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JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/033, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 21 March 2014, in the matter of *Leboeuf et al. v. Secretary-General of the United Nations*.[1] The staff members, Leboeuf et al., filed their appeal on 20 May 2014, and the Secretary-General filed his answer on 28 July 2014.

Facts and Procedure

2. The Appellants are staff members at the Gene

9. On 7 April 2005, in response to a letter from the Staff Union President concerning DGACM's "troubling" interpretation of the relevant provisions of Appendix B on the issue of payment of overtime on weekdays, OHRM advised that it had "no basis to request DGACM to change its position" as the position was "fully consistent with the wording of Appendix B".

10. On 11 and 18 April 2005, OHRM held meetings with the Executive Offices of several

16. On 20 August 2009, the group filed an application with the Dispute Tribunal contesting the December 2005 decision to "abrogat[e the] pre-2005 UN policy which allowed computation of overtime […] regardless of a staff having previously been on compensatory time […], sick leave […], or annual leave […]". [5]

17. On 22 September 2009, the Assistant Secretary-General (ASG) for OHRM issued an interoffice memorandum on the issue of overtime payment addressed to "All Departments and Offices in Headquarters". The memorandum stated: "[W]ith respect to overtime payment, the staff member must have *actually worked* eight hours before becoming eligible for such payments".[6]

18. On 30 November 2010, the Dispute Tribunal rendered Judgment No. UNDT/2010/206. The UNDT found that the application was time-barred with respect to its challenge to the alleged change of policy in December 2004, as the request for administrative review had not been timely filed. However, it found the case was receivable with respect to the calculation and application of compensatory time and overtime payments made to individual staff members, but only concerning those payments made after 19 November 2008, being the two months that preceded the date of the request for administrative review. In this respect, it held that the Administration's interpretation and application of Appendix B in place at DGACM since December 2004 was correct, and that compensatory time and overtime payments had been properly applied. The UNDT dismissed the application.

19. On appeal, in its judgment issued on 21 October 2011, the Appeals Tribunal found that the case raised a number of additional questions that the Dispute Tribunal might find relevant, and remanded the matter "for further proceedings" before the same Dispute Tribunal.[7] In particular, the Appeals Tribunal directed the Dispute Tribunal to consider whether it was appropriate for the Staff Rules to be interpreted differently within departments in New York, as well as in different duty stations; and whether the policy applied post-December 2014 was "the interpretation of language that no longer exist[ed]". Judge Courtial appended a concurring opinion stating that the Dispute Tribunal should examine whether there was a change in the application of Appendix B in DGACM as of 1 January 2005; and in the affirmative, whether consultation with staff was required before the change and whether the staff members could

[5] Impugned Judgment, para. 9.
[6] *Ibid.*, para. 78, quoting the memorandum of 22 September 2009 (emphasis added).
[7] *Leboeuf et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-185.

advance "the provisions for the protection of legitimate expectation [….] against the Administration", i.e. whether "the former Staff Rules were really applied in a continuous, uniform and general manner during an extended period of time".[8]

20. Following the remand, on 21 and 22 November 2013, the Dispute Tribunal held oral hearings at which it heard seven witnesses.

21. On 21 March 2014, the UNDT issued the Judgment under appeal and concluded:

a) that there was a change in the application of Appendix B in DGACM as of 1 January 2005 insofar as DGACM thereafter discounted annual leave, sick leave, and CTO in calculating *actual* work time completed, i.e., hours of work, before staff were entitled to payment of overtime;

b) nonetheless, that the Appellants' challenge to the change introduced in December 2004, with effect from January 2005, was time-barred and not receivable;

c) in any event, that in the period from 1 January 2005 to January 2009, the Appellants acquiesced to the change in practice, such that by the time they formally contested the change in January 2009 they could no longer be said to have a legitimate expectation to the practice's continuance;

d) that such change was based on a valid policy and legal rationale, namely to bring the inconsistent application within DGACM in line with the terms of Appendix B and with the practices of other departments;

e) that although it would have been preferable for staff to have been consulted *prior* to 1 January 2005 when the change was implemented, the discussions between management and staff from January to March 2005 partly remedied this failure;

f) that even if consultations would have taken place prior to 1 January 2005, it was doubtful that the outcome would have been

g) that the challenge concerning the application of the policy on overtime in the period immediately preceding the request for administrative review of 16 January 2009, was receivable; and

h) with respect to the latter, that the Administration's interpretation and application of the relevant provisions of Appendix B was lawful.

22. The UNDT dismissed the application and declined to order costs.

23. The staff members, Leboeuf et al., filed their appeal on 20 May 2014, and the Secretary-General filed his answer on 28 July 2014.

24. By Order No. 219 (2015) dated 20 May 2015, the Appeals Tribunal granted Leboeuf et al.'s request for an oral hearing. The oral hearing was held in Geneva on 25 June 2015, with the counsel for the Appellants attending in person and the Representative of the Secretary-General participating via video-conference.

25. On 16 June 2015, Leboeuf et al. filed a "Motion for Contempt and to Strike para[s]. 26-27 of the Respondent's Answer". The Secretary-General filed his observations on the motion on 22 June 2015.

Submissions

Leboeuf et al.'s Appeal

26. The Appellants submit that the UNDT did not properly address the directions and legal issues that the Appeals Tribunal raised in Judgment No. 2011-UNAT-185 when it remanded the matter.

27. The UNDT erred in law insofar as it recognized the existence of a decades-long practice in DGACM concerning the manner in which overtime was paid, yet: (a) failed to address the issue of the Administration's legal obligation to conduct prior consultation, and follow proper promulgation procedures before unilaterally amending the DGACM practice in September 2005; and (b) failed to draw the appropriate conclusions concerning the consequences on the Appellants' salary for payment of their entitlements for the 12 months preceding their request for administrative review, based on former Staff Rule 103.15.

Administration only formally repealed or "clarified" the DGACM practice on 22 September 2009 when the ASG of OHRM issued an interoffice memorandum on the issue. Alternatively, the time limit for the Appellants to submit their request for administrative review began to run upon receipt of any of their salary payslips that reflected the computation of contentious overtime payments and compensatory time. Moreover, the UNDT's finding that time ran as of 15 December 2004 contradicts its prior finding that the same e-mail was only a "general policy announcement", and not an individual administrative decision. Lastly, the UNDT should have informed the parties from the outset that it did not consider the case receivable, rather than proceeding with a three-day hearing entailing significant trial preparation, especially as the issue of receivability was never raised by the judge and parties before or during the 2013 hearing.

33. The UNDT failed to address the issue of discrimination against the Appellants. While staff members outside DGACM could take morning sick-leave and are not compelled to work at night, the Appellants are compelled to work four hours in the evening before they can get paid their eight-hour day and start getting overtime. Moreover, most of the Appellants are female staff with family obligations and their job security depends on their willingness to obey their supervisors' orders to work overtime and nightshifts. They are therefore "more vulnerable to such abuses".

34. The UNDT also failed to consider and apply United Nations international covenants, and resolutions of the General Assembly and the Economic and Social Council concerning the conditions of work aoresoll820.9617 l tnno0.9617 lt

c) legal costs in the amount of USD 20,000 for the Administration's abuse of procedures, for concealing that at least two other United Nations departments have salary practices similar to those of DGACM, and for denying that it had constantly violated international labour standards on overtime, on nightshifts and on employment of female staff members at night.

The Secretary-General's Answer

37. The UNDT correctly concluded that the Appellants' claims regarding the December 2004 communication were time-barred given they did not request administrative review until January 2009. The UNDT also correctly concluded that the Appellants' application was time-barred on the basis of Article 8(4) of the UNDT Statute, which precludes jurisdiction over an application filed more than three years after an applicant is notified of a contested administrative decision.

38. The UNDT was also correct to reject the argument that time for requesting management evaluation ran from when the Administration notified that it was withdrawing its alleged support to the staff members' proposition, since the Appeals Tribunal has consistently held that the UNDT has "no jurisdiction to waive deadlines for management evaluation or administrative review". It deadli6 0leTwnqlo corpTJej3wnqlo0 Tw(38.)rative

each of these factors, but concluded that none of these factors undermined the lawfulness of the Administration's interpretation and application of Appendix B.

41. In particular, as concerns consultations and the Appellants' submission that OHRM conceded and recognised in a statement at a Staff Council meeting in September 2005 the long-standing practice of DGACM, Appendix B was not amended as a result of that statement, and that statement alone clearly could not take precedence over properly promulgated Staff Rules, including Appendix B. Further, insofar as the Appellants claim that the Administration "proposed" a draft administrative instruction that reflected DGACM's overtime practice, the cover page of the draft administrative instruction shows it was actually circulated by the Staff Council as a "Working Paper" and that it

48. The Secretary-General requests the Appeals Tribunal to deny the motion. Leboeuf et al.'s allegations of impropriety on the part of the Secretary-General are "manifestly without merit". Moreover, the request to introduce additional evidence is not in accordance with Article 10(1) of the Appeals Tribunal Rules of Procedure.

49. Having reviewed the arguments made by the parties, the Appeals Tribunal finds no basis to grant the relief sought by the Appellants. However, the issue raised by the Appellants will be dealt with in the Judgment.

The number of Appellant witnesses before the UNDT

50. Amongst the complaints made by the Appellants at the oral hearing was that the UNDT limited to three the number of witnesses they could call, notwithstanding that the Appellants had many more witnesses available to prove the existence of the decades-long practice on overtime within the TPUs of DGACM. This was in the context of the UNDT having already limited the number of Applicants from 25 to 20. Additionally, the UNDT refused to hear from any more DGACM supervisors on the issue of the accrual of compensatory time from overtime other than the testimony of Ms. Hassa-Boko. Furthermore, had more of the Appellants been allowed to give evidence, they would have testified that they never acquiesced to the post 1 January 2005 change.

51. The Appeals Tribunal holds that insofar as the Appellants seek to impugn the UNDT Judgment on the basis of the number of witnesses permitted to testify, there is no merit in this argument and we find no error of procedure such as to affect the decision in the case. In accordance with its Rules of Procedure, the UNDT enjoys a considerable discretion in case management with which the Appeals Tribunal is slow to interfere, absent any procedural error affecting the ultimate outcome of the case before the UNDT.[9] In any event, the UNDT Judgment records that "[f]ollowing the case management, the Applicants reduced the previously expected number of 33 witnesses, and the parties agreed that each party would call approximately three witnesses".[10]

52. Furthermore, we note that the UNDT accepted the existence of a practice within DGACM for at least a decade where annual leave, sick leave and CTO were counted for the purpose of computing overtime payments.[11] We do not find merit in the arguA

Appellant witnesses before the UNDT had a bearing on the ultimate finding on the issue of acquiescence. The procedural point made before us at the oral hearing was merely that each of the Appellants would have testified that they had not acquiesced. It is apparent from the UNDT Judgment that the issue of acquiescence (discussed later in this Judgment) was considered in the context of what occurred between the relevant parties in the period 1 January 2005 to 16 January 2009

Did the Dispute Tribunal err in finding that the Appellants were barred from contesting the 15 December 2004 decision?

53. We turn now to the question of whether the Dispute Tribunal was correct to find that the Appellants' challenge to the December 2004 change, as implemented by the Administration on 1 January 2005, was time-barred.

54. It is common cause that on 15 December 2004, the Appellants were in receipt of a communication from the then Executive Officer with DGACM, conveying news of the change in the application of the policy. This communication came in the wake of a prior e-mail of 16 March 2004 from the Executive Officer to the staff of DGACM which stated, inter alia, "payment for overtime takes place only after eight hours of work any day of the scheduled work week".[12] Attached to that e-mail was a memorandum of 5 November 1998 which, inter alia, had advised that "[s]taff members who have not worked a full work day or a full work week are not entitled to be granted overtime pay for that day or for that weekend".[13]

55. Paragraphs 58 to 71 inclusive of the UNDT Judgment set out the chronology of various communications and meetings between the Administration and staff representatives subsequent to the 15 December 2004 e-mail. Those interactions on the issue of overtime pay and how it was to be computed were ongoing until about October 2006.

56. It is also common cause that changes to overtime pay forewarned in the e-mail
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1 January 2005", the changes referred to in the 15 December 2004 e-mail were implemented by the Administration.

57. As found by the UNDT, after 1 January 2005, it appears that each of the Appellants

day". They submit that the Respondent never notified the Staff Union that it was withdrawing its "support" to the agreement regarding CTO reached with staff representatives at the JAC meeting of 13 September 2005 or that it was withdrawing its draft administrative instruction of 30 November 2005.

65. Furthermore, the Appellants argue that the Administration had reassured staff representatives of its "follow up" actions on the draft administrative instruction at subsequent staff management meetings. In those circumstances, the Appellants argue that the UNDT erred when it decided that the 15 December 2004 e-mail should be the starting point to compute the Appellant's time-limit for administrative review.

66. Moreover, the Appellants contend that the issue of receivability was never raised by the UNDT before or during the 2013 hearing and the UNDT's finding on this issue came to them as a surprise.

67. On the issue of it being a surprise to the Appellants, the Appeals Tribunal does not find merit in this contention, since the approach adopted to the issue of receivability in the impugned UNDT Judgment was previously the subject of consideration by the UNDT in Judgment No. UNDT/2010/206 where the Dispute Tribunal found as follows:[17]

> … […] I […] find the application to be receivable, in principle, because the Applicants appeal against allegedly incorrect calculation of their compensation for overtime work. Each time overtime payment is made or compensatory time is recorded at the end of the month, an administrative decision in respect of the calculations relating to that period is made[.] […]
>
> … However, the present application is receivable only with respect to the calculation and application of compensatory time and overtime payments *following* 19 November 2008, as the Applicants were required to file their request for administrative review within two months of the date of notification of the contested decision in writing. Accordingly, this application is time-barred with respect to any compensation calculations that occurred prior to November 2008 as no timeous request for administrative review was filed.

68. The Appeals Tribunal is satisfied that the Dispute Tribunal's rejection (in the Judgment under appeal) of the Appellant's claims regarding the 15 December 2004 communication was fully consistent with the jurisprudence of the Appeals Tribunal, namely that applications to the

[17] Judgment No. UNDT/2010/206, paras. 20 and 21 (emphasis in original).

UNDT are only receivable when a staff member has previously submitted a contested decision for administrative review or management evaluation within the specified deadlines.[18] The UNDT correctly found that pursuant to Article 8(3) of its Statute, it had no jurisdiction to suspend or waive deadlines for administrative review of the 15 December 2014 decision, or more appropriately, its implementation which became effective 1 January 2005. Moreover, the overarching issue for the Dispute Tribunal was Article 8(4) of its Statute which provides that claims filed more than three years after the contested decision "shall not be receivable".

69. The Appeals Tribunal notes that prior to coming to its conclusion on the receivability of the claims regarding the change made in December 2004, effective 1 January 2005, the Dispute Tribunal considered the argument advanced by the Appellants, namely that as there were ongoing discussions concerning the change, the time for filing their application for administrative review did not start to run until sometime in 2008. The Dispute Tribunal found

The Dispute Tribunal's consideration of the merits of the Appellants' claims

71. Further to the remand by the Appeals Tribunal in Judgment No. 2011-UNAT-185 to the Dispute Tribunal "for further proceedings", at the subsequent hearing, the UNDT categorised the relevant questions for determination as follows:[21]

> A. When a rule is consistently applied – at least in one department – for decades, and its "interpretation" is then changed, having a serious effect on working conditions and compensation of the staff members involved, must the Administration consult with staff representatives, under Chapter IX of the Staff Regulations?
>
> B. What is the practice in granting overtime throughout the United Nations?
>
> C. Do Staff Rules apply differently in different duty stations, or should the same "interpretation" apply everywhere?

72. Moreover, the Dispute Tribunal stated that it should examine "whether 'the provisions for the protection of legitimate expectation can be advanced by Ms. Leboeuf *et al.* against the Administration in this case, meaning [...] whether the provisions of Appendix B paragraphs (iv) and (vi) of the former Staff Rules were really applied in a continuous, uniform and general manner during an extended period of time'".[22]

73. Before considering the Appellants' argumeFur(71.occontinu)6.9(o)-1.9suhctiu

(ii) The scheduled work day at Headquarters means the duration of the working hours in effect at the time on any day of the scheduled work week, less one hour for a meal.

[…]

(iii) Compensation shall take the form of an equal amount of compensatory time off for overtime in excess of the scheduled work day up to a total of eight hours of work on the same day. Subject to the exigencies of the service, such compensatory time off may be given at any time during the four months following the month in which the overtime takes place […]

[…]

(vi) Compensation shall take the form of an additional payment for overtime in excess of a tentteightho

that the UNDT was silent on the issue of the Administration's own acquiescence to this practice over 40 years, and to the Administration's acknowledgement of the practice by virtue of the draft administrative instruction it circulated in November 2005 with regard to CTO.

77. The Respondent argues that the Dispute Tribunal correctly concluded that the Administration's interpretation and application of Appendix B was correct and lawful. The Respondent submits that what the Appellants request is that the use of annual leave, sick leave and CTO should be counted as hours of work towards the minimum of eight hours work necessary for overtime pay. The Respondent states that such a demand is against the letter and spirit of Appendix B, as found by the UNDT. Time off work is not work for the purposes of Appendix B and the Respondent contends that what the Appellants effectively want is the Appeals Tribunal's blessing for "double dipping".

78. The Respondent maintains that since the 1970s, overtime pay has been consistently interpreted to mean eight hours of actual work while present at work within a 24-hour period. In November 1998, January 2003 and March 2004, the Executive Officer of DGACM sent memoranda to all DGACM staff explaining that staff members who had not worked a full day were not entitled to overtime pay for that day. Despite those instructions, as found by the UNDT, some units within DGACM developed a divergent practice whereby time off as leave, sick leave and CTO was calculated as eight hours of work when computing overtime pay. The Respondent submits that the UNDT correctly concluded that the Administration was entitled to correct the erroneous approach which had been taken to the application of Appendix B.

79. With regard to the content of Appendix B, and its application, the UNDT, inter alia, found:[23]The Re.186 Tw[(Tc5006 Tw66f as leave,43.01Does "TJh"886E leave)Tj4(iicatmcons

or compensatory time *off* are authorized absences from work, permitting staff to be absent from work and to not perform one's duties (that is, to *be* off work), while still being a staff member. [...]

... Thus, time spent on annual leave, sick leave, or compensatory time off is not

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toleration (until December 2004) of the practice that had evolved within DGACM over a considerable period of time.

other than DGACM had practices similar to that of DGAGM but found that no specific evidence was led by the Appellants on this issue. Accordingly, we find no error in the approach of the Dispute Tribunal such as would warrant interference by this Tribunal.

Alleged errors of fact on the issue of mandatory consultation

89. The Appellants contend that while the UNDT Judgment rightfully recognised the existence of a decades-long overtime salary practice within DGACM, the Dispute Tribunal did not fully or properly address the modalities and procedures required from the Administration when it decided to amend the application of Appendix B within DGACM prior to December 2004. The Appellants argue that any change required prior consultation followed by an official promulgation of an administrative instruction or by an amendment issuance, in accordance with Staff Regulation 8 and with Circular ST/SGB/2009/4 (Procedure for the Promulgation of Administrative Issuances). The Appellants contend that the Dispute Tribunal erred when it concluded that the Respondent was entitled to amend, effectively, "unilaterally" the long-standing practice within DGACM. The UNDT "pushed the limits of legality and of the UN rule of law to the extreme" in questioning, having recognized that the Administration failed to hold prior consultations with staff representatives, whether "the outcome with respect of the issue in question would have been any different"[27] had such consultations been held prior to the December 2004 memorandum.

90. In the course of the [illegible]

discount the possibility of such expectation on the part of the Appellants. However, the

parties in September 2005. We note that another document referred to by the Appellants, namely the "Notes on the SMC meeting" of 14 July 2006 states that "OHRM had drafted an AI to address various CTO-related issues". The note of the 11 October 2006 meeting states that "the new administrative instruction [...] was being prepared by OHRM". Thus, to some extent, we are surprised at the thrust of paragraph 26 of the Respondent's answer to the present appeal given that management were present at the meetings held in July and October 2006 where a proposed administrative instruction on CTO was discussed and indeed where the record suggests that the proposed administrative instruction was being drafted by the Administration. At the end of the day of course, the proposed change referred to in the November 2005 and July and October 2006 documents never came to fruition.

98. One of the arguments made in the present appeal is that the UNDT in its Judgment ignored the import of the agreement reached on 13 September 2005, which the Appellants argue was an important milestone in that the 13 September 2005 agreement had resolved the issue of CTO and overtime payment in the Appellants' favour. While there is no specific reference to the 13 September 2005 meeting in the UNDT Judgment, there is reference to the fact that there were ongoing discussions between the parties in 2006 "regarding a draft administrative instruction on overtime".[31] Thus, while the meeting of 13 September 2005 might not have been alluded to, we cannot accept that the UNDT ignored evidence in the manner suggested by the Appellants. At paragraph 88 of the Judgment, the UNDT states that there was "no record that any changes to Appendix B were even contemplated". We are not persuaded that the UNDT was correct in that finding, given that there was the proposal in 2005/2006 (never promulgated) that CTO would be credited in the computation of overtime payments. However, even if the UNDT erred in that finding, we do not consider that it resulted in a manifestly unreasonable decision such as to warrant the intervention of the Appeals Tribunal, for reasons which are set out later in this Judgment.

99. To some extent, the Appeals Tribunal accepts the Appellants' argument that the UNDT erred in fact in holding that the Appellants had acquiesced to the change from December 2004. The evidence before the Dispute Tribunal (which included the discussions which took place between management and staff representatives under the auspices of the JAC, resulting in the draft administrative instruction in November 2005, and the record of what was discussed on 11 October 2006) shows that the changes effected in January 2005 remained an issue of concern

[31] *Ibid.*, para. 86.

for them. However, there was no evidence adduced before the UNDT that after October 2006, any further consultations or negotiations were entered into between the parties on the issue of how overtime pay for weekdays should be computed. We note the Appellants' closing submissions to the UNDT state that "no meetings took place in 2007 where this issue was raised". The position was likewise throughout 2008. The case made to the Appeals Tribunal on the Appellants' behalf is that they were awaiting the promulgation of the proposed administrative instruction of 30 November 2005.

100. The first thing to be observed with regard to the proposed administrative instruction is that it provided only for "accrued compensatory time off" to qualify as actual work towards the required eight hours of work for the purpose of overtime pay. The draft explicitly stated that annual leave or sick leave would not count towards hours of work for the purpose of overtime pay, contrary to the manner in which overtime pay had been calculated for DGACM staff pre- January 2005. The Appeals Tribunal finds that insofar as the Appellants had an expectation post-November 2005 or indeed October 2006, this would appear to have been limited to the computation of CTO as actual work being credited towards the required eight hours for overtime pay.

101. That being said, notwithstanding the arguments advanced by the Appellants in the course

103. Insofar as they may have had an expectation as of 30 November 2005 or October 2006 that CTO would again be credited as actual work for computing overtime pay, the Appeals Tribunal holds that this expectation could not be said to have continued to subsist given the inaction of the Appellants from October 2006 until they ultimately submitted a request for administrative review on 16 January 2009. At all relevant times throughout this period the Administration continued to compute overtime in accordance with the provisions of Appendix B, a factor which was known to the Appellants by virtue of the computations which would have been evident in their payslips. While the Appeals Tribunal is of the view that the Dispute Tribunal should not have concluded that the Appellants acquiesced to the changes from January 2005, it remains the case that they acquiesced to the Administration's continued inclusion post-October 2006 of CTO in the change effected on 1 January 2005, without demur, until the request for administrative review on 16 January 2009. In all of the circumstances, the Appeals Tribunal is thus not persuaded that the Dispute Tribunal's Judgment should be impugned for having failed to acknowledge that the Appellants had a legitimate expectation to the continuance of the pre-January 2005 practice within DGACM.

Conclusion

104. We have not been persuaded that the UNDT erred in law, or in fact resulting in a manifestly unreasonable decision, or in procedure in its decision arrived on the Appellants' claims. Accordingly, the appeal is dismissed.

Judgment

105. The appeal is dismissed and the Judgment of the UNDT is affirmed.

Original and Authoritative Version: English

Dated this 4th day of September 2015.

(Signed)	*(Signed)*	*(Signed)*
Judge Faherty, Presiding	Judge Lussick	Judge Simón
Dublin, Ireland	London, United Kingdom	Montevideo, Uruguay

Entered in the Register on this 4th day of September 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar