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Programme, Financial and Administrative Section

PFA

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Review of the jurisdictional set-up of the United Nations common system

Purpose of the document

This document provides updated information on the review of the jurisdictional set-up of the United Nations (UN) common system that is being undertaken by the UN Secretary-General at the request of the UN General Assembly. In particular, it contains information on the third report on the review issued by the Secretary-General, which finalizes proposals to address the issue of inconsistent implementation of the recommendations and decisions of the International Civil Service Commission and assesses the viability of other options. The Governing Body is invited to take note of the third report of the Secretary-General and his overall assessment and to defer any action at this stage (see the draft decision in paragraph 26).

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](#); [GB.346/PFA/12\(Rev.1\)](#); [GB.347/PFA/INF/11](#).

► Introduction

1. In August 2023, the United Nations (UN) Secretary-General published his third report on the review of the jurisdictional set-up of the UN common system.¹ The report was prepared in response to UN General Assembly resolution 77/257, which invited 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”.²
2. It is recalled that the review exercise was initiated in 2019 by virtue of General Assembly resolution 74/255, which was adopted in the aftermath of the judgments of the ILO Administrative Tribunal concerning the Geneva post adjustment cases.³ The first report of the Secretary-General on the review was published in January 2021 and provided an overview of the jurisdictional set-up of the UN common system and outlined various options to address the issue of inconsistent implementation of the recommendations and decisions of the International Civil Service Commission (ICSC).⁴ The second report was published in August 2022 and comprised a set of more detailed proposals to address the issue of inconsistent application of ICSC recommendations and decisions as a result of conflicting judgments of the two tribunals of the UN common system.⁵ They included: a proposal to facilitate ICSC submissions to the tribunals during litigation arising out of ICSC recommendations or decisions; a proposal to facilitate ICSC guidance following tribunal judgments in cases involving ICSC recommendations or decisions; and a proposal to establish a joint chamber of the ILO Administrative Tribunal and the UN Appeals Tribunal to issue interpretative, preliminary and/or appellate rulings in cases involving ICSC recommendations and decisions.
3. The Governing Body has been kept regularly informed of the progress of the review exercise.⁶ At its 346th Session (October–November 2022), it took note of the proposals set out in the Secretary-General’s second report on the review and of the comments of the judges of the ILO Administrative Tribunal on those proposals. Furthermore, it requested the Director-General to continue to engage with the UN Secretariat, taking into account the views expressed during its discussion on the item, and to prepare an updated report for its consideration at its 349th Session (October–November 2023).⁷
4. As requested by the Governing Body, the Office has prepared this document to give a summary account of the Secretary-General’s third report on the review and his overall assessment of the advisability of implementing any of the proposals that have been developed.

¹ UN General Assembly, *Review of the jurisdictional set-up of the United Nations common system: Report of the Secretary-General*, A/78/154, 2023.

² UN General Assembly, resolution 77/257, *Review of the jurisdictional set-up of the United Nations common system*, A/RES/77/257 (2023).

³ UN General Assembly, resolution 74/255. *United Nations common system*, A/RES/74/255 B (2020).

⁴ UN General Assembly, *Initial review of the jurisdictional set-up of the United Nations common system: Report of the Secretary-General*, A/75/690, 2021.

⁵ UN General Assembly, *Review of the jurisdictional set-up of the United Nations common system: Report of the Secretary-General*, A/77/222, 2022.

⁶ GB.341/PFA/INF/8; GB.344/PFA/INF/9; GB.346/PFA/12(Rev.1); and GB.347/PFA/INF/11.

⁷ GB.346/PV, para. 1153.

► Proposals for promoting consistency in the implementation of ICSC recommendations and decisions

5. As specifically requested by the General Assembly in resolution 77/257, the Secretary-General's third report contains finalized proposals concerning the possible establishment of a joint chamber of the ILO Administrative Tribunal and the UN Appeals Tribunal to issue preliminary rulings in cases involving ICSC recommendations or decisions (paras 25–53). It also contains an assessment of the viability of three other options, namely:
 - (a) increased informal exchanges between the tribunals, a proposal that has been revived in the light of the readiness expressed by the tribunals to explore this option (paras 54–61);
 - (b) the designation of one tribunal with exclusive jurisdiction to hear cases related to the implementation of ICSC recommendations or decisions, a proposal that was submitted by the ICSC (paras 62–68);
 - (c) the establishment of an appeal mechanism with limited jurisdiction over cases arising from ICSC recommendations and decisions, a proposal that was put back on the table during the consideration of the second report of the Secretary-General, despite the initial lack of interest in this possibility (paras 69–74).

The report also contains a set of conclusions drawing from the consultations (paras 75–77).

6. The third report is premised on the Secretary-General's key consideration that divergent judgments of the tribunals on ICSC recommendations and decisions carry the risk that key features of the UN common system will be inconsistently implemented by the participating organizations, directly undermining the scope and purpose of the common system and that, while such a split in the jurisprudence may be atypical and exceptional, it is detrimental to organizations and staff and undermines trust and confidence in the system, as well as the credibility of the system. Divergences between the tribunals on such critical matters should therefore be avoided as a matter of principle (para. 20). Moreover, the Secretary-General observes that the recent amendments to the ICSC statute, set out in General Assembly resolution 77/256, have addressed an important yet strictly limited issue, namely the ICSC's authority to establish post adjustment multipliers, while the comprehensive assessment and review of the compensation system scheduled to be presented to the General Assembly in 2026 may well give rise to litigation and this, in turn, would carry an inherent risk of further divergences in the jurisprudence, with attendant negative consequences for the unity and cohesion of the common system as a whole (para. 21).
7. In a manner similar to the first and second reports, the third report was prepared in close consultation with the Office, on the understanding that the Office's participation was without prejudice to the views and decisions of the Governing Body and that the assessment of the proposals and the conclusions of the report could not be deemed to reflect an endorsement by the Office (para. 15). The UN Secretariat was apprised of the strong reservations voiced by some ILO constituents in the discussions held at the 346th Session (October–November 2022) of the Governing Body.
8. With respect to the establishment of a joint chamber of the ILO Administrative Tribunal and the UN Appeals Tribunal, which remains the most advanced proposal, the Secretary-General's third report contains draft amendments to the statutes of the tribunals. The establishment of the joint chamber would be provided for in the respective statutes, while the details of its composition, competence and procedure would be set out in a common annex to them. The

joint chamber would be convened on an ad hoc basis and would be composed of three judges from each tribunal, with the presiding judge having a casting vote. The joint chamber would not be extraneous to the ILO Administrative Tribunal or the UN Appeals Tribunal, but would rather be a shared ad hoc body that would form part of the set-up of the two tribunals. It would not be a permanent body and its composition could vary in different cases.

9. The joint chamber would be competent to issue preliminary rulings concerning the lawfulness of an ICSC recommendation or decision in respect of four matters, namely:
 - (a) whether the recommendation or decision is consistent with the ICSC statute and rules of procedure, both procedurally and substantively, including whether the ICSC has the authority to make a recommendation or decision on a specific subject;
 - (b) whether the recommendation or decision is consistent with the ICSC's methodology, developed through the ICSC's own work as a subsidiary body of the General Assembly;
 - (c) whether the methodology employed is tainted by a material error; or
 - (d) whether the recommendation or decision is consistent with the legal framework governing the international civil service.
10. Under the proposed amendments, it would be for the tribunals concerned under defined conditions to refer a question to the joint chamber for a preliminary ruling in the context of a case concerning the implementation of an ICSC recommendation or decision. Pending the preliminary ruling, the proceedings would be suspended.
11. The preliminary ruling would be binding on the tribunals when adjudicating such cases. Otherwise, its use would not be efficient and its purpose of providing legal clarity and consistency would be undermined. The joint chamber would have the discretion to establish its procedure but would be expected to issue its reasoned ruling in writing within three months of the referral of a matter. Proceedings would be based on written submissions and deliberations could be conducted remotely, thus saving resources.

► Views of stakeholders and assessment

12. The four proposals set out in the Secretary-General's third report have been the subject of extensive consultations with all stakeholders concerned, namely the UN system organizations, their staff federations, the tribunals, the ICSC, the Internal Justice Council and the Office of the Administration of Justice. Three rounds of consultations and a series of briefings were held between February and July 2023.
13. The extensive consultative process has provided the opportunity to the various stakeholders to express a broad array of views on the inconsistent implementation of ICSC recommendations and decisions, on the establishment of the joint chamber and on the other proposals.
14. With regard to inconsistent implementation, the Secretary-General's third report draws attention to the diverging positions that emerged among stakeholders during the consultative process. Some considered the review to be ill-conceived and disproportionate in view of the rare occurrences of inconsistent implementation of ICSC recommendations and decisions (para. 18). Others considered that, even if occurrences of divergent jurisprudence were infrequent, their possible significant and long-lasting impact warranted a solution (para. 19).

15. The third report notes significantly different views among the stakeholders on the desirability and viability of establishing a joint chamber. Among those opposing it, some considered that the establishment of a joint chamber would be disproportionate to the nature of the issue, which they saw as being sporadic. Others were of the view that the differences in the case law of the tribunals would be difficult to reconcile. Yet others raised concerns about potential infringements of the independence and autonomy of the tribunals and the potential for significant delays and unnecessary costs (para. 50).
16. By a letter dated 28 July 2023 from its President and Vice-President to the Director-General, the ILO Administrative Tribunal reaffirmed its earlier position and considered that “its many and fundamental concerns regarding the proposed creation of a joint chamber ... have not been adequately understood and addressed. Furthermore ... the new proposals formulated in the report would limit, in a most problematic way, its existing competence in reviewing matters arising from the UN common system. The Tribunal therefore continues to consider that this proposal is fundamentally unsound and should not be pursued.” The text of the letter is reproduced in the appendix.
17. In contrast, some stakeholders expressed support for the establishment of a joint chamber as a practical and effective approach to mitigating the risk of divergent jurisprudence between the tribunals and the solution most likely to preserve the unity and coherence of the common system (para. 51). While considering that the establishment of a joint chamber could be a suitable solution, the Secretary-General acknowledged that the proposal lacks, at present, the level of support from the stakeholders that would be required for its implementation, notably from the ILO Administrative Tribunal and the UN Appeals Tribunal (para. 52).
18. With respect to the three other proposals, the third report notes that, although the tribunals were prepared to engage in informal exchanges with each other, with the caveat that a number of safeguards should be put in place so as to preserve judicial independence (para. 57), the Secretary-General considers that such exchanges would not, in any event, constitute a way to resolve the issue of inconsistent implementation of ICSC recommendations and decisions (para. 59). The proposal to give exclusive jurisdiction to one tribunal was met with scepticism and raised numerous questions of a political and legal nature (paras 63 and 64). The proposal to establish an appeal mechanism also lacked significant support, largely because of the delays that an additional level of review would cause and the additional resources that it would require (para. 70).
19. In his conclusions, the Secretary-General notes that, at the current stage, stakeholders have not coalesced around any of the proposals put forward, with some doubting that any action is necessary in the first place and, in any event, opposing all proposals that would change the existing jurisdictional set-up of the UN common system (para. 76(a)).
20. The Secretary-General stresses, nonetheless, that maintaining the status quo carries significant risks for the cohesion and consistency of the UN common system as even one case of inconsistent implementation of an ICSC recommendation or decision could have harmful repercussions for organizations and staff (para. 76(e)).
21. The Secretary-General also underlines that any measures involving changes to the adjudication of cases involving ICSC matters by the tribunals would require, at the very least, the agreement of the tripartite constituents of the ILO, as the custodial institution of the ILO Administrative Tribunal, and, depending on the nature of those changes, the agreement of other organizations concerned. Consequently, any unilateral action by the General Assembly would be neither advisable nor sufficient to achieve a practical outcome (para 76(b)).

22. With regard to the proposal for a joint chamber, the Secretary-General recognizes the reservations of the majority of stakeholders, the outright opposition of the two tribunals and also the strong objections expressed by the non-governmental groups of the Governing Body, that lead to the conclusion that the prospects for the acceptance and practical implementation of the proposal are compromised (para. 76(c)).

► Conclusion

23. In view of the Secretary-General's overall assessment and conclusions, the Office considers that the conditions are not met for the Governing Body to move forward at this stage with consideration of any of the proposals, including the possible amendment to the Statute of the ILO Administrative Tribunal with a view to setting up a joint chamber of the ILO Administrative Tribunal and the UN Appeals Tribunal. In particular, while acknowledging the risks that a status quo represents, any decision to work towards adopting amendments to the Statute of the ILO Administrative Tribunal for the establishment of a joint chamber would appear to be premature, at best.
24. Under the circumstances, the Governing Body may wish to defer any decision on the matter at this stage. It may also consider conveying its appreciation to the Secretary-General for having concluded the review exercise and for having undertaken a broad consultative process in this regard.
25. Given that the Secretary-General's third report will be considered by the General Assembly later in 2023, at its 78th session, the Governing Body may also wish to be kept informed of the outcome of those deliberations.

► Draft decision

26. **The Governing Body, having carefully examined the third report of the United Nations (UN) Secretary-General on the review of the jurisdictional set-up of the UN common system, decided to:**
- (a) **Express its appreciation to the Secretary-General for the work accomplished;**
 - (b) **take no follow-up action for the time being, noting the lack of support for the various proposals to address the issue of inconsistent implementation of the recommendations and decisions of the International Civil Service Commission, with the exception of the promotion of informal exchanges among the judges of the tribunals of the UN common system;**
 - (c) **request the Director-General to communicate this decision to the UN Secretariat and to keep the Governing Body informed of any decisions that the UN General Assembly may take on this matter at its 78th session or thereafter.**

► Appendix

Letter of the President and the Vice-President of the ILO Administrative Tribunal



28 July 2023

Dear Director-General,

With reference to the invitation made on 3 July 2023 to the Tribunal to provide comments on the latest report of the UN Secretary-General on the review of the jurisdictional set-up of the United Nations common system, the Tribunal wishes to reaffirm its adherence to the various arguments presented in its letters of 25 July 2022 and 12 April 2023. The Tribunal believes that its many and fundamental concerns regarding the proposed creation of a joint chamber, as expressed in these previous letters, have not been adequately understood and addressed. Furthermore, the Tribunal notes that the new proposals formulated in the report would limit, in a most problematic way, its existing competence in reviewing matters arising from the UN common system. The Tribunal therefore continues to consider that this proposal is fundamentally unsound and should not be pursued.

Regarding exchanges between the UN Appeals Tribunal and the ILO Administrative Tribunal, this Tribunal noted with interest that in its Resolution 77/757 the UN General Assembly encouraged “increased informal exchanges and sustained communication” between the Tribunals. Indeed, the two Tribunals have recently created a channel of communication at the level of their Presidencies. Unfortunately, the lack of funding has prevented a planned meeting in person of the Presidencies, which would have allowed more productive exchanges.

Finally, the Tribunal notes with some concern that the UN Secretary-General’s report seems to suggest that the exchanges between the Tribunals would have to be “transparently communicated” and/or should be “facilitated and administered” by the UN and the ILO. Such administrative arrangements do not appear to us to be a means of allowing informal exchanges of the type contemplated by the General Assembly but rather an entirely inappropriate attempt to control or regulate these exchanges. If so they would plainly not respect the two Tribunals’ full independence and, moreover, could undermine the conditions required for really productive contacts between them. This Tribunal does not see any need for involvement of anyone, beyond the Tribunals’ respective Registries, in the organization of such exchanges apart from the provision of funding.

Yours sincerely,

Judge Patrick Frydman
President of the Tribunal

Judge Michael Moore
Vice-President of the Tribunal