*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

## 2014

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# Chapter VI

# SELECTED LEGAL OPINIONS OF THE SECRETARIATS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS*

## A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

### 1. Privileges and immunities

#### (*a*) Note to the Permanent Observer Mission of the African Union to the United Nations concerning full diplomatic status in the host country

Status of the African Union Permanent Observer Mission to the United Nations as a successor to the Organization of African Unity—Functional immunities and privileges of permanent observers to the United Nations based on Article 105 of the United Nations Charter and the 1947 Headquarters Agreement between the United Nations and the United States of America—Possibility to extend full diplomatic privileges and immunities by means of a special arrangement with the host State

I have the honour to refer to your letter of 4 July 2014 seeking the assistance of the Secretary-General to ensure that the African Union (AU) Permanent Observer Mission to the United Nations obtains "full diplomatic status from the US as the Host Country of the United Nations". In your letter, you note that the Organization of African Unity (OAU) Permanent Observer Mission to the United Nations, which was the predecessor to the AU Permanent Observer Mission, was previously accorded such status in 1974, but that it was withdrawn in 1996 by a decision of the United States Government. You also note that the AU Commission has undertaken consultations with officials from the United States Mission to the United Nations, as well as officials of the United Nations Secretariat, with a view to restoring the privileges and immunities accorded prior to 1996. You further note that "investigation revealed that the [AU Permanent Observer Mission] is not appropriately accredited by the United Nations, which appears to be impacting its diplomatic status with the US Government" and that it is your "considered view that the diplomatic status of the [AU Permanent Observer Mission] is predicated upon its appropriate accreditation by the UN". Your letter has been referred to this Office for a response.

With respect to the issue of "accreditation", I wish to recall that the General Assembly, in its resolution 2011 (XX) of 11 October 1965, entitled "Co-operation between the United Nations and the Organization of African Unity", requested the

* This chapter contains legal opinions and other similar legal memoranda and documents.

Secretary-General of the United Nations "to invite the Administrative Secretary-General of the Organization of African Unity to attend sessions of the General Assembly as an observer". The United Nations and the OAU also concluded the "Cooperation Agreement between the United Nations and the Organization of African Unity" on 9 October 1990 (the 1990 Cooperation Agreement), in which the two Organizations agreed to reciprocal representation at meetings organized under the auspices of the other.

Thereafter, in its decision 56/475 of 15 August 2002, entitled "Succession by the African Union to observer status in the General Assembly", the General Assembly decided that "the African Union would assume the rights and responsibilities of the Organization of African Unity as an observer invited in accordance with resolution 2011 (XX) and the [1990] cooperation agreement between the United Nations and the Organization of African Unity".

I am of the view, and the practice of the United Nations confirms, that the invitation contained in General Assembly resolution 2011 (XX), the 1990 Cooperation Agreement and General Assembly decision 56/475 provide the necessary basis for the AU to establish a Permanent Observer Mission to the United Nations and for its representatives to participate in the work of the General Assembly and other organs as observers. Moreover, as you know, representatives of the AU Permanent Observer Mission have in fact attended many United Nations meetings in the capacity of observers.

However, the privileges, immunities and facilities to be accorded to observers, including the AU Permanent Observer Mission and its representatives, are not specifically outlined in any General Assembly resolution or international legal instrument.

In the absence of any specific international legal regulation of the privileges and immunities of entities invited to participate as observers in United Nations meetings at Headquarters, United Nations practice has been to consider such issues principally in the light of the pertinent provisions of the Charter of the United Nations and the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (the Headquarters Agreement). It has been the consistent view of the Organization that a permanent observer delegation, as an invitee to meetings of United Nations organs, is entitled to enjoy in that capacity certain functional immunities necessary for the performance of official functions *vis-à-vis* those organs. These immunities flow by necessary intendment from Article 105 of the Charter of the United Nations. The United Nations has consistently maintained that a permanent observer delegation would enjoy functional immunity from legal process in respect of words spoken or written and all acts performed by members of the observer delegation in their official capacity before relevant United Nations organs. In addition to that functional immunity, a permanent observer delegation would also enjoy inviolability for official papers and documents relating to their relations with the United Nations. If such inviolability is to have any meaning, it also necessarily extends to the premises of the mission.

In addition, observer delegations benefit from the following provisions of the Headquarters Agreement concerning transit to and from the headquarters district. Section 11 of the Headquarters Agreement provides that "the federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of … persons invited to the headquarters district by the United Nations", and that "the appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the headquarters district." Furthermore, according

to section 12, the facilities referred to in section 11 "shall be applicable irrespective of the relations between the Governments of the persons referred to in that section and the Government of the United States". Section 13 further provides that the host State shall grant visas "without charge and as promptly as possible" to the persons in question and also exempts such persons from being required "to leave the United States on account of any activities performed by [them] in [their] official capacity".

The Headquarters Agreement does not confer diplomatic privileges and immunities on observer delegations. I would note however that diplomatic status may of course be extended to an observer delegation by virtue of a special arrangement with the host State and that this would be a matter for negotiation between the host State and the intergovernmental organization concerned. If the AU continues to encounter difficulties in this endeavour, this Office would be prepared to intercede with the United States Mission, as appropriate.

[…]

24 July 2014

### (*b*) Note to the Ministry of Foreign Affairs of [State] concerning the imposition of certain taxes in respect of fuel purchases on [a United Nations Mission]

Imposition on [a United Nations Mission] of a compulsory stock obligation fee under fuel contracts with third party vendors—Characterization of the compulsory stock obligation fee as a direct tax under article II, section 7(*A*) of the Convention on the Privileges and Immunities of the United Nations—Extension of the privileges and immunities granted in the Convention on the Privileges and Immunities of the United Nations by means of the Status-of-Forces Agreement—Exemption of [the United Nations Mission], as a subsidiary organ of the United Nations, from paying such a tax in respect of its fuel purchases

1. The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of [State] to the United Nations and has the honour to refer to the Note Verbale from the [United Nations Mission] to the Permanent Secretary, Ministry of Foreign Affairs, dated 20 September 2010, regarding the imposition on [the United Nations Mission] of a compulsory stock obligation (CSO) fee under its fuel contracts with third party vendors, as well as the Note Verbale, in response, from the Ministry of Foreign Affairs to [the United Nations Mission], dated 13 May 2011 (both documents attached hereto for ease of reference).

2. The Legal Counsel wishes to recall that, pursuant to the provisions of article II, section 7(*a*) of the Convention on the Privileges and Immunities of the United Nations to which [State] is a party since […] without reservation, the United Nations, its assets, income and other property shall be "[e]xempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services".

3. The Legal Counsel notes that under [the United Nations Mission's] previous and current fuel contracts with third party vendors for the provision of fuel and related services, such vendors have invoiced [the United Nations Mission] the CSO fee as a separate line item on each invoice, currently calculated as [amount] per litre of fuel. The Legal

Counsel notes that the Ministry of Foreign Affairs, in the above-referenced Note Verbale, dated 13 May 2011, has taken the position that the CSO fee is neither a direct nor an indirect tax. The Legal Counsel considers, however, that notwithstanding the views expressed by the Ministry of Foreign Affairs, the CSO fee constitutes a tax, and more particularly a "direct tax" within the meaning of section 7(*a*) of the Convention and, thus, [the United Nations Mission], as a subsidiary organ of the United Nations, is exempt from payment of the CSO fee. Pursuant to paragraph 23 of the Exchange of Letters Constituting an Agreement between the United Nations and the Government of the Republic of [State] concerning the Status of the [United Nations Mission] dated […], "the [United Nations Mission] as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the Organization in accordance with the Convention on the Privileges and Immunities of the United Nations".

4. Unless the Government of [State] can demonstrate that the CSO fees constitute "charges for public utility services" within the meaning of the latter part of section 7(*a*) of the Convention, the United Nations will maintain the position that the CSO is a "direct tax" within the meaning of the first part of section 7(*a*) of the Convention and, that, [the United Nations Mission] is thus exempt from paying such tax in respect of its fuel purchases.

[…]

15 September 2014

[Enclosures omitted]

## 2. Procedural and institutional issues

### (*a*) Note to the Executive Director of the Green Climate Fund concerning a possible relationship agreement between Green Climate Fund and the United Nations

Whether the Green Climate Fund may conclude a relationship agreement with the United Nations pursuant to which the officials of the Fund may avail themselves of the use of the United Nations *laissez-passer*—Status of the Green Climate Fund as a subsidiary organ of the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC)—Non-applicability of the of the institutional linkage between the United Nations and the UNFCCC secretariat to the Green Climate Fund—Need to establish the fund as a separate international organization to allow for the entitlement of officials of the Fund to use the UNLP based on a relationship agreement with the United Nations

I wish to refer to your letter dated 26 November 2013 to the Legal Counsel in which you ask for our advice on whether the Green Climate Fund ("the Fund") may enter into a relationship agreement with the United Nations pursuant to which the officials of the Fund may avail themselves of the use of the United Nations *laissez-passer* ("UNLP"). We would like to recall that the Fund was established by decision 1/CP.16 of the Conference of the Parties ("COP") of the United Nations Framework Convention on Climate Change ("UNFCCC"). By paragraph 3 of COP decision 3/CP.17 which recalled the earlier decision, the COP decided, "to designate the Green Climate Fund as an operating entity of the financial mechanism

of the Convention, in accordance with article 11 of the Convention" and decided that the Fund would be "accountable to and function under the guidance" of the COP.

As to whether the Fund may avail itself of an "institutional linkage" with the United Nations and more specifically the requirements and procedures to be followed for the Fund to enter into a relationship agreement with the United Nations, we would like to point out the following.

The United Nations has previously concluded relationship agreements with international organizations. Those international organizations that have negotiated relationship agreements with the Economic and Social Council and concluded such agreements with the United Nations upon approval by the General Assembly, pursuant to Articles 57 and 63 of the Charter are specifically referred to as "specialized agencies", as provided in Article 57 (2) of the Charter. There are also several other international organizations known as "related organizations" that have concluded relationship agreements with the United Nations in the past and upon approval by a competent principal organ of the United Nations, but outside the framework of Articles 57 and 63 of the Charter. These include the International Atomic Energy Agency (IAEA), the Organization for the Prohibition of Chemical Weapons (OPCW) and the International Criminal Court (ICC).

Currently there exists no relationship agreement between the COP of the UNFCCC and the United Nations and the COP does not have either the status of a United Nations specialized agency or related organization.

As far as the Fund is concerned, by decision 3/CP.17, the COP decided to confer juridical personality and legal capacity on the Fund. Paragraph 11 of the decision provides that the COP "*[d]ecides* that the Green Climate Fund be conferred juridical personality and legal capacity and shall enjoy such privileges and immunities related to the discharge and fulfilment of its functions, in accordance with paragraphs 7 and 8 of the governing instrument". Paragraph 7 of the governing instrument of the Green Climate Fund annexed to the decision further provides that "[i]n order to operate effectively internationally, the Fund will possess juridical personality and will have such legal capacity as is necessary for the exercise of its functions and the protection of its interests."

While COP decision 3/CP.17 did confer juridical personality and legal capacity on the Fund, it also stated that the Fund would be accountable to and function under the guidance of the COP thus establishing the subsidiary nature of the Fund and confirming the fact that it remains part of the UNFCCC process rather than a separate free-standing international organization. As such, the Fund does not have the same status under international law as the specialized agencies and related organizations that have relationship agreements with the United Nations.

Therefore, it is our view that the Fund would not be able to conclude a relationship agreement of the nature concluded between the United Nations and specialized agencies and related organizations.

As to whether it is possible for the Fund to avail itself of the institutional linkage that the UNFCCC secretariat has with the United Nations in order for the 1946 Convention on the Privileges and Immunities of the United Nations (the "General Convention") to be fully applicable to the Fund and its officials, we wish to recall that the institutional linkage, including the applicability of the United Nations staff regulations and rules to

the UNFCCC secretariat, was approved by the General Assembly and the COP.[1] It was approved by the COP pursuant to a proposal submitted by the Secretary-General during the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change and was intended to provide an efficient arrangement for administrative support to the Convention secretariat.[2]

In the light of the fact that staff of the secretariat enjoy the privileges and immunities set out under the General Convention and also fall under the United Nations Staff Regulations and Rules, they are entitled to use the UNLP.

However, we note from paragraph 9 of the letter that the COP and the Board of the Fund have decided on a different set of administrative and financial arrangements for the Fund. The General Convention and United Nations Staff Regulations and Rules are not applicable to the Fund and the United Nations plays no role in its administrative support.

Consequently, the institutional linkage that currently exists between the United Nations and the UNFCCC secretariat does not apply to the Fund and its officials. In addition, officials of the Fund are not entitled to a UNLP.

You have also sought our views on whether there are any arrangements that can be put in place so that officials of the Fund can avail themselves of the use of the UNLP.

The United Nations' authority to issue UNLPs stems from the General Convention and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (the "Specialized Agencies Convention"), which sets out the privileges and immunities of officials of the United Nations and Specialized Agencies respectively and the use by those officials of a UNLP.

In the case of "related organizations", to which the General Convention and the Specialized Agencies Convention do not apply, the United Nations only issues UNLPs to those related organizations, such as IAEA, OPCW and the ICC, that have their own multilateral treaty pursuant to which States Parties agree to grant privileges and immunities to officials of these organizations which include a provision concerning the use of the UNLP and that have concluded relationship agreements with the United Nations that provides for the entitlement of those officials of those organizations to use the UNLP.

In answer to the questions you raise in paragraph 14 of your letter, the Fund may propose to States Parties of the UNFCCC to negotiate and adopt a multilateral treaty which establishes the Fund as a separate international organization that provides for the privileges and immunities for the Fund and its officials and authorizes the use of the UNLP as the travel document for the Fund's officials. The Fund would then need to conclude a relationship agreement with the United Nations that included a provision concerning the entitlement of officials of the Fund to use the UNLP.

As to whether it would be possible and sufficient for the Fund to enter into bilateral agreements with those States where it conducts operations or maintains offices which recognize the use of the UNLP as the travel document for the Fund's officials, we would point out, as explained above, that there is no multilateral treaty establishing the Fund that

[1] See COP decision 14/CP.1 and General Assembly resolutions 50/115 of 20 December 1995, 54/222 of 27 December 1999, 56/199 of 21 December 2001 and 61/201 of 20 December 2006 which has endorsed an institutional linkage between the secretariat of the Convention and the United Nations.

[2] See FCCC/CP/1999/5/Add.4 and A/AC.237/91.

provides, *inter alia* for the privileges and immunities of its officials and there is no relationship agreement between the United Nations and the Fund.

Consequently, the United Nations would not be in a position at this stage to issue UNLP's on the basis of such bilateral agreements.

[…]

21 February 2014

### (*b*) Inter-office memorandum to a Humanitarian Affairs Officer, Funding Coordination Section, the Office for the Coordination of Humanitarian Affairs (OCHA), concerning the review of the proposed "Global Guidelines for Country-Based Pooled Funds"

Review of the proposed "Global Guidelines for Country-Based Pooled Funds" (CBPFs), i.e. Common Humanitarian Funds (CHFs) and Emergency Response Funds (ERFs)—Requirement to promulgate rules binding on staff members through Secretary-General's bulletins and administrative instructions pursuant to section 1.2 of ST/SGB/2009/4 of 18 December 2009—Proposal to promulgate the normative measures relating to CBPFs in the form of Secretary-General's bulletins or administrative instructions and not as guidelines

1. […]

2. […]

3. The Draft Guidelines seek to address both normative measures[3] as well as operational and procedural matters[4] concerning the use and administration of CBPFs. Some of the normative measures addressed in the Draft Guidelines concern the rules by which staff members would deploy funds from and by which they would administer the CBPFs in order to ensure that funds would be used appropriately for intended humanitarian purposes and with full transparency and accountability. Thus, the intention for the Draft Guidelines was that if any staff members were to deploy or administer CBPFs in a manner inconsistent with such rules, OCHA would seek to hold such staff members accountable, including through the imposition on them of disciplinary measures for the violation of such rules as would be promulgated means of the Draft Guidelines.

4. In this connection, "guidelines," *per se*, are not appropriate means to promulgate binding rules by which to hold staff members accountable, including through the imposition of disciplinary measures. Section 1.2 of the Secretary-General's bulletin concerning "Procedures for the promulgation of administrative issuances," ST/SGB/2009/4, of 18 December 2009, provides that "rules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative instructions." Since OCHA did not propose to promulgate the Draft Guidelines as a Secretary-General's bulletin or as an administrative instruction in accordance with the procedures set forth in ST/SGB/2009/4, the Draft Guidelines, in their present

[3] See, e.q., section 4 of the Draft Guidelines concerning the accountability framework for CBPFs, purporting to establish rules for those managing the Funds and those utilizing the Funds.

[4] See, e.q., section 1.3 of the Draft Guidelines concerning the establishment and closing of CBPFs, setting out the specific steps to be taken in opening and closing the Funds.

form, cannot be used to establish rules, policies or procedures for which staff members could be held accountable to observe.

5. Accordingly, as discussed in our meetings and other consultations, if OCHA considers that the normative measures addressed in the Draft Guidelines should become binding rules for staff members, then those normative measures should be separated from the Draft Guidelines and promulgated through a Secretary-General's bulletin or an administrative instruction in accordance with the provisions of ST/SGB/2009/4. Other issues set forth in the Draft Guidelines that are descriptive, operational, procedural or informational in nature could remain in the Draft Guidelines. However, because the two kinds of CBPFs employed by OCHA constitute dissimilar funding mechanisms emanating from distinct institutional frameworks (paragraph 6, below), the Draft Guidelines should be split into different parts addressing the two kinds of funding mechanisms separately.

6. In addition to its Central Emergency Response Fund, established by the General Assembly,[5] OCHA has for several years now made use of two kinds of pooled funds that are established at the country level: Common Humanitarian Funds (CHFs) and Emergency Response Funds (ERFs). CHFs are established as UNDP multi-partner trust funds and are administered by UNDP under UNDP's Financial Regulations and Rules for humanitarian relief purposes.[6] Even though CHFs are established and administered by UNDP, country-level Humanitarian Coordinators operating under the aegis of OCHA act as programme managers for the CHFs. ERFs similarly are country level pooled funds, but they are established and managed by OCHA as trust funds under the United Nations Financial Regulations and Rules. As noted, OCHA is seeking to develop a stronger legal basis for the ERFs.[7]

7. […]

8. […]

9. […]

[…]

30 June 2014

[5] See General Assembly resolutions 46/182, of 19 December 1991, and 60/124, of 15 December 2004.

[6] Under UNDP's Financial Regulations and Rules, funds in such multi-partner trust funds may be distributed directly to "implementing partners" for carrying out project activities. OLA understands that (under the terms of reference for such CHPs, project activities can include humanitarian response and capacity building activities undertaken by partnering NGOs so that there is an established legal basis for OCHA to make disbursements to NGOs from CHFs.

[7] OCRA's separately promulgated guidelines for ERFs (2010) state that "there is no dedicated General Assembly resolution with a governing mandate for ERFs, unlike for the Central Emergency Response Fund (CERF). There are also no provisions in the United Nations Financial Regulations and Rules allowing for the Secretariat, including OCHA, to make direct grants or other disbursements of funds, such as those in the ERPs, to implementing partners other than for the procurement of goods or services from them. OCHA has indicated, however, that a practice has been developed in recent years of OCHA's making such disbursements to NGOs. It may be reasonable to consider that the General Assembly has become aware of the practice; nevertheless, OCHA's obtaining additional authority to make such disbursements from the General Assembly would be advisable, and as noted, this is what OCHA will be seeking to do over the course of the next biennium.

## (*c*) Inter-office memorandum to the Secretary, United Nations Publications Board, Department of Public Information, regarding the copyright to and use of a special emblem

Copyright to special and distinctive logos for United Nations conferences and international years pursuant to the annex to ST/AI/189/Add.21—Responsibility of the United Nations Publications Board for the final selection and approval of special and distinctive logos for United Nations conferences and international years—Transfer of a copyright to the United Nations—Conditions for use of a special and distinctive logo by non-United Nations entities—Non-United Nations entities may use a special and distinctive logo for information and illustrative purposes—Neither the United Nations emblem nor special and distinctive logos used for United Nations Conferences or International Years may be used for commercial purposes—Special and distinctive logos for United Nations Conferences may be used for fundraising purposes insofar as they are used to cover costs of activities in support of celebrations associated with the conference

1. […]

2. […]

3. With regard to the proposed use of the [Conference] logo by non-United Nations entities, you have forwarded an e-mail message from [United Nations office], whereby [United Nations office] informed your Office that the Government of [State] is seeking support from the private sector for the Conference, and that, in return, the Government wishes to acknowledge the private sector's support to the Conference. [United Nations office] refers in particular to the possible use of the [Conference] logo by a beverage company, which has proposed two alternatives for the use of the [Conference] logo. In the first case, the company would sell the water bottles displaying the [Conference] logo together with the words, "[the company] supports the [Conference]." In the second case, the company would distribute water bottles at the Conference venue, free of charge, displaying the [Conference] logo together with the words, "[the company] supports the [Conference]."

4. We have reviewed the matter and have the following comments concerning the copyright to the [Conference] logo, and the proposed use of the logo by non-United Nations entities. First, with respect to the copyright issue, as you are aware, it is a well-established United Nations policy and practice that the United Nations has the copyright to any special logos for United Nations conferences and international years, based on the provisions of the Annex to Administrative Instruction ST/AI/189/Add.21 on "Regulations for the control and limitation of documentation—Use of the United Nations emblem on documents and publications". The Annex to the ST/AI sets out the procedure for the "Selection of distinctive emblems for special conferences and international years" and indicates, *inter alia*, that the United Nations Publications Board has the responsibility for the final selection and approval of special logos for United Nations conferences and international years. As in this case, when the name and/or acronym of the United Nations is used as part of the design of the special logo, i.e., [full name of Conference], it would be particularly important that the United Nations hold the copyright to the design of the logo since the use of the United Nations emblem and name, including any abbreviation thereof, is reserved for the official purposes of the United Nations in accordance with General Assembly resolution 92(I) of 7 December 1946. Accordingly, as you have already

indicated to [United Nations office], we consider that the Government of [State] should be requested to transfer the copyright to the [Conference] logo to the United Nations, representing and warranting that the Government has the right to transfer the copyright to the design of the [Conference] logo and that the graphic design of the logo is not copyrighted or trademarked by a third party.

5. In light of the foregoing, our comments set out below concerning the proposed use of the [Conference] logo by non-United Nations entities are premised on the understanding that the United Nations owns the copyright to the logo, and that the Guidelines for the use of the [Conference] logo would essentially be identical to the template Guidelines. In this regard, we understand that the guidelines will soon be submitted to the United Nations Publications Board for approval.

6. Based on paragraph II(*a*) of the template Guidelines, authorization may be granted to non-United Nations entities, including private sector entities, to use a special logo for informational purposes. Informational uses are defined as those which are "primarily illustrative" and "not intended to raise funds". In these cases, a special logo may be used side by side with the logo of the non-United Nations entity, but the logo of the non-United Nations entity would need be given prominence *vis-a-vis* the special logo. In addition to the logos, a sentence would be displayed, stating "[the name of the non-United Nations entity] supports the [name of the Conference]." Accordingly, OLA is of the opinion that the second option mentioned in paragraph 3 above, i.e., that the beverage company would distribute water bottles at the Conference venue, free of charge, displaying the [Conference] logo together with the words, "[the company] supports the [Conference]," would fall under the category or informational purposes. Therefore, it appears that authorization to use the [Conference] logo may be granted in the case of option 2, subject to the terms of use set out in the Guidelines for the use of the [Conference] logo, i.e., the company logo would be displayed side-by-side with the [Conference] logo and be given prominence vis-a-vis the [Conference] logo.

7. The alternative option referred to in paragraph 3 above, i.e., the company would sell water bottles displaying the [Conference] logo together with the words, "[the company] supports the WCDRR," would constitute a commercial use of the special logo as the company would profit from that activity. Such commercial use is not permitted by the template Guidelines *unless* it is to raise funds to cover costs of activities in support of the Conference (see paragraph II.*b*) of the template Guidelines). Therefore, authorization to use the [Conference] logo under the conditions stated in option 1 in paragraph 3 above should not be granted.

8. […]

15 July 2014

### (*d*) Inter-office memorandum to the Under-Secretary-General, Department of Peacekeeping Operations, on the proposed use of the United Nations emblem in relation to a course organized by a not-for-profit organization

Use of the United Nations emblem—Authorization of the Secretary-General for any non-official use—Conditions for the use of the United Nations emblem by non-United Nations entities pursuant to ST/AI/189/Add.21 and

ST/AI/189/Add.21/Amend.1—Use of the United Nations emblem permitted when the United Nations participates in organizing a conference or meeting convened by an outside body and when the emblems of other participating bodies are also used—Use of the United Nations emblem next to the insignia of individual Governments requires express permission by the United Nations Publications Board

1. This refers to your e-mail message of 6 August 2014, seeking OLA's advice regarding the use of the United Nations emblem on an "[i]nvitation to nominate experts for the [institution's] course on the protection of civilians in armed conflict" to be held in [State] from […], and organized by the [Study Centre]. The course invitation notes that the course was organized in close cooperation between the [Government Ministry] and the [Study Centre], which we understand is a not-for-profit organization, and is supported by the [Government Ministries] of the [State]. The United Nations emblem features at the top of the front page of the draft course invitation, next to the names and emblems of the [Government Ministry], [Government Ministry, the [institution], the [Study Centre]and the [Government Ministry]. We understand that DPKO provided the [Government] with certain substantive input for the development of the course and wishes to continue cooperating with [Study Centre] in relation to this course. However, according to the information provided to us, the course is not a United Nations training course nor is it co-organized by the United Nations. We further understand that since OLA's receipt of the above request for advice, the organizers of the course decided to issue the course invitation without including the United Nations emblem, but DPKO nevertheless wishes to receive guidance from OLA on the rules and general policy regarding the use of the United Nations emblem by non-United Nations entities.

2. The use of the United Nations name and emblem is strictly reserved for the official purposes of the United Nations in accordance with General Assembly resolution 92(1) of 7 December 1946. Furthermore, that resolution expressly prohibits the use of the United Nations name and emblem in another way without the authorization of the Secretary-General, and provides that Member States should take the necessary measures to prevent such use without the authorization of the Secretary-General. The United Nations name and emblem are also protected under article 6 *ter* of the Paris Convention for the Protection of Industrial Property, revised in Stockholm on 14 July 1967, which requires states party to the Convention "to prohibit by appropriate measures the use, without authorization by competent authorities" of the emblems and names of international organizations, including the United Nations.

3. The use of the United Nations emblem in documents and publications is further regulated by Administrative Instruction ST/AI/189/Add.21 of 15 January 1979, as amended in 2008 by ST/AI/189/Add.21/Amend.1. The two documents are enclosed herewith for your ease of reference [enclosures omitted]. We note that section V, paragraph 25 of the ST/AI, as amended, restricts the use of the United Nations emblem in documents and publications of non-United Nations entities to instances where the United Nations "participates in organizing a conference or meeting convened by an outside body," provided that "the emblems of other participating bodies are so used on the documents of the conference or meeting." According to the information provided to us, the present situation is not covered by the above-referenced provision since the UN's involvement in the training course is limited to providing certain substantive input in relation to the event, which is organized exclusively by a non-United Nations entity, i.e., the [Study Centre].

4. In addition, we note as a general comment that ST/AI/189/Add.21 contains specific provisions regarding the use of the United Nations emblem next to the insignia of individual Governments. Pursuant to section IV of ST/AI/189/Add.21, the United Nations emblem may be placed next to the insignia of individual Governments only with the express permission of the United Nations Publications Board. The ST/AI further provides that a report or other document prepared by the United Nations in co-operation with a Government should include a sentence of acknowledgment of the individual Government's contribution, such as "Prepared in co-operation with the Government of …", without showing the insignia of the Government. In case an individual Government prints a report or other document of which the United Nations is the publisher, credit may be given to the Government in a form such as the following: "Printed by the Government of … as a contribution to the work of the United Nations" (see section IV, paragraphs 23 and 24 of ST/AI/189/Add.21).

5. Pursuant to the above and given that the training course is not a United Nations event or training co-organized by the United Nations, it would not have been appropriate for the invitation to the training course to display the United Nations emblem next to the emblems of the organizer, [Study Centre], and various [State] Governmental entities that have contributed to the development and/or organization of the course. Please note that the same conclusion applies to any report, document and/or materials that may be published in relation to this training course.

6. […]

20 August 2014

## 3. Procurement

### Inter-office memorandum to the Officer-in-Charge, Award Review Board, Department of Management, concerning legal representation in the alternative dispute resolution procedure in relation to procurement bidding

Whether the terms of reference (ToR) of the alternative dispute resolution (ADR) procedure in the procurement challenge system should stipulate legal representation of the parties—Participation in the bidding process does not commit the United Nations to award a contract—Administrative nature of the bid protest system—The informal ADR process should be treated as an administrative non-binding conciliation/mediation process not involving legal representatives

1. I refer to you the memorandum of 2 December 2014, by which you had requested OLA's views on the alternative dispute resolution (ADR) procedure that has been recently included in the procurement challenge system.

2. According to your memorandum, the Secretary-General, in his report to the General Assembly at is 67th session (A/67/683/Add.1), extended the pilot phase of the Award Review Board (ARB) up to 30 June 2015, and introduced the option of an alternative dispute resolution procedure. According to Amendment 2 to the Terms of Reference (ToR) of the ARB, such ADR "shall consist of a voluntary, informal process for dealing with disputes whereby a third party shall facilitate the discussion of the parties toward resolution. The process shall involve an ARB expert, who shall serve as the third party and meet

informally with authorized representatives of the United Nations and the vendor." From recent discussions between our two offices, we understand that such ADR is intended to involve non-binding mediation.

3. While you have noted that the ARB "has not yet had occasion to offer a vendor the option to utilize the alternative dispute resolution procedure," you have sought our views on whether it would be advisable to stipulate in the ToR that parties should be represented by counsel in the ADR process. You have further inquired whether, if a vendor were to be represented by counsel in such ADR proceedings, OLA would be in a position to provide legal counsel to procurement and requisitioning staff members participating in the discussions.

4. Turning to your question on whether legal counsel should participate in the ADR (i.e., non-binding mediation) proceedings, we would advise against the inclusion of legal counsel in such proceedings for the following reasons:

5. According to the solicitation documents issued by the United Nations Procurement Division during the acquisition process, a bidder's participation in such process does not give rise to any legal rights for the bidder to be awarded a contract. Indeed, pursuant to the standard Request for Proposal (RPF), article 3, "[a]ny proposal submitted will be regarded as a proposal by the Proposer and not as an acceptance by the Proposer of any proposal by the United Nations. *This RFP does not commit the United Nations to award a contract*." (Emphasis added). Moreover, according to article 23 of the RPF, *Notice of Award*, "*[n]o legal obligation exists* until the contract is finalized and signed by both parties." (Emphasis added).

6. In view of the foregoing, the bid protest system is an administrative procedure—as opposed to quasi-judicial one—in which the parties do not need to be represented by an attorney. The informal ADR process (i.e., non-binding mediation) should thus be treated as an administrative conciliation/mediation process and not involve legal representatives.

7. Indeed, the inclusion of legal counsel in such informal ADR processes as non-binding mediation or conciliation could render such processes contentious, therefore reducing the opportunities for problem-solving and relationship-repair.[8] Other commonly cited disadvantages to having attorney representation in informal ADR proceedings include the incorporation of adversarial practices and "client control" in the mediation/conciliation process and the chilling effect on and formalization of such processes. Last but not least, the inclusion of legal representatives in the ADR process is also likely to significantly augment the costs of the bid protest system for all parties.

8. Consequently, we would recommend that the ToR clarify that legal representatives would not be permitted in the informal, voluntary ADR process, introduced by Amendment 2 to the ToR of the ARB.

20 August 2014

[8] See National Arbitration Forum, *Business-to-Business Mediation/Arbitration* vs. *Litigation* (2005), available at http:/www.adrforum.com.

## 4. Liability and Responsibility of the United Nations

### Inter-office memorandum to the Chief, Intergovernmental and Outreach Section, Office of the High Commissioner for Human Rights, concerning the modification of the standard indemnification provision in a draft license agreement

The United Nations may not incur any potential financial liabilities in-connection with the acceptance of a voluntary contribution pursuant to Financial Regulation 3.12 and Financial Rule 103.4(*B*)—Inclusion of a provision in a financial contribution agreement requiring the United Nations to indemnify a counterparty constitutes a potential financial liability—derogations from the United Nations Financial Regulations and Rules may only be authorized by the General Assembly

1. This refers to the e-mail message of 30 October 2014 from your Office to OLA, in which OLA was requested to reach out to the producer of the film […], […] (the "Producer"), to discuss the indemnification provision included in the draft license agreement between the United Nations and the Producer for the screening of the said film at the United Nations Free & Equal Global Film Series festival (the "Festival"), which we understand is organized by OHCHR in coordination with DPI.

Background

2. It is recalled that in November 2013, OLA was requested by DPI to develop a model *pro bono* license agreement to be used for the Festival. OLA subsequently prepared a template license agreement for the Festival, which included the required standard provisions protecting the interests of the Organization. Based on the information received by this Office, at least two license agreements have already been concluded with respective producers of the films participating in the Festival without major changes to the template license agreement. However, the director of the film […] has proposed and is insisting upon, an amendment to the standard indemnification provision whereby the United Nations would, contrary to its policy, agree to indemnify and hold the producer harmless, and waive any possible claims against it arising from the screening of the film.

3. At OHCHR's request, OLA first reached out to the Producer in August 2014, proposing to discuss the terms of the indemnification provision directly with the Producer's lawyers. Following a conference call on 19 August 2014 between OLA and the Producer, OLA proposed a modified indemnification clause, quoted below, whereby the Producer would agree to indemnify the United Nations only for violations of third party intellectual property rights and other private law rights by the Producer, such as rights of publicity and privacy rights.

> "[…] the Producers shall indemnify, hold and save harmless, and defend, at their own expense, the United Nations, its officials, agents, and employees from and against all suits, claims, demands, losses and liability of any nature or kind, including their costs and expenses, arising from or relating to any allegations or claims by any third party that any act or omission of the Producers in the creation of the Film, including any provided subtitled or dubbed versions thereof, and any promotional materials relating to the Film, provided or licensed to the United Nations under the terms of this Agreement, in whole or in part, violates one or more of such third party private law rights, including, but not limited to,

> allegations or claims based on an infringement of any copyright, trademark, or other intellectual property rights, violation of rights of publicity, theories of libel, defamation, invasion of privacy, breach of confidence, and breach of express or implied contract. The obligations under this provision do not lapse upon the termination of this Agreement."

4. We understand that the modified indemnification provision was not agreeable to the Producer. As per the Producer's e-mail message of 30 October 2014, forwarded to this Office by DPI, we understand that the Producer insists on the text of the indemnification provision he had originally proposed to be used in the license agreement (see paragraph 2 above).

Requirements under the United Nations Financial Regulations and Rules

5. Please note that the policy of the United Nations regarding acceptance of donations, including the present arrangement whereby the United Nations would be given a license to use the Producer's film on a *pro bono* basis, is based on United Nations-Financial Regulation 3.12 and Financial Rule 103.4 promulgated thereunder. Financial Regulation 3.12 provides that:

> "Voluntary contributions, whether or not in cash may be accepted by the Secretary-General provided that the purposes for which the contributions are made are consistent with the policies, aims and activities of the Organization and provided further that the acceptance of voluntary contributions that directly or indirectly involve additional financial liability for the Organization shall require the consent of the appropriate authority."

Pursuant to the above, Financial Rule 103.4 (*b*) provides that:

> "Voluntary contributions, gifts or donations that directly or indirectly involve additional financial liability for the Organization may be accepted only with the approval of the General Assembly."

6. We note that the Producer conditions the grant of a *pro bono* license upon the United Nations indemnifying and holding the Producer harmless and waiving any possible claims against the Producer and his company arising from the screening of the film by the United Nations. The indemnification provision proposed by the Producer, i.e., (*a*) imposing upon the United Nations the obligation to indemnify and hold the Producer harmless, and (*b*) waiving all claims for possible future damages caused by the film's potential violation of third party intellectual property and other rights, exposes the United Nations to the risk of claims and the possibility that the United Nations would have to bear financial liability as a result. As such, the suggested indemnification provision is contrary to Financial Regulation 3.12 and Financial Rule 103.4(*b*), quoted above, and cannot be accepted unless it is approved by the General Assembly, as required by Financial Rule 103.4(*b*).

7. We understand that the Producer is not willing to agree to the amended indemnity provision as proposed by the Organization. In light of the requirements under the United Nations Financial Regulations and Rules, as indicated above, unless the Producer is amenable to the modified indemnification clause as proposed, the Organization is not in a position to agree to the Producer's terms, which would require the approval of the General Assembly.

8. […]

[…]

19 December 2014

## 5. Miscellaneous

### (*a*) Note to the Executive Secretary of the Convention on Biological Diversity concerning the legal effects of replacing a term used in the Convention in decisions of the Conference of the Parties

Legal effects of replacing the term "indigenous and local communities", as provided in Article 8 (*j*) of the Convention of the on Biological Diversity, by "indigenous peoples and local communities" in decisions of the Conference of the Parties (COP)—Difference between COP decisions and amendments under Article 29 of the Convention—COP decisions that represent one or more single common acts of the Parties could constitute a subsequent agreement regarding the interpretation of a treaty or the application of its provisions within the meaning of Article 31 (3) (*a*) of the Vienna Convention on the Law of Treaties—Legal effects of a change in terminology depend on the intention of the Parties to reach a binding agreement on the interpretation of a treaty

I wish to refer to your letter dated 12 November 2013 to the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel by which you have asked for our legal opinion on the consequences of adopting the term "indigenous peoples and local communities" in decisions of the Conference of the Parties to the Convention on Biological Diversity, instead of the term "indigenous and local communities" which is used in article 8 (*j*) of the Convention. You indicate that the Ad Hoc Open-ended Inter-sessional Working Group on article 8 (*j*) and Related Provisions ("the Working Group") which was established by the Conference of the Parties ("the COP") in 1998 has considered this matter in its meeting held in October 2013 and has requested you to obtain our advice on this question.

You recall that the Permanent Forum on Indigenous Issues, a subsidiary organ of ECOSOC, had recommended to the Parties to the Biological Diversity Convention "to adopt the terminology 'indigenous peoples and local communities' as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention [on Biological Diversity] almost 20 years ago" (E/2013/43-E/C.19/2010/15, paragraph 112).

In the light of this recommendation the Working Group has requested the Executive Secretary of the Biological Diversity Convention to obtain advice from our Office on the legal implications of the use of the term "indigenous peoples and local communities" for the Convention and its Protocols.

I wish to recall that the primary responsibility of the Office of Legal Affairs is to provide formal legal opinions to United Nations offices[,] funds or programmes and to United Nations intergovernmental organs at the formal request of those organs. We can provide legal opinions to Treaty Bodies on questions of international law but that is usually pursuant to a formal and written request from the inter-governmental organs of the Treaty Body concerned. Therefore, we are responding to your questions on an informal basis.

I am also aware that Parties to the Convention may take a different view to the responses we provide. As such, our response should not in any way be construed as the only or definitive view and I would appreciate your conveying this understanding to the Working Group. Subject to that understanding I would like to respond as follows.

Article 8 (*j*) of the Biological Diversity Convention requires that each party "as far as possible and as appropriate …[s]ubject to its national legislation, respect, preserve and

maintain knowledge, innovations and practices of *indigenous and local communities* embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity" (emphasis added).

In this context, your first question is formulated as follows:

> "Article 8 (*j*) of the Convention on Biological Diversity uses the terminology 'indigenous and local communities'. Would the use of the terminology 'indigenous peoples and local communities' in future decisions of the Conference of the Parties and documents under the Convention alter the scope of the Convention? And/or would a change in terminology in future decisions of the Conference of the Parties have the same legal implications or effects as an amendment to Article 8 (*j*) of the Convention or the relevant provisions of its Protocols?"

We wish to point out that there is a specific amendment procedure to the Convention set out in Article 29. Decisions of the COP that use the term "indigenous peoples and local communities" would not constitute an amendment to Article 8 (*j*) unless the amendment procedures outlined in article 29 were followed or unless it is by the unanimous agreement of the Parties. As to whether it would have the "same legal implications or effects as an amendment to article 8(*j*) of the Convention or the relevant provisions of its Protocols" this question is considered in our answers to questions 2 and 3 set out below.

Your second question is formulated as follows:

> "Would a change of terminology in decisions of the Conference of the Parties and documents under the CBD constitute a subsequent agreement on interpretation or application within the context of Article 31, paragraph 3 of the Vienna Convention on the Law of Treaties and therefore have legally binding effect?"

As a preliminary matter, it is noted that, article 31 of the Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention") reflects customary international law (e.g. *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, ICJ Reports 2009*, p. 237, para. 47).

Hence, references to article 31 in the analysis should be read in that context.

Article 31 (3) (*a*) of the Vienna Convention provides that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" should be taken into account in interpreting a treaty.

Article 31 (3) (*b*) further provides that, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into account in interpreting a treaty.

In this connection, we would like to draw your attention to the Report of the International Law Commission for its 65th session (A/68/10) ("Commission"), which contains the "text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-fifth session." ("Draft Conclusions")

The Commission in draft Conclusion 1, paragraph 5 stated that "the interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated respectively, in articles 31 and 32."

In draft Conclusion 2, the Commission stated that, "subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), being objective evidence of the

understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31."

In defining the term "subsequent agreement" the Commission stated that it is "an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of a treaty or the application of its provisions." (draft Conclusion 4, paragraph 1).

The Commission in its commentary on draft Conclusion 2 pointed out that subsequent agreements and subsequent practice are not the only "authentic means of interpretation" and that "analyzing the ordinary means of the text of a treaty" is also such a means. In addition, while both subsequent agreement and practice were "authentic means of interpretation" this did not however imply that these means necessarily possess a conclusive or legally binding effect pointing to the chapeau of article 31 (3) which states that subsequent agreements and subsequent practice shall only be "taken into account" in the interpretation of a treaty.

That said, Parties could, if they so wished reach a binding agreement on the interpretation of a treaty, although it would have to be clear that the Parties considered the interpretation to be binding upon them.

In seeking to define subsequent agreement and subsequent practice the Commission in its commentary on draft Conclusion 4 pointed out that the Vienna Convention did not envisage any particular formal requirements for agreements and practice under article 31 (3) (*a*) and (*b*). As to the difference between these two concepts, the Commission expressed the view that a subsequent agreement must be "reached" and therefore presupposes a single common act by the parties by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions. Subsequent practice under article 31 (3) (*b*) on the other hand, encompasses all relevant forms of subsequent conduct by the parties to a treaty which contribute to the identification of an agreement or understanding of the parties regarding the interpretation of a treaty.

Consequently, in answer to your second question and bearing in mind the views of the Commission, a change of terminology in decisions of the Conference of the Parties that represent one or more single common acts of the Parties, could constitute a subsequent agreement regarding the interpretation of the Convention or the application of its provisions within the meaning of article 31 (3) (*a*). As the Commission points out such decisions would not have legally binding effect unless it was clear that the Parties wished to reach a binding agreement on the interpretation of a treaty.

Your third question is formulated as follows:

> "Is it possible, in decisions and documents under the Convention, to adopt terminology that is different to terminology used in the Convention text (e.g. Article 8(*j*) in this case) without this being a subsequent agreement on interpretation or application within the context of Article 31, paragraph 3 of the Vienna Convention on the Law of Treaties? If the answer to this question is 'yes', how could this be achieved?"

In answer to your third question it is important to draw a distinction between decisions adopted by the Conference of the Parties under the Convention, which as explained above, are common acts by the Parties, on the one hand, and, on the other hand, Convention documents such as reports and proposals by the Secretariat or individual Parties that may be circulated amongst the Parties. In the case of the latter, the use of different terminology would not constitute an agreement within the context of Article 31. In

the case of the former, in order for the Parties to ensure that the use of different terminology in a decision would not be construed as a "subsequent agreement", they should make clear in their decision that the use of different terminology was on an exceptional basis and without prejudice to the terminology used in the Convention and should not be taken into account for purposes of interpreting or applying the Convention.

Finally and as explained above, I would like to note that the points mentioned above do not purport to be an authoritative or definitive interpretation of the relevant provisions of both Vienna Conventions and that other parties may take a different view. Furthermore, the points we raise may be subject to adjustments depending on the specific circumstances of each case.

I hope the responses above would provide some guidance to your questions.

[…]

28 February 2014

### (*b*) Inter-office memorandum to the Director, Outreach Division, Department of Public Information, concerning the collaboration between the United Nations and a not-for profit organization in the selection of films

Possible conflict of interest arising from an outside entity's role in the selection process of a United Nations activity—The provision of advice by an outside entity constitutes the donation of a *pro bono* service—Secretary-General's bulletin ST/SGB/2006/5 sets out the rules concerning the acceptance of *pro bono* donations—The acceptance of pro bono donations requires the Controller's approval pursuant to United Nations Financial Regulations and Rules—An outside entity that contributes funds, goods or services in-connection with a United Nations activity is not necessarily considered a joint organizer of that activity

1. […]
2. […]
3. […]

4. From these discussions, we subsequently became aware that before the United Nations selected "[Title of film]" as the film to be screened at the launch of the United Nations Film Festival, the film producer had independently submitted the film for consideration for screening at the [City] Film Festival, and that [Film entity], as the event organiser, had selected it among the many films to be shown during the [City] Film Festival. Thereafter, [Film entity] advised the United Nations to select the same film for the launch event of the United Nations Film Series. We also note that the selection of any winners at the [City] Film Festival will be made by a jury or through audience-polling, and that [Film entity] would play no role in this selection process.

5. As we indicated during these discussions, we remain concerned that the above-described circumstances, i.e., [Film entity], having already selected "[Title of film]" as one of the films to be screened at the [City] Film Festival in its capacity as the organizer of the film festival, and subsequently advising the United Nations (DPI/OHCHR) to select the same film for the launch of the United Nations Film Series, may expose the United Nations to the risk of criticism that it is endorsing the producers of "[Title of film]"

over the producers of other films that will be screened at the [City] Film Festival. For instance, should "[Title of film]" be eventually selected as a winner of the [City] Film Festival, questions may be raised as to whether the film's association with the United Nations gave it an unfair advantage and whether [Film entity]'s role in advising the Organization on what films—including "[Title of film]"—to include in the United Nations Film Series, created a conflict of interest. This is underscored by the decision to launch the United Nations Film Series at the [City] Film Festival with the screening of "[Title of film]"—an event which is likely to garner this particular film more attention than other entrants.

6. Having noted our concerns, we were informed of your Office's decision to proceed, nevertheless, with the arrangement with [Film entity] and your Office requested OLA for a legal review of the draft agreement between the United Nations (DPI/OHCHR) and [Film entity]. Therefore, and subject to our comments above, we have prepared and attach herewith a markup of the draft agreement incorporating our comments [Enclosure omitted].

7. In this regard, the proposed arrangement with [Film entity] appears to constitute a donation of *pro bono* services to the United Nations since [Film entity] has provided and is providing advice, free of charge, to DPI/OHCHR on the selection of films to be shown during the United Nations Film Festival, including providing the [City] Film Festival the platform to launch the United Nations Film Series. We note that the rules concerning the acceptance of *pro bono*-donations are set out in the Secretary-General's bulletin ST/SGB/2006/5 on "Acceptance of *pro bono* goods and services", which also applies to pro bono donations from NGOs, except as otherwise indicated. Also, pursuant to the United Nations Financial Regulations and Rules, the acceptance of *pro bono* donations requires the Controller's approval. In light of the above, we recommend that DPI ensure that the proposed arrangement would be made in accordance with the provisions of ST/SGB/2006/5 and that when the agreement is finalized, it be submitted to the Controller's Office for approval and signature.

8. Additionally, we note that the section of the [City] Film Festival website that pertains to the launch of the United Nations Film Series states that "…the United Nations and [Film entity] have curated a collection of films and documentaries to be screened around the world". Since DPI approached [Film entity] for only their assistance in selecting what films to be included in the United Nations Film Series, and given that the United Nations Film Series is a United Nations campaign, we believe that this text could create the impression that the United Nations Film Series is actually a joint United Nations and [Film entity] initiative. We recommend that your Office request [Film entity] to make the necessary changes to the text.

9. All our comments on the draft Agreement are set out in the attached markup [Enclosure omitted]. […]

11 June 2014

## B. Legal opinions of the secretariats of intergovernmental organizations related to the United Nations

### 1. International Labour Organization*

(submitted by the Legal Adviser of the International Labour Organization)

#### (*a*) Report on a legal opinion on the legal status of the Transitional Provisions of the Forced Labour Convention, 1930 (No. 29)[1]

Legal status of the transitional provisions of the Forced Labour Convention, 1930 (No. 29)—Acknowledgement of the Expiration of the transitional period by the supervisory bodies and governing organs of the ILO—Inapplicability of the transitional provisions of the Forced Labour Convention, 1930

The Legal Adviser rendered a legal opinion in reply to queries from several Government members concerning the legal status of certain provisions of Convention No. 29, pursuant to which recourse could be had to forced or compulsory labour during a transitional period. Concerning the possible removal of the transitional provisions from the text of Convention No. 29, the Legal Adviser explained that the only way to delete them would be to have a provision on the matter inserted into the main text of the draft Protocol, as the preambular clause recognizing that the transitional period had expired and that the transitional provisions were no longer applicable was only of a declaratory value and not legally binding. Similarly, this could not be achieved by addressing the transitional provisions in a Recommendation. The Legal Adviser explained that, as stated in the Office report, the expiration of the transitional period had been acknowledged by the ILO's supervisory bodies and governing organs. The Committee of Experts on the Application of Conventions and Recommendations had been making comments to this effect, while the Conference withdrew in 2004 Recommendation No. 36—an instrument that set the rules for recourse to forced labour during the transitional period—and the Governing Body adopted in 2010 a new report form for Convention No. 29, which no longer contained questions regarding the transitional provisions. Therefore, no good faith interpretation of the relevant provisions of the Convention, in accordance with their ordinary meaning and in the light of the Convention's object and purpose, could support the view that 84 years after the adoption of Convention No. 29, the transitional provisions remained applicable.

* A number of legal opinions were rendered during the 103rd Session of the International Labour Conference. Only two legal opinions have been selected for reproduction here. The others can be found in the records of the Conference (see http://www.ilo.org/ilc/ILCSessions/103/lang--en/).

[1] See Provisional Record No. 9(rev), 103rd session, Supplementing the Forced Labour Convention, 1930 (No. 29) to address implementation gaps to advance prevention, protection and compensation measures, to effectively achieve the elimination of forced labour, Report of the Committee on Forced Labour.

### (*b*) Report on a legal opinion on the prohibition of forced or compulsory labour as peremptory norm of international law[2]

Characterization of the prohibition of forced or compulsory labour as a peremptory norm by the supervisory bodies of the ILO—Article 53 of the 1969 Vienna Convention on the Law of Treaties

In reply to a question from the Government member of Greece, speaking on behalf of EU Member States, the Legal Adviser indicated that the Commission of Inquiry appointed under article 26 of the ILO Constitution to examine the complaint for non-observance of Convention No. 29 by Myanmar had noted that "a State which supports, instigates, accepts or tolerates forced labour on its territory commits a wrongful act and engages its responsibility for the violation of a peremptory norm of international law". This view was later endorsed by the ILO Committee of Experts which, in its 2007 General Survey on Convention No. 29, stated that the principles embodied in Convention No. 29 "had since been incorporated in various international instruments both universal and regional, and had therefore become a peremptory norm of international law". These important pronouncements of the ILO supervisory bodies had been largely commented and reproduced in academic writings over the past 16 years. In terms of international legal theory, the concept of a peremptory norm (*jus cogens*) can be found in article 53 of the 1969 Vienna Convention on the Law of Treaties, which defines it as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". However, even though the existence of peremptory norms of international law was today generally accepted, identifying the principles which would be qualified as peremptory norms remained a matter of debate. The principles that were most frequently cited as belonging to the category of peremptory norms were the prohibition of slave trade, genocide, piracy, apartheid and war of aggression. Reverting to the question of EU Member States, the Legal Adviser noted that the prohibition of forced labour could be considered a peremptory norm of international law—indeed this had been the position taken by ILO supervisory bodies—and it would be now for the Committee to decide whether it wished to echo that view.

## 2. United Nations Industrial Development Organization

(submitted by the Legal Adviser of the United Nations Industrial Development Organization)

### (*a*) External e-mail message to a Legal Adviser of a United Nations specialized agency concerning the criteria for submission of Agreements/ Arrangements to the Policymaking Organs of the United Nations Industrial Development Organization (UNIDO) for review/approval

Categories of agreements that must be submitted to the Industrial Development Board (IDB) before signature by the Director-General—Possibility that the Director-General, with the approval of the IDB, may enter into rela-

[2] See *ibid*.

TIONS AND AGREEMENTS WITH ORGANIZATIONS IDENTIFIED IN THE GUIDELINES FOR THE RELATIONSHIP OF UNIDO WITH INTERGOVERNMENTAL, GOVERNMENTAL, NON-GOVERNMENTAL AND OTHER ORGANIZATIONS—NO GENERAL CRITERIA FOR SUBMISSION FOR REVIEW AND APPROVAL BY THE GENERAL CONFERENCE OR THE IDB—CASE-BY-CASE DECISION OF THE DIRECTOR-GENERAL UPON THE RECOMMENDATION OF THE LEGAL ADVISOR

1. I refer to your email of [date] concerning the criteria for submission of Agreements/Arrangements to the Policymaking Organs for review/approval.

2. I wish to inform you that the only Agreements which must be submitted for approval to the Industrial Development Board [IBD] (53 Members) before being signed by the Director-General are those defined in articles 18 and 19 of the Constitution of UNIDO,[3] Relationship Agreements with the United Nations and other IGOs [intergovernmental organizations]. In addition, the Host Country Agreement, Supplementary Agreements foreseen therein such as the Social Security Agreement and amendments thereto must be submitted to the General Conference (all UNIDO Members) for review/approval by way of practice.

3. On 12.12.1985, the General Conference of UNIDO by recalling article 19 of the Constitution, adopted decision 41 (Guidelines for the Relationship of UNIDO with Intergovernmental, Governmental, Non-Governmental and Other Organizations). Under these Guidelines, the Director-General, with the approval of the Industrial Development Board, may enter into agreements or establish appropriate relations with certain organizations identified in the Guidelines. I have attached these Guidelines [enclosure omitted].

4. The Member States of UNIDO have yet to establish criteria for determining the financial, strategic, legal, political and other implications of various Agreements/Arrangements in order to determine which of these Agreements/Arrangements should, prior to signature, be submitted for review and approval by the General Conference or IDB.

5. In the absence of such criteria, the Director General decides, on a case-by-case basis and upon the recommendation of the Legal Adviser, which Agreement may need to be submitted to the General Conference for approval in addition to those that have either been specified in the Constitution or are otherwise submitted to the Policymaking

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[3] Article 18 of the Constitution of UNIDO (Relations with the United Nations) stipulates: "The Organization shall be brought into relationship with the United Nations as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations. Any agreement concluded in accordance with Article 63 of the Charter shall require the approval of the Conference, by a two-thirds majority of the Members present and voting, upon the recommendation of the Board." Articles 19 of the Constitution of UNIDO (Relations with other organizations) provides: "1. The Director-General may, with the approval of the Board and subject to guidelines established by the Conference: (*a*) Enter into agreements establishing appropriate relationships with other organizations of the United Nations system and with other intergovernmental and governmental organizations, (*b*) Establish appropriate relations with non-governmental and other organizations the work of which is related to that of the Organization. When establishing such relations with national organizations the Director-General shall consult with the governments concerned. 2. Subject to such agreements and relations, the Director-General may establish working arrangements with such organizations." Article 8, paragraph 3, of the Constitution of UNIDO (General Conference) also lists the following as one of the functions that UNIDO General Conference should exercise: […] (*d*) Have the authority to adopt, by a two-thirds majority of the Members present and voting, conventions or agreements with respect to any matter within the competence of the Organization and to make recommendations to the Members concerning such conventions or agreements; …".

Organs by way of practice, i.e., the Host Country Agreement, the related Supplementary Agreements and amendments to them.

6. As concerns reporting of concluded Agreements to the Policymaking Organs, I may add that the Annual Report of UNIDO has an appendix which lists all Agreements/Arrangements that are concluded in a given year. The exact title of an Agreement, the full names of the Parties, the date and place of its signature will be included in this appendix.

7. My own assessment of the new initiative at [United Nations specialized agency] is that it could have been originated from your supreme Policymaking Organ as to my knowledge the executive heads of United Nations agencies normally have the authority to conclude directly any binding agreement that advances the goals, mandates and interests of their Organizations, with the exception of those Agreements that are subject to the prescriptions of the founding document of the Organization or a subsequent decision of the supreme Policymaking Organ. So any micromanaging initiative which may take away from the authority of the executive head should either originate from the supreme Policymaking Organ or its practicality and constitutionality should be examined by it.

23 January 2014

### (*b*) Internal e-mail message memorandum to a UNIDO Industrial Development Officer concerning partnership with [Company] in a UNIDO project in [State]

Whether UNIDO is bound by the position of the International Court of Justice with regard to human rights issues in the same way as it is by Security Council sanctions—Advisory opinions of the International Court of Justice are not binding but may identify binding rules and principles of international law

1. I wish to refer to your email of [date] concerning the results of a due diligence investigation into the [Company], which was conducted with a view to entering into a business partnership with the company regarding a project in [State]. I note that it has already been decided to move ahead with the project and that the specific question referred to this Office is *whether UNIDO is bound by the position of the International Court of Justice with regard to human rights issues in the same way as it is by Security Council sanctions*. The purpose of this email is to confirm the advice already provided telephonically in the first half of [date].

2. As their name suggests, advisory opinions of the International Court of Justice do not have the same legal force as mandatory sanctions imposed by the Security Council under Chapter VII of the Charter of the United Nations. In examining the jurisprudence of the International Court of Justice, a distinction should be drawn between *judgments* in contentious matters involving States, which are binding on the parties, and *advisory opinions* on questions submitted to the court by international organizations, which are not. With few exceptions, advisory opinions are not binding on the organizations requesting the opinions, it being left to the parties concerned to give effect to the opinions as they consider best. Though advisory opinions are not binding as such, they may still identify rules and principles of international law that are binding on subjects of international law, including international organizations.

11 September 2014

### (*c*) Note to the Permanent Mission of [State] concerning imposition of taxes and duties on UNIDO equipment in [State]

Whether UNIDO has to pay a duty on equipment purchased for a project funded by the Multilateral Fund for the Implementation of the Montreal Protocol—Applicability of Article 21, paragraph 1, of the Constitution of UNIDO on privileges and immunities in the territory of Member States

The Secretariat of the United Nations Industrial Development Organization (UNIDO) presents its compliments to the Permanent Mission of the [State] to UNIDO and has the honour to inform the Permanent Mission that the [State] customs authorities intend to impose a duty of 10% on a shipment of equipment purchased by UNIDO for a project in [State] funded by the Multilateral Fund for the Implementation of the Montreal Protocol. The consignee of the equipment is the Resident Representative of the United Nations Development Programme in [City] (see attached purchase order) [enclosure omitted]. In this regard, the Secretariat is of the opinion that the imposition of taxes and duties on UNIDO is inconsistent with the provisions of article 21, paragraph 1, of the Constitution of the Organization, which reads as follows:

*The Organization shall enjoy in the territory of each of its Members such legal capacity and such privileges and immunities as are necessary for the exercise of its functions and for the fulfillment of its objectives … .*

In view of the foregoing, the Secretariat has the honour to request the Permanent Mission to facilitate the issuance of any permits or authorizations that may be necessary to enable the tax and duty-free importation by UNIDO of equipment, materials and supplies into the [State].

17 October 2014

### (*d*) Internal e-mail message to a UNIDO Unit Chief and Deputy to the Director concerning the status of a [territory] and the [City] in statistical publications

Whether UNIDO should follow the general recommendation of the United Nations with regard to a status of a territory and city—Advice to follow the United Nations policy on the status of the territory in the absence of guidance from the Policymaking Organs of UNIDO

I refer to your email of [date] concerning the status of [territory] and the city of [City] in statistical publications. You asked for my "advice whether there is any other legal issue that prevents [UNIDO] from following the United Nations general recommendations on this matter."

I wish to inform you that the UNIDO Policymaking Organs have yet to consider the status of the [territory] peninsula, and in the absence of a specific guidance by its Policymaking Organs, UNIDO follows the United Nations policies/practices in each case. In the light of the above, it is advisable to follow the guidance contained in the United Nations General Assembly resolution […] on [date] entitled: *Territorial integrity of [State]* and the subsequent memorandum from the Assistant Secretary-General for Legal

Affairs, dated […], which is addressed to the Director, Statistics Division, Department of Economic and Social Affairs.

I also recall that the Office of Legal Affairs of the United Nations—in response to various questions from the United Nations System Organizations concerning [territory]—addressed a confidential email on [date] to the Legal Advisers of United Nations System Organizations informing them that, while the resolution of [date] does not make requests or recommendations specifically addressed to the Secretary-General, the Legal Counsel of the United Nations has taken the view that the Secretary-General, the Secretariat and the United Nations Funds and Programmes should be guided by its terms. In a nutshell, the United Nations acts as if [territory] were still an integral part of [State].

Conclusion: In view of the fact that UNIDO as a specialized agency of the United Nations has already agreed "to co-operate with the United Nations in whatever measure may be necessary to effect the required co-ordination of policies and activities",[4] and in the absence of any guidance from its own Policymaking Organs at this point in time, it is advisable for UNIDO to follow the United Nations policy on the status of [territory].

10 November 2014

## 3. Universal Postal Union

(submitted by the Director of Legal Affairs of the Universal Postal Union)

### Interoffice memorandum to the Directorate of Operations and Technology concerning the potential use of official Universal Postal Union (*UPU*) documents and forms by non-designated operators and other external entitles

Whether entities that are not officially designated by UPU member states to operate postal services ("non-DOs") in accordance with article 1 *bis* paragraph 1.7 of the UPU Constitution are allowed to make use of official UPU documents and forms—Operational benefits and prerogatives related to the exercise of the mandate awarded to DOs by UPU member countries are solely established to fulfill the obligations arising out of the Acts of the Union—Potential conflict with obligations assumed by UPU member states under other treaties resulting from the use of UPU forms by non-DOs—No possibility for non-Dos to

[4] Article 2 (co-ordination and co-operation) of the Relationship Agreement of 17 December 1995 reads as follows: "In its relations with the United Nations, its organs and the agencies of the United Nations system, the Organization [UNIDO] recognizes the coordinating role, as well as the comprehensive responsibilities in promoting economic and social development, of the General Assembly and the Economic and Social Council under the Charter of the United Nations. The Organization, in exercise of its central coordinating role in the field of industrial development, recognizes the need for effective co-ordination and co-operation with the United Nations, its organs and the agencies within the United Nations system. Accordingly, the Organization agrees to co-operate with the United Nations in whatever measure may be necessary to effect the required co-ordination of policies and activities. The Organization agrees further to participate in the work of any United Nations bodies which have been established or may be established for the purpose of facilitating such co-operation and co-ordination, in particular through membership in the Administrative Committee on Co-ordination."

USE ANY OFFICIAL DOCUMENTS OR FORMS UNDER THE CURRENT PROVISIONS CONTAINED IN THE ACTS OF THE UNION, UNLESS THE CURRENT LEGAL FRAMEWORK WAS CHANGED

### *A. Background Information*

1. On 18 November 2013, the Directorate of Operations and Technology requested to the Directorate of Legal Affairs the preparation of a legal analysis on whether entities which are not officially designated by UPU member countries to operate postal services and to fulfil the related obligations arising out of the Acts of the Union countries (hereinafter the "non-DOs") in accordance with article 1 *bis* paragraph 1.7 of the UPU Constitution (hereinafter the "Constitution") are allowed to make use of certain official documents and forms established by the UPU.

2. It may be noted that the aforementioned request follows on specific inquiries which were made by certain UPU member countries and conveyed to the International Bureau of the UPU (hereinafter the "IB") after the conclusion of the 2013.2 POC sessions.

### *B. Preliminary considerations pertaining to the potential use of official UPU documents and forms by non-DOs*

3. On a preliminary note, it needs to be mentioned that the 25th UPU Congress held at Doha in 2012 Instructed the Council of Administration (hereinafter the "CA"), through resolution C 7/2012, to conduct a "full product and service audit of offerings that the UPU has developed and provided", to assess the "risks and benefits of allowing access to specific products and services to external stakeholders in the wider postal sector", to "develop the governance principles and rules applicable to each product or service the UPU wishes to make available to wider postal sector players", and finally to implement such policy and rules during the cycle of 2013–2016 and submit, if necessary, proposals to the 2016 UPU Congress.

4. As a result of the above decision, the CA assigned the overall conduct of this study to its Regulatory Issues Project Group, particularly in order to prepare an action plan concerning possible ways for enhancing the involvement and contribution of wider postal sector players in UPU activities, while at the same time preserving the UPU's actual strengths such as "independence, neutrality and ensuring efficient and acceptable universal postal services of quality at a global level."

5. In that regard, the 25th UPU Congress also acknowledged the increasing demand for the interconnection of wider postal sector players to various UPU services and products, and thereby recognized the imminent need for the UPU to establish a number of governance principles relating to this issue and which should be taken into account by the POC when it carries out its work in this connection.[5]

[5] See document CA C 1 RIPG 2013.1-Doc 3 for further information relating to the various tasks assigned by Congress. In addition, pursuant to resolution C 6/2012, Congress instructed the CA to conduct a study with the aim of producing a definitive policy on the conditions of access for non-DOs to International Mail Processing Centre (IMPC} codes, as well as to other UPU products such as International Postal System applications (IPS, IPS Light}, POST*Net and POST*Clear, in order to manage these access conditions in a properly regulated manner and in the interests of transparency and efficiency.

6. In the light of the above, it can be expected that the relevant questions regarding the possibility for non-DOs to use official UPU documents and forms will be further examined in detail within the framework of the most recent Congress decisions. Nevertheless, while the above-mentioned projects are currently under study and conclusive results may be reasonably expected for the end of the current Congress cycle, it is worth noting that such studies will most likely require a change of certain fundamental provisions within the UPU legal framework. Accordingly, this brief legal assessment is based on the current Acts of the Union and does not take into account any proposals associated with the implementation of actions pursuant to resolution C 7/2012.

### *C. Current status and situation within the UPU legal framework*

#### i. The UPU as an Intergovernmental organization

7. The UPU is an intergovernmental organization and a specialized agency of the United Nations whose membership currently comprises 192 member countries.[6] As such, it contributes to the development of United Nations policies and activities which have a direct link with its mandate and mission as defined in the Constitution.

8. In the light of the above, the UPU is not only set up but also bound by international law and the treaties that constitute it. This is reflected in the Acts of the Union, which establish the basic legal framework of the organization as well as the international postal network of UPU member countries.

9. For that reason and in order to determine whether non-DOs may use official UPU documents and forms, one needs to examine the language contained in the Acts of the Union, consistently with the fundamental public international law tenet of literal interpretation of treaties (article 31 of the Vienna Convention on the Law of Treaties), by which "[a] treaty shall be 'interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty In their context and in the light of its object and purpose."

#### ii. The UPU Constitution and General Regulations

10. The Constitution constitutes the basic act of the UPU and contains its most fundamental principles and organic rules applicable to the organization.

11. As mentioned above, countries that fulfil the requirements specified in article 2 of the Constitution can become members to the Union. As such, no private company or individual governmental entity (on its own) can hold any status of membership.

12. Nevertheless, article 1 *bis* paragraph 1.7 of the Constitution provides the definition of a designated operator, namely "any governmental or non-governmental entity officially designated by the member country to operate postal services and to fulfil the related obligations arising out of the Acts of the Union on its territory."[7] Accordingly, and despite the respective member country being the actual member and signatory to the Acts of the Union, designated operators (hereinafter the "DOs") are mandated to fulfil all or part of

[6] In more specific terms, 190 sovereign States as well as two non-self-governing territories to which earlier Congresses had granted the status of member countries.

[7] The same definition can be found in article 2.1.9 of the Universal Postal Convention.

the obligations arising out of the Acts on behalf of their respective member countries, regardless of the specific setup within a given member country (whereby some DOs may operate as private companies while others constitute a governmental entity belonging to a member country's public sector).

13. Consequently, even though postal markets may have already been liberalized in many UPU member countries, the intergovernmental status of the UPU implies that DOs are statutorily bound by the directives, instructions of their member country governments, as well as the related obligations arising out of the Acts of the Union. Further, only through the membership of a member country and the legal mandate entrusted in them as DOs can these entities enjoy certain benefits and prerogatives awarded to them in the exercise of the aforementioned mandate.

14. Such benefits and prerogatives would comprise a number of streamlined procedures applicable to postal operations and which are solely granted as part of a member country's overall obligation to satisfy, as indicated in article 1 *bis* paragraph 1.1 of the Constitution, certain social and economic objectives of that member country by ensuring the collection, sorting, transmission and delivery of postal items. Those procedures may for instance include simplified custom procedures, usage of certain technological systems and tools provided by the International Bureau of the UPU, development cooperation assistance for developing countries, emergency and disaster relief funds, development of common postal standards and exercise of freedom of transit obligations.

15. For informational purposes, it may be noted that the UPU General Regulations (hereinafter the "Gen Regs") define in article 118 the aim of the UPU Consultative Committee (hereinafter the "CC") "to represent the interests of the wider international postal sector, and to provide a framework for effective dialogue between stakeholders." The Gen Regs also determine in article 121 that the functions of the CC shall for instance comprise the examination of documents and reports from the UPU governing bodies; the preparation of studies concerning issues of importance to CC members; the consideration of issues affecting the postal services sector; and the provision of general input and recommendations to the UPU governing bodies on certain issues.

16. However, as can be seen from the above, nowhere in these international treaties does one find a possibility for non-DOs to make use of official UPU documents and forms or partake in the enjoyment of the benefits and prerogatives statutorily accorded to DOs for the necessary fulfilment of obligations arising from the Acts of the Union.

### iii. The UPU Convention and Regulations

17. Similarly to the Constitution, the Universal Postal Convention (hereinafter the "Convention") provides, in its article 1.1.9 for the definition of a DO. This definition is further detailed in article 2 of the Convention, whereby "[m]ember countries shall notify the International Bureau […] of the name and address of the governmental body responsible for overseeing postal affairs. […] member countries shall also provide the International Bureau with the name and address of the operator or operators officially designated to operate postal services and to fulfil the obligations arising from the Acts of the Union on their territory."

18. Following the above provision, it is worth reiterating that the operation of all international postal services (whose scope is determined by the Acts of the Union), as well as the fulfilment of the various obligations arising from those Acts shall be guaranteed

by the member country and executed by its respective DO(s). These obligations relate to the various basic and supplementary postal services established and regulated by member countries, as well as a wide range of legal and operational aspects, including without limitation inquiries, liability, quality of service standards and remuneration conditions which a member country and its DO(s) shall respect in order to be able to comply with the international treaty obligations reflected in the Acts of the Union.

19. Moreover, the Convention refers in multiple occasions[8] to the Letter Post or Parcel Post Regulations (hereinafter the "LPR" or "PPR" respectively), which stipulate more detailed provisions concerning the description of postal services as well as applicable charges and operational requirements.[9] Within this context, the LPR and the PPR also define the relevant official UPU documents and forms to be used within the international postal network. Needless to say, these official UPU documents and forms are fully integrated into the respective UPU Regulations and form an intrinsic part of the legal framework of the Union.[10]

20. This understanding is clearly corroborated by articles RL 273 (of the LPR), RC 220 (of the PPR) and RP 1501 (of the Postal Payment Services Regulations), which unambiguously define a number of obligations and procedures relating to the preparation and use of forms by DOs.

21. Furthermore, nowhere in the LPR or PPR does one find rules that would allow (i) for the provision of postal services by non-DOs; or (ii) for the use of official UPU documents and forms by non-DOs, except as specifically authorized and referred to in the case of entities indirectly associated with the conveyance and processing of postal items, such as airlines and customs authorities. In fact, as per the provisions of the Constitution and the Convention, any such postal benefits, prerogatives and obligations are to be solely enjoyed, guaranteed and/or compiled with by UPU member countries and their DOs.

22. As a result, due to the specific status of the UPU as an intergovernmental organization (and unless otherwise decided by Congress at a later stage), only UPU member countries and their DOs (as well as the indirectly associated entitles referred to in paragraph 21 above) are supposed to make use of official UPU documents and forms and benefit from any logistical or operational synergies related thereto—yet again, this stems from a fundamental need to ensure fulfilment of the international treaty obligations arising out of the Acts of the Union.

### iv. Related International treaties and general comparative considerations

23. The above considerations are supported by other international treaties to which the UPU has an indirect association. In this regard, the International Convention

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[8] See for example article 14 of the Convention.

[9] This is also reflected in article 22.3 of the Constitution, which states that the "Universal Postal Convention, the Letter Post Regulations and the Parcel Post Regulations shall embody the rules applicable throughout the International postal service and the provisions concerning the letter-post and postal parcels services." Likewise for the Regulations applicable to postal payment services, as indicated In article 22.4 of the Constitution.

[10] A cursory glance at the LPR, the PPR and the Postal Payment Services Regulations reveals, as of this date, at least 125 official UPU forms to be used exclusively by UPU member countries and their DOs In the operation of international postal services.

on the Simplification and Harmonization of Customs Procedures (hereinafter the "Kyoto Convention"), an international treaty administered by the World Customs Organization, pursues the objective of achieving a high degree of simplification and harmonization of Contracting Parties' [i.e., member countries] customs procedures with a view to effectively contributing to the development of international trade and of other international exchanges.[11]

24. Likewise, the Kyoto Convention also defines, within its specific Annex J—Chapter 2 "Postal traffic", the term "postal service" as "[…] a public or private body authorized by the government to provide the international services governed by the Acts of the Universal Postal Union currently in force", which is perfectly in line with the definition of DO as provided for in the Acts of the Union. In addition, the same chapter of the Kyoto Convention provides for a simplified customs clearance procedure, which in consequence may only be used by DOs of UPU member countries.

25. Accordingly, as only DOs may benefit from the simplified procedures contained within the Kyoto Convention, any initiative to allow non-DOs to use the respective official UPU forms (such as the CN 22/23 forms described in the UPU Regulations) would constitute a deviation from Kyoto Convention provisions and a breach of the international commitments assumed by member countries.

26. Furthermore, with a view to the exclusiveness of the Acts of the Union, it needs to be noted that virtually all other international treaties are constructed in a similar way as far as intergovernmental organizations are concerned. Indeed, in cases where the involvement of private sector players is envisaged, a specific mention in the text of the treaty text is normally deemed necessary by Contracting States.

27. As an example, the Kyoto Protocol to the United Nations Framework Convention on Climate Change (hereinafter the "Kyoto Protocol") sets binding obligations on industrialized countries to reduce greenhouse gas (hereinafter "GHG") emissions. In this regard, several industrialized countries (generally considered as the actors responsible for the highest volumes of GHG emissions in the atmosphere), have agreed to legally binding limitations in their own GHG emissions. However, given the critical importance of involving the private sector in any effort to mitigate climate change, the Kyoto Protocol formally refers to private sector players into its operationalization of the three flexible mechanisms contained In the Kyoto Protocol.[12] Thus, the Kyoto Protocol allows various tasks to be performed by private actors during the CDM and JI project cycles, and contemplates their possible participation under article 17 of the Protocol on IET.

28. As already explained in paragraphs 15 and 16 above, similarities concerning the possible involvement of the private sector exist in comparison to the UPU, but only in so far as this involvement is limited to the participation of private sector players within the CC (or more broadly through the *ad hoc* participation of observers in meetings of the UPU bodies).

29. Even so, the possibility above should not be confounded with the exclusive statutory role of DOs which, despite being in some cases privately-owned entities operating in liberalized postal markets are nonetheless mandated by their respective member country

[11] The Kyoto Convention was originally adopted in 1974 and was subsequently revised in 1999; the revised Kyoto Convention came into force in 2006.

[12] Namely the Joint Implementation (JI) mechanism, the Clean Development Mechanism (COM) and the International Emissions Trading (IET) mechanism.

governments to either fulfil the entirety of the obligations arising out of the Acts of the Union or at least undertake activities on the operational side of those obligations. In any case, the situation within the UPU, as a technical Intergovernmental organization of the United Nations system with a definite set of rules agreed by its member countries, cannot be equated with other more permissive international legal frameworks such as the Kyoto Protocol.

### *D. Conclusions*

30. In summary, the following conclusions may be drawn from the brief considerations above:

– Under the current provisions contained in the Acts of the Union, non-DOs cannot make use of any official UPU documents and forms. In logical terms, this would also apply to any private subsidiary entities of a DO, to the extent that such entitles are not encompassed in the scope of official designation as DO by a UPU member country;

– Any operational benefits and prerogatives pertaining to the exercise of the mandate awarded to DOs by UPU member countries are solely established for the fulfilment of the obligations arising out of the Acts of the Union;

– In the light of the above and taking into account the current legal framework and the most recent Congress decisions (particularly resolutions C 6/2012 and C 7/2012), any future changes involving the possibility for non-DOs to use official UPU documents and forms shall be subject to a detailed study conducted by UPU member countries and the governing bodies of the Union.

[…]

28 February 2014