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**FUNDAMENTAL AGREEMENTS
OF INTERSPUTNIK:
TOWARDS CONSENSUS**

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The texts of fundamental agreements to serve as a legal basis for INTERSPUTNIK on the way to become a commercial organization are about to be finalized.

The 10th meeting of INTERSPUTNIK's Committee of Plenipotentiaries held in Budapest, Hungary, in May 1995 decided to recommend to the Board to approve the above agreements and initiate, under national laws of INTERSPUTNIK's members, the procedure of coordinating these draft documents with Departments concerned and submitting them to relevant governmental bodies in order to obtain, by mid-96, authorization to sign them.

While finalizing the wording of the Operating Agreement, INTERSPUTNIK had to resolve and size up a number of legal problems, which will permit the legal basis of this international organization to be better understood in the future.

First of all, drafting of the Operating Agreement made it necessary to adequately modify and amend the Agreement on the Establishment of the INTERSPUTNIK International System and Organization of Space Communications of November 15, 1971, hereinafter referred to as the Basic Agreement.¹⁷

As agreed, amendments to the Basic Agreement are to be approved simultaneously with the signing of the Operating Agreement to avoid any contradictions between both documents.

An interesting legal problem appeared with regard to the future destiny of those INTERSPUTNIK Members who, for various reasons, will neither approve amendments to the Basic Agreement nor sign the Operating Agreement. Such a situation is quite possible because Article 24 of the Basic Agreement in force reads: "an amendment which has come into force shall be binding on the other Contracting Parties after their acceptance of such amendment". In other words, some Members may remain in the Organization without being bound by amendments to the Basic Agreement. A proposal that these Members should be considered withdrawn was not supported by most of the Organization's Members.

Thus, Poland has suggested on October 14, 1994 that the Basic and Operating Agreements should stipulate that in order to become a Member, one should sign both documents. Given this provision, the existing Members of the Organization would have to determine, within a certain period of time, their attitude to the Operating Agreement and the amendments to the Basic Agreement. Any Member of the Organization would be regarded as withdrawn if it does not sign the documents by a fixed date.

German proposals of January 10, 1995 feature certain flexibility. In parallel with the requirement to make provisions of Article 24 of the Basic Agreement tougher²¹, Germany found it advisable to provide for so called "dual membership".

It was this proposal that was supported after careful examination. The 5th meeting of the Working Group for the elaboration of the Operating Agreement held in Moscow on September 12-14, 1994 made an important decision that "any Member of the Organization that would not accept the amendments under discussion would continue its membership in the Organization regardless of the fact whether it signs the Operating Agreement or not"²³.

This case illustrates one of the most difficult problems in international law which arises out of the fact that agreements pertaining to one and the same issue are concluded one after another. Modern world contractual practice favours the right of the parties to the Basic Agreement to conclude a new agreement and consequently modify the previous one. But this modification will cover relationship only between parties of the later agreements. The Basic Agreement will remain in force between the countries that do not become parties to the new agreement. To substantiate this practice, we may mention such multilateral international conventions as the Universal Postal Convention, Berne Convention for the Protection of Literary and Artistic Works, Paris Convention for the Protection of Industrial Property, which have been revised several times at diplomatic conferences held from time to time. Each new version of the conventions differed from the initial wording and became a new international regulatory document. Neither did coincide the circle of initial parties with the parties to successively revised versions. However, this set of circumstances has not affected the action of the Universal Postal Union, Berne Union for the Protection of the rights of authors over their literary and artistic works and Union for the protection of industrial property. Similar problems are faced by the ITU due to regular revisions of their constructive documents and the Radio Regulations.

Modern contractual practice gives an answer on how the relationship between the parties to the earlier and the later agreements might be regulated. A revised agreement is binding only upon its members, whereas relations between any member country of the revised agreement and any member country of the initial one are covered by provisions of the initial agreement.

Earlier and later versions of the convention were correlated according to approved practice i.e. accession to the later agreement was regarded (provided that no special statements had been made) as accession to all previous versions of the convention⁴⁷. The problem of application of the successive treaties relating to the same subject-matter was covered by paragraph 4(b), Article 30 of the Vienna Convention on the Law of Treaties of 1969 which provides that "when the parties to the later treaty do not include all the parties to the earlier one:.....(b) as between a State party to both treaties and a State party to only one of the treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations". Vienna Convention on the Law of Treaties of 1969. If we suppose that in the near future each

INTERSPUTNIK Member accedes to the revised Basic Agreement of 1971, the current Basic Agreement will be considered suspended according to Article 59 of the Vienna Convention of 1969 and all provisional legal problems will automatically fall away.

Given the modification of the Basic Agreement, a new document - the Protocol on Amendments to the Basic Agreement- was decided to be drawn up, as proposed by Bulgaria and Poland. This decision was the most optimum one to meet the "dual" legal status of INTERSPUTNIK's Members.

After the amendments to the Basic Agreement have been approved, a number of problems will appear and will have to be resolved by all INTERSPUTNIK's Members irrespective of their legal status. For instance, regular sessions of the INTERSPUTNIK Board will be held at least once in two years while the current Basic Agreement provides for annual sessions. Another example: decisions of the Board are considered approved, according to the current Basic Agreement, if they are voted for by at least two thirds of all the Members of the Board (para 7, Art. 12), whereas the amendment to this Article takes into account the present and voting Members of the Organization. Moreover, the current Basic Agreement stipulates that "the decisions of the Board will not be binding on those Members who did not favour their adoption and submitted their reservations in writing", whereas the Protocol on Amendments makes decisions of the Board binding on all Members of the Organization

In general, the amendments listed in the Protocol to the Basic Agreement result from the Operating Agreement to be concluded. This refers to Articles 3, 4(2), 5, 11 (1,4), 12 (3,6,7,10), 13 (3), 14, 15, 16, 17, 18 (2), 20, 22, 24 and 26 of the Basic Agreement. Let us dwell upon some amendments contained in the Protocol.

Following the recommendation of the Operations Committee, the Board may decide to relocate the Organization's headquarters to one of the member countries (amendments to Art.3). The Basic Agreement in force does not include this provision. According to the Protocol, the Organization will expand its terms of reference with regard to the lease of the space segment (amendment to para 2, Art.4 and Art.5). The Operations Committee - a working body of INTERSPUTNIK - will be included in the structure of the Organization (amendment to para 1, Art. 4); in parallel with the Board, this Committee will be granted the right to establish auxiliary bodies (amendment to para 4, Art. 11); since the day-to-day activity will be covered by the Operations Committee, the Board's sessions are not planned to be held so often (amendment to para 3, Art. 12) and the Board's terms of reference will be limited within the margin of the most important lines of general policy and long-term goals of the Organization (amendments to para 6, Art. 12). Establishment of the Operations Committee logically results in a detailed definition of its functions to be included in the Basic Agreement (amendment to Art. 12) as well as additional functions of the Director General (amendments to Art.

13). According to the Protocol on Amendments, the Auditing Commission will be elected by and be responsible to the Operations Committee, instead of the Board (amendment to Art. 14).

The amendment regarding the establishment of the share capital and purposes of its allocation is also significant (amendment to Art. 15) and a detailed procedure of forming the share capital is given in the Operating Agreement (Arts 6-9). Since the Operating Agreement regulates various aspects of using space segments of the Organization (Arts. 10-18), the Basic Agreement is proposed to be modified accordingly (amendments to Art. 16).

Much importance is attached to the issue of making the Basic and Operating Agreements match each other, the documents being a legal basis of INTERSPUTNIK under transformation. This issue has been covered by a broad circle of amendments concerning the membership of Members and Signatories, their accession to and withdrawal from the Organization. Thus, according to an amendment to the Basic Agreement, each Member signs the Operating Agreement itself or appoints a legal telecommunications entity (Signatory) to sign the Operating Agreement. The Protocol on Amendments provides for the expansion of Art. 22 of the Basic Agreement by way of adding a new and important provision that "no state may continue to be or become a party hereto unless it or a telecommunications entity appointed by it sign the Operating Agreement".

The withdrawal of a Member of the Organization from INTERSPUTNIK entails simultaneous withdrawal of any Signatory appointed by this Member. And if it is a Signatory that withdraws from the Organization, a Member is also considered withdrawn (amendments to Art. 17) unless it appoints a new Signatory to the Operating Agreement or acts itself in the capacity of a Signatory. For us, it is important to point out an indissoluble connection of memberships in the Basic and Operating Agreements. It is the Operating Agreement that embodies practical implementation of the goals and principles of the Basic Agreement. In this light we would commit an error if we say that the governing body of the Organization - the Board - will weaken for the day-to-day functions will pass over to the Operations Committee. The point is that the whole Organization will become stronger, the role and prestige of all its bodies, including the Director General, will enhance.

In this connection, a proposal of Germany aimed at establishing a Community of Signatories within the framework of the Operating Agreement deserves particular interest. This Community of Signatories will be a kind of a private regulatory consortium having the status of a legal entity with all the ensuing consequences: the right to conclude contracts, purchase and alienate movable property and real estate, act as a plaintiff and defendant before the court. In this case the Operations Committee will perform commercial guidance of the Community and the Director General will be an external representative. According to Germany, this is the way to separate the Operating

Agreement from the Basic Agreement. The proposal of Germany concerning the Community of Signatories goes out of the framework of the amendments to the Basic Agreement and practically implies a new concept of INTERSPUTNIK's modernization.

It should be noted that INTERSPUTNIK, like other international organizations of space communications, represents the emergence of international organizations of a completely new kind which perform operational/commercial functions and possess their own space segment. These organizations are subjects of international law. However, if necessary they make deals covered by private law. Obviously, INTERSPUTNIK's opportunities in breaking traditional practice of international organizations of space communications require careful examination. At the same time, in May 1995 the INTERSPUTNIK Committee of Plenipotentiaries agreed to the recommendation of the legal experts' Working Group to enhance the responsibility and independence of the Signatories with regard to the operation of the space segment; in this connection Germany's proposal of Germany to establish the institution of the Community of Signatories as an independent legal entity in the course of further harmonization of the Basic and Operating Agreements was decided to be taken into account. Germany is expected to additionally clarify its proposal.

While discussing the draft Operating Agreement at the meetings of the Committee of Plenipotentiaries and the Working Group on this Agreement in 1993-1995, different ideas were expressed regarding the definition the "Member of the Operations Committee".

According to Art. 1(4) of the last draft version of the Operating Agreement, the "Member of the Committee" means a Signatory to the Operating Agreement representing in the Committee one or several Members of the Organization or Signatories or a group of Signatories formed as set forth in Article 4 of this Agreement". Article 4 of the draft reads that the Committee is composed of 17 members including 13 members representing the Signatories having the greatest investment share in the Share Capital and four members of the Signatories not represented in the Committee and elected by the Board without taking into account their investment shares in order to observe the principle of fair geographic representation.

Each Member of the Committee has a weighted vote equal to its investment share in the Capital. The weight of vote of each Member of the Committee shall not exceed 25% of the total number of weighted votes.

Decisions are approved by a qualified majority if they are voted for by at least half of the present and voting Members of the Committee having an aggregate weight of votes of at least 2/3 of the total number of weighted votes of all Members of the Committee (para 6, Art.5). It is important that any Signatory being a non-member of the Committee may take part in the meetings of the Committee as an observer (para 2 Art.5).

When elaborating the Operating Agreement, no objections were made against the right of any Member of the Organization to appoint several Signatories. This provision was included in the text of the Agreement. However, no consensus was reached with regard to the idea whether only one or more independent Members of the Committee may represent any member-country of the Organization.

The comments and proposals made by the Cuban Administration on January 12, 1995 following the protocols of the first and second experts' meeting on the Operating Agreement in 1993 strongly support the idea that para 4, Art.1 and para 3, Art.4 should include the provision that each member country might appoint only one Member of the Committee. In doing so, each Member of the Organization must give written notice to the Depository, Director General and the Members of the Organization from the Signatory that will represent its country in the Committee.

The Cuban Administration proposed that the Agreement should embody a provision that a non-member of the Committee may be represented in the Committee by way of concluding a special representation agreement with a Member of the Committee. The Director General of INTERSPUTNIK is proposed to be the Depository of this agreement. This proposition was received with interest by other Members of the Organization.

Nevertheless, most of the Organization's Members think that the only criterion allowing the membership in the Committee should be the Signatory's investment share in the Share Capital. This means that if several Signatories are appointed by one and the same Member of the Organization and have a weight of vote "inside" the first thirteen most "heavy" votes each Signatory has a full right to become a plenipotentiary Member of the Operations Committee.

Legally, the Operating Agreement is an inter-departmental international treaty. The treaties of this kind formalize scientific and technological cooperation between states in exploring and using space and are an obligatory source of international public law for the parties which sign them. It makes no difference for international law who signs the agreement, the main thing is that the signing party - whether it is a state body or a non-governmental organization - should be duly authorized by the government to perform adequate functions. That is why Art.28 of the Protocol on Amendments reads: "each Member of the Organization shall sign the Operating Agreement or appoint a telecommunications entity (Signatory) under its jurisdiction to sign the Operating Agreement". In doing so, the Member of the Organization gives notice in writing to the Depositories of the Basic and Operating Agreements regarding a Signatory appointed by this Member.

Conclusion

The paper is dedicated to the analyses of the legal problems experienced by INTERSPUTNIK in the process of its transformation into commercial organization.^{5/} This means the elaboration of the INTERSPUTNIK Operating Agreement and the need to substantially modify the existing Basic Agreement of 1971. When INTELSAT and INMARSAT Organizations were established both agreements were signed simultaneously and this simplify the legal situations.

As regards INTERSPUTNIK, more than a 2-decade gap has taken place between signing the Basic Agreement on 1971 and expected signing of Operating Agreement on 1996. Given the above, a number of complicated legal problems have appeared that did not affect either INTELSAT or INMARSAT. While discussing these problems INTELSAT and INMARSAT's experience was taken into account. At the same time, a number of new legal problems were experienced, which are not covered by INTELSAT's and INMARSAT's agreements and practice of their application. Just for these reasons the authors of this paper hope that the analyses of all these legal problems may be of interest for space law experts and scholars.

Notes

1/. Amendments and modifications to the Basic Agreement and the Operating Agreement are discussed at the Working Group for the elaboration of the Operating Agreement established by the Board according to para 4, Art. of the Basic Agreement in force.

2/. See Protocol of the 5th meeting on the Operating Agreement, Moscow, September 1994, p.9

3/. Protocol of the 5th meeting on the Operating Agreement, Moscow, September 1994, page 2.

4/. See Kalamkaryan. R. Time Factor on the Law of Treaties. Moscow, 1989 pp. 76-174 (in russian).

5/. See Zhukov G. and Veshchunov V. INTERSPUTNIK: Developing legal basis of activity , in proceedings of the 37 Colloquium on the Law of Outer Space, 1994, p.63-74.