

**Mandate issues in the activities of
the International Fund for Agricultural Development (IFAD)**

Dr. Rutsel Silvestre J. Martha
General Counsel, IFAD

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PRACTICAL LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS

A Global Administrative Law Perspective on Public/Private Partnerships,
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40, Boulevard du Pont-d'Arve 1211 Genève 4

I. Introduction

It has been argued that to be effective an international organization must (a) be given an appropriate mission; (b) be given the means to accomplish its mission; and (c) be viewed as legitimate when carrying out the mission. According to the proponent of this thesis, ensuring that these conditions are met is not easy, because there is an inherent tendency for many international institutions to experience 'mission creep' particularly when accountability for burden sharing is weak. This leads to the central dilemma facing many international organizations. If missions are expanded, and organizations are given insufficient means, they are likely to fail (or fall short of optimal behaviour) and be criticized for ineffectiveness. However, the more extensive the means they are given, the more likely that their legitimacy will be questioned¹. At the same time, it could also be argued that where the means given to an organization are not commensurate to the mission, this may induce a self-limitation that in the end will also lead to an organization being less effective than it could otherwise be.

As international organizations are not States, but institutions with a special purpose, they continuously grapple with the question of whether their activities fit into the functions bestowed upon them by their constitutive instruments. It is of course recognized that they have the power to exercise these functions to their full extent, in so far as their constituent instruments do not impose restrictions on that power. This principle, which was stated by the Permanent Court of International Justice in its advisory opinion in the *European Commission of the Danube*², is much easier to state than to apply in the day to day practice of particularly the executive organizations. By executive international organizations it is meant those that discharge their functions through external operations rather than through deliberation and recommendations. Of the global organizations, the World Bank Group, the IMF, INTERPOL and IFAD are examples of executive organizations.

It would appear that due to dynamics of the external environment in which they operate and? the evolution of the needs of those they serve, such institutions are constantly faced with the question of whether the functions bestowed upon them cover the evolving needs, and whether the powers to fulfil those functions are adequate to deal with new demands. Because the means of the international organizations are not limitless, while needs and demands do not appear to be subject to any limit, there is an inbuilt tension in the executive organizations that keeps mandate issues at the centre of the deliberations in and between the various bodies of these organizations. Traditionally this tension is further influenced by the state of affairs of international politics. That is: member countries try and often succeed in ensuring that the operations of international institutions either reflect or are responsive to international political developments, which may entail efforts to limit, expand or condition the activities of international organizations. There is also evidence that, increasingly, as the secretariats of international organizations become bureaucratic powerhouses and the executive heads take on roles or attitudes perceived to be too autonomous to the taste of the stakeholders, the issue of mandate becomes the battlefield of choice to fight out institutional turf wars. Mentions should also be made of the effects of the trend to take recourse in informal networks of decision-makers in order to manage a great variety of international issues³. Finally, due to the

¹ Robert Z. Lawrence, *International Organisations: The Challenge of Aligning Mission, Means and Legitimacy*, World Economy, Volume 31, Issue 11, Date: November 2008, pp. 1455-1470

² *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, 8 December 1927, PCIJ Series B, No. 14, p. 64.

³ See generally Anne-Marie Slaughter, *A NEW WORLD ORDER* (Princeton and Oxford, 2004). Also J.Klabbers, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* (Cambridge, 2002), pp. 339-343.

failure of the United Nation's Economic and Social Council (ECOSOC) to effectively perform its role as coordinator for the global allocation of resources⁴, misallocations, overlaps and negative conflicts of jurisdiction are not uncommon within the United Nations System. It is therefore no surprise that it took the International Court of Justice to finally arbitrate on the issue of the meaning of the concept of a specialized agency, but even then, the atmosphere of *competence de competence* still prevails, as is evidenced by the reactions to the recent global fuel, food and financial crises.

It is against this background that I undertake this journey through the various mandate issues that have emerged over the last 30 years in the practice of the International Fund for Agricultural Development (IFAD), some of which are currently on the organization's agenda. After a brief overview of IFAD and its statutory mandate, the evolution of its mandate in practice will be described and an assessment made of the state of affairs at the end of 2008.

II. Filling up a gap: the IFAD Mandate

1. General

Food security has been a matter of continuous concern for humanity. This concern has not only occupied the minds of rulers and policy makers, but also academicians have reflected on this issue of food security and its implications. Famous among the theories that produced by such reflections it is the so-called "Malthusian Trap: The Principle of Population". Thomas Robert Malthus was an English political economist and demographer who lived from 13 February 1766 to 23 December 1834. His area of research and reflections was population growth and he noted the potential for populations to increase rapidly. In a study under the title "An Essay on the Principle of Population (1798) he developed the following theory that became known as The Malthusian Trap⁵. This is called a Malthusian catastrophe (sometimes called a Malthusian check, Malthusian crisis, Malthusian dilemma, Malthusian disaster, Malthusian trap, Malthusian controls or Malthusian limit), which is a return to subsistence-level conditions as a result of population growth outpacing agricultural production.

It can be said that when the first World Food Conference was held in Rome in 1974 by the United Nations under the auspices of the UN Food and Agriculture Organization (FAO), in the wake of the devastating famine in Bangladesh in the preceding two years, the world was at the brink of a Malthusian catastrophe. Governments attending the World Food Conference proclaimed that "every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop their physical and mental faculties." The Conference set as its goal the eradication of hunger, food insecurity and malnutrition within a decade. Among other outcomes of the Conference was the creation of IFAD. The acronym IFAD stands for the International Fund for Agricultural Development. IFAD was established in

⁴ See e.g. Jens Martens, *The Reform of the UN Economic and Social Council (ECOSOC): A Never-Ending Story?* World Economy and Development and Global Policy Forum, November 14, 2006, <http://www.globalpolicy.org/socecon/un/reform/2006/1114ecosocmartens.htm>

⁵ The theory goes as follows: 1. subsistence severely limits population-level; 2. when the means of subsistence increases, population increases; 3. population-pressure stimulates increases in productivity; 4. increases in productivity stimulate further population-growth; 5. since this productivity can not keep up with the potential of population growth for long, population requires strong checks to keep it in line with carrying-capacity; 6. individual cost/benefit decisions regarding marriage, work, and children determine the expansion or contraction of population and production; 7. checks will come into operation as population exceeds subsistence-level; 8. the nature of these checks will have significant effect on the rest of the socio-cultural system — Malthus points specifically to misery, vice, and poverty.

1977. IFAD, the World Bank Group and the International Monetary Fund are the only international financial institutions that have the status of a United Nations specialized agency⁶.

The World Food Conference recognized:

- (i) the need for a substantial increase in investment in agriculture for increasing food and agricultural production in the developing countries;
- (ii) that provision of an adequate supply and proper utilization of food are the common responsibility of all members of the international community; and
- (iii) that the prospects of the world food situation call for urgent and coordinated measures by all countries; and therefore resolved: that an International Fund for Agricultural Development should be established immediately to finance agricultural development projects primarily for food production in the developing countries.

To implement Resolution XIII of the World Food Conference a treaty, the Agreement Establishing IFAD, was negotiated and concluded in 1977. IFAD started operation in 1978.

2. Mandate and system of priority

The Agreement Establishing IFAD states that “the objective of the Fund shall be to mobilize additional resources to be made available on concessional terms for agricultural development in developing Member States. In fulfilling this objective the Fund shall provide financing primarily for projects and programmes specifically designed to introduce, expand or improve food production systems and to strengthen related policies and institutions within the framework of national priorities and strategies, taking into consideration: a) the need to increase food production in the poorest food deficit countries; b) the potential for increasing food production in other developing countries; and, c) and the importance of improving the nutritional level of the poorest populations in developing countries and the conditions of their lives”.

Because of this special mandate, the Agreement Establishing IFAD contains a very specific system for the use and the allocation of its resources. It states that:

(a) First: the resources of IFAD shall be used to achieve the objective that just described. (b) Second: financing by IFAD shall be provided only to developing States that are Members of the Fund or to intergovernmental organizations in which such Members participate. (c) Third: IFAD shall make arrangements to ensure that the proceeds of any financing are used only for the purposes for which the financing was provided, with due attention to considerations of economy, efficiency and social equity. (d) Fourth: in allocating its resources the Fund shall be guided by the following priorities: (i) the need to increase food production and to improve the nutritional level of the poorest populations in the poorest food deficit countries; (ii) the potential for increasing food production in other developing countries. Likewise, emphasis shall be placed on improving the nutritional level of the poorest populations in these countries and the conditions of their lives.

⁶ Theodor Van der Pluijm, *Het Internationale Fonds voor Agrarische Ontwikkeling – Kanttekeningen bij de oprichting van een nieuw financieringsorgaan*, XXXI Internationale Spectator, December 1977, pp. 745-736; see also Fawzi H. Al-Sultan, *Ibrahim Shihata and the Establishment of the International Fund for Agricultural Development*, in Sabine Schlemmer-Schulte & Ko-Yung Tung, LIBER AMICORUM IBRAHIM SHIHATA (The Hague-London-Boston-New York, 2001), pp. 37-50.

Within the framework of the above-mentioned priorities, eligibility for assistance shall be on the basis of objective economic and social criteria with special emphasis on the needs of the low income countries and their potential for increasing food production, as well as due regard to a fair geographic distribution in the use of such resources.

Based on these provisions of the Governing Council has adopted the Lending Policies and Criteria, which the Executive Board is required to take into account when considering projects and programmes for approval.

III. Interpretation

Every action of an international organization, including IFAD, expresses or implies some interpretation of the organization's law, in particular its constituent instrument. In other words, IFAD's actions, like those of other international organizations, imply a view about the meaning of its law, and are therefore quintessentially interpretative of the legal regulations that govern its existence and operations⁷. When the notion of interpretation is regarded in this sense it becomes clear that the vast majority of mandate issues that arise in the practice of IFAD are dealt with through the process of interpretation, which suggests that the activities that IFAD engages in are manifestations of organization's understanding of its own mandate. Despite the fact that "every act performed by an international organization must be compatible with the purposes which the organization is supposed to pursue"⁸, it would be utterly impracticable if were required that the lawyers of the organizations vet each of those actions daily. Thus a great part of the interpretation in the sense here described occurs decentralised, mainly by non-lawyers. But very frequently, mostly when questions are referred to the legal department or when preparing decisions to be adopted by the competent governing bodies, the legal department, in the case of IFAD the Office of the General Counsel, is called upon to vet the activities of the organization.

Although the Agreement Establishing IFAD foresees the possibility of authoritative interpretation and dispute settlement on the issue of interpretation, that possibility has not been used, leaving the General Counsel in practice as the ultimate custodian of the IFAD basic documents. Based on this responsibility, the activities that will be described in the following paragraphs have been cleared by the Office of the General Counsel as being within the mandate of the organization. A selection has been made of those cases that have led to decisions of the competent governing bodies, and thus confirm the understanding of those bodies about the mandate of the organization.

1. Grants to non-governmental organizations

During the first decade of its existence, IFAD's interpretation of Article 7, Section 1 (b) of the Agreement Establishing IFAD⁹ which states that the Fund can only finance its developing Member States and intergovernmental organizations in which those States participate, limited the possibility for it to fully benefit from its partnership with non-governmental organizations. It was particularly felt that by not directly financing such organizations (NGO), the Fund was depriving itself of the potential of using NGO experience and know-

⁷ See on this approach to the notion of interpretation, Joseph Gold, *INTERPRETATION: THE IMF AND INTERNATIONAL LAW* (London/The Hague/Boston, 1996), p. 3

⁸ Peter H.F. Bekker, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS – A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES* (Dordrecht/Boston/London, 1994), p. 157.

⁹ This provision has now been amended and will be discussed in Part IV(1) of this paper.

how in order to improve its own approaches in the identification, design, implementation and evaluation of its projects and thus contribute to increased responsiveness and sustainability of its development operations. The *IFAD/NGO Extended Cooperation Programme* (ECP) was therefore created in September 1987, during the Thirty-First Session of the Executive Board¹⁰. As of 2004, the IFAD/NGO Extended Cooperation Agreement has been abolished. Under IFAD's new Policy on Grant Financing, NGOs and Civil Society organizations are not limited to a specific facility, but can apply for support under the Fund's overall grant programme. Its purpose has been to enhance IFAD's direct collaboration with NGOs in the promotion of participatory and community-based rural development and poverty alleviation and to encourage recipient governments to build upon the experience and know-how accumulated from the activities of NGOs and to engage, themselves, in dialogue and collaboration with these organizations. The principle objectives of the ECP were to: (i) extend direct grant financing in support of innovative pilot activities by NGOs which can provide prototypes and instruments of intervention for ongoing or future IFAD loan operations; (ii) offer IFAD opportunities to tap valuable NGO experience and know-how in order to improve its own approaches in the identification, design, implementation and evaluation of its projects and thus contribute to increased responsiveness and sustainability of its development operations; (iii) contribute to the development of a repository of relevant experience and know-how in operational and strategic issues and thus enhance IFAD's role as a knowledge institution on rural poverty and its alleviation; and (iv) build durable partnerships and maintain regular consultations and dialogue with a family of development NGOs that can assist IFAD's strategy articulation and choice of project interventions. (I think this section is too long)

How then was the ostensible legal obstacle posed by Article 7, Section 1 (b) of the Agreement Establishing IFAD overcome? The position was taken that the cooperation with NGO's does not rest on the aforementioned provision but on Article 8, Section 2, which states that the Fund shall cooperate closely with inter alia non governmental organizations. As this cooperation is a prescribed activity, it was felt that the financing of that cooperation is an authorized expense of the organization. By itself there is nothing particularly outrageous in this interpretation, particularly if one takes into account that effectively the NGOs deliver valuable services to IFAD in return for the financing received. From this perspective, the financing of NGOs under the ECP and its successor is not necessarily distinguishable from the purchase of services (e.g. from consultants) for assisting in the development and the delivery of the operational programme of work of the organization.

Nevertheless, the interpretation that the cooperation with the NGO, including grants to these institutions, is not impaired by impeded by Article 7, Section 1 (b) of the Agreement Establishing IFAD because it rests on a special clause, is not without its difficulty. This difficulty stems from the fact that the Agreement Establishing IFAD makes a strict distinction between the financing of the operational activities on the one hand and the funding of the administrative expenses on the other. The latter must be cover from the Administrative Budget contemplated by Section 10 of Article 6 of the Agreement, whereas the planned operational activities defined in the Programme of Work are to be from the proportion of the Fund's resources that the Executive Board has determined as available for commitment under

¹⁰ <http://www.ifad.org/ngo/ecp/ecp.htm>; see also A/53/170 , Arrangements and practices for the interaction of non-governmental organizations in all activities of the United Nations system, General Assembly Fifty-third session, Item 58 of the provisional agenda, Strengthening of the United Nations system, <http://www.un.org/documents/ga/docs/53/plenary/a53-170.htm>

Section 2(a) of Article 7. At first sight it would appear that, like the activities undertaken with other entities mentioned in Article 8, Section 2 of the Agreement (something is missing here). It was decided, however, that the resources to finance the activities with NGOs envisaged by the ECP and its successor should be drawn from the grant envelope available under the regular Programme of Work, within the limits approved by the Executive Board.

2. Facilitating migrants remittances

Another activity in which IFAD became involved invites comments from the legal point of view. IFAD's interest in migration issues derives from the fact that migration is intimately related to rural poverty. It has been pointed out that in recent decades migration has changed the composition of families in many poor rural communities where the organization operates. The primary income earners of these families can be working in another city in the country, or in a different country or continent. In addition, migration by men results in many households being headed by women. Furthermore, many communities are deprived of a significant part of their labour force within the communities themselves. Communities are extended beyond strict geographic boundaries, and their members abroad are playing an active role – sending remittances, bringing innovative ideas – in the well-being of the rural communities they left behind. Against this background IFAD concluded that by working with rural poor people, governments, donors, non-governmental organizations and other partners, IFAD can focus on country-specific solutions to increase rural poor peoples' access to financial services, markets, technology, land and other natural resources. Given that nevertheless, persistent poverty continues to push poor rural people elsewhere in an effort to improve their life and livelihood, the organization broadened its rural development perspective to a trans-national level in two ways. The first was by recognizing the existence of large migrant populations with strong ties to their communities of origin. To that effect since 2000 IFAD has been engaged in a process to formally incorporate migrant associations in the design frameworks and financing of some of its projects and programmes. The second method was by identifying and strengthening groups among the migrant communities, particularly in the United States and the European Union, who are interested in supporting development in their communities of origin. In April 2004, IFAD and the Multilateral Investment Fund (MIF) of the Inter-American Development Bank (IDB) launched a joint programme to help senders and recipients of remittances increase their access to financial services and invest in employment- and income-generating projects. In particular, this programme supports bi-national rural development projects in remittance-receiving communities and fosters alliances between migrant associations, savings and credit institutions and immigrant communities of origin¹¹. More recently, IFAD, in partnership with the European Commission, the Inter-American Development Bank, the Consultative Group to Assist the Poor, the Government of Luxembourg, the Ministry of Foreign Affairs and Cooperation, Spain, and the United Nations Capital Development Fund, created in 2008 the Financing Facility for Remittances (FFR). The FFR is a multi-donor facility that aims to reduce rural poverty and promote development. The facility strives at increasing economic opportunities for the rural poor through support and development of innovative, cost-effective and easily accessible international or domestic remittance services, with or within countries in Africa, Asia, Europe, Latin America and the Caribbean (LAC), and the Near East.

¹¹ Rosemary Vargas-Lundius, *Migration, remittances and rural development*, FIFTH COORDINATION MEETING ON INTERNATIONAL MIGRATION, Population Division Department of Economic and Social Affairs, United Nations Secretariat, New York, 20-21 November 2006, UN/POP/MIG-5CM/2006/04 14 November 2006, p. 2.

At first sight, the Fund's involvement may seem difficult to fit into the objective stated in Article 2 of the Agreement Establishing IFAD and Article 7, Section 2(a). Probably the best way to explain IFAD's involvement in emigrants international or domestic remittance services is on the basis of Article 7, Section 3 of the Agreement, which states that "in addition to the operations specified elsewhere in this Agreement, the Fund may undertake such ancillary activities and exercise such powers incidental to its operations as shall be necessary in furtherance of its objective."

IV. Waiver of statutory limitations

1. The concept

The second technique employed in the practice of IFAD in order to cope with mandate constraints is the use of dispensation or waiver. Dispensation or waiver is based on the proposition that the Governing Council, as the supreme policy and regulatory body of the organization, has the power to dispense with requirements imposed by the Agreement Establishing IFAD, provided that such decision is adopted through the same majority as is required for the amendment of the Agreement.

2. Direct supervision of project implementation

This technique was employed for the first time in 1997 to overcome the impediment posed by the original version of Article 7 Section 2(g) of the Agreement Establishing IFAD, which provided that "the Fund shall entrust the administration of loans, for the purpose of the disbursement of the proceeds of the financing and the supervision of the implementation of the project or programme concerned, to competent international institutions." In other words, IFAD was legally barred from directly supervising the projects and programmes it financed, and was legally required to enlist the services of third parties for that purpose. In practice that meant that in the most cases the UNOPS¹² was engaged as the Cooperating Institution (CI) for these purposes.

As can be expected, improving the quality of project implementation and achieving better results on the ground has been a priority for the Fund since the early 1990s. This gave rise to a series of studies to examine and clarify the role of project supervision in the IFAD project cycle². In 1996 IFAD's Programme Management Department commissioned a Joint Review of Supervision Issues in IFAD Financed Projects in collaboration with four major Cooperating Institutions. The review presented five recommendations: (i) introduce and enforce Minimum Supervision Requirements for the Cooperating Institutions; (ii) improve coordination procedures between IFAD and the Cooperating Institutions; (iii) establish an efficient portfolio management system; (iv) strengthen IFAD priority areas of getting results on the ground and reinforce the learning loop; and, (v) undertake an experimental direct project supervision programme by IFAD for 15 of its initiated projects (three for each regional division). By Resolution 102/XX of 21 February 1997 the Governing Council approved the recommendations of the Report of the Joint Review on Supervision Issues and an associated five year Plan of Action. The resolution stated that IFAD "may supervise specific projects and programmes financed by it". According to the action plan, no more than 15 IFAD-initiated projects were to be directly supervised and administered during the five-year period. This initiative, including the 15 projects, has since been referred to as the Direct

¹² The United Nations Office for Project Services (UNOPS), is dedicated exclusively to implementing projects for the United Nations system, international financial institutions, and governments.

Supervision Pilot Programme (DSPP). The Governing Council resolution entered into effect on 21 February 1997 and will cease to be operational five years after the date of effectiveness of the last approved project to be directly supervised by IFAD

In order to justify the power of the Governing Council to approve experimental direct supervision by the Fund, notwithstanding Article 7, section 2(g) of the Agreement Establishing IFAD, the theory was advanced that the Governing Council could derogate from the said provision provided that the decision were adopted through the same majority as is required for the amendment of the Agreement.

Not surprisingly, not all delegations were convinced of the validity of this theory. The representatives of the United Kingdom and the United States expressed their reservations regarding operative paragraph 2 of the resolution concerning the fifth recommendation of the Report on the Joint Supervision relating to the direct supervision of a representative sample of projects¹³. Beyond requesting that their reservations be registered in the records of the session, the legal appropriateness of the technique was not further raised. This allowed the Chairman to conclude that the resolution had been adopted unanimously¹⁴.

3. Financing non-members - The Palestinian Autonomous Territories

One year after the adoption of Resolution 107/XXI, the technique of waiver was employed for a second time by the Governing Council in relation to the provision in the Agreement Establishing IFAD that confines its financing to developing Member States. As will be recalled, in 1993 the *Oslo Accords*, officially called the *Declaration of Principles on Interim Self-Government Arrangements or Declaration of Principles* (DOP) was intended to be a framework for the future relations between Israel and the anticipated Palestinian State, when all outstanding final status issues between the two states would be addressed and resolved in one agreement. It is said that in 1994 IFAD launched its first intervention in the Palestinian territories, soon after the signing of the Oslo accords in September 1993. The Gaza Strip and Jericho Relief and Development Programme¹⁵ was designed to improve incomes and living standards and help create an environment conducive to peace and security. This was followed in the late 1990s by a broad-based agricultural development intervention programme in collaboration with the Ministry of Agriculture of the Palestinian Authority, the seven-year Participatory Natural Resources Management Programme. As a result of the difficult political situation and border and internal closures, in 2002 IFAD initiated a second phase of the Rural Development Programme to address the immediate needs of the poorest rural communities and help mitigate the consequences of the *intifada*, especially the severe limitations on movement, while contributing to their longer-term development. IFAD has provided a total of US\$13.8 million in loans and grants for these three projects. Other donors have been generous in co-financing these projects: the Arab Authority for Agricultural Investment and Development (US\$0.8 million); the Arab Fund for Economic and Social Development (US\$1.0 million); Belgium (US\$3.6 million); CARE (US\$0.5 million); Italy (US\$0.8 million); and Japan (US\$0.4 million). IFAD's strategy in Gaza and the West Bank addresses the key agricultural development challenges facing the territories. Since the start of the *intifada* IFAD has shifted emphasis towards meeting the immediate needs of rural poor people and finding temporary measures to help people cope with the situation, while still pursuing the longer-term goals of reducing poverty and sustaining growth.

¹³ Report of the Twentieth Session of the Governing Council, Rome, 20-21 February 1997, p. 20

¹⁴ Report of the Twentieth Session of the Governing Council, Rome, 20-21 February 1997, p. 60

¹⁵ See, *IFAD in Gaza and the West Bank*, <http://www.ifad.org/english/operations/pn/pse/>

To make this intervention possible it was necessary for IFAD to overcome a few legal hurdles presented by its constituent instrument. A proposal for the establishment of an IFAD Fund for Gaza and the West Bank so as to permit the Fund to use its own and other resources to finance loans and grants in the Palestinian Autonomous Territories was presented to the Governing Council. This Fund would be necessitated because the Palestinian Autonomous Territories is not a Member State of IFAD and, thus, ineligible to receive loans for projects in line with IFAD's mandate.

Three provisions posed challenges. In the first place, the Agreement Establishing IFAD specifies in the first sentence of Article 2 that:

“The objective of the Fund shall be to mobilize additional resources to be made available on concessional terms for agricultural development in developing Member States.”

In other words, the territorial scope of IFAD's mandate is limited to the territories of its Member States; more specifically, it's developing Member States. This implies that, unless Palestine were to become a Member State and were qualified as a developing Member State, IFAD cannot operate in its territories. However, the status of Member State is pre-empted by Article 3, Section 1 of the Agreement Establishing IFAD, which states that:

“(a) Membership of the Fund shall be open to any State member of the United Nations or of any of its specialized agencies, or of the International Atomic Energy Agency.
(b) Membership shall also be open to any grouping of States whose members have delegated to it powers in fields falling within the competence of the Fund, and which is able to fulfil all the obligations of a Member of the Fund.”

Thus, aside of the question of Statehood, not being a Member of the either the United Nations nor of any specialized agency, or of the International Atomic Energy Agency, clearly Palestine was not eligible for IFAD membership, and by consequence was also not eligible for receiving loans and or grants from the Fund. One angle that could be taken was to authorize the financing as being extended to Israel as the occupying power. The argument favouring this approach could be derived from the responsibilities of the occupying power with regard to the respect of the human rights in the occupies territories, as was lately confirmed and articulated by the International Court of Justice¹⁶. However, at the time, it was not considered plausible to expect the occupying Member State to either borrow or guarantee a loan on behalf of the occupied territory. Moreover, the ability of Israel to obtain financing from IFAD has a history of its own. As stated before, only developing Member States are eligible for IFAD financing. The drafting history of the Agreement confirms the limitation of access to the developing Member States (and intergovernmental organizations in which such Members participate) and therefore the qualification of a Member as a developed or as a developing country is a matter of pivotal importance for the purpose of the Fund's financing and governance. Despite the decision to refrain from inserting criteria for determine whether a Member is a developing country, throughout the negotiations it has been generally understood that the developing States which are the only potential recipients of Fund

¹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004.

financing (aside some intergovernmental organizations in which they participate) are States in Categories II and III (current Lists B and C), and that states in Category I (current List A) will not be eligible for access to the Fund financing. That explains why, when at the third Meeting of Interested Countries Israel indicated that it desired to become a Member in category III (current List C) this triggered a proposal from Egypt to the effect that the Governing Council would be empowered to declare that the classification of an original member does not correspond to its degree of economic development. In the event, after protracted negotiations, Israel addressed a letter to the President of the Conference indicating that Israel would not seek assistance from the Fund. Based on this letter, footnote 1 of Part 1 of Schedule I to the Agreement specifically states that Israel “will not be seek or receive financing from the Fund”.

This avenue thus being unavailable, the only alternative that remained was Section 3 of Article 7 of the Agreement Establishing IFAD. However, whereas under this provision it would be possible to administer third party resources to finance projects and programmes in the occupied territories, it is not permissible to use IFAD’s own resources for that purpose. Therefore, the only way out was to amend the Agreement Establishing IFAD. Nevertheless, that was not how the solution was found, at least not strictly speaking. It was believed that the time that the best solution would be for the Governing Council to waive the application of Article 7, Section 1 (b), of the Agreement Establishing IFAD in the specific case of the Gaza Strip and the West Bank, through a decision adopted with the same majority required for the formal amendment of the Agreement. This was deemed preferable to the alternative of amending the relevant Article, as it was feared that such approach would be to open the doors of IFAD to loan applications from many non-Member States, whereas this approach is more limited or “once-off”. Accordingly, the Governing Council adopted Resolution 107/XXI, which states in its paragraph 7:

“7. Notwithstanding Article 7, Section 1 (b) of the Agreement Establishing IFAD, IFAD shall use the resources of the FGWB to provide financial assistance for projects and programmes in the form of loans and grants for Gaza and for such areas, sectors and activities in the West Bank which are or will be under the jurisdiction of the Palestinian Authority pursuant to the relevant Israeli-Palestinian agreements consistent with the purposes of IFAD.”

4. Comments on the technique of waiver in IFAD

When compared to other international organizations, the use of the technique of waiver in IFAD in order to overcome mandate limitations is somewhat remarkable. There is no precedent in other organizations whereby any organ of an international organization is authorized to waive the limitations imposed by the constituent instrument on the activities that the organization may engage in. As can be learned from Sir Joseph Gold’s most instructive study on “dispensing” and “suspending” powers of international organizations¹⁷, in the case of other organizations such powers have been dully granted by the respective constituent instruments, and have a different content than the one given to the technique of

¹⁷ Joseph Gold, “*Dispensing*” and “*Suspending*” *Powers of International Organizations*, 19 *Nederlands Tijdschrift voor Internationaal Recht*, 1972, pp. 169-200, here cited from Joseph Gold, *LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS* (Washington D.C., 1979), pp. 352-389.

waiver within IFAD in the two aforementioned instances¹⁸. In those other organizations the technique of dispensation or waiver means the power to waive one or more obligations of a member of the organization or to make derogations from certain obligations.

In his closing statement the Chairman of the 21st session of the Governing Council captured accurately the political atmosphere that transpired from the interventions of many delegations with regard to financing the agricultural development in Palestine:

“The long arms of hunger and poverty know no legal or political boundaries, yet development aid very often faces constraints that limit its outreach. During this Session we have overcome just such a constraint by establishing a Fund for Gaza and the West Bank, a territory that is not a Member State of IFAD. There is indeed satisfaction in overcoming bounds and in reaching out to PEOPLE not to boundaries.”¹⁹

One of the dangers of the technique of waiver expressed in the following remarks of the United States representative:

“First, regarding IFAD’s Gaza and West Bank proposal, discussed earlier today, my Government wishes to note that, as demonstrated by our own generous assistance package, the United States supports international efforts to assist the Palestinian people, not only to improve day-to-day lives, but also to build a constituency for peace. At this time, because of US legal restrictions, our contributions and assistance cannot be used for the proposed IFAD special fund. However, we will continue to look for ways to promote development of the Palestinian economy, including the agricultural sector.”²⁰

This highlights the fact that when organizations embark on activities which cannot be clearly identified as having been authorized by the constituent instrument, it may place membership contribution at risk.

V. Amendment

Amendment is of course the logical tool to be employed when an organizations wants to undertake an activity which is found to be pre-empted by the organization’s constituent instrument. In the case of IFAD, the amendment procedure is set forth in Article 12, of which the first paragraph is relevant here. It provides that “(i) Any proposal to amend this Agreement made by a Member or by the Executive Board shall be communicated to the President who shall notify all Members. The President shall refer proposals to amend this Agreement made by a Member to the Executive Board, which shall submit its recommendations thereon to the Governing Council. (ii) Amendments shall be adopted by the Governing Council by a four-fifths majority of the total number of votes. Amendments shall enter into force three months after their adoption unless otherwise specified by the Governing

¹⁸ See also Ibrahim F.I. Shihata, *THE WORLD BANK LEGAL PAPERS* (The Hague/Boston/London, 2000), *passim*.

¹⁹ Statement by the Chairman, His Excellency Shah A.M.S. Kibria, Closing the Twenty-First Session of the Governing Council, Report of the 21st session of the Governing Council, p. 151.

²⁰ Statement of the Representative of the USA to the 21st session of the Governing Council. Report of the 21st session of the Governing Council, p. 102.

Council”. However, for certain provisions a stricter procedure applies. That is the case for any amendment modifying: (A) the right to withdraw from the Fund; (B) the voting majority requirements provided for in this Agreement; (C) the limitation on liability of Member States; and, (D) the procedure for amending this Agreement. Such amendments shall not come into force until written acceptance of such amendment by all Members is received by the President.

It is to be noted that the two principal provisions that are relevant for the mandate of the Fund, to wit Articles 2 and 7, are subject to the more relaxed amendment procedure.

1. Debt sustainability financing

It might be said that when IFAD formally amends its constituent instrument in order to undertake an activity, this provides evidence of a struggle with a perceived mandate constraint that it was unable to overcome with the tools discussed hitherto. The report of the Consultation on the Seventh Replenishment of IFAD’s Resources (GC 29/L.4) adopted by the twenty-ninth session of the Governing Council of IFAD recommended that commencing in 2007, IFAD should adopt the IDA model of a debt sustainability framework (DSF) to govern the allocation of assistance to countries eligible for highly concessional assistance and with high to moderate debt-distress risk. The report of the Consultation on the Seventh Replenishment stipulated that IFAD management should submit to the Executive Board in September 2006 proposals for the operation of the DSF. In addition, the Consultation recommended that the Executive Board review, at the same time, the IFAD Policy for Grant Financing in the light of the adoption of the DSF, taking into account the impact of the Multilateral Debt Relief Initiative (MDRI) on the level of IFAD assistance projected to be provided on DSF terms. The Governing Council subsequently adopted Resolution 141/XXIX/Rev.1 amending Article 7, section 2 (a) and Article 7, section 2 (b) of the Agreement Establishing IFAD to provide an enabling framework for the implementation of a DSF assistance in IFAD. This included the amendment that the financing provided under the DSF assistance would not fall within the grant ceilings established by the Agreement.

The DSF is part of the architecture of multilateral financial institutions’ (MFIs) support for debt relief and management in the poorest countries. The DSF was introduced more or less contemporaneously in the context of the negotiations of the fourteenth replenishment of the International Development Association (IDA) and the tenth replenishment of the African Development Fund (ADF), subsequent to the implementation of the Debt Initiative for Heavily Indebted Poor Countries (HIPC) but prior to the implementation of the Multilateral Debt Relief Initiative (MDRI). The DSF is designed to ensure that the poorest countries’ development efforts are not compromised by the re-emergence of unsustainable debt levels – by providing new development assistance to them on terms consistent with achieving and maintaining sustainable levels of debt and by supporting debt management at the country level. The DSF is intended by the international community to provide comprehensive and common framework assistance to poor countries through which individual international financial institutions will provide assistance on grant terms taking into account the results of country debt-distress risk analysis. Thus, whereas the HIPC and MDRI initiatives deal with the stock of debt, DSF helps to manage future debt accumulation. It provides poor countries with financing needs a middle way between excessive borrowing and no external financing at all.

As will be recalled, according to Section 2(a) of article 7 of the Agreement Establishing IFAD, the Fund’s financing can take the form of either a loan or a grant. Thus technically,

providing assistance on terms of to poor countries in order to forestall the accumulation of unsustainable future debt was already possible under the foregoing provision. The only limitation was that the proportion of grants cannot exceed one-eighth of the resources committed by IFAD in any financial year. By listing the debt sustainability mechanism as a third form of financing next to loans and grants, the amended text of Section 2(a) of Article 7 of the Agreement Establishing IFAD suggests that the DSF assistance is not a grant within the meaning of that provision, but something different. Moreover, a second sentence has been added to that provision, in which it is made clear that financing provided under the DSF assistance would not fall within the aforementioned grant ceilings established by the Agreement. Admittedly, this could also have been achieved by raising the grant ceiling and specifying that part of the grant portfolio shall serve to provide DSF assistance.

2. Direct supervision

As previously discussed, by virtue of the original version of Article 7, Section 2 (g) of the Agreement Establishing IFAD, IFAD was legally barred from directly supervising the projects and programmes it financed, and was required to enlist the services of third parties for that purpose. The waiver discussed above to permit the organization to experiment obviously had a limited reach. The Direct Supervision Pilot Programme was evaluated in 2005, and the evaluation recommended that IFAD should continue providing direct supervision and implementation support to ongoing projects and programmes in countries included in the Direct Supervision Pilot Programme. Since the authorization of the Governing Council for such an initiative was about to expire in June 2006, it became necessary to adopt measures beyond the Governing Council Resolution 102/XX. The Executive Board, at its Eighty-Fifth Session in September 2005, endorsed the recommendations contained in the Direct Supervision Pilot Programme evaluation's "agreement at completion point", including extension of the implementation period for the Direct Supervision Pilot Programme, a provision for the interim phase and amendment of Article 7, Section 2 (g), of the Agreement Establishing IFAD. Accordingly, at the next session of the Governing Council it was decided that the 15 directly-supervised and administered projects financed by IFAD in accordance with Resolution 102/XX should continue to be directly supervised and administered until such time as the IFAD loans for the projects shall be closed, notwithstanding the provisions of Article 7, Section 2 (g), of the Agreement Establishing IFAD. It was further decided that Article 7, Section 2 (g), of the Agreement Establishing IFAD should be amended. Under the amended Article 7, Section 2 (g), henceforth, the default position is supervision by third parties unless the Executive Board decides that a project or programme shall be directly supervised by the Fund itself.

VI. Prospective Mandate Issues

The Report of the Consultation on the Eighth Replenishment of IFAD's Resources (GC 32/L.5 + Add.1), which was adopted at the 32nd Session (18-19 February 2009) the Governing Council, contains several issues that are likely require reflection on the organization's mandate in the coming three years. Two of these issues merit some comment on the type of legal questions that might be involved.

1. Graduation policy and IFAD's role in middle-income countries (MICs)

According to the Consultation Report, it was recognized that the needs of MICs are varied and are changing, and that to remain effective IFAD needs to better fulfil its mandate by improving the service that it offers them, ensuring that its engagement with them is relevant,

and enhancing the partnerships that these are built on. At the International Bank for Reconstruction and Development (IBRD), once a MIC reaches a certain level of GNI per capita (currently US\$6,465) a dialogue is opened with the country concerned on the continuing need for that country to borrow. The Report announced that IFAD will develop a graduation policy consistent with the voluntary practice of other International Financial Institutions. It will furnish a framework with objective and transparent criteria that provides for consideration of the interests and wishes of borrowing countries that reach a graduation point. A policy paper on the Fund's engagement in MICs will be provided to the Executive Board by September 2010²¹.

At this stage, it suffices to point out the legal considerations that are likely to be relevant in the process of the development of a graduation policy in IFAD. In this regard it would be useful to briefly refer the legal background of the graduation policy in other international financial institutions, particularly the World Bank Group and the regional development banks, as IFAD differs fundamentally from these institutions in this regard. Invariably, the constituent instruments of particularly the World Bank Group and the regional development banks contain a clause stating the operating principles, which include the condition that, when deciding on loans, the institution in question must be satisfied that in the prevailing market conditions the borrower should be unable to otherwise to obtain the loan under the conditions which in the opinion of the institution are reasonable for the borrower. It is due to the said clause that the World Bank Group (and the regional development banks) were required to adopt a graduation policy²².

Graduation from International Development Association (IDA) is based on per capita gross national product and creditworthiness considerations. It is designed to aid countries in making the transition to International Bank for Reconstruction and Development (Bank) lending and eventually to creditworthiness in the international capital markets. The policy is effectively compelled by the IDA Articles of Agreement, which limit it from providing assistance if financing (i) is available from private sources on terms are reasonable for the recipient, or (ii) could be provided by a loan of the type made by the Bank²³. By virtue of these dual criteria, it may occur that countries with per capita incomes below the operational cut-off do not receive IDA credits if they are creditworthy and able to obtain substantial loans on non-concesional terms. Conversely, it may also occur that a country that is above the operational cut-off is not able to graduate if for reasons beyond their control (e.g. vulnerability for natural disasters) they are not creditworthy.

Graduation from the Bank is the outcome of an extensive review, which examines a country's overall economic situation and its capacity to sustain a long-term development programme with particular reference to two important factors which influence the pace of graduation: (i) access to external capital markets on reasonable terms and (ii) the extent of progress in establishing key institutions for economic and social development. Per capita income is mentioned in this context only as a mechanical starting point for a careful review. According to a statement of the Bank's General Counsel to its Board on 21 February 1984, such comprehensive review serves the purpose of Article III, Section 4 (ii) of the Bank's articles, which states that the Bank may make loans if it is satisfied that in the prevailing market

²¹ See, Report of the Consultation on the Eighth Replenishment of IFAD's Resources (GC 32/L.5 + Add.1), paras 47-49.

²² See e.g. *The IBRD Graduation Policy*, in Shihata, *THE WORLD BANK LEGAL PAPERS*, *op. cit.*, pp. 493-507

²³ IDA Article V, Section 1 (c)

conditions the borrower would be unable otherwise to obtain the loan under conditions which in the opinion of the Bank are reasonable for the borrower²⁴.

The Agreement Establishing IFAD does not contain an equivalent clause, rendering the motivation and essential features of the graduation policy of the World Bank Group and the regional development banks of limited relevance when considering the issue of graduation/progression in the Fund. The difference between the Fund and the World Bank Group and the regional development banks is of utmost importance. Under the standard applied by the charters of the World Bank Group and the regional development banks, it is theoretically possible that a country might have access to resources from the capital market, but if there is no appetite in the market for investment in agricultural development it might still not be able to make the investments necessary to enhance food security and nutritional levels.

As mentioned previously in the present paper, the Agreement Establishing IFAD contains an priority system for the allocation of the resources of the Fund, which is further defined in the Lending Policies and Criteria, that performs a function comparable to the graduation policy in the in other international financial institutions. According to this system a Member State would not be eligible for Fund financing if it ceases to be a developing State. Members on Lists B and C annexed to the Agreement are presumed to be developing States for the purposes of Fund financing, but whether they are actually eligible for Fund financing depends on the prevailing situation with regard to food production and nutrition; In allocating financing among the developing Member States the Executive Board must give priority to the need to increase food production and the nutritional level of the poorest population in the poorest food deficit countries and to the potential for increasing food production and the nutritional level of the poorest population in the other developing countries. Within the framework of the priorities stated above, eligibility for Fund financing shall be on the basis of objective economic criteria with special emphasis on the needs of the low income countries and their potential for increasing food production, as well as due regard to a fair geographical distribution in the use of resources. Under the Agreement Establishing IFAD, as long as a Member qualifies as a developing State and the prevailing situation with regard to food production and nutrition demands investment in agricultural development it remains eligible for Fund financing. However, the economic and financial situation of eligible Member States shall be taken into account in order to determine the degree of concessionality of Fund financing. Therefore, the margins for an Executive Board graduation/progression policy within the Fund are set by the degrees of concessionality to be accorded to eligible developing Member States based on the economic indicators as determined by the Governing Council in the Lending Policies and Criteria.

The specificity of IFAD's mandate and the attendant framework just described suggest that an IFAD graduation policy that goes beyond the current progression through the three levels of concessionality, is likely to be guided by criteria that are not necessarily similar to those that have guided the World Bank and the regional development banks.

²⁴ *Intervention of the General Counsel during Board Discussion of the Graduation Issue*, 21 February 1984, reproduced in Shihata, *THE WORLD BANK LEGAL PAPERS*, *op. cit.*, pp. 493-494

2. Responding to the emerging role of corporate private sector

The Report of the Consultation points out that a strong and diverse private sector, providing agricultural inputs, production and financial services and markets, which poor rural producers are able to access and use, is critical for increasing their agricultural production and incomes. Accordingly, IFAD will explore with potential partners the need for, and the value added of, a new and additional facility to promote private-sector investment that can stimulate pro-poor economic growth in rural areas. If such a need is identified, a proposal for IFAD's role and instruments, fully consistent with IFAD's mandate, will be prepared and presented for approval to IFAD's Executive Board by December 2010.

The background of this is an IFAD Staff Paper titled "IFAD's response to the emerging role of the private sector"²⁵ that was submitted to the Consultation on the Eighth Replenishment of IFAD's Resources at its Fourth Session (21-22 October 2008). The paper notes that agricultural production and processing, and rural economic activities in general, have traditionally been, and will continue to be, private-sector endeavours. While smallholder farmers are part of the private sector, they also interact on a daily basis with larger private-sector operators and the corporate private sector (i.e. commercial companies) for the delivery of agricultural services, inputs, finance and markets. As a result, increasing agricultural production, sustainably raising the incomes of poor rural people and promoting their empowerment is heavily – and increasingly – dependent on the vibrancy, performance and investments made by the corporate private sector and larger private-sector actors. According to the paper, at the same time, the expectation that agricultural commodity prices will remain high for at least the next 10 to 15 years, together with related concerns over food security, have spurred the interest of sovereign wealth funds and private investment vehicles alike in investing in agriculture. These trends could usher a new era and opportunities to ensure that smallholder farmers and rural communities are part of the solution to the current food crisis, by jointly promoting partnerships between small farmers and private-sector commercial interests. It is considered that IFAD needs to respond with flexibility and agility to the growing role of the private sector in poor rural areas and to the opportunities that are emerging to harness new sources of funding for the benefit of poor rural people. While there are risks associated with new approaches, and these will need to be very carefully managed, direct support to the private sector is also expected to bring substantial benefits to IFAD's target group of poor rural producers in terms of broadened economic opportunities. The Agreement Establishing IFAD confines IFAD's financing to developing Member States or intergovernmental organizations. While much can and has been done to work with the private sector in the context of the Fund's current business model and within the framework of IFAD's existing Private-Sector Development and Partnership Strategy, much more could be done if IFAD were able to engage the private sector on the basis of a broader and more flexible set of business models and financial instruments.

Depending on the outcome of the need assessment and modalities for engaging with corporate private sector that will be presented to the Executive Board at the end of 2010, it may or may not be necessary to amend the Agreement Establishing IFAD. Clearly, there will be no need for any amendment of Article 2 of the Agreement Establishing IFAD in order to provide equity to corporate private sector in developing Member States, because that provision already states that the Fund shall make concessional financing for agricultural development in the territory of such States. For instance, the use of IFAD grants extended to Member States to set up equity capital funds or guaranty funds for investing developing corporate private

²⁵ <http://www.ifad.org/gbdocs/repl/8/iv/e/REPL-VIII-4-R-6.pdf>

sector in rural areas of eligible Member States, would not require any change at the level of the Agreement Establishing IFAD. Similarly, the existing on-lending possibility under Section 2(i) of Article 7 of the Agreement Establishing IFAD could be used by Member States to develop rural corporate securities. In case the preference is to use third party funds, rather than IFAD's own resources for rural equity investment and corporate securities, to a large extent that could be arranged through trust funds or administrated accounts set up under Article 7, Section 3 of the Agreement. The need to recur to an amendment of current article 7, Section 2(a) or to supplementing the Agreement with a protocol on corporate private sector is more likely if the wish is to use the organization's own resources for direct engagement with rural corporate private sector.