



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.:	UNDT/GVA/2010/046 (UNAT 1676)
Judgment No.:	UNDT/2011/035
Date:	23 February 2011
	English
Original:	French

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**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

MARSH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Kate Lannan

**Counsel for Respondent:**

Linda Starodub, UNOV/UNODC

## **Introduction**

1. On 28 February 2009, the Applicant filed an application with the former United Nations Administrative Tribunal contesting the decisions (i) to appoint a candidate other than himself to the P-4 post of Chief, Staff Development Unit at the United Nations Office at Vienna (“UNOV”), and (ii) to place him on annual leave from 3 to 7 October 2005. He requested the Tribunal to order the Respondent to pay him:

- a. An amount equal to three years’ net base salary in compensation for the damage caused by the unlawful selection process;
- b. An amount of EUR50,000 in compensation for the damage caused by having been unlawfully placed on annual leave from 3 to 7 October 2005;
- c. Interest on the above amounts.

2. The case, which was pending before the former Administrative Tribunal, was transferred to the United Nations Dispute Tribunal on 1 January 2010 pursuant to the transitional measures set forth in General Assembly resolution 63/253.

3. In his most recent submissions dated 7 February 2011, the Applicant requests the Tribunal:

- a. To rescind the decision to appoint a candidate other than himself to the above-mentioned post and to order the Respondent to hold a new selection process;
- b. To fix the amount of compensation that the Respondent may choose to pay him as an alternative to rescission of the above-mentioned decision at two years’ net base salary;

- c. To order the Respondent to pay him EUR50,000 in compensation for the damage sustained by having been unlawfully placed on annual leave from 3 to 7 October 2005, being the equivalent to approximately one year of his net base salary at the time of the facts.

## **Facts**

4. The Applicant entered the service of the United Nations on 14 September 1982 as a Security Officer at level S-1 in New York. In 1984 he obtained a permanent appointment, and in 1988 he was promoted to the professional category at level P-1 and reassigned to Bangkok.

5. In June 1990, he was transferred to UNOV in Vienna as Deputy Chief, Security and Safety Section. On 11 November 1996, following other promotions and assignments, he was reassigned to the Human Resources Management Service (“HRMS”) of UNOV as Training Officer at level P-3. On 1 June 1999, his job title was changed to that of Chief, Staff Development Unit, still at level P-3, then on 1 November 2001, to that of Human Resources Officer. After being reassigned to the Economic and Social Commission for Asia and the Pacific from March to August 2002 as Chief of Security, the Applicant returned to the HRMS Staff Development Unit as Human Resources Officer at level P-3.

6. The Applicant was temporarily reassigned to the Division for Operations of the United Nations Office on Drugs and Crime (“UNODC”), from March 2004 to July 2005, as a Programme Management Officer, P-3 level.

7. On 6 August 2004, a vacancy announcement was published for the post of Chief, Staff Development Unit, at level P-5, within HRMS. That selection process was afterwards abandoned.

8. On 17 March 2005, Vacancy Announcement 05-HRE-UNODC-406062-R-VIENNA was published for the post of Chief, Staff Development Unit, HRMS, this time at level P-4. The closing date for applications was set at 16 May 2005, 60 days after publication of the announcement, and the Applicant submitted his

application via the Galaxy recruitment system on 16 April 2005, in time to be considered at the 30-day mark.

9. The selection process for all candidates began after 60 days, on 16 May 2005.

10. Of a total of 178 candidates, eight candidates, including the Applicant, were short-listed and summoned for a written test, which the Applicant took on 24 May 2005. Of those eight candidates, three, including the Applicant, were called for interview on 30 June 2005 with a five-member panel comprising: (i) the Chief, HRMS, as head of the service responsible for the post to be filled; (ii) the latter's supervisor, namely the Director of the Division for Management ("DM"); (iii) an official from another division of UNODC, namely a Senior Programme Management Officer, Treaties Division; (iv) an official from the UN Secretariat in New York, namely the Chief, Learning Section, Office of Human Resources Management; and (v) an official from another international organization, namely the Head, Recruitment and Staff Development Section, International Atomic Energy Agency, the latter two also having specialist knowledge of the content of the post.

11. On 5 July 2005, based on the recommendations of the selection panel, the Chief, HRMS proposed to the Central Review Board, through the Director, DM, a list of two candidates eligible at the 30-day mark. The Applicant's name was not on that list.

12. The Central Review Board having accepted the two candidates proposed, on 22 July 2005 the Director, DM, on behalf of the Executive Director, UNODC, who is also Director-General of UNOV, selected the chosen candidate who, despite being eligible in principle at the 30-day mark, had applied only after that date.

13. On 28 July 2005, the Chief, HRMS informed the Applicant orally that the post had been filled.

14. The chosen candidate accepted the offer of the post on 19 September 2005 and took up her duties on 13 October 2005.

15. On 20 September 2005, the Applicant requested the Vienna Joint Appeals Board (“JAB”) to suspend the decision to appoint a candidate other than himself to the post. He had previously, on 1 September 2005, made a similar request to the Executive Director, UNODC.

16. At a meeting held on 28 September 2005, the Director, DM informed the Applicant that, with effect from close of business on Friday 30 September 2005, he would be reassigned to another Division. That decision, taken with the agreement of the Executive Director, UNODC, followed statements made by the Applicant in the requests for suspension referred to above.

17. By email of 29 September 2005, the Chief, Recruitment and Placement Unit informed the Applicant that he was to be reassigned from HRMS to the Division for Operations with effect from close of business on Friday 30 September 2005, on the decision of the Director, DM with the agreement of the Executive Director, UNODC.

18. By email of 30 September 2005, the Chief, Recruitment and Placement Unit informed the Applicant that the Division for Operations was not ready to receive him and that, as a result, the Director, DM had “authorized” him to take annual leave from 3 to 7 October 2005 “in conformity with Staff Rule 105.1(b)(iii)”. The Applicant officially took up his duties in the Division for Operations on 10 October 2005.

19. By memorandum of 24 October 2005, the Applicant submitted to the Secretary-General a request for review of the decisions not to appoint him to the post of Chief (P-4), Staff Development Unit and to place him on annual leave from 3 to 7 October 2005.

20. On 20 December 2005, the Officer-in-Charge of the Administrative Law Unit, UN Secretariat, informed the Applicant of the Secretary-General’s decision to uphold the contested decisions.

21. On 3 February 2006, the Applicant lodged an incomplete appeal with the JAB, followed by a completed appeal on 3 March 2006.

22. The JAB submitted its report to the Secretary-General on 29 January 2008. It concluded, on the one hand, that the decision refusing to promote the Applicant to the post of Chief, Staff Development Unit was lawful, and on the other, that the decision to place him on annual leave from 3 to 7 October 2005 amounted to a procedural abuse. It recommended that the Secretary-General re-credit the Applicant with five days of annual leave and award him a minimum of EUR5,000 as compensation.

23. On 31 March 2008, the Deputy Secretary-General forwarded the JAB report to the Applicant and notified him of the Secretary-General's decision to accept its conclusions and recommendations. The Secretary-General thus converted the five days of annual leave into five days of special leave with full pay, and awarded the Applicant EUR5,000 as compensation.

24. On 19 April 2008, the Applicant accepted a post as L-4 Project Coordinator in Doha (under the 200 series of the Staff Rules then in force).

25. On 28 February 2009, having requested and been granted three extensions of time and submitted an application that failed to comply with formal requirements, the Applicant submitted a corrected application to the former Administrative Tribunal, which registered it on 3 March 2009.

26. On 2 September 2009, having requested and been granted an extension of time from the Administrative Tribunal, the Respondent filed his answer to the application. The Applicant forwarded his rejoinder on 25 November 2009.

27. As the case could not be decided by the former Administrative Tribunal before its abolition on 31 December 2009, it was transferred to the United Nations Dispute Tribunal on 1 January 2010.

28. By letter dated 20 January 2011, the Tribunal ordered the Respondent to produce all documents concerning the selection process for the post of Chief, Staff Development Unit.

29. By Order No. 8 (GVA/2011) of 31 January 2011, the Tribunal informed the parties that a hearing would be held, but that, in view of the documented record available, no witnesses would be called. It further granted the Applicant one week in which to provide justification of the damage allegedly sustained and the financial compensation sought, and granted the Respondent a further week in which to file comments, if any.

30. Also on 31 January 2011, the Respondent forwarded the documents on the selection process to the Tribunal, with the request that the said documents be kept confidential. By Order No. 11 (GVA/2011) of 2 February 2011, the Tribunal decided to share with the Applicant copies of the documents it considered necessary to pass judgment, namely the interview reports, the proposal to the Central Review Board and the final selection decision as recorded in Galaxy. It also ordered the Applicant and his Counsel to keep the said documents confidential.

31. On 7 February 2011, the Applicant provided additional information to substantiate his damage and the financial compensation sought. He also submitted observations on the documents relating to the selection process, requesting the production of additional documents. On 14 February 2011, the Respondent replied to the Applicant's latest written submissions, and submitted to the Tribunal, on a confidential basis, all the documents the Applicant had requested.

32. On 18 February 2011, a hearing was held in which the Applicant and his Counsel took part in person, and Counsel for the Respondent took part by videoconference.

### **Parties' contentions**

33. The Applicant's contentions are:

- a. The selection process was tainted by irregularities because the Director, DM was in a situation of conflict of interest, in appearance at least, because of his several roles in the selection process;

b. There is another conflict of interest because the Director, DM and the Chief, HRMS were members of the interview panel when they were clearly negatively biased against the Applicant and could not therefore assess his candidature impartially. In fact, when the post of Chief, Staff Development Unit had been advertised at level P-5, both the Chief, HRMS and the Director, DM had given him to understand that he had little chance of being selected;

c. The selection process did not comply with the terms of administrative instruction ST/AI/2002/4 of 23 April 2002. The Administration in practice reviewed all the eligible candidates together, irrespective of whether they were 15-day, 30-day or 60-day mark candidates, in violation of the rules in force at the time. Since the candidate chosen had not submitted her application until after the 30-day time limit had expired, she should not have been considered together with the 30-day mark candidates who had applied within the time limit;

d. The Director, DM could not lawfully compel him, against his wishes, to take five days of annual leave. That amounted to a retaliatory measure for having contested the decision refusing to select him for the post of Chief, Staff Development Unit;

e. With regard to the selection of 15-day, 30-day and 60-day mark candidates, the case law of the Dispute Tribunal must apply (see Judgment UNDT/2009/022, *Kasyanov*).

34. The Respondent's contentions are:

a. The Applicant's candidature was properly examined and the decision not to select him was a reasonable exercise of the Secretary-General's discretionary power;

b. There were no candidates who fulfilled the conditions of eligibility for consideration at the 15-day mark for the post in dispute. As long as the programme manager had not examined applications from staff members



fulfilling the conditions of eligibility for consideration at the 30-day mark, there was nothing to prevent examination of the list of 60-day mark candidates including, in this case, the candidature of the staff member who was selected;

c. Although the chosen candidate submitted her application after the 30-day time limit, it was right for her candidature to be given priority over those of 60-day mark candidates, as she was a 30-day mark candidate;

d. The interview panel was constituted in accordance with the Terms of Reference for the Interview Process under the Staff Selection System (Galaxy). The Applicant has not established that the Director, DM and the Chief, HRMS were in a situation of conflict of interest by taking part in the interview panel. As to their previous assessments of the Applicant's work, these were part of the normal relations between a staff member and his supervisors and do not indicate any negative bias against the Applicant;

e. Since the Applicant's candidature was fully, regularly and impartially examined, he is not entitled to any compensation under that head. In any event, the compensation the Applicant seeks is much greater than the amounts awarded by the former Administrative Tribunal in cases where the selection process was found to be irregular;

f. The amount of EUR5,000 awarded by the Secretary-General as compensation for the damage resulting from the unlawfulness of the decision to place him on annual leave for five days is entirely adequate, the more so as he has been re-credited with five days of annual leave.

## **Judgment**

35. As a preliminary matter, the Tribunal must rule on the Respondent's request to preserve the confidentiality of a number of documents relating to the selection process, which he had forwarded to the Registry on his own initiative—in other words not at the Tribunal's request—four days before the hearing in

response to the Applicant's observations of 7 February 2011. Since the Tribunal has not based itself on those documents in reaching its decision, it does not consider it necessary to forward them to the Applicant.

***Lawfulness of the promotion of the candidate appointed***

36. Next, the Tribunal must dismiss the Applicant's claim for rescission of the decision to appoint a candidate other than himself to the disputed post. In fact, while, in his request to the Secretary-General, the Applicant contested the decision to appoint another candidate, when he filed his Application with the former Administrative Tribunal in February 2009, he merely claimed compensation for the damage resulting from the unlawfulness of the selection process. Only two years later, in his latest submissions to this Tribunal, did the Applicant claim rescission of the contested decision. This claim for rescission is therefore time-barred, since the Applicant failed to raise it within the statutory time limit for appeals.

***Lawfulness of the denial of promotion***

37. In seeking to show that the selection process for the P-4 post of Chief, Staff Development Unit was irregular, the Applicant contends, first, that the composition of the interview panel was irregular as it included the Chief, HRMS and the Director, DM.

38. The administrative instruction ST/AI/2002/4 on the staff selection system in force at the date of the contested selection provides:

2.3 Selection decisions are made by the head of department/office when the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed. If a list of qualified candidates has been approved, the head of department/office may select any one of those candidates for the advertised vacancy. The other candidates shall be placed on a roster of preapproved candidates from which they may be considered for future vacancies with similar functions.

...

7.4 The programme manager shall evaluate new candidates and roster candidates transmitted by OHRM or the local personnel office for consideration at the 15-, 30- or 60-day mark on the basis of criteria pre-approved by the central review body.

7.5 Interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required for appointment and promotion at the 30- and 60-day marks of the candidates identified by the programme manager as meeting all or most of the requirements of the post, and are encouraged for lateral moves at the 15-day mark. Whenever possible, interviews should be competencybased and conducted by an ad hoc panel.

7.6 For each vacancy, the programme manager shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and/or decision by the head of the department/office.

7.7 Programme managers shall transmit their proposal for one candidate or, preferably, a list of qualified, unranked candidates to the appropriate central review body through the head of department/office after the 15-, 30- or 60-day mark. The head of department/office shall ensure that, in making the proposal, he or she has taken into account the Organization's human resources planning objectives and targets, especially with regard to geography and gender, and provide a certification to that effect to the central review body. There shall be no joint advisory body at the department or office level prior to the transmission of the proposal to the central review body.

...

9.1 The selection decision shall be made by the head of department/office when the central review body finds that the evaluation criteria have been properly applied and/or that the applicable procedures have been followed ...

9.2 The head of department/office shall select the candidate he or she considers to be best suited for the functions, having taken into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender, and shall give the fullest regard to candidates already in the service of the Organization.

39. Annex I (Responsibilities of the head of department/office) of that administrative instruction moreover provides:

3. In the discharge of his or her responsibility to deliver mandated programmes and activities, the head of department/office works in close cooperation with the programme managers and

other responsible officials in the department/office concerned to ensure that:

...

(b) The candidates best suited for the functions are selected for vacancies in strict compliance with the requirements of the new system, having taken into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender, and after giving the fullest regard to candidates already in the service of the Organization; ...

40. Pursuant to the provisions cited above, which specifically so provide, a special panel was set up to evaluate the competence of the candidates, first on the basis of a written test, then on an interview. At the date of the contested selection, the only instrument governing the composition of such a panel was the "Terms of Reference for the Interview Process under the Staff Selection System (Galaxy)", which stipulated:

Each interview panel is composed of a minimum of three members:

a) the programme case officer...

b) a member from a non-related office within UNOV/UNODC or a member from another UN Agency who: i) is normally at the same or a higher level of the post... iii) who should be a staff member of UNODC in the case of a vacancy in UNOV...;

c) a member from a related office within UNOV/UNODC.

41. The facts as described above, especially in paragraph 10, show that the interview panel was constituted in accordance with the said provisions.

42. While the Applicant contends that the Director, DG was in a situation of conflict of interest, in appearance at least, because of his several roles in the selection process, namely as member of the interview panel on the one hand and on the other, as the manager acting on behalf of the Head of Department for transmission of the recommendations to the Central Review Board, and then in the final selection decision, the Tribunal finds that while it would certainly have been preferable to avoid such a situation, it was not prohibited by any instrument. Moreover, the panel's independence and impartiality were guaranteed by the fact that three of its members had no reporting relationship with the Director, DM, two of them being specialists in the job content of the disputed post from outside UNOV and UNODC, namely the Chief, Learning Section, Office of Human

Resources Management at the UN Secretariat and the Head, Recruitment and Staff Development Section at the International Atomic Energy Agency.

43. The Applicant further contends that, by taking part in the interview panel, the Chief, HRMS and the Director, DM placed themselves in another situation of conflict of interest. The Applicant states in effect that, prior to the opening of the selection process, they had expressed their opinion about the quality of his work and his chances of being appointed to the post of Chief, Staff Development Unit. While the documents filed by the Applicant show that at least one of those two officials had expressed doubts about the Applicant's suitability for the said post when the first vacancy announcement had been published in 2004 at level P-5, there is no indication of any particular animosity towards the Applicant in those opinions, which appear to be comments or assessments of the kind normally made by supervisors working in the same service.

44. The Applicant has thus failed to establish that the composition of the interview panel was irregular.

45. However, the Applicant maintains, in addition, that there was non-compliance with administrative instruction ST/AI/2002/4 in that the candidature of the staff member finally selected was examined together with those of 30-day mark candidates who had submitted their applications within that time limit, while it should have been examined with those of the 60-day mark candidates, if that became necessary.

46. Administrative instruction ST/AI/2002/4 provides:

4.5 ... The deadline for vacancies at the Professional level and above shall normally be 60 calendar days after posting... Staff members are encouraged to submit their applications as early as possible, because staff fulfilling the eligibility requirements set out in section 5.4 shall be considered 15 calendar days after posting, and those fulfilling the eligibility requirements set out in section 5.5 shall be considered 30 calendar days after posting.

...

*Eligibility to be considered at the 30-day mark*

5.5 The following staff members shall be eligible to be considered at the 30-day mark:

(a) For promotion against a post one level higher than the level of the staff member:

(i) Internal candidates whose appointment is not limited to service with a particular office may be considered for any post in the Secretariat;

...

(b) For promotion against a post one level higher than the level of the staff member ... of staff who are not internal candidates but fall in the following categories:

(i) Staff appointed at the P-3 level under the 100 series of the Staff Rules to serve against peacekeeping support account posts at Headquarters or under the 100 or 300 series in peacekeeping or other field missions may be considered for vacancies at the P-4 level; ...

(ii) Women staff members who hold a current appointment of any type at the P-3/L-3 level may be considered for vacancies at the P-4 level; ...

...

6.2 Applications of candidates eligible to be considered at the 15-day mark but received before the 30-day mark shall nevertheless be transmitted for consideration to the department/office... Applications for a vacancy posted with a 60-day deadline from candidates eligible to be considered at the 30-day mark but received afterwards shall be transmitted with all the other applications received before the deadline.

...

7.1 In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable.

47. Annex III (Responsibilities of the staff member/applicant) of the above-cited administrative instruction also provides:

4. Staff members may apply for a vacancy any time before the deadline for applications expires, but are encouraged to submit their applications as early as possible so that they may be considered at the 15- or 30-day mark, depending on their eligibility as defined in sections 5.4 and 5.5 of this instruction.

48. The vacancy announcement in question itself specified:

All applicants are strongly encouraged to apply online as soon as possible after the vacancy has been posted and well before the deadline stated in the vacancy announcement. Because applications submitted by United Nations (UN) staff members are considered

first, provided the eligibility requirements set out in ST/AI/2002/4 are met and the application is submitted in a timely fashion, staff members should apply within 15-day or 30-day mark.

49. The documents on the selection process show that eight candidates meeting the conditions for eligibility at the 30-day mark were called to take a written test, and then three of them, including the Applicant and the candidate who finally secured the post, were called for interview.

50. The Applicant maintains that the candidate finally selected was wrongly included in the group of staff members fulfilling the conditions of eligibility at the 30-day mark, as she had not submitted her application within that time limit.

51. In this regard, the provisions of section 6.2, set forth below, are clear: “Applications for a vacancy posted with a 60-day deadline from candidates eligible to be considered at the 30-day mark but received afterwards shall be transmitted with all the other applications received before the deadline.” Those provisions therefore preclude the possibility of a 30-day mark candidate who applies only after that time limit being considered in the same group as candidates who have complied with the time limit.

52. Moreover, it is clear from the very terms of the provisions cited above, and more particularly sections 4.5 and 7.1, as well as Annex III, paragraph 4, that where there were 30-day mark candidates who applied within that time limit, their applications should have been examined first, and only if none of them proved to be suitable could 60-day candidates, including the candidate selected, be considered. The Tribunal has, moreover, already ruled to that effect in its Judgments *Verschuur* UNDT/2010/153 and *Contreras* UNDT/2010/154 of 26 August 2010.

53. The Applicant is right, therefore, to argue that the candidate appointed was selected as the result of an irregular process, and to seek compensation for the damage suffered.

### ***Compensation***

54. It should be recalled, first, that the Appeals Tribunal has ruled in *Solanki* 2010-UNAT-044 and *Ardisson* 2010-UNAT-052:

We believe that in determining compensation, the Dispute Tribunal should bear in mind two considerations. The first is the nature of the irregularity that led to the rescission of the contested administrative decision. The second is an assessment of the staff member's genuine prospects for promotion if the procedure had been regular.

55. The Tribunal must therefore assess the Applicant's chances of obtaining the disputed post if the proper procedure had been followed.

56. After the written test, the Applicant and two female candidates were selected for interview. Following the interview, the Applicant was excluded from the selection process and only the two female candidates were recommended for the post, one of whom was finally appointed and the other placed on the roster of pre-approved candidates for similar functions. This latter was a candidate eligible at the 30-day mark, who had submitted her application within that time limit. Thus, even assuming the proper procedure had been followed, it is clear that the Applicant would have had only a slight chance of being selected for the post. On the other hand, his chances of being recommended and therefore placed on the roster would have been substantially increased.

57. The Tribunal therefore considers that, in view of the foregoing, an award of EUR2,500 will fully and fairly compensate the Applicant for his material damage, which is only that of loss of a slight chance of promotion on the one hand, and of a more realistic chance of being placed on the roster on the other, together with an additional amount of EUR2,500 for moral damage.

### ***Placing on annual leave***

58. Turning to the decision to place the Applicant on annual leave from 3 to 7 October 2005, the Respondent has admitted that the said decision was unlawful, and it did indeed amount to an abuse of procedure that caused the Applicant damage.



59. The Tribunal must determine whether the Applicant has been fairly compensated for the damage suffered. It notes, on the one hand, that the Applicant has not suffered any material damage as a result of the contested decision, as the five days of annual leave he was forced to take have been re-credited to him by decision of the Secretary-General. On the other, the Tribunal considers that the amount of EUR5,000 granted to the Applicant, or EUR1,000 per day of compulsory leave, is ample compensation for the moral damage suffered.

### **Decision**

60. In view of the foregoing, the Tribunal DECIDES:

- 1) The Respondent is ordered to pay the Applicant the amount of EUR5,000;
- 2) The above-mentioned compensation shall bear interest at the US Prime Rate from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the US Prime Rate 60 days following the date this Judgment becomes executable.
- 3) All other claims are dismissed.

*(Signed)*

Judge Jean-François Cousin

Dated this 23<sup>rd</sup> day of February 2011

Entered in the Register on this 23<sup>rd</sup> day of February 2011

*(Signed)*

Víctor Rodríguez, Registrar, Geneva