JUDGMENT No. 2867 OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION UPON A COMPLAINT FILED AGAINST THE INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (REQUEST FOR ADVISORY OPINION)

Complainant's Comments

I. Introduction

1. The complainant has already set out her views on the questions put to the Court in the request for an advisory opinion. The present comments are therefore limited to particular elements of the defendant's statement requiring comment. They also correct errors in the complainant's statement of 20 October 2010. Additional document G is attached; it is the Letter from the President, IFAD, to the Complainant, 18 July 2007.

2. There is much that could be said on the issues raised by the defendant, but mindful of the Court's Practice Direction III, the complainant will refrain from challenging every passage of the defendant's statement with which she disagrees. The comments instead deal at some length with the defendant's arguments concerning IFAD's functions, which have broad application, and with its arguments concerning *non ultra petita*, as an example of the inapplicability of such arguments to the present case.

Functions of the Fund and of the Global Mechanism

3. The Fund has argued that neither the complainant, nor the Managing Director nor, when acting under the Memorandum of Understanding, the President of IFAD has performed the "functions" of IFAD. This leads it to conclude that the Tribunal did not have jurisdiction over IFAD in respect of the complainant, the actions of the Managing Director or those of the President of IFAD.

4. The most authoritative definition of responsibility according to function is found in the International Law Commission's draft articles on the responsibility of international organizations, cited by the defendant. Article 5(2) states: "Rules of the organization shall apply to the determination of the functions of its organs and agents." Article 2(b) defines "rules" to mean, "in particular, the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization" (Report of the International Law Commission, 61st Sess. 2009, UN Doc. A/64/10, pp. 20-21).

5. IFAD's "objective and functions" are set out in Article 2 of the Agreement Establishing IFAD (IFAD's Document I):

> The objective of the Fund shall be to mobilize additional resources to be made available on concessional terms for agricultural development in developing Member States. In fulfilling this objective the Fund shall provide financing primarily for projects and programmes specifically designed to introduce, expand or improve food production systems and to strengthen related policies and institutions within the framework of national priorities and strategies, taking into consideration: the need to increase food production in the poorest food deficit countries; the potential for increasing food production in other developing countries; and the importance of improving the nutritional level of the poorest populations in developing countries and the conditions of their lives.

6. The purpose of the Global Mechanism is defined in article 21(4) of the Desertification Convention (IFAD's Document IV):

> 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 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.

7. The two statements appear to be compatible. This is confirmed by IFAD's consistent claims, prior to the present proceedings, that hosting the Global Mechanism makes IFAD more effective in fulfilling its functions (see Joint Inspection Unit, Assessment of the Global Mechanism of the United Nations Convention to Combat Desertification, 2009, para. 112-116[1]; Independent External Evaluation of IFAD, Desk Review Report, July 2004, para. 4.22, 4.29[2]).

8. If there were any doubt about the Fund's functions encompassing the operations of the Global Mechanism, it was removed when IFAD's Governing Council, noting "the important role played by IFAD . . . in combatting desertification," specifically authorized the President of IFAD to sign the Memorandum of Understanding on behalf of IFAD (see Complainant's Statement para. 55). The Court is requested to take note of the Agreement Establishing IFAD (IFAD's Document I), article 6, section 2(b): "All the powers of the Fund shall be vested in the Governing Council." This would appear to be authoritative. In any event, to make sure, the Memorandum of Understanding itself specifies, "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**." (IFAD's Document V(5), Part I, emphasis supplied.)

9. In accepting responsibility for the Global Mechanism, IFAD adopted the latter's functions as its own. Thus even if some of the activities of the Global Mechanism were different from the main activities of IFAD, which is not conceded, the Governing Council has brought them within the functions of IFAD.

II. Responses to the Questions

Question I

10. The defendant has argued that the complainant was not a staff member of IFAD and therefore that the Tribunal lacked jurisdiction *ratione personae*. The complainant's status as a staff member is fully substantiated in the Complainant's Statement (para. 16-23). ILOAT Judgments 68 and 1033, cited by IFAD and involving persons that did not have staff contracts with the defendant organizations, are irrelevant to the present proceedings.

11. The defendant has attempted to get around the fact of the complainant's appointment with IFAD in two ways. In one it has repeatedly argued that if she worked for the Global Mechanism she could not be a staff member of IFAD. But the one does not exclude the other, as the offers of appointment show ("appointment . . . with IFAD" for a "position . . . in the Global Mechanism"). To say as IFAD does that she worked "exclusively for the Global Mechanism and not the Fund" (para. 106-107) or that she "was never charged with performing any of the functions of the Fund" (para. 101) is a false dichotomy. The functions of the Global Mechanism were functions of the Fund.

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[1] http://www.unjiu.org/data/reports/2009/en2009_04.pdf

[2] http://www.ifad.org/evaluation/iee/desk/final.pdf

12. The defendant has also stated that a "practice" of IFAD overcomes the clear words of the complainant's contract and the applicable staff regulations and administrative instructions. It offers no evidence of the existence of such a practice, which would surely have induced IFAD to issue different contracts if such a practice ever existed. The authority cited does not suggest a practice that can nullify the employment relationship (see P. Sands and P. Klein, Bowett's Law of International Institutions, 6th ed. 2009, p. 430). And in any case, a practice needs to be proved, not hypothesized (see de Merode, WBAT Dec. No. 1, para. 23[3]; Gran Olsen No. 1 and 2, ILOAT Judgment 1806, consid. 16-17[4]).

13. The defendant has added arguments concerning the status of the Global Mechanism and its Managing Director which depend largely on the false distinction between the functions of the Global Mechanism and those of IFAD, discussed above.

14. The defendant has also argued that the Global Mechanism is separate from the Fund without confronting the fact that the Global Mechanism possesses no powers of its own. If it is to function, it depends on another entity with such powers, in this case IFAD. IFAD has stated (para. 136) that the Memorandum of Understanding "merely addresses 'the modalities and administrative operations' of the Global Mechanism." This is precisely the complainant's argument and the Tribunal's finding. The operations of the Global Mechanisms, including hiring of staff, are entirely in the hands of IFAD, and it is in connection with such matters that the complaint was brought. The Tribunal correctly found that the Global Mechanism was "assimilated to the various administrative units of the Fund for all administrative purposes".

15. The defendant has stated (para. 174) that the complainant "did not direct her challenge against the IFAD President or the Fund". This is not correct. She addressed her appeal to the Secretary of the Joint Appeals Board pursuant to paragraph 10.22.2 of the Human Resources Procedures Manual. It was referred to the Office of the President in accordance with paragraph 10.22.4. The President designated the Managing Director as the respondent also in accordance with paragraph 10.22.4 (Complainant's Document G).

Question II

16. The defendant has taken the lack of argument on **legal separateness** of the Global Mechanism to foreclose the issue of **administrative separateness.** The two are not the same.

17. The defendant has suggested (para. 200) that the Tribunal regarded legal separateness as "the key question" affecting jurisdiction. In fact, the Tribunal merely stated that the **defendant's** argument was mainly based on legal separateness. The Tribunal itself made no ruling on legal separateness, focussing instead on the administrative assimilation of the Global Mechanism. It also did not say "for all *legal* purposes" decisions of the Managing Director are decisions of the Fund. It said very carefully that, as a result of the assimilation for administrative purposes, "administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund." This is very similar to the views of the Office of Legal Affairs of the United Nations (see Complainant's Document B).

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[3] http://lnweb90.worldbank.org/crn/wbt/wbtwebsite.nsf/%28resultsweb%29/470F6C6098A11FDF852569ED006BB877

[4] http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1806&p_language_code=EN

Question III

18. The *non ultra petita* rule cited by the defendant would only be violated if the Tribunal had decided a point not submitted to it. In the passage cited by the defendant, Mr. Amerasinghe goes on to say, "The principle requires that a judgment award as reparation no more than has been requested by the defendant." (C.F. Amerasinghe, Jurisdiction of International Tribunals, 2003, p. 422). This Court has considered the rule and stated that while the Court may not "decide upon questions not asked of it, the *non ultra petita* rule cannot preclude the Court from addressing certain legal points in its reasoning" (Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002 p. 3, at 19). In the opinion of Judge Higgins cited by the defendant, she enumerates examples of other matters the Court may deal with in its reasoning. "None of these," she concludes, "entailed a determination that one party had acted contrary to international law when no determination on that point of law had been sought by the other party in its final submission." (Oil Platforms (Islamic Republic of Iran v. United States of America), Separate Opinion of Judge Higgins, ICJ Rep. 2003, p. 225, para. 14).

19. The Tribunal clearly did not award more than was asked nor did it determine that anyone had acted contrary to international law with respect to the other Global Mechanism staff members. The judgment made no award in respect of the IFAD's other employees in the Global Mechanism, nor is it *res judicata* between them and IFAD.

20. Even on the simple issue whether the status of the other staff members had been submitted to the Tribunal, the defendant's statement does not appear correct. In mentioning their status, the Tribunal took up the complainant's allegations that they were IFAD staff. In her brief she stated, "All staff of the Global Mechanism received IFAD contracts" (IFAD's Document VII.12, para.3). In her rejoinder she referred to the Managing Director's supervision of "a large number of IFAD staff" (i.e., the staff of the Global Mechanism) (IFAD's Document VII.14, para. 11), and she cited the President's Bulletin's collective references to Global Mechanism staff (ibid. para. 7). The defendant also entered the discussion of the general status of Global Mechanism staff under the President's Bulletin (IFAD's Document VII. 13, para. 22-23), so the issue can hardly be said not to have been before the Tribunal.

21. The complainant notes that the defendant's argument (para. 210) for the effect of disregarding the rule is based entirely on dissenting opinions of this Court. There is no judgment of the Court that would invalidate the entire judgment of the Tribunal even if it had infringed the *non ultra petita* rule with respect to one question.

Question IV

22. The defendant has argued that the Tribunal ignored its claim of lack of jurisdiction to entertain the plea alleging excess of authority on the part of the Managing Director. The Tribunal gave adequate attention to the claim in consideration 8: "Because decisions of the Managing Director are, in law, decisions of the Fund, these submissions must be rejected."

Question V

23. The complainant would only add to her statement on this point that the "very subject matter" of the complaint is not the rights of the Global Mechanism or the Conference of Parties. It is the respective rights of IFAD and an IFAD staff member. Only they are affected by the decision. No claims of either the complainant or IFAD against the Conference of Parties were adjudicated by the Tribunal.

24. If the defendant were correct in its view of Question V, no action of an employer could be reviewed by the Tribunal to the extent that it depended on – or was justified by – the act of a supplier or financer or host government. This would carve an enormous exception out of the normal jurisdiction of the Tribunal.

Question VI

25. The defendant has stated that "according to the Tribunal [the Memorandum of Understanding] was **the document** on which the Complainant relied for the purpose of supporting her complaint." (Para. 246, emphasis supplied.) In fact the Tribunal noted and paid attention to the complainant's contracts (Complainant's Documents E.1, E.2, E.3), the Human Resources Procedures Manual and the President's Bulletin PB/2004/01 (IFAD's Document V(8)). There is no indication that it considered the Memorandum of Understanding to be "the document" relied on by the complainant.

26. The defendant's argument on this point seems to misconstrue what the Tribunal actually decided. In consideration 9 it analysed the complainant's offers of appointment and found, without reference to the Memorandum of Understanding, that "those written offers and their subsequent acceptance clearly constituted the complainant a staff member of the Fund."

27. In any event, there is no opposition between the Memorandum of Understanding and the complainant's terms of appointment. The Memorandum defined the institutional context within which IFAD made the appointment. It formed the basis for the President's Bulletin which spelled out further details of the appointment.

28. The complainant wishes to draw the Court's attention to some apparent inaccuracies in the defendant's statement under Question VI. In paragraph 246 it argues that the Memorandum of Understanding makes the Managing Director and not IFAD "responsible for . . . staffing" (omission in original). In fact the Memorandum reads: "The Managing Director will be responsible for preparing the programme of work and budget of the Global Mechanism, including proposed staffing, which will be reviewed and approved by the President of 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." Neither elsewhere in the Memorandum of Understanding nor in the Managing Director's Position Description (IFAD's Document V(9)) is there any mention of his being "responsible for staffing".

29. In paragraph 251 the defendant has argued that according to the President's Bulletin "the pertinent regulations were explicitly declared to be inapplicable to the staff of the Global Mechanism". The complainant refers to paragraphs 17 to 22 of her statement for a fuller discussion of the meaning of the President's Bulletin. Suffice it to say here that **only one** regulation, governing continuing appointments, was declared to be inapplicable to the staff of the Global Mechanism.

Question VII

30. The defendant's argument for an agency relationship between the Conference of Parties and IFAD does not explain how this would exonerate the Fund from liability for wrongful actions toward its employees. The Fund did not purport to be acting only as an agent in offering the complainant an appointment "with the Fund". The Conference of Parties is nowhere mentioned in these letters, which would be a bare minimum to make it and not IFAD the contracting party under the law of agency. (See the International Law Commission's draft articles on the responsibility of international organizations, article 13 on the responsibility of an organization that aids another

organization to commit an internationally wrongful act, Report of the International Law Commission, 61st Sess. 2009, UN Doc. A/64/10, p. 23.) If IFAD had it in mind to act exclusively as an agent, it should not have issued IFAD employment contracts.

31. This is another question on which IFAD has argued that activities it and its officers engaged in with respect to the Global Mechanism were not its functions. The court is respectfully referred to the discussion in paragraphs 3 through 9.

Question VIII

32. It should be noted that the views on the scope of review of administrative decisions cited by the defendant (para. 297) as the "words of the President of the Court" were pronounced in dissent. They also failed to recognize the limits to the discretion of the heads of international organizations which subsequent case law in all international administrative tribunals has followed. In addition to the spare words of the dissenter ("bad faith, i.e. . . . arbitrary or capricious") current law would add, as the Tribunal in Judgment 2867 did, "that the decision . . . was taken without authority or was based on an error of law (see also P. Sands and P. Klein, Bowett's Law of International Institutions, 6th ed. 2009, p. 429). A recent judgment has stated the law with specific reference to the non-renewal of an appointment (ILOAT Judgment 2916 consideration 3[5]):

> It is well settled that a decision not to renew a contract is a discretionary decision that may only be reviewed on limited grounds, namely, that "it was taken without authority, or in breach of a rule of form or of procedure, [...] or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority" (see Judgment 1262, under 4).

III. Correction of Errors

33. The Court is respectfully requested to accept the correction of two errors in the complainant's submission. Paragraph 58 of her statement should read,

> 58. The Court is respectfully requested to answer question I in the affirmative. It is requested to answer questions II-VII in the negative. It is requested to refuse to answer question VIII, or alternatively to answer it in the negative. It is requested to confirm the validity of Judgment 2867 in response to question IX.

34. Item D in the English text of the list of the Complainant's Documents should read

> D. Letter from the General Counsel, IFAD, to the Complainant's Counsel, 24 September 2010

27 January 2011

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[5] http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2916&p_language_code=EN