

NEW LEGAL DIMENSIONS OF THE ORBITAL FREQUENCY MANAGEMENT:
CONFLICT OF INTERESTS BETWEEN A GROUP OF ADMINISTRATIONS
AND ITS NOTIFYING ADMINISTRATION

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Under the Radio Regulations of the International Telecommunication Union (“ITU”), a single Administration can act on behalf of a group of Administrations when filing frequency assignments of satellite networks and taking further steps with respect to such assignments. In such cases the Administration that acts on behalf of a group is appointed by this group as this group’s Notifying Administration. These provisions are also applicable to a group of Administrations being members of an international intergovernmental organization. Intergovernmental satellite organizations file, via appointed Notifying Administrations, their own frequency and geostationary orbit resource to be used to implement space programs and satellite projects. In certain cases international organizations used to request the Radiocommunication Bureau of the ITU (“Bureau”) to replace their Notifying Administration. Provisions of the Constitution, Convention or Radio Regulations of the ITU do not rule out that a Notifying Administration acting on behalf of other Administrations can be replaced, but do not specify how such a change should be handled. In this connection any such changes were until recently dealt with by the Radio Regulations Board of the ITU (“RRB”) on a case by case basis and no general rule was ever established. The earlier practice of the ITU made it possible to replace a Notifying Administration if requested by an intergovernmental organization provided that both Administrations – the initial Notifying Administration and the new Notifying Administration – inform the Bureau that the responsibility of the Notifying Administration for all coordination and notification matters has been transferred. In the absence of formal confirmations, the Bureau was not in a position to change the Notifying Administration as requested by an intergovernmental organization even after a decision had been made to replace the Notifying Administration in strict conformity with the constitutive acts of said intergovernmental organization and considering the viewpoint of the overwhelming majority of the member states. It goes without saying that this practice never reflected the interests of groups of Administrations and had to be changed. The conflict of interests that persisted in 2009 – 2011 between the Intersputnik International Organization of Space Communications (“Intersputnik”) and its initial Notifying Administration spurred the ITU to come up with a regulatory initiative and led to the approval of an amendment to the Rules of Procedure concerning the replacement of an Administration acting as the Notifying Administration on behalf of a group of Administrations within the framework of an intergovernmental satellite telecommunications organization.

I. INTERSPUTNIK INTERNATIONAL ORGANIZATION

I.I General

Founded on November 15, 1971 under the Agreement on the Establishment of the Intersputnik International System and Organization of Space Communications, Intersputnik is an international intergovernmental organization headquartered in Moscow, Russia. Intersputnik’s mission is to contribute to the consolidation and expansion of economic, scientific, technological and cultural relations using satellite telecommunications, video and audio broadcasting and to support cooperation and coordination of the efforts of the member countries aimed at designing, procuring, operating and expanding an international satellite telecommunications system. Today, Intersputnik has twenty five member countries.

I.II Orbit and Frequency Resource

Within the framework of its technological policy and in accordance with its mission, Intersputnik filed with the Bureau frequency assignment of satellite

networks in various geostationary orbital positions constituting its own orbit and frequency resource. Later, Intersputnik secured the international legal protection and analyzed utilization prospects of its satellite networks. With its own orbit and frequency resource, Intersputnik is able to participate in international and domestic satellite projects together with its member countries for the purpose of manufacturing, launching and operating telecommunication satellites in Intersputnik’s orbital slots.

I.III Notifying Administration

Under the ITU Radio Regulations, frequency assignments of satellite networks can be filed on behalf of a group of Administrations while one of such Administrations acts as the Notifying Administration and takes steps for the purpose of filing the assignments on behalf and in the interests of the whole group. This is also applicable to a group of Administrations being members of an international organization (an association of states based on an international treaty and having its own governance bodies).

In accordance with the Radio Regulations, Intersputnik member states appointed its Notifying Administration which in 1993-1998 filed with the ITU a number of frequencies for satellite networks in the geostationary orbit in the interests of Intersputnik.

I.IV Satellite Projects

Intersputnik's first satellite project was successfully launched in 1999 when the LMI-1 spacecraft (current name ABS-1) was injected into the 75 East Longitude orbital position to operate in Intersputnik's satellite networks. The satellite continues to be operated until now and will be replaced by a new higher power spacecraft in 2013. National operators of Intersputnik's member countries have been actively using this spacecraft to set up a wide-spread terrestrial satellite infrastructure and to establish numerous telecommunications and broadcasting channels.

Another project is being implemented presently to place a Russian-built satellite called AMOS-5 at 17 degrees East Longitude in the interests of the satellite operator Spacecom.

More similar satellite projects are under review with potential partners including entities from Intersputnik's member countries.

II. REPLACEMENT OF THE NOTIFYING ADMINISTRATION

II.I Replacement agreed to by both Administrations

In the middle of 2009 Intersputnik's Notifying Administration that had been performing such functions in the interests of the Administrations of the Intersputnik member countries and in Intersputnik's interests since 1993 formally notified the Bureau of its decision to stop performing the functions of the Notifying Administration with respect to the overwhelming majority of satellite networks filed earlier in Intersputnik's interests except for three satellite networks at 75 degrees East Longitude.

Simultaneously the Bureau was notified by another Administration of one of Intersputnik's member countries of its preparedness to perform the functions of Intersputnik's Notifying Administration with respect to the overwhelming majority of satellite networks except for three satellite networks. Upon receipt of the above two notices the Bureau made the required changes in the ITU database.

That information was published in special section No. 2649 of the Radiocommunication Bureau International Frequency Information Circular ("BR IFIC") on July 28, 2009.

II.II Status of Three Satellite Networks at 75E

The reason for such partial abandonment of the functions of the Notifying Administration was that the initial Notifying Administration and Intersputnik had started disputing over the status of the three satellite networks at the 75 degrees East Longitude. In the opinion of the initial Notifying Administration, the networks had a national status while Intersputnik maintained that they had been filed in the interests of

all Administrations of Intersputnik's member countries and hence had an international rather than national status.

Intersputnik's opinion that all three satellite networks had an international status was confirmed by Intersputnik's governing bodies that made a decision that Intersputnik had an exclusive right to these satellite networks. This decision was binding on all Intersputnik member countries, including the member country whose Administration acted as the Notifying Administration.

Nevertheless, in 2009-2010 the initial Notifying Administration several times requested the Bureau to recognize its exclusive rights to the above three networks and suspend their use. Actually, suspension of use of satellite networks means removal of all satellites using the frequencies of such satellite networks from their orbital slots.

Responding to the requests of the initial Notifying Administration the Bureau requested that Notifying Administration to confirm that it had claimed that this be done on behalf of a group of Administrations of the members countries of Intersputnik. The reason for such request by the Bureau was that it had earlier received communications from certain Intersputnik member countries confirming that the national operators of these countries had been actively using the spacecraft operating the disputed satellite networks. The Notifying Administration failed to confirm that it had acted on behalf of a group of Administrations when demanding that the Bureau change the status and suspend the use of the three satellite networks at 75 degrees East Longitude. In the absence of such confirmation the Bureau did not comply with the above demand.

If the Bureau had formally complied with the request of the Notifying Administration, this would have seriously affected the lawful interests of other Administrations of the Intersputnik member countries and would have caused considerable material damage to the Administrations that in practice used the satellite networks in question to establish branched terrestrial satellite telecommunications networks and numerous telecommunications and broadcasting channels.

Despite the fact that in the official letter of May 2009 the Bureau confirmed that the satellite networks had been filed by the initial Notifying Administration on Intersputnik's behalf and in Intersputnik's interests, in June 2010 said Notifying Administration requested the RRB to recognize the exclusive national right to one of three satellite networks; suspend the use of the frequency assignments of two satellites networks and modify the ITU database by specifying that the entity responsible for the operation of the allegedly national satellite network is the initial Notifying Administration and not Intersputnik. Having thoroughly studied this request, the RRB turned down at its 54th meeting in July 2010 all claims of the Notifying Administration.

II.III Replacement upon Request of an International Organization

The Intersputnik Board, being the superior governing body of that intergovernmental organization,

resolved at its session in April 2010 to terminate the performance by the initial Notifying Administration of its functions of the Notifying Administration acting on behalf of a group of Intersputnik Administrations in respect of three satellite networks at 75 degrees East Longitude and assign such functions to the Administration, which had been already acting as the Intersputnik Notifying Administration with respect to the overwhelming majority of Intersputnik's satellite networks – to the new Notifying Administration.

As the international legal status of three Intersputnik satellite networks was at that time confirmed by the Intersputnik governing bodies, and endorsed by the Bureau and the RRB, Intersputnik presented an official letter of the Chairman of the Intersputnik Board with the endorsement of 24 out of 25 member states of Intersputnik to change the Notifying Administration for the three networks concerned. The new Notifying Administration confirmed the same information. The initial Notifying Administration had been asked twice by the Bureau to confirm the change, but had not done so (later the initial Notifying Administration rejected the change and confirmed its intention to continue fulfilling the functions of the Notifying Administration for the three networks despite the decision of Intersputnik's highest governing bodies and in defiance of the will of the overwhelming majority of Intersputnik's member countries).

While considering the above request of the Chairman of the Intersputnik Board, the Bureau noted that according to the established practice the Bureau was required to receive two official notices in order to modify the database to replace the Notifying Administration, namely, one notice from the Administration which stops performing the functions of the Notifying Administration and the other one from the new Administration confirming its preparedness to perform such functions.

In the case of Intersputnik no notice was received from the Administration performing the functions of the Notifying Administration to the effect that it was giving up the functions of the Notifying Administration, and the Bureau did not modify the database.

III. REGULATORY VACUUM

III.I No Binding Rules

The procedure of appointing a Notifying Administration acting on behalf of a group of Administrations is clearly defined in the Radio Regulations: for this purpose the Notifying Administration chosen as agreed by the group only needs to specify in the new filing that the satellite networks concerned are filed on behalf of the group. All future requests concerning registration of the filing should be treated by the Bureau as if they are sent by the whole group unless there exists any information to the contrary.

It is beyond any doubt that both the appointment and the replacement of a Notifying Administration acting on behalf of a group of Administrations is the

prerogative of this group. Provisions of the Constitution, Convention or the Radio Regulations of the ITU do not rule that a Notifying Administration acting on behalf of other Administrations can be replaced, but do not specify how such replacement should be handled.

In this connection, such changes used to be dealt with by the RRB on a case by case basis in the past and any change of the Notifying Administration of a group of countries used to be treated as a unique case, not to be taken as setting a precedent.

III.II Earlier Practice

The issue of the change of a Notifying Administration, and its role, came up at the ITU Plenipotentiary Conference in November 2006 with the proposed suppression of Resolution 87 (Minneapolis, 1998) – Role of the Notifying Administration in the case of an Administration notifying on behalf of a named group of Administrations. When that suppression was dealt with at the 13th plenary meeting of the Plenipotentiary Conference, a note was incorporated in the minutes of the meeting listing several stages involved in a change of the Notifying Administration on behalf of a named group of Administrations, and recalling the need for both the former and new Notifying Administrations to formally inform the Bureau of the change (Annex A to the Minutes of the 13th plenary meeting of Plenipotentiary Conference of the ITU in 2006).

Despite the fact that this explanation regarding a change of the Notifying Administration simply formed a section of the Minutes of that Plenipotentiary Conference and could not be regarded as a binding rule of the ITU, this has for many years been applied by the Bureau and supported by the RRB.

III.III Change of the ASA Notifying Administration

The issue of the replacement of the Notifying Administration acting on behalf of a group of named Administrations in the absence of any agreement of the initial Notifying Administration was for the first time raised before the RRB in December 2006.

The 42nd meeting of the RRB reviewed a submission from the Administration of Colombia relating to the change of the Notifying Administration for the Simón Bolívar 2 satellite network. The network had originally been registered with the ITU for ASETA – an international intergovernmental organization with Bolivia, Colombia, Ecuador, Peru and Venezuela as its members, and with the Administration of Venezuela as the Notifying Administration. The Administration of Colombia had been appointed by the member states to replace the Administration of Venezuela as the Notifying Administration of the Association of Andean Satellites (“ASA”), which superseded ASETA.

The Bureau requested Venezuela's formal confirmation of its agreement to the change of the Notifying Administration for ASA. No such confirmation was received from Venezuela.

The RRB noted that the ITU must avoid a situation in which all actions by the other four Administrations was blocked because Venezuela failed to respond.

However, in the absence of formal confirmation from Venezuela, the Bureau was not in a position to effect the change of the Notifying Administration as requested by Colombia.

An extra problem with regard to the Simón Bolívar 2 network was that the use of the network was suspended and before the regulatory deadline the network had to be brought into regular use. In this connection it was essential to rapidly decide to replace the Notifying Administration acting on behalf of ASA.

That was the first time the RRB acknowledged that there existed legal vacuum and discussed a draft rule of procedure to cover the change of the Notifying Administration, the rule being supposed to be reviewed at the ITU World Radiocommunication Conference in 2007 (“WRC-07”).

However, the problem of the replacement of the Notifying Administration for the Simón Bolívar 2 satellite network was resolved based on consensus on the part of the Administrations concerned, *i.e.* the Administration of Venezuela confirmed its consent to transfer the functions of the Notifying Administration. Considering the provisions of Article 13 of the Radio Regulations which called for rules of procedure to be produced only when really necessary, a new rule was neither drafted nor submitted to WRC-07 review nor ever approved.

III.IV Need to Update the Regulatory Framework

As the case of Intersputnik showed, if an Administration continues to perform the functions of a Notifying Administration on behalf of a group of Administrations against the explicit will of the group’s members, this can not only discriminate the lawful interests of the group because the Administrations that are members of the group have equal rights with respect to the satellite networks in question, but also affect the interests of third Administrations.

The fact that the Bureau had no tools to duly take into account the opinion of a large group of Administrations of the group’s member countries makes the Bureau with no appropriate tools unintentionally keep the situation affecting the lawful interests of a large group of Administrations and ultimately impeding the efficient use of the orbit and frequency resource by the Administrations on whose behalf this resource was filed.

In this situation the Administrations that are members of the group of an intergovernmental organization were actually unable to implement their agreed decision to replace their Notifying Administration because the Bureau’s practice only allowed a Notifying Administration to be replaced if the Notifying Administration being replaced voluntarily gives notice to the Bureau of the cessation of the performance of its functions as the Notifying Administration.

In the case of Intersputnik there was no such consensus between the international organization and its Notifying Administration, and similar situations could arise in the future. As the responsibilities of Notifying Administration are significant, the RRB might have considered developing a Rule of Procedure

to deal with such cases.

IV. NEW RULE OF PROCEDURE

IV.I Rule-Making Initiative of the RRB

In March-April 2011, at its 56th meeting the RRB reviewed a request by the Bureau for advice of the RRB with regard to changing the Notifying Administration for three satellite networks at 75 East Longitude orbital position of Intersputnik replacing the initial Notifying Administration with a new Notifying Administration acting on behalf of the Intersputnik Administrations.

The RRB decided that the designation or change of the Notifying Administration acting on behalf of a group of named Administrations was an internal affair within the group of Administrations pertaining to the organization. The RRB also noted that normally, such a change is undertaken by the Bureau only if requested by the initial Notifying Administration acting on behalf of all member states of this organization. However, the RRB concluded, that in the case of divergence between the Notifying Administration and the member states of the organization no provisions of the Constitution, Convention, Radio Regulations, or Rules of Procedure dealt with this situation. The RRB noted the importance of clarifying the situation, which could affect others outside Intersputnik because satellite network coordination and related matters required the involvement of the Notifying Administration.

The RRB, therefore, instructed the Bureau to expeditiously prepare a Rule of Procedure for circulation to all ITU Administrations, with a view to considering its approval at the RRB’s next meeting. The RRB decided to postpone further decisions at the Bureau’s request for the RRB’s advice until its 57th meeting.

IV.II Drafting a New Rule of Procedure

In April 2011, the Bureau circulated to the Administrations of the ITU member states a proposal to add an amendment to the Rules of Procedure concerning replacement of the Notifying Administration acting on behalf of a group of named Administrations. The amendment stipulated that subject to certain conditions a Notifying Administration acting on behalf of an international organization may be replaced by the Bureau in ITU documents with a new Notifying Administration without the consent of the previous Notifying Administration.

Eight Administrations supported the proposed amendment to the Rules of Procedure. Six of them sent their agreement on due dates and two agreeing Administrations were delayed. Six out of eight Administrations that supported the Bureau’s amendment are the Administration of Intersputnik’s member countries.

The initial Notifying Administration of Intersputnik presented to the Bureau its version of the new rule saying that it was necessary to receive written agreement from two Notifying Administrations, *i.e.* the initial and the newly appointed Administrations.

Essentially, that repeated the then existing practice of the ITU and did not settle the issue raised by the RRB to update the ITU's regulatory basis. That version of the new Rule of Procedure was supported by two more Administrations, both from non-Intersputnik member countries.

IV.III Approval of a New Rule of Procedure

The 57th meeting of the RRB reviewed the draft Rule of Procedure proposed by the Bureau, took into account the comments received, and approved the Rule without any modifications.

Thus the new Rule approved by the RRB reads as follows:

“When an intergovernmental satellite telecommunications organization wishes to designate a new Notifying Administration vis-à-vis ITU for its satellite networks, the Bureau shall effect the corresponding modifications upon receipt of due written notification to that effect by the legal representative of the intergovernmental organization in question under the terms of its constitutive Act. This notification shall include the evidence of agreement from the newly named Administration to act as the Notifying Administration on behalf of the intergovernmental organization”.

IV.IV Change of the Notifying Administration under the New Rule of Procedure

Considering that Intersputnik met all the conditions under the new rule, the Bureau made known in its Special Section of BR IFIC No. 2699 of July 26, 2011 that the initial Notifying Administration had been replaced with the new Notifying Administration acting on Intersputnik's behalf with respect to all the satellite networks, including those three networks at 75 degrees East Longitude being some time ago the subject of dispute.

This new rule enables a group of Administrations to exercise their natural right both to appoint a Notifying Administration acting on their behalf and in the interests of this group and to replace the current Notifying Administration. We strongly believe that the new Rule of Procedure approved by the RRB will help to secure the lawful rights of groups of Administrations within the international intergovernmental organizations and protect the interests of most Administrations from being infringed upon by denying a single Administration the right of veto over the other Administrations.