

Document: EC 2010/64/W.P.2/Add.1
Agenda: 3
Date: 06 October 2010
Distribution: Public
Original: English

E



Enabling poor rural people
to overcome poverty

Legal Issues Raised in the Report of the Peer Review of IFAD's Office of Evaluation and Evaluation Function

Note to Evaluation Committee members

Focal points:

Technical questions:

Rutsel Martha
General Counsel
Tel.: +39 06 5459 2457
e-mail: r.martha@ifad.org

Dispatch of documentation:

Liam F. Chicca
Governing Bodies Officer
Tel.: +39 06 5459 2462
e-mail: l.chicca@ifad.org

Evaluation Committee — Sixty-fourth Session
Rome, 8 October 2010

For: **Information**

1. Introduction

1. According to Section 5(c) of Article 6 of the Agreement Establishing the International Fund for Agricultural Development (IFAD) ("Agreement") the Executive Board is responsible for the conduct of the general operations of the Fund. This responsibility includes assessing the development effectiveness of the Fund's financing. Accordingly, further to Governing Council Resolution 130/XXVI (2003) and in line with the powers outlined above, the Board developed the Fund's evaluation function that is currently embodied in its Evaluation Policy.¹
2. Upon the request of the Executive Board a peer review was undertaken of the aforementioned evaluation function and at its Ninety-Ninth session (21-22, April 2010) the Executive Board endorsed Recommendation No. 1 of the Peer Review of IFAD's Office of Evaluation and Evaluation Function², which states:

"The Executive Board reaffirms its commitment to the principles of IFAD's independent evaluation function and asks the General Counsel to prepare a paper for its consideration that identifies options for the necessary changes to resolve any possible legal incompatibilities between the Evaluation Policy and the Agreement Establishing IFAD in a way that fully respects the wishes of the shareholders for an independent evaluation function, as expressed under the Sixth Replenishment."

3. The present paper is prepared in response of the foregoing decision. Its **main conclusions and recommendations** are as follows:
 - (i) **Independence:** The desired independence of the OE can be achieved in essentially two different ways: a) outsourcing to external independent agencies, and b) establishing an internal autonomous unit. The first option requires the least interventions, the second requires more elaborate engineering to ensure respect for the institutional set up of the Fund. **The difficulties of the second option could be overcome by following the same approach as when the Executive Board established the IFAD Staff Credit Union³;**
 - (ii) **Hierarchy:** The Governing Council endorsed the recommendation to establish an internal autonomous unit without amending the Agreement or any of the other basic documents. Therefore, the Evaluation Policy should be developed, interpreted and applied in a way that is consistent with the instruments that rank above it;
 - (iii) **Reconciling inconsistencies:** Now that the Governing Council has opted for an internal autonomous evaluation function, current paragraph 50 of the Lending Policies and Criteria, which envisages outsourcing to external independent agencies, should give way to the later choice for an internal autonomous evaluation unit. The Governing Council should be asked to amend the Lending Policies and Criteria accordingly;
 - (iv) **Completing incomplete decisions:** Since the Governing Council decided that the financial resources for the evaluation function should be distinguishable, and unless the model of the Staff Credit Union is followed, the Governing Council should be asked to amend the Financial Regulations in order to reflect the wish to create a category for the OE in the administrative budget;
 - (v) **Audit:** The proposal to give a veto power to the chair of the Audit Committee over special internal audits of the OE or to prescribe external

¹ Office of Evaluation, IFAD Evaluation Policy, (EB 2003/78/R.17/Rev. 1), April 2003.

² EB 2010/99/R.6 + Add.1 + Add.2 + Add.3

³ It is to be noted that this approach would involve the risks and weaknesses pointed out in the General Counsel's opinion to the President on the prudential and integrity supervision of the IFAD Staff Credit Union.

audit in lieu of internal audit by the Office of Audit and Oversight would not fit in the set up for internal and external auditing envisaged by the Agreement and its implementation in the By-Laws for the Conduct of the Business of IFAD and in the Financial Regulations;

- (vi) **The Director OE:** It is possible under the Agreement that the Director OE is appointed by the Executive Board without involvement of the President. In that case the Director will not have the status of a staff member of the Fund and the Executive Board will have to establish the terms and conditions of her or his employment. As in the case of the Asian Development Bank, the Executive Board could declare the IFAD staff rules and policies applicable *mutatis mutandis*;
- (vii) **Personnel of the OE:** Inherent in the decision of the Governing Council that the evaluation function should be independent is the obligation of the President to take all the necessary measures required in the independent performance of the evaluation. This includes ensuring that it is timely provided the number of qualified staff deemed necessary by the Director OE;

2. Independence

4. As a preliminary matter and in order to avoid any misunderstanding about the present opinion, it is deemed appropriate to consider the various ways the term "independent" can be given effect in structuring the evaluation function in the Fund. The degree of legal, institutional and administrative engineering that will be necessary greatly depends on the model that is chosen. Broadly speaking there are two models, of which one can be divided in two sub-models.
 - (i) Outsourcing of the evaluation function: external audit analogy
5. The model with the least legal, institutional and administrative impact, while at the same time ensuring full and uncompromised independence is outsourcing. Under this model, evaluation would be trusted to an outside entity that is contracted upon selection by the Executive Board. The terms of reference for such an external agency could be set forth in the Evaluation Policy.
6. This model is currently followed with regard to the external audit function. According to Section 9 of the By-Laws for the Conduct of the Business of IFAD, Financial Regulation XI.1 and the delegation decision in Governing Council Resolution 77/II, the accounts of the Fund shall be audited at least once a year by a qualified and independent external auditor appointed by the Executive Board.
7. It might come as a surprise that since 1978 the Lending Policies and Criteria adopted by the Governing Council envisage a comparable system for the evaluation of the Fund's completed projects.
 - (ii) Paragraph 50 of the Lending Policies and Criteria.
8. Before explaining this statement it is necessary to recall that the responsibility of the Executive Board for the evaluation of the Fund's completed projects derives from Article 6, Section 5 (c) of the Agreement, which states that "[T]he Executive Board shall be responsible for the conduct of the general operations of the Fund, and for this purpose shall exercise the powers given to it by this Agreement or delegated to it by the Governing Council."
9. This provision bestows upon the Executive Board the responsibility to ensure that the resources of the organization are used in accordance with the Agreement and that the Fund's operations achieve the highest possible development

effectiveness. By implication this means, not only *ex-ante* assurances regarding the project and programme design and implementation capacity, but also *ex post* assessment of the relevance, efficacy, efficiency of the Fund's operational programs and activities, and their contribution to agricultural and rural development. Whilst the Agreement itself is largely silent on how the Board should go about discharging this responsibility, except with some aspects of project preparation, the Governing Council has established the guidelines for both the *ex-ante* assurance and the *ex-post* assessment of the Fund's operations.

10. As far as concerns the evaluation of the Fund's completed projects, the Governing Council prescribes in paragraph 50 of the Lending Policies and Criteria adopted by Resolution 78/II (1978) that:

"IFAD will, from time to time, ask independent agencies to evaluate its completed projects. Such evaluation will normally be the responsibility of an institution in the recipient country".

11. In other words, by this provision the Governing Council requires that the evaluation of the Fund's projects is done 1) after completion, 2) by independent agencies, and 3) normally such evaluation shall be the responsibility of an institution of the recipient country.

12. Paragraph 50 still exists in Lending Policies and Criteria, which means that theoretically if the Executive Board so wishes it could opt to effectuate the independent evaluation function by appointing an external agency to perform this function in accordance with the policy and guidelines adopted by the Executive Board.

b. Internal independent evaluation

13. If it is opted instead for an internal independent evaluation, the degree of legal, institutional and administrative engineering that is required increases significantly, because in that model "independence" does not mean that the set up and operation is divorced from Fund's rules, policies and procedures. This will differ again depending on the sub-model one chooses. For the sake of simplification these sub-models are labelled "aggregated" and "disaggregated" models. These terms are used here to distinguish international organizations where each body has its own financial, administrative and human resources ("disaggregated model") and those where the various bodies are served by one secretariat headed by the chief executive ("aggregated model"). The European Union is typical example of an organization that adheres to the "disaggregated model". This is enshrined in the basic documents of that organization and conflicts that might arise between the institutions are arbitrated by the European Court of Justice. Most global organizations on the other hand, including the Fund, and regional organizations, are structured along the lines of the "aggregated model".

(i) Aggregated model: internal audit model

14. In the aggregated model, it is incumbent upon the chief executive to ensure that the Executive Board, and for that matter any governing or controlling body, is provided with honest, objective and complete information needed to enable proper discharge of its functions. Actually, this is the approach adopted in the Agreement, which envisages that such support is provided by the staff of the Organization, unless it is decided to assign the support to an external entity. Accordingly, unless the support is externalized, the President of the Fund is mandated to appoint and manage such staff and conduct the business of the Fund under the control and direction of the Governing Council and the Executive Board.

The direction and control of the Governing Council and the Executive Board may include the requirement for the President to establish an evaluation unit that is autonomous and operate independent from the programming unit. Such directive already exists under the Financial Regulations in respect of the internal audit function. The most recent version of the corresponding arrangement was reviewed by the Executive Board at its Ninety-Ninth session⁴.

15. As was noted above, notwithstanding paragraph 50 of Lending Policies and Criteria, the evaluation of IFAD's completed projects follows the internalized aggregated model. Rather than engaging independent agencies to evaluate the completed projects, management established a Monitoring and Evaluation Division that reported to the Assistant President, Economic Policy Department, who had no direct operational responsibility. This arrangement was changed in 1994 when the rapid external assessment of the Fund⁵, undertaken during the negotiation of the Fourth Replenishment of IFAD's resources, concluded that strengthening of the evaluation function required "upgrading of the evaluation function, as well as more staff. It required direct reporting to the President of the Fund and to the Board." A number of these recommendations, including direct reporting to the President, were implemented in October 1994, and OE was created as an evaluation office independent from operations. In this sense, this model broadly mirrored the system in place for internal audit and control.
 - (ii) Fitting a disaggregated model in an aggregated structure
16. In the disaggregated model evaluation is structured in a parallel way leading directly to the Executive Board. Ideally such a parallel structure is given its own legal basis and instructional set up in the basic document. In that case the degree of legal, institutional and administrative engineering required is minimal⁶.
17. The situation is completely different when it is opted for a disaggregated model within an essentially aggregated structure. As evidenced by the findings and recommendations of the Panel, this implies significant legal, institutional and administrative engineering.
18. It can safely be said that this is what the Governing Council chose for when in 2003, upon recommendation of the Consultation for the Sixth Replenishment, by Resolution 130/XXVI (2003) it endorsed the report contained in Document GC 26/L.4, titled "Enabling the Rural Poor to Overcome their Poverty: Report of the Consultation on the Sixth Replenishment of IFAD's Resources (2004-2006)".
19. The Consultation's recommendation resulted from its discussion of a paper presented by management on strengthening the effectiveness of the evaluation function at IFAD in the light of international experience. The paper was in response to a proposal made by a Member State that the Office of Evaluation and Studies (OE) report directly to the Executive Board, independently of management. It is to be noted that neither in the paper nor in the discussions during the Consultation meetings any reference was made to paragraph 50 of the said Lending Policies and Criteria.

⁴ See: EB 2010/99/R.49/Rev.1

⁵ "Report of the Rapid External Assessment of the International Fund for Agricultural Development", IFAD, Rome, July 1994

⁶ E.g. the European Court of Audit. The Court performs its audits within an inter-institutional framework laid down mainly by: the Treaty on the Functioning of the European Union, Articles 310 to 325 of which contain financial provisions governing the Union's revenue and expenditure, Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

20. Accordingly, the subsequent endorsement of the relevant recommendation by the Governing Council and the adoption of the Evaluation Policy at the Seventy-Eighth Session of the Executive Board in April 2003⁷ took place without any consideration of the aforementioned provision of the Lending Policies and Criteria. More importantly, no changes to the Agreement were proposed nor decided by the Governing Council.

(iii) Disaggregated model: Staff Credit Union analogy

21. Hence, achieving the desired independent evaluation function within the existing institutional set up is the challenge placed before the Executive Board. This task, challenging as it may be, is not impossible to accomplish. It requires open consideration of the issues and careful calibration of the choices.
22. One clean cut way of achieving this is by applying the same technique that was employed when the Executive Board established the IFAD Staff Credit Union. The Credit Union was established at the Forty Sixth session of IFAD's Executive Board in September 1992, with the purpose of encouraging thrift by providing a convenient means of saving and of providing credit for emergency needs and for the general benefits of its members. It was constituted within the framework of IFAD and must be regarded as a body created by the Executive Board. It is, however, separate from the rest of IFAD, with a different administration and budget, ruled by its own statutes issued by the Executive Board.
23. As shown in the brief summary below about the Credit Union, this approach would create the same degree of independence as in case full externalization and thus overcome all the concerns expressed by the Panel while at the same provide the adequate setting for optimizing the learning loop.
24. The Credit Union was formally established at the Forty-Sixth session of the Executive Board of IFAD in September 1992. Pursuant to Sections 1.01 and 5.01, respectively, of the Statutes of the Credit Union approved by the IFAD Executive Board at the same Session, the Credit Union shall be within the framework of IFAD and shall be operated by the Board of Directors (BoD) in accordance with the Statutes. IFAD explicitly recognises the Credit Union as being within the framework of IFAD itself, and the provisions of Articles IX (Freedom from Taxation), X (Financial Facilities) and XV (Officials of the Fund) of the Headquarters Agreement between the Italian Republic and IFAD apply, *mutatis mutandis*, to the operation of the Credit Union (Section 1.02 of the Statutes).
25. The meaning of the expression "IFAD recognises the Credit Union as being within the framework of IFAD" calls for further elaboration to clarify the legal status of the Credit Union.
26. Whilst established by an organ of an international organisation (IFAD's Executive Board) the Credit Union cannot be deemed to be an international organisation in its own right. Indeed, the Credit Union is not capable of independently bearing rights and obligations under international law, as it cannot enter into international agreements, send/receive legations, and/or bring/receive international claims.

⁷ The Executive Board opted for a special arrangement and decided on the establishment of the Office of Evaluation (hereby called "the OE") of the Fund to facilitate achievement of its evaluation objectives. After April 2003 the Executive Board required that the OE be independent from the Management of the Fund: OE now reports directly to the Executive Board. The OE is mandated by the Board to evaluate the Fund's operations, policies, projects, programmes and strategies based on a coherent set of evaluation methodologies to assess; what works and what doesn't, to identify key insights and recommendations and to facilitate learning, efficiency and ultimately to achieve the Fund's strategy agricultural development in its Development Member States.

27. It may be held that in the absence of express prohibitions to create subsidiary organs, existing organs of international organisations, including the Executive Board, must be deemed allowed to create sub-organs, or subsidiary organs such as the Credit Union within the limits set by their constituent documents. In international law, such limits are flexible and, when acting in good faith, the creation of subsidiary organs will normally go unchallenged⁸. Indeed, where it is challenged by a majority of the organisation's members, the subsidiary organ will simply not be created. IFAD's Executive Board endorsed the establishment of the Credit Union it being known that initial support would have to be provided thereto. Such support was approved by the IFAD Executive Board at its Forty-Sixth Session in September 1992 and at its Forty-Seventh Session in December 1992 (item a below), as follows:
- The extension of a line of credit of up to USD 6 400 000 to the Credit Union, whereby IFAD would place deposits with the Credit Union at market rates in order to provide the Credit Union with adequate liquidity to support its lending to members. In this regard, it is noted that the Credit Union availed of this facility once only, on 1 July 1994, when it drew the amount of US\$ 100 000 which was fully paid back, together with interest, on 30 September 1994;
 - A (one-off) grant of up to USD 50 000 to cover the cost of office equipment, software and publications, during the first year of the Credit Union's operations;
 - Permission for IFAD Staff members to perform investment functions and other duties for the Credit Union during normal working hours; and,
 - Funding for the recruitment and employment, upon UN Common System terms and conditions, of a Credit Union Manager for an initial period of three years. (Reduced) funding to cover 33% of the Credit Union Manager's salary and benefits in the financial years 1997 and 1998 was approved by the IFAD Executive Board at its Fifty-Eighth Session in September 1996. Thereafter, no additional funding for this purpose was provided by IFAD.
28. It would also appear that IFAD expected its subsidiary organ to operate independently and in full autonomy therefrom. Indeed, pursuant to Section 5.02 (b) of the Statutes, "IFAD shall neither be liable for any financial losses of the Credit Union nor shall it be held responsible for any action of the Credit Union".
29. Such exclusion of liability/responsibility by IFAD would suggest that in the absence of any other third party being accountable for the operations of the Credit Union, the Credit Union itself would be held fully responsible for its actions/omissions versus its own members. The position different when it comes to the outside world. Indeed, whilst hypothetically, entities can possess legal personality under any legal system, dependent on whether they meet the requirements which that legal system posits for acceptance of the entity's personality, the Credit Union does not benefit from legal personality under any system, be it of domestic or international law. Externally it is a limb of the Fund.
30. It follows that the Credit Union does not have its own juridical personality, i.e. the capacity, for instance, to contract, acquire and dispose of movable and immovable property, or be a party to judicial proceedings in its own right. Indeed, the Credit Union does not have a "legal representative" and, we understand, it has never entered into contracts with third parties (with the exception, however, of contracts for the Credit Union external auditors).

⁸ This power of international organizations was used to establish such celebrate bodies as the administrative tribunals at the World Bank, IMF (Joseph Gold, *Interpretation: The IMF and International Law* – Kluwer Law International, 1996, p 285), the regional banks and at the UN. The same power was used to create the International Criminal Tribunal for Former Yugoslavia. See: Dan Sarooshi, *The Legal Framework Governing United Nations Subsidiary Organs*, LXVII British Yearbook of International Law (1997), pp. 413 - 478

31. Thus it can be concluded that as the Credit Union was established within the framework of the Fund, the status, privileges and immunities recognised to IFAD pursuant to Article 10 of the Agreement Establishing IFAD, would extend to cover the Credit Union as one of the subsidiary organs established by the Fund.

3. Hierarchy of norms in the Fund

32. The foregoing finding makes it necessary to dispel at the outset a misunderstanding that appears in paragraph 17 of the Report. The following is stated there:

“The Panel is of the view that the legal framework should support the organizational and managerial structure that is seen by shareholders as best suited to achieving IFAD’s goals. The Sixth Replenishment Resolution, which included a commitment to establish an independent office of evaluation, was adopted by all IFAD member states at the February 2003 Governing Council. The Governing Council is IFAD’s supreme governing body, which has in the past made amendments to the Agreement. Replenishment resolutions are generally viewed as binding commitments on the institution in return for financial support. Legal arguments should not be used to undermine the legitimacy of the Evaluation Policy or to change its application unilaterally without reference to the Executive Board, thus risking a violation of the shareholder’s intentions when they decided on the Sixth Replenishment. Rather than appearing to undermine the legitimacy of a key provision in the Evaluation Policy, the better approach would be to make the necessary changes in policies, administrative regulations and, if necessary, the Agreement to make them consistent with the wishes of shareholders as expressed in the Sixth Replenishment.”

33. If what is implied by the Panel is that the Evaluation Policy should be interpreted without consideration of the superior basic texts, including the Agreement Establishing IFAD that is not a correct proposition. It is important to repeat that when the Governing Council endorsed the recommendation it did not amend either the Agreement or any of the other basic documents, namely, the By-Laws for the Conduct of the Business of IFAD, the Financial Regulations of IFAD, and the Lending Policies and Criteria. As a matter of fact, although the Governing Council is the supreme organ of the organization, the Agreement clearly establishes that in its decision making, the Governing Council must observe the Agreement⁹. Thus in Article 6, Section 2(f) of the Agreement it is clearly stated that “the Governing Council may, by a two-thirds majority of the total number of votes, adopt such regulations and by-laws not inconsistent with this Agreement as may be appropriate to conduct the business of the Fund”. This principle is recognized by the Governing Council itself in the introductory provision of the By-Laws for the Conduct of the Business of IFAD:

“These By-laws, adopted pursuant to Article 6.2(f) of the Agreement, are intended to be complementary to the Agreement and shall be construed accordingly. In the event of a conflict between the provisions of these By-laws and the Agreement, the provisions of the Agreement shall prevail. In the event of a conflict between these By-laws and any rules and regulations adopted pursuant to the Agreement, the By-laws shall prevail.”

⁹ An expression thereof can be found in

34. Similarly, in Regulation I of the Financial Regulations of IFAD, the Governing Council states:
- “These regulations shall govern the financial administration of the Fund and shall be interpreted in accordance with the Agreement.”
35. As is stated in the second sentence of Section 7 of the By-Laws for the Conduct of the Business of IFAD, the same principle applies as well for the Executive Board:
- “The Board shall not take any action pursuant to powers delegated to it by the Council that is inconsistent with any decision of the Council.”
36. As far as concerns the decisions and directives of the President, Article 6, Section 8(d) of the Agreement provides that:
- “The President shall head the staff and, under the control and direction of the Governing Council and the Executive Board, shall be responsible for conducting the business of the Fund. The President shall organize the staff and shall appoint and dismiss members of the staff in accordance with regulations adopted by the Executive Board.”
37. The foregoing establish the following hierarchy:
- (i) The provisions of the Agreement are paramount.
 - (ii) The decisions of the Governing Council must be consistent with, and construed according to, the Agreement.
 - (iii) The decisions of the Executive Board must be consistent with both the Agreement and the actions of the Governing Council¹⁰.
 - (iv) The actions, decisions and directives of the President must be consistent with all these other norms.
38. Consequently, having regard to the fact that that when the Governing Council endorsed the recommendation it did not amend either the Agreement or any of the other basic documents, established principles of international institutional law¹¹ dictate that the Evaluation Policy should be developed, interpreted and applied in a way that is consistent with the instruments that rank above it in the legal order created by the Agreement.
39. Applied to **Recommendation 1** of the Peer Review Panel, the foregoing implies that since the Sixth Replenishment Consultation – unlike at previous and later occasions – did not recommend any amendment of the Agreement and other basic documents nor has the Governing Council introduced any such amendment, when adopting the Evaluation Policy the Executive Board must ensure the compatibility of that policy with the Agreement and the other basic documents. However, as will become clear there are some areas where it is nevertheless advisable to amend some basic documents to more accurately reflect the intentions of the Governing Council with regard to the function of evaluation.
4. **Reconciling (ostensive) conflicting directives of the Governing Council**
40. Although the classes of norms/decisions mentioned above constitute a hierarchy, individual norms within a class cannot be ranked in that way. For this reason it is important that when decisions are adopted care is taken to ensure that the new

¹⁰ See also Article 7, Section 2(d) of the Agreement prescribes: “Decisions with regard to the selection and approval of projects and programmes shall be made by the Executive Board. Such decisions shall be made on the basis of the broad policies, criteria and regulations established by the Governing Council.”

¹¹

decision does not contradict a previous decision of the same body. Where it is the intention to depart from a previous decision of the same body, it is advisable to expressly repeal the previous one. This problem presents itself with regard to the very issue of evaluation in the Fund.

41. As mentioned before, by virtue of the absence of any consideration of paragraph 50 of the Lending Policies and Criteria when the recommendation regarding evaluation was endorsed by the Governing Council in 2003, it must be recognized that currently there exist two directives of the of the Governing Council dealing with the same matter in two different ways. Nevertheless, based on the long practice, it would appear that the idea of evaluation by an independent office of the organization itself is now the preferred method. This can be derived from the Sixth Replenishment Consultation Report where it is noted that many Consultation members expressed support for the proposal contained in the paper. It consists of a two-pronged approach to balance the need for enhancing independence with the requirement of improving the evaluation learning loop. Accordingly, if this is a correct understanding, even though paragraph 50 of Lending Policies and Criteria would ensure full independence from management if it were implemented, it would seem advisable to bring the Lending Policies and criteria in line with the 2003 decision on this point. Paragraph 50 of the Lending policies and Criteria could be replaced with a text along the following lines:

"The Executive Board shall adopt an Evaluation Policy and arrange for independent evaluation of projects and programmes financed by the Fund".

42. This language is suitable to also accommodate the Credit Union model if it is decided to follow that approach.

5. Completing incomplete decisions

43. Whilst it is true that the fact that when the Governing Council endorsed the recommendation it did not amend either the Agreement or any of the other basic documents creates the presumption that no change was intended, it is clear that with regard to certain aspects, such change should have been contemplated. Any new decision of a governing body may imply consequences for existing regulations. Careful decision making requires that the consequences of such new decisions are properly reflected in all the relevant basic documents. This is the case with regard to the budget of the Office of Evaluation.

(i) Preparation and approval of the budget.

44. According to Article 6, Section 10 of the Agreement the responsibility for the preparation of the budget rests with the President: "The President shall prepare an annual administrative budget which he shall submit to the Executive Board for transmission to the Governing Council for approval by a two-thirds majority of the total number of votes". This is repeated in Financial Regulation VI.1.

45. It is clear from these provisions that the President is responsible to prepare and present a single budget to the Executive Board for transmittal by the latter to the Governing Council's for approval. These provisions have never been amended. Nevertheless, the endorsement of the recommendation of the Consultation for the Sixth Replenishment the Governing Council concerning the evaluation function has been understood to mean that a separate budget for the Office of Evaluation needed to be developed. It must be recognized however, that the Consultation report does not contain an express statement in that regard. It is, however possible to read that in the sentence in paragraph 90 of the report that speaks of "degree of independence required to strengthen the evaluation function".

Admittedly, the paper presented by management to the Consultation contained more details views on this matter, but that paper was not part of the report and was not as such endorsed by the Governing Council. The draft Evaluation Policy presented by management to the Executive Board was in line with the aforementioned paper. That explains why paragraph 15 (iii) of the Evaluation Policy currently reads that:

“[T]he OE Director, acting independently of IFAD management with the approval of the Executive Board and the Governing Council of IFAD, will be responsible for formulating OE’s annual programme of work and budget”

46. In paragraph 27 – 30 of the Evaluation Policy it is stated that:

“27. The OE Director will formulate the annual OE work programme and budget independently of the management and transmit it to the President, who will submit it unchanged to the Executive Board and Governing Council for approval.

28. The OE annual work programme and budget will be presented together, but as a separate submission, with IFAD’s annual work programme and budget to the Executive Board for approval, and to the following Governing Council meeting.

29. The President will convey to the Director of OE without change any changes requested by the Board to the OE work programme and budget. The Director of OE will then resubmit the work programme and budget to the Board via the President, as described above.

30. The Governing Council will be requested to delegate to the Board the authority to amend or supplement OE’s work programme and budget by separate decision during the year. The levels of the OE component and the remainder of IFAD’s budget will be determined independently of each other.”

47. These paragraphs diverge from Article 6, Section 10 of the Agreement and Financial Regulation VI.1 in several respects. In the first place, they treat the budget and the annual programme of work on the same footing, thereby introducing a role for the Governing Council with regard to the programme of work that is not envisaged by the Agreement or any other basic text. In addition, whereas the Agreement and the Financial Regulations envisage a single administrative budget prepared by the President to the Board for its transmittal to the Governing Council for its approval, the said paragraphs in Evaluation Policy suggest that there will be a separate OE budget prepared and submitted by the Director OE for the approval of both the Executive Board and the Governing Council.

48. This must be an error, because the approval of the budget is a reserved power of the Governing Council, which it expressly did not delegate to the Executive Board in Section 7 of the By-Laws and in Governing Council Resolution 77/II (as amended by Resolution 86/XVIII). In other words, the Executive Board does not exercise an approval power with regard to the budget. Therefore the term “approval” in paragraph 15 (iii) of the Evaluation Policy must therefore be understood to mean approval of the transmission as far as it refers to the Executive Board.

49. The foregoing applies also to paragraph 30 of the Evaluation Policy where it is foreseen that the Governing Council will be requested to delegate to the Board the authority to amend or supplement (OE’s work programme and) and budget by separate decision during the year. However, given Section 7 of the By-Laws and in Governing Council Resolution 77/II, as is the case with the remainder of the

budget, the Executive Board cannot be deemed to have the power to amend or supplement the OE budget, other than approving reallocation of funds between categories as envisaged by Financial Regulation VI.3¹².

50. The preparation of the OE part of the administrative budget by the Director OE is by itself not problematic, because according to Financial Regulation II (f) for the purposes of these regulations "President" means the President or any person acting in his or her place.
- (ii). One or more budgets?
51. Another issue concerns the question whether there is to be one administrative budget or that the budget of the OE is to be considered a separate budget. This question is relevant for the application of at least two provisions of the Financial Regulations.
52. Financial Regulation VI.2, first sentence, reads:
- "The appropriations voted by the Governing Council for the ensuing financial year shall constitute an authorization by the President to incur obligations and make payments for the purpose for which the appropriations were voted".
53. Thus according to this provision it is the President that is given the authorization to incur obligations and make payments for the purpose for which the appropriations were voted.
54. Financial Regulation VI.3 provides that the "President may reallocate funds within categories of the administrative budget. In addition, the President may, with the approval of the Executive Board, reallocate funds between categories". Insofar as the budget of the OE can be considered a category within the administrative budget, the latter sentence provides ultimate control to the Executive Board over any request to use the OE appropriations for anything other than evaluation and *vis-a-versa*. The possibility that resources are reallocated between categories with the approval of the Executive Board is not without importance. This may prove useful in the event that the OE resources turn out to be insufficient during a given financial year.
55. The problem rests more in the first sentence of Financial Regulation VI.3, which strictly speaking gives the President the power to reallocate within a category. It is thus not entirely correct for the Panel to state that "... Management cannot provide direction to OE or redeploy resources between OE and between OE and other parts of IFAD". However, as the Panel rightly observes, through the delegation by the President to the Director OE (as is also the case for the other directors) in practice no issue arises in this regard.
56. A more problematic issue results from the 3% carry forward introduced by Governing Council Resolution 133/XXVII (2004). Since this amendment the second sentence of Regulation VI.2 reads:
- "The appropriations voted by the Governing Council for the ensuing financial year shall constitute an authorization by the President to incur obligations and make payments for the purpose for which the appropriations were voted. Unobligated appropriations at the end of the

¹² Financial Regulation VI.3: "To meet the Fund's requirements the President may reallocate funds within categories of the administrative budget. In addition, the President may, with the approval of the Executive Board, reallocate funds between categories."

financial year may be carried forward into the following financial year up to an amount not exceeding 3% of the said financial year.”

57. This triggers the important issue of what amount constitutes the basis to calculate the 3% carry forward. This question basically asks whether the 3% is determined on the basis of the total unutilised budget at the close of the specified financial year, i.e. the sum of the unobligated appropriations of the “administrative budget, the capital budget, and the budget of the Office of Evaluation”, or that the capital budget and or the budget of the OE should be excluded. A second issue entails who decides on the allocation of the carry forward.
58. To address the first issue, recourse is had to Regulation VI.2, second sentence, which stipulates that “Unobligated appropriations at the close of the financial year may be carried forward into the following year up to an amount not exceeding 3% of the said financial year.” (Underline added).
59. Unobligated appropriations mean the total unutilised amount at the close of the specified financial year. As mentioned above, according to the wording Section 10 of Article 6 of the Agreement, formally the Governing Council approves one budget labelled the “administrative budget”. This is not changed by the fact that in recent years the presentation of this budget has been divided into an “administrative budget, the capital budget, and the budget of the Office of Evaluation”. In other words, neither the Agreement nor the Regulations envisage three budgets. Since Regulation VI deals with the Fund’s administrative budget, then it is apparent that the 3% applies to the total of the administrative budget irrespective of the categories within the administrative budget.
60. This said there is no record showing that when the 3% carry forward was introduced in 2004 by the Governing Council – and later when the capital budget was introduced (2007) - any consideration was given to the foregoing implications. It seems nevertheless that in practice when the 3% is calculated no account is taken of the unutilised amounts under the capital budget and the OE budget.

(iii) Completing the decision

61. The technical implications of the foregoing oversight can easily be removed and brought in line with the practice hitherto. If it is decided to follow the model of the Staff Credit Union, no action needs to be taken under the Financial Regulation. In that case the Statutes of the Office of Evaluation to be adopted by the Executive Board would address all aspects of budget and financial administration.
62. Actions regarding the Financial Regulations are only needed if it is decided not to follow the model of the Staff Credit Union. In that case, to eliminate any doubt it is recommended that the Financial Regulations be amended to read as follows:

“1. The President shall submit an annual administrative budget estimate to the Executive Board for transmission to the Governing Council for approval by a two-thirds majority of the total number of votes.

2. The annual administrative budget shall consist of an IFAD corporate budget, an IFAD capital budget and an IFAD Office of Evaluation budget.

3. The appropriations for the corporate budget voted by the Governing Council for the ensuing financial year shall constitute an authorization to the President to incur obligations and make payments for the purpose for

which the appropriations were voted. **All unobligated appropriations at the close of the financial year may be carried forward into the following financial year up to an amount not exceeding 6% for the country programme development and implementation expenditures¹³ and not exceeding 3% for the remaining categories.**

4. To meet the Fund's requirements the President may reallocate funds within categories of the corporate budget. In addition, the President may, with the approval of the Executive Board, reallocate funds between categories."

7. Audit

63. The Report of the Panel recommends mandatory consultation with the Evaluation Committee for any proposed audit of OE and empowering it, in consultation with the chair of the Audit Committee, to agree to the audit proposal, prescribe an external audit or veto the proposed audit. It is important to underscore in this context that as a consequence of the choice for an internal autonomous evaluation function, rather than outsourcing to an external agency, the OE is subject to the structure for the financial administration and audit that the basic documents prescribe. Aside from the fact that this recommendation cannot be traced back to any discussion that took place during the Consultation for the Sixth Replenishment, there is no evidence in the Panel Report that it considered this implications of the decision by the Governing Council to opt for an internal autonomous evaluation. This may explain the recommendation.
64. As will become evident in the following paragraphs, what the Panel recommends would amount to lifting one part of the internal audit to the level of oversight, which effectively means that, as far as concerns special audits the oversight body will be responsible for both the internal and external auditing of the financial administration of the resources voted for the OE.
65. This being said, it needs to be emphasised that in the model of the Credit Union the issue raised by the Panel would not arise because the OE would not be subject to the internal audit jurisdiction of the President. The corresponding arrangements would have to be provided for in the Statutes of the Office of Evaluation. Therefore, the remarks that follow are only relevant if it is decided not to follow the model of the Credit Union.
- (i) Allocation of the responsibility for the financial administration
66. Financial Regulation IX stipulates that equipment, supplies and other requirements for servicing the Fund shall be procured and, when necessary, disposed of in accordance with rules prescribed by the President. The Fund's procurement of services and good is regulated in the Headquarters Procurement Guidelines, which specify that the general principles of (a) best value for money; (b) fairness, integrity and transparency through competition; (c) economy and effectiveness; (d) the interests of the Fund; and (e) obtaining the most favourable contractual terms and conditions must be given due consideration. Thus, absent any contrary provision in the Agreement, the procurement function related to OE

¹³ The Governing Council at its Thirty-Second Session in 2009 endorsed the Report of the Consultation of the Eight Replenishment which required the IFAD 2010 budget to integrate the PDFF expenditures fully into IFAD's Administrative Budget. Moreover, the Governing Council had adopted Resolution 133/XXVII at its Twenty- Seventh Session in 2004, authorizing the amendment of Regulation VI, Paragraph 2 of the Financial Regulations of IFAD, to provide that unobligated appropriations at the close of the financial year may be carried forward into the following financial year up to an amount not exceeding 3% of the said financial year. Therefore, this Regulation has been amended to reflect the need to define the Administrative Budget which is now divided into three branches, i.e., a Corporate budget (which is divided into categories or clusters), a Capital budget and the Office of evaluation budget and create a separate carry forward facility for the PDFF expenditures at a rate of 6% to be applied from IFAD's budget period of 2010.

is performed under the ultimate responsibility of the President by a special procurement unit, which resides under the line responsibility of the Chief Financial and Administrative Officer (CFAO). Pursuant to Financial Regulation X - like any other part of the Fund's secretariat (i.e. Management and Staff) - the structures and procedures set up at secretariat's level to support the evaluation function of the Executive Board are supposed to be subject to directives concerning financial management as well as internal audit prescribed by the President. Likewise, these activities shall be subject to external audit as part of the annual audit exercise in the context of financial accountability of the President to the Board and the Governing Council.

(ii) Allocation of the responsibilities for internal audit

67. In considering this recommendation account has to be taken of the fact that the basic documents envisage two types of audit, internal audit and external audit. These two types of audits serve different functions. Internal audit is an ongoing appraisal of the financial and administrative health of an organization's operations by its own employees. During an internal audit, internal auditors will evaluate and monitor an organization's risk management, reporting, and control practices and make suggestions for improvement. Internal auditing covers not only an organization's finance function, but all the operations and systems in an organization. Internal audit is therefore by definition a management instrument. The external audit, on the other hand, is an oversight instrument. External audit – also called outside audit - entails a measurement and report on the state of an organization's finances, made by an external agency. Often, international organizations engage an ad hoc committee of the supreme plenary organ or a national auditor general for this purpose. However, international financial institutions typically hire audit firms to look at their financial states and to receive an objective assessment¹⁴.
68. The distinction between internal audit as a management instrument and external audit as an oversight instrument is also recognized by the Agreement, the By-Laws for the Conduct of the Business of IFAD, and the Financial Regulations. In the first place, the Agreement makes it a responsibility of the President for conducting the business of the Fund under the control and direction of the Governing Council and the Executive Board (Article 6, Section 8(d) of the Agreement). As the chief administrative officer of the Fund the President is therefore responsible to ensure an adequate financial administration and the corresponding internal audit function. In Financial Regulation X the Governing Council established the following directives for the President in this respect:
- “1. Consistent with well-recognized international standards of financial management and accountancy, the President shall:
 - (a) Establish detailed financial rules and procedures in order to ensure:
 - (i) Effective financial administration and the exercise of economy;
 - (ii) Effective custody of the physical assets of the Fund; and
 - (iii) That all payments are made on the basis of relevant supporting evidence;
 - (b) Designate the officers who may receive moneys, incur commitments or obligations and make payments on behalf of the Fund;
 - (c) Establish and maintain appropriate internal financial control and audit systems.
 2. Commitments or obligations shall not be incurred and payments shall not be made unless an appropriate authorization has been made in writing under the authority of the President.”

¹⁴ See on the allocation of responsibilities regarding internal and external auditing in the law of international organizations: Henry G. Schermers & Niels M. Blokker, *International Institutional Law*, 4th revised edition (Martinus Nijhoff, 2003), §§ 1123-1130.

69. According to this set up the President, in his capacity as the chief administrative officer is responsible for the administration of all the financial resources of the Fund, including those voted by the Governing Council for the OE under the corresponding part of the administrative budget. The internal audit system established by the President must therefore cover the administration and management of all these resources. The role of the Executive Board with regard to the internal audit is limited to ascertaining whether the system put in place by the President in conformity with the requirements of Financial Regulation X. For this purpose it has charged the Audit Committee to review and report on the audit charter adopted under the Financial Regulations¹⁵ and the annual work plans of the internal audit office and report its findings to the Board.

(iii) Allocation of the responsibilities for external audit

70. In respect of the financial administration, which is an oversight function, an external audit is necessary. This is provided for in Section 9 of the By-Laws for the Conduct of the Business of the Fund, which states that "[T]he accounts of the Fund shall be audited at least once a year by highly-qualified outside auditors selected by the Governing Council on the recommendation of the Executive Board. The Board shall submit to the Council, for approval at its annual session, the audited financial statements of the Fund, including the general balance sheet and a statement of profit and loss." This is further elaborated as follows by the Governing Council in Financial Regulation XII:

"1. The accounts of the Fund shall be audited at least once a year by a qualified and independent external auditor, who shall be appointed in a manner and for a period decided by the Governing Council on the recommendation of the Executive Board.

2. The audit shall be conducted in conformity with generally accepted international auditing standards, and any special directions of the Executive Board.

3. The external auditor may make observations with respect to the efficiency of the financial procedures, the accounting system and the internal financial controls.

4. The Governing Council may request the external auditor to undertake specific tasks and issue separate reports on the results.

5. The President shall provide the external auditor with the facilities required in the performance of the audit.

6. The Executive Board shall submit to the Governing Council, for approval at its annual session, the report(s) of the external auditor and the audited financial statement of the Fund, including the general balance sheet and a statement of profit and loss."

71. By virtue of Governing Council Resolution 77/II the appointment of the external auditor is in the hands of the Executive Board. As required by the foregoing provisions the external audit is conducted in conformity with generally accepted international auditing standards, and any special directions of the Executive Board. Annually the Executive Board reviews the audited financial statements of IFAD for preceding financial year and the report of the external auditor thereon. These statements, which are prepared in accordance with accounting principles recommended by the International Accounting Standards Board (IASB), are first examined in detail by the Audit Committee on behalf of the Executive Board. Thereafter the Executive Board submits them to the Governing Council with a recommendation for their approval, in accordance with Financial Regulation XII.6.

¹⁵ See: EB 2010/99/R.49/Rev.1

72. Against this background, it would seem that the Panel's proposal to give a veto power to the chair of the Audit Committee over special internal audits of the OE or to prescribe external audit in lieu internal audit by the Office of Audit and Oversight would not fit in the design for the allocation of responsibilities for internal audit (management) and external audit (oversight) under the Agreement and its implementation in the By-Laws for the Conduct of the Business of the Fund and in the Financial Regulations.

8. Selection and appointment of the Director OE

73. Before starting to discuss the matter of the selection and appointment of the Director OE, it must be repeated *ex abundantia* that in the model of the Staff Credit Union the issue raised by the Panel would not arise because the OE would not be subject to the internal audit jurisdiction of the President. The corresponding arrangements would have to be provided for in the Statutes of the Office of Evaluation. Therefore, the remarks that follow are only relevant if it is decided not to follow the model of the Staff Credit Union.
74. In considering the issue of the selection and appointment of the Director OE it is advisable to keep the position of the President in mind. Article 6, Section 8(a) of the Agreement stipulates that the "Governing Council shall appoint the President by a two-thirds majority of the total number of votes. He shall be appointed for a term of four years and shall be eligible for reappointment for only one further term. The appointment of the President may be terminated by the Governing Council by a two-thirds majority of the total number of votes."
75. The President is the only official of the Fund that is appointed by the Governing Council. Other officials of the Fund are appointed by the President pursuant to Article 6, Section 8(d), second sentence of the Agreement, which prescribes that the "President shall organize the staff and shall appoint and dismiss members of the staff in accordance with regulations adopted by the Executive Board."
76. The current procedure for the selection and appointment is compatible with the foregoing, but it is not without risks. The Evaluation Policy stipulates that the OE Director will be directly responsible to the Executive Board; he or she will be appointed and removed only with the endorsement of the Board, and will not be eligible for re-employment within IFAD after the completion of his or her fixed term(s).
77. Despite the fact that under the Agreement the President heads the staff, according to the Fund's Evaluation Policy, Director OE is directly responsible to the Executive Board for the implementation of the evaluation policy. The Evaluation Policy has outlined the terms of reference for the office, which include the responsibilities for managing OE as the independent evaluation function of the Fund in accordance with its rules and procedures. This construction contains inherent tension and contradictions that require a resolution, which may or may not entail amending the Agreement. As the special regulations do not address the issue of performance evaluations of the Director of OE, they should therefore be conducted by the President. However, performance evaluation presupposes a relationship between a supervisor and a subordinate, which is not the case in the current design. Moreover, on the point of the code of conduct laid down in the HRPM, the Director OE is accountable to the President for issues such as disclosure of (potential) conflicts of interest. Similarly, the Director remains accountable to the President with regard to all issues related to the standards of behaviour for international civil servants. Except for dismissal, the current

regulations leave the President with the full responsibility with regard to the disciplinary procedures and sanctions in respect to the Director OE.

78. This system thus retains the President's ultimate responsibility, which could create a situation of conflict. The risks involved in a system where the responsibility for selection and appointment is shared between the President and the Executive Board are demonstrated in the judgment of the Administrative Tribunal of the Asian Development Bank in the case of the former Director General (DG) in the Operations Evaluation Department¹⁶. In that case the re-appointment of the person in question was blocked by the President despite the recommendation of the Development Effectiveness Committee of the Executive Board. At the same time, the same judgment also holds valuable lessons on how the selection and appointment of the Director OE can be structured so as to avoid risks. Based on the fact in the case of the Asian Development Bank that the DG Evaluation is appointed by the Executive Board the Asian Development Administrative Tribunal found that the DG is not ordinary staff but held a position to which the certain staff rules and policies applied *mutatis mutandis*.
79. Likewise, in the case of the Fund it could be decided that the Director OE is appointed by the Executive Board. If it is so decided the following consequences ensue:
- The Director OE is not a staff member of the Fund and is such she or he would not be subject to the President's authority.
 - Given that, as explained above, evaluation is a Board function (as opposed to project preparation and implementation as well as internal audit, which is a management function) such decision could be validly taken;
 - Given that the Director OE would not be a staff member in such a case, the Board will have to establish the terms and conditions of her or his employment. As in the case of the Asian Development Bank, the Executive Board could consider to declare the IFAD staff rules and policies applicable *mutatis mutandis*.
80. The fact that in a construction whereby the Director OE is not a staff member would not impact on the preparation of the OE part of the administrative budget or the commitment of the OE budget appropriations by the Director OE because Financial Regulation II (f) does not require that the person replacing the President is a staff member. In the absence of any Executive Board decision barring the President from allowing IFAD staff to be managed by a person who is not a staff member, the President must be deemed to have that authority as an inherent part his power to organize the staff under Article 6, Section 8(d), second sentence, of the Agreement.

9. Selection and appointment of the staff of the OE

81. Unlike all the other points discussed above, only with respect to the selection and appointment of the Staff of the OE the Credit Union would not overcome the concerns of the Panel. However, it is not believed that this should be deemed problematic because, as will become clear in the following paragraphs, if the Executive Board requires the President to hire the staff necessary for the OE, the President will be obliged to do so.
82. Under the Agreement the President heads, organizes, appoints and dismisses the staff, the Evaluation Policy directs that the OE Director exercises authority delegated by the President to make all personnel and operational decisions

¹⁶ *Bruce Murray v. Asian Development Bank*, ADBAT Judgment 91 (2009), Available online: <http://www.adb.org/Documents/Reports/ADBT/number.asp?wp=4&ps=25>, visited on 27 September 2010.

concerning OE staff and consultants in accordance with the Fund's polices and procedures and the Human resources procedures manual (HRPM).¹⁷

83. To a large extent this requirement in the Evaluation Policy is superfluous because such system of delegations exists throughout the organization. As is the case with other heads of departments, directors and unit heads, the Director has authority for managing OE personnel, their work plans and the demands on their time. The OE Director is mandated to ensure that OE is staffed by independent-minded, experienced and sufficiently senior evaluators. In accordance with the Fund's current practice, OE is required to ensure that the engagement of any individual in an evaluation exercise will not generate a conflict of interest.¹⁸ In particular, an evaluation will not be entrusted to an OE staff member who has been responsible in the past for the design, implementation and supervision of the project, programme or policy to be evaluated.
84. The Peer Review the Panel understands this to include the power to appoint and dismiss staff. The Report of the Panel takes issue particularly with the legal interpretation that "...the appointment and dismissal of OE staff remain the prerogative of the President as those functions cannot be removed, without an amendment of the Agreement." The Panel deems that this interpretation undermines the perception of OE's organizational and behavioural independence, since the implication is that the President, not Director OE, has the ultimate authority to decide who works, or does not work, in OE. This assertion, it is submitted is at odds with both the very concept of "delegation" as well with norm stated in Section 6.3 of the By-Laws for the Conduct of the Business of IFAD.
- (i) Delegation does not mean a transfer of power
85. Starting with the notion of delegation, it is important to note that it goes without saying that a President alone cannot perform all the tasks assigned to her/him by and pursuant to the Agreement. In order to meet the targets, the President delegates authority. Delegation of authority means division of authority and powers downwards to the subordinates. It is about entrusting someone else to do parts of the President's job on his behalf.
86. Delegation of authority can be defined as subdivision and sub-allocation of powers to the subordinates (the "delegee") in order to achieve effective results. In this sense, the delegee does not exercise his or her own power, for, although the subordinate is empowered, the responsibility of the entire job remains on the shoulders of the supervisor (the "delegor" or "delegant").
87. Therefore three elements characterize the notion of delegation: authority, responsibility, and accountability. Authority can be defined as the power and right of a person to use and allocate the resources efficiently. Responsibility is the duty of the person to complete the task assigned to him. A person who is given the responsibility should ensure that he accomplishes the tasks assigned to him. Accountability means giving explanations to the delegor for any variance in the actual performance from the expectations set. Accordingly, when the President delegates authority to make all personnel and operational decisions concerning OE staff and consultants to the OE Director, it does not mean that the Director OE can act on his or her own without respecting the limits of the "authority" that has been delegated, nor can he decline to accomplish the task assigned to him, or not

¹⁷According to the Evaluation Policy "[T]he President will delegate authority to make all personnel and operational decisions concerning OE staff and consultants to the OE Director, in accordance with IFAD rules and procedures covering human resources. Within these rules and procedures, the Director will have authority for managing OE personnel, their work plans and the demands on their time."

¹⁸ See IFAD Human Resources Manual, Code of Conduct, paragraph 8.3.

be accountable to the President. To hold that the otherwise is be tantamount to saying that the Evaluation Policy requires the President to surrender the responsibility that Agreement bestows upon him to an official that has not been appointed by the Governing Council.

88. It is for this reason that international courts and tribunals have established the principle of international institutional law according to which, discretionary powers implying a wide margin of discretion cannot be transferred because that would upset the institutional design contained in the founding charter of the organization¹⁹. In the present case, the Agreement bestows the responsibility to conduct the business of the organization and to head, organize, appoint and dismiss staff on the President. Within the margins established by regulations of the Executive Board, in this case the Human Resources Policies adopted in 2004, the President exercises wide discretion as to organization, appointment and dismissal of Fund's staff. Transferring that power to the Director OE, albeit limited to the personnel of the OE, would not be compatible with the functions entrusted to the President by the Agreement. The Governing Council appoints the President for him or her exercise the functions of the President, not for him to transfer those to someone that was not appointed by it.

(ii) The preclusion in Section 6.3 of the By-Laws for the Conduct of the Business of IFAD

89. The only circumstance where another person than the one appointed as such by the Governing Council can perform the functions of the President, including appointing staff, is stated in Section 6.3 of the By-Laws for the Conduct of the Business of IFAD concerning the exercise the authority and perform the functions of the President in cases of incapacitation or vacancy:

"The President shall designate the staff member to exercise the authority and perform the functions of the President, should he become incapacitated or there arise a vacancy in his office. If he has failed to do so, the Executive Board shall designate a senior officer of the Fund to exercise the authority and perform the functions of the President temporarily. Any person exercising the authority and performing the functions of the President under this paragraph shall have the same powers and duties as the President, except the power to appoint a Vice-President."

90. There are five points that strike the attention in this provision and underscore its function as means to deal with temporary situations. First of all, it is the President that needs to designate the person to exercise the authority and perform the functions of the President. Second, the person must be a staff member. Third, the person to be designated must be a staff member of the Fund. Forth, the exercise the authority and performance of the functions of the President by such person is restricted to the duration of the incapacitation or vacancy. Fifth, such person can perform all functions of the President, including the appointment of staff, except the appointment of a Vice-President. Such person does not perform those by virtue of a delegation of authority; rather, the person substitutes for the President.
91. The foregoing leads to the conclusion that the Panel is wrong in assuming that the Evaluation Policy requires or can require the surrender of the power to appoint OE staff to the Director OE, simply because the Executive Board does not have such a power.

¹⁹ Case 9/56, *Meroni*, ECR 1957-1958, at 151-152

(iii) The President's responsibility to ensure adequate staffing of the OE

92. This conclusion does not mean, however, that the President is at liberty to ignore the requirement that the Director OE should have the authority to select evaluators and consultants, formulate and approve their terms of reference and manage the human resources employed in evaluation. Inherent in the decision of the Governing Council that the evaluation function should be independent is the obligation of the President to take all the necessary measures required in the independent performance of the evaluation. The President remains accountable to the Executive Board for ensuring that the OE is properly served by the recruitment division (e.g. timely issuance of vacancy notices and the processing of applications). For, merely delegating the recruitment to the Director OE (as is currently the case) does not by itself guarantee timely and adequate staffing of the OE. If the human resources division fails to promptly deliver on the request of the OE that will also affect the independent functioning of the OE.

93. The foregoing applies also to other aspects of support needed by the OE for it to operate with the autonomy desired by the Governing Council and the Executive Board.

(iv) Uniform application of the staff rules and policies

94. In addition to the technical legal reasons why the concept of delegation cannot be deemed to imply the surrender of the appointment and dismissal authority of the President, there is also a need for ensuring uniform application the organization's rules and policies concerning staff employment and their conditions of service. The International Labour Organization Administrative Tribunal (ILOAT), which is the judicial body that oversees IFAD's personnel decisions, has repeatedly held that equal cases should be treated equally. This requires that a mechanism should be in place to ensure that all staff members of the Fund who are in comparable situations are treated equally in accordance with the applicable rules and policies. One such mechanism is the Joint Appeals Board (JAB), which hears staff complaints about decision affecting them individually and brings out recommendations to the President for his or her decision. Similar mechanisms exist for the application of disciplinary measures against staff, name the Sanctions Committee. The decisions taken by the President after JAB's recommendation or that of the Sanctions Committee can be appealed to the ILOAT. Such cases can involve decisions of the Director OE. Obviously, if the Panel's interpretation of the concept of delegation of authority were accepted that could lead to a situation where the organization is confronted before the ILOAT with contradictory decisions of the Director OE in respect to OE staff and of the President in respect of the rest of the IFAD staff. Needless to say that such a situation should be avoided, which is another reason why the interpretation given by the Panel of the concept of delegation is flawed.