



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/085

Judgement No.: UNDT/2013/044

Date: 8 March 2013

Original: French

**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** René M. Vargas M.

OUMMIH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGEMENT**

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**Counsel for Applicant:**

None

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

Chenayi Mutuma, ALS/OHRM, UN Secretariat

## Application

1. By application filed on 8 October 2012 with the Registrar of the United Nations Dispute Court, the applicant:

(a) Contests her performance evaluations for the periods 2009-2010 and 2010-2011, as well as the decisions of 28 March 2012 and 3 April 2012 to place those evaluations on her official administrative file.

(b) She asks, first, that those evaluation reports be annulled in part and that the decisions to place them on her file be annulled; in addition, that the contested decisions be fully annulled, that the Secretary-General be ordered to pay her a sum corresponding to 12 months' salary as reparations for damages caused by the above-mentioned decisions; lastly, that her name not be mentioned in the published judgement.

## Facts

2. The applicant was recruited effective 1 September 2009 as a Legal Officer at the Office of Staff Legal Assistance.

3. On 18 August 2011, the applicant signed by electronic means her performance evaluation for the period from 1 September 2009 to 31 March 2010.

4. The applicant's first and second reporting officers signed her evaluation report for the period from 1 September 2009 to 31 March 2010, on 22 and 23 August 2011, respectively, with the rating "*does not meet performance expectations*".

5. On 22 August 2011, the applicant's first reporting officer, Mr. Brian Gorlick, Chief of the Office of Staff Legal Assistance, recommended that her appointment, expiring on 31 August 2011, should not be renewed on the grounds of professional inadequacy. Subsequently, her contract was renewed on several occasions, and the date of expiry of her current contract is 11 June 2013.

6. On 28 October 2011, the applicant initiated a rebuttal process against her evaluation for the period from 1 September 2009 to 31 March 2010.

7. On 18 November 2011, her first reporting officer signed the performance evaluation for the applicant for the period 2010-2011, and the second reporting officer signed it on 21 November 2011. The evaluation report for the period 2010-2011 contained the rating "*does not meet performance expectations*".

8. On 19 December 2011, the applicant initiated a rebuttal process for the period 2010-2011. On 12 March 2012, the rebuttal panel rendered its report for the period 2010/11, noting that in the case at hand it could not fulfil its mandate under section 15.4 of ST/AI/2010/5, namely to prepare a report setting forth the reasons why the original rating should or should not be maintained.

9. The panel concluded that, in light of flagrant procedural irregularities, the evaluation report should be deemed null and void. On 26 March 2012, the Office of Human Resources Management requested the rebuttal panel to give its opinion as to the rating that should be accorded the applicant for the period 2010/11. On 28 March 2012, pursuant to the request of the Office of Human Resources Management, the rebuttal panel responded that it stood by the conclusions in its report of 12 March 2012, to the effect that the initial rating should not be maintained but should be raised to "*successfully meets performance expectations*". The applicant was informed on that same day that certain documents had been placed on her file, namely a copy of her rebuttal statement, a copy of the report of her first reporting officer in response to her rebuttal statement, a copy of a memorandum from the Executive Office of the Secretary-General to the president of the panel, a copy of a memorandum from the Executive Office of the Secretary-General to the Office of Human Resources Management requesting instructions, the response of the Office of Human Resources Management to that request, a copy of the letter from the Executive Office of the Secretary-General to the president of the panel

dated 26 March 2012 transmitting the opinion of the Office of Human Resources Management, a copy of the report of the rebuttal panel dated 28 March 2012, and, lastly, a copy of her performance evaluation for the period 2010-2011.

10. On 2 April 2012, the rebuttal panel rendered its report for the period 2009-2010 and awarded the rating “*fully successful performance*”, and on 3 April 2012, the applicant was informed that the panel report as well as other documents related to her evaluation by her supervisors were placed on her personal file, namely the applicant’s rebuttal statement with its annexes, the report dated 2 November 2011 of the first reporting officer on the rebuttal statement, the memorandum of the Executive Office of the Secretary-General to the rebuttal panel dated 21 November 2011 and the performance evaluation of the applicant for the period from 1 September 2009 to 31 March 2010.

11. On 19 May 2012, the applicant requested a management review of the evaluation decisions concerning the periods 2009-2010 and 2010-2011 and the decisions of 28 March and 3 April 2012 to place on her file the documents relating to those evaluations. On 10 July 2012, the Under-Secretary-General for Management responded to the request for a management review, specifying that the documents covering her original evaluations, the report of the rebuttal panel, the rebuttal statement and the responses of the supervisors would remain on her personal file. With respect to the other documents relating to her evaluations, he responded to her that the Office of Human Resources Management would remove them from her file, if she so requested. He also informed the applicant that her request for damages had been rejected.

12. On 8 October 2012, the present application was registered with the Registrar of the Tribunal. The respondent presented his response on 23 November 2012, after requesting a postponement, which was granted by order No. 156 (GVA/2012) of 7 November 2012.

13. On 5 February 2013, the applicant submitted observations.

14. On 12 February 2013, the Tribunal held a hearing which the applicant attended in person, while counsel for the respondent participated by videoconference.

15. Following the hearing, the applicant presented observations on 19 February 2013. The respondent presented his response on 1 March 2013.

### **Contentions of the parties**

16. The applicant’s contentions are:

(a) The irregular and prejudicial assessments contained in the rating reports must be removed from her file, as it cannot be contested that the original evaluations were done illegally, as was admitted by the rebuttal panel and by the Under-Secretary-General for Management in his response to the request for management evaluation.

(b) Management must recognize the consequences of the irregularities affecting the original rating reports. Although administrative instructions ST/AI/2002/3 (Performance Appraisal System) and ST/AI/2010/5 (Performance Management and Development System) provided that the original report must remain on the staff member’s file, those provisions must be deemed illegal as contrary to Regulation 1.3 of the Staff Regulations and Rule 1.3 of the Staff Rules which require that a staff member’s file must not contain any evaluations conducted irregularly.

(c) As she wishes to retain the general appraisals awarded by the rebuttal panel, she requests partial annulment of her evaluation, i.e. annulment of all the appraisals by her first reporting officer, with the consequent removal from her file of her rebuttals, the response of the reporting officer, and certain portions of the panel report.

(d) In addition, she asks annulment of the rating reports, the panel reports as well as the decisions to place on her file the documents resulting from the evaluation and review.

(e) She has suffered serious moral damages as a result of the contested decisions, for she has been deeply hurt by the reports of her first reporting officer. She became ill in the aftermath of these irregularities. She suffered hostility from her first reporting officer for which she bore no responsibility. The failure to conduct an interview prior to the assessment was a deliberate attack on her dignity. The fact that the evaluation was made retroactive is absurd, recognizing that the work plan was drawn up and the mid-point performance review conducted only after the end of the period evaluated.

(f) Contrary to what the respondent maintains, it is the place of the Tribunal to rule on the harassment and the abuse of authority of which she has been the victim.

(g) As the rebuttal panel recognized, the contested evaluations must be deemed null and void, and thus cannot be considered as evaluations.

17. The respondent's contentions are:

(a) The application is not admissible because the contested decision to place on the applicant's file certain documents is a decision taken in application of Administrative Instructions ST/AI/2003/3 and ST/AI/2010/5, which provide that performance evaluations and rebuttal jury reports shall be automatically placed on the staff member's file; thus there is no administrative decision to be contested. The letters of 28 March 2012 and 3 April 2012 are mere communications and not administrative decisions that might affect the rights of the applicant.

(b) The only decisions that can be contested before the Tribunal are those for which management review has been requested; thus all the claims relating to harassment by the first reporting officer are inadmissible and are, moreover, the object of another application registered before the Tribunal under number UNDT/GVA/2012/076.

(c) Administrative Instructions ST/AI/2003/3 and ST/AI/2010/5 specify which documents must be placed on the staff member's file following a rebuttal procedure for an evaluation. The respondent thus has no discretion in the matter.

(d) The placement of such documents on the file cannot be injurious to the applicant for, to the contrary, the outcome of the rebuttal procedure was in her favour. The staff member's file must contain all the documents tracing the course of the rebuttal procedure.

(e) Administrative Instruction ST/AI/2010/5 differs from the preceding one in that it provides for including on the staff member's file only the report of the rebuttal panel and the performance evaluation.

(f) The applicant has produced no proof of harassment by her first reporting officer. The applicant launched several dispute proceedings that relate to the same thing. Moreover, she has not offered proof of any injury and the medical document produced is not sufficient to establish the reality of her health problems.

(g) The applicant's career has not suffered from the inclusion of the disputed documents on her file, for during the same period she received two offers of employment.

(h) There is no reason for deleting the name of the applicant in the judgement, for there are no exceptional circumstances that would justify this.

## **Judgement**

18. The applicant asks, first, that the Tribunal annul, either wholly or partially, the performance evaluation reports for the periods 2009-2010 and 2010-2011.

### ***Admissibility***

19. With respect to the period 2009-2010, the applicable text is Administrative Instruction ST/AI/2002/3, section 15 of which (Rebuttal Process) reads as follows:

15.3. The rebuttal panels shall prepare with maximum dispatch a brief report setting forth the reasons why the original appraisal ratings should or should not be maintained. The report of the rebuttal panel shall be placed in the staff member's official status file as an attachment to the PAS [Performance Appraisal System]. The performance rating resulting from the rebuttal process shall be binding on the head of the department or office and on the staff member concerned, subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization, who may review the matter as needed on the basis of the record. Any change in the final rating, and the date of the decision, shall be marked by the executive or administrative office on the final appraisal section of the PAS form, with annotation that the rating was changed as a result of a PAS rebuttal.

15.4. The rating resulting from an appraisal that has not been rebutted, or from the rebuttal process, shall not be subject to further appeal. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be appealed.

20. The above provisions mean that, when the final rating has been amended by the panel, as in this case, the latter rating replaces the one previously given. Thus, the applicant is not entitled to request cancellation of an evaluation that has been replaced by the rating awarded by the panel, namely "*fully successful performance*", the final rating which the applicant has expressly declared she is not contesting.

21. With respect to the period 2010-2011, the applicable text is Administrative Instruction ST/AI/2010/5, which provides as follows:

**Section 15**  
**Rebuttal Process**

15.5. The performance rating resulting from the rebuttal process shall be binding on the head of the department/office/mission and on the staff member concerned, subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization, who may review the matter as needed on the basis of the record. Any change in the final rating, and the date of the decision, shall be communicated to OHRM with an annotation that the rating was changed as a result of a review of the performance management and development rebuttal and the final rating recommended by the rebuttal panel.

...

15.7. The rating resulting from an evaluation that has not been rebutted is final and may not be appealed. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be resolved by way of informal or formal justice mechanisms.

22. The above-cited provisions differ little from those applicable to the period 2009-2010, and specify in the same manner that the rating awarded by the rebuttal panel replaces the rating awarded by the first reporting officer. Thus, on the same grounds as those argued above, the applicant is not entitled to request annulment of an evaluation that has been replaced by the rating awarded by the panel, namely, "*successfully meets performance expectations*", the final rating which the applicant has expressly declared she is not contesting.

23. The respondent goes on to argue that all the claims of the applicant concerning the harassment of which she might have been a victim at the hands of her first reporting officer are inadmissible. The Tribunal accepts that statement and finds that the applicant has requested only the annulment of the decisions mentioned in paragraph 1 of this judgement and compensation for the resulting damages, and that while she has cited certain circumstances of the disputes she has had with her first reporting officer, these were proffered as arguments and not as claims on which the Tribunal must rule.

24. The applicant next asks for annulment of the decisions of 28 March 2012 and 3 April 2012 to place on her official administrative file certain documents relating to her performance evaluations for the periods 2009-2010 and 2010-2011.

25. The respondent claims that the contested decisions are not administrative decisions that might affect the rights of the applicant, as management was merely applying Administrative Instructions ST/AI/2002/3 and ST/AI/2010/5, which require that the contested documents be placed on the staff member's file. The Tribunal considers that the exception of inadmissibility claimed by the respondent is completely erroneous. The Tribunal recalls that it is competent to judge the legality of decisions that might affect the rights of the staff member pursuant to the Staff Regulations or his/her contract. The contested decisions were taken by management on the basis of the two Administrative Instructions mentioned above, and it is the role of the Tribunal to determine whether, as the applicant maintains, those texts have been applied in error or whether they are contrary to a higher rule. Thus, the Tribunal considers that the decisions of 28 March 2012 and 3 April 2012 are administrative decisions that can be challenged before the Tribunal.

***Substance***

26. Having specified above which of the applicant's claims are admissible, the Tribunal must now delimit the present dispute precisely. Following the request for management review, management decided that, pursuant to the above-cited texts, it must, on one hand, place on the applicant's official administrative file the documents constituting her performance evaluations for the two periods concerned with, as attachments, the reports of the rebuttal panels, and on the other hand that the remaining documents relating to these evaluations should be removed from the applicant's file if she so requests. Thus, the Tribunal considers that, since management has left on the file all the documents that the applicant seeks to have removed, it must consider the legality of the presence of all those documents on the applicant's file.

27. The above-cited texts define in a limiting manner which documents relating to the evaluation of staff members must be placed on their personal file, in case of their objection.

28. With respect to the period 2009-2010, ST/AI/2002/3 requires that there be placed on the staff member's official status file the brief written response of the head of department or office to the rebuttal statement submitted by the staff member, the evaluation report, and the panel report. For the period 2010-2011, Administrative Instruction ST/AI/2010/5 specifies only that the rebuttal panel report and the original evaluation are to be placed on the file.

29. Thus, in the first place, the applicant is entitled to request that none of the documents concerning her evaluation, other than those specified above, should appear on her file. It is proper for the Tribunal, therefore, to annul the decision to place on the applicant's file documents other than those listed above, and to order the human resources office to remove them without the need for the applicant to lodge a specific request to this end.

30. The applicant asks in addition that all the documents relating to the two evaluations for which she has initiated rebuttal processes should be removed from her file. The above-cited texts, however, are very clear in their requirement that these documents must be placed on the staff member's official status file.

31. The applicant maintains that the above-cited administrative instructions are illegal because they are contrary to Regulation 1.3 of the Staff Regulations and Rule 1.3 of the Staff Rules in that they require that the evaluation reports, even if the rating has been amended by the rebuttal panel, are to be placed on the staff member's official status file.

32. The Staff Regulations provide as follows:

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**Regulation 1.3**  
**Performance of staff**

(a) Staff members are accountable to the Secretary-General for the proper discharge of their functions. Staff members are required to uphold the highest standards of efficiency, competence and integrity in the discharge of their functions. Their performance will be appraised periodically to ensure that the required standards of performance are met;

(b) The whole time of staff members shall be at the disposal of the Secretary-General for the performance of official functions. The Secretary-General shall establish a normal working week and shall establish official holidays for each duty station.

33. Rule 1.3 of the Staff Rules provides as follows:

**Performance of staff**

(a) Staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms that shall assess the staff member's compliance with the standards set out in the Staff Regulations and Staff Rules for purposes of accountability.

(b) The Secretary-General shall seek to ensure that appropriate learning and development programmes are available for the benefit of staff.

(c) Performance reports shall be prepared regularly for all staff members, including at the Assistant Secretary-General level and above, in accordance with procedures promulgated by the Secretary-General.

34. The Tribunal considers that no provision of the contested administrative instructions runs counter to the higher rules constituted by the Staff Rules and Staff Regulations. Consequently, the argument of the applicant must be rejected.

35. The applicant maintains that the procedures that led to the contested evaluations are so completely illegal that the documents supporting them cannot be qualified as evaluations and, for that reason, cannot be placed on her official status file.

36. With respect to the period from 1 September 2009 to 31 March 2010, it is accepted that the applicant's work plan was submitted to her on 20 March 2010, or 11 days before the end of the period, that the mid-point performance review was signed by the applicant's immediate superior and by herself on 29 November 2010, that there was no discussion of the final evaluation between the first reporting officer and the staff member and, finally, that the applicant's first reporting officer and her second reporting officer signed her evaluation on 22 and 23 August 2011, respectively.

37. With respect to the period from 1 April 2010 to 31 March 2011, the applicant prepared her workplan on 31 October 2011 and it was approved by her first reporting officer on 2 November 2011. The mid-point performance review was conducted in the following week, and the final evaluation was done by the first reporting officer on 18 November 2011, and by the second reporting officer on 21 November 2011.

38. Administrative Instruction ST/AI/2002/3 specifies as follows:

**Section 2**  
**Purpose**

2.2. PAS is a management tool based on linking individual workplans with those of departments and offices and entails setting goals, planning work in advance and providing ongoing feedback. An important function of the PAS is to promote two-way communication between staff members and supervisors on the goals to be achieved and the basis on which individual performance will be assessed. PAS also encourages continuous learning, fosters teamwork, and assists in planning career development.

#### **Section 4** **Reporting officers and additional supervisors**

4.1. A first reporting officers shall be designated for each staff member at the beginning of the cycle. The first reporting officers responsible for:

- (a) Setting the workplan with the staff member;
- (b) Conducting the mid-point review and final appraisal;
- (c) Providing supervision of the overall work of the staff member through the reporting period.

...

4.3. The second reporting officer, who shall be the first reporting officer's supervisor, is responsible for:

- (a) Ensuring that the first reporting officer understands and applies the PAS principles and procedures;
- (b) Holding the first reporting officer accountable for appraising staff in accordance with PAS guidelines;
- (c) Providing ongoing feedback and including in the PAS of the first reporting officer an appraisal of his or her management of staff performance;
- (d) Resolving disagreements between staff and the first reporting officer in the interpretation of PAS.

#### **Section 6** **Individual plans**

6.1. In the light of the departmental and work unit plans, managers meet with the staff under their direct supervision to ensure that the objectives of the work unit are understood and annual individual workplans are drawn up.

6.2. The staff member works with the first reporting officer to devise the plan for the performance cycle and to determine the competencies that will be used to carry out the workplan.

#### **Section 7** **Implementation and monitoring**

7.3. Primary responsibility for the timely execution of the PAS rests with the head of department or office for overall compliance as well as consistent and fair implementation.

7.4. Timely implementation of all aspects of the PAS and compliance with the spirit and the letter of the process, including completion of the PAS forms and development of remedial action under section 8.3, if necessary, rests with the supervisor acting as the first reporting officer under section 4.1.

7.5. Officials acting as second reporting officers under sections 4.3 and 4.4 shall be held accountable for the fair and consistent implementation of PAS by supervisory staff acting as first reporting officers.

#### **Section 8** **Mid-point performance review**

8.1. In the middle of each performance year, the first reporting officer reviews with each staff member the manner in which the individual workplan has been carried out and provides performance feedback and guidance for the accomplishment of the goals and/or performance expectations set out in the workplan.



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## Section 9

### Appraising performance

9.1. At the end of the performance year, the first reporting officer and the staff member shall meet to discuss the overall performance during the reporting period.

9.2. Prior to the appraisal meeting between the first reporting officer and the staff member, the staff member should review the manner in which he or she has carried out the workplan defined at the beginning of the performance year.

39. The above-cited administrative instruction was replaced by Administrative Instruction ST/AI/2010/5 which, while it differs from the previous one with respect to certain points, has the same objective and calls for the same mandatory stages in the evaluation procedure. The Tribunal does not consider it necessary to quote that instruction.

40. Thus, the evaluation system now in place relies, first of all, on a workplan established jointly by the staff member and his or her first reporting officer, and then on a mid-point performance review conducted jointly towards the middle of the period concerned. In the applicant's case, the workplans and the mid-point evaluations were conducted after the period of reference had expired, an effort at regularization that made no sense in light of the goals pursued by the performance management system, which is to maintain dialogue during the period between the staff member and his or her reporting officers.

41. At the hearing, the first reporting officer, who testified as a witness called by the respondent, explained that, with establishment of the new Office of Staff Legal Assistance, his many obligations had prevented him from respecting the deadlines set by the administrative instructions. He also insisted that the applicant bore some responsibility for these delays.

42. The Tribunal can only stress that the above-cited texts place responsibility for the evaluation of staff members essentially on their supervisors and considers that, regardless of the reasons for these delays, the irregularities committed in the case of these two performance evaluations are so serious that they render the applicant's evaluations meaningless, as was decided by the rebuttal panel which held these evaluations to be null and void.

43. Administrative Instruction ST/AI/2006/3, which dealt with the staff selection system and is no longer in effect, had provided that when, for various reasons, no appraisal had been completed, the staff member should be "*deemed to have fully met performance expectations*". This is the situation in the present case. For various reasons, the applicant's performance was not evaluated within the time limits required, and it was evidently not possible to make the workplan and the mid-point review retroactive. Thus, the applicant should not have been evaluated by her supervisors and, as the rebuttal panel indeed decided, she should have been awarded a rating of "*fully meets performance expectations*" for the two contested periods.

44. Now that the Inspira system instituted for selecting staff requires candidates to communicate their last two evaluations, the Tribunal considers that they are not to be expected to communicate documents that cannot seriously be called evaluations. Thus, although the Tribunal, as noted above, cannot nullify the contested evaluations, it decides that the applicant's performance evaluation reports for the periods 2009-2010 and 2010-2011 do not exist legally and for this reason administrative instructions ST/AI/2002/3 and ST/AI/2010/5, which called for those documents to be placed on the official status file, are not applicable. These evaluation reports should not be placed on the applicant's official status file, and the decisions to do so should therefore be annulled.

45. It remains for the Tribunal to consider the question of prejudice that the applicant may have suffered through these legally nonexistent evaluations.

46. The material losses invoked by the applicant can only be considered as future and uncertain losses, as the applicant is today still employed by the Organization and as all the documents relating to

the evaluation by her supervisors are to be withdrawn from her personal file, management can in no case cite them as grounds for any refusal to renew her current appointment.

47. With respect to the moral damages claimed by the applicant, the Tribunal considers that these have been in part compensated by the satisfactory ratings awarded her by the rebuttal panel. However, for the two periods under dispute the applicant worked without a workplan and her first reporting officer did not conduct any mid-point review with her. The applicant has been left in great uncertainty as to the quality of her work, to the point where her relations with her first reporting officer have deteriorated seriously, while her second reporting officer has been unable to intervene, as he could have if the evaluations had been conducted regularly. The Tribunal considers, then, that the irregularities committed in the applicant's evaluations have been at least in part the source of the difficult relations that she has had and continues to have with her supervisors. On this point, it is proper to order the respondent to pay her the sum of US\$ 5,000.

48. Lastly, the applicant has asked the Tribunal to ensure that her name does not appear in this judgement. The same request had already been made to the Tribunal for the previous applications submitted by the same applicant, and the Tribunal accepted the request on the grounds that publication of her name in a judgement might be damaging to her as a staff member of the Office of Staff Legal Assistance and could also affect the proper functioning of that office.

49. The Tribunal considers that, while it may on an exceptional basis decide to conceal the name of the applicant or of any other person in the published judgement, as it did previously for the applicant, there is no good reason in the present case to continue to grant her special treatment vis-à-vis other staff members who submit applications before the Tribunal. The present case is part of a broader context of conflict between a staff member and her first reporting officer that has come before the Tribunal, and this is certainly not an exceptional situation. Therefore, there are no grounds to grant anonymity and the applicant's request is rejected.

## **Decision**

50. For the reasons set forth above, the Tribunal decides:

(a) Management is ordered to remove from the applicant's official administrative file the evaluation reports on her performance for the periods 2009-2010 and 2010-2011 as well as all other documents prepared by her supervisors in relation to those evaluations. Only the rebuttal panel reports are to be kept on file.

(b) The respondent shall pay to the applicant the amount of US\$ 5,000.

(c) This compensation shall be increased by interest at the United States prime rate beginning on the date this judgement becomes final, plus 5 per cent beginning 60 days after the date on which this judgement becomes enforceable, and until the payment is made.

(d) The applicant's other requests are rejected.

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Judge Jean-François Cousin  
Dated this 8th day of March 2013

Entered in the Register on this 8th day of March 2013

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René M. Vargas M., Registrar, Geneva

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