

WIPO Comments on the Three Draft Proposals Circulated as part of the Review of the Jurisdictional Setup of the United Nations Common System

General remarks

1. At the outset, and before responding to the request for comments on the three draft proposals that were developed by a working group comprising of members of the Legal Advisers Network, the World Intellectual Property Organization (WIPO) considers it useful to recall its position, which is fully maintained, in relation to the review of the jurisdictional set up of the United Nations (UN) common system.¹

2. The review was requested by the UN General Assembly in response to five judgments issued by the International Labour Organization Administrative Tribunal (ILOAT) with which it was clearly dissatisfied. This request was made at a time when the General Assembly did not yet know which way the United Nations Dispute Tribunal (UNDT), and ultimately the United Nations Appeals Tribunal (UNAT), would rule on the same matter that had been reviewed by the ILOAT in the above-mentioned judgments. In addition, in criticizing the ILOAT's judgments in such a formal and public manner, and by going as far as to request a review of the entire jurisdictional set up of the UN common system, strong signals were being sent to the UN common system, which were provided on October 30 and December 10, 2020, respectively.

² See also paragraphs 6 to 9 of WIPO's comments on the first draft report.

³ See paragraphs 12 and 16 of WIPO's comments on the first draft report.

⁴ It was the risk of this very instance that triggered the request for a full-scale review: see paragraph 2 above.

⁵ See also paragraph 16 of WIPO's comments on the first draft report.

⁶ See paragraph 8 of WIPO's comments on the second draft report (citing to paragraph 98 thereof).

Proposal 1: Submissions by the ICSC to tribunals during litigation of complaints arising out of an ICSC decision or recommendation

7. The discussion paper correctly recognizes that the presentation of observations by the ICSC to the ILOAT and UN Tribunals is already permitted under the current legal framework and that therefore no changes are required to the Statutes or Rules of Procedures of the tribunals. The ICSC considers, however, that “it should always be heard if the decision under litigation is based on a recommendation or decision emanating from it”.⁷ To overcome the fact that the tribunals’ authority to solicit submissions from the ICSC is discretionary, the proposal seeks to impose a number of new obligations on the respondent organizations with the aim of systematically involving the ICSC in the litigation process, as if it were a party.

8. It is crucial to underscore, however, that the ICSC is not a party to the litigation and has no standing before the tribunals. Legally, what is being challenged is a decision

. As such, it would be incongruous to cast the ICSC’s involvement as a right. Instead, it should remain discretionary, as correctly recognized by the tribunals in their respective procedural frameworks, as well as by the organizations when deciding whether to request information and/or comments from the ICSC for the purpose of formulating their defense. This does not mean that the ICSC’s views may not be important in a given case, but its contribution should be left to the discretion of the tribunals and the respondent organizations, and should not be “mandatory” or “automatic”.

9. It further follows that respondent organizations cannot be forced to notify the ICSC that a confidential legal challenge has been filed by one or more of their staff members in relation to the implementation of an ICSC recommendation or decision.⁸ Nor can they be obliged to keep the ICSC informed of all major developments in the litigation process, including by communicating “any orders of the tribunal which might be of interest for the ICSC”, and by promptly sending it a copy of the judgment.⁹ The added difficulty for the organizations would be to try to systematically second-guess what would be “of interest” to the ICSC. It should further be noted that all ILOAT judgments are publicly available from its website, and thus freely accessible to all, including ICSC members and support staff.

10. It is recognized that the proposal does not formally oblige respondent organizations to transmit a copy of any application to the ICSC and invite the latter to prepare a statement; it obliges them instead to “promptly consider whether it would be necessary” to do so.¹⁰ However, what may appear an obligation merely “to consider” will become, in practice, an obligation to communicate every incoming application, out of an abundance of caution, as it is impossible for the organization to determine upfront whether or not “it would be necessary” for the ICSC to be made aware of the content of the application, and to provide its comments thereon. Acting in any other way would expose the respondent organizations to the risk of being held responsible for not having foreseen that a particular case was relevant for the ICSC.

11. The proposal further imposes an obligation on the respondent organization to attach the ICSC’s statement to its response, “unless special circumstances require otherwise”. If the statement is not attached, the respondent organization is required to inform the ICSC accordingly.¹¹ This approach is unacceptable, as it unduly interferes with an organization’s right to determine for itself how it wishes to defend its decisions in legal proceedings brought against it. It would effectively require an organization, as a party to the litigation, to systematically justify e wa8.6(o7(n)-.6.

challenge that the review is seeking to address. As mentioned above, having one jurisdiction for the review of all ICSC-related matters would not guarantee the consistent implementation of ICSC recommendations and decisions.¹⁷ In addition, the current jurisdictional set up would not have prevented the ICSC from issuing guidance to all organizations in the UN common system, indicating an adjustment to its “decision” on the post adjustment, by applying the effects of the five ILOAT judgments. The real issue, of course, is the dissatisfaction with the fact that an

24. While a deadlock would be resolved if the joint chamber were to be composed of an uneven number of judges, it would be at the expense of the joint nature of the chamber and the parity between the ILOAT and the UNAT, if the majority is composed of judges coming from one tribunal, even on an alternating arrangement. Maintaining the same number of judges from each tribunal, but appointing a final, external, judge is not considered a solution either, as it would grant decisive authority to an “outsider” judge. The threat the foregoing would represent for the authority of both tribunals and the independence of the international administrative justice cannot be underestimated.

d) Costs

25. Given that the proposal for a joint chamber is still evolving and its configuration has not been clearly defined, it is impossible to provide any meaningful input at this stage on the proposed application of the “standard cost-sharing methodology”,¹⁹

requisite independence to develop its own procedures, it would be premature to rely on such assumptions.

31. Finally, bearing in mind the proposal that the ICSC would also be able to request interpretative, preliminary and appellate rulings, it too (or the UN indirectly) should pay a share of the costs of the joint chamber, if established.

32. The discussion paper proposes that the ICSC, the Secretary-General and the executive heads of other organizations in the UN common system would be able to request interpretative

38. Preliminary rulings differ from interpretative rulings in that the tribunal has been seized of a dispute. It is proposed by the working group that the President of that tribunal may consider that a preliminary ruling on a legal question relating to an ICSC recommendation or decision “would be in the interest of ensuring consistency across the UN common system”. In such a

Final remarks

46. WIPO's comments on the three draft proposals were prepared following an internal consultation process coordinated by the Office of the Legal Counsel. The WIPO Staff Council, the Human Resources Management Department and the Office of the Controller are in agreement with the content of this document.³³