## INTRODUCTION

1. The Applicants are ten staff members of the United Nations Development Programme ("UNDP") who were based in Geneva, Switzerland, at the time of the contested decision. They are challenging the Administration's decision to implement a post adjustment multiplier resulting in a pay cut.

2. Identical individual applications were initially filed with the United Nations Dispute Tribunal ("UNDT/the Tribunal") in Geneva on 8 August 2018, and then consolidated (henceforth: the application) and transferred to UNDT in Nairobi on 14 February 2019 after the Geneva-based UNDT Judge President recused herself from the proceedings.[1]

## PROCEDURAL HISTORY

3. The applications belong to the fifth set ("waves") of appeals by the Applicants regarding the decision to implement a post adjustment change in the Geneva duty station resulting in a pay cut. The first three waves of applications stemming from the same decrease of post adjustment have been disposed of as irreceivable by way of UNDT judgments which became final. The applications belonging to the fourth wave were accepted as receivable being directed against individual decisions on reduction of post adjustment and application of transitional allowance. These were dismissed on the merits, by way of judgments which are not yet final. The fifth wave cases concern different individual decisions whereby an actual reduction in post adjustment had been implemented.

4. Pursuant to Order No. 039 (NBI/2019), the Respondent filed a reply on 15 April 2019.

5. It is noted that the parties agreed to accept as part of the record all evidence and arguments presented by them in the fourth wave case.[2] The facts described in the

[1] Order No. 008 (GVA/2019).
[2] Reply, para. 9.

following sections of this Judgment are based on the parties' pleadings, additional submissions totalling over 3000 pages and record of the hearing which the Tribunal held in the fourth wave of cases on 22 October 2018 and where evidence was given by Ms. Regina Pawlik, Executive Head of the International Civil Service Commission ("ICSC") and Mr. Maxim Golovinov, Human Resources Officer, Office of Human Resources Management ("OHRM") on the following: (i) the legal framework for the functions of the ICSC vis-à-vis the General Assembly and the Secretary-General; (ii) the methodology used by the ICSC to establish the cost of living; and (iii) the function of the transitional allowance.

6. On 3 July 2019, the International Labour Organization Administrative Tribunal ("ILOAT") rendered its Judgment No. 4134 in relation to complaints filed by International Labour Organization ("ILO") staff members based in Geneva challenging the ILO's decision to apply to their salaries, as of April 2018, the post adjustment multiplier determined by the ICSC based on its 2016 cost-of-living survey, which resulted in their salaries being reduced. The ILOAT set aside the impugned decision after concluding that the ICSC's decisions were without legal foundation and thus, the action of ILO to reduce the salaries of the complainants based on the ICSC's decisions was legally flawed.

7. On 22 July 2019, the Applicants filed a motion seeking leave to file submissions on ILOAT Judgment No. 4134 and its relevance to the instant case. By Order No. 106 (NBI/2019), the Tribunal admitted the Applicants' submissions regarding ILOAT Judgment No. 4134 into the case record. The Respondent filed a response to the Applicants' submissions on 7 August 2019.

8. The Respondent sought leave on 21 January 2020 to file General Assembly resolution 74/255 A-B (United Nations Common System). The Applicants filed a response to the motion on 5 February 2020.

**FACTS**

9. At its 38th session in February 2016, the Advisory Committee on Post

Adjustment Questions ("ACPAQ")[3] reviewed the methodology for the cost-of-living measurements in preparation for the 2016 round of surveys. The Committee made recommendations on several aspects, including the use of price data collected under

and staff federations expressed concern about the negative impact of a drastic reduction in post adjustment. The staff federations urged the ICSC to reinstate the 5 percent augmentation of the survey post adjustment index as part of the gap closure measure. Alternatively, they suggested a freeze on the multiplier for Geneva until the lower post adjustment index caught up with the prevailing pay index.[10]

12. In April 2017, the Executive Heads of Geneva-based organizations requested that ICSC provide information regarding the specific impact that the survey components and the changes to the methodology had on the 2016 survey results and proposed the deferral of any implementation until such information was available and validated in a process in which their representatives participated. The ICSC Chair provided the information on 9 May 2017.[11]

13. On 11 May 2017, the Department of Management informed staff members that: (a) the post adjustment index variances for Geneva translated into a decrease of 7.7% in the net remuneration of staff in the professional and higher categories; (b) the post adjustment change would be implemented effective 1 May 2017; (c) the new post adjustment would only be applicable to new staff joining Geneva on or after 1 May 2017; and (d) currently serving staff members would not be impacted until August 2017 due to payment of a personal transition allowance ("PTA").[12] The PTA reflected the difference between the new and the existing post adjustment multiplier and was supposed to be adjusted every three months until it was phased out.[13]

14. Between 31 May and 2 June 2017, an informal review team of senior statisticians,[14] requested by the Geneva Human Resources Group[15], conducted a targeted review of the 2016 cost-of-living survey in Geneva to ascertain "whether, from a statistical perspective, the calculations used in the 2016 survey could be considered

[10] Ibid., paras. 92-98.
[11] Application, annex 13, paras. 5 - 7. The organizations were: ILO, UNOG, ITU, WIPO, WHO, UPU, IOM, WMO, UNAIDS and UNHCR.
[12] Reply, annexes 3, 4 and 5.
[13] Reply, annex 5, section V.
[14] Application, annex 13, page 18. The review team consisted of two staff members of ILO, one staff member of UNCTAD and an international consultant.
[15] Ibid., page 19.

of good quality and sufficiently robust to be designated 'fit for purpose'". Given the relatively short time, the review was not a comprehensive review of all elements of the ICSC methodology or implementation of the methodology. However, the reviewers concluded that: (a) due to several serious calculation and systemic errors in the compilation of the ICSC results, the ICSC calculations for Geneva could not be considered of "sufficiently good quality to designate them 'fit for purpose'; (b) implementation by the ICSC does not always correspond with the "approved" methodology described in the formal documentation; (c) many important compilation methodologies were not described in the formal documentation; and (d) several methodological changes introduced since 2010 had increased the instability and volatility of the indices used to calculate the cost-of-living comparisons. These changes appear to have almost universally reduced the Geneva post adjustment index in 2016.[16]

15. On 10 July 2017, the Applicants sought management evaluation of the decision to implement the post adjustment change to their salaries effective 1 May 2017 that would result in a 7.7% reduction in their net remuneration.[17] In the ensuing litigation, this Tribunal, in its Judgment No. UNDT/2018/024, dismissed the application as irreceivable, having found that no individual decisions had been taken in the Applicants' cases.

16. Pursuant to a decision made at the ICSC's 85th session in July 2017, the ICSC engaged an independent consultant to review the methodology underlying the post adjustment system and as 11.c

implementation of the pay cut.[26] On 13 April 2018, they requested management evaluation of the reduction of their salaries as evidenced in their February pay slips.[27]

21. On 6 June 2018, the Assistant Administrator and Director, Bureau for Management Services, UNDP, responded to the Applicants' management evaluation request of 13 April 2018. The Assistant Administrator informed the Applicants that: challenges to the ICSC's decisions were not receivable as the ICSC is "answerable and accountable" only to the General Assembly; ICSC decisions cannot be imputed to the Secretary-General in the absence of any discretionary authority to execute such decisions; the ICSC's 18 July 2017 decision was binding on the Secretary-General; the payment of post adjustment in accordance with the post adjustment multiplier established by the ICSC is not an administrative decision; and they did not have an acquired right to post adjustment.[28] The Applicants filed the current application on 8 August 2018.

**RECEIVABILITY**

22. The Tribunal finds that the application is timely, having been filed within the applicable deadline following a properly requested management evaluation.

23. On the question whether the application concerns an individual administrative decision with adverse consequences for the Applicants' terms of appointment, as required by art. 2 of the heSy-Ghe hebunheahei3(fil-34prc)1ous0heholdpro,fil-34 TJ 1 0 0 -1 0 168.08734

of general order, but, as will be discussed later, only reviews them incidentally, the decisions impugned in the fifth wave of cases may be appealed and adjudicated in itself without entering in the relation of *lis pendens*, or *res judicata*, with cases belonging to

28. Systemically speaking, the use of discretion as criterion for determination of an administrative decision has no basis in any generally accepted doctrine. Conversely, the doctrine of administrative law recognizes both discretionary decisions and constrained decisions, the latter having basis in substantive law which determines that wherm [5on f0 0 -1 0 93.oesined ret8-6 -1 0 3c

> standards of lawfulness and good administration: purely mechanical powers are hence reviewable on grounds of legality."[42]

35. This Tribunal assumes, therefore, that the claim to have discretion as criterion for receivability has now been set aside.

36. The Tribunal finds, moreover, that the present application is unambigously directed against individual decisions concerning each of the Applicants. Whatever argument the authors used in support, it has no bearing on the identification of the contested decision. To the extent the Tribunal is authorised to individualise and articulate pleadings of an applicant who exhibits difficulty with this respect, it must make such representations *bone fidei*, consistently with the presumed interest of the applicant. It is, however, not the Tribiunal's role – nor is the Respondent's- to pervert a clearly-articulated application, as the one here, so as to strike it for the lack of receivability.

37. The present application is receivable.

38. The question of the scope of the Tribunal's review of regulatory acts will be addressed in a further section of this judgment.

**MERITS**

39. There is no dispute that the Secretary-General acted in accordance with the ICSC decision. The merits of his decision are contested by the Applicants on the following grounds: in deciding on the post adjustment the ICSC acted outside its statutory authority, which vitiates individual decisions taken by the Secretary-General; the applied methodology was inappropriate, including that factual errors were committed in applying it; the decision is in normative conflict with staff members' acquired rights and causes inequality of pay within the United Nations common system.

40. The Respondent replies that the ICSC decision on post adjustment reduction was taken in accordance with its statutory competence and the impugned decision

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properly implemented it; the Tribunal lacks competence to review legislative decisions and the Applicants are erroneously asking the Tribunal to assume powers it does not have by asking for a review of alleged flaws in the decisions by the ICSC and the methodology that it used; the issue of acquired rights does not arise.

41. The Tribunal will address the relevant arguments in turn.

**Did the ICSC have the requisite authority, under art. 11 of its Statute, to make a decision regarding a reduction in the post adjustment multiplier?**

42. The parties' arguments pertain to the following provisions of the ICSC Statute:

> *Article 10*
>
> The Commission shall make recommendations to the General Assembly on:
>
> (a) The broad principles for the determination of the conditions of service of the staff;
>
> (b) The scales of salaries and post adjustments for staff in the Professional and higher categories;
>
> (c) Allowances and benefits of staff which are determined by the General Assembly;
>
> (d) Staff assessment.
>
> *Article 11*
>
> The Commission shall establish:
>
> (a) The methods by which the principles for determining conditions of service should be applied;
>
> (b) Rates of allowances and benefits, other than pensions and those referred to in article 10 (c), the conditions of entitlement thereto and standards of travel;
>
> (c) The classification of duty stations for the purpose of applying post adjustments.

*Applicants' submissions*

43. The Applicants' case is that the Secretary-General is not obliged to implement

decisions taken without proper authority.[43]

44. The ICSC did not have authority under art. 11 of the ICSC statute to unilaterally impose alterations to the survey methodology, operational rules and to the Geneva post adjustment index without approval from the General Assembly. The Applicants submit that decisory authority regarding classification of duty station under art. 11(c) pertains to determining bands in which duty stations would be placed. Whereas a decision regarding the appropriate multiplier to apply to a duty station corresponds with an art. 10(b) decision rather than an art. 11(c) decision since it indicates a precise financial calculation. Thus, the ICSC cannot unilaterally impose alterations to the survey methodology, operational rules and to the Geneva post adjustment index without first seeking approval for the same from the General Assembly. The ICSC granted itself decisory powers in all matters contrary, thereby exceeding its delegated power.[44]

45. The Applicants further echo ILOAT Judgment 4134 in its analysis of art. 10 of the ICSC statute as exclusively governing the *"determination of post adjustments in a quantitative sense"* and its conclusion that because articles 10 and 11 cover *"mutually exclusive matters",* art. 11 cannot cover any matter that affects the quantification of post adjustment. There has been no change to the ICSC statute in accordance with the prescribed procedure. In the absence of an amendment to the ICSC statute, the ILOAT rejected the Respondent's argument that the migration of the decisory authority had been accepted by the General Assembly by virtue of its acceptance of the alteration to the manner of calculating the post adjustment. The ILOAT similarly rejected the suggestion that the practice itself had broadened the scope of the ICSC's powers beyond those contained in the ICSC statute, as per its established position that "a practice cannot become legally binding if it contravenes a written rule that is already in force".[45]

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[43] Application, page 7, paras.11-13.
[44] Application, paras. 42 - 46.
[45] Judgment 4134 consideration 33 and consideration 39, referring to Judgment 3883, consideration 20; Judgment 3601, consideration 10; and Judgment 3544, consideration 14.

46. The Applicants submit[46]

The Respondent underlines that in paragraph 2 of resolution 44/198 I D, the General Assembly took note "of all other decisions taken by the ICSC in respect of the operation of the post adjustment system as reflected in chapter VI of volume II of its report", except one issue, not relevant for the matter at hand, which means that it approved the establishment of a post adjustment multiplier for each duty station. The Respondent asserts that the General Assembly saw no reason to additionally endorse/approve these decisions.[51] In 1991, the General Assembly, by its resolution 45/259, approved deletion of post adjustment schedules and references to such schedules from the Staff Regulations.

49. The Respondent explains that the review of the post adjustment system was an integral part of the comprehensive review provided for in General Assembly resolution 43/226 of 21 December 1988. The "major simplification of the post adjustment system (…)" was one of the elements of that review.

50. The Respondent argues against ILOAT's interpretation of art. 10 as exclusively governing the *"determination of post adjustments in a quantitative sense"*. According to the Respondent, this reasoning reflects a misunderstanding of how the post adjustment system has operated, before and after the 1989 changes to the post adjustment system.[52] The ICSC has always assigned post adjustment multipliers to duty stations. The Respondent provides examples that before the changes were initiated in 1989 the ICSC did this by assigning each duty station to a class corresponding to a specific post adjustment multiplier. After the changes, the ICSC did this by establishing a specific post adjustment multiplier for each duty station. The Respondent stresses that classification of duty stations has always been linked with the establishment of post adjustment multipliers and, therefore, has always involved a determination of post adjustment in the quantitative sense without the need for General Assembly approval.[53]

51. The Respondent further submits that already in the second annual report of the ICSC, the ICSC emphasized its responsibility under art. 11 for "establishing the

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[51] Respondent's reply, para. 53.
[52] Respondent's submission in response to Order No. 106 (NBI/2019), para. 16 and annex 1A.
[53] Ibid., referring to 14 March 1985 Post Adjustment Classification Memorandum (annex 1.B, p. 13).

methods" for determining conditions of service and the classification of duty stations for the purpose of applying post adjustments. The ICSC stated that "the technical questions of methodology involved in computing post adjustment indexes, in making place-to-place and time-to-time comparisons and in classifying duty stations on the basis of the indexes" fell within its competence.[54] The General Assembly has not challenged the ICSC's authority in respect to post adjustment classification under art. 11(c).

52. Since

when the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation.[55] This follows general international practice, which refers to interpretation according to the 'ordinary meaning' of the terms 'in their context and in the light of [their] object and purpose' unless the parties intended to give the word a special meaning.[56] In the argument on ICSC's statutory competences, the central issue appears to lie in the fact that art. 10 *prima facie* confirms the competence of the General Assembly to decide post adjustment akin to the way it decides salaries. What does the ICSC ultimately decide upon, however, is conditioned by the meaning ascribed to the terms "scales" in the same article and "classification" in art. 11. The ordinary meaning of these terms is not informative; rather, they are particular to certain technical assumptions underpinning the ICSC Statute. In explaining the relevant competencies, therefore, it would be appropriate to examine the meaning of these terms intended by the parties, as evidenced by practice.

55. As demonstrated by the documents submitted by the Respondent as well as reports available on the ICSC website, the delineation of the relevant competencies was along the lines that the General Assembly decided legal parameters of the post adjustment and the ICSC decided its methodological parameters and applied both to calculating post adjustment at different duty stations. The ICSC has always, *ab initio* and notwithstanding changes concerning post adjustment schedules, determined the cost of living index as a step in the process of classification and, after abolition of scales in 1989 and subsequent changes in methodology, assigned post adjustment multipliers to duty stations.[57] Thus, the ICSC's decisory powers under art. 11(c) have always involved determination of post adjustment in the quantitative sense without the General Assembly's approval. The General Assembly, on the other hand, until 1985

[55] E.g., *Scott* 2012-UNAT-225.

[56] See UN Administrative Tribunal Judgment No. 942 (1999) para. VII, citing to Vienna Convention on the Law of Treaties, Articles 31.1 & 31.4, see also UN Administrative Tribunal Judgement No. 852, *Balogun* (1997); I.C.J. Reports 1950, p. 8 "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur".

[57] See e.g., A/74/30, paras, 19, 35 and 43 (Report of the International Civil Service Commission for the year 2019).

determined, under its art. 10 powers, two prerequisites for transition from one class to another: the required percentage variation in the cost of living index and required period for which it had to be maintained, the so-called schedules for post adjustment.[58] Moreover, until 1989 the General Assembly determined regressivity scales. The latter involved a "precise financial calculation" in terms of US dollars per index point for each grade and step; the calculations, however, were related to the salary scales only. The exercise of the General Assembly powers under art. 10 did not involve either confirming the determination of index points for duty stations or the calculation of post adjustment for each grade and step per duty station.

56. The post-1989 practice, therefore, does not "contravene a written rule that is already in force", in the sense that there has not been a shift in the subject matter competence. While the General Assembly gradually relinquished determining scales and schedules, so that post adjustment became the function of post adjustment index and the salary, there has not been usurpation of power on the part of the ICSC. The Tribunal's conclusion has been recently confirmed by General Assembly resolution 74/255 A-B of 27 December 2019:

> 1. *Reaffirms* the authority of the International Civil Service Commission to continue to establish post adjustment multipliers for duty stations in the United Nations common system, under article 11 (c) of the statute of the Commission;[59]
>
> 2. *Recalls* that, in its resolutions 44/198 and 45/259, it abolished the post adjustment scales mentioned in article 10 (b) of the statute of the Commission, and reaffirms the authority of the Commission to continue to take decisions on the number of post adjustment multiplier points per duty station, under article 11 (c) of its statute […].

57. It is clear, nevertheless that the ICSC statute had been crafted with a different method of determining post adjustment in mind. Resignation of post adjustment scales amounts to a change to the Statute. Retaining in the ICSC statute references to elements

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[58] It would seem that the General Assembly in its resolution 40/244 conferred on the Commission the power to "take steps to prevent the rules relating to a post adjustment increase" from adversely affecting the margin defined by the same resolution and thus, effectively authorised it to depart from schedules in case where post adjustment calculation indicated that it could be decreased.
[59] Resolution 3357 (XXIX).

of methodology that have been abolished is confusing and non-transparent and is

> and which accept the present statute (hereinafter referred to as the organizations).
>
> 3. Acceptance of the statute by such an agency or organization shall be notified in writing by its executive head to the Secretary-General.

60. As results from section 2, the United Nations has been juxtaposed with "specialized agencies and other international organizations …which accept the present statute".[62] As results from section 3, it is only "specialized agencies and other international organizations" who have the option of accepting, or not, the ICSC statute and, in accordance with art.30, any ensuing amendments. The United Nations, which,

"receivability of challenges to decisions by legislative bodies and by their subsidiary organs".[64]

63. The Respondent submits that, since 1987, the ILOAT has applied the principle that if a *"decision is based on one taken by someone else it is bound to check that the other one is lawful."* Executive heads of Organizations cannot argue before the ILOAT that they are bound by decisions made by legislative bodies or by their subsidiary organs. Rather, the executive heads of Organizations that appear before the ILOAT must demonstrate that they have examined whether such decisions are proper. This examination includes reviewing whether legislative decisions were made based on a *"methodology which ensures that the results are stable, foreseeable and clearly understood or transparent."*[65] If any flaws in the decisions are established by the ILOAT, the Organization can be found liable for the execution of a flawed legislative decision.

64. By contrast, the Respondent's case is that UNAT in *Lloret-Alcañiz et al.*[66], distinguished claims that challenged the legality of the Secretary-General's execution of legislative decisions from claims that challenged the legality of the legislative decisions themselves. The Respondent proceeds to cite UNAT in that its authority did

principle confirmed by UNAT in *Tintukasiri*:

> [The applicant] may sustain the illegality of the decision by the Secretary-General to fix and apply a specific salary scale to him/her, in which case the Tribunal could examine the legality of that salary scale without rescinding it.. [T]he Tribunal confirms its usual jurisprudence according to which, while it can incidentally examine the legality of decisions with regulatory power, it does not have the authority to rescind such decisions.[69]

69. The question arising on the basis on *Tintukasiri* in connection with the Respondent's argument is not, therefore, about jurisdiction to pronounce on the illegality of regulatory acts akin to a constitutional court, because this is expressly ruled out, and is, thus, not about "receivability of challenges to decisions by legislative bodies and by their subsidiary organs". Rather, the question properly articulated would be about the binding force of regulatory acts upon the Tribunal. In other words, the question is whether the UNDT and UNAT in exercising their jurisdiction over individual cases are bound to apply regulatory acts issued by the Organization without any further iquiry into their legality and, if so, whether the question turns on the hierarchy of the act.

70. The answer may be readily found in the advisory opinion by the International Court of Justice in relation to the jurisdiction of the former United Nations Adminstrative Tribunal (relied upon by the Appeals Tribunal in *Lloret-Alcañiz et al.*), where the IJC held:

rightly pointed out by the Respondent, the General Assembly confirmed in 2014 that:

> [A]ll elements of the system of administration of justice must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly" and that "decisions taken by the Dispute Tribunal and the United Nations Appeals Tribunal shall conform with the provisions of General Assembly resolutions on issues related to human resources management".

Administrative Tribunal and indeed from UNAT[73], that confirm this principle. Therefore, to the extent the Respondent appears to argue the binding nature of all regulatory acts, no matter the placement in the hierarchy, this proposition must be rejected. To accept it would deny the UNDT, and UNAT alike, independence from the executive, reduce its cognizance to a replication of the management evaluation process and deny staff members effective recourse to an independent tribunal, which is clearly against the rationale adopted by the General Assembly resolution 61/261.[74] Noting that the Respondent seeks support in the quote: *"recourse to general principles of law and the Charter of the United Nations by the Tribunals is to take place within the context of and consistent with their statutes and the relevant General Assembly resolutions, regulations, rules and administrative issuances*"[75], the Tribunal finds this statement's normative value limited to the importance of a proper application of the *lex specialis* principle.

74. The last pertinent issue on this score is one contemplated in the *Lloret-Alcañiz et al.* judgment. Contrary to the Respondent's linguistic parsing based on selective quotes from it, what the Appeals Tribunal confirmed in *Lloret-Alcañiz* was that UNDT and UNAT may also need to incidentally review acts originating from the General Assembly, where a question arises about a conflict of norms.[76] Altogether, with respect

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[73] In addition to *Tintukasiri, Pedicelli*, and *Lloret-Alcañiz* cases cited in the text of this Judgment, see e.g. *Scott* 2012-UNAT-225 accepting to review a challenge to literal reading of a staff rule based on general principle of law; *Neault* 2013-UNAT-345, para. 31 declaring staff rule inapplicable because of inconsistency with the Statute; *Gehr* 2013-UNAT-293 stating where there is ambiguity or a contradiction, the UNDT Statute prevails over the Staff Rules; *Couquet* 2015-UNAT-574 citing *Gehr* to support that staff rules prevail over administrative issuances; *Lemonnier* 2016-UNAT-679 citing *Neault* 2013-UNAT-345 and *Gehr* 2013-UNAT-293.

[74] Also, as recognized in Internal Justice Council reports "If the Dispute Tribunal and the Appeals Tribunal are seen simply as an arm of the Secretary-General's administration then they will not serve the purpose envisaged by the Redesign Panel on the United Nations system of administration of justice, which called for an open, professional and transparent system of internal justice" (A/70/188 dated 10 August 2015) and "The administration of any justice system worthy of the name is based on the rule of law and there can be no rule of law without an independent judiciary, as declared in article 10 of the Universal Declaration of Human Rights. The United Nations judges must not only be, but be seen to be, wholly independent of management and its lawyers. It goes without saying that one of the functions of

to the scope of review of regulatory acts, there is no difference either in statutory regulation or in "approach" between the ILOAT and the UNDT/UNAT system as both concern themselves only with incidental review. This can be clearly seen from the fact that neither ILOAT Judgment 4134 ruled on the illegality of the ICSC decision in the operative part of the judgment nor did UNAT rule on the illegality of staff rule 11.4 in the operative part of its *Neault* 2013-UNAT-345 judgment, while in both cases the regulatory acts were found unlawful.

75. In conclusion, the Respondent's assertion that that the "Applicants' claims must be rejected as non-receivable as they seek a review of the legality of the ICSC's decisions"[77] needs to be corrected on three levels: Firstly, denying receivability is untenable because the Applicants are contesting individual decisions concerning their terms of appointment, as discussed *supra*, and, while they contest the legality of the regulatory decision by the ICSC, they contest it as a premise for the claim of illegality of the individual decision and not with a claim to have the regulatory decision stricken. Secondly, determination whether to entertain a challenge to legality of the ICSC decision depends, primarily, on whether it was an exercise of the delegated regulatory authority under art. 11 of the Statute or the ultimate decision had the endorsement of the General Assembly. Thirdly, even in the latter case, an incidental review of the controlling regulatory decision may be warranted if legality of an individual decision based upon it is being challenged on the ground of a normative conflict with other acts emanating from the General Assembly.

**The scope of review of regulatory decisions on post adjustment**

76. It is useful to record that the ICSC, as a subsidiary organ of the United Nations General Assembly, is subject to its supervision. Where the ICSC recommends the content of regulatory decisions under art. 10 of the Statute, the ultimate regulatory decision emanates from the General Assembly. Such a decision is binding on the Tribunals and may only be reviewed incidentally pursuant to the narrow *Lloret-Alcañiz et al.* test. On the other hand, where the ICSC exercises a delegated regulatory power

[77] Respondent's submission in response to Order No. 106 (NBI/2019), para. 8.

under art. 11 of the Statute, its decision, while undisputedly binding on the Secretary-General, may be subject to incidental examination for legality, including that where the contested matter belongs in the field of discretion, the applicable test will be that pertinent to discretionary decisions i.e., the *Sanwidi* test. This is confirmed by the Appeals Tribunal in *Pedicelli*, where, following a remand for consideration of the merits, an individual decision, based on the conversion of a salary scale then applied to General Service staff in Montreal promulgated by the ICSC under art. 11, entailed an examination of the ICSC decision for reasonableness.[78]

77. Notwithstanding the aforesaid, also where the ICSC exercises its delegated regulatory powers, it remains subordinated to the United Nations General Assembly which may intervene and indeed does so, mainly in the policy stage but also after the ICSC decision has been taken. Thus, the General Assembly interfered in 2012 in the system of post adjustment, requesting the ICSC to maintain the existing level of post adjustment in New York.[79] Also, in August 1984, the ICSC decided that the post adjustment in New York would be increased by 9.6%. However, the General Assembly, in paragraph 1(c) of its resolution 39/27 of 30 November 1984[80], requested

implementation of the post adjustment freeze because the ICSC decision, subject to

be considered to have induced them to enter into and remain in contract. The term relates to the remuneration for work and, particularly, stability in such remuneration, which is a fundamental term. Amendments to the gap closure measure breach this right. The consequences of this breach of the Applicants' acquired right to a stable remuneration are considerable: a salary reduction of 4.7%. The scale of the cut will impact long term financial commitments they entered into based on a stable salary provided over an extended period. Implementation of transitional measures will not mitigate the impact of such a drastic cut.

82. The Applicants submit that the methodology applied by the ICSC raises issues regarding the International Service for Remunerations and Pensions ("ISRP") rent index, domestic services aggregation, place-to-place surveys, cost of education and medical insurance. They further submit that the methodology does not provide for results that are foreseeable, transparent and stable.[88] There is no foreseeability because the decision-making process is fragmented, rule changes are adopted in a piecemeal manner and relevant information is dispersed over numerous documents. The findings by the statisticians from the Geneva-based entities show that the lack of transparency extends beyond the ICSC decision making process and into their methodology and treatment of data.

83. The Applicants submit that the application of gap closure measures is arbitrary. The way the amended rule operated in the past ensured stability in circumstances where the salary reduction for staff would be within 5%. This has now been revised to an augmentation of 3% on changes of 3% or more. No indication has been provided as to why the margin of error might have been reduced at a time when the ICSC have been applying a new and untested methodology.

[88] See The Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labour Organization Article XI; ILOAT Judgment Nos. 2420, 1821, 1682, 1419, 1265; and ILO Protection of Wages Convention, 1949 (No. 95) Article 14.

*Respondent's submission*

84. The Respondent submits that the change in the post adjustment multiplier does not violate the Applicants' acquired rights. Staff members do not have a right to the continued application of the Staff Regulations and Rules, including the system of computation of their salaries, in force at the time they accepted employment for the

relation between the staff members and the United Nations, while the Appeals Tribunal

> doctrine, to an evident intention by the General Assembly, the sovereign lawmaker in the United Nations system, to amend those rights or to substitute them with others. Any normative conflict would have to be decided in favour of the later resolution.

88. The Appeals Tribunal proceeded to discuss whether there was indeed a normative conflict or an irreconcilable inconsistency between staff regulation 12.1 protecting acquired rights and the subsequent resolutions of the General Assembly on salary scale, which resulted in the lowering of the salary of the applicants. It held (internal references omitted):

> The term "acquired rights" therefore must be construed in the context of the peculiar statutory employment relationships prevailing at the United Nations. In any contract of employment, an acquired right might firstly mean a party's right to receive counter-performance in consideration for performance rendered. Thus, the aim of the intended protection would be merely to ensure that staff members' terms and conditions may not be amended in a way that would deprive them of a benefit once the legal requirements for claiming the benefit have been fulfilled–in

> 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.

89. The Appeals Tribunal concluded that the concept of acquired rights was, in essence, a prohibition of retroactivity of legislative amendments:

> … The limited purpose of Staff Regulation 12.1, therefore, is to ensure that staff members are not deprived of a benefit once the legal requirements for claiming the benefit have been fulfilled. The protection of acquired rights therefore goes no further than guaranteeing that no amendment to the Staff Regulations may affect the benefits that have accrued to, or have been earned by, a staff member for services rendered before the entry into force of the amendment.[33] Amendments may not retrospectively reduce benefits already earned. In the final analysis, the doctrinal protection of acquired rights is essentially an aspect of the principle of non-retroactivity. The aim is to protect individuals from harm to their vested entitlements caused by retrospective statutory

> their salaries–in force at the time they accepted employment for the entirety of their service. The fact that the unilateral variation of a validly concluded contract may cause individual loss poses no legal obstacle to the exercise of regulatory power.

90. It falls to be noted that referring the concept of acquired rights to entitlements already accrued was well-established in the jurisprudence of the former United Nations Administrative Tribunal such as the *Mortished* judgment and other ones, which were usually concerned with entitlements of a peripheral or occasional nature.[99] In such situations, the plane of reference is the state of the law at the time where the conditions for the entitlement were fulfilled; as a consequence, application of the doctrine of acquired right yields the same interpretative results as the non-retroactivity principle. In relation, however, to salary and other continuing benefits, the matter is more complicated and the jurisprudence, as will be shown below, diverged in addressing it. In rejecting the extension of acquired rights to a future salary, the *Lloret Alcaniz et al.* and *Quijano-Evans et al.* judgments place the matter of modifications in the area of regulatory discretion. These judgments did not contemplate - as apparently the issue had not been put before the Tribunal – any limitations on the exercise of this power. This begs the question of where they lie. Relevant issues include: fundamentals of the nature of the performance-remuneration exchange, the public interest in stability of the civil service, and the resulting test or criteria for legitimacy of a modification.

91. On the first issue, consideration must be given to the fact that the employment relation by definition presupposes continuality and durability, whether during a pre-determined finite period or indefinitely, with salary playing a central role in it; in this respect, periodical render of salary does not transform employment into a series of consecutive contracts where each subsequent one could be renegotiated. Another consideration must be given to inherent inequality of the parties and the socio-

[99] UN Administrative Tribunal Judgment No. 273, *Mortished* (1981), cited by UNAT in *Lloret-Alcaniz et al.* at para. 74, and by *Quijano-Evans et al.,* para. 22; see also UN Administrative Tribunal Judgment No. 82, *Puvrez* (1961); UN Administrative Tribunal Judgment No. 1333, *Varchaver* (2007); UN Administrative Tribunal Judgment No. 1197, *Meron* (2004), para. XIV; UN Administrative Tribunal Judgment No. 202, *Queguiner* (1975); UN Administrative Tribunal Judgment No. 634, *Horlacher* (1994).

economic function of salary as a source of maintenance, thus giving reason for a specific protection by law. Yet another consideration is due to the fact that the employment relation, and especially in civil service, presupposes equivalence of service and the counter-performance; downward amendment of remuneration distorts this equivalence. All these concerns speak in favour of protection against unilateral and unfettered downward revision of salary to extend throughout the duration of service.

92. On the question of interests involved, there is obviously, interest of staff in stability of employment conditions and protection from arbitrary change and erosion. Here, recognition is due to the fact that international civil servants do not participate in a democratic legislative process and in principle, as mentioned by the Appeals Tribunal in *Quijano-Evans et al.* have no right to strike[100]; thus, enhanced protection is required. It would not be, however, appropriate to place it in sharp opposition with the public interest in "that public authorities retain the freedom to exercise their discretionary or legislative powers", given that public interest lies also in guarantying stability to cadre and in attracting the most highly qualified personnel, as recognized by the United Nations Charter in article 101. The point lies rather in striking a balance between the

jurisprudential developments, therefore, explore when individually determined ("contractual") elements might be statutorily modified.

95. First, a criterion was introduced according to which modifications were allowed insofar as they do not adversely affect the balance of contractual obligations or infringe the "essential" or "fundamental" terms of appointment.[102]

96. The next development was marked by the ILOAT Judgment in *Ayoub*

the right as such (in that case the right to pension) but only introduce rules that garnish it; amendments serve a legitimate objective and do not overly deplete the content of the entitlement[106] or, as it was alternatively proposed, do not cause "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".[107]

99. Other former United Nations Administrative Tribunal decisions remained on the position that the question of acquired rights does not arise where the modification has no retroactive effect. Instead, a fetter on legislative power to introduce modification with effect for the future was construed through the test of reasonability, applied in light of the principles laid down in the Charter of the United Nations art. 101 para. 3, *i.e.*, that economy measures must not be allowed to lead, cumulatively, to the deterioration of the international civil service.[108] Concerning specific requirements that a modification must meet in order to be reasonable, the following were distinguished: the modifications must not be arbitrary; must be consistent with the object of the system, for example, adjustment to cost-of living changes and protection of purchasing power of staff members[109]; must arise from reasonable motives; must not cause unnecessary or undue injury[110] or "significantly alter the level of basic benefits[111] or "cause unnecessary forfeiture or deprivation".[112] In the latter aspect, it was also proposed to consider whether the modification is permanent or temporary.[113]

100. As it can be seen from the above, the criteria used for the application of the rights concept and reasonable exercise of discretion are not dissimilar, the difference lying in the operation of the attendant presumptions (presumption of regularity of an official act versus the need to demonstrate that the limitation of a right is formally legal,

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[106] UN Administrative Tribunal Judgment No 1253, consideration V.
[107] UN Administrative Tribunal Judgment No 1253, concurring opinion of Judge Stern who proposes the criterion of "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".
[108] UN Administrative Tribunal Judgment Nos. 403, 404, 405.
[109] UN Administrative Tribunal Judgment No. 379.
[110] UN Administrative Tribunal Judgment No. 405 adopting after ILOAT in *Ayoub*.
[111] UN Administrative Tribunal Judgment No. 404.
[112] UN Administrative Tribunal Judgment No. 403.
[113] UN Administrative Tribunal Judgment No. 403, partially dissenting opinion of Judge Pinto.

necessary and proportionate) and the resulting stringency of the applicable criteria and the burden of proof. Below, the Tribunal shall undertake to test the reasonability of the disputed regulatory decision of the ICSC against these criteria. As previously explained, this is done in order to evaluate the legality of the impugned individual decisions based on it, and not to hold ICSC "answerable" or exercise a constitutional court-type jurisdiction over its decisions.

**Application of the criteria to the impugned decision**

101. As to the nature of the entitlement in the present case, it is undisputed that the post adjustment is an element of salary. The post adjustment multiplier, however, is not an individually determined ("contractual") element of the salary, rather, unlike the salary *sensu stricto*, it is inherently variable in relation to the cost of living, with a view, in addition, to maintaining purchasing power parity of salaries across duty stations, and not to keep pace with inflation at any particular duty station. The Applicants' general right to post adjustment under the terms of their employment[114] is not at issue; rather, the question concerns decisions adopted to give effect to this right. With this respect, the legal benchmarks in place include determining a comparator in accordance with the Noblemaire principle and directives to adjust remunerations to accurately reflect

ICSC system, to ensure that they are precise[119]; and that with regard to multiple issues of importance, believed to have statistically biased the 2016 results, the report has not

responsible for up to 4.1% downward miscalculation. In this regard, concerning the disputed use of quantity weights, the independent expert's reservations point out to an inconsistent application of the chosen indexation formula to rent but not to other in-area components, moreover, improper designation of the applied method as the Fisher index, which it was not, and should instead be referred to as "Fisher-type" index.

and the Commission, as well as top-level consultants in the field of economics and price statistics. The latter produced a report on a wide array of technical and procedural issues, covering, in general terms, elements disputed by the Geneva statisticians. The ICSC report for 2019 shows, in particular, that the problem of generalized decreases in the post adjustment index attributable to methodological change is taken very seriously and neutralizing such effects are to be addressed either through a compensatory mechanism on a no-gain, no-loss basis, or through statistical solutions formed in the same context of statistical methodology in which it originated. The results are to be applied in the 2021 round of surveys.

112. Everything considered: the nature of the entitlement, consistency of procedure with internal rules ("approved methodology"), high complexity, multiple alternatives and absence of outright arbitrariness in the methodology, mitigation applied and, above all, the temporary character of the modification, the ICSC decision does not disclose unreasonableness in the sense of risking deterioration of the international civil service. This Tribunal concedes that the application of rights construct would pose more stringent requirements as to the quality and stability of the methodology and could have brought about a different conclusion.

**Whether there is a normative conflict with the principle of equality in remuneration**

*Applicants' submissions*

113. The Protocol concerning the entry into force of the Agreement between the United Nations and the International Labour Organization, which was adopted by the General Assembly, referenced the undesirability of serious discrepancies in the terms and conditions of employment which could lead to competition in recruitment. This demonstrates the intention of the General Assembly that staff members across the common system should have equal rights including in relation to dispute resolution. A failure to agree with the ILOAT judgment would lead to staff members at the same level being paid differently depending on the jurisdiction their employer is subject to.

This would represent a threat to the United Nations common system. [128]

*Respondent's submissions*

114. The Respondent points out that, on critical matters, the UNAT has been willing to depart from the jurisprudence of the ILOAT where there are sound reasons for doing so.[129] As there is no appellate review to address decisions of the ILOAT, Judgment No. 4134 is final and binding for the organizations that have accepted the jurisdiction of that Tribunal but there is no legal imperative for the UNDT to adopt an incorrect ruling of the ILOAT.

***Considerations***

115. On the matter of upholding the common system, this Tribunal cannot but agree, *mutatis mutandis*, with ILOAT Judgment No 4134:

> 29. In its judgments the Tribunal has recognised and accepted the existence of the United Nations common system and respected its objectives. However, the existence of the United Nations common system and a desire to maintain its integrity should not, in itself, compromise the Tribunal's adjudication of individual disputes in any particular case or series of cases involving the application of its principles. Indeed, in Judgment 2303, consideration 7, the Tribunal acknowledged the argument of the organization that considerable inconvenience arose from an earlier judgment (Judgment 1713) and it was virtually impossible for the organization to depart from the scale recommended by the ICSC. The Tribunal has to recognise that an organization's legal obligations arising from the operation of the common system could have legal ramifications for an organization that inform or even determine the resolution of any particular dispute. However notwithstanding these matters, the Tribunal must uphold a plea from a staff member or members if it is established that the organization has acted unlawfully.

116. The Tribunal wishes to add that the impugned decision subject to its review

[128] Applicants' motion to file submissions regarding ILOAT Judgment No. 4134.
[129] *Molari* 2011-UNAT-164, para. 1 ("We will not follow the Administrative Tribunal of the International Labour Organization (ILOAT) in holding that the standard of proof in disciplinary cases is beyond a reasonable doubt. While it is correct that beyond a reasonable doubt is the standard at the ILOAT, this has never been the standard at the United Nations.").

does not involve a question of integrity of the United Nations common system. This matter is properly before the ICSC and, ultimately, the General Assembly.

117. Absent a finding of illegality of the regulatory decision, there is no basis for a rescission of the decision impugned in this case.

**JUDGMENT**

118. The application is dismissed.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 29th day of July 2020

Entered in the Register on this 29th day of July 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi