" of the organizations which have recognized the jurisdiction of the Tribunal. According to Article II, paragraph 6(a), of the Statute, the Tribunal is also open to the official even if his/her employment has ceased, and to any person on whom the official's rights have devolved on his/her death; or to any other person who can show that he/she is entitled to some right under the terms of appointment of a deceased official or under the provisions of the Staff Regulations on which the official could rely (Article II, paragraph 6(b)).

146. Clearly, by the terms of Article II of its Statute, the Tribunal's jurisdiction does not extend to organizations or entities that have not recognized its jurisdiction. The Tribunal's own case law confirms this.[145] In *Molla*, without addressing the merits, and relying on *Haile-Mariam*[146] and on *Mulate,*[147] the FAO asked that the complaint be dismissed on the grounds that the complainant's special service agreement was with the United Nations,[148] not with the FAO; that his claim, if any, to redress lay against the United Nations; and that the Tribunal therefore lacked competence. The Tribunal accepted FAO's submission that the complaint was not

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[145] Thierry d'Hubert, Les principes généraux selon le Tribunal administrative de l'OIT (Paris, Editions A. Pedone, 2009), 275.

[146] ILOAT Judgment No. 1285, delivered on 14 July 1993.

[147] ILOAT Judgment No. 1286, delivered on 14 July 1993.

[148] The United Nations has not recognized the jurisdiction of the ILOAT.

receivable because the complainant was never under contract with it.[149] The Tribunal, having held in *Haile-Mariam* and *Mulate* that it lacked competence to entertain a complaint against the FAO by a party to a special service agreement with the United Nations, agreed and thus declined to exercise jurisdiction. As the Tribunal itself ruled in a judgment delivered on the very same day that it delivered Judgment No. 2867, if it finds that the dispute brought to it is in fact a dispute with an entity which has not recognized its jurisdiction, the complaint must be dismissed:

> "It is, however, for the Tribunal to determine whether it is competent to hear a dispute, and the Tribunal is by no means bound in this respect by the opinions expressed by the parties in the course of the proceedings. Article II, paragraph 5, of its Statute makes it clear that the Tribunal may hear only disputes between officials and the international organisations employing them. In the instant case it finds, in the light of considerations 3 and 4 above, that the dispute is not between the complainants and the international organisation EUTELSAT, but between them and Eutelsat S.A., a limited company governed by French law. Consequently, the dispute between these parties does not fall within the Tribunal's jurisdiction and the complaints, as well as the Organization's counterclaims, must be dismissed."[150]

147. In this regard it is important to note that as at the date on which the Complainant filed her complaint, the jurisdiction of the Tribunal was recognized by no fewer than 58 organizations, of which 12 are specialized agencies of the United Nations, including the Fund, and four related UN organizations, as well as 42 organizations not pertaining to the UN system. The jurisdiction of the Administrative Tribunal has been recognized by the following organizations (in order of recognition):

1. International Labour Organization (ILO), including the International Training Centre

2. World Health Organization (WHO), including the Pan American Health Organization (PAHO)

3. International Telecommunication Union (ITU)

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[149] ILOAT Judgment No. 1337, delivered on 13 July 1994.

[150] ILOAT Judgment No. 2900, adopted on 13 November 2009, and delivered in public on 3 February 2010 (Consideration 9); see also ILOAT Judgements Nos. 433 (1980), 650 (1986) and 803 (1987). In the same sense: C.F. Amerasinghe, *Jurisdiction of Specific International Tribunals* (Leiden/Boston: Martinus Nijhoff Publishers, 2009), p. 317.

4. United Nations Educational, Scientific and Cultural Organization (UNESCO)

5. World Meteorological Organization (WMO)

6. Food and Agriculture Organization of the United Nations (FAO), including the World Food Programme (WFP)

7. European Organization for Nuclear Research (CERN)

8. World Trade Organization (WTO)

9. International Atomic Energy Agency (IAEA)

10. World Intellectual Property Organization (WIPO)

11. European Organisation for the Safety of Air Navigation (Eurocontrol)

12. Universal Postal Union (UPU)

13. European Southern Observatory (ESO)

14. Intergovernmental Council of Copper Exporting Countries (CIPEC) (until 1992)

15. European Free Trade Association (EFTA)

16. Inter-Parliamentary Union (IPU)

17. European Molecular Biology Laboratory (EMBL)

18. World Tourism Organization (UNWTO)

19. European Patent Organisation (EPO)

20. African Training and Research Centre in Administration for Development (CAFRAD)

21. Intergovernmental Organisation for International Carriage by Rail (OTIF)

22. International Center for the Registration of Serials (CIEPS)

23. International Office of Epizootics (OIE)

24. United Nations Industrial Development Organization (UNIDO)

25. International Criminal Police Organization (Interpol)

26. International Fund for Agricultural Development (IFAD)

27. International Union for the Protection of New Varieties of Plants (UPOV)

28. Customs Co-operation Council (CCC)

29. Court of Justice of the European Free Trade Association (EFTA Court)

30. Surveillance Authority of the European Free Trade Association (ESA)

31. International Service for National Agricultural Research (ISNAR) (until 14 July 2004)

32. International Organization for Migration (IOM)

33. International Centre for Genetic Engineering and Biotechnology (ICGEB)

34. Organisation for the Prohibition of Chemical Weapons (OPCW)

35. International Hydrographic Organization (IHO)

36. Energy Charter Conference

37. International Federation of Red Cross and Red Crescent Societies

38. Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom)

39. European and Mediterranean Plant Protection Organization (EPPO)

40. International Plant Genetic Resources Institute (IPGRI)

41. International Institute for Democracy and Electoral Assistance (International IDEA)

42. International Criminal Court (ICC)

43. International Olive Oil Council (IOOC)

44. Advisory Centre on WTO Law

45. African, Caribbean and Pacific Group of States (ACP Group)

46. Agency for International Trade Information and Cooperation (AITIC)

47. European Telecommunications Satellite Organization (EUTELSAT)

48. International Organization of Legal Metrology (OIML)

49. International Organisation of Vine and Wine (OIV)

50. Centre for the Development of Enterprise (CDE)

51. Permanent Court of Arbitration (PCA)

52. South Centre

53. International Organisation for the Development of Fisheries in Central and Eastern Europe (EUROFISH)

54. Technical Centre for Agricultural and Rural Cooperation ACP-EU (CTA)

55. The International Bureau of Weights and Measures (BIPM)

56. ITER International Fusion Energy Organization (ITER Organization)

57. Global Fund to Fight AIDS, Tuberculosis and Malaria

58. International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM)

148. The Court is invited to take note of the fact that neither the Global Mechanism nor the Conference of the Parties is listed as an organization having recognized the jurisdiction of the Tribunal. While the Tribunal acknowledged that IFAD took the position that "neither the COP nor the GM has recognised the jurisdiction of the Tribunal,"[151] it neglected to address this point explicitly in its ruling and proceeded to exercise jurisdiction.

[151] ILOAT Judgment No. 2867, para. C.

D. Lack of jurisdiction *ratione personae*: The Global Mechanism and the Conference of the Parties of the UNCCD have not been included in the Fund's recognition of the jurisdiction of the Tribunal

149. The Court is equally invited to take note of the fact that, unlike the case of the WHO with respect to Pan-American Health Organization (PAHO) and the Food and Agriculture Organization (FAO) with respect to the World Food Programme (WFP), or as was done by the Universal Postal Union (UPU) with regard to the UPU Provident Scheme, a foundation established under Swiss National law,[152] neither when the Fund recognized the jurisdiction of the Tribunal, nor at any time thereafter has the Fund included any of the entities that it hosts, or with which it has concluded an agreement concerning its hosting of entities, in its recognition of the jurisdiction of the Tribunal. The letter dated 4 October 1988 from the President of IFAD to the Director-General of the International Labour Organization reads in pertinent part as follows:

> "The Executive Board of the International Fund for Agricultural Development, at its meeting held from 26 to 28 April 1988, adopted a decision authorising the President of the Fund to recognise the Jurisdiction of an Administrative Tribunal over disputes between the Fund and its employees.
>
> In accordance with that decision and with Article II, paragraph 5, of the Statute of the Administrative Tribunal of the International Labour Organisation and with the Annex to that Statute, I have the honour to inform you that the Fund recognises the Tribunal's competence to hear complaints alleging non-observance, in substance and in form, of the terms of employment of staff the Fund and of the provisions of the Personnel Policies Manual which are applicable to them and the Fund likewise accepts the Tribunal's Rules of Procedure"[153]

150. It follows from the foregoing that the recognition of the Tribunal's jurisdiction by the Fund does not extend to acts of either the Global Mechanism and its officials or those of the Conference of the Parties of the UNCCD.

151. While the Tribunal acknowledged that IFAD took the position that "IFAD's acceptance of the jurisdiction of the Tribunal [under Article II, paragraph 5, of its Statute] does not extend to entities that it may host pursuant to international agreements with third parties" such as the Conference of the Parties,[154] it

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[152] See ILOAT Judgments Nos. 1451 of 6 July 1965 and 2203 of 3 February 2003.

[153] Documents II.1.

[154] ILOAT Judgment No. 2867, para. C.

neglected to address this point explicitly in its ruling and proceeded to exercise jurisdiction.

E. The conduct complained of is outside the Tribunal's jurisdiction and in any event is not attributable to the Fund

1. The general rule of the attribution of conduct to international organizations

152. The Global Mechanism and the Conference of the Parties are "environmental entities," established by treaties that at first sight appear to be almost complete international organizations, with at least one political organ (a meeting or Conference of the Parties), some expert organs or an advocacy organ, and a secretariat – except that these secretariats and/or advocacy organs are attached to (i.e. hosted by) or form part of the secretariat of an existing international organization or of a quasi-autonomous body of such an international organization.[155] These treaties seem to be deliberatively vague on the question as to the legal nature of these entities.[156] A definitive answer to the question is not called for in the present case. It will suffice to answer the question whether the Global Mechanism is or is not a part of the Fund or has otherwise acted as an agent of the Fund.

153. International organizations are abstract (fictional) entities. The same is true for corporate entities established under domestic law and even more for the State itself. Conduct always originates in individuals, i.e. natural persons. The "normative" operation of attribution is thus required to bridge the gap between the physical actor and the subject of international law. In the law of State responsibility, as codified in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, in particular Articles 4 and 7, the conduct of acting individuals is attributed to the State automatically when these natural persons are connected to the State through an institutional or organic link. It is clearly implied in Article 8 of the aforementioned Articles that absent such an institutional or organic link, acts of individuals are only exceptionally attributed to the State when a control link can be established.

154. This simplified description of the basic avenues for attribution may disregard certain specific cases of attribution, but it sets out the fundamental distinction, which shall prove to be conceptually useful: if the acting entity is a State organ,

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[155] P. Szasz, "The Complexification of the United Nations System," 3 *Max Planck UNYB* (1999), pp. 1-57, at 30-35, in particular p. 32.

[156] See J.E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005), pp. 136-137.

the act is automatically attributable. Control over the conduct is not just presumed; it is irrelevant. If the acting entity is not an organ, then the only way in which the conduct can be attributed is on the basis of a showing that the specific conduct in question took place under the control of the State.

155. When it comes to the attribution of conduct to international organizations, similar considerations apply in the first instance. If an international organization's organ is acting, attribution is automatic; if it is not an organ, a control link must be established. Moreover, as will be explained below, given that international organizations are entities with a determined scope, whether certain conduct is to be attributed to an organization will require the additional element of functionality.

156. When an international organization undertakes actions, it will normally act through its "constitutional" organs, i.e. the organs identified in its constituent instrument. Sometimes international organizations also enlist the services of third parties. This makes it important to answer the question of what constitutes an organ of an international organization. Several parts of the work of the International Law Commission underscore an awareness that the qualification of a body as an "organ of an international organization" bears significant legal consequences under the various segments of international law. However, with the exception rather rhetorically phrased in Article 1, paragraph 4, of the 1975 *Vienna Convention on the Representation of States in their Relations with International Organizations*, neither a definition nor criteria to distinguish are provided[157]. In its commentary on the Draft articles on the Representation of States in their Relations with International Organizations, the International Law Commission explains that the term "organ," as defined in Article 1, sub-paragraph 4, applies only to bodies in which States are members.[158] The Commission has divided the sub-paragraph into two sub-sections concerning, respectively, "any principal or subsidiary organ of an international organization" and "any commission, committee or sub-group of any such organ." This was done in order to make clear that the expression "in which States are members" applies to both sets of bodies. It clarified that the expression excludes from the scope of the Draft articles bodies composed of individual experts who serve in a personal capacity, as it deemed that this was necessary in order to limit the expression to the aspects dealt with in the 1975 Convention. The Commission also stressed that the term, as used, would not exclude the somewhat

[157] Article 1 (Use of terms) (4) of the 1986 Vienna Convention states that "organ" means:(a) any principal or subsidiary organ of an international organization, or (b) any commission, committee or subgroup of any such organ, in which States are members.

[158] Draft articles on the Representation of States in their Relations with International Organizations with commentaries (1971), http://untreaty.un.org/ilc/texts/instruments/english/commentaries/5_1_1971.pdf.

exceptional case when an organ comprises both States and individuals as members.[159]

157. Obviously, such a narrow definition, which excludes the chief executive officer of an organization, the general secretariat, and other bodies composed of persons elected or appointed on a personal basis, can only be suitable in the context of the representation of States in their relations with international organizations. Said definition certainly would not be suitable for purposes of the law of international responsibility. In that branch of international law the question of what constitutes an organ of an international organization is critical in the context of attribution of conduct to States and international organizations, respectively.

158. With regard to the former, Article 13 of the Articles on State Responsibility adopted on first reading by the International Law Commission stated that the conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction. The commentary to Article 13 explained that draft article 13 was not to be taken as defining the responsibility of international organizations or the problems of attribution which such responsibility presents. It merely affirms that the conduct of organs of international organizations acting in that capacity is not attributable to a State by reason only of the fact that such conduct has taken place in the territory of the State in question or in some other territory under its jurisdiction. In the event, no provision corresponding to Article 13 appears in the draft articles adopted on second reading. Instead, Article 57 (responsibility of an international organization) provides that these articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization. The International Law Commission explained that Article 57 is a saving clause which reserves two related issues from the scope of the articles, namely (a) any question involving the responsibility of international organizations, and (b) any question concerning the responsibility of any State for the conduct of an international organization.

159. Thus, for both questions the issue of which conduct is to be considered a conduct of an international organization is critical. Indeed, at the 15th Meeting of the Sixth Committee (2003) during the 58th session of the UN General Assembly this was emphasized by the United Kingdom representative who made the following statement with regard to the concept of an organ of an international organization:

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[159] Ibid.

> "With regard to the questions the Commission had asked governments to address, he said the concept of an "organ of an international organization" was central. How did one determine what an organ was? Did it include any person or entity with the status of organ in accordance with the "rules of the organization"? There were obvious differences between the internal law of a State and the rules of an organization. In the case of an organization, there wasn't necessarily a body with the ultimate power to change the rules or interpret them. What if there were a difference of opinion on whether an entity was an organ for the purpose of the articles? Who would decide? The third question, on the extent of responsibility with regard to peace-keeping, forces illustrated the sensitivity of the attribution question."[160]

160. On the other hand, the Japanese representative saw matters as less complicated. He considered that with regard to an organ of an international organization, there does not seem to be much problem in assuming that in most cases an organ of the organization would be identified and defined by the rules of that organization. Therefore he deemed that a certain reference on the "rules of the organization" would be useful as an element in considering a general rule on the attribution of conducts to international organizations.[161] It would seem that the latter view is shared by the Special Rapporteur on responsibility of international organizations, who suggested the following wording for general rule on attribution of conduct to an international organization,[162] which was adopted by the International Law Commission at its 56th session:[163]

> "1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

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[160] Fifty-eighth General Assembly Sixth Committee 15th Meeting (AM), Press Release GA/L/3239, 28/10/2003

[161] Mr. Yukihiro Wada, Permanent Mission of Japan, On Item 152, "Report of the International Law Commission (Diplomatic Protection)", 29 October 2003, www.un.int/japan/statements/wada031029.html

[162] Giorgio Gaja, Special Rapporteur, Second Report on Responsibility of International Organizations, International Law Commission, Fifty-fifth session (2004), UN Doc. A/CN.4/541.

[163] UN Doc. A/CN.4/L.648, 27 May 2004, ILC, RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS, Titles and texts of the draft articles 4, 5, 6, and 7 adopted by the Drafting Committee.

2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization."

161. It is to be noted that in the foregoing text agents and organs are placed on the same footing for purposes of the general rule regarding the attribution of conduct. This is logical because in many cases international organizations engage the services of third parties, whether non-staff individuals, other organizations, business enterprises or even States, to act on their behalf. It is mainly for this reason that the general rule of attribution of conduct to international organizations does not solely refer to "organs" of the organization, as is the case with the general rule of attribution to States. Rather, it also refers to "agents" of the international organization. Thus, Article 5 of the ILC's Draft Articles on the Responsibility of International Organizations ("Draft Articles") states as follows:

"Article 5

General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2. Rules of the organization shall apply to the determination of the functions of its organs and agents."

162. It is important to underline that the term "agent" has been given a special meaning by the Court:

"The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an

> organ of the organization with carrying out, or helping to carry out, one of its functions - in short, any person through whom it acts." [164]

163. It appears that the Court understands the term "in the most liberal sense." An agent thus is not necessarily an "official" but "any person through whom [the organization] acts," i.e. there is no requirement of any official link in this case for automatic attribution to take place. Any conferral of power upon someone to act "on behalf" of the organization would suffice to establish the requisite organic link. The key point of the foregoing holding in the present proceedings is the phrase "one of its functions."

2. The decision of the Managing Director of the Global Mechanism was not an act carried out in the performance of one of the Fund's functions

164. It is recalled that the Tribunal acknowledged, in summarizing the Fund's challenge to its jurisdiction, that the Fund's "submissions relating to the Tribunal's powers and jurisdiction" could be broken down into three points, "the third [of which] is that acts of the Managing Director of the Global Mechanism are not attributable to the Fund."[165]

165. The essential question in the present case is whether the decision of the Managing Director of the Global Mechanism not to renew the Complainant's fixed-term contract and the subsequent execution of that decision by the President of IFAD is to be regarded as an act performed as part of the functions of the Fund.

166. Given that an "agent" is a person "through whom [the organization] acts", it would appear at first sight that the mere existence of some sort of agreement between the Conference of the Parties and the Fund should suffice for the establishment of the agency link. If this is in fact the case, the Global Mechanism becomes an agent of IFAD without the added complication of the Conference of the Parties retaining any control over it.

167. However, the very concept of "agent" as defined by the Court in *Reparation for Injuries* implies that at least one of the functions of the principal is being exercised. In other words, if an actor is not acting in the performance of one of the functions of the organization in question, it cannot be considered an agent of the organization for purposes of the attribution of conduct. The foregoing makes it

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[164] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174, at 177.

[165] ILOAT Judgment No. 2867, Consideration 8.

necessary to examine, on the one hand, the functions of the Global Mechanism as a UNCCD body and, on the other hand, those of the Fund.

168. The point of departure for answering this question is the principle of specialty. Like any international organization with legal personality, the Fund is entitled to exercise the powers assigned to it by the Agreement Establishing IFAD and which are necessary to achieve the object and purpose of the latter. This means that even though the power to engage and release staff is inherent in the Fund's international legal personality, the Fund's dealings with the Complainant in the case decided by the Tribunal would not constitute conduct in the performance of its own functions if the purpose for which the dealings took place was to perform the functions of the Global Mechanism rather than those of the Fund.

169. By virtue of its mandate, the Global Mechanism provides advisory services on finance to developing country Parties to the Convention with a view to assisting them in up-scaling public finance and private sector investments in sustainable land management (SLM) and rural development activities. As previously mentioned, the Global Mechanism was established by Article 21 of the Convention and commenced its operations in October 1998. As a body of the UNCCD its mandate is to "increase the effectiveness and efficiency of existing financial mechanisms … [and] … to promote actions leading to the mobilization and channelling of substantial financial resources to affected developing-country Parties.". The Global Mechanism's work is based on this mandate and the decisions of the Conference of the Parties and its approach to resource mobilization are fully aligned with the 10-Year Strategic Plan and Framework for the Implementation of the UNCCD (the "10-Year Strategy"), adopted in 2007. In practice, the Global Mechanism forges partnerships with national institutions to promote inter-ministerial dialogue that engages the Ministries of the Environment and Agriculture with the Ministry of Finance. This dialogue centres on priority setting and finance for Sustainable Land Management (SLM), a matter intrinsically linked to desertification. The reason for such an approach is to ensure that SLM becomes more central to budget and financial resource allocation processes. The Global Mechanism professes that understanding and working within domestic budget processes increases access to emerging international finance – particularly climate change finance and resources available to safeguard food security as well as water harvesting and environmentally-induced migration.[166] To perform these functions, it *inter alia* engages and releases staff, be it through the hosting agency, such as the Complainant in the case decided by the Tribunal, or otherwise.

[166] Global Mechanism Web site, at: http://global-mechanism.org/about-us/what-we-do

170. It is to be noted that the functions of the Global Mechanism are entirely different from those of the Fund. According to Articles 2 and 7, Section 2 of the Agreement Establishing IFAD, the Fund is an international financial institution, which lends – and to a lesser extent also grants - money to its developing Member States for the purpose of agricultural development in those countries. While the rate of success of the Global Mechanism certainly contributes to countries' appetite to borrow resources from IFAD, there can be no question that the functions of the two institutions are legally different, and that it therefore cannot be said that when engaging and releasing staff, the Global Mechanism acts as an agent of the Fund as defined by the Court in *Reparation for Injuries*. This is made clear by Article I of the Memorandum of Understanding between the Conference of the Parties and the Fund:

> "2. In carrying out its mandate, under the authority and guidance of the Conference, the Global Mechanism will, in accordance with paragraph 2 of Decision 24/COP.1 of the Conference, perform the functions described in the Annex to that Decision. As the housing institution, the Fund will support the Global Mechanism in performing these functions in the framework of the mandate and policies of the Fund."

171. This provision makes it clear that the Memorandum of Understanding does not purport to alter the fact that the Global Mechanism performs functions of the Convention, and not functions of the Fund. Consequently, while the law on the responsibility of international organizations presumes that acts of an official of an international organization are in principle attributable to the organization concerned, that presumption is not irrefutable. The very notion of *dédoublement fonctionnel* in international law[167] implies that an international official may have more than one capacity and, therefore, whether his or her acts are attributable to one subject of international law or the other depends on which function he or she was exercising. In the present case, apart from the fact that the Managing Director of the Global Mechanism is not an official of the Fund, even if the opposite were the case, the acts complained of would still not be attributable to the Fund because the Managing Director was exercising a function of the Global Mechanism, and not of the Fund. Given that - as the Complainant conceded[168] in the proceedings before the Tribunal - the Global Mechanism and the Fund are separate

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[167] See G. Scelle, Règles générales du droit de la paix, 46 *Recueil des Cours* (1933) p. 331 *et seq*. See for a discussion of Scelle's theory A. Cassese, "Remarks on Scelle's Theory of 'Role Splitting' (dédoublement fonctionnel) in International Law," 1 *EJIL* (1990), pp. 210 ff.

[168] "Complainant has no reason to dispute the separateness of IFAD and the Global Mechanism", Rejoinder, p. 2, A, para. 5. See for the Fund's reaction, see Surrejoinder, p. 2, para. 6.

legal entities; all acts of the Managing Director in the exercise of that function should be attributed to the Global Mechanism, and not to the Fund.

172. Given that it is undisputed that the Managing Director acted in his capacity as Managing Director of the Global Mechanism in taking the decision of which the Complainant complained before the Joint Appeals Board and ultimately the Tribunal, Draft Article 6 of the ILC's Draft Articles on Responsibility of International Organizations dictates that his conduct must be considered an act of the Global Mechanism, *casu quo*, the Conference of the Parties, under international law. Therefore, if the complaint alleged "that the Managing Director exceeded his authority in deciding not to renew her [fixed-term] contract,"[169] as was the case here, and the Tribunal upheld this complaint, which it did, Draft Article 6 should have led the Tribunal to conclude that the Managing Director's conduct must be considered an act of the Global Mechanism/Conference of the Parties, and not of IFAD. Draft Article 6 could not result in a finding that the Managing Director's conduct must be considered an act of IFAD, given that it is undisputed that the Managing Director acted in his capacity as Managing Director of the Global Mechanism and not as an IFAD official in deciding not to renew the Complainant's fixed-term contract.[170] The Tribunal itself stated that "[t]he question of the Managing Director's authority to abolish the complainant's post depends on whether, in the circumstances, that course was impliedly prohibited by the terms of the MOU and *the decision of the Conference* relating to staffing and budget for the 2006-2007 biennium."[171]

173. The Tribunal based its very ruling that "[t]he President's decision of 4 April 2008 is set aside"[172] on its conclusion that he "erred in law" in not finding that the decision of the Managing Director "not to renew the complainant's contract on the ground of its abolition constituted an error of law."[173] The Tribunal based the latter finding directly on its separate finding that "the Managing Director had no authority to abolish the complainant's post."[174] There is, however, no support in

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[169] ILOAT Judgment No. 2867, Considerations 4 and 16.

[170] As was explained by the ILC's Special Rapporteur on Responsibility of International Organizations, "[t]he key wording 'in that capacity' refers to a relation that must exist between the *ultra vires* conduct and the functions entrusted to the organ, entity, person or official." *Second Report on responsibility of international organizations*, at 26, para. 57, UN Doc. A/CN.4/541 (2 April 2004).

[171] ILOAT Judgment No. 2867, Consideration 13 (emphasis added).

[172] Ibid., p. 18, operative paragraph, item (1). See also ibid., Consideration 17.

[173] Ibid., Consideration 17.

[174] Ibid. ("*Because* the Managing Director had no authority to abolish the complainant's post, his decision not to renew the complainant's contract on the ground of its abolition constituted an error of law. The President of the Fund erred in law in not so finding when considering her internal appeal. *It*

Article 6 of the ILC's Draft Articles on Responsibility of International Organizations for attributing the Managing Director's alleged error of law to the IFAD President or the Fund, as can be seen from a ruling in a case where the question was whether an international organization can be held responsible for harm caused to one of its staff members by an error of a third party. In its Judgment No. 84, the Asian Development Bank Administrative Tribunal (ADBAT)[175] refused to hold the Asian Development Bank responsible for the conduct of a third party, namely the medical services company to which it outsourced the health care services for its staff, because it had not been established that the Bank failed in its duty of care in the selection and the supervision of the company. Although that case did not directly address the issue of attribution of conduct to an international organization, the opinion of the ADBAT clearly stands for the principle that for an international organization to be held responsible for harm caused by a third party, there must be breach of a primary obligation resting directly on the organization.

3. The Managing Director of the Global Mechanism is not an official of the Fund

174. In Judgment No. 2867, the Tribunal acknowledged that "[t]he complainant filed an appeal with the Joint Appeals Board on 27 June 2007 *challenging the Managing Director's decision* of 15 December 2005."[176] The record indicates that the Complainant initially did not direct her challenge against the IFAD President or the Fund, and it was the Managing Director of the Global Mechanism, and not the IFAD President, who replied to the appeal lodged by the Complainant on 21 September 2007.[177] It is true, however, that "the President of the Fund informed the complainant that he had decided to reject her appeal" by "a memorandum of 4 April 2008"[178] (issued pursuant to his special capacity under the Memorandum of Understanding between the Fund and the Conference of the Parties) and it is this decision against which the complaint before the Tribunal was directed. However, the Tribunal itself observed that "[t]he complainant contends that the decision not to renew her contract was tainted with abuse of authority" on the part of the Managing Director of the Global Mechanism.[179] That decision was taken by the

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follows that the President's decision of 4 April 2008 dismissing the complainant's internal appeal must be set aside." (Emphasis added)).

[175] ADBAT Judgment No. 84 (*Chang et al v ADB*), 25 January 2008, text available online: http://www.adb.org/Documents/Reports/ADBT/ADBT0084.pdf

[176] Ibid., para. A, p. 3, first full paragraph (emphasis added).

[177] See IFAD's Reply, para. 10 sub (f).

[178] Ibid.

[179] Ibid., para. B, p. 4.

Managing Director of the Global Mechanism, not the Fund or its President.[180] In its ruling, the Tribunal acknowledged that a "preliminary question arises as to the extent to which the Tribunal may review [the] earlier decision" of the Managing Director not to renew the Complainant's fixed-term contract, a question that goes to "the powers and jurisdiction of the Tribunal."[181] Thus, the Tribunal clearly understood itself to be sitting in judgment of the earlier decision of the Managing Director of the Global Mechanism and acknowledged that this raised a preliminary question of "the powers and jurisdiction of the Tribunal."[182] Accordingly, the validity of Judgment No. 2867 may legitimately be challenged in a proceeding derived from Article XII of the Tribunal's Statute.

175. While Judgment No. 2867 nowhere states unequivocally that the Managing Director of the Global Mechanism is or was an official or agent of the Fund, notwithstanding the fact that the Complainant had alleged that the Managing Director was an IFAD official in the pleadings submitted to the Tribunal[183] and the Fund had categorically denied before the Tribunal that he was,[184] by stating generally that "the personnel of the Global Mechanism are staff of the Fund,"[185] the Tribunal in effect concluded that the Managing Director belongs to the staff of IFAD. The Tribunal apparently came to this conclusion without having investigated independently whether or not the Managing Director was an official of the Fund.[186] This is surprising, given that Global Mechanism organizational charts set forth in Attachments 14 and 16 to the complaint featured the Managing Director prominently. The Tribunal also relied on certain references to the Managing Director and the President of IFAD in various provisions of the Memorandum of Understanding in support of its key jurisdictional conclusion that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for

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[180] While the Tribunal observes that the Complainant also "alleges that IFAD acted in breach of its duty of care and good faith," IFAD did not raise jurisdictional objections to this particular complaint made by the Complainant before the Tribunal.

[181] ILOAT Judgment No. 2867, Consideration 1, final sentence.

[182] Ibid., Consideration 1.

[183] See Rejoinder, para. 10 ("In fact the Managing Director, like the complainant, has an appointment with IFAD.").

[184] See IFAD's Reply, para. 39 ("the Managing Director of the Global Mechanism is not a staff member of the Fund within the meaning of Article 6, Section 8 of the Agreement Establishing the International Fund for Agricultural Development as he is not appointed by the President pursuant to the said provision, but pursuant to the Memorandum of Understanding with the Conference of the Parties.").

[185] ILOAT Judgment No. 2867, Consideration 11.

[186] As the ICJ has said in this context, "[a] mere allegation by the complainant cannot be sufficient to cause the Tribunal to accept it for the purpose of examining the complaint." *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 89.

all administrative purposes" and that the "effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund."[187]

176. The Tribunal could have read in the Fund's offer document submitted to the Conference of the Parties[188] that the Managing Director of the Global Mechanism was considered a member of the staff of the Global Mechanism, and not of the Fund. The offer document contains the following passage: "In addition to a Management Section, comprising the Managing Director and one administrative assistant, the GM staff would consist of three teams, one for each programme area and one for administration and finance."[189] The words "In addition to" in conjunction with "the GM staff would consist of" unambiguously clarify that the Managing Director was always understood to be a member of "the GM staff," and not of the IFAD staff.

177. Paragraph 11(f) of the IFAD President's Bulletin No. PB/04/01 provides further proof, independently of the Memorandum of Understanding, that the Managing Director belongs to the staff of the Global Mechanism and not the Fund:

> "IFAD and *Global Mechanism staff, with the exception of the Managing Director of the Global Mechanism*, shall have the right to be treated as an internal candidate when applying for vacancies in the other entity as well as regarding mobility of staff between the two entities." (Emphasis added)

178. The distinction between IFAD staff, on the one hand, and "Global Mechanism staff, with the exception of the Managing Director *of the Global Mechanism*," on the other hand, is clearly borne out by the text of this provision.

179. Article 6, Section 1 ("Structure of the Fund"), of the Agreement Establishing IFAD refers in sub-paragraph (c) to "a President and such staff as shall be necessary for the Fund to carry out its functions." Apart from the fact that the Global Mechanism has been assigned its own functions by the Conference of the Parties, a body which falls outside out of the structure of the Fund and is explicitly acknowledged by the Tribunal "not [to be] an organ of the Fund,"[190] it is clear that the staff of the Global Mechanism, which includes the Managing Director, is not

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[187] ILOAT Judgment No. 2867, Consideration 7.

[188] Appendix II to ICCD/COP(1)/5 (25 June 1997).

[189] Ibid., p. 21, para. 44.

[190] ILOAT Judgment No. 2867, Consideration 5 ("the Fund claims, correctly, that the Conference of the Parties is not an organ of the Fund and that the Global Mechanism is an integral part of the Convention accountable to the Conference").

"necessary for the Fund to carry out its functions" and for that reason alone cannot be considered as IFAD staff.

180. According to Section II.D of the Memorandum of Understanding, the Managing Director of the Global Mechanism "will be nominated by the Administrator of UNDP," and not IFAD's Governing Council, its Executive Board or its President. The UNDP is also mentioned in the Preamble and in Sections III.B(c) and IV of the Memorandum of Understanding, which identify the UNDP as a supporting organization for the Global Mechanism alongside the Fund and the World Bank.

181. It is only after the UNDP nominates a candidate for appointment as Managing Director of the Global Mechanism that such candidate is formally "appointed by the President of the Fund" pursuant to Section II.D of the Memorandum of Understanding. Significantly, Section II.D. does not use the words "appointed by the Fund." By the terms of Section II.D, neither the IFAD President nor the Fund can determine who can be a candidate to be Managing Director of the Global Mechanism. It is the UNDP's role to do so. The role of the IFAD President (not the Fund) is limited to formally appointing a candidate nominated by a third organization pursuant to the authority specially vested in him by Section II.D of the Memorandum of Understanding. Thus, the Managing Director is *not* appointed by the President pursuant to Article 6, Section 8(d), of the Agreement Establishing IFAD. Moreover, the appointing role of the IFAD President under Section II.D. of the Memorandum of Understanding and the statement in Section II.D that the Managing Director "will report directly to the President of IFAD" must be understood in the light of IFAD's supporting role regarding "the modalities and administrative operations of the Global Mechanism," constituting the object and purpose of the Memorandum of Understanding.

182. According to Section III.A of the Memorandum of Understanding, "[t]he chain of accountability will run directly from the Managing Director to the President of the Fund to the Conference." This provision underscores that the Managing Director is ultimately accountable to the Conference and not to the Fund's governing bodies or its President, with the latter merely acting as a point of reference or intermediary as part of the Fund's undertaking to support "the modalities and administrative operations of the Global Mechanism" under the Memorandum of Understanding. The provision also must be viewed in the context of the immediately preceding provision, according to which "[t]he Global Mechanism will … be *fully* accountable to the Conference" (emphasis added).[191]

183. While Section III.A.4 of the Memorandum of Understanding provides that the Managing Director "will be responsible for preparing the programme of work and

[191] Memorandum of Understanding, Section III.A.1.

budget of the Global Mechanism, including proposed staffing," the remainder of this provision and the two provisions that follow make clear that this involves budget *estimates* only. Thus, it is the budget estimates prepared by the Managing Director that are to be "reviewed and approved by the President of the Fund [and not 'the Fund'] before being forwarded to the Executive Secretary of the Convention for consideration in the preparation of the budget estimates of the Convention, in accordance with the financial rules of the Conference [not: 'of the Fund']." The words "before being forwarded to the Executive Secretary of the Convention for consideration in the preparation of the budget estimates of the Convention" in Section III.A.4, in combination with the words "[t]he Conference will approve the programme of work and budget of the Global Mechanism" in Section III.A.6, underscore the purely intermediary or facilitating role of the IFAD President under the Memorandum of Understanding and confirm that neither he nor IFAD has final approval power in this important matter.

184. Section III.A.2 of the Memorandum of Understanding states that the "Managing Director will submit reports to the Conference on behalf of the President of the Fund." Similarly, Section III.B of the Memorandum of Understanding states that the Managing Director "will submit a report to each ordinary session of the Conference on the activity of the Global Mechanism" to "the Executive Secretary of the CCD for circulation to the COP." These provisions confirm that the Managing Director reports to the Conference of the Parties, and not to IFAD. The words "on behalf of the President of the Fund" after "to the Conference" in Section III.A.2 and before "will submit a report … to the Executive Secretary" in Section III.B mean simply that the Managing Director is to submit the report concerned through the intermediary of the President of the Fund. In other words, the President in this regard is performing at best an intermediary or facilitating function under the Memorandum of Understanding. This interpretation is supported by the Conference of the Parties' Decision 25/COP.1 entitled "Collaborative institutional arrangements in support of the Global Mechanism," the Annex of which provides in paragraph 17: "The GM would report to the COP *through* the Head of the Housing Organization" (emphasis added).[192] Section III.A.2, in particular the above-referenced wording, was one of the provisions of the Memorandum of Understanding on which the Tribunal relied in concluding that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes [and the] effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund."[193]

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[192] Doc. ICCD/COP(1)/11/Add.1, p. 79.

[193] ILOAT Judgment No. 2867, Consideration 7.

185. That the Managing Director is to submit his reports to the Conference of the Parties and the Executive Secretary of the Conference of the Parties through the Fund's President makes perfect sense when viewed against the object and purpose of the Memorandum of Understanding, under which the Fund has assumed obligations vis-à-vis the Conference of the Parties "regarding the modalities and administrative operations of the Global Mechanism," in other words, obligations in support of the functions of the Global Mechanism. Section III.B identifies IFAD as one of several "supporting" organizations for the Global Mechanism.

186. The foregoing observations demonstrate that the Tribunal's statement that it "is significant that, according to the MoU, the Managing Director is to report to the President of the Fund"[194] is incomplete and misleading. The Tribunal reads too much into the references to the IFAD President in the Memorandum of Understanding, in a way that is not justified under both the terms and the object and purpose of the Memorandum of Understanding. While it is true that Section II.D of the Memorandum of Understanding states that the Managing Director is to "report directly to the President of IFAD," the Managing Director is to do so "in *discharging* his or her responsibilities" (emphasis added), i.e., as a purely operational matter. Those responsibilities are defined, not by IFAD or its President, but by the Conference of the Parties. Moreover, Section III.A makes clear that the chain of accountability "will run directly from the Managing Director to the President of the Fund *to the Conference*," and the "*Conference* will approve the programme of work and budget" prepared by the Managing Director (emphasis added). According to Section III.B of the Memorandum of Understanding, the Managing Director is to submit a report "to ... *the Conference* on the activities of the Global Mechanism," with such reports to "be submitted to the Executive Secretary of the CCD for circulation to the COP."

187. According to a "Position Description" dated 13 January 2005, issued on official IFAD letterhead some five years after the Memorandum of Understanding was concluded and IFAD became the organization to house the Global Mechanism,[195] the "principal responsibility" of the "Managing Director of the Global Mechanism of the Convention to Combat Desertification" is "to ensure that the GM fulfils its mission entrusted to it, i.e., to promote the mobilization of resources to support affected developing country Parties to implement the Convention to Combat Desertification (CCD)" and to do so "under the direction of the President of the International Fund for Agricultural Development (IFAD)." The document lists among the specific tasks to be undertaken by the Managing Director: "Lead, manage and develop a close liaison with appropriate organizational units of the

[194] Ibid., Consideration 7, second sentence.

[195] See IFAD's Reply, Attachment T.

housing institution (IFAD) to ensure synergy with its operations." It does not make sense for the Managing Director of the Global Mechanism to be entrusted with such task if he belongs to, i.e. is an official of, the organization with which he is to liaise, i.e., the Fund.

188. When the Managing Director described himself in his memorandum of 15 December 2005 in which he announced his decision not to renew the Complainant's fixed-term contract, as "Managing Director, Global Mechanism, IFAD Rome,"[196] the reference to IFAD clearly was to the organization housing the GM, given that the Managing Director was based at IFAD headquarters in Rome. According to Section VI of the Memorandum of Understanding, "[t]he Global Mechanism will be located at the headquarters of the Fund in Rome." The placement of the words "Global Mechanism" immediately after "Managing Director" in the Managing Director's memorandum indicate that the Managing Director's affiliation was with the Global Mechanism of the Convention, not with the Fund. In other words, the word "at" should be read into the text before "IFAD." Moreover, the Managing Director's decision was not transmitted on letterhead of the IFAD, but on letterhead of the Global Mechanism, with the logo and name of the Global Mechanism appearing at the top of the letter, next to the logo and name of the United Nations Convention to Combat Desertification. While it is true that the IFAD logo and name are featured in smaller font at the bottom of the Managing Director's memorandum to the Complainant, IFAD's letterhead differs from the letterhead of the Global Mechanism in that IFAD's letterhead includes the IFAD logo and name in large font at the top.

189. The foregoing leads to the conclusion that the Managing Director of the Global Mechanism was not a member of IFAD's staff in his dealings with the Complainant. Therefore, the Tribunal was not competent to entertain pleas B(1) and B(2) of the complaint filed with it, insofar as these included arguments directed at the Managing Director and the President of IFAD acting in his special capacity under the Memorandum of Understanding between the Fund and the Conference of the Parties.

4. The Fund has neither acknowledged nor adopted the decision of the Managing Director of the Global Mechanism as its own

190. According to Article 7 of the ILC's Draft Articles on Responsibility of International Organizations ("Conduct acknowledged and adopted by an international organization as its own"):

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[196] ILOAT Judgment No. 2867, Consideration 1.

> "Conduct which is not attributable to an international organization under preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct as its own."

191. The text of Draft Article 7 raises the question whether the IFAD President's decision of 4 April 2008, which he made in his special capacity under the Memorandum of Understanding between the Fund and the Conference of the Parties and by which he informed the Complainant that he had decided to reject her appeal, could be considered to be within the scope of this provision and thus constitute an act of the Fund under international law. Apart from the fact that there is no evidence that the Fund acknowledged and adopted the impugned decision of the President as its own, Draft Article 7 does not appear to address this situation. The original "conduct" at issue in this case was the decision of the Managing Director of the Global Mechanism not to renew the Complainant's fixed-term contract. The President of the Fund was not involved in that decision, nor had he any reason or authority to be involved under the Memorandum of Understanding. Draft Article 7 would concern the situation where the Managing Director's conduct, while not being attributable to the Global Mechanism, *casu quo*, the Conference of the Parties, would be acknowledged by the two latter entities and adopted as its own. That is not the situation here, given that the conduct of the Managing Director of the Global Mechanism was attributable to the Global Mechanism, *casu quo*, the Conference of the Parties even if he exceeded his authority, given that he acted in the capacity of Managing Director of the Global Mechanism.[197] In sum, the ILC's Draft Articles concerning attribution in the context of the responsibility of international organizations merely confirm that the conduct of the Managing Director of the Global Mechanism was attributable to the Global Mechanism, *casu quo*, the Conference of the Parties, and not the Fund. Therefore, the Tribunal's conclusion, based on its interpretation of various provisions of the Memorandum of Understanding between the Conference of the Parties and the Fund (including Section III.A), that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for administrative purposes" and that the "effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund"[198] is not supported by the rules of attribution under the law of international organizations.

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[197] See Draft Article 6.

[198] ILOAT Judgment No. 2867, Consideration 7.

F. Conclusion

192. Based on the foregoing, the Fund submits that Question I should be answered in the negative: the Tribunal was not competent to hear the complaint introduced against the Fund by the Complainant. Principally, the Complainant was not an official of the Fund at the relevant time, as is required by Article II of the Tribunal's Statute. Second, the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa has not recognized the jurisdiction of the Tribunal in accordance with Article II, paragraph 5, of the Tribunal's Statute, and neither has the Conference of the Parties. Third, the Fund's acceptance of the jurisdiction of the Tribunal does not extend to acts or decisions of the Global Mechanism or its officials and of the Conference of the Parties. Fourth, the conduct of the Global Mechanism, in particular the decision of its Managing Director not to renew the Complainant's fixed-term contract, is not attributable to the Fund under international law, because (i) as the Fund and the Complainant expressly agreed before the Tribunal, the Global Mechanism and the Fund are separate legal entities; (ii) the Managing Director is not an official of the Fund; (iii) the decision of the Managing Director was not made in the exercise of one of the Fund's functions; (iv) the act of the President of the Fund to implement the decision of the Managing Director of the Global Mechanism was performed in his capacity as an official placed at the disposal of the Conference of the Parties of the UNCCD under the Memorandum of Understanding; and (v) the Fund has endorsed neither the decision of the Managing Director of the Global Mechanism nor the act of the IFAD President performed in his special capacity under the Memorandum of Understanding between the Fund and the Conference of the Parties.

Chapter 5. QUESTION II

193. The second question put to the Court by the Fund in the present proceedings reads as follows:

> "II. Given that the record shows that the parties to the dispute underlying the ILOAT's Judgment No. 2867 were in agreement that the Fund and the Global Mechanism are separate legal entities and that the Complainant was a member of the staff of the Global Mechanism, and considering all the relevant documents, rules and principles, was the ILOAT's statement, made in support of its decision confirming its jurisdiction, that 'the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes' and that the 'effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global

Mechanism are, in law, decisions of the Fund' outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT? "

194. It is the Fund's submission that in light of the fact that the Tribunal, by virtue of is nature as a judicial body, is authorized to exercise its jurisdiction only with regard to matters about which the parties before it are in dispute, the Tribunal was not competent to make the statement, in support of its decision confirming its jurisdiction, that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes" and that the "effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund." By making this statement, the Tribunal entertained complaints which it was not legally qualified to examine under Article II of its Statute. First of all, as the Tribunal itself confirmed, "Article II, paragraph 5, of its Statute makes it clear that the Tribunal may hear only *disputes* between officials and the international organisations employing them."[199] Therefore, when there is no substantive dispute between a complainant and the defendant organization – as in the present case regarding the issue of separateness – the Tribunal not only lacks jurisdiction, but it also would amount to a fundamental fault in the procedure followed by the Tribunal if it were to decide or make statements on a matter about which there is no dispute between the parties before it.[200]

195. Moreover, the Tribunal lacked jurisdiction under Article II, paragraph 2, of its Statute to make the general statement that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes", as that statement does not concern "the terms of employment of officials and of provisions of the Staff Regulations." The Tribunal's lack of jurisdiction to make such a general statement is exacerbated by the fundamental fault in the procedure committed by the Tribunal when, based on the foregoing irregular statement, it proceeded to conclude that the "effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund" for all legal purposes.

196. The Fund submits that, for the foregoing reasons, Question II should be answered in the affirmative. The legal analysis supporting this conclusion is set forth in the following paragraphs.

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[199] ILOAT Judgment No. 2900 of 13 November 2009.

[200] ILOAT Judgment No. 1431 of 6 July 1995 (Consideration 5).

A. Disregard of the absence of a dispute regarding separateness of the Fund and the Global Mechanism

1. The principle that only disputed issues are justiciable

197. According to the classic definition of a dispute adopted by the Permanent Court of International Justice (PCIJ), a dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons."[201] In the past, the Court has "found that the opposing attitudes of the parties clearly established the existence of a dispute."[202] Consequently, if there are no "opposing attitudes of the parties" on a given issue, that issue is not part of the dispute and, thus, is not justiciable. Indeed, according to the Tribunal itself "Article II, paragraph 5, of its Statute makes it clear that the Tribunal may hear only *disputes* between officials and the international organisations employing them."[203] (Emphasis added). In *Vollering No. 4*, the Tribunal held specifically that it would not rule on a certain issue "since … there is no longer any substantive dispute between the complainant and the Organization."[204]

2. The parties expressly agreed that there was no dispute regarding separateness before the Tribunal

198. In the instant case, the record before the Tribunal demonstrates unequivocally that there was no dispute between the parties in the case before the Tribunal regarding the key issue of the separateness between the Fund and the Global Mechanism, *casu quo*, the Conference of the Parties, given that the Complainant's Rejoinder states, under the heading "Separate legal entities," that "[t]he complainant has no reason to dispute the separateness of IFAD and the Global Mechanism"[205] and the Fund in its Surrejoinder "takes note of the fact that in paragraph 5 of the Rejoinder, the Complainant concedes that the Fund and the Global Mechanism are separate legal entities by stating that there is no reason to dispute the separateness of the two aforementioned institutions."[206] Indeed, the Fund explicitly invited the Tribunal "to take note of this significant concurrence of views between the parties to the present dispute as it has far reaching

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[201] *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. Ser.. A, No. 2, p. 11.

[202] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Reports 1988, p. 12, at 27, para. 35.

[203] ILOAT Judgment No. 2900 of 13 November 2009.

[204] ILOAT Judgment No. 1431 of 6 July 1995 (Consideration 5).

[205] Rejoinder, p. 2, A.(1), para. 5.

[206] Surrejoinder, p. 2, para. 6.

consequences for … critical issues regarding the Tribunal's competence and the rules that the Complainant can rely on before the Tribunal."[207] The record before the Tribunal reflects the fact that both parties were in express agreement, and had no "opposing attitudes," concerning the separateness of "the Fund and the Global Mechanism," and not merely the Fund and the Conference of the Parties.

199. The significance of this observation lies in the fact that the Tribunal acknowledged that "[t]he argument with respect to the Tribunal's jurisdiction is based, in the main, on the proposition that '[t]he Fund and the Global Mechanism are separate legal identities'."[208] In other words, the Tribunal explicitly phrased the issue of separateness as a jurisdictional issue, thereby bringing its findings on that issue within the scope of Article XII of its Statute. In its ruling, the Tribunal identifies the Conference of the Parties, the Fund's counterparty under the Memorandum of Understanding, as "the Convention's supreme body" having "established the Global Mechanism"[209] and accepts the Fund's argument that "the Global Mechanism is an integral part of the Convention accountable to the Conference."[210] But notwithstanding these observations and the parties' express agreement that the Fund and the Global Mechanism are "[s]eparate legal entities," the Tribunal still refused to accept that the Global Mechanism has its own legal identity or legal personality.[211]

200. In the view of the Fund, faced with the written statements of both parties, the Tribunal erred in rejecting the separate legal identity of the Fund and the Global Mechanism in paragraphs 6-7 of its ruling and consequently erred in asserting jurisdiction over acts of the Global Mechanism and over the Fund. The Tribunal should have accepted the parties' express agreement regarding the legal separateness of the Fund and the Global Mechanism and should have attached the necessary conclusions stemming from such separateness. Based on the parties' statements, there was nothing left for the Tribunal to decide on the key question, which the Tribunal acknowledged was one affecting its jurisdiction, whether or not the Fund and the Global Mechanism are legally separate.

201. The Tribunal's finding on the issue of separateness constitutes a key element of its ruling, without which it could not have concluded that "administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in

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[207] Ibid.

[208] ILOAT Judgment No. 2867, Consideration 5.

[209] Ibid., para. A.

[210] Ibid., Consideration 5.

[211] Ibid., Consideration 6.

law, decisions of the Fund,"[212] which conclusion is inextricably linked to the Tribunal's decision to set aside the President's decision of 4 April 2008.[213] The Tribunal's decision to assimilate the Global Mechanism and the Fund for purposes of administrative decisions is especially surprising in the light of the Tribunal's observation that "the MOU confers no power on the President [of IFAD] to determine the conditions of appointment of the personnel of the Global Mechanism."[214]

202. Even if one were to accept, for the sake of argument, both the appropriateness and correctness of the Tribunal's conclusion that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes,"[215] this does not warrant or justify the Tribunal's separate conclusion, offered without any reasoning, that, for all *legal* purposes, "administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund."[216]

B. Conclusion

203. Based on the foregoing and given that the record before the Tribunal shows that the parties to the dispute underlying the Tribunal's Judgment No. 2867 were in express agreement that the Fund and the Global Mechanism are separate legal entities and that the Complainant was a member of the staff of the Global Mechanism, and considering all the relevant facts, documents, rules and principles, the Tribunal's statement, which it acknowledged was made within the context of its jurisdiction, that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes" and that the "effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund" was outside its jurisdiction and/or constituted a fundamental fault in the procedure followed by the Tribunal toward reaching its final decision.

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[212] Ibid., Consideration 7.

[213] Ibid., p. 18.

[214] Ibid., Consideration 10.

[215] Ibid.

[216] Ibid.

Chapter 6. QUESTION III

A. Lack of jurisdiction *ratione materiae*; Disregard of the *non ultra petita* rule

204. For the same reasons as stated above with regard to Question II, as well as those spelled out below, the Fund submits that Question III should be answered in the affirmative. Question III reads as follows:

> "III. Was the ILOAT's general statement, made in support of its decision confirming its jurisdiction, that 'the personnel of the Global Mechanism are staff members of the Fund' outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?"

1. The principle of non ultra petita partium

205. Pursuant to the principle of *ne eat judex ultra petita partium* or *non ultra petita*, a body adjudicating a dispute should rule only on those issues on which it is asked to rule. In other words, an international court or tribunal must not exceed the limits of its statutory jurisdiction and the jurisdiction conferred upon it by the parties to a given case by deciding points not submitted to it, or by awarding more than it is asked to award. The principle is recognized as a general principle of law.[217] For example, Article V, paragraph (1)(c), of the New York Convention on the Recognition and Enforcement of International Arbitral Awards confirms that arbitrators cannot go outside the parties' claims. The *non ultra petita* rule is not only an inevitable corollary – indeed a part of the general principle of consent of the parties as the basis of international jurisdiction – it is also a necessary rule, for without it the consent principle itself could be circumvented[218]. As the Court itself has stated, "[t]he Court must not exceed the jurisdiction conferred upon it by the parties …"[219] Time and again international courts and tribunals have restated the principle that the principle of *non ultra petita partium* prevents them from awarding more than what was requested. The Court has observed generally that "it is the duty of an international tribunal 'not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding

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[217] C.F. Amerasinghe, *Jurisdiction of International Tribunals* (The Hague/London/New York: Kluwer Law International, 2003), p. 422.

[218] I.F.I. Shihata, *The Power of the International Court to Determine its Own Jurisdiction* (The Hague: Martinus Nijhoff, 1965), p. 219

[219] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, I.C.J. Reports 1985, p. 23, para. 19.

points not indicated in those submissions' (*I.C.J. Reports 1950*, p. 402)."[220] According to another tribunal:

> "The competence of international judges is limited by the functions assigned to them by the parties in the case. Their powers are also limited by the extreme claims which the parties put forward in the hearings. To exceed these functions or powers means deciding *ultra vires* and rendering the decision null by reason of *excès de pouvoir."*[221]

206. Thus, for instance, in *Chile-Price Band (Argentina v. Chile)* the WTO Appellate Body found that the Panel failed to make an objective assessment of the matter before it and "*acted ultra petita"* by making a finding on a claim that no party had put forward[222]. The Appellate Body reversed the Panel's findings under GATT Article II:1(b), second sentence, on the grounds that it was a claim that had not been raised by Argentina in its panel request or any subsequent submissions, and the Panel, by assessing a provision that was not part of the matter before it, acted *ultra petita* and in violation of Article 1 of the Dispute Settlement Understanding ("DSU"). The Appellate Body also stated that consideration by a Panel of claims not raised by the claimant deprived Chile of its due process rights under the DSU. This statement finds support in the following explanation provided by the Court in the *Arrest Warrant* Case, decided earlier in the same year[223], which referred to "the well-established principle that 'it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions'"[224]. Because of this principle, in the *Oil Platforms* Case several Members of the Court considered that the first part of the *dispositif* violated the *non ultra petita* rule[225]. In Judge Buergenthal's view, "the *non ultra petita* rule prevents the Court from making a specific finding in its *dispositif* that the challenged action, while not a violation of

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[220] *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1973, pp. 207-208, para. 87.

[221] Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy, 21 October 1994, UNRIAA VOLUME XXII, pp. 3-149, at p. 36 §106.

[222] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* – Recourse to Article 21.5 of the DSU by Argentina, AB-2002-2 WT/DS 207/ABR, para. 173, adopted by the DSB, 23 October 2002.

[223] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, p. 3, at 18-19, para. 43.

[224] *Asylum,* Judgment, I.C.J. Reports 1950, p. 402.

[225] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161, Separate Opinion of Judge Higgins, paras. 9-24; Separate Opinion of Judge Kooijmans, ibid., paras. 27-35; Separate Opinion of Judge Buergenthal, ibid., paras. 4-10.

Article X, paragraph 1, is nevertheless not justified under Article XX, paragraph 1 (d), when the Parties in their submission did not request such a finding with regard to that Article, which they did not do in this case."[226] Similarly, Judge Kooijmans observed that "the first part of [the *dispositif*] is redundant: it introduces an *obiter dictum* into the operative part of a judgment."[227] Admittedly, in *Arrest Warrant* the Court stated that while it is not entitled to decide upon questions not put to it, the *non ultra petita* rule did not preclude the Court from addressing certain legal points in its reasoning. But this qualification of the principle does not mean that an international court or tribunal may make broad generic legal determinations beyond the matter requested by either party.

207. In the past, the Tribunal itself has shown respect for the principle of *ne eat judex ultra petita partium*. Thus, in its Judgment No. 2186 the Tribunal explained that it "will not be in breach of the rule *ne eat judex ultra petita partium* by awarding damages on grounds other than those initially cited."[228] This recognition by the Tribunal means that it accepts the inherent limitation of its jurisdiction that ensues from this principle and the fact that non-observance will lead to nullity of the Tribunal's judgment.

2. The Tribunal acted *ultra petita* in making a general determination with regard to all staff and all acts of the Global Mechanism in a situation where neither were before the Tribunal

208. The case before the Tribunal concerned only one staff member of the Global Mechanism, namely the Complainant. Nevertheless, without the authority to do so and in breach of the fundamental principles pertaining to judicial proceedings, the Tribunal made a general determination that purports to apply to all the personnel of the Global Mechanism. In addition to the fact that according to Article II, paragraph 5, of its Statute, the Tribunal can only make determinations with regard to a complainant over which it has jurisdiction, it is incompatible with the most fundamental principles of judicial procedure to make judicial determinations without ascertaining the facts of each case. By making the general statement that "the personnel of the Global Mechanism are staff members of the Fund," the Tribunal ignored its duty to examine all elements of a situation on which it is asked to decide before making a determination.

209. Even if it were to be assumed, for the sake of argument, that the Tribunal drew the correct conclusion regarding the legal status and standing of the Complainant

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[226] Separate Opinion of Judge Buergenthal, ibid., para. 6.

[227] Separate Opinion of Judge Kooijmans, ibid., para. 33.

[228] ILOAT Judgment No. 2186 of 3 February 2003, Consideration 3.

in this case, which on balance was not the case in the view of the Fund, the Tribunal was not justified to follow this conclusion with the general statement that "*the personnel* of the Global Mechanism are staff members of the Fund."[229] The Tribunal was not justified to make this broad statement applying to *all* personnel of the Global Mechanism, given that the terms of appointment and employment of Global Mechanism staff members other than the Complainant were not before the Tribunal in this case and, therefore, were not within its jurisdiction. For such staff members to fall within the Tribunal's jurisdiction, they formally must be IFAD staff members in addition to being Global Mechanism staff members. If it is accepted that the parties before the Tribunal were in agreement concerning the separateness of the Fund and the Global Mechanism and that this means that the two are legally separate,[230] the Tribunal's conclusion that "administrative decisions taken by the Managing Director in relation to staff [i.e., the Complainant as well as other staff] in the Global Mechanism are, in law, decisions of the Fund" is deprived of its foundation. It is one thing for the Tribunal to conclude, after examining the circumstances underlying the Complainant's appointment, that in the light of those circumstances administrative decisions taken by the Managing Director in relation to this *particular* staff member in the Global Mechanism are, in law, decisions of the Fund. But without having examined the circumstances underlying the appointment of other personnel in the Global Mechanism, which were not before the Tribunal in this case, the Tribunal had no jurisdictional basis for making this broad and generic statement. Clearly, such generic statement is not a consideration of fact or law other than those relied upon by the parties, which according to doctrine[231] an international court or tribunal may pronounce on without infringing the *non ultra petita* rule. In accordance with the example set by the Permanent Court of International Justice in its Judgment in the case of *Access of Polish War Vessels to the Port of Danzig*, the Tribunal should have made any statements with regard to the employment status of the Complainant, if any, without expressing any opinion on the status of the Global Mechanism staff in general, and should have expressly limited its conclusion to the case presented to it.[232] The Tribunal failed to do so in this case.

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[229] ILOAT Judgment No. 2867, Consideration 11 (emphasis added).

[230] See Rejoinder, para. 5 ("Separate legal entities"), and IFAD's Surrejoinder, para. 6.

[231] See G. Fitzmaurice, *The Law and Practice of the International Court of Justice* (Cambridge, Cambridge University Press/Grotius Publications, reprint 1996), Vol. 2, p. 533.

[232] *Access of Polish War Vessels to the Port of Danzig*, PCIJ Ser. A/B, No 43 (1931), p. 140. See also H. Lauterpacht, *The Development of International Law by the International Court* (Cambridge, Grotius Publications, reprint 1982), p. 80.

B. Conclusion

210. Given the inherent limitation of its jurisdiction that ensues from the Tribunal's Statute, in combination with the principle of *non ultra petita* and the fact that non-observance of this principle will lead to nullity of the judgment because disrespect for the principle constitutes a fundamental fault in the procedure followed, Question III must be answered in the affirmative. As pointed out by President Hackworth in his Dissenting Opinion in the *Unesco* Case, "judgments given by a Tribunal which is without jurisdiction … can have no validity."[233] As explained by Judge De Castro in the *Falsa* Case, in procedural law, a breach of the *non ultra petita* rule produces a lack of correlation between the judgment and the subject-matter of the application, which is regarded as a fundamental error that invalidates the judgment.[234]

Chapter 7. QUESTION IV

A. The Tribunal lacked jurisdiction to entertain the Complainant's plea alleging an excess of authority by the Managing Director of the Global Mechanism and/or its decision to entertain this plea constituted a fundamental fault in the procedure followed; Disregard of the *non infra petita* rule

211. The Fund submits that Question IV should be answered in the affirmative. Question IV reads as follows:

> "IV. Was the ILOAT's decision confirming its jurisdiction to entertain the Complainant's plea alleging an abuse of authority by the Global Mechanism's Managing Director outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?"

1. The principle of *non infra petita*

212. A judgment may be invalid not only by going too far (*ultra petita*) but also by virtue of not going far enough (*infra aut minus petita*). It fails to go far enough if no decision is rendered on one of the heads of claim. Thus, an international court or tribunal must render a decision not only according to the *petitum* in the application or complaint (*sententia debet esse conformis libelli*), but it should not leave out any of the claims made in the parties' submissions, including the

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[233] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, Dissenting Opinion of President Hackworth, I.C.J. Reports 1956, p. 77, at 122.

[234] *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, Dissenting Opinion of Judge De Castro, I.C.J. Reports 1973, p. 166, at 291.

defenses of the respondent. As the Court itself has recognized, "[t]he Court must not exceed the jurisdiction conferred upon it by the [p]arties, but it must … exercise that jurisdiction to its full extent."[235] An international court or tribunal does not fulfil its judicial duty if it fails to give a decision on one of the *causae petendi* of the application or neglects the submissions made by the respondent (*non est judex minus petita partium*)[236].

2. The Tribunal ruled *infra petita* in relation to the plea alleging an excess of authority by the Managing Director of the Global Mechanism

213. As already explained with regard to Question I, the Global Mechanism has not recognized the jurisdiction of the Tribunal in accordance with Article II, paragraph 5, of the Tribunal's Statute. Moreover, the Fund's acceptance of the jurisdiction of the Tribunal does not extend to the acts or decisions of the Global Mechanism or its officials.

214. The Global Mechanism has not submitted the declaration specified in Article II, paragraph 5, of the Tribunal's Statute and is, therefore, not an "intergovernmental international organisation" within the meaning of Article II against which the Complainant could complain before the Tribunal and over the acts of which the Tribunal could exercise jurisdiction. The same must apply to the Conference of the Parties based on the Tribunal's observation that the Conference of the Parties "established the Global Mechanism."[237] Hence, acts of the Conference of the Parties, including the conduct of an organ or agent of the Conference of the Parties (such as the Global Mechanism or its Managing Director), are plainly outside the jurisdiction of the Tribunal, unless such conduct can somehow be said to be IFAD's

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[235] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 23, para. 19.

[236] Compare: *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, Dissenting Opinion Judge De Castro, I.C.J. Reports 1973, p. 166, 291. Note also that in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, the arbitral award was annulled because the tribunal accepted jurisdiction over treaty claims but did not exercise it for various reasons. The tribunal annulled the award because it was *infra petita***.** ICSID Case No. ARB/97/3, Award of the Tribunal of 21 Nov. 2000, 40 ILM (2001), pp. 426-453, Decision on Annulment of 3 July 2002, 41 ILM (2002), pp. 1135-1162. See generally H.E. Kjos, "The Role of Arbitrators and the Parties in Ascertaining the Applicability and Content of National and International Law" in: *The Interplay Between National and International Law in Investor-State Arbitration* (forthcoming) ch. 5, noting authority for arbitrators' right to apply a rule of law not discerned by the parties, provided the award respects principles of *non infra petita* (no award less than what has been requested by the parties) and the parties' right to be heard.

[237] ILOAT Judgment No. 2867, para. A, second sentence.

conduct or otherwise can be considered to be attributable to IFAD under international law.[238]

215. As the Fund stated before the Tribunal, the Tribunal can only "examine the budget and related practices of the Global Mechanism, its reporting and other interactions with the Conference of the Parties to the Convention, as well as the terms of the Memorandum of Understanding between the latter and the Fund"[239] in the context of a determination whether the decision of the Managing Director of the Global Mechanism not to renew the Complainant's fixed-term contract on the ground of its abolition was outside his authority and constituted an error or law if, and only if, the Conference of the Parties, *casu quo*, the Global Mechanism has accepted the Tribunal's jurisdiction, which clearly was not the case, as demonstrated in Chapter 4 *sub* C. above.

216. While the Tribunal acknowledged that IFAD took the position that "IFAD's acceptance of the jurisdiction of the Tribunal [under Article II, paragraph 5, of its Statute] does not extend to entities that it may host pursuant to international agreements with third parties" such as the Conference of the Parties and that "neither the COP nor the GM has recognised the jurisdiction of the Tribunal,"[240] it neglected to address this point explicitly in its ruling and proceeded to exercise jurisdiction.

B. Conclusion

217. Given the inherent limitation of the Tribunal's jurisdiction that ensues from its Statute, in combination with the principle of *non infra petita* and the fact that non-observance of this principle will lead to nullity of the judgment because disrespect for the principle constitutes a fundamental fault in the procedure followed, Question IV must be answered in the affirmative.

Chapter 8. QUESTION V

218. The Fund submits that Question V should be answered in the affirmative due to the Tribunal's disregard of the indispensable third party rule. Question V reads as follows:

> "V. Was the ILOAT's decision confirming its jurisdiction to entertain the Complainant's plea that the Managing Director's decision not to renew

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[238] See International Law Commission, *Responsibility of International Organizations*, Arts. 4-7, UN Doc. A/CN.4/L.648 (27 May 2004).

[239] IFAD's Reply, para. 33.

[240] ILOAT Judgment No. 2867, para. C.

the Complainant's contract constituted an error of law outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?"

A. The Indispensable Third Party Rule in international adjudication

219. In its Reply before the Tribunal, the Fund maintained that the Global Mechanism (and the Conference of the Parties) must be considered an indispensable third party for purposes of the proceedings before the Tribunal.[241] The Tribunal failed to address this vital argument in its Judgment No. 2867, even though it acknowledged, in summarizing the Fund's challenge to its jurisdiction, that the Fund's "submissions relating to the powers and jurisdiction of the Tribunal" could be broken down into three points: "The first is that the Tribunal may not entertain flaws in the decision-making process of the Global Mechanism; the second is that the Tribunal may not entertain flaws in the decision-making process of Fund if it entails examining the decision-making process of the Global Mechanism and the third is that acts of the Managing Director are not attributable to the Fund."[242]

220. The Fund pointed out that inherent in the limited and voluntary nature of international jurisdiction is that if a judgment of a court or tribunal against a participating party will effectively determine the legal obligations of one or more parties which are not before that court or tribunal, such court or tribunal should not proceed to consider rendering judgment against the participating party in absence of the others. The fact that the timing of the finding of the responsibility of the absent party precedes such a finding in respect of the participating party, or that the finding of the responsibility of the absent party is a logical prerequisite to the finding of the responsibility of the participating party, is not significant. What is dispositive is whether the determination of the legal rights of the participating party effectively determines the legal rights of the absent party.[243] The principle of permitting third parties by their non-appearance to foreclose litigation between two parties over which the court or tribunal otherwise has jurisdiction appears unappealing. As the present case demonstrates, the reverse is even less appealing. Obviously, the question is one of balancing, on the one hand, the propriety of the court or tribunal's exercising to the fullest extent the jurisdiction which it has been given and, on the other hand, the impropriety of determining the legal interests of a third party which is not a party to the proceedings. While it may in practice be unusual for the legal interests of a third party to be subject to

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[241] IFAD's Reply, paras. 32-33.

[242] ILOAT Judgment No. 2867, Consideration 8.

[243] See: See also: H. Lauterpacht, *The Development of International Law by the International Court* (Cambridge, Grotius Publications, reprint 1982), pp. 342-344..

such determination, where they are, the balance should swing in its favour, and in favour of the inadmissibility of the action against the participating party.

221. The Court – as well as other international courts and tribunals[244] - has had to consider questions of this kind on previous occasions insofar as it concerns its own proceedings. On those occasions the Court has acknowledged the indispensable third party-rule as being a well-established principle of international law. In the case concerning the *Monetary Gold Removed from Rome* in 1943 (Preliminary Question), the first submission in Italy's Application was worded as follows: "(1) that the Governments of the French Republic, Great Britain and Northern Ireland and the United States of America should deliver to Italy any share of the monetary gold that might be due to Albania under Part III of the Paris Act of January 14th, 1946, in partial satisfaction for the damage caused to Italy by the Albanian law of January 13th, 1945"[245]. In its Judgment of 15 June 1954, the Court, noting that only France, Italy, the United Kingdom and the United States of America were parties to the proceedings, found that:

> "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[246]

222. Noting that Albania had chosen not to intervene, the Court stated:

> "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania."[247]

223. Subsequently, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* the Court observed as follows:

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[244] *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration, Award of 5 February 2001, text available at http://www.pca-cpa.org; also published in *International Law Reports* 119 (2001), pp. 566-598. Reprinted at *Hawaiian Journal of Law and Politics*, 1 (Summer 2004), pp. 238-277. The Tribunal comprised James Crawford, Gavan Griffith, and Christopher Greenwood. Under the parties' agreement to arbitrate, the appointing authority for the Tribunal was Keoni Agard.

[245] I.C.J. Reports 1954, p. 22.

[246] Ibid., p. 32.

[247] Ibid.

> "There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning *Monetary Gold Removed from Rome in* 1943, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings 'would not only be affected by a decision, but would form the very subject-matter of the decision' (I.C.J. *Reports* 1954, p. 32). Where, however, claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated (paragraph 74, above) other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings." [248]

224. That jurisprudence was applied by a Chamber of the Court in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)* in a Judgment given on 13 September 1990, which examined whether the legal interests asserted by Nicaragua in support of an application for permission to intervene in the case did or did not form "part of 'the very subject-matter of the decision'" to be taken or whether they were only affected by that decision.[249]

225. In its Judgment in the case concerning *East Timor (Portugal v. Australia)*[250], the Court found that it could not exercise the jurisdiction conferred upon it by the declarations made by the parties under Article 36, paragraph 2, of the Court's

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[248] Judgment of 26 November 1984, I.C.J. Reports 1984, p. 43 1, para. 88.

[249] I.C.J. Reports 1990, p. 116, para. 56.

[250] *East Timor* (*Portugal* v. *Australia*), Judgment, I.C.J. Reports 1995, p. 90; For a discussion, see N. Symbesma-Knol, "The Indispensable Third Party Rule in the East Timor Case," in: E. Denters and N. Schrijver, (eds.), *Reflections on international law from the low countries: in honour of Paul de Waard* (Martinus Nijhoff Publishers, 1998), p. 442..

Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic. Australia objected to the Court's deciding on the case by contending that the jurisdiction conferred upon the Court by the parties' declarations under Article 36, paragraph 2, of the Statute would not enable the Court to act if, in order to do so, the Court were required to rule on the lawfulness of Indonesia's entry into and continuing presence in East Timor, on the validity of the 1989 Treaty between Australia and Indonesia, or on the rights and obligations of Indonesia under that Treaty, even if the Court did not have to determine its validity. Having carefully considered the argument advanced by Portugal, which sought to separate Australia's conduct from that of Indonesia, the Court concluded that Australias conduct could not be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia. The Court explained in *East Timor* that the test is whether a determination of the absent third State's rights and obligations would "constitute the very subject-matter of,"[251] and is "needed as a basis for,"[252] its decision, as opposed to the situation where its findings "might well have implications"[253] for the third State's rights and obligations or "might affect the legal interests"[254] of another State.

226. In its Judgment in the case concerning *Phosphate Lands in Nauru*, the Court explained the *rationale* behind the absent third party rule at the international level as opposed to the national level by pointing out:

> "National courts, for their part, have more often than not the necessary power to order *proprio motu* the joinder of third parties who may be affected by the decision to be rendered; that solution makes it possible to settle a dispute in the presence of all the parties concerned. But on the international plane the Court has no such power. Its jurisdiction depends on the consent of States and,

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[251] Ibid., 105, para. 34.

[252] Ibid.

[253] Ibid.

[254] Ibid., p. 104.

consequently, the Court may not compel a State to appear before it, even by way of intervention."[255]

B. The Tribunal lacked jurisdiction to entertain pleas of flaws in the decision-making process of the Fund to the extent that such pleas involved an examination of the decision-making process of absent third parties and/or its decision to entertain these pleas constituted a fundamental fault in the procedure followed

227. Admittedly, in its *Unesco* Opinion the Court observed that:

> "The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization."[256]

228. However, given that the Tribunal's jurisdiction over international organizations and their acts is dependent on those organizations having accepted the jurisdiction of the Tribunal, there is no objection against the application of the indispensable third party rule to the Tribunal's exercise of jurisdiction. On the contrary, just as in the case of States the Tribunal's jurisdiction – and for that matter any international tribunal wishing to adjudicate a dispute involving an international organization and its acts - depends on the acceptance of jurisdiction by the international organization concerned and, consequently, the Tribunal may not compel an international organization to appear before it, even by way of intervention.[257] In fact, it is important to note that international organizations that have not recognized the jurisdiction of the Tribunal and which are not a party to a case before it do not have the option to apply for permission to intervene. Article 13.2 of the Rules of the Administrative Tribunal of the International Labour Organization provides that only "[a]n organization which has recognized the Tribunal's jurisdiction may intervene in a complaint on the grounds that the ruling which the Tribunal is to make may affect it." Therefore, whereas in the case of the Court

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[255] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, 260, para. 53.

[256] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 97.

[257] At the 32nd Session of the International Labour Conference (1949), Article II of the Statute of the ILO Tribunal was amended to permit other international organizations that were approved by the ILO's Governing Body to recognize the jurisdiction of the Tribunal to consider complaints alleging the non-observance, in substance or in form, of the terms of appointment of officials, or of the provisions of the Staff Regulations of those organizations.

itself (due to the possibility of filing a request for intervention), the absence of such a request in no way precludes the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for, in the case of the Tribunal no such possibility exists, which *a fortiori,* renders the absence of any indispensable party an inherent and peremptory impediment for the exercise of jurisdiction by the Tribunal.

229. In the present case, the interests of the Global Mechanism and the Conference of the Parties constituted the very subject-matter of the Complainant's complaint and of the decision rendered by the Tribunal on the merits of that complaint. The situation is in that respect not different from that with which the Court had to deal in the *Monetary Gold* Case. In the latter case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. Similarly, in the present case, as the Fund's purported responsibility predicates on the decision-making in the Global Mechanism and the Conference of the Parties, the determination of the responsibility of those two bodies is a prerequisite for the determination of the responsibility of the Fund. The central contention of the Complainant before the Tribunal was that it is not true that the budget of the Global Mechanism that was authorized by the Conference of the Parties necessitated the abolition of her post and non-renewal of her fixed-term contract. This assertion necessitated an examination and interpretation of the decision of the Conference of the Parties. In the *Monetary Gold* Case the link between, on the one hand, the necessary findings regarding Albania's alleged responsibility and, on the other hand, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical. As the Court explained:

> "In order . . . to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her."[258]

230. Similarly, in the present case, the findings by the Tribunal regarding the existence or the content of the responsibility attributed to the Fund by the Complainant had direct implications for the legal situation of the Global Mechanism and the Conference of the Parties. As explained above, this fact is not obfuscated by the Tribunal's erroneous assimilation of the Global Mechanism and the Fund. Once this assimilation is undone, as the Fund is requesting the Court to do, the indispensable third party rule will prompt the conclusion that, as pointed out in the

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[258] I.C.J. Reports 1954, p. 32.

Fund's Reply submitted to the Tribunal,[259] the Tribunal should not have entertained the Complainant's pleas of flaws in any decision-making process of the Fund insofar as they may entail examining the decision-making process in the Global Mechanism and/or the Conference of the Parties.

231. What makes the Tribunal's Judgment No. 2867 subject to challenge under Article XII of the Tribunal's Statute is that the Tribunal based its very decision that "[t]he President's decision of 4 April 2008 is set aside"[260] on its conclusion that he "erred in law" in not finding that the decision of the Managing Director of the Global Mechanism "not to renew the complainant's contract on the ground of its abolition constituted an error of law."[261] The Tribunal based its finding that the Managing Director's decision constituted an error of law directly on its separate finding that "the Managing Director had no authority to abolish the complainant's post."[262] The Tribunal arrived at the latter finding solely after analyzing the Memorandum of Understanding and the Conference of the Parties' decision on budgetary matters in the absence of both the Global Mechanism and the Conference of the Parties. Thus, the Tribunal's decision that "[t]he President's decision of 4 April 2008 is set aside" is directly linked to its analysis of the Memorandum of Understanding and the Conference of the Parties' decision insofar as they concern budgetary matters.[263]

232. In Judgment No. 2867, the Tribunal expressly acknowledged that "[t]he Fund contends that the Tribunal lacks jurisdiction to entertain" the following two arguments on which the Complainant relied in her complaint: "firstly, that the Managing Director exceeded his authority in deciding not to renew her contract and, secondly, that the 'core budget' approved by the Conference did not require the abolition of her post."[264]

233. The Tribunal should have recognized that the complaints that the Complainant submitted before the Tribunal through items B(1) and B(2) of her complaint, namely "firstly, that the Managing Director exceeded his authority in deciding not

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[259] Reply, paras. 31-34.

[260] ILOAT Judgment No. 2867, p. 18, operative paragraph, item (1). See also ibid., Consideration 17.

[261] Ibid., Consideration 17.

[262] Ibid. ("*Because* the Managing Director had no authority to abolish the complainant's post, his decision not to renew the complainant's contract on the ground of its abolition constituted an error of law. The President of the Fund erred in law in not so finding when considering her internal appeal. *It follows that* the President's decision of 4 April 2008 dismissing the complainant's internal appeal must be set aside." (Emphasis added)).

[263] See ibid., Considerations 12-17.

[264] Ibid., Consideration 4.

to renew her contract and, secondly, that the 'core budget' *approved by the Conference* did not require the abolition of her post,"[265] concerned the Conference of the Parties, which is plainly outside the Tribunal's jurisdiction, and raised issues of accountability for the exercise of discretionary powers of the Managing Director of the Global Mechanism, which according to Article 21 of the Convention is reserved to the Conference of the Parties.[266] Section III of the Memorandum of Understanding merely implements the accountability rule set forth in the Convention and emphasizes the exclusive competence of the Conference of the Parties in this regard by stating that "[t]he Global Mechanism will function under the authority of the Conference and be *fully* accountable *to the Conference*" (emphasis added).

234. By exclusively analyzing the Memorandum of Understanding and "the Conference decision"[267] in determining whether the decision of the Managing Director of the Global Mechanism to abolish the Complainant's post was taken with or without authority, the Tribunal made the determination of a third party's rights and obligations "the very subject-matter of" its decision, to use the Court's words in the *East Timor* Case. The Tribunal's conclusion that "the abolition of her post was impliedly forbidden by the Conference decision" constituted the very basis for its decision that "the decision of the Managing Director to abolish it was taken without authority,"[268] and hence that "his decision not to renew the complainant's contract on the ground of its abolition constituted an error of law," which according to the Tribunal was also, and automatically, committed by the President of the Fund (and hence the Fund itself) when he dismissed the Complainant's internal appeal on 4 April 2008. By ruling in this way, the Tribunal violated the "indispensable party" or "necessary third party" rule developed in the Court's case law.

C. Conclusion

235. For the reasons stated above, the Fund submits that Question V should be answered in the affirmative.

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[265] Ibid., Consideration 4 (emphasis added).

[266] IFAD alerted the Tribunal to this in the proceedings before the Tribunal, to no avail. See IFAD's Reply, para. 34.

[267] ILOAT Judgment No. 2867, Consideration 16.

[268] Ibid. ("*Accordingly*, the decision of the Managing Director to abolish it was taken without authority." (Emphasis added)).

Chapter 9. QUESTION VI

A. Lack of Jurisdiction *ratione materiae*: The Memorandum of Understanding between the Conference of the Parties and the Fund is neither part of "the terms of appointment of officials" nor of "the provisions of the Staff Regulations" within the meaning of Article II(5) of the ILOAT Statute

236. The Fund respectfully invites the Court to find that the Memorandum of Understanding between the Conference of the Parties of the UNCCD and the Fund is neither part of the terms of appointment of officials nor of the provisions of the Staff Regulations within the meaning of Article II, paragraph 5, of the ILOAT Statute, and hence to find that the Tribunal lacked jurisdiction to entertain the Complainant's complaint. Accordingly, Question VI should be answered in the affirmative. Question VI reads as follows:

> VI. Was the ILOAT's decision confirming its jurisdiction to interpret the Memorandum of Understanding between the Conference of the Parties to the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa and IFAD (hereby the MoU), the Convention, and the Agreement Establishing IFAD beyond its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

237. As has been observed in the literature, "[t]he extent of the jurisdiction *ratione materiae* of the administrative tribunals is somewhat less easy to ascertain" than their jurisdiction *ratione personae*.[269] Jurisdiction *ratione materiae* concerns the subject-matter over which the Tribunal may assert jurisdiction. In other words, is the Tribunal competent to deal with this kind of dispute or complaint under the document from which it derives jurisdiction? Generally speaking, "the task of the [administrative] tribunals is to adjudicate disputes arising from the contracts or the terms of employment."[270]

238. According to Article II, paragraph 5, of its Statute, the Tribunal is "competent to hear complaints alleging non-observance, in substance or in form, *of the terms of appointment* of officials *and of provisions of the Staff Regulations* of any other intergovernmental international organisation" having accepted "the jurisdiction of the Tribunal for this purpose," which in this case can only mean IFAD. (Emphasis added). In order to determine the jurisdiction of the Tribunal, it is thus not necessary for the complainant to prove his or her right (that pertains to the

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[269] P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001), p. 422.

[270] Ibid.

merits), but it is indispensable for the complainant to define the basis of his or her action in order for the Tribunal to ascertain whether it falls within the sphere of activity of the Tribunal or, in other words, whether the Tribunal is or is not competent to hear it. As far as the Fund is concerned, according to the words employed in Article II, paragraph 5, of the Tribunal's Statute, the Tribunal is only competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of the Fund. This coupling of the two categories of rules is designed to put them on a footing of equality, in the sense that non-observance of either will give rise to judicial proceedings and that it is the duty of the Tribunal to safeguard and protect officials against their non-observance.[271] Any claim or part of a claim against the Fund, even if filed by a staff member of the Fund, which does not allege the non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of the Fund, falls outside the competence of the Tribunal insofar as it concerns the Fund[272]. In this sense, it does not matter whether or not Complainant in the present case qualifies as a staff member of the Fund. Accordingly, in a case where a complainant invoked the Regulations of the United Nations Joint Staff Pension Fund, the Tribunal held that the "Tribunal is not competent to interpret the Fund Regulations."[273]

239. Therefore, even assuming, *arguendo,* that it has jurisdiction *ratione personae*, for the Tribunal to have jurisdiction *ratione materiae* under Article II, paragraph 5, of its Statute, the complaint must either be "alleging non-observance, in substance or form, of the terms of appointment" of the Complainant *as an IFAD official* or it must allege non-observance "of provisions of the Staff Regulations of" IFAD, the "intergovernmental international organisation" having submitted a declaration recognizing the Tribunal's jurisdiction under Article II, paragraph 5 "for this purpose." The latter words indicate that the subject-matter jurisdiction of the Tribunal is limited to the two types of complaints mentioned in Article II, paragraph 5. The two classes of complaints that the Tribunal is competent to hear under that provision are: (1) complaints alleging "non-observance, in substance or form, of the terms of appointment of officials" and (2) complaints alleging "non-observance of provisions of the Staff Regulations." Indeed, the Court has

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[271] Cf. *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Dissenting Opinion of Judge Badawi, I.C.J. Reports 1956, p. 77, at 123, 125.

[272] See in the same sense ILOAT Judgment No. 1105 of 3 July 1991 (Consideration 2).

[273] ILOAT Judgment No. 1245 of 10 February 1993 (Consideration 19).

explained that "the scope" of jurisdiction under Article II, paragraph 5, covers "(*a*) 'terms of appointment' or (*b*) 'Staff Regulations'."[274]

240. As regards the applicable standard of review, the Court has said that "[i]n order to admit that the Tribunal had jurisdiction, it is sufficient to find that the claims set out in the complaint are, by their nature, such as to fall within the framework of Article II, paragraph 5, of the Statute of the Administrative Tribunal … ."[275] Recently, the Tribunal itself confirmed the foregoing in its Judgment No. 2952:

> "The complainant does not allege the non-observance of any of the terms of his appointment or of any of the Staff Regulations applicable to him. Nor does he claim that the Agency has infringed his rights as a member of the Staff Committee. [...] Further, he does not claim to have suffered any loss, damage or other injury, and does not point to any decision affecting him directly or which would have legal consequences for him individually. Thus, he has not established any cause of action [...] or raised any matter that may be the subject of a complaint to the Tribunal."[276]

241. Thus, the question in the present case is whether the claims and pleas as formulated in the Complainant's complaint are, by their nature, such as to fall within the framework of Article II, paragraph 5, of the Tribunal's Statute. If they are not, it was not open to the Tribunal to examine the Complainant's pleas on this point. As the Court has stated, "it is not open to the Court to go beyond the claim as formulated by the [applicant] and it will not pursue its examination of this point any further."[277]

242. Based on the text of the Complainant's pleadings submitted to the Tribunal, it is clearly not possible to fit her complaints under the two grounds set forth in Article II, paragraph 5, of the Tribunal's Statute. The first two grounds included in the complaint against which the Fund raised jurisdictional objections before the Tribunal[278] made no allegation whatsoever of "non-observance, in substance or in

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[274] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 89. Elsewhere, the Court stated that it "recognizes that the Administrative Tribunal is a Tribunal of limited jurisdiction." Ibid., p. 97.

[275] Ibid., p. 88.

[276] ILOAT Judgment No. 2952 of 8 July 2010.

[277] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, p. 37, para. 49.

[278] "(1) The Managing Director exceeded his authority in deciding not to renew the complainant's contract" and "(2) The approved core budget did not require elimination of complainant's post." Complaint, paras. 17-25.

form, of the terms of appointment of officials and of provisions of the Staff Regulations" of IFAD. The Complainant put her case on an entirely different basis, which was described by the Tribunal in the following words: "[t]he complainant relies on [Paragraphs 4 and 6 of Section III.A of the Memorandum of Understanding between the Fund and the Conference of the Parties] to argue, firstly, that the Managing Director exceeded his authority in deciding not to renew her contract and, secondly, that the 'core budget' approved by the Conference did not require the abolition of her post."[279] Instead of not pursuing its examination of this point any further, the Tribunal proceeded to adjudicate her claims, not with reference to her contract or the Fund's Staff Regulations, but with reference to various provisions of the Memorandum of Understanding[280] and Conference of the Parties' decisions.[281] It also is noteworthy that there is no finding of "non-observance" in the reasoning or *dispositif* of Judgment No. 2867.

243. According to the Court, "what must be alleged, according to Article II, paragraph 5, is non-observance, namely, some act or omission on the part of the Administration."[282] "Administration" evidently means the defendant-organization having issued the declaration specified in Article II, paragraph 5, of the Tribunal's Statute. In this case, it means some act or omission on the part of the Fund.

244. Given that the Tribunal asserted that "the MOU confers no power on the President [of IFAD] to determine the conditions of appointment of the personnel of the Global Mechanism,"[283] if it is accepted that the Complainant belonged to "the personnel of the Global Mechanism," it is difficult to see how the Tribunal could entertain the Complainant's arguments concerning her terms of appointment or employment (termination) against the Fund (the organization to which the President belongs) as derived from the Memorandum of Understanding, as opposed to the Fund's staff regulations—for it is only those staff regulations that fall within the scope of the Tribunal's jurisdiction *ratione materiae* under Article II, paragraph 5, of its Statute. According to the Court, the words "complaints alleging" in Article II, paragraph 5, "refer to what the complainant alleges—to that on which he relies for the purpose of supporting his complaint." The Tribunal acknowledged *expressis verbis* that "[t]he complainant relies on [Paragraphs 4 and 6 of Section III.A *of the Memorandum of Understanding*] to argue, firstly, that

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[279] ILOAT Judgment No. 2867, Consideration 4.

[280] Ibid., Consideration 7.

[281] Ibid., Considerations 13-15.

[282] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 88.

[283] ILOAT Judgment No. 2867, Consideration 10.

the Managing Director exceeded his authority in deciding not to renew her contract and, secondly, that the 'core budget' approved by the Conference did not require the abolition of her post,".[284] Thus, in the view of the Tribunal, "that on which he relies" in the case of the Complainant meant the Memorandum of Understanding, and not IFAD's staff regulations.

245. Article 6, section 8(d), of the Agreement Establishing IFAD states that the IFAD President "shall organize the staff [of IFAD] and shall appoint and dismiss members of the staff [of IFAD] in accordance with regulations adopted by the Executive Board [of IFAD]." The IFAD President was not the one refusing to extend the Complainant's fixed-term contract. She was not extended by the Managing Director of the Global Mechanism acting on behalf of the Global Mechanism, and not the Fund.

246. The Memorandum of Understanding, which according to the Tribunal was the document on which the Complainant relied for the purpose of supporting her complaint, does not provide for the appointment of Global Mechanism staff by IFAD or the IFAD President, except for the reference, in Section II.D., to the appointment of the Managing Director of the Global Mechanism by the President upon the nomination by the UNDP Administrator. In fact, Section III.A.3, under the heading "Accountability to the Conference," makes clear that "[t]he Managing Director will be responsible for … staffing." The Memorandum of Understanding provides nowhere that "IFAD will be responsible for … staffing" of the Global Mechanism or that IFAD's "President will be responsible for … staffing." Given that it is undisputed that the Complainant was part of the staff of the Global Mechanism, neither the Fund nor its President was responsible for her appointment or employment/non-extension under the terms of the Memorandum of Understanding.

247. As mentioned above, Article 6, Section 8(d), of the Agreement Establishing IFAD states that the IFAD President "shall organize the staff and shall appoint and dismiss members of the staff in accordance with regulations adopted by the Executive Board." The pertinent regulations are set out in a Human Resources Policies Manual ("HRPM") adopted by the President pursuant to the Human Resources Policies ("HRP") adopted by IFAD's Executive Board. The HRP sets forth "the broad principles in accordance with which the President shall organize and manage" the staff of IFAD. According to the HRPM, the President may supplement it by issuing administrative instructions.

[284] Ibid., Consideration 4.

248. The Court is invited to take note of the fact that the President's Bulletin No. PB/04/01 dated 21 January 2004[285] is not adopted pursuant to the HRP. The basis for the President's authority to stipulate to the matters addressed in that Bulletin is found in Section II.A of the Memorandum of Understanding in conjunction with Section VI thereof referring to "personnel, financial, communications and information management services." Thus, the Tribunal was wrong in concluding that "the MOU confers no power on the President to determine the conditions of appointment of the personnel of the Global Mechanism and, thus, the President has authority to do so only if they are staff members of the Fund."[286]

249. Both parties invoked the President's Bulletin No. PB/04/01 in the proceedings before the Tribunal. Paragraph 11(f) of the Bulletin clearly distinguishes between "IFAD and Global Mechanism staff." By referring to "IFAD and Global Mechanism staff" in combination with "the two entities" in the same provision, the President's Bulletin leaves no doubt about the fact that IFAD staff are separate from Global Mechanism staff and are, therefore, not to be assimilated for purposes of Article II, paragraph 5, of the Tribunal's Statute or Article 6, Section 8(d), of the Agreement Establishing IFAD. Moreover, paragraph 11(c) of the same document provides as follows:

> "All fixed-term contracts of employment for the Global Mechanism shall be for a maximum of two years, renewable, and subject to the availability of resources. *IFAD's rules and regulations* on the provision of career contracts for fixed-term staff *shall not apply to the staff of the Global Mechanism*, except for those that have already received a career contract as a result of their earlier employment with IFAD." (Emphasis added)

250. It is beyond doubt that the Complainant fell within the category of "fixed-term contracts of employment for the Global Mechanism … for a maximum of two years, renewable, and subject to the availability of resources," i.e., the first sentence of paragraph 11(c) of the President's Bulletin.

251. The second sentence of paragraph 11(c) of the President's Bulletin underscores that the Tribunal could not, using the words contained in Article II, paragraph 5, of its Statute, "hear complaints alleging non-observance, in substance or form, … of [applicable] provisions of the Staff Regulations" of the Fund in the case of the Complainant, given that the pertinent regulations were explicitly declared to be

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[285] Document V.8.

[286] ILOAT Judgment No. 2867, Consideration 10.

inapplicable to the staff of the Global Mechanism by the Bulletin and such staff included the Complainant.

252. Faced with a complaint alleging "non-observance, in substance or form, of the terms of appointment of officials," the Tribunal "is entitled to ascertain and to determine what are the texts applicable to the claim submitted to it."[287] While it is unclear from this statement of the Court which texts the Tribunal may actually *examine* in adjudicating upon a complaint that is otherwise within its jurisdiction, this question is immaterial in this case involving a complaint that failed to allege "non-observance, in substance or form, of the terms of appointment of officials and of provisions of the Staff Regulations" of IFAD.

253. The Court also has stated that "[i]n order to determine the jurisdiction of the Tribunal, it is necessary to ascertain whether the terms and the provisions invoked appear to have a substantial and not merely an artificial connexion with the refusal to renew the contracts."[288]

254. Whatever "the terms of appointment" of the Complainant were, they have nothing to do with the Memorandum of Understanding, an agreement between the Conference of the Parties and the Fund from which the Complainant can derive no individual rights. It has been pointed out that "[i]t is a general principle of law, recognized in national legal systems and by international jurisprudence, that a Tribunal must base its decision on the legal rights of the parties."[289] The Memorandum of Understanding is an international agreement governed by international law and concluded in written form as meant in the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It was entered into by the Conference of the Parties and the Fund in direct implementation of the Conference of the Parties' Decision 24/COP.1, which was adopted pursuant to Article 21, paragraph 6, of the Convention.[290] For this reason alone, the Tribunal was not competent to entertain the Complainant's arguments as derived from the Memorandum of Understanding, the Convention, or

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[287] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports, p. 77, at 88. In addition, "it is necessary that the complaint should indicate some genuine relationship between the complaint and the provisions invoked." Ibid., p. 89.

[288] Ibid., 89.

[289] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, Dissenting Opinion of Judge Read, I.C.J. Reports, p. 77, at 150.

[290] Art. 21, para. 6, of the Convention reads as follows: "The Conference of the Parties shall, at its first session, make appropriate arrangements with the organization it has identified to house the Global Mechanism for the administrative operations of such Mechanism, drawing to the extent possible on existing budgetary and human resources."

Conference of the Parties' decisions. The Memorandum of Understanding is plainly outside the scope of Article II, paragraph 5, of the Tribunal's Statute. Yet the Tribunal acknowledged that "[t]he complainant relies on [Paragraphs 4 and 6 of Section III.A of the Memorandum of Understanding] to argue, firstly, that the Managing Director exceeded his authority in deciding not to renew her contract and, secondly, that the 'core budget' approved by the Conference did not require the abolition of her post,"[291] and it proceeded to adjudicate her claims with reference to various provisions of the Memorandum of Understanding[292] and even Conference of the Parties' decisions.[293] In reaching its conclusions, the Tribunal examined the internal decision-making process of the Convention, even though neither the Convention nor any of its organs or agents is subject to the Tribunal's jurisdiction. According to the Tribunal:

> "*The MOU* makes it clear that the Global Mechanism functions under the authority of the Conference. Thus, the conclusion that *the Conference decision* required the continuation of the approved posts, including that of the complainant, directs the further conclusion that the abolition of her post was impliedly forbidden by *the Conference decision*. *Accordingly*, the decision of the Managing Director to abolish it was taken without authority.
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> ...
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> *Because* the Managing Director had no authority to abolish the complainant's post, his decision not to renew the complainant's contract on the ground of its abolition constituted an error of law. The President of the Fund erred in law in not so finding when considering her internal appeal. It follows that the President's decision of 4 April 2008 dismissing the complainant's internal appeal must be set aside."[294]

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[291] ILOAT Judgment No. 2867, Consideration 4.

[292] The Tribunal also relied on various provisions of the Memorandum of Understanding in support of its finding that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes" and that the "effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund." ILOAT Judgment No. 2867, Consideration 7.

[293] See, e.g., ILOAT Judgment No. 2867, Consideration 13 ("The question of the Managing Director's authority to abolish the complainant's post depends on whether, in the circumstances, that course was impliedly prohibited by the terms of the MOU and the decision of the Conference relating to staffing and budget for the 2006-2007 biennium").

[294] Ibid., Considerations 16-17 (emphasis added).

255. In other words, the key holding (*dictum*) in the Tribunal's Judgment No. 2867[295] is inextricably linked to the Tribunal's findings based on the Memorandum of Understanding and Conference of the Parties' decisions concerning the budget of the Conference of the Parties and the Global Mechanism established by the Conference of the Parties, whereas the Tribunal had acknowledged that "[t]he argument with respect to the Tribunal's jurisdiction is based, in the main, on the proposition that '[t]he Fund and the Global Mechanism are separate legal identities'."[296]

256. The Court has linked the express reference in a fixed-term contract to "Staff Regulations and Rules" to the question whether "the complainant, in claiming to possess a right to renewal of his contract and in claiming that that right had been infringed, was placing himself on the ground of non-observance of the terms of appointment," the expression employed in Article II, paragraph 5, of the Tribunal's Statute.[297] In the Court's view, the staff regulations "constitute the legal basis on which the interpretation of the contract must rest." This statement means that for the Tribunal to have jurisdiction over a complaint alleging non-observance of the terms of appointment under Article II, paragraph 5, the complainant must invoke the contract and, if the contract refers to staff regulations or such regulations otherwise apply to the complainant, the complainant must also invoke such staff regulations, which constitute the legal basis on which the interpretation of the contract must rest. In the *Unesco* Case, the Court observed that the complainant contested the Unesco Director-General's propositions "in reliance not only on the terms of the contract, but also on the Staff Regulations." In stark contrast, in Judgment No. 2867, the Tribunal acknowledged that "[t]he complainant relies on [Paragraphs 4 and 6 of Section III.A of the Memorandum of Understanding] to argue, firstly, that the Managing Director exceeded his authority in deciding not to renew her contract and, secondly, that the 'core budget' approved by the Conference did not require the abolition of her post,"[298] and it proceeded to adjudicate her claims with reference to various provisions of the Memorandum of Understanding and Conference of the Parties' decisions. In other words, the Complainant relied on the Memorandum of Understanding and on Conference of the Parties' decisions, as opposed to the contract or any applicable staff regulations, for the purpose of supporting her complaint, and the Tribunal relied *exclusively* on the Memorandum of Understanding and on Conference of the

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[295] Ibid., p. 18: "1. The President's decision of 4 April 2008 is set aside."

[296] Ibid., Consideration 5.

[297] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 94.

[298] ILOAT Judgment No. 2867, Consideration 4.

Parties' decisions in upholding her complaint.[299] Therefore, in contrast to the *Unesco* Case, the question was not "one of a 'dispute concerning the interpretation and application of the Staff Regulations and Rules of the defendant Organisation'" on the basis of which "the Tribunal was justified in confirming its jurisdiction,"[300] but it was one that the Tribunal treated as a dispute concerning the interpretation and application of the Memorandum of Understanding and on Conference of the Parties' decisions. Given that the Tribunal chose this treatment, it was not justified in confirming its jurisdiction and therefore its decision cannot stand: "It must be obvious that judgments given by a Tribunal which is without jurisdiction over the subject-matter can have no validity."[301]

B. Conclusion

257. For the reasons set out above, the Fund submits that the claims formulated in the Complainant's complaint, at least items B(1) and B(2) of the complaint, were, by their nature, such as to fall outside the framework of Article II, paragraph 5, of the Tribunal's Statute, and given that the Tribunal lacked jurisdiction to rule on them, Question VI should be answered in the affirmative.

Chapter 10. QUESTION VII

258. The Fund submits that Question VII should be answered in the affirmative. Question VII reads as follows:

> "VII. Was the ILOAT's decision confirming its jurisdiction to determine that by discharging an intermediary and supporting role under the MoU, the President was acting on behalf of IFAD outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?"

A. The Tribunal failed to recognize that the Fund, per its President, acted as an agent of the Conference of the Parties when it implemented the decision of the Managing Director of the Global Mechanism, leaving the Tribunal without jurisdiction

259. Given the relationship of agent and principal under the Memorandum of Understanding between the Fund and the Conference of the Parties, the Tribunal should have recognized that the Fund, per its President, acted as agent of the Conference of the Parties and that, therefore, it lacked jurisdiction in light of the

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[299] Ibid., paras. 13-17.

[300] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 97.

[301] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, Dissenting Opinion of President Hackworth, I.C.J. Reports 1956, p. 77, at 166, 122.

fact that the Conference of the Parties has not recognized the Tribunal's jurisdiction and the acts of the Conference of the Parties, *casu quo*, the Global Mechanism, do not fall within the Tribunal's jurisdiction. Moreover, exercising jurisdiction over a principal – i.e. reviewing the acts of the Managing Director of the Global Mechanism – through an agent – i.e., IFAD, per its President – in the absence of recognition of the Tribunal's jurisdiction by that principal amounts to a fundamental fault in the procedure followed by the Tribunal due to the fact that IFAD, the agent in this case, had no power of attorney to represent the Conference of the Parties in any disputes.

260. In Consideration 17 of Judgment No. 2867, the Tribunal, after finding that the Managing Director's "decision not to renew the complainant's contract on the ground of its abolition constituted an error of law," proceeded to find that "[i]t follows that the President's decision of 4 April 2008 dismissing the complainant's internal appeal must be set aside." While the Tribunal made no mention of the Fund in this part of its reasoning – in other words, did not attach the conclusion that IFAD was liable for the President's decision –, the operative paragraph of Judgment No. 2867, after declaring that "[t]he President's decision of 4 April 2008 is set aside," contained no fewer than three separate holdings directing that "IFAD shall pay" certain amounts to the Complainant. In other words, in order to hold the agent (IFAD) liable, the Tribunal confirmed and exercised jurisdiction over a principal that has not recognized the Tribunal's jurisdiction.

261. Judgment No. 2867 therefore also raises questions concerning the role of IFAD's President under the Memorandum of Understanding and its impact on the Fund. It is premised on a view regarding international institutional law which seems to exclude two possibilities: (a) that two or more international organizations may have common organs and even a common chief administrative officer, and (b) that an organ or chief administrative officer of an organization may be placed at the disposal of other international persons. That image of international institutional law clearly does not accord with contemporary international practice. International organizations sharing the same organs are quite common,[302] whereas certain global and regional multilateral financial institutions share the same chief administrative officer.[303] Whether the conduct of such organs or officials must be attributed to the one or the other organization involved will depend on the question in which capacity the common organ or common official acted in a particular case.

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[302] See for a discussion of this practice, see H.G. Schermers and N.M. Blokker, *International Institutional Law*, 4th rev. ed. (Boston/Leiden: Martinus Nijhoff, 2003), paras. 1715-1720.

[303] E.g., the World Bank Group comprising the IBRD, IDA, IFC, and MIGA.

262. The President of IFAD signed the Memorandum of Understanding between the Conference of the Parties and the Fund "FOR THE INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT."[304] He signed the Memorandum of Understanding on behalf of the Fund as "the legal representative of the Fund" under Article 6, Section 8(h), of the Agreement Establishing IFAD.

263. In addition to signing the Memorandum of Understanding as IFAD's legal representative, the President also was assigned certain functions under the Memorandum of Understanding. Those functions are most accurately described as purely supervisory and facilitating functions. In exercising those functions, which are entirely and exclusively in support of the functions of the Global Mechanism, the President cannot be said to be discharging functions of the Fund. Thus, the role of the IFAD President under the Memorandum of Understanding is different from the role of the President as an organ under the Agreement Establishing IFAD. According to Article 6, Section 8(f), of the Agreement Establishing IFAD, "[t]he President and the staff, in the discharge of their functions [for IFAD], owe their duty exclusively to the Fund and shall neither seek nor receive instructions in regard to the discharge thereof from any authority external to the Fund." The Memorandum of Understanding does not contain a similar provision. Moreover, Article 6, Section 8(d), of the Agreement Establishing IFAD provides that the "President … , under the control and direction of the Governing Council and the Executive Board, shall be responsible for conducting the business of the Fund." The Memorandum of Understanding lacks a similar provision.

264. The role assigned to the President of IFAD under Sections II.D and III of the Memorandum of Understanding underscores the purely supporting/facilitating or supervisory role of the President assigned to him jointly by the Conference of the Parties and the Fund under the Memorandum of Understanding. Under Section II.D, the President is given the special authority to appoint a candidate for Managing Director of the Global Mechanism "nominated by the Administrator of UNDP." In other words, the President does not select and nominate any candidates, and in appointing the Managing Director of the Global Mechanism, he acts pursuant to the special authority vested in him by Section II.D of the Memorandum of Understanding, and not pursuant to his authority under Article 6, Section 8(d), of the Agreement Establishing IFAD. The Managing Director of the Global Mechanism is "housed," i.e., occupies office space, in the Office of the President at IFAD's headquarters in Rome. According to Section III.A.2 of the Memorandum of Understanding, the Managing Director of the Global Mechanism is to submit reports to the Conference of the Parties through ("on behalf of") the President. Under Section III.A.4, the President is charged with reviewing and

[304] Memorandum of Understanding, p. 6, Annex I to Fund doc. EB 99/66/INF.10 (28 April 1998).

approving the "programme of work and budget of the Global Mechanism" prepared by the Managing Director "before being forwarded to the Executive Secretary of the Convention for consideration." Pursuant to Section III.B, the Managing Director of the Global Mechanism is to submit a report to each ordinary session of the Conference of the Parties on the activities of the Global Mechanism through ("on behalf of") the President.

265. Based on the foregoing, by performing a limited intermediary or facilitating function under the Memorandum of Understanding in his individual capacity, the President is not discharging functions under the Agreement Establishing IFAD. This situation is not unique in international law. For instance, under Article 41, fourth paragraph, of the Constitution of the International Criminal Police Organization (INTERPOL), the Executive Committee and the Secretary General of that organization may accept duties from other international organizations or in application of international conventions. In such cases the organ of an organization is placed at the disposal of another organization, with the consequence that the situation envisaged by Draft Article 6 of the ILC's Draft Articles on Responsibility of International Organizations may arise:

> "The conduct of an organ of a State or an international organization that is placed at the disposal of another international organization for the exercise of one of that organization's functions shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over the conduct of the organ."

266. Whilst this provision requires effective control over the conduct of the organ, where, as in the present case, an international organization agrees to lend the services of one of its organs or officers to another organization, without submitting such organ or official to the effective control of the latter, the general rules concerning agency can be said to apply.

267. When the relationship between the Conference of the Parties of the UNCCD and the Fund, as spelled out in the Memorandum of Understanding, is considered in the light of the definition of the term "agent" in the Court's Opinion in *Reparation for Injuries*, it becomes clear that the Fund, per its President, is the agent whereas the Conference of the Parties is the principal. As explained above, the functions performed by the Global Mechanism are not those of the Fund but of the UNCCD. Under the Memorandum of Understanding, the Fund accepted that its President would act as agent of the Conference of the Parties insofar as it relates to the administrative services to be provided by the Fund under the Memorandum of Understanding. This implies that when the Fund, per its President, implements a staffing decision of the Managing Director of the Global Mechanism, it acts as an

agent of the Conference of the Parties within the meaning of the term "agent" as defined in *Reparation for Injuries*. Accordingly, the decision of the Managing Director of the Global Mechanism not to renew the Complainant's contract and the subsequent execution of that decision by the IFAD President is not to be regarded as an act performed as one of the functions of the Fund. Under these circumstances, that conduct cannot be attributed to the Fund.

268. The foregoing conclusion follows from the following analysis of the concept of agency in international law. An agency relationship exists where a principal has empowered an agent to act on its behalf. The existence of such agency relationships in a treaty under international law has been recognized by the Court in *Rights of Nationals of the United States of America in Morocco* in respect of the Protectorate Treaty of 1912:

> "Under this Treaty, Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco."[305]

269. Four important elements can be discerned from the Court's Judgment. First, the existence of an agency relationship requires that both the principal and the agent are separate legal entities.[306] Second, inherent in the fact that the relationship is established in a consensual legal instrument is that consent is a prerequisite for the existence of an agency relationship. Third, the consensual foundation of the relationship and the fact that the parties retain their independence towards each other entails that it can be terminated at any time in accordance with the procedures for the termination of treaties and other international agreements under international law. Fourth, the relationship must entail that one party agrees to perform functions on behalf of the other.

B. The requirement that the principal and the agent be separate legal entities

270. With regard to the requirement that both the principal and the agent be separate legal entities, the Fund wishes to recall Consideration 6 of Judgment No. 2867:

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[305] *Case concerning Rights of Nationals of the United States of America in Morocco*, Judgment of 27 August 1952, I.C.J. Reports 1952, p. 176, at 188. For a discussion of the issues of agency addressed in this judgment, see C. Chinkin, *Third Parties in International Law* (Oxford University Press, 1993), pp. 65-66.

[306] Cf D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford Monographs in International Law, 2005), p. 34.

> "The fact that the Global Mechanism is an integral part of the Convention and is accountable to the Conference does not necessitate the conclusion that it has its own legal identity. Rather, and as the term 'Global Mechanism' suggests, it merely indicates that it is the nominated mechanism by which the Conference gives effect to certain obligations created by the Convention. Nor does the stipulation in the MOU that the Global Mechanism is to have a 'separate identity' indicate that it has a separate legal identity or, more precisely for present purposes, that it has separate legal personality. In this last regard, the difference may conveniently be illustrated by reference to a distinct trade name under which a person or corporation carries on business. The trade name frequently constitutes 'the identity' or, perhaps, one of 'the identities' of the person or corporation concerned, but it is the person or corporation that has legal personality for the purposes of suing and being sued. It is in this context that the statement that the Global Mechanism is to be 'an organic part of the structure of the Fund' is to be construed."

271. The Fund submits that the Tribunal's statements in the aforementioned consideration do not support the conclusion drawn by the Tribunal. If, as the Tribunal rightly states, "the Global Mechanism is an integral part of the Convention and is accountable to the Conference" and the Global Mechanism is "the nominated mechanism by which the Conference gives effect to certain obligations created by the Convention", then the question of whether or not it possesses legal personality is not determinant. Rather, the question is whether the Global Mechanism is an organ of the Fund or of the Convention. The Tribunal construes the Memorandum of Understanding between the Fund and the Conference of the Parties to mean that the Global Mechanism is an organ of the Fund, without addressing the question of whether it remained an organ of a legal person or entity that is distinct from the Fund. Implied in the Tribunal's failure to address the latter question is the suggestion that the Convention has not established an international legal person of which the Global Mechanism is an organ. But if this is really what is suggested by the Tribunal, then the very Memorandum of Understanding would be an agreement between the Fund, on the one hand, and all the contracting parties of the Convention, on the other. In that situation, as the Court explained in the case concerning *Certain Phosphate Lands in Nauru*, the Global Mechanism would not have an international legal personality distinct from the States parties to the Convention, in which case the conduct of the Global

Mechanism would have to be attributed to those parties.[307] In other words, it still would not necessarily follow from any determination that the Global Mechanism has no legal personality that, therefore, its conduct is attributable to the Fund. An agency relationship would still exist – which would bar the attribution of conduct to the Fund - if it can be established that the undertakings of the Fund under the Memorandum of Understanding are to perform functions on behalf of the Conference of the Parties.

272. In its analysis, the Tribunal ignored the important fact that the Global Mechanism is a grant recipient of the Fund. By definition, the relationship between a grantor and a grantee presumes that the two are separate entities. The existence of such a grant relationship was known to the Tribunal, but it failed to take this important fact into account. It is evident from the Memorandum of Understanding that, as the institution housing the Global Mechanism, the Fund has undertaken to support the Global Mechanism through the provision of grants, with a view to allowing it to provide financial support for "enabling activities" to be undertaken by the affected developing parties to the Convention, nongovernmental organizations (NGOs) and civil-society organizations. Such an undertaking was included in the Fund's proposal to house the Global Mechanism. More specifically, Article II.B(c) of the Memorandum of Understanding between the Conference of the Parties and the Fund stipulates, *inter alia*, that:

> "The Fund will provide a grant contribution as part of the initial capitalization of the SRCF (Special Resources for CCD Finance) Account and seek matching financing from interested donors, taking into account the offer made by IFAD at the first ordinary session of the COP…"

273. The Memorandum of Understanding therefore envisages the opening of an account called the Special Resources for CCD Finance (SRCF) Account, in which the Fund's contributions and matching financing will be held by the Fund, upon receipt. As specified in paragraph II.B. (c) of the Memorandum of Understanding between the Conference of the Parties and the Fund regarding the modalities and administrative operations of the Global Mechanism, the Fund has opened a "Special Resources for the CCD Finance (SRCF) Account" to receive "amounts made available for the use, as requested and appropriate, of the Global Mechanism … for its functioning and activities from bilateral and multilateral resources through trust fund(s) and/or equivalent arrangements established by [the fund], including the proceeds of cost-sharing arrangements with the Global

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[307] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, at 258, para. 47. See also R. Higgins, *Themes and Theories – Selected Essays, Speeches and Writings in international law*, Vol. 2 (Oxford University Press, 2009), pp. 835-838.

Mechanism". The SRCF Account has been opened in conformity with paragraph 4(f) of the Annex to Decision 24/COP.1 of the Conference of the Parties. The SRCF Account is to be used to support the development of national, regional and sub-regional Action Programmes in accordance with Article 9 of the Convention. Resources held in the SRCF Account shall also be used for the implementation of initiatives, activities and the design of projects and programmes derived from such Action Programmes, either in their totality or on a cost sharing arrangement with one or several other sources of funding. The initiatives, activities and design of projects and programmes eligible for financial support from the SRCF Account may or may not have been developed with support from the Global Mechanism. They shall, however, form part of a coherent set of interventions designed to foster the efficient implementation of the Convention at national, regional or sub-regional levels. In conformity with the Convention, funds held in the SRCF Account may benefit Parties to Annexes I, II and III of the Convention and/or its partners in civil society, as well as organisations and entities involved in the transfer of science and technology.

274. The Memorandum of Understanding also envisages two other accounts: (a) the Core Budget Administrative Account, in which amounts received from the allocation of the Core Budget of the Convention by the Conference of the Parties will be held, in order to meet the administrative and operational expenditure of the Global Mechanism; and (b) The Voluntary Contributions Administrative Expenses Account, in which voluntary contributions from multilateral and bilateral sources, including NGOs and the private sector, to meet the administrative and operational expenditures of remuneration to the Global Mechanism for services rendered to a specific donor or group of donors, will be received.

275. The establishment of such accounts, which are held separate from the Fund's resources, is addressed in President's Bulletin No. 99/10 of 4 October 1999. From the point of view of international law, these are accounts held and administered by the Fund on behalf of the Conference of the Parties for the purpose of administering the Global Mechanism.[308] The resources in these accounts are not resources of the Fund within the meaning of Article 4 of the Agreement Establishing IFAD. This is expressly stipulated in the following terms in Article II.C of the Memorandum of Understanding:

[308] For examples of the practice of other international organizations with regard to the administration of resources of third parties in administered account, reference is made to the practice of the International Monetary Fund (IMF). The IMF may establish administered accounts for purposes such as financial and technical assistance that are consistent with the Articles. One such account is the "Japan Administered Account for Selected IMF Activities (JSA)". For a brief legal explanation, see: J. Gold, *Interpretation: The IMF and International Law* (London/The Hague/Boston, Kluwer Law International Law, 1996), p. xxxi.

> "With respect to the funds allocated from the core budget of the Convention and received by the Fund under (a) above, the rules of procedure and financial rules adopted by the Conference shall apply to the transfer to IFAD of the said funds. With respect to the funds received by IFAD under (a), (b) and (c) above, all these amounts shall be received, held and disbursed and the said accounts shall be administered by the Fund in accordance with the rules and procedures of the Fund, including those applicable to the management of the Fund's own supplementary funds (trust funds)."

276. The existence of such a separate ownership of financial resources underscores the fact that at least two distinct legal persons are involved.

C. The requirement of consent

277. The foregoing leads to the second precondition for the existence of an agency relationship as understood by the Court in *Rights of Nationals of the United States of America in Morocco.* While it is accepted that the role of consent in the establishment of an agency relationship can be guaranteed by means other than by requiring the conclusion of a treaty,[309] in the present case such an international agreement does exist in the form of the Memorandum of Understanding between the Conference of the Parties and the Fund.

278. The element of consent is clearly manifested by the actions undertaken by the supreme bodies of the parties to the Memorandum of Understanding leading up to its signature. The First Conference of the Parties, held in Rome between 29 September and 10 October 1997, selected the Fund to house the Global Mechanism. It also requested that the Secretariat, in consultation with the Fund, develop a Memorandum of Understanding between the Conference of the Parties and the Fund for consideration and adoption at the second session in 1998. The main operative paragraphs of the decision of the Conference of the Parties are reproduced in full below:

> "1. *Decides* to select IFAD to house the Global Mechanism on the basis of the criteria agreed on in Section B of the Annex to INCD decision 10/3:
>
> 2. *Decides also* that the Global Mechanism, in carrying out its mandate, under the authority and guidance of the COP, should perform the functions described in the annex to this decision;

[309] Cf D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford Monographs in International Law, 2005), p. 36.

3. *Requests* the secretariat, in consultation with the organisation, to house the Global Mechanism, as well as the other two collaborating institutions referred to in Decision 25/COP.1, to develop a memorandum of understanding between the COP and appropriate body or organisation for consideration and adoption at the second session of the COP".

279. Since the Fund's acceptance of the decision of the Conference of the Parties was within the prerogative of the Governing Council, at its Twenty-First Session held in February 1998, the Council, upon the recommendation of the Executive Board, adopted Resolution 108/XXI, containing the following operative paragraphs:

> "1. IFAD shall accept the decision of the Conference of the Parties (COP) of the CCD at its First Session to select IFAD to house the Global Mechanism hereof.
>
> 2. The Executive Board is authorized to approve the modalities, procedures and administrative arrangements to be contained in a Memorandum of Understanding between the COP and IFAD for the housing of the Global Mechanism by IFAD.
>
> 3. The President of IFAD is authorized to sign a Memorandum of Understanding between the COP and IFAD, containing such arrangements as the Executive Board may approve for the housing of the Global Mechanism.
>
> 4. The President of IFAD is requested to report periodically to the Executive Board on the administrative arrangements for the housing of the said Global Mechanism in IFAD and on such activities as IFAD may undertake in support of the Global Mechanism, while also keeping the Executive Board informed of the activities of the Global Mechanism."

280. It is clear from the foregoing that, unlike the situation where an international organization unilaterally establishes a subsidiary body or a department within its secretariat, the relationship regarding the housing of the Global Mechanism by the Fund was freely established between the Conference of the Parties and the Fund through joint action.

D. The revocable nature of the hosting arrangement

281. The third condition for the existence of an agency relationship, i.e. revocability, is satisfied by Article VII.C of the Memorandum of Understanding:

> "The present Memorandum of Understanding may be terminated at the initiative of the Conference or the Fund with prior written notice of at

least one year. In the event of termination, the Conference and IFAD will jointly reach an understanding on the most practical and effective means of carrying out any responsibilities assumed under the present Memorandum of Understanding."

282. It will be noted that, contrary to the Fund's submission to the Tribunal with regard to the need for an amendment of the Agreement Establishing IFAD (and, one may add, an amendment of the Convention as well), in the event that it will have to be concluded that the Global Mechanism is an organ of the Fund, the Tribunal's analysis leads to the conclusion that the Global Mechanism is an organic part of the Fund merely by virtue of the Memorandum of Understanding:

> "The words 'an organic part of the structure of the Fund' do not fall for consideration in isolation from other provisions of the MOU. It is significant that, according to the MOU, the Managing Director is to report to the President of the Fund. Moreover, the chain of accountability does not run directly from the Managing Director of the Global Mechanism to the Conference but 'directly from the Managing Director to the President of the Fund to the Conference'. Similarly, '[t]he Managing Director […] reports to the Conference on behalf of the President of the Fund' (emphasis added). The President of the Fund is to review the programme of work and the budget prepared by the Managing Director of the Global Mechanism before it is forwarded to the Executive Secretary of the Convention for consideration. Additionally, the Global Mechanism is not financially autonomous. Rather, the Conference authorises the transfer of resources to the Fund for the operating expenses of the Global Mechanism. When regard is had to these provisions in the MOU, it is clear that the words 'an organic part of the structure of the Fund' indicate that the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes. The effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund. Given this, it is wrong to say that to treat the Global Mechanism as part of the Fund would require an amendment to the Convention and, also, to the Agreement Establishing IFAD." (Consideration 7)

283. The foregoing analysis serves as evidence of the Tribunal's failure to acknowledge the concept of agency in international law and its application to the Memorandum of Understanding, as well as a disregard of the applicable rules of international law concerning the interpretation of treaties.

E. The requirement that the agent act on behalf of the principal

284. As regards the Tribunal's failure to acknowledge the concept of agency in international law and its application to the Memorandum of Understanding, the following aspects should be highlighted.

285. An important consequence of an agency relationship is that an agent, when exercising the powers conferred by the instrument establishing the agency, can alter the legal relationship between the principal and third parties.[310] The acts performed by the agent within the limits of its authority bind the principal as if they had been personally performed by the latter.[311] Thus, the Fund, acting as an agent, may implement decisions of the Managing Director of the Global Mechanism to engage and release staff, without establishing or terminating a legal relationship with the Fund itself. The same is true with regard to the administration of the resources of the Global Mechanism. Indeed, the execution of payments to third parties ordered by the Managing Director of the Global Mechanism are not payments made in the name of the Fund itself. Therefore, the observation in Consideration 7 of Judgment No. 2867 that "the Global Mechanism is not financially autonomous," neither by itself nor in combination with the other observations made in that context support the Tribunal's conclusion that the Global Mechanism is an organ of the Fund.

286. Another important consequence of an agency relationship is that the principal is responsible for its agent's acts that are within the scope of the authorized representational powers.[312] The disregard of the concept of agency is manifested by the Tribunal's decision that, notwithstanding the fact that the Memorandum of Understanding underscores the parties' separate financial ownership, the Fund is to pay the Complainant material damages equivalent to the salary and other allowances she would have received if her contract had been extended for two years from 16 March 2006, together with interest at the rate of 8 per cent per annum from due dates until the date of payment, as well as moral damages in the sum of 10,000 Euros. Thus, the Tribunal is forcing the Fund to use its own resources in order to pay for actions attributable to the Global Mechanism, despite the fact that the resources of the two are not supposed to be co-mingled.

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[310] Cf D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford Monographs in International Law, 2005), p. 50.

[311] A.P. Sereni, "Agency in International Law," 34 *AJIL* (1940), pp. 630-688, at 655.

[312] *Cf* D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers (Oxford Monographs in International Law*, 2005), pp. 50-51; A.P. Sereni, "Agency in International Law," 34 *AJIL* (1940), pp. 630-688, at 655.

287. Finally, the existence of an agency relationship imposes an obligation on the agent to act in the interests of the principal.[313] As the Fund explained in the proceedings before the Tribunal,[314] it must defer to the Managing Director of the Global Mechanism on the issue of the justification of the non-renewal of the contract of the Complainant for budgetary reasons. In this regard the Fund wishes to recall that decisions regarding the staffing and budget of the Global Mechanism are the prerogatives of the Conference of the Parties. According to Section II.A.6 of the Memorandum of Understanding, it is the Conference that approves the programme of work and the budget of the Global Mechanism and it authorizes the Executive Secretary of the Convention to transfer resources from the General Fund of the Convention to IFAD. These funds are administered by the Fund upon the instructions of the Managing Director of the Global Mechanism, who informs the Fund of the staff needed, the cost of which shall be reimbursed to the Fund under Section VI of the Memorandum of Understanding. Therefore, the Fund has no authority to examine whether the core budget approved by the Conference of the Parties required the elimination of the Complainant's post, lest the Fund be placed in a position where it can impose staff on the Global Mechanism and then claim reimbursement for staff that the latter considers is no longer needed.

F. Conclusion

288. For the reasons set out above, the Fund submits that Question VII should be answered in the affirmative.

Chapter 11. QUESTION VIII

A. In deciding to substitute the discretionary decision of the Managing Director of the Global Mechanism with its own, the Tribunal acted outside its jurisdiction and such decision constituted a fundamental fault in the procedure followed

289. The Fund submits that Question VIII should be answered in the affirmative. Question VIII reads as follows:

> "VIII. Was the ILOAT's decision confirming its jurisdiction to substitute the discretionary decision of the Managing Director of the Global Mechanism with its own outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?"

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[313] A.P. Sereni, "Agency in International Law, 34 *AJIL* (1940), pp. 630-688, at 655; D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers (Oxford Monographs in International Law*, 2005), p. 51.

[314] See Reply, paras. 60-61.

290. Even if the Managing Director's conduct of which the Complainant complained before the Tribunal could be said to be IFAD's conduct or could otherwise be attributable to IFAD so as to come within the Tribunal's jurisdiction, *quod non*, Section III.A.4 of the Memorandum of Understanding provides that "[t]he Managing Director will be responsible for … staffing." This provision and the practice of international organizations support the view that the Managing Director of the Global Mechanism did have the authority to decide not to renew the Complainant's contract, especially in light of the budgetary restraints with which he was confronted at the time. Insofar as his decisions complied with the budgetary limits established by the Conference of the Parties, the Managing Director must be deemed to be authorized to make decisions in relation to the staffing needs of the Global Mechanism on a daily basis.[315] Thus, once the Conference of the Parties approved the budget for the Global Mechanism, including proposed staffing, the Managing Director, as the chief of the management section of the Global Mechanism, had the power to decide concrete staffing issues and it was for him to determine whether the budget approved by the Conference of the Parties justified keeping the Complainant's post. As the chief of the management section of the Global Mechanism, he had "responsibility for ensuring that the expenses of the organisation remain within its framework of resource allocation."[316] In deciding not to renew the Complainant's fixed-term contract upon its expiration, the Managing Director was exercising an implied discretionary power. Nowhere in the Memorandum of Understanding is this power of the Managing Director tied to the Fund or its President. The terms of the Memorandum of Understanding do not support any authority for IFAD let alone its President to examine whether the core budget, once approved by the Conference of the Parties, warranted the abolition of the Complainant's post. Under Section III.A.4 of the Memorandum of Understanding, the role of the IFAD President is expressly limited to (i) reviewing and approving budget *proposals* prepared by the Managing Director, and (ii) forwarding reviewed and approved proposals "to the Executive Secretary of the Convention for consideration in the preparation of the budget estimates of the Convention, in accordance with the financial rules of the Conference." Concrete decisions concerning the staffing and budget of the Global Mechanism are not taken by IFAD or its President. Therefore, neither the President nor the Fund itself can be held responsible for the Managing Director's

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[315] See H.G. Schermers and N.M. Blokker, *International Institutional Law*, 4th ed. (Boston/Leiden: Martinus Nijhoff Publishers, 2003), p. 706 ("During the financial year the departments of the secretariat … may spend within the limits set by the budget."); P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001), p. 574 (post-approval "[a]dministration of the budget of an international organization is generally placed in the hands of the executive branch of the organization, headed by its chief executive officer.").

[316] P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001), p. 574.

decision to abolish a Global Mechanism staff post due to constraints in the Global Mechanism's budget.

291. The typical budgetary practice of international organizations has been summarized as follows: "The secretariat drafts the budget, the general congress (sometimes the board) establishes it, the secretariat again executes it and the general congress (sometimes the board) supervises its execution."[317] In the case of the Global Mechanism, the Managing Director of the Global Mechanism drafts the "programme of work and budget of the Global Mechanism, including proposed staffing, … for consideration in the preparation of the budget estimates of the Convention,"[318] the Conference of the Parties "will approve the programme of work and budget of the Global Mechanism"[319] and the Conference of the Parties supervises its execution through the reporting to the Conference of the Parties by the Managing Director.[320]

292. The Tribunal acknowledged in its Judgment No. 2867 that the decision to abolish the Complainant's post, which the complaint alleged "was taken without authority and was not required by budgetary constraints," as well as the decision not to renew her contract "are discretionary decisions that may be reviewed only on limited grounds."[321] According to the Tribunal, those "grounds include that the decision in question was taken without authority or was based on an error of law." A leading treatise summarizes the practice of international administrative tribunals regarding review of discretionary administrative decisions as follows:

> "[I]n practice, international administrative tribunals have not hesitated to rescind administrative decisions taken in virtue of discretionary powers when the judges were satisfied that the motives put forward by the administrative organ were not the actual grounds on which the decision had been taken (*détournement de pouvoir*), or when it appeared that procedural requirements had not been respected by the administration. Discretionary administrative decisions have been rescinded for, *inter alia*, the following reasons:
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> - they had been taken on a discriminatory basis;

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[317] H.G. Schermers and N.M. Blokker, *International Institutional Law*, 4th ed. (Boston/Leiden: Martinus Nijhoff Publishers, 2003), p. 691.

[318] Memorandum of Understanding, Section III.A.4.

[319] Ibid., Section III.A.6.

[320] Ibid., Section III.B ("The Managing Director … will submit a report to each ordinary session of the Conference on the activities of the Global Mechanism …").

[321] ILOAT Judgment No. 2867, Consideration 12.

- they entailed a violation of the principle of equity;
- they carried sanctions which were out of proportion with agent's misconduct;
- they were taken on grounds which the applicable rules were forbidding to taken into account;
- there had been a failure to ensure a due disciplinary process."[322]

293. The same source points out that "[w]hat is clear is that the limits on the administrative tribunals' power of review lies in the fact that they are not entitled to substitute their views of what is administratively convenient or desirable for that of the administrative organ whose decision is challenged."[323]

294. Another leading treatise states the following with regard to the review by international administrative tribunals of the exercise of discretionary powers of an international organization:

> "In exercising control over the exercise of discretionary power by administrative authorities, tribunals will not substitute their own assessment or judgments for those of administrative authorities.
>
> (…)
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> The control is not as extensive as in the case of a purely obligatory power or a quasi-judicial power. It may broadly be defined in terms of the prevention of 'arbitrary' conduct on the part of administrative authorities. It is sufficiently substantial to protect the interests of staff members while not impeding the execution of the administrative or management function by international organizations."[324]

295. In general, international tribunals reviewing discretionary acts of international organizations do not substitute their own judgment for that of the entity under review but rather look for "an egregious error that calls into question the good faith" of the body reviewed.[325] Thus, the Asian Development Bank Administrative

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[322] P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001), p. 423.

[323] Ibid., p. 424.

[324] C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge University Press, 2005), pp. 301-302.

[325] World Trade Organization Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, AB Report of 16 January 1998, para. 101.

Tribunal observed as follows in a 1992 ruling: "However, the fact that the Tribunal may review the exercise of a discretion by the Bank does not mean that the Tribunal can substitute its discretion for that of the management. The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed." [326] In the same sense, the World Bank Administrative Tribunal (WBAT) has held that: "[t]he Respondent's [Bank's] appraisal is final unless, as a result of a review of the exercise of the Bank's discretion, the Tribunal finds that there has been an abuse by the Bank in that its actions have been arbitrary, discriminatory or improperly motivated, or have been carried out in violation of a fair and reasonable procedure."[327]

296. Finally, and most important, according to the Tribunal's own case law, international organizations may undertake restructuring by reducing or reassigning their staff, even for the sole purpose of making budgetary savings. This view was expressed, for example, in the Tribunal's Judgment No. 2156 (Consideration 8) and, significantly, in its Judgment No. 2907 (Consideration 13), which was rendered on the same date as Judgment No. 2867, the ruling which is challenged in the present proceeding.

297. In the present context, it is useful to recall the words of the President of the Court in the *Unesco* Case:

> "In the absence of evidence that the Director-General had acted in bad faith, i.e. that his action was arbitrary or capricious, it was not for the Tribunal to say that the reasons assigned by him were not justified. It was not for the Tribunal to substitute its judgment in this administrative field for that of the Director-General. He, acting under the authority of the Executive Board and of the General Conference, and not the Tribunal, was charged with responsibility. There was no obligation to renew the appointments. He could have allowed the contracts to lapse without assigning reasons or he could

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[326] Decision No. 1 of the Asian Development Bank Administrative Tribunal (18 December 1992), *Carl Gene Lindsey v. Asian Development Bank*, para. 12, text available online: http://www.adb.org/Documents/Reports/ADBT/ADBT0001.asp

[327] See, *Suntharalingam*, WBAT Reports 1982, Decision No. 6, para. 27; *Mr. X*, WBAT Reports 1984, Decision No. 16, para. 39.

have told these officials that their terms of employment would not be renewed without stating reasons."[328]

298. It is obvious that neither the action of the Managing Director of the Global Mechanism, nor that of the IFAD President in relation to the Complainant, can be said to be "arbitrary" or "capricious" or otherwise falling under the aforementioned grounds for rescinding discretionary decisions. The Tribunal's ruling demonstrates that it essentially substituted its view for what the Managing Director of the Global Mechanism viewed was administratively desirable for the Global Mechanism, a view which the Fund's President declined to upset in his memorandum of 4 April 2008, which was issued in his special capacity under the Memorandum of Understanding between the Fund and the Conference of the Parties.

B. Conclusion

299. For the reasons set out above, the Fund submits that Question VIII should be answered in the affirmative.

Chapter 12. QUESTION IX

A. The Tribunal's Judgment No. 2867 is invalid

300. Through Question IX, the Fund's Executive Board expressly asks the Court to determine the validity of ILOAT Judgment No. 2867:

> "IX. What is the validity of the decision given by the ILOAT in its Judgment No. 2867?"

301. This question is prompted by the fact that it is a general principle of international law that lack or excess of competence are causes of nullity of a final judgment.[329] Under Article VI of the Tribunal's Statute, its judgments "shall be final and without appeal." This means that, unless the validity of the Tribunal's Judgment No. 2867 is formally denied by the Court, the Fund will be bound by it. Article XII authorizes the Executive Board to challenge those judgments, on the ground of lack of jurisdiction or of fundamental fault in the procedure followed. In case of such a challenge, it is for the Court to pass, by means of an Opinion having binding force, upon the challenge thus raised and, consequently, upon the validity of the judgment challenged. The Tribunal's Judgment No. 2867 is being challenged both

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[328] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, Dissenting Opinion of President Hackworth, I.C.J. Reports 1956, p. 77, at 121.

[329] B. Cheng, *General Principles of Law As Applied by International Courts and Tribunals* (Cambridge, Grotius Publications, reprint 1987), p. 357. See also *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, Dissenting Opinion of President Hackworth, I.C.J. Reports 1956, p. 77, at 122.

in respect of the competence of the Tribunal which rendered them as well as in respect of fundamental faults in the procedure followed by the Tribunal in reaching its decision. It is recalled that in the *Unesco* Case, the Court observed that "any mistakes which [the Tribunal] may make with regard to its jurisdiction are capable of being corrected by the Court on a Request for an Advisory Opinion emanating from the Executive Board" and that if it had upheld the challenge in that case, it would have had to declare the Tribunal's judgments invalid. Therefore, in the present case, the Court, in the event that it agrees with the Fund's contentions relating to lack of jurisdiction and fundamental fault in the procedure followed by the Tribunal, must declare the Tribunal's Judgment No. 2867 invalid.[330]

B. Conclusion

302. For the reasons set out above, the Fund submits that Question IX must be answered in such a way as to render Judgment No. 2867 invalid.

[330] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 100.

Part Three

SUMMARY OF CONCLUSIONS AND REQUEST

Chapter 13. SUMMARY OF CONCLUSIONS AND REQUEST

303. Rather than involving a simple appeal from a ruling in an employment case such as the Court has had occasion to address in the past, the present proceeding raises issues of fundamental importance for the effective work and potential liability not only of the International Fund for Agricultural Development, but also of a significant number of international organizations serving as housing organizations to other institutions, and indeed all organizations having accepted the jurisdiction of the Administrative Tribunal of the International Labour Organization. As such, the outcome of this proceeding likely will determine the future of institutional housing arrangements the world over.

304. This statement has in the first instance endeavoured to establish that the Executive Board of the Fund was fully authorized to address its questions to the Court, as those queries are purely legal ones and arose within the scope of the Fund's activities, concerning as they do the Fund's measures to be taken as a result of Judgment No. 2867. It also appears from this statement that there are no compelling reasons preventing the Court from giving the requested Opinion, given that (i) the Court has sufficient information to give its Opinion; (ii) the requested Opinion will assist the Fund and the Tribunal in their subsequent actions; (iii) upholding the Fund's challenge will not deprive the Complainant of her right of redress; (iv) providing the requested Opinion will not violate the principle of the equality of parties; and (v) the Fund's Request raises issues never before presented to or addressed by the Court.

305. With regard to the substance of the Fund's questions, this statement has sought to demonstrate that the Tribunal lacked jurisdiction *ratione personae* and *ratione materiae* to entertain the complaint introduced against the Fund by the Complainant and that the Tribunal's decision to entertain and dispose of the complaint in its entirety constituted a fundamental fault in the procedure followed.

306. The Tribunal lacked jurisdiction in the case introduced by the Complainant because (i) the Complainant was not an official of the Fund at the relevant time; (ii) the Global Mechanism and the Conference of the Parties of the UNCCD, which must be regarded as indispensable third parties for the purposes of the complaint as filed and argued by the Complainant, have not recognized the jurisdiction of the Tribunal; (iii) the Global Mechanism and the Conference of the Parties have not been included in IFAD's recognition of the Tribunal's jurisdiction; and (iv) the conduct complained of is not attributable to the Fund.

307. By acknowledging that "[t]he argument with respect to the Tribunal's jurisdiction is based, in the main, on the proposition that '[t]he Fund and the Global

Mechanism are separate legal identities',"[331] the Tribunal explicitly phrased the key issue of the separateness between the Fund and the Global Mechanism, on which the parties were in express agreement, as a jurisdictional issue, thereby bringing its findings on that issue, and any findings resulting from the consequent incompetence of the Tribunal, within the scope of Article XII of the Statute of the Tribunal.

308. The Tribunal also lacked jurisdiction *ratione materiae* in the Complainant's case because the complaint submitted to the Tribunal did not fall within the framework of Article II, paragraph 5, of the ILOAT Statute, in that it made no allegation of "non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations" of IFAD, but instead relied on provisions of the Memorandum of Understanding between the Conference of the Parties and the Fund, an international agreement that confers no legal rights on the Complainant, to argue, first, that the Managing Director of the Global Mechanism exceeded his authority in deciding not to renew the Complainant's fixed-term contract and, second, that the "core budget" approved by the Conference of the Parties did not require the abolition of the Complainant's post in the Global Mechanism.

309. The Tribunal expressly acknowledged that the Fund's "submissions relating to the powers and jurisdiction of the Tribunal" could be summarized as follows: "The first is that the Tribunal may not entertain flaws in the decision-making process of the Global Mechanism; the second is that the Tribunal may not entertain flaws in the decision-making process of Fund if it entails examining the decision-making process of the Global Mechanism and the third is that acts of the Managing Director are not attributable to the Fund."[332] In other words, the Tribunal explicitly phrased these issues as jurisdictional issues, thereby bringing its findings on those issues, and any findings resulting from the consequent incompetence of the Tribunal, within the scope of Article XII of the Statute of the Tribunal.

310. Instead of referring to the grounds set forth in Article II, paragraph 5, of its Statute, the Tribunal adjudicated the Complainant's claims with reference to various provisions of the Memorandum of Understanding between the Conference of the Parties and the Fund as well as Conference of the Parties' decisions.

311. In sum, the complaint, as submitted to the Tribunal by the Complainant, was not "one the merits of which fell to be determined by the Administrative Tribunal in accordance with the provisions governing its jurisdiction," as the Court has

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[331] ILOAT Judgment No. 2867, Consideration 5.

[332] ILOAT Judgment No. 2867, Consideration 8.

formulated the key question to be answered in a proceeding of this kind.[333] The Tribunal in this case was not "legally qualified to examine the complaints submitted to it and to adjudicate on the merits of the claims set out therein."[334]

312. For all of the foregoing reasons, it is submitted that Judgment No. 2867, being outside the jurisdiction conferred upon the ILO Administrative Tribunal by its Statute and IFAD's declaration accepting its competence, and/or having been adopted through various fundamental faults in the procedure followed by the Tribunal, must be declared invalid by the Court.

313. Accordingly, the Fund respectfully requests the Court to find that Question I must be answered in the negative, that Questions II through VIII must be answered in the affirmative, and that Question IX must be answered in such a way as to render Judgment No. 2867 invalid.

October 2010

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[333] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 77, at 87.

[334] Ibid.