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TO: FICSA Secretariat

I. Mandate

1. To provide FICSA an opinion on the lawfulness of the ICSC decision adopting operational rules for implementation of the salary survey conducted in Montreal and the lawfulness of its application by ICAO, and to provide an overview of the appeal processes and general litigation strategy.

II. Background Taken from Terms of Reference

2. The report of the salary survey for Montreal that was conducted in April 2024 should have been presented at the 99th ICSC session for consideration by the Commission.
3. However, considering the overwhelmingly positive outcome, the organizations in Montreal requested the ICSC to postpone the discussion of this agenda item 7 of the 99th ICSC Session “Conditions of service of the General Service and other locally recruited categories: survey of best prevailing conditions of employment in Montreal ICSC/99/R.7” to the 100th Session.
4. At the 100th ICSC Session, this item was discussed under agenda item 7; however, with a new proposal from the ICSC Secretariat added for consideration by the Commission, document ICSC/100/CRP.5, which included the proposal to adopt “operational rules” for implementation of the survey results.

“Operational rule 2

9. The coordinating agency or responsible agency may decide to phase the implementation of survey results by a **factor no lower than two times the interim adjustment applicable as of the survey reference date**. The calculation of the interim adjustment will be subject to the same conditions and order of preference applicable for operational rule 1. If **external salary data** were

used, the **existing cap of three times**¹ the latest external salary movement stated in the methodology will continue to apply.

10. The factor determined to phase the implementation of survey results, i.e. two or more times the interim adjustment, will be maintained until the full survey results have been implemented. However, the actual percentage used as threshold could change according to the results of future interim adjustments.

11. Any percentage carried forward will be implemented in subsequent years taking into account the combined effect of the interim adjustment and threshold calculated for the relevant year.”²

5. Despite the request of the Staff Federations to establish a technical task force or working group to review this proposal, as well as the concern raised by the Staff Federations and HR Network that “modifying the survey methodology mid-cycle should be avoided to protect the integrity and predictability of the salary-setting process and avoid any legal risk associated with it”³ the ICSC adopted the operational rules with immediate effect for all surveys to be finalized during the eighth round of surveys on the basis of the application of the salary survey methodology (ICSC/94/R.16 and ICSC/94/R.17).
6. On 29 August 2025, applying operational rule 2, ICAO in Montreal implemented a **6.44** per cent increase (two times the interim adjustment applicable as of the survey reference date) to the salary scales, instead of the actual result of **17.23** per cent. Despite that the operational rule itself states that a factor of 3 times will apply if external data is used, this was not applied by ICAO.

III. Lawfulness of ICSC Decision to Adopt Operational Rules and ICAO Decision

A. Injury

7. Since ICAO has announced in August 2025 that it will implement the operation rule, the question is whether it resulted in injury to staff members.
8. This question can be answered in the affirmative.
9. It is estimated that the full 17.23 % would already be implemented by 2025 if the 3 times factor was applied; under the 2 times factor in operational rule 2 the final 7.79 % is carried to 2026 subject to threshold test and therefore may go beyond 2026. A G-5,

¹ See ICSC/94/R.16 (ICSC Methodology), para. 104.

² See document ICSC/100/R.18, Annex II.

³ See document ICSC100R16 Montreal Survey Disc and Dec),

Step 1 staff member, for example, will therefore lose approximately **CAD 5,194** by the time the 7.79% balance is applied in April 2026.⁴

10. Moreover, absent evidence of evidence of a *bona fide* reason with substantiating evidence, 17.23% should have been implemented already in 2024.
11. Finally, the phase-in will have a cascade effect on other significant entitlements and benefits, e.g. reducing pension contributions.

B. Appeals to and Remedies in the ICAO/UN Justice System

12. ICAO has three steps in the appeal procedure: administrative review; appeal board review and decision; and United Nations Appeals Tribunal (UNAT) review and decision.
13. ICAO staff members have the right to appeal administrative decisions affecting their appointments. The issuance of a payslip has been held to be an administrative decision pertaining to salary subject to appeal.⁵
14. The affected staff member must initially file a request for administrative review to the Secretary General within 60 days of receipt of the pay slip reflecting the change in pay⁶. If the answer is negative, the next step is the first instance appeal before the ICAO Appeals Board, which is empowered pursuant to Staff Rule 11.2 to “render a decision on the matter comprised of a written record and a written decision providing reasons, fact and law to make judgments on the appeal.” Either party may appeal to the UNAT from the decision of the Appeals Board. If no appeal is taken, the decision becomes final and binding.
15. Under the applicable tribunal statutes, the appeal system is an individual system and neither staff representatives nor staff unions/associations have standing to lodge appeals⁷. Since the decision affects the pay of staff representatives, they could appeal in their personal capacity, raising breach of freedom of association as a plea in the appeal.

⁴ Unaudited figures provided to author by staff representative – expert testimony required.

⁵ See *Issa* Judgment No. 2024-UNAT-1503, para. 36 (“*Mr. Issa in fact contests the decision not to pay him for each of the three months at issue (March, April, and May), and each such decision is itself an administrative decision subject to review*”); and *Tintukasiri* 2015-UNAT-526, para. 38.

⁶ See ICAO Appeals Board – Rules of Procedure.

⁷ See *Faye* Judgment No. 2016-UNAT-654, para. 19 (“UNDT Statute does not provide for filing of applications by staff representatives or a staff association in the name of, or on behalf of, the collective interests of staff members.”)

16. On the merits, there is a threshold issue of whether the ICSC methodology and adoption of the operational rules are subject to judicial review. In the PAM cases from Geneva, the UNAT held that the ICSC methodology and recommendations, which were subsequently endorsed by the General Assembly, are in effect immune from judicial review as constituting regulatory or legislative decisions.⁸ The UN SG had no discretion according to the UNAT other than to implement the PAM, and in doing so acted rationally and in keeping with the law.
17. However, in the present factual scenario, the ICSC's recommendations and the recommendations/results of the survey and the adoption of the operational rules are not subject to endorsement or approval by the GA. Instead, the organizations are given discretionary power on implementation, as stipulated in the methodology:

“109. Every survey will have a reference date to which the survey data should correspond. The recommended scales based on the survey results would therefore relate to that reference date. **The data collected represent the best prevailing salaries at the reference date and, from a technical point of view, would be most appropriately applied as of that same date.** However, there may be other reasons for establishing a different effective date, such as for administrative convenience, prior understanding with staff representatives, or **financial restrictions.** **The actual decision with regard to the effective date of the scales is part of the process relating to the implementation of the survey recommendations and rests with the organizations concerned.**”

18. The decision whether or not to implement the increase, whether with reference to the operational rule or some other criteria, is thus at the discretion of the ICAO Secretary-General.⁹
19. In exercising discretion¹⁰, the ICAO Secretary-General would have the power to assess the methodology and the wisdom of applying the ICSC operational rules, and to assess

⁸ See *Doedens et al.* Judgment No. 2021-UNAT-1112.

⁹Article 12(2) would also not be a source of authority for the ICSC to decide upon the phase-in of the survey results: “Notwithstanding the provisions of paragraph 1 above, the executive head or heads concerned, after consultation with the staff representatives, may request the Commission to determine the salary scales at a particular duty station instead of making a recommendation. The salary scales so determined shall apply to all staff in the same category at the duty station.”

¹⁰ See *Sanwidi* Judgment No. 2010-UNAT-084, para. 38 (“There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity,

whether they were lawfully adopted or promulgated within the ICSC's statutory authority. Obviously, there should be no challenge to the methodology and the survey results, having resulted in a very favourable number.

20. Thus, there is a live issue as to whether the adoption of the operational rules amounted to an amendment of the methodology or simply modified or supplemented paragraph 109 of the methodology cited above or were altogether issued *ultra vires*. There is no dispute that the ICSC under Article 11 has the power to determine the methodology. However, in its statute there is no express power to adopt a methodology or recommendations or rules for a phased-in implementation, and the methodology expressly invests the authority for implementation with the organizations. In a conference paper (and likely in the knowledge that it had no authority in this area), the ICSC made it clear that they would not be requiring strict or even tepid application of the operational rules on the organizations and instead the rules were presented as a proposal for consideration when implementing the survey results.

“By implementing operational rules and not modifying the methodology, the findings of the salary survey conducted in accordance with the approved methodology would remain intact. Additionally, the coordinating agency or the responsible agency may exercise flexibility to address cashflow difficulties faced by organizations while limiting the impact on staff and without compromising any correction of market positioning calculated based on the implementation of the Flemming principle.”¹¹

21. It is noted, however, that the text of the final operational rules did not include any language to suggest that they were provided merely for flexibility. It appears that the ICAO SG may simply have felt compelled to implement the operational rule without exercising any discretion, and this goes to the important legal issue on the merits, i.e., whether the ICAO SG lawfully exercised discretion by implementing the pay increase according to the 2 times factor in operational rule 2.
22. Accordingly, based on the analysis so far the appeal should challenge the exercise of the discretion of the ICAO SG, and in particular that in applying the operational rule: i) that the SG failed to account for the unlawful amendment of the methodology by the ICSC (on the premise that the adoption of the operational rules represented an

bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.”).

¹¹ See ICSC/100/CRP.5.

- amendment to the methodology); ii) that ICSC had no power to issue the operational rules in the first instance as implementation of the results is expressly reserved for the individual organization; iii) that the operational rule conflicts with paragraph 109 of the methodology; and iv) that the ICSC did not make the required consultations with staff representatives and the HR Network before issuing the rules (Article 12(3) of its statute).
23. There are other grounds for showing the exercise of discretion in the decision-making process in this case was unlawful. The methodology allows for changes in the implementation of the results based on “financial restrictions” but there is no evidence the SG ever considered such issues or commissioned a detailed audit or other type of financial report on budgetary constraints that may have presented circumstances to justify applying a phased implementation.
24. Moreover, in the ICAO HR Global Announcement of 29 August 2025 it is stated that “at the request of [ICAO], the ICSC recommended the implementation of a salary scale 6.44 per cent higher than the existing scale . . . based on the implementation of operational rules approved by the Commission at its 100th session.” On its face, this evidence demonstrates that the SG (even intentionally if the representations are true) delegated his authority to the ICSC to make the decision instead of exercising his own discretionary authority. Article 12(2) authorizes the ICSC, instead of making a recommendation, to establish salary scales at the request of the executive head, after consultation with the staff representatives. This article does not strictly apply in this case as it concerns implementation of the results, although perhaps broadly the language could include implementation as part of establishing the salary scale. The ICAO executive head, however, and in any event did not consult with staff representatives.
25. As part of the litigation strategy, any documents relating to information provided by the ICAO SG to the ICSC or generated internally about alleged financial restrictions should be identified. In these type of cases, there is usually very little evidence that the organization can produce to actually show real financial constraints that could justify a phase-in approach.
26. It could also be argued that the ICAO SG also did not implement the recommendation in accordance with the ICSC operational rule 2 which stipulates that “[i]f external salary data were used, the existing cap of three times the latest external salary movement stated in the methodology will continue to apply.” It appears that external salary data were used in the Montreal survey, so this factor should have been applied.

27. If it is proven that the exercise of discretion was unlawful, it follows naturally that there is a corresponding breach of the Flemming principle, in that ICAO staff members are deprived of the best prevailing conditions in the locality for similar work, until the survey results are fully implemented.
28. Finally, it can be argued that the ICAO SG breached the principle of freedom of association by not consulting with staff representatives in advance of taking the decision. In *Arvizu* Judgment No. 2022-UNAT-1231, the UNAT reiterated that the “principle of freedom of association is one of the principles of law that must be observed by the organisations of the United Nations Common System.”¹² For purposes of this paper, it is taken as given that ICAO staff representatives were not consulted prior to the announcement of the salary survey results.

C. Appeals to the ILO Administrative Tribunal

29. To the extent other salary surveys are implemented based on the same operational rules and similar factual circumstances by organizations subscribing to the jurisdiction of the ILOAT, similar arguments may be raised before the ILOAT by affected staff members.¹³
30. The Tribunal has held that although the ICSC has significant discretion in applying its method, a decision of the executive head of the organization implementing the recommendation may be set aside if “it overlooks or misconstrues some particular factor, or if some method is applied for the wilful contrivance of lower figures of local pay, or if corners are cut for the sake of saving time, but to the detriment of staff.”¹⁴
31. In the Geneva PAM cases, the ILOAT¹⁵ specified its scope of review of decisions taken as a result of the ICSC’s recommendations, which although it involved the Noblemaire principle, will likely apply in the present circumstances:

“26. . . . an international organization is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all the principles of international civil service law (see, for example, Judgments 1821, consideration 7, and 3324, consideration 16). Further, the Tribunal has noted that cases such as the present can raise issues of a highly

¹² Citing *De Kermel* Judgment No. 2012-UNAT-239, para.39.

¹³ Vienna-based organizations IAEA or UNIDO, for example. However, if decisions are taken by the executive head of UNOV/UNODC, the procedure is different, and initially requires a management evaluation request, and then an appeal to the UNDT, and if that is not successful, to the UNAT.

¹⁴ Judgment No. 1713 (Rome language factor).

¹⁵ Judgment No. 4134.

specialised nature being ‘based on the technical judgment to be made by those whose training and experience equip them for that task’ and that it will not substitute its own assessment for that of the organization (see, for example, Judgment 3360, considerations 4 and 5). While an international organization is free to choose a methodology, system or standard of reference for determining salary adjustments it must be a methodology which ensures that the results are stable, foreseeable and clearly understood or transparent (see, for example, Judgments 1821, consideration 7, and 2095, consideration 13). The requirement that the results must be stable, foreseeable and clearly understood or transparent does not mean a salary regime is fixed once and for all and is incapable of change (see Judgment 1912, consideration 14), or that this requirement excludes reasonable variations in the results yielded (see Judgment 3676, consideration 6). Moreover ‘a methodology cannot be applied without a degree of flexibility and without leaving some room for interpretation by the competent authority, which [is] entitled to take into account the imbalances generated by past applications of the adopted methodology in order to try to attenuate the effects thereof and properly to implement the Noblemaire principle’ (Judgment 2420, consideration 15).”

...

28. However, if the organization is relying on an external body for advice and assistance, it nonetheless needs to ensure these principles have been applied (see, for example, Judgment 1765, consideration 8, where the Tribunal said in relation to erroneous calculation by the ICSC):

‘[The organization] has the duty of checking the lawfulness of any decision by another body on which it bases its own decision. So too must it check the adequacy of action by that other body to correct any mistake it may have made, and make sure that such corrective action respects the rights of staff. Authority for that is in Judgment 826 [...] under 18. If the [ICSC]’s original reckoning was unlawful, so is a second one that fails to redress fully the wrong.’”

32. There are a number of arguments that could be raised that were covered in the previous section.
33. Appeals may challenge the adoption of the operational rules either as an unlawful amendment of the methodology or as an *ultra vires* act by the ICSC, and as a breach of freedom of association.
34. The operational rules were formulated and adopted as a result of a request from ICAO. If the same rules are applied by other organizations, but which have not made a similar

request, it could be argued that essential facts were not considered involving the particular financial circumstances of the organization implementing the rules.

35. The organizations have to justify any phase-in of survey results with actual evidence of financial hardship.
36. The executive head may have to obtain a decision from the governing body in order to implement the survey results, and this would have to be explored by reference to the staff regulations and rules, etc., with each individual organization applying a phase-in approach.
37. As with the UN justice system, appeals may be initiated following receipt of the first payslip representing the implementation of the survey results in a phased-in manner, which constitutes the administrative decision for purposes of most appeal rules, although each FICSA member should carefully review their own specific appeal rules¹⁶.
38. In Judgment No. 3931, the ILOAT dismissed the appeal of WFP staff members challenging a salary freeze following results of a salary survey by UN/OHRM conducted in New Delhi in 2013 based on receivability. Instead of challenging the individual payslips, the staff members had appealed against a “general decision” contained in an administrative order announcing the freeze. The ILOAT stated that “[c]hallenging a pay slip is an orthodox and accepted mechanism whereby an individual staff member can challenge a general decision as and when it is implemented in a way that affects or is likely to affect that individual staff member.” The ILOAT thus did not reach the merits of the challenge.
39. In Judgment No. 3883, the ILOAT reached the merits of an appeal by ILO staff members stationed in Bangkok challenging a local salary survey in 2011. The ILOAT rejected the arguments for lack of evidence, that wilfull efforts were made to skew the results and that the allegation that job matching was conducted to lower the overall results “in the main, are speculation, assertion or both.” The ILOAT did find that there was a violation of Staff Regulation 3.1(e) since there was no consultation with the joint negotiating committee, and awarded compensation until the freeze ends or a “lawful decision involving consultation with the JNC is made by the Director-General to freeze existing salaries”. This demonstrates that a plea of breach of freedom of association may have some positive results.

¹⁶ Judgment No. 3931.

40. Finally, there does not appear to be an issue of practice. As demonstrated in the PAM cases in Geneva, where there has been a practice¹⁷ by the ICSC to issue operational rules on implementation of the survey results. If an organization were to rely on a practice, which conflicted with the ICSC statute, the Tribunal held in the PAM cases that to “accept the contention of the ILO concerning the legal effect of practice is to invite instability, unpredictability and uncertainty and must be rejected.”

IV. Conclusion

41. There are good grounds for challenging the ICAO decision to phase-in the salary survey results for Montreal, which certainly has caused financial injury to staff members. Given that the GA is not involved in the decision-making process, compared to the PAM cases in Geneva, challenges in the UN justice system and judicial review will likely be similar to the judicial review conducted by the ILO Administrative Tribunal, which focuses on the discretion exercised by the executive head. This will obviate to some extent the political concerns that the Tribunals will issue contradictory or opposite judgments, as happened with the PAM appeals.

42. The following summary of arguments can be asserted to challenge the exercise of discretion in both judicial fora:

- i) There were no reasons given for the decision other than it was recommended by the ICSC; there is a fundamental principle that any administrative decision must be justified by reasons;
- ii) The ICAO SG should have concluded that the ICSC exceeded its authority by issuing operational rules, i.e., it is not authorized by its Statute (Articles 11 and 12) and the methodology (see paragraph 109), and the rules are not consistent with or merely explanatory to the methodology, and indeed could be construed as an amendment of the methodology;
- iii) The ICAO SG exceeded his authority by requesting in effect the ICSC to decide the phase-in factor; or similarly, delegated his authority to the ICSC when the methodology reserves the right to implement the survey results strictly to the organizations;
- iv) There were no *bona fide* financial constraints preventing the full implementation of the results in 2024;
- v) The rules themselves were breached in that a 3 times factor should have been applied since external data was utilized;
- vi) The ICSC and the ICAO SG breached the principle of freedom of association by not consulting staff representatives in advance of taking the decisions.

¹⁷ The UNAT held the practice had in effect amended the ICSC statute; the ILOAT held the statute would have to be formally amended to give effect to the practice.