1 FEBRUARY 2012

ADVISORY OPINION

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

JUGEMENT N^{o} 2867 DU TRIBUNAL ADMINISTRATIF DE L'ORGANISATION INTERNATIONALE DU TRAVAIL SUR REQUÊTE CONTRE LE FONDS INTERNATIONAL DE DÉVELOPPEMENT AGRICOLE

1ER FEVRIER 2012

AVIS CONSULTATIF

TABLE OF CONTENTS

LIST OF ACRONYMS AND ABBREVIATIONS

Agreement establishing IFAD	Agreement of 13 June 1976 establishing the International Fund for Agricultural Development
COP	Conference of the Parties of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa
Global Mechanism	Global Mechanism of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa
HRPM	Human Resources Procedures Manual of the International Fund for Agricultural Development
IFAD (or the "Fund")	International Fund for Agricultural Development
ILO	International Labour Organization
ILOAT (or the "Tribunal")	Administrative Tribunal of the International Labour Organization
JAB	Joint Appeals Board of the International Fund for Agricultural Development
MOU	Memorandum of Understanding between the Conference of the Parties of the Convention to Combat Desertification and the International Fund for Agricultural Development regarding the Modalities and Administrative Operations of the Global Mechanism
PPM	Personnel Policies Manual of the International Fund for Agricultural Development
Relationship Agreement	Relationship Agreement between the United Nations and the International Fund for Agricultural Development
UNAT	United Nations Administrative Tribunal
UNCCD (or the "Convention")	United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa
Unesco	United Nations Educational, Scientific and Cultural Organization
1956 Advisory Opinion	*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, *I.C.J. Reports 1956*, p. 77

INTERNATIONAL COURT OF JUSTICE

YEAR 2012

2012
1 February
General List
No. 146

1 February 2012

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

Jurisdiction of the Court to give advisory opinion requested.

Article XII of Annex to Statute of Administrative Tribunal of International Labour Organization (ILOAT) — Power of Executive Board of International Fund for Agricultural Development (IFAD) to request an advisory opinion — Jurisdiction of the Court to give opinion founded on Charter of United Nations and Statute of the Court, not only on Article XII of Annex to ILOAT Statute — Request presents "legal questions" *which* "arise within the scope of the Fund's activities" *— The Court has jurisdiction to give the advisory opinion.*

Scope of jurisdiction of the Court.

Binding character attributed to opinion of the Court by ILOAT Statute does not affect the way in which the Court functions — Power of the Court to review a judgment of ILOAT limited to two grounds: that Tribunal wrongly confirmed its jurisdiction or that decision is vitiated by fundamental fault in procedure followed — The Court's review not in the nature of an appeal on merits of judgment.

*

Discretion of the Court to decide whether it should give an opinion.

The Court as principal organ of the United Nations and as judicial body — The Court's exercise of its advisory jurisdiction represents its participation in the activities of the Organization — Refusal only justified for "compelling reasons" *— Principle of equality before the Court of organization and official.*

Inequality of access to the Court — Comparison with former procedure for review of judgments of the United Nations Administrative Tribunal — Relevant General Comments of the Human Rights Committee — Comparison with equality of the parties in investment disputes — Requirements of good administration of justice include access on an equal basis to available appellate or similar remedies.

Inequality in proceedings before the Court has been substantially alleviated by decisions of the Court, on the one hand, to require that IFAD transmit any statement setting forth the views of Ms Saez García and, on the other hand, not to hold oral proceedings.

Reasons to decline to give advisory opinion not sufficiently compelling.

*

Merits.

Question of whether Ms Saez García was a staff member of IFAD or of the Global Mechanism of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Convention) — Relationship between IFAD, Global Mechanism and Conference of the Parties of the Convention — Relationship under the Convention — Relationship under the Memorandum of Understanding between the Conference of the Parties and IFAD regarding modalities and administrative operations of Global Mechanism — Respective powers of IFAD, Global Mechanism, Conference of the Parties and Permanent Secretariat of the Convention — Range of different hosting arrangements exist between international organizations — Neither the Convention nor Memorandum of Understanding expressly confer legal personality on Global Mechanism or otherwise endow it with capacity to enter into legal arrangements — Global Mechanism has no power to enter into contracts, agreements or "arrangements"*, internationally or nationally.*

Response to Question I.

Questions put to the Court for an advisory opinion should be asked in neutral terms — ILOAT competent, under Article II, paragraph 5, of its Statute, to hear complaints alleging non-observance of either "terms of appointment of officials" *of an organization that has accepted its jurisdiction or of* "provisions of the Staff Regulations" *of such organization.*

Jurisdiction ratione personae *of ILOAT — Terms of Ms Saez García's letters of appointment and renewals of contract — The Court finds that employment relationship was established between Ms Saez García and IFAD, and that she was a staff member of Fund — IFAD did not object to Ms Saez García engaging the facilitation process and lodging a complaint with the Joint Appeals Board — Memorandum of President of Fund rejecting recommendations of Joint Appeals Board contains no indication that Ms Saez García was not staff member of Fund — Terms of President's Bulletin of IFAD further evidence of applicability of staff regulations and rules of Fund to fixed-term contracts of Ms Saez García — Fact that neither Global Mechanism nor Conference of the Parties has recognized jurisdiction of ILOAT not relevant — Status of Managing Director of Global Mechanism has no relevance to Tribunal's jurisdiction* ratione personae *— ILOAT was competent* ratione personae *to consider complaint brought by Ms Saez García against IFAD.*

Jurisdiction ratione materiae *of ILOAT — Terms of Human Resources Procedures Manual of IFAD — Tribunal was competent to examine decision of Managing Director of Global Mechanism — Ms Saez García's complaint to Tribunal contained allegations of non-observance of* "terms of appointment of an official" *— Link between Ms Saez García's complaint to Tribunal and staff regulations and rules of IFAD — ILOAT was competent* ratione materiae *to consider complaint brought by Ms Saez García against Fund.*

The Court finds that ILOAT was competent to hear complaint introduced against IFAD.

Response to Questions II to VIII.

The Court considers that its answer to first question covers also all issues on jurisdiction of ILOAT raised by Fund in Questions II to VIII — The Court has no power of review with regard to reasoning of ILOAT or merits of its judgments — The Fund has not established that ILOAT committed a "fundamental fault in the procedure" *— No further answers required from the Court.*

Response to Question IX.

The Court finds that the decision given by ILOAT in Judgment No. 2867 is valid.

ADVISORY OPINION

Present: *President* OWADA; *Vice-President* TOMKA; *Judges* KOROMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; *Registrar* COUVREUR.

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

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. By a letter dated 23 April 2010, which reached the Registry on 26 April 2010, the President of the International Fund for Agricultural Development (hereinafter "IFAD" or the "Fund") informed the Court that the Executive Board of IFAD, acting within the framework of Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization (hereinafter the "ILOAT" or the "Tribunal"), had decided to challenge the decision rendered by the Tribunal on 3 February 2010 in Judgment No. 2867, and to refer the question of the validity of that Judgment to the Court. Certified true copies of the English and French versions of the resolution adopted by the Executive Board of IFAD for that purpose at its ninety-ninth session, on 22 April 2010, were enclosed with the letter. The resolution reads as follows:

> "*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.'[1],

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

[1]Note of the Court: According to the preamble of the Annex to the Statute of the ILOAT, that Statute "applies in its entirety to . . . international organizations [having made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal] subject to . . . provisions which, in cases affecting any one of these organizations, are applicable as [set out in this Annex]". With respect to Article XII of the Statute, it should be noted that only its first paragraph is modified by the Annex. Its second paragraph is not set out in the Annex and thus remains unchanged as applicable to those organizations. In this regard, the text of Article XII of the Annex to the Statute quoted by IFAD contains both paragraphs. When the Court in the present Advisory Opinion refers to Article XII of the Annex to the Statute of the ILOAT, it is understood that this includes both the modified paragraph 1 and the original paragraph 2 of Article XII of the Statute.

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?"

2. On 26 April 2010, in accordance with Article 66, paragraph 1, of the Statute of the Court, notice of the request for an advisory opinion was given to all States entitled to appear before the Court.

3. By an Order dated 29 April 2010, in accordance with Article 66, paragraph 2, of its Statute, the Court decided that IFAD and its member States entitled to appear before the Court, the States parties to the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (hereinafter the "UNCCD" or the "Convention") entitled to appear before the Court and those specialized agencies of the United Nations which had made a declaration recognizing the jurisdiction of the ILOAT pursuant to Article II, paragraph 5, of the Statute of the Tribunal were likely to be able to furnish information on the questions submitted to the Court for an advisory opinion. By that same Order, the Court fixed, respectively, 29 October 2010 as the time-limit within which written statements might be presented to it on the questions, and 31 January 2011 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute of the Court.

The Court also decided that the President of IFAD should transmit to the Court, within the same time-limits, any statement setting forth the views of Ms Ana Teresa Saez García, the complainant in the proceedings against the Fund before the ILOAT, which she might wish to bring to the attention of the Court, as well as any possible comments she might have on the other written statements.

4. By letters dated 3 May 2010, pursuant to Article 66, paragraph 2, of the Statute of the Court, the Registrar notified the above-mentioned States and organizations of the Court's decisions and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute of the Court, IFAD communicated to the Court a dossier of documents likely to throw light upon the questions; these documents reached the Registry on 2 August 2010. The dossier was subsequently placed on the Court's website.

6. Within the time-limit fixed by the Court for that purpose, written statements were presented, in order of their receipt, by IFAD and by the Plurinational State of Bolivia. Also within that time-limit, the General Counsel of IFAD transmitted a statement setting forth the views of Ms Saez García. On 1 November 2010, the Registrar communicated to IFAD a copy of the written statement of the Plurinational State of Bolivia, a second copy of which was included to be provided to Ms Saez García. On the same date, the Registrar communicated to the Plurinational State of Bolivia copies of the written statement of IFAD and of the statement of Ms Saez García.

7. By a letter dated 21 January 2011 and received in the Registry on the same day, the General Counsel of IFAD, referring to forthcoming consultations between the Fund and the Bureau of the Conference of the Parties of the UNCCD (hereinafter the "COP") relating to the very subject-matter of the proceedings before the Court, requested that the time-limit for the submission of written comments be extended, in order that comments on behalf of the Fund might be submitted "immediately following such consultations and after the thirty-fourth session of the IFAD Governing Council . . . and the first session of the Consultation for the Ninth Replenishment of the Resources of the Fund . . .". Accordingly, the President of the Court, by Order of 24 January 2011, extended to 11 March 2011 the time-limit within which written comments might be submitted on the other written statements, in accordance with Article 66, paragraph 4, of the Statute of the Court, and within which any possible comments by Ms Saez García might be presented to the Court.

8. Within the time-limit so extended, the General Counsel of IFAD communicated to the Court the written comments of IFAD and transmitted to the Court the comments of Ms Saez García. In the letter dated 9 March 2011 accompanying the first of these documents, the General Counsel also requested that the Court make the written statements and comments accessible to the public, that the Court seek the views of the COP and that the Court hold oral proceedings.

On 14 March 2011, the Registrar transmitted to the Plurinational State of Bolivia a copy of the written comments of IFAD and of Ms Saez García.

9. In a letter dated 24 March 2011 addressed to the Registrar, the counsel for Ms Saez García stated, with respect to the requests made by the General Counsel of IFAD in his above-mentioned letter dated 9 March 2011 (see paragraph 8), that his client had no objection to the Court making the written statements and comments accessible to the public, but that she wished to express her disagreement with the other two requests expressed by the General Counsel in that letter.

10. By a letter dated 30 March 2011, the Registrar informed counsel for Ms Saez García that, in proceedings concerning the review of judgments of administrative tribunals, it was not possible for the complainant before such a tribunal to address directly to the Court communications for its consideration, and that any communication coming from Ms Saez García in the case should be transmitted to the Court through IFAD.

11. By letters from the Registrar dated 13 April 2011, the General Counsel of IFAD and counsel for Ms Saez García were informed that, in accordance with normal practice in such cases, the Court did not intend to hold public hearings. In the letter to the General Counsel of IFAD, the Registrar, on the instructions of the Court, also requested the former to transmit to him documents that were attached both to the complaint of Ms Saez García submitted to the ILOAT on 8 July 2008 and to IFAD's Reply dated 12 September 2008, and which had not already been transmitted to the Court. The Registrar further requested the General Counsel to provide the Court with a copy of the employment contract of the Managing Director of the Global Mechanism of the UNCCD (hereinafter the "Global Mechanism") for the years 2005 and 2006.

12. By another letter dated 13 April 2011, on the instructions of the Court, the Registrar also requested that the General Counsel of IFAD duly provide to the Court, without any control being exercised over their content, any communications from Ms Saez García relating to the request for an advisory opinion that she might wish to submit to it. In his letter to counsel for Ms Saez García, mentioned in the previous paragraph, the Registrar reiterated that any further communications directed to the Court were to be transmitted to it through IFAD.

13. By a letter dated 6 May 2011, the General Counsel of IFAD communicated to the Court a set of documents, attesting that those documents, combined with the documents which had been submitted by IFAD on 2 August 2010 (see paragraph 5 above), "comprise[d] the entire procedure before the Administrative Tribunal of the International Labour Organization". The employment contract of the Managing Director of the Global Mechanism for the years 2005 and 2006 was not transmitted as requested by the Court, the General Counsel stating in his letter that IFAD, as the housing entity of the Global Mechanism, was not authorized to disclose the employment contract of the latter's Managing Director, and that even if IFAD had such authority, it could not disclose such a document without the authorization of the person concerned.

14. By a letter of 28 June 2011 to the General Counsel of IFAD, the Registrar indicated that, after an examination of the materials received relating to the procedure before the ILOAT, it appeared that 24 documents were still missing. Under cover of a letter dated 7 July 2011, the General Counsel of IFAD provided these 24 documents.

15. By a letter dated 20 July 2011, the Registrar informed the General Counsel of IFAD that the Court, in application of its powers under Article 49 of its Statute, called upon the Fund to produce copies of the employment contract for the years 2005 and 2006 of the Managing Director of the Global Mechanism. Under cover of a letter dated 29 July 2011, the General Counsel of IFAD communicated to the Court that employment contract, as well as subsequent employment

contracts of the Managing Director, accompanied by a letter from the Managing Director authorizing the disclosure of those employment contracts for use by the Court. By this same letter, the General Counsel requested the Court to authorize IFAD to present additional observations and documents to the Court relating to those contracts.

16. By letter dated 21 July 2011, on the instructions of the President, the Registrar communicated to the General Counsel of IFAD a question addressed by a Member of the Court to the Fund and, through it, to Ms Saez García. By letters dated 26 August 2011, the General Counsel of IFAD communicated to the Court the response of the Fund to that question, transmitted to the Court the response of Ms Saez García to that question and reiterated the Fund's request that the Court hold oral proceedings in the case. Under cover of a letter also dated 26 August 2011, the General Counsel of IFAD communicated to the Court a copy of Judgment No. 3003 of the ILOAT, delivered on 6 July 2011, whereby the Tribunal dismissed IFAD's application for suspension of the execution of Judgment No. 2867 pending the delivery of the advisory opinion of the Court.

17. By a letter dated 1 September 2011, the General Counsel of IFAD requested the Court to authorize the Fund to produce other additional documents.

18. By a letter dated 23 September 2011, the Registrar informed the General Counsel of IFAD that, with regard to the requests made on behalf of IFAD in his letter dated 9 March 2011 accompanying the written comments of the Fund (see paragraph 8 above) and in his letters dated 29 July 2011 (see paragraph 15 above), 26 August 2011 (see paragraph 16 above), and 1 September 2011 (see paragraph 17 above), the Court had reconfirmed that no oral proceedings would be held, had decided that IFAD should not be authorized to present additional observations or documents to the Court, and had decided to make the written statements and comments, with annexed documents, accessible to the public, with immediate effect. Accordingly, under cover of letters dated 28 September 2011, electronic copies (on CD-ROM) of those documents were provided to all States and international organizations having been considered by the Court likely to be able to furnish information on the questions submitted to it. The written statements and comments (without annexes) were also placed on the website of the Court.

*

* *

I. The Court's Jurisdiction

19. The resolution of the Executive Board of IFAD requesting an advisory opinion in this case quotes Article XII of the Annex to the Statute of the ILOAT and states that it "wishes to avail itself of the provisions of the said Article". That Article is in the following terms:

> "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."

20. The Court recalls that, by a letter dated 4 October 1988, the President of IFAD informed the Director General of the International Labour Organization (hereinafter the "ILO") that the Executive Board of IFAD had made the declaration required by Article II, paragraph 5, of the Statute of the Tribunal recognizing the jurisdiction of the Tribunal. The Governing Body of the International Labour Office (the Office is the secretariat of the ILO) approved the declaration on 18 November 1988, and the Fund's acceptance of jurisdiction took effect from 1 January 1989.

21. The Court first considers whether it has jurisdiction to reply to the request. While its jurisdiction was not challenged, the Court notes that Ms Saez García contended that some of the questions posed by IFAD in its request do not fall within the scope of Article XII of the Annex to the Statute of the ILOAT. The Court observes that the power of the Executive Board to request an advisory opinion and the jurisdiction of the Court to give the 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 ILOAT alone. Under Article 65, paragraph 1, of its Statute,

> "[t]he 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".

The General Assembly and the Security Council are authorized by Article 96, paragraph 1, of the Charter to request an advisory opinion on "any legal question"; and, under Article 96, paragraph 2,

> "[o]ther 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".

22. That is to say, the General Assembly is given a gatekeeping role. It is only in terms of its authorization, given under Article 96, paragraph 2, that requests can be made by organs other than the Assembly itself and the Security Council, as the Court has already pointed out in its Advisory Opinion of 23 October 1956 (see *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion (hereinafter the "1956 Advisory Opinion"), *I.C.J. Reports 1956*, pp. 83-84; see also *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21).

23. The General Assembly, by resolution 32/107 of 15 December 1977, approved the Relationship Agreement between the United Nations and the International Fund for Agricultural Development (hereinafter the "Relationship Agreement"). Under Article I of the Relationship Agreement, the United Nations recognized the Fund as a specialized agency in accordance with Articles 57 and 63 of the Charter and Article 8 of the Agreement of 13 June 1976 establishing IFAD (hereinafter the "Agreement establishing IFAD"). In Article XIII, paragraph 2, of the Relationship Agreement, the General Assembly authorized the Fund to request advisory opinions:

> "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."

The Relationship Agreement came into force on 15 December 1977, the date of its approval by the General Assembly. The Court notes that the record before it does not include any communication from IFAD informing the Economic and Social Council of its request for an advisory opinion.

24. On the following day, 16 December 1977, the Governing Council of the Fund, in exercise of the power conferred on it by Article 6, Section 2 *(c)*, of the Agreement establishing IFAD, by resolution 77/2, "[a]uthorize[d] the Executive Board to exercise all the powers of the Council", with the exception of certain specified powers and those reserved by the Agreement to the Council. That delegation was amended by Council resolution 86/XVIII of 26 January 1995 with effect from 20 February 1997. The power to request advisory opinions was not excluded from the delegation. No issue arises in respect of the delegation of that power by the Council to the Board.

25. As already noted (see paragraph 19), the Executive Board of IFAD, in its resolution requesting an advisory opinion in this case, expresses its wish to avail itself of Article XII of the Annex to the Statute of the ILOAT. While the resolution does not also refer to the authorization granted by the General Assembly under Article 96, paragraph 2, of the Charter, that authorization, as the Court has already stated, is a necessary condition to the making of such a request. The Court takes the opportunity to emphasize that the ILO could not, when it adopted the Tribunal's Statute, give its organs, or other institutions, the authority to challenge decisions of the Tribunal by way of a request for an advisory opinion.

26. The terms of Article 96, paragraph 2, of the Charter, Article 65, paragraph 1, of the Statute of the Court and the authorization given to the Fund by Article XIII, paragraph 2, of the Relationship Agreement state certain requirements which are to be met if an opinion is to be requested. In terms of those requirements, 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 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". That exclusion, which is included in all authorizations given by the General Assembly to specialized agencies, reflects the co-ordinating role of the Economic and Social Council under Chapter X of the Charter. That role was expressly mentioned by the General Assembly in the authorization it gave to the Council to request advisory opinions (resolution 89 (I) of 11 December 1946). The exclusion does not prevent the Court from considering the relationships between the Fund and the Global Mechanism or the COP, which are not specialized agencies, so far as these relationships are raised by the questions put to the Court by IFAD.

27. Accordingly, the Court concludes that, in terms of the relevant provisions of the Charter, the Statute of the Court and the authorization given under the Relationship Agreement, the Fund has the power to submit for an advisory opinion the question of the validity of the decision given by the ILOAT in its Judgment No. 2867 and that the Court has jurisdiction to consider the request for an advisory opinion. The scope of that jurisdiction is however subject to the effect in the present case of Article XII of the Annex to the Statute of the ILOAT, a matter to which the Court now turns.

* *

II. Scope of the Court's jurisdiction

28. Under Article VI, paragraph 1, of the Statute of the ILOAT, the judgment of the Tribunal relating to a complaint brought by an official 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 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 (*I.C.J. Reports 1956*, p. 84; see also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 76-77, paras. 24-25).

29. 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. In the 1956 Advisory Opinion, the Court emphasized the limits of the first of these grounds:

> "The circumstance that the Tribunal may have rightly or wrongly adjudicated on the merits or that it may have rightly or wrongly interpreted and applied the law for the purposes of determining the merits, in no way affects its jurisdiction. The latter is to be judged in the light of the answer to the question whether the complaint was one the merits of which fell to be determined by the Administrative Tribunal in accordance with the provisions governing its jurisdiction. That distinction between jurisdiction and merits is of great importance in the legal régime of the Administrative Tribunal. Any mistakes which it may make with regard to its jurisdiction are capable of being corrected by the Court on a Request for an Advisory Opinion emanating from the Executive Board. Errors of fact or of law on the part of the Administrative Tribunal in its Judgments on the merits cannot give rise to that procedure. The only provision which refers to its decisions on the merits is Article VI of the Statute of the Tribunal which provides that its judgments shall be 'final and without appeal'." (*I.C.J. Reports 1956*, p. 87.)

The review, the Court said later in the same Opinion, is not in the nature of an appeal on the merits of the judgment; 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 (*ibid.*, pp. 98-99).

30. The other ground for challenge — a fundamental fault in the procedure followed — concerns the procedure and not the substance of the judgment. When the Court was asked to review a judgment of the United Nations Administrative Tribunal (hereinafter the "UNAT") in 1973, where the grounds for review included "a fundamental error in procedure which ha[d] occasioned a failure of justice", it stated that the essence of the concept,

> "in the cases before the Administrative Tribunal, may be found in the fundamental right of a staff member to present his case, either orally or in writing, and to have it considered by the Tribunal before it determines his rights. An error in procedure is fundamental and constitutes 'a failure of justice' when it 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. To put the matter in that way does not provide a complete answer to the problem of determining precisely what errors in procedure are covered by the words of Article 11. But certain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 209, para. 92.)

31. The Court observes at this stage that the procedural grounds in the two Statutes are stated differently. The ILOAT provision speaks of a decision "vitiated by a fundamental fault in the procedure followed" by the Tribunal while that in the UNAT Statute required a finding of "a fundamental error in procedure which has occasioned a failure of justice". That difference in wording, however, does not "alter the scope of this ground of challenge" (*ibid.*, p. 209, para. 91). The Court returns to this ground which is invoked in Questions II-VIII later in this Opinion (see paragraph 98 below).

32. Having determined that it has jurisdiction to answer the present request for an advisory opinion and indicated in a preliminary way the limits on the scope of its power of review in terms of Article XII of the Annex to the Statute of the ILOAT, the Court now considers whether in exercise of its discretion there is reason to refuse to answer that request.

* *

III. The Court's Discretion

33. Article 65 of the Statute of the Court makes it clear that it has a discretion whether to reply to a request for an advisory opinion: "The Court may give an advisory opinion on any legal question . . ." That discretion exists for good reasons. In exercising that discretion, 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). That indication of a strong inclination to reply 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).

34. The Court and its predecessor have emphasized that, in their advisory jurisdiction, they must maintain their integrity as judicial bodies. The Permanent Court of International Justice as long ago as 1923, in recognizing that it had discretion to refuse a request, made an important statement of principle: "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court." (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J. Series B, No. 5,* p. 29; for the most recent statement on this matter see *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo,* Advisory Opinion of 22 July 2010, para. 29, and the authorities referred to there.)

35. In the particular context of the four requests (i.e, the 1956 Advisory Opinion; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973,* p. 166; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982,* p. 325; *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987,* p. 18) brought to this Court by way of applications for review of judgments of the UNAT and the ILOAT, concerns have been raised about a central aspect of the good administration of justice: the principle of equality before the Court of the organization on the one hand and the official on the other.

36. Two issues arising from Article XII of the Tribunal's Statute and its Annex providing for review of the ILOAT judgments were addressed by the Court in its 1956 Advisory Opinion: inequality of access to the Court and inequalities in the proceedings before the Court. With regard to the first point, it is only the employing agencies which have access to the Court. By contrast, the provisions for the review by the Court of judgments of the UNAT, in force from 1955 to 1995, gave officials, along with the employer and Member States of the United Nations, access to the process which could lead to a request to the Court for review. When that review procedure was being established, the Secretary-General identified as a fundamental principle that the staff member should have the right to initiate the review and to participate in it. Further, any review procedure should enable the staff member to participate on an equitable basis in such procedure, which should ensure substantial equality (United Nations document A/2909 of 10 June 1955, paras. 13 and 17).

37. In its 1956 Advisory Opinion, the Court said this about equality of access:

> "According to generally accepted practice, legal remedies against a judgment are equally open to either party. In this respect each possesses equal rights for the submission of its case to the tribunal called upon to examine the matter . . . However, the advisory proceedings which have been instituted in the present case involve a certain absence of equality between Unesco and the officials both in the origin and in the progress of those proceedings . . . [T]he Executive Board availed itself of a legal remedy which was open to it alone. Officials have no such remedy against the Judgments of the Administrative Tribunal . . . However, the inequality thus stated does not in fact constitute an inequality before the Court. It is antecedent to the examination of the question by the Court. It does not affect the manner in which the Court undertakes that examination. Also, in the present case, that absence of equality between the parties to the Judgments is somewhat nominal since the officials were successful in the proceedings before the Administrative Tribunal and there was accordingly no question of any complaint on their part." (*I.C.J. Reports 1956*, p. 85.)

38. After considering inequality before the Court, it concluded that not to respond to the request for an advisory opinion "would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials" (*ibid.*, p. 86). The Court, addressing this matter 50 years later, has two observations to make, one particular, about the use actually made of the review processes in respect of the two Tribunals — that of the United Nations and that of the ILO — and one general, about the development of the concept of equality before courts and tribunals over that period. On the review process, the critical element for the judicial protection of officials was the creation of the right of officials to challenge decisions taken against them by their employer before an independent judicial body which follows fair procedures. Next, reviews have been sought in only a handful of cases; and when the General Assembly decided in 1995 to remove the provision for review of UNAT decisions by this Court, it stated that the procedure that had existed since 1955 had "not proved to be a constructive or useful element in the

adjudication of staff disputes within the Organization" (resolution 50/54 of 11 December 1995, preamble). The Court also notes that between 1995 and 2009 the United Nations system contained no provision at all for review of, or appeal against, the judgments of the UNAT.

39. To turn to the general question of the concept of equality, the development of the principle of equality of access to courts and tribunals since 1946, when the review procedure was established, may be seen in the significant differences between the two General Comments by the Human Rights Committee on Article 14, paragraph 1, of the International Covenant on Civil and Political Rights of 1966. That provision requires that "[a]ll persons shall be equal before the courts and tribunals". The first Comment, adopted in 1984, just seven years after the Covenant came into force, did no more than repeat the terms of the provision and call on States to report more fully on steps taken to ensure equality before the courts, including equal access to the courts (*Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice)*, paras. 2-3). The later Comment, one adopted in 2007 on the basis of 30 years of experience in the application of the above-mentioned Article 14, gives detailed attention to equality before domestic courts and tribunals. According to the Committee, that right to equality guarantees equal access and equality of arms. While in non-criminal matters the right of equal access does not address the issue of the right of appeal, if procedural rights are accorded they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds (*Human Rights Committee, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial*, paras. 8, 9, 12 and 13). In the case of the ILOAT, the Court is unable to see any such justification for the provision for review of the Tribunal's decisions which favours the employer to the disadvantage of the staff member.

40. The Fund and Ms Saez García answered a question from a Member of the Court (see paragraph 16 above) about the significance, if any, of the developments relating to the equality of the parties before courts and tribunals since 1946. In her response, Ms Saez García calls attention to the relevant guarantees included in global and regional instruments over those 65 years and their further elaboration by international and national courts. She sets out how, in her view, the present proceedings illustrate the contradiction between the procedure set out in Article XII of the Annex to the Statute of the ILOAT and more modern concepts of the equality of arms. She contrasts, on the one hand, the application which the Fund made to the Tribunal for the suspension of the execution of the Judgment, an application which was rejected on the ground that the Tribunal had no power to do so (see paragraph 16 above), and, on the other hand, the power of the newly established United Nations Appeals Tribunal to order interim measures for the protection of either party. The lack of such a power, in her view, provides a compelling reason for this Court to refuse to exercise its advisory jurisdiction to review judgments of the ILOAT. Ms Saez García also refers to problems, as she sees it, in the equality of the parties in the present proceedings before the Court, considered later in this Opinion (see paragraphs 45-46). She concludes, in the light of the developments relating to the requirement of equality in the administration of justice and the abolition of the review of UNAT judgments, that "the many defects that the Court has remarked upon in the review procedure constitute a compelling reason to reject the . . . request for an advisory opinion".

41. In its reply, IFAD for its part first emphasizes that "the sole function" of Article XII of the Annex to the Statute of the ILOAT, when a specialized agency is invoking it, is to interpret the agreement between the ILO and that specialized agency; the questions submitted to the Court, it maintains, "deal exclusively with the application and the interpretation of the agreement between the ILO and IFAD in the context of Article XII". Individuals, says the Fund, stand outside the institutional relationship that forms the subject-matter of Article XII procedures. It concludes this part of its answer in the following terms:

> "The Fund respectfully submits that, given that the Complainant in ILOAT Judgment No. 2867 is not a party to the agreement between the ILO and the Fund, which accords jurisdiction to the ILOAT, it would be a mistake to consider that the inability of third parties to invoke Article 96, paragraph 2, of the UN Charter in order to apply Article XII of the ILOAT Statute constitutes a breach of the principle of equality of the parties in judicial proceedings. Accordingly, it would not be appropriate for the Court to decline to perform the function envisaged by Article 96, paragraph 2, of the UN Charter on account of a third party that stands outside the relationship that forms the subject-matter of the proceedings before the Court."

Further, IFAD states that:

> "the Fund's request for an advisory opinion pertains, not to any dispute between the Fund and Ms Saez García, but to the relationship between the Fund and the ILO as it relates to the ILOAT, a subsidiary body of the ILO".

42. In the Court's Opinion, this argument faces two insurmountable hurdles. In the first place, the real dispute underlying the request for an advisory opinion was between Ms Saez García and the Fund. She brought proceedings before the Tribunal against a decision attributed to the Fund and was successful. The Fund then invoked the procedure under the Statute of the ILOAT, supported by the General Assembly's authorization given under Article 96, paragraph 2, of the Charter, to challenge that decision in her favour. In that regard, the Court cannot see that a question arises between the Fund and the ILO. The record before the Court provides no evidence of any such matter. In the second place, the Fund in any event would not be able to bring a matter about its relationship with the ILO before the Court: when the General Assembly authorized IFAD to seek advisory opinions, under Article 96, paragraph 2, of the Charter, it expressly excluded from the authorization "questions concerning the mutual relationships of the Fund and the United Nations or other specialized agencies"; a similar exclusion is to be found in all the authorizations given by the General Assembly to specialized agencies (see paragraph 26 above).

43. In replying to the question about equality of access, the Fund emphasized what it saw as a parallel with investor-State arbitration. First, it pointed out that in such arbitrations, it is only the investor that may initiate the dispute settlement process. But that process is initiated in response to the conduct of the host State, alleged to be in breach of the investor's rights, and is a first instance

process. It is comparable to the proceeding brought in the ILOAT by the staff member against the agency. In the case of investment arbitrations brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (*United Nations Treaty Series (UNTS)*, Vol. 575, p. 159), both parties — and not just one — are able to seek interpretation, revision or annulment of the award: it is that situation which is analogous to the present one. The Fund, secondly, refers to a number of provisions in bilateral free trade and investment treaties which enable the State parties to those treaties, by joint decision, at the request of one of them, to declare their interpretation of a provision of the treaty. That interpretation is binding on the tribunal hearing an investment dispute including those brought by the investor. That situation bears little resemblance to the present one: parties to treaties are in general free to agree on their interpretation, while in the present case the Court is concerned with the initiation of a review process to be carried out by an independent tribunal.

44. As the Court said, on the only other occasion in which a specialized agency sought an opinion in terms of Article XII of the Annex to the Statute of the ILOAT, "[t]he principle of equality of the parties follows from the requirements of good administration of justice" (1956 Advisory Opinion, *I.C.J Reports 1956*, p. 86). That principle 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 (see paragraph 39 above). For the reasons given, 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. The Court now turns to that question.

45. In the present case, as in the four earlier applications for review of judgments of administrative tribunals, 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 two decisions of the Court. First, in its Order of 29 April 2010, the Court decided that the President of the Fund was to transmit to the Court any statement setting forth the views of Ms Saez García which she might wish to bring to the attention of the Court and fixed the same time-limits for her as for the Fund for the filing of written statements in the first round of written argument and comments in the second round. The second step the Court took was to decide that there would be no oral proceedings; when the Fund reiterated its request that the Court should hold hearings, it confirmed its previous decision of principle. As has been clear since 1956 when the Court first addressed the matter of procedure in cases involving reviews of judgments of administrative tribunals, the Court's Statute does not allow individuals to appear in hearings in such cases, by contrast to international organizations concerned (1956 Advisory Opinion, *I.C.J Reports 1956*, p. 86; see also *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, para. 34).

46. The process was not without its difficulties. The Court mentions three matters. The first relates to the documentary record: the filing of "all documents likely to throw light upon the question" in terms of Article 65, paragraph 2, of the Court's Statute was not completed until

July 2011 and following three requests from the Court — that is, fully 15 months after the submission of the request for the Advisory Opinion (see paragraphs 13-15 above). The second is the failure of IFAD to inform Ms Saez García in a timely way of the procedural requests it was making to the Court. And the third is IFAD's initial failure to transmit to the Court certain communications from Ms Saez García. That last position was based on the proposition that the matter before the Court was not a matter between the Fund and Ms Saez García but between the Fund and the ILO. The Court has already commented on this proposition (see paragraphs 41-42 above).

47. Notwithstanding these difficulties, the Court concludes that, by the end of the 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.

*

48. In light of the analysis above, the Court maintains its concern about the inequality of access to the Court arising from the review process under Article XII of the Annex to the Statute of the ILOAT. In addition, the Court 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.

* *

IV. Merits

49. The request for an advisory opinion from the Court concerns the validity of the Judgment given by the ILOAT relating to Ms Saez García's contract of employment. The Court notes that that contract of employment, as extended, was governed by the Personnel Policies Manual (hereinafter "PPM") and the Human Resources Handbook, until 22 July 2005. From that date, the PPM and Human Resources Handbook were replaced by a document entitled "IFAD Human Resources Policy" and the Human Resources Procedures Manual (hereinafter "HRPM"), respectively. Accordingly, subsequent events, such as the facilitation process and the convening of the Joint Appeals Board referred to in paragraphs 70 and 77 below, were governed by the latter documents. The Court will refer hereinafter to the titles of the documents in force at the time of events being considered.

50. In December 2005, a decision was made not to renew Ms Saez García's contract of employment as from March 2006 on the alleged basis that her post was being abolished. She challenged that decision by filing an appeal with the Joint Appeals Board of the Fund (hereinafter the "JAB") under the 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. Following two rounds of written submissions (oral hearings were not sought), the Tribunal, in its Judgment of 3 February 2010, decided that "[t]he President's decision of 4 April 2008 is set aside" and made orders for the payment of damages and costs.

51. The Fund contends, as it did before the Tribunal, that Ms Saez García was a staff member of the Global Mechanism and not of IFAD and that her employment status has to be assessed in the context of the arrangement for the housing of the Global Mechanism made between the Fund and the COP.

The Court first considers the powers of, and relationships between, those various bodies. It will then turn to the documents relating specifically to Ms Saez García's employment.

52. Part III of the UNCCD, which came into force in 1996, is entitled "Action Programmes, Scientific and Technical Cooperation and Supporting Measures" and contains three sections addressed to each of those matters. The section on "Supporting Measures" imposes obligations on the State parties to the Convention relating to capacity building, financial resources and financial mechanisms (Arts. 19-21). Under Article 21, paragraph 4, a "Global Mechanism" is established "[i]n order to increase the effectiveness and efficiency of existing financial mechanisms". It is "to promote actions leading to the mobilization and channelling of substantial financial resources . . . to affected developing country Parties". It is to function under the authority and guidance of the COP and to be accountable to it. Under paragraph 5, the COP was to identify, at its first ordinary session, an organization to house the Global Mechanism. Paragraph 6 provides this elaboration: the COP was to make appropriate arrangements with the housing organization "for the administrative operations of such Mechanism, drawing to the extent possible on existing budgetary and human resources". According to paragraph 5, the COP was to agree with the organization upon modalities to ensure, among other things, that the mechanism *(a)* prepares an inventory of co-operation programmes that are available to implement the UNCCD, *(b)* provides advice, on request, to parties on innovative methods of financing and related matters, *(c)* provides interested parties and organizations with information on sources of funds and funding patterns to facilitate co-ordination between them, and *(d)* reports to the COP on its activities.

Before the Court sets out the terms of the agreement between the COP and IFAD, it refers to relevant provisions of the Convention concerning the COP and its Permanent Secretariat.

53. Part IV of the Convention, entitled "Institutions", follows immediately the provisions of Article 21 which have just been discussed. It provides for the establishment of the COP, a Permanent Secretariat (replacing an interim Secretariat established by United Nations General Assembly resolution 47/188 of 22 December 1992 and referred to in Article 35 of the UNCCD) and a Committee on Science and Technology as a subsidiary body of the COP (Arts. 22, 23 and 24). The Conference's powers include the power to establish subsidiary bodies, to approve a programme and a budget, and to make arrangements, at its first session, for a Permanent Secretariat (Art. 22, paras. 2 *(c)* and *(g)*, and Art. 23, para. 3). The Permanent Secretariat's functions include: to enter, under the guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions (Art. 23, para. 2 *(e)*).

54. So far as the arrangement for the housing of the Global Mechanism is concerned, the COP, at its first session, held in 1997, decided to select IFAD for that purpose. In 1999 the Conference and the Fund signed a "Memorandum of Understanding . . . regarding the Modalities and Administrative Operations of the Global Mechanism" (hereinafter the "MOU"). The MOU provides, under Section II A, that "[w]hile the Global Mechanism will have a separate identity within the Fund, it will be an organic part of the structure of the Fund directly under the President of the Fund". It also provides, under Section II D, that the Managing Director of the Global Mechanism shall be nominated by the Administrator of the United Nations Development Programme and appointed by the President of the Fund and that, in discharging his or her responsibilities, the Managing Director shall report directly to the President of IFAD. Under paragraph (1) of Section III A, headed "Relationship of the Global Mechanism to the Conference", the Global Mechanism functions under the authority of the COP and is fully accountable to it. Under paragraph (2) of the same section, the chain of accountability runs directly from the Managing Director to the President of the Fund to the COP, and the Managing Director submits reports to the COP on behalf of the President of the Fund. Under Section III A, paragraph (4), the Global Mechanism's work programme and budget, including proposed staffing, are prepared by the Managing Director, reviewed and approved by the Fund's President and forwarded to the Executive Secretary of the Convention for consideration in the preparation of the budget estimates of the Convention. Under Section II B, the resources of the Global Mechanism are held by the Fund in various accounts. Under Section IV B, the Managing Director, on behalf of the President, submits reports on the Global Mechanism's activities to each ordinary session of the COP. The Fund and Convention Secretariat are to co-operate in various ways. The final substantive provision of the MOU, Section VI, entitled "Administrative Infrastructure", provides that the Global Mechanism shall be located at the headquarters of the Fund in Rome where it "shall enjoy full access to all of the administrative infrastructure available to the Fund offices, including appropriate office space, as well as personnel, financial, communications and information management services". The terms of that provision reflect those of paragraph 6 of Article 21 of the UNCCD set out above (see paragraph 52 above).

55. For its Permanent Secretariat, the COP made an arrangement with the United Nations. The General Assembly approved the institutional linkage between the Secretariat of the Convention and the United Nations in accordance with the offer made by the Secretary-General and accepted by the COP (General Assembly resolution 52/198 of 18 December 1997 and COP decision

No. 3/COP.1). Under the arrangement, the Secretariat functions under the authority of the Secretary-General as chief administrative officer of the organization (United Nations document A/52/549 of 11 November 1997, para. 25). While institutionally linked to the United Nations, the Secretariat is not fully integrated in the work programme and management structure of any particular department or programme (*ibid.*, para. 26; COP decision No. 3/COP.1 and General Assembly resolution 52/198 of 18 December 1997, eighth preambular paragraph).

56. The General Assembly also noted that the COP had decided to accept the offer of the Government of Germany to host the Convention Secretariat in Bonn (General Assembly resolution 52/198 of 18 December 1997, para. 3). In 1998, the Secretariat of the Convention, the Government of the Federal Republic of Germany and the United Nations concluded an Agreement concerning the Headquarters of the Convention's Permanent Secretariat (*UNTS*, Vol. 2029, p. 316). Under the Agreement, the Convention Secretariat possesses, in the host country, the legal capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings (*ibid.*, Art. 4; see also Arts. 3 and 4 of the Agreement between the United Nations and the Federal Republic of Germany relating to the Headquarters of the United Nations Volunteers Programme, 10 November 1995 (*UNTS*, Vol. 1895, p. 103), which is applicable, *mutatis mutandis*, to the Permanent Secretariat).

57. The Court observes that, under Part IV of the Convention entitled "Institutions", the COP and the Permanent Secretariat are expressly established as such. These institutions are given the following powers: in the case of the COP, it is given the power to "make appropriate arrangements" to house the Global Mechanism, to "undertake necessary arrangements" for the financing of its subsidiary bodies and to "make arrangements" for the functioning of the Permanent Secretariat (Arts. 21 (6), 22 (2) *(g)* and 23 (3), respectively); in the case of the Permanent Secretariat, it is given the general power "to enter, under the guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions" (Art. 23 (2) *(e)*).

As the above account indicates, both have exercised those powers. By contrast, the Global Mechanism is not included in Part IV of the Convention. 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. IFAD, on 14 May 2010, during the period when the first round of written statements was being prepared, wrote to the Managing Director of the Global Mechanism seeking information on that matter in the following terms:

> "In order to help us prepare our submission to the ICJ, IFAD kindly requests that your Office supply a comprehensive list of all agreements and legal documents signed between the Global Mechanism and other entities, including international organisations and private entities. We intend to provide this list as part of our submission to the ICJ in order to show that the GM is recognized as having the capacity to enter into agreements." (United Nations document ICCD/COP(10)/INF.3 of 11 August 2011, p. 30.)

The written statement of IFAD submitted five months later includes no such list.

58. The position of the Global Mechanism may also be contrasted with that of IFAD, its housing body. The Agreement establishing IFAD expressly provides that "[t]he Fund shall possess international legal personality" (Art. 10, Sec. 1). Its privileges and immunities are defined by reference to the Convention on the Privileges and the Immunities of the Specialized Agencies of 21 November 1947 (Art. 10, Sec. 2, of the Agreement establishing IFAD). Under Article II, Section 3, of that Convention, specialized agencies subject to it, which include IFAD, are given the express capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings in those States, including Italy, which are parties to the Convention.

59. The Court recalls a point made by the Fund in its response to a question put by a Member of the Court to IFAD — and through it to Ms Saez García. According to the Fund, should the Court decline to provide an advisory opinion, it would forsake the opportunity to "assist the international community by clarifying how the rules concerning the ILOAT's jurisdiction should operate in respect of entities hosted by international organizations". The Fund contends that this phenomenon of "hosting" arrangements is "one of the most significant developments since the adoption of Article XII of the ILOAT Statute in 1946".

60. The Court is aware that there exists a range of hosting arrangements between international organizations which are concluded for a variety of reasons. Each arrangement is distinct and has different characteristics. There are hosting arrangements between two entities having separate legal personalities, and there are others concluded for the benefit of an entity without legal personality. An example of the former is the arrangement between the World Intellectual Property Organization — as the hosting organization — and the International Union for the Protection of New Varieties of Plants — as the hosted organization — which has legal personality under Article 24, paragraph 1, of its constituent instrument, the International Convention for the Protection of New Varieties of Plants of 2 December 1961.

61. By contrast, with regard to the Global Mechanism, 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 in paragraph 54 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

62. The Court now 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.

63. The first question put to the Court is formulated as follows:

> "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?"

64. 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.

65. The Fund recognized the jurisdiction of the Tribunal and accepted its Rules of Procedure with effect from 1 January 1989 (see paragraph 20 above). However, as implied in the formulation of its first question to the Court, the Fund considers Ms Saez García

> "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".

The Fund therefore objected to the jurisdiction of the Tribunal with respect to the complaint filed by Ms Saez García, and in particular her pleas alleging that the Managing Director of the Global Mechanism exceeded his authority in deciding not to renew her contract and that the approved core budget of the Global Mechanism did not require the elimination of her post.

66. 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.

67. 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. After examining the Fund's argument that the Tribunal did not have jurisdiction because the Fund and the Global Mechanism had separate legal identities, the Tribunal observed that:

> "The fact that the Global Mechanism is an integral part of the Convention and is accountable to the Conference does not necessitate the conclusion that it has its own legal identity . . . 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." (Judgment No. 2867, p. 11, para. 6.)

The Tribunal then referred to the provisions of the MOU, and stated that:

> "[I]t is clear that the words 'an organic part of the structure of the Fund' indicate that the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes. The effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund." (*Ibid.*, p. 12, para. 7.)

Following this analysis, the Tribunal concluded as follows:

> "Given that the personnel of the Global Mechanism are staff members of the Fund and that the decisions of the Managing Director relating to them are, in law, decisions of the Fund, adverse administrative decisions affecting them are subject to internal review and appeal in the same way and on the same grounds as are decisions relating to other staff members of the Fund. So too, they may be the subject of a complaint to this Tribunal in the same way and on the same grounds as decisions relating to other staff members." (*Ibid.*, p. 14, para. 11.)

68. 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, under Article XII of the Annex to the Statute of the ILOAT and is the object of the first question put to the Court as

reproduced in paragraph 63 above. To answer this question, the Court has to consider whether the Tribunal had the competence to hear the complaint submitted by Ms Saez García in accordance with Article II, paragraph 5, of its Statute. According to this provision, for the Tribunal to exercise its jurisdiction it is necessary that there should be a complaint alleging non-observance of the "terms of appointment of officials" of an organization that has accepted its jurisdiction or "of provisions of the Staff Regulations" of such an organization. It follows from this that 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*.

69. The Court will examine these two sets of conditions below. However, before doing so, a brief overview of the factual background to the case decided by the Tribunal is warranted.

1. Factual background

70. 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. 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 from the Managing Director of the Global Mechanism, 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 filed an appeal with the JAB on 27 June 2007, challenging the Managing Director's decision of 15 December 2005. In its report of 13 December 2007, the JAB unanimously recommended that Ms Saez García be reinstated within the Global Mechanism under a two-year fixed-term contract and that the Global Mechanism pay her an amount equivalent to all the salaries, allowances and entitlements she had lost since March 2006.

By a memorandum of 4 April 2008, the President of the Fund informed Ms Saez García that he had decided to reject the recommendations of the JAB. It is this decision of the President of the Fund that was impugned before ILOAT and set aside by it (see paragraph 50 above).

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

71. 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", used in the ILO Staff Regulations, as well as in the Statute of the Tribunal, and the words "staff member", used in the staff regulations and rules of many other organizations, may be considered to have the same meaning in the present context; the Court thus will use both terms interchangeably. The document entitled "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.

72. 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 Section 4.8.2 of 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".

73. The above-mentioned facts are not contested by the Fund. In its Written Statement to the Court, the Fund makes the following observations:

> "It is true that the offer and extension letters in the case of the Complainant were all issued on IFAD letterhead by IFAD officials and all of them refer to an 'appointment with the International Fund for Agricultural Development'. The initial offer letter dated 1 March 2000, which was signed by the Director of the Fund's Personnel Division, also stated that the Complainant's 'employment may be terminated by IFAD' and that she 'will be required to give written notice of at least one month to IFAD' should she wish to terminate her employment during the probationary period. While the two extension letters are silent on termination and resignation, both state that '[a]ll other conditions of employment will remain unchanged'."

74. Notwithstanding the above, the Fund maintains that Ms Saez García was not an IFAD official, but a staff member of the Global Mechanism which has not recognized the jurisdiction of the Tribunal. In this connection, it refers to the fact that the 1 March 2000 contract also contained the following statement: "The position you are being offered is that of Programme Officer in the Global Mechanism of the Convention to Combat Desertification, Office of the President (OP), in which capacity you would be responsible to the Managing Director of the Global Mechanism." It also argues that throughout her employment with the Global Mechanism, Ms Saez García "was never charged with performing any of the functions of the Fund, nor had she been employed by the Fund or performed functions for the Fund prior to being employed by the Global Mechanism". Moreover, the Fund contends that IFAD and the Global Mechanism are separate legal entities, and that the Tribunal should have taken into account the consequences of this separation for its jurisdiction with respect to the complaint filed by Ms Saez García.

75. Ms Saez García submits that she was a staff member of the Fund and that the staff regulations and rules of the Fund applied to her. She further contends that the Managing Director of the Global Mechanism was an officer of the Fund and that his actions were, in law, the actions of the Fund.

76. 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 general conditions and terms of employment with the Fund, as well as the respective duties and obligations of the Fund and the staff. 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 Fund. The fact that she was assigned to perform functions related to the mandate of the Global Mechanism does not mean that she could not be a staff member of the Fund. The one does not exclude the other. In this context, reference may also be made to the fact that IFAD included Ms Saez García's name on the list of IFAD officials for whom the Organization claimed privileges and immunities in the host country in accordance with the Convention on the Privileges and Immunities of the Specialized Agencies.

77. 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 the post of Programme Manager for the Global Mechanism's regional desk for Latin America and the Caribbean, 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. The record before the Court includes no evidence that the Fund objected to the use of these procedures by Ms Saez García. The facilitation process was conducted by a facilitator appointed by the IFAD administration and in accordance with Chapter 10 of the HRPM. That process was terminated in accordance with paragraph 10.21.1 *(b)* of the HRPM. Similarly, the JAB was convened under the terms of the HRPM and its report and recommendations were submitted to the President of IFAD for consideration in accordance with the procedures established by Chapter 10 (Sec. 10.38) of the HRPM. In a memorandum dated 4 April 2008, the President of IFAD rejected the recommendations of the JAB to reinstate Ms Saez García to a position in the Global Mechanism with a two-year fixed-term contract from the date of reinstatement. However, the President's memorandum 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.

78. The Court turns now to the other arguments submitted by the Fund to support its contention that Ms Saez García was not a staff member of the Fund. First, the Fund refers to an administrative instruction issued by IFAD in the form of a President's Bulletin on 21 January 2004 which, according to the Fund, was meant "to refine and clarify the legal position of the personnel working for the Global Mechanism", and quotes paragraph 11 *(c)* of the Bulletin in which it is stated that:

> "IFAD's rules and regulations on the provision of career contracts for fixed-term staff shall not apply to the staff of the Global Mechanism, except for those that have already received a career contract as a result of their earlier employment with IFAD."

For the Fund, this stipulation makes clear that "while Global Mechanism staff are not IFAD staff, some of IFAD's rules and regulations apply *mutatis mutandis* to Global Mechanism staff".

Secondly, the Fund asserts that, although the Tribunal acknowledged that IFAD took the position that "neither the COP nor the GM has recognized the jurisdiction of the Tribunal", it did not address this point explicitly in its ruling and proceeded to exercise jurisdiction. Therefore, the Fund invites the Court to take note of the fact that neither the Global Mechanism nor the COP has recognized the jurisdiction of the Tribunal, and that consequently the Tribunal lacked jurisdiction.

Thirdly, the Fund argues 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 member of IFAD's staff in his dealings with the complainant" (*ibid.*, para. 189). According to the Fund, the Tribunal had, therefore, no jurisdiction to examine the decision of the Managing Director to abolish the post of Ms Saez García or the budgetary reasons underlying that decision.

79. The Court first notes that staff members of the Global Mechanism are not eligible, under the terms of the IFAD President's Bulletin mentioned above, for career appointments under the staff regulations and rules of the Fund. This does not however put them outside the purview of such provisions, nor deprive them of the possibility of being appointed on the basis of renewable fixed-term contracts. In this connection, the Court recalls that the complaint filed by Ms Saez García with the ILOAT was not about the alleged failure of IFAD to grant her a career contract, but about the non-renewal of her fixed-term contract. The Court also recalls that paragraph 10 of the same Bulletin provides that:

> "As a matter of principle and where there is an absence of a specific provision to the contrary, as specified below, the Global Mechanism shall be subject to all provisions of IFAD's Personnel Policies Manual (PPM) and Human Resources Handbook (HRH), as they may be amended."

It is the Court's 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 additional indication of the existence of an employment relationship between her and the Fund.

80. The Court next takes note of the fact that, as underlined by the Fund and based on the record before it, neither the COP nor the Global Mechanism has accepted the jurisdiction of the ILOAT. The Tribunal did not however base its jurisdiction with respect to the complaint filed by Ms Saez García on such acceptance. The judgment rendered by the Tribunal shows that it decided to exercise its jurisdiction after having concluded that Ms Saez García and other staff members of the Global Mechanism were staff members of the Fund and, as such, were entitled to submit complaints to the Tribunal in the same way and on the same grounds as other staff members of the Fund.

81. Finally, with respect to the Fund's contention that the Managing Director of the Global Mechanism 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. The Court will examine the status of the Managing Director, rather, in its treatment of the Tribunal's jurisdiction *ratione materiae* below.

82. 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.

3. Jurisdiction *ratione materiae* of the Tribunal

83. As a staff member of the Fund, Ms Saez García had the right to submit her complaint to the ILOAT. The HRPM provides in Section 10.40.1 as follows:

> "Staff members have the right to appeal to the ILOAT, under the procedures prescribed in its Statute and Rules, against: *(a)* final decisions taken by the President; and *(b)* after the expiration of the period prescribed in para. 10.39.2 above, the failure of the President to take a final decision."

84. 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 emphasizes that, under the terms of Article II, paragraph 5, of the Statute of the ILOAT, there are only two classes of complaints that the Tribunal is competent to hear, 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 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. It asserts that the complainant's case was placed entirely on a different basis, namely, paragraphs 4 and 6 of Section III A of the MOU, which the complainant used to argue, first, that the Managing Director exceeded his authority in deciding not to renew her contract and, secondly, that the "core budget" approved by the Conference did not require the abolition of her post. The reliance by the complainant on these provisions of the MOU was acknowledged and described by the Tribunal in paragraph 4 of its Judgment (p. 10). The Fund further argues that the Tribunal lacked jurisdiction to entertain these submissions, which did not contain allegations of non-observance of IFAD staff regulations and rules, and erred by nonetheless proceeding to adjudicate the complainant's claims on this basis.

85. The Fund also contends that the Tribunal was not competent to entertain the complainant's arguments as derived from the MOU, the UNCCD or the COP's decisions, as these are outside the scope of Article II, paragraph 5, of the Tribunal's Statute. According to the Fund, the Tribunal, in reaching its conclusions, examined the internal decision-making process established by the Convention, even though neither the COP nor any other organ or agent of the Convention is subject to the Tribunal's jurisdiction. Thus, for the Fund, the Tribunal treated the dispute as one concerning the interpretation and application of the MOU and the COP's decisions, instead of as a dispute concerning the interpretation and application of the staff regulations and rules of the defendant Organization. In IFAD's view, given that the Tribunal chose this treatment, it was not justified in confirming its jurisdiction and therefore its decision is invalid.

86. 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.

87. 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. The JAB unanimously found that:

> "the Managing Director's decision not to renew the Appellant's fixed-term contract was beyond his authority and contrary to the rules and spirit of the HRPM. In addition, no evidence was presented or found to support the Respondent's claim that the decision was made in consultation with IFAD's Management, specifically the President who is ultimately responsible for the GM." (JAB, Recommendations, para. 31.)

In the notice of non-renewal of Ms Saez García's contract dated 15 December 2005, the Managing Director of the Global Mechanism informed her that due to the decrease in the core budget of the Global Mechanism, it was decided to abolish the post of Programme Manager for the Global Mechanism's regional desk for Latin America and the Caribbean, which she had hitherto occupied. Ms Saez García challenged, among other things, the decision of the Managing Director, in her complaint to the Tribunal, and alleged 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".

88. 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. The letter of appointment of the Managing Director of the Global Mechanism, which was signed by the President of the Fund on 13 January 2005, provides that the Managing Director was offered "a fixed-term appointment for a period of two years with the International Fund for Agricultural Development (IFAD)". In this capacity he was to be "directly responsible to the President of IFAD". His appointment was "governed by the general provisions of the IFAD Personnel Policies Manual . . . together with the provisions of the Human Resources Handbook". The Managing Director was appointed at the D-2 level and provided with a copy of IFAD's Information Circular IC/PE/03/11, which described the various components of salaries, allowances and other benefits "to which IFAD staff members in the professional category and above are entitled". In addition, the Managing Director was required to participate in the Fund's medical insurance schemes. Moreover, the report of the JAB concerning the appeal of Ms Saez García, while showing the Managing Director as the respondent, indicates that he acted as such on behalf of IFAD, following designation by the IFAD President. Thus, the record before the Court clearly indicates that the Managing Director of the Global Mechanism, in his capacity as an IFAD official, acted on behalf of IFAD at the time the decision was taken not to renew the fixed-term contract of Ms Saez García.

89. Secondly, the allegation by Ms Saez García in her complaint to the Tribunal, according to which the non-renewal of her appointment was not based on valid reasons, or that it suffered from other substantive or procedural flaws, 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. As was emphasized by the Court in its 1956 Advisory Opinion:

> "there is a relationship, a legal relationship, between the renewal and the original appointment and, consequently, between the renewal and the legal position of an official at the moment when his claim to renewal is granted or denied . . . Thus the complainant, in claiming to possess a right to renewal of his contract and in claiming that that right had been infringed, was placing himself on the ground of non-observance of the terms of appointment." (*I.C.J. Reports 1956*, p. 94.)

90. 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 PPM 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 (see paragraph 49 above), could be impugned before the Tribunal in accordance with Article II, paragraph 5, of its Statute. In this connection, the Court observes that Ms Saez García alleged violations of the HRPM before the Tribunal, notably violations of Sections 1.21.1 and 11.3.9 *(b)* (Judgment No. 2867, p. 4, para. B). Moreover, the fact that the President of IFAD stated, in his memorandum rejecting the JAB recommendations, that the non-renewal of her contract "was in accordance with the Human Resources Procedures Manual (HRPM), section 1.21.1" is further evidence of the link between her complaint to the Tribunal and the staff regulations and rules of the Fund.

91. 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.

92. 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 in reaching its key decisions, as those matters are outside the scope of Article II, paragraph 5, of its Statute, the Court notes that the Tribunal first examined the MOU, as a preliminary question regarding its jurisdiction in the context of the arguments of the parties, and in connection with the extent to which it could legally review the decision of the Managing Director of the Global Mechanism. In this context, the Tribunal stated that the arguments of the Parties "[went] to the powers and jurisdiction of the

Tribunal and, on that account, must be dealt with even though raised for the first time in [the] proceedings [before the Tribunal]" (Judgment No. 2867, p. 9, para. 1). The Tribunal then analysed various provisions of the MOU, in particular paragraphs 4 and 6 of Section III A, which deal with the accountability of the Global Mechanism and its Managing Director to the COP.

93. The Court accepts that these matters are not directly related to the provisions of the staff regulations and rules of IFAD, the alleged non-observance of which confers jurisdiction on the Tribunal to hear complaints from the Fund's staff members. The Court, however, recognizes their relevance for the Tribunal's determination of its own jurisdiction in a case in which the complainant's status as a staff member of the Fund was contested by the Fund itself on the basis of the arrangements made between the COP and IFAD. In this context, the Court recalls that the Fund, in its written submissions to the Tribunal in response to the complaint filed by Ms Saez García, contended that the Fund and the Global Mechanism were separate legal entities, and that the acts of the Global Mechanism or those of its Managing Director were not attributable to IFAD. Moreover, the Fund challenged the competence of the Tribunal to review alleged flaws in the decision-making of the Global Mechanism and its Managing Director, since neither the COP nor the Global Mechanism had accepted the jurisdiction of the ILOAT. In these circumstances, the Court is of the opinion that the Tribunal could not avoid determining whether it had jurisdiction to hear the complaint, and 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.

94. In light of the above, it is not necessary for the Court to give detailed consideration to the arguments put forward by the Fund, in its submissions to the Tribunal and to the Court, that the Tribunal lacked jurisdiction to entertain the complaint because the Fund and the Global Mechanism were separate legal entities, and the latter had never accepted the jurisdiction of the Tribunal. Even if, contrary to the observation that the Court has made in paragraph 61 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 the contractual documents examined and the provisions of the IFAD staff regulations and rules.

95. 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

96. 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 from the Court. In addition to the issues of jurisdiction, two sets of other issues are raised in these questions. First, Questions II to VIII are framed in such a manner as to seek the opinion of the Court on the reasoning underlying the conclusions reached by the Tribunal either on its jurisdiction or on the merits of the complaint brought before it. Secondly, they contain references to the possible existence of a fundamental fault in the procedure followed by the Tribunal. The Court will briefly address these two sets of issues.

97. 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 seeking review of a judgment of the Tribunal is limited to cases where a decision of the Tribunal confirming its jurisdiction is challenged or where a fundamental fault in the procedure is alleged (see paragraph 29 above). 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).

98. Regarding the "fundamental fault in the procedure followed", 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 in paragraphs 30 to 31 above.

Questions II to VIII of IFAD 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. Neither the information made available to the Court by the Fund, nor an analysis of the judgment of the Tribunal, demonstrate a fundamental fault in its procedure. 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

99. 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 the procedure committed by the Tribunal, finds that the decision given by the ILOAT in its Judgment No. 2867 is valid.

*

* *

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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this first day of February, two thousand and twelve, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Secretary-General of the United Nations and the President of the International Fund for Agricultural Development, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

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.

(Initialled) H. O.

(Initialled) Ph. C.