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**Appeal of judgment No. 2867 of the  
International Labour Organization  
Administrative Tribunal to the  
International Court of Justice**

Executive Board — Ninety-ninth Session  
Rome, 21-22 April 2010

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For: **Approval**

## **Note to Executive Board members**

This document is submitted for approval of the Executive Board.

To make the best use of time available at Executive Board sessions, representatives are invited to contact the following focal point with any technical questions about this document before the session:

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## **Recommendation for approval**

The Executive Board is requested to adopt the attached resolution submitting the question regarding the validity of ILOAT judgment No. 2867 to the International Court of Justice for an advisory opinion.



## Appeal of judgment No. 2867 of the International Labour Organization Administrative Tribunal to the International Court of Justice

1. IFAD has hosted the Global Mechanism (GM) of the United Nations Convention to Combat Desertification (UNCCD) since 2000. The arrangements governing the hosting of the GM are set out in a memorandum of understanding between IFAD and the UNCCD Conference of the Parties (COP) signed on 26 November 1999. IFAD considers the GM to be an organ of the UNCCD, which it hosts; it is not part of IFAD and GM staff are not IFAD employees.
2. A complaint was filed against IFAD before the International Labour Organization Administrative Tribunal (ILOAT) on 8 July 2008 by Ms A.T.S.G., a former GM staff member. In its judgment No. 2867, delivered on 3 February 2010, the ILOAT ruled in favour of Ms A.T.S.G. and ordered IFAD to pay damages to her which could exceed US\$450,000.
3. The General Counsel has carefully reviewed the decision of the ILOAT, and submits that the decision of the ILOAT is incorrect and that if it is allowed to stand, the relationship between IFAD and its hosted entities will be irreparably harmed.
4. The ILOAT decided that “the personnel of the Global Mechanism are staff members of the Fund” (Considerations, paragraph 11) and that the decision not to renew the contract of Ms A.T.S.G. was made without proper authority. In reaching these conclusions, which IFAD strongly disputes, the ILOAT examined the internal decision-making process of the UNCCD, which is not subject to the ILOAT’s jurisdiction. For these reasons, the General Counsel believes that the decision of the ILOAT exceeded its jurisdiction and authority.
5. Furthermore, the Office of the General Counsel has requested an external expert legal opinion from Dr Pieter Bekker on the validity of the ILOAT ruling in judgment No. 2867. Dr Bekker has been a member of the adjunct faculty at Columbia Law School in New York City since 2007. He is also a partner and Head of Public International Law at the law firm Crowell & Moring LLP in New York. Dr Bekker served as a staff lawyer in the Registry of the International Court of Justice (ICJ) in The Hague between 1992 and 1994, during which time he was involved in some 15 ICJ cases.
6. Dr Bekker’s expertise lies in the fields of public international law, international dispute resolution, international courts and tribunals, as well as the United Nations and its specialized agencies. He has lectured and written extensively on the law and practice of the ICJ, including its advisory jurisdiction. Dr Bekker has published two books on the ICJ: *World Court Decisions at the Turn of the Millennium (1997-2001)*<sup>1</sup> and *Commentaries on World Court Decisions (1987-1996)*.<sup>2</sup>
7. In his legal opinion, Dr Bekker corroborates the position taken by the General Counsel and stresses the fact that there was no dispute between the Fund and Ms A.T.S.G. in the case before the ILOAT regarding the key issue of the separateness between IFAD and the GM, nor the fact that Ms A.T.S.G. was a member of the staff of the Global Mechanism. Consequently, 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

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<sup>1</sup> (2002) Kluwer Law International

<sup>2</sup> (1998) Kluwer Law International

Mechanism are, in law, decisions of the Fund" lay outside the jurisdiction of the ILOAT and constitutes a fundamental fault in the procedure followed by the ILOAT.

8. The Statute of the ILOAT (annex, article XII) provides as follows:
  - "1. In any case in which the Executive Board of an international organization ... challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.
  2. The opinion given by the Court shall be binding."
9. The General Counsel is of the opinion that allowing this decision to stand poses a serious risk to IFAD's ability to manage its relationship with its hosted entities, and that IFAD should therefore take advantage of the procedure set out above and request an advisory opinion from the International Court of Justice. If IFAD does not do so, the organization will be exposed to significant liability in relation to the administrative decisions taken by the hosted entities in relation to their staff. Indeed, if IFAD does not challenge the decision it may well be forced to reconsider entirely the concept of hosting other organizations and entities. The ILOAT decision could also affect other international organizations that act as host agencies, and thus call into question many successful hosting arrangements.
10. In this respect, Dr Bekker has confirmed in his legal opinion that it is advisable for IFAD's Executive Board to challenge the ILOAT's judgment No. 2867 before the ICJ. In addition, Dr Bekker has drafted the questions that should be addressed to the ICJ, should the challenge be made. These questions are reproduced in the attached resolution.
11. The Executive Board is therefore requested to adopt the attached resolution submitting the question regarding the validity of ILOAT judgment No. 2867 to the International Court of Justice for an advisory opinion.

## **Draft resolution on the request by the Executive Board to the International Court of Justice for an advisory opinion with respect to judgment No. 2867 of the International Labour Organization Administrative Tribunal**

The Executive Board,

**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 of the Statute of the Administrative Tribunal of the International Labour Organization provides as follows:

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

2. The opinion given by the Court shall be binding.”

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

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

- I. Was the ILOAT competent, under article II of its Statute, to hear the complaint introduced against the International Fund for Agricultural Development (hereby the Fund) on 8 July 2008 by Ms A.T.S.G., an individual who was a member of the staff of the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (hereby the Convention) for which the Fund acts merely as housing organization?
- II. Given that the record shows that the parties to the dispute underlying the ILOAT's judgment No. 2867 were in agreement that the Fund and the Global Mechanism are separate legal entities and that the complainant was a member of the staff of the Global Mechanism, and considering all the relevant documents, rules and principles, was the ILOAT's statement, made in support of its decision confirming its jurisdiction, that “the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes” and that the “effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund” outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?
- III. Was the ILOAT's general statement, made in support of its decision confirming its jurisdiction, that “the personnel of the Global Mechanism are staff members of the Fund” outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?
- IV. Was the ILOAT's decision confirming its jurisdiction to entertain the complainant's plea alleging an abuse of authority by the Global Mechanism's Managing Director outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

- V. Was the ILOAT's decision confirming its jurisdiction to entertain the complainant's plea that the Managing Director's decision not to renew the complainant's contract constituted an error of law outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?
- VI. Was the ILOAT's decision confirming its jurisdiction to interpret the memorandum of understanding between the Conference of the Parties to the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa and IFAD (hereby the MoU), the Convention, and the Agreement Establishing IFAD beyond its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?
- VII. Was the ILOAT's decision confirming its jurisdiction to determine that by discharging an intermediary and supporting role under the MoU, the President was acting on behalf of IFAD outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?
- VIII. Was the ILOAT's decision confirming its jurisdiction to substitute the discretionary decision of the Managing Director of the Global Mechanism with its own outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?
- IX. What is the validity of the decision given by the ILOAT in its judgment No. 2867?



