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# COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

## Hundred and Nineteenth Session

Rome, 9-11 October 2023

### Review of the jurisdictional set-up of the United Nations common system – Update

#### I. Introduction

1. The Committee on Constitutional and Legal Matters (hereinafter “CCLM” or “the Committee”) has been regularly briefed on the on-going review of the jurisdictional set-up of the UN common system, including at its last session in March 2023.<sup>1</sup> In its report, the Committee noted “*the significant divergence of views*” among stakeholders and “*looked forward to receiving an update at a future session (...) including the FAO Legal Office’s engagement in this process as well as progress being made on the review*”.<sup>2</sup>

2. Accordingly, this item has been placed on the Provisional Agenda of the Committee 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*”.

#### II. Background

3. As previously recalled,<sup>3</sup> the review of the jurisdictional set-up of the United Nations common system was initiated following a request of the United Nations General Assembly (hereinafter “UNGA”) in its Resolution 74/255 B of 27 December 2019,<sup>4</sup> in which it expressed “*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*”.

4. This Resolution was adopted following the judgments of the Administrative Tribunal of the International Labour Organization (hereinafter “ILOAT”) setting aside, in July 2019, decisions made by the International Civil Service Commission (hereinafter “ICSC”) regarding the post adjustment multiplier applicable to staff members serving in Geneva, Switzerland, based on its 2016 cost-of-living survey in that city. Subsequently, in March 2021, the United Nations Appeals Tribunal

<sup>1</sup> CCLM 118/4.

<sup>2</sup> CL 172/10.

<sup>3</sup> CCLM 118/4, paragraphs 2-6.

<sup>4</sup> UN Doc. A/RES/74/255 A-B.

(hereinafter “UNAT”) ruled, further to appeals lodged by staff members serving in Geneva with organizations under the jurisdiction of the UNAT, that the said ICSC decisions were valid. As a result of these conflicting judgments, staff members based in Geneva are subject to different levels of pay depending upon the administrative tribunal exercising jurisdiction over their organization.

5. A first report on this question was issued by the UN Secretary-General in January 2021.<sup>5</sup> It was reviewed by the UNGA in April 2021,<sup>6</sup> and an additional report was requested, “*with detailed proposals (...) on practical options, giving priority to measures involving changes to the adjudication of cases involving [the ICSC]*”. This second report<sup>7</sup> was circulated to the CCLM members before its 117th Session in October 2022.<sup>8</sup>

6. In response to the UNGA’s request, the report included the following three proposals for consideration: i) facilitating submissions by the ICSC to the UN and ILO administrative tribunals during litigation of complaints arising out of an ICSC decision or recommendation; ii) seeking ICSC guidance after a Tribunal issues a judgment concerning an ICSC decision or recommendation; and iii) the establishment of a joint ILOAT-UNAT chamber competent to issue interpretative, preliminary or appellate rulings.

7. The first two proposals were widely supported among organizations participating in the UN common system, including FAO. However, “[t]here was a wide divergence of views among stakeholders on the concept of the joint chamber”.<sup>9</sup> Some stakeholders objected to the proposal per se, considering it to be a disproportionate solution to the problem at hand, bearing in mind that the matters giving rise to this exercise had been the first and only incidence of conflicting judgments. Others who supported the idea in principle held differing views about the scope of the joint chamber’s powers as regards the type of rulings that should be issued and the legal authority of such rulings. Other points of divergence pertained, *inter alia*, to the body of law that should be applied by a joint chamber, the extent of its judicial review authority, the possible infringement on the independence and autonomy of the respective Tribunals brought about by the creation of a joint chamber, the inclusion of an even or uneven number of judges, and the additional costs that this new chamber would entail.

8. Despite these significant divergent viewpoints among stakeholders, the Secretary-General’s report concluded with a recommendation “*that the proposal for a joint chamber be advanced and concretized for review by the General Assembly and the ILO Governing Body*”.<sup>10</sup>

9. The UNGA resolution regarding the second report of the Secretary-General was adopted on 30 December 2022,<sup>11</sup> and was subsequently shared with CCLM members for consideration during the 118th Session of the Committee, in March 2023.<sup>12</sup> Proposals i) and ii) were not controversial and the UNGA requested the ICSC and other relevant stakeholders to implement them when appropriate. As for proposal iii), i.e. the establishment of a joint chamber of the ILOAT and UNAT, the UNGA decided as follows:

*Invites the Secretary-General to complete the work on the outstanding legal and practical aspects pertaining to the jurisdictional set-up of the United Nations common system, including finalizing past proposals and assessing the viability of other options, including those proposed by the stakeholders as reflected in the report of the Secretary-General, and to submit final proposals no later than the main part of the seventy-eighth session of the General Assembly.*

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<sup>5</sup> UN Doc. A/75/690.

<sup>6</sup> UNGA Resolution 75/245 B.

<sup>7</sup> UN Doc. A/77/222.

<sup>8</sup> CCLM 117/INF/1.

<sup>9</sup> UN Doc. A/77/222, paragraph 97.

<sup>10</sup> UN Doc. A/77/222, paragraph 111.

<sup>11</sup> UNGA Resolution 77/257.

<sup>12</sup> CCLM 118/4, paragraph 7.

10. The CCLM was informed<sup>13</sup> during its last session that the UN Secretariat and the International Labour Office (hereinafter “the ILO”) had proposed further consultations among UN common system organizations through the informal Legal Advisors Networks. The UN Secretariat and the ILO considered that these consultations would help clarify pending issues and addressing concerns that have been raised regarding the proposed joint chamber.

11. It is noted that, during its last session, the Committee<sup>14</sup> was also informed that the UNGA had decided to amend Articles 10 and 11 of the Statute of the ICSC, by resolution adopted on 30 December 2022. These amendments aimed at clarifying the authority of the ICSC under Article 11 (c) of its Statute to establish post adjustments applicable to each duty station. This fundamental question of the authority of the ICSC led to the judgments by the ILOAT, in July 2019, concluding that the ICSC decision on the applicable post adjustment in Geneva was *ultra vires*.

### III. Update on subsequent developments

#### A. Consultations through the Legal Advisors Networks

12. The consultations on an appropriate response to the UNGA’s request of 30 December 2022 started with a letter of 23 February 2023 sent by the UN Secretariat and the ILO to agencies participating in the Legal Advisors Networks. This led to two rounds of consultations and exchanges of views, in which FAO participated fully.

13. In their initial communication, the UN Secretariat and the ILO explained that they were aiming at bringing the review of the jurisdictional set-up to a successful conclusion and proposed four possible approaches to this end:

- (i) *increased informal exchanges between the United Nations Dispute Tribunal (UNDT), the UNAT and the ILOAT;*
- (ii) *the establishment of a joint chamber of the UNAT and the ILOAT, to be convened on an as-needed basis and with narrowly circumscribed jurisdiction;*
- (iii) *the designation of one tribunal which would be conferred exclusive jurisdiction to hear cases related to the implementation of recommendations and decisions of the International Civil Service Commission; and*
- (iv) *the establishment of an appeal mechanism, with limited jurisdiction over cases relating to the Commission’s recommendations and decisions.*

14. Two briefings were organized to discuss these proposals, following which FAO circulated its comments on 14 April 2023. FAO observed that two significant developments had materialized since the review started: firstly, the amendment to the ICSC Statute in December 2022 and, secondly, the firm position taken by the ILOAT judges against the proposal to establish a joint chamber.

15. On the first point, FAO observed that the original request by the UNGA for a review of the jurisdictional set-up of the UN common system flew from the ILOAT judgments of July 2019 quashing as *ultra vires* the ICSC’s decisions on post adjustment multipliers for Geneva based on the 2016 survey. With the amendment to the Statute of the ICSC confirming the jurisdiction of the Commission in this area and given that only one instance of conflicting judgements by the ILOAT and the UNAT had occurred since the ICSC was created in 1975, FAO considered that the urgency to address any inconsistencies in the application of ICSC decisions had significantly receded.

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<sup>13</sup> CCLM 118/4, paragraph 10.

<sup>14</sup> CCLM 118/3.

16. The second important factor was the firm opposition to the establishment of a joint chamber expressed by the judges of the ILOAT. They considered this proposal to be “*fundamentally unsound*” and stated that “[they] *do not support it*”.<sup>15</sup>

17. Based on these preliminary considerations, FAO expressed the view that maintenance of the *status quo* would be a valid outcome of the ongoing review. Nonetheless, FAO stated that it could join an eventual consensus among organizations of the UN common system supporting the establishment of a joint chamber competent to issue preliminary rulings only, provided that such rulings be binding on the parties. FAO clarified that this position was subject to approval by the FAO Governing Bodies, which had taken the decision to accept the jurisdiction of the ILOAT.

18. As for the other options listed under paragraph 13 above, FAO saw no downside to proposal i) and supported it. Proposals iii) and iv) were not supported.

19. The staff representative bodies of FAO, i.e. the Union of General Service Staff (UGSS) and the Association of Professional Staff (AP-in-FAO) were consulted as part of this initial round of consultations. Both expressed their preference for the *status quo* and their objection to the creation of a joint chamber, out of concern that it would limit the independence of the ILOAT. They also based their objections on the differences between the respective mandates and power of review of the ILOAT and the UN Tribunals. These views were incorporated in FAO’s comments sent on 14 April 2023 to the UN Secretariat and the ILO.

20. A second round of consultations was initiated following a message of 9 May 2023 from the UN Secretariat, forwarding some adjustments to the proposal for the establishment of a joint chamber. However, it acknowledged that “*several stakeholders have expressed their strong principled opposition*” to the establishment of a joint chamber.

#### *B. Joint position adopted by nine UN common system agencies*

21. In line with the position it had communicated earlier, FAO joined eight other UN common system agencies<sup>16</sup> in a common statement of 2 June 2023, which reads in part as follows:

*(...) we do not wish to submit additional observations at this time and (...) we reaffirm the positions previously expressed in our respective submissions. In summary, we do not believe there is a need to review the jurisdictional setup of the UN common system in light of the recent amendments to the ICSC statute. Furthermore, we are doubtful about the effectiveness and proportionality of the proposals in addressing the alleged issue they aim to resolve. Accordingly, our common position regarding the on-going review is to maintain the status quo.*

(...)

*We further note that reservations about the proposals in principle are also raised by key stakeholders, whose buy-in is essential not only for instilling legitimacy in the adoption of the proposed measures, but also for facilitating their effective implementation.*

22. It is noted that these nine Organizations, including FAO, are all under the jurisdiction of the ILOAT.

<sup>15</sup> UN Doc. A/77/222, Annex II, page 28.

<sup>16</sup> Respectively the International Telecommunication Union (ITU), the Organization for the Prohibition of Chemical Weapons (OPCW), the Pan American Health Organization (PAHO), the Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Industrial Development Organization (UNIDO), the World Health Organization (WHO), and the World Intellectual Property Organization (WIPO).

### C. Third report of the Secretary-General

23. In August 2023, the Secretary-General submitted his third report on the review of the jurisdictional set-up of the UN common system<sup>17</sup> in response to the requests made by the UNGA in its resolution 77/257 of December 2022. The report includes a detailed presentation of the structure, composition and competence of the proposed joint chamber. It would be authorized to issue preliminary rulings concerning the lawfulness of ICSC decisions and recommendations. These preliminary rulings would be binding on the parties before the tribunal having referred the matter to the joint chamber. Draft amendments to the statutes of the ILOAT, UNDT and UNAT that would be required for the establishment of a joint chamber were annexed to the report.

24. The Secretary-General considered that the establishment of a joint chamber could be a suitable measure to help avoid divergent jurisprudence by the two tribunal systems. However, it was recognized that “*even with possible further refinements, the proposal lacks, at present, the level of support by the stakeholders that is required for its implementation, notably from the [ILOAT] and the [UNAT]*”.<sup>18</sup>

25. This reality was reiterated in the report’s conclusion, in the following terms:

*However, the majority of stakeholders do not support or have strong reservations about this proposal, raising various concerns. Among them are the two tribunals, which have expressed their outright opposition. It is also recognized that there are strong objections expressed by the non-governmental groups of the ILO’s Governing Body. Without the support of these key stakeholders, the prospects for the acceptance and practical implementation of the proposal are compromised.*<sup>19</sup>

26. On 28 July 2023, the nine agencies mentioned above, including FAO, reacted to an advance copy of the report by confirming the position previously communicated to the UN Secretariat in June 2023. Part of the joint statement read as follows:

*The secretariats of FAO, ITU, OPCW, PAHO, UNAIDS, UNESCO, UNIDO, WHO and WIPO reaffirm the positions previously expressed (...). In summary, we do not believe there is a need to revise the jurisdictional setup of the UN common system in light of the recent amendments to the ICSC statute. Furthermore, we are not convinced by the effectiveness and proportionality of the proposals in view of the actual issue they aim to resolve. Accordingly, our common position regarding the ongoing review is to maintain the status quo.*

27. At this stage of the review of jurisdictional set-up of the common system, FAO is of the view that maintaining the *status quo* would be the preferable outcome. Notably, the proposal for the establishment of a joint chamber appears unlikely to materialize, given the strong reservations expressed by many stakeholders and the firm opposition communicated by the judges of the ILOAT and the UNAT. FAO also maintains its view that the establishment of a joint chamber, altering the architecture of the two tribunal systems, may be excessive in light of the limited likelihood of recurrence of conflicting judgments regarding ICSC decisions, especially in light of amendments to the ICSC Statute.

28. The FAO Legal Office will continue to monitor closely this ongoing review and report future developments to the CCLM.

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<sup>17</sup> UN Doc. [A/78/154](#)

<sup>18</sup> UN Doc. [A/78/154](#), paragraph 52.

<sup>19</sup> UN Doc. [A/78/154](#), paragraph 76 (c).

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

29. 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 this matter at a future session.