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

Summary of the Advisory Opinion of 1 February 2012

History of the proceedings (paras. 1-18)

The Court begins by recalling that the questions on which the advisory opinion has been requested are set forth in the resolution adopted by the Executive Board of the International Fund for Agricultural Development (hereinafter "IFAD" or the "Fund") on 22 April 2010 (That resolution is included as Annex 1 to the present Summary). The Court then gives a brief summary of the history of the proceedings.

The Court's Jurisdiction (paras. 19-27)

The Court first addresses the question whether it possesses jurisdiction to reply to the request. After recalling that the request for an advisory opinion was submitted under Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization (hereinafter "ILOAT"), the Court notes that the Executive Board has duly made the declaration recognizing the jurisdiction of the Tribunal, required by Article II, paragraph 5, of the Statute of the Tribunal. The Court observes that the power of the Executive Board to request an advisory opinion and the jurisdiction of the Court to give such an opinion are founded on the Charter of the United Nations and the Statute of the Court, and not on Article XII of the Annex to the Statute of the Tribunal alone. In addition to the latter provision, the Court examines Article 96 of the United Nations Charter, Article 65, paragraph 1, of its Statute and Article XIII, paragraph 2, of the Relationship Agreement between the United Nations and the Fund (hereinafter the "Relationship Agreement"). (These provisions are included in Annex 2 to this Summary.) The Court states that the Fund's request for review of a judgment concerning its hosting of the Global Mechanism and the question of whether it employed Ms Saez García do present "legal questions" which "arise within the scope of the Fund's activities". The Court notes that, while the authorization given to IFAD by Article XIII, paragraph 2, of the Relationship Agreement excludes "questions concerning the mutual relationships of the Fund and the United Nations or other specialized agencies", such exclusion does not prevent the Court from considering the relationships between the Fund and the Global Mechanism or the Conference of the Parties of the Convention on Desertification (hereinafter "COP"), which are not specialized agencies, so far as these relationships are raised by the questions put to the Court by IFAD. Accordingly, the Court finds that the Fund has the power

to submit for an advisory opinion the question of the validity of the decision rendered by the ILOAT in its Judgment No. 2867 and that the Court has jurisdiction to consider the request for an advisory opinion.

Scope of the Court's jurisdiction (paras. 28-32)

Under Article VI, paragraph 1, of the Statute of the ILOAT, the Tribunal's judgment is final and without appeal. However, pursuant to Article XII, paragraph 1, of the Statute of the ILOAT and Article XII, paragraph 1, of its Annex, respectively, the ILO and international organizations having made the declaration recognizing the jurisdiction of the ILOAT may nonetheless challenge the ILOAT judgment within the terms of these provisions. Under Article XII, paragraph 2, of the Statute of the ILOAT and of its Annex, the opinion of this Court given in terms of those provisions is "binding". As the Court said in Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco (Advisory Opinion, I.C.J. Reports 1956, p. 77, hereinafter the "1956 Advisory Opinion"), that effect goes beyond the scope attributed by the Charter and the Statute of the Court to an advisory opinion. It does not affect the way in which the Court functions; that continues to be determined by its Statute and Rules. The power of the Court to review a judgment of the ILOAT by reference to Article XII of the Annex to the Statute of the ILOAT at the request of the relevant specialized agency is limited to two grounds: that the Tribunal wrongly confirmed its jurisdiction or the decision is vitiated by a fundamental fault in the procedure followed. The Court cites the relevant section of the 1956 Advisory Opinion, in which the Court emphasized the limits of the first of these grounds. The Court observes that the 1956 Advisory Opinion stated that the review is not in the nature of an appeal on the merits of the judgment and that the challenge cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision. With regard to the other ground, the Court, referring to its Advisory Opinion on Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, recalls that a fundamental fault in procedure occurs when an error of procedure "is of such a kind as to violate the official's right to a fair hearing . . . and in that sense to deprive him of justice" (I.C.J. Reports 1973, p. 209, para. 92.)

The Court's Discretion (paras. 33-48)

The Court recalls that Article 65 of its Statute makes it clear that it has a discretion whether to reply to a request for an advisory opinion. In exercising it, the Court has to have regard to its character, both as a principal organ of the United Nations and as a judicial body. The Court early declared that the exercise of its advisory jurisdiction represents its participation in the activities of the Organization and, in principle, a request should not be refused (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, pp. 71-72). This is also reflected in the Court's later statement, in the only other challenge to a decision of the ILOAT brought to it, that "compelling reasons" would be required to justify a refusal (1956 Advisory Opinion, I.C.J. Reports 1956, p. 86).

The Court then examines the principle of equality before it of IFAD on the one hand and the official on the other, including equality of access to the Court and equalities in the proceedings before the Court. The Court considers that the principle of equality, which follows from the requirements of good administration of justice, must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds. Questions may now properly be asked whether the system established in 1946 meets the present-day principle of equality of access to courts and tribunals. While the Court is not in a position to reform this system, it can attempt to ensure, so far as possible, that there is equality in the proceedings before it. In the present case, the unequal position before the Court of the employing institution and its official, arising from provisions of the Court's Statute, has been substantially alleviated by the Court's decision that the President of the Fund was

to transmit to it any statement setting forth the views of Ms Saez García which she might wish to bring to the attention of the Court, and by the Court's decision that there would be no oral proceedings (since the Court's Statute does not allow individuals to appear in hearings in such cases). Although the process of ensuring equality in the proceedings was not without its difficulties, the Court concludes that, by the end of that process, it does have the information it requires to decide on the questions submitted; that both the Fund and Ms Saez García have had adequate and in large measure equal opportunities to present their case and to answer that made by the other; and that, in essence, the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice, has been met.

In light of the analysis above, the Court maintains its concern about the inequality of access to the Court and remains concerned about the length of time it took the Fund to comply with the procedures aimed at ensuring equality in the present proceedings. Nevertheless, taking the circumstances of the case as a whole, and in particular the steps it has taken to reduce the inequality in the proceedings before it, the Court considers that the reasons that could lead it to decline to give an advisory opinion are not sufficiently compelling to require it to do so.

Merits (paras. 49-99)

The Court recalls that the request for an advisory opinion concerns the validity of the Judgment given by the ILOAT relating to Ms Saez García's contract of employment. Ms Saez García, a national of Venezuela, was offered by IFAD on 1 March 2000 a two-year fixed-term contract at P-4 level to serve as a Programme Officer in the Global Mechanism, an entity hosted by IFAD. The purpose of the Global Mechanism — established by the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa — is to mobilize and channel financial resources to developing countries. She accepted this offer on 17 March 2000. Subsequently, her contract was twice extended, to 15 March 2004 and 15 March 2006, respectively. In addition, her title changed to "Programme Manager, Latin America Region", from 22 March 2002, and is subsequently referred to, in the notice of non-renewal of her contract as "[P]rogramme [M]anager for GM's regional desk for Latin America and the Caribbean". By a memorandum of 15 December 2005, the Managing Director of the Global Mechanism informed her that the COP had decided to cut the Global Mechanism's budget for 2006-2007 by 15 per cent. As a result, the number of staff paid through the core budget had to be reduced. Her post would therefore be abolished and her contract would not be renewed upon expiry on 15 March 2006. He offered her a six-month contract as consultant from 26 March to 15 September 2006 as "an attempt to relocate her and find a suitable alternative employment". Ms Saez García did not accept that contract. On 10 May 2006, Ms Saez García requested a facilitation process, which ended with no settlement on 22 May 2007. She then challenged the Managing Director's decision by filing an appeal with the Joint Appeals Board of the Fund (hereinafter the "JAB") under IFAD's Human Resources Procedures Manual (hereinafter "HRPM"). On 13 December 2007 the JAB unanimously recommended that Ms Saez García be reinstated and that she be awarded a payment of lost salaries, allowances and entitlements. On 4 April 2008 the President of the Fund rejected the recommendations. Ms Saez García then filed on 8 July 2008 a complaint with the Tribunal requesting it to "quash the decision of the President of IFAD rejecting the complainant's appeal", order her reinstatement and make various monetary awards. In its Judgment of 3 February 2010, the Tribunal decided that "[t]he President's decision of 4 April 2008 is set aside" and made orders for the payment of damages and costs.

With respect to the powers of, and relationships between, the Fund, the Global Mechanism, the COP and the Permanent Secretariat of the Convention on Desertification, the Court examines the provisions of the Convention on Desertification and the Memorandum of Understanding between the Conference of the Parties of the Convention to Combat Desertification and the Fund

regarding the Modalities and Administrative Operations of the Global Mechanism (hereinafter the "MOU"). The Court observes that, while the Permanent Secretariat is institutionally linked to the United Nations, it is not fully integrated in the work programme and management structure of any particular department or programme. The Court recalls that, under the Permanent Secretariat's Headquarters Agreement with Germany, the Convention Secretariat possesses the legal capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings in the host country. The Court observes that, under the Convention on Desertification, the COP and the Permanent Secretariat are expressly established as institutions and given various powers. By contrast, the Global Mechanism is not included in the Part of the Convention on "Institutions" and it is not given any express powers of contracting or entering into any agreements by the Convention nor by a headquarters agreement such as that relating to the Permanent Secretariat. Moreover, the record before the Court does not include any instances of it entering into contracts or agreements. The position of the Global Mechanism may also be contrasted with that of the Fund, which possesses international legal personality by virtue of Article 10, Section 1 of the Agreement establishing IFAD, and is given the capacity to contract and to acquire and dispose of movable and immovable property under Article II, Section 3 of the Convention on the Privileges and the Immunities of the Specialized Agencies of 21 November 1947. The Court notes that the Convention directs the COP to identify an organization to house it and to make appropriate arrangements with such an organization for its administrative operations. It was for this reason that a Memorandum of Understanding was concluded between the COP and IFAD in 1999 as described above. Neither the Convention nor the MOU expressly confer legal personality on the Global Mechanism or otherwise endow it with the capacity to enter into legal arrangements. Further, in light of the different instruments setting up IFAD, the COP, the Global Mechanism and the Permanent Secretariat, and of the practice included in the record before the Court, the Global Mechanism had no power and has not purported to exercise any power to enter into contracts, agreements or "arrangements", internationally or nationally.

A. Response to Question I

The Court then turns to the questions put to it for an advisory opinion and notes that such questions should be asked in neutral terms rather than assuming conclusions of law that are in dispute. They should not include reasoning or argument. The questions asked in this case depart from that standard as reflected in normal practice. The Court will nevertheless address them.

The Court is requested to give its opinion on the competence of the ILOAT to hear the complaint brought against the Fund by Ms Saez García on 8 July 2008. The competence of the Tribunal regarding complaints filed by staff members of organizations other than the ILO is based on Article II, paragraph 5, of its Statute, according to which "[t]he Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex" to the Statute of the ILOAT and having made a declaration recognizing the jurisdiction of the Tribunal.

The Fund considers Ms Saez García to be a staff member of the Global Mechanism, not the Fund, and therefore objected to the jurisdiction of the Tribunal over her complaint. Before the Tribunal, the Fund contended that its acceptance of the jurisdiction of the ILOAT did not extend to entities that are hosted by it pursuant to international agreements. It maintained that the Global Mechanism was not an organ of the Fund, and that, even if the Fund administered the Global Mechanism, this did not make the complainant a staff member of the Fund; nor did it make the actions of the Managing Director of the Global Mechanism attributable to the Fund. According to the Fund, despite the fact that the staff regulations, rules and policies of IFAD were applied to the complainant, she was not a staff member of the Fund. Conversely, the complainant submitted that she was a staff member of IFAD throughout the relevant period until her separation on

15 March 2006, and that her letters of appointment and renewal of contract all offered her an appointment with the Fund. In its Judgment No. 2867 of 3 February 2010, the Tribunal rejected the jurisdictional objections made by the Fund and declared itself competent to entertain all the pleas set out in the complaint submitted by Ms Saez García. It is this confirmation by the Tribunal of its "competence to hear" the complaint filed by Ms Saez García that is challenged by the Executive Board of the Fund and is the object of the first question put to the Court. Under Article II, paragraph 5, of its Statute, the Tribunal could hear the complaint only if the complainant was an official of an organization that has recognized the jurisdiction of the Tribunal, and if the complaint related to the non-observance of the terms of appointment of such an official or the provisions of the staff regulations of the organization. The first set of conditions has to be examined with reference to the competence ratione personae of the Tribunal, while the second has to be considered within the context of its competence ratione materiae. The Court will examine these two sets of conditions below.

1. Jurisdiction ratione personae of the Tribunal in relation to the complaint submitted by Ms Saez García

Since recourse to the ILOAT is open to staff members of IFAD, the Court will now consider whether Ms Saez García was an official of the Fund, or of some other entity that did not recognize the jurisdiction of the Tribunal. The Court notes that the word "official" and the words "staff member" may be considered to have the same meaning in the present context and thus uses both terms interchangeably. The IFAD Human Resources Policy defines a staff member as "a person or persons holding a regular, career, fixed-term, temporary or indefinite contract with the Fund". To qualify as a staff member of the Fund, Ms Saez García would have to hold one of the above-mentioned contracts with the Fund. The Court notes that on 1 March 2000, Ms Saez García received an offer of employment, written on the Fund letterhead, for "a fixed-term appointment for a period of two years with the International Fund for Agricultural Development (IFAD)". The letter stated that the appointment "[would] be made in accordance with the General provisions of the IFAD Personnel Policies Manual . . . [and] with such Administrative Instructions as may be issued . . . regarding the application of the Manual". The offer of appointment also noted that her contract might be terminated by IFAD with one month's written notice and that she was subject to a probationary period as prescribed in the Personnel Policies Manual (hereinafter the "PPM"). Moreover, under the terms of the offer, she was required to give written notice of at least one month to IFAD of any desire to terminate her contract. The renewals of her contract to March 2004 and to March 2006, respectively, referred to an "extension of [her] appointment with the International Fund for Agricultural Development". It was also said in the letters of renewal that all other conditions of her employment would remain unchanged and that her appointment would "continue to be governed by the Personnel Policies Manual, together with the provisions of the Human Resources Handbook regarding the application of the Manual".

The Court observes that a contract of employment entered into between an individual and an international organization is a source of rights and duties for the parties to it. In this context, the Court notes that the offer of appointment accepted by Ms Saez García on 17 March 2000 was made on behalf of the Fund by the Director of its Personnel Division, and that the subsequent renewals of this contract were signed by personnel officers of the same Division of the Fund. The Fund does not question the authority vested in these officials to act on its behalf on personnel matters. These offers were made in accordance with the general provisions of the PPM, which then contained the regulations and rules applicable to staff members of the Fund. As the Court stated in its 1956 Advisory Opinion, staff regulations and rules of the organization in question "constitute the legal basis on which the interpretation of the contract must rest" (I.C.J. Reports 1956, p. 94). It follows from this that an employment relationship, based on the above-mentioned contractual and statutory elements, was established between Ms Saez García and the Fund. This relationship qualified her as a staff member of the organization.

Ms Saez García's legal relationship with the Fund as a staff member is further evidenced by the facts surrounding her appeal against the decision to abolish her post, and the consequent non-renewal of her fixed-term appointment. Her appeals were initially lodged with the internal machinery established by the Fund for handling staff grievances, namely the facilitation process and the JAB, both of which were conducted in accordance with the HRPM. The memorandum of 4 April 2008 by the President of IFAD rejecting the recommendations of the JAB does not contain any indication that Ms Saez García was not a staff member of the Fund. On the contrary, it is stated in the memorandum that "the non-renewal of your fixed-term contract was in accordance with section 1.21.1 of the IFAD HRPM". There is also nothing to suggest that, in rejecting the recommendation of the JAB, the President was acting otherwise than in his capacity as the President of IFAD.

The Court then rejects three additional arguments submitted by the Fund to support its contention that Ms Saez García was not a staff member of the Fund. With respect to the Fund's argument that an administrative instruction issued by IFAD in the form of a President's Bulletin on 21 January 2004 was meant "to refine and clarify the legal position of the personnel working for the Global Mechanism", and makes clear that "while Global Mechanism staff are not IFAD staff, some of IFAD's rules and regulations apply mutatis mutandis to Global Mechanism staff", the Court states its view that the provisions of the IFAD President's Bulletin constitute further evidence of the applicability of the staff regulations and rules of IFAD to the fixed-term contracts of Ms Saez García and provide an additional indication of the existence of an employment relationship between her and the Fund. With respect to the Fund's argument that the ILOAT lacked jurisdiction because neither the COP nor the Global Mechanism has recognized its jurisdiction, the Court observes that the Tribunal did not base its jurisdiction with respect to the complaint filed by Ms Saez García on such acceptance. With respect to the Fund's argument that the Tribunal did not have jurisdiction to review the decision not to renew Ms Saez García's contract which was taken by the Managing Director of the Global Mechanism as he was not a staff member of IFAD, the Court considers that the status of the Managing Director has no relevance to the Tribunal's jurisdiction ratione personae, which depends solely on the status of Ms Saez García.

In light of the above, the Court concludes that the Tribunal was competent ratione personae to consider the complaint brought by Ms Saez García against IFAD on 8 July 2008.

2. Jurisdiction ratione materiae of the Tribunal

As a staff member of the Fund, Ms Saez García had the right under the HRPM to submit her complaint to the ILOAT. The Fund, however, argues that, even if it were to be assumed that the Tribunal had jurisdiction ratione personae over the complainant because of her being a staff member of the Fund, the Tribunal would still not have jurisdiction ratione materiae over the complaint. The Fund argues that, based on the text of the complainant's pleadings submitted to the Tribunal, it is clearly not possible to fit her complaints under the two classes of complaints set forth in Article II, paragraph 5, of the Tribunal's Statute, namely: (1) complaints alleging "non-observance, in substance or form, of the terms of appointment of officials"; and (2) complaints alleging non-observance "of provisions of the Staff Regulations". The Fund also contends that the Tribunal was not competent to entertain the complainant's arguments as derived from the MOU, the Convention on Desertification or the COP's decisions, as these are outside the scope of Article II, paragraph 5, of the Tribunal's Statute. Ms Saez García asserts that the large number of jurisdictional questions raised by the Fund in its request for an advisory opinion suggest that it is indeed going beyond the rulings on jurisdiction made by the Tribunal, to question either the manner in which the Tribunal has exercised its jurisdiction or the breadth of its considerations in hearing the complaint.

The Court reiterates that the decision impugned before the Administrative Tribunal was that of the President of IFAD contained in a memorandum to Ms Saez García dated 4 April 2008 in

which he rejected the recommendations of the JAB to reinstate Ms Saez García. Ms Saez García also challenged the decision of the Managing Director not to renew her contract, alleging that it was tainted with abuse of authority and that he was not entitled to determine the Global Mechanism's programme of work independently of the COP and of the President of IFAD. The Fund objected to the Tribunal's competence to examine these allegations since they would involve the examination by the Tribunal of the decision-making process of the Global Mechanism for which it had no jurisdiction. The Tribunal rejected these objections on the ground that "decisions of the Managing Director relating to [staff in the Global Mechanism] are, in law, decisions of the Fund".

The Court cannot agree with the arguments of the Fund that the Tribunal did not have competence to examine the decision of the Managing Director of the Global Mechanism. First, the Managing Director of the Global Mechanism was a staff member of the Fund when the decision of non-renewal of Ms Saez García's contract was taken, as evidenced by his letter of appointment and the conditions of his appointment. Secondly, Ms Saez García's complaint to the Tribunal falls within the category of allegations of non-observance of the "terms of appointment of an official" as specified in Article II, paragraph 5, of the Statute of the Tribunal. Thirdly, the letters of appointment and renewal of contract of Ms Saez García clearly stipulate that her appointment was made in accordance with the general provisions of the IFAD Personnel Policies Manual and any amendments thereto, as well as such administrative instructions as may be issued from time to time regarding the application of the Manual. The non-observance of the provisions of these instruments, or those adopted subsequently to replace them, could be impugned before the Tribunal in accordance with Article II, paragraph 5, of its Statute, and Ms Saez García did in fact allege violations of the HRPM before the Tribunal. The Court, therefore, concludes that Ms Saez García's complaint to the ILOAT, following the decision of the Fund not to renew her contract, falls within the scope of allegations of non-observance of her terms of appointment and of the provisions of the staff regulations and rules of the Fund, as prescribed by Article II, paragraph 5, of the Statute of the Tribunal. Consequently, the Court is of the view that the Tribunal was competent ratione materiae to consider the complaint brought before it by Ms Saez García in respect of the non-renewal of her contract by IFAD.

With regard to the Fund's contention that the Tribunal lacked jurisdiction to examine the provisions of the MOU and the decision-making process of the COP, as those matters are outside the scope of Article II, paragraph 5, of its Statute, the Court is of the opinion that the Tribunal could not avoid examining the legal arrangements governing the relationship between the Global Mechanism and the Fund, as well as the status and accountability of the Managing Director of the Global Mechanism. The Court states that, even if, contrary to the observation it has made above, the Global Mechanism did have a separate legal personality and the capacity to conclude contracts, the conclusions arrived at above would still be warranted, essentially on the basis of contractual documents and the provisions of the IFAD staff regulations and rules. The Court, therefore, finds, in response to the first question put to it by IFAD, that the ILOAT was competent to hear the complaint introduced against IFAD, in accordance with Article II of its Statute, in view of the fact that Ms Saez García was a staff member of the Fund, and her appointment was governed by the provisions of the staff regulations and rules of the Fund.

B. Response to Questions II to VIII

The Court, having decided to give an affirmative answer to the first question, and having concluded that the Tribunal was justified in confirming its jurisdiction, is of the view that its answer to the first question put to it by the Fund covers also all the issues on jurisdiction raised by the Fund in Questions II to VIII of its request for an advisory opinion. To the extent that Questions II to VIII seek the opinion of the Court on the reasoning underlying the conclusions reached by the Tribunal, the Court reiterates that, under the terms of Article XII of the Annex to the Statute of the ILOAT, a request for an advisory opinion is limited to a challenge of the decision of the Tribunal

confirming its jurisdiction or to cases of fundamental fault of procedure. The Court has already addressed the IFAD Executive Board's challenge to the decision of the Tribunal confirming its jurisdiction. Not having a power of review with regard to the reasoning of the Tribunal or the merits of its judgments under Article XII of the Annex to the Statute of the ILOAT, the Court cannot give its opinion on those matters. As the Court observed in its 1956 Advisory Opinion, "the reasons given by the Tribunal for its decision on the merits, after it confirmed its jurisdiction, cannot properly form the basis of a challenge to the jurisdiction of the Tribunal" (I.C.J. Reports 1956, p. 99). With respect to the possible existence of a "fundamental fault in the procedure followed", raised in Questions II to VIII, the Court recalls that this concept was explained by the Court in its Advisory Opinion of 1973 on the Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, as set out above. Questions II to VIII do not identify any fundamental fault in the procedure which may have been committed by the Tribunal in its consideration of the complaint against the Fund. Thus, in the view of the Court, these questions constitute either a repetition of the question on jurisdiction, which the Court has already answered, or have an object which concerns wider issues falling outside the scope of Article XII of the Annex to the Statute of the ILOAT which was invoked by the Fund as the basis of its request for an advisory opinion.

C. Response to Question IX

Question IX put by the IFAD Executive Board in its request for an advisory opinion is formulated as follows: "What is the validity of the decision given by the ILOAT in its Judgment No. 2867?" The Court, having answered in the affirmative the first question of IFAD, and having therefore decided that the Tribunal was entirely justified in confirming its jurisdiction, and not having found any fundamental fault in procedure committed by the Tribunal, finds that the decision given by the ILOAT in its Judgment No. 2867 is valid.

Operative clause (para. 100)

For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) Unanimously,

Decides to comply with the request for an advisory opinion;

(3) Is of the opinion:

(a) with regard to Question I,

Unanimously,

That the Administrative Tribunal of the International Labour Organization was competent, under Article II of its Statute, to hear the complaint introduced against the International Fund for Agricultural Development on 8 July 2008 by Ms Ana Teresa Saez García;

(b) with regard to Questions II to VIII,

Unanimously,

That these questions do not require further answers from the Court;

(c) with regard to Question IX,

Unanimously,

That the decision given by the Administrative Tribunal of the International Labour Organization in its Judgment No. 2867 is valid.

Judge Cançado Trindade appends a separate opinion to the Advisory Opinion of the Court; Judge Greenwood appends a declaration to the Advisory Opinion of the Court.

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ANNEX 1

Resolution adopted by the Executive Board of the International Fund for Agricultural Development on 22 April 2010

The Executive Board of the International Fund for Agricultural Development, at its ninety-ninth session held on 21-22 April 2010:

Whereas, by its Judgment No. 2867 of 3 February 2010, the Administrative Tribunal of the International Labour Organization (ILOAT) confirmed its jurisdiction in the complaint introduced by Ms A.T.S.G. against the International Fund for Agricultural Development,

Whereas Article XII of the Annex [to] the Statute of the Administrative Tribunal of the International Labour Organization provides as follows:

> "1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.
>
> 2. The opinion given by the Court shall be binding."

Whereas the Executive Board, after consideration, wishes to avail itself of the provisions of the said Article,

Decides to submit the following legal questions to the International Court of Justice for an advisory opinion:

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

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

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

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

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

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

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

VIII. Was the ILOAT's decision confirming its jurisdiction to substitute the discretionary decision of the Managing Director of the Global Mechanism with its own outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

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

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ANNEX 2

Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization

1. In any case in which the Executive Board of an international organization which has made the declaration specified in article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.

2. The Opinion given by the Court shall be binding.

Article 96 of the Charter of the United Nations

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Article 65 of the Statute of the Court

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article XIII, paragraph 2, of the Relationship Agreement between the United Nations and the International Fund for Agricultural Development

The General Assembly of the United Nations authorizes the Fund to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the Fund's activities, other than questions concerning the mutual relationships of the Fund and the United Nations or other specialized agencies. Such requests may be addressed to the Court by the Governing Council of the Fund, or by its Executive Board acting pursuant to an authorization by the Governing Council. The Fund shall inform the Economic and Social Council of any such request it addresses to the Court.

Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 15 parts, Judge Cançado Trindade begins by explaining that, though he concurred with his vote to the adoption of the present Advisory Opinion, he feels bound to leave on the records the foundations of his personal position on certain issues raised in the course of the present advisory proceedings, which touch on points of juridical epistemology that lay on the foundations of contemporary law as well as the internal law of the United Nations (part I), such as the emergence of individuals as subjects of international law, endowed with international juridical capacity, and their appeals for the observance of the principle of equality of arms in the international administrative contentieux.

2. He identifies the position of the individual as subject of rights in international law as the core of the matter before the Court in the present Advisory Opinion, after reviewing its factual background (part II), and drawing attention to the determination by the Administrative Tribunal of the ILO (the ILOAT) of compliance by IFAD with its Judgment n. 2867 of 2010, in favour of the individual complainant, Ms. Ana Teresa Saez García (part III). Judge Cançado Trindade then draws attention to the persisting difficulty faced by the individual complainant (part IV), in that all communications coming from her had to be transmitted to the Court through the IFAD, thus raising the issue of the application of the principle of the good administration of justice (la bonne administration de la justice).

3. Turning to the individual complainant's appeal for equality of arms (égálité des armes), Judge Cançado Trindade identifies two distinct inequality claims in the present advisory proceedings (part V). The first claim concerns the fact that, pursuant to Article XII of the Annex to the ILOAT Statute, only the international organization at issue, the IFAD, can challenge an unfavourable decision of the ILOAT before the ICJ (a question which was examined by the ILOAT in its Judgment n. 3003 of 2011, concerning the IFAD's request for stay of execution of Judgment n. 2867 of the ILOAT, which found in favour of the complainant, Ms. Saez García). The second claim of procedural inequality pertains to the position of the individual complainant in the present proceedings before this Court, and more particularly to an aspect not addressed in the ILOAT's Judgment n. 3003 of 2011, — but touched upon by Ms. Saez García herself, — namely, the fact that only the IFAD (her opposing party in the present case) can address the Court directly, and that all her communications and submissions to the ICJ ought to be done through the IFAD.

4. The contrasting positions of the individual complainant and the IFAD in the present advisory proceedings are then singled out by Judge Cançado Trindade (part VI). He recalls that the same problem had led to the abolition, by the U.N. General Assembly in 1995, of the review procedure of the United Nations Administrative Tribunal (UNAT) rulings by the ICJ, keeping in mind the principle of the equality of parties. In the course of the present advisory proceedings before the ICJ, the difficulties encountered by the original complainant, Ms. Saez García (ensuing from her dependence upon the IFAD for the simple transmission of documents to the Court), twice required the intervention of the Court's Registry, having in mind the good administration of justice.

5. In part VII of his Separate Opinion, Judge Cançado Trindade then embarks on an examination of the lack of equality of arms as a recurring problem in review procedures of the kind before the ICJ. He begins by warning that, despite the fact that one is here before general principles of law such as the equality of arms (égalité des armes) before courts and tribunals, and the principle of la bonne administration de la justice, the fact remains that the problem at issue has regrettably persisted for more than half a century (56 years), "much to the detriment of individuals, subjects of rights under international administrative law, or the law of the United Nations".

6. He then proceeds to an overview of the five previous Advisory Opinions of the kind, delivered by the ICJ (in 1954, 1956, 1973, 1982 and 1987), preceding the present Advisory Opinion, so as to enable one "to appreciate the difficulties experienced by the Court when faced with a conception of international law which had the vain pretension to defy the passing of time (as legal positivists do)". Those were the Advisory Opinion of 1954 on the Effect of Awards of Compensation Made by the U.N. Administrative Tribunal; the Advisory Opinion of 1956 on Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO; the Advisory Opinion of 1973 on the Application for Review of Judgment n. 158 of the U.N. Administrative Tribunal; the Advisory Opinion of 1982 on the Application for Review of Judgement n. 273 of the U.N. Administrative Tribunal; and the Advisory Opinion of the ICJ of 1987, on the Application for Review of Judgement n. 333 of the U.N. Administrative Tribunal .

7. At the end of his overview, Judge Cançado Trindade assesses that "[f]or 56 years the force of inertia and mental lethargy have prevailed in this regard. The abnormal procedure keeps on being followed by the Court (in respect of review of the ILOAT judgments), in 2011 as in 1956", on the basis of "the dogma of times past that individuals cannot appear before the ICJ because they are not subjects of international law. The result is the prehistoric and fossilized procedure that defies logic, common sense and the basic principle of the good administration of justice (la bonne administration de la justice)". He then recalls that, throughout the last 56 years, "well-founded expressions of discontent with the present situation emanated from Judges (also jurists) from different legal systems and traditions", his predecessors in the ICJ. To Judge Cançado Trindade, "[t]his is not surprising, as we are here before basic principles of law, such as those of the good administration of justice (la bonne administration de la justice) and of the equality of arms (égalité des armes) in (international) legal procedure".

8. He further recalls (part VIII) that, despite the persistence of the problem of the procedural inequality (in the proceedings of the five previous Advisory Opinions of the Court, 1954, 1956, 1973, 1982 and 1987), or parallel to it, "the inclination of the ICJ has been in the sense of confirming the validity of the decisions at issue of both the UNAT and the ILOAT, whether favourable to the original complainants or not. Thus, in its Advisory Opinions of 1954, 1973, 1982 and 1987, it upheld the prior decisions of the UNAT, while in its Advisory Opinion of 1956 and in the present one of 2012, it did the same in respect of prior decisions of the ILOAT (…). Yet, the handling of the issue of procedural inequality, — e.g., by deciding not to have oral hearings in the course of the proceedings, — has been and is", in his understanding, "most unsatisfactory: rather than a solution, it is the capitulation in face of a persisting problem".

9. This being so, it seems all too proper to him to rescue, for consideration in the present context, "the advances experienced by the jus gentium of our times with the emergence and consolidation of individuals as subjects of International Law, with their access to justice lato sensu (encompassing procedural equality), with their locus standi in judicio and their jus standi, in the hope that due consideration will be given to them in the operation of international administrative jurisdictions in general (encompassing the review procedure in particular) in future developments". That is what Judge Cançado Trindade does in the remaining parts of his Separate Opinion.

10. In part IX of it, he addresses the issue of the emergence of individuals as subjects of international law, endowed with international juridical capacity. He begins by singling out the legacy of the writings of the "founding fathers" of the droit des gens (Francisco de Vitoria, Alberico Gentili, Francisco Suárez, Hugo Grotius, Samuel Pufendorf, Christian Wolff, Cornelius van Bynkershoek), on the subjects of jus gentium. After reviewing subsequent doctrinal developments, he draws attention to the fact that the advent of permanent international jurisdictions, as from the early

XXth century (starting with the 1907 Central American Court of Justice), "in fact transcended a purely inter-State outlook of the international contentieux".

11. In our days, — he proceeds, — the co-existence of international human rights tribunals (the European and Inter-American Courts of Human Rights, lately followed by the African Court of Human and Peoples' Rights) bears witness of the fact that individuals were erected into subjects of international law, "endowed with international procedural capacity". In fact, — Judge Cançado Trindade adds, — individuals have "always remained in contact, directly or indirectly, with the international legal order. In the inter-war period, the experiments of the minorities and mandates systems under the League of Nations, for example, bear witness thereof. They were followed, in that regard, by the trusteeship system under the United Nations era, parallel to the development under this latter, along the years, of the multiple mechanisms — conventional and extra-conventional — of international protection of human rights".

12. In part X of his Separate Opinion, Judge Cançado Trindade further recalls that the question of the procedural capacity of the individuals before the ICJ, and its predecessor the Permanent Court of International Justice (PCIJ), was effectively considered on the occasion of the original drafting, in 1920, by the Advisory Committee of Jurists appointed by the old League of Nations, of the Statute of the PCIJ. The view which prevailed in 1920, that "only the States were juridical persons in the international order", and which has been maintained in Article 34 (1) of the Statute of the ICJ (formerly the PCIJ) to date — "was promptly and strongly criticized in the more lucid doctrine of the epoch (already in the twenties)". In Judge Cançado Trindade's view, "[t]he option made by the draftsmen of the Statute of the old PCIJ, stratified with the passing of time in the Statute of the ICJ up to the present time, is even more open to criticism if we consider that, already in the first half of the XXth century, there were experiments of International Law which in effect granted international procedural status to individuals".

13. This evolution of the right of international individual petition, — he adds, — "intensified and generalized in the era of the United Nations", with the adoption of the system of individual petitions under some universal human rights treaties of our times, in addition to human rights conventions at regional level. The question of access of individuals to international justice, with procedural equality, underwent a remarkable development in recent decades. And Judge Cançado Trindade proceeds:

> "The dogmatic position taken originally in 1920, on the occasion of the preparation and adoption of its Statute, did not hinder the PCIJ to occupy itself promptly of cases pertaining to the treatment of minorities and inhabitants of cities or territories with a juridical statute of their own. In considerations developed in the examination of such matters, the PCIJ went well beyond the inter-State dimension, taking into account the position of individuals themselves (as in, e.g., inter alia, the Advisory Opinion on the Jurisdiction of the Courts of Danzig, 1928). Ever since, the artificiality of such dimension became noticeable and acknowledged, already at an early stage of the case-law of the PCIJ."

14. He then refers to subsequent examples, in the case-law of the ICJ itself, to the same effect, namely: the Nottebohm case concerning double nationality (Liechtenstein versus Guatemala, 1955); the case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (The Netherlands versus Sweden, 1958); the cases of the Trial of Pakistani Prisoners of War (Pakistan versus India, 1973); of the Hostages (U.S. Diplomatic and Consular Staff) in Teheran case (United States versus Iran, 1980); of the East-Timor (Portugal versus Australia, 1995); the case of the Application of the Convention against Genocide (Bosnia-Herzegovina

versus Yugoslavia, 1996); and the three successive cases concerning consular assistance — namely, the case Breard (Paraguay versus United States, 1998), the case LaGrand (Germany versus United States, 2001), the case Avena and Others (Mexico versus United States, 2004).

15. In those cases, — he further adds, — "one of their predominant elements was precisely the concrete situation of the individuals directly affected, and not merely abstract issues of exclusive interest of the litigating States in their relations inter se". Moreover, he further recalls that, in the case of Armed Activities in the Territory of Congo (D.R. Congo versus Uganda, 2000) the ICJ was concerned with "grave violations of human rights and of International Humanitarian Law"; in the Land and Maritime Boundary between Cameroon and Nigeria (1996), it was likewise concerned with "the victims of armed clashes". More recent examples wherein "the Court's concerns have gone beyond the inter-State outlook" include, e.g., the case on Questions Relating to the Obligation to Prosecute or Extradite (Belgium versus Senegal, 2009) pertaining to the principle of universal jurisdiction under the U.N. Convention against Torture, the Advisory Opinion on the Declaration of Independence of Kosovo (2010), the case of A.S. Diallo (Guinea versus D.R. Congo, 2010) on detention and expulsion of a foreigner, the case of the Jurisdictional Immunities of the State (Germany versus Italy, counter-claim, 2010), the case of the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia versus Russian Federation, 2011), the case of the Temple of Preah Vihear (Cambodia versus Thailand, 2011).

16. The "artificiality of the exclusively inter-State outlook of the procedures before the ICJ" is thus "clearly disclosed by the very nature of some of the cases submitted to it", and remains susceptible of further criticisms, for not having accompanied the evolution of international law. This is the case of the review procedure, as in the present advisory proceedings before the Court; it defies the passing of time by insisting on the outdated lack of locus standi in judicio of individuals in the review procedures of the kind before the ICJ (part XII). In this connection, Judge Cançado Trindade recalls that, already at the Xth session of the U.N. General Assembly (1955), the then U.N. Secretary-General (Dag Hammarskjold) presented to it a Memorandum titled "Participation of Individuals in Proceedings before the International Court of Justice", stressing the need to devise an equitable procedure in that emerging domain, with "the possible participation of individuals in proceedings before the International Court of Justice", as subjects of rights. Thus, — Judge Cançado Trindade proceeds, — "by the mid-XXth century, the individuals' international legal standing, and the need to secure a procès equitable (also in the emerging law of international organizations) were already recognized".

17. In part XIII of his Separate Opinion, Judge Cançado Trindade strongly supports the "imperative of securing the equality of parties in the international legal process" before the ICJ, as "a component of the right of access to justice lato sensu". To that effect, he reviews the contribution of the relevant case-law on the matter of the European and Inter-American Courts of Human Rights. He then states that "[i]t is firmly established, in contemporary international procedural law, that contending parties are to be afforded the same opportunity to present their case and to take cognizance of, and to comment upon, the arguments advanced and the evidence adduced by each other, in the course of the proceedings". Likewise, "the principe du contradictoire has marked its presence in the most distinct contemporary international jurisdictions".

18. Part XIV of Judge Cançado Trindade's Separate Opinion is devoted to "the need to secure the locus standi in judicio and the jus standi to individuals before international tribunals, including the ICJ", in order to guarantee the equality of the parties in the international legal process (as a component of the right of access to justice lato sensu), in review procedures such as the one in the cas d'espèce. Due to "an outdated dogma, imposed upon this Court since its historical origins",

individuals cannot appear before itself because they are still not regarded as subjects of international law. The result, — Judge Cançado Trindade points out critically, —is that "[o]nly the international organization concerned (the employer) has jus standi and locus standi in judicio before the ICJ, the individual (the employee) depends on the decision (as to resorting to this Court) of the employer, and, if the matter is submitted to the Court, he or she cannot appear before it. This is certainly a double procedural inequality before the World Court".

19. In his concluding observations (part XV), Judge Cançado Trindade holds that the advisory jurisdiction of the ICJ seems to offer an adequate framework for the consideration of possible advances in this domain, going beyond a strictly inter-State outlook, and overcoming "a dogma entirely outdated", particularly in "an epoch, such as ours, of the rule of law at national and international levels". The high significance of this topic is that it appears to go beyond an unsatisfactory inter-State outlook, in the line of recent developments in several domains of contemporary international law. This, in his view, cannot pass unnoticed, or unexplored, in a World Court such as the ICJ. The participation of individuals in review procedures before the ICJ would, in his understanding, preserve the principe du contradictoire, "essential in the search for truth and the realization of justice, guaranteeing the equality of arms (égalité des armes) in the whole procedure before the Court, essential to la bonne administration de la justice".

20. To Judge Cançado Trindade, "[t]his is logical, since, to the international legal personality of the parties ought to correspond their full juridical capacity to vindicate their rights before the Court. In addition, their public participation in the proceedings before the Court recognizes the right of free expression of the contending parties themselves, in affording them the opportunity to act as true subjects of law. This provides those who feel victimized and are in search of justice a form of reparation, in directly contributing — with their participation — to the patient reconstitution and determination of the facts by the Court itself". All these considerations render the subject-matter at issue, in his view, suitable for further careful consideration from now onwards. He concludes that "as this Court is to perform its functions at the height of the challenges of our times, as the International Court of Justice, it is bound at last to acknowledge that individuals are subjects of international law, of the jus gentium of our times".

Declaration of Judge Greenwood

Judge Greenwood agrees with the answers given by the Court and the reasoning on which they are based. He expresses serious reservations about the one-sided nature of the provision for recourse to the Court in Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization and about the difficulty of ensuring equality between the employing organization and the employee. He considers that it is beyond doubt that Ms Saez García was employed by IFAD. He would have supported an order that IFAD should pay at least part of Ms Saez García's legal costs had that been requested.