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To: Chairs, Member Associations/Unions
Chairs, Members with Associate Status
Chairs, Associations with Consultative Status
Presidents, Federations with observer status
Chairs and Vice-Chairs, Standing Committees
Members of the Executive Committee/Regional Representatives

From: Diab El-Tabari, President

REPORT BY THE FEDERATION OF INTERNATIONAL CIVIL SERVANTS' ASSOCIATIONS (FICSA) ON THE MEETING OF THE ICSC WORKING GROUP 2(2) ON THE REVIEW OF THE COMMON SYSTEM COMPENSATION PACKAGE: COMPETITIVENESS AND SUSTAINABILITY

(WMO Geneva, 18 to 22 May 2015)

The ICSC Working Group 2(2) on Competitiveness and Sustainability met in Geneva from 18 to 22 May 2015 to address the following issues before the forthcoming 81st session of the ICSC to be held at the IAEA in Vienna from 27 July to 10 August 2015:

1- **Salary Scale and the Transitional Measures**:

(a) All Staff would be placed at their current grade on the proposed salary scale at the corresponding step. No staff member would lose out; in fact a high number of single parent would partially gain with this approach;

(b) Current single staff would retain a personal Pensionable Remuneration (PR) until they move to the next step, if the PR on their new step is lower than at their current step;

(c) Staff whose salary is beyond the maxima on the proposed salary scale would be maintained on personal steps with associated PR;

(d) Staff with a non-dependent spouse but receiving the dependency allowance due to children will no longer receive the dependency benefit or spouse allowance. Discussion continues as to whether this category of staff would receive a transitional allowance and under what conditions.

(e) Staff with no dependent spouse but with a dependent child would only receive the child allowance in respect of the currently eligible children. This category of staff would

lose considerably. However, the whole issue of single parents and transitional measures for this category of staff was still open to discussion at the 81st session of the ICSC to take place in July 2015. Conditions under discussion included:

i) Transitional allowance (given either as an allowance or a dependency supplement a salary) of 6% of net remuneration;
ii) The allowance would be phased out over a period of time;
iii) The allowance would be maintained; and
iv) Transitional flat amount of 6% of net remuneration subject to post adjustment.

2- **Education Grant**:

The Group did not support proposed revisions to the original sliding scale agreed upon at the 80th ICSC session. The staff federations maintained the position that the current system was fairer than the proposed one and could work with some fine tuning to make the process less cumbersome. FICSA questioned the severity of the reduction in the education grant proposals including the reduced scope for education cost reimbursement, boarding and education travel. FICSA also expressed misgivings regarding the formula that would overwhelmingly benefit those with lower education expenses at the expense of high-cost duty station locations which would end up paying significantly higher out-of-pocket costs.

A transitional period of up to five years was being considered. At a minimum, the grant on behalf of eligible children for the school year in progress would be reimbursed under the current scheme. However, the feasibility of running two systems in parallel and its cost had to be checked with the organizations.

3- **Repatriation Grant**:

(a) The Group confirmed the rationale of the repatriation grant as an earned service benefit payable to expatriate staff members who leave the country of the last duty station on separation.

(b) The repatriation grant was not based on quantification of related expenses but, rather, recognized the length of expatriate service.

(c) A threshold of five years of expatriate service should be considered as an eligibility requirement for the repatriation grant given that difficulties of the latter occur and increase after prolonged service abroad.

(d) Current staff would maintain their eligibility of the present repatriation grant schedule up to the number of years of expatriate service accrued at the time of implementation of the revised scheme.

4- **Margin Methodology and Management**:

To establish the margin with the comparator, UN salaries have traditionally been compared to US civil service salaries at the dependency rate. To adjust to the situation where there is no longer a dependency rate, the ICSC secretariat recommended several options. Two options for the

comparison to US salaries (net of taxes) will be submitted to the Commission using as a comparison the US average salaries based on:

(a) the "Single" tax status; and

(b) the "married filing jointly" tax status reduced by 1.06 per cent

It was also advised that performance related payments should not be included in the net remuneration margin. In terms of the above methodology management there do not appear to be any negative implications on conditions of service.

The Secretariat will present the ICSC with an option to maintain the margin between the 113% - 117% range, with a desirable mid-point of 115, in order to minimize the differences (whether positive or negative) which may occur at both ends of the current system. A narrower margin may be an advantage to staff in the long run as the margin tends to be lower in the range more frequently than higher, and this would keep the margin from sinking too low.

5- **Step Increments**:

The Working Group discussed the slowing down of the step periodicity after step 7 from annual to bi-annual. This had already been approved at the 80th session of the ICSC. Given that the scale had now increased steps at the P-1, P-2 and D-1 and D-2 levels, this would only affect staff negatively at the P-3, P-4 and slightly the P-5 levels. This would not affect current staff salaries. . Over time this could have a negative impact on the progression of salary growth (to what actually would have been received if the step periodicity remained annual).

6- **Hardship Allowance**:

The Working Group agreed to recommend no transitional measures for the payment matrix agreed at the 80th ICSC session.

7- **Additional Hardship Allowance – to be replaced by the Non-Family Service Allowance**:

The Group noted that a single *Flat amount (agreed at the 80th session as Non-Family Service allowance* – NFSA), regardless of personal status, would result in very high gains for single staff – such as over $US 6,000 for some 30 per cent of staff in non-family duty stations. Staff with dependents would have significant losses – such as over $US 6,500 for some 35 per cent of the staff, which would create an unnecessary inequitable situation.

On the other hand, the Working Group discussed the new proposal made by the Secretariat with separate amounts for single staff and staff with a dependent spouse as a NFSA. It considered that should this new proposal be implemented, no transitional measure would be required.

The Group recognized that, as per the rationale of the current AHA or the proposed NFSA, job responsibility had no relation to this allowance but rather to family status. A different amount for single staff, as in the case of present system, would therefore be more appropriate, but should not be differentiated by grade groupings.

Considering the fact that there would be a single salary scale in the future, the Group was of the view that it would be fair and equitable to treat needs of different groups of staff (i.e. single staff vs. staff with eligible dependents) differently with regard to this particular allowance in order to achieve its objective.

The Working Group was of the view that the decision on this matter should be taken by the Commission at its 81st session. It therefore agreed to recommend to the Commission to reconsider the decision that was taken at the 80th session.

8- **Accelerated Home Leave paid Travel**:

The accelerated home leave paid travel would be discontinued on the approved implementation date of the new Compensation package to all staff in C, D and E category duty stations. The Commission was of the view that the AHL was an overlap with the rest and recuperation travel. The Commissioners agreed to recommend no transitional measure. In the staff's view this would be subject to a legal challenge.

9- **Relocation Package (i.e. Relocation travel, Relocation Shipment including Optional Removal Grant and Settling-in Grant)**:

The Working Group took note of the proposal made by the Secretariat to be submitted to the Commission at its 81st session for consideration as once again no agreement had been reached as to what would be a reasonable lump sum to offer staff in this respect.

The Group also noted that if the new package proposed by the Secretariat was implemented staff who moved before the implementation date and opted for non-removal of household goods (i.e. partial removal) would continue to receive the current Non-Removal Allowance up to five years at the same duty station or until the time they move to another duty station.

10- **Rewards and Bonuses**:

The Working Group noted the main points made by the consultant on the Total Rewards:

(a) In reviewing the Total Reward policies and practices of both the UN common system and US Federal Civil Service, there was a broad comparability between the two entities;

(b) From a non-cash perspective both the UN and the US offered various Total Rewards programmes. It appears that the US might be more advanced in terms of work-life programme implementation, given the high priority given to such programmes such as flexible work scheduling, telecommuting, and similar programmes under the current administration;

(c) The Total Reward elements could be viewed as levers which an organization could use to determine its value proposition;

(d) In regard to Total Rewards benchmarking, using a single comparator makes benchmarking challenging. It might potentially encourage the use of outdated and ineffective programmes. Additionally, the needs of the single comparator often vary from

the needs of the UN with its very diverse workforce. On the other hand, a single comparator provided the opportunity for good discipline for improvements;

(e) Total Rewards programmes should be targeted to a specific population, and benchmarking should strive to ensure that, like populations and business models, they are matched in order to closely manage valid comparisons. By using the US as the sole comparator, the reality of US Total Rewards programmes linked to the needs of its domestic workforce and regulatory environment, would be problematic in serving to meet the UN's desire for competitive information relevant to the needs of its international expatriate staff;

(f) Communication across the workforce is vital to engage both staff and managers regarding the policies and programmes as well as the underlying rationale behind their conception.

Cost implications:

The ICSC provided estimates of the cost differences that could be expected as a result of changes to the compensation package. Salary structure cost reductions have been initially estimated at USD 25 million. These are primarily due to reduced payments for staff currently receiving the dependency rate of pay in respect to the first dependent child. Recognizing in particular the hardship this would have, the Commission agreed to consider proposals for assistance to single parents at its next session.

Other areas of reduced cost included:

Mobility	$ 7.4 million	11% reduction
Accelerated home leave	$ 35.3 million	complete elimination
Education Benefits	$ 23.1 million	10% reduction

There would be an increase in hardship allowance of USD 8 million (7%). Other areas were still to be calculated or were not yet calculated due to the proposed arrangement not yet being finalized.

In conclusion:

A- Competitiveness:

The comparison of the total compensation packages of the United Nations and the United States Federal Civil Service is full of significant difficulties because of the fundamental differences in underlying philosophies, even of seemingly similar allowances, which are designed to cater to each civil services' unique circumstance (e.g. hardship, housing, etc.), availability of data and the number of assumptions that needed to be made in the calculations.

Despite the above, the qualitative and quantitative comparative analysis of the two packages, complemented by additional recent studies of major individual elements (pensions, insurance, leave, etc.) has shown that the two packages are largely comparable. The comparisons also confirmed a competitive level of the UN compensation package vis-à-vis the US Federal Civil Service.

However, the hardship allowance has been amplified to attract staff to the most difficult duty stations.

B- Sustainability:

(a) Modified step periodicity would provide a long-term cost-containment;

(b) Some of the benefits were streamlined e.g. Education Grant, Repatriation Grant, Relocation Allowance and Mobility Allowance;

(c) Some elements have been discontinued (accelerated home leave; some admissible expenses and additional travel for staff at designated duty stations under the education grant **and the additional one month for relocation after a two-year contract);**

(d) Margin management would provide for keeping the margin closer to the desirable mid-point of 115;

(e) Revised operational rules of post adjustment should improve predictability (synchronization of review cycles) and further contain costs;

(f) As compared to the present system, fewer staff would qualify for a dependency spouse allowance given that the latter would be paid only to staff with a dependant spouse. In addition, the income basis to determine eligibility for the spouse allowance would be broadened to include pension income and other related income. Together these measure would ensure that benefits were provided only where necessary.

Acquired Rights:

The working groups took note of the document dated 19 May 2015 from the Director General of the Legal Division, Office of Legal Affairs (Annex) which provides valuable background on previous jurisprudence. However, it is not comprehensive enough to address all questions that might arise. Further consultations are to be held between organizations and OLA regarding the optimal and legally sound transition mode. OLA is to be requested to provide more detailed advice on the proposed changes as they are developed.

FICSA, with the sister Federations, will conduct a study on Acquired Rights and will assess the situation with the membership prior to the 81st session of the ICSC.

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Annex

United Nations Nations Unies

INTEROFFICE MEMORANDUM MEMORANDUM INTERIEUR

TO Ms. Regina Pawlik
A Executive Secretary
International Civil Service Commission

DATE 19 May 2015

FROM Antigoni Axenidou
DE Director
General Legal Division, Office of Legal Affairs

REFERENCE

SUBJECT Request for guidance on ICSC Comprehensive Review of the Compensation Package
OBJET

1. This is further to your letter, dated 24 April 2015, by which you requested our preliminary guidance on envisaged changes to the common system compensation package, and in particular as they relate to the principle of acquired rights.

2. In respect of your request, we have prepared the attached "Background Note on Acquired Rights".

3. I hope the note is of assistance as you finalize the various changes envisaged in your request for advice. Should you have further questions or concerns, we stand ready to assist as needed.

Background Note on Acquired Rights

Introduction

1. The ICSC is presently engaged in a review of the Common System Compensation package (the "compensation package"), as mandated by the General Assembly (*see e.g.* A/Res/67/257). As a consequence of the mandated review, the ICSC proposes "to change the structure of the salary scale for staff in Professional and higher categories and to make some changes to allowances." In order to finalize its proposals in this respect, the ICSC has requested OLA to provide advice "concerning acquired rights of staff, and possible transitional measures."

2. As will be elaborated below, the legal framework relating to the "acquired rights" contains broad principles, which could only be applied on a case-by-case basis. Accordingly, without the benefit of greater detail concerning the envisaged changes, it is not possible at this stage to determine with specificity whether or how any acquired rights of staff members may be affected by the envisaged changes. The present background note, therefore, outlines the legal framework applicable to the principle of acquired rights and provides examples of the manner in which this framework has been applied.

The legal framework for acquired rights

3. It is an established principle that international organizations are vested with the authority to regulate the terms and conditions of service of their staff. The preamble to the Staff Regulations of the United Nations provides: "The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat ...The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary".

4. This regulatory authority has also been widely recognized by various administrative tribunals. For example, in its first decision, the World Bank Administrative Tribunal (the "WBAT") held as follows:

> "The Bank possesses, in common with other international organizations, an inherent power to change — subject to conditions which the Tribunal will examine later — the general and impersonal rules establishing the rights and duties of the staff. It is a well-established legal principle that the power to make rules implies in principle the right to amend them."[1]

5. International organizations also have the corollary authority to amend their regulations. For example, in Puvrez, the former UN Administrative Tribunal (the "UNADT") held that the "power to adopt general provisions implies in principle the right to amend the

[1] WBAT Decision No. 1, *de Merode et al* (1981), para. 31.

rules established."[2] The power to modify established rules is not, however, unlimited and must in particular take into account what are commonly referred to as "acquired rights".

6. The concept of "acquired rights" is enshrined in UN Staff Regulation 12.1, which states that "[t]he present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members." Pursuant to the jurisprudence of the ILO Administrative Tribunal (the "ILOAT"), "the doctrine of acquired rights is a general principle" that is likewise incorporated into the ILO Staff Regulations and Rules, and "[t]hus ILO staff have their acquired rights protected by the Organisation's own Staff Regulations."[3]

7. While the administrative tribunals of the UN Common System have considered the questions of what is an acquired right and what actions by the administration would violate such a right, the resulting jurisprudence has not established a consistent definition and/or standard in that respect. Nevertheless, the jurisprudence of the tribunals has established some useful "guidelines" that may be relied upon by management when considering changes to the terms and conditions of employment.

8. Several of the general principles underlying these "guidelines" will be addressed in detail below, namely: i) the prohibition on retroactive application; (ii) the distinction between contractual and statutory conditions of employment; and (iii) the distinction between fundamental or essential and non-fundamental or non-essential conditions of employment.

The principle of non-retroactivity

9. Under the principle of non-retroactive application of amendments to the terms and conditions of service of staff, any such amendment that would affect a benefit or entitlement accrued under a previous rule or regulation could only be applied prospectively. Accordingly, the UNADT has held that:

> "... no amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered before the entry into force of the amendment. Hence, **no amendment may have an adverse retroactive effect in relation to a staff member**, but nothing prohibits an amendment of the regulations where the effects of such amendment apply only to benefits and advantages accruing through service after the adoption of such amendment."[4]

10. The jurisprudence of the UNADT remained consistent on this point (*See e.g.* UNADT Judgement Nos. 202, *Quéguiner* (1975) and 266, *Capio* (1980)). The ILOAT has also applied the principle of non-retroactive application. For example, the Tribunal has held that

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[2] UNADT Judgment No. 82, *Puvrez* (1961), para. V.
[3] ILOAT Judgment No. 832, *Ayoub* (1987), paras. 11-12.
[4] UNADT Judgment No. 82, *Puvrez* (1961), para. VII) (emphasis added).

provisions on the structure and functioning of the international civil service, which are of a statutory nature, may be amended "subject to the rule on non-retroactivity."[5]

11. The developing jurisprudence of the UNAT suggests that the Tribunal will likewise apply a prohibition on retroactive applications of amendments to the rules. For example, in Leboeuf staff challenged changes to the manner in which the rules governing the calculation of overtime were applied by the administration. In a concurring opinion, Judge Courtial found that in cases where "the Secretary-General clearly has the right to modify the rule moving forward – the staff members have no given rights to maintain a rule – he can only do it following the established procedure regarding the modification of a rule ... The Administration's theory that it can at any moment, and without any formal proceedings, revert to the correct interpretation of a rule that was misinterpreted appears to me to be generally appropriate, except when the provisions for the protection of legitimate expectation can be advanced against it by the staff members."[6]

12. In light of the well-established principle of non-retroactive application, any amendment to the Staff Regulations and Rules may only be applied prospectively.

Distinction between contractual and statutory elements of employment

13. Acquired rights are generally considered to be rights that are derived from the staff member's contract of employment, and which are accrued though service. However, not all benefits or entitlements accrued through service create acquired rights, such that they may not be unilaterally amended by the employing organization. Various criteria have been proposed by the administrative tribunals for marking the demarcation between changes that are permissible, and those which are not because they would adversely affect acquired rights.

14. One approach employed by the UNADT has been to distinguish between contractual and statutory elements of a staff member's employment, with the guarantee of acquired rights, as set forth in Staff Regulation 12.1, extending only to contractual elements. In Kaplan, the UNADT held that "[w]hile the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly".[7]

15. In attempting to define the difference between the two types of elements of employment, the UNADT held that contractual elements relate to matters that "affect the personal status of each member - e.g. the nature of his contract, salary, and grade." Whereas statutory elements relate to matters that affect in general the organization of the international civil service in relation to the need for "its proper functioning."[8] However, given, for example, that the United Nations has issued letters of appointment that incorporate by

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[5] *See* ILOAT Judgment No. 61, *In re Lindsey* (1962).
[6] UNAT Judgment No. 2011-UNAT-185 (Leboeuf), concurring opinion, J. Courtial, paras. 4-6.
[7] UNADT Judgement No. 19, *Kaplan* (1953).
[8] UNADT Judgement No. 19, *Kaplan* (1953).

reference, *inter alia*, the totality of the Staff Regulations and Rules,[9] the question of whether an element of employment is contractual or statutory is frequently not straightforward.

16. For example, in Quéguiner, a staff member challenged an amendment to "the procedure for computation of the Organization's contribution to educational expenses." The UNADT held that, while the challenged amendment to the rules "d[id] in fact lead to a reduction in the grant paid … to some staff members," the amendment did not breach an acquired right because "it d[id] not seem that the decision exceed[ed] the powers accorded to the Organization in the contract accepted by the Applicant." In essence, the Tribunal found that there had been no breach of an acquired right, because under the amendment the staff member still received payment of an "education grant," per the terms of his contract, but only at a different rate due because of a statutory change in the manner in which the grant was calculated.[10] Similarly, in Molinier the UNADT found that the "the rules of post adjustment are statutory," and thus, while staff members may have a right to a post adjustment under the terms of their contract, staff do not have a right to a specific *amount* of post adjustment.[11]

17. On the other hand, in Mortished, in which the applicant claimed an acquired right to be granted a repatriation grant without having to produce evidence of relocation, the Tribunal held that "respect for acquired rights carries with it the obligation to respect the rights of the staff member expressly stipulated in the contract." Since the entitlement to the grant was explicitly provided for in the applicant's contract, and payment did not require evidence of relocation at the time the applicant entered into service, the applicant, therefore, had an acquired right to the grant without providing proof of relocation. Notably, if the amended rule had been applied to the applicant, he would not have been able to benefit from the grant – at all - as the applicant did not possess the requisite proof of relocation required under the new rule, and, accordingly, he would not have been eligible for payment of the grant.[12]

18. In its judgment No. 61, *In re Lindsey* (1962), the ILOAT conducted a similar analysis of the distinction between statutory and contractual elements of employment. In *Lindsey* an International Telecommunication Union (the "ITU") staff member claimed an acquired right to various benefits that he was entitled to before the ITU amended its regulations so that its conditions of service were in line with those of the United Nations.[13] The ILOAT noted that the terms and conditions of ILO staff are derived from the contract of appointment, and from the ILO Staff Regulations and Rules, which are incorporated by reference into the contract of employment. The ILOAT further clarified that the ILO Staff Regulations and Rules contain two types of provisions: (i) those relating to the structure and functioning of the international civil service, which are of a statutory nature; and (ii) those relating to the individual terms

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[9] UN issued letters of appointment are specifically made subject to the Staff Regulations and Rules, "and to changes that may be duly made in such regulations from time to time." *See* UN Staff Regulations, annex II.
[10] UNADT Judgment No. 202, *Quéguiner* (1975), para. VI.
[11] UNADT Judgment No. 370, *Molinier et al.* (1986), para. XMI.
[12] UNADT Judgment No. 273, *Mortished* (1981), para. XV.
[13] Specifically, the staff member claimed an acquired right under the former ITU system to: (i) the pension scheme; (ii) termination allowance in the event of an abolition of post; and (iii) certain family allowances.

and conditions of employment, in consideration of which a staff member accepted his or her appointment, which are contractual in nature.

19. Applying this distinction to the case before it, the ILOAT found that the newly incorporated United Nations provisions on termination allowance were not applicable to the terms of appointment of the staff member, as they were fundamentally different from the rules that had previously applied to him. With respect to the newly incorporated regulations on pension, which abolished all immediate rights to a pension and substituted an allowance of three months' salary for each year of service with an amount to be decided by the Administration, the ILOAT likewise concluded that the applicant had an acquired right to the application of the previous rules. On the other hand, with respect to the various "family allowances" claimed by the applicant, the ILOAT found that the challenged amendments merely affected the conditions for granting family allowances within the framework of a family welfare policy, and, moreover, the Tribunal noted that the changes were generally favourable to the interests of affected staff. Accordingly, the ILOAT found that there had been no breach of an acquired right in this regard.[14]

20. In short, while staff *may* have a contractual right to a certain benefit or entitlement, the methodology for the computation of such an allowance or entitlement is generally considered a statutory element of employment, which may be lawfully amended by the administration under certain circumstances. As a general rule, an amendment to a statutory element of employment may lawfully reduce a benefit, but the change should not result in the total evisceration of the benefit.

21. Although the UNAT has not yet pronounced on the distinction between contractual versus statutory elements of employment in the context of acquired rights, the Tribunal has distinguished between an "appealable administrative decision" and a "regulatory measure," the latter of which it has found not to be subject to judicial review. For example, in a case where staff challenged the results of a salary survey conducted by ICSC, the UNAT found that the Secretary-General's decision to freeze salary scales as a consequence of findings of the survey constituted a regulatory measure, and consequently the case was not receivable.[15] Thus, by analogy it may be reasonable to expect that, should the UNAT issue a substantive ruling on acquired rights in a future judgment, the Tribunal would likely apply the same distinction, i.e. the distinction between decisions that directly affect the rights of individual staff, and regulatory matters of general application.

Distinction between fundamental or essential and non-fundamental or non-essential conditions of employment

22. Another approach by the administrative tribunals in respect of acquired rights is to distinguish between "fundamental or essential and non-fundamental or non-essential conditions of employment," with only the former giving rise to acquired rights. This

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[14] ILOAT Judgment No. 61, *In re Lindsey* (1962).
[15] UNAT Judgment No. 2015-UNAT-526 (Tintukasiri et al.), paras. 38-40

approach, for example, was taken by the World Bank Tribunal in the *de Merode et al.* case (cited above at paragraph 4):

> "Certain elements are fundamental and essential in the balance of rights and duties of the staff member; they are not open to any change without the consent of the staff member affected. Others are less fundamental and less essential in this balance; they may be unilaterally changed by the Bank in the exercise of its power, subject to [certain] limits and conditions ..."[16]

23. The ILOAT has likewise held that in order for there to be a breach of an acquired right, the alteration being challenged must relate to a fundamental and essential term of employment "in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on."[17] Again, however, the distinction between those rights that must be respected because they are essential and those that can be modified because they are less essential is not always readily apparent. As the WBAT provided in its judgment in *de Merode et al.*:

> "The Tribunal recognizes that it is not possible to describe in abstract terms the line between essential and non-essential elements any more than it is in abstract terms possible to discern the line between what is reasonable and unreasonable, fair and unfair, equitable and inequitable ... Sometimes it will be the principle itself of a condition of employment which possesses an essential and fundamental character, while its implementation will possess a less fundamental and less essential character. In other cases, one or another element in the legal status of a staff member will belong entirely — both principle and implementation — to one or another of these categories. In some cases the distinction will rest upon a quantitative criterion, in others, it will rest on qualitative considerations. Sometimes it is the inclusion of a specific and well-defined undertaking in the letters of appointment and acceptance that may endow such an undertaking with the quality of being essential."[18]

24. UNADT Judgment No. 1253, and in particular the concurring opinion by Judge Stern provides a greater degree of insight into how the tribunals have applied this admittedly nebulous distinction. In that case, the applicant took "early retirement" and separated from the service of the International Civil Aviation Organization (ICAO) in 1999. As an ICAO staff member, the Applicant was a participant in the United Nations Join Staff Pension Fund (the "UNJSPF" or the "Fund"). Several years after his separation from service, the Fund was notified that the applicant had failed to meet his obligations under a court issued order of support in respect of his ex-wife. The Fund then notified the applicant that a request had been made pursuant to article 45 of the UNJSPF Regulations to have all or part of the Applicant's UNJSPF pension benefit paid to his ex-wife. The Applicant responded that, because article 45 was not in existence at the time he retired, he had an "acquired right" that protected him

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[16] WBAT Decision No. 1, *de Merode et al.* (1981), para. 42.
[17] *See, e.g.* ILOAT Judgment No. 3074 (2012).
[18] WBAT Decision No. 1, *de Merode et al.* (1981), para. 43.

from changes in the Regulations which would adversely impact upon his pension rights.[19] The Tribunal rejected his application finding, *inter alia*, that the challenged amendment did not infringe upon any acquired right because "the pension systems for public international organizations operate under statutory rules" and "the statutory part of the scheme may be changed at the discretion of the administration." [20]

25. Although Judge Stern agreed with the outcome of the judgment, she was of the view that the majority opinion would benefit from the inclusion of the "general presentation on the principle of acquired rights," which she provided in her concurring opinion. In considering whether a staff member had an acquired right, Judge Stern found two factors to be of particular importance, namely: (i) the importance of the right established in the staff member's decision to join the Organization; and (ii) whether modification of the right entailed "extremely grave consequences for the staff member, more serious than mere prejudice to his or her financial interests." On the latter point, Judge Stern adopted the analysis employed by the ILOAT in the Ayoub case, according to which the financial injury to the staff member, even where severe, is not enough in itself to establish a breach of acquired rights, although such injury is "one of the elements that may affect the assessment of the overall situation."[21]

26. Finally, Judge Stern further clarified that "the essential character [of a condition of employment] should not be assessed solely in ... [the abstract] and only from the point of view of the interested party, but should be evaluated in a comparative fashion, looking at it from the standpoint of the interests pursued by the new regulations." Thus, the Judge clarified that in assessing the two above-mentioned considerations, it should be "understood that what is at issue is not strictly subjective importance, with some exceptions, but rather objective importance ."[22] In short, the subjective opinions of the affected staff member might be considered by the Tribunal, but such opinions are not dispositive.

27. Applying these criteria to the case before her, Judge Stern opined that the applicant did not have an acquired right to the "non-garnishability" of his pension, because the asserted "right" did not concern an essential contractual element of his employment. Rather, the rules concerning pensions were general statutory rules. Judge Stern further underlined that no breach occurred of the applicant's actual right to the pension, since the amount of the pension owed to the applicant did not change under the application of the new rule. All that was modified were the modalities of distribution. Lastly, Judge Stern recalled that article 4.2 of the UN Staff Regulations states that "(t)he paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity." As such it would be "unthinkable to accept that a staff

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[19] In 1998, article 45 of the UNJSPF Regulations, entitled "Non-assignability of rights", had been amended to enable a portion of a participant's pension benefit to be paid directly to a former spouse or otherwise satisfy court-ordered or court-approved family obligations, where the participant requested that such action be taken.
[20] UNADT Judgment No. 1253 (2005), para. III.
[21] UNADT Judgment No. 1253 (2005), concurring opinion, para. XVIII.
[22] UNADT Judgment No. 1253 (2005), concurring opinion, para. XVIII.

member could invoke an acquired right in order to evade obligations that have been duly contracted and recognized by law."[23]

28. The concurring opinion by Judge Stern, and in particular the distinction made therein between essential and non-essential conditions of employment, has been cited by the UNDT in a handful of judgments. For example, in Candusso, the staff member asserted an "acquired right" to a "subsidized cafeteria." In considering this claim, the UNDT relied on Judge Stern's concurring opinion and held that "it cannot be argued ... that access to a subsidized cafeteria is a fundamental and essential term of employment without which the Applicant would not have accepted his job with the Organization and the modification of which would entail 'extremely grave consequences for [him], more serious than mere prejudice to his ... financial interests.'"[24]

29. In sum, while there is no definitive test or standard for distinguishing an essential from a non-essential condition of employment, it may be reasonably extrapolated from the available jurisprudence that an essential condition of employment would be one that: (i) but for the condition, the staff member would likely *not* have entered the service of the Organisation; and (ii) would cause "grave consequences" for the staff member, beyond "mere prejudice to his or her financial interests," if it were to be changed by an amendment to a regulation or rule. Finally, the jurisprudence of the UNADT (cited above in paragraph 26) suggests this analysis is of an objective, not subjective, nature.

30. The above considerations are consistent with the previous advice of the United Nations Office of Legal Affairs ("OLA"). For example, in March 2007, OLA was asked to provide advice regarding changes to the After-Service Health Insurance (or "ASHI") program, then under review by the Fifth Committee of the United Nations General Assembly (the "Fifth Committee"). The proposed modifications to the eligibility criteria applicable to staff members not yet eligible for ASHI were as follows: (i) an increase in the subsidy-eligibility requirement; (ii) the use for the purpose of a contribution basis assessment of a theoretical pension of a minimum of twenty-five years of service; and (iii) the introduction of new dependent eligibility requirements. The Fifth Committee was also considering an increase in the minimum eligibility for ASHI from five to ten years participation in a United Nation contributory insurance health plan.

31. OLA opined that applying the proposed modifications to serving staff would not be in accord with the terms and conditions of employment, which staff accepted on entry into service with the Organization. OLA considered that if implemented, the changes would "not only materially affect but also [would] substantially prejudice those terms of employment." Accordingly, OLA opined that, given that the ASHI benefits were derived from the staff members contracts of employment, and had been accrued through service, the envisaged amendments if enacted would have violated the principle of acquired rights of currently

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[23] UNADT Judgment No. 1253 (2005), concurring opinion, para. XIX.
[24] UNDT Judgment No. 2013/090 (Candusso), paras. 31-32, citing ILOAT Judgment No. 3074 (2012)); *see also* UNDT Judgment No. 2013/090 (Omar), para. 31.

serving staff. Thus, OLA recommended that the proposed modifications to the ASHI scheme be made applicable only prospectively to "new recruits."

Cumulative effect of amendments on the functioning of the international civil service

32. Finally, the tribunals have been clear that, irrespective of the question of acquired rights, any proposed changes to the rules and regulations must not be "arbitrary" and must promote implementation of the principles in Article 101 of the United Nations Charter, i.e. the requirement that "the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity."[25] The ILOAT has similarly held that "[a]n international organization should refrain from any measure which is not warranted by its normal functioning or the need for competent staff."[26] The rationale for this requirement appears to be to ensure that the effect of an amendment to the rules (individually or cumulatively) should not be so dire or draconian that it would undermine the very functioning and health of the international civil service system.

33. For example, in the ILOAT case of Ayoub, the applicants challenged amendments to the UNJSPF rules governing the calculation of pensionable remuneration. The ILOAT found that, notwithstanding the financial detriment caused by the change to some staff, the applicants did not have an acquired right to the previous system of calculation, because the amendment concerned a statutory element of the applicants' conditions of service, and, moreover, the rationale put forward by the employing organization for the amendment was reasonable. However, the ILOAT went on to hold that, although the applicants did not have an "acquired right" under the circumstances of the case, the finding did not render them without any legal "protection" because "[a]n international organization should refrain from any measure which is not warranted by its normal functioning or the need for competent staff. It is bound by the general principles of law such as equality, good faith and non-retroactivity. It will act from reasonable motives and avoid causing unnecessary or undue injury."[27]

34. In Christy, the applicants (FAO, IAEA and IAEA staff members) likewise challenged amendments to UNJSPF rules used to calculate pensionable remuneration. The UNADT noted the applicants' claim that the changes violated their right to the "maintenance of an effective and just pension system," and found that while the organization had such an obligation, "this does not mean that the system may not be modified so long as the modifications are not arbitrary, ... [and] promote implementation of the principles laid down in Article 101 of the United Nations Charter." The UNADT found in that case that the amendments to the UNJSPF were neither arbitrary, nor "improperly unfavourable to staff members, or destructive for staff members' rights to a pension system."[28]

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[25] UNADT Judgment No. 546, *Christy et al.* (1991), para. XIII.
[26] ILOAT Judgment No. 832, *In re Ayoub* (1987), para. 16.
[27] ILOAT Judgment No. 832, *In re Ayoub* (1987), para. 16.
[28] UNADT Judgment No. 546, *Christy et al.* (1991), para. XIV.

35. This basic principle of "fair dealing" has been relied on by the UNAT as well. For example, in Castelli the UNAT considered the legality of an administrative decision requiring that the applicant take a break in service, which had the effect of nullifying his right to a relocation grant. The Tribunal held that "[w]hile staff members' acquired rights do not operate to prevent the General Assembly from supplementing or amending the provisions of the Staff Regulations, as stipulated in regulation 21.1 ... the administration may not subvert the entitlements of a staff member by abusing its powers ... ." While the UNAT did not find that the applicant had an "acquired right" to a relocation grant, the Tribunal upheld the finding by the UNDT that the actions by the administration, i.e. requiring that the applicant take a break in service without a proper basis in the rules, had been unlawful.[29]

Transitional measures

36. Taken in totality, the foregoing suggests that "acquired rights" could be seen as rights that derive from the staff member's contract of employment and are accrued through service. Pursuant to the applicable legal principles, amendments to the rules that breech acquired rights will not withstand successfully a challenge before the tribunals. However, even in cases where an amendment to the rules may not affect an acquired right, the Administration has on occasion opted to implement the amendment in such a way as to permit staff to continue to take advantage of a benefit, to which they were entitled prior to the amendment, for a limited period of time. This is commonly referred to as a "transitional measure".

37. For example, when the Organization amended the mobility and hardship scheme in 1989, it was decided that a transitional allowance would be payable to staff members who experienced a reduction in their allowances under the revised scheme.[30] Transitional measures could also include, for instance, a deferral of the implementation of the amendment for a number of years, a progressive alteration of the modalities for a reduction of allowances, or the payment to each affected staff member of an amount to counteract any negative effect of the amendments on allowances they might receive in future.

38. The decision to implement transitional measures is not necessarily relevant to situations concerning acquired rights. In other situations in which it is not clear that acquired rights are involved in a regulatory change to the terms and conditions of employment, it remains an option for the employing organization to consider providing for transitional measures as a matter of administrative policy with respect to the best manner in which to implement an amendment to the rules.

Proposed changes to the compensation package

39. In its request for advice, the ICSC identified some ten (10) different proposed changes to the compensation package that are currently under consideration by the Commission. The jurisprudence of the various administrative tribunals on the question of "acquired rights" is not sufficiently clear so as to be predictive as to how such tribunals might rule in respect of

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[29] UNAT Judgment No. 2010-UNAT-037 (Castelli), para. 24.
[30] *See e.g.* "Mobility and Hardship Allowance," ST/AI/363, 1 August 1990, paras. 56–58.

each of the ten proposed amendments. Indeed, there is no case law to speak of with regard to some of the proposals. That being said, in order to illustrate the manner in which the tribunals have considered the principle of "acquired rights" in practice, a sample of the jurisprudence relevant to a few of the proposals is elaborated below.

40. As a preliminary matter, it should be noted that while the UNADT discussed substantively the concept of acquired rights in some sixty (60) cases, only in approximately twelve (12) of these cases did the Tribunal find a breach of an acquired right. The ILOAT has likewise interpreted the concept of "acquired rights" conservatively. Out of about eighty (80) cases relating to acquired rights, the ILOAT only found a breach of an acquired right in two cases, one of which related to the discontinuance of the reimbursement of travel expenses, while the other concerned an amendment of a pension scheme.

41. Finally, the UNAT has held that "when the Appeals Tribunal has determined its jurisprudence on a precise legal issue, it is not appropriate for [the UNDT] to consider the jurisprudence of other jurisdictions ... when a judgment of the Appeals Tribunal conflicts with a judgment from another tribunal, the UNDT has the duty to apply Appeals Tribunal jurisprudence."[31] However, in respect of the matter at hand, it is again recalled that the jurisprudence of the new system of internal justice remains limited, such that the jurisprudence of the UNADT and other administrative tribunals remains relevant.

Education Grant

42. In UNADT Judgment No. 202 (1975) (Quéguiner), a staff member challenged an amendment to the rules governing the payment of an education grant. Pursuant to the previous rules, staff members were entitled to a flat rate amount (USD 1,000). Under the new rules, staff members were entitled to the payment of a maximum of 75 per cent of the cost of attendance, up to a maximum amount (USD 1,500). The UNADT dismissed the staff member's application, holding that the "amendment made concern[ed] the procedure for computation of the Organization's contribution to educational expenses . . . [w]hile it d[id] in fact lead to a reduction in the grant paid on that account to some staff members, it d[id] not seem that the decision exceed[ed] the powers accorded to the Organization in the contract accepted by the Applicant."

43. In ILOAT Judgment No. 666 (*In re* Chomentowski (No. 2), Maugain (No. 3) and Niveau de Villedary (No. 3)) (1985), three staff members of the European Patent Organization ("EPO") contested the administration's decision not to provide them with an education grant in the form of a direct payment following their transfer to the EPO, in Munich, Germany, from another organization in The Hague. As a matter of policy, the EPO had decided not to disburse education grants directly to staff members. Instead, it elected to subsidize the European School of Munich. The ILOAT dismissed the staff members' application ruling that "an allowance may form an essential part of the official's contract in that he considered it to be of decisive importance when he accepted employment, and its

[31] UNAT Judgment No. 2015-UNAT-526 (Tintukasiri et al.), para. 34.

abolition would therefore constitute [a] breach of his acquired right; but he has no acquired right to the actual amount of the allowance or to [the] continuance of any particular method of reckoning it. Indeed he must expect these to change as circumstances change."

Dependency benefit

44. In Puvrez, the ICAO Council had amended the rules to require that a staff member furnish information concerning the income of his or her spouses in order to qualify for dependency benefits. The applicant claimed he had an acquired right to dependency benefits irrespective of spousal income in accord with the previous system. Relying on UNADT Judgment No. 19, *Kaplan* (1953), the Tribunal held that "no amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered before the entry into force of an amendment." However, although amendments cannot have an adverse retroactive effect, amendments may apply to benefits and advantages that accrue after the adoption of the amendment. On this basis, the Tribunal found that the adoption of an amended definition of a dependent spouse was a statutory matter, and thus the applicant did not have an acquired right to a dependency benefit as defined in the previous system (UNADT Judgement No. 82, *Puvrez* (1961)).

45. Similarly, in Sundaram, an information circular issued by the UN Pension Fund amended the definition of occupational income for dependent spouses to include pension income. The amendment to the rules resulted in the income of the applicant's husband exceeding the applicable threshold and, thus, disqualified the applicant from receiving a dependency benefit for her husband. The UNADT determined that the change in the definition of occupational earnings, which resulted in the loss of the applicant's dependency allowance, did not constitute denial of acquired rights (UNADT Judgment No. 478, *Sundaram* (1990)).

Termination benefits

46. In Ayoub, the applicant was informed that her post was set to be abolished. As a consequence, the applicant claimed an acquired right to receive a separation indemnity (redundancy benefit) in the specific amount provided for by the administrative issuance in effect at the time she entered into service, which had subsequently been amended. The Tribunal ruled against the applicant, holding that the provisions contained in administrative issuance constituted a statutory condition of employment, and as such the condition could be modified at the discretion of the administration without affecting her acquired rights (UNADT Judgment No. 959, *Ayoub* (2000)).

Repatriation Grant

47. In Mortished the applicant's contract explicitly provided for a repatriation grant, but was silent on any requirement to produce supporting evidence of such repatriation as a precondition to payment of the allowance. A subsequent amendment made submission of supporting evidence a condition to payment. The applicant claimed an acquired right to a

repatriation grant without having to produce evidence of relocation. In that case, the Tribunal found in favour of the applicant, holding that "respect for acquired rights carries with it the obligation to respect the rights of the staff member expressly stipulated in the contract." Since the entitlement to the grant was explicitly provided for in the applicant's contract, and payment did not require evidence of relocation at the time the applicant entered into service, the applicant had an acquired right to the grant. The Tribunal further held that "respect for acquired rights also means that all the benefits and advantages due to the staff member for services rendered before the coming into force of a new rule remain unaffected" (UNADT Judgment No. 273, *Mortished* (1981), para. XV)).

Conclusion

48. Based on the foregoing, the principle of acquired rights involves a complex balancing act between the need for an international organization to amend its rules and regulations in the face of changing circumstances, with the obligation by such organizations to respect the acquired rights of staff that are derived from their contracts of employment and are accrued through service. While it has been rare thus far for an administrative tribunal to find a violation of an acquired right in any one particular case, it remains important that the principles discussed above are taken into consideration with respect to any envisaged changes to the terms and conditions of employment.

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