International Labour Organization

▶ GB.346/PFA/12(Rev.1)

Governing Body

346th Session, Geneva, October–November 2022

Programme, Financial and Administrative Section

PFA

Personnel Segment

Date: 20 October 2022
Original: English

Twelfth item on the agenda

Matters relating to the Administrative Tribunal of the ILO: Review of the jurisdictional set-up of the United Nations common system

Purpose of the document

This document provides updated information on the ongoing review of the jurisdictional setup of the UN common system undertaken by the UN Secretary-General at the request of the UN General Assembly. The Governing Body is invited to consider the merits of the three proposals outlined in the Secretary-General's report and provide guidance on next steps (see the draft decision in paragraph 25).

Relevant strategic objective: None.

Main relevant outcome: Enabling outcome C: Efficient support services and effective use of ILO resources.

Policy implications: None.

Legal implications: None at this stage.

Financial implications: None at this stage.

Follow-up action required: Depending on the decision of the Governing Body.

Author unit: Office of the Legal Adviser (JUR).

Related documents: GB.341/PFA/INF/8; GB.344/PFA/INF/9.

To minimize the environmental impact of ILO activities, Governing Body documents published before or after the sessions are not printed. Only documents issued in-session are printed in limited numbers and distributed to Governing Body members. All Governing Body documents are available at www.ilo.org/gb.

▶ Introduction

1. As requested by the United Nations (UN) General Assembly in resolution 75/245 B, the UN Secretary-General has prepared a second report on the review of the jurisdictional set-up of the United Nations common system, which will be considered at the 77th Session of the General Assembly, probably in November 2022. [1]

2. The General Assembly requested, in particular, detailed proposals concerning changes to the adjudication of cases involving decisions or recommendations of the International Civil Service Commission (ICSC or "the Commission") before the UN tribunals and the ILO Administrative Tribunal.

3. Three separate proposals have been developed. The first seeks to facilitate submissions from the ICSC to the tribunals during proceedings relating to its decisions or recommendations. The second proposal addresses the action that may be taken by the ICSC when one of the tribunals issues a judgment involving an ICSC decision or recommendation. The third proposal elaborates on key elements for the establishment of a joint chamber composed of judges from the UN Appeals Tribunal and the ILO Administrative Tribunal with a view to avoiding inconsistent application of ICSC decisions or recommendations across the UN common system due to conflicting judgments.

4. The development of the proposals was facilitated by a working group established in July 2021, composed of members of the UN Legal Advisers networks and co-chaired by a representative of the UN secretariat and a representative of the International Labour Office. [2] The draft proposals were the subject of broad consultations held between January and June 2022 involving the organizations within the UN system, the ICSC, the tribunals, the staff federations and the UN Internal Justice Council. [3]

5. The first report of the UN Secretary-General stated that, ultimately, it is for the UN Member States, through the General Assembly, and for the governing bodies of the organizations concerned to assess the gravity of the problem of inconsistent implementation of ICSC decisions or recommendations and to determine the necessity of preventing or mitigating the risks of inconsistency, and the appropriate degree of mitigation. [4]

6. Even though further work is needed on the proposals, they are now sufficiently developed to be brought before the governing bodies of the organizations concerned for their consideration and guidance, as appropriate. Below is a summary of the three proposals contained in the report of the UN Secretary-General.

[1] *Review of the jurisdictional set-up of the United Nations common system*, A/77/222, released on 22 September 2022. The first report of the Secretary-General, *Initial review of the jurisdictional set-up of the United Nations common system* (A/75/690), provided an overview of the establishment and evolution of the two tribunal systems, examined past efforts to address the challenges of having two tribunal systems, and set out options to address the issue of inconsistent implementation of ICSC recommendations and decisions. See also GB.341/PFA/INF/8.

[2] GB.344/PFA/INF/9.

[3] All organizations and staff federations are given the opportunity to place any comments on a special website to which the report will link, whereas the tribunals, the ICSC and the Internal Justice Council may annex their comments directly to the report.

[4] A/75/690, para. 89.

7. The views of the judges of the Administrative Tribunal of the ILO can be found in Annex II to the report of the UN Secretary-General, which is reproduced in the Appendix.

Submissions from the ICSC during judicial proceedings

8. The proposal to facilitate submissions from the ICSC during judicial proceedings arising out of its recommendations or decisions does not require any modifications to current mechanisms and rules of procedure, as the presentation of observations by the ICSC is already permitted. The proposal is intended simply to streamline the processes of defendant organizations in the interest of greater consistency.

9. As a matter of best practice, it is recommended that, upon receipt of a complaint, the legal office of the defendant organization would notify the ICSC and would promptly consider whether it was necessary to transmit a copy of the complaint and invite the ICSC to prepare a statement. In such a case, the defendant organization would indicate the deadline for the ICSC to finalize its statement and would also transmit any specific questions or requests for clarification.

10. Upon receipt of the ICSC's statement, the defendant organization would normally append it to its reply to the complaint. It would also keep the ICSC secretariat informed of major developments in the litigation process, and would promptly send it a copy of the judgment, once issued.

11. Most stakeholders recognized that a streamlined process, which would ensure that the ICSC is made aware of relevant litigation and is given an opportunity to state its position, would contribute to the fair and efficient disposal of cases before the tribunals.

12. The report of the UN Secretary-General notes that this practical approach would not create any new obligations for the organizations or the Commission or require any changes to the existing legal framework, and that implementing the proposal would help to ensure that when the tribunals decide on relevant complaints in cases involving ICSC decisions or recommendations, they are fully briefed on any observations by the ICSC.

Guidance by the ICSC following tribunal judgments involving its recommendations or decisions

13. It is proposed that in cases where the implementation of an ICSC decision or recommendation is found to be unlawful by a tribunal, the ICSC secretariat would schedule at the earliest opportunity a discussion by the Commission of the impact of the judgment, following which the ICSC might issue guidance to all UN common system organizations, indicating any adjustments to be made or any other action on the part of the Commission as a consequence of the judgment. Consideration of a judgment by the ICSC cannot affect the legal authority of the judgment or the obligation of the organization or organizations concerned to execute it.

14. Most stakeholders supported this proposal, which builds on existing practice. Accordingly, the report of the UN Secretary-General notes that furthering ICSC guidance following relevant tribunal judgments would promote greater consistency of the UN common system and that

the organizations and the ICSC should therefore be encouraged to follow the steps set out in the proposal as a matter of best practice.

▶ Establishment of a joint chamber

15. The proposed joint chamber would be composed of judges of the UN Appeals Tribunal and the ILO Administrative Tribunal and would be empowered to issue interpretative, preliminary or appellate rulings. The purpose of an **interpretative ruling** would be to identify and resolve any legal issues pre-emptively before an ICSC recommendation or decision is finalized or implemented. In contrast, a **preliminary ruling** would be issued at the request of a tribunal on a legal question arising during proceedings challenging the implementation of an ICSC decision or recommendation. An **appellate ruling** would seek to resolve divergences in cases where the UN Appeals Tribunal and the ILO Administrative Tribunal have already reached different conclusions on a legal question relevant to an ICSC decision or recommendation.

16. The joint chamber would be competent to review matters such as whether an ICSC decision or recommendation is consistent with the statute and rules of the ICSC or with the general principles of international civil service law, and also to review the methodology employed by the ICSC.

17. The proposal includes options concerning the composition and decision-making of the joint chamber which would need to be elaborated. Having an equal number of judges from the UN Appeals Tribunal and the ILO Administrative Tribunal on the joint chamber would be a recognition of parity between the tribunals. However, in a joint chamber with an even number of judges, there would be a potential for deadlock, in which case the options would include giving the presiding judge a casting vote, providing for a majority vote, or augmenting the composition with one or two additional judges from the respective tribunals or from a roster of external judges.

18. If, however, the joint chamber were to have an uneven number of judges, there could be no deadlock, but an agreed formula would be required (for example, the drawing of lots, or using a roster of external judges) for the nomination of the additional judge needed to obtain the uneven number of judges.

19. Regarding the legal authority of the interpretative and preliminary rulings of the joint chamber, different options were considered: to make both types of ruling binding; to characterize them as advisory; or to require the tribunals to give due consideration to such a ruling, providing a reasoned justification in the event of a departure from the ruling.

20. The joint chamber would be responsible for adopting its own rules of procedure. Nevertheless, the report of the UN Secretary-General indicates that deliberations of the joint chamber would, in principle, be based on written submissions without oral hearings. The joint chamber would issue a ruling as expeditiously as possible, normally within three months of the notification of a request or referral. Secretarial support could be provided jointly by the registries of the UN Appeals Tribunal and the ILO Administrative Tribunal. Operational costs would be apportioned among the organizations of the UN common system under an agreed methodology.

21. The possible establishment of a joint chamber would require parallel amendments to the statutes and rules of procedure of the UN tribunals and the ILO Administrative Tribunal. Under article XI, the Statute of the ILO Administrative Tribunal may be amended by the International Labour Conference after consultation with the Tribunal.

22. Consultations with the relevant stakeholders have revealed a wide divergence of views on the advisability of establishing a joint chamber. Whereas a majority supported the idea in principle – subject to further development of the scope of the joint chamber's powers, procedural matters and costs – several stakeholders objected to the idea, considering that the effort required to establish the joint chamber was disproportionate to the actual need for such a body and asserting that the joint chamber would infringe on the independence of the tribunals.

23. In its recommendations, the report of the UN Secretary-General considers that conflicting decisions of the two tribunal systems in cases involving ICSC recommendations and decisions are undesirable and, indeed, have the potential to undermine the cohesion of a single, unified UN common system as the cornerstone for the regulation and coordination of the conditions of service. Although the cases concerning the Geneva post adjustment are the only instance so far where the rulings of the tribunals have diverged, the Secretary-General notes that even a single occurrence of divergent jurisprudence could create significant financial, legal and administrative challenges. His report therefore recommends that the proposal for a joint chamber should be advanced and concretized, since it would preserve the coexistence of the two independent tribunal systems while minimizing the risks inherent to such jurisdictional duality.

24. Accordingly, in the report of the UN Secretary-General, the General Assembly is requested to: (i) encourage the implementation of the first two proposals by the UN common system organizations and the ICSC; and (ii) invite the Secretary-General to complete the work on the outstanding legal and practical aspects pertaining to the proposed establishment of a joint chamber with jurisdiction to issue interpretative and preliminary rulings concerning cases involving the implementation of ICSC recommendations or decisions.

▶ Draft decision

25. The Governing Body:

(a) took note of the proposals set out in the UN Secretary-General's report on the review of the jurisdictional set-up of the United Nations common system (A/77/222); and

(b) requested the Director-General to continue to cooperate with the United Nations secretariat taking into account the views expressed during the discussion of document GB.346/PFA/12(Rev.1), and to prepare an updated report for its consideration at its 349th Session (November 2023).

▶ Appendix

Annex II

Comments of the International Labour Organization Administrative Tribunal judges

These are comments on a paper by a working group developing proposals responsive to resolution 75/245 B of the United Nations General Assembly. A copy of the paper was provided to the Registrar of the International Labour Organization Administrative Tribunal (ILOAT) on 24 June 2022 in an email from the International Labour Organization (ILO) Legal Adviser and forwarded to us. The Legal Adviser is a member of the working group. He asked for ILOAT observations by 26 July 2022. As ILOAT was also asked to limit the length of its comments, they are written with as much economy as is possible, though some of our reasoning will be curtailed.

The most convenient way of advancing the views of ILOAT in response to the email from the Legal Adviser, having regard to the time limit he set, is for us, the President and the Vice-President of ILOAT, to respond personally. However, the views in this letter are endorsed by all other ILOAT judges and they are consistent with a consensus reached by the ILOAT judges in a meeting by videoconference on 22 March 2022 and a plenary session on 11 May 2022 when considering an earlier substantively not different version of the paper. Their views were communicated to the ILO Director General in a letter of 11 April 2022. That letter, in relation to the proposal for a joint chamber, mostly advanced the analysis which follows in this letter, concluding with a request that the proposal should not be pursued.

First, some background. As an institution, ILOAT (though differently named)[1] was established in 1927 by the League of Nations. It is an "independent judicial body"[2] presently comprised of seven judges from seven countries[3] who are or have been senior and experienced judges in their domestic legal systems and this has been the case since 1927. Presently, the judges are from either a civil law background or a common law background. The role of the judges is to adjudicate on individual claims (made by way of a complaint) of international civil servants though sometimes presenting as collective claims.

Of basic importance is that the ILOAT judges apply what can be described as the judicial method, a hallmark of judiciaries around the world. Its essential elements are these. First, and fundamentally, a judge acts impartially without fear or favour, uninfluenced by considerations extraneous to the case presented by the parties. The judicial method entails ascertaining what are the facts and, if facts are contested, making findings of fact. It is necessary to identify what is the applicable law and apply that law to the facts. In relation to ILOAT, where judges normally sit in a panel of three, the applicable law is, in almost all cases, one or more of, firstly, the terms of the appointment of the international civil servant bringing the claim including any contract of employment, secondly, normative legal documents applicable to the employment of that international civil servant[4] and, thirdly, the general principles of law emerging from the case law of ILOAT established over many decades. The

[1] Administrative Tribunal of the League of Nations.

[2] International Court of Justice advisory opinion of 1 February 2012 concerning ILOAT judgment No. 2867 upon a complaint filed against the International Fund for Agricultural Development, para. 38.

[3] Art. III, para. 1, of the ILOAT statute. The seven judges are presently: Mr. Michael F. Moore (Australia), Mr. Patrick Frydman (France), Sir Hugh A. Rawlins (Saint Kitts and Nevis), Mr. Jacques Jaumotte (Belgium), Mr. Clément Gascon (Canada), Ms. Rosanna De Nictolis (Italy) and Ms. Hongyu Shen (China).

[4] The normative legal documents may consist of staff regulations but also a collection of internal rules, instructions, bulletins, memoranda or circulars, to cite some of them.

applicable law may also be found in the statute establishing ILOAT.[5] Importantly, it is for the parties to identify how they wish to conduct their case and to identify what issues (and what arguments they wish to advance in support) they seek to have determined by means of judicial adjudication resulting in the final and binding resolution of the claim. Occasionally, ILOAT will raise an issue ex officio but almost invariably it will concern a question of jurisdiction or receivability.

Within ILOAT, the judges are guided by the approach of *stare decisis*.[6] Legal conclusions in a case decided by ILOAT are generally applied and followed in subsequent cases.

We now turn to the three proposals in the working group's paper. We will mention the so-called Geneva salaries cases,[7] because we apprehend that the several judgments of ILOAT, when taken together with several judgments of the United Nations Appeals Tribunal (UNAT)[8] on the same general topic and the differing conclusions of the two Tribunals, have, centrally, precipitated the investigation called for by resolution 75/245 B.

Proposal 1: submissions of ICSC to the Tribunal during the litigation

The Rules of ILOAT already contain a provision enabling it to obtain submissions of any third party in a case before it. However, whether a request for such a submission is made is within the discretionary power of the Tribunal, and this situation should not be changed.

ILOAT supports the idea that the views of the ICSC should be made known to the Tribunal but through the submissions of the defendant organization. In complaints challenging indirectly decisions taken within the United Nations common system on the basis of the deliberations of the ICSC, the defendant organization normally defends the decision taken by the ICSC or the United Nations General Assembly which was implemented internally. The position of the ICSC can be an important part of the defence of the decision impugned before ILOAT. Experience indicates that a defendant organization will contact the ICSC and ask for its opinion, which will be advanced as part of the organization's arguments in the case.

This occurred in the Geneva salaries cases, which involved five organizations (ILO, the World Health Organization, the International Telecommunication Union, the International Organization for Migration and the World Intellectual Property Organization). They sought the opinion of the ICSC on the question of its power. A written opinion was provided by the ICSC by letter dated 23 November 2018, and this letter was put into evidence by the organizations concerned. This evidence was duly taken into account by ILOAT and, though it reached a different view about the powers of the ICSC, that body's reasoning certainly was not ignored.

Proposal 2: ICSC guidance following Tribunal judgments

Organizations within the jurisdiction of ILOAT[9] are bound to follow and implement the Tribunal's judgments and the best way those judgments would be taken into account by the United Nations common system seems to be with the ICSC

[5] Statute of the Administrative Tribunal of the International Labour Organization.
[6] See judgment 3450, consideration 8.
[7] Judgment 4134 concerning ILO; judgment 4135 concerning the World Health Organization; judgment 4136 concerning the International Organization for Migration; judgment 4137 concerning the International Telecommunication Union; and judgment 4138 concerning the World Intellectual Property Organization.
[8] And two judgments of the United Nations Dispute Tribunal.
[9] Out of the total of 59 organizations currently recognizing the jurisdiction of ILOAT, 13 are listed on the ICSC website as common system members.

guidance. Though ILOAT does not see itself having a role in this process, it agrees with this proposal.

Proposal 3: joint chamber

The judges of ILOAT consider that this proposal is fundamentally unsound and do not support it. At the outset, it should be noted that the discussion in the working group's paper of the organizational architecture of the proposed joint chamber (upon which much of the paper is focused) proceeds on the basis that serving judges of ILOAT (who have recently been appointed for terms of either five or seven years) will, in that capacity, serve on, and participate in, a joint chamber or otherwise facilitate its operation. However, this would be a major change in the role of the judges of ILOAT, of which they were unaware at the time of their acceptance of their appointment, which is uncalled for and of doubtful legality.

There is a fundamental underlying problem concerning the deliberations of the proposed joint chamber. It concerns what would be the applicable law in relation to any of the proposed functions (giving an interpretative ruling, a preliminary ruling and/or an appellate ruling). The differences in the statutes of UNAT and ILOAT are well known and were highlighted in paragraph 70 of UNAT judgment No. 2021-UNAT-1107, the leading judgment of UNAT (decided by all sitting UNAT judges) on the question of the Geneva salaries.

In that paragraph of its judgment, UNAT observed that:

- UNAT was aware that its decision was apparently at odds with the decision of ILOAT on the same questions
- The fundamental structures under which each of the United Nations and ILO judicial bodies operate differ considerably
- UNAT is bound by resolutions of the United Nations General Assembly
- ILOAT is not bound by resolutions of the United Nations General Assembly
- The resolutions of the United Nations General Assembly together with the statute establishing UNAT[10] limit the scope of judicial review in the cases then under consideration, viz. the Geneva salaries cases
- To quote UNAT: "The ILOAT is not constrained by these significant jurisdictional characteristics"
- This may be an undesirable situation

Differences in the case law arising out of differences in the normative framework cannot be resolved by judges in a joint chamber. It is improbable in the extreme that, against this background, judges of ILOAT and UNAT can apply the same law in determining issues which may have been presented to the joint chamber for determination.

Moreover, judges of ILOAT would in that capacity be inclined to, if not bound to, apply principles emerging from ILOAT case law as they would in individual cases dealt by ILOAT in the ordinary course. These principles may not accord with principles emerging from the case law of UNAT. An important divergence of principle

[10] Statute of the United Nations Appeals Tribunal as adopted by the General Assembly in resolution 63/253 on 24 December 2008, amended by resolution 66/237 adopted on 24 December 2011, by resolution 69/203 adopted on 18 December 2014, by resolution 70/112 adopted on 14 December 2015 and by resolution 71/266 adopted on 23 December 2016.

between ILOAT and UNAT case law concerns what is an "acquired right",[11] a concept which is essential for the making and application of ICSC decisions or recommendations.[12]

The working group identifies three types of rulings which might be made (one, some or all) by a joint chamber. We briefly comment on each.

1. Interpretative ruling:

(a) As proposed, the key elements are that the ruling can be sought by the ICSC, the Secretary-General of the United Nations or an executive head of an organization (all of which can make submissions even if they are not the applicant) for, it appears, a non-binding (on the tribunals) pre-emptive ruling before a recommendation or decision is "finalized or implemented" (the working group's expression). Such a ruling is to be more than an advisory opinion and the judges of that tribunal hearing a case in which the legality of the recommendation (and presumably its consequences) or decision is contested must "provide a reasoned justification in the event of a departure from it" (the working group's language);

---

[11] ILOAT judgment 4465 recently recalled the origin and content of this notion:

"In Judgment 4381, the Tribunal discussed acquired rights. The Tribunal observed that the concept of breach of acquired rights has its genesis in the first decision given on 15 January 1929 by this Tribunal, then called the Administrative Tribunal of the League of Nations. In that decision (In re *di Palma Castiglione v. International Labour Office*), the Tribunal held: "The Administration is at liberty to establish for its staff such regulations as it may see fit, provided that it does not in any way infringe the acquired rights of any staff member." Over the decades since, the basis for recognising and protecting acquired rights has evolved and, in particular, principles developed for demarking what are and are not such rights".

In judgment 4381, the Tribunal quoted the applicable legal principles as summarized in judgment 4195, consideration 7:

"According to the case law, '[i]n Judgment 61 [...] the Tribunal held that the amendment of a rule to an official's detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment' (see Judgment 832, under 13). Judgment 832, under 14 (cited in part, below), poses a three-part test for determining whether the altered term is fundamental and essential. The test is as follows: (1) What is the nature of the altered term? 'It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.' (2) What is the reason for the change? 'It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.' (3) What is the consequence of allowing or disallowing an acquired right and the effect it will have on staff pay and benefits, and how do those who plead an acquired right fare as against others?"

Also, as the Tribunal observed in Judgment 4028, consideration 13, international civil servants are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered though, depending on the nature and importance of the provision in question, staff may have an acquired right to its continued application".

UNAT, in its judgment 2018-UNAT-840, *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, discussed the issue of acquired rights, starting at para. 83. It concluded, in para. 90:

"An 'acquired' right should be purposively interpreted to mean a vested right; and employees only acquire a vested right to their salary for services already rendered. Promises to pay prospective benefits, including future salaries, may constitute contractual promises, but they are not acquired rights until such time as the quid pro quo for the promise has been performed or earned. Moreover, the fact that increases have been granted in the past does not create an acquired right to future increases or pose a legal bar to a reduction in salary".

[12] According to art. 26 of the ICSC statute, "the Commission, in making its decisions and recommendations, and the executive heads, in applying them, shall do so without prejudice to the acquired rights of the staff under the staff regulations of the organizations concerned".

(b) The working group does not take an unequivocal position on the legal effects of an interpretative ruling vis-à-vis judges of a tribunal, including ILOAT. It appears to favour a capacity in the judges to depart from such a ruling. This is discussed shortly. The working group adverts to the possibility that the ruling could be binding. It could not be because that would subvert the judicial independence of the judges of ILOAT. By their appointment, the judges are entrusted with the task of identifying the applicable law and applying it. Their task as it has always been conceived is not to do so by reference, in a binding way, to the conclusions of individuals extraneous to the tribunal even if they are judges, however distinguished, of another tribunal;

(c) Also, and importantly, if an interpretative ruling was binding in subsequent proceedings brought by way of complaint filed with ILOAT by an international civil servant, that civil servant would be denied the opportunity of raising, as part of her or his case, the issue of whether the decision or recommendation of the ICSC was unlawful in the event that the decision or recommendation was foundational to the actual decision impugned in those proceedings;

(d) The first specific difficulty with this concept of interpretative ruling is that proceedings of this type would occur in a comparative factual vacuum. Whether, for example, a recommendation or decision might violate acquired rights (see footnote 11 above) requires consideration of the individual circumstances of international civil servants;

(e) Secondly, one would expect many, if not most, such applications would be made by the ICSC. It is probable there would be no contradictor. In the absence of a contradictor there is a real risk the joint chamber would not have the benefit of all reasonably available arguments concerning the legality of the proposed recommendation or decision;

(f) Thirdly, if judges of a tribunal can depart from the ruling (a concession correctly made by the working group including for the reasons it gives), then, in doing so, the "reasoned justification" would be that the decision or recommendation was unlawful as the reason for the departure which would then be explained including that the interpretative ruling was wrong (essentially for the same reasons). This would be no different than the task judges assume in motivating any significant conclusion in a judgment in the ordinary course. In such situations, the cost and administrative inconvenience, not to mention the deployment of judicial resources, occasioned by obtaining the interpretative ruling cannot be justified;

(g) Of course, if the interpretative ruling is correct and accepted as such by judges of the tribunal hearing an individual case, then the grounds of this acceptance could equally underpin a conclusion of lawfulness in the individual case itself (in the absence of an interpretative ruling) and all the more so if the tribunal was assisted by the views of the ICSC as discussed in relation to proposal 1. The concept of *stare decisis* would likely result in the conclusion in that particular case being followed and applied by the judges of the tribunal in subsequent individual cases. The seeking and giving of interpretative ruling would be effectively redundant.

2. Preliminary ruling:

(a) It is unnecessary, on this question, to summarize what the working group says. Suffice it to note that the process hinges on a discretionary decision of the President of either tribunal to refer, upon request, a legal question to the joint chamber. Who can make the request is unstated. It would be problematic if it was a stranger (non-party) to the litigation. Moreover, when, in the course of proceedings, this discretion may be exercised is not stated in the paper. If it was before findings of fact were made, the issue discussed in 1 (d) above arises. If it was intended to be exercised after findings of fact were made, then the judges hearing the particular

application/complaint (for ILOAT, normally a panel of three) could only speculate about what would be relevant facts for the joint chamber;

(b) The observations made in 1 (b), (f) and (g) apply also in relation to this process of securing a preliminary ruling;

(c) This process will, potentially, delay, and probably by a considerable period, the resolution of the individual complaint or application. It will add to the costs of the litigation (particularly for an applicant/complainant), again probably considerably, by the preparation of submissions before the joint chamber, which presumably would have to be responsive to submissions made by all parties the paper contemplates might be involved (ICSC, the Secretary-General, the executive heads of all other common system organizations as well as staff representative bodies).

3. Appellate ruling:

(a) The paper, on this topic, says the appellate ruling could, as one possibility, enable reconsideration by the tribunal concerned of the judgment the subject of the appellate ruling. This is entirely inconsistent with the entrenched principle in ILOAT of *res judicata*, an element of which is that a judgment resolves finally the litigation between the parties subject to what follows. There is, in the Tribunal's statute, a process of review. In substance, this is a limited appeal. The review is determined by judges of ILOAT and it does not involve adjudication by individuals who are not judges of the Tribunal, which would raise questions of judicial independence referred to in 1 (b) above;

(b) The paper identifies a second possibility, namely that the joint chamber could finally resolve the litigation at an appellate level. The discussion of this process ends with the observation that "this […] would have the potential of effectively transforming the joint chamber into a separate autonomous tribunal". This is expressed with equivocation and qualification. But it is doubtless correct and would involve an absolutely major change to arrangements presently in place.

The judges of ILOAT understand the concern amongst international organizations about the operation and viability of the United Nations common system. They would be quite prepared to engage in periodic informal dialogue with judges of UNAT to see what can be done to maintain or create consistency and cohesion within that common system without compromising the judges' duties deriving from acceptance of appointment to an independent international judicial tribunal. The importance of the common system has been recognized and acknowledged by ILOAT in its judgments. Indeed, in each of the various Geneva salaries judgments (see footnote 7 above) ILOAT underlined that "[in] its judgments [over the decades] the Tribunal has recognized and accepted the existence of the United Nations common system and respected its objectives". This remains the position.

(*Signed*) Michael **Moore**
President

(*Signed*) Patrick **Frydman**
Vice-President