

# **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 Advisory Opinion)**

### **Written Comments of the International Fund for Agricultural Development**

**11 March 2011**

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## **Chapter 1. INTRODUCTION**

1. Pursuant to paragraph 3 of the Order dated 29 April 2010 of the International Court of Justice ("ICJ" or "Court") and the Order dated 24 January 2011 of the President of the Court, the International Fund for Agricultural Development ("IFAD" or "Fund") submits the present written comments on the written statement of the Plurinational State of Bolivia ("Bolivia").<sup>1</sup>
2. The Fund understands Bolivia to be of the view that the respective competencies of the Global Mechanism and IFAD have not been adequately defined and, specifically, that what Bolivia refers to as the "administrative competences" between the two entities and their staff's functions were not clearly identified, or were defined inaccurately, in the April 1999 Memorandum of Understanding between the Fund and the Conference of the Parties to the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa ("Convention" or "UNCCD").<sup>2</sup>
3. At the same time, Bolivia acknowledges that the Fund and the Global Mechanism are "separate legal entities" having administrative units working together and that the status of "host" under the Memorandum of Understanding does not imply a merger, or union, of these entities, but rather means that the Global Mechanism is supported in its functions by the Fund.<sup>3</sup> In the Fund's view, it is precisely this lack of a merger that points to clearly defined roles and functions of the respective entities, which should have been recognised by the International Labour Organization Administrative Tribunal ("Tribunal" or "ILOAT") in its Judgment No. 2867. By stating that "it should have been known exactly if the GM was subject to the jurisdiction of the ILOAT, or if that tribunal is fitting up both international agencies as if they were one,"<sup>4</sup> the Fund understands Bolivia to agree with its position that the Tribunal's jurisdiction over the Global Mechanism and its staff in fact was *not* provided for. In any event, the Memorandum of Understanding, whatever its wording, is not determinative of the question of the identity of the Complainant's employer, as will be demonstrated below.

## **Chapter 2. THE ISSUE OF THE EMPLOYER'S IDENTITY**

4. The Fund understands Bolivia's principal concern to be that – irrespective of any differences that may arise regarding the jurisdiction of the Tribunal – labour and social rights of individuals should be clearly protected and that they should be

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<sup>1</sup> Statement of the Plurinational State of Bolivia, October 2010 (hereinafter "Written Statement of Bolivia").

<sup>2</sup> *Ibid.*, pp. 2-4.

<sup>3</sup> *Ibid.*, p. 4.

<sup>4</sup> *Ibid.*, p. 3.

provided with assurances and proper legal security, including by clearly identifying their employer.<sup>5</sup>

5. While agreeing with this basic postulate, the Fund wishes to emphasise that in the present context the central issue of concern is not labour and social rights of any particular individual, but rather whether the Tribunal acted within the limits of its statutory competence as defined by IFAD's acceptance of the Tribunal's jurisdiction. For this purpose, and in particular in answer to Question I before the Court, or part thereof, it is necessary to establish whether the Complainant was an "official" of the Fund at the relevant time. In that sense the Fund acknowledges that, where doubts exist with regard to the identity of the employer, the issue of the Tribunal's jurisdiction might arise. However, for the reasons set out below, the Fund submits that there is no reason for any doubt regarding either the labour and social rights of the Complainant or the identity of her employer. As described in detail in the Fund's written statement filed with the Court in October 2010, the Tribunal wrongfully asserted its jurisdiction over the Complainant's case, it applied standards of review that are not part of the employment conditions of the Complainant, and it reviewed certain actions of indispensable third parties that were not before it.
6. Moreover, as can be seen from paragraph 27 of the Complaint submitted to the Tribunal, the Complainant explicitly acknowledged that she was not considered an IFAD staff member. The Complaint refers to the fact that "*while 'FH (IFAD's Personnel Division) feels it can provide administrative support to GM staff it does not consider them the staff of IFAD'*" (emphasis in original). The Fund referred to this acknowledgment in paragraph 26 of its Reply submitted to the Tribunal and the Court has also been made aware of it in paragraph 107 of IFAD's written statement. As will be explained in the following paragraphs, there is a clear legal explanation behind this situation.

#### **A. Complainant's Admissions**

7. First and foremost, both the Complaint submitted to the Tribunal and the Tribunal's decision make clear that the Complainant herself recognised that her post was in the Global Mechanism and not in the Fund. This is evident from her articulation of the relief requested from the Tribunal. In the Complaint filed with the Tribunal, the Tribunal was requested to:

"...

- b. Order the defendant to reinstate the complainant in her post or an equivalent post in IFAD, ... .

... ."<sup>6</sup>

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<sup>5</sup> Ibid., p. 5.

8. The same words are repeated in the Complainant's Rejoinder filed with the Tribunal. In other words, the Complainant herself juxtaposed the Global Mechanism with the Fund during the proceeding before the Tribunal, in that she repeatedly requested two alternative forms of relief: (a) reinstatement "in her post," which both her appointment and extension letters and her tenure demonstrate was a post in the Global Mechanism, or (b) "an equivalent post in IFAD." Significantly, the Complainant did not request, as her primary relief, reinstatement "in her post in IFAD" and the use of the word "equivalent" in combination with a reference to IFAD in the subsidiary relief requested demonstrates that IFAD was being referred to as an entity separate from the one in which she held her post. In this context, it is not surprising that the Complainant acknowledged, under the heading "Separate legal entities" in her Rejoinder filed with the Tribunal, that "[t]he complainant has no reason to dispute the separateness of IFAD and the Global Mechanism."<sup>7</sup>
9. Equally unsurprising, the Tribunal understood the reference to "her post" in the Complaint to mean her post *in the Global Mechanism*, as is evident from paragraph 18 of Judgment No. 2867:
- "Although the Joint Appeals Board recommended that the complainant be reinstated in a post in the Global Mechanism, there is no evidence that her contract would have been renewed for the 2008-2009 biennium. Accordingly, reinstatement will not be ordered."
10. In addition, by invoking the budgetary situation of the Global Mechanism to contest the appropriateness, and indeed legality, of her redundancy rather than invoking IFAD's budgetary situation and resources in the proceedings before the Tribunal, the Complainant indicated that she properly understood that she was employed by the Global Mechanism and that her continuation in her post in the Global Mechanism depended on the needs and financial means of the Global Mechanism alone. This argument concerning the financial means of the Global Mechanism would not be relevant if the Complainant were an IFAD staff member.
11. The Tribunal entertained the Complainant's budget argument in Judgment No. 2867 and faulted the IFAD President for not finding that the Managing Director of the Global Mechanism had no authority to abolish the Complainant's post in the Global Mechanism.<sup>8</sup>
12. In the light of the foregoing, the Fund fails to understand how the Tribunal could have considered itself competent to hear the complaint and indicate the relief it ordered.

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<sup>6</sup> See IFAD Written Statement Volume I/III, para. 149.

<sup>7</sup> Rejoinder, para. 5.

<sup>8</sup> ILOAT Judgment No. 2867, paras. 15-17.

## B. Functions performed

13. The Human Resources Policy adopted by the Fund's Executive Board pursuant to Article 6, Section 8(d), of the Agreement Establishing IFAD,<sup>9</sup> defines "staff member or staff" as "a person or persons holding a regular, career, fixed-term, temporary or indefinite contract with the Fund."<sup>10</sup> The requirement that there be a contract "with the Fund" means that by virtue of the contract the individual concerned must be charged with a function of the Fund and be "subject to the authority of the President and to assignment to any of the activities of the Fund."<sup>11</sup> Moreover, "[s]taff shall comply fully with ... such procedure, rules and orders as the President may promulgate."<sup>12</sup>
14. Thus, the principal reason why there should not be any doubt concerning the proper identity of the employer in the present case is the actual work performed by the Complainant. Clearly, if, and only if, the Complainant was charged by the IFAD President with work for the Fund in addition to work for the Global Mechanism, *quod non*, a question might reasonably arise regarding the identity of her actual employer. As explained in the Fund's written statement,<sup>13</sup> throughout her employment with the Global Mechanism, the Complainant in fact was never charged by the IFAD President with performing any of the functions of IFAD, nor was she employed by the Fund or performed functions for the Fund prior or after being employed by the Global Mechanism; she was never involved in any of the activities related to either IFAD's lending operations (e.g., as a country programme manager, regional economist, loan officer, quality enhancement/assurance officer, project design, legal officer, etc.), its treasury operations, its administration or its governance. Throughout her tenure, she was a programme officer in the Global Mechanism, in which capacity she performed exclusively functions of the Global Mechanism. This fact by itself should be sufficient to dispel any doubts regarding the identity of the employer in the instant case. Indeed, the fact that the complainant in the *Bustany* case performed his function in his capacity as the executive head of the organisation concerned – which the Tribunal qualified as the foremost official – was decisive for his qualification both as an official within the meaning of the Tribunal's Statute and a staff member in the sense of the relevant staff regulations.<sup>14</sup> It can be inferred *a contrario* from the foregoing that when the individual concerned has not performed any function of the organisation involved, he or she does not qualify either as an "official" of that organisation within the

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<sup>9</sup> Article 6, Section 8(d), of the Agreement Establishing IFAD provides in pertinent part: "The President shall organize the staff and shall appoint and dismiss members of the staff in accordance with regulations adopted by the Executive Board."

<sup>10</sup> IFAD Human Resources Policy, "Definitions," text in: Dossier submitted to the ICJ, sub VI., doc. No. (11).

<sup>11</sup> *Ibid.*, Para. 5.1.

<sup>12</sup> *Ibid.*, Para. 5.2.

<sup>13</sup> Written Statement of the International Fund for Agricultural Development, 29 October 2010 ("IFAD Written Statement Volume I/III"), para. 101.

<sup>14</sup> ILOAT Judgment No. 2232 (2003).

meaning of the Tribunal's Statute or as a staff member in the sense of the pertinent staff regulations.

15. The foregoing establishes why the three cumulative characteristics of an official defined in the earliest cases dealt with by the Tribunal are not present in the instant case. In order to be an "official" for the purpose of the Tribunal's jurisdiction *ratione personae*, a complainant must be an individual who (a) has a contractual relationship with an organisation subject to the Tribunal's jurisdiction and who is subordinated (b) to the rules and regulations of that organisation and (c) to the authority of the organisation's executive head.<sup>15</sup> An individual who never performed any functions of the Fund, who by the terms of his or her appointment in practice was subordinated only to the Managing Director of the Global Mechanism (as opposed to the IFAD President in his capacity as the President of the Fund),<sup>16</sup> and who was not *ipso iure*<sup>17</sup> subject to IFAD's staff regulations, except insofar as these have been declared applicable *mutatis mutandis* by the IFAD President, cannot be considered an IFAD "official" within the meaning of Article II, paragraph 6, of the ILOAT Statute. In this respect, "*mutatis mutandis*" means "[a]ll necessary changes having been made."<sup>18</sup> Because the Complainant was not an IFAD staff member as defined by IFAD's Executive Board in the Human Resources Policy – given the fact that she was not appointed to perform services for IFAD and never performed such services during her tenure with the Global Mechanism – any application of IFAD staff rules and procedures to her must necessarily be *mutatis mutandis*. In other words, all necessary changes must be deemed to have been made. According to IFAD's Human Resources Policy, a binding directive for the IFAD President adopted by IFAD's Executive Board pursuant to Article 6, Section 8(d), of the Agreement Establishing IFAD, "[t]his policy applies to all staff appointed by the President to perform services for IFAD and to consultants."<sup>19</sup> In other words, this provision contains an inherent exclusion of anyone who is appointed to perform services other than for IFAD.
16. In this respect, it is important to recall that the ILOAT itself noted in its Judgment No. 1033, rendered in a case where, similar to the IFAD-Global Mechanism situation, the staff regulations and staff rules of the housing organization had been declared applicable *mutatis mutandis* to the staff of the hosted entity, that "even

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<sup>15</sup> See ILOAT Judgments Nos. 11, 61, 323 and 339.

<sup>16</sup> The initial offer letter dated 1 March 2000 specified that "[t]he 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). The extension letter of 22 March 2002 similarly specified that "[y]our duties and responsibilities will continue to be those of Programme Manager, Latin America Region P-4, in the Global Mechanism to Combat Desertification," with the exact same language being repeated in the extension letter of 5 March 2004. See text in IFAD Written Statement Volume III/III.

<sup>17</sup> As previously recalled, acting under Article 6, Section 8(d), of the Agreement Establishing IFAD, the Fund's Executive Board defined "staff member or staff" as follows in the IFAD Human Resources Policy: "a person or persons holding a regular, career, fixed-term, temporary or indefinite contract with the Fund." Thus, the implementing rules, policies and procedures adopted by the President in the Human Resources Procedures Manual (HRPM) apply *ipso iure* only to staff so defined.

<sup>18</sup> Black's Law Dictionary, 9<sup>th</sup> ed., p. 1115.

<sup>19</sup> IFAD Human Resources Policy, "Application" (emphasis added).

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),<sup>20</sup> so that the Tribunal was not competent to hear the complaint. Given that the work performed by the Complainant was Global Mechanism work, and not IFAD work, and given the fact that she was subordinated to the Managing Director of the Global Mechanism, there can be no question that her employer was the Global Mechanism, and not IFAD. Therefore, Bolivia is correct to point out that the Complainant "had a labour relation with the GM international agency ...".<sup>21</sup>

17. It is further recalled that the letter dated 4 October 1988 from the President of IFAD to the Director-General of the International Labour Organization states 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*."<sup>22</sup>

18. In other words, the Fund's acceptance of the Tribunal's jurisdiction by its terms was limited to IFAD employees, who pursuant to IFAD's Human Resources Policy can only be individuals appointed to positions in which they perform services for IFAD. In the Complainant's case, both her appointment letters and the actual work performed by her demonstrate unequivocally that she was appointed to, and held, a position as Programme Officer in the Global Mechanism of the Convention to Combat Desertification, a position in which she was responsible to the Managing Director of the Global Mechanism.
19. As IFAD explained in its written statement filed with the Court, the President's Bulletin No. PB/04/01 dated 21 January 2004 was not adopted pursuant to the Human Resources Policy and 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."<sup>23</sup> Only appointments made pursuant to Article 6, Section 8(d), of the Agreement Establishing IFAD, as implemented by IFAD's Human Resources Policy, can give rise to an individual right of redress before the ILOAT. By contrast, appointments made pursuant to the Memorandum of Understanding between the Fund and the Conference of the Parties cannot produce that effect. This follows directly from the terms under which the President was authorised to recognise the jurisdiction of the

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<sup>20</sup> ILOAT Judgment No. 1033 of 26 June 1990 (Consideration 6). See also IFAD Written Statement Volume I/III, para. 99.

<sup>21</sup> Written Statement of Bolivia, p.5.

<sup>22</sup> See IFAD Written Statement Volume I/III, para. 149 (emphasis added).

<sup>23</sup> IFAD Written Statement Volume I/III, para. 248.



Tribunal, which, as the above-referenced letter dated 4 October 1988 make clear, jurisdiction was conferred upon the ILOAT only in respect of "disputes between the Fund and its employees," and not disputes between the Fund and employees performing services for entities hosted by the Fund.

### C. Distinct mandate

20. The distinct mandate of the Global Mechanism constitutes yet another reason why there cannot be any doubt regarding the Global Mechanism being the employer of the Complainant. This follows from the division of responsibilities between the United Nations and its specialised agencies.
21. In its 1927 opinion in the case concerning *Jurisdiction of the European Commission of the Danube*,<sup>24</sup> the Permanent Court of International Justice developed the doctrine of attributed powers, or "functions" as it chose to call them at the time. Shortly thereafter, it applied the doctrine of implied powers to international organisations in the case concerning *Exchange of Greek and Turkish Populations*.<sup>25</sup> The Court itself expanded on this notion, namely, in *Reparation for Injuries Suffered in the Service of the United Nations*<sup>26</sup> and again in *Certain Expenses*,<sup>27</sup> in which it elaborated on the autonomous role ascribed to international organisations. By introducing the "principle of speciality" in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, which in the Court's definition meant that international organisations "are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them,"<sup>28</sup> the fundamental principle underlying the powers of international institutions was identified. As the Court made clear in the latter case, "to ascribe to the WHO the competence to address the legality of the use of nuclear weapons ... would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States."<sup>29</sup> In addition, the Court ruled that where specialised agencies (of which the Fund is one) are involved, the general system created by the United Nations Charter must also be taken into account. In other words, whatever responsibilities the Fund has been given, these "cannot encroach on the responsibilities of other parts of the United Nations system."<sup>30</sup> Indeed, the very notion of a specialised agency only makes sense, so the Court suggested, against the background of a division of labour.<sup>31</sup>

<sup>24</sup> *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, 1927, P.C.I.J. Series B, No. 14.

<sup>25</sup> *Exchange of Greek and Turkish Populations*, Advisory Opinion, 1925, P.C.I.J. Series B, No. 10.

<sup>26</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174.

<sup>27</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, p. 151.

<sup>28</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66, at 74-75, para. 19.

<sup>29</sup> *Ibid.*, pp. 78-79, para. 25.

<sup>30</sup> *Ibid.*, pp. 79-81, para. 26.

<sup>31</sup> See Rutzel Silvestre J. Martha, 'Mandate Issues in the Activities of the International Fund for Agricultural Development (IFAD)', 6 *International Organizations Law Review* (2009), pp. 447-477.

Consequently, since matters of combating desertification have not been assigned to the Fund by the *Agreement Establishing IFAD*, but rather have been entrusted to the entities created by the *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, such matters must lie outside the competence of the Fund.

22. As will be recalled, the international community has long recognised that desertification is a major economic, social and environmental problem of concern to multiple countries in all regions of the world. In 1977, the United Nations Conference on Desertification ("UNCOD") adopted a Plan of Action to Combat Desertification ("PACD"). Notwithstanding these and other efforts, the United Nations Environment Programme ("UNEP") had to conclude in 1991 that the problem of land degradation in arid, semi-arid and dry sub-humid areas had intensified, although it identified a few "local examples of success." As a result, the question of how to tackle desertification was still a major concern for the United Nations Conference on Environment and Development ("UNCED"), which was held in Rio de Janeiro in 1992. The Conference supported a new, integrated approach to the problem, emphasising action to promote sustainable development at the community level. It also called on the United Nations General Assembly to establish an Intergovernmental Negotiating Committee ("INCED") to prepare, by June 1994, a Convention to Combat Desertification, particularly in Africa. In December 1992, the General Assembly agreed and adopted resolution 47/188. 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. As at August 2009, 193 countries were Parties to the Convention. The Conference of the Parties, which is the Convention's supreme governing body, adopted the implementing decision regarding the housing of the Global Mechanism envisaged by the Convention.
23. It follows from the combination of the principle of speciality and the division of responsibilities between the entities charged with combating desertification established under the auspices of the United Nations and the Fund as a UN specialised agency that there cannot be any doubt regarding the proper identity of the employing entity in the present case: working to mobilise resources to combat desertification, which is the Global Mechanism's main purpose, and working to finance agricultural development in Member States, which is IFAD's main purpose, are two entirely different things.

**D. Distinct needs**

24. The distinct needs of the Global Mechanism/Conference of the Parties, on the one hand, and the Fund, on the other hand, constitute a third reason why there should be no doubt regarding the proper identity of the employer in the present case.

25. It goes without saying that separate entities with distinct mandates have needs of their own that are determined by their respective functions and operations. Accordingly, the workforce planning and the attendant budgetary appropriations of each entity are driven by those functions and operations. This explains why, in performing recruitment and personnel management services for the Global Mechanism, the Fund must defer to the expressions of need by the Global Mechanism. This point was explained by the Fund to the Tribunal in Parts III and IV(4) of IFAD's Reply and was reiterated in paragraphs 30-31 of the Fund's Surrejoinder. However, in paragraph 17 of its Judgment No. 2867, the Tribunal ignores this critical fact by holding that "[b]ecause 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 in law." The Tribunal further held that "[t]he President of the Fund erred in law in not so finding when considering her internal appeal."<sup>32</sup> In so holding, the Tribunal attributed to the Fund powers and responsibilities that cannot be traced back to any of its functions as a hosting institution. In fact, the Tribunal's ruling amounts to ascribing to the Fund the power to override decisions of an autonomous treaty body established by a multilateral environmental agreement. As was explained by the Office of Legal Affairs of the United Nations Secretariat when responding negatively to the question whether the UN General Assembly can override the provisions of the Convention on the Elimination of All Forms of Racial Discrimination regarding meetings of the Committee of the Elimination of Racial Discrimination, "[t]reaty organs' must function in accordance with the provisions of treaties which create them and give them tasks to perform."<sup>33</sup> This means that the Global Mechanism must function in accordance with the UNCCD and perform its tasks under the direction of the Conference of the Parties. Hence, notwithstanding the close link between the Global Mechanism and IFAD resulting from the former's housing by the latter, as the hosting institution the Fund cannot impose its will on the Global Mechanism. In a letter to the Counsel for the Complainant dated 5 May 2010, the Fund's General Counsel explained this in the following terms:

"As I said in the meeting, the abolition of Ms Saez' post by the Global Mechanism and the consequent non-renewal of her contract in accordance with the relevant arrangements regarding the hosting of the latter body by IFAD did not reflect in any way on her abilities or performance."<sup>34</sup>

26. A different and incorrect conclusion, to which the Tribunal adhered, would mean that IFAD, as the housing institution, can substitute its judgment regarding the workforce needs of the Global Mechanism for that of the executive head of the

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<sup>32</sup> ILOAT Judgment No. 2867, para. 17.

<sup>33</sup> *Question whether the Committee on the Elimination of Racial Discrimination is a subsidiary organ of the General Assembly*, Memorandum to the Officer-in-Charge, Department of Services, 17 August 1976, UNJYB 1976, pp. 200-201, at 200.

<sup>34</sup> See Dossier submitted to the ICJ, sub X, doc. no. (17).

Global Mechanism, and can impose staff on the latter even if the Managing Director does not consider such staff to be needed. A close reading of Judgment No. 2867 reveals that the Tribunal seems to have realised the absurdity of the situation and thus refrained from awarding both the requested reinstatement of the Complainant "in her post" with the Global Mechanism and her alternative request to be appointed in "an equivalent post in IFAD."<sup>35</sup> While the Tribunal held in paragraph 18 that "reinstatement will not be ordered," it found at the same time that "as the abolition of her post was the only reason advanced for non-renewal of the complainant's contract ... she is entitled to material damages" and it ordered the Fund to pay damages equivalent to the salary and other allowances that the Complainant would have received from the Global Mechanism.

27. In essence, the Tribunal's ruling means that IFAD is made to pay because the Global Mechanism no longer needed the services of the Complainant. In the same way that the Fund cannot impose staff on the Global Mechanism that it does not need, given that IFAD only needs the personnel required to perform its own functions, it is logical that the Fund cannot be compelled, either *de jure* or *de facto*, to absorb staff not needed by the Global Mechanism, let alone to pay damages to non-renewed Global Mechanism staff serving on a fixed-term contract. It is this logic that underpins the President's Bulletin No. PB/04/01 of 21 January 2004. According to the rules contained therein, unlike IFAD staff having been seconded to the Global Mechanism, personnel recruited exclusively to work for the Global Mechanism, which the original appointment letter and subsequent extensions clearly demonstrate was the situation in the Complainant's case,<sup>36</sup> like other non-staff have no right to employment in IFAD, without going through a recruitment process for vacant positions. This explains why the Complainant was not assigned to any position in IFAD itself after the Global Mechanism did not renew her fixed-term contract pertaining to her position in the Global Mechanism.<sup>37</sup>

#### **E. Distinct governance**

28. The distinct governance of the Fund and the Global Mechanism/Conference of the Parties constitutes yet another reason why there should not be any doubt regarding the proper identity of the Complainant's employer.
29. Since the early 1970s a considerable number of multilateral agreements have been concluded in the environmental field which establish a common pattern of

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<sup>35</sup> See ILOAT Judgment No. 2867, para. 18 ("Although the Joint Appeals Board recommended that the complainant be reinstated in a post in the Global Mechanism, there is no evidence that her contract would have been renewed for the 2008-2009 biennium. Accordingly, reinstatement will not be ordered." (Emphasis added)). In her Complaint, under "Relief claimed," the Complainant requested the Tribunal "to reinstate the complainant in her post or an equivalent post in IFAD." See Dossier submitted to the ICJ, sub VII, doc. no. (12).

<sup>36</sup> See footnote 16 above.

<sup>37</sup> Instead of being offered a regular staff position within IFAD, she was offered consultancy positions with IFAD. See Dossier submitted to the ICJ, sub VII, doc. no. (12), Complainant's Brief, para. 30, and *ibid.*, doc. no. (14), Complainant's Rejoinder, para. 18.

institutional arrangements.<sup>38</sup> Multilateral environmental agreements establishing these autonomous institutional arrangements include the *Convention on Wetlands of International Importance*, of 1971 (the Ramsar Convention); the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, of 1972 (the London Convention); the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, of 1973 (CITES), and the *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* ("Convention" or "UNCCD").

30. The purpose of these arrangements is to develop the normative content of the regulatory regime established by each agreement and to supervise the contracting parties' *implementation of*, and compliance with, that regime. These institutional arrangements usually comprise a conference or meeting of the parties (COP, MOP) with decision-making powers, a secretariat, and one or more specialist subsidiary bodies. Such arrangements, because of their *ad hoc* nature, are not immediately recognised as intergovernmental organizations in the traditional sense. On the other hand, as the creatures of treaties or international agreements, such conferences and meetings of the parties, with their secretariats and subsidiary bodies, add up to more than just diplomatic conferences. Because such arrangements do not constitute traditional intergovernmental organisations and yet are freestanding and distinct both from the States parties to a particular agreement and from existing intergovernmental organisations, they can be described as "autonomous." They are also autonomous in the sense that they have their own decision-making powers, procedures and compliance mechanisms, i.e., they possess a distinct governance structure.<sup>39</sup>
31. Likewise, in the case of the UNCCD, the Conference of the Parties oversees the implementation of the Convention. The Conference of the Parties is *established* by the Convention as the supreme decision-making body, and it comprises all ratifying governments. The Conference of the Parties is responsible for giving strategic direction to the Global Mechanism and to assess its performance. As regards strategic direction, the Conference of the Parties adopted a 10-year strategic plan and framework to enhance the implementation of the Convention ("The Strategy") in 2007 pursuant to decision 3/COP.8. This decision requests the Global Mechanism to revise its strategic and operational planning documents, taking a results-based management approach, to make them consistent with The Strategy, and to present its planned contribution to The Strategy. The Strategy was subsequently translated

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<sup>38</sup> See, generally, Barath H. Desai, *Multilateral Environmental Agreements – Legal Status of the Secretariats* (Cambridge University Press, 2010).

<sup>39</sup> See Robin R. Churchill and Geir Ulfstein, 'Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law,' 94 *American Journal of International Law* (2000), p. 623 et seq. See also Bharat H. Desai, 'Mapping the Future of International Environmental Governance,' 13 *Yearbook of International Environmental Law* (2003), pp. 44-61.

into the Global Mechanism's four-year work plan and is contained in that document.<sup>40</sup>

32. Similarly, as far as the review of the Global Mechanism's performance is concerned, in accordance with paragraph 27 of its decision 3/COP.8, the COP requested the Joint Inspection Unit (JIU) of the United Nations to conduct an assessment of the Global Mechanism and submit it to COP 9. Specifically, the JIU was tasked with assessing the following: (1) To evaluate the work and functions of the Global Mechanism, in accordance with its mandate as set out in the Convention and relevant decisions of the Conference of the Parties; (2) To identify any lack of clarity in the institutional arrangements and *accountability* set out in the Convention and in the memorandum of understanding between IFAD and the UNCCD, with a view to ensuring the effectiveness of the functioning of the Convention bodies; (3) To assess the alignment between the programme of the Global Mechanism and that of the secretariat, and the conformity of the programme of the Global Mechanism to the guidance of the Conference of the Parties; and (4) To evaluate the communication and working modalities between the Global Mechanism and the secretariat. Being a United Nations body, acceptance of this assignment was necessary. Accordingly, the UN General Assembly took note of this request in its resolution 62/193 of 19 December 2007 and stated that it looked forward to the findings of JIU. Upon completion of the assessment by the JIU the Conference of the Parties, at its 2009 session, adopted *Decision 6/COP.9 -Joint Inspection Unit report on the assessment of the Global Mechanism*,<sup>41</sup> from which it can be clearly derived that from the perspective of the Conference of the Parties the Global Mechanism is considered an integral part of the UNCCD.

#### **F. Distinct legal personalities**

- (i) The issue of the Global Mechanism's legal personality

33. Bolivia is correct to point out that Judgment No. 2867 should be reviewed by the Court in order to establish which international organisation should properly be sued.<sup>42</sup> The Fund takes note of the fact that the Tribunal and, more recently, the Office of Legal Affairs of the United Nations Secretariat have taken the position that the Global Mechanism lacks legal personality. In the Fund's view, whatever the correctness of that position, the alleged lack of legal personality on the part of the

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<sup>40</sup> COMMITTEE FOR THE REVIEW OF THE IMPLEMENTATION OF THE CONVENTION, Seventh Session, Istanbul, 3–14 November 2008, Item 3 (b) (ii) of the provisional agenda. The 10-year strategic plan and framework to enhance the implementation of the Convention Consideration of the work plans of the Convention bodies The multi-year work plan for the Global Mechanism. The 10-year Strategic plan and framework to enhance the implementation of the Convention, Note by the Global Mechanism, Addendum

Consideration of the draft multi-year work plan for the Global Mechanism (2008–2011), ICCD/CRIC(7)/2/Add.3 27 August 2008, <http://www.unccd.int/cop/officialdocs/cric7/pdf/cric2add3-eng.pdf>.

<sup>41</sup> CONFERENCE OF THE PARTIES, Report of the Conference of the Parties on its ninth session, held in Buenos Aires from 21 September to 2 October 2009, Addendum, Part two: Action taken by the Conference of the Parties at its ninth session, ICCD/COP(9)/18/Add.1, 18 November 2009, <http://www.unccd.int/cop/officialdocs/cop9/pdf/18add1eng.pdf>.

<sup>42</sup> See Written Statement of Bolivia, p. 5 (bottom).

Global Mechanism does not constitute an obstacle to the identification of the Global Mechanism as the employer of the Complainant and it certainly does not mean that the Fund can be held liable for the conduct of the Global Mechanism vis-à-vis the Complainant. Before elaborating on this assertion, it is worth recalling that, unlike domestic legal systems, the international legal order has no prescribed legal and administrative process of incorporation for international legal persons.<sup>43</sup> Therefore, an international entity must legitimise its existence, its powers, its independence, etc., by reference to and through interpretation of its constituent instrument in the context of general international law and the needs of the international community.<sup>44</sup> As the Court itself indicated in *Reparation for Injuries Suffered in the Service of the United Nations*, if an entity is "recognized as having that personality, it is capable of availing itself of obligations."<sup>45</sup> More importantly, in the same opinion the Court noted that:

"The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States."<sup>46</sup>

34. Indeed, it is the requirements of international life, in particular the need for a multilateral regulatory approach in the field of the environment, that prompted the emergence of the "autonomous treaty body," which "possess[es] the trappings of an international organization without actually being one."<sup>47</sup> These treaty bodies need not have all the features of the traditional international organisation in order to function, perform legal acts and incur obligations under international law.

(ii) Legal personality of the Conference of the Parties and legal capacity of the Global Mechanism distinguished

35. That being said, it should be emphasised that the assertion that the Global Mechanism lacks legal personality, even if it were correct, in and of itself does not lead to the conclusion that IFAD can be held responsible for the conduct of the Global Mechanism vis-à-vis the Complainant. Rather, the question is whether the Convention created an actor whose legal personality is engaged by the treaty bodies established by and under the Convention. For instance, when the United

<sup>43</sup> See Ian Brownlie, *Principles of Public International Law*, 6th edn (Oxford, Clarendon Press, 2003), p. 648.

<sup>44</sup> See Rutsel Silvestre J. Martha, *The Legal Foundations of INTERPOL* (Oxford, Hart Publishing, 2010), pp. 2-3.

<sup>45</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174, at 178. See also James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2006), p. 29, and Rutsel Silvestre J. Martha, *The Legal Foundations of INTERPOL* (Oxford, Hart Publishing, 2010), pp. 137-138.

<sup>46</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174, at 178.

<sup>47</sup> Barath H. Desai, *Multilateral Environmental Agreements – Legal Status of the Secretariats* (Cambridge University Press, 2010), p. 136. See also IFAD Written Statement Volume I/III, para. 152 and the sources cited therein.

Nations Development Programme (UNDP) undertakes legal acts, including the conclusion of contracts and other agreements, even when it does so in its own name, having been established by the General Assembly through its resolutions 1240 (XIII), 1383 (XIV) and 2688 (XXV), in pursuance of Article 22 of the United Nations Charter, it engages the personality of the United Nations.<sup>48</sup> As explained by the Office of Legal Affairs of the United Nations Secretariat, within the general mandate conferred upon it by the resolutions of the General Assembly, the UNDP enjoys such capacities as may be necessary for the exercise of its functions and the fulfilment of its purposes.<sup>49</sup> The same office explained that, "[w]hile UNDP is a subsidiary organ of the General Assembly, it has a distinct identity of its own within the developmental area within which it operates. It has its own Governing Council, its own budget and its own staff, headed by an Administrator. It indeed enjoys virtual autonomy within its area of operations."<sup>50</sup> It can even acquire real estate in the territory of the Member States in its own name.<sup>51</sup> Thus, although the UNDP does not have legal personality of its own, it has the capacity to perform legal acts which engage the legal personality of the organization of which it is an organ.

36. A similar situation exists in respect of the United Nations Institute for Training and Research (UNITAR), which was established by the UN Secretary-General pursuant to General Assembly Resolution 1934(XVIII) of 11 December 1963. Under the Statute of the UNITAR issued by the Secretary-General, UNITAR is defined as an "autonomous institution" within the framework of the United Nations. According to the Office of Legal Affairs of the United Nations Secretariat, UNITAR has the authority to enter into contracts and thus has "limited legal capacity, which is drawn on the legal personality of the United Nations,"<sup>52</sup> the UNITAR Executive Director has the authority to appoint staff and promote staff,<sup>53</sup> and he has authority in respect of other human resources matters.<sup>54</sup>
37. A similar situation exists also with regard to the United Nations Joint Staff Pension Fund, which has been described as "a subsidiary organ of the United Nations established by action of the United Nations General Assembly"<sup>55</sup> and which "has been established as a subsidiary body of the General Assembly in accordance with

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<sup>48</sup> *Legal Status of the UNDP*, Memorandum to the Director, Policy Division, Bureau for Programme Policy and Evaluation, United Nations Development Programme, UNJYB 1990, pp. 276-278.

<sup>49</sup> *Question whether the UNDP could become a founding member of a corporate body under the national law of a Member State*, Memorandum to the Director, Policy Division, Bureau for Programme Policy and Evaluation, United Nations Development Programme, UNJYB 1990, pp. 259-260.

<sup>50</sup> *Request for authorization to use the United Nations name and emblem in an advertisement to be published in the framework of an information campaign in a Member State*, Letter to a Government official of a Member State, UNJYB 1992, pp. 415-417.

<sup>51</sup> *Legal Status of the UNDP*, Memorandum to the Director, Division for Administrative and Management Services, United Nations Development Programme, UNJYB 1990, pp. 276-277.

<sup>52</sup> *Note to the Assistant Secretary-General, Executive Director of the UNITAR, regarding the autonomy of UNITAR*, UNJYB 2008, pp. 427-434, at 428.

<sup>53</sup> *Ibid.*, pp. 429-430.

<sup>54</sup> *Ibid.*, pp. 431-432.

<sup>55</sup> *Immunity from legal process of the United Nations Joint Staff Pension Fund, a subsidiary organ of the United Nations, under article II, section 2 of the Convention on the Privileges and Immunities of the United Nations*, Letter to the United States Mission to the UN, UNJYB 1978, p. 186.



Article 22 of the Charter of the United Nations and, therefore, ... is an integral part of the United Nations.”<sup>56</sup>

38. IFAD sees no reason why the foregoing analysis should not apply to the multilateral environmental agreements in general, and to the UNCCD in particular. As regards the secretariats established by these treaties, a recent study describes the legal situation as follows:

“The advent of MEAs on the international scene has led to the growth of various kinds of treaty bodies. In general, at the apex level the COP has full legal capacity. That capacity is in turn passed on, under its authority, to the secretariat as a treaty body. The said legal capacity of the secretariat is borne out of sheer functional necessity.”<sup>57</sup>

39. Applied to the instant case, this implies that since the Global Mechanism is a treaty body established by the UNCCD, its acts and transactions – such as the contracting of staff with the assistance of the Fund – must be deemed to draw on the legal personality of the Conference of the Parties. It is for this reason that international agreements entered into by the Global Mechanism with third parties do not engage the Fund—they are not opposable to IFAD. They are not submitted for approval to the Fund’s Executive Board in accordance with Article 8, Section 2, of the Agreement Establishing IFAD. They are decided upon by the Managing Director of the Global Mechanism without involvement of the Fund’s President or any organ of the Fund. Thus, contrary to what has been advised by the Office of Legal Affairs of the United Nations Secretariat in response to a request for legal opinion from the Joint Inspection Unit concerning the mandate, status and legal capacity of the Global Mechanism,<sup>58</sup> the ability of the Global Mechanism’s Managing Director and other representatives to enter into such agreements does not in any way depend on a delegated authority given by IFAD, let alone its President acting in its capacity as IFAD’s chief administrative officer or otherwise, but must be sought in the Convention and the rules and practices of the Convention and the Conference of the Parties. As a matter of fact, in the same opinion the Office of Legal Affairs of the United Nations Secretariat states that “the Global Mechanism and Secretariat are subsidiary bodies established by the Convention. ... [T]he Convention does not entrust the Global Mechanism with the capacity to enter independently into legally binding agreements.”<sup>59</sup> As the same Office advised in respect of the UNJSPF, the UNDP and the UNITAR, when a subsidiary body performs legal acts it draws on the legal

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<sup>56</sup> Note to the Secretary-General regarding the Staff Council resolution 42/24 proposing to hire Counsel and explore the possibility of bringing a legal action in the United States of America Federal Courts, UNJYB 2007, pp. 395-397, at 396.

<sup>57</sup> Barath H. Desai, *Multilateral Environmental Agreements – Legal Status of the Secretariats* (Cambridge University Press, 2010), pp. 169-170. For a comprehensive study of the relationship between functional necessity and the legal personality, capacity and competence of intergovernmental organisations, see Peter H.F. Bekker, *The Legal Position of Intergovernmental Organizations—A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers, 1994).

<sup>58</sup> Interoffice memorandum to the Executive Secretary of the UNCCD Secretariat regarding questions posed by the Joint Inspection Unit, UNJYB 2009, pp. 450-453.

<sup>59</sup> Ibid., p. 452.

personality of the body to which it pertains. In this regard, the only relevant question is whether in entering into such employment contracts – albeit with the support of the Fund –, the Global Mechanism acts within the limits of its competence (*intra vires*) as defined by the Conference of the Parties. This question, which is not a matter of legal personality, but rather a matter of allocation of competencies among various organs and bodies of an international entity, albeit not properly before the Court, must certainly be answered in the affirmative. It requires an examination of the internal distribution of powers under the UNCCD, but in any case, it can never lead to the conclusion reached by the Tribunal, which in its Judgment No. 2867 adopted the view that because the Global Mechanism lacks legal personality its staff are the Fund's staff. Indeed, similar to what was decided by the United Nations Administrative Tribunal in *Walter* (1986) and in *Isaacs* (1988), the proper conclusion should be that, in the final analysis, Global Mechanism staff are staff of the entity of which it is a subsidiary body. In the aforementioned cases the UN Administrative Tribunal ruled that, since UNITAR has no legal status of its own<sup>60</sup> but is a part of the United Nations, its personnel are staff members of the United Nations.<sup>61</sup>

40. The Fund wishes to draw the Court's attention to paragraph 11 of the above-referenced opinion issued by the UN Office of Legal Affairs.<sup>62</sup> In that paragraph, the Office of Legal Affairs asserts that "[h]aving reviewed the MOU and the COP decisions," it is "of the view that the Global Mechanism has not been entrusted with the legal personality [sic] to enter into legally-binding agreements." But the Fund submits that the text of the Memorandum of Understanding and pertinent COP decisions point to the opposite conclusion. In Article II.B(b) of the Memorandum of Understanding, it is expressly stated that the resources of the Global Mechanism shall include "remuneration to the Global Mechanism for services rendered to a specific donor or group of donors." Clearly, in order to be able to establish the terms of reference for services to be rendered and the remuneration to be received by the Global Mechanism in return for those services, the Global Mechanism should be able to enter into the attendant legal agreements. In other words, the Memorandum of Understanding itself envisages that the Global Mechanism is endowed with a certain degree of legal capacity. This is not surprising in the light of paragraph 4(b) of the annex to Decision 24/COP.1 of the Conference of the Parties, where it is stated that the Global Mechanism shall "[u]ndertake actions and/or activities, in partnership particularly with developed country Parties, and relevant institutions, that shall, consistent with the Convention, mobilize and

<sup>60</sup> "UNITAR has no legal status of its own. It was established at the request of the General Assembly (resolution 1934 (XVIII) of 11 December 1963) by the Secretary-General (Statute of November 1965, amended in 1967). Its Statute defines it as 'an autonomous institution ... within the framework of the United Nations ...'" UNAT Judgment No. 390, *Walter* (1986), consideration II.

<sup>61</sup> "In Judgement No. 390, *Walter* (1986), the Tribunal held that 'UNITAR has no legal status of its own.' It was established at the request of the General Assembly by the Secretary-General. The Statute defines UNITAR as 'an autonomous institution ... within the framework of the UN ...'. This indicates that UNITAR is part of the UN and, hence, that staff members of UNITAR are staff members of the UN", UNAT Judgment 423, *Isaacs* (1988), consideration no. III.

<sup>62</sup>See UNJYB 2009, pp. 450-453.

maximize for the purpose of the Convention adequate and substantial financial resources, including, as agreed in the Convention, new and additional resources, on grant or, if necessary, concessional basis, to fund activities under action programmes of affected developing country Parties, particularly those in Africa, at all levels in conformity with the Convention and with the particular conditions of the regions of relevant regional implementation annexes."<sup>63</sup>

41. In sum, in contrast to the advice given by the UN Office of Legal Affairs, both the Memorandum of Understanding and the COP decisions in fact presume that the Global Mechanism has been entrusted with the necessary legal capacity to partner with States and international organizations to undertake obligations to discharge services and to be remunerated for those services.
42. The following statement by the Office of Legal Affairs made in the same memorandum is equally unsupported by the pertinent legal instruments:

"We understand that the Managing Director of the Global Mechanism (hereinafter the 'Managing Director'), who in accordance with Section II D of the MOU is nominated by the Administrator of the UNDP and appointed by the President of IFAD has certain delegated authority by the President on administrative issues. *Accordingly, in our view, the Managing Director would be able to enter into a legally-binding agreement if this is within the authority delegated by the President of IFAD to the Managing Director in accordance with IFAD's rules and regulations.*"<sup>64</sup>

43. This statement not only is contrary to the text of the Memorandum of Understanding and the pertinent COP decisions, it also ignores the fact that, in accordance with the Agreement Establishing IFAD, the President of IFAD has no authority to decide on agreements with States and with other international organizations and thus cannot delegate an authority that he does not have. Pursuant to Article 8, Section 2, of the Agreement Establishing IFAD, such decisions are the prerogative of IFAD's Executive Board. Only upon approval by the Executive Board can the President act in representation of the Fund to sign the agreement concerned. It will be noted that none of the agreements entered into by the Global Mechanism has ever been submitted for approval by IFAD's Executive Board as they are not legal acts of the Fund nor otherwise engage the legal personality of the Fund.
44. The Court is requested to take note of the fact that the Fund's General Counsel, in a telephone conversation which took place during the first week of September 2009, had advised the legal officer in the UN Office of Legal Affairs responsible for

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<sup>63</sup> See Dossier submitted to the ICJ, sub V, doc. (4), *Decision 24/COP.1 of the Conference of the Parties of the UNCCD with respect to the organization to house the Global Mechanism and agreement on its modalities*.

<sup>64</sup> UNJYB 2009, pp. 450-453 (emphasis added).

preparing the above-referenced memorandum concerning the mandate, status and legal capacity of the Global Mechanism of the Fund's views regarding the relationship between the Fund and the Global Mechanism. The Fund's General Counsel summarised those views as follows in an e-mail dated 21 September 2009 addressed to the same legal officer and attaching the text of the Fund's Response submitted in the proceeding resulting in Judgment No. 2867 (incorporating the Fund's position regarding that relationship):

"...

Concerning the capacity [sic] of GM to enter into agreements with other entities, our view can be summarized as follows

This capacity is not determined [sic] by IFAD but must be deemed to derive from the UNCCD and general international law principles. The GM enters into agreements in its own name and these agreements are signed by the Managing Director. This is the practice that has been followed and some UN bodies, particularly the UNDP, have previously entered into several such agreements with the GM. We recognize that the Convention does not clearly state that the GM has legal identity, but that is only one aspect of the issue. As a matter of general international law, If States wish an international body to be endowed specifically with legal personality, this will appear in the constituent treaty and be determinative of the issue. But this actually occurs in only a minority of cases. However, personality on the international plan, or rather the capacity to enter into (certain) contractual arrangements under international law, may be inferred from the powers or purposes of the body concerned and its practice. This is the more usual situation and one authoritatively discussed and settled (at least as far as the UN was concerned directly) by the *Reparation for Injuries* case. A case in point is the Charter of the United Nations, which does not explicitly state that the UN has legal identity, and neither does the General Assembly resolution creating the UNDP. Thus the practice has been that as far as IFAD is concerned, the GM has the authority to enter into agreements of this type under its own name, and the Managing Director is the person with the authority to sign the agreements.

... ."

45. The Fund notes, with great regret, that its view, which it had explicitly been invited to express both orally and in writing, evidently was ignored by the UN Office of Legal Affairs in finalising its memorandum concerning the mandate, status and legal capacity of the Global Mechanism.
46. Notwithstanding the compelling arguments set out above, in confirming its jurisdiction beyond the consent given by IFAD, the Tribunal, instead of drawing the

logical conclusion that the legal personality of the Fund was not involved, chose to negate the status of the Global Mechanism as an autonomous treaty body under the UNCCD by describing it as follows:

"The fact that the Global Mechanism is an integral part of the Convention and is accountable to the Conference [of the Parties] 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."<sup>65</sup>

47. It is clear that the last sentence in the above excerpt simply does not flow from the analysis that precedes it within the same paragraph. If anything, that analysis points unequivocally and exclusively towards the Conference of the Parties as the embodiment of the legal personality established by the UNCCD. There is in this regard absolutely no difference between the situation of the UNJSPF, UNDP and UNITAR under the UN Charter and that of the Global Mechanism under the UNCCD. So why could the obvious conclusion not be drawn by the Tribunal? By resorting only to the text of Section II.A. of the Memorandum of Understanding in the above excerpt, the Tribunal ignored the fact that the Memorandum of Understanding merely implements Decision 24/COP.1, which was adopted by the Conference of the Parties under Article 21 of the Convention. Article 21, paragraph 1, of the Convention provides that the "Conference of the Parties shall promote the availability of financial mechanisms and shall encourage such mechanisms to seek to maximize the availability of funding for affected developing country Parties, particularly those in Africa, to implement the Convention." Accordingly, in order to increase the effectiveness and efficiency of existing financial mechanisms, a Global Mechanism to promote actions leading to the mobilisation and channeling 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, was established by Article 21, paragraph 4, of the Convention. The same provision states clearly that "[t]his Global Mechanism shall function under the

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<sup>65</sup> ILOAT Judgment No. 2867, consideration 6.

authority and guidance of the Conference of the Parties and be accountable to it." According to Article 21, paragraph 5, of the Convention, "[t]he Conference of the Parties shall identify, at its first ordinary session, an organization to house the Global Mechanism." Finally, Article 21, paragraph 6, of the Convention stipulates that "[t]he 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." Clearly, being an arrangement pursuant to Article 21, paragraph 6, of the Convention, the Memorandum of Understanding cannot be construed to mean that the Global Mechanism has become an integral part of the housing institution. Therefore, the principal function of Section II.A. of the Memorandum of Understanding is to underscore that within the housing institution, the Global Mechanism's status as an autonomous treaty body under the Convention shall be respected and preserved.

48. The correct conclusion must be that, irrespective of the housing arrangement, the Global Mechanism remains an integral part of the institutional framework set up by the Convention and thus – similar to the UNDP, UNJSPF and UNITAR in respect of the United Nations – it partakes in the legal personality established by the Convention of which the Conference of the Parties is a body. As the Tribunal's own jurisprudence confirms, in particular Judgment No. 1033 (1990) where it declined jurisdiction to entertain complaints of UNOV staff that was assimilated with WIPO staff, as the Complainant was employed by a body that had not recognized the Tribunal's jurisdiction, her complaint should have been dismissed by the Tribunal.

#### **G. Conclusion**

49. For the reasons stated above, the Fund submits that there is no ground whatsoever for any doubt regarding identifying the Global Mechanism as the employer of the Complainant.

### **Chapter 3. LEGAL MEANING OF THE TERM "HOUSING" IN THE PRESENT CONTEXT**

50. Bolivia's written statement also raises the question of the meaning to be assigned to the terms "to house" and "housing" in the Memorandum of Understanding between the Fund and the Conference of the Parties to the UNCCD. Compared to a body such as the Global Mechanism, the practice relating to multilateral environmental agreements displays a pattern that assists in identifying the functions of the institutions hosting the secretariats set up by these treaties. It has been pointed out that:

"[i]n general, all of the secretariats are expected to make arrangements for and provide services to meetings of the COP and the subsidiary bodies.

Similarly, other important roles that the secretariat (or the host institution acting as secretariat for the convention) is required to play include providing assistance to the parties in the implementation of the convention, preparing necessary reports as required by the parties, ensuring necessary coordination with other international bodies, and putting into place the necessary administrative and contractual arrangements for effective discharge of its functions.”<sup>66</sup>

51. The situation is different in respect of the Global Mechanism, which is not a secretariat in the aforementioned sense – for it exists along with the UNCCD Secretariat located in Bonn – but rather a resource mobilisation vehicle. By emphasising the need to delineate the functions of the Fund and the Conference of the Parties, Bolivia appears to suggest that ambiguities exist in respect of the meaning of those terms in the present context as it relates to the particular nature of the Global Mechanism. However, given the ordinary meaning to be given to the terms “to house” and “housing” in their context and in light of their object and purpose, the Fund respectfully submits that there should be no uncertainty in this regard.

#### **A. Interpretation**

52. It is recalled that the Conference of the Parties was required, pursuant to Article 21, paragraphs 5 and 6, of the Convention, to identify at its first ordinary session an organisation “to house” the Global Mechanism established under Article 21, paragraph 4, of the Convention. Acting under Article 21, paragraphs 5 and 6, of the Convention, in paragraph 1 of its decision 24/COP.1, adopted at its first session, the Conference of the Parties selected the Fund to house the Global Mechanism. By paragraph 1 of Resolution 108/XXI (“Housing the Global Mechanism of the United Nations Convention to Combat Desertification”), the Fund’s Governing Council decided that IFAD shall accept the decision of the Conference of the Parties to house the Global Mechanism of the UNCCD. Accordingly, a Memorandum of Understanding was concluded between the Fund and the Conference of the Parties, which states in Section I that:

“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 of 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.”

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<sup>66</sup> Barath H. Desai, *Multilateral Environmental Agreements – Legal Status of the Secretariats* (Cambridge University Press, 2010), p. 124.

53. The wording of this provision leaves no doubt about the fact that the Global Mechanism was to perform its own functions as defined by its progenitor, whereas IFAD would support the Global Mechanism in its (i.e., the Global Mechanism's) functions by providing housing facilities. While the term "to house" is not a legal term of art in international law, as it is employed in a transitive sense, it intends to convey the same meaning as employed in ordinary language, i.e., to serve as shelter. In this sense, as the "housing institution" the Fund is expected to provide accommodation to the Global Mechanism. The housing institution does not legally absorb and become one with the hosted entity. In fact, the very use of the terms "to house" and "housing" intends to convey the notion that there is no transfer of functions of the treaty body to another entity or organisation, in this case the Fund.
54. Section II.A of the Memorandum of Understanding states explicitly that "the Global Mechanism will have a separate identity within the Fund." While in hindsight it would have been clearer, from a drafting viewpoint, if the words "in relation to the Fund" had been used after "separate identity" instead of the words "within the Fund," if the Memorandum of Understanding were in need of interpretation, as "an international agreement governed by international law and concluded in written form"<sup>67</sup> between international organizations, or between a group of States and an international organization, the Memorandum of Understanding's interpretation would be informed by the applicable rules embodied in the 1969 Vienna Convention on the Law of Treaties ("1969 Vienna Convention")<sup>68</sup> and/or the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("1986 Convention").
55. In cases of treaty interpretation, it is the well-established practice of the ICJ to resort to rules of interpretation set forth in the 1969 Vienna Convention. Article 31 of the Vienna Convention, which is identical to Article 31 of the 1986 Convention, provides in pertinent part:
- "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
  - 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
    - (a) Any agreement relating to the treaty which has been made between all the parties in connection with the conclusion of the treaty;

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<sup>67</sup> 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Art. 2(1)(a)(ii), done at Vienna on 21 March 1986, not yet in force.

<sup>68</sup> Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entry into force on 27 January 1980, U.N.T.S. vol. 1155, p. 331.



(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties."

56. As the Court has explained with regard to this provision:

"A treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty."<sup>69</sup>

In other words, as one commentator has pointed out, "the natural and ordinary meaning must be given to words 'in the context in which they occur' and not in the abstract" and "it is not a narrow and quasi-literal interpretation of words, phrases or articles, taken in isolation, that is envisaged, but one related to the [document to be interpreted] as a whole."<sup>70</sup>

57. In this case, the ordinary meaning to be given to the words "housing" in Section I of the Memorandum of Understanding and "separate identity within the Fund" in Section II.A thereof viewed in the context of the Memorandum of Understanding and in the light of the object and purpose of the Memorandum of Understanding, i.e., a document entered into with a view to arranging the modalities and administrative operations of the Global Mechanism "within IFAD" as "the organization to house the Global Mechanism,"<sup>71</sup> must be that the Global Mechanism does not form part of IFAD.<sup>72</sup> There is no subsequent agreement or practice that suggests otherwise. As a matter of fact, the creation and functioning of the "Global Mechanism Advisory Group" at IFAD proves this point. As the President's Bulletin of 21 January 2004 announced:

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<sup>69</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6, at 21-22, para. 41; see also *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045, at 1060, para. 20.

<sup>70</sup> C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2<sup>nd</sup> ed. (Cambridge University Press, 2005), p. 44 (citing *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 4, at 8).

<sup>71</sup> Memorandum of Understanding, Preamble.

<sup>72</sup> Cf. Judgment No. 2867, para. 7.

"3. To strengthen further the relationship between IFAD and the Global Mechanism, a Global Mechanism Advisory Group is established, chaired by the Assistant President (PMD), with representatives from EC, ER, NALO, FC, FH and PT as well as the Managing Director of the Global Mechanism or his/her representative as an observer. The secretariat of the Global Mechanism Advisory Group shall be placed in PMD. The Global Mechanism Advisory Group shall be responsible for all aspects of collaboration between IFAD and the Global Mechanism and its chair shall report to and advise, the President on GM matters."<sup>73</sup>

58. The above excerpt from the Presidential Bulletin makes it clear that the Fund and the Global Mechanism were always regarded as two separate legal entities. The composition of the Advisory Group reflects this separate identity of the Fund and the Global Mechanism: while it is composed of IFAD departmental units established by the IFAD President himself, which units have full membership status in the Advisory Group, the participation of the Managing Director is in an observatory capacity. Moreover, the stated mandate of the Global Mechanism Advisory Group is to advise the President on all aspects of "collaboration between the Fund and the Global Mechanism," i.e., collaboration between two separate entities.
59. The words "within the Fund" in Section II.A must be interpreted in conjunction with the Memorandum of Understanding's Preamble, which identifies the Conference of the Parties as the body responsible for the Global Mechanism and the counterparty of IFAD under the Memorandum of Understanding for purposes of housing the Global Mechanism.
60. If there were any ambiguity regarding the meaning of the words "to house" in the Preamble of the Memorandum of Understanding or the words "housing" or "the Global Mechanism will have a separate identity within the Fund" in Sections I and II.A of the Memorandum of Understanding, or if their interpretation would lead to the "manifestly absurd" result that the Global Mechanism is not legally separate from IFAD,<sup>74</sup> common Article 32 of the 1969 and 1986 Conventions, entitled "Supplementary means of interpretation," would point to "the preparatory work" of the Memorandum of Understanding and "the circumstances of its conclusion" to confirm or determine their meaning. These supplementary means of interpretation all point to the conclusion that the Global Mechanism and IFAD are separate and cannot be assimilated for any purpose.<sup>75</sup> The offer document, which may be viewed

<sup>73</sup> See Dossier submitted to the ICJ, sub V, doc. no. (8).

<sup>74</sup> It makes no sense for the Conference of the Parties to enter into an arrangement (the Memorandum of Understanding) with an external "organization to house the Global Mechanism" (i.e., IFAD) if the Global Mechanism is not separate from IFAD. If the Global Mechanism were "part of the Fund" (ILOAT Judgment No. 2867, para. 7), there would have been no need for a Memorandum of Understanding between the Conference of the Parties and IFAD.

<sup>75</sup> In its decision selecting IFAD to house the Global Mechanism, the Conference of the Parties requested the Permanent Secretariat of the Convention and IFAD 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 ... ." Decision 24/COP.1, doc. ICCD/COP(1)/11/Add. 1, p. 68.

as the preparatory work of the Memorandum of Understanding, in particular confirms this conclusion.<sup>76</sup>

61. By effectively denying effect to the words "the Global Mechanism will have a separate identity within the Fund" in Section II.A of the Memorandum of Understanding, the Tribunal violated the principle of effectiveness that is part of the corpus of international institutional law. It has been explained in the literature that the principle of effectiveness includes the following two aspects:

"The first embraces the rule that all provisions of a treaty must be supposed to have been intended to have significance and be necessary to convey the intended meaning so that an interpretation which reduces some part of the text to the status of a pleonasm or mere surplusage is *prima facie* not acceptable – 'la règle de l'effet utile'. The second covers the rule that the instrument as a whole, and each of its provisions, must be taken to have been intended to achieve some end and that an interpretation which would make the text ineffective to achieve the object in view is *prima facie* suspect – 'la règle de l'efficacité.'<sup>77</sup>

62. As has been summarised by an investment tribunal comprising former ICJ President Stephen Schwebel as a member:

"It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective."<sup>78</sup>

63. By its key finding, based on provisions of the Memorandum of Understanding (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,"<sup>79</sup> the Tribunal gave an interpretation to the words "to house," "housing" and "the Global Mechanism will have a separate identity within the Fund" contained in the Memorandum of Understanding that made the pertinent text ineffective in the

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<sup>76</sup> See doc. ICCD/COP(1)/5, "Global Mechanism: Compilation of Revised Offers of International Fund for Agricultural Development (IFAD) and United Nations Development Programme (UNDP)" (25 June 1997), especially pp. 20-23.

<sup>77</sup> C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2<sup>nd</sup> ed. (Cambridge University Press, 2005), p. 45.

<sup>78</sup> *Euroko B.V. v. Republic of Poland*, Partial Award of 19 August 2005, para. 248 (L. Yves Fortier, President; Stephen M. Schwebel, Jerzy Rajske, arbitrators).

<sup>79</sup> ILOAT Judgment No. 2867, para. 7.

context of the Memorandum of Understanding. In the process, it also made the text of Article 21, paragraph 4, of the Convention ineffective.

**B. Substance**

64. The above is underscored by Sections II and III of the Memorandum of Understanding, which expressly assert that:

- a. The Global Mechanism shall have its own resources separate from those of the housing institution (Section II.B);
- b. The housing institution shall administer those funds in the same way that it administers third party supplementary funds (trust funds) (Section II.C);
- c. The executive head of the Global Mechanism shall be appointed upon the nomination of the Administrator of the UNDP (Section II.D);
- d. The Global Mechanism shall function under the authority of the Conference of the Parties and be fully accountable to the said Conference (Section III.A); and
- e. The Global Mechanism shall report to the Conference of the Parties (Section III.B).

65. Sections II and III of the Memorandum of Understanding make clear that the Fund provides an array of services to the Global Mechanism, which together constitute the "housing" of the Global Mechanism by the Fund. These services include:

- a. Providing offices and office facilities;
- b. Serving as recruitment agency for the Global Mechanism and to administer the staff on behalf of the Global Mechanism;
- c. Authorising the personnel of the Global Mechanism to share in the privileges and immunities that the Fund's own staff members enjoy under the relevant international instruments, including through annual notifications pursuant to Article VI, Section 18, of the Convention on the Privileges and Immunities of the Specialized Agencies, according to which "[e]ach specialized agency will specify the categories of officials to which the provisions of this article and of article VIII shall apply" (emphasis added) – but inclusion of an individual employed by a housed entity on this list submitted by the housing organisation does not necessarily mean that such person belongs to the category of "members

of the staff" of IFAD within the meaning of Article 6, Section 8(d), of the Agreement Establishing IFAD);

- d. Declaring certain of the staff rules, regulations and policies applicable to the personnel of the Global Mechanism (Doc. PB/04/01);
- e. Administering the financial resources of the Global Mechanism (Doc. PB No. 99/10); and
- f. Permitting the IFAD President to act as agent of the Conference of the Parties as determined in the Memorandum of Understanding. The IFAD President's functions under the Memorandum of Understanding are to be compared to the role assumed by the President of the International Court of Justice under various treaties and agreements that charge him or her with the responsibility to appoint arbitrators failing the appointment by parties to arbitration agreements/compromissory clauses. Such appointment actions do not engage the personality, let alone the responsibility, of the Court or of the United Nations. Likewise, actions by the IFAD President pursuant to the Memorandum of Understanding do not engage the personality of IFAD.

#### **C. Conclusion**

66. Based on the foregoing, the Fund submits that the suggested ambiguity identified in the written statement of Bolivia is not present in the circumstances. The situation is perfectly clear: the Global Mechanism, and not IFAD, was the employer of the Complainant at the relevant time.

#### **Chapter 4. SUMMARY OF CONCLUSIONS AND REQUEST**

67. For the reasons stated above, IFAD submits that it is clear that the Fund and the Global Mechanism are separate legal entities and that, by explicitly rejecting this legal point – which the Tribunal itself defined as a jurisdictional question<sup>80</sup> and the Complainant has acknowledged before this Court as constituting the first of "two principal rulings on its jurisdiction"<sup>81</sup> –, and by denying effect to the Memorandum of Understanding between the Fund and the Conference of the Parties, especially Sections I and II.A thereof, the Tribunal's decision is open to challenge under Article XII of the ILOAT Statute, a position which IFAD understands Bolivia to agree with, where Bolivia states that "[w]ith regard to critical failures that could have [been] committed [by] the ILOAT in its judgment, *they should be reviewed* in order to establish which ... international organization [is] subject to be sued ...." (emphasis

<sup>80</sup> See ILOAT Judgment No. 2867, para. 5, first sentence: "The 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*.'" (Emphasis added).

<sup>81</sup> Complainant's Statement of 29 October 2010, para. 3.

added).<sup>82</sup> In this respect, the Fund wishes to draw the Court's attention to the equally critical failures reflected in the ILOAT's Judgment No. 2420, where the Tribunal entertained three pleas involving the review of the validity of a UN General Assembly resolution notwithstanding the fact that the United Nations has never recognised the jurisdiction of the Tribunal.<sup>83</sup> In the instant case, neither the Conference of the Parties nor the Global Mechanism has ever recognised the ILOAT's jurisdiction.

68. Accordingly, as stated in paragraph 3 of IFAD's written statement submitted to the Court, the Fund seeks the Court's confirmation that Judgment No. 2867 is not in conformity with the 1988 agreement between the ILO and IFAD and must be declared invalid on the grounds set forth in the aforementioned statement and as further elaborated in these written comments.
69. For the reasons set out in its written statement, as supplemented by these written comments, 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.

March 2011

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by 'utzel Silvestre J. Martha'. The signature is written over a horizontal line.

General Counsel, Representative of  
the International Fund for Agricultural Development

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<sup>82</sup> Written Statement of Bolivia, p. 5.

<sup>83</sup> See IFAD Written Statement, Volume III/III, Document F, especially Considerations 13-17.