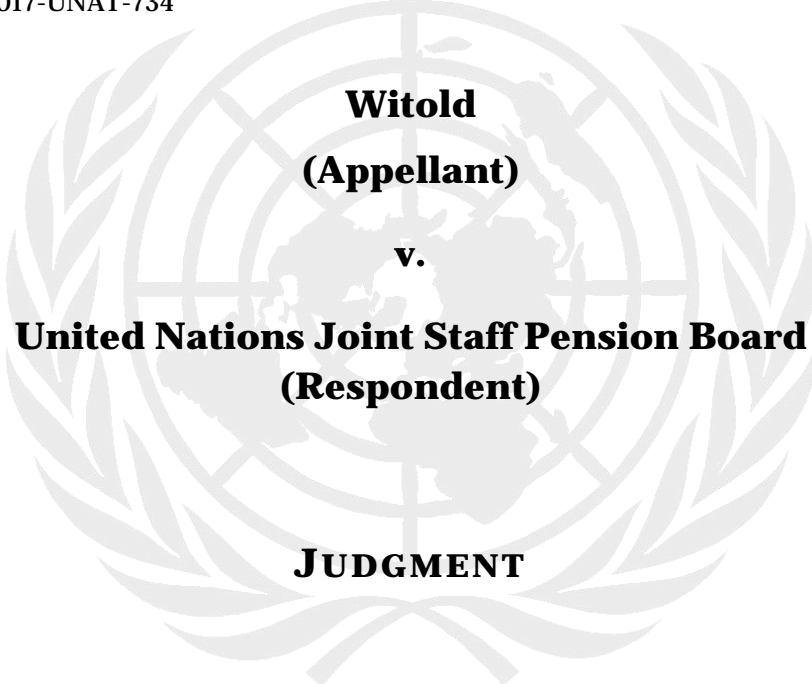




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-734



**Witold
(Appellant)**
v.
**United Nations Joint Staff Pension Board
(Respondent)**

JUDGMENT

Before: Judge Sabine Knierim, Presiding
Judge Richard Lussick
Judge Dimitrios Raikos

Case No.: 2016-977

Date: 31 March 2017

Registrar: Weicheng Lin

Counsel for Mr. Witold: Brandon Gardner, OSLA

Counsel for United Nations Joint Staff Pension Board: Sergio B. Arvizú

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Smyk Witold against a decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and UNJSPB, respectively) made on 29 July 2016. Mr. Witold filed his appeal on 24 October 2016, and the United Nations Joint Staff Pension Fund (UNJSPF or the Fund) filed its answer on 6 December 2016.

Facts and Procedure

2. Mr. Witold (born 23 September 1951) joined the UNJSPF as a staff member of the United Nations Children's Fund (UNICEF) on 29 April 1992 and continued his participation during his employment with the International Labour Organization (ILO) starting from May 2001 until he separated from service on 10 October 2003 (first participation). Upon separation from service, he opted for a deferred retirement benefit to be paid when he would reach the regular retirement age of 62 in 2013. On 2 March 2006, Mr. Witold requested that his deferred retirement commence when he would reach age 55 on 23 September 2006. His benefit was put into payment under Retirement No. R/89314 on 24 September 2006 with the application of a reduction factor of 42 per cent due to the early payment of the benefit (six per cent per year for seven years pursuant to Articles 30(b) and 29(b) of the Regulations, Rules and Pension Adjustment System of the UNJSPF (UNJSPF Regulations)) amounting to USD 1,156.51 per month as opposed to USD 1,993.98 per month which would have been the amount at the age of 62.

3. On 7 March 2009, Mr. Witold was re-employed by UNICEF and his employment lasted until 26 April 2011. During this period, his retirement benefit payments were suspended pursuant to Article 40(a) of the UNJSPF Regulations and he re-entered the Fund pursuant to Article 21(a) of the UNJSPF Regulations (second participation).

4. Following his separation from UNICEF, Mr. Witold requested a full early retirement benefit for his second participation which went into payment under Retirement No. R/B 8227 on 27 April 2011 in the amount of USD 477.21 per month based on a reduction factor of 14.5 per cent pursuant to Article 29(b) of the UNJSPF Regulations since he had not reached the regular retirement age by 29 months.

5. By letter dated 18 March 2015, Mr. Witold submitted to the Fund that he was subject to “double-penalization” for opting for an early retirement. He argued as follows:

- a) The period of his re-employment with UNICEF from March 2009 to May 2011 (27 months) contributed 13.5 per cent (27 times six per cent divided by twelve months) towards the 42 per cent by which the benefit for his first participation (R/89314) was reduced in accordance with Article 29(b) of the UNJSPF Regulations; and
- b) during that period, he did not receive this pension benefit since its payment was suspended in accordance with Article 40(a) of the UNJSPF Regulations and it was not retroactively paid after the monthly payments were resumed.

Mr. Witold alleged that the cumulative effect of the application of Articles 29(b) and 40(a) of the UNJSPF Regulations in his case amounted to a “discriminatory treatment” by the UNJSPF of a person like him who takes an early retirement benefit and then re-enters service between age 55 and 62. He compared this scenario to that of a retiree who opts for an early retirement benefit but is not re-employed by the Organization and thus receives a higher payout in total because his or her benefit is paid continuously, with no suspension, throughout the period between age 55 and 62. Mr. Witold also claimed to be discriminated against vis-à-vis those participants who do not choose early retirement but continue in service until the regular retirement age and receive the full pension.

6. Therefore, in the same letter to the UNJSPF, Mr. Witold requested to be compensated in one of the following ways:

- (a) increase of his retirement benefit with respect to the first participation by 13.5 per cent; or
- (b) retroactive payment of the retirement benefits suspended during his re-employment with UNICEF.

Mr. Witold stated that while compensation in accordance with option (a) is not foreseen in the UNJSPF Regulations, these provisions do not disallow such compensation either. With regard to option (b), he argued that at the time of the period in question, there was no rule in force explicitly excluding retroactive payment of UNJSPF funds. It was only as of 1 January 2013 that Article 40(e) of the UNJSPF Regulations was adopted.

7. Following an extensive e-mail exchange, the Chief of the UNJSPF Office in Geneva, by letter dated 7 October 2015, denied Mr. Witold's request for retroactive payment. The UNJSPF asserted that in accordance with Article 40(a) and (e) of the UNJSPF Regulations, it was impossible to be a participant in the Fund accruing contributory service and to be a recipient of pension benefits at the same time. A retroactive payment, however, "would ... result in the delayed payment of the benefit for the same period that [Mr. Witold was] a participant".

8. In a letter of 7 December 2015, the UNJSPF further emphasized that there was no legal basis in the UNJSPF Regulations for the compensation requested by Mr. Witold and that these provisions constituted the only relevant rules for the payment of benefits to UNJSPF beneficiaries. The UNJSPF argued that the benefits for both the first and second participation were calculated separately, based on the applicable reduction factor for Mr. Witold's respective age at the time and may not be subsequently increased. A retroactive payment of the suspended benefits on the other hand would run counter to Article 40(a) and (e) of the UNJSPF Regulations.

9. On 27 December 2015, Mr. Witold submitted a request for review of the UNJSPF's 7 October 2015 decision to the Standing Committee.

10. The Standing Committee considered Mr. Witold's case at its 198th meeting on 20 July 2016. Mr. Witold was informed of the Standing Committee's decision to uphold the UNJSPF's decision by letter dated 29 July 2016. It affirmed the UNJSPF's position that Mr. Witold has not been disadvantaged by the application of the UNJSPF Regulations. The Standing Committee reasoned as follows:

- a) There is no basis under the UNJSPF Regulations to increase his early retirement benefit by 13.5 per cent with respect to the first participation. He could have waited regarding both participations until the regular retirement age of 62. Once he opted for early retirement, the reduction factors under Article 29(b) of the UNJSPF Regulations became applicable and there was no basis for recalculation.
- b) When he re-entered the Fund, Mr. Witold was "clearly covered" by Article 40(a) of the UNJSPF Regulations. Since he was, during the period of suspension, a participant in the Fund in receipt of a salary and would now be receiving a benefit for the same period, a retroactive payment of the 27-month benefit would result in "double-dipping".

11. On 24 October 2016, Mr. Witold filed an appeal against the Standing Committee's decision with the Appeals Tribunal.

12. On 13 February 2017, Mr. Witold filed a "Motion for Request for Leave to File Additional Pleadings pursuant to Article 2(5) of the Statute of the Appeals Tribunal". The UNJSPF filed its response to the motion on 17 February 2017.

Submissions

Mr. Witold's Appeal

13. Mr. Witold submits that while the application of both Articles 29(b) and 40(a) of the UNJSPF Regulations - viewed in isolation - constituted a valid exercise of the UNJSPF's fiduciary obligations, their combined application resulted in discrimination and unfair treatment in his case. Even if the payment of his pension benefit was validly suspended during his re-employment, it was unreasonable for him "never to receive those 27 months of pension benefits, especially when he is forever subject to the 42 [per cent] reduction in benefits when opting to take his benefits early". Mr. Witold adds that there is no clear provision in the UNJSPF Regulations preventing the UNJSPF from granting his request for the 13.5 per cent increase in pension or retroactive payment in application of Staff Rule 12.3(b).

14. In response to what he calls the Standing Committee's "'tough luck' approach", namely that he should have taken full retirement at 62 instead of opting for early retirement and has to "suffer whatever negative pecuniary outcome ... flow[ing] from that decision", Mr. Witold states that the UNJSPF failed to engage with his main arguments. In particular, it did not address his submission that at the time he opted for early retirement, he could not have foreseen that he would re-enter service and that the rules would change so substantially as to prejudice his interests. The ability to take an early pension at a reduced rate is a normal part of pension schemes and explicitly stipulated in Article 29 of the UNJSPF Regulations. The 42 per cent reduction of his benefits "was reasonable when it was originally amortized over the course of his expected lifespan" and served to achieve parity with other staff members, but "became arbitrary and unfair when it was suspended upon his re-entry without possibility to be retroactively increased" since it "no longer bore any rational relationship to the actuarial calculations as he had received 27 months of non-payment". After his second retirement in 2011, the actuarial value of his pension no longer matched the actuarial value of the pension benefits given to any

United Nations staff member who either takes early retirement without re-entering into service or who retires with a full pension.

15. With regard to the Standing Committee's argument that there was no basis for recalculation once he opted for early retirement, Mr. Witold replies that the UNJSPF Regulations are silent on recalculating early retirement benefits upwards after a suspension of benefits. Therefore, there is no legal barrier to the UNJSPF exercising its discretion to rectify the described discriminatory effect and return Mr. Witold's retirement benefit to parity with the benefits enjoyed by other UNJSPF beneficiaries in accord with the actuarial calculations upon which the UNJSPF based its original 42 per cent calculation. The UNJSPF does not incur a loss by retroactively paying him pension benefits for the 27-month suspension period because, according to the original projected outlay, he was supposed to be paid such benefits during that period.

16. Further, Mr. Witold refutes the Standing Committee's argument that Article 40(e) of the UNJSPF Regulations is relevant to his case and disallows a retroactive payment. This provision first entered into force on 1 January 2013. Prior to that, including at the date when he ended his re-employment with UNICEF in 2011, the UNJSPF Regulations did not contain such limitations and the provision cannot be construed as having retroactive effect.

17. Finally, Mr. Witold presents scenarios of different staff members to demonstrate the discriminatory effect in comparison with other UNJSPF beneficiaries, stating that his investment in the Fund significantly outlasts his life expectancy while the other beneficiaries' investment is exhausted at an age roughly equivalent to their life expectancy. Since the sole reason for this distinction is his re-entry into service which did not have any negative effect on the other participants' contributions and their return on investment, the differentiation lacks any rational basis.

18. Mr. Witold respectfully requests that the Appeals Tribunal rescind the Standing Committee's decision and "allow the Fund to exercise its discretion to rectify the discriminatory effects of the application of Article 29(b) and Article 40(a) on his pension benefits by either increasing his early retirement benefit by 13.5 [per cent] of the base value of his retirement benefit or retroactively paying him the 27 months of benefits that had been suspended between 7 March 2009 and 26 April 2011".

The UNJSPF's Answer

19. The UNJSPF reiterates that there is no legal basis under the UNJSPF Regulations to recalculate and increase the first retirement benefit following Mr. Witold's election of an early retirement benefit for his second participation and adds that Mr. Witold has not pointed to any provision that would bestow discretion in the Fund in this respect. It further submits that "he could have waited until he reached his normal retirement age instead of electing an early retirement benefit in respect of (...) both his first and second participation". The reduction factors applied to his benefits solely resulted from his election to receive both benefits earlier than the entitlement date to a normal benefit. They were treated as two separate benefits and calculated based on the respective reduction factor in accordance with Article 29(b) of the UNJSPF Regulations. Mr. Witold's calculations have not taken into account the financial gain from receiving the benefits at an earlier age than the regular retirement age.

20. The UNJSPF further argues that a retroactive payment of Mr. Witold's pension benefit for the period in which it was suspended would result in "double-dipping" by retroactively creating a situation as if he had been in simultaneous receipt of his pension benefits and his salary. The United Nations General Assembly has long been concerned with the phenomenon of "double-dipping" and introduced, *inter alia*, Article 40(a) of the UNJSPF Regulations to prevent such effects. Article 40(e) of the UNJSPF Regulations was intended to "clarify" the application of these existing principles to higher level officials and its introduction did not change the circumstances regarding Mr. Witold who was a staff member and not a higher level official. Despite having been introduced after the relevant period of suspension, Article 40(e) of the UNJSPF Regulations is relevant to his case as he is "directly covered" by Article 40(a) of the UNJSPF Regulations and the prohibition of "double-dipping" thus applies to him.

21. Moreover, the UNJSPF maintains that rather than being discriminated against, Mr. Witold is treated in the same way as any other retiree who is in receipt of a benefit and re-enters the Fund. Just like the appellants in the case of *Muthuswami et al.*¹ cited by Mr. Witold, he is effectively seeking an amendment to the Regulations of the Fund to provide for additional benefits although the Appeals Tribunal has clearly stated that only the General Assembly can amend the UNJSPF Regulations. Contrary to Mr. Witold's suggestion,

¹ *Muthuswami et al. v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-034, para. 33.

the Fund does not enjoy discretion to rectify what he sees as a discriminatory effect since no regulation allowing this exists and introducing such a benefit would require a change to the UNJSPF Regulations.

22. Based on the foregoing, the UNJSPF prays the Appeals Tribunal to uphold the Standing Committee's decision and to dismiss Mr. Witold's request for an additional benefit.

Considerations

Mr. Witold's motion for leave to file additional pleadings

23. We reject Mr. Witold's motion. The Appeals Tribunal notes that Articles 8 and 9 Of the Appeals Tribunal's Rules of Procedure (Rules) provide for an appellant to submit an appeal form, accompanied by a brief, and for a respondent to submit an answer form, accompanied by a brief. There is no provision under the Rules for additional pleadings to be submitted by the parties after the answer. Under Article 31(1) of the Rules and Section II A(3) of the Appeals Tribunal's Practice Direction No. 1 on Filing of Documents and Case Management, the Appeals Tribunal may allow additional pleadings in exceptional circumstances.² Mr. Witold, however, has not demonstrated any exceptional circumstances allowing him to present new legal arguments after having filed his appeal and received the UNJSPF's answer to the appeal. In particular, Mr. Witold could have presented his arguments on the issue of discretion (based on the UNJSPF's 7 October 2015 decision to allow him to switch his second benefit R/B 8227 from the local to the US Dollar track) in his appeal. The 29 July 2016 Standing Committee decision makes it clear that there is "no basis" or "no provision" that would allow the Standing Committee to grant Mr. Witold's request. At this time, Mr. Witold knew that the UNJSPF had allowed him to switch track although there existed no legal basis for this decision. In addition, Mr. Witold has already presented his arguments on "double-dipping" in his 27 December 2015 submissions to the Standing Committee. Accordingly, the Appeals Tribunal decides to strike Mr. Witold's additional submission and not to take it into consideration.

² *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 27.

Did the Standing Committee err in law or fact when it affirmed the UNJSPF's decision to deny Mr. Witold's request?

24. We find no fault in the Standing Committee's decision which is in full accord with the UNJSPF Regulations. Mr. Witold is neither entitled to a 13.5 per cent increase of his pension benefit R/89314 nor to a retroactive payment of pension benefits for the period of his re-employment from 2009 to 2011.

25. The relevant provisions of the UNJSPF Regulations read as follows:

Article 29

EARLY RETIREMENT BENEFIT

Participation in the Fund has commenced or recommenced prior to 1 January 2014:

- (a) An early retirement benefit shall be payable to a participant whose age on separation is at least 55 but less than the normal retirement age and whose contributory service was five years or longer.
- (b) The benefit shall be payable at the standard annual rate for a retirement benefit, reduced for each year or part thereof by which the age of the participant on separation was less than the normal retirement age (60 or 62), at the rate of 6 per cent a year, except that: ...

Article 30

DEFERRED RETIREMENT BENEFIT

- (a) A deferred retirement benefit shall be payable to a participant whose age on separation is less than the normal retirement age and whose contributory service was five years or longer.
- (b) The benefit shall be payable at the standard annual rate for a retirement benefit and shall commence at the normal retirement age, or, if the participant so elects, at any time once the participant becomes eligible to receive an early retirement benefit from the Fund, provided that in such event it shall be reduced in the same manner and under the same conditions as specified in article 29.

...

Article 40

EFFECT OF RE-ENTRY INTO PARTICIPATION

- (a) If a former participant who is entitled to a retirement, early retirement or deferred retirement benefit under these Regulations again becomes a participant,

entitlement to such benefit or to a benefit derived therefrom shall be suspended and no benefit shall be payable until the participant dies or is again separated.

- (b) Such a participant who again becomes a participant and is again separated after at least five years of additional contributory service shall also be entitled, at the time of such subsequent separation, in respect of such service and subject to paragraph (d) below, to a retirement, early retirement or deferred retirement benefit, or a withdrawal settlement under article 28, 29, 30 or 31, as the case may be.
- (c) Such a participant, who again becomes a participant and is again separated after less than five years of additional contributory service, shall, in respect of such service, become entitled to:
 - (i) A withdrawal settlement under article 31; or
 - (ii) Subject to (d) below, a retirement, early retirement or deferred retirement benefit, as the case may be, under article 28, 29 or 30, based on the length of such additional contributory service; provided, however, that such benefit may not be commuted into a lump sum, in whole or in part, and shall not be subject to any minimum provisions.
- (d) Payment of benefits under (b) or (c) (ii) above shall commence on the date of the resumption or commencement, as the case may be, of payment of benefits suspended under (a) above. In no event shall the total benefits payable to or on account of a former participant in respect of separate periods of contributory service exceed the benefits which would have been payable had the participation in the Fund been continuous.
- (e) Article 40 shall apply *mutatis mutandis* to the ungraded officials who are appointed or elected irrespective of whether they join the Fund again during their tenure as elected officials. There is no retroactive payment of suspended UNJSPF benefits that may have been accrued from previous participation in the Fund. ^[3]

26. As to Mr. Witold's early retirement benefit R/89314 (for his first participation), the original calculation was correct: Following Articles 30(b) and 29(b) of the UNJSPF Regulations, the reduction factor was 42 per cent (seven times six per cent) since Mr. Witold had chosen early retirement at the age of 55 instead of 62 (hence seven years earlier than the regular retirement age). When he re-entered the Fund in March 2009 for his second participation, the calculation of this first pension benefit was not re-opened. Rather, as prescribed in Article 40(c) of the UNJSPF Regulations, an independent second pension process was initiated. Consequently,

^[3] Article 40(e) was introduced by JSPB/G.4/Rev. 18 and entered into force on 1 January 2013. The previous version of the UNJSPF Regulations (JSPB/G.4/Rev. 17 of 1 January 2011) did not contain such a provision.

Mr. Witold has paid pension contributions and has, since his (second) retirement, not only received pension benefits for his first participation (R/89314) but also for his second participation (R/B 8227). Thus, the time of his second participation has been taken into consideration (by the payment of the second benefit R/B 8227), but cannot be (additionally) taken into account for the first period of participation (by increasing this pension by 13.5 per cent which would be the factor for the length of his second participation) as this would mean a double consideration of the time of his second employment.

27. Mr. Witold cannot request retroactive payment of the pension benefits for his first participation (R/89314) suspended between March 2009 and April 2011 either. While Mr. Witold received salary during his second participation, the pension benefits R/89314 were suspended (Article 40(a) of the UNJSPF Regulations). The Standing Committee has stated correctly that there is no legal basis for a retroactive payment of these benefits and that it has no discretion to grant such a retroactive payment. "Suspension" means that there is no entitlement to the pension benefits while a staff member receives a salary. Article 40(a) of the UNJSPF Regulations expressly states that "no benefit shall be payable until the participant dies or is again separated". A retroactive payment of pension benefits which were previously suspended would run counter to Article 40(d) of the UNJSPF Regulations which prescribes that the payment of benefits shall commence (only) on the date of the resumption of payment of benefits previously suspended. Article 40(a) and (d) of the UNJSPF Regulations were already in force at the time of Mr. Witold's second participation. Article 40(e) of the UNJSPF Regulations which entered into effect only in 2013 extends the applicability of Article 40 (a-d) of the UNJSPF Regulations to certain ungraded officials and merely emphasizes the existing interdiction of retroactive payments of suspended pension benefits.

28. In requesting either an increase of his first pension benefit R/89314 by 13.5 per cent or a retroactive payment of the pension benefits suspended during his re-employment from 2009 until 2011, Mr. Witold is effectively seeking an amendment to the UNJSPF Regulations. However, only the General Assembly can amend the UNJSPF Regulations.⁴

⁴ *Taylor v. United Nations Joint Staff Pension Board*, Judgment No. 2011-UNAT-156, paras. 22-26, citing *Muthuswami et al. v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-034, para. 33.

Does the combined application of Article 29(b) and Article 40(a) of the UNJSPF Regulations result in discrimination against Mr. Witold vis-à-vis 1) those staff members who opt for early retirement at the age of 55 and do not re-enter into service; 2) those staff members who opt for early retirement at the age of 57 and do not re-enter into service; or 3) those staff members who retire at the normal retirement age?

29. We can find neither unfairness nor discrimination in the combined application of Articles 29(b) and 40(a) of the UNJSPF Regulations to Mr. Witold. In his case, both of his pension benefits have to be taken into account. Mr. Witold's contention that his second benefit R/B 8227 should be "left out from considerations" as he considers it to be "not material in this context" is without merit. On the contrary, it is decisive in this case that Mr. Witold receives two independent pension benefits for his two different participation periods. This becomes clear when the scenarios presented by Mr. Witold are examined more closely.

30. Mr. Witold compares himself to a staff member who retired at age 55 and did not re-enter the Fund. Such a staff member, he argues, would be subject to the 42 per cent reduction factor, but without the suspension period he himself had to endure which he deems unfair. However, this difference in treatment is due to the fact that this staff member did not re-enter the Organization and thus did not receive salary after his retirement; so there is no reason and no legal possibility to suspend his (first and only) pension. On the other hand, as this staff member only worked until age 55, he or she will receive a lower pension than Mr. Witold who receives two pension benefits.

31. Secondly, Mr. Witold compares himself to a staff member who retired at the age of 57 (and thus continued to work for a period comparable to Mr. Witold's second employment). This staff member would have a lower reduction factor and no suspension of pension benefits. Mr. Witold deems it unfair that his pension benefit is subject to the high 42 per cent reduction factor in addition to the suspension. However, Mr. Witold does not take into account that, unlike the staff member in question, he receives two different pensions, one for his first and one for his second participation. The two must be seen together (see also Article 40(d) of the UNJSPF Regulations). This done, there is no unfairness or discrimination.

32. Finally, Mr. Witold argues that a staff member retiring at the normal retirement age would have the full pension and endure no suspension. However, this staff member worked several years longer and so naturally will receive a higher pension than Mr. Witold who chose early retirement.

Judgment

33. The appeal is dismissed and the decision of the Standing Committee is hereby affirmed.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Raikos

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar