

Establishment of a Specialized Tribunal under the International Telecommunication Union to Adjudicate Disputes as a Means to Improve the Efficiency of the Management of the Radio Frequency Spectrum

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The radio frequency spectrum of the geostationary satellite orbit, being an integral part of outer space, is a unique limited natural resource, which is about to be exhausted. In this connection it is important to make sure that it is used based on equality of all states without exception. The International Telecommunication Union (ITU) is a focal point of international cooperation of various states in this field. Its Radiocommunication Sector (ITU-R) plays a vital role in the global management of the radio frequency spectrum aiming to ensure their rational, equitable, efficient and economical use and deals with quite a lot of disputes involving administrations of the ITU member states and satellite operators. Such disputes fall under the jurisdiction of the Radio Regulations Board (Board). Notwithstanding the fact that the Board promptly makes independent and competent decisions, such administrative treatment of disputes has a number of disadvantages, which are avoided if disputes are adjudicated by other jurisdictional bodies through arbitration. However, none of the existing bodies is specialized enough. This is why a specialized tribunal under the ITU with sufficient authority based on the principles of justice to adjudicate disputes related to the radio frequency spectrum will help improve the efficiency of the use of such resources, assure equal protection of the interests of all states and become an extra guarantee that international treaties in the field of space activity are observed. Taking into account that nearly all modern states are members

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of the ITU and that the ITU is a reputed international organization unconditionally recognized the world over and having a flawless reputation, all this will help to have disputes adjudicated by this new tribunal.

I. Concept of the Radio Frequency Spectrum

The radio frequency spectrum of the geostationary satellite orbit located at an altitude of approximately 36,000 kilometers (“radio frequency spectrum”) is an integral part of outer space. In this connection, management of the radio frequency spectrum falls within the purview of the 1967 Outer Space Treaty.¹ Article I of the Treaty reads that the “use of outer space shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind”. It will be recalled that the radio frequency spectrum is widely used by a large and growing number of services such as fixed, mobile, broadcasting, amateur, space research, emergency telecommunications, meteorology, global positioning systems, environmental monitoring, and communication services that ensure safety of life on land, at sea and in the skies.²

At the same time, the radio frequency spectrum is a unique limited natural resource, which is about to be exhausted. In this connection it is important to make sure that it is used, as set forth in the 1967 Outer Space Treaty, by all States without discrimination of any kind, on the basis of equality and in accordance with international law.

II. Role of the International Telecommunication Union in the Management of the Radio Frequency Spectrum

The International Telecommunication Union (ITU), which is the United Nations specialized agency for information and communication technologies, is the focal point of international cooperation and public-private partnership in this field and currently unites 193 countries and over 700 private sector entities and academic institutions.³

The ITU is made up of three sectors covering specific areas of information and communication technologies activity: Radiocommunication (ITU-R), Telecommunication Standardization (ITU-T), and Telecommunication Development (ITU-D).

The kingpin of the global management of the radio frequency spectrum is the ITU-R, which aims at ensuring its rational, equitable, efficient and

1 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, January 27, 1967.

2 ITU website: <www.itu.int/ITU-R/index.asp?category=information&rlink=itur-welcome&lang=en>.

3 ITU website: <www.itu.int/en/about/Pages/default.aspx>.

economical use.⁴ Today, the Radiocommunication Sector has 256 members including administrations of all ITU member states, entities and organizations dealing with radiocommunications. Also, 15 academic institutions and 3 associates take part in its activity.⁵

III. Disputes Involving the Radio Frequency Spectrum

The scarcity of the radio frequency spectrum and the existing high demand for such spectrum, primarily due to an increase in commercial uses of the geostationary and other satellite orbits, have inevitably resulted in many disputes related to the status of frequency assignments, coordination, notification and recording of satellite networks, and other issues concerning the use of the radio frequency spectrum. Parties to such disputes may be administrations of the member states of the ITU or recognized satellite operators (acting though their notifying administrations), while the adjudication of the disputes falls under the jurisdiction of the Radio Regulations Board (“Board”)⁶, which is one of the ITU-R working bodies.

It is beyond any doubt that an extremely important category of the disputes are cases of unresolved interference investigations carried out by the Radiocommunication Bureau (“Bureau”)⁷, being the executive arm of the Radiocommunication Sector, at the request of one or more administrations, if a given problem remains unresolved either by the parties concerned or though the Bureau’s efforts.

Also, the Board addresses matters referred by the Bureau, wherever such matters cannot be resolved through application of the Radio Regulations and Rules of Procedure; and considers appeals against decisions made by the Radiocommunication Bureau regarding frequency assignments.

Besides the functions mentioned above, the Board approves Rules of Procedure used by the Radiocommunication Bureau in applying the provisions of the Radio Regulations and registering frequency assignments made by the ITU member states, nearly officially interprets the ITU’s rules and resolutions, and provides advice to Radiocommunication Conferences and Radiocommunication Assemblies, thus participating in drafting new ITU resolutions, which in certain cases help resolve the disputes in question.

Thus, the terms of reference of the Radio Regulations Board are wide enough for the Board to address a large number of disputes related to the use of the

4 No. 78, Article 12, Chapter II - Radiocommunication Sector, Constitution of the ITU.

5 ITU website: <www.itu.int/online/mm/scripts/mm.list?_search=SEC&_language-id=1>.

6 No. 82, Article 12, Chapter II - Radiocommunication Sector, Constitution of the ITU.

7 No. 85, Article 12, Chapter II - Radiocommunication Sector, Constitution of the ITU.

radio frequency spectrum and application of the ITU Constitution, the ITU Convention, and the ITU Administrative Regulations including the Radio Regulations.

IV. Current Dispute Resolution Procedure – Pros and Cons

The Board is a collegiate body, which currently consists of twelve skilled experts from various countries thoroughly qualified in the field of radiocommunication and possessing practical experience in the assignment and utilization of frequencies. They are familiar with geographic, economic and demographic conditions within a particular area of the world.⁸ Board members are elected at the ITU Plenipotentiary Conference and perform their duties independently and on a part-time basis. Such membership guarantees that the Board makes competent, substantiated and independent decisions. As a rule, members of the Board meet three or even four times a year. This helps make decisions promptly. Notwithstanding the above, such procedure of adjudication has a number of disadvantages.

In the first place, by virtue of its specific nature the Board only treats disputes administratively, i.e. it adjudicates disputes in the absence of the parties concerned. As a result, it may happen that the object and all circumstances of a dispute are only examined in part. Moreover, preventing parties from personally taking part in the adjudication makes a dispute non-adversary while the adversary character is an important principle of justice.

Secondly, decisions of the Board can be revised by World Radiocommunication Conferences (WRC) making them non-final. The fact that the WRCs are convened every three to four years to consider issues of worldwide nature within its competence and related to its agenda may put a final decision in a case “in limbo” for a long period of time.

Thirdly, decisions of the Board are recommendatory and, thus, non-binding. Therefore, their fulfillment is contingent on the good will and preparedness for cooperation on the part of administrations of the ITU member states and satellite operators.

And finally, the Board does not consider, cannot and must not consider any recovery claims, which may be inseparable from the Board’s decisions in relevant cases. It is evident however that a number of disputes, in the first place, related to causing harmful interference entail economic losses. For example, parties to a dispute incur extra costs associated with monitoring observations and performing measurements to confirm the origin of interfering signals, lose profits from the usual commercial operation of their satellite systems and may even bear losses in the form of penalties or other sanctions. In terms of assessing potential damages it is important that satellite systems are used not only commercially but also in emergencies, transportation systems, power networks,

8 No. 93, Article 12, Chapter II - Radiocommunication Sector, Constitution of the ITU.

education, environmental management, and for other government needs. This is why any harmful interference to satellite networks needs to be resolved and eliminated on a priority basis and any such harmful interference continuing for long term is a matter of serious concern.

It is obvious that any other breaches of the provisions of the ITU Radio Regulations or their undue observance including intentional procrastination of international frequency coordination, just like undue fulfillment of the recommendations of the Board or late response to messages from the Radiocommunication Bureau, impede efficient use of the radio frequency spectrum have an adverse impact on all those dealing with information and communication technologies.

It is extremely complicated to determine how reasonable a recovery claim is and if the claimed damages are commensurate with a given breach. To do so, one not only needs to be well qualified in the field of law but also in the field of information and communication technologies, including radiocommunications. All the above-mentioned defects of adjudication by the Radio Regulations Board can be avoided if disputes are adjudicated by other jurisdictional bodies.

V. Alternative Means of Dispute Resolution

It should be noted that today there exist a range of jurisdictional bodies, which can potentially adjudicate disputes related to space activities and, specifically, the geostationary satellite orbit or geostationary satellites. However, part of the existing dispute resolution mechanisms, such as the International Court of Justice and the arbitration procedures as specified in Article 41 of the ITU Convention, the Optional Protocol on the Compulsory Settlement of Disputes Relating to ITU regulatory regime, the 1972 Convention on International Liability for Damages Caused by Space Objects, the founding convention of the European Space Agency, are not available to private parties. The functions of jurisdictional bodies having potential for disputes not only among states, but also for disputes among international organizations and private entities, can be performed by the Permanent Court of Arbitration at The Hague using the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities, and other international arbitration tribunals. However, none of the existing bodies is specialized enough in the field of the radio frequency spectrum to adjudicate this complex and nuanced category of disputes.

VI. Significance of the Establishment of a Specialized Tribunal

Adjudication of disputes covered by the terms of reference of the ITU, and, specifically, related to the use of the radiofrequency spectrum, by a specialized tribunal under the ITU will help keep all the advantages of their consideration by the Board and add the advantages of adjudication through arbitration.

Taking into account that nearly all modern states are members of the ITU and that the ITU is a reputed international organization unconditionally recognized

the world over and having a flawless reputation, all this will help to have disputes adjudicated by this new tribunal. The ITU may well make sure that arbitral agreements are entered into to refer the disputes in question to an arbitration institution under that international organization, at least initially. Then all interested parties will understand that there is no better body to settle a dispute of this kind.

This is why a specialized tribunal under the ITU with sufficient authority based on the principles of justice to adjudicate disputes related to the radio frequency spectrum will help improve the efficiency of the use of such resources, assure equal protection of the interests of all states and become an extra guarantee that international treaties in the field of space activity are observed.