



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

SAREVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Kara Nottingham, UNOG

Introduction

1. By application filed on 1 July 2017, the Applicant requests suspension of action, pending management evaluation, of the decision not to select him for the position of Director, United Nations Institute for Disarmament Research (“UNIDIR”) (D-2), advertised under job opening 16-Political Affairs-UNOG-59375-B-Geneva (R).
2. The application was served on the Respondent on 3 July 2017, and he was requested to submit his reply by 5 July 2017 (eob).
3. By Order No. 136 (GVA/2017) of 5 July 2017, the Tribunal granted the Respondent an extension of time to submit his reply by noon on 6 July 2017, as per his request.
4. The Respondent submitted his reply on 6 July 2017, with Annex 4 filed *ex parte* on the basis that it allegedly contains confidential information.
5. By Order No. 140 (GVA/2017) of 6 July 2017, the Tribunal ordered the Respondent to produce additional documents related to the contentions made in his reply by 5 p.m. (New York time) of the same day.
6. The Respondent submitted a number of requested documents within the set deadline on 6 July 2017, and informed the Tribunal that additional ones would be submitted “tomorrow”. On 7 July 2017, the Respondent submitted additional documents, on an *ex parte* basis.

Facts

7. The Applicant joined the Organization as a Special Assistant to the Executive Chairman (P-5), United Nations Monitoring, Verification and Inspection Commission, in 2001. Thereafter, he worked as an Ambassador, Deputy Permanent Representative, at the Permanent Mission of Finland to the United Nations from 2002 to 2006. In 2006, the Applicant was appointed Chief (D-1), Disarmament and Peace Affairs Branch, United Nations Department of

General Assembly and Conference Management. He then worked as Director (D—2), Geneva Branch, United Nations Office for Disarmament Affairs, from 2009 to 2014.

8. In January 2015, the Applicant took up the position of Director (D-2), UNIDIR. On 28 October 2016, he was granted a continuing appointment. The Applicant's position as Director, UNIDIR, was subsequently extended through 31 August 2017.

9. On 20 April 2016, the position of Director (D-2), Political Affairs, UNIDIR, was advertised under job opening 16-Political Affairs-UNOG-59375-B-Geneva (R) as part of the Staff Exercise SE3 (POLNET 2016 Semi-Annual 1). The documents on file and submissions of the parties provide no explanation as to why this position, encumbered by the Applicant, was subject to advertisement.

10. The Applicant applied for the position on 8 June 2016 and participated in the substantive knowledge test on 22 July 2016. After successfully passing the assessment, he participated in a competency-based interview on 19 August 2016, along with six other candidates.

11. The Applicant was found suitable for the position by the assessment panel and recommended for the position, along with two other male candidates. The Applicant was ultimately not selected for the post. The Applicant was informally advised of the Secretary-General's decision not to select him for the post prior to the official notification. On 13 June 2017, he requested management evaluation and suspension of action of this decision pending management evaluation. His request for management evaluation was rejected on 15 June 2017 on the ground that no final decision had yet been made. His application for suspension was consequently rejected as irreceivable on 19 June 2017 by Order No. 127 (GVA/2017).

12. By email from the Office of Human Resources Management ("OHRM") of 30 June 2017, the Applicant was formally notified that he had not been selected for the contested post.

13. By email of 1 July 2017 from the OHRM, the selected candidate, who is an external candidate, was informed that he had been selected for the post and required to confirm his “continued interest and availability” for the post within five business days. By email of the same day, he confirmed “[his] continued availability in and continued interest for the position”.

14. On 30 June or 1 July 2017, the Applicant requested management evaluation of the decision not to select him for the contested post. On 1 July 2017, he submitted the present application for suspension of action.

Parties’ contentions

15. The Applicant’s primary contentions may be summarized as follows:

Prima facie unlawfulness

- a. The selection process, which included an informal “straw poll” carried out among the members of the Secretary-General’s Advisory Board on Disarmament Matters, which also serves at the UNIDR Board of Trustees, to select a candidate from those short-listed, was not conducted in accordance with the applicable rules, which include the Staff Rules and Regulations and related administrative issuances concerning the Staff Selection System and the Statute of the UNIDIR;
- b. The contested decision is substantially defective as there is significant evidence that the Applicant, who encumbers the position since January 2016, was the most qualified candidate;
- c. The contested decision may lead to the improper termination of the Applicant’s continuing appointment and he may be left without any assignment as of 1 September 2017;

Urgency

d. The requirement for urgency is met as the contested decision will be implemented on 1 September 2017, at which point the Applicant is at risk of being terminated;

Irreparable damage

e. The implementation of the contested decision would cause him economic loss and may result in significant reduction of his future pension as he will reach the retirement age in four years.

16. The Respondent's primary contentions may be summarized as follows:

Receivability

a. The application for suspension of action is not receivable as the contested decision has already been implemented. The selected candidate accepted the offer and confirmed his continued interest in and availability for the position on 1 July 2017.

Prima facie unlawfulness

b. The selection decision was made in accordance with ST/AI/2016/1 (Staff selection and managed mobility system) and the UNIDIR Statute. In line with art. IV(1) of the UNIDR Statute, the process included consultations with the UNIDIR Board of Trustees. The job opening was sent to the Senior Review Board ("SRB"), which then referred the matter to the Secretary-General for further consideration. Three candidates, including the Applicant, were forwarded to the Secretary-General for final consideration and approval. The Secretary-General has broad discretion in making final selection decisions; and

c. Contrary to the Applicant's assertion, no action has been taken towards termination of his continuing appointment.

Urgency and irreparable damage

- d. The Respondent did not make any submission on these two conditions.

Consideration

17. Art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative and must, thus, all be met in order for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)).

Implementation of the contested decision

18. As a preliminary matter, the Tribunal recalls that a suspension of action is only possible regarding decisions that have not yet been implemented (see *Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011) and *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

19. The Dispute Tribunal repeatedly held that in cases concerning the selection of external candidates, the selection decision has to be considered as implemented when the Administration receives the selected candidate's unconditional acceptance of the offer of appointment (see, e.g., *Murnane* UNDT/2012/128).

20. That being said, the Dispute Tribunal's jurisprudence is not entirely consistent when it comes to determining whether this condition is met in various factual scenarios. For example, in *Tiwathia* UNDT/2012/109, the Tribunal found that the notification sent to the successful candidate informing him that he had been selected, and his subsequent confirmation of continued availability for and interest in the position satisfied this condition (see also, e.g. *Kawas* Order No. 297 (NY/2014)). In other cases, the Dispute Tribunal found that the decision had been implemented when a formal offer of appointment detailing the terms of

employment and setting the expected date of entry in duty had been sent to the successful candidate, who had signed it and confirmed his or her available date for entry of duty (see, e.g., *Samra* Order No. 195 (GVA/2015), *Murnane* UNDT/2012/128). Finally, in a recent case, the Tribunal found that it is not sufficient that the Organization make an offer and that the selected candidate unconditionally accept it, but that it is also required that the selected candidate meet the conditions contained in the offer, if any (*Abdul Ghafoor* Order No. 103 (GVA/2017)).

21. Having reviewed the various approaches adopted by the Dispute Tribunal and the jurisprudence of the Appeals Tribunal, this Tribunal is of the view that the mere notification of the selection decision to the successful candidate and his or her confirmation of availability for and interest in the position is not sufficient to consider that the decision to select an external candidate has been implemented, for the following reasons.

22. The Appeals Tribunal clearly stated in *Gabaldon* 2011-UNAT-120 that the parties must agree on the conditions of employment for an offer to produce legal consequences (emphasis added):

Unconditional acceptance by a candidate *of the conditions of an offer of employment* before the issuance of the letter of appointment can form a valid contract, provided the candidate has satisfied all of the conditions. The conditions of an offer are understood as those mentioned in the offer itself, those arising from the relevant rules of law for the appointment of staff members of the Organization, as recalled in article 2, paragraph 2(a) of the UNDT Statute, and those necessarily associated with constraints in the implementation of public policies entrusted to the Organisation. (see also *Sprauten* 2011-UNAT-111; *Cranfield* 2013-UNAT-367).

23. It further required in *Sprauten* 2011-UNAT-111 that there be not only an agreement on the terms and conditions of appointment but also that all the conditions be met by the candidate for the offer to produce legal effects. The Tribunal insisted that the date of entry of duty is an essential condition of an offer of appointment and that there could be no binding agreement between the parties in the absence of an agreement on that point.

24. The notification of a selection decision must be distinguished from an offer of appointment. It is clear from sec. 13 of ST/AI/2016/1 that the successful candidate is first notified of the selection decision within 14 calendar days of the decision being made (sec. 13.1) and that the decision is implemented thereafter (sec. 13.3), notably through the sending of a formal offer detailing the terms and conditions of appointment. Contrary to what appears to be the Respondent's assertion, sec. 13.3, which states that "[t]he decision to select a candidate shall be implemented upon its official communication to the individual concerned", cannot be interpreted as meaning that the notification amounts to implementation. The use of the word "shall" indicates that actions must be taken to give effect to the decision and to ensure its implementation, as actually reflected by the practice of the Organization.

25. If selection decisions were considered to have been implemented upon their notification to the selected candidate and his or her confirmed interest and availability for the concerned position, the window of opportunity for unsuccessful candidates to seek suspension of action would be so limited that it would virtually deprive them of this recourse. This is particularly problematic in the context where unsuccessful candidates have a limited possibility to obtain rescission of selection decisions once they have been implemented, given that the Tribunal is bound to set an alternative amount of compensation that the Respondent may elect to pay in lieu of rescission of the decision and that the Respondent's practice is to systematically elect to pay this buy-out.

26. In the instant case, the selected candidate was informed of the following on 1 July 2017 by an email of OHRM:

In reference to your application to the above-mentioned Job Opening, we are pleased to inform you that the United Nations Secretariat has selected you for the position.

Please confirm by return e-mail, within five business days of receipt of this message, your continued interest in and availability for this position.

The Human Resources Management Office will be contacting you shortly with regard to further recruitment or staffing procedures.

The successful candidate responded the same day that “[he] confirmed [his] continued interest and availability for the position”.

27. The Tribunal notes that the email from OHRM does not contain any actual offer of appointment but merely informed the successful candidate, an external one, that he had been selected for the position and asked him to confirm his continued availability for and interest in the position. This is the very first step of the recruitment process where no reference was made to the terms and conditions of appointment, nor to the expected date of entry of duty. Absent any agreement on these fundamental elements of an offer of appointment, the contested decision cannot be considered as having been implemented.

28. In view of the foregoing, the Tribunal finds that the application for suspension of action is receivable.

Prima facie unlawfulness

29. The Tribunal recalls that the threshold required in assessing this first condition is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

30. The Tribunal also recalls that, in reviewing decisions regarding appointments and promotions, it shall examine the following: (1) whether the procedure as laid down in the relevant provisions was followed; and (2) whether the staff member was given fair and adequate consideration (see *Nunez* Order No. 17 (GVA/2013) and *Abbassi* 2011-UNAT-110).

31. Regarding the scope of judicial review with respect to decisions in selection and/or promotion matters, the Appeals Tribunal has held in *Ljungdell* 2012-UNAT-265:

Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this

Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

32. The Appeals Tribunal further ruled in *Rolland* 2011-UNAT-122 that official acts are presumed to have been regularly performed; accordingly, in a recruitment procedure, if the management is able to even minimally show that the staff member's candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must be able to show through clear and convincing evidence that she or he was denied a fair chance.

33. The Tribunal notes that the Applicant in his application essentially takes issue with the fact that the Secretary-General unlawfully abdicated his decision-making power in favour of the Board of Trustees, on the basis of information that he received in this respect and having no access at the time to the documents concerning the selection process. Upon its request, the Tribunal received from the Respondent a number of these documents which disclose prima facie fundamental procedural flaws in the selection process. The Tribunal will focus its examination of the case on these matters, which could not be known to the Applicant.

34. The Tribunal further notes with concerns that its Order No. 140 (GVA/2017) of 6 July 2017 for the production of evidence has not been fully complied with by the Respondent. Notably, it appears that the Respondent failed to provide a full record of the communications between the Secretary-General and the UNIDIR Board of Trustees in respect of the selection for the contested post, as required by para. 6(e) of said order. Accordingly, some steps of the process remain nebulous and unexplained, particularly insofar as to how the final selection decision was made between the three recommended candidates. In this respect, the Tribunal recalls that the Respondent is bound to comply with orders issued by it and to disclose the information required. This is particularly important in non-selection cases, where the evidence whether full and fair consideration has been given to a candidate lies with the Administration. Adverse inferences may be drawn from the Administration's failure to disclose relevant evidence absent any

acceptable justification (see *Bertucci* 2011-UNAT-21; *Valentine* UNDT/2017/004).

Legal framework

35. It is not disputed that the selection exercise for the contested position had to be conducted in accordance with ST/AI/2016/1 and the UNIDIR Statute. In this connection, the Tribunal notes that art. IV(1) of the UNIDIR Statute provides that “[t]he Director shall be appointed by the Secretary-General of the United Nations, after consultations with the Board”. This is the only provision of the UNIDIR Statute that deals with the recruitment of its Director and, indeed, the Respondent did not point out any other relevant provision. Art. IV(4) further provides that “[t]he terms and conditions of service of the Director and the staff shall be those provided in the Staff Regulations and Rules of the United Nations, subject to such arrangements for special rules or terms of appointment as may be proposed by the Director and approved by the Secretary-General”.

36. It follows that the recruitment procedure for the Director, UNIDIR, is that set forth in ST/AI/2016/1, subject to the specific provision of art. IV(1). Concretely, this entails that the provisions of ST/AI/2016/1 must be complied with and, at the final stage of the decision-making process, the Secretary-General shall consult the UNIDIR Board of Trustees in selecting the successful candidate among those recommended by the Senior Review Board in exercising his discretion under sec. 12.2 of ST/AI/2016/1. In this connection, it is emphasised that the role of the UNIDIR Board of Trustees in the recruitment of the Director, UNIDIR, is solely consultative. The Statute does not grant it any decision-making power in this respect.

37. Based on the documents submitted by the Respondent, the Tribunal has identified on a *prima facie* basis at least four procedural flaws in the selection process, which are detailed below.

Composition of the assessment panel

38. Pursuant to sec. 7.1 of ST/AI/2016/1, eligible candidates for a job opening “shall be invited by the Office of Human Resources Management for an assessment to evaluate their knowledge, skills, abilities and competencies in order to determine their suitability for the vacant position”.

39. Sec. 7.3 of said administrative instruction further provides that:

Assessments will be conducted by assessment panels, which will be set up by the Office of Human Resources Management. Each assessment panel shall have a minimum of three staff members at the same or at a higher level than the vacant position and shall hold appointments under the Staff Regulations and Rules other than temporary appointment.

40. In the present case, the evidence shows that one of the three panel members in this recruitment exercise was not a staff member but the “Principal Deputy Assistant Secretary for Nuclear and Strategic Research Policy, US Department of State”, in flagrant violation of sec. 7.3 of ST/AI/2016/1. The SRB raised concerns in this respect and was told that, the participation of this individual was “allowed” by OHRM, without any further explanation. In the end, the SRB did not make any actual finding about the non-compliance with the applicable rules as it declined to review the selection process, as will be more amply discussed below.

41. The Tribunal recalls that the compulsory and cumulative requirements for the composition of the assessment panel are binding upon the Organization. They are not in any way subject to the discretion of the OHRM, which, on the contrary, has a duty to ensure that rules concerning the management of human resources are strictly complied with. Further, the Secretary-General is bound by and has to follow and respect the Organization’s rules and regulations in order to ensure not only respect for the rule of law but also fairness and transparency in the exercise of his decision-making power.

42. The Tribunal, having been provided no reason as to why OHRM authorised a departure from the applicable rules in this case, stresses that in allowing participation of a member of the US State Department, OHRM opened the door to

possible interference from a member state in the recruitment of a key position on disarmament matters. This concern is compounded by the fact that the Principal Deputy Assistant Secretary for Nuclear and Strategic Research Policy, US Department of States, appears to have played a prominent role in this recruitment process, in taking part on both the assessment panel and the “Sub-Committee of the Secretary-General’s Advisory Board on Disarmament” that provided recommendation to the Under-Secretary-General and High Representative for Disarmament Affairs on the selection of the candidate for the contested position, as will be more amply discussed below. She was even the one who conveyed this recommendation, as the “Board Representative for the UNIDIR Director Selection Panel”.

43. The flagrant disregard of the applicable rules governing selection processes to allow participation of a representative of a political organ of a member State raises serious concerns as to compliance with art. 100 of the UN Charter, which is of a constitutional and supra-legal nature and enshrines the fundamental principle of non-interference of member states with the internal affairs of the United Nations. More specifically, art. 100 provides that:

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

44. The Tribunal finds that the participation of the Principal Deputy Assistant Secretary for Nuclear and Strategic Research Policy, US Department of States, in the selection process appears to be in breach of sec. 7.3 of ST/AI/2016/1 and possibly art. 100 of the UN Charter, and is sufficient to raise serious and reasonable doubts about the legality of the contested decision.

45. The Tribunal will nevertheless address a few additional breaches of the applicable procedure that can be discerned prima facie from the documents produced thus far by the Respondent.

Review of the selection process by the SRB

46. Pursuant to sec. 11.1 of ST/AI/2016/1, “the Senior Review Board shall review, validate and endorse lists of suitable candidates who have successfully passed the assessment process in accordance with section 7.6 above for the filling of vacant positions of staff members at the D-1 and D-2 levels in the Secretariat”.

47. In turn, sec. 12.2 of said administrative instruction provides that “[t]he Secretary-General shall make the selection decision based on the selection recommendations submitted by the Senior Review Board for the filling of the vacant positions at the D-1 and D-2 levels”.

48. The role of the SRB is detailed in sec. 4.2 of ST/SGB/2016/3 (Senior Review Board), which provides that:

The Senior Review Board secretariat shall review the lists of suitable candidates prepared by the Office of Human Resources, together with, where applicable, the lists of previously rostered candidates, to ensure that the integrity of the process of identifying suitable candidates to fill vacant positions through job openings was upheld, that the candidates were evaluated on the basis of the pre-approved evaluation criteria specified in the job opening and that the applicable procedures were followed.

49. It follows from the above that the SRB is required to review the selection process for positions in the Secretariat at the D-2 level and that the Secretary—General shall then select one candidate among those endorsed and recommended by the SRB.

50. In the present case, the recruitment process was sent for review by the SRB, but the latter declined to review it and to make any endorsement of the recommended candidates. In this connection, the minutes of the SRB meeting held on 1 November 2016, which are dated 17 November 2016 and were sent to the Secretary-General, state:

The SRB noted that this position is for UNIDIR, which is a special entity outside the Secretariat;

The SRB further noted that ... , Principal Deputy Assistant Secretary for Nuclear and Strategic Policy, US Department of State, was a member of the interview panel. The SRB Secretariat advised the Board members that OHRM had approved [her] participation;

The Board considered that the Secretary-General has broad discretion to appoint candidates to positions in specialized entities without referral to a review body;

The SRB concluded that the case be referred directly to the Secretary-General for his decision.

51. The Tribunal acknowledges that the Secretary-General has broad discretion in selecting a candidate for a position at the D-2 level. However, his discretion is limited to selecting one candidate among those endorsed and recommended by the SRB after its review of the legality of the selection process, as per sec. 12.2 of ST/AI/2016/1. The SRB's abdication of its responsibility to review the legality of the selection process, after having apparently identified a procedural flaw therein, places the whole selection process outside the applicable legal framework by removing any guarantee of compliance.

52. The SRB's decision to decline to review the process cannot be legitimately justified by the fact that the UNIDIR is "a special entity outside the Secretariat". Irrespective of the nature of UNIDIR, it appears that the Organization elected to follow the provisions of ST/AI/2016/1 for the recruitment of the Director of UNIDIR by the Secretary-General, given its inclusion of the job opening in the POLNET exercise and as explicitly acknowledged by the Respondent. The Administration itself sent the process for review to the SRB, showing its own understanding that the provision of ST/AI/2016/1 had to be complied with. Again, on 2 December 2016, a representative of the Executive Office of the Secretary—General on Senior Leadership Appointments, wrote to the SRB to inquire as to "the process the Board followed and specific considerations taken into account in arriving at the final list of three recommended male candidates, bearing in mind that according to paragraph 11.10 of ST/AI/2016/1 the SRB "shall present to the Secretary-General, in no ranking order, selection recommendations of three

candidates including at least one female candidate and at least one male candidate”. By email of the say day, the Chief, SRB Secretariat, reiterated that the SRB did not review this case. Finally, the SRB’s position that the post related to a distinct entity and fell outside the regular selection process by the Secretary—General is further contradicted by the fact that the selected candidate was advised that he had been selected for the post by “the United Nations Secretariat”.

53. The Tribunal finds that the lack of review by the SRB constitutes, on a prima facie basis, a procedural flaw in the selection process but also removed an important safeguard to ensure compliance with the rules. This procedural error affects the whole selection process, as it appears that the selected candidate was not endorsed by the SRB prior to his selection, as required by the rules. It also deprived the Applicant of the possibility to be placed on the roster under sec. 14.1 of ST/AI/2016/1, causing him further prejudice in addition to not be selected for the position.

Decision-making process

54. The Tribunal notes that the decision-making process in this case, which led to the selection of the successful candidate among the three recommended ones, remains entirely obscure at this stage, despite the Tribunal’s order for the Respondent to submit evidence in this respect.

55. Most certainly, it appears that a “Sub-Committee of the Secretary-General’s Advisory Board on Disarmament” played a prominent role in the process. In an email of 12 October 2016 to the Under-Secretary-General and High Representative for Disarmament Affairs, the Principal Deputy Assistant Secretary for Nuclear and Strategic Policy, US Department of State, acting as the “Board Representative for the UNIDIR Director Selection Panel” conveyed “the UNIDIR Sub-Committee’s preferred ranking of candidates for the [contested position]”. She explained that the “Sub-Committee used a simple ranking methodology to arrive at [its] recommendation. Sub-committee (sic.) members provided individual rankings, [they] then assigned 3 points for each time a candidate finished first, 2 points for each time a candidate finished second, and 1 point each time a candidate finished third.” The Applicant’s was ranked third among the three

candidates reviewed by this Sub-Committee. This is the only document that was provided by the Respondent in respect of the involvement of the Board of Trustees or a part thereof in the selection process.

56. The exact process that was followed by the Sub-Committee to make its recommendation on the preferred candidate remains unclear. Notably, there is no indication as to who this Sub-Committee was composed of and how it was created. However, the Tribunal understands that it comprised a number of members of the UNIDIR Board of Trustees, which is equivalent to the Secretary-General's Advisory Board on Disarmament (see art. III(1) of the UNIDIR Statute). It is unclear on what basis the Sub-Committee's members provided their individual ranking and what document(s), if any, were provided to them. Despite its explicit request, the Tribunal is also unaware as to how the Sub-Committee's recommendation, initially sent to the Director of the Secretary-General's Advisory Board on Disarmament, was ultimately conveyed to the Secretary-General.

57. That being said, the Tribunal notes that the Sub-Committee's recommendation was made on 12 October 2016, that is before the selection process was sent to the SRB, in contradiction with the Respondent's submissions in para. 10 of his reply. Most strangely, in his submission for review to the SRB dated 19 October 2016, the representative of the Mobility, Network Staffing Team, indicated that "the manager put all 3 applicants as NR because they wanted to say they will be fine with ANY of the 3. They didn't rank but are willing to take any of the 3 that the SG decides". Likewise, the SRB indicated in its Minutes of 17 November 2016 that "[t]he programme manager informed that all candidates are equally qualified and therefore did not provide any ranking". Apparently, the decision by this "Sub-Committee" was already made by that time and, indeed, no additional document has been provided by the Respondent in response to the Tribunal's order to produce "[a]ny communication between the Secretary-General and the UNIDIR Board of Trustees in respect of the selection for the contested position", thereby suggesting that this constitutes the recommendation of the UNIDIR Board of Trustees referred to by the Respondent.

58. This early “consultation” with the Sub-Committee appears to be in violation of the applicable rules. Whilst the UNIDIR Board of Trustees may be consulted by the Secretary-General when making the selection decision, this consultation ought to occur only after the Secretary-General has received the list of recommended candidates by the SRB, as recalled above. Any advice or recommendation beforehand may be considered as illegitimate interference with the conduct of the selection process, which is under the purview of the assessment panel, the programme manager and the SRB at this stage (see secs. 7, 8 and 11 of ST/AI/2016/1). In this respect, the Tribunal notes that it is unclear in this case who was the programme manager in charge of this recruitment process.

59. Further, art. IV(1) of the UNIDIR Statute, in referring to “consultations with the Board” for the selection of its Director, suggests that the whole board ought to be consulted. Most certainly, there is no provision for the creation of a sub-committee, which casts doubts as to its authority to make any recommendation to the Secretary-General concerning the selection of the Director, UNIDIR, on behalf of the Board of Trustees.

60. The Tribunal is also concerned with the fact that the Deputy Assistant Secretary for Nuclear and Strategic Policy, US Department of State, appears to have been on both the assessment panel and the “Sub-Committee”, thereby confusing the role of assessment of the candidates and participating in recommendation discussions. This may have led to her undue influence over the whole selection process.

61. Finally, there appears to be contradictions in the assessment of the Applicant’s candidacy by the assessment panel, which may suggest an attempt by the latter to influence the ranking of the recommended candidates by the Sub-Committee. The comparative analysis report of 19 October 2016 by the assessment panel indicates that the Applicant successfully meets or even exceeds each of the requirements for the position, including those which were assessed during the competency-based interview. Likewise, the scoring sheet of his interview shows that for each competency assessed, he received a score of at least 3, which represents a “Satisfactory” rating. However, he was rated as only

“partially meets the requirements” for the “overall rating for the interview” in the comparative analysis report. There is no explanation for this overall rating, which appears to be in contradiction with the actual assessment of his competencies. It is further noted that with similar ratings for each of the competencies assessed at the interview and an overall score equal to that of the Applicant, the successful candidate received an overall rating for the interview as “fully meets the requirements”. These discrepancies in the Applicant’s overall interview ranking and with that of the successful candidate is particularly concerning in light of the fact that it appears from an email of 19 October 2016 from the representative of the Mobility, Network Staffing Team to the Secretariat of the SRB, that edits have been made to the interview comments.

62. Whilst the Tribunal is not in a position to ascertain at this stage the exact role played by the UNIDIR Board of Trustees or the Sub-Committee of the Secretary-General’s Advisory Board on Disarmament, the information disclosed thus far raise serious and reasonable doubts about the legality of its involvement at this early stage of the selection process, the authority of this Sub-Committee to make recommendations on behalf of the whole board and the legitimacy of the involvement of the Deputy Assistant Secretary for Nuclear and Strategic Policy, US Department of State, on both the assessment panel and the Sub-Committee.

Requirement to include at least one female candidate among the recommended candidates

63. Pursuant to sec. 11.10 of ST/AI/2016/1, [t]he Senior Review Board shall present to the Secretary-General...selection recommendations of three candidates, including at least one female and at least one male candidate”.

64. It appears that the three candidates recommended for the contested post were all male. As recalled above, this prompted the Secretary-General to enquire with the SRB about this aspect of this requirement. No information was provided to explain why the requirement set out in sec. 11.10 which, again, appears to be a mandatory one, has not been complied with. This appears to be an additional procedural flaw in the recruitment process, which should have been raised by the SRB.

Conclusion on the prima facie unlawfulness

65. In view of the above, the Tribunal finds that the documents disclosed thus far raise serious and reasonable doubts as to the compliance of the selection process with the provisions of ST/AI/2016/1 and the UNIDIR Statute, notably as to the composition of the assessment panel, the lack of review of the process by the SRB, the intervention of the UNIDIR Board of Trustees or a part thereof in the selection process before a recommendation was made by the SRB and the failure to recommend at least one female candidate. These procedural errors are compounded by the absence of any scrutiny of the whole recruitment procedure by the SRB, as was its legal obligation. Therefore, the Tribunal is satisfied that the contested decision appears to be prima facie unlawful.

Urgency

66. As the Respondent did not make any submission in respect of this condition, the Tribunal assumes that he does not contest that it is met and accepts the facts alleged by the Applicant in this respect.

67. According to the Applicant, his appointment to the contested post will end at the end of August 2017, which leads him to assume that the selected candidate will take up his function on 1 September 2017. This appears to be a reasonable inference to draw in the circumstances, absent any confirmation of the date of entry of duty by the selected candidate at this stage. The Tribunal considers that there is urgency to suspend the implementation of the contested decision pending management evaluation to avoid that any additional on-boarding procedures be undertaken by the Administration prior to the issuance of the management evaluation.

Irreparable damage

68. The Dispute Tribunal repeatedly held that the loss of a career opportunity with the United Nations may cause harm to the affected individual which cannot be adequately remedied by financial compensation (see, e.g. *Calvani* UNDT/2009/092, *Villamorán* UNDT/2011/126, *Ullah* UNDT/2012/140, *Saffir*

Order No. 49 (NY/2013) and Zhuang Order No. 165 (GVA/2013)). In the instant case, the implementation of the contested decision will not only deprive the Applicant of a career opportunity but also of the post that he currently encumbers. The Tribunal finds that the potential harm to the Applicant's careers prospects is not purely financial in nature and could not be fully remedied by financial compensation.

69. In view of the foregoing, the Tribunal finds that all three conditions for granting a suspension of action are satisfied.

Disclosure of documents submitted ex parte to the Applicant

70. As recalled above, the Respondent submitted a number of documents on an *ex parte* basis with his reply and in response to Order No. 140 (GVA/2017). The Tribunal notes that these documents were not clearly identified, resulting in difficulties in making precise reference to them. Article 18.4 of the Dispute Tribunal's Rules of Procedure reads:

The Dispute Tribunal may at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances.

71. Article 19 (Case management) further states:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

72. Regarding the principle governing the confidentiality of evidence, the Appeals Tribunal held in *Bertucci* 2011-UNAT-121 that:

In principle, when the Administration relies on the right to confidentiality in order to oppose disclosure of information, it may request the Tribunal to verify the confidentiality of the document whose production may be relevant for the settlement of the case.

The document may not be transmitted to the other party before such verification has been completed. If the Tribunal considers that the claim of confidentiality is justified, it must remove the document, or the confidential part of the document, from the case file. In any event, the Tribunal may not use a document against a party unless the said party has first had an opportunity to examine it.

73. Having reviewed Annex 4 to the Respondent's reply and all the documents submitted in response to Order No. 140 (GVA/2017), the Tribunal notes that most of these contain confidential information and are relevant for the Applicant's case. As these documents were not previously available to the Applicant and were used for the purpose of the present order, the Tribunal finds it appropriate that he be given access to them.

74. The Tribunal is mindful that the aforementioned documents contain sensitive information that requires protection. Accordingly, the Tribunal's Registry will duly redact them—to protect all information concerning individuals other than the Applicant and the selected candidate—and make them available to the Applicant on an under seal basis.

Conclusion

75. In view of the foregoing, it is ORDERED that:

- a. The decision not to select the Applicant for the position of Director, UNIDIR, advertised under job opening 16-Political Affaires-UNOG-59375-B-Geneva (R), be suspended pending the outcome of the management evaluation;
- b. Annex 4 to the Respondent's reply be made available to the Applicant on an under seal basis;
- c. The documents produced by the Respondent in response to Order No. 140 (GVA/2017) identified by the Tribunal as relevant for consideration of the present application and as redacted by the Registry upon instruction from the Tribunal, be made available to the Applicant on an under seal basis;
- d. The Applicant not disclose, use, show, convey, disseminate, copy, reproduce or in any way communicate any of the documents referred to above and disclosed to him on an under seal basis—except for the filing of an appeal with the United Nations Appeals Tribunal—without prior authorization by the Tribunal.

(Signed)

Judge Teresa Bravo

Dated this 10th day of July 2017

Entered in the Register on this 10th day of July 2017

(Signed)

René M. Vargas M., Registrar, Geneva