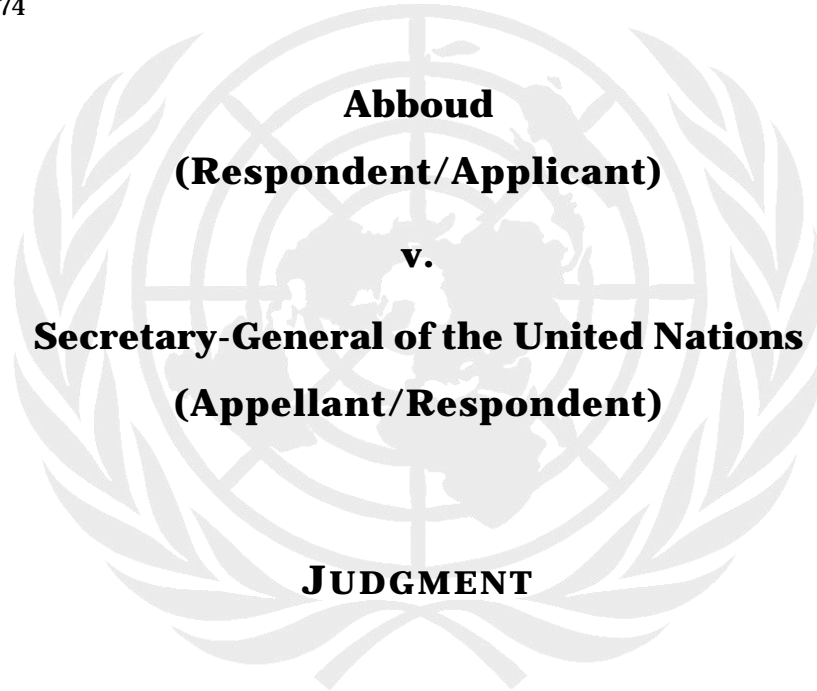




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-074



**Abboud
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Jean Courtial Judge Mark P. Painter
Judgment No.:	2010-UNAT-100
Date:	29 December 2010
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Bart Willemsen

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. On 8 July 2008, Samer Abboud (Abboud) was interviewed by a five-member panel for a P-5 position in the Department for General Assembly and Conference Management (DGACM). Abboud subsequently complained that one of the panel members, the Special Assistant (SA) of the Under-Secretary-General for Department for General Assembly and Conference Management (USG/DGACM), had behaved inappropriately and requested an investigation into the SA's conduct. The USG/DGACM refused to undertake a preliminary investigation.

2. Abboud filed an application before the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) challenging the decision of the USG/DGACM. The UNDT rescinded the decision of the USG/DGACM not to order an investigation of the SA. While acknowledging that Abboud had not suffered any economic loss, the UNDT determined that the violation of Abboud's right to a fair consideration of his request for an investigation entitled him to compensation in the amount of USD 20,000.

3. Abboud appeals the UNDT Judgment. The Appeals Tribunal holds that the circumstances of the allegation of unsatisfactory conduct in the present case created the obligation to initiate a preliminary investigation. The UNDT, however, erred in awarding damages to Abboud proprio motu, while finding that he had not suffered any economic loss and that no actual damage exists. The Appeals Tribunal therefore vacates the award of damages.

Facts and Procedure

4. On 8 July 2008, Samer Abboud (Abboud) was interviewed by the SA of the USG/DGACM, the Programme Case Officer (PCO), and three other panel members for a P-5 position in DGACM. In an e-mail dated 9 July 2008 to the Assistant Secretary-General of Human Resources Management (ASG/OHRM), Abboud alleged that the SA had behaved inappropriately during the interview and requested an investigation into the SA's conduct. In particular, he alleged that the SA used inappropriate language; made sarcastic observations and questioned his answers; questioned OHRM's rationale of including specific competencies in the vacancy announcement and their relevancy;

argued with other panel members; showed an intimidating posture; created a tense and unsettling atmosphere; asked hypothetical questions; and asked investigation-like questions about issues that had already been answered. Since the SA was copied on the e-mail, he provided his comments. On 10 July 2008, Abboud was informed that the matter should be referred to the Head of the Department, the USG/DGACM, Shaaban Muhammad Shaaban (Shaaban), which Abboud immediately did.

5. On 10 July 2008, the USG/DGACM asked the PCO to provide comments in writing regarding Abboud's allegations. The PCO provided his comments the same day. On 11 July 2008, the USG/DGACM requested a second panel member, Ms. Janet Beswick, to provide comments on the allegations, which she did on 14 July 2008.

6. On 14 July 2008, Abboud sent an e-mail to the Under-Secretary-General of the Department of Management (USG/DM), copied to Shaaban, requesting that the entire process of investigation be transferred from DGACM to DM "so as to ensure the highest possible objective and impartial outcome of the investigation", basing his request on "the nature of relationship that exists between any USG/ASG and his/her Special Assistant, and since getting to the bottom of the matter might require widening the scope of staff to be interviewed by the investigation panel".

7. By memorandum dated 15 July 2008 to the USG/DM, the USG/DGACM described Abboud's reference to the relationship between any USG/ASG and his/her SA as a "blatant slanderous accusation against all USGs/ASGs as it questions their integrity and impartiality, which is objectionable and unacceptable". He further stated that he "found NO reason to believe that the [SA] [had] engaged in unsatisfactory conduct, and thus [had] decided NOT to undertake a preliminary investigation". In conclusion, the USG/DGACM requested that "the case be closed as far as the [staff member's] allegations are concerned. As far as the slanderous accusations and aspersions that the [staff member] casts on all USGs/ASGs and on DGACM, I formally request that you deal with them in accordance with the relevant disciplinary measures and procedures".

8. On 15 July 2010, the USG/DGACM requested the three remaining panel members to provide their comments on Abboud's allegations in writing. He specified that he would decide "in light of the comments made by [a]ll Panel members, whether to set up an official investigation panel". The SA and Mr. Raja Abboud provided their written

comments on 16 July 2008. Ms. Tavares-Walsh also provided her written comments on 16 July and, upon the USG/DGACM's request of 16 July, provided further details on 17 July 2008. On 17 July 2008, the USG/DGACM forwarded the comments of all the panel members to the Officer-in-Charge, OHRM.

9. On 21 July 2008, Abboud e-mailed the USG/DGACM, bringing to his attention that he had received no information as to how far the case had proceeded. The USG/DGACM replied the same day that the matter had been referred to the USG/DM. On 30 July 2008, Abboud e-mailed the ASG/OHRM complaining that nothing appeared to have happened with his complaint and requesting an urgent meeting. The same day, the ASG/OHRM e-mailed Abboud that the USG/DGACM had decided not to undertake a preliminary investigation. On 27 August 2008, Abboud requested a suspension of action and an administrative review of the decision not to undertake a preliminary investigation. The decision was confirmed and, on 30 November 2008, Abboud filed an application with the Joint Appeals Board (JAB). After the abolition of the JAB on 1 July 2009, the case was transferred to the UNDT.

10. On 6 January 2010, the UNDT issued its Judgment No. UNDT/2010/001 on the merits of the case. In order to determine whether the USG/DGACM erred in deciding not to undertake a preliminary investigation, the UNDT first elaborated on the applicable test under section 1 of ST/AI/371 (Revised disciplinary procedures):

4. As per sec 2 of ST/AI/371, the crucial question for Mr Shaaban to determine was whether there is "reason to believe... [that the SA] has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed". The "reason to believe" must be more than mere speculation or suspicion: it must be reasonable and based on facts sufficiently well founded – though of course not necessarily proved – to rationally incline the mind of an objective and reasonable decision-maker to the belief that the staff member has engaged in the relevant conduct. ... Whether there is "reason to believe" the relevant matter is an objective question of judgment and, if there is, the official has no residual discretion to refuse to conduct a preliminary investigation. ... It is not necessary that the official believes that the particular impugned conduct occurred or that it amounts to misconduct. ... [E]ssentially, the task of the official is to determine whether, in substance, there are circumstances which give rise to a reason to believe (or expect) that a succeeding "formal" investigation might, not necessarily will, disclose relevant misconduct.

5. ...

The mere fact that otherwise apparently reliable witnesses give completely contradictory accounts about the relevant facts will not mean that there is no reason to believe that the impugned conduct did not occur. To the contrary, if there is an apparently reliable witness who says that it did occur, there will almost invariably be

reason to believe that it did, even though, because he or she is contradicted, there is a reason to believe that it did not occur. The resolution of this contradiction would be a matter for the preliminary investigation... Of course, the necessity that the material forming the basis for the belief should be sufficiently reliable to rationally justify the relevant inclination of mind will require at least some enquiries of potentially contradictory material (or contradictory witnesses) as a test of reliability or credibility.
...

11. The UNDT however noted that it was uncertain whether this procedure still applied in light of ST/SGB/2009/7.

12. The UNDT then found that the memorandum of the USG/DGACM regarding Abboud's e-mail of 14 July 2008 reflected his inability to satisfy the "fundamental obligation ... to act objectively and fairly, free of bias, favour towards or antipathy against any staff member in respect of whom a decision is to be made".

13. The UNDT noted that the USG/DGACM only asked the PCO and a member of the interview panel to send him their comments on the allegations and that it was unclear why he did not ask all members of the panel for their views. The UNDT stated that the USG/DGACM, in his evidence, accepted that he had indeed made the decision but asserted that, before making his decision, he had considered more than the information from the PCO and the other panel member. The UNDT went on to state that "[t]his forms part of a picture of contradiction and confusion which has regrettably required findings seriously adverse to Mr Shaaban's credibility".

14. The UNDT held that Mr. Shaaban's request that Abboud's case be closed was based on two considerations: "[T]he first was that, as he had already decided that the prerequisites for a preliminary investigation had not been satisfied, there was nothing to be transferred for decision (which ... was designed to preempt any transfer); and the second was that the request was based on what Mr Shaaban characterized as "unjustified slander". The UNDT concluded that "the request that action be taken against the applicant was absurd and retaliatory, demonstrating ... that the USG/DGACM was incapable of dealing with the applicant's claims objectively or rationally".

15. The UNDT found several inconsistencies in the testimony of the USG/DGACM, in particular with respect to the information he had sought and considered before taking the impugned decision as well as his contention that he had met with OHRM about the case

and had transferred responsibility for deciding whether there should be a preliminary investigation of the SA's conduct to OHRM.

16. The UNDT found that it was impossible to accept that any competent and objective decision-maker could have decided on this material alone that there was no reason to believe that the SA had not conducted himself unsatisfactorily. It found that the only reasonable explanation for the USG/DGACM's decision of 15 July 2008 was that he wanted to pre-empt the requested transfer to the Department of Management and decide the matter himself. The USG/DGACM received, on 16 July, the comments of the four other members of the panel. On 17 July, the Executive Officer of DGACM sent to the then acting chief of the Administrative Law Unit what were described as "the updated comments of DGACM to the statement of appeal made to the Joint Appeals Board". The comments stated that the USG/DGACM had sought information from all the panel members "upon receiving the complaint" and "carefully reviewed" the responses of all panel members. The UNDT found that this was not true, because at the date of his decision on 15 July 2008, he had reviewed only two. The UNDT held that it was evident from the comments made by three of the panel members that they were in a position to give further information about the SA's behaviour and "every reason to believe that the information was likely to be critical rather than supportive". The USG/DGACM should have sought more specific information. There was more than sufficient evidence to raise a reasonable suspicion that the SA's behaviour was not at all what it should have been. The UNDT concluded:

I regret that I have concluded that Mr Shaaban is an unreliable witness in respect of every important issue of fact that is not independently corroborated, although I do not go so far, I should say in fairness, as to conclude that he was actively dishonest. Having paid close attention to his testimony at the time and carefully reread the transcript I must say, however, that I am left with the powerful impression that he was not concerned to tell the truth but thought, rather than being a witness obliged to tell the truth, he could enter into a self-justifying negotiation and state as fact what was no more than a mixture of surmise and self-serving argument. At the conclusion of the evidence, I informed counsel for the respondent, in substance, that I did not think Mr. Shaaban's honesty was in issue so much as his reliability. After having carefully reviewed the evidence in light of the submissions of both parties, reread the transcripts several times and listened again to the way in which he gave evidence, I have reluctantly concluded that my initial inclination to explain away the unsatisfactory aspects of his testimony as mere unreliability was mistaken.

17. The UNDT concluded that the decision of the USG/DGACM not to order an investigation of the SA “followed a seriously inadequate initial inquiry, was tainted by personal pique and the process of the appeal and the hearing itself marred by careless and misleading statements with recurrent lack of candour”. The UNDT rescinded the decision of the USG/DGACM and left open the possibility that it might order another initial inquiry into the conduct of the SA. While acknowledging that Abboud had not suffered any economic loss, the UNDT determined that the violation of Abboud’s right to a fair consideration of his request for an investigation entitled him to compensation in the amount of USD 20,000. The UNDT stated that it would consider whether to refer the conduct of the USG/DGACM to the Secretary-General under Article 10(8) of its Statute, for possible action to enforce accountability. In this connection, the UNDT indicated that it would order an additional hearing to which the President of the United Nations Staff Union would be invited. The UNDT also sought assistance of counsel concerning the form of the order requiring the Respondent to arrange to have Abboud’s complaint properly considered, having regard to the supersession of ST/AI/371 by ST/SGB/2009/7.

18. On 8 February 2010, Abboud requested the Appeals Tribunal to suspend the time limit for filing an appeal of UNDT Judgment No. 2010/001 until the UNDT addressed the additional matters raised in the Judgment on the merits. On 19 February 2010, the Registrar of the Appeals Tribunal informed Abboud that the President granted his request and that he had 45 days from the receipt of the second Judgment to appeal both Judgments.

19. On 22 February 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/030. It ordered that an official of at least the rank of Under-Secretary-General consider afresh Abboud’s complaints in respect of the SA’s conduct. It further ordered that “[i]n the event that it is concluded that it is reasonable to suspect that SA acted in such a way as to justify the imposition of a disciplinary measure and that it is appropriate to launch an investigation within rule 10.1 of ST/SGB/2009/7 in respect of those allegations as to which there is such conclusion, he or she is to take all necessary steps to arrange for such an investigation to be launched”. The UNDT further referred, pursuant to Article 10(8) of its Statute, the case to the Secretary-General to determine what action should be taken in respect of the conduct of the USG/DGACM in dealing

with Abboud's complaints and what action should be taken in respect of the conduct of the USG/DGACM in giving evidence before the UNDT.

20. On 8 April 2010, the Secretary-General filed his appeal against both Judgments. On 24 May 2010, Abboud requested an extension of the time limit of seven days to file his answer. On 25 May 2010, the Registrar of the Appeals Tribunal informed Abboud that the President of the Appeals Tribunal had granted his motion and that his answer was therefore due on 1 June 2010. Abboud filed his answer on 1 June 2010.

21. The present judgment will dispose of the Secretary-General's appeal against Judgment No. UNDT/2010/001 only. The Secretary-General's appeal against Judgment No. UNDT/2010/030 will be considered separately.

Submissions

Secretary-General's Appeal

22. The Secretary-General submits that the UNDT erred in law in its interpretation of the "reason to believe" threshold in ST/AI/371 for determining when to initiate a preliminary investigation. He argues that, contrary to the approach adopted by the UNDT, the determination of whether the "reason to believe" threshold in ST/AI/371 has been met necessarily requires the exercise of discretionary judgment to assess the reliability of the witnesses and the weight to be given to their respective statements. The determination of whether there is "reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed" requires an evaluation of the totality of the circumstances, on the basis of which the head of an office must determine whether such a belief would be reasonable.

23. The Secretary-General submits that the decision of the USG/DGACM that he had no reason to believe that the SA engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, was reasonable and well-founded. The USG/DGACM had received information from four out of six individuals who had been present at the interview on 8 July 2008 during which the alleged misconduct occurred. Based on the information he had received from some of the interview panel members, the USG/DGACM understood that part of the tensions during the interview with Abboud arose from the fact that he was the first person to be interviewed and, therefore, the

interactions between the interview panel members may have been awkward, because they had not yet established a rapport amongst themselves.

24. The Secretary-General contends that the UNDT exceeded its competence in substituting its judgment for that of the USG/DGACM and by concluding that information from all individuals present during the interview of 8 July 2008 was required. He submits that the UNDT exceeded its competence, by going beyond the appropriate scope of judicial review applicable to a review of the Secretary-General's discretionary authority in disciplinary matters.

25. The Secretary-General submits that the UNDT erred in fact by concluding that the USG/DGACM did not meet with OHRM and that he did not intend to transfer the case to OHRM for a further review. These errors of fact led the UNDT to reach the manifestly unreasonable decision that the USG/DGACM recognized that his inquiry was inadequate without the additional comments of Mr. Abboud and Ms. Tavernes-Welsh; and that the manner in which the USG/DGACM gave evidence to the UNDT was improper.

26. The Secretary-General submits that while it appears that the compensation awarded by the UNDT was intended to compensate for moral damages, the UNDT has cited no evidence of moral damages incurred by Abboud. It failed to explain how the amount of USD 20,000 corresponds to actual damages and why a favorable judgment would not constitute a sufficient legal remedy. The Secretary-General is therefore unable to appeal the amount in any meaningful way.

Abboud's Answer

27. Abboud submits that there is no legal error either in the method or the standard ultimately adopted by the UNDT. It correctly observed that the relevant passage in ST/AI/371 leaves no room for any residual managerial discretion. Once the "reason to believe" standard is satisfied, a preliminary investigation must ensue.

28. With respect to the Secretary-General's ground of appeal that the UNDT did not err in fact it exceeded its competence in concluding that the inquiry was inadequate, Abboud submits that the Secretary-General relies on materials which had not been tendered before the UNDT and the Secretary-General has not sought to adduce same materials in the present appellate proceedings pursuant to Article 2(5) of the Appeals

Tribunal's Statute. He therefore requests that the Appeals Tribunal dismiss this ground of appeal.

29. In the alternative, Abboud submits that the Secretary-General has failed to demonstrate that the UNDT erred in fact or law and merely requests the Appeals Tribunal to review the record de novo. The UNDT acted within its scope of review to find that the initial inquiry was "seriously inadequate" with the inevitable conclusion that the contested decision was unlawful.

30. Abboud submits that the Secretary-General does not dispute the characterization by the USG/DGACM of Abboud's request as "blatant slanderous accusation against all USGs/ASGs, which is objectionable and unacceptable" and an "outrageous slur against DGACM" nor does he argue that the conclusion at which the UNDT arrived was unreasonable. The Secretary-General merely invites the Appeals Tribunal to engage in a de novo review.

31. Abboud observes that the UNDT made it clear that the compensation ordered was not of a punitive nature. The Secretary-General's contention that the compensation was punitive is tantamount to the assertion that the UNDT tried to circumvent its Statute and has been actively dishonest in its Judgment. This assertion is a flagrant attack on the integrity and honesty of the UNDT and the system of administration of justice. It would be impossible to provide a complete breakdown of an amount ordered for compensation for non-economic losses. The amount of compensation is a matter of discretion for the UNDT and the Secretary-General has not pointed to any error committed by the UNDT.

Considerations

32. Article 2(1)(a) of the UNDT Statute establishes that the UNDT shall be competent to hear and pass judgment on an application filed by an individual against the Secretary-General 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.

33. In the instant case, Abboud seeks an order to compel the Administration to undertake a preliminary investigation into the allegedly inappropriate behaviour of one of the panel members during the Appellant's interview for a P-5 position. The panel member's behaviour, however, had no impact on the outcome of the promotion process.

34. As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action against another part.¹

35. Article (2)(1)(a) of the UNDT Statute covers the pertinent Regulations, Rules, as well as the Bulletins, and Administrative Instructions issued by the Secretary-General. These include ST/SGB/2008/5 and ST/AI/371.

36. Paragraph 2.1 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides that "every staff member has a right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse". Paragraph 2.2 adds that "[t]he Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct".

37. Paragraph 5.3 adds: "Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings."

38. And Paragraph 5.17 provides: "The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving full account of the facts they have ascertained in the process and attaching documentary evidence This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report."

39. ST/AI/371 in its amended version was not in force until 11 May 2010. Nonetheless, both the former and the amended version establish the obligation to

¹ Cf. United Nations Administrative Tribunal Judgment No. 1086, *Fayache* (2003).

undertake an investigation in cases of “[a]cts or behaviour that would discredit the United Nations” (II.2. (g) of the amended version and 2. (g) of the prior version).

40. In the instant case, no concrete action was taken in order to comply with these provisions.

41. With respect to the chronology of the event, the Appeals Tribunal notes that the Secretary-General presents evidence which was not part of the case record before the UNDT and for which the Secretary-General has not requested leave to have it admitted on appeal, and Abboud contests its admission on this basis.

42. Article 10(2) of the Statute of the Appeals Tribunal provides that “[a] party may seek to submit to the Appeals Tribunal ... documentary evidence ... in addition to that contained in the written record. In exceptional circumstances and where the Appeals Tribunal determines that the facts are likely to be established with such additional documentary evidence, it may receive the additional evidence from a party.” (emphasis added).

43. In the instant case, the Secretary-General has not demonstrated exceptional circumstances warranting the admission of additional evidence on appeal nor has he sought leave to present such evidence on appeal. The Appeals Tribunal will therefore not consider this evidence, but rely on the factual findings of the UNDT.

44. Abboud pursued his grievances in relation to the alleged misconduct of the panel member. The UNDT found that the USG/DGACM took the decision not to undertake a preliminary investigation on 15 July, before requesting the statements of all panel members.

45. The UNDT examined whether the USG/DGACM erred in exercising his discretion when he decided not to carry out a preliminary investigation. It found that the circumstances of the allegation of unsatisfactory conduct in the present case created the obligation to initiate a preliminary investigation, which the USG/DGACM failed to conduct. In making this finding, the UNDT did not exceed its competence and did not err in law.

46. The procedure by which the USG/DGACM reached the impugned decision was therefore flawed, but—as the UNDT found—this did not create any economic loss. The UNDT awarded damages acknowledging that Abboud had suffered no economic loss and that no actual damage existed. The UNDT Judgment explains that the matter is incommensurable, that it is not a case of punitive damage and that there is no intent to punish the Organization, that damages are awarded because the request for an investigation was treated with unseemly disdain, subject to insult, patronizing comments and retaliatory threats.

47. Article 11 of the UNDT Statute establishes that “[t]he judgments of the Dispute Tribunal shall be issued in writing and shall state the reasons, facts and law on which they are based”.

48. In the instant case, the UNDT awarded damages – a relief which Abboud had not requested - without stating the facts and law underlying this decision. The Appeals Tribunal therefore vacates the award of damages.

Judgment

49. For the foregoing reasons, we grant the appeal in part and rescind the UNDT Judgment to the extent that it awards damages to Abboud.

Dated this 29th day of December 2010.

Original and authoritative version: English

(Signed)

Judge Weinberg de Roca,
Presiding
Buenos Aires, Argentina

(Signed)

Judge Courtial
Paris, France

(Signed)

Judge Painter
Cincinnati, United States

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar