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# COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

## Hundred and Seventeenth Session

Rome, 24-26 October 2022

**Update on the status of recommendations presented in the JIU Report, *Review of Whistleblower Policies and Practices in United Nations System Organizations* (JIU/REP/2018/4) and JIU Report, *Review of the State of the Investigation Function: Progress made in the United Nations System Organizations in Strengthening the Investigation Function* (JIU/REP/2020/1) - (CL170/12)**

## I. Introduction

1. This item is presented to the Committee on Constitutional and Legal Matters (CCLM) further to the Finance Committee's request, endorsed by the Council at its 170th Session,<sup>1</sup> for updates to the CCLM and the Finance Committee on the development of procedures related to the handling of allegations against the Head of the Organization, as recommended by the Joint Inspection Unit of the United Nations (JIU). It is presented in accordance with the mandate of the CCLM, as set out in Rule XXXIV, paragraph 7(m) of the General Rules of the Organization, whereby the Committee considers specific items referred to it that may arise out of "*policy aspects of relations with international governmental or non-governmental organizations, national institutions or private persons*".

## II. Background

2. In recommendation 7 of its report on the Review of the State of the Investigation Function, the JIU recommended that: "[t]he legislative bodies of United Nations system organizations that have not yet done so should develop and adopt appropriate formal procedures for the investigation of complaints of misconduct by executive heads and adopt appropriate policies by the end of 2021".<sup>2</sup>

3. At its 188th Session in November 2021, the Finance Committee noted that the recommendations "*were still in progress, encouraged Management to propose appropriate*

<sup>1</sup> CL 170/REP, paragraph 30.

<sup>2</sup> JIU/REP/2020/1. This echoed Recommendation 1 in the earlier JIU report on the "Review of whistle-blower policies and practices in United Nations system organizations" (JIU/REP/2018/4) which recommended that "[l]egislative bodies should adopt measures by 2020 to ensure that all policies related to misconduct/wrongdoing and retaliation specify appropriate channels and modalities, such as independent oversight committees, for reporting and investigating allegations against the executive head of the organization, as well as against any other functions that may entail a potential conflict of interest in the handling of such issues".

Documents can be consulted at [www.fao.org](http://www.fao.org)

*procedures for implementing these recommendations, coordinated with broader UN System efforts, and requested Management present these draft procedures, together with relevant views of the Committee on Constitutional and Legal Matters (CCLM) as appropriate, to the Finance Committee for consideration and further action at its 189th Session”.*<sup>3</sup>

4. At its 191st Session, the Finance Committee received a further update on this matter. The Committee:

*“a) welcomed the confirmation provided by Management that it was committed to addressing these recommendations and that procedures would be developed as soon as possible for consideration by the Committee on Constitutional and Legal Matters and the Finance Committee, coordinated and harmonized with the broader UN System, and taking into consideration the efforts of other Specialized Agencies; and*

*b) looked forward to receiving further updates on this matter at the next regular session of the Finance Committee and encouraged Management to take steps towards implementation of the related recommendations of the JIU at the earliest opportunity.”*<sup>4</sup>

### **III. The FAO legal framework relevant to this matter**

#### *A. The Governing Bodies and the Director-General*

5. The Director-General is appointed by the Conference in accordance with paragraph 1 of Article VIII of the FAO Constitution. As provided in paragraph 4 of the same Article, and Rule XXXVIII, paragraph 1 of the General Rules of the Organization, the Director-General has full power and authority to direct the work of the Organization “*subject to the general supervision of the Conference and the Council*”.<sup>5</sup>

6. As regards decision-making between the sessions of the Conference, unlike most other UN system organizations, the President and bureau of the FAO Conference do not normally discharge functions intersessionally. Rather, as provided in Rule XXIV, subject to the provisions of paragraph 3 of Article V of the Constitution, the Council “*shall, between sessions of the Conference, act on behalf of the Conference as its executive organ and make decisions on matters that need not be submitted to the Conference*”.

7. The Council is chaired by an Independent Chairperson of the Council (ICC), i.e. an *ad personam* appointment by the Conference, a role that is distinct from the standard UN system practice of a chair appointed by the body concerned from among the representatives of its members.<sup>6</sup>

8. While the Council is involved in the arrangements for an election for the office of Director-General, it does not participate in the selection or nomination of the successful candidate. Indeed, as set out in Rule XXXVII, if the office of Director-General becomes vacant prior to the end of the term of office, a Deputy Director-General acts as Director-General pending new elections by the Conference.

9. In accordance with Article V, paragraph 6, of the Constitution, the Council is assisted by the Programme Committee, the Finance Committee and the Committee on Constitutional Matters, within the scope of their mandates.

<sup>3</sup> CL 168/9, paragraph 18(d). Due to the convening of some unscheduled sessions, the scheduled autumn session was the 191st Session of the Committee, not the 189th Session.

<sup>4</sup> CL 170/12, paragraph 30.

<sup>5</sup> In its Resolution 4/2019 on Appointment of the Director-General, adopted on 28 June 2019, the Conference resolved “*that the terms and conditions of appointment of the Director-General shall be governed by the relevant provisions of the Staff Regulations subject, however, to the provisions of the contract to be signed by the Chairperson of the Conference on behalf of the Organization and by the Director-General elect, in accordance with Rule XXXVII, paragraph 4*”.

<sup>6</sup> The mandate of the ICC is set out in paragraph 1 of Resolution 9/2009, Volume II, Section E of the Basic Texts (2017 edition), page 139.

### B. The Oversight Advisory Committee

10. The Oversight Advisory Committee (OAC) “*serves as an independent expert advisory panel to assist the Director-General and the Finance Committee on (...) investigation and ethics functions of the Organization, and such other matters as may be referred to it by the Director-General or the Finance Committee in respect of which the Committee is considered to have relevant expertise*”.<sup>7</sup> It also “*provides independent advice and information to the Finance Committee in these areas, through its annual reports and as appropriate, through updates during the intervening period*”. Its members “*are selected on the basis of their qualifications and relevant experience at senior level in the areas of oversight including audit, investigation and ethics, financial management, governance, risk and controls*”.<sup>8</sup>

11. While the OAC has a mandate to review and advise on “*OIG investigations into allegations of misconduct involving FAO personnel*”, it does not currently have a mandate to address individual complaints, except in the event of a complaint against the Inspector General. According to the FAO Investigation Guidelines, “[a]llegations of misconduct against the Inspector General shall be reported to the Director-General, who will seek the advice of the FAO Oversight Advisory Committee on how to proceed.”<sup>9</sup>

### C. The Office of the Inspector General

12. Under paragraph 38 of the Charter of the Office of the Inspector General (“OIG Charter”), “[t]he Inspector General shall have free and unrestricted access to the Oversight Advisory Committee, the Finance Committee, the External Auditor and the Independent Chairperson of the Council”. The OIG Charter also establishes that “*OIG shall assess and investigate allegations of misconduct involving FAO personnel, such as: fraud and corruption; abuse of privileges and immunities; sexual exploitation and abuse; sexual harassment; workplace harassment and abuse of authority; retaliation against whistleblowers; or any other conduct not in conformity with the Standards of Conduct for the International Civil Service.*”

## IV. FAO procedures for the handling of allegations of misconduct

13. Under FAO’s Investigation Guidelines, all complaints must be addressed to OIG, either directly or through direct or higher-level supervisors, who are under an obligation to promptly forward them to OIG.

14. There are three phases in the subsequent investigation phase. These are:

- a) Case intake and assignment of priority, in which all complaints (other than those that constitute spam, scams or generalized grievances) are registered in OIG’s case management system and assigned a priority.
- b) Preliminary Review, which is “*the process of collecting, preserving, securing and evaluating basic evidence to determine whether there is a legitimate basis to warrant an investigation*”. A preliminary review may result in the matter being closed (e.g. as unsubstantiated, unfounded, referred to another office, or withdrawn), or an investigation being opened.
- c) Investigation, which has the purpose of gathering “*all reasonably available evidence, both inculpatory and exculpatory, to establish the material facts; conclude on the allegation(s) at issue; and formulate a recommendation, which in turn allows the Organization to decide on any appropriate action*”. According to the OIG Charter, an investigation is “a

<sup>7</sup> Updated Terms of Reference, FC 191/8, Annex 2, endorsed by the Council at its 170th Session, CL 170/REP, paragraph 30.

<sup>8</sup> Ibid.

<sup>9</sup> Administrative Circular 2021/06, paragraph 7.6. It is noted that these Guidelines are issued pursuant to paragraph 34 of the Charter of the Office of the Inspector General (OIG), approved by the Finance Committee on 17 June 2020, under which the Inspector General may issue additional guidelines as necessary to complement the Charter and to accomplish OIG’s mission.

*formal fact-finding inquiry to examine allegations of, or information concerning, misconduct or other wrongdoing to determine whether they have occurred and, if so, the persons or entities responsible”.*<sup>10</sup> The OIG Charter also establishes that “*OIG has sole responsibility for the conduct of all investigations in FAO*”.<sup>11</sup>

## **V. Reporting and investigating mechanisms in other Specialized Agencies**

15. The UN Secretary-General transmitted the comments of the UN System Chief Executives Board for Coordination (CEB) on JIU/REP/2020/1 to the 75th Session of the UN General Assembly, including the following comments on Recommendation 7:

*“21. Organizations note that this recommendation is addressed to their legislative bodies, underscoring the tight deadline in cases in which the proposed procedures are not yet implemented.*

*22. A consultative process for a harmonized implementation approach would be sought in carrying out the proposed recommendation.”*<sup>12</sup>

16. At the time of preparation of this document, there had been no developments in the CEB, nor in the United Nations. A number of Specialized Agencies commenced working on mechanisms to address the JIU recommendation during 2021 and 2022, and several such mechanisms are still in development, as outlined in the annex. In summary:

- a) With respect to the reporting of allegations against an organization’s executive head and the determination of whether to launch an investigation:
  - i. In some organizations, allegations are reported to the internal investigation function (UNIDO, IMO, WHO, WIPO),<sup>13</sup> or to the Ethics Office (UNWTO),<sup>14</sup> or to an external investigating entity (ICAO).<sup>15</sup>
  - ii. Some processes specify a range of options for reporting or referring allegations, including to the chairs of independent oversight committees, similar to FAO’s OAC, or to the chairs of governing bodies (ILO).<sup>16</sup> Others do not specifically identify where the initial report of allegations should be addressed, but identify that action should be taken by the chairs of independent oversight committees upon receipt of an allegation (ITU).
- b) With respect to the preliminary review of the allegations and the conduct of an investigation:
  - i. In a few organizations, an internal entity will conduct the preliminary review and determine whether an allegation warrants a full investigation or the case should be closed (UNIDO, UNWTO).
  - ii. In other organizations, the independent oversight advisory committee will advise on whether a preliminary review should be conducted by an internal or external body and, following that review, whether a full investigation should be conducted (WIPO, WHO).

<sup>10</sup> Paragraph 12.

<sup>11</sup> Paragraph 17.

<sup>12</sup> [A/75/719/Add.1](#) dated 21 January 2021.

<sup>13</sup> UNIDO - United Nations Industrial Development Organization; IMO - International Maritime Organization; WHO - World Health Organization; WIPO - World Intellectual Property Organization).

<sup>14</sup> UNWTO - World Tourism Organization.

<sup>15</sup> ICAO - International Civil Aviation Organization.

<sup>16</sup> ILO - International Labour Organization.

- iii. One existing mechanism provides that an external investigative entity will conduct the preliminary review and determine whether further investigation is warranted (WMO).
- iv. In some organizations, the decision on whether to close a case after a preliminary review or to conduct a full investigation is taken by the chairs of the governing bodies that are involved in the nomination or appointment of the executive head (WIPO, IMO). Where this is not the case, organizations often provide that the chair of the governing body that nominates or appoints the executive head is/will be notified of a determination that a complaint warrants full investigation (WMO).
- v. Some organizations request UN OIOS<sup>17</sup> to conduct investigations, including those organizations which do not have an investigation function (ICAO, UNWTO). Another organization provides that full investigations are to be conducted by a suitable external investigative entity, without limiting this to any specific external entity (WIPO).
- vi. Others have preserved the option of an investigation to be conducted by its own investigating entity or by an external entity (UNIDO), in some instances calling for guidance from its independent oversight advisory committee in this decision-making (IMO, WHO).
- vii. Yet others have not identified the investigating entity (ILO).

17. There are differences between organizations in the processes established or which are being established. This most probably results from their specific constitutional and legal frameworks.

18. In addition, a range of legal instruments have been, or are being, employed to promulgate these measures. For example, the processes have been reflected in, variously, the charter of the internal investigation function, internal investigation rules or policies, staff regulations, governing body decisions, and terms and conditions to be included in the contracts of employment with the chief executive. In most instances, decisions of the primary governing bodies have been or will be required to effect these processes.

## **VI. Next steps**

19. Exchanges will continue with other Specialized Agencies. Concurrently, specific textual proposals will be developed reflecting FAO's governance structure and existing legal framework, as well as the requirements of due process and relevant jurisprudence of the ILO Administrative Tribunal (ILOAT). The appropriate legal instruments will also be identified (e.g. conference resolution or decision), as well as any amendments required to existing instruments (e.g. the terms of reference of the OAC, the OIG Charter, the mandate of the ICC).

## **VII. Suggested action by the Committee**

20. The Committee is invited to provide its views or suggestions on possible mechanisms for the implementation of Recommendation 7, taking into account the legal framework of the Organization.

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<sup>17</sup> OIOS - Office of Internal Oversight Services.

## Annex

## Summary of status of implementation of Recommendation 7 of JIU/REP/2020/01 by Specialized Agencies

**ICAO:** ICAO does not have an internal investigation function and, in January 2022, it signed a Memorandum of Understanding with UN OIOS, establishing a mechanism for the reporting and handling of all cases of misconduct, including allegations of misconduct against the President of Council and the Secretary General of ICAO, by UN OIOS.<sup>18</sup>

**ILO:** The Standard Operating Procedure for Investigations provide that “[a]llegations of fraud/misconduct concerning the Director-General shall be reported to the Chair of the Governing Body either directly or via the Treasurer and Financial Comptroller, Chief Internal Auditor, or the Chair of the IOAC [Independent Oversight Advisory Committee].”<sup>19</sup> The investigating entity is not identified.

**IMO:** The IMO Policy and Procedures on the Prevention and Detection of Fraud and Serious Misconduct further specify that “[w]here cases of fraud or other alleged breach of staff regulation 10.3 involving the executive head of the Organization has been established and such alleged breach could result in disciplinary measures, IOS may bring the matter directly to the Council, for its consideration, as appropriate, and to seek outside assistance for the conduct of the investigation, including but not limited to assistance from the Joint Inspection Unit of the UN or other oversight/investigation units of the Secretariats of other UN system organizations.”<sup>20</sup> The IMO Staff Regulations establish that “The Internal Oversight and Ethics Office, or the Joint Inspection Unit, as appropriate, will conduct investigations into alleged cases of wrongdoings or misconduct allegedly committed by the Secretary-General.”<sup>21</sup>

**ITU:** The ITU Investigation Guidelines establish that “[w]here allegations are raised involving potential misconduct by Secretary-General, the matter will be referred by the Chairman of the Independent Management Advisory Committee (IMAC) to the Chair of Council for decision on how to proceed.”<sup>22</sup> The investigating entity is not identified. The internal investigation unit was established in 2021 and its charter is still being developed.

**UNESCO:** In October 2021, the Executive Board requested the Internal Oversight Service to propose to it for adoption at its 215th session, scheduled for October 2022, appropriate formal procedures for investigation in the event of complaints of misconduct by a Director-General.<sup>23</sup>

**UNIDO:** The Investigation Policy establishes that “[a]llegations of misconduct against the Director General shall be referred to the Director of the Office [of Evaluation and Internal Oversight] for preliminary evaluation. The Director of the Office shall determine whether the allegations fall within the scope of this Policy and warrant a full investigation, or close the case. In case a full investigation is warranted, the Director shall further determine whether the Office is capable of carrying out a full investigation consistent with the principles governing the investigation function (...) or whether the investigation shall be conducted by a separate entity competent to carry out an independent investigation, such as the investigation office of another United Nations agency or the Joint Inspection

<sup>18</sup> See [Annual Report of Investigative Entity on Cases of Misconduct Handled on behalf of ICAO – 2021](#), ICAO Council, 225th Session, C-WP/15331, 18/2/22.

<sup>19</sup> ILO [Standard Operating Procedure \(SOP\) for Investigations](#), July 2018, Section 5.8.

<sup>20</sup> IMO [Staff Regulation and Rules](#), February 2022, Staff Rules, Appendix F: Policy and Procedures on the Prevention and Detection of Fraud and Serious Misconduct, paragraph 5.3.

<sup>21</sup> IMO [Staff Regulation and Rules](#), February 2022, Staff Regulation 10.4.

<sup>22</sup> ITU [Investigation Guidelines](#), Service Order No. 19/10, promulgated by the Secretary-General, paragraph 7.

<sup>23</sup> UNESCO, [Decisions adopted by the Executive Board at its 212th session](#), November 2021.

*Unit. The confidential final investigation report, whether it emanates from the Office or a separate entity, shall be issued to the President or the Acting President of the Industrial Development Board and any findings of misconduct referred by him or her to the members of the Board in order to enable the Board to act.”<sup>24</sup>*

**UNWTO:** The Ethics Office is mandated to undertake the intake and initial consideration of allegations against the Secretary-General, but there is no investigation procedure.<sup>25</sup> UNWTO does not have an internal investigation function and is currently exploring possible agreements with an external body.

**WHO:** The revised terms of reference of the Independent Expert Oversight Advisory Committee (IEOAC) of the WHO Executive Board reflect the specific responsibilities of the Committee, which includes providing advice to the Executive Board through the Programme, Budget and Administration Committee, on “[a]llegations of inappropriate activity: the process for handling and investigating significant allegations, including allegations against the Director-General”.<sup>26</sup> As reported to the Executive Board in January 2022, the “Committee began discussing with WHO senior management possible modalities and the roles that the IEOAC, PBAC and the Executive Board would have in this regard. Given the sensitivities involved and the fact that any such investigations would likely involve the WHO governing bodies, the Committee has decided to engage in formal and informal Member State consultations before it moves forward with a concrete proposal. Those consultations and the development of a proposal will take place on time for the 152nd session of the Executive Board in January 2023, through the thirty-seventh PBAC.”<sup>27</sup> The WHO Director-General is a WHO staff member and, as such, the WHO investigation policy (currently under review) also applies to him. Allegations of misconduct against the Director-General are reported to the Office of Internal Oversight Services (WHO IOS), which has functional independence. If deemed warranted the Director, IOS will bring the allegations to the attention of the Chair of the WHO Executive Board and/or the IEOAC Chair.

**WIPO:** Under WIPO’s Internal Oversight Charter, “[a]llegations of misconduct against the Director General shall be reported to the Director, IOD, who shall immediately inform the Chairs of the General Assembly and of the Coordination Committee and seek the advice of the IAOC [the Independent Advisory Oversight Committee (IAOC)] on how to proceed. The IAOC shall advise the Director, IOD, on whether to conduct a preliminary evaluation or arrange for a preliminary evaluation by an independent external investigative entity. Based on the results of the preliminary evaluation, the IAOC shall provide a recommendation to the Chairs of the General Assembly and of the Coordination Committee on whether to request the Director, IOD, to close the case or to refer the matter for investigation to an independent external investigative entity. In case referral is recommended, such recommendation shall include the proposed Terms of Reference of the investigation and a proposal for a suitable investigative entity. In the event the Chairs cannot reach an agreement or propose to deviate from the IAOC recommendation, the Vice-Chairs of the General Assembly and of the Coordination Committee shall be involved in the decision.”<sup>28</sup>

**WMO:** At its 75th Session in June 2022, WMO’s Executive Council endorsed a proposed Annex on “Unsatisfactory conduct, Investigations and the Disciplinary Process” to be appended to the contract of the Secretary-General.<sup>29</sup> It is understood that the proposals will be submitted to the 19<sup>th</sup> World

<sup>24</sup> UNIDO, Director General’s Bulletin 2021/13, [Investigation Policy](#), paragraph 41(b).

<sup>25</sup> UNWTO [Resolutions adopted by the General Assembly at its twenty-fourth session](#), 30 November - 3 December 2021, Progress on JIU recommendations, and document [A/24/16 rev.1](#).

<sup>26</sup> WHO [Independent Expert Oversight Advisory Committee: terms of reference](#), agreed to by the Executive Board through its decision EB 150(16), 150th session, 24-29 January 2022.

<sup>27</sup> WHO [Report of the 37th Meeting of the Independent Expert Oversight Advisory Committee](#), 6-8 April 2022.

<sup>28</sup> WIPO [Financial Regulations and Rules](#), Annex I, WIPO Internal Oversight Charter, paragraph 24.

<sup>29</sup> WMO Executive Council, Seventy-Fifth Session, 20 to 24 June 2022, [Misconduct Rules to Address JIU/REP/2020/1 Recommendation 7](#).

Meteorological Congress for approval in June 2023. The proposal foresees the establishment of an “*Executive Council Disciplinary Committee*” comprising six members of the Executive Council, designated by the Executive Council, to advise the President on matters concerning disciplinary proceedings against the Secretary-General into unsatisfactory conduct. The process itself envisages the following: 1) an external investigative body receiving complaints, undertaking preliminary reviews and, if required, investigations and the issuance of associated reports; 2) the authority of the President, in consultation with Executive Council Disciplinary Committee, to issue interim measures to ensure the conduct of the investigation; 3) the authority of the President, in consultation with the Executive Council Disciplinary Committee, to determine disciplinary action following a review of the investigation report and any comments of the Secretary-General; and 4) the right of the Secretary-General to appeal the decision of the President through the UN’s internal justice system, should a disciplinary sanction or administrative measure be imposed.