



# COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

## Hundred and Seventeenth Session

Rome, 24-26 October 2022

### Review of the jurisdictional setup of the United Nations common system - Update

#### I. Introduction

1. The review of the jurisdictional setup of the United Nations common system is an on-going process which has been brought to the attention of the Committee on Constitutional and Legal Matters (hereinafter “CCLM” or “the Committee”) on three occasions<sup>1</sup> thus far. In its report for the 113th Session, held on 25-27 October 2021, the CCLM “(...) *looked forward to being updated on further developments in this regard, and confirmed its readiness to consider any substantive proposals that may arise following completion of the review*”.<sup>2</sup>

2. Since then, a set of detailed proposals has been developed by a working group of legal advisors on behalf of the Secretary-General of the United Nations (hereinafter “the Secretary-General”), in response to a request by the United Nations General Assembly (hereinafter “UNGA”). These proposals aim at improving the adjudication of cases involving the International Civil Service Commission (hereinafter “ICSC”) and resolving instances of divergence in the jurisprudence of the Administrative Tribunal of the International Labour Organization (hereinafter “ILOAT”) and the United Nations Appeals Tribunal (hereinafter “UNAT”). They will be submitted for consideration by the UNGA at its 77th Session, opening in September 2022.

3. In line with the wish expressed by the Committee at its 113th Session, this item is presented as an information item under Rule XXXIV, paragraph 7(m) of the General Rules of the Organization, whereby the Committee shall consider specific items referred to it which may arise out of: “*policy aspects of relations with international governmental or non-governmental organizations, national institutions or private persons*”.

<sup>1</sup> See reports of the 111th, 112th and 113th Sessions of the Committee on Constitutional and Legal Matters, (CL 165/12, CL166/11 and CL 168/10).

<sup>2</sup> CL 168/10, paragraph 29.

## II. Background

4. As recalled in previous documents on this subject submitted to the CCLM, the review of the jurisdictional setup of the UN common system was initiated following a request made by the UNGA in the following terms in its resolution 74/255 B of 27 December 2019:<sup>3</sup>

*“8. Notes with concern that the organizations of the United Nations common system face the challenge of having two independent administrative tribunals with concurrent jurisdiction among the organizations of the common system, as highlighted in the report of the Commission, and requests the Secretary-General, in his capacity as Chair of the United Nations System Chief Executives Board for Coordination, to conduct a review of the jurisdictional setup of the common system and submit the findings of the review and recommendations to the General Assembly as soon as practicable”.*

5. The UNGA expressed these concerns following its consideration of the report of the ICSC for 2019, in which a series of judgments issued by the ILOAT on 3 July 2019 were discussed.<sup>4</sup> With these judgments, the Tribunal “set aside” decisions made by the ICSC regarding the post adjustment multipliers applicable to staff members serving in Geneva, Switzerland, based on its 2016 cost-of-living survey in that city. Following the application of these new multipliers as of April 2018, Geneva-based staff members of ILO, ITU, IOM, WHO and WIPO<sup>5</sup> contested the legality of the ICSC decisions before the ILOAT, because it resulted in a reduction of their total remuneration. The Tribunal ruled that the ICSC had gone beyond the authority conferred upon it under its Statute, by taking decisions instead of making recommendations to the UNGA on this subject-matter. Therefore, these decisions were quashed, and the complainants reinstated in their rights.

6. However, on 19 March 2021, the UNAT issued a series of judgments dealing with the same issue, where it upheld rulings made by the United Nations Dispute Tribunal that the ICSC decisions were valid.<sup>6</sup> The UNAT dismissed appeals lodged by Geneva-based staff members serving with the UN Secretariat, UNEP, UNCTAD, UNECE, ITC and UNJSPF,<sup>7</sup> and held, in line with its jurisprudence, that decisions taken by the Secretary-General to execute regulatory decisions adopted by the UNGA are not subject to judicial review. The UNAT found that the Secretary-General had acted in accordance with the ICSC decisions subsequently endorsed by the UNGA and dismissed the appeals on that basis.

7. These conflicting judgments by the ILOAT and the UNAT have resulted in two levels of pay being effective in Geneva, one for UN entities under the jurisdiction of the ILOAT and another for those under UNAT’s jurisdiction. It will be noted from the foregoing that this situation arose because the two Tribunals follow different theories of judicial review.

8. The report on the review of the jurisdictional setup of the UN common system requested by the UNGA with its resolution 74/255 B was issued by the Secretary-General on 15 January 2021.<sup>8</sup> It followed consultations with organizations of the UN common system, in which FAO participated fully. The report focused on how the coexistence of the two Tribunals impacted on consistency in the

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<sup>3</sup> UN Doc. A/RES/74/255 A-B.

<sup>4</sup> ILOAT Judgments 4134 to 4138.

<sup>5</sup> ILO – The International Labour Organization; ITU – The International Telecommunication Union; IOM – International Organization for Migration; WHO – World Health Organization; WIPO – World Intellectual Property Organization.

<sup>6</sup> UNAT Judgments 2021-UNAT-1107 to 1114.

<sup>7</sup> UNEP – The United Nations Environment Programme; UNCTAD – The United Nations Conference on Trade and Development; UNECE – The United Nations Economic Commission for Europe; ITC – The International Trade Centre; UNJSPF – The United Nations Joint Staff Pension Fund.

<sup>8</sup> Submitted to the Committee at its 112th Session of March 2021, as document CCLM 112/INF/1.

implementation of ICSC decisions. In particular, Section IV of the report proposed different options to address the inconsistent implementation of ICSC decisions and recommendations.

9. As reported to the CCLM in October 2021,<sup>9</sup> the UNGA considered the report of the Secretary-General in April 2021.<sup>10</sup> It expressed “*concern over the continued inconsistencies in the application of the 2016 post adjustment results across duty stations of the United Nations common system*”, and requested a further report in the following terms:

“8. Requests *the Secretary-General to submit a further report with detailed proposals and thorough analysis on practical options, giving priority to measures involving changes to the adjudication of cases involving International Civil Service Commission matters, (...) limited to the review of tribunal judgments and issuance of guidance by the Commission, as well as increased exchanges between the tribunals, (...) and to present it for the consideration of the General Assembly no later than the seventy-seventh session*”.

### III. Update on subsequent developments

10. In compliance with this UNGA resolution, the UN Legal Counsel, in consultation with the ILO, established a Working Group of the UN Legal Advisors Networks on the Review of the Jurisdictional Setup of the UN Common System (hereinafter “the working group”), to develop the proposals requested by the UNGA. The working group circulated a first set of proposals to the Legal Advisors of the UN common system organizations in December 2021. The draft report was finalized in January 2022 and circulated by the working group to the ICSC and the staff federations (CCISUA and FICSA)<sup>11</sup> for their comments.

11. The UN Legal Advisors Networks were invited to comment on the outcome of these consultations in April 2022. The draft report included three proposals for consideration by the UNGA, as follows:

- **Proposal 1:** Submissions by the ICSC to Tribunals during litigation of complaints arising out of an ICSC decision or recommendation.
- **Proposal 2:** ICSC guidance following Tribunal judgments.
- **Proposal 3:** Establishment of a joint ILOAT-UNAT chamber issuing interpretative, preliminary or appellate rulings.

12. On this occasion, the Legal Advisors were informed that in its comments, the ICSC stressed the need for it to have an opportunity to explain its position before the Tribunals (Proposal 1) and highlighted that it should be informed of any relevant judgments, so that it could discuss any impact at the earliest opportunity (Proposal 2). The ICSC was generally open to the idea of setting up a Joint Chamber (Proposal 3), with a slight preference for its rulings to have binding force. The ICSC also noted that the system should not be too complex, with parity between judges of each Tribunal and an alternating presidency. The staff federations questioned the premise of the jurisdictional review and the need to change the *status quo*.

13. The draft proposals were reviewed by the Legal Advisors through two rounds of comments. The FAO Legal Office participated in both exercises and, at the same time, sought comments from the

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<sup>9</sup> See the report of the 113th Session of the Committee, document CL 168/10, paragraph 29.

<sup>10</sup> UNGA Resolution 75/245 B, UN Doc. A/RES/75/245 B.

<sup>11</sup> CCISUA – The Coordinating Committee for International Staff Unions and Associations; FICSA – The Federation of International Civil Servants’ Associations.

FAO staff representative bodies ((UGSS and AP-in-FAO;<sup>12</sup> hereinafter “the SRBs”), which were conveyed to the working group. Each proposal, and FAO’s position thereon, are summarized below:

- **Proposal 1: Submissions by the ICSC to Tribunals during litigation of complaints arising out of an ICSC decision or recommendation**

This proposal would facilitate submissions by the ICSC to the ILOAT and the UNAT during the litigation of any complaint filed by a staff member arising out of an ICSC decision or recommendation. The proposal would apply to litigations governed by the current Statutes and Rules of Procedure of the Tribunals. It is not intended to replace existing mechanisms that allow for the introduction of relevant information or evidence in proceedings before the Tribunals.

*FAO agrees with this proposal. As mentioned in the report of the working group, the Rules of Procedure of the ILOAT already allow the ICSC to submit observations to the Tribunal, either at the request of the Tribunal or as part of a submission made by the respondent organization. Relevant amendments to this end were brought to the Rules of Procedure of the ILOAT in 1993, and numerous ICSC submissions have since been filed with the Tribunal. It is noteworthy that in the Geneva post adjustment case, the ICSC was not invited to submit its views.*

- **Proposal 2: ICSC guidance following Tribunal judgments**

In cases where a Tribunal determines that the implementation of an ICSC recommendation or decision is unlawful, it will normally order the respondent organization to undertake specific actions. The conclusions of the Tribunal in such cases may also have implications beyond those involving the respondent organization named in the judgment.

Under this proposal, when the responding legal office receives a judgment from the ILOAT or the UNAT, it would send a copy to the ICSC Secretariat. The ICSC will schedule a discussion of the impact, if any, of the judgment to take place at the earliest opportunity. This may be followed by guidance from the ICSC to all organizations of the UN common system regarding any adjustment to be made to its initial decision or recommendation, as a consequence of the judgment.

*FAO agrees with this proposal, as it would facilitate concerted consideration at the level of the UN common system on the best response to the Tribunal’s ruling, especially when an ICSC decision or recommendation is set aside. At the request of FAO, it was clarified that this mechanism would not affect the legal authority of a final judgment or its execution by the respondent organization.*

- **Proposal 3: Establishment of a joint ILOAT-UNAT chamber issuing interpretative, preliminary or appellate rulings**

Under this proposal, a joint chamber composed of judges from the ILOAT and the UNAT would be created to issue one or more of the following types of rulings:

- a) **Interpretative ruling:** The purpose of an interpretative ruling is to identify and resolve any legal issues pre-emptively, before an ICSC recommendation or decision is finalized or implemented.
- b) **Preliminary ruling:** The purpose of a preliminary ruling is to enable a Tribunal to seek a ruling from the joint chamber on a legal question that is relevant to the Tribunal’s review of an application challenging the implementation of an ICSC recommendation or decision.

<sup>12</sup> UGSS – The Union of General Service Staff; AP-in-FAO – The Association of Professionals in FAO.

- c) **Appellate ruling:** The purpose of an appellate ruling is to resolve divergence in cases where the ILOAT and the UNAT reach inconsistent conclusions on a legal question relevant to an ICSC recommendation or decision.

This last proposal is the more complex of the three proposals developed by the working group. It raises questions as to the competence of the joint chamber, its composition (even or uneven number of judges), the designation of judges to sit in the joint chamber and how decisions would be made (consensus or majority vote, and possibility of even votes).

*FAO supports the establishment of a joint chamber to issue appellate rulings only. As noted by the working group, empowering the joint chamber with the authority to issue interpretative, preliminary, and appellate rulings would not be efficient. There is a risk that interpretative or preliminary rulings would be sought automatically in cases concerning an ICSC decision, which could slow down the appeal process and, more importantly, deter from the “de plano” jurisdiction of the tribunals.*

*Moreover, we consider that the facilitation of ICSC submissions in pending cases, as envisaged in Proposal 1, would contribute significantly to exposing all the relevant issues of fact and law to the panel of judges hearing a complaint or an appeal. This practice would reduce the need for an interpretative or preliminary ruling in cases concerning an ICSC decision or recommendation.*

*For these reasons, FAO supports the establishment of a joint chamber which would be competent only to resolve cases of divergence between ILOAT and UNAT rulings on the legality of a particular ICSC decision or recommendation. Such a judicial body would be ideally suited to resolve the uneven application of the ICSC decision that resulted from the conflicting judgments issued in the Geneva post adjustment cases.*

*FAO considers that the appellate ruling should be binding on the parties, including the Secretary-General, the executive heads of the UN common system, as well as the ICSC itself. We also support the proposal that the joint chamber be authorized to order appropriate remedies and award compensation.*

*However, FAO notes that in a situation of divergence, the second judgment issued by a tribunal might come some years after the first one, with the respondent organization in the first case having already implemented measures based on the first judgment. This could lead to situations where it would be impossible to restore the parties to the “status quo ante”.*

14. When consulted by the Legal Office, the SRBs advised that their positions were aligned with that of the staff federations. In short, they considered that all three proposals should be rejected, because there has been only one notable case of divergent judgments. They also mentioned that these proposals do not resolve the problem of disharmony in the system’s jurisprudence with respect to ICSC decisions and recommendations. One staff body added that if these proposals were to go forward, only the creation of a joint chamber issuing appellate rulings would be supported.

15. The three proposals outlined above have now been finalized by the working group and will be included in the report of the Secretary-General to the UNGA.<sup>13</sup> The Tribunals, the ICSC, and the UN Internal Justice Council will be given an opportunity to annex comments on the proposals in the Secretary-General’s report, if they wish to do so.

16. At this stage, it can be observed that there are still divergent views among organizations regarding these proposals, and that they are still to be approved, let alone implemented. Further deliberations on this topic will take place in the UNGA and among organizations of the UN common system. In that respect, the Legal Office has made it clear during this review that any changes to the

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<sup>13</sup> This report will be circulated to the members of the CCLM as an information document when it is issued.

current jurisdictional setup would have to be submitted for approval to the FAO Governing Bodies, starting with the CCLM.

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

17. This document is for the information of the Committee, which is invited to make such observations thereon as it considers appropriate. It may wish to request the Secretariat to provide updates on any developments on this matter at a future session.