

Dispute Settlement and Decision Making in Relation to the Scarce Orbit-Spectrum Resource – ‘Preventive’ and ‘Reactive’ ITU Procedures and Their Relevance for Private Sector Actors

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Abstract

The exploration and sustainable use of outer space is dependent, not only upon technological developments and capital investments, but also on the availability of the spectrum-orbit resource for the associated relevant radio communications. Even though the electromagnetic spectrum is a non-exhaustible resource, it is a limited and finite one. The increased number of actors and activities in space – both current and planned- is putting a strain on the coordination and allocation processes for available spectrum as well as on the subsequent observance of the international requirements in this respect. Hence, this paper focuses on the way geostatic positions are assigned and frequencies - allocated on an international level. These are complicated and highly time-consuming processes, involving technical and engineering expertise, coordination, compromise and some diplomacy too. On a global level these negotiations are done within the framework of the International Telecommunications Union (ITU) and spectrum/orbital positions can only be assigned to sovereign member states. At the same time, more and more satellite communication operators nowadays are private commercial entities, even if, licensed and supervised by their respective national administrations. The aim of this article is two-fold. First, it will examine the ways disputes related to the allocation and use of the spectrum resources are handled within the framework of the ITU. It identifies ‘preventive’ and ‘reactive’

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efforts to settle disputes within the framework of the organization. In other words: what is the ITU doing to prevent the potential for conflict and what measures does it offer for resolution once a conflict has occurred? Different means of dispute resolution - will be examined together with the associated advantages. Secondly, the article will also analyse the role of private operators and not only Member States administrations in these processes. The ITU brings together also Sector members from the industry and in doing so, it provides for multi-stakeholder discussion. Arguably, as the oldest UN agency, the Union is remarkably fast and adept when responding to technological challenges and considering the needs of the private sector. Is this so also when disputes are at stake, whereby private operators are not an official party?

Keywords: ITU, Dispute Settlement, Spectrum Management, Private Actors

1. The ITU and Spectrum Management

The process of spectrum management is based on the predicament that spectrum is a limited resource, which must be apportioned among uses and users by the government. The main objective of such government administration is to protect the transmission of information from harmful interference, so that communication can be unimpeded. Government administration of the radio spectrum comprises a tiered structure of regulation at the international and national levels. The current regime first allocates spectrum on an international level and then leaves it up to national administrations to allocate further to entities within their jurisdiction and control.¹

The ITU is the UN agency, responsible for Information and Communication technologies, and more specifically, for the coordination of the shared global use of the radio spectrum.² The organization is governed by the basic legal instruments, configured as international treaties and therefore binding on all signatory States. These are: the Constitution of the ITU, the Convention of the ITU and the Administrative Regulations governing the use of Telecommunications (International Telecommunication Regulations and Radio Regulations (including the Rules of Procedure). Additionally, if States have acceded to the Optional Protocol on the Compulsory Settlement of Disputes Relating to the Constitution, Convention and Administrative Regulations, then this international treaty would be binding upon them as well.

1 Wellenius, Bjorn and Neto, Isabel, "Managing the Radio Spectrum: Framework for Reform in Developing Countries", Policy Research Working Paper 4549, The World Bank, March 2008, Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/6559/wps4549.pdf?sequence=1&isAllowed=y>.

2 ITU Official Website: www.itu.org.

With the purpose of fostering international cooperation, harmonizing the actions of Member States, promoting fruitful partnerships and providing technical assistance in matters, related to ICT³, the Union in particular effects the allocation of bands of the radio-frequency spectrum, the allotment of radio frequencies and the registration of radio-frequency assignments, for space services, of any associated orbital position in the geostationary-satellite orbit or of any associated characteristics of satellites in other orbits.⁴

The ITU is made up of three different sectors with various responsibilities and functions, related to the attainment of its main goals. The sector of relevance and interest to this study is the Radiocommunications Sector (ITU-R). It manages the detailed coordination and recording procedures for space systems and earth stations. It also processes and publishes the respective data and carries out the examination of frequency assignment notices submitted by administrations for inclusion in the formal coordination procedures or recording in the Master International Frequency Register.⁵ Before decisions can be made within the ITU, however, the overarching regulations and processes are discussed and agreed upon by Member states in the framework of World Conferences.

1.1. The WRC Process

The WRC format was actually born in 1992 when changes in the ITU constitution were made to convene regular conferences every three to four years. The change was made to keep up with rapid technological developments.⁶ Prior to that, periodic World Administrative Radio Conferences (WARCs) were conducted to cover specific issues concerning particular radio services. It is at these conference that Member States established regulations, agreements, and plans for the global use of the radio spectrum. This includes the international table of frequencies that allocates the spectrum among classes of radio services and which serves as the basis for the national table of frequency allocations of governments. A wide range of regulatory, operational, and technical provisions are discussed and agreed upon within these conferences to ensure that radio services are compatible with one another and free from interference among countries. Individual countries also undertake additional commitments in the context of regional and sub-regional telecommunications organizations, other international

3 Art. 1, ITU CS.

4 Art. 1, ITU CS.

5 ITU Official Website: www.itu.org.

6 GSMA, "An Introduction to the WRC", Available at <https://www.gsma.com/spectrum/wp-content/uploads/2017/02/An-Introduction-to-the-WRC.pdf>, Feb 2017.

organizations, and bilateral or multilateral agreements.⁷ The WRC process is a tremendous undertaking to arrive at a consensus on a wide range of spectrum-related issues. Each WRC is attended by as many as 170 countries and must conclude in a four-week period of time. WRCs are held under the auspices of the ITU-R. The main role of the ITU-R is to help manage the world's radio frequency spectrum and satellite orbits.⁸

The agenda for each WRC is actually set several years prior to the actual conference and is finalized at the time of the preceding WRC, after which it is approved by the ITU Council. At each WRC a separate committee is formed, which is tasked with the preparation of the next conference.⁹ The WRC process is rather complex, but also fairly predictable – the main reasons being the preparatory processes behind it. Work on the next WRC begins immediately following the conclusion of the preceding one. Member States are expected to determine and justify their own internal position on relevant agenda items and understand the position of other Member States. After the national consensus comes the process of regional coordination within relevant organizations, bodies, or just bilateral talks with other countries to ascertain their support.¹⁰ In addition to that, there is much work being done within the ITU itself. ITU-R Study Groups develop the technical bases for important decisions taken at the quadrennial World Radiocommunication Conferences. They also develop Global Standards, Reports and Handbooks on radiocommunication matters. Currently, more than 5,000 specialists, from administrations, the telecommunications industry and academic organizations throughout the world, participate in the work of the ITU-R Study Groups on all the various relevant topics.¹¹ Member States would advocate their positions within the ITU-R process itself, whether in a technical study group meeting or a conference preparatory meeting. Most

7 Wellenius, Bjorn and Neto, Isabel, “Managing the Radio Spectrum: Framework for Reform in Developing Countries”, Policy Research Working Paper 4549, The World Bank, March 2008, Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/6559/wps4549.pdf?sequence=1&isAllowed=y>.

8 Kathleen Q. Abernathy, “Why the World Radiocommunication Conference Continues to Be Relevant Today”, 56 Fed. Comm. L.J. 287 (2004).

9 Manner, Jennifer “A. Spectrum Wars. The Policy and Technology Debate”, Artech House, 2003. p.86.

10 Kathleen Q. Abernathy, “Why the World Radiocommunication Conference Continues to Be Relevant Today”, 56 Fed. Comm. L.J. 287 (2004).

11 90th Anniversary Celebration of the CCIR/ITU Radiocommunication Study Groups (1927 -- 2017). (2017). *Telecom Standards*, 27(11), 8–10.

WRC decisions are thus, based on consensus and more rarely the result of a popular vote whereby every State has one vote.¹²

As a matter of content, as per the ITU Constitution, the WRC can: modify the Radio Regulations and any associated frequency plans; address any radiocommunication matters that have worldwide effects; instruct the Radio Regulations Board and the Radiocommunication Bureau, and review their activities as well as decide what areas the Radiocommunication Assembly and its study groups should look at in preparation for future WRCs.¹³ For instance, at the last WRC-19, ITU's 193 Member States discussed a range of issues, such as the allocation of new frequency bands for 5G, high-altitude platform stations (HAPS), regulatory actions to support the use of new and enhanced technologies in satellite applications, maritime and aeronautical services, as well as for intelligent transport systems.

Despite the accomplishments of past WRCs, some have argued that the WRC process is outdated and slow, and that it should be phased out. And yet, it is hard to imagine a different set-up, which would deal with so many technical issues and guarantee consensus at a global level. WRCs remain an integral part of the world's ability to use the radiocommunications spectrum resource as efficiently as possible. In particular, it has been argued that the WRC is extremely important in accomplishing two critical goals in managing the radiocommunications spectrum on a global basis. "First, the WRC provides an international forum to maximize the global harmonization of the radiocommunications spectrum resource. Second, the WRC decision-making process creates technical and operational certainty for new and existing users."¹⁴ The third part of this article, will in turn reason why the WRCs are not at all obsolete, especially when we consider the private sector.

1.2. Internal ITU Decision Making Processes

The actual every-day coordination and allocation work of the ITU, and more specifically of the Radiocommunication Sector, continues outside the framework of the conferences it organizes. To better understand its work and processes, we need to look at its structure. The ITU-R is made up of the RRB (Radio Regulations Board); the BR (Radiocommunication Bureau) and various Radiocommunication Study Groups, which are tasked with technical

12 Kathleen Q. Abernathy, "Why the World Radiocommunication Conference Continues to Be Relevant Today", 56 *Fed. Comm. L.J.* 287 (2004).

13 ITU CS.

14 Kathleen Q. Abernathy, "Why the World Radiocommunication Conference Continues to Be Relevant Today", 56 *Fed. Comm. L.J.* 287 (2004).

studies and preparatory work for the resolutions and recommendations that take place during the WRCs.

The Radiocommunication Bureau (BR) is the executive arm of the ITU-R, and is headed by a Director, who is in turn assisted by a team of engineers, computer specialists and managers together with administrative staff. The Bureau records and registers frequency assignments and also orbital characteristics of space services, and maintains the Master International Frequency Register (MIFR). In addition, on an everyday basis, it also communicates with and provides advice to States on the use of the radio-frequency spectrum and satellite orbits, and investigates and assists in resolving cases of harmful interference. From an administrative point of view, the Bureau also coordinates the preparation, editing and dispatch of relevant documents and helpful recommendations.¹⁵ The Board, in turn, is more of an advisory and oversight body and it meets on a part-time basis in Geneva. Its members are elected and they perform their duties independently of their governments. The Board addresses matters referred by the Bureau which cannot be resolved in a straightforward manner and considers reports of unresolved interference investigations carried out by the Bureau at the request of one or more administrations. Lastly, it also considers appeals against decisions made by the Radiocommunication Bureau regarding frequency assignments.¹⁶

Within this structure, the ITU maintains the International Table of Frequency Allocations and the MIFR. The table serves as the basis for the subsequent national allocation tables and today, nearly all countries worldwide have adopted their own national tables to facilitate spectrum use.¹⁷ Officials from the Radiocommunications Bureau manage the detailed coordination and recording procedures for space systems and earth stations. They have implemented a complex application and registration software for processing assignment applications and they advise administrations during the examination of frequency assignment notices for formal inclusion into the Master International Frequency Register. The ITU-R also further develops and manages space-related assignment or allotment plans and it coordinates the data for launching of new satellites and the continuation of satellite services in a safe way.¹⁸

15 ITU Official website. Available at www.itu.int.

16 ITU Official website. Available at www.itu.int.

17 Art.5, ITU RR.

18 ITU Official website. Available at www.itu.int.

2. ITU and Dispute Management

To put it simply, the main role of the ITU is that of a coordinator of extremely complex and multifaceted processes. In order to ease that process of coordination, the Union has created a large regulatory framework of rules, that guide administrations and subsequently satellite operators in their activities. The main focus of these rules is on prevention of conflicts and disagreements. The ITU was (and still is) envisaged as a technical organization to set standards, rather than a watchdog to monitor compliance with said standards, nor an enforcer of any kind.

Throughout its existence the ITU-R has faced and reacted to many challenges in its work and procedures in its attempt to manage and assign spectrum in an efficient and effective manner. For instance, one of the issues it faced was the overfilling of GEO satellite network filings, the so-called ‘paper satellites’. It has addressed these issues and reconsidered its ‘administrative due diligence’ processes, as well as the cost recovery for satellite networks and it has continuously played a mediator’s role in harmful interference disputes.¹⁹

On the matter of disputes, these shall be grossly divided into two main kinds. First there are the disputes between Member States on matters that the ITU administers and second, there could be disputes between Member States and the ITU. Given that the ITU is made up of its Member States, who take decisions on the basis of unanimity and compromise, and more rarely so by a general vote, it not so easy to conceive of a dispute between the ITU-R and a Member State. On the contrary, conflicts between Member States are not infrequent and the technical staff of the ITU is often instrumental in resolving these.

2.1. Official Dispute Resolution Procedures

The legal documents forming the International Telecommunications Union contain two main references to dispute resolution. The first one is Article 56 CS, found in Chapter IX – Final Provisions. The Convention, in turn further contains the Optional Protocol on the Compulsory Settlement of Disputes Relating to the Constitution and the Convention of the International Telecommunication Union and to the Administrative Regulations.

The ITU Constitution provides for dispute resolution through “negotiation, through diplomatic channels or according to procedures established by bilateral or multilateral treaties concluded between them (Member States) ... , or by any other method mutually agreed upon.”²⁰ It is worth pointing

19 Allison, Audrey, “The ITU and Managing Satellite Orbital and Spectrum Resources in the 21st Century”. Springer, 2014.

20 ITU CS, Art 56.1.

out that this possibility is not mandatory, as States “may settle” their disputes in this way and if none of them are adopted, any Member State “may” have recourse to arbitration in accordance with the procedure defined in the Convention. While the Constitution does provide for possibilities for dispute resolution, none of those are made mandatory. Hence, parties could refer their disputes to the PCA or another recognized body. The Union as such does not take it upon itself to establish any dispute resolution body, organ or function.

As for the Optional Protocol on the Compulsory Settlement of Disputes: this document was adopted in 1992 and has not been amended nor used since. It is a relatively short document consisting of only 6 articles and it is only applicable to those State parties, which have acceded to it and it basically makes the optional arbitration clause compulsory in case of disputes between the parties.

Apart from these legal processes and stipulations, the ITU-R, the Bureau and the Board actually deal with potential disputes and disagreements on an operation level every day. When disputes are concerned, there are two main approaches in tackling them: prevention and resolution. The paragraphs below examine how the ITU is both preventing and resolving potential disputes between its members.

2.2. Preventing Disputes

It is impossible to mention all and every dispute that the ITU-R has encountered. The main issues, however, concern disputes pertaining to frequency allocations and assignments and to harmful interference. Disagreements pertaining to frequency allocations are actually discussed within the framework of the WRCs and the bulk of the technical works is assigned to study groups (SGs), who arrive at decisions and recommendations on a conciliatory basis. The entire process used by the ITU-R in arriving at agreements for the use of the radio frequency spectrum is an example of compromise through negotiation. While there is no formal dispute resolution body within the ITU, the work of the SGs are instrumental in determining how disputes and disagreements will be settled. Negotiations often continue throughout each WRC with the parties holding lengthy sessions on particular topics. Notably, the ITU does not take any steps in the field of dispute resolution unless its Members vote for such an action. This is rarely, if ever, done as the ITU rather seeks to create consensus.²¹

²¹ Bruce, Robert et al, “Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions”, Discussion Paper, Prepared for ITU, The World

On matters of harmful interference, in a similar fashion, many of the provisions, contained within the CS and RRs serve the purpose of preventing disputes. For instance, the Constitution of the Union provides that “all stations must be established and operated in such a manner as not to cause harmful interference to stations of other Members which operate in accordance with the RR”²² The Radio Regulations further contain a number of provisions, aiming at avoiding harmful interference. Thus, for example, Article 4, deals with the assignment and use of frequencies and, stipulates that new assignments must be made in accordance with the Table of Frequency Allocations. Furthermore, there is also a requirement that if an assignment is not made in accordance with Table of Frequency Allocations, this can only be done on the express condition that it should again not cause harmful interference to other stations, operating in accordance with the TFA. An allocation, made with no regard to the TFA may not claim protection against harmful interference. Further to that, The RRs stipulate that there are international rights and obligations of administrations in respect to their own and other administrations’ frequency assignments. These rights are derived from the recording of those assignments in the Master International Frequency Register. Furthermore, any frequency assignment recorded in the Master Register with a favourable filing has the right to international recognition, which means that when other administrations make their own assignments, they should take this into account in order to avoid harmful interference disputes.

2.3. Reacting to Disputes and Resolution

If a dispute has arisen, the presumption within the ITU system is that administrations would cooperate in order to resolve it as soon as possible, rather than remain at a deadlock. It is also expected that there would be a ‘guilty’ party, which will act swiftly and in good will in order to put an end to the dispute.²³ As per the Radio Regulations, “administrations are urged to exercise the utmost goodwill and mutual cooperation taking into account all the relevant technical and operational factors of the case.”²⁴ When it comes to actual cases of interference, the exact procedures and technicalities to be undertaken are elaborated in the 5 RRs. Where practicable, the case of harmful interference may be dealt with directly by their monitoring stations

Bank, Geneva 2004, Available at https://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf.

22 ITU CS.

23 As would be the case in certain cases with non-authorized emission, as per RR Article 9 or 11, for example. RR Art. 7.8. 509 RR Art. 8.5. 158 assistance. 510.

24 ITU RR Art 7.8.

or between the operators. If no satisfactory resolution is found on this basis, then the administration concerned shall forward details of the case to the Bureau for its information.²⁵ In such a case, request of assistance may also be sent with all the technical and operational details and copies of the correspondence.²⁶ In case of a request of assistance, the Bureau contacts the responsible administration in order to resolve the matter. If the harmful interference persists, the Bureau prepares a report for consideration by the Radio Regulations Board. The Board is the final step within the ITU system. In practice, most disagreements pertaining to harmful interference are settled pursuant to Art. 15 of the Radio Regulations.

3. The ITU and Private Actors

So what about private sector actors and the ITU? As demonstrated, the ITU is a very peculiar institution in that its members are exclusively sovereign members, but the direct ‘beneficiaries’ or ‘users’ of its services nowadays are private companies. Clearly, with the exponential development in telecommunication services, we have also witnessed an increasing demand for spectrum/orbit usage for practically all space communication services. This increase is attributable to many factors, including scientific progress, but also political, social and structural changes around the world: the liberalization of telecom services, the introduction of non-geostationary-satellite orbit satellite systems for commercial communications, growing market orientation, and very importantly, the resulting change in the way this widening market is shared between private and state-owned service providers.²⁷ The ITU has on numerous occasions attempted to accommodate those changes with a view to a continuously efficient and equitable spectrum allocation. It has reviewed its orbit resource allocation procedures and introduced of new concepts to facilitate frequencies application as well as the simplification of the advance publication information to be provided to initiate the registration process for a satellite network.²⁸ Even back in 1998, the ITU itself admitted that : “With an increasing number of new fora created by the market, many users and experts now question the relevance of [...] the ITU, where all power is vested in government representatives rather than in those organization who are investing in and developing new technologies.” The awareness was certainly

25 ITU RR Art. 15.41.

26 ITU RR Art. 15.42.

27 ITU, “ITU Radio Regulatory Framework for Space Services”, Available at https://www.itu.int/en/ITU-R/space/snl/Documents/ITU-Space_reg.pdf.

28 https://www.itu.int/en/ITU-R/space/snl/Documents/ITU-Space_reg.pdf.

there. “However, before writing off the ITU, one should bear in mind that it is the only truly global impartial organization whose membership spans all aspects of the industry, from PTOs to manufacturers to satellite system operators to service providers and even user groups.”²⁹

The gradual shifting of powers away from the public and onto the private sector has led to a boom in private membership within the ITU, with companies, such as Intel, Microsoft and Hewlett-Packard joining.³⁰ Within the ITU, private companies provide some much-needed technical expertise and are at the forefront of the development of new satellite technologies. It has been calculated that the private sector is behind as much as 90 percent of the technical and intellectual contributions, behind the organizations’ technical recommendations, proposals and standards.

3.1. Private actors and decision making

One of the most often cited advantages of government administration of the radio spectrum is that it is well established and still functioning. It originated in the early days of radio communication and has been around for more than 100 years.³¹ Furthermore, research has demonstrated the Government administration has proven to be effective in coordinating use of the spectrum and preventing harmful interference at both international and national levels.³² Nevertheless, in the last ten years, government administrations have found it increasingly difficult to respond to the fast growth of spectrum demand, the new technologies and changing markets. Experience has further demonstrated that (at least in some countries) private companies are much more knowledgeable of the ITU process than their respective governmental officials. In addition, the fact that spectrum is first managed on an international level and then on a national level, creates a situation whereby private companies have to work in close coordination with their national counterparts. This is indeed the case and even more so in countries with a greater number of private satellites in orbit. These private representatives

29 McPhail, Thomas L. *Global Communication: Theories, Stakeholders and Trends*, John Wiley & Sons, 2010. p.116.

30 McPhail, Thomas L. “Global Communication: Theories, Stakeholders and Trends”, John Wiley & Sons, 2010.p.115.

31 Wellenius, Bjorn and Neto, Isabel, *Managing the Radio Spectrum: Framework for Reform in Developing Countries*, Policy Research Working Paper 4549, The World Bank, March 2008, Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/6559/wps4549.pdf?sequence=1&isAllowed=y>.

32 Analysys Consulting, DotEcon, and Hogan & Hartson. 2004. “Study on conditions and options in introducing secondary trading of radio spectrum in the European Union.” Final report for the European Commission. http://europa.eu.int/information_society/policy/radio_spectrum/docs/ref_docs/secontrad_study/secontrad_final.pdf.

work together with their governments to propose suggestions and recommendation on spectrum management and, even though they have no voting power on an international level, their voices are heard – more and more. In particular, the 1998 and 2002 Plenipotentiary Conferences focused on strengthening the participation of the private sector in the ITU, adopting several resolutions enhancing the rights of sector members, as well as measures to enable the ITU to match industry's time-frames and operational practices.

The financial element of the picture should not be overlooked as well. Even though funding has not been a determinant for reforms within the Union³³, it is a fact that currently about 10 percent of the organization's funding comes from the fees that the private sector is paying to the organization. In addition, MacCormick argues that threatening to reduce one's financial contribution is “often employed as a means to change an organization, or at least as a limited retaliation or demonstrated opposition to an organizational decision, as arguably demonstrated by some European firms reducing their ITU contributions when voting rights were denied to sector members.”³⁴

3.2. The Private Sector at WRCs

Traditionally, WRCs were only attended by member states and only in rare cases some private sector delegations. This is no longer the case. Today more and more private-sector member are joining the organization and participate in their own right as well as on member state delegations, to the WRC preparatory meetings and within the World Radio Conference itself.³⁵

The WRC is a treaty making body, so private members cannot vote on matters within this frameset, but their presence is still vital and has dramatically changed the dynamics of the meetings, whereby the participants now “outwardly address commercial issues”.³⁶ Specifically, the WRC process allows participation by governments, industry, and other international organizations in all of its meetings. Industry participation occurs in one of two ways. First, individual member states may choose to allow their industry to become private sector members of the ITU. Second, member states may

33 Geri, L. (2001), “New public management and the reform of international organizations”, *International Review of Administrative Sciences*, 67.3, pp. 445-60.

34 McCormick Patricia K, “Private Sector Influence in the International Telecommunication Union”, Available at <https://core.ac.uk/download/pdf/56681333.pdf>.

35 Manner, Jennifer A. *Spectrum Wars. The Policy and Technology Debate*, Artech House, 2003. p.87.

36 Manner, Jennifer A. *Spectrum Wars. The Policy and Technology Debate*, Artech House, 2003. p.87.

also designate industry representatives to serve on their national delegation to the WRCs and other technical and preparatory meetings.³⁷

The private sector is heavily involved in those preparatory discussions, including stakeholders such as equipment makers, network operators, industry forums and users of spectrum. Many of these stakeholders also serve as members of national delegations at the conference itself. This multi-stakeholder approach enables the necessary consensus.³⁸ Additionally, for example, although US delegates to the ITU represent US policy, not any particular company or private interest, the fact that all delegates are charged with supporting the documentation that is submitted by the USA is to a large extent immaterial given the crucial role of the private sector in initially formulating the policy.³⁹ In the United States, there exists a dedicated ITU Association (USITUA), formed in December of 1999 as an open US industry forum for discussion of issues and development of consensus on proposals and views on ITU policy matters that maximize common benefits to the US industry. The views of USITUA are solicited on various issues by the US Department of State, the National Telecommunications and Information Administration (NTIA), and the Federal Communications Commission (FCC).⁴⁰

3.3. Towards more participation for the private sector

Private actors caught up in unresolved spectrum disputes would not be able to make full use of the spectrum assigned to them. They may be reluctant to invest in innovative technologies or buy new spectrum if they do not know how the disputes would be resolved. Unresolved spectrum disputes may mean that operators will either have to accept the harmful interference and risk service degradation which could mean inability to complete their mission or losing customers and thus returns on investment—or invest in alternatives to avoid the harmful interference. Operators may not be able to secure capital to exploit their spectrum rights if investors are nervous about what will happen to their investment should the operator be caught in an unresolved dispute.

37 Kathleen Q. Abernathy, *Why the World Radiocommunication Conference Continues to Be Relevant Today*, 56 Fed. Comm. L.J. 287 (2004).

38 Cowhey, P and Aronson J., “The ITU in Transition”, *Telecommunications Policy* 15:4, 1991, pp.298-310.

39 Patricia K. McCormick, “Private Sector Influence in the International Telecommunication Union”, Available at <https://core.ac.uk/download/pdf/56681333.pdf>.

40 USITUA, Available at: <http://www.usitua.org/frontpageposting/welcome>.

Arguments both for and against a higher level of participation of the private sector in the ITU process can be made. Arguably, private countries contain the valuable expertise and their 'power; in the process is not enough. Others, however, fear that the organization has been overtaken by private interests and that given the importance of the radio-frequency communications in our modern world, the regulatory process should be rather entrusted to nations states – only this approach would render the goal of an 'equitable and efficient' allocation of the spectrum and avoid a similar discourse as the one around the Bogota Declaration. The influence of the private sector in defining its respective member state's policies and proposals as part of the preparatory work for a successful WRC varies significantly, and is notably weaker among developing countries, but it is nonetheless of vital importance to have an efficient national as well as regional consultation between the private sector and the government.

Lastly, even though on paper the private sector does not have any voting rights, their virtual omnipresence in creating these policies that are later voted on by governments actually makes them even more important than State representatives. That can additionally also lead to the question – can private influence be too much within the ITU system? First of all, given that most of the private companies involved are nationals of the more developed countries, the private sector in poorer countries is lagging behind. Secondly, participating in the decision making process of the ITU is also a challenge for the state administrations of some countries who lack the technical expertise for an in-depth continued involvement. As MacCormick has noted "developing countries constitute the majority of ITU members and the bulk of the world's populace to whom telecommunications services must be extended in order to reduce the global disparity in access to information technologies and services." The ITU enjoys near universal membership, but that does not necessarily translate into universal participation. Further questions remain- should private sector members be given more decisional power, including voting rights, at all levels of ITU activities?