INTRODUCTION

1. The Applicant is a staff member of the United Nations Entity for Gender Equality and the Empowerment of Women ("UN Women") who was based in Geneva,

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 Applicant filed a motion seeking leave to file submissions on ILOAT Judgment No. 4134 and its relevance to the instant case. By Order No. 105 (NBI/2019), the Tribunal admitted the Applicant's submissions regarding ILOAT Judgment No. 4134 into the case record. The Respondent filed a response to the Applicant's submissions on 6 August 2019.

8. The Applicant filed additional submissions on 5 February 2020.

FACTS

9. The following facts are based on the parties' pleadings, additional submissions totalling over 3000 pages and oral evidence adduced at the hearing.

10. At its 38th session in February 2016, the Advisory Committee on Post Adjustment Questions ("ACPAQ")[2] 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 the European Comparisons Program ("ECP"). The ICSC approved all the ACPAQ's recommendations in March 2016.[3]

[2]

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.[10]

14. 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").[11] The PTA reflected the difference between the new and the existing post adjustment multiplier and was

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.[15]

16. On 10 July 2017, the Applicant sought management evaluation of the decision to implement the post adjustment change to her salaries effective 1 May 2017 that would result in a 7.7% reduction in her net remuneration.[16] In the ensuing litigation, this Tribunal, in its Judgment No. UNDT/2018/026, dismissed the application as irreceivable, having found that no individual decisions had been taken in the Applicant's case.

17. 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 assess, *inter alia*, whether it was "fit for purpose". In a report dated 6 February 2018, the consultant noted that the purpose of the post adjustment system "is to adjust salaries of UN Common System professional staff in all duty stations in a way that is fair, equitable and meets standards of compensation policies. To this extent it can be said that these procedures and the approved methodology go a long way to meet the criterion of 'fit for purpose'. There are however clearly areas for improvement […]".[17]17.

18. On 18 July 2017, the ICSC decided to change the implementation date of the results of the cost-of-living survey in Geneva from 1 May 2017 to 1 August 2017.[21] Staff members were informed on 19 and 20 July 2017 of the new implementation date, the reintroduction of a 3% margin to reduce the decrease of the post adjustment, postponement of post adjustment-related reduction for serving staff members by extending the transitional measures applicable to serving staff members from three to six months (i.e. 1 February 2018), and that subsequent post adjustment reductions would occur every four months instead of every three months.[22]

19. On 14 September 2017, the Applicant requested management evaluation of the 19 and 20 July 2017 decisions indicating, in the alternative to previous filings[23], the decision date as being from receipt of the August payslip.[24] This decision forms the basis of the present application.

20. On 27 October 2017, UN Women's Director of Human Resources responded to the Applicant's management evaluation request of 14 September. The Director informed the Applicant that her request was not receivable because the contested decision was of general application to all staff of the United Nations Common System; consequently, it did not satisfy the definition of an administrative decision; it was to take effect in February 2018, thus she had not suffered any loss in her remuneration attributable to the contemplated changes in post adjustment; and that the Secretary-General had no discretion in implementing a binding decision of the ICSC. Consequently, the contested decision did not satisfy the definition of an administrative decision.[25] The Applicant filed the current application on 21 December 2017.

RECEIVABILITY

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

[21] Reply, annex 8, para. 129 (A/72/30 – Report of the International Civil Service Commission for the year 2017).
[22] Application, annex 3; reply, annex 9.
[23] See Judgment Nos. UNDT/2018/026; UNDT/2018/035 and UNDT/2018/069.
[24] Application, annex 4.
[25] Application, annex 5.

receivability of the application is contested on several grounds, which the Tribunal will address in turn.

reflected an actual reduction in her net salary resulting from the contested decision. This is evidence of damage.

Considerations

25. In the first wave of Geneva cases, including an application by the present Applicant, the UNDT explored the issue of decisions of general and individual application; in other words, concreteness of an administrative decision, as opposed to the abstract nature of norms contained in regulatory acts. [28] These considerations are restated here for completeness. At the outset, it is recalled that art. 2.1(a) of the UNDT statute provides as follows:

> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
>
> (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

26. It is further recalled that in *Hamad*[29], the UNAT adopted the former United Nations Administrative Tribunal's definition forged in *Andronov*, which describes an administrative decision as:

> a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry legal consequences. [30]

[28] *Steinbach* UNDT/2018/025, para. 58.
[29] *Hamad* 2012-UNAT-269, para. 23.
[30] Judgment No. 1157, *Andronov* (2003) V.

salaries for extant staff members at then-existing rates and established a second tier of salaries for staff members hired on or after 1 March 2012. The UNAT agreed with the UNDT's reasoning that the decision to issue secondary salary scales for staff members recruited on or after 1 March 2012 did not amount to an administrative decision under art. 2.1(a) of the UNDT's Statute, as per the terms of *Andronov,* because at the moment of their issuance the secondary salary scales were to apply exclusively in the future, for an undefined period and to a group of persons which at that time could not be identified. The UNAT upheld the UNDT's finding that the applications were not receivable *ratione materiae*.[34] However, the UNAT opened the possibility for the concerned staff members to challenge decisions implemented in their individual cases. Specifically, it agreed with the UNDT that:

> … [i]t is only at the occasion of individual applications against the

on the aspect that the Secretary-General was bound by the ICSC decision[38], however affirmed the judgment, among other, because "Mr. Obino did not identify an

the jurisprudence of UNAT affirmed the receivability of applications when an act of

administrative decision of constrained character, whereby the administration subsumes facts concerning individual addressee under the standard expressed by the general order. Therefore, constrained decisions are as a rule reviewable for legality, *i.e.*, their compliance with the elements of the controlling legal norm. Whereas state systems may conventionally determine that constrained decisions are to be challenged not before an administrative but rather before a civil or labour court, the applicants challenging decisions of the Secretary-General have no such option available. To exclude *a limine*

44. Jurisdictionally, the discord on the point in issue seems to have originated from *Obino*. In *Obino*, where the UNDT had interpreted the application as directed against the ICSC decision and as such had found grounds to reject it as irreceivable, UNAT apparently agreed with this interpetation of the application. It held:

> 19. In the instant matter, the UNDT correctly found that Mr. Obino did not identify an administrative decision capable of being reviewed, *as* he failed to meet his statutory burden of proving non-compliance with the terms of his appointment or his contract of employment [emphasis added].
>
> […]
>
> 21. In the instant case the ICSC made a decision binding upon the

48. Conversely, in response to similar arguments by the Respondent in *Lloret Alcañiz et al.*, the majority of UNAT has recently held:

> 65. The majority of Judges accept that the Secretary-General had little or no choice in the implementation of the General Assembly resolutions. The power he exercised was a purely mechanical power, more in the nature of a duty. However, such exercises of power are administrative in nature and involve a basic decision to implement a regulatory decision imposing the terms and conditions mandated by it. They are thus administrative decisions that may adversely affect the terms of employment. However, importantly, given that purely mechanical powers entail little choice, they are rarely susceptible to review on the grounds of reasonableness. A review on grounds of reasonableness typically involves examination of the decision-maker's motive, the weighing of competing considerations and the basis for, and effects of, any choice made. An exercise of a purely mechanical power normally does not require the administrator to formulate an independent purpose or basis for action. Nevertheless, purely mechanical powers are still accompanied by implied duties to act according to the minimum standards of lawfulness and good administration: purely mechanical powers are hence reviewable on grounds of legality."[57]

49. This Tribunal assumes, therefore, that the claim to have discretion as criterion for receivability has now been set aside. It concludes, accordingly, that the present application is receivable.

MERITS

50. There is no dispute that the Secretary-General acted in accordance with the ICSC decision. The merits of his decision are contested by the Applicant 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.

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

[57] 2018-UNAT-840. reiterated in *Quijano-Evans* 2018-UNAT-841.

properly implemented it; the Tribunal lacks competence to review legislative decisions and the Applicant is 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.

52. 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?

53. 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.

Applicant's submissions

54. The Applicant's case is that the impugned decision is *ultra vires* because 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 Applicant submits that art. 10 of the ICSC statute provides it with authority to make recommendations to the General Assembly regarding salary scales and post adjustment for staff in the professional and higher categories, which involves a precise financial calculation. As concerns art. 11, it grants the ICSC authority to make decisions regarding classification of duty stations. Classification, at the current state of affairs, denotes assignment of a duty station within Group I or Group II dependent on whether it concerns countries with hard or soft currencies, a consideration which is not relevant for the case at hand.

55. The Applicant further echoes 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".[58]

56. While the General Assembly appears to have endorsed a departure from post adjustment scales in 1989, its resolutions 44/198 and 45/259 do not represent a legal framework providing authority for the contested decision. They are discrete decisions that do not indicate either on ongoing delegation of authority or a regulatory framework for the work of the ICSC. The alleged practical difficulty in seeking General Assembly approval of multipliers does not imply delegated authority. In conclusion, the ICSC operates in a manner inconsistent with its Statute.

[58] Judgment 4134 consideration 39, referring to Judgment 3883, consideration 20; Judgment 3601, consideration 10; and Judgment 3544, consideration 14.

Respondent's submissions

57. The Respondent explains that the reference to "scales" of post adjustment in art. 10(b) refers to a former method of calculating post adjustment based on schedules of post adjustment that were, in the past, submitted by the ICSC to the General Assembly for approval under art. 10(b) of its Statute and annexed to the Staff Regulations. Post adjustment scales were needed to implement the principle of regressivity, and to indicate how the post adjustment multiplier would be modified, when applied to staff members depending on their grade level and step. The Respondent shows that the post adjustment scale, reflecting the regressive factors, was expressed as an amount in US dollars per index point for each grade and step.[59] The approval by the General Assembly of the post adjustment scale was, in effect, an approval of the regressive factors applicable to each grade level and step.[60]

58. The system for calculating post adjustment changed in 1989, when, by virtue of resolution 44/198, the General Assembly decided to eliminate regressivity from the post adjustment system and discontinued the practice of approving post adjustment.[61] 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.[62] 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.

59. 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

[59] Respondent's submission in response to Order No. 105 (NBI/2019), annex R/1 (para. 8, diagram 4) and annex R/2.
[60] Respondent's submission in response to Order No. 105 (NBI/2019), annex R/1A para 10.
[61] A/RES/44/198, part D, "post adjustment" para. 3.
[62] Respondent's submission in response to Order No. 189 (NBI/2018), paras. 30 and 31.

43/226 of 21 December 1988. The "major simplification of the post adjustment system (…)" was one of the elements of that review.

60. 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.[63] 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.[64]

61. 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 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.[65] The General Assembly has not challenged the ICSC's authority in respect to post adjustment classification under art. 11(c).

62. Since the removal of classes in 1993, the annual reports of the ICSC have defined the term "post adjustment classification" as follows:

> Post adjustment classification (PAC) is based on the cost-of-living as reflected in the respective post adjustment index (PAI) for each duty

[63] Respondent's submission in response to Order No. 105 (NBI/2019), para. 16 and annex 1A.
[64] Ibid., referring to 14 March 1985 Post Adjustment Classification Memorandum (annex 1.B, p. 13).
[65] Supplement No. 30, para. 241 (A/31/30 – Report of the International Civil Service Commission).

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

66. 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

been questioned.[72] This considered, the Applicant's argument relying on the procedure

by the General Assembly's decisions on the matter of ICSC competencies. This conclusion distinguishes the present case from the case subject to ILOAT Judgment 4134.

Whether the Dispute Tribunal's jurisdiction excludes review of regulatory decisions

Applicant's submissions

71. The Appeals Tribunal confirmed reviewability of ICSC decisions in *Pedicelli,* moreover, ILOAT has consistently reviewed decisions relating to post adjustment. To refuse the Applicant's access to judicial review would violate basic human rights and the Organization's obligation to provide a suitable recourse; it would also risk the breakup of the United Nations common system with staff members from one jurisdiction afforded recourse denied in other parts. Moreover, the Secretary-General cannot be obliged to implement *ultra vires* decisions. If the ICSC can exercise powers for which it has no authority and those actions cannot be checked by either the Secretary-General or the internal justice system, then there is no rule of law within the Organization.[74]

Respondent's submissions

72. The Respondent submits that the ILOAT and the United Nations Tribunals (the UNDT and UNAT) have developed divergent approaches with respect to the "receivability of challenges to decisions by legislative bodies and by their subsidiary organs".[75]

73. 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

[74] Application, page 7, paras.11-13.
[75] Respondent's submission in response to Order No. 105 (NBI/2019).

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.*"[76] 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.

74. By contrast, the Respondent's case is that UNAT in *Lloret-Alcañiz et al.*[77], 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 not include the review of the legality of General Assembly decisions, as it was not established to operate as a constitutional court. Additionally, the General Assembly has directed that UNDT and UNAT decisions "shall conform with General Assembly resolutions on issues related to human resources management".[78] The Respondent derives therefrom that the UNDT lacks jurisdiction to review the legality of legislative decisions.

75. The Respondent refers to *Lloret-Alcañiz et al.* in submitting that the present case involves a mechanical exercise of authority. Thus, the Tribunal's review in this case is limited to whether the Secretary-General was authorized by law to implement the ICSC decision and whether he failed to comply with the statutory requirements or preconditions attached to the exercise of that authority. The internal decision-making processes and the methodologies used by the ICSC, on the other hand, do not fall within the jurisdiction of the Dispute Tribunal and that the ICSC is only accountable to the General Assembly.

Considerations

76. At the outset, in his citations from *Lloret-Alcañiz et al.*, and conclusions drawn,

[76] Ibid., citing to ILOAT Judgment No. 4134, considerations 8, 26.
[77]

the Respondent seems to blur the difference between a review for the purpose of pronouncing on the question of legality of regulatory acts being a first and final subject of the exercise of judicial power, and a review involving an *incidental* examination for

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.

80. 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:

> Certainly the [former Administrative Tribunal] must accept and apply the decisions of the General Assembly made in accordance with Article 101 of the United Nations Charter. Certainly there can be no question of the [former Administrative Tribunal] possessing any "powers of judicial review or appeal in respect of the decisions" taken by the General Assembly (…).[81]

81. There is no claim that the UNDT may exercise any more power. Moreover, as 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".[82]

82. The General Assembly reiterated the same in its 22 December 2018 resolution

[81] ICJ, *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1982, page 325, para. 74.
[82] A/RES/68/254 of January 2014 para. 4 and 5.

on the administration of justice at the United Nations:

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.[85] Noting that the Respondent seeks support in the quote: "*recourse to general principles of law and the Charter of the United*

85. In conclusion, the Respondent's assertion that that the "Applicant's claims must be rejected as non-receivable as they seek a review of the legality of the ICSC's decisions"[88] needs to be corrected on three levels: Firstly, denying receivability is untenable because the Applicant is contesting individual decisions concerning her terms of appointment, as discussed *supra*, and, while she contests the legality of the regulatory decision by the ICSC, she contests 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

to General Service staff in Montreal promulgated by the ICSC under art. 11, entailed an examination of the ICSC decision for reasonableness.[89]

87. 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.[90] 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[91], requested the ICSC to maintain the level of the post adjustment and not to introduce the new one. The power of the General Assembly to intervene in the implementation of the post adjustment was confirmed by the former United Nations Administrative Tribunal.[92] The ICSC recalled this precedent in its report of 2012.[93] Intervention of the General Assembly largely removes the matter from the purview of the Tribunals. This, as noted by the Respondent[94], is confirmed in *Ovcharenko*, where the Appeals Tribunal confirmed legality of the implementation of the post adjustment freeze because the

accordance with *Lloret-Alcañiz et al.*, judicial review is limited to the question of a normative conflict between the acts of the General Assembly.

88. The Tribunal notes that, with respect to the present dispute, the General Assembly observed in its resolution 72-255[96]:

> **Preamble**
>
> 6. *Notes with serious concern* that some organizations have decided not to implement the decisions of the Commission regarding the results of of 1 0 08 [19st 0 08 [-of-livi(

> station under article 11 (c) of the statute of the Commission as a matter of priority, and requests the Commission to report on the matter to the General Assembly at its seventy-fifth session […].

89. Accompanying documents, in particular, the Report of the ICSC for 2017 and its Addendum [98] show that in arriving at this decision the General Assembly was alive to the arguments advanced against the methodology and the application of the gap closure measure and had available to it materials relevant to the post adjustment, including detailed analysis of the quantitative impact of the ICSC decision on staff remuneration in Geneva. Yet, it did not intervene in any of these specific decisions.

Whether acquired rights have been violated.

Applicant's submission

90. Relying on the Salary Scale cases, UNDT Judgment in *Quijano Evans et al.*[99], the Applicant submits that tension has been created between a binding decision of the General Assembly and the breach of acquired rights of staff members derived from other General Assembly decisions in that the salary cannot be unilaterally lowered by the employer. Post adjustment is a constituent element of salary; specifically, Annex 1 to the Staff Rules describes post adjustment as a way that "the Secretary-General may adjust the basic salaries". Further, upward revision of base salary resulting from the Noblemaire principle is introduced through post adjustment and subsequently absorbed into base salary.

91. Relying on ILOAT Judgment No. 832, In re *Ayoub* (1985), the Applicant submits that the right to a stable salary represents an acquired right that can reasonably be considered to have induced her 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 Applicant's acquired right to a stable remuneration

[98] A/72/30 and A/72/30/Corr.1, Add.1, Annex 2 to Respondent's submission pursuant to Order No. 189 (NBI/2018).
[99] *Quijano Evans et al.* UNDT/2017/098, paras 60-71.

are considerable: a salary reduction of 4.7%. The scale of the cut will impact long term financial commitments she 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.

92. The Applicant submits that the methodology applied by the ICSC raises issues

rights extending only to contractual elements. Contractual elements relate to matters that affect the personal status of each staff member (e.g. the nature of contract, salary and grade) whereas statutory elements relate to matters that generally affect the organization of the international civil service. Relying on the judgment in *Kaplan*, the Respondent submits that contractual elements cannot be changed without the agreement of the two parties, but statutory elements may always be changed through regulations established by the General Assembly.[101] The former United Nations Administrative Tribunal found that "the rules of post adjustment are statutory".[102]

95. The Respondent further recalls that the World Bank Administrative Tribunal in *de Merode* has distinguished between "fundamental or essential and non-fundamental or non-essential conditions of employment"[103] with fundamental conditions of employment not being open to change without the staff member's consent. A fundamental condition is one that induces a person to enter the service of the Organization. The Respondent cites former United Nations Administrative Tribunal Judgment No 1253's concurring opinion of Judge Stern, that a modification is allowed unless it would cause "grave consequences" for the staff member beyond "mere prejudice to his or her financial interests."

96. The Respondent submits that the determination of the post adjustment multiplier is a statutory element of employment. The Applicant has a general right to post adjustment under the terms of her employment, but she is not entitled to have the post adjustment multiplier set at any particular rate or to receive any particular amount of post adjustment. Further, she does not have an acquired right to the previous system of calculation or to the continuance of any particular methodology.[104]

97. The Respondent recalls that the Secretary-General has no authority to decide on the methodology to be followed by the ICSC and submits that the Tribunal does not have jurisdiction to review the methodology or the data used. The collection and

[101] Former UN Administrative Tribunal Judgment No. 19, *Kaplan* (1953).
[102] Former UN Administrative Tribunal Judgment No. 370, *Molinier et al*. (1986), para. XMI.
[103] World Bank Administrative Tribunal Decision No. 1, *de Merode et al*

processing of the data from the baseline cost-of-living surveys for 2016 were carried out by the ICSC Secretariat in accordance with the established methodology, and that decisions taken in the context of this review were not taken in isolation, but in the framework of the Commission's overall decisions on methodological and operational matters pertaining to the 2016 round of surveys. The Chairman of the ICSC also concluded that the findings of the Geneva statisticians "*were found to be based on alternative methodologies, data, and scenarios that appeared to be formulated for the purpose of changing the result for one duty station*".[105] Lastly, the ICSC advised that an independent review of the core methodological issues of the post adjustment system is ongoing.

Considerations

98. It will be useful to begin with a general clarification regarding contractual versus statutory elements of the employment relation. A contractual relationship refers to the relationship between the staff member and the international organisation as evidenced in a contract, i.e., a bilateral act. The statutory relationship, on the other

tradition dating back to the League of Nations[108], may be misleading. Strictly speaking, in the present relation it would be more accurate to distinguish individually determined elements (nature of appointment, duration, grade and step, duties and responsibilities) and generally applicable statutory elements. Salaries, in particular, as briefly

101. The Appeals Tribunal proceeded to discuss whether there was indeed a normative conflict or an irreconcilable inconsistency between staff regulation 12.1

> granted in the past does not create an acquired right to future increases or pose a legal bar to a reduction in salary.

102. 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 instruments.
>
> …It follows that, absent any normative conflict, the Secretary-General did not act illegally in implementing resolutions 70/244 and 71/263.
>
> … The basic conditions of employment of staff members as set out in their letters of appointment may and often do change throughout the duration of their service. The contentions of the Respondents, if accepted, would constitute a contractual fetter upon the authority and powers of the General Assembly. In accordance with universally accepted principles, contracts which purport to fetter in advance the future exercise of constitutional, statutory or prerogative powers are *contra bonos mores* and not valid or enforceable. It is in the public interest that public authorities retain the freedom to exercise their discretionary or legislative powers. It can never be in the international public interest to contractually fetter the General Assembly in the exercise of its powers to make policy for the Organization. A body such as the General Assembly cannot be compelled to uphold a promise not to exercise its regulatory powers so as not to interfere with its contractual arrangements.
>
> … In the context of the United Nations system, the salary entitlements of staff members are therefore statutory in nature and may be unilaterally amended by the General Assembly. Staff members do not have a right, acquired or otherwise, to the continued application of the Staff Regulations and Rules−concerning the system of computation of 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.

103. 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.[112] 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

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.

105. 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[113]; 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 competing interest of staff and the Organization's need to adapt its functioning and employment conditions to evolving circumstances.

106. On the ensuing question of test or criteria limiting the power to introduce legislative amendments to salary, in the absence of legal provisions beside staff regulation 12.1, the Tribunal turns to jurisprudence.

107. At the outset, it should be noted that the criterion applied in the *Kaplan* case[114], i.e., sharp delineation between contractual and statutory elements in the employment relation, the former conducive to acquired rights and thus outside the scope of unilateral modification by the employer, did not survive the test of utility over time. Subsequent jurisprudential developments, therefore, explore when individually determined ("contractual") elements might be statutorily modified.

[113] *Lloret Alcaniz et al.*, ibid., para. 94, *Quijano*-Evans et al, ibid., at para. 52, p. 27.
[114] See also ILOAT Judgment No. 29, in re *Sherif* (1957); UN Administrative Tribunal Judgment No. 202, *Queguiner* (1975).

108. 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.[115]

109. The next development was marked by the ILOAT Judgment in *Ayoub*, where a three-prong test was applied in determining whether the altered term is fundamental or essential. According to *Ayoub*, the first test is the nature of the term. Here, whereas the contract or a decision may give rise to acquired rights, the regulations and rules do not necessarily do so. The second test is the reason for the change. It recognizes that the terms of appointment may often have to be adapted to circumstances, and that there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted. The third test is the consequence of a modification, that is, what effect will the change have on staff pay and benefits.[116] In this regard, financial injury to the complainants, even if serious, is not enough in itself to establish it as a breach of acquired right.[117]

110. Finally, this jurisprudence recognized that sometimes only the existence of a particular term of appointment may form the subject of an acquired right, whereas the arrangements for giving effect to the term may do so or not.[118]

111. The parallel jurisprudence of the former United Nations Administrative Tribunal was not entirely consistent on the question whether the acquired rights concept extends beyond prohibition of non-retroactivity. Judgment No. 1253 answered in the positive but accepted that modifications are not necessarily inconsistent with the acquired rights. The Tribunal contemplated the following criteria: the term of appointment has a statutory, and not a contractual character; amendments do not deny the right as such (in that case the right to pension) but only introduce rules that garnish

the entitlement[119] 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".[120]

112. Other former United Nations Administrative Tribunal decisions remained on the position that the question of acquired rights does not arise where the modification

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

114. 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 Applicant's general right to post adjustment under the terms of her employment[127] 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 differences in the cost of living at various duty stations in observance of the established margin.[128] Otherwise, methods of calculating the post adjustment and establishing procedures for it are delegated to the ICSC. The Tribunal takes it that there is also no dispute that the applicable rules do not confer upon the Applicant a right to have the post adjustment multiplier set at any particular rate or to receive any particular amount of post adjustment. Further, she does not have an acquired right to the previous system of calculation or to the continuance of any particular methodology.

115. In light of the holding of the Appeals Tribunal in *Lloret-Alcaniz et al.* the Tribunal, however, must also find that notwithstanding the 75 years of practice of refraining from downward revision of salary and post adjustment by the Organization, the Applicant does not have an acquired right to protection against such a downward revision of the post adjustment multiplier, through the application of a freeze, gap

[127] Staff rule 3.7.
[128] General Assembly resolutions 38/232; 44/198, 72/255, 73/273

of importance, believed to have statistically biased the 2016 results, the report has not been able to quantify the extent of the impact of these problems on the Geneva PAI and recommended further studies.[133] The independent expert likewise stressed the complexity of adjusting pay of staff in all duty stations in a way that is fair, equitable

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. Eventually, for coherence and feasibility of use, the expert recommends the use of the so-called Walsh index, based on expenditure weights.[136] Appendix 3 of the review demonstrates, however, that the use of the recommended Walsh index applied to the 2010 survey in Geneva would result in the housing expenditure value increase by 0.3%. [137] This recommendation, therefore, does not lend support to a claim that the application of the actually applied Fisher-type index, as opposed to the preferred Walsh index, would have been responsible for the disputed 4.1% of the housing component. As to the remaining part, the independent expert review, albeit identifying numerous areas for improvement, concludes that the procedures applied by the ICSC Secretariat were consistent m sidentifyinnifyi8Tm [(were)-36(consistent)v o-10l0 280.27700806 0sn for io-10l0 280.

> (b) The revised post adjustment multiplier is applicable to all Professional staff members in the duty station. Existing staff members already at the duty station on or before the implementation date of the survey results receive the revised post adjustment multiplier, plus a personal transition allowance;
>
> c) The personal transitional allowance is the difference between the revised and prevailing post adjustment multipliers. It is paid in full for the first six months after the implementation date; and adjusted downward every four months until it is phased out [..]

123. The Tribunal agrees with the Applicant that the mitigation, on both counts, the augmentation of the post adjustment multiplier and the transitional allowance, appears more as a rule of thumb than actual calculation of a margin of error. However, the resulting financial loss for the Applicant, 4.7% of the post adjustment component of the salary - and not 4.7% of the salary as a whole, as it is presented by the Applicant, moreover, delayed by one year through the application of the transitional allowance - is not such that would overly deplete the content of the entitlement or cause "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".

124. Finally, the modification is temporary. As evidenced by ICSC reports 2017-2019, the impugned decision occurs in the context of a review of the post adjustment system carried out by the ICSC under the scrutiny of the General Assembly.[139] Retaining an independent expert to examine the methodology was a step toward a

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.

125. 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

Applicant's submissions

126. 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

Respondent's submissions

127. 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.[141]