



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

MERSMANN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Maria Teresa Cirelli

Counsel for Respondent:

Stéphanie Cochard, UNOG

Arne Treves, UNOG

Introduction

1. By application filed on 22 October 2012, the Applicant contests the decision not to renew his fixed-term appointment beyond 31 May 2012 as Managing Director of the Global Mechanism of the United Nations Convention to Combat Desertification (“UNCCD”).

Facts

2. The Global Mechanism was created by the UNCCD and has been housed and administered by the International Fund for Agricultural Development (“IFAD”) since 1998. On 26 November 1999, a Memorandum of Understanding (“MOU”) was signed between the UNCCD Conference of the parties (“COP”) and IFAD, with respect to the modalities and administrative operations of the Global Mechanism.

3. The Applicant joined the Global Mechanism as Managing Director at the D -2 level in February 2005, under a two-year fixed-term appointment with IFAD. The initial letter of appointment, dated 13 January 2005, indicated that the appointment was governed by the general provisions of the IFAD Personnel Policies Manual, and any amendments thereto, together with the provisions of the IFAD Human Resources Handbook. The Applicant served as Managing Director of the Global Mechanism from February 2005 until 31 May 2012, when his appointment was no longer extended.

4. By letter dated 30 March 2011, the President of IFAD, acting under the MOU, offered the Applicant an extension of his contract of employment with the Global Mechanism until 30 November 2011. The letter stated that the extension

will be governed by the provisions on the administrative operations of the Global Mechanism, including the modalities for its housing by IFAD and the relevant and applicable policies and procedures the Global Mechanism has adopted to govern its operations, such as the Human Resources Policy and Procedures of the International Fund for Agricultural Development (IFAD) [...]

5. The Applicant signed the letter of appointment for the above extension on 1 April 2011.

6. On 21 October 2011, the COP issued decision 6/COP.10 with respect to the Governance and institutional arrangements of the Global Mechanism. In it, the COP recalled that the appointment and recruitment of staff of the Global Mechanism is done under the Rules and Regulations of IFAD and decided that the accountability and legal representation of the Global Mechanism shall be transferred from IFAD to the UNCCD Secretariat.

7. By its decision 6/COP.10, the COP further requested the Executive Secretary, UNCCD, “to ensure that all accounts and staff managed by the Global Mechanism are under one single administrative regime administered by the United Nations Office at Geneva and managed under the Financial Regulations and Rules of the United Nations”.

8. Under the MOU of 1999, the Managing Director of the Global Mechanism was appointed by the President, IFAD, to whom he had to directly report in discharging his/her responsibilities. In its decision 6/COP.10, the COP decided that the Managing Director of the Global Mechanism shall be appointed by the Executive Secretary, UNCCD, through the recruitment process of the United Nations. Moreover, to address the governance issues immediately the COP directed the Executive Secretary, UNCCD

to revise and implement the Memorandum of Understanding between the Conference of the Parties and the International Fund on Agricultural Development to limit IFAD to (1) logistical and administrative support other than those provided under paragraph 5 and (2) privileges and immunities to Global Mechanism staff through the Government of Italy.

9. The COP further requested the Executive Secretary, UNCCD, to take all necessary measures urgently “in consultation with the [Managing Director of the Global Mechanism] and the President of the [IFAD], to implement the governance arrangements [...] to ensure that the administrative, procedural and legal aspects of this decision are implemented”.

10. On 21 November 2011, the Executive Secretary, UNCCD, wrote to the President, IFAD, with respect to the implementation of decision 6/COP.10, referring to the fact that the Managing Director of the Global Mechanism would be appointed through the recruitment process of the United Nations and requesting to be provided with a job description for said post. To his letter, the Executive Secretary, UNCCD, attached a proposed road map for the implementation of decision 6/COP.10. On 28 November 2011, the Executive Secretary, UNCCD, informed the President of IFAD that it was expected that the recruitment process of the Managing Director of the Global Mechanism, under the United Nations recruitment procedures, be completed by 30 June 2012.

11. On 23 November 2011, the Director, Human Resources Department (“HRD”), IFAD, sent to the Executive Secretary, UNCCD, the job description for the post of the Managing Director of the Global Mechanism that had been issued in January 2005. UNCCD revised it and sent it for classification to the Human Resources Management Service (“HRMS”), United Nations Office at Geneva (“UNOG”).

12. On 30 November 2011, the Applicant’s appointment was extended for a period of six months, with an expiration date of 31 May 2012. The extension letter stated that “the terms of the letter of 30 March 2011 shall remain unchanged, except that they shall be interpreted and applied in accordance with decision COP (10)”. With reference to paragraph 10(f) of the President’s Bulletin 04/01 of 21 January 2004, the letter clarified that the extension of the appointment did not carry any expectation of “further employment relationship with the Global Mechanism or the establishment of such a relationship with the Fund”. The letter was signed by the Interim Head Corporate Services Department, IFAD, and the Applicant agreed to its terms and conditions by signature of 30 November 2011.

13. After HRMS, UNOG, informed the UNCCD that UNOG did not have delegation of authority to classify posts at the D-2 level, she wrote on 26 January 2012 to the Assistant Secretary-General (“ASG”), OHRM, informing her of decision 6/COP.10 and seeking OHRM assistance for the classification of and recruitment process for the Managing Director of the Global Mechanism post.

On 27 January 2012, the Executive Secretary, UNCCD, informed the Applicant that the UNCCD Secretariat had initiated, through OHRM, the recruitment process for the post of Managing Director of the Global Mechanism.

14. On 1 February 2012, the International Court of Justice (“ICJ”) rendered an advisory opinion on Judgement No. 2867 of the Administrative Tribunal of the International Labour Organization (“ILOAT”). The ILOAT judgement related to an appeal against the Managing Director’s decision not to renew the appointment of an employee of the Global Mechanism. In its advisory opinion, the ICJ confirmed ILOAT ruling that employees performing functions for the Global Mechanism were staff members of IFAD and that, as such, had access to ILOAT jurisdiction. Taking into account the terms of the letter of appointment of the Managing Director of the Global Mechanism of 13 January 2005, the ICJ further clarified that at the time of the administrative decision under review by the ILOAT (December 2005) “the Managing Director of the Global Mechanism was a staff member of [IFAD]”.

15. By letter dated 14 February 2012, the Director, HRD, IFAD, informed the Applicant that his contract had been extended on 30 November 2011 for six months on behalf and at the direction of UNCCD, and that any further extension would equally need to be authorized by UNCCD.

16. The same day, the President, IFAD, issued a President’s Bulletin (PB/2012/01), noting that in accordance with decision 6/COP.10 “IFAD is no longer authorized to undertake any actions with respect to the financial or human resources management of the [Global Mechanism] except at the request and on behalf of the Executive Secretary of the UNCCD or such other authority that has been delegated by the Executive Secretary of the UNCCD”. The bulletin further stated that until the Executive Secretary, UNCCD, decided otherwise, “the legal relationship between the staff of the [Global Mechanism] and the [Global Mechanism] shall continue to be governed by the terms of their current letter of appointment [...]”. The bulletin recalled that 6/COP.10 provides “that the appointment of the Managing Director of the Global Mechanism shall be done through the recruitment process of the United Nations by the Executive Secretary.

Accordingly, IFAD or its President is no longer to act on behalf of and for the account of the COP in this respect”.

17. By email of 16 February 2012, the Executive Secretary, UNCCD, following up on his memorandum of 26 January 2012, sought the advice of the ASG, OHRM, with respect to the governance and institutional arrangements of the Global Mechanism, particularly the recruitment of its Managing Director and the migration of Global Mechanism staff to UNCCD contracts. The following day, the ASG/ORHM responded that while OHRM had the capacity to advertise the post, the procedure for the recruitment should be further discussed, in view of the delegation of authority of UNCCD. She further requested UNCCD to designate a focal point in this respect.

18. By memorandum dated 17 February 2012, the Applicant asked the Executive Secretary, UNCCD, for clarification concerning the renewal of his contract after 1 June 2012, and requested him to be informed of his decision concerning the continuation or discontinuation of the recruitment process for the post of Managing Director of the Global Mechanism.

19. At its meeting from 22-24 February 2012, the COP decided to set up a Senior Management Task Force to advise the Executive Secretary, UNCCD, on issues relating to the implementation of decision 6/COP.10. The Executive Secretary, UNCCD, informed the COP about the steps undertaken with respect to the recruitment of the Managing Director of the Global Mechanism. The report of the meeting further notes that the Executive Secretary, UNCCD, “ha[d] decided to request IFAD to extend the contracts of Global Mechanism staff members for 6 months pending final arrangements with the UN relevant Office”.

20. By memorandum dated 9 March 2012, the Executive Secretary, UNCCD, wrote to the Applicant, reiterating that he had requested OHRM to initiate the recruitment process for the post of Managing Director of the Global Mechanism.

21. At the end of March 2012, the focal point, UNCCD, met with the Chief, Human Resources Policy Service, OHRM, and subsequently provided documents

to assist OHRM in the recruitment of the Managing Director of the Global Mechanism.

22. On 2 April 2012, an amendment to the MOU dated 26 November 1999 between UNCCD and IFAD COP regarding the modalities and administrative operations of the Global Mechanism entered into force.

23. The amended MOU provides:

Article VI- Administrative Infrastructure

1. In accordance with the provisions of decision 6/COP.10

a. While the Global Mechanism will have a separate identity within the UNCCD secretariat, it will be an organic part of the structure of the secretariat directly under the Executive Secretary.

b. The accountability and the legal representation of the Global Mechanism are hereby transferred from the International Fund for Agricultural Development to the UNCCD secretariat.

[...]

d. Until such time that all accounts and staff managed by the Global Mechanism shall be under one single administrative regime administered by the United Nations Office at Geneva and managed under the Financial Regulations and Rules and Staff Rules of the United Nations, IFAD shall continue to, in consultation with the Executive Secretary, provide personnel and financial management services to employees or contractors of the Global Mechanism. Accordingly, IFAD is not, and will not be, responsible for any element of the personnel management or financial management of the Global Mechanism, including the selection and recruitment of its staff and Managing Director. Furthermore, IFAD is not, nor will it be, a party to employment contracts with employees or contractors of the Global Mechanism, and the IFAD rules and procedures will not apply to such employees or contractors.

e. The appointment of the Managing Director of the Global Mechanism shall be done through the recruitment process of the United Nations by the Executive Secretary.

f. Until such time as the full implementation of Decision 6/COP.10, IFAD shall house the Global Mechanism and provide sufficient office space for its offices on the basis of an agreement to be concluded between the Executive Secretary and the President of IFAD.

[...]

2. The President of IFAD and the Executive Secretary shall cooperate to the fullest degree to ensure the smooth

implementation of this Amendment to the Memorandum of Understanding and any other decision which may be made by the Conference of the Parties relative to any new housing arrangement that may be concluded for the Global Mechanism.

24. By memorandum dated 25 May 2012, the Executive Secretary, UNCCD, wrote to the ASG, OHRM, reiterating the urgency to receive advice on the recruitment process for the position of Managing Director of the Global Mechanism, in view of the expiration of the Applicant's contract on 31 May 2012, which could no longer be handled under the previous arrangement with IFAD. He stressed that he did not have a mandate to extend the current contract, which is not a UN contract, and that he did neither have the authority to initiate the recruitment process for the post until feedback was received from the ASG, OHRM, in this respect.

25. By memorandum of the same day the Executive Secretary, UNCCD, reminded the Applicant that his last contract extension of 30 November 2011, extending his appointment until 31 May 2012, was made by IFAD and that the Applicant had agreed to its terms. The Executive Secretary, UNCCD, further informed the Applicant that he was still awaiting feedback from OHRM with respect to the recruitment of the Managing Director through the UN recruitment process. He requested the Applicant to prepare a handover report to ensure continuity at the Global Mechanism managerial level.

26. By letter dated 28 May 2012, referring to the memorandum of 25 May 2012 of the Executive Secretary, UNCCD, the Director, HRD, IFAD, informed the Applicant about the separation modalities under the Regulations and Rules of IFAD.

27. By office memorandum dated 30 May 2012, addressed to the President, IFAD, the Applicant challenged his separation. He stressed that IFAD Rules and Regulations, in particular with respect to human resources issues, should apply to the Global Mechanism and continue to apply until such time that the transfer of Global Mechanism administration to UNCCD - including human resources management and legal representation - was completed.

28. The Director, HRD, IFAD, responded to the Applicant on behalf of the President, IFAD, by memorandum dated 31 May 2012. He emphasised that pursuant to decision 6/COP.10, IFAD no longer had authority over Global Mechanism, its operations, assets, staff and the appointment of its Managing Director.

29. On 13 July 2012, the Applicant filed a request for facilitation to the President, IFAD, in accordance with the IFAD rules governing grievance procedures, with respect to the decision not to renew his contract beyond 31 May 2012. He noted that the argument that the last six months extension on 30 November 2011 was done “at the sole discretion of the UNCCD” could not stand, since no legal steps had yet been taken to modify his status as IFAD staff member and that IFAD rules still applied in full to his case. He emphasised that he and his colleagues from the Global Mechanism should be considered as IFAD staff members. The Applicant stressed that the appointment of the Managing Director, Global Mechanism, had always been extended on the basis of IFAD Human Resources Policy and Procedures, provided that a decision of UNCCD COP granted the extension of the post. He noted that there can be no doubt that until his separation as Managing Director of the Global Mechanism, he was an IFAD official, in accordance with the terms of his first contract of 2005, since none of his contract renewals ever indicated that his employer had changed. The Applicant further stressed that his status as an IFAD staff member had been confirmed by the ICJ in its Advisory opinion of 1 February 2012. He noted that when his contract was renewed in November 2011, the revised MOU did not yet exist and that even after it entered into force, it did not unequivocally modify the status of the Global Mechanism staff. His status as an IFAD staff member was neither changed through the President’s Bulletin of 14 February 2012, which stated that the legal relationship between the Global Mechanism and its staff shall continue to be governed by their current letter of appointment, nor by the relevant policies and procedures which the Global Mechanism adopted to govern its operations. The Applicant stressed that the only policies and procedures ever applied by the Global Mechanism were those of IFAD. He requested to be reinstated in his previous position of Managing Director of the Global

Mechanism, either until the time authorized in the budget approved by the UNCCD COP, namely until the end of 2013, or until the transfer of staff required by decision 6/COP.10 has been completed and a new Managing Director been recruited, in both alternatives with retroactive effect from 1 June 2012.

30. By letter dated 23 July 2012, the Director, HRD, IFAD, responded to the Applicant's request for facilitation, stating that as a result of decision 6/COP.10 and the amended terms of the MOU, neither IFAD nor its President were authorized to act on behalf and for the account of the COP with respect to the extension of the Applicant's appointment. The Director, HRD, IFAD, stressed that therefore, the relief requested by the Applicant was not within the powers of IFAD or its President, but exclusively with the Executive Secretary, UNCCD. Therefore, he requested the Applicant to address any further communications on the matter to the UNCCD Secretariat.

31. On 23 July 2012, the Applicant forwarded the response from the Director, HRD, IFAD, to the Executive Secretary, UNCCD, asking him to review his request for facilitation, particularly with respect to the responsibility of the UNCCD for the decision taken by the Executive Secretary, UNCCD, not to extend the Applicant's appointment beyond 31 May 2012. He therefore requested the management evaluation of the content of the memorandum dated 25 May 2012 under the UN Rules. His request for management evaluation was copied to the United Nations Under-Secretary General for Management.

32. The Executive Secretary, UNCCD, responded to the Applicant's request for management evaluation by letter dated 31 July 2012, noting that OHRM had informed the Secretariat of UNCCD that since the Applicant held an IFAD letter of appointment and was not a holder of a UN letter of appointment, any request for management evaluation should be addressed to IFAD.

33. By memorandum dated 2 August 2012, the ASG, OHRM, responded to the Executive Secretary's letter of 25 May 2012, stressing, *inter alia*, that the UN Secretariat "does not have a mandate to administer the staff of the Global Mechanism for lack of express mandate from the General Assembly".

34. On 23 August 2012, the Applicant submitted a statement of appeal against IFAD decision not to extend his appointment beyond 31 May 2012 to the Secretary of IFAD Joint Appeals Board (“JAB”), requesting it to find that the decision not to renew his appointment was taken in violation of IFAD human resources rules and constituted a violation of the duty of care of international organizations towards their employees. He requested, *inter alia*, to be reinstated to the position of Managing Director of the Global Mechanism, with retroactive effect from 1 June 2012, either until the time authorized in the budget approved by the UNCCD COP, i.e. the end of 2013, or until the transfer of staff required by decision 6/COP.10 has been completed and a new Managing Director of the Global Mechanism had been recruited.

35. By email dated 28 August 2012, the Secretary of IFAD JAB asked the Applicant to provide the JAB Secretary with a written request by the Executive Secretary, UNCCD, to IFAD, with respect to the application of IFAD grievance procedures to Global Mechanism staff.

36. On 3 September 2012, the Applicant sent an email to the Executive Secretary, UNCCD, informing him about the request from the Secretary of IFAD JAB, and asking him to confirm whether he would be ready to request IFAD to apply its internal grievances procedure.

37. By letter dated 9 October 2012, the Executive Secretary, UNCCD, reiterated the content of his previous message of 31 July 2012, namely that the United Nations OHRM had confirmed that the Applicant held an IFAD letter of appointment which indicated the applicable regulations and rules.

38. The Applicant filed the present application on 22 October 2012 and the Respondent filed his reply on 23 November 2012. Both parties submitted additional information, pursuant to Orders Nos. 12 (GVA/2013) and 22 (GVA/2013).

39. The Applicant further filed a complaint with the Administrative Tribunal of the International Labour Organization on 31 October 2012.

40. By letter of 10 January 2013, the Director, HRD, IFAD, informed the Applicant that pursuant to a request from the Executive Secretary, UNCCD, IFAD—on behalf and in the name of UNCCD under the terms of the revised MOU—was making arrangements to ensure that the internal recourse mechanisms of IFAD, initiated by the Applicant on 13 July 2012, were applied. The Applicant however rejected IFAD offer at this stage.

41. An oral hearing was held on 15 March 2013, at which Counsel for the Respondent was present in person and Counsel for the Applicant participated via telephone.

Parties' submissions

42. The Applicant's principal contentions are:

Receivability

a. He is aware and recalls that the ICJ confirmed in its Advisory opinion of 1 February 2012 that the Managing Director of the Global Mechanism is an IFAD staff member;

b. The foregoing notwithstanding, by decision 6/COP.10, the existing contractual arrangements ought to be modified and it was the responsibility of the Executive Secretary, UNCCD, to transfer the existing contracts of Global Mechanism employees under the administrative regime administered by UNOG. Decision 6/COP.10 did not foresee a phase during which Global Mechanism appointments would be subject neither to IFAD nor to UNOG;

c. Despite his obligation, the Executive Secretary, UNCCD, did not take the actions required under decision 6/COP.10 to ensure that Global Mechanism employment contracts be transferred from IFAD to UNOG;

d. According to the revised MOU, which entered into force while his appointment of 30 November 2011 was still valid, IFAD is not a party to the appointments of Global Mechanism staff and IFAD Rules and procedures do not apply to the Global Mechanism staff. IFAD had informed him that

his contract of 30 November 2011 was issued “on behalf of and at the direction of UNCCD”;

e. In view of the foregoing, “the [Executive Secretary] should either have requested IFAD to remain fully responsible as [the Applicant’s] employer, or should have taken on the legal responsibility for his employment contract, directly hiring him at the Secretariat and assigning him to the [Global Mechanism]” and “[i]t is only this unlawful omission by the [Executive Secretary] that has prevented the formal employment of the applicant by the Secretariat”;

f. He cannot be deprived of any judicial protection as a result of the omissions of the Executive Secretary, UNCCD;

g. In Judgement *Gabalton* 2011-UNAT-120, the United Nations Appeal Tribunal (UNAT) concluded that

Having undertaken, even still imperfectly, to conclude a contract for the recruitment of a person as a staff member, the Organization should be regarded as intending for this person to benefit from the projection of the laws of the United Nations and, thus, from its system of administration of justice and, for this purpose only, the person in question should be regarded as a staff member.

h. Under the terms of decision 6/COP.10 and of the amended MOU, he must be considered as having been employed by UNCCD at the latest since the adoption of the MOU, at least for the purpose of receiving the legal protection afforded to United Nations staff members;

i. He was denied access to internal grievances both by IFAD and UNCCD, and should the Tribunal conclude that it does not have jurisdiction over his case, he will be deprived of any judicial protection.

Merits

j. The decision was illegal because it was unsubstantiated, constitutes an abuse of discretionary power, a violation of the Applicant’s expectancy for renewal and a violation of the Organization’s duty of care and good faith;

k. The decision damaged the Global Mechanism since it left it without a Managing Director, despite the fact that the Applicant, as incumbent of the post, had served on it for a long time, fulfilled all the post's requirements and that funding for the post was available;

l. Decision 6/COP.10 does not require the appointment of the Managing Director of the Global Mechanism and even less that a new recruitment process ought to be undertaken immediately;

m. ORHM has not yet started the recruitment for the Managing Director of the Global Mechanism post through the United Nations procedures;

n. As any other Director of IFAD, the Managing Director's fixed-term contract has always been extended under IFAD Human Resources Rules and Procedures, provided that COP had decided to grant an extension, as was the case here, since the COP had confirmed the post for the 2012/13 biennium;

o. Instead of cooperating with him as Managing Director of the Global Mechanism, as per the terms of the COP decision, the Executive Secretary, UNCCD, decided not to renew his appointment in view of the new governance arrangements; this decision constitutes an abuse of discretion;

p. He had a legitimate expectation that his contract would be renewed, particularly since the budget had been allocated, his professional ability had never been questioned and he could expect to be extended since the Global Mechanism could not remain without a Managing Director; the last extension of only six months could be due to the necessity to transfer staff to UNOG and did not imply that his contract would not be renewed;

q. The decision is a violation of the principle of good faith and the duty of care, since there was no reason to abruptly terminate his appointment, and even if a new recruitment of the Managing Director of the Global Mechanism were considered justified under the COP decision, he should at

least have been extended until a new Managing Director was recruited. As such, the decision affected his dignity and professional reputation;

- r. The Applicant requests the Tribunal to order:
 - i. the rescission of the decision not to renew his contract;
 - ii. UNCCD to reinstate him to the post of Managing Director of the Global Mechanism, either until the end of 2013 or until the transfer of staff to the United Nations has been completed and a new Managing Director of the Global Mechanism has taken up functions, both with retroactive effect from 1 June 2012;
 - iii. payment of salary and allowances until date of reinstatement together with payment of moral damages and legal fees.

43. The Respondent's principal contentions are:

Receivability

- a. The present application is not receivable *rationae personae* under arts. 3.1, and 8.1(b) of the Statute of the Dispute Tribunal, since the Applicant was an IFAD staff member and as such eligible to file an application with the ILOAT, but not with the UNDT, as confirmed by ILOAT judgement No. 2867 (2010);
- b. Decision 6/COP.10 did not have any impact on the categorization of Global Mechanism employees as IFAD staff members;
- c. The Applicant's letter of appointment was not changed through decision 6/COP.10 and the amendment to the MOU adopted on 2 April 2012. An Organization cannot unilaterally alter the terms of a letter of appointment which had been signed by a staff member; to unilaterally apply different rules or rules of another organization would lead to a high legal uncertainty for the staff member;

d. Decision 6/COP.10 and the amended MOU were agreements with mutual obligations for future implementation. With respect to the Managing Director of the Global Mechanism, the implementation would be completed upon filling of the post in question through the UN recruitment system. The decision could not have an implication for the existing appointments and did not change the Applicant's status as an IFAD staff member;

e. UNAT Judgement *Gabaldon* 2011-UNAT-120 is not relevant to this case since the Applicant was never approached by UNCCD for an employment under the UN recruitment procedures. The fact that the Applicant performed functions for a post at the Global Mechanism, under an IFAD appointment, which were supposed to be transferred to the UNCCD, does not imply any pre-contractual obligations on the part of the United Nations;

f. The Respondent concludes that as such, the Applicant does not even fall under the enlarged category of persons who have access to the Tribunal's jurisdiction. The Applicant is not without judicial protection since as a former IFAD staff member, he has access to IFAD grievance procedures and ILOAT.

Merits

g. If the Tribunal were to find that the application is receivable, the Respondent notes that the decision not to extend the Applicant's fixed-term appointment was lawful. It was motivated by the major reorganization of the Global Mechanism, by which the administration of Global Mechanism staff was shifted from IFAD to UNCCD. The Applicant was informed about that reorganization and the consequences it would have on his position. The decision was a rightful exercise of the discretionary power of the Administration and the Applicant failed to substantiate/prove any improper motive.

Consideration

44. The Applicant contests the decision not to renew his contract beyond 31 May 2012, notified to him by memorandum of 25 May 2012 of the Executive Secretary, UNCCD.

45. This Tribunal first has to determine whether in view of the Applicant's contractual status at the time of the contested decision and at the time of his separation, the present application is receivable *ratione personae*, under the terms of the Tribunal's Statute.

46. Article 2, paragraph 1, of the Tribunal's statute provides:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations: (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms 'contract' and 'terms of appointment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

47. Article 3, paragraph 1, of the Tribunal's statute further provides:

An application under article 2, paragraph 1, of the present statute may be filed by: (a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes; (b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes; (c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations.

48. Article 3, paragraph 1, thus stipulates that the jurisdiction of the UNDT is limited to persons who have acquired the status of a staff member or former staff member of the United Nations or of the separately administered United Nations funds and programmes.

Applicant's contractual status

49. The Applicant's initial letter of appointment of 13 January 2005 provided for a two-year fixed-term appointment with IFAD as Managing Director of the Global Mechanism; it is not disputed that, at that time, he became an IFAD staff member. Furthermore, the letter of appointment stipulated that the appointment was governed by the general provisions of the IFAD Personnel Policies Manual and Human Resources Handbook, which include the provisions about IFAD recognition of the ILOAT to hear appeals from its staff members against administrative decisions from the IFAD.

50. However, the Tribunal has to examine whether subsequent developments, starting with decision 6/COP.10 of 21 October 2011 and followed by the amendment to the MOU on 2 April 2012, in any way impacted on the Applicant's access rights to the internal justice system of the United Nations.

Applicant's contract of 30 November 2011

51. The Applicant's last contract extension of six months was signed on 30 November 2011 by an IFAD Official. It stated that the terms of his previous contract extension of 30 March 2011 remained unchanged but that it had to be interpreted in light of decision 6/COP.10.

Impact of decision 6/COP.10 and of the amendment of the MOU

52. The UNCCD Convention provides that the COP shall identify a housing organisation for the Global Mechanism, and that it shall make the appropriate arrangements with that organisation for its administrative operations. After the COP decided in 1997 that IFAD shall host the Global Mechanism and after IFAD Governing Council agreed to that decision in 1998, the COP and IFAD entered into the MOU of 1999. Under the terms of this MOU, the Managing Director of the Global Mechanism was appointed by and had to report directly to the President, IFAD.

53. Decision 6/COP.10 directed the Executive Secretary, UNCCD, to revise the MOU of 1999 with respect to the modalities and administrative operations of the

Global Mechanism, and to work with the President, IFAD, to enable the timely termination of the MOU once a new housing arrangement for the Global Mechanism had been concluded.

54. Decision 6/COP.10 recalled that “the appointment and recruitment of staff, management and the auditing of the accounts of the Global Mechanism are under the rules and regulations of [IFAD] and have not been subject to direct review and guidance by the [COP]”. It further requested the Executive Secretary, UNCCD, “to ensure that [...] staff managed by the Global Mechanism are under one single administrative regime administered by [UNOG] and managed under the Financial Regulations and Rules of the United Nations.” The COP also decided that “the appointment of the Managing Director of the Global Mechanism shall be done through the recruitment process of the United Nations by the Executive Secretary”. The COP further requested the Executive Secretary, UNCCD, “to take all necessary measures [...], in consultation with the Managing Director of the Global Mechanism and the President of [IFAD], to implement the governance arrangements in this decision to ensure that the administrative, procedural and legal aspects of this decision are implemented”.

55. The Applicant’s last contract extension was signed on 30 November 2011, namely shortly after the issuance of decision 6/COP.10. It follows from decision 6/COP.10, as quoted above, that its implementation with respect to the contractual status of Global Mechanism staff members, including its Managing Director, was not meant to be instantaneous, but required additional steps to be undertaken, including, *inter alia*, the revision of the MOU of 1999 between the COP and IFAD. This is confirmed by the terms of IFAD President’s Bulletin of 14 February 2012, which notes that decision 6/COP.10 “initiates a process to identify a new set of administrative and institutional arrangements for the [Global Mechanism]” (emphasis added). Also, for a full implementation of decision 6/COP.10 with respect to the contractual regime of Global Mechanism staff, it was obvious that further consultations with the United Nations were required, as it was highlighted by the ASG, OHRM, in her letter dated 2 August 2012 to the Executive Secretary, UNCCD.

56. Therefore, at the moment of the signature of the Applicant's last contract extension, the set of Rules and Regulations that applied to his contract continued to be those of IFAD and, as such, pending the full implementation of decision 6/COP.10, that contract extension constituted a mere renewal of the employment relationship between IFAD and the Applicant.

57. The question remains if the amendment to the MOU, which entered into force on 2 April 2012, impacted the Applicant's status as an IFAD staff member. The amended MOU recalled under Article VI(d) and (e) that

d. Until such time that all accounts and staff managed by the Global Mechanism shall be under one single administrative regime administered by [UNOG] and managed under the Financial Regulations and Rules and Staff Rules of the United Nations, IFAD shall continue to, in consultation with the Executive Secretary, provide personnel and financial management services to employees or contractors of the Global Mechanism. Accordingly, IFAD is not, and will not be, responsible for any element of the personnel management or financial management of the Global Mechanism, including the selection and recruitment of its staff and Managing Director. Furthermore, IFAD is not, nor will it be, a party to employment contracts with employees or contractors of the Global Mechanism, and the IFAD rules and procedures will not apply to such employees or contractors.

e. The appointment of the Managing Director of the Global Mechanism shall be done through the recruitment process of the United Nations by the Executive Secretary.

58. The amended MOU further noted that the legal representation of the Global Mechanism was transferred from IFAD to the UNCCD Secretariat. It clearly put a legal obligation on the Executive Secretary, UNCCD, to undertake the necessary actions to ensure that, in the future, contracts of Global Mechanism staff, including that of the Managing Director of the Global Mechanism, are no longer administered by IFAD but by UNOG, under the United Nations Regulations and Rules. However, this mandate given to the Executive Secretary, UNCCD, could not have an impact on the Regulations and Rules governing the running contract of the Managing Director of the Global Mechanism.

59. With respect to the Managing Director of the Global Mechanism, both the COP decision and the amended MOU provide that the appointment shall be done

by the Executive Secretary, UNCCD, through the recruitment process of the United Nations. This clearly asks for the implementation of a future recruitment process, under a different set of Regulations and Rules than those that governed the contract of the then incumbent of the post of Managing Director of the Global Mechanism. The provision in question cannot be interpreted as implying an automatic transfer of the incumbent or the automatic issuance of a United Nations contract to the incumbent of the post of Managing Director of the Global Mechanism.

60. The Applicant, from the beginning to the end of his contractual relationship with the Global Mechanism, was and remained an IFAD staff member; he never became a staff member of an organization falling under this Tribunal's jurisdiction as per art. 3.1 of its Statute. Accordingly, and as the letter of 28 May 2012 from the Director, HRD, IFAD, indicated, the Applicant's separation was done in accordance with the applicable Rules and Regulations of IFAD, which were the provisions governing his last contract extension.

61. In view of the foregoing the Tribunal finds that at the moment the decision not to extend the Applicant's appointment was taken— as well as at his date of separation from service on 31 May 2012— he was an IFAD staff member. As such, he does not, in principle, have access to the jurisdiction of this Tribunal under the terms of articles 2 and 3 of its statute quoted above.

UNAT jurisprudence on receivability ratione personae

62. The foregoing notwithstanding, the Tribunal notes that the Appeals Tribunal has decided that there may be rare and very specific situations in which persons who have not formally acquired the status of staff member of the United Nations and who would otherwise be denied justice, ought to be granted access to the United Nations system of administration of justice. Therefore, the Tribunal will examine the respective decisions and their impact in turn.

63. In its Judgement *Gabalton* 2011-UNAT-120, the Appeals Tribunal described several scenarios in which persons who, despite the fact that they never received a letter of appointment from the United Nations, shall nevertheless be

considered staff members for the sole purpose of art. 3 of this Tribunal's statute. The Appeals Tribunal clarified however, that such an extension of the United Nations system of justice to persons who have not formally become staff members has to be applied in a restrictive manner, namely "to persons who are legitimately entitled to similar rights to those of staff members". The Appeals Tribunal stated that this may be the case for persons who begin to exercise their functions based on the acceptance of an offer of employment or persons who fulfil all the conditions of and have unconditionally accepted an offer of employment.

64. The Applicant does not belong to any of the group of persons identified in *Gabaldon*. It has already been established that at the moment of the contested decision and of his separation from service, the Managing Director of the Global Mechanism was an IFAD and not a United Nations staff member. The Applicant's last contract extension as Managing Director of the Global Mechanism, of 30 November 2011, clearly referred to decision 6/COP.10, hence to the fact that under the new arrangement, the Managing Director of the Global Mechanism was to be appointed through the recruitment procedure of the United Nations. Neither decision 6/COP.10 nor the amended MOU contain any element by which the United Nations undertook to approach the Applicant, in a view of offering him a contract under the United Nations Rules and Regulations, and as a consequence the Applicant has never been in a position to accept any kind of offer either.

65. While the Executive Secretary, UNCCD, was directed and did actually take action to implement the COP decision with respect to the future administration of Global Mechanism staff contracts by UNOG, including that of the Managing Director of the Global Mechanism, the United Nations did never approach the Applicant to engage in any negotiations, let alone did it make any offer of appointment to the Applicant as new Managing Director of the Global Mechanism under the Regulations and Rules of the United Nations. On the contrary, the case file shows that a revised job description, containing eligibility requirements which differ from the job opening in 2005, was sent to OHRM to launch a recruitment process under the United Nations Rules and Regulations. As outlined above, it was obvious, and also clear to the Applicant, that this was to be a new recruitment process, and did in no way imply any offer - which he could potentially have

accepted - to him being simply transferred or extended under a new legal and administrative regime.

66. In view of the foregoing, and duly taking into account the Appeals Tribunal's Judgement *Gabaldon*, the Tribunal finds that the United Nations did not engage in or conclude any pre-contractual obligations that could lead to conclude that the Applicant had a status legitimately entitling him to similar rights as those of a United Nations staff member.

67. In its Judgement *Iskandar* 2011-UNAT-116, the Appeals Tribunal ruled that there may be situations in which the United Nations, by its behaviour, extended the protection of its system of administration of justice to persons who are not staff member of the United Nations, but of another International Organization, which accepted the jurisdiction of the ILOAT. In that case, the Appellant, a World Food Programme staff member, while on loan to the African Union/United Nations Hybrid operation in Darfur ("UNAMID") under the terms of an Inter-Organization loan agreement, unsuccessfully applied to a post at UNAMID. Paragraph 11 of the Inter-Organization agreement provides that "appeals against administrative decisions taken [...] during a period of [...] loan, will be heard by the appropriate appeals body of the organization which took the decision appealed against, and be dealt with under the regulations and rules of that organization." The Appeals Tribunal found that as a consequence of that paragraph of the agreement, the United Nations undertook to extend the protection of its internal justice system to the Appellant who could appeal before the UNDT decisions taken by UNAMID during the loan period. The Appeals Tribunal also stressed that if *Iskandar* were not to be granted access to the United Nations system of administration of justice, he would have no right to an effective remedy, which would be a denial of justice.

68. The circumstances of the present case are not similar to those of *Iskandar*. In the current arrangement, no document on file leads to conclude that the United Nations undertook action to extend the protection of its system of administration of justice to the Applicant, a holder of an IFAD contract of employment. On the contrary, the correspondence on file shows clearly that the United Nations was

considering the implications of taking over the administrative handling of Global Mechanism staff (e.g. pending claims of Global Mechanism staff vis-à-vis IFAD) before formalizing the administrative transfer. More specifically concerning the United Nations new system of administration of justice, the ASG, OHRM, in her memorandum of 2 August 2012 to the Executive Secretary, UNCCD, clarified that if the arrangement of the institutional linkage between the UNCCD Secretariat and the United Nations were to be revised in view of decision 6/COP.10, and Global Mechanism staff members were to work under United Nations contracts in the future, the revised arrangements should also take into account the new internal justice system of the United Nations, including the required contributions thereto, by the UNCCD. Neither have such arrangements with respect to the institutional linkage of the United Nations Secretariat been revised, nor has the Applicant received a contract of employment with the United Nations. Therefore, the Tribunal finds that the Applicant's situation is not comparable to that of the case of *Iskandar*.

69. With respect to the question of the Applicant's access to any judicial remedies, and while this Tribunal cannot make any pronouncements with respect to the internal grievance procedure of IFAD and the competence of the ILOAT in the present case, it is noted that in January 2013 IFAD informed the Applicant that it was ready to apply its internal remedies mechanism. It is also undisputed that IFAD has accepted the jurisdiction of ILOAT and, therefore, the Applicant, being an IFAD staff member, in principle, has access to ILOAT. Insofar, the Applicant has a right to an effective legal remedy and does not face a denial of justice as mentioned in *Iskandar*.

70. The Tribunal concludes that the Applicant does not fall under any of the scenarios covered by the jurisprudence of the Appeals Tribunal. Considering that the Appeals Tribunal has emphasized that exceptions from the requirements of the wording of this Tribunal's Statute have to be applied in a restrictive manner, this Tribunal sees no legal grounds to find that its jurisdiction covers the Applicant.

71. In sum, this Tribunal is not competent to consider the present application since it is irreceivable *ratione personae*.

Conclusion

72. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 9th day of April 2013

Entered in the Register on this 9th day of April 2013

(Signed)

René M. Vargas M., Registrar, Geneva