

## **Note by the Secretary-General**

### **ITU'S ROLE AS SUPERVISORY AUTHORITY OF THE INTERNATIONAL REGISTRATION SYSTEM FOR SPACE ASSETS UNDER THE SPACE PROTOCOL**

#### **Summary**

This report is a follow-up to the questions and comments raised by the Administrations of Japan, Australia, the Philippines, Germany, France, India, Mali, Nigeria, Argentina, Sweden, China, Turkey and the United States of America during Council 2012 and Council 2013 relating to the possible role of the International Telecommunication Union (ITU) as Supervisory Authority of the International Registration System for Space Assets and presents some information, clarification and background in this regard.

#### **Action required**

This report is transmitted to Council for information.

#### **References**

*Documents* [C12/36](#), [C12/68](#), [C12/77](#), [C12/94](#), [C13/15](#), [C13/55](#), [C13/78](#), [C13/107](#)

## **The Role and Functions of the Supervisory Authority**

**Question 1:** Further clarifications are needed about the role of the ITU as Supervisory Authority of the future International Registration System for Space Assets. (The Administration of Japan, The Administration of Sweden)

**Question 2:** Relating to question 4 of document C13/15, there is a need to specify clearly the rights and duties of the Supervisory Authority. Therefore, which document shall be read to the best answer this question? (The Administration of the Philippines)

- **As answered by the Legal Adviser at the 2013 Council session**, *“The ITU would not supervise the Space Protocol but the International Registration System for Space Assets which will be managed by a Registrar. So, the role of ITU as Supervisory Authority is very narrowly defined<sup>1</sup>.”* The Legal Adviser also indicated to the Administration of the Philippines *“to refer to Article 17 of the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets which enumerates the rights and obligations of the Supervisory Authority as well as the Registrar. Article 17 could be completed by Article 27 of the same Convention which deals with the legal personality and the immunity of the Supervisory Authority and the Registrar. Also, this can be completed by two Articles of the Space Protocol which are Article XXVIII related to the role of the Supervisory Authority as well as Article XLVII which is entitled Review Conferences, amendments and related matters.”*
- In addition, **Document C13/15, Annex 1 (question 4)** also refers to this issue and stipulates that *“ITU’s role will be limited to the supervision of the management of the International Registry by the Registrar (it would nominate the Registrar, it would put an end to its function, follow its activities, develop regulations<sup>2</sup> regarding the operation of the registry, rule on the tariff and structure of the Registry). However, it would not be implicated in the implementation of the Protocol by States Parties.”*
- Furthermore, **the above information was already addressed at the 2011 Council session<sup>3</sup>** as follows, *“the Supervisory Authority would oversee the operation of the Registry by the Registrar. In particular, it would appoint and, where necessary, dismiss the Registrar, monitor its activities, establish regulations in relation to the functioning of the Registry after approval by Contracting States and could be assisted by a commission of experts nominated by Signatory and Contracting States. It would determine and periodically review the structure of fees for the Registry’s services (see Article 17(2) of the Convention).”*

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<sup>1</sup> Comment partially recorded within Document C13/120, paragraph 1.3.

<sup>2</sup> Article XXIX of the Space Protocol entitles *First regulations* states that *“the first regulations shall be made by the Supervisory Authority so as to take effect on the entry into force of the Space Protocol.”* Nevertheless, as mentioned within Document C13/15, Annex 2 (question 3), *“the first regulations will be set by the Preparatory Commission that will act with full authority as provisional Supervisory Authority for the establishment of the International Registry for space assets pending the entry into force of the Protocol and definite choice of the Supervisory Authority.”*

<sup>3</sup> Document C11/26, paragraph 1.5.

- In regards to the above which expresses the role that ITU might be able to play in the process, **Document C11/120, paragraph 5.3** identifies what ITU would not do as follows: *“ITU would be neither the depositary of the protocol nor the guarantor of its implementation or application. The purpose of the protocol was to put in place the tools required to establish a suitable global mechanism for registering titles, security rights and interests in space assets. It was not envisaged that ITU be requested to manage or administer the registry, or even to keep it up to date, but solely to supervise its management, which would be entrusted to a registrar. Thus, ITU would not assume any responsibility for management of the registry in question.”*
- To summarize, the Supervisory Authority is concerned solely with the International Registry. It has no responsibility for interpretation of the Protocol, its implementation in matters not pertaining to the Registry or any other functions or activities not related to the Registry. Interpretation is ultimately a matter for national courts, which for this purpose can have regard to the Official Commentary on the Convention and Space Protocol. Similarly, the Supervisory Authority is not responsible for adjudicating on a particular registration, nor does it give instructions to the Register to change any data relating to a particular registration.

**N.B.:** It should be underlined that this is currently the Preparatory Commission which acts with full authority as Provisional Supervisory Authority as mentioned within **Resolution 1 relating to the setting up of the Preparatory Commission for the Establishment of the International Registry for Space Assets**. The Resolution in its Resolves stipulates *“to establish, pending the entry into force of the Protocol, a Preparatory Commission to act with full authority as Provisional Supervisory Authority for the establishment of the International Registry for space assets, under the guidance of the General Assembly of UNIDROIT [...].”*

**Question 3:** Within the International Civil Aviation Organization (ICAO), the Council is the body which would assume the functions of the Supervisory Authority. Which body of the ITU could be responsible for this function specifically? (The Administration of Australia)

- It could reasonably be assumed that, as is the case with ICAO, this task could be assigned to the Council. Nevertheless, Resolution 3 invites the Supervisory Authority to establish a Commission of Experts, consisting of not more than 20 members nominated by the Signatory and Contracting States to the Protocol, having the necessary qualifications and experience to assist the Supervisory Authority in the discharge of its functions. A similar committee, CESAIR, a body of governmental civil aviation officials, was set up to advise ICAO as Supervisory Authority for aircraft objects. The International Registry for aircraft objects set up an International Registry Advisory Board (IRAB), group of industry special legal and technical experts, to advise the Registrar on the needs of users of the registration system. IRAB makes recommendations to CESAIR which considers them and, with such modifications as it considers necessary, recommends them to the Council of ICAO. A similar structure could also be established should ITU become the Supervisory Authority of the International Registration System for Space Assets.

## The ITU mandate

**Question 4:** Can Article 1 of the ITU Constitution be interpreted to provide sufficient mandate to the ITU to take on this responsibility? (The Administration of Australia)

**Question 5:** There is a need to analyze the ITU Constitution and more particularly the Preamble and the Purpose of the Union as well as the Purpose of the Space Protocol and consequently determine if there is a direct relationship between both texts. (The Administration of the Philippines)

- **As answered by the Legal Adviser during the 2013 Council session,** *“beyond the fact that this activity could indeed be additional to what ITU normally does in administering the spectrum of radiofrequencies, it is not in contradiction with the mandate of ITU and it could be in addition to Nos. 5, 6 and 7 of the ITU Constitution.”*<sup>4</sup>
- The above questions were already addressed within **Document C13/15, Annex 1 and 2, question 1** as follow: *“Preliminary legal review shows that the participation of ITU as Supervisory Authority for the future registration system would be consistent with Article 1 of the ITU Constitution and would not be incompatible with other provisions of the ITU Constitution and Convention. This activity would also be complementary to ITU activities in managing spectrum/orbit resources for satellite networks.”*
- In addition, it seems important to underline that *“the role of ITU in this area would be very circumscribed. ITU would not be called on to manage or administer the Registry, and even less, to oversee the implementation of the Protocol. Similarly, ITU would not be the depository of the Protocol.”*<sup>5</sup>
- Furthermore, in order to prevent conflicts, *“it would be preferable however, that the ITU be in a position to prevent them from happening, rather than trying to resolve them after they have occurred. For this reason, involvement of ITU as Supervisory Authority of the registration system could be of interest.”*<sup>6</sup>
- In 2011, the report by the Secretary-General, **Document C11/26, paragraph 1.9** already mentioned that the role of the Supervisory Authority was in line with ITU’s mandate as it states that *“the participation of ITU would be consistent with Article 1 of the ITU Constitution. This activity would also be complementary to the ITU activities in managing spectrum/orbit resources for satellite networks.”*

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<sup>4</sup> Comment partially recorded within Document C13/120, paragraph 1.3.

<sup>5</sup> Document C13/15, Annex 1, question 1.

<sup>6</sup> *Ibid*, Annexes 1 and 2, question 1.

## **The International Registry**

**Question 6:** What is the exact role played by the Supervisory Authority regarding the International Registry? Does the Supervisory Authority supervise the International Registry? (The Administration of Japan)

Additionally to the response given to questions 1 and 2 above which expresses among others that the Supervisory Authority “*supervises the Registrar and the operation of the International Registry*”<sup>7</sup>, it also performs other functions towards the International Registry which are very narrowly detailed within Article 17, paragraph 2 of the Convention. As stipulates within this article, the Supervisory Authority shall also:

*“(a) establish or provide for the establishment of the International Registry;*

*“(d) after consultation with the Contracting States, make or approve and ensure the publication of regulations pursuant to the Protocol dealing with the operation of the International Registry;*

*“(e) establish administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority;*

*“(h) set and periodically review the structure of fees to be charged for the services and facilities of the International Registry;*

*“(i) do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of this Convention and the Protocol.”*

Futhermore, “*the Supervisory Authority shall own all proprietary rights in the data bases and archives of the International Registry.*”<sup>8</sup>

Although supervising the Register, ITU will not incur any potential liability with regard to the Registrar’s performance. Indeed, under Article 28 of the Cape Town Convention, the Registrar is strictly liable for compensatory damages for loss suffered by a person directly resulting from an act or omission of the Registrar and its officers and employees or from a malfunction of the international registry system and is required to cover this liability by insurance or a financial guarantee in an amount determined by the Supervisory Authority. In the case of the International Registry for aircraft objects the current level of cover is USD 130 million. In its eight years of operation, in which it has effected some 420,000 registrations, the Registry has not received a single claim.

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<sup>7</sup> *Convention on International Interests in Mobile Equipment on Matters specific to Space Assets*, Article 17, paragraph 2 (f).

<sup>8</sup> *Ibid*, Article 17, paragraph 4.

**Question 7:** Further clarifications are needed concerning the fee structure of the International Registration System for Space Assets. Indeed, the ITU might accept the fee structure in order to recover all the costs for the establishment, the ongoing and maintenance of the system both for the ITU and for the separate Registrar. Would the ITU accept the registration fees at a higher rate in order to recover cost? (The Administration of Australia)

- **During the 2013 Council session, the Legal Adviser mentioned that** *“It is currently premature to talk about the amount of the registration fees. It has to be kept in mind that these fees are established by the Supervisory Authority<sup>9</sup>. In the case that the ITU becomes the Supervisory Authority, then it will be the responsibility of the ITU to fix the rate in order to recover the costs.”<sup>10</sup>*
- Indeed, according to **Document C11/26, paragraph 1.7** *“the Supervisory Authority will be financed out of the fees to be paid to the international registry. The future International Registry for space assets is not intended to be a for-profit operation. Article XXXII, paragraph 4 of the Space Protocol provides that “the fees referred to in Article 17(2)(h) of the Convention shall be determined so as to recover the reasonable costs of establishing, operating and regulating the International Registry and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers and discharge of the duties contemplated by Article 17(2) of the Convention”. So, the Supervisory Authority, in setting the fees to be charged, will be entitled to charge for reasonable setting-up costs and the reasonable costs of establishing, operating and regulating the future International Registry and of supervising the Registrar and performing the other functions of the Supervisory Authority.”*

## The Registrar

**Question 8:** The Preparatory Commission made some proposals relating to the selection of the Registrar. In this respect, what is the position of the ITU? (The Administration of Australia)

It is premature to discuss about the selection of the Registrar<sup>11</sup> as the Working Group II of the Preparatory Commission which is in charge of this concern will have to give its first results before April 2014. These results will be based on *“the discussions regarding the elements to be needed to draft a request for proposal, on the basis of the results reached by that time in Working Group I.”<sup>12</sup>*

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<sup>9</sup> *Ibid*, Article 17, paragraph 2(h).

<sup>10</sup> Comment partially recorded within Document C13/120, paragraph 1.3.

<sup>11</sup> The Registrar has as his main duty the operation of the International Registry. Cf Article 17, paragraph 5 of the *Convention on International Interests in Mobile Equipment on Matters specific to Space Assets*.

<sup>12</sup> Document C13/55, paragraph 6(b).

## **Human Resources Management and Financing**

**Question 9:** As mentioned within the clarifications given by the Secretary-General, it is stipulated that there will be an office for the Supervisory Authority and in this connection, there will be a staff managing this office. For the effective control and supervision of this office/staff, will ITU be the employer? If this is the case, will the employees be treated as regular staff of the ITU? (The Administration of the Philippines)

- It could be assumed, taken the ICAO experience, that there should be no need to hire specific employees for the normal management of the office of the Supervisory Authority and that the extra tasks, foreseen as minimum, would be shared by a few ITU staff in addition to their normal workload, taking account that any extra expenses (participation to a meeting and associated travel and accommodation spending,...) would be recovered from the fees.

**Question 10:** It is argued that these employees could be paid from the fees to be paid to the International Registry. If this is the case, what would be the role of ITU in the determination, the fixing and in the collection of these fees? (The Administration of the Philippines)

- This element will be taken into consideration in the establishment of the fees, on a cost recovery basis. Fees shall be established and adjusted by the Supervisory Authority, as required by the Convention and the Protocol. In this regard, the first set of fees will be discussed and proposed by the Preparatory Commission, acting as Provisional Supervisory Authority pending the entry into force of the protocol and the final choice of the Supervisory Authority (See answer to question 7 above)

**Question 11:** The ITU could be assisted by a commission of experts<sup>13</sup> but who will be its employer? (The Administration of the Philippines)

- See answer to question 3 above.

## **ITU's participation within the Space Protocol**

**Question 12:** What is the participation of the ITU within the Space Protocol? (The Administration of the Philippines)

**As mentioned by the Legal Adviser during the 2013 Council session, "this Protocol is not open for signing and much less for accession or ratification by an International Organization with the exception of different type of organizations such as the European Union. Therefore, the ITU is not a party to this Protocol."** Moreover, in the event that the ITU be appointed as Supervisory

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<sup>13</sup> *Space Protocol*, Article XXVIII, paragraph 3.

Authority, as mentioned within questions 1 and 2 above<sup>14</sup>, it *“would not supervise the Space Protocol but the International Registration System for Space Assets which will be managed by a Registrar.”* Indeed, *“the ITU would be neither the depositary<sup>15</sup> of the protocol nor the guarantor of its implementation or application.”*<sup>16</sup> For more detailed information on the role and functions of the Supervisory Authority, please refer to Article 17 of the Convention as well as Articles XXVIII and XLVII of the Space Protocol.

Furthermore, as already mentioned above, the Supervisory Authority is concerned solely with the International Registry. It has no responsibility for interpretation of the Protocol, its implementation in matters not pertaining to the Registry or any other functions or activities not related to the Registry. Interpretation is ultimately a matter for national courts, which for this purpose can have regard to the Official Commentary on the Convention and Space Protocol. Similarly, the Supervisory Authority is not responsible for adjudicating on a particular registration, nor does it give instructions to the Register to change any data relating to a particular registration.

**Question 13:** The clarifications provided in the document C13/15 seem to endorse ITU being appointed as Supervisory Authority. Even if the Space Protocol is not inimical to ITU which is the case at present, the ITU has to bear in mind that it contains article XLVII in its paragraph 3 which concerns the amendments in regards to the Space Protocol. What could be the participation of ITU in the amendments of the Space Protocol? In this amendatory process, the provisions of the current Space Protocol which are for the moment favorable to the ITU could be modified. In this context, how can ITU’s interests be protected? (The Administration of the Philippines)

- Concerning the participation of the ITU in a possible amendatory process of the Space Protocol, the **Legal Adviser** stipulated, during the 2013 Council session that *“the Supervisory Authority would have a say in the amendment process and could possibly participate in a Conference which could be conducted in order to amend the Space Protocol.”*<sup>17</sup>
- Article XLVII of the Protocol provides that at the request of not less than 25% of the States Parties, Review Conferences of the States Parties shall be convened by UNIDROIT as Depositary in consultation with the Supervisory Authority. UNIDROIT would thus be responsible for the organization of any Review Conference but would, of course, act in close collaboration with ITU if it assumed the position of Supervisory Authority.
- The **Legal Adviser** also pointed out that the *“ITU cannot be held to any further changes or modifications which can occur to the Space Protocol and could have a negative impact on the organization or its members. Also, It shall be clearly specified in the legal instrument established by 2014 Plenipotentiary Conference that ITU reserves the right to withdraw*

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<sup>14</sup> In reference to The Legal Adviser quotation during the 2013 Council session, Document C13/15, Annex 1 (question 4), Document C11/120, paragraph 5.3.

<sup>15</sup> The functions of the Depositary are listed in Article XLVIII of the *Space Protocol*.

<sup>16</sup> Information also given within Document C13/15, Annex 2 (question 4).

<sup>17</sup> Comments partially recorded within Document C13/120, paragraph 1.3.



*from this activity and no longer exercise as Supervisory Authority should the Space Protocol be modified or amended in such a way as to harm the interests of ITU and its members.”<sup>18</sup>*

- In addition to the above, **Document C13/15, Annex 1 (question 1)** which refers to Article XXXV<sup>19</sup> of the Space Protocol states that *“the Convention as applied to space assets shall not affect State Party rights and obligations under the existing United Nations outer space treaties or instruments of the International Telecommunication Union.”* So, this Article *“establishes a hierarchy of norms between the Convention on international interests in mobile equipment on matters specific to space assets and other treaties by ensuring that, should conflicts arise, the ITU instruments shall prevail.”*
- The protection of the Member States’ interests was already a strong concern at the 2011 Council session. Indeed, the **Legal Adviser** mentioned that *“only ratification of the Protocol by a Member State could give rise to legal obligations for that Member State”<sup>20</sup>*. He also stressed that *“were ITU at the present stage to show interest in possibly playing the role of supervisory authority that would in no way constitute an irrevocable decision. Moreover, should agreement ultimately be expressed, it would of course be accompanied by all the precautions and limitations required to protect the interests of the Union and its Member States.”<sup>21</sup>*
- Consequently, in order to prevent conflicts, *“it would be preferable however, that ITU be in a position to prevent them from happening, rather than trying to resolve them after they have occurred. For this reason, involvement of ITU as Supervisory Authority of the registration system could be of interest.”<sup>22</sup>*

**N. B.:** As pointed out within **Document C13/15, Annex 1 (question 2)**, *“there is [...] a need to ensure that the implementation of this protocol is carried out in a way that takes into account the requirements of the ITU stakeholders.”*

**Question 14:** Which document shall the ITU sign in the event that such authority would be accepted? (The Administration of the Philippines)

- **As answered by the Legal Adviser at the 2013 Council session:** *“the decision of the ITU to become or not Supervisory Authority will depend on a legal instrument which still has to be produced by the 2014 Plenipotentiary Conference. The ITU is not linked by another legal instrument coming from elsewhere, it will be a legal instrument crafted by ITU itself*

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<sup>18</sup> *Ibid.*

<sup>19</sup> Article XXXV is entitled *Relationship with the United Nations outer space treaties and instruments of the International Telecommunication Union.*

<sup>20</sup> Document C11/120, paragraph 5.5.

<sup>21</sup> *Ibid.*, paragraph 5.6.

<sup>22</sup> Document C13/15, Annex 1 (question 1).

*and it will have to be sufficiently detailed in order to protect the interests of the organization.*<sup>23</sup>

## **The Evaluation of ITU's implications**

**Question 15:** The ITU shall analyze and evaluate the financial, legal, regulatory as well as operational impacts which could result from assuming the role of Supervisory Authority of the future International Registration System for Space Assets (The Administration of France, The Administration of Japan, The Administration of China as well as The Administration of Sweden).

Part of the information requested was already answered above especially the legal and regulatory implications developed within questions 1, 2, 4, 5, 6, 12, 13 as well as the financial implications which can be found under question 7. Nevertheless, relating to the financial implications, it could be of interest to refer to Article XXXII of the Space Protocol in its paragraph 4, as well as **Document C13/15, Annex 1, question 9 (b)** which points out that *“there is not and there will be not subsidization of Supervisory Authority activity to be charged to general accounts of the Union. Indeed, the Supervisory Authority will be financed out of the fees to be paid to the international registry.”* Also, relating to ITU's expenses as an observer in the Preparatory Commission, it should be noted that the establishment of the International Registry will be covered *“within the current ITU budget, similar to participation in events in the framework of technology/ITU related matter watch.”*<sup>24</sup>

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<sup>23</sup> Comment partially recorded within Document C13/120, paragraph 1.3.

<sup>24</sup> Document C13/15, Annex 1, question 9 (paragraphs b. and c.).