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° 2867 DU TRIBUNAL ADMINISTRATIF DE L'ORGANISATION INTERNATIONALE DU TRAVAIL SUR REQUÊTE CONTRE LE FONDS INTERNATIONAL DE DÉVELOPPEMENT AGRICOLE

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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

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

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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

TABLE OF CONTENTS

Page No.

I. INTRODUCTION

1. I have concurred with my vote to the adoption today, 01st February 2012, by the International Court of Justice (ICJ), of the present Advisory Opinion on *Judgment n. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*. The course of the advisory proceedings has, however, raised points to which I attach much importance, and in relation to which I feel bound to leave on the records the foundations of my position thereon. I propose thus to dwell upon such points in the present Separate Opinion, in a logical sequence, and with a constructive spirit, so as to shed some light on certain matters which lay on the foundations of contemporary international law as well as the internal law of the United Nations, which seem to me to require the utmost attention.

2. In this understanding, I purport to examine, in the present Separate Opinion, a series of interrelated points, having, as common denominator, the fundamental question of procedural equality in the access of individuals to justice at international level. To start with, I shall address the points which are predominantly factual in the context of the present Advisory Opinion, namely: *(a)* the factual background of the present matter lodged with the Court; *(b)* the determination of compliance with Judgment n. 2867 of 2010 of the ILOAT favourable to the individual complainant; *(c)* the difficulties in the compliance with Judgment n. 2867 of 2010 of the ILOAT favourable to the individual complainant; *(d)* the individual complainant's appeal for equality of arms and realization of justice; and *(e)* the contrasting positions of the individual complainant and the IFAD as to the present request for an Advisory Opinion of the ICJ.

3. Next, I shall focus on the points of juridical epistemology, which in my view are deserving of attention and care, and from which we can extract lessons in the light of the present Advisory Opinion. Those points are the following ones: *(a)* the lack of equality of arms: a recurring problem in procedures of the kind before the ICJ; *(b)* the force of inertia: the regrettable persistence of procedural inequality; *(c)* the emergence of individuals as subjects of international law, endowed with international juridical capacity; *(d)* subjects of rights: the outdated dogmatism of the PCIJ and ICJ Statutes; *(e)* the erosion of the inter-State outlook of adjudication by the ICJ; *(f)* the imperative of securing the equality of the parties in the international legal process, as a component of the right of access to justice *lato sensu*; and *(g)* the need to secure the *locus standi in judicio* and the *jus standi* to individuals before international tribunals, including the ICJ. The way will then be paved for the presentation of my concluding observations.

II. THE FACTUAL BACKGROUND OF THE PRESENT MATTER LODGED WITH THE COURT

4. May I at first recall, as to the factual background of the present matter lodged with this Court, that, on 26.04.2010, the International Court of Justice (ICJ) received a request for an Advisory Opinion from the International Fund for Agricultural Development (the IFAD)[1], concerning the validity of a Judgment rendered by the Administrative Tribunal of the International Labour Organization (the ILOAT). Ms. Ana Teresa Saez García, a national of Venezuela, had a contract of employment with the IFAD, whereby she worked for the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Global Mechanism).

[1]The IFAD is one of the specialized agencies of the United Nations, which have been authorized by the General Assembly, on the basis of Article 96 (2) of the U.N. Charter, to request advisory opinions of the ICJ on legal questions arising within the scope of their activities.

5. The Global Mechanism was established by Article 21 of this U.N. Convention, and began its operations in October 1998. Before that, the IFAD had been selected to house the Global Mechanism in 1997, and to provide the needed administrative services to it. The Global Mechanism was — and remains — housed in the IFAD's premises in Rome, by virtue of a housing agreement (Memorandum of Understanding), entered into by the IFAD and the Conference of the Parties to the Desertification Convention in 1999.

6. Ms. Saez García held a fixed-term contract of employment (with the IFAD, to render services to the Global Mechanism)[2], which was due to expire on 15.03.2006, and was not renewed subsequently[3]; she then filed an appeal with the Joint Appeals Board, which recommended in December 2007 that she be reinstated within the Global Mechanism for a period of two years, and that she be paid an amount equivalent to all the salaries, allowances and entitlements she had lost since March 2006. The President of the IFAD rejected this decision in April 2008.

7. The next step taken by her was to file a complaint against the IFAD with the ILOAT, on 08 July 2008, asking that Tribunal to order the IFAD to reinstate her, for a minimum of two years, in her previous post, or an equivalent post with retroactive effect from 15.03.2006, and to grant her monetary compensation for the damages suffered. The two parties in the case before the ILOAT were, thus, an individual (Ms. Saez García, the complainant) and an international organization (the IFAD, the respondent).

8. The ILOAT, in its Judgment n. 2867, of 03.02.2010, on the complaint filed by Ms. Saez García against the decision of the President of the IFAD to dismiss her internal appeal against the decision not to renew her contract because her post was being abolished, found in favour of the complainant. The ILOAT decided, in the aforementioned Judgment n. 2867 of 2010, *inter alia*, to set aside the decision of the President of the IFAD, because the abolition of the complainant's post was tainted with illegality; it then ordered the IFAD to pay material and moral damages and costs to Ms. Saez García.

9. The Executive Board of the IFAD decided to challenge the validity of Judgment n. 2867 of the ILOAT, by way of application to the International Court of Justice (ICJ) for an Advisory Opinion, pursuant to Article XII of the Annex to the ILOAT Statute, which reads 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."

10. Upon the filing of its request for an advisory opinion to the ICJ, the IFAD thereafter requested the ILOAT the stay of execution of its Judgment n. 2867, pending the delivery of the ICJ's Advisory Opinion in the *cas d'espèce*. For its part, the ILOAT, in its subsequent Judgment

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[2]Her appointment was made in accordance with the general provisions of the IFAD Personal Policies Manual; it was signed by the Director of the Personnel Division of the IFAD.

[3]The decision not to renew her contract was sealed by the President of the IFAD.

n. 3003, of 06.07.2011, dismissed the IFAD's application for stay of execution of prior Judgment n. 2867, pending the delivery of the present Advisory Opinion of the ICJ. In the course of the somewhat troublesome advisory proceedings before this Court, both the IFAD and Ms. Saez García referred to the issue of the equality of parties before (international) courts and tribunals since 1946, when the provision was made, in Article XII of the Annex to the Statute of the ILOAT, for the ICJ to review, on specified grounds, judgments of the Tribunal (cf. *supra*).

11. In the course of the present advisory proceedings, the only State which forwarded its views to the ICJ was the Plurinational State of Bolivia. In its written statement of 26.10.2010, it expressed its concern, in particular, with the relationship between the Global Mechanism (under the U.N. Convention to Combat Desertification) and the IFAD, and the need to clarify their respective competences, bearing in mind the right of individuals to identify with legal certainty "the international organization that hires them" (p. 6). Bolivia added that

> "labour and social rights of individuals should clearly be protected, providing them assurances and proper legal security (. . .), having identified clearly the employer" (p. 5).

12. It ensues, from the aforesaid, that the subject-matter of the present Advisory Opinion of the Court contains elements which are proper to the law of the international organizations, one of them being the relationship between the IFAD and the Global Mechanism. Yet, the core of the matter is a distinct one: it concerns the position of the individual as subject of rights in international law, in its various interrelated aspects, which form altogether the object of attention of the present Separate Opinion. As I attach the utmost importance to the condition of the individual as subject of contemporary international law (the *droit des gens*), I feel bound to examine those aspects, one by one, in the sections that follow.

III. The Determination of Compliance with Judgment n. 2867 of 2010 of the ILOAT in Favour of the Individual Complainant

13. Before I embark on an examination of the various aspects of the procedural equality of parties before international courts and tribunals, with a bearing on the *cas d'espèce*, may I summarize the Judgment n. 3003 of 2011, whereby the ILOAT dismisses the IFAD's application for stay of execution of its previous Judgment n. 2867 of 2010. The ILOAT determined, *inter alia*, that Judgment n. 2867 was "immediately operative", there being no need for Ms. Saez García to have further recourse to the ILOAT to ensure its execution (para. 16). The ILOAT further clarified that there was no provision in the Statute or the Rules of the ILOAT which stipulated that a request to the ICJ for an Advisory Opinion would automatically have suspensive effect on the contested judgment, even though this fact would not in itself preclude the possibility of requesting the ILOAT for the suspensive effect of the judgment (para. 25).

14. As to the central question of the equality of arms (*égalité des armes*) between the parties, the ILOAT next considered whether international organizations — such as the IFAD, in the *cas d'espèce*, — should be permitted to request suspension of a judgment of the ILOAT which they intend to challenge before the ICJ pursuant to Article XII of the Annex to the ILOAT Statute. In this regard, the ILOAT was of the opinion that the procedure set forth in Article XII of the Annex of its Statute is "fundamentally imbalanced to the detriment of staff members", because the option of submitting a request for an Advisory Opinion of the ICJ is limited only to the organization concerned, and cannot be pursued by staff members (para. 40). The ILOAT added that, as only the organization can request the ICJ for an advisory opinion, this means that

> "the possibility of obtaining a stay of execution would, by definition, only benefit the organizations themselves (. . .), doubly worsen[ing] the imbalance between the parties created by the Article XII procedure, to the detriment of staff members" (para. 43).

The ILOAT then insisted on its view that it is

> "difficult to justify that organisations should be able to seek a stay of execution where the staff members concerned are without any parallel recourse in law" (para. 44).

15. The ILOAT next stated that granting a stay of a judgment which was rendered in favour of a staff member would further aggravate the imbalance between the parties, since it would deprive the staff member of the benefit of the judgment in her favour (such as its Judgment n. 2867 of 2010, in the present case), for the duration of the advisory proceedings before this Court. The ILOAT added that

> "[t]he difference in treatment between organizations and their staff which derives from the actual provisions of Article XII (. . .) would thus be compounded by a further inequality, and one which would doubtless be even more keenly felt in practice, stemming from the fact that an application to the Court [for an advisory opinion] in this context could result in a stay of execution of the contested judgment" (para. 45).

16. The ILOAT then went on to state that, as Article XII of the Annex of the ILOAT Statute creates "an objective inequality between the parties", it has the duty to take care that it does not amplify the consequences of this inequality by considering admissible organizations' requests for a stay of execution of a judgment, to the detriment of a staff member (para. 46). The ILOAT then concluded that it is not possible to recognize the admissibility of an organization's request to stay the execution of a judgment in respect of which the procedure set forth in Article XII has been initiated before the ICJ (para. 47).

IV. THE DIFFICULTIES IN THE COMPLIANCE WITH JUDGMENT N. 2867 OF 2010 OF THE ILOAT IN FAVOUR OF THE INDIVIDUAL COMPLAINANT

17. The concern rightly expressed by the ILOAT has, in my view, its *raison d'être*. It is well-founded. Yet, despite its new Judgment n. 3003 of 2011, whereby the ILOAT dismissed the IFAD's request for a stay of execution of Judgment n. 2867 of 2010 (which ordered the IFAD to pay moral and material damages, and costs, to the complainant, Ms. Saez García), it appears from the records of the case that Ms. Saez García has not yet received any payment from the IFAD. Ms. Saez García contended, in a written statement submitted to the Court on 30.08.2011, that

> "[t]he mere request for an advisory opinion has provided an excuse for [the IFAD] not to execute Judgment [n.] 2867. Even though [the IFAD]'s application for suspension of execution was denied, [it] has still avoided execution on the grounds that it might become entitled to repayment of the amounts due if the Court declares Judgment [n.] 2867 invalid" (para. 14).

18. Thus, to sum up, Ms. Saez García obtained a judgment in her favour, ordering the IFAD to pay to her moral and material damages, and costs (the ILOAT's Judgment n. 2867 of 2010). The Executive Board of the IFAD, pursuant to Article XII of the Annex to the ILOAT Statute, decided to challenge the validity of Judgment n. 2867 of 2010, by way of a request to the ICJ for an Advisory Opinion. The IFAD then requested the ILOAT for a stay of execution of Judgment n. 2867 of 2010, pending the delivery of the Advisory Opinion by the ICJ. In its subsequent Judgment n. 3003 of 2011, the ILOAT dismissed the IFAD's application for stay of execution of

Judgment n. 2867 of 2010, reaffirming that this judgment is operative. In considering the IFAD's request for suspensive effect of Judgment n. 2867 of 2010, the ILOAT examined the question of the inequality of parties that stems from the procedure set forth under Article XII of the Annex to the ILOAT Statute and decided that ordering a stay of the contested judgment would only amplify this inequality.

19. In its Judgment n. 3003 of 2011, the ILOAT limited its examination of the matter to the inequality of parties ensuing from Article XII of the Annex to the ILOAT Statute, given that only the international organization concerned may challenge a decision of the ILOAT unfavourable to itself. Understandably, the ILOAT did not dwell upon the question of the *locus standi in judicio* of individuals in advisory proceedings before this Court. Yet, the position of the individuals before this Court (whether they can appear before it) and the persisting restriction that all communications coming from the complainant have to be transmitted to the Court through the IFAD (the fact that all) are, in my understanding, of the utmost importance, for the good administration of justice (*la bonne administration de la justice*). Accordingly, I deem it fit to examine the question of the *locus standi in judicio*, as well as of *jus standi*, of individuals before this Court, in the present Separate Opinion (section XIV, *infra*).

V. THE INDIVIDUAL COMPLAINANT'S APPEAL FOR EQUALITY OF ARMS AND REALIZATION OF JUSTICE

20. It is indeed worrisome to see that, despite the two Judgments of the ILOAT in her favour (n. 2867 of 2010, and n. 3003 of 2011), the complainant, Ms. Ana Teresa Saez García, has not yet seen justice done, and the two Judgments of the ILOAT have not been complied with yet, pending the advisory proceedings before this Court. It is worth referring here to a passage of her statement submitted to this Court on 30.08.2011, wherein she contends that "[t]he imbalance in the present proceedings began with the fact that only the defendant was able to request review" (para. 14). As regards, more specifically, her position before the Court in the present proceedings, she stated that:

> "Only [the IFAD] is able to communicate directly with the Court. The Court has attempted to equalize the position of the complainant by requiring [the IFAD] to transmit the pleadings of the complainant. But the positions have not been equalized. Before the first pleadings were due, the complainant's counsel requested a document to attach to the complainant's statement. The [IFAD] replied that, 'in conformity with the rules governing advisory proceedings before the International Court of Justice, you do not have the prerogative to introduce such an item in the proceedings' (…). Since the complainant depended upon [the IFAD] to transmit her statement and documents, this created a significant obstacle to pleading her case. It required the intervention of the Registry to overcome.
>
> In transmitting the comments of [the] IFAD on 9 March 2011, [the IFAD] requested that the Court seek the views of the Conference of Parties of the United Nations Convention to Combat Desertification. [The IFAD] also requested oral hearings. The complainant's counsel received this letter on 17 March. When he attempted to respond to these new requests, the [IFAD] refused to transmit the communication to the Court on the grounds that it was after the deadline of 11 March for filing comments. Again the intervention of the Registry was required to compel the [IFAD] to transmit the letter from the complainant's counsel.
>
> Even at the present time, the complainant is under the disadvantage of having to submit this statement through [the] IFAD, which requires submitting it well before the deadline specified in the Registrar's letter of 21 July 2011. [The] IFAD will be able to

work on its reply until the morning of 29 August 2011; the complainant will have to submit hers the morning of 26 August" (paras. 15-17).

21. At this stage of the present Separate Opinion, I shall limit myself to pointing out that there clearly appears to exist two distinct inequality claims in the present advisory proceedings. The *first claim* concerns the fact that, pursuant to Article XII of the Annex to the ILOAT Statute, only the international organization at issue, the IFAD, can challenge an unfavourable decision of the ILOAT before the ICJ. This question was examined by the ILOAT in its Judgment n. 3003 of 2011 concerning the IFAD's request for stay of execution of Judgment n. 2867 of the ILOAT, which found in favour of the complainant, Ms. Saez García.

22. The *second claim* of procedural inequality pertains to the position of the individual complainant in the present proceedings before this Court, and more particularly to an aspect not addressed in the ILOAT's Judgment n. 3003 of 2011. Yet, Ms. Saez García touched upon it, in complaining of the inequality of the parties reflected in the fact that only the IFAD — her opposing party in the present case — can address the Court directly, and that all her communications and submissions to the ICJ ought to be done through the IFAD; such inequality, — she added, — has, not surprisingly, caused her some constraints.

VI. The Contrasting Positions of the Individual Complainant and the IFAD as to the Present Request for an Advisory Opinion of the ICJ

23. In the present advisory proceedings, the IFAD and Ms. Saez García have made clear their contrasting positions as to the present request for an Advisory Opinion of this Court. Thus, in its written statement of 29.10.2010, submitted to this Court, the IFAD argued that the issuing of an Advisory Opinion by the ICJ would not violate the rights of equality of parties, since the subject matter of the requested Advisory Opinion is not the rights of the individual, but the jurisdiction of the ILOAT, based on the agreement between the IFAD and the ILO that recognized the jurisdiction of the ILOAT (paras. 78-83). Thus the IFAD attempted to decharacterize its difference with an individual staff member, as — in its argument — a "matter pertaining to the external relations of the organization concerned" (para. 79), here concerning the IFAD and the ILO (as to the jurisdiction of the ILOAT).

24. The IFAD insisted on its own description of the case: in a subsequent statement, its Reply of 26.08.2011, it argued that the operation of Article XII of the Annex to the ILOAT Statute is to resolve disputes within the ILO regarding the competences of each of its bodies (paras. 39-44) or to resolve "disputes" between the ILO and U.N. specialized agencies pertaining to the jurisdiction of the ILOAT, which is based on an agreement between such specialized agencies and the ILO (paras. 45-68). The IFAD went further: it made a parallel with investor-State arbitration, where only the investor has the right to initiate proceedings and the State has exclusively the right to seek authoritative interpretation of a treaty, without — in its view — violating the right of the equality of parties (paras. 69-76). The IFAD made even a parallel with the pending contentious case before the ICJ concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Greece intervening), arguing that "interested individuals" do not have access to the ICJ, but issues that are clearly of their interest are going to be adjudicated by the ICJ (para. 77).

25. Contrariwise, in her written statement of 26.08.2011, the original complainant, Ms. Saez García, stated that the right of equality of parties before courts and tribunals is enshrined in all major human rights instruments, at global and regional levels, namely: the Universal Declaration of Human Rights (Article 10), the U.N. Covenant on Civil and Political Rights

(Article 14 (1)), the European Convention of Human Rights (Article 6 (1)), and the American Convention on Human Rights (Article 8 (1)) (paras. 5-9). She also referred to some of the jurisprudence of the supervisory organs or Courts operating thereunder (paras. 5 and 9-11); she quoted, *inter alia*, the *Andrejeva versus Latvia* case (2009), before the European Court of Human Rights, as illustration of the view that, when appeal procedures exist, they ought to abide by the provisions of Article 6 (right to a fair trial) of the European Convention of Human Rights (para. 11).

26. She then recalled the *rationale* of the abolition, by the U.N. General Assembly in 1995, of the review procedure of the United Nations Administrative Tribunal (UNAT) rulings by the ICJ, which also had in mind the issue of the equality of parties (para. 12). Next, Ms. Saez García turned to the recognition, by the ILOAT itself, that its review procedure was not in accordance with the principle of the equality of the parties, and was "fundamentally imbalanced to the detriment of staff members" (para. 13). She also claimed that the IFAD, despite not winning a suspension of execution of the 2010 Judgment of the ILOAT, unilaterally denied execution of the ILOAT ruling while the advisory proceedings before the ICJ were pending, whereas in a situation of real equality it is up to the courts to decide "whether and upon what conditions judgments are executed during the appellate phases" (para. 14).

27. She further also argued that, despite the practical measures taken by the ICJ to secure equality to the position of the parties, their positions have not been equal, since "[o]nly the defendant is able to communicate directly with the Court" (para. 15), and she — the complainant — remains dependent upon the IFAD for the simple transmission of documents to the Court, and the IFAD has in fact been posing obstacles (paras. 15-17); twice, in the course of the proceedings, the intervention of the Court's Registry was thereby required (paras. 15-16). The difficulties she encountered affected even the deadlines for the submission of written statements (para. 17). Ms. Saez García then concluded that:

> "The substantial inequality of arms between the complainant and the [IFAD] is one factor that the Court may wish to take into account in exercising its discretion under Article 65 of its Statute. (. . .)
>
> In [the Advisory Opinion of 1956 on *Judgments of the ILOAT upon Complaints Made against UNESCO*] the Court achieved a balance between equality and usefulness. Since [that Advisory Opinion on *Judgments of the ILOAT upon Complaints Made against UNESCO*] the doctrine of equality of arms has increased the requirement for equality in the administration of justice. (. . .)" (paras. 18-19).

VII. THE LACK OF EQUALITY OF ARMS: A RECURRING PROBLEM IN REVIEW PROCEDURES OF THE KIND BEFORE THE ICJ

1. The Dilemma before the Court

28. Despite the fact that we are here before general principles of law such as the equality of arms (*égalité des armes*) before courts and tribunals, and the principle of *la bonne administration de la justice*, the fact remains that a problem such as the one raised before the ICJ, by the original complainant before the ILOAT, has been recurrent in this Court, in procedures of the kind. As already indicated, the review procedure of the UNAT decisions by the ICJ has been abolished in 1995 (*supra*), but the review procedure of the *cas d'espèce*, of the ILOAT decisions by the ICJ, subsists, with the same problem identified in 1956 by this Court in its Advisory Opinion on *Judgments of the ILOAT upon Complaints Made against UNESCO*. Despite that identification of

the problem, it persists to date: for more than half a century (56 years) the force of inertia and mental lethargy seem to have prevailed, much to the detriment of individuals, subjects of rights under international administrative law, or the law of the United Nations.

29. In the proceedings which led to the Court's Advisory Opinion of 1973 on the *Application for Review of Judgment n. 158 of the U.N. Administrative Tribunal*, the question came to the fore of the *nature* of the procedure, prompted by the fact that it was *not* the rights of States which were in issue herein: it was the rights of individuals. Doubts were voiced as to "the legality of the use of the advisory jurisdiction for the review of judgments of the [U.N.] Administrative Tribunal", i.e., for dealing with what originally appeared as a contentious case within the internal law of the United Nations. The use of the Court's advisory jurisdiction was questioned for "the judicial review of contentious proceedings which have taken place before other tribunals and to which individuals were parties"[4].

30. Dogmas of the past began, not surprisingly, to weigh heavily in the minds of the Judges of this Court, in particular the outdated dogma that individuals were not subjects of international law (the *droit des gens*). In any case, the ICJ, in its aforementioned Advisory Opinion of 1973, without ridding itself of the consequences of this dogma, at least asserted that

> "The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute" (para. 14)[5].

31. Before I proceed to a consideration of this matter, to which I attribute much importance, I find it appropriate to proceed, first, to an overview of the five Advisory Opinions of the kind (issued in 1954, 1956, 1973, 1982 and 1987), which preceded the present Advisory Opinion on *Judgment n. 2867 of the Administrative Tribunal of the ILO upon a Complaint Filed against the International Fund for Agricultural Development (IFAD)*, which the Court is delivering today, 01 February 2012. This will enable us to appreciate the difficulties experienced by the Court when faced with a conception of international law which had the vain pretension to defy the passing of time (as legal positivists do).

2. The Advisory Opinion of 1954

32. In its Advisory Opinion of 1954 on the *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, the main focus of attention of the ICJ was on the relations between the General Assembly and the U.N. Administrative Tribunal, in the newly-emerging internal law of the United Nations. Yet, despite this focus of attention on the relations between U.N. organs, the ICJ kept in mind that what was ultimately at stake were the rights of individuals, of U.N. staff members. The Court then concluded that the General Assembly cannot "on any grounds" refuse to give effect to an award of compensation made by the U.N. Administrative Tribunal in favour of a U.N. staff member, "whose contract of service has been terminated without his assent"[6].

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[4]Paragraph 14, of the Advisory Opinion of 12.07.1973, on the *Application for Review of Judgement n. 158 of the U.N. Administrative Tribunal, I.C.J. Reports* (1973) p. 171.

[5]*Ibid.*, p. 172.

[6]*ICJ*, Advisory Opinion of 13.07.1954, on the *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, *ICJ Reports* (1954) p. 62.

3. The Advisory Opinion of 1956

33. Two years later, in its Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* (1956), the ICJ observed that the "absence of equality" in the review procedure before it flew from the relevant provisions of its own Statute, affecting rights of U.N. officials. It added that the Court was required, by its own judicial character, to ensure that "both sides directly affected by these proceedings" be in "a position to submit their views and their arguments to the Court". In its view, the difficulty confronting it

> "was met, on the one hand, by the procedure under which the observations of the [U.N.] officials were made available to the Court through the intermediary of Unesco and, on the other hand, by dispensing with oral proceedings. [. . .] The principle of equality of the parties follows from the requirements of good administration of justice. These requirements have not been impaired in the present case by the circumstance that the written statement on behalf of the [U.N.] officials was submitted through Unesco. Finally, although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it. In view of this there would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized to ask for an Advisory Opinion of the Court"[7].

34. This time the Court focused its attention on the controversy opposing individuals (staff members) to an international organization (UNESCO). After expressly saying so, the Court deemed it fit to warn:

> "The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization.
>
> The Court recognizes that the Administrative Tribunal is a Tribunal of limited jurisdiction"[8].

35. The developments of international law had already overcome the *mens legis* of pertinent provisions of the Statute of the Court, concerning review procedures, opposing individuals to international organizations. In its 1956 Advisory Opinion, the Court, referring to the applicable Staff Regulations, stated that it had kept in mind their texts as well as "their spirit, namely, the purpose for which they were adopted". The Court reminded that:

> "That purpose was to ensure to the Organization the services of a personnel possessing the necessary qualifications of competence and integrity and effectively protected by appropriate guarantees in the matter of observance of the terms of employment and of the provisions of the Staff Regulations"[9].

36. By then, the Court — created to solve disputes only between States — was already attentive, in the review proceedings of the kind, to the individuals employed by international

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[7] *ICJ*, Advisory Opinion of 23.10.1956, on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, *ICJ Reports* (1956) p. 86.

[8] *Ibid*., p. 97.

[9] *Ibid*., p. 98.

organizations and working for them. Already in 1956 the Court pondered that a request for an Advisory Opinion under Article XII of the Annex to the Statute of the ILOAT was limited to challenges of decisions of this latter confirming its jurisdiction, or else to cases of "fundamental fault of procedure"; apart from that, there was no remedy against decisions of the ILOAT[10]. In other words, the rule of law applied not only in inter-State disputes, but also in controversies between international organizations and their staff members. In its Advisory Opinion of 1956, the Court confirmed the validity of the Judgments of the ILOAT[11].

37. The procedure followed by the Court, however, did not escape criticisms. In his Separate Opinion, Judge M. Zafrulla Khan observed that

> "By dispensing with oral proceedings the Court deprived itself of a means of obtaining valuable assistance in the discharge of one of its judicial functions. Oral proceedings were dispensed with not because the Court considered that it could not receive any assistance through that means, but because the inequality of the parties in respect of oral hearings could not be remedied in any manner"[12].

38. Judge R. Córdova went even further: in a thoughtful Dissenting Opinion, he began by pondering that review procedures of the kind envisaged herein attributed new functions to the ICJ, well beyond the provision of Article 34 (1) of its Statute, whereby *only* States may be parties in cases before it[13]. Article XII of the Annex to the Statute of the ILOAT and Article 11 of the Statute of the UNAT introduced "a confusion" into the two main functions (contentious and advisory) of the ICJ. Articles 34-37 of the Court's Statute exclude the possibility of individuals "becoming parties in contentious cases before the Court"[14]. The contentious function of the Court, — Judge Córdova recalled, — was limited to cover

> "disputes between States, *only and exclusively*.
>
> In debarring individuals from coming before the Court as parties to 'a case', that is, to a contentious litigation, the Statute adopted the theory that individuals are not subjects of international law"[15].

39. At the 1945 San Francisco Conference, — he went on, — this matter was the object of attention (and even a Venezuelan amendment did not succeed), but at the end of the debates the Chairman of the Committee IV of the Conference (the Delegate of Peru) summed up the discussions, stating that Article 34 of the Court's Statute was indeed intended to lay down that only States, and not individuals and international organizations, might be parties to contentious cases before the Court[16]. Yet, the case brought before the Court in the present review procedure was of a "contentious" nature, seeking, "in the guise of an advisory opinion", a "true judgment", a "real decision binding those parties"[17].

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[10] *Ibid.*, p. 98.

[11] Cf. *ibid.*, p. 101.

[12] *Ibid.*, p. 114.

[13] *Ibid.*, p. 157.

[14] *Ibid.*, p. 159.

[15] *Ibid.*, p. 160.

[16] *Ibid.*, p. 161.

[17] *Ibid.*, p. 161.

40. There was, — Judge Córdova insisted, — a "confusion", in Article XII of the Annex to the Statute of the ILOAT and in Article 11 of the UNAT, between advisory and contentious proceedings; but what UNESCO wanted (in that case of 1956) from the ICJ was, in his view, "a binding decision, a judgment"[18], — binding on "both the Organization and the private individuals, its officials"[19]. To him, that was indeed "a contentious case"; and he lucidly added:

> "It is impossible to get away from the fact that the [U.N.] officials were necessarily parties in the first instance and they should be so considered in the second instance as well. One cannot think of this case as being of two different natures, a contentious case before the Administrative Tribunal and not a contentious one when it comes before the Court. When and why should it lose its initial nature? When it comes to the second instance before the Court and just because it is improperly introduced as an Advisory Opinion? The decision of this Court is not only connected with, but absolutely restricted to, the contentious dispute decided by the Administrative Tribunal between the two parties, the Organization and the individuals"[20].

41. Equality of the parties existed in the procedure before the ILOAT, but not subsequently, in the review procedure before the ICJ. As to this latter, Judge Córdova warned,

> "The inequality of the parties in the present case is evident, owing to the impossibility under the Statute for individuals to come before the Court and therefore the impossibility for the Court to respect one of the most fundamental and time-honoured principles which requires equality of the parties before the law and in the exercise of their rights before tribunals"[21].

42. The decision to dispense with oral hearings, thus departing from "the normal procedure", — he added, — led to an "unusual" and "abnormal" procedure, making "more flagrant the existence of such inequality between the parties", making the original complainants "depend upon the goodwill of their opponents", rendering it, in his view, "impossible for the Court to administer justice in strict compliance with the basic principles of justice"[22]. He then concluded that:

> "For individuals and international organizations to be parties in a contentious procedure it would be absolutely necessary to change the Statute, the only means of securing equality for them before the Court. This fact necessarily means that the Court, according to the present terms of the Statute, cannot legally act in compliance with the equality principle (. . .)"[23].

4. The Advisory Opinion of 1973

43. Almost two decades later, in its Advisory Opinion of 1973 on the *Application for Review of Judgment n. 158 of the U.N. Administrative Tribunal*, the ICJ admitted that the difficulty it faced

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[18] *Ibid*., p. 161.

[19] *Ibid*., p. 163.

[20] *Ibid*., p. 163.

[21] *Ibid*., p. 166.

[22] *Ibid*., pp. 166-167.

[23] *Ibid*., p. 168.

in such review proceedings ensued from Article 66 of its Statute, which made provision for "the submission of written or oral statements only by States and international organizations" (para. 34). The Court then bypassed that difficulty by deciding not to hold public hearings; in this way, it added, "the requirements of equality had been sufficiently met to enable it to comply with the request for an Opinion" (para. 34)[24]. The Court referred to General Assembly resolution 957 (X), which recommended in 1955 to avoid oral statements in such review proceedings, so as to avoid inequality of arms; the Court itself found that it could prescind from oral statements, as it did in its advisory proceedings which led to the Advisory Opinion of 1956 (*supra*). In its view, written statements were sufficient in review proceedings (para. 36)[25].

44. The Court upheld its *jurisprudence constante* to the effect that "a reply to a request for an advisory opinion should not, in principle, be refused", and "only compelling reasons would justify such a refusal" (para. 40)[26]. In his Dissenting Opinion, Judge F. de Castro referred to a "hybrid procedure", or a "pseudo-advisory opinion", which Judge P. Morozov commented in his Dissenting Opinion that "the right to initiate the procedure for review of the judgments of the ILO Tribunal does not belong to private persons or to any State, but to the Governing Body itself alone"[27]. And in his insightful Dissenting Opinion, Judge André Gros warned that "[l]egality and expediency must be clearly separated", and added that

> "the elimination of the oral proceedings in this case prejudiced the right of Members of the Court to obtain information. Unwillingness to open the door of oral argument for the staff member concerned has led to its being closed not only to the administration — which obviously did not mind — but also to the judge"[28].

5. The Advisory Opinion of 1982

45. One decade later, in its Advisory Opinion of 1982 on the *Application for Review of Judgement n. 273 of the U.N. Administrative Tribunal*, the ICJ expressly acknowledged that the questions lodged with it, in the *cas d'espèce* and in previous cases of the kind, concerned the rights of individuals (para. 20). The Court also warned that the fact that it decided to comply with the request for an advisory opinion did not in any way imply "condonation" of irregularities, and stressed the need "to secure equality between the applicant State and the staff member" and to assist the General Assembly in this connection[29]. In his Separate Opinion, Judge H. Mosler referred to the *bypassing* of "the question of inequality between the parties", by not holding hearings (as the Court had done in 1973); and he judiciously added that

> "The main preoccupation of the Court related to the inequality between the parties to the original dispute, the Secretary-General and the staff member, because individual persons have, according to the Statute, no *jus standi in judicio* before the Court. (. . .) I cannot but regret that there should exist a particular type of case

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[24] *ICJ*, Advisory Opinion of 12.07.1973, on the *Application for Review of Judgement n. 158 of the U.N. Administrative Tribunal*, *ICJ Reports* (1973) p. 179.

[25] *Ibid*., pp. 180-181.

[26] *Ibid.*, p. 183.

[27] *Ibid.*, pp. 275 and 300, respectively.

[28] *Ibid.*, pp. 257 and 262.

[29] Cf. paragraph 79, of the Advisory Opinion of 20.07.1982, on the *Application for Review of Judgement n. 273 of the U.N. Administrative Tribunal*, *ICJ Reports* (1982) pp. 365-366.

coming under the competence of the Court in which oral statements before the Court are practically excluded once and for all"[30].

6. The Advisory Opinion of 1987

46. Half a decade later, the Advisory Opinion of the ICJ of 1987, on the *Application for Review of Judgement n. 333 of the U.N. Administrative Tribunal*, was unfavourable to the original complainant, not having accepted his pleas. The ICJ found therein that the UNAT did not fail to exercise jurisdiction vested in it, and did not err on any question of law relating to the provisions of the U.N. Charter[31]. In his Separate Opinion, Judge Roberto Ago was critical of the review procedure, for not fully meeting the need for a satisfactory "system of administrative justice". In his view, "the only true remedy" for the existing drawbacks

> "would be the introduction of a second-tier administrative court, in other words, a court with competence to review the decisions of the first-tier court in all respects, both legal and factual, and to correct and compensate any defects they may contain" (para. 6).

7. General Assessment

47. In so far as the problem of the inequality of the parties in review procedures before the ICJ is concerned, the incisive dissenting warning of Judge Córdova in the Court's Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* (*supra*), dates from 23.10.1956. The problem still faced by the ICJ today, 01.02.2012, over half a century later, when the Court delivers its present Advisory Opinion on *Judgment n. 2867 of the Administrative Tribunal of the ILO upon a Complaint Filed against the International Fund for Agricultural Development (IFAD)*, is essentially the same.

48. For 56 years the force of inertia and mental lethargy have prevailed in this regard. The abnormal procedure keeps on being followed by the Court (in respect of review of the ILOAT judgments), in 2011 as in 1956, rested olympically upon the dogma of times past that individuals cannot appear before the ICJ because they are not subjects of international law. The result is the prehistoric and fossilized procedure that defies logic, common sense and the basic principle of the good administration of justice (*la bonne administration de la justice*).

49. In the course of the present proceedings, not only was the original complaint in the hands of her opponent to submit their views to the Court, but, moreover, twice the Registry of the Court had to intervene to make sure that that was done in a duly and proper way (cf. *supra*). In the already mentioned statement by Ms. Saez García of 30.08.2011 (para. 20, *supra*), she complained of the inequality permeating the whole review procedure; not only was the IFAD the sole party able to request review, but inequality continued to exist all the time, as

> "The mere request for an advisory opinion has provided an excuse for the [IFAD] not to execute Judgment 2867. Even though the [IFAD]'s application for suspension of execution was denied, the [IFAD] has still avoided execution on the grounds that it might become entitled to repayment of the amounts due if the Court declares Judgment 2867 invalid" (para. 14).

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[30] *ICJ Reports* (1982) p. 380.

[31] Cf. paragraph 97, of the Advisory Opinion of 27.05.1987, on the *Application for Review of Judgement n. 333 of the U.N. Administrative Tribunal*, *ICJ Reports 1987*, p. 72.

In an epoch in which the topic of "*The Rule of Law at National and International Levels*" is gaining increasing currency in the recent debates of the U.N. General Assembly[32], it may not be excessive to add that the rule of law is not only for States but also for international organizations, encompassing review procedures of the kind envisaged in the present Advisory Opinion of the Court, in so far as the internal law of the United Nations is concerned.

50. Last but not least, on the problem at issue, it should not pass unnoticed that, throughout the last 56 years, dissenting views and well-founded expressions of discontent with the present situation emanated from Judges (also jurists) from different legal systems and traditions (like M. Zafrulla Khan, R. Córdova, F. de Castro, P. Morozov, A. Gros, H. Mosler, R. Ago). This is not surprising, as we are here before basic principles of law, such as those of the good administration of justice (*la bonne administration de la justice*) and of the equality of arms (*égalité des armes*) in (international) legal procedure.

51.As for many years I have consistently attached the utmost importance to such matter (also in another international jurisdiction), I feel obliged to take this criticism further, given the unnecessary persistence of the problem, and the fact that it touches on other aspects which are very dear to me, namely: *(a)* the emergence and consolidation of individuals as subjects of international law; *(b)* the imperative of securing the equality of the parties in the international legal process, as a component of the right of access to justice *lato sensu*; and *(c)* the need to secure the *locus standi in judicio* and the *jus standi* to individuals before international tribunals, including the ICJ. May I thus add some remarks on the regrettable persistence of procedural inequality, and then move, accordingly, to the consideration, within the confines of the present Separate Opinion, of these three remaining points.

VIII. The Force of Inertia: The Regrettable Persistence of Procedural Inequality

52. As we have seen, the problem of the procedural inequality has marked presence in the five previous Advisory Opinions of the Court, namely, those of 1954, 1956, 1973, 1982 and 1987 (cf. s*upra*). Despite this inequality, or parallel to it, the inclination of the ICJ has been in the sense of confirming the validity of the decisions at issue of both the UNAT and the ILOAT, whether favourable to the original complainants or not. Thus, in its Advisory Opinions of 1954, 1973, 1982 and 1987, it upheld the prior decisions of the UNAT, while in its Advisory Opinion of 1956 and in the present one of 2012, it did the same in respect of prior decisions of the ILOAT (cf. *supra*). Yet, the handling of the issue of procedural inequality, — e.g., by deciding not to have oral hearings in the course of the proceedings, — has been and is, in my understanding, most unsatisfactory: rather than a solution, it is the capitulation in face of a persisting problem.

53. It is not surprising that, in the mid-nineties, the initiative was again taken by the U.N. General Assembly to undertake an over-all revision of the review procedure concerning the UNAT. This occurred half a century after its 1955 reconsideration of the procedures for review of judgments of administrative tribunals. In fact, the U.N. General Assembly retook the subject, in 1994. This time the General Assembly focused specifically on the review of the procedure under Article 11 of the Statute of the UNAT. A clear majority of the Delegations found that that procedure was not feasible, and should be replaced by a more adequate one, "to assist practically in the resolution of staff employment problems" (para. 9, and cf. para. 12).

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[32]Cf., on the item "The Rule of Law at the National and International Levels", the following resolutions of the U.N. General Assembly: resolutions A/RES/61/39, of 04.12.2006; A/RES/62/70, of 06.12.2007; A/RES/63/128, of 11.12.2008; A/RES/64/116, of 16.12.2009; A/RES/65/32, of 06.12.2010.

54. Much of the criticism was directed to the appeal system (in the review procedure at issue) available within the Secretariat (para. 37). Several representatives raised "serious doubts" about the appropriateness of involving the ICJ in staff disputes; the Nordic countries noted further, in particular, that

> "the advisory procedure envisaged by the Statute of the Court did not provide an appropriate adversary procedure necessary for an appeals tribunal, which is the Court's present role in this process" (para. 18)[33].

55. The "overwhelming majority of representatives" found that the UNAT's review procedure "should be abolished" (para. 36). This is what in fact happened. By 1995 the decision had been taken to suppress the existing review procedure in respect of the UNAT; that mechanism was formally extinguished by General Assembly resolution 50/54, of 29.01.1996. However, the other mechanism, the review procedure in respect of the ILOAT, persists to date, and, with it, by force of inertia, the procedural inequality which has existed from the beginning.

56. The shortcomings of, and problems raised by, the operation of international administrative jurisdictions in general, and by the review procedure in particular, have kept on being object of attention in expert writing[34]. Yet, such problems persist to date. This being so, it seems all too proper to rescue, for consideration in the present context, the advances experienced by the *jus gentium* of our times with the emergence and consolidation of individuals as subjects of International Law, with their access to justice *lato sensu* (encompassing procedural equality), with their *locus standi in judicio* and their *jus standi*, in the hope that due consideration will be given to them in the operation of international administrative jurisdictions in general (encompassing the review procedure in particular) in future developments.

IX. The Emergence of Individuals as Subjects of International Law, Endowed with International Juridical Capacity

57. Preliminarily, it should be kept in mind that this matter can, in its origins, be traced back to the *emerging* law of nations, which envisaged the individuals as *subjects* of rights. In effect, the acknowledgment of the necessity of the *legitimatio ad causam* of individuals in international law[35], finds support, in historical perspective, in the thinking of the so-called "founding fathers" of the discipline, which should not be forgotten in our times. May I briefly recall the main thrust of their thinking to this effect, within the confines of the present Separate Opinion. I have done so in my Separate Opinion (paras. 26-28) in the Court's Order of 04.07.2011 (concerning the intervention of Greece) in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy); as the point has again been brought to the fore in the course of the present advisory proceedings, I deem it fit to dwell upon it once more herein, in greater detail, in the present Separate Opinion.

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[33] And cf. para. 35, for the reference to the 1984 *Report* of the U.N. Secretary General, on the feasibility of establishing a single administrative tribunal for the settlement of disputes of the kind.

[34] Cf, *inter alia*, e.g., X. Pons Rafols, *Las Garantías Jurisdiccionales de los Funcionarios de las Naciones Unidas*, Barcelona, Universitat de Barcelona, 1999, ch. IV, pp. 145-193; D. Ruzié, "Réflexions sur la pratique du droit de recours des fonctionnaires internationaux", *in Internationale Gemeinschaft und Menschenrechte - Festschrift für G. Ress* (eds. J. Bröhmer *et alii*), Köln/Berlin/München, C. Heymanns Verlag, 2005, pp. 223-233.

[35] A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-212; A.A. Cançado Trindade, *Évolution du droit international au droit des gens — L´accès des individus à la justice internationale: Le regard d´un juge*, Paris, Pédone, 2008, pp. 7-184; A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, University of Deusto, 2001, pp. 7-96.

58. Along the XVIth century, the conception of Francisco de Vitoria (author of the renowned *Relecciones Teológicas*, 1538-1539) flourished, whereby the law of nations regulates an international community (*totus orbis*) constituted of human beings organized socially in States and coextensive with humanity itself; the reparation of breaches of (human) rights reflects an international necessity fulfilled by the law of nations, with the same principles of justice applying both to States and to individuals and peoples who form them[36]. Earlier on, in his *De Lege*, F. Vitoria sustained the necessity of every law to pursue, above all, the common good; and he added that natural law is found not in the "will", but rather in right reason (*recta ratio*)[37].

59. More than four and a half centuries later, his message retains a remarkable topicality. On his turn, Alberico Gentili (author de *De Jure Belli*, 1598) sustained, by the end of the XVIth century, that Law governs the relationships between the members of the universal *societas gentium*. In his *De Jure Belli Libri Tres* (1612), A. Gentili held that the law of nations was "established among all human beings", being "observed by all mankind"[38]. In the XVIIth century, in the outlook advanced by Francisco Suárez (author of the treaty *De Legibus ac Deo Legislatore*, 1612), the law of nations discloses the unity and universality of humankind, and regulates the States in their relations as members of the universal society[39].

60. Shortly afterwards, the conception elaborated by Hugo Grotius (*De Jure Belli ac Pacis*, 1625), sustained that *societas gentium* comprises the whole of humankind, and the international community cannot pretend to base itself on the *voluntas* of each State individually; human beings — occupying a central position in international relations — have rights *vis-à-vis* the sovereign State, which cannot demand obedience of their citizens in an absolute way (the imperative of the common good), as the so-called "*raison d'État*" has its limits, and cannot prescind from Law[40]. In this line of reasoning, in the XVIIIth century, Samuel Pufendorf (*De Jure Naturae et Gentium*, 1672) sustained as well the subjection of the legislator to reason; to him, international law was founded on natural law, being a great system of universal law "embracing even private law"[41].

61. On his turn, Christian Wolff (author of Jus Gentium Methodo Scientifica *Pertractatum*, 1749), pondered that, just as individuals ought to, in their association in the State, promote the

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[36]Cf. Francisco de Vitoria, *Relecciones — del Estado, de los Indios, y del Derecho de la Guerra*, México, Porrúa, 1985, pp. 1-101; Francisco de Vitoria, *De Indis - Relectio Prior* (1538-1539), *in*: *Obras de Francisco de Vitoria — Relecciones Teológicas* (ed. T. Urdanoz), Madrid, BAC, 1960, p. 675; F. de Vitoria, *La Ley* (*De Lege — Commentarium in Primam Secundae*), Madrid, Tecnos, 1995, pp. 5, 23 and 77.

[37]F. de Vitoria, *La Ley* (*De Lege — Commentarium in Primam Secundae*), Madrid, Tecnos, 1995, pp. 5, 23 and 77.

[38]A. Gentili, *De Jure Belli Libri Tres* (1612), vol. II, Oxford/London, Clarendon Press/H. Milford — Carnegie Endowment for International Peace, 1933, p. 8.

[39]Cf. Association Internationale Vitoria-Suarez, *Vitoria et Suarez — Contribution des Théologiens au Droit International Moderne*, Paris, Pédone, 1939, pp. 169-170.

[40]Cf., on his conception of *jus gentium*, H. Grotius, *De Jure Belli ac Pacis* (1625), The Hague, Nijhoff, 1948, pp. 6, 10 and 84-85. Cf. also Hersch Lauterpacht, "The Grotian Tradition in International Law", 23 *British Yearbook of International Law* (1946) pp. 1-53.

[41]H. Wehberg, "Introduction", *in* S. Pufendorf, *Elementorum Jurisprudentiae Universalis Libri Duo* (1672), vol. II, Oxford/London, Clarendon Press/H. Milford — Carnegie Endowment for International Peace, 1931, pp. XIV, XVI and XXII. To him, the standards of justice applied *vis-à-vis* the States as well as the individuals; Hersch Lauterpacht, "The Law of Nations, the Law of Nature and the Rights of Man", 29 *Transactions of the Grotius Society* (1943) pp. 7 and 21-31, esp. p. 26.

common good, the State for its part has the correlative duty to seek its perfection[42]. Stressing that the law of nations was necessary rather than voluntary, Wolff defined it as "the science of that law which nations or peoples use in their relations with each other and of the obligations corresponding thereto"; it "binds nations in conscience", in order to preserve society composed of individuals, and to promote the common good. C. Wolff stressed that, just as all individuals were free and equal, all nations likewise were "by nature equal the one to the other", with the corresponding rights and obligations being also the same[43]. Already in the presentation of his treatise, Wolff wrote with clarity that natural law

> "controls the acts of individual men as well as those of nations also, by prescribing duties both toward themselves and toward each other. And just as it has united individual men to each other (. . .) and has established among them a certain society, so that man is necessary to man (. . .); so (. . .) has it united nations, (. . .) so that nation is necessary to nation (. . .). Therefore the entire human race is likened to a living body (. . .), and it retains unimpaired health so long as the individual members perform their functions properly"[44].

62. However, the illuminating thoughts and vision of the so-called founding fathers of International Law, which conceived it as a truly *universal* system, regrettably came to be gradually surpassed by new doctrinal constructions, and mainly by the emergence of legal positivism. Yet, even with the early emergence of this latter, doctrinal constructions such as that of Cornelius van Bynkershoek (*De Foro Legatorum*, 1721; *Questiones Juris Publici — Libri Duo*, 1737) continued to uphold a multiplicity of subjects of *jus gentium*. To Bynkershoek, e.g., those subjects were mainly the nations (*gentes*), but also peoples and other "persons of free will" (*inter volentes*); legal subjectivity, to him, embraced all those who acted in the field of *jus gentium* of his times, and, to approach this latter, resort was to some extent still made to *ratio*[45].

63. The subsequent personification of the all-powerful State, inspired mainly in the philosophy of law of Hegel, had a harmful influence in the evolution of international law by the end of the XIXth century and the beginning of the XXth century. This doctrinal trend resisted as much as it could to the ideal of emancipation of the human being as subject of the law of nations, endowed with international juridical capacity. Legal positivism personified the State and shifted emphasis to its "will", seeking to reduce the rights of the human person to those "conceded" by the State. It was necessary to wait for the first decades of the XXth century to witness individuals vindicating their own rights as subjects of the law of nations, endowed with international juridical personality.

64. The advent of a permanent international jurisdiction, early in the XXth century, in fact transcended a purely inter-State outlook of the international *contentieux*. The projected International [Maritime] Prize Court (1907) foresaw the access to international justice not only by States, but also by individuals. That Court, however, was not established, given the lack of the required number of ratifications for the corresponding Convention to enter into force. Yet, the idea

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[42]C. Wolff beheld nation-States as members of a *civitas maxima*, a concept which Emmerich de Vattel (author of *Le Droit des Gens*, 1758), subsequently, invoking the necessity of "realism", pretended to replace by a "society of nations" (a less advanced concept); cf. F.S. Ruddy, *International Law in the Enlightenment — The Background of Emmerich de Vattel's Le Droit des Gens*, Dobbs Ferry/N.Y., Oceana, 1975, p. 95.

[43]C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (edition of 1764), vol. II, Oxford/London, Clarendon Press/H. Milford — Carnegie Endowment for International Peace, 1934, pp. 3, 9-11, 13 and 15-16.

[44]*Ibid*., p. 3.

[45]K. Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law*, The Hague, Kluwer, 1998, pp. 56-59, 174-175 and 178-179, and cf. pp. 68-69.

of overcoming the inter-State paradigm was already present at the II Hague Peace Conference of 1907. In that same year, in effect the idea found concrete expression, not at universal level, but rather at the regional Latin-American level, by means of the creation of the first (permanent) international tribunal of our era, the Central American Court of Justice.

65. Created in 1907 and endowed with a wide jurisdictional basis, the Central American Court of Justice, the pioneer of modern international tribunals, granted *jus standi* (direct access not only to States but also to individuals who could present claims against their own States). In fact, the Central American Court of Justice was seized by both States and individuals[46], having operated continuously for one decade (1908-1918), while the Washington Convention which established it remained in force. Once again, Latin America, faithful to its rich international legal heritage, was in the forefront of the evolution of modern international law in this domain.

66. The Central American Court of Justice heralded the advent and the first concrete advances of the *rule of law (préeminence du droit)* at international level, even before the creation of the Permanent Court of International Justice (PCIJ). During its decade of existence, it was regarded as giving expression to the "Central American conscience"[47]. The important point to retain here is that, in historical perspective, that pioneering experiment granted *jus standi* — not only *locus standi in judicio* — to individuals as the complaining party before it.

67. In the era of the League of Nations, other pioneering experiments flourished, going likewise beyond the traditional inter-State dimension, and giving procedural capacity to individuals (*jus standi* and *locus standi*) at international level. Such was the case of the systems of minorities and of territories under mandate (*infra*), and the systems of petitions of Upper-Silesia, the Aaland Islands and the Saar and of Danzig[48]. They paved the way for the consolidation, in the era of the United Nations, of the mechanisms of international individual petition, not only in the trusteeship system, but also, and above all, under the international human rights treaties and instruments[49], which were to be extended also to the regional level (European and Inter-American Courts of Human Rights, lately followed by the African Court of Human and Peoples' Rights). The individual was erected into subject of international law, endowed with international procedural capacity.

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[46] A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* — General Course on Public International Law – Part I", 316 *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) p. 289.

[47] C.J. Gutiérrez, *La Corte de Justicia Centromericana,* San José of Costa Rica, Ed. Juricentro, 1978, pp. 31, 42, 106, 150-154 and 157-158.

[48] J.-C. Witenberg, "La recevabilité des réclamations devant les juridictions internationales", 41 *RCADI* (1932) pp. 5-135; J. Stone, "The Legal Nature of Minorities Petition", 12 *BYBIL* (1931) pp. 76-94; M. Sibert, "Sur la procédure en matière de pétition dans les pays sous mandat et quelques-unes de ses insuffisances", 40 *RGDIP* (1933) pp. 257-272; M. St. Korowicz, *Une expérience en Droit international — La protection des minorités de Haute-Silésie,* Paris, Pédone, 1946, pp. 81-174.

[49] J. Beauté, *Le droit de pétition dans les territoires sous tutelle,* Paris, LGDJ, 1962, pp. 1-256; M.E. Tardu, *Human Rights — The International Petition System,* binders 1-3, Dobbs Ferry N.Y., Oceana, 1979-1985; T. Zwart, *The Admissibility of Human Rights Petitions,* Dordrecht, Nijhoff, 1994, pp. 1-237.

68. The individual came to be acknowledged as subject of both domestic and international law[50]. In fact, he has always remained in contact, directly or indirectly, with the international legal order. In the inter-war period, the experiments of the *minorities*[51] and *mandates*[52] *systems* under the League of Nations, for example, bear witness thereof[53]. They were followed, in that regard, by the *trusteeship system*[54] under the United Nations era, parallel to the development under this latter, along the years, of the multiple mechanisms — conventional and extra-conventional — of international protection of human rights.

69. Those earlier experiments in the XXth century were of relevance for subsequent developments in the international safeguard of the rights of the human person[55]. It is beyond the purposes of the present Separate Opinion to undertake a survey of all these developments. May I limit myself here, once again, to refer to my previous Separate Opinion in the Court's recent Order of 04.07.2011 (pertaining to Greece's intervention) in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy): I have had therein the occasion to dwell upon the distinct aspects of the individuals as *titulaires* of rights (parallel to States) in the new *jus gentium* of our times, namely: *(a)* the legacy of the individuals' subjectivity in the law of nations (paras. 25-29); *(b)* their presence and participation in the international legal order (paras. 30-35); *(c)* their rescue as subjects of international law (paras. 36-49); and *(d)* the historical significance of their international subjectivity (paras. 50-54).

X. SUBJECTS OF RIGHTS: THE OUTDATED DOGMATISM OF THE PCIJ AND ICJ STATUTES

70. The question of the procedural capacity of the individuals before the ICJ, and its predecessor the Permanent Court of International Justice (PCIJ), was effectively considered on the occasion of the original drafting, by the Advisory Committee of Jurists appointed by the old League of Nations, of the Statute of the PCIJ, in 1920[56]. Of the ten members of the aforementioned Committee of Jurists, only two — Loder and De La Pradelle — pronounced themselves in favour of enabling the individuals to appear as parties before The Hague Court (*jus*

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[50]On the historical evolution of the legal personality in the law of nations, cf. H. Mosler, "Réflexions sur la personnalité juridique en Droit international public", *in Mélanges offerts à H. Rolin — Problèmes de droit des gens*, Paris, Pédone, 1964, pp. 228-251; G. Arangio-Ruiz, *Diritto Internazionale e Personalità Giuridica*, Bologna, Coop. Libr. Univ., 1972, pp. 9-268; G. Scelle, "Some Reflections on Juridical Personality in International Law", *in Law and Politics in the World Community* (ed. G.A. Lipsky), Berkeley/L.A., University of California Press, 1953, pp. 49-58 and 336; J.A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", 179 *Recueil des Cours de l'Académie de Droit International de La Haye [RCADI]* (1983) pp. 157-238.

[51]Cf., e.g., P. de Azcárate, *League of Nations and National Minorities: An Experiment*, Washington, Carnegie Endowment for International Peace, 1945, pp. 123-130; J. Stone, *International Guarantees of Minorities Rights*, Oxford, University Press, 1932, p. 56; A.N. Mandelstam, "La protection des minorités", 1 *RCADI* (1923) pp. 363-519.

[52]Cf., e.g., G. Diena, "Les mandats internationaux", 5 *RCADI* (1924) pp. 246-261; N. Bentwich, *The Mandates System*, London, Longmans, 1930, p. 114; Quincy Wright, *Mandates under the League of Nations*, Chicago, University Press, 1930, pp. 169-172.

[53]C.A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, Munksgaard, 1962, pp. 109-131; A.A. Cançado Trindade, "Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century", 24 *Netherlands International Law Review/Nederlands Tijdschrift voor international Recht* (1977) pp. 373-392.

[54]Cf., e.g., C.E. Toussaint, *The Trusteeship System of the United Nations*, London, Stevens, 1956, pp. 39, 47 and 249-250; J. Beauté, *Le droit de pétition dans les territoires sous tutelle*, Paris, LGDJ, 1962, pp. 48-136; G. Vedovato, "Les accords de tutelle", 76 *RCADI* (1950) pp. 613-694.

[55]Cf., e.g., C.Th. Eustathiades, "Une nouvelle expérience en Droit international — Les recours individuels à la Commission des droits de l'homme", *in Grundprobleme des internationalen Rechts — Festschrift für J. Spiropoulos*, Bonn, Schimmlebusch, 1957, pp. 111-137, esp. pp. 77 and 121 n. 32

[56]A.A. Cançado Trindade, *El Acceso Directo del Individuo…*, *op. cit. supra* n. (35), p. 31, and cf. pp. 32-35.

standi) in contentious cases against (foreign) States. The majority of the Committee, however, was firmly opposed to this proposition: four members[57] objected that the individuals were not subjects of International Law (and could not, thus, in their view, be parties before the Court) and that only the States were juridical persons in the international order, — in what they were followed by the other members[58].

71. The position which prevailed in 1920 — which has been surprisingly and regrettably maintained in Article 34 (1) of the Statute of the ICJ (formerly the PCIJ) to date — was promptly and strongly criticized in the more lucid doctrine of the epoch (already in the twenties). Thus, in his thoughtful monograph *Les nouvelles tendances du Droit international* (1927), Nicolas Politis pondered that the States are no more than fictions, composed as they are of individuals, and that all Law ultimately aims at the human being, and nothing more than the human being[59]: this is something "so evident", — he added, that

> "il serait inutile d'y insister si les brumes de la souveraineté n'avaient pas obscurci les vérités les plus élémentaires"[60].

And N. Politis proceeded in the defence of the granting to individuals of the direct appeal to international instances to vindicate their "legitimate interests", as that would to "a true necessity of international life"[61].

72. Another criticism to the solution adopted in the matter by the Statute of the PCIJ (Article 34 (1)) was formulated by J. Spiropoulos, also in the twenties. Already in 1928, he had anticipated that the emancipation of the individual from the State was a "question of time" and that the individual should be able to defend *himself* and his rights at the international level[62]. There was — he added — no impediment for conventional International Law to secure to individuals a direct action at international level (there having even been precedents in this sense in the inter-war period); if this did not occur and one would limit oneself to judicial actions at domestic law level, not seldom the State would become "judge and party" at the same time, what would be an incongruity.

73. To J. Spiropoulos, the international legal order can address itself directly to individuals (as exemplified by the peace treaties of the inter-war period), thereby erecting them into the condition of subjects of International Law, to the extent that a direct relationship is established between the individual and the international legal order, which renders him "directly *titulaire* of rights or of obligations"; thus, one cannot fail to admit the international legal personality of the individual[63]. Without the granting to individuals of direct means of action at international level, his rights will continue "without sufficient protection"; only with such direct action before an international instance, — he added, — an *effective* protection of human rights will be achieved, in conformity with "the spirit of the new international order".

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[57] Ricci-Busatti, Baron Descamps, Raul Fernandes and Lord Phillimore.

[58] Cf. account *in* J. Spiropoulos, *L´individu en Droit international*, Paris, LGDJ, 1928, pp. 50-51; N. Politis, *op. cit. infra* n. (59), pp 84-87; M.St. Korowicz, "The Problem of the International Personality of Individuals", 50 *American Journal of International Law* (1956) p. 543.

[59] N. Politis, *Les nouvelles tendances du Droit international*, Paris, Libr. Hachette, 1927, pp. 76-77 and 69.

[60] *Ibid*., pp. 77-78.

[61] *Ibid*., pp. 82-83 and 89-90, and cf. pp. 92 and 61.

[62] J. Spiropoulos, *op. cit. supra* n. (58), p. 44, and cf. pp. 49 and 64-65.

[63] *Ibid*., pp. 50-51, 25, 31-33 and 40-41.

74. The option made by the draftsmen of the Statute of the old PCIJ, stratified with the passing of time in the Statute of the ICJ up to the present time, is even more open to criticism if we consider that, already in the first half of the XXth century, there were experiments of International Law which in effect granted international procedural status to individuals. This is exemplified by the system of the navigation of the river Rhine, by the Project of an International Prize Court (1907), by the Central American Court of Justice (1907-1917), as well as, in the era of the League of Nations, by the systems of minorities (including Upper Silesia) and of the territories under mandate, by the systems of petitions of the Islands Aaland and of the Saar and of Danzig, besides the practice of mixed arbitral tribunals and of mixed claims commissions, of the same epoch[64].

75. This evolution intensified and generalized in the era of the United Nations, with the adoption of the system of individual petitions under some universal human rights treaties of our times, in addition to human rights conventions at regional level, which established international human rights tribunals (the European and Inter-American Courts of Human Rights[65], followed, more recently, by the African Court of Human and Peoples' Rights). Thereunder the international procedural capacity of individuals came to be exercised, with their direct access to international justice[66]. The significance of the right of individual petition can only be properly assessed in historical perspective.

XI. THE EROSION OF THE INTER-STATE OUTLOOK OF ADJUDICATION BY THE ICJ

76. The fact that the Advisory Committee of Jurists did not find, in 1920, that the time was ripe to grant access to the PCIJ to subjects of rights other than the States, such as the individuals, did not mean a definitive answer to the question at issue. The fact that the same position was maintained at the time of adoption in 1945 of the Statute of the ICJ did not mean a definitive answer to the question at issue. The question of access of individuals to international justice, with procedural equality, continued to occupy the attention of legal doctrine ever since, throughout the decades. Individuals and groups of individuals began to have access to other international judicial instances (cf. *supra*), reserving the PCIJ and later the ICJ only for disputes between States.

77. The dogmatic position taken originally in 1920, on the occasion of the preparation and adoption of its Statute, did not hinder the PCIJ to occupy itself promptly of cases pertaining to the treatment of minorities and inhabitants of cities or territories with a juridical statute of their own. In considerations developed in the examination of such matters, the PCIJ went well beyond the inter-State dimension, taking into account the position of individuals themselves (as in, e.g., *inter alia*, the Advisory Opinion on *the Jurisdiction of the Courts of Danzig*, 1928 — cf. *infra*, para. 88).

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[64] For a study, cf., e.g., A.A. Cançado Trindade, "Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century", *op. cit. supra* n. (53), pp. 373-392; C.A. Norgaard, *The Position of the Individual in International Law, op. cit. supra* n. (53), pp. 109-128; M.St. Korowicz, *Une expérience de Droit International — La protection de minorités de Haute-Silésie, op. cit. supra* n. (48), pp. 81-174; among others

[65] A.A. Cançado Trindade, *El Acceso Directo del Individuo…, op. cit. supra* n. (35), pp. 34-35.

[66] At the beginning of the exercise of the right to individual petition, such right, even if motivated by the search for individual reparation, also contributed to secure the respect for the objective obligations that were binding upon States Parties. Cf., under the original text of Article 25 of the European Convention of Human Rights, e.g., H. Rolin, "Le rôle du requérant dans la procédure prévue par la Commission européenne des droits de l'homme", 9 *Revue hellénique de droit international* (1956) p. 9; C.Th. Eustathiades, "Les recours individuels à la Commission européenne des droits de l'homme", *in Grundprobleme des internationalen Rechts - Festsschrift für J. Spiropoulos*, Bonn, Schimmelbusch & Co., 1957, p. 121; F. Durante, *Ricorsi Individuali ad Organi Internazionali*, Milano, Giuffrè, 1958, pp. 129-130; K. Vasak, *La Convention européenne des droits de l'homme*, Paris, LGDJ, 1964, pp. 96-98; F. Matscher, "La Posizione Processuale dell'Individuo come Ricorrente dinanzi agli Organi della Convenzione Europea dei Diritti dell'Uomo", *in Studi in Onore di G. Sperduti*, Milano, Giuffrè, 1984, pp. 601-620.

Ever since, the artificiality of such dimension became noticeable and acknowledged, already at an early stage of the case-law of the PCIJ.

78. The exclusively inter-State character of the *contentieux* before the ICJ has not appeared satisfactory at all. At least in some cases, pertaining to the condition of individuals, the presence of these latter (or of their legal representatives), in order to submit, themselves, their positions, would have enriched the proceedings and facilitated the work of the Court. One may recall, for example, the classical *Nottebohm* case concerning double nationality (Liechtenstein *versus* Guatemala, 1955), the case concerning the *Application of the Convention of 1902 Governing the Guardianship of Infants*, (The Netherlands *versus* Sweden, 1958), the cases of the *Trial of Pakistani Prisoners of War* (Pakistan *versus* India, 1973), of the *Hostages (U.S. Diplomatic and Consular Staff) in Teheran* case (United States *versus* Iran, 1980), of the *East-Timor* (Portugal *versus* Australia, 1995), the case of the *Application of the Convention against Genocide* (Bosnia-Herzegovina *versus* Yugoslavia, 1996), and the three successive cases concerning consular assistance — namely, the case *Breard* (Paraguay *versus* United States, 1998), the case *LaGrand* (Germany *versus* United States, 2001), the case *Avena and Others* (Mexico *versus* United States, 2004).

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

80. The artificiality of the exclusively inter-State outlook of the procedures before the ICJ is thus clearly disclosed by the very nature of some of the cases submitted to it. Such artificiality has been criticised, time and time again, in expert writing, including by a former President of the Court itself. It was recalled that "nowadays a very considerable part of international law" (e.g., law-making treaties) "directly affects individuals", and the effect of Article 34(1) of the ICJ Statute has been "to insulate" the Court "from this great body of modern international law". The ICJ remains

> "trapped by Article 34(1) in the notions about international law structure of the 1920s. (. . .) [I]t is a matter for concern and for further thought, whether it is healthy for the World Court still to be, like the international law of the 1920s, on an entirely different plane from that of municipal courts and other tribunals"[67].

[67] R.Y. Jennings, "The International Court of Justice after Fifty Years", 89 *American Journal of International Law* (1995) p. 504.

81. To the same effect, S. Rosenne expressed the view, already in 1967, that there was "nothing inherent in the character of the International Court itself to justify the complete exclusion of the individual from appearing before the Court in judicial proceedings of direct concern to him"[68]. The current practice of exclusion of the *locus standi in judicio* of the individuals concerned from the proceedings before the ICJ, — he added, — in addition to being artificial, could also produce "incongruous results". It was thus highly desirable that that scheme be reconsidered, in order to grant *locus standi* to individuals in proceedings before the ICJ, as

> "it is in the interests of the proper administration of international justice that in appropriate cases the International Court of Justice should take advantage of all the powers which it already possesses, and permit an individual directly concerned to present himself before the Court, (. . .) and give his own version of the facts and his own construction of the law"[69].

XII. THE EARLY ACKNOWLEDGMENT OF THE INEQUALITY OF THE PARTIES IN THE PROCEDURE OF REVIEW OF JUDGMENTS OF ADMINISTRATIVE TRIBUNALS

82. The fact that a procedure such as the one followed in the *cas d'espèce* (review procedure) subsists unchanged to date, despite all the insufficiencies it revealed in the course of past decades, and all the criticisms raised by some of my predecessors as Members of this Court as well as by expert writers, shows indeed the force of inertia and of mental lethargy in its maintenance to date. The present review procedure has persisted so far, making abstraction of — or even indifferent to — the remarkable advances achieved, in the international adjudication by other tribunals, throughout the last decades, in respect of the *equality of the parties* in the international legal process.

83. Yet, the question was object of attention, early in the life of the ICJ, shortly after it delivered its Advisory Opinion of 1954 (cf. *supra*), particularly when the U.N. General Assembly considered, in 1955, the *Report* of its Special Committee on Review of Administrative Tribunal Judgments[70]. In the debates that followed, during the Xth session of the General Assembly, the participating Delegations dwelt upon a series of issues, amongst which was the problem of the lack of *locus standi in judicio* of individuals in the review procedure before the ICJ. The view was expressed that the review procedure should not be used "in a manner that would take undue advantage of a staff member or other interested party"[71].

84. In the course of the debates, the "serious practical difficulties" in the review procedure before the ICJ were acknowledged; the only possibility of by-passing them, then contemplated, was that of the presentation of documents and written briefs by U.N. staff members, to be brought to the attention of the ICJ, but not (under Article 66(2) of the Court's Statute) their representation at oral hearings before the Court[72]. There was thus, admittedly, a lack of equality between the parties[73], as

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[68] S. Rosenne, "Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice", *in International Arbitration — Liber Amicorum for M. Domke* (ed. P. Sanders), The Hague, Nijhoff, 1967, p. 249, and cf. p. 242.

[69] *Ibid.*, p. 250, and cf. p. 243.

[70] Cf. U.N./General Assembly, *Report of the Special Committee on Review of Administrative Tribunal Judgements*, U.N. document A/2909, of 10.06.1955, pp. 1-46.

[71] *Ibid.*, p. 11, para. 74.

[72] *Ibid.*, pp. 5-6, paras. 27 and 31.

[73] *Ibid.*, p. 6, para. 31.

U.N. staff members had "no *locus standi* before the Court"; the view was then expressed that "it would be inequitable to deny a party the right to appear before the reviewing body"[74].

85. On the occasion of that exercise of review at the Xth session of the U.N. General Assembly (1955), the then U.N. Secretary-General, Dag Hammarskjold, pursuant to a suggestion of the Special Committee, presented to the General Assembly an insightful *Memorandum* titled "*Participation of Individuals in Proceedings before the International Court of Justice*"[75]. He regarded of interest

> "to examine in some detail the question of [the] possible participation [of] individuals in proceedings before the International Court of Justice" (para. 7)[76].

To that end, Dag Hammarskjold reviewed the work on this matter since the days of the 1920 Advisory Committee of Jurists, focused on

> "the question of the presentation by individuals of written and oral statements of an argumentative character in contentious cases and in advisory proceedings before the International Court of Justice and its predecessor the Permanent Court of International Justice" (para. 8)[77].

86. Despite the fact that the Advisory Committee at the end decided that "individuals should not be able to become parties" (para. 9), and that this position remained unchanged at the San Francisco Conference in 1945 (para. 25), the U.N. Secretary-General drew attention, in his *Memorandum*, to the actual participation by individuals (who submitted written statements) in advisory proceedings before the old PCIJ[78] (in the "advisory case" of the *Danzig Legislative Decrees*, 1935, and in the "advisory case" of the *Governing Commission of the Saar Territory, 1939*[79]) (paras. 15-24)[80].

87. It is thus clear that, already in the mid-XXth century, the aforementioned *Memorandum* of 1955 of the U.N. Secretary-General acknowledged that the challenge in the present context, — in respect of the procedure of review of judgments of administrative tribunals, — was to devise an *equitable procedure* in this emerging domain. The practice of the international administrative tribunals — of (formerly) the U.N. (the UNAT) and the ILO (the ILOAT) — led one into the

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[74]*Ibid.*, p. 5, para. 27.

[75]U.N., document A/AC.78/L.10, of 13.04.1955 (submitted to the Xth General Assembly, of 20.09-20.12.1955), *Official Records of the X General Assembly — Plenary Meetings*, pp. 26-28.

[76]Cf. *ibid.*, p. 26.

[77]*Ibid.*, p. 26.

[78]*Ibid.*, pp. 27-28.

[79]The proceedings of this latter were never carried through, and the PCIJ had no opportunity to pass on it, because of the disruption caused by the II world war; *ibid.*, p. 28, paras. 22-23.

[80]*Ibid.*, pp. 27-28.

domain of the internal or domestic law of international organizations[81], wherein the individual also marked its presence as a *subject* of rights.

88. May I just, in addition, single out the historical relevance, in my view, of the Advisory Opinion of the PCIJ on the *Jurisdiction of the Courts of Danzig* (of 03.03.1928, followed by its Advisory Opinion on *Danzig Legislative Decrees*, of 04.12.1935). In the view of Poland, the Danzig-Polish Agreement of 22.10.1921 (*Beamtenabkommen*), as an international agreement, created "rights and obligations for the contracting Parties only" (p. 17). The PCIJ, however, did not find that such Agreement could not create "direct rights and obligations" for individuals. In its understanding, the "very object" of the *Beamtenabkommen*, according to the ascertained intention of the contracting Parties, had been "the adoption by the Parties of some definite rules creating rights and obligations and enforceable by the national courts" (paras. 17-18).

89. In sum, the PCIJ held that a treaty (the 1921 Danzig-Polish Agreement) conferred rights directly upon the individuals concerned (railway employees). They could thus lodge personal pecuniary claims (e.g., salaries, and pensions), even though they had passed from the service of the Free City of Danzig into the jurisdiction of Poland. Thus, as early as in 1928, — two decades before the proclamation by the U.N. General Assembly of the Universal Declaration of Human Rights, — the PCIJ had the courage and vision to determine, in its Advisory Opinion on the *Jurisdiction of the Courts of Danzig*, that, in the circumstances of the matter brought into its cognizance, individuals can be subjects of rights and bearers of obligations emanating directly from international law, from an international treaty.

90. That finding by the PCIJ, recognizing standing to individuals, as early as in 1928, was to have repercussions in the following United Nations era. Thus, the new Court, the ICJ, in its Advisory Opinion of 1950 on the *International Status of South West Africa*, held that the inhabitants of the mandated territories had (even irrespective of a bilateral treaty) a right to petition the [former] U.N. Trusteeship Council, under Article 80 of the U.N. Charter[82]. From all the aforesaid, it is clear that, by the mid-XXth century, the individuals' international legal standing, and the need to secure a *procès équitable* (also in the emerging law of international organizations) were already recognized.

XIII. The Imperative of Securing the Equality of the Parties in the International Legal Process, as a Component of the Right of Access to Justice *Lato Sensu*

91. The awareness of the need to secure a *procès équitable*, and the contribution of Secretary-General Dag Hammarskjold to that end, should not be forgotten in our days. The fact that, ever since, the problem at issue has persisted unchanged to date, is, in my view, cause of concern. Worse still, in our days, the unsettled problem makes abstraction of the considerable contribution — in addition to the U.N. Human Rights Committee, quoted by this Court in the present Advisory Opinion, — of international human rights tribunals operating for many years —

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[81] Cf. C.W. Jenks, *The Proper Law of International Organizations*, London/N.Y., Stevens/Oceana, 1962, pp. 43 and 48; M.B. Akehurst, *The Law Governing Employment in International Organizations*, Cambridge, Cambridge University Press, 1967, pp. 3-10; S. Bastid, "Have the U.N. Administrative Tribunals Contributed to the Development of International Law?", *in Transnational Law in a Changing Society — Essays in Honour of Ph.C. Jessup* (ed. W. Friedmann, L. Henkin and O. Lissitzyn), N.Y., Columbia University Press, 1972, pp. 301-302, 307 and 309; A.A. Cançado Trindade, "Exhaustion of Local Remedies and the Law of International Organisations", 57 *Revue de droit international de sciences diplomatiques et politiques* (Sottile) — Geneva (1979) pp. 86-87, 92, 96 and 108-109.

[82] Cf. W.P. Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals*, The Hague, Nijhoff, 1966, p. 40 n. 25; and, generally, J. Beauté, *Le droit de pétition dans les territoires sous tutelle*, *op. cit. supra* n. (54), pp. 48-136.

the European (ECtHR) and the Inter-American (IACtHR) Courts of Human Rights to the basic principle of equality of arms (*égalité des armes*) in international legal procedure.

92. Thus, the ECtHR has constructed a vast case-law on the right to a fair trial (Article 6 of the European Convention on Human Rights), wherein it has pointed out, in its *jurisprudence constante*, that that right encompasses the respect for the principle of equality of arms (*égalité des armes*), that is, the principle of the procedural equality between the contending parties (e.g., case *Delcourt versus Belgium*, 1970, para. 28; case *Monnel and Morris versus United Kingdom*, 1987, para. 62). In the case *Dombo Beheer versus The Netherlands* (1993), the ECtHR observed that the principle of equality of arms implies the reasonable opportunity to be afforded to the contending parties to present, each one, his case and evidence, without being in disadvantage *vis-à-vis* his opposing party (para. 33). This includes cross-examination of witnesses, as pointed out by the ECtHR in the *Rowe and Davis versus United Kingdom* case (2000, paras. 62 and 65).

93. The ECtHR has further stressed, in its *jurisprudence constante*, the "*caractère contradictoire de la procédure*", allowing each party "*de prendre connaissance et de discuter toute pièce ou observation présentée au juge en vue d'influencer sa décision*" (cases *Mantovanelli* versus *France*, 1997, para. 31; *Lobo Machado* versus *Portugal*, 1996, para. 31; *Vermeulen* versus *Belgium*, 1996, para. 33; *Nideröst-Huber* versus *Switzerland*, 1997, para. 24)[83]. In the cases of *Borges* versus *Belgium* (1991, para. 24) and of *Ekbatani* versus *Sweden* (1988, paras. 28-30 and 33), the ECtHR characterized the principle of "equality of arms" (*égalité des armes*) as one of the elements of the wider notion of "fair trial" (*procès équitable*).

94. In the case of *Ruiz-Mateos* versus *Spain* (1993), the ECtHR observed that Article 6(1) of the European Convention of Human Rights encompasses the principle of "equality of arms" (*égalité des armes*) as well as the "fundamental right" to the "*caractère contradictoire de la procédure*", which implies, for its part, "*la faculté de prendre connaissance des observations ou pièces produites par l'autre ainsi que de les discuter*" (para. 63). And, in the case *Hentrich* versus *France* (1994), the ECtHR deemed it fit to ponder that

> "une des exigences d'un 'procès équitable' est 'l'égalité des armes', laquelle implique l'obligation d'offrir à chaque partie une possibilité raisonnable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire" (para. 56).

95. In fact, looking back in time, already in the late sixties it was rightly pointed out, in respect of the interrelatedness of the right to a fair trial and the principle of equality of arms, that

> "Art. 6 Abs. 1 der Europäischen Menschenrechtskonvention garantiert ein fair trial, das dem Grundsatz der Waffengleichheit Rechnung trägt. (. . .) Fair trial und Waffengleichheit gebieten, dass die Parteien eines Rechtsstreites unter gleichen Voraussetzungen die Entscheidung eines Gerichtes erlangen können. (Article 6 paragraph 1 of the European Convention of Human Rights guarantees a fair trial, which provides for the principle of equality of arms. (. . .) Fair trial and equality of

[83] Cf. also, on the principle of equality of arms, ECtHR, case *Yvon* versus *France*, 2003, paras. 29-37.

> arms demand the parties to a legal dispute to be able to obtain the decision of a court under the same conditions)"[84].

This understanding has been sustained, not surprisingly, in both the European and the inter-American systems of human rights protection.

96. In Latin America, for its part, the IACtHR has held, in the case of *Hilaire, Constantine and Benjamin et allii* versus *Trinidad and Tobago* (2002), that, in order to secure the right to a fair trial, proceedings ought to ensure "the entitlement to a right or the exercise thereof", and the adequate protection of those, whose rights are pending of judicial consideration (para. 147). In the case *Loayza Tamayo* versus *Peru* (1997), the IACtHR warned that a judicial process wherein a party is not able to contradict the evidence produced against her does not meet the standards of a fair trial (*juicio justo*) (para. 62). In the case of *Juan Humberto Sánchez* versus *Honduras* (2003), the IACtHR again held that the right to a fair trial (Article 8 of the American Convention on Human Rights) implies the observance of all requirements to secure the "adequate defense" of all those, whose rights and obligations are under "judicial consideration" (para. 124).

97. The IACtHR has stressed that the due process of law is "intimately linked to the right of access to justice" (cases *Cantoral Benavides* versus *Peru*, 2000, para. 112, and *Castillo Petruzzi and Others* versus *Peru*, 1999, para. 128). The IACtHR has further warned that a party (the respondent State) cannot rest on, or take advantage of, the difficulties or impossibility of the other party (the individual complainant) to produce evidence which not seldom cannot be obtained without its procedural cooperation (case *Maritza Urrutia* versus *Guatemala*, 2003, para. 128).

98. And, in its Advisory Opinion n. 16, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), the IACtHR pondered that

> "(. . .) para que exista 'debido proceso legal' es preciso que un justiciable pueda hacer valer sus derechos y defender sus intereses en forma efectiva y en condiciones de igualdad procesal con otros justiciables. Al efecto, es útil recordar que el proceso es un medio para asegurar, en la mayor medida posible, la solución justa de una controversia. (. . .) for the 'due process of law' to exist, it is necessary that a *justiciable* be able to exercise his rights and defend his interests effectively and in full procedural equality with other *justiciables*. In effect, it is proper to recall that the judicial process is a means to secure, insofar as possible, an equitable solution of a difference" (para. 117).

99. It is firmly established, in contemporary international procedural law, that contending parties are to be afforded the same opportunity to present their case and to take cognizance of, and to comment upon, the arguments advanced and the evidence adduced by each other, in the course of the proceedings. This has been carefully observed and applied by international human rights tribunals, such as the European[85] and the Inter-American[86] Courts of Human Rights, in their

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[84]W.P. Pahr, "Die Staatenimmunität und Artikel 6 Absatz 1 der Europäischen Menschenrechtkonvention", *in Mélanges offerts à P. Modinos - Problèmes des droits de l´homme et de l´unification européenne*, Paris, Pédone, 1968, p. 231.

[85]For doctrinal considerations, cf., e.g., P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th. ed., Antwerpen/Oxford, Intersentia, 2006, pp. 580-589.

[86]For doctrinal considerations, cf., e.g., A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte/Brazil, Edit. Del Rey, 2011, pp. 101-105 and 133-138.

well-sedimented case-law on the matter at issue. Likewise, the *principe du contradictoire* has marked its presence in the most distinct contemporary international jurisdictions[87].

100. Notwithstanding the advances achieved in international procedural law, it is clear that the review procedure, considered by this Court in the present Advisory Opinion, does not abide by the principle of equality of arms (*égalité des armes*), nor does it meet the aforementioned standards. That review procedure has not accompanied the considerable advances experienced in international legal procedures throughout the last decades. It fails to do justice to the original complainants[88], who have — so anachronistically — to rely upon the opposing party to submit his or her arguments to the consideration of this Court. It regrettably has not at all accompanied the advances of international justice in our times. It is high time that it does, perhaps — and hopefully — as from the present Advisory Opinion of this Court on *Judgment n. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*.

XIV. THE NEED TO SECURE THE *LOCUS STANDI IN JUDICIO* AND THE *JUS STANDI* TO INDIVIDUALS BEFORE INTERNATIONAL TRIBUNALS, INCLUDING THE ICJ

101. In order to secure the equality of the parties in the international legal process, as a component — as already indicated — of the right of access to justice *lato sensu* (*supra*), there is need to provide for the *jus standi* and the *locus standi in judicio* before this Court, among other international tribunals. Unfortunately, neither of them is granted to individuals before the ICJ, not even in review procedures such as the present one. There are thus, in fact, two regrettable and longstanding *sources of procedural inequality* before this Court in review procedures such as the one in the *cas d'espèce*. First, the lack of *jus standi*, ensuing from Article XII (1) of the Annex to the ILOAT Statute, whereby only the Executive Board of the international organization concerned (the employer) can lodge a request for an Advisory Opinion with the ICJ. The original individual complainant, the staff member of the organization (the employee), cannot do so; he or she is deprived of any *jus standi* to do so.

102. Secondly, and in addition, the lack of *locus standi in judicio*, ensuing from the ICJ Statute itself, renders unfeasible the participation of individuals in the procedures before the Court, even in a hybrid procedure such as the review one (advisory procedures disguising a contentious case of international administrative law), wherein the most interested "party", who claims the violation of a right (the employee), has to rely on the opposing party (the employer), to present his or her submissions to the consideration of the Court. The procedural inequality to the detriment of the employee thus covers the lack of *jus standi* as well as *locus standi in judicio*.

103. The perfectly avoidable position results from an outdated dogma, imposed upon this Court since its historical origins, whereby individuals cannot appear before itself because they are not subjects of international law. Only the international organization concerned (the employer) has *jus standi* and *locus standi in judicio* before the ICJ, the individual (the employee) depends on the decision (as to resorting to this Court) of the employer, and, if the matter is submitted to the Court,

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[87]For a survey, cf., e.g., [Various Authors,] *Le principe du contradictoire devant les jurisdictions internationales* (Journée d'études de Paris de 2003, eds. H. Ruiz Fabri and J.-M. Sorel), Paris, Pédone, 2004, pp. 1-195.

[88]It is thus not surprising to find the suggestion that, the creation of a new appellate instance, or a regular appellate court, would appear more appropriate and satisfactory than to maintain the existing review procedure; cf., e.g., R. Ostrihansky, "Advisory Opinions of the International Court of Justice as Reviews of Judgments of International Administrative Tribunals", 17 *Polish Yearbook of International Law* (1988) pp. 117 and 120.

he or she cannot appear before it. This is certainly a double procedural inequality before the World Court.

104. For decades the ICJ has been considering an alternative of resorting to a procedural *acrobatie* in order to by-pass or circumvent this situation, so detrimental to the individual as subject of international law. The alternative it has considered is not to give the requested Advisory Opinion: this is not a solution, as the Court is bound to clarify — as it does in the present Advisory Opinion — the subject brought before it, in the exercise of its functions. The procedural *acrobatie* is not to hold oral hearings: this is not a solution either, as the Court thereby ends up depriving itself to instruct better the *dossier* of the case, by imposing such limit to the freedom of expression of the "parties" concerned.

105. In so far as the review procedure is concerned, the solution adopted by the Statute of the PCIJ, which has been affirmed by the ICJ Statute, appears even more problematic, since, — as already indicated (cf. *supra*), — as early as in the first half of the XXth century there were already experiments of international law which had granted a procedural capacity to individuals. Such evolution was triggered in the era of the United Nations, with the adoption of a system of individual petition under the auspices of some human rights treaties of universal character[89]. This procedural capacity of the individual has a direct incidence on the individual's access to justice at international level[90].

106. It is thus necessary, still in our days, to have a thorough understanding of the nature and scope of the individual right to petition under the auspices of human rights treaties[91]. The experiments during the first half of the XXth century paved the way to the development, within the United Nations and under the auspices of human rights treaties at the global and regional levels (in addition to extra-conventional mechanisms), of contemporary mechanisms of petitions or communications relating to violations of human rights. Thus, in this context, the individual recovered its presence for the vindication of his rights at international level.

107. The appreciation of the individual right of petition as a means of international implementation of human rights has to take into account the basic point of the *legitimatio ad causam* of the individual petitioners and the conditions of the use and admissibility of their petitions. The solutions given by human rights treaties and instruments to the question of the *jus standi* of the individual applicant seem to be related to the nature of the proceedings at issue. But differences in the nature of the respective proceedings have not hindered, nor stood in the way of, the development of a converging jurisprudence of distinct international human rights tribunals and supervisory organs striving to secure a more efficient protection of the alleged victims.

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[89] A.A. CançadoTrindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987) pp. 21-412.

[90] A.A. Cançado Trindade, *The Access of Individuals to International Justice*, *op. cit. supra* n. (35), pp. 50124 and 179-212.

[91] At the historical beginning of the exercise of the right to individual petition, such right, even if motivated by the search for individual reparation, also contributed to secure the respect for the objective obligations that were binding upon States Parties. Only subsequently the right *of* petition (and no longer the right *to* petition) came into being within international organizations. The distinction between *pétition plainte* (based on the violation of a private individual right and the search for reparation before the relevant authorities) and *pétition voeu* (concerning the general interests of a group and the search of public measures by the authorities) was developed.

XV. CONCLUDING OBSERVATIONS

108. Such reassuring development should be kept in mind, to reassess and overcome, once and for all, the pitfalls of the present review procedure. Its intrinsic and unjustified imbalance in the proceedings, — as disclosed in the *cas d'espèce*, — is a remnant of the past, revealing a lack of equality of arms. Expressions of discontent have, throughout many years, been uttered by some members of succeeding generations of Judges of this Court. Given the unnecessary persistence of the problem, I feel obliged to take my own criticism even further, as for many years I have consistently attached the utmost importance to such matter (also in another international jurisdiction, wherein positive results have been achieved, that is, results *pro persona humana*)[92].

109. This unnecessary problem, ensuing from outdated dogmatisms (identified in the present Separate Opinion), touches on other aspects which are very dear to me, namely: *(a)* the emergence and consolidation of individuals as subjects of international law; *(b)* the imperative of securing the procedural equality of the parties in the course of the proceedings (as a component of the right of access to justice *lato sensu*); and *(c)* the need to secure the *locus standi in judicio* and the *jus standi* to individuals before international tribunals, including the ICJ. Keeping this in mind, — and dogmatisms apart, — it can hardly be denied that there should have been a hearing, with the presence not only of the legal representative of the IFAD but also of Ms. Ana Teresa Saez García.

110. This would have better instructed the *dossier*, and would have avoided the problems that occurred, which prompted two interventions of the Court's Registry, to secure the proper administration of justice (cf. para. 49, *supra*). This would, moreover, have been in conformity with the principle of equality of arms, and ultimately of the general principle of *la bonne administration de la justice*. This would, furthermore, have at last overcome a dogma entirely outdated, which no longer finds any justification to be followed in our days. In an epoch, such as ours, of the *rule of law at national and international levels*, it is high time to abide firmly by such general principles of law in any procedures and circumstances.

111. In the present Advisory Opinion the Court has fortunately, at the end, reached the right decision. But this is not the first time in this Court that I stress the need of holding a public hearing. In my long Dissenting Opinion in the Court's Order of 06.07.2010 in the case concerning the *Jurisdictional Immunities of the State (Germany* versus *Italy)*, whereby the Court dismissed the counter-claim (which purported to link State immunities to the factual background of war reparations claims), I allowed myself to warn that:

> "(. . .) In summarily discarding the Italian counter-claim as 'inadmissible as such', the Court should have at least instructed properly the *dossier* of the cas *d'espèce*, by holding, prior to the decision it has just taken, public hearings to obtain further clarifications from the contending parties. The same treatment is to be rigorously dispensed to the original claim and the counter-claim as a requirement of the sound administration of justice (*la bonne administration de la justice*). They are, both, autonomous, and should be treated on the same footing, with a strict observance of the *principe du contradictoire*. Only in this way the *procedural equality* of the parties (applicant and respondent, rendered respondent and applicant by the counter-claim) is secured. (. . .)

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[92] A.A. Cançado Trindade, "Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne", 14 *Revue québécoise de droit international* (2001) pp. 207-239; A.A. Cançado Trindade, "El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000): La Emancipación del Ser Humano como Sujeto del Derecho Internacional", 28 *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano de la OEA* (2001) pp. 33-92.

> The Order that the Court has just adopted has made abstraction of the configuration of the notion of "continuing situation" in international legal thinking, — in both international litigation and case-law, and in international legal conceptualization at normative level. Furthermore, it has not addressed the position of the true bearers (*titulaires*) of the originally violated rights, oblivious of the pitfalls of State voluntarism. Its emphasis fell solely on waiver of claims, again oblivious of the incidence of *jus cogens*, rendering certain waivers of claims devoid of any juridical effects (. . .).
>
> The Court has discarded the Italian counter-claim on the basis of succinct considerations in the two brief paragraphs 28 and 29, of the present Order. Paragraph 29 is a *petitio principii*, simply begging the question. The *ratio decidendi* lies in paragraph 28 of the Order (. . .).
>
> This is, in fact, another *petitio principii* (. . .). The matter summarily disposed of, in the present Order, is not so clear and self-evident as the Court's majority seems to believe. On the basis of the considerations and reflections developed in the present Dissenting Opinion, I am led to conclude that the Court's majority position does not stand, and finds no basis, neither as to the facts nor as to the law, to rely upon. It is nothing but a *petitio principii*" (paras. 154 and 156-158).

112. There are lessons that can be extracted from the experience with the present Advisory Opinion of this Court, which, at least, has had a happy end[93], unlike the Order of 06.07.2010 in the aforementioned case. The subject of a wider participation in advisory proceedings before this Court has, along the history of The Hague Court — both the PCIJ and the ICJ, — attracted attention from time to time. Much has been written on it, and we live now a historical moment in which I deem it fit to single it out for further reflection, as I have always attached considerable importance to the issue of access to international justice, of *all* subjects of International Law.

113. The advisory jurisdiction of the ICJ seems to me to offer an adequate framework for the consideration of possible advances in this domain. The high significance of this topic is that it appears to go beyond a strictly inter-State outlook, in the line of recent developments in several domains of contemporary international law. This, in my view, cannot pass unnoticed, or unexplored, in a World Court such as ours. There have indeed been glimpses of enlightenment when our Court itself has taken cognizance of the issue.

114. The old PCIJ, for example, — as I pointed out in this Separate Opinion, — was attentive to it, in its advisory proceedings concerning the *Free City of Danzig*, in the late twenties and early thirties of last century. Forty years later, in the advisory proceedings on *Namibia*, — which led to the adoption of its célèbre Advisory Opinion of 21.06.1971, — the ICJ considered the possibility of receiving *amicus curiae* briefs (including from individuals), but preferred not to innovate. Yet, well before this, the PCIJ had taken innovative steps and indeed shaped its advisory proceedings largely through practice itself.

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[93] After all, one should not lose sight of the fact that international organizations operate day-to-day, due to a large extent to the invisible work of their staff members, human beings of body and soul, and not simply "human resources", as their post-modern administrations tend to label them.

115. It appears to me that we ought to be attentive to the densely changing world wherein we live, and the adjustments it appears to require from our *interna corporis* and our practice[94]. To count on the public participation of all subjects of international law — including individuals — is to be faithful to the thinking of the "founding fathers" of our discipline, as indicated in the present Separate Opinion. As I also deemed it fit to recall herein, many of the matters — including contentious cases — brought into the cognizance of this Court have pertained ultimately to the concrete situations in which the individuals concerned found themselves (paras. 78-79).

116. In the light of such cases at least, one can surely argue that the participation of the individuals concerned in legal proceedings contributes to a better instruction of the process, by giving the Court the opportunity to have a better knowledge of the parties' perception of the facts and their arguments as to the law. Furthermore, it preserves the *principe du contradictoire*, essential in the search for truth and the realization of justice, guaranteeing the equality of arms (*égalité des armes*) in the whole procedure before the Court, essential to *la bonne administration de la justice*.

117. This is logical, since, to the international legal personality of the parties ought to correspond their full juridical capacity to vindicate their rights before the Court. In addition, their public participation in the proceedings before the Court recognizes the right of free expression of the contending parties themselves, in affording them the opportunity to act as true subjects of law. This provides those who feel victimized and are in search of justice a form of reparation, in directly contributing — with their participation — to the patient reconstitution and determination of the facts by the Court itself.

118. All these considerations render the subject-matter at issue, — which in my perception has assumed a central position in the proceedings which led to the present Advisory Opinion, — in my view a suitable one for further careful consideration from now onwards. Legal instruments, whichever their hierarchy, are a product of their time, and I am sure that we all agree as to the need to work for the realization of justice at the level of the challenges of our time, so as to respond properly to them. And as this Court is to perform its functions at the height of the challenges of our times, as the International Court *of Justice*, it is bound at last to acknowledge that individuals are subjects of international law, of the *jus gentium* of our times.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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[94] Thus, in the advisory proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Palestine was among those which appeared in public sittings before the Court; *ICJ Reports 2004*, pp. 141 and 143, paras. 4 and 12. And subsequently, in the advisory proceedings on the *Declaration of Independence of Kosovo*, before the Court pronounced on the matter (in its Advisory Opinion of 22.07.2010) Kosovo participated in the public sittings (of 01-11.12.2009) before the Court.

DECLARATION OF JUDGE GREENWOOD

Agreement with Opinion and its reasoning — Ms Saez García unquestionably an official of IFAD at all relevant times — Propriety of Court giving an Opinion — Unsatisfactory nature of procedure for recourse to the Court — Incompatibility with modern concepts of justice — Need for equality before the Court — Power of Court to order IFAD to pay some or all of Ms Saez García's costs.

1. I have voted for the Advisory Opinion and have no reservations about the answers given by the Court to the questions posed by IFAD. Far from the ILOAT having exceeded its jurisdiction, I do not see how it could have arrived at any decision other than that Ms Saez García was an official of IFAD and that the actions of which she complained were attributable to IFAD. I agree with the conclusion in the Advisory Opinion that the Global Mechanism does not have international legal personality and, in particular, lacks the power to conclude a contract of employment. However, even had I been persuaded that the Global Mechanism *could* have employed Ms Saez García, I have no doubt that it was IFAD which *did* in fact employ her. Since the successive offers of employment she received came from IFAD, expressly offered her an appointment with IFAD, stipulated that her appointment was to be on the terms specified in IFAD's personnel manual (in its successive versions) and was terminable by notice from or to IFAD, I find it more than a little surprising that IFAD has tried to argue that she was not its employee. Such an argument is plainly unsustainable. It also seems to me to be beyond serious argument that Ms Saez García's complaint concerned matters falling within the jurisdiction of ILOAT. I am therefore entirely in agreement with the answers which the Court has given to Questions I and IX and with the decision that there is no need for any further answer to Questions II to VIII.

2. I also agree that, in the circumstances of the present case, the Court was right to comply with the request for an advisory opinion but I have reached that conclusion with considerable reluctance and only because of the particular circumstances of the case. The Opinion highlights — rightly, in my view — the unsatisfactory nature of the provision for recourse to the Court laid down in Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization (reproduced in paragraph 1 of the Opinion). As the Court makes clear, the procedure created by that provision is open to serious criticisms in that it falls well short of modern standards on equality of the parties in legal proceedings.

3. The first criticism is systemic in nature. In contrast to the procedure which existed, until 1995, in respect of decisions of the United Nations Administrative Tribunal, there is a marked inequality of access to justice in that the employer, but not the employee, may challenge a decision of the Tribunal. While that inequality might have been acceptable fifty years ago (although for some judges it aroused concerns even then), I do not believe that it is acceptable today. This inequality is no technicality; it is a fundamental flaw in the system created by Article XII. I agree with what the Court says about this flaw in the system at paragraphs 33 to 48 of the Advisory Opinion. The Court should not be asked to participate in a procedure whose inequality is at odds with contemporary concepts of due process and the integrity of the judicial function. I agreed that the Court should give an Opinion in the present case only because I believed that the Court should not, without warning, withdraw its participation in a procedure for challenging Tribunal decisions which has been in place for many years and has therefore formed part of the assumptions made by all concerned — employees as well as employers — in proceedings before the Tribunal. However, the inequality of access which exists at present cannot be allowed to persist into the future. The need for reform of Article XII of the ILOAT Statute is urgent and it is very much to be hoped that a new procedure for challenging judgments of the Tribunal can be put in place within a short period of time.

4. The second criticism is somewhat different and concerns a potential inequality in the proceedings before the Court. There are, of course, no parties in the formal sense in advisory proceedings before the Court. Nevertheless, the type of advisory proceeding in which the Court is asked to engage under Article XII of the ILOAT Statute is of a quite different character from those proceedings which result from questions posed by the General Assembly, such as *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136) and *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion of 22 July 2010). Under Article XII, a staff member, such as Ms Saez García, who has been successful in a case before ILOAT can find that the judgment in her favour is challenged before this Court, whose opinion, though "advisory" under the Court's Statute, is binding under the terms of Article XII (2) of the ILOAT Statute. If the Court concludes that the ILOAT has exceeded its jurisdiction, or that there has been a fundamental flaw in procedure, the staff member will lose the compensation awarded to her. In substance, therefore, if not in form, the proceedings before the Court are proceedings between the Organization requesting the Opinion and the staff member, and the Court's opinion will determine whether or not the staff member continues to be entitled to the compensation awarded to her. Yet, as the Opinion points out at paragraphs 45 to 47, the staff member has no direct access to the Court; she can make representations and submit documents to the Court only through the Organization. The resulting disparity is incompatible with modern notions of justice and due process. I agree that the Court has managed to fashion a procedure which, in the present case, has done all that can be done to compensate for that deficiency and has ensured that, in the end, Ms Saez García received a fair hearing. However, IFAD's approach to the proceedings, of which the Court (in paragraph 46 of the Opinion) has rightly been critical, amounted to treating Ms Saez García as a spectator rather than a participant in proceedings whose outcome would have a direct and substantial effect upon her. In the end, I believe that the action taken by the Court prevented that approach from giving rise to a denial of justice but it is a graphic reminder of the deficiencies inherent in a system in which a judgment in favour of a staff member is challenged in proceedings to which the employing organization, but not the staff member, has direct access to the Court.

5. That leads me to a final point concerning the costs of the proceedings. Article 64 of the Court's Statute provides that "[u]nless otherwise decided by the Court, each party shall bear its own costs". The words "unless otherwise decided" make clear that the Court is given a power to order that one party should pay all or part of the costs incurred by the other party, although Article 64 plainly envisages that the Court will do so only in exceptional circumstances and that the normal rule will be that each party bears its own costs. In fact, the Court has never made use of the power given to it by the opening words of Article 64. Article 64 is, of course, designed for contentious proceedings in which there are parties but Article 68 of the Statute provides that "[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable". The Court is given a broad discretion by this provision; it may determine whether and to what extent provisions of the Statute framed for use in contentious cases are appropriate to be applied in advisory proceedings. In my view, the Court can — and should — recognize the provisions of Article 64 as applicable in the present type of advisory proceeding. To do so would recognize the reality of such proceedings as a confrontation between a staff member and an international organization and address the obvious disparity between the financial resources available to each of them.

6. In the present case, Ms Saez García did not request an order for costs. Had she done so, I would have been willing to order that IFAD paid at least part of the costs she incurred. In my opinion, there are two reasons for making such an order. First, IFAD chose to challenge the judgment of the ILOAT and was unsuccessful in that challenge. In doing so, it forced Ms Saez García to suffer a significant delay in payment of the compensation awarded to her and to incur costs of legal representation in the proceedings before the Court. I do not question IFAD's entitlement to seek the opinion of the Court but, since that challenge failed, I consider it only

equitable that IFAD should meet the costs reasonably incurred by Ms Saez García. That it was reasonable for Ms Saez García to use the services of counsel to make representations on her behalf is beyond doubt given the resources which IFAD was able to devote to the case. I should add that the high quality of the representations made on her behalf meant that they were of substantial assistance to the Court. Secondly, the costs which Ms Saez García was obliged to incur were almost certainly increased by the approach which IFAD took to the proceedings. For this reason also, I consider it equitable that IFAD, rather than Ms Saez García, should be required to meet those costs.

(Signed) Christopher GREENWOOD.