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글로벌 법제 동향 모니터링 및 이슈 분석 보고서

GLOBAL LEGAL ISSUES (Ⅰ)

ISSUE 01 **지식재산분야**

의약발명의 지식재산 보호동향

신 혜 은 충북대학교 법학전문대학원 교수

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국제해양법 현안의 토의 동향과 분쟁해결 결과 분석

이 용 희 한국해양대학교 해사법학부 교수

ISSUE 03 **정보통신분야**

국제전기통신연합의 위성궤도 관리 제도 동향

신 홍 균 국민대학교 법과대학 교수

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CONTENTS

ISSUE 01

지식재산분야 05

의약발명의 지식재산 보호동향

신 혜 은 충북대학교 법학전문대학원 교수
부록 글로벌 동향 모니터링 / 40

ISSUE 02

해양분야 85

국제해양법 현안의 토의 동향과 분쟁해결 결과 분석

이 용 희 한국해양대학교 해사법학부 교수
부록 글로벌 동향 모니터링 / 123

ISSUE 03

정보통신분야 133

국제전기통신연합의 위성궤도 관리 제도 동향

신 홍 균 국민대학교 법과대학 교수
부록 글로벌 동향 모니터링 / 163

2017

글로벌 법제 동향 모니터링 이슈 분석 보고서

KOREA LEGISLATION RESEARCH INSTITUTE

GLOBAL LEGAL ISSUES (Ⅰ)

ISSUE 01

지식재산분야

의약발명의 지식재산 보호동향

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신혜은 교수는 변리사로 일하면서 2007년 고려대학교에서 지적재산법분야 박사학위를 취득한 후 현재 충북대학교 법학전문대학원 교수로 재직 중이다. 주요 연구활동 분야는 특허법과 상표법 분야이다.

의약발명의 지식재산 보호동향

신 혜 은 충북대학교 법학전문대학원 교수

Abstract

전 세계적인 경기침체에도 불구하고, 제약산업은 최근 인구의 고령화에 따라 향후 가장 유망한 사업으로 주목받고 있다. 2014년 세계 의약품 시장규모는 1200조 원이라고 하는데, 이는 각각 400조 원대에 달하는 휴대전화산업이나 반도체산업을 합한 것보다 더 큰 규모이다. 이와 같은 상황을 반영하듯 미국, 유럽, 일본을 비롯한 선진국들은 의약발명의 범위를 확대하고 보호를 강화함으로써 자국 산업의 경쟁력을 강화하려는 움직임을 보이고 있다.

미국과 일본은 의약품 허가를 받기 위한 유효성·안전성 시험으로 인해 특허발명을 실시할 수 없었던 때에는 5년의 한도에서 특허권의 존속기간을 연장해 준다. 유럽연합은 의약품 허가 등의 이유로 실시할 수 없었던 기간에 대해서 추가보호증명서(SPC)를 부여해 준다.

미국을 제외한 대부분의 나라가 인간을 치료하는 방법발명에 대해서는 특허를 허용하지 않지만 의약용도발명에 대해서는 널리 특허적격성을 인정하고 있다. 그런데 투여용법·용량에 특징이 있는 의약용도발명의 경우에는 치료방법적인 특징을 포함하고 있어서 유럽, 일본 및 우리나라에서 해당발명의 보호와 관련하여 오랜 논란이 있었다. 치료방법발명의 특허성에

대해 전통적으로 부정적 입장을 취하던 유럽은 개정 유럽특허조약(EPC 2000)에서 특정의 투여용량·용법을 포함한 제2의약용도발명도 특허로 보호받을 수 있다는 점을 명확히 한 바 있다. 일본 또한 자국의 경쟁력강화를 위해 첨단 의료기술을 특허로 보호해야 한다는 인식하에 투여용량·용법에 특징이 있는 의약발명을 적극적으로 보호하기 시작하였다. 우리나라는 2015. 5. 21. 선고 전원합의체 판결에서 "투여용법과 투여용량이라는 새로운 의약용도가 부가되어 신규성과 진보성 등의 특허요건을 갖춘 의약에 대해서는 새롭게 특허권이 부여될 수 있다."고 하였다.

최근 의약발명의 지식재산권 보호와 관련하여 TPP에 대한 관심이 높아지고 있다. 미국의 탈퇴로 인해 해당 조약의 발효는 불투명해졌지만 중국과 일본의 움직임, 미국의 재협상 가능성 등을 눈여겨보고 다양한 가능성에 대해 미리 대비할 필요가 있다. 의약품과 관련해서는 특히 제18.48조(불합리한 단축에 대한 특허기간의 조정), 제18.50조(공개되지 않은 시험 또는 그 밖의 데이터 보호), 제18.51조(생물의약품), 제18.54조(보호기간의 변경) 제18.53조(의약품의 판매에 관한 조치)를 눈여겨볼 필요가 있다. TPP 협정 제18.48조가 "불합리한 단축에 대한 특허기간의 조정"을 규정함에 따라 제도운영국가가 증가할 것으로 예상되는 바, 각국의 제도 정비 및 구체적인 연장등록제도 운영 현황에 대해 모티터링할 필요가 있다. 또한, 제18.53조는 비록 완화된 형태이기는 하나 허가-특허 연계제도를 규정하고 있는바, 향후 협정국들의 국내법 이행에 대해 주목할 필요가 있다.

최대 의약품 시장은 아직까지 단연 미국이지만 중국은 새로운 시장으로 떠오르고 있고, 특히 2017년 3월 중국 식의약품감독국(CFDA)이 수입 의약품 등록에 관한 개정안을 발표함으로써 외국 제약사의 중국 내 진입이 가속화될 전망인바, 중국 시장에 대한 연구와 대책마련도 요구된다.

Ⅰ. 들어가며

21세기를 흔히 지식정보화 시대라고 한다. 그만큼 지식이나 정보가 중요하다는 것이다. 과거에는 유형적인 제품의 생산과 판매를 통해 부를 창출하였지만 지식정보화시대에는 무형의 기술을 판매함으로써 더 많은 부를 창출해 낼 수 있다. 지식이나 정보가 창출할 수 있는 부가가치는 유형의 물건을 생산하여 창출할 수 있는 것과는 비교할 수 없을 만큼 크다. 유형의 물건으로 창출할 수 있는 부가가치는 그 특성상 일정한 한계가 있을 수 밖에 없지만 지식이나 정보는 사용에 제한이 없기 때문이다. 한 번 가치 있는 기술을 개발하게 되면 이를 통해 엄청난 부를 창출하는 것도 가능한데, 제약산업은 대표적인 고부가가치 산업이다. 글로벌 신약 하나의 연간 부가가치는 자동차 300만대를 수출하는 것과 맞먹는다고 한다.

전 세계적인 경기침체에도 불구하고, 제약산업은 최근 인구의 고령화에 따라 향후 가장 유망한 사업으로 주목받고 있다. 2014년 세계 의약품 시장규모는 1200조 원이라고 하는데, 이는 각각 400조 원대에 달하는 휴대전화산업이나 반도체산업을 합한 것보다 더 큰 규모이다.[1] 이와 같은 상황을 반영하듯 미국, 유럽, 일본을 비롯한 선진국들은 의약발명의 범위를 확대하고 보호를 강화함으로써 자국 산업의 경쟁력을 강화하려는 움직임을 보이고 있다. 중국 또한 2016년 12월 25일, 중국 전국인민대표대회 상무위원회(全国人民代表大会常务委员会) 제25차 회의에서 '중화인민공화국 중의약법(中华人民共和国中医药法)'[2]을 최종 통과시킴으로써 중의약에 대한 보호를 강화하고 있다.

1) 2017.4.10. 서울경제 기사 참조.
2) http://www.npc.gov.cn/npc/xinwen/2016-12/25/content_2004972.htm (2017.5.2. 최종방문)

Ⅱ. 의약발명의 보호범위

1. 제약산업의 특수성

의약발명은 발명의 완성에 이르기까지 막대한 시간과 비용이 소모되고, 개발이 실패로 끝날 확률도 높고, 일단 개발에 성공하더라도 제품화를 위해서는 또다시 유효성, 안전성 시험을 거쳐야 하는 등, 기계나 전자분야 발명과는 다른 특성을 가진다. 그로 인해 의약발명은 특허권에 의한 보호가 필수적이라는 견해가 지배적이다.[3] 반면 의약은 국민의 생명이나 건강과 직결되는 것이어서 공익적 측면에서 특허권을 부여하지 않거나 권리를 제한해야 할 필요가 있는 분야이기도 하다.

특허법의 궁극적 목적은 산업발전이다. 특허법은 이와 같은 목적을 합리적으로 달성하기 위한 수단으로, 유용하고 새로운 기술을 개발한 자가 자발적으로 자신의 기술개발내용을 공개하게 하여 이어지는 후속연구의 바탕이 되게 하는 동시에 기술의 이용을 촉진하고, 해당 기술을 공개한 자에게는 합리적인 범위의 대가(인센티브)를 부여함으로써 기술발전의 원동력이 될 수 있도록 하고 있다. 그런데 부여된 인센티브가 너무 큰 경우에는 해당 발명의 이용이 저해되어 특허권으로 인해 오히려 해당 산업의 발전이 저해되는 결과를 초래할 수 있다. 반대로 인센티브가 너무 작은 경우에는 기술개발에 대한 의욕이 저하될 수 있다. 따라서 해당 기술 분야의 발전과 시대상황에 맞게 적절한 인센티브를 부여하여 기술발전의 선순환이 이루어질 수 있도록 하는 것이 무엇보다 중요하다. 의약발명의 경우에는 이에 더하여 공익적인 요소도 고려될 수 밖에 없고 해당 국가의 의료상황 또한 고려되어야 한다.

3) 신물질을 탐색하여 신약이 탄생하기까지는 막대한 비용과 시간이 소요되고 성공할 확률도 매우 낮으나, 일단 성공하기만 하면 매출액 대비 20~30%라는 큰 이윤을 얻을 수 있다고 한다. 이와 같은 제약산업의 특성상 특허권에 의한 보호는 투자한 R&D자금을 회수하는 중요한 수단으로 활용되고 있다.

우리 특허법은 처음에는 의약은 국민의 건강과 직결되는 문제라는 이유로 의약발명에 대한 특허성을 부정하다가 차츰 그 외연을 넓혀가는 방향으로 발전해왔다. 1961년 제정 특허법[4]에서는 관련 국내 산업을 보호하기 위하여 의약 또는 그 조합법, 화학방법에 의하여 제조할 수 있는 물질에 대하여 특허를 인정하지 않았다. 그러나 1987년 시행 개정 특허법[5]은 의약발명, 화학물질의 발명 및 용도 발명에 대해서도 특허받을 수 있도록 발명의 보호 범위를 넓히는 한편, 2이상의 의약을 혼합함으로써 제조되는 의약의 발명 또는 2이상의 의약을 혼합하여 의약을 제조하는 방법의 발명에 관한 특허권의 효력은 약사법에 의한 조제행위와 그 조제에 의한 의약에는 미치지 아니하는 것으로 효력제한규정을 두게 되었다. 이처럼 우리나라는 1987년 물질특허를 도입하면서 의약용도발명에 대해서도 보호하기 시작하였다. 다만 인간을 치료하는 방법발명에 대해서는 산업상 이용가능성이 없다는 이유로 여전히 그 특허성을 부정하고 있다.

2. 의료관련기술의 보호형태

(1) 인간을 치료하는 방법발명

인간을 치료하는 방법발명에 대해서는 미국을 제외한 대부분의 나라가 특허를 받을 수 없는 것으로 하고 있다. 의료행위에 대해 특허를 허용하지 않는 이유는 의료행위는 기술의 성질상 특허법에 의한 보호가 부적절해서라기보다 공익을 배려한 정책적 고려 때문이다.

WTO/TRIPS협정에는, 특허대상에 대해서, "특허는, 신규성, 진보성 및 산업상 이용가능성이 있는 모든 기술분야의 발명에 대해 주어지는 것"[6]과 "회원국은 인간 또는 동물의 치료를

4) 법률 제950호, 1961.12.31, 제정.

5) 법률 제3891호, 1986.12.31, 일부개정.

6) Article 27 (Patentable Subject Matter)

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. (5) Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

위한 진단방법, 치료방법 및 외과적 방법에 대해서는 특허대상에서 제외할 수 있다는 점"[7]이 규정되어 있다. 이처럼 TRIPS협정은 기술에 대해 차별없는 보호를 요구하면서도 치료방법 발명에 대해서는 예외를 인정하여 회원국의 자유에 맡기고 있다.

개정 전 유럽특허조약(European Patent Convention, 이하, 'EPC')은 제52조 제4항에서 "외과적 처치 또는 치료에 의한 인간 또는 동물의 처치방법 및 인간 또는 동물에 실시되는 진단방법은 동조 제1항에서 규정하는 산업상 이용가능성이 없다"고 하여 치료방법 발명의 특허적격성을 부정하였다.[8] 그러나 2000년 개정 EPC는 WTO/TRIPs 협정을 반영하여 제52조 제4항의 해당 부분을 삭제하는 대신 불특허사유에 대한 규정인 제53조에서 (c)를 신설하여 "수술 또는 치료에 의한 인체 또는 동물의 치료방법 및 진단방법(해당 처치 또는 진단방법에 사용하기 위한 물건 또는 합성물에는 적용되지 않는다)에는 특허가 부여되지 않는다"고 규정하였다.[9]

일본과 우리나라 심사실무는 동물을 치료하는 방법에 대해서는 특허를 허용하나 인간을 치료하는 방법발명에 대해서는 산업상 이용가능성이 없다는 이유로 특허적격성을 부정한다. 일본과 우리나라 모두 특허법에 인간을 치료하는 방법발명의 특허적격성을 부정하는 명문의 규정을 두고 있지는 않지만 심사기준에서 의료행위의 산업상 이용가능성을 부정하는 방법으로 해당 발명에 대해서는 특허를 허용하지 않고 있다.[10]

7) Article 27 (Patentable Subject Matter)
3. Members may also exclude from patentability:
(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

8) EPC Article 52(4) : "Methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body shall not be regarded as inventions which the meaning of paragraph 1. This provision shall not apply to products, in particular substances or composition, for use in any of these methods."

9) EPC Article 53(Exceptions to patentability) : "European patents shall not be granted in respect of : ...
(c) methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body; this provision shall not apply to products, in particular substances or compositions, for use in any of these methods.

10) 특허·실용신안 심사기준(개정 2017. 3. 1. 특허청 예규 제97호) 제3부 특허요건 제1장 산업상 이용가능성 5.1

미국은 거의 유일하게 인간을 치료하는 방법발명에 대해서도 특허를 허용하는 국가이다. 미국에서도 인간을 치료하는 방법발명의 특허성과 관련하여 오랜 논란이 있어왔다. 그런데 미국은 1996년 특허법을 개정하여, 인간을 치료하는 방법 발명에 대해서도 특허를 받을 수 있도록 하면서 의사에 의한 치료행위에 대해서는 일정한 예외를 인정하는 것으로 하였다. 즉, 미국에서는 치료방법발명에 대해서도 특허를 받을 수 있지만, 의사가 행하는 의료행위에 대해서는 해당 특허권에 기초한 금지명령이나 손해배상과 같은 민사적 구제조치를 취할 수 없는 것으로 하고 있다(미국 특허법 제287조(c)).

필자는 의료행위에까지 특허권을 부여하는 것은 현재의 상황으로서는 바람직하지 않다고 생각한다. 다만 현행 특허법상 의료행위에 대한 특허보호를 부정하는 방법으로 "산업상이용가능성이 없다"고 하는 것이 과연 논리적으로 타당한지는 의문이다. 유전공학기술의 발전에 힘입어 의료산업은 최근 세계에서 가장 빠르게 성장하고 있는 산업 중 하나로 꼽히고 있다. 게다가 특허청의 심사기준에 근거하여 의료행위의 특허성을 부정하는 방법은 법적안정성을 해칠 우려가 있다.[11] 이와 같은 이유로 필자는 특허법 제32조의 불특허사유에 '인간을 수술, 치료 또는 진단하는 방법'을 명문으로 포함시킬 것을 제안한 바 있다.[12]

(2) 의료기기 및 의약품

앞서 살핀 바와 같이, 의료행위에 해당하는 치료방법 자체는 미국을 제외한 대부분의 나라가 특허를 허용하지 않지만, 인간을 수술하거나 치료하거나 또는 진단에 사용하기 위한 의료기기 그 자체, 의약품 그 자체 등은 다른 특허요건을 모두 만족하는 경우 특허를 받을 수 있다.[13] 따라서 의약으로서 사용될 수 있는 물질을 처음으로 합성한 경우에는 물질특허를

의료행위("인간을 수술하거나 치료하거나 또는 진단하는 방법의 발명, 즉, 의료행위에 대해서는 산업상 이용할 수 있는 발명에 해당되지 않는 것으로 한다.")

11) 대법원은 1985. 2. 26. 선고 82후3 판결에서 "특허청의 심사기준은 그 내규에 불과하여 법원의 판단을 기속하는 것이라 할 수 없다"고 판단하였다.

12) 많은 학자들이 현재의 의료방법발명에 대한 보호의 문제점을 지적하고 있다. (박준석, "의약(醫藥)에 관한 특허법의 통합적 검토", 저스티스 通卷128號, 한국법학원, 2012.2, 229-289면; 신혜은, "의료방법발명의 특허법에 의한 보호", 안암법학, 2006.11, 261-295면; 정차호, "의료방법발명의 특허보호 타당성 검토", 산업재산권 통권19호, 산업재산권법학회, 2006.4, 1-36면; 김병일, "의료방법발명의 특허성", 창작과 권리 2002년 가을호, 2002, 2-38면).

13) 특허·실용신안 심사기준(개정 2017. 3. 1. 특허청 예규 제97호) 제3부 특허요건 제1장 산업상 이용가능성 5.1

받을 수 있고, 공지의 물질이라도 의약으로서의 새로운 용도를 밝혀낸 경우에는 새로운 용도에 대해 특허를 받을 수 있다.

의료행위와 달리 의약품이나 의료기기에 대해서는 특허를 허용하는 이유는 해당 기술에 대해서는 특허권이 부여되더라도 의사가 치료행위를 하는 시점에서는 해당 치료행위를 방해하지 않기 때문이다. 예컨대 의약품에 특허권이 존재하는 경우 의사는 대체재를 찾을 수도 있고, 해당 의약품을 처방해야하는 경우라도 자신의 치료행위가 특허권을 침해하는 것이어서 소를 제기당할 우려가 있는 등의 염려를 할 필요가 없다. 시장에서 판매된 의약품은 의사가 해당 의약품을 사용하는 시점에는 이미 특허권이 소진되어 특허권을 행사할 수 없기 때문이다.

(3) 의약용도발명

인간을 치료하는 방법(의료행위)에 대해서는 특허를 받을 수 없지만 의료행위에 사용되는 의약에 대해서는 물건의 발명으로 특허를 받을 수 있다.

특허청의 심사실무가이드에 따르면, 의약발명이란 의약을 발명의 구성요소로 하고, 이 의약의 용도가 직접 혹은 간접적으로 인체에 관여되는 발명을 말한다. 한편 의약이란 사람을 포함한 동물의 질병의 진단, 치료, 경감, 처치 또는 예방을 목적으로 사용하는 약제를 의미하는데, 의약발명에 해당하는지의 여부는 특허청구범위에 의약으로서의 용도를 기재하고 있는지 여부에 따라 판단한다.[14]

의약용도발명은 실무상 물의 형식으로 기재하여 출원하도록 하고 있고,[15] 의약용도의 표시에 있어서 의약용도를 한정하지 않은 「의약」, 「치료제」라는 포괄적 기재는 인정하지 않는다. 따라서 의약용도의 표시는 원칙적으로 질병의 진단, 치료, 경감, 처치 또는 예방에 해당하는 약효로써 표현해야 한다. 단, 의약용도가 약리기전으로만 정의되어 있다 하더라도

의료행위(“인간을 수술하거나 치료하거나 또는 진단에 사용하기 위한 의료 기기 그 자체, 의약품 그 자체 등은 산업상 이용할 수 있는 발명에 해당한다.”)

14) 특허청, 의약·화장품분야 심사실무가이드, 2011.12, 1-2면.

15) 예컨대 “화합물 A를 유효성분으로 하는 B질병 치료용 약학조성물”과 같은 형식으로 기재하여야 한다. “B질병 치료를 위한 화합물 A”는 의약용도를 청구하는 것이 아니고 “화합물 A”를 청구하는 것으로 판단한다.

당해 표현이 통상의 기술자에게 구체적인 약효로 인식되어 있어서 의약으로서의 용도가 명확하다고 인정되는 경우에는 그러한 기재를 허용할 수 있다.[16]

(4) 의약의 투여용법·용량 특허

투여용법·용량(dosage regimen)이란 투여주기, 투여절차, 투여부위, 투여경로와 같은 투여용법과 환자에게 투여되는 용량 등을 포함하는, 환자의 질환을 치료하기 위해 의약을 투여하는 스케줄에 관한 의약기술을 말한다. 의약이 부작용은 최소화하면서 온전한 효능을 발휘하기 위해서는 정확한 투여용법·용량을 결정하는 것이 매우 중요하다. 용법·용량에 대한 정보가 정확해야만 의약후보물질을 유용한 의약품으로 제품화할 수 있고, 의사도 환자에게 정확한 처방을 할 수 있다. 제약회사는 의약품에 첨부된 제품설명서 또는 라벨에 투여용법·용량을 기재하여 의약품을 판매하게 된다. 그런데 새로운 용법·용량은 인간을 치료하는 방법적인 요소이므로 이를 의약용도발명의 구성요소로 인정할 수 있을 것인지가 문제된다.

일본과 유럽에서는 오랜 논란이 있었고, 우리나라에서는 비교적 최근 해당 논란이 수면위로 떠올랐다. 찬성하는 입장에서는 ① 투여용법·용량도 기술적 특징이 우수한 발명이 존재하고, ② 우수한 투여용법·용량을 찾아내는 것도 상당한 비용과 노력이 소요되며, ③ 특허법적으로도 문제가 없으며, ④ 투여용법·용량 특허를 인정하는 것이 오히려 제약산업 발전에 도움이 된다는 점을 논거로 한다. 이에 반해, 반대하는 입장에서는 ① 투여용법·용량은 특허법의 청구범위 해석 및 침해와 관련된 일반적인 법리와 부합되지 않고, ② 투여용법·용량의 세부적인 판단기준에 대한 논의가 충분하지 않으며, ③ 투여용법·용량은 용도발명의 내재적 속성에 불과한 것으로 기술적 의의가 크다고 볼 수 없고, ④ 투여용법·용량 특허를 인정하게 되면 중복특허의 문제가 야기될 수 있으며, ⑤ 다국적 기업의 에버그리닝 전략으로 활용되어 국내 제약 산업의 발전을 오히려 저해할 수 있다고 주장한다.[17]

16) 예컨대 히스타민은 체내에서 유리되어 발진 등을 일으키는 인자로서 '항히스타민제'라는 표현은 약리기전에 관한 표현이지만 약효로 당업계에서 인식되어 있어서 의약으로서의 용도가 명확하므로 "하기 화학식 I의 화합물을 유효성분으로 하는 항히스타민제"와 같은 기재는 허용된다.

1) 미국

미국에서는 인간을 치료하는 방법발명에 대해서도 특허를 받을 수 있으므로, 치료의 태양에 특징이 있는 의약발명의 청구항은 "화합물 H를 초회에 ●~●●mg/kg의 양으로 투여하고 그 후 1회당 ○~○○mg/kg의 양으로 격일 투여하는 것을 특징으로 하는 C형간염치료방법"과 같은 형식으로 작성된다.[18] 청구항에 기재된 모든 구성요소가 신규성 및 진보성의 판단대상이 된다. 특히 해당 화합물이 C형간염치료에 사용될 수 있다는 것이 이미 공지되어 있는 경우에는 약제의 투여량이나 투여방법이 신규성 및 진보성을 판단하는 가장 중요한 요소가 된다.

2) 유럽

유럽에서는 인간을 치료하는 방법뿐만 아니라 동물을 치료하는 방법발명에 대해서도 특허권을 부여하지 않는다. 그러나 의약용도발명에 대해서는 최초의 의약용도를 발견한 제1 의약용도 발명이나 추후에 새로운 의약적 용도를 발견한 제2 의약용도발명에 관계없이 널리 용도발명의 특허성을 인정하여 왔다.

EPC 2000 제54조(4)에 따르면, 제53조(c)에 규정된 사람이나 동물의 치료방법에 이용하기 위한 물질 또는 조성물은 해당 치료방법(용도)이 신규하면 신규성이 있다. 아울러 제54조(5)에 따르면, 제53조(c)의 치료방법에 있어서 "특별한 사용(specific use)"에 대해서도 해당 사용이 신규하면 해당 사용에 이용하기 위한 물질 또는 조성물은 신규성이 있다. 유럽특허청의 확대심판부는 2010년 2월 19일 제2 의약용도에 대해 규정하는 유럽특허조약 제54조(5)의 해석에 대해, "용도에는 신규질환의 치료 이외의 것이 포함되는 경우가 있고 기지 의약의 신규한 투여형태(dosage regime)도 보호대상"이라고 판시했다.[19]

17) 김동준, 한국지식재산학회 2015년 춘계학술대회 토론문; 조명선, "투여주기와 단위투여량에 특징이 있는 의약발명의 진보성 판단", 특허판례연구 개정판, 박영사, 2012, 204-205면; 신혜은, "투여용량·용법에 특징이 있는 의약발명의 특허성", 산업재산권 제45호, 2014, 41-82면.

18) "A method for treatment of ~"

19) G 0002/08 심결.

3) 일본

일본은 우리나라나 유럽과 마찬가지로 치료방법발명에 대해서는 특허적격성을 인정하지 않지만 의약용도발명은 '물의 발명'으로 기재하면 특허를 받을 수 있다.[20] 그런데 개정전, 일본의 구심사기준에 따르면, 의약발명에서 투여방법이나 투여량 등이 인용발명과 달라도 대상 환자군이나 적용부위가 같으면 신규성이 없어서 특허를 받을 수 없었다. 이로 인해 미국이나 유럽에서는 신규성과 진보성을 인정받아 등록된 의약발명이 일본에서는 거절되는 사례가 많았고, 이에 대한 우려의 목소리가 증가하였다[21]

지식재산전략본부는 2008년 11월에 의사, 연구자, 법학자, 경제학자, 산업계, 변호사, 변리사, 공익대표 등 폭 넓은 분야의 위원으로 구성되는 「첨단 의료 특허 검토 위원회」를 설치하여 첨단 의료 분야에서의 적절한 특허 보호에 대해 검토하였는데 그 결과 공지의약의 신용법·용량에 특징이 있는 발명을 특허대상으로 보호해야한다는 점과, 신용법·용량의 의약발명을 특허대상으로 하는 경우에는 '물(物)'의 발명으로서 보호하는 것이 적당하다는 점을 제안하였다. 일본특허청은 위의 제안을 받아들여 2009년에 의약발명 심사기준을 개정하였다.

새롭게 개정된 일본의 의약발명 심사기준(2009. 11. 1. 이후 출원부터 적용)에서는 아래와 같이 의약용도 발명에 대한 정의를 새롭게 규정하였다.

> "의약용도란 (i) 특정 질병에의 적용, 또는 (ii) 투여시간·투여순서·투여량·투여부위 등의 용법 또는 용량(이하, '용법 또는 용량'이라 함)이 특정된 특정 질병에의 적용을 의미한다."

20) 의료방법발명에 대해서는 우리나라와 마찬가지로 특허법 제29조에서 규정하는 산업상 이용가능성이 없다는 이유로 거절한다.

21) 일본의 바이오테크놀로지 위원회는 투여방법, 투여량에 특징이 있는 의약발명 9개를 추출하여 미국, 유럽 및 일본에서의 심사현황을 각각 조사하였는데, 그 결과 일본에서 등록된 사례는 3건임에 반해 유럽은 모두 등록, 미국은 7건이 등록되었다고 보고하였다.(バイオテクノロジー委員会第1小委員会 , 治療の態様に特徴がある医薬発明の審査の現状と三極比較(その2) , 知財管理 58-10 , 2008年10月, 1321면).

신규성 판단과 관련해서는 "청구항에 기재된 의약발명의 화합물과 인용발명의 화합물이 상이하지 않고 적용하는 질병 또한 상이하지 않더라도 청구항에 관한 의약발명과 인용발명이 그 화합물의 속성에 근거하여 특정의 용법 또는 용량으로 특정의 질병에 적용하는 의약용도가 상이한 경우에는 청구항에 기재된 의약발명의 신규성은 부정되지 않는다"고 규정하였다.

한편 진보성 판단과 관련해서는 "특정의 질병에 대해서, 약효 증대, 부작용 저감, 복약 순응도의 향상이라고 하는 당업자에게 잘 알려진 과제를 해결하기 위해서, 용법 또는 용량을 호적화하는 것은, 당업자의 통상의 창작 능력의 발휘이다. 따라서 청구항에 기재된 발명과 인용발명이 적용하는 질병은 다르지 않지만 용법 또는 용량이 달라서 의약발명의 신규성이 인정되더라도 인용발명과 비교하여 유리한 효과가 당업자에게 예측할 수 있는 범위 내라면 진보성은 부정된다. 그러나 인용발명과 비교한 유리한 효과가 출원시 기술수준에 비추어 예측할 수 있는 범위를 넘어서는 현저한 것일 때에는 진보성은 긍정된다."[22)23)]

4) 정리

의약이 부작용을 최소화하면서 효능을 온전하게 발휘하기 위해서는 약효를 발휘할 수 있는 질병을 대상으로 하여 사용하여야 할 뿐만 아니라 투여주기·투여부위나 투여경로 등과 같은 투여용법과 환자에게 투여되는 용량을 적절하게 설정할 필요가 있는데, 이러한 투여용법과 투여용량은 의약용도가 되는 대상 질병 또는 약효와 더불어 의약이 효능을 온전하게 발휘하도록 하는 요소로서 의미를 가진다. 이러한 투여용법과 투여용량은 의약물질이 가지는 특정의 약리효과라는 미지의 속성의 발견에 기초하여 새로운 쓰임새를 제공한다는 점에서 대상 질병 또는 약효에 관한 의약용도와 본질이 같다.

그리고 동일한 의약이라도 투여용법과 투여용량의 변경에 따라 약효의 향상이나 부작용의 감소 또는 복약 편의성의 증진 등과 같이 질병의 치료나 예방 등에 예상하지 못한 효과를 발휘할 수 있는데, 이와 같은 특정한 투여용법과 투여용량을 개발하는 데에도 의약의 대상 질병 또는 약효 자체의 개발 못지않게 상당한 비용 등이 소요된다.

22) 「特許·実用新案 審査基準」第Ⅶ部「特定技術分野の審査基準」第3章「医薬発明」
23) 자세한 내용은 신혜은, "투여용량·용법에 특징이 있는 의약발명의 특허성", 산업재산권 제45호, 2014, 62-68 참조.

따라서 이러한 투자의 결과로 완성되어 공공의 이익에 이바지할 수 있는 기술에 대하여 신규성이나 진보성 등의 심사를 거쳐 특허의 부여 여부를 결정하기에 앞서 특허로서의 보호를 원천적으로 부정하는 것은 발명을 보호·장려하고 그 이용을 도모함으로써 기술의 발전을 촉진하여 산업발전에 이바지한다는 특허법의 목적에 부합하지 아니한다.

그렇다면 의약이라는 물건의 발명에서 대상 질병 또는 약효와 함께 투여용법과 투여용량을 부가하는 경우에 이러한 투여용법과 투여용량은 의료행위 자체가 아니라 의약이라는 물건이 효능을 온전하게 발휘하도록 하는 속성을 표현함으로써 의약이라는 물건에 새로운 의미를 부여하는 구성요소가 될 수 있고, 이와 같은 투여용법과 투여용량이라는 새로운 의약용도가 부가되어 신규성과 진보성 등의 특허요건을 갖춘 의약에 대해서는 새롭게 특허권이 부여될 수 있다.

최근 대법원은 국제적 추세를 반영하고 투여용법과 용량을 적절하게 설정할 필요성을 감안하여 전원합의체 판결을 통해 해당 요소 또한 의약용도발명의 구성요소로 인정한 바 있다.[24)]

투여용량·용법을 의약용도발명의 구성요소로 볼 수 있게 됨에 따라 구체적인 진보성 판단기준이나 침해요건 판단기준 등의 정립문제가 시급한 상황이다. 특허청은 최근 대법원 전원합의체 판결을 반영하여 "의약용도발명의 경우, 투여용법 또는 용량을 의약용도 발명의 구성으로 인정하고 진보성을 판단하며, 이로 인해 통상의 기술자가 예측할 수 없는 현저하거나 이질적인 효과를 발휘하기 때문에 특허로써 보호할만한 가치가 있다고 인정되는 특정한 투여용법과 투여용량에 대하여만 진보성이 인정될 수 있다."고 하여 투여용량 및 용법으로 한정된 의약용도발명에 대한 진보성 판단기준을 제시한 바 있다.[25)]

24) 대법원 2015. 5. 21. 선고 2014후768 판결(전원합의체).

25) 특허·실용신안 심사기준(개정 2017. 3. 1. 특허청 예규 제97호) 제9부 기술분야별 심사기준 제2장 의약·화장품 관련 발명 2.3 진보성.

Ⅲ. 의약특허권의 존속기간 연장제도

1. 특허권의 보호기간과 존속기간의 연장

특허권은 출원일로부터 20년간 존속하고, 특허권자는 특허권이 존속하는 동안 해당 특허발명을 실시할 권리를 독점한다. 그런데 의약이나 농약과 관련된 특허발명을 실시하기 위해서는 약사법 등에 의한 허가 또는 등록을 받아야 하므로 타 분야 발명과 비교해 존속기간이 실질적으로 단축되는 문제점이 제기되어 왔다.[26] 특허권 존속기간 연장제도는 특허권자가 존속기간 중 일정한 사유로 인하여 해당 발명을 실시하지 못한 경우에 그 실시하지 못한 기간만큼 존속기간을 연장시켜 주는 제도를 말한다.

현행 특허법 제89조에 따르면, "특허발명을 실시하기 위하여 다른 법령에 따라 허가를 받거나 등록 등을 하여야 하고, 그 허가 또는 등록 등(이하 "허가 등"이라 한다)을 위하여 필요한 유효성·안전성 등의 시험으로 인하여 장기간이 소요되는 대통령령으로 정하는 발명인 경우에는 제88조 제1항에도 불구하고 그 실시할 수 없었던 기간에 대하여 5년의 기간까지 그 특허권의 존속기간을 한 차례만 연장할 수 있다." 한편 동법 시행령 제7조에 따르면, 허가 등에 따른 특허권의 존속기간 연장등록출원 대상 발명은 신물질(약효를 나타내는 활성부분의 화학구조가 새로운 물질을 말한다. 이하 이 조에서 같다)을 유효성분으로 하여 제조한 의약품으로서 최초로 품목허가를 받은 의약품으로 한정된다. 결론적으로 현행 특허법 규정에 따르면, 하나의 특허에 대한 허가 등에 따른 특허권의 존속기간연장은 1회에 한하고, 신약에 상당하는 유효성분에 대하여 최초의 허가 또는 등록에 의한 것만 존속기간 연장등록이 인정된다.[27]

26) 이봉문·임정훈, "특허권 존속기간 연장등록제도가 제약산업에 미치는 영향", 창작과 권리, 세창출판사, 2003년 봄호, 2-3면.

27) 「허가등에 따른 특허권 존속기간의 연장제도 운용에 관한 규정」 일부개정 2015. 8. 21. 특허청고시 제2015-19호, 제3조.

2. 미국

허가 등에 따른 특허권 존속기간 연장등록제도는 신약개발자(특허권자)와 복제약 사업자의 타협의 결과라고 할 수 있는 미국의 Hatch-Waxman법[28]에 의해 처음 도입된 것이다.[29] 의약품의 경우에는 특허권을 부여받더라도 제품을 생산·판매하기 위해서는 유효성, 안전성 시험을 거쳐야하기 때문에 실질적으로 특허권을 행사할 수 있는 기간은 그만큼 줄어들 수 밖에 없게 되는데, 특허권자에게는 신약허가를 위해 자신의 특허발명을 실시할 수 없었던 기간만큼 특허권의 존속기간을 연장시켜줌으로써 신약개발에 대해 충분한 인센티브를 보장받을 수 있도록 하였다. 한편 복제약의 경우에는 이미 신약을 기초로 한 유효성과 안전성이 입증된 상태이므로 복제약 신청자는 동 복제약이 관련 신약과 생물학적으로 동등하다는 생물학적동등성(bioequivalence) 자료만 제출하여 약식신약신청(Abbreviated New Drug Application, ANDA)을 할 수 있도록 하고, 특허권 존속기간 중이라도 그와 같은 자료를 생성하기 위한 특허발명의 실시행위는 침해를 구성하지 않도록 하였다.[30]

미국은 의약품 허가를 위한 유효성·안전성 실험으로 인해 특허발명을 실시할 수 없었던 경우에는 새로운 유효성분(active ingredient)에 대해서만 1회에 한해 존속기간의 연장을 허용하고 있다.

한편, 미국 특허법 제156조(b)에 따르면, 존속기간이 연장된 특허권의 권리범위는 제품(product) 청구항의 경우 그 제품을 위하여 허가된 용도로 권리범위가 한정된다.[31] 아울러 동법 제156조(f)에 따르면, 제품은 유효성분(active ingredient)의 유리형태뿐 아니라 그

28) 정확한 명칭은 "Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (1984)"이나 이 법을 입안한 상원의원과 하원의원의 이름을 따라 통상 Hatch-Waxman법이라 부른다.

29) Hatch-Waxman법이 가져온 효과에 대해서는 Emily Michiko Morris, "THE MYTH OF GENERIC PHARMACEUTICAL COMPETITION UNDER THE HATCH-WAXMAN ACT", 22 Fordham Intell. Prop. Media & Ent. L.J. 245 참조.

30) 이를 소위 '볼라조항'이라 한다.

31) 35USC156

(b) Except as provided in subsection (d)(5)(F), the rights derived from any patent the term of which is extended under this section shall during the period during which the term of the patent is extended—

(1) in the case of a patent which claims a product, be limited to any use approved for the product—

유효성분의 염과 에스테르를 포함하고, 단일제제뿐 아니라 다른 유효성분과 조합되는 복합제제로 사용되는 것도 모두 포함하는 것을 의미하므로 결국 미국 특허법 규정에 따르면 존속기간이 연장된 특허권의 권리범위는 허가를 받은 유효성분(유리형태, 염 및 에스테르)의 허가된 용도에 관한 실시에까지 미치게 된다.

3. 유럽

유럽연합은 특허권 존속기간 연장등록출원을 통해 존속기간의 연장을 인정하는 미국, 일본 및 우리나라와 달리 특허권의 존속기간은 출원일로부터 20년이 경과하면 만료하는 것으로 하고, 의약품 허가 등의 이유로 실시할 수 없었던 기간에 대해서는 추가보호증명서(Supplementary Protection Certificate, 이하 'SPC')를 부여하는 형태로 제도를 운영하고 있다.[32]

유럽의 실무는 SPC를 수여받기 위해서는 해당 제품(product)에 대하여 이전에 SPC를 받은 사실이 없어야 하고(유럽연합규정 제469/2009호 제3조(c)), 제품(product)은 유효성분 또는 유효성분의 조합을 의미한다(유럽연합규정 제469/2009호 제1조)는 문언의 의미를 엄격히 해석하여, 공지의 물질에 대해서는 어떠한 획기적인 제형의 변화가 있거나[33] 새로운 용도를 개발하더라도 이를 기초로 SPC를 수여받을 수는 없는 것으로 하고 있다.[34] 한편 SPC에 의해 부여되는 특허권의 범위는 원특허권의 전체범위에 걸친 것이 아니라 "기본 특허에 의해 부여된 보호범위의 제한 내에서", "상응하는 의약품으로서 시장 판매 허가를 받은 제품(product)" 및 "SPC 만료일까지 허가된 의약품으로서의 제품의 용도"로 한정된다.[35] 그런데 동규정 제1조에서는 제품(product)을 "의약품(medicinal product)의

32) 용어와 기간의 계산방법 등은 상이하나 허가 등을 위하여 소요되는 기간으로 인해 실제로 특허발명을 실시할 수 없었던 기간만큼 추가보호를 위한 증명서를 부여한다는 점에서 허가 등에 따른 특허권 존속기간 연장제도와 그 취지나 효과는 동일하다.

33) 유럽사법재판소 2006. 5. 4. 선고 C-431/04 Massachusetts Institute of Technology 판결.("어떤 유효성분에 대해 이미 의약품으로 허가를 받은 바가 있다면 새로운 제형특허에 대해서는 존속기간을 연장받을 수 없다.")

34) 유럽사법재판소 2007. 4. 17. 선고 C-202/05 Yissum 결정.("물질의 제2 의약용도는 유럽연합규정 제1조(b)에서 정의하는 제품(product)에 포함되지 않는다 ... 따라서 어떤 유효성분에 대해 이미 의약품으로 허가를 받은 바가 있다면 해당 유효성분의 제2의약용도발명에 대해서는 존속기간을 연장받을 수 없다.")

유효성분 또는 유효성분의 조합(active ingredient or combination of active ingredients of a medicinal product)"이라고만 정의하고 있어서 유효성분을 어떻게 정의하는지에 따라 SPC에 의한 보호범위가 달라질 수 있다.

유럽사법재판소는 "제품(product)을 특정 염의 형태로만 제한하여 해석하게 되면 특허권자의 개발의욕을 고취시킨다는 SPC 제도의 취지에 맞지 않는다."는 점 등을 들어 "특정치료효과를 갖는 유리염기 형태의 화합물에 관한 물질특허에 대해 연장된 특허권의 효력은 의약품 허가를 받은 특정한 유효성분 그 자체뿐만 아니라 기본특허에 의해 보호되는 그의 염 및 에스테르에도 미친다."고 판시한 바 있다.[36]

4. 일본

일본 특허법은 유효성, 안전성 확보를 위해 법률의 규정에 따른 허가 등을 받아야 하고 이로 인해 특허발명을 실시할 수 없었던 때에는 5년의 한도에서 특허권의 존속기간을 연장해 준다는 점에서 기본적인 틀은 우리법과 유사하다.[37] 그러나 구체적인 연장등록 허용범위는 우리나라 제도와 매우 다르게 운용되고 있다. 현행 일본의 심사실무에 따르면 대상물건은 의약품의 유효성분에 한정되지 않고 '의약품의 성분, 분량 및 구조에 의해 특정된 물건'으로 해석되므로, 유효성분과 효능·효과가 과거의 승인과 동일하더라도 새로운 제제에 대해 별도의 승인을 얻을 수 있으면 해당 승인에 기초하여 제제특허의 연장등록이 인정된다.[38]

35) Article 4 (Subject matter of protection) Within the limits of the protection conferred by the basic patent, the protection conferred by a certificate shall extend only to the product covered by the authorisation to place the corresponding medicinal product on the market and for any use of the product as a medicinal product that has been authorised before the expiry of the certificate.

36) 유럽사법재판소 1999.9.16. 선고 C-392/97 Farmitalia 판결.

37) 특허권의 존속기간은 특허출원일로부터 20년이 되는 때에 종료하나(일본 특허법 제67조 제1항) 그 특허발명의 실시에 대하여 안전성의 확보 등을 목적으로 하는 법률의 규정에 의한 허가 그 밖의 처분으로서 해당 처분의 목적, 절차 등에 비추어 해당 처분을 정확하게 시행하기에는 상당한 기간을 요하는 것으로서 정령에서 정하는 것을 받을 필요가 있어 그 특허발명을 실시할 수 없는 기간이 있는 때에는 5년을 한도로 하여 연장등록의 출원에 의해 이를 연장할 수 있다(제67조 제2항). 한편, 존속기간 연장등록을 받기 위해서는 그 특허발명의 실시에 제67조 제2항의 정령에서 정하는 처분을 받을 필요가 있어야 한다(제67조의3 제1호).

38) 일본 특허청, 「特許権の存続期間の延長」に関するQ&A (平成28年3月23日).

일본 특허법 제68조의2에 따르면, 존속기간이 연장된 특허권의 효력은 그 연장등록의 이유가 된 처분의 대상이 된 물건(그 처분에서 그 물건이 사용되는 특정용도가 정해져 있는 경우에는 그 용도로 사용되는 그 물건)에 대한 해당 특허발명의 실시 이외의 행위에는 미치지 아니한다. 일본 지식재산고등재판소는 "대상이 된 물건"의 범위를 매우 좁게 해석하여 "유효성분 뿐 아니라 의약품의 구성을 객관적으로 특정하는 성분 또한 연장된 특허권의 효력을 제한하는 요소가 된다고 한다."[39]

5. 정리

특허권은 원칙적으로 출원일로부터 20년간만 존속할 수 있는 것인데, 활성 및 안전성 시험으로 인하여 장기간 소요되는 의약관련 발명의 경우에는 타기술분야와의 형평성을 고려하여 존속기간 연장등록제도를 도입하였다. 이와 같은 동제도의 취지와 특허법의 목적을 고려하면 존속기간의 연장은 단지 타법령에 의한 허가를 받을 필요가 있었다고 항상 허용되는 것은 아니고 특허권자의 이익, 사용자의 이익, 일반 공중의 이익을 고려하여 가장 형평에 맞으면서도 특허법의 목적을 달성할 수 있는 방향으로 제도를 설계하고 법을 해석해 나갈 필요가 있다. 아울러 존속기간 연장등록의 허용범위는 일정 측면 우리나라 제약산업이 처한 현실을 고려하여 정책적으로 판단할 필요도 있다. 이 경우에는 단순히 존속기간 연장등록의 허용범위가 미치는 영향뿐 아니라 연장된 특허권의 권리범위에 대한 부분도 고려되어야 한다. 연장등록 허용범위를 엄격하게 판단하는 경우에는 연장된 특허권의 권리범위는 그만큼 넓어질 수 있을 것이고, 연장등록을 널리 허용하는 경우에는 연장된 특허권의 권리범위는 한정 해석될 수 밖에 없을 것이기 때문이다. 이는 큰 발명은 크게 작은 발명은 작게 해석한다는 특허권 권리범위 해석의 일반원칙을 고려해 보더라도 당연하다.

구법하에서는 특허권 존속기간 연장제도의 대상이 되는 특허발명에 대하여 명확하게 규정하고 있지 않아서 심사·심판에서 일부 혼란이 발생했었다.[40] 그러나 2013년 특허법

39) 平成26年 5月30日 知財高裁判決 平２５（行ケ）１０１９５号.
40) 특허법원 2016.1.29.선고 2015허1256 판결 참조(1999년부터 2007년까지의 존속기간 연장등록 출원에 대해서는

시행령 개정으로 인해 대상물건은 '약효를 나타내는 활성부분의 화학구조가 새로운 물질'이라는 점이 명확하게 되었고,[41] 2014년 특허법 개정[42]에 따라 하나의 특허권에 대한 존속기간연장은 1회에 한한다는 점이 명확해졌다. 향후 위와 같은 점들을 반영하여 우리나라 산업현실에 맞으면서도 국제적으로 정합성을 이룰 수 있도록 연장된 특허권의 권리범위에 대한 판례의 축적이 이루어질 필요가 있다.

Ⅳ. 관련조약과 국제적 동향

1. TPP 협정의 타결

2015년 10월 5일 미국 조지아주 애틀랜타에서 열린 TPP 12개국 각료회의는 6일간 협상을 마무리하고 협상 타결을 공식 선언했다.[43] 이어서 2016년 2월 4일 참여국 12개국이 서명함으로써 TPP는 2년 내 발효될 수 있을 것이라는 기대를 모았으나 2017년 1월 트럼프 행정부가 돌연 탈퇴를 선언함으로써 앞으로의 향방이 불투명해지고 있다.

TPP 협정의 발효시기는 각국이 서명 후 각서명국의 비준에 어느 정도 시간이 걸리는지에 달려있고, 다음 3가지가 예상된다(제30.5조). ① 서명에서 2년 이내에 모든 서명국이 기탁자(뉴질랜드정부)에 국내절차완료의 서면통보를 하는 경우, 최후 통보일부터 60일, ② 서명에서 2년 이내에 2013년 GDP 합계 85% 이상[44]을 점하는 적어도 6개국이 통보한 경우는 2년 경과후 60일, ③ 서명에서 2년 이후에 2013년 GDP 합계 85% 이상을 점하는 6개국이 통보한

신약 및 자료제출의약품에 대해 모두 등록을 인정하였고, 2008년부터 2011년까지의 존속기간 연장등록의 출원은 자료제출의약품에 대해 등록 또는 거절이 혼재하며, 2012년 이후에는 자료제출의약품에 대해 등록이 모두 거절되었다.).

41) 대통령령 제24491호 일부개정 2013.04.03.

42) 법률 제12753호 일부개정 2014. 06. 11.

43) 2015.10.5. 조선일보 기사참조.

44) 85% 요건만족을 위해서는 미국과 일본의 비준이 필요. (역내 GDP 비율이 미국 60.5%, 일본 17.7%)일본과 GDP 하위 7개국으로는 85%가 되지 않으므로 캐나다(6.6%), 유럽(5.4%), 멕시코(4.5%)가 비준할 필요가 있다.

경우는 요건을 만족하는 국가의 통보일부터 60일.

TPP는 총 30개의 챕터로 구성되고 부속서까지 포함하면 2,000페이지가 넘는 방대한 양으로 구성되어 있다. 비록 뒤늦게 TPP 협상에 참여하였지만 일본과 함께 동 협상을 주도하던 미국의 탈퇴로 다양한 가능성이 예상되고 있지만, TPP 협정문 제18장 지식재산권, 특히 의약발명의 지식재산관련 규정들은 향후 다른 FTA에서도 국제적 방향성을 제시하는 기준이 될 수 있을 것인바, 관련규정들을 검토해 볼 필요가 있다.

2. TPP 협정에서 의약발명의 지식재산 보호

TPP 제18장 지식재산권은 제A절 (총칙: 제18.1~18.11조) 제B절 (협력: 제18.12~18.17조), 제C절 (상표: 제18.18~18.28조), 제D절 (국명: 제18.2조), 제E절 (지리적 표시: 제 18.30~18.36조), 제F절 (특허 및 공개되지 않은 시험 또는 그 밖의 데이터: 제18.37~18.54조), 제G절 (디자인: 제18.55~18.56조), 제H절 (저작권 및 관련 권리: 제18.57~18.70조), 제I절 (권리행사: 제18.71~18.80조), 제J절 (인터넷 서비스 제공 업자: 제18.81~18.82조) 제K절 (최종 규정: 제18.83조)로 구성된다. 그 중 의약 관련 조항을 살펴본다.

(1) Article 18.48: Patent Term Adjustment for Unreasonable Curtailment (불합리한 단축에 대한 특허기간의 조정)

특허권의 존속기간은 출원일부터 20년이나 의약품특허의 경우 승인을 위한 심사에 장기간이 소요되므로 5년의 한도로 기간의 연장을 인정하는 '의약품 특허에 대한 존속기간 연장제도'를 운영하는 경우가 있다.

제18.48조는 제2항에서 "각 당사국은 특허의 대상이 되고 있는 의약품에 대해 판매 승인 절차의 결과로 발생한 유효 특허 기간의 불합리한 단축에 대해 특허권자에게 보상하기 위한 특허 기간 조정을 이용할 수 있도록 한다."고 규정한다. 이 조항은 TPP 협상 참가국인 페루, 호주, 싱가포르, 칠레의 대미 FTA와 거의 같은 조문이며, 연장 기간의 상한과 구체적인

계산 방법, 연장이 인정되는 특허의 종류 등에 대해서는 언급하고 있지 않다. 캐나다가 TPP 협상 참가 표명 시에는 이 조항은 캐나다가 강력하게 반대할 수 있다고 우려되었으나, 2014년 9월에 체결된 캐나다-EU FTA에서 의약 특허 연장 제도가 규정됨으로써 TPP 협상에서는 지금까지의 미국 FTA와 동일한 수준의 의약 특허 연장 조항이 채택되었다고 한다.[45)]

(2) 신약 데이터 보호

신약 데이터에 대한 보호는 제18.50조 (공개되지 않은 시험 또는 그 밖의 데이터 보호), 제18.51조 (생물의약품), 제18.54조 (보호기간의 변경)에 규정되어있다.

1) Article 18.50: Protection of Undisclosed Test or Other Data (공개되지 않은 시험 또는 그 밖의 데이터 보호)

제18.50.1(a)는 신약 데이터 보호에 대해 아래와 같이 규정하고 있다.

> "체약국은 신규 의약품의 판매 승인을 부여하는 조건으로 본 해당 의약품의 안전성 및 유효성에 관한 공개되지 않은 시험 또는 그 밖의 데이터 제출을 요구하는 경우, 당사국의 영역에서 해당 신규 의약품의 판매승인일로부터 적어도 5년간, 이전에 그와 같은 정보를 제출한 자의 승낙을 얻지 않고 제삼자가 다음 중 하나의 정보에 근거하여 동일 또는 유사한 제품을 판매하는 것을 허락해서는 안 된다.
> (ⅰ) 당해 정보; 또는
> (ii) 당해 정보를 제출한 자에게 부여되는 판매승인"

본 항에서 보호되는 신약의 안전성·유효성에 대한 비공개 시험데이터뿐만 아니라, 신약의 타국 판매 증거 (제18.50.1(b)), 생물의약품에 대한 데이터 (제18.51.1), 신규 효능 등에 관한 추가 시험 데이터 (제18.50.2(a)), 먼저 승인되어 있지 않은 화합물을 포함하는 신약에 대한 데이터 (동2(b)) 등에 관하여, 그에 근거하여, 표 1의 기간 동안 제삼자에 대해 해당

45) 桝田 祥子, "環太平洋経済連携協定 (TPP 協定) における医薬知財保護", パテント 2016年3月号, 68頁.

의약품의 승인을 하는 것을 금지한다. 해당 보호 기간은 특허 기간과는 독립적으로 설정하여야한다(제18.54조).

지금까지 미국이 체결한 FTA에서는 생물의약품 (보호기간 5년 또는 8년)에 대하여 별도로 규정되어 있지 않았다. 신규 효능 등에 관한 추가 시험 데이터 (보호기간 3년) 또한 한미 FTA 제18.9.2(a)에서 처음으로 규정된 것으로 이전 FTA에서는 요구되지 않았다.

2) Article 18.51: Biologics (생물의약품)

생물의약품에 관해서는 "적어도 생명 공학 공정을 사용하여 생산되고, 또한 질병 또는 이상의 예방, 치료 또는 치유를 위해 인간에게 사용되는 단백질인 제품 또는 당해 단백질을 포함 제품"에 대해 적용된다는 점이 규정되어 있다(제18.51.2). 또한 "당사국에서의 최초 판매 승인"에 대한 데이터를 보호 대상으로 하는 것이 명기되어 있다. 이것은 바이오 후속품의 임상 데이터를 제외하기 위한 것이라고 생각된다. 보호기간에 관하여는 "(a) 적어도 8년간" 또는 "(b) (ⅰ) 당사국에서 당해 의약품의 최초 판매 승인 일로부터 최소 5년간 (ii) 다른 조치를 취할 것, 그리고 (iii) 시장의 환경도 효과적인 시장의 보호에 기여할 것을 확인할 것"에 의해 효과적인 보호를 할 것이 요구된다(제18.51.1).

생물의약품에 관한 본조 규정의 적용 범위·보호 기간은 국제적인 개발 환경 등을 고려하여 원칙적으로 10년 후 재협의하는 것으로 되어있다(제18.51.3).

〈표 1〉 보호가 요구되는 기간[46]

보호대상		생물의약품 이외	생물의약품[47][48]
신약의 안전성·유효성에 관한 비공개 시험데이터		적어도 5년간	적어도 8년 또는 일정 요건하[49] 적어도 5년
신약의 타국판매증거			
(a) 또는 (b)	(a) 신규효능, 제형 또는 투여방법에 관한 추가시험데이터	적어도 3년간	규정 없음
	(b) 먼저 승인되어 있지 않은 화합물을 함유하는 신약[50]에 관한 보호	적어도 5년간	규정 없음

46) 桝田 祥子, "環太平洋経済連携協定 (TPP 協定) における医薬知財保護", パテント 2016年3月号, 68頁.

47) 생물의약품 규정은 적어도 인간의 질병이나 상태의 예방·치료·치유에 사용되는 바이오테크놀로지 공정에 의해

(3) Article 18.53: Measures Relating to the Marketing of Certain Pharmaceutical Products (의약품의 판매에 관한 조치)

특허연계에 관한 제도는 제18.53조에 규정되어있다. 체약국은 제1항 또는 제2항 중 하나를 준수해야 한다.

제1항은 "체약국은 의약품의 판매를 승인하는 조건으로 안전성 및 유효성에 관한 정보를 최초로 제출한 사람 이외의 사람이 이전에 승인된 제품의 안전성 또는 유효성에 대한 증거 또는 정보 (예를 들어, 선행하는 판매승인으로서, 해당 체약국에 의한 것 또는 다른 국가 또는 지역의 영역에서의 것)에 의거하는 것을 인정하는 경우에는 다음 사항을 정한다.

(a) 당해 최초로 제출한 자 이외의 자가 당해 승인된 제품 또는 그 승인된 사용 방법이 청구 범위에 기재되어 있는 적용되는 특허 기간 중에 해당 의약품을 판매하려고 하는 것에 대해 해당 의약품이 판매되기 전에 특허권자에게 통지하거나, 또는 특허권자가 통지를 받을 수 있도록 하는 제도

(b) 특허권자가 침해 의심제품의 판매 전에 (c)에 규정하는 이용가능한 구제수단을 구하기에 충분한 기간 및 기회; 그리고

(c) 승인된 의약품 또는 그 승인된 사용방법이 청구범위에 기재되어 있는 적용되는 특허의 유효성 또는 침해에 관한 분쟁을 적시에 해결하기 위한 절차(사법상 또는 행정상 절차 등) 및 신속한 구제조치(예비적 금지명령 또는 이와 동등한 효과적인 잠정조치 등)."이다.

제2항은 "체약국은 제1항의 규정을 실시하는 대신, 특허권자 또는 판매승인신청자가 판매승인당국에 제출한 특허관련 정보에 근거하거나 또는 판매승인당국과 특허청간의 직접

생산되는 단백질(또는 해당 단백질을 포함하는) 의약품에 적용된다. 또한 '최초로' 승인된 의약품에 한하고, 바이오 후속품에 관한 데이터는 포함되지 않는 것으로 해석된다.

48) 생물의약품에 관한 규정의 적용범위·보호기간은 10년 후에 다시 재협의한다(제18.51.3).

49) '다른 조치를 취할 것', '시장의 환경도 효과적인 시장의 보호에 기여할 것을 확인할 것'을 요건으로 한다.

50) 타국판매의 증거(제18.50.1.(b))에는 적용하지 않아도 됨.

조정에 근거하여, 해당 특허권자의 승인 또는 묵인을 얻지 않는 한, 청구범위에 기재된 특허대상 의약품을 판매하고자 하는 제3자에게 판매승인을 하지 않는 사법상 절차 이외의 제도를 채용하거나 유지할 것."으로 되어 있다.

지금까지의 미국 FTA 특허연계조항은 특허기간 중에 제3자의 의약품 판매개시(통상은 제네릭약품의 판매개시)를 저지하는 수단을 해당 의약품의 승인절차 중에 설치할 것을 요구하거나, 보다 구체적으로 특허기간 중에 제3자의 의약품 승인을 인정하지 않을 것을 요구했으나 TPP는 대폭 조건을 완화하고 있다. 제1항은 (승인전이 아니라) 해당 의약품이 판매되기 전에 ① 제3자에 의한 신청에 대한 특허권자에의 통지 및 ② 특허권자가 구제를 구하기에 충분한 기간·기회의 제공을 각 체약국에게 요구하고 있고, 또한 ③ 특허유효성·침해성에 관한 적시분쟁해결을 위한 절차 및 신속한 구제조치에 대해서도 제3자가 신청한 의약품의 승인 절차에서 행할 것 까지는 요구하고 있지 않다. 제2항에서는 특허기간 중에 제3자의 의약품 판매개시를 저지하는 수단을 해당 의약품의 승인 프로세스 중에 설치할 것을 요구하고는 있으나 그 수단은 '사법상의 절차 이외의 제도'로 한정하고 있다.

3. 미국의 탈퇴선언과 'RCEP'의 급부상

TPP는 2005년 6월에 뉴질랜드, 싱가포르, 칠레, 브루나이 4개국 체제로 출범하였지만, 2010년 미국이, 2013년 일본이 각각 협상에 합류하면서 두 후발 주자가 사실상 협상을 주도해왔다. TPP는 2015년 10월 5일 극적인 타결에 이어 2016년 2월 4일 참여국 12개국이 서명함으로써 2년 내 발효될 수 있을 것이라는 기대를 모았지만, 2017년 1월 트럼프 행정부가 돌연 탈퇴를 선언함으로써 앞으로의 향방이 불투명해지고 있다.

미국의 탈퇴에 따라 TPP가 폐기될 가능성도 있지만, 아베 신조(安倍晋三) 총리는 "아직 끝나지 않았다"며 트럼프 행정부를 계속 설득해 나가겠다는 입장을 밝힌바 있다. 그런데 최근 아베 정권은, 2017년 5월 하노이에서 열리는 통상장관회의에서 TPP 11개국이 모여 재출발 협상을 개시해 빠르면 11월의 APEC 정상회의까지는 합의해 참가국들의 서명을 끝낼 방침으로, TPP 11의 체결을 서두르고 있다. 호주와 뉴질랜드는 지난해 11월 트럼프가 당선된

직후부터 이미 미국을 포함한 형태의 TPP는 무리라고 주장하면서 미국을 뺀 TPP 11의 실현을 제창한 바 있다. 아베 정권은 당초, 미국을 뺀 TPP는 무의미하다는 전제하에 호주와 뉴질랜드의 제안을 거절한 바 있는데, 아베 정권의 태도변화는 호주와 뉴질랜드의 제안을 받아들이기로 한 것을 의미한다.[51]

한편, 미국의 TPP 탈퇴에 따라 중국이 급부상하고 있다. 중국을 견제하기 위해 시작된 TPP에 중국을 가입시키자는 움직임도 있고, 미국의 TPP 탈퇴 후 중국이 주도하는 '역내 포괄적 경제동반자협정'(Regional Comprehensive Economic Partnership Agreement; 이하, 'RCEP')이 아시아 시장의 자유무역체제로 새롭게 떠오르고 있다. RCEP는 동남아시아국가연합(아세안) 10개국과 한국, 중국, 일본, 호주, 뉴질랜드, 인도 등 총 16개국이 참여하는 거대한 경제블록이다. 회원국을 모두 합치면 세계 인구의 거의 절반, 세계 국내총생산(GDP)의 3분의 1을 차지한다.

중국은 내심 미국의 TPP 탈퇴를 흐뭇해하면서 RCEP 체결을 올해 말까지 끝내려고 서두르고 있다. RCEP를 주로 관세 장벽을 낮추는 '낮은 수준'의 자유무역협정으로 만들려는 것이 중국의 의도다. 여기에는 미국의 TPP 탈퇴 후 주도권을 장악하려는 정치적 의도도 깔렸다. 이에 맞서 일본과 호주는 시간이 다소 걸리더라도 RCEP를 서비스와 투자 분야를 포괄하는 '높은 수준'의 협정으로 만들고자 한다. 중국과의 줄다리기가 불가피하다는 얘기다. 여기에는 미국을 자극해 TPP에 복귀시키고자 하는 속셈도 담겨 있다.[52]

51) 2017年4月24日 田中 宇의 뉴스해설 참조. https://tanakanews.com/170424tpp11.htm (2017.5.2. 최종방문)
52) 2017.3.14. 연합뉴스 기사 참조.

Ⅴ. 시사점

1. 의약발명의 보호범위의 확대

공지물질의 새로운 용도에 대해서만 특허를 허용할 것인지, 제2 용도발명까지 특허를 허용할 것인지, 새로운 투여용법·용량까지 특허를 허용할 것인지, 이에 더 나아가 인간을 치료하는 방법발명에 대해서까지 특허를 허용할 것인지는 자국의 산업발달 정도와 국민의 보건에 미치는 영향을 고려하여 정책적으로 판단할 문제이다. 미국은 일찍이 특허법을 개정하여 인간을 치료하는 방법발명에 대해서도 특허적격성을 인정한 바 있고, 치료방법 발명의 특허성에 대해 전통적으로 부정적 입장을 취하던 유럽은 개정 유럽특허조약(EPC 2000)에서 특정의 투여용량·용법을 포함한 제2 의약용도발명도 특허로 보호받을 수 있다는 점을 명확히 한 바 있다. 일본 또한 자국의 경쟁력강화를 위해 첨단 의료기술을 특허로 보호해야 한다는 인식하에 투여용량·용법에 특징이 있는 의약발명을 적극적으로 보호하기 시작하였다.

인구의 고령화에 따른 노인성질환 치료수요의 증가, 제3세계 의약시장의 확대에 따라 선진국들이 자국 산업의 경쟁력 강화를 위해 의약발명의 보호범위를 확대해 나가고 있는 가운데, 비록 협상 참가국들의 강력한 반대에 부딪혀 최종 시안에서는 삭제되었지만 TPP 2013년 검토안에서 치료방법발명의 특허적격성 여부가 제안되었다는 점을 주목할 필요가 있다.[53] 미국은 인간에 대해 적용되는 진단·치료 및 수술방법의 경우에도 그것이 기계·제조물 또는 조성물을 이용하는 방법을 포함하는 경우에는 특허의 대상적격을 갖는 발명에 해당하는 것으로 포함시키자는 제의를 하였다.[54]

반면, 미국, 일본, 호주 등 3개국을 제외한 9개국은 인간이나 동물의 치료방법을 특허부여대상에서 제외할 수 있다는 예외조항으로 규정하자고 제안하였고, 결국 특허대상에 관한 제18.37조(특허를 받을 수 있는 대상)에서 체약국은 "인간 또는 동물의 치료를 위한

53) 박준석, "환태평양 경제동반자 협정(TPP) 중 지적재산권 조항에 대한 고찰", 통상법률 통권 제120호, 2014, 52-54면.
54) 2013년 검토안 Article QQ.E.1.3.(b).

진단방법, 치료방법 및 외과적 방법"을 특허대상에서 제외할 수 있는 것으로 규정하였다.[55]

이처럼 나머지 당사국들의 반대에 부딪혀 최종 협정문에서는 미국의 제의가 반영되지 않았지만, 미국과 일본은 이 문제를 다시 논의할 수 있는 여지를 남겨두고 있었다는 주장도 있는 바,[56] 투여용법·용량에 특징이 있는 의약용도발명을 포함하여 의료방법발명의 보호 문제를 큰 틀에서 연구하고, 우리나라 산업환경에 맞는 대응책을 미리 모색해 둘 필요가 있다.

2. 의약품 허가와 특허권 존속기간의 연장

(1) 특허발명을 실시할 수 없었던 기간

특허권은 원칙적으로 출원일로부터 20년간만 존속할 수 있지만, 의약발명은 활성 및 안전성 시험에 장기간이 소요된다는 점을 감안하여 우리나라는 1987년에 물질특허제도를 도입하면서 특허권 존속기간 연장등록 제도를 함께 도입하였다. 우리나라에서 동제도를 도입한지 거의 30년이 지났지만 2007년까지는 물질특허의 존속기간들이 아직 만료되지 않아서 출원 자체가 많지 않았고, 그 이후로도 실제로 연장등록이 된 의약품과 관련한 분쟁이 발생한 경우는 매우 드물었다. 그런데 최근 특허권의 존속기간 연장을 규정한 특허법 제89조에서 규정하는 '특허권의 허가절차 등으로 특허발명을 실시할 수 없었던 기간'에 대한 의미있는 판결이 나왔다. 특허권의 존속기간 연장을 규정한 우리나라 특허법 제89조는 의약품 허가 절차 등으로 특허발명을 실시할 수 없었던 기간에 대하여는 존속기간을 연장할

55) 제18.37조(특허를 받을 수 있는 대상)
...
3. 체약국은 공공의 질서 또는 선량한 풍속을 지킬 것(사람, 동물 또는 식물의 생명 또는 건강을 보호하거나 자연 또는 환경에 대한 중대한 손해를 회피할 것을 포함)을 목적으로 상업적인 실시를 자국의 영역에서 방지할 필요가 있는 발명을 특허대상에서 제외할 수 있다. 다만 그 제외가 단순히 해당 체약국의 법령에 의해 해당 실시가 금지되어 있다는 이유로 행해지지 않을 것을 조건으로 한다. 체약국은 또한 다음의 것을 특허대상에서 제외할 수 있다.
(a) 인간 또는 동물의 치료를 위한 진단방법, 치료방법 및 외과적 방법
(b) 미생물 이외의 동물 및 비생물학적 방법 및 미생물학적 방법 이외의 동식물 생산을 위한 본질적으로 생물학적인 방법.

56) 특허청 연구보고서, 기술 및 환경 변화에 따른 지식재산 제도 개선 방안, 2016.12, 119면.

수 있다고 규정하고 있다. 다만 허가 등을 받은 자에게 책임 있는 사유로 소요된 기간은 이 기간에 포함되지 않는다고 정하고 있는데, 이전까지는 존속기간 연장에 관한 구체적이고 명시적인 기준이 없었다.

특허법원 특별재판부는 존속기간연장무효심결 취소소송(2016허21 등)에서 존속기간 연장기간 산정의 기초가 되는 기간을 '특허권자 등이 특허발명을 실시하려는 의사 및 능력이 있었음에도 불구하고 특허발명을 실시할 수 없었던 기간, 즉 약사법 등에 의한 허가 등을 받는데 필요한 기간'으로 해석했다. 또한, 특허발명을 실시할 수 없었던 기간의 시작과 끝나는 날에 대한 기준을 명확히 했다. 재판부는 "시기(始期)는 특허권자 등이 약사법 등에 의한 허가 등을 받는데 필요한 활성·안전성 등의 시험을 개시한 날 또는 특허권의 설정등록일 중 늦은 날이 되고, 그 종기(終期)는 약사법 등에 의한 허가 등의 처분이 그 신청인에게 도달함으로써 그 처분의 효력이 발생한 날"이라고 밝혔다.

'특허권자에게 책임 있는 사유로 소요된 기간'에 대해서는 "특허권자의 귀책사유로 말미암아 약사법 등의 허가 등이 실제로 지연된 기간, 즉 특허권자의 귀책사유와 약사법 등에 의한 허가 등의 지연 사이에 상당인과관계가 인정되는 기간을 의미한다"고 설명했다. 특별재판부는 위와 같은 기준을 근거로 특허청이 특허권자의 존속기간을 연장해준 처분은 정당하다고 판시했다. 위 사건은 의약품 특허권 존속기간 연장기간 산정 기준을 제시한 최초의 판결로 현재 특허법원에 계류 중인 120여 건의 유사 사건에도 기준이 되는 중요한 판결이 될 것으로 예상된다.[57]

(2) 재생의료에 대한 연장등록의 필요성

의약품 허가에 따른 특허권 존속기간 연장등록의 허용범위와 관련하여 최근 일본에서 이루어지고 있는 재생의료의 특허권 존속기간 연장논의를 주목할 필요가 있다. 일본은 재생의료에 관한 연구규모가 세계 6위권에 달하는데, 재생의료의 잠재적 가치를 인식한 일본 정부는 의약품에 대해 인정해오던 특허권 존속기간 연장제도를 재생의료까지 확대하는 방안을 검토 중이다.[58] 일본의 논의배경에는 재생의료 산업을 국가 신성장 전략으로 삼아

57) 2017.03.20. 법률신문 기사 참조.

각종 규제를 완화하여 투자를 유치하고 산업을 활성화 시키려는 인식이 깔려있다. 일본도 우리나라와 마찬가지로 '농약취재법'에 규정되어 있는 농약, '약사법'에 규정되어 있는 의약품에 대해 5년을 한도로 침식된 기간에 해당하는 만큼 특허권 존속기간 연장을 인정하고 있는데, 동제도를 재생의료까지 확대하겠다는 것이다.[59] 우리나라 또한 재생의료 관련 기술은 경쟁력이 있는 것으로 평가되고, 전통적 의약품이나 농약뿐 아니라 재생의료 기술 역시 유효성·안전성 시험에 장기간이 소요된다는 점을 고려해 볼 때, 향후 국제적 보호 동향을 주시하면서 우리나라 산업환경에 맞도록 약사법을 개정하는 등 방향성을 설정해 나갈 필요가 있다.

(3) TPP 관련 규정

의약품 허가 등에 따른 특허권 존속기간 연장등록 제도는 미국의 Hatch-Waxman법에서 유래한 제도로 그동안 미국, 우리나라와 일본 등 몇몇 국가에서만 운영되어왔지만 TPP 협정이 제18.48조에서 "불합리한 단축에 대한 특허기간의 조정"을 규정함에 따라 제도운영 국가가 증가할 것으로 예상되는바, 각국의 제도 정비 및 구체적인 연장등록제도 운영 현황에 대해 모티터링할 필요가 있다.

3. 자유무역체제의 재편

최근 의약발명의 지식재산권 보호와 관련하여 TPP에 대한 관심이 높아지고 있다. 미국의 탈퇴로 인해 해당 조약의 발효는 불투명해졌지만 중국과 일본의 움직임, 미국의 재협상 가능성 등을 눈여겨보고 다양한 가능성에 대해 미리 대비할 필요가 있다.

FTA에 대해 그동안 소극적인 자세를 취하던 일본은 2013년 TPP에 참여하면서 세계통상질서의 주도권 경쟁에 합류했다. 특히 일본은 자국이 경쟁력 우위를 나타내는

58) 産業構造審議会　知的財産分科会　特許制度小委員会,　再生医療等製品の特許権の存続期間検討WG報告書, 平成２６年２月.

59) 특허청 연구보고서, 기술 및 환경 변화에 따른 지식재산 제도 개선 방안, 2016.12, 37-38면.

제약산업의 육성을 위해 의약발명의 지식재산보호에 대해 일부 미국과 한목소리를 낸 바 있다.

시진핑 중국 국가주석은 지난해 말 아시아·태평양경제협력체(APEC) 기조연설에서 중국 주도로 21개국이 참여하는 FTAAP[60]와 16개국이 참여하는 RCEP[61]을 자유무역 질서의 대안으로 제시한 바 있다.[62]

TPP의 당초 정책목표는 대(對)중국 견제와 지식재산권 보호 강화 등 미국이 주도하는 무역 규범을 만들겠다는 것이었다. 이 목표는 여전히 유효하고, 미국은 비록 TPP에서 탈퇴했지만 재협상 가능성도 존재하고, 아·태 지역 무역협정을 다시 시도할 가능성도 높다.

우리나라는 해당 협정에 참여하기를 망설여 왔지만 TPP가 전 세계 시장에서 차지하는 규모 등을 고려해 볼 때 향후 어떠한 형태로든 참여가 불가피할 것으로 판단된다. 주형환 산업통상자원부 장관은 2016년 10월 10일 서울을 방문 중인 일본 게이단렌 대표단과 만나 조만간 TPP 가입 결정을 할 것이라고 밝힌 바 있다.[63] 다양한 가능성이 존재하는 현 상황에서 우리나라는 TPP가 폐기될 경우와 유지될 경우 각각에 대한 대응방안 마련이 필요하다. 특히 미국, 중국, 일본의 움직임을 주시한 후, 단기 대응책과 중장기적 대응책을 각각 마련하는 것이 중요하다. TPP가 결과적으로 폐기되는 경우에도 의약발명의 지식재산권 보호와 관련하여 TPP 관련규정들이 하나의 규범으로서 작동할 수 있으므로, 해당 사안들에 대해 면밀히 검토하고 대비책을 마련하는 것이 중요하다.

60) 중국이 주도 중인 아시아·태평양자유무역지대(Free Trade Area of the Asia-Pacific; FTAAP)는 한국과 동남아 국가연합(ASEAN.아세안) 10개국 등 21개국이 참여하는 메가 자유무역협정(FTA)임. 2004년 처음 제시된 FTAAP는 속도를 내지 못하다가 2010년대 들어 중국이 중앙아시아 및 동남아 진출을 위한 전략적 포석 차원에서 적극 주도하고 있음.

61) 중국은 아·태 지역에서 한국과 일본 등 16개국이 참가하고 있는 역내포괄적경제동반자협정(Regional Comprehensive Economic Partnership Agreement; RCEP)도 주도하고 있음. 세계 인구의 절반과 세계 GDP의 30%를 차지하는 RCEP는 시장개방이나 범위 등에서 TPP보다 수위가 낮다는 평가를 받고 있음.

62) 2017.01.24. 파이낸셜뉴스 기사 참조.

63) 2016.10.11. 한국경제 기사 참조.

4. 생물의약품과 자료독점권

TPP 협상과정 중에서 가장 첨예하게 의견이 대립되었던 것 중 하나가 생물의약품(biologics)에 대한 자료독점권 문제였다. 일반적으로 자료독점기간은 대부분 특허권의 존속기간을 넘기지 않기 때문에 특허권이 존재하는 경우에는 자료독점기간이 큰 문제가 되지 않는다. 그러나 타분야에 비해 특허권을 부여받기 힘든 바이오 신약의 경우에는 자료독점권에 의해 사실상 복제약의 시장진입이 방지되어 자료독점권이 강력한 역할을 담당할 수 있게 된다. 미국은 12년, 호주, 뉴질랜드 등은 5년을 주장했고, 최종안에서는 8년간 보호하는 것으로 합의되었다. 우리나라는 이미 한미 FTA를 통해 자료독점권 보호에 대한 입법의무를 부담하고 있고, 현행 의약품재심사제도에서 부여하는 보호가 최대 6년이라는 점, TPP의 보호기간은 8년이지만 '5년+알파'의 보호방식을 인정하고 있고 '+알파'의 요건들이 추상적으로 규정되어 있어서 각국의 해석여하에 따라 재량이 인정될 여지가 크다는 점 등을 고려해 볼 때 TPP에 가입하더라도 추가적인 부담은 크지 않을 것으로 예상된다.[64] 다만 현행 자료독점권제도는 자료독점권을 제도적 취지가 전혀 다른 신약재 심사제도와 결합해서 운영함으로써 여러 가지 문제를 내포하고 있는 바, 향후 전반적인 재검토가 필요한 것으로 생각된다.[65]

미국은 전통적인 화학의약품과 구별되는 생물의약품의 특징을 반영하여 2010년 '생물의약품 가격경쟁과 혁신법(Biologics Price Competition and Innovation Act, 이하 'BPCIA')을 제정하였는데, 이법에서 규정하는 ANDA는 Hatch-Waxman법의 것과 취지와 절차가 유사하나 몇 가지 차이가 존재한다. 예컨대 특허권의 존재를 공시하는 오렌지북(Orange Book) 제도를 두고 있지 않고 후발업체가 복제약 허가 신청 시 특허권자에게 통지할 의무를 인정하지 않는다. 미국에서도 BPCIA에 의한 관련 규정의 개정 이전까지 생물 의약품에 관해서는 약식 품목허가신청 절차인 ANDA가 존재하지 않았고, 그 개정 이후에도 아직 약식 품목허가를 받은 예를 찾기 어렵다고 한다.[66]

64) 박준석, "의약허가와 관련한 자료독점권(data exclusivity)의 고찰-TPP 협정과의 관련성을 중심으로-", 통상법률 제125호, 2015, 36-37면.

65) 신혜은, "자료독점권(Data Exclusivity), 사실상 특허권 존속기간의 연장인가?", 안암법학 제35호, 2011, 354-355면.

5. 허가-특허 연계제도

2015년 3월 15일 우리나라에서 허가-특허연계제도가 본격적으로 시행된 이후 관련 소송이 증가하고 있다고 한다. 제도 시행 후 2년의 시간이 지났지만 앞으로 해결해야 할 다양한 문제들이 남아 있다. 예컨대 특허권자가 판매금지조치를 한 후 특허가 무효 또는 비침해로 판명될 경우, 특허권자의 시장진입 방해책임을 어떤 식으로 물을 수 있을 것인지(후발의약품 진입지연에 대한 책임), 반대로 특허심판원에서 승소 심결을 받은 후 특허법원 또는 대법원에서 이와 반대되는 판결이 나오는 경우 특허심판원의 심결을 근거로 시장에 진입한 제네릭의 손해배상책임(오리지널의 약가 인하 또는 시장잠식으로 인한 손해배상책임)을 물을 수 있을 것인지에 대한 의문에 답하기 위해서는 앞으로도 많은 시간이 필요할 것으로 생각된다.

TPP 최종 협정문 제18.53조는 비록 완화된 형태이기는 하나 허가-특허 연계제도를 규정하고 있는바, 향후 협정국들의 국내법 이행에 대해 주목할 필요가 있다.

6. 세계시장을 향하여

의약품 분야는 소수의 다국적 제약사가 시장을 주도하고 있다. 노바티스, 화이자 등 상위 10대 기업이 세계 의약품 시장의 40%를 점유하고 있다. 국내 시장은 전 세계 의약품 시장의 약 2%를 차지하는 것에 불과하여 국내시장 개척만으로는 글로벌 제약회사로 성장하는 것이 거의 불가능하고, 적극적으로 글로벌 시장진출을 모색할 필요가 있다.

특히 바이오헬스 산업은 고성장이 예상되는 신산업으로, 2017년 3월 산업통상자원부가 발표한 '4차 산업혁명 대비 바이오헬스 산업 발전전략'에 따르면 바이오헬스 시장은 고령화, 건강에 대한 관심 증대, ICT 융합 등으로 향후 10년간 연평균 5.9%씩 성장이 예상된다. 오는 2025년이 되면 바이오헬스 산업의 규모는 14조 원을 넘을 것으로 예상되고 있다. 이

66) 박정희·박성민, "의약품 허가특허연계제도의 생물의약품 적용에 관한 연구", 식품의약품안전처 용역보고서, 2014, 17-19면; 박준석, "의약허가와 관련한 자료독점권(data exclusivity)의 고찰-TPP 협정과의 관련성을 중심으로-", 통상법률 제125호, 2015, 24면.

중 의약품 분야는 연평균 4.1%씩 상승해 오는 2025년에는 1조3918억 달러 규모가 예상된다.[67]

우리나라 제약산업은 반도체 등 타분야와 비교하여 상대적으로 영세하고 글로벌 경쟁력 측면에서도 큰 역량을 발휘하고 있지 못한 것이 현실이다. 그러나 2016년에는 한미약품에서 사노피로 수출한 당뇨신약으로 약 4조 원 규모의 라이센싱 계약이 체결됐고, 미국 FDA의 허가를 받은 임상시험이 25건, KDDF를 통해 지원된 해외 임상2상 개발 과제만 8건에 이른다.[68] 게다가 우리나라는 그동안 허가-특허 연계제도를 시행한 경험이 있어서 전략적인 측면에서도 다른 개도국 제약기업에 비해 유리한 위치를 차지하고 있다고 생각된다.

향후 퍼스트 제네릭의 개발 검토 시 국내시장뿐 아니라 외국시장, 특히 허가-특허제도를 우리에 앞서 시행하고 있는 미국시장의 진출 가능성 또한 염두에 둘 필요가 있다. 미국은 180일의 제네릭 독점기간 동안 전체 제네릭사들이 취할 수 있는 이익의 70~80%를 가져갈 수 있기 때문에 제네릭 독점권을 취득하기만 하면 미국제약회사와의 위탁계약 등을 통해 판로가 보장된다고 할 수 있다. 국내 제약기업들은 그동안 다국적 제약기업과의 소송을 통해 특허 분석능력과 소송능력을 배양해 왔다. 우리나라 제약기업 중 미국 FDA에서 제네릭 허가를 받아본 기업은 아직 없지만, 허가-특허 연계제도를 잘 활용하면 충분한 가능성이 있다고 판단된다. 퍼스트 제네릭이 되기 위해서는 정해진 시간 내에 허가준비를 완료해야 하고, 이를 위해서는 연대 및 협력이 필요하다.

한편, 최대 의약품 시장은 아직까지 단연 미국이지만 중국은 새로운 시장으로 떠오르고 있고, 특히 2017년 3월 중국 식의약품감독국(CFDA)이 수입 의약품 등록에 관한 개정안을 발표함으로써 외국 제약사의 중국 내 진입이 가속화될 전망인 바,[69] 중국 시장에 대한 연구와 대책 마련도 요구된다.

67) 2017.4.26. 헤럴드 경제 기사참조.

68) 김태억 (재)범부처신약개발사업단 사업본부장의 전문가 기고 내용 참조. http://www.healthmedia.co.kr/news/articleView.html?idxno=60757 (2017.5.2. 최종방문)

69) 2017.4.25. LIFE 기사참조. http://www.econovill.com/news/articleView.html?idxno=313602 (2017.5.2. 최종방문)

〈부록 1〉 Trans-Pacific Strategic Economic Partnership[70]

CHAPTER 18
INTELLECTUAL PROPERTY

Section F: Patents and Undisclosed Test or Other Data

Subsection A: General Patents

Article 18.37: Patentable Subject Matter

1. Subject to paragraphs 3 and 4, each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step and is capable of industrial application.[30]

2. Subject to paragraphs 3 and 4 and consistent with paragraph 1, each Party confirms that patents are available for inventions claimed as at least one of the following: new uses of a known product, new methods of using a known product, or new processes of using a known product. A Party may limit those new processes to those that do not claim the use of the product as such.

3. A Party may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to nature or the environment, provided that such exclusion is not made merely because the exploitation is prohibited by its law. A Party may also exclude from patentability:

   (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

   (b) animals other than microorganisms, and essentially biological processes for the production of plants or animals, other than non-biological and microbiological processes.

4. A Party may also exclude from patentability plants other than microorganisms. However, consistent with paragraph 1 and subject to paragraph 3, each Party confirms that patents are available at least for inventions that are derived from plants.

[30] For the purposes of this Section, a Party may deem the terms "inventive step" and "capable of industrial application" to be synonymous with the terms "non-obvious" and "useful", respectively. In determinations regarding inventive step, or non-obviousness, each Party shall consider whether the claimed invention would have been obvious to a person skilled, or having ordinary skill in the art, having regard to the prior art.

18-20

70) 환태평양 경제 동반자 협정(Trans-Pacific Partnership, TPP) 제18장 지식재산권 중 의약품과 관련되는 부분을 발췌하였다.

Article 18.38: Grace Period

Each Party shall disregard at least information contained in public disclosures used to determine if an invention is novel or has an inventive step, if the public disclosure:[31, 32]

(a) was made by the patent applicant or by a person that obtained the information directly or indirectly from the patent applicant; and

(b) occurred within 12 months prior to the date of the filing of the application in the territory of the Party.

Article 18.39: Patent Revocation

1. Each Party shall provide that a patent may be cancelled, revoked or nullified only on grounds that would have justified a refusal to grant the patent. A Party may also provide that fraud, misrepresentation or inequitable conduct may be the basis for cancelling, revoking or nullifying a patent or holding a patent unenforceable.

2. Notwithstanding paragraph 1, a Party may provide that a patent may be revoked, provided it is done in a manner consistent with Article 5A of the Paris Convention and the TRIPS Agreement.

Article 18.40: Exceptions

A Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

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[31] No Party shall be required to disregard information contained in applications for, or registrations of, intellectual property rights made available to the public or published by a patent office, unless erroneously published or unless the application was filed without the consent of the inventor or their successor in title, by a third person who obtained the information directly or indirectly from the inventor.

[32] For greater certainty, a Party may limit the application of this Article to disclosures made by, or obtained directly or indirectly from, the inventor or joint inventor. For greater certainty, a Party may provide that, for the purposes of this Article, information obtained directly or indirectly from the patent applicant may be information contained in the public disclosure that was authorised by, or derived from, the patent applicant.

Article 18.41: Other Use Without Authorisation of the Right Holder

The Parties understand that nothing in this Chapter limits a Party's rights and obligations under Article 31 of the TRIPS Agreement, any waiver or any amendment to that Article that the Parties accept.

Article 18.42: Patent Filing

Each Party shall provide that if an invention is made independently by more than one inventor, and separate applications claiming that invention are filed with, or for, the relevant authority of the Party, that Party shall grant the patent on the application that is patentable and that has the earliest filing date or, if applicable, priority date,[33] unless that application has, prior to publication,[34] been withdrawn, abandoned or refused.

Article 18.43: Amendments, Corrections and Observations

Each Party shall provide a patent applicant with at least one opportunity to make amendments, corrections and observations in connection with its application.[35]

Article 18.44: Publication of Patent Applications

1. Recognising the benefits of transparency in the patent system, each Party shall endeavour to publish unpublished pending patent applications promptly after the expiration of 18 months from the filing date or, if priority is claimed, from the earliest priority date.

2. If a pending application is not published promptly in accordance with paragraph 1, a Party shall publish that application or the corresponding patent, as soon as practicable.

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[33] A Party shall not be required to apply this Article in cases involving derivation or in situations involving any application that has or had, at any time, at least one claim having an effective filing date before the date of entry into force of this Agreement for that Party or any application that has or had, at any time, a priority claim to an application that contains or contained such a claim.

[34] For greater certainty, a Party may grant the patent to the subsequent application that is patentable, if an earlier application has been withdrawn, abandoned, or refused, or is not prior art against the subsequent application.

[35] A Party may provide that such amendments do not go beyond the scope of the disclosure of the invention, as of the filing date.

3. Each Party shall provide that an applicant may request the early publication of an application prior to the expiration of the period referred to in paragraph 1.

Article 18.45: Information Relating to Published Patent Applications and Granted Patents

For published patent applications and granted patents, and in accordance with the Party's requirements for prosecution of such applications and patents, each Party shall make available to the public at least the following information, to the extent that such information is in the possession of the competent authorities and is generated on, or after, the date of the entry into force of this Agreement for that Party:

(a) search and examination results, including details of, or information related to, relevant prior art searches;

(b) as appropriate, non-confidential communications from applicants; and

(c) patent and non-patent related literature citations submitted by applicants and relevant third parties.

Article 18.46: Patent Term Adjustment for Unreasonable Granting Authority Delays

1. Each Party shall make best efforts to process patent applications in an efficient and timely manner, with a view to avoiding unreasonable or unnecessary delays.

2. A Party may provide procedures for a patent applicant to request to expedite the examination of its patent application.

3. If there are unreasonable delays in a Party's issuance of patents, that Party shall provide the means to, and at the request of the patent owner shall, adjust the term of the patent to compensate for such delays.[36]

4. For the purposes of this Article, an unreasonable delay at least shall include a delay in the issuance of a patent of more than five years from the date of filing of the application in the territory of the Party, or three years after a request for examination of the application has been made, whichever is later. A Party may exclude, from the determination of such delays, periods of time that do not

[36] Annex 18-D applies to this paragraph.

occur during the processing[37] of, or the examination of, the patent application by the granting authority; periods of time that are not directly attributable[38] to the granting authority; as well as periods of time that are attributable to the patent applicant.[39]

Subsection B: Measures Relating to Agricultural Chemical Products

Article 18.47: Protection of Undisclosed Test or Other Data for Agricultural Chemical Products

1. If a Party requires, as a condition for granting marketing approval[40] for a new agricultural chemical product, the submission of undisclosed test or other data concerning the safety and efficacy of the product,[41] that Party shall not permit third persons, without the consent of the person that previously submitted such information, to market the same or a similar[42] product on the basis of that information or the marketing approval granted to the person that submitted such test or other data for at least 10 years[43] from the date of marketing approval of the new agricultural chemical product in the territory of the Party.

2. If a Party permits, as a condition of granting marketing approval for a new agricultural chemical product, the submission of evidence of a prior marketing approval of the product in another territory, that Party shall not permit third persons, without the consent of the person that previously submitted undisclosed

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[37] For the purposes of this paragraph, a Party may interpret processing to mean initial administrative processing and administrative processing at the time of grant.

[38] A Party may treat delays "that are not directly attributable to the granting authority" as delays that are outside the direction or control of the granting authority.

[39] Notwithstanding Article 18.10 (Application of Chapter to Existing Subject Matter and Prior Acts), this Article shall apply to all patent applications filed after the date of entry into force of this Agreement for that Party, or the date two years after the signing of this Agreement, whichever is later for that Party.

[40] For the purposes of this Chapter, the term "marketing approval" is synonymous with "sanitary approval" under a Party's law.

[41] Each Party confirms that the obligations of this Article apply to cases in which the Party requires the submission of undisclosed test or other data concerning: (a) only the safety of the product, (b) only the efficacy of the product or (c) both.

[42] For greater certainty, for the purposes of this Section, an agricultural chemical product is "similar" to a previously approved agricultural chemical product if the marketing approval, or, in the alternative, the applicant's request for such approval, of that similar agricultural chemical product is based upon the undisclosed test or other data concerning the safety and efficacy of the previously approved agricultural chemical product, or the prior approval of that previously approved product.

[43] For greater certainty, a Party may limit the period of protection under this Article to 10 years.

test or other data concerning the safety and efficacy of the product in support of that prior marketing approval, to market the same or a similar product based on that undisclosed test or other data, or other evidence of the prior marketing approval in the other territory, for at least 10 years from the date of marketing approval of the new agricultural chemical product in the territory of the Party.

3. For the purposes of this Article, a new agricultural chemical product is one that contains[44] a chemical entity that has not been previously approved in the territory of the Party for use in an agricultural chemical product.

Subsection C: Measures Relating to Pharmaceutical Products

Article 18.48: Patent Term Adjustment for Unreasonable Curtailment

1. Each Party shall make best efforts to process applications for marketing approval of pharmaceutical products in an efficient and timely manner, with a view to avoiding unreasonable or unnecessary delays.

2. With respect to a pharmaceutical product[45] that is subject to a patent, each Party shall make available an adjustment[46] of the patent term to compensate the patent owner for unreasonable curtailment of the effective patent term as a result of the marketing approval process.[47, 48]

3. For greater certainty, in implementing the obligations of this Article, each Party may provide for conditions and limitations, provided that the Party continues to give effect to this Article.

4. With the objective of avoiding unreasonable curtailment of the effective patent term, a Party may adopt or maintain procedures that expedite the processing of marketing approval applications.

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[44] For the purposes of this Article, a Party may treat "contain" as meaning utilise. For greater certainty, for the purposes of this Article, a Party may treat "utilise" as requiring the new chemical entity to be primarily responsible for the product's intended effect.

[45] A Party may comply with the obligations of this paragraph with respect to a pharmaceutical product or, alternatively, with respect to a pharmaceutical substance.

[46] For greater certainty, a Party may alternatively make available a period of additional *sui generis* protection to compensate for unreasonable curtailment of the effective patent term as a result of the marketing approval process. The *sui generis* protection shall confer the rights conferred by the patent, subject to any conditions and limitations pursuant to paragraph 3.

[47] Notwithstanding Article 18.10 (Application of Chapter to Existing Subject Matter and Prior Acts), this Article shall apply to all applications for marketing approval filed after the date of entry into force of this Article for that Party.

[48] Annex 18-D applies to this paragraph.

Article 18.49: Regulatory Review Exception

Without prejudice to the scope of, and consistent with, Article 18.40 (Exceptions), each Party shall adopt or maintain a regulatory review exception[49] for pharmaceutical products.

Article 18.50: Protection of Undisclosed Test or Other Data[50]

1. (a) If a Party requires, as a condition for granting marketing approval for a new pharmaceutical product, the submission of undisclosed test or other data concerning the safety and efficacy of the product,[51] that Party shall not permit third persons, without the consent of the person that previously submitted such information, to market the same or a similar[52] product on the basis of:

(i) that information; or

(ii) the marketing approval granted to the person that submitted such information,

for at least five years[53] from the date of marketing approval of the new pharmaceutical product in the territory of the Party.

(b) If a Party permits, as a condition of granting marketing approval for a new pharmaceutical product, the submission of evidence of prior marketing approval of the product in another territory, that Party shall not permit third persons, without the consent of a person that previously submitted such information concerning the safety

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[49] For greater certainty, consistent with Article 18.40 (Exceptions), nothing prevents a Party from providing that regulatory review exceptions apply for purposes of regulatory reviews in that Party, in another country or both.

[50] Annex 18-B and Annex 18-C apply to paragraphs 1 and 2 of this Article.

[51] Each Party confirms that the obligations of this Article, and Article 18.51 (Biologics) apply to cases in which the Party requires the submission of undisclosed test or other data concerning: (a) only the safety of the product, (b) only the efficacy of the product or (c) both.

[52] For greater certainty, for the purposes of this Section, a pharmaceutical product is "similar" to a previously approved pharmaceutical product if the marketing approval, or, in the alternative, the applicant's request for such approval, of that similar pharmaceutical product is based upon the undisclosed test or other data concerning the safety and efficacy of the previously approved pharmaceutical product, or the prior approval of that previously approved product.

[53] For greater certainty, a Party may limit the period of protection under paragraph 1 to five years, and the period of protection under Article 18.51.1(a) (Biologics) to eight years.

and efficacy of the product, to market a same or a similar product based on evidence relating to prior marketing approval in the other territory for at least five years from the date of marketing approval of the new pharmaceutical product in the territory of that Party.[54]

2. Each Party shall:[55]

(a) apply paragraph 1, *mutatis mutandis*, for a period of at least three years with respect to new clinical information submitted as required in support of a marketing approval of a previously approved pharmaceutical product covering a new indication, new formulation or new method of administration; or, alternatively,

(b) apply paragraph 1, *mutatis mutandis*, for a period of at least five years to new pharmaceutical products that contain[56] a chemical entity that has not been previously approved in that Party.[57]

3. Notwithstanding paragraphs 1 and 2 and Article 18.51 (Biologics), a Party may take measures to protect public health in accordance with:

(a) the Declaration on TRIPS and Public Health;

(b) any waiver of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement to implement the Declaration on TRIPS and Public Health and that is in force between the Parties; or

(c) any amendment of the TRIPS Agreement to implement the Declaration on TRIPS and Public Health that enters into force with respect to the Parties.

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[54] Annex 18-D applies to this subparagraph.

[55] A Party that provides a period of at least eight years of protection pursuant to paragraph 1 is not required to apply paragraph 2.

[56] For the purposes of this Article, a Party may treat "contain" as meaning utilise.

[57] For the purposes of Article 18.50.2(b) (Protection of Undisclosed Test or Other Data), a Party may choose to protect only the undisclosed test or other data concerning the safety and efficacy relating to the chemical entity that has not been previously approved.

Article 18.51: Biologics[58]

1. With regard to protecting new biologics, a Party shall either:

   (a) with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic,[59,60] provide effective market protection through the implementation of Article 18.50.1 (Protection of Undisclosed Test or Other Data) and Article 18.50.3, *mutatis mutandis,* for a period of at least eight years from the date of first marketing approval of that product in that Party; or, alternatively,

   (b) with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic, provide effective market protection:

      (i) through the implementation of Article 18.50.1 (Protection of Undisclosed Test or Other Data) and Article 18.50.3, *mutatis mutandis,* for a period of at least five years from the date of first marketing approval of that product in that Party,

      (ii) through other measures, and

      (iii) recognising that market circumstances also contribute to effective market protection

   to deliver a comparable outcome in the market.

2. For the purposes of this Section, each Party shall apply this Article to, at a minimum, a product that is, or, alternatively, contains, a protein produced using biotechnology processes, for use in human beings for the prevention, treatment, or cure of a disease or condition.

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[58] Annex 18-B, Annex 18-C and Annex 18-D apply to this Article.

[59] Nothing requires a Party to extend the protection of this paragraph to:

   (a) any second or subsequent marketing approval of such a pharmaceutical product; or

   (b) a pharmaceutical product that is or contains a previously approved biologic.

[60] Each Party may provide that an applicant may request approval of a pharmaceutical product that is or contains a biologic under the procedures set forth in Article 18.50.1(a) (Protection of Undisclosed Test or Other Data) and Article 18.50.1(b) within five years of the date of entry into force of this Agreement for that Party, provided that other pharmaceutical products in the same class of products have been approved by that Party under the procedures set forth in Article 18.50.1(a) and Article 18.50.1(b) before the date of entry into force of this Agreement for that Party.

3. Recognising that international and domestic regulation of new pharmaceutical products that are or contain a biologic is in a formative stage and that market circumstances may evolve over time, the Parties shall consult after 10 years from the date of entry into force of this Agreement, or as otherwise decided by the Commission, to review the period of exclusivity provided in paragraph 1 and the scope of application provided in paragraph 2, with a view to providing effective incentives for the development of new pharmaceutical products that are or contain a biologic, as well as with a view to facilitating the timely availability of follow-on biosimilars, and to ensuring that the scope of application remains consistent with international developments regarding approval of additional categories of new pharmaceutical products that are or contain a biologic.

Article 18.52: Definition of New Pharmaceutical Product

For the purposes of Article 18.50.1 (Protection of Undisclosed Test or Other Data), a **new pharmaceutical product** means a pharmaceutical product that does not contain[61] a chemical entity that has been previously approved in that Party.

Article 18.53: Measures Relating to the Marketing of Certain Pharmaceutical Products

1. If a Party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting the safety and efficacy information, to rely on evidence or information concerning the safety and efficacy of a product that was previously approved, such as evidence of prior marketing approval by the Party or in another territory, that Party shall provide:

(a) a system to provide notice to a patent holder[62] or to allow for a patent holder to be notified prior to the marketing of such a pharmaceutical product, that such other person is seeking to market that product during the term of an applicable patent claiming the approved product or its approved method of use;

(b) adequate time and opportunity for such a patent holder to seek, prior to the marketing[63] of an allegedly infringing product, available remedies in subparagraph (c); and

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[61] For the purposes of this Article, a Party may treat "contain" as meaning utilise.

[62] For greater certainty, for the purposes of this Article, a Party may provide that a "patent holder" includes a patent licensee or the authorised holder of marketing approval.

[63] For the purposes of paragraph 1(b), a Party may treat "marketing" as commencing at the time of listing for purposes of the reimbursement of pharmaceutical products pursuant to a national

(c) procedures, such as judicial or administrative proceedings, and expeditious remedies, such as preliminary injunctions or equivalent effective provisional measures, for the timely resolution of disputes concerning the validity or infringement of an applicable patent claiming an approved pharmaceutical product or its approved method of use.

2. As an alternative to paragraph 1, a Party shall instead adopt or maintain a system other than judicial proceedings that precludes, based upon patent-related information submitted to the marketing approval authority by a patent holder or the applicant for marketing approval, or based on direct coordination between the marketing approval authority and the patent office, the issuance of marketing approval to any third person seeking to market a pharmaceutical product subject to a patent claiming that product, unless by consent or acquiescence of the patent holder.

Article 18.54: Alteration of Period of Protection

Subject to Article 18.50.3 (Protection of Undisclosed Test or Other Data), if a product is subject to a system of marketing approval in the territory of a Party pursuant to Article 18.47 (Protection of Undisclosed Test or Other Data for Agricultural Chemical Products), Article 18.50 or Article 18.51 (Biologics) and is also covered by a patent in the territory of that Party, the Party shall not alter the period of protection that it provides pursuant to Article 18.47, Article 18.50 or Article 18.51 in the event that the patent protection terminates on a date earlier than the end of the period of protection specified in Article 18.47, Article 18.50 or Article 18.51.

Section G: Industrial Designs

Article 18.55: Protection

1. Each Party shall ensure adequate and effective protection of industrial designs and also confirms that protection for industrial designs is available for designs:

(a) embodied in a part of an article; or, alternatively,

(b) having a particular regard, where appropriate, to a part of an article in the context of the article as a whole.

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healthcare programme operated by a Party and inscribed in the Appendix to Annex 26-A (Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices).

〈부록 2〉 Biologics Price Competition and Innovation Act

1. Implementation of the Biologics Price Competition and Innovation Act of 2009[71)]

The Patient Protection and Affordable Care Act (PPAC Act), signed into law by President Obama on March 23, 2010, amends the Public Health Service Act (PHS Act) to create an abbreviated approval pathway for biological products that are demonstrated to be "highly similar" (biosimilar) to or "interchangeable" with an FDA-approved biological product. These new statutory provisions also may be referred to as the Biologics Price Competition and Innovation Act of 2009 (BPCI Act).

Immediately after the new statute was enacted, FDA formed a working group to plan the agency's approach to implementing the statute in order to ensure that the process of evaluation, review and approval of products within this newly-defined product category, will be achieved in a consistent, efficient and scientifically sound manner.

The Biosimilar Implementation Committee (BIC) is co-chaired by Dr. Janet Woodcock, director of the Center for Drug Research and Evaluation (CDER) and Dr. Karen Midthun, acting director of the Center for Biologics Evaluation and Research (CBER). In addition to CDER and CBER staff, this cross-center group also has members from the Office of Chief Counsel and the Office of the Commissioner. Two review committees have also been chartered; the CDER Biosimilar Review Committee which will be chaired by Dr. John Jenkins and the CBER Biosimilar Review Committee which will be chaired by Dr. Robert Yetter. Both groups will have members from both centers and will address product-specific review and issues relating to scientific methodology.

The BIC has been deeply engaged in the work of evaluating the statute and planning the necessary steps toward implementation. Among other things the scope of this work includes: budget planning, policy development, resource evaluation and needs assessment.

71) https://www.fda.gov/drugs/guidancecomplianceregulatoryinformation/ucm215089.htm

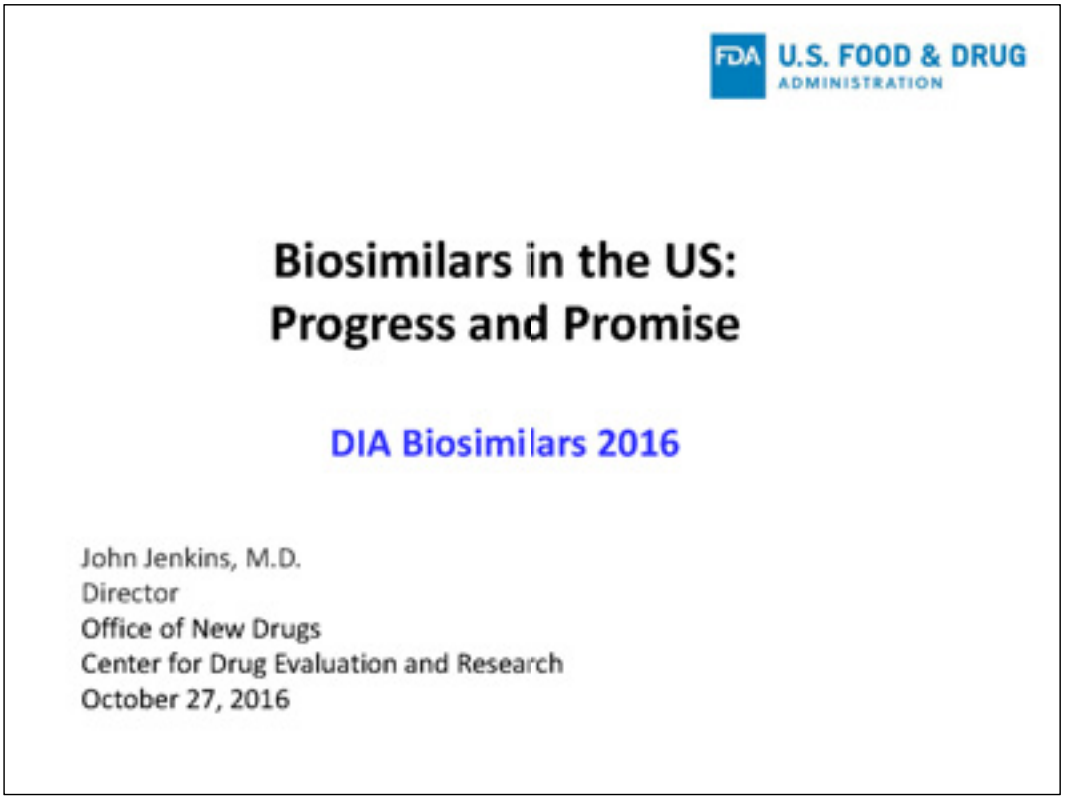
The committee intends to hold public meetings in order to solicit comment from stakeholders, experts, innovators, patients and all members of the public who wish to express their point of view. In addition, the committee is in the process of considering how best to provide clarification on the policies and processes which will be used in the evaluation and approval process.

The goal of the BPCI Act is similar, in concept, to that of the Drug Price Competition and Patent Term Restoration Act of 1984 (a.k.a the "Hatch-Waxman Act") which created abbreviated pathways for the approval of drug products under Federal Food, Drug, and Cosmetic Act (FFD&C Act). The BPCI Act aligns with the FDA's longstanding policy of permitting appropriate reliance on what is already known about a drug, thereby saving time and resources and avoiding unnecessary duplication of human or animal testing.

Under the BPCI Act, a sponsor may seek approval of a "biosimilar" product under new section 351(k) of the PHS Act. A biological product may be demonstrated to be "biosimilar" if data show that the product is "highly similar" to the reference product notwithstanding minor differences in clinically inactive components and there are no clinically meaningful differences between the biological product and the reference product in terms of safety, purity and potency.

In order to meet the higher standard of interchangeability, a sponsor must demonstrate that the biosimilar product can be expected to produce the same clinical result as the reference product in any given patient and, for a biological product that is administered more than once, that the risk of alternating or switching between use of the biosimilar product and the reference product is not greater than the risk of maintaining the patient on the reference product. Interchangeable products may be substituted for the reference product by a pharmacist without the intervention of the prescribing health care provider.

2. Biosimilars in the US: Progress and Promise[72)]



72) https://www.fda.gov/downloads/aboutfda/centersoffices/officeofmedicalproductsandtobacco/cder/ucm526935.pdf

BPCIA 2009 Created an Abbreviated Licensure Pathway for Biological Products

FDA

- A biological product that is demonstrated to be "**highly similar**" to an FDA-licensed biological product (the **reference product**) may rely for licensure on, among other things, publicly-available information regarding FDA's previous determination that the reference product is safe, pure and potent.
- This new licensure pathway under section 351(k) of the PHS Act permits a biosimilar biological product to be licensed based on **less than a full complement of product-specific preclinical and clinical data → abbreviated licensure pathway.**

2

FDA

Definition

Biosimilar or **Biosimilarity** means:

- that the biological product is **highly similar** to the reference product notwithstanding minor differences in clinically inactive components; **and**
- there are **no clinically meaningful differences** between the biological product and the reference product in terms of the safety, purity, and potency of the product.

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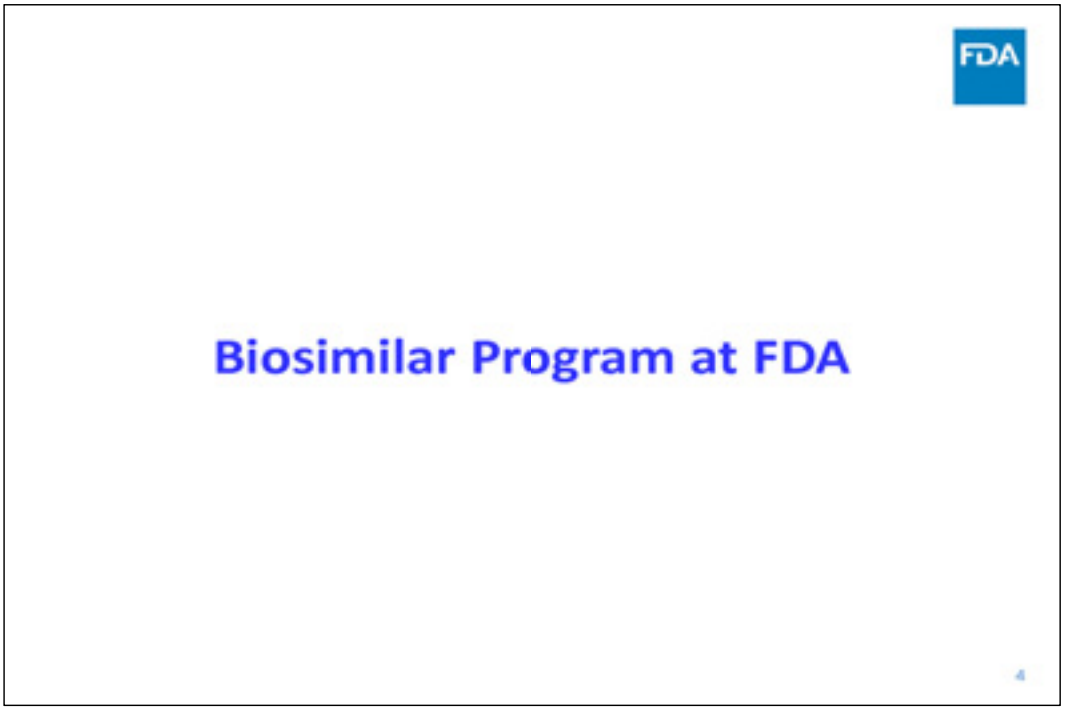
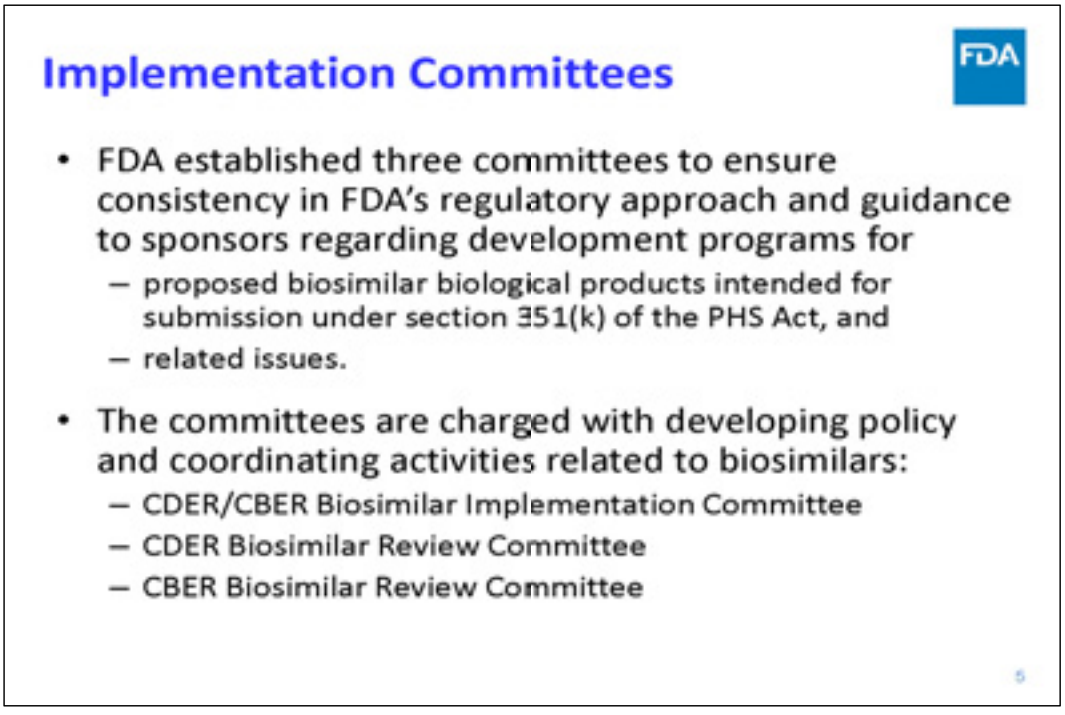

FDA
Biosimilar Program at FDA
4

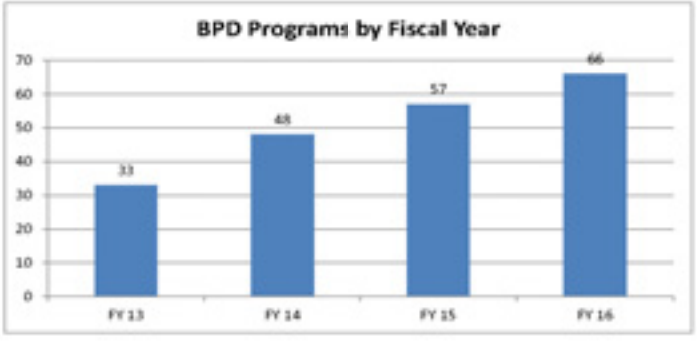

Implementation Committees
FDA
• FDA established three committees to ensure consistency in FDA's regulatory approach and guidance to sponsors regarding development programs for
– proposed biosimilar biological products intended for submission under section 351(k) of the PHS Act, and
– related issues.
• The committees are charged with developing policy and coordinating activities related to biosimilars:
– CDER/CBER Biosimilar Implementation Committee
– CDER Biosimilar Review Committee
– CBER Biosimilar Review Committee
5

OND Therapeutic Biologics and Biosimilars Staff (TBBS)

- Housed in the Office of New Drugs (OND) Immediate Office
- Ensures consistency in regulatory approach and in advice provided to sponsors regarding development programs for proposed biosimilar products, review of applications submitted under 351(k) of the PHS Act, and issues related to the implementation of the BPCI Act of 2009
- Central point of contact for OND and other CDER staff for biosimilars, therapeutic biologics, and follow-on versions of complex protein products and other complex products
- Develop policy, procedures, and staff training to consistently implement the BPCI Act
- Manage CDER's Biosimilar Review Committee
- Led by Leah Christl, Ph.D.

6

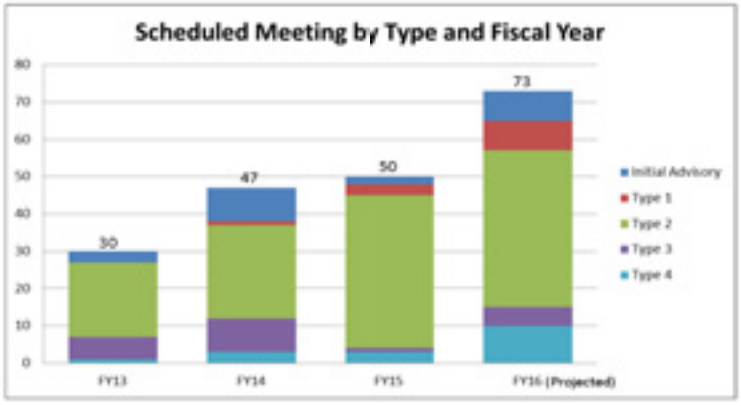
Growth in Enrollment in Biosimilar Product Development (BPD) Program



- A biosimilar product is no longer in the BPD program after a 351(k) BLA is accepted for review (i.e., filed)
- CDER has received meeting requests to discuss the development of biosimilars to 20 different reference products.

7

Growth in BSUFA Development-Phase Meetings for Proposed Biosimilars



8

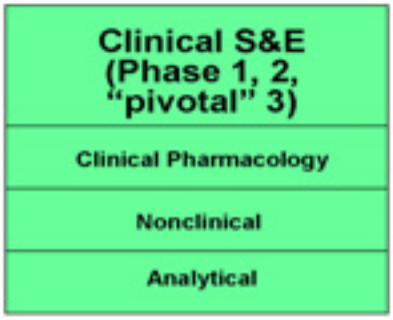
Biosimilars: Key Concepts and Lessons Learned

9

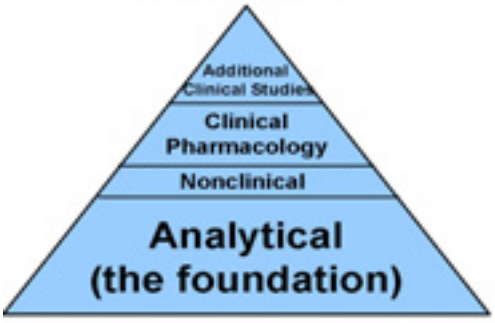
Key Concept 1: Goals of "Stand-alone" and Biosimilar Development are Different

FDA

"Stand-alone" Development Program, 351(a)
Goal: To establish safety and effectiveness of a new product



"Abbreviated" Development Program, 351(k)
Goal: To demonstrate biosimilarity (or interchangeability)



10

Lesson #1: The "cultural and cognitive transformation" is challenging

FDA

- "Biosimilars represent a paradigm shift in the way we make a finding of safety and efficacy." This requires a "cultural and cognitive transformation" [1]
- Significant progress made within FDA, still a work in progress for many clinicians, patients, and other stakeholders
- Example: ODAC discussion of Zarxio (filgrastim-sndz)
  - FDA focused on analytics, PK, PD as most sensitive
  - Committee members focused on comparative clinical trial in breast cancer patients and foreign marketing

[1]2012 DIA/FDA Biosimilars Conference: Dr. Janet Woodcock's keynote address

11

Lesson #2: Biosimilar Development Concepts are Novel and Often Complex

- FDA encourages the use of novel methods and study designs (e.g., endpoints, populations) to increase sensitivity to detect potential differences to support a demonstration of biosimilarity
  - Program may be very different from program that supported reference product approval; e.g., PK/PD in normal volunteers rather than Phase 3 clinical trial
- Novel approaches must be justified and supported by adequate data and information
- Extensive internal FDA scientific, regulatory, and legal discussions often required to support novel approaches
  - Very resource and time consuming process

12

Lesson #3: Extrapolation is a novel and challenging concept

- Novel concept that can be challenging for some to accept
  - Biosimlar extrapolation is from reference product to biosimilar product based on all available data, **not** from indication studied for biosimilar to other indications
  - For products where the approved uses are in patient populations/diseases that are very different, extrapolation raises significant concern among prescribers and patients
    - Lack of direct evidence, i.e., no comparative clinical trial
    - Fear of the unknown, "don't know what we don't know"
- Consequences of lack of understanding of extrapolation
  - Sponsors may conduct additional clinical studies that are not necessary for biosimilar approval
    - Defeats the intent of the **abbreviated** pathway
  - Potential for reduced uptake and acceptance of biosimilars by prescribers and patients
    - Reduces cost savings anticipated through use of biosimilars

13

Key Concept 2: Stepwise Evidence Development

- FDA has outlined a **stepwise approach** to generate data in support of a demonstration of biosimilarity
  - Evaluation of residual uncertainty at each step
- **Totality-of-the-evidence** approach in evaluating biosimilarity

* The list is not intended to imply that all types of data described here are necessary for any given biosimilar development program. FDA may determine, in its discretion, that certain studies are unnecessary in a 351(k) application.

14

Lesson #4: Legal Rationale for Stepwise Development Program

- "Highly similar" and "No clinically meaningful differences" are **related but distinct** statutory requirements for a biosimilar
  - **Cannot** "overcome" lack of ability to demonstrate *highly similar* with a demonstration of *no clinically meaningful differences*
- Risk of not proceeding in a stepwise fashion is wasted time and resources for industry and FDA
  - Using a product that is not reflective of the final commercial process to conduct PK/PD and clinical studies may necessitate repeating some/all studies

15

Best Practices

16

Best Practice #1: Support Education Regarding the "paradigm shift"

- Need to change the focus and the conversation:
  - The goal of a biosimilar development program is to **demonstrate biosimilarity** between the proposed product and a reference product, not to independently establish safety and effectiveness of the proposed product.
  - Move away from concept of "pivotal Phase 3" safety and efficacy study paradigm to more sensitive measures
- Need to better explain and educate stakeholders about:
  - Analytical similarity data (structural and functional analysis)
  - PK and PD (if relevant) endpoints are generally more sensitive to product differences than traditional clinical efficacy endpoints
  - Extrapolation

17

Best Practice #2: Choose and use your BPD Meetings Wisely

- Refer to FDA guidance for industry on Formal Meetings Between the FDA and Biosimilar Biological Product Sponsors or Applicants at
  - http://www.fda.gov/downloads/drugs/guidancecomplianceregulatoryinformatior/guidances/ucm345649.pdf
- Choose a meeting type that meets your needs, and submit a meeting package that will support that objective
  - e.g., BIA meeting is not intended to provide in depth, highly detailed advice on clinical development
- Timelines with the different meeting types can impact development - anticipate the type of interaction you will want and prepare in advance

18

Best Practice #3: Submit a Complete Application

- Incomplete applications and submissions are not a good use of FDA (or industry) time and resources
- FDA strongly recommends requesting a BPD Type 4 meeting **and** ensuring adequate time to address the advice provided prior to submitting the 351(k) BLA accordingly
- Ensure totality of the evidence, including scientific justification for extrapolation, supports approval
  - Present data in the step-wise framework – tell the "biosimilarity story"
- Ensure facilities are **ready for inspection** within the necessary timeframes
- Concepts are captured in draft BSUFA II goals letters regarding "Program" for biosimilar BLA review

19


FDA
Thank you
20


FDA
U.S. FOOD & DRUG
ADMINISTRATION

Biosimilars: Additional Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009

Guidance for Industry

DRAFT GUIDANCE

This guidance document is being distributed for comment purposes only.

Comments and suggestions regarding this draft document should be submitted within 60 days of publication in the *Federal Register* of the notice announcing the availability of the draft guidance. Submit comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number listed in the notice of availability that publishes in the *Federal Register*.

For questions regarding this draft document contact (CDER) Sandra Benton at 301-796-2500 or (CBER) Office of Communication, Outreach and Development at 1-800-835-4709 or 240-402-7800.

U.S. Department of Health and Human Services
Food and Drug Administration
Center for Drug Evaluation and Research (CDER)
Center for Biologics Evaluation and Research (CBER)

May 2015
Biosimilarity

Revision 1

Biosimilars: Additional Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009

Guidance for Industry

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U.S. Department of Health and Human Services
Food and Drug Administration
Center for Drug Evaluation and Research (CDER)
Center for Biologics Evaluation and Research (CBER)

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TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **3**

QUESTIONS AND ANSWERS **5**

I. BIOSIMILARITY OR INTERCHANGEABILITY 5
II. PROVISIONS RELATED TO REQUIREMENT TO SUBMIT A BLA FOR A "BIOLOGICAL PRODUCT" 12
III. EXCLUSIVITY 13

Contains Nonbinding Recommendations

Draft — Not for Implementation

Biosimilars: Additional Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009 Guidance for Industry[1]

This draft guidance, when finalized, will represent the current thinking of the Food and Drug Administration (FDA or Agency) on this topic. It does not create any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. To discuss an alternative approach, contact the FDA staff responsible for this guidance as listed on the title page.

INTRODUCTION

This guidance provides answers to common questions from sponsors interested in developing proposed biosimilar products, biologics license application (BLA) holders, and other interested parties regarding FDA's interpretation of the Biologics Price Competition and Innovation Act of 2009 (BPCI Act). This guidance revises the 2012 draft guidance on *Biosimilars: Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009* to provide new and revised questions and answers. It also includes certain original questions and answers that have not yet been finalized. The questions and answers (Q&As) are grouped below in the following categories:

- Biosimilarity or Interchangeability
- Provisions Related to Requirement to Submit a BLA for a "Biological Product"
- Exclusivity

The BPCI Act amends the Public Health Service Act (PHS Act) and other statutes to create an abbreviated licensure pathway in section 351(k) of the PHS Act for biological products shown to be biosimilar to, or interchangeable with, an FDA-licensed biological reference product (see sections 7001 through 7003 of the Patient Protection and Affordable Care Act (Pub. L. 111–148)

[1] This guidance has been prepared by the Center for Drug Evaluation and Research (CDER) and the Center for Biologics Evaluation and Research (CBER) at the Food and Drug Administration (FDA or the Agency).

Guidance documents are available on the CDER guidance page at http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm and on the CBER guidance page at http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm. We update guidances periodically. To make sure you have the most recent version of a guidance, check the CDER or CBER guidance page.

(Affordable Care Act)). On November 2 and 3, 2010, FDA held a public hearing and established a public docket to obtain input on specific issues and challenges associated with the implementation of the BPCI Act (see Docket No. FDA-2010-N-0477). This guidance describes FDA's current interpretation of certain statutory requirements added by the BPCI Act and reflects consideration of the comments concerning those requirements that were submitted to the public docket.

This guidance is one in a series of guidances that FDA is developing to implement the BPCI Act. The guidances address a broad range of issues, including:

- Quality Considerations in Demonstrating Biosimilarity of a Therapeutic Protein Product to a Reference Product
- Scientific Considerations in Demonstrating Biosimilarity to a Reference Product
- Biosimilars: Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009
- Formal Meetings Between the FDA and Biosimilar Biological Product Sponsors or Applicants

When applicable, references to information in these guidances are included in this Q&A guidance.

The Q&A format is intended to promote transparency and facilitate development programs for proposed biosimilar products by addressing questions that may arise in the early stages of development. In addition, these Q&As respond to questions the Agency has received from prospective BLA and new drug application (NDA) applicants regarding the appropriate statutory authority under which certain products will be regulated. FDA intends to update this guidance to include additional Q&As as appropriate.[2] Table 1 describes the status of the draft guidance Q&As provided in this guidance and final guidance Q&As that are included in the guidance on *Biosimilars: Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009*. FDA has maintained the original numbering of the Q&As used in the February 2012 draft guidance. Q&As that have been finalized appear in the final guidance, and the omission of these Q&As from this revised draft guidance is marked by several asterisks between nonconsecutively numbered Q&As.

[2] The process by which FDA is requesting public comment on proposed Q&As and issuing new Q&As is described in the accompanying FEDERAL REGISTER notice.

Table 1. Status of Draft Guidance Q&As for Comment and Final Guidance Q&As

Q&A Category	Q&A Numbers	Publication Date of Draft Guidance Q&As for Comment	Comment Period	Publication Date of Final Guidance Q&As
Part I. Biosimilarity or Interchangeability	I.1—I.8 I.11—I.12 I.15	2/15/12	2/15/12-4/16/12	April 2015
	I.13—I.14	2/15/12	2/15/12-4/16/12	
	I.9—I.10 (revised)	5/13/15	5/13/15-7/13/15	
	I.16—I.19 (new)	5/13/15	5/13/15-7/13/15	
Part II. Provisions Related To Requirement To Submit A BLA For A "Biological Product"	II.1—II.2	2/15/12	2/15/12-4/16/12	April 2015
	II.3 (new)	5/13/15	5/13/15-7/13/15	
Part III. Exclusivity	III.1 (revised)	5/13/15	5/13/15-7/13/15	
	III.2	2/15/12	2/15/12-4/16/12	April 2015

In general, FDA's guidance documents do not establish legally enforceable responsibilities. Instead, guidances describe the Agency's current thinking on a topic and should be viewed only as recommendations, unless specific regulatory or statutory requirements are cited. The use of the word *should* in Agency guidances means that something is suggested or recommended, but not required.

BACKGROUND

The BPCI Act was enacted as part of the Affordable Care Act on March 23, 2010. The BPCI Act creates an abbreviated licensure pathway for biological products shown to be biosimilar to, or interchangeable with, an FDA-licensed biological reference product. The objectives of the BPCI Act are conceptually similar to those of the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (commonly referred to as the "Hatch-Waxman Act"), which established abbreviated pathways for the approval of drug products under the Federal Food, Drug, and Cosmetic Act (FD&C Act).[3] The implementation of an abbreviated licensure pathway for biological products can present challenges given the scientific and technical complexities that may be associated with the larger and typically more complex structure of biological products, as well as the processes by which such products are manufactured. Most biological products are produced in a living system such as a microorganism, or plant or animal cells, whereas small molecule drugs are typically manufactured through chemical synthesis.

Section 351(k) of the PHS Act (42 U.S.C. 262(k)), added by the BPCI Act, sets forth the requirements for an application for a proposed biosimilar product and an application or a supplement for a proposed interchangeable product. Section 351(i) defines *biosimilarity* to mean

[3] See section 505(b)(2) and 505(j) of the FD&C Act (21 U.S.C. 355(b)(2) and 355(j)).

"that the biological product is highly similar to the reference product notwithstanding minor differences in clinically inactive components" and that "there are no clinically meaningful differences between the biological product and the reference product in terms of the safety, purity, and potency of the product" (see section 351(i)(2) of the PHS Act). A 351(k) application must contain, among other things, information demonstrating that the biological product is biosimilar to a reference product based upon data derived from analytical studies, animal studies, and a clinical study or studies, unless FDA determines, in its discretion, that certain studies are unnecessary in a 351(k) application (see section 351(k)(2) of the PHS Act). To meet the additional standard of "interchangeability," an applicant must provide sufficient information to demonstrate biosimilarity, and also to demonstrate that the biological product can be expected to produce the same clinical result as the reference product in any given patient and, if the biological product is administered more than once to an individual, the risk in terms of safety or diminished efficacy of alternating or switching between the use of the biological product and the reference product is not greater than the risk of using the reference product without such alternation or switch (see section 351(k)(4) of the PHS Act). Interchangeable products may be substituted for the reference product without the intervention of the prescribing healthcare provider (see section 351(i)(3) of the PHS Act).

The BPCI Act also includes, among other provisions:

- A 12-year exclusivity period from the date of first licensure of the reference product, during which approval of a 351(k) application referencing that product may not be made effective (see section 351(k)(7) of the PHS Act);
- A 4-year exclusivity period from the date of first licensure of the reference product, during which a 351(k) application referencing that product may not be submitted (see section 351(k)(7) of the PHS Act);
- An exclusivity period for the first biological product determined to be interchangeable with the reference product for any condition of use, during which a second or subsequent biological product may not be determined interchangeable with that reference product (see section 351(k)(6) of the PHS Act)
- An exclusivity period for certain biological products for which pediatric studies are conducted in accordance with a written request (see section 351(m) of the PHS Act);
- A transition provision for biological products that have been or will be approved under section 505 of the FD&C Act (21 U.S.C. 355) before March 23, 2020 (see section 7002(e) of the Affordable Care Act); and
- A provision stating that a 351(k) application for a biosimilar product contains a "new active ingredient" for purposes of the Pediatric Research Equity Act (PREA) (see section 505B(n) of the FD&C Act).

The BPCI Act also establishes procedures for identifying and resolving patent disputes involving applications submitted under section 351(k) of the PHS Act.

QUESTIONS AND ANSWERS

I. BIOSIMILARITY OR INTERCHANGEABILITY

* * * * *

Q. I.9. Is a clinical study to assess the potential of the biological product to delay cardiac repolarization (a QT/QTc study) or a drug-drug interaction study generally needed for licensure of a proposed biosimilar product? [Revised]

A. I.9. (Revised Proposed Answer): In general, a proposed biosimilar product may rely upon the reference product's clinical evaluation of QT/QTc interval prolongation and proarrhythmic potential and drug-drug interactions. If such studies were not required for the reference product, then these data generally would not be needed for licensure of the proposed biosimilar product. However, if the BLA holder for the reference product has been required to conduct postmarket studies or clinical trials under section 505(o)(3) of the FD&C Act to assess or identify a certain risk related to a QT/QTc study or a drug-drug interaction study and those studies have not yet been completed, then FDA may impose similar postmarket requirements on the biosimilar applicant in appropriate circumstances.

Q. I.10. How long and in what manner should sponsors retain reserve samples of the biological products used in comparative clinical PK and/or PD studies intended to support a 351(k) application? [Revised]

A. I.10. (Revised Proposed Answer): Reserve samples establish the identity of the products tested in the actual study, allow for confirmation of the validity and reliability of the results of the study, and facilitate investigation of further follow-up questions that arise after the studies are completed. FDA recommends that the sponsor of a proposed biosimilar product retain reserve samples for at least 5 years following a comparative clinical PK and/or PD study of the reference product and the proposed biosimilar product (or other clinical study in which PK or PD samples are collected with the primary objective of assessing PK similarity) that is intended to support a submission under section 351(k) of the PHS Act. For a 3-way PK similarity study, samples of both comparator products should be retained, in addition to samples of the proposed biosimilar product.

For most protein therapeutics, FDA recommends that a sponsor retain the following quantities of product and dosage units, which are expected to be sufficient for evaluation by state of the art analytical methods:

- A minimum of 10 dosage units each of the proposed biosimilar, reference product and, if applicable, comparator product, depending on the amount of product within each unit. In general, this should provide for a total product

mass of equal to or greater than 200 mg in a volume equal to or greater than 10 mL.

- For multi-site studies, 3 or more dosage units each of the proposed biosimilar, reference product, and, if applicable, comparator product, at the site where the highest number of patients enrolled, and 1 or more dosage units from the next highest enrolling sites until the minimum recommended total number of retained samples is met.

FDA recommends that the sponsor contact the review division to discuss the appropriate quantities of reserve samples in the following situations:

- A product mass of equal to or greater than 200 mg in a volume equal to or greater than 10 mL requires a large number of dosage units.
- Biologics other than protein therapeutics.
- A product intended for multi-dose administration.

* * * * *

Q. I.13. What constitutes "publicly-available information" regarding FDA's previous determination that the reference product is safe, pure, and potent to include in a 351(k) application?

A. I.13. (Proposed Answer): "Publicly-available information" in this context generally includes the types of information found in the "action package" for a BLA (see section 505(l)(2)(C) of the FD&C Act). However, FDA notes that submission of publicly available information composed of less than the action package for the reference product BLA will generally not be considered a bar to submission or approval of an acceptable 351(k) application.

FDA intends to post on the Agency's Web site publicly available information regarding FDA's previous determination that certain biological products are safe, pure, and potent in order to facilitate biosimilar development programs and submission of 351(k) applications. We note, however, that the publicly available information posted by FDA in this context does not necessarily include all of the information that would otherwise be disclosable in response to a Freedom of Information Act request.

Q. I.14. Can an applicant obtain a determination of interchangeability between its proposed product and the reference product in an original 351(k) application?

A. I.14. (Proposed Answer): Yes. Under the BPCI Act, FDA can make a determination of interchangeability in a 351(k) application or any supplement to a 351(k) application. An interchangeable product must be shown to be biosimilar to the reference product and meet the other standards described in section 351(k)(4) of

the PHS Act. At this time, it would be difficult as a scientific matter for a prospective biosimilar applicant to establish interchangeability in an original 351(k) application given the statutory standard for interchangeability and the sequential nature of that assessment. FDA is continuing to consider the type of information sufficient to enable FDA to determine that a biological product is interchangeable with the reference product.

Q. I.16. How can a proposed biosimilar product applicant fulfill the requirement for pediatric assessments under the Pediatric Research Equity Act (PREA)? [New]

A. I.16. (Proposed Answer): Applicants for proposed biosimilar products should address PREA requirements based upon the nature and extent of pediatric information in the reference product labeling.

As a preliminary matter, we note that there are differences in the use of the term "extrapolation" in the context of a proposed biosimilar product under the BPCI Act and in the context of PREA. Under the BPCI Act, if a biosimilar applicant fulfills the requirements for demonstrating its product is biosimilar to a reference product in one condition of use for which the reference product is licensed (e.g., an indication for an adult population), information regarding the safety, purity, and potency of the reference product in one or more additional conditions of use for which the reference product is licensed (e.g., the same indication in the pediatric population) may be extrapolated to the proposed biosimilar product if sufficient scientific justification for extrapolation is provided by the applicant (see question and answer I.11 in FDA's guidance for industry on *Biosimilars: Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009*). In this context, extrapolation occurs across drug products (i.e., from the reference product to the proposed biosimilar product).

Under PREA, a single sponsor with a single drug or biological product or drug or biological product line may conduct studies in an indication in one population (e.g., adults or older pediatric populations) and extrapolate efficacy findings to satisfy, in part, PREA requirements regarding use of that same product or product line in additional populations (e.g., younger pediatric populations). In this context, "extrapolation" occurs in a single product or product line without relying on studies comparing the product to an approved product and without conducting a full complement of additional studies in those additional populations. Under PREA, extrapolation of efficacy (but not safety or dosing) from adult populations to pediatric populations in a single drug or biological product or drug or biological product line may be permitted if the adult and pediatric indications are the same indication and the course of the disease and the effects of the drug are sufficiently similar in adult and pediatric patients. Extrapolation from one pediatric age group to another pediatric age group for a single drug or biological

product or drug or biological product line also may be appropriate to fulfill a PREA requirement under these circumstances. However, under PREA, extrapolation of dosing or safety from adult populations to pediatric populations in a single drug or biological product or drug or biological product line generally is not permitted and will not satisfy a PREA requirement.

In the discussion that follows, the term "extrapolation" generally refers to extrapolation from the reference product to the proposed biosimilar product under the BPCI Act, not to extrapolation from adults or older pediatric populations to younger pediatric populations within a single product or product line under PREA.

- Adequate pediatric information in reference product labeling

  If the labeling for the reference product contains adequate pediatric information (information reflecting an adequate pediatric assessment) with respect to an indication for which a biosimilar applicant seeks licensure in adults, the biosimilar applicant may fulfill PREA requirements by satisfying the statutory requirements for showing biosimilarity and providing an adequate scientific justification under the BPCI Act for extrapolating the pediatric information from the reference product to the proposed biosimilar product. See question and answer I.11 in FDA's guidance for industry on *Biosimilars: Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009* for additional information on extrapolation under the BPCI Act.

  If the submitted scientific justification for extrapolation under the BPCI Act is inadequate, a biosimilar applicant must submit appropriate data to fulfill applicable PREA requirements.

- Lack of adequate pediatric information in reference product labeling

  If the labeling for the reference product does not contain adequate pediatric information for one or more indications for which a biosimilar applicant seeks licensure in adults, and applicable PREA requirements were deferred for the reference product for those indications, a biosimilar applicant should request a deferral of PREA requirements for those indications.

  If PREA requirements were waived for the reference product sponsor for those indications, and if the biosimilar applicant believes that its proposed product meets the requirements for a full or partial waiver of PREA requirements under section 505B(a)(4) of the FD&C Act, the biosimilar applicant should request a full or partial waiver for those indications.

If a biosimilar applicant believes that none of the situations described above applies to its proposed product, the applicant should contact FDA for further information.

Q. I.17. When should a proposed biosimilar product applicant submit an initial pediatric study plan (PSP)? [New]

A. I.17. (Proposed Answer): Section 505B(e) of the Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended by Section 506 of the Food and Drug Administration Safety and Innovation Act (FDASIA), requires applicants subject to the Pediatric Research Equity Act (PREA) to submit an initial pediatric study plan (PSP) no later than 60 calendar days after the date of an end-of-Phase 2 (EOP2) meeting, or at another time agreed upon by FDA and the applicant. This provision of FDASIA has an effective date of January 5, 2013. FDA has issued draft guidance on the PSP process, including the timing of PSP submission, as required by section 505B(e)(7) of the FD&C Act.

Sections 505B(e)(2)(C) and 505B(e)(3) of the FD&C Act set forth a process for reaching agreement between an applicant and FDA on an initial PSP that lasts up to 210 days. Given the potential length of this process, and in the absence of an EOP2 meeting for a proposed biosimilar product, FDA recommends that if a sponsor has not already initiated a comparative clinical study intended to address the requirements under section 351(k)(2)(A)(i)(I)(cc) of the Public Health Service (PHS) Act, the sponsor should submit an initial PSP as soon as feasible, but no later than 210 days before initiating such a study. This is intended to provide adequate time to reach agreement with FDA on the initial PSP before the study is initiated. Depending on the details of the clinical program, it may be appropriate to submit an initial PSP earlier in development. FDA encourages the sponsor to meet with FDA to discuss the details of the planned development program before submission of the initial PSP.

The initial PSP must include an outline of the pediatric study or studies that a sponsor plans to conduct (including, to the extent practicable, study objectives and design, age groups, relevant endpoints, and statistical approach); any request for a deferral, partial waiver, or full waiver, if applicable, along with any supporting documentation; and should also include any previously negotiated pediatric plans with other regulatory authorities. For additional guidance on submission of the PSP, including a PSP Template, please refer to: http://www.fda.gov/Drugs/DevelopmentApprovalProcess/DevelopmentResources/ucm049867.htm. After the initial PSP is submitted, a sponsor must work with FDA to reach timely agreement on the plan, as required by section 505B(e)(2)-(3) of the FD&C Act. It should be noted that requested deferrals or waivers in the initial PSP will not be formally granted or denied until the product is licensed.

Q. I.18 For biological products intended to be injected, how can an applicant demonstrate that its proposed biosimilar product has the same "dosage form" as the reference product? [New]

A. I.18. (Proposed Answer): Under section 351(k)(2)(A)(i)(IV) of the PHS Act, an applicant must demonstrate that the *dosage form* of the proposed biosimilar or interchangeable product is the same as that of the reference product. For purposes of implementing this statutory provision, FDA considers the *dosage form* to be the physical manifestation containing the active and inactive ingredients that delivers a dose of the drug product. In the context of proposed biosimilar products intended to be injected, FDA considers, for example, "injection" (e.g., a solution) to be a different dosage form from "for injection" (e.g., a lyophilized powder). Thus, if the reference product is an "injection," an applicant could not obtain licensure of a proposed biosimilar "for injection" even if the applicant demonstrated that the proposed biosimilar product, when constituted or reconstituted, could meet the other requirements for an application for a proposed biosimilar product.

For purposes of section 351(k)(2)(A)(i)(IV) of the PHS Act, FDA also considers emulsions and suspensions of products intended to be injected to be distinct dosage forms. Liposomes, lipid complexes, and products with extended-release characteristics present special scenarios due to their unique composition, and prospective applicants seeking further information should contact FDA.

It should be noted, however, that this interpretation regarding the same dosage form is for purposes of section 351(k)(2)(A)(i)(IV) of the PHS Act only. For example, this interpretation should not be cited by applicants seeking approval of a new drug application under section 505(c) of the FD&C Act or licensure of a BLA under section 351(a) of the PHS Act for purposes of determining whether separate applications should be submitted and assessed separate fees for different dosage forms. For more information about the prescription drug user fee *bundling policy*, see FDA's guidance for industry on *Submitting Separate Marketing Applications and Clinical Data for Purposes of Assessing User Fees*, available at http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM079320.pdf.

Q. I.19. If a non-U.S.-licensed product is proposed for importation and use in the U.S. in a clinical investigation intended to support a proposed biosimilar development program (e.g., a bridging clinical PK and/or PD study), is a separate IND required for the non-U.S.-licensed product? [New]

A. I.19. (Proposed Answer): No, a sponsor may submit a single IND for its proposed biosimilar development program, and may submit information supporting the proposed clinical investigation with the non-U.S.-licensed comparator product under the same IND. This scenario may occur, for example, if a sponsor seeks to use data from a clinical study comparing its proposed biosimilar product to a non-U.S.-licensed product to address, in part, the requirements under section 351(k)(2)(A) of the PHS Act, and proposes to conduct a clinical PK and/or PD study in the U.S. with all three products (i.e., the proposed biosimilar product, the U.S.-licensed reference product, and the non-U.S.-licensed product) to support establishment of a bridge to the U.S.-licensed reference product and scientific justification for the relevance of these comparative data to an assessment of biosimilarity.

A non-U.S.-licensed comparator product is considered an investigational new drug in the United States, and thus would require an IND for importation and use in the United States (see 21 CFR 312.110(a)). If a sponsor intends to conduct a clinical investigation in the United States using a non-U.S.-licensed comparator product, the IND requirements in 21 CFR part 312 also would apply to this product (see, e.g., 21 CFR 312.2).

With respect to chemistry, manufacturing, and controls (CMC) information, a sponsor should submit to the IND as much of the CMC information required by 21 CFR 312.23(a)(7) as is available. However, FDA recognizes that a sponsor may not be able to obtain all of the CMC information required by 21 CFR 312.23(a)(7) for a non-U.S.-licensed comparator product for which it is not the manufacturer. In these circumstances, the sponsor can request that FDA waive the requirement for complete CMC information on the non-U.S.-licensed comparator product (21 CFR 312.10). The IND must include, as part of the waiver request, at least one of the following:

- A sufficient explanation why compliance with the complete requirements of 21 CFR 312.23(a)(7) is unnecessary or cannot be achieved,
- Information that will satisfy the purpose of the requirement by helping to ensure that the investigational drug will have the proper identity, strength, quality, and purity, or
- Other information justifying a waiver.

Information that is relevant to whether the investigational drug will have the proper identity, strength, quality, and purity may include, for example, information indicating whether the investigational drug has been licensed by a regulatory authority that has similar scientific and regulatory standards as FDA (e.g., International Conference on Harmonisation (ICH) countries). This should include, to the extent possible, summary approval information and current product labeling made public by the foreign regulatory authority. In addition, a sponsor

should also provide information on the conditions and containers that will be used to transport the drug product to the US clinical site(s) and information on the relabeling and repackaging operations that will be used to relabel the drug product vials for investigational use. (This should include information on how exposure of the product to light and temperature conditions outside of the recommended storage conditions will be prevented. A risk assessment on the impact the relabeling operations may have on drug product stability should also be included.)

The sponsor should consult with the appropriate FDA review division regarding the CMC information necessary to support the proposed clinical trial.

As applicable to all investigational drugs, FDA reminds sponsors that the investigator brochure (IB) for studies to be conducted under the IND should be carefully prepared to ensure that it is not misleading, erroneous, or materially incomplete, which can be a basis for a clinical hold (see 21 CFR 312.42(b)(1)(iii) and (b)(2)(i)). For example, the term *reference product* should be used in the IB only to refer to the single biological product licensed under section 351(a) of the Public Health Service Act against which the proposed biosimilar product is evaluated for purposes of submitting a 351(k) application. The IB and study protocol(s) should use consistent nomenclature that clearly differentiates the proposed biosimilar product from the reference product. The IB and study protocol(s) also should clearly describe whether the comparator used in each study is the US-licensed reference product or a non-U.S.-licensed comparator product, and use consistent nomenclature that clearly differentiates these products. If a non-U.S.-licensed comparator product is being used in a study conducted in the United States, the IB and study protocol(s) should clearly convey that the product is not FDA-approved and is considered an investigational new drug in the United States. The IB and study protocol(s) also should avoid conclusory statements regarding regulatory determinations (e.g., "comparable," "biosimilar," "highly similar") that have not been made.

II. PROVISIONS RELATED TO REQUIREMENT TO SUBMIT A BLA FOR A "BIOLOGICAL PRODUCT"

* * * * *

Q. II.3. What type of marketing application should be submitted for a proposed antibody-drug conjugate? [New]

A. II.3. (Proposed Answer): As described in further detail below, a BLA should be submitted for a proposed monoclonal antibody that is linked to a drug (antibody-drug conjugate). FDA considers an antibody-drug conjugate to be a combination

product composed of a biological product constituent part and a drug constituent part (see 21 CFR 3.2(e)(1); 70 FR 49848, 49857-49858; August 25, 2005).

CDER is the FDA center assigned to regulate antibody-drug conjugates, irrespective of whether the biological product constituent part or the drug constituent part is determined to have the primary mode of action (see section 503(g) of the FD&C Act; see, e.g., Transfer of Therapeutic Biological Products to the Center for Drug Evaluation and Research (June 30, 2003), available at http://www.fda.gov/CombinationProducts/JurisdictionalInformation/ucm136265.htm; Intercenter Agreement Between the Center for Drug Evaluation and Research and the Center for Biologics Evaluation and Research (October 31, 1991), available at http://www.fda.gov/CombinationProducts/JurisdictionalInformation/ucm121179.htm).

To enhance regulatory clarity and promote consistency, CDER considered several factors to determine the appropriate marketing application type for antibody-drug conjugates, including the relative significance of the safety and effectiveness questions raised by the constituent parts, particularly the highly specific molecular targeting by the antibody to a cell type, cellular compartment, or other marker at the site of action (as distinguished from mere alteration of systemic pharmacokinetics).

In light of such factors, CDER considers submission of a BLA under section 351 of the PHS Act to provide the more appropriate application type for antibody-drug conjugates.

Sponsors seeking to submit a BLA for a proposed antibody-drug conjugate should contact CDER's Office of New Drugs at 301-796-0700 for further information.

III. EXCLUSIVITY

Q. III.1. Can an applicant include in its 351(a) BLA submission a request for reference product exclusivity under section 351(k)(7) of the PHS Act?

A. III.1. (Proposed Answer): Yes. FDA is continuing to review the reference product exclusivity provisions of section 351(k)(7) of the PHS Act and has published a draft guidance addressing certain exclusivity issues (see FDA's draft guidance for industry on *Reference Product Exclusivity for Biological Products Filed Under Section 351(a) of the PHS Act*, available at http://www.fda.gov/downloads/drugs/guidancecomplianceregulatoryinformation/guidances/ucm407844.pdf). An applicant may include in its BLA submission a request for reference product exclusivity under section 351(k)(7) of the PHS Act,

525 and FDA will consider the applicant's assertions regarding the eligibility of its
526 proposed product for exclusivity. The draft guidance describes the types of
527 information that reference product sponsors should provide to facilitate FDA's
528 determination of the date of first licensure for their products.
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국제해양법 현안의 토의 동향과 분쟁해결 결과 분석

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이용희교수는 1994년 경희대학교에서 국제법분야로 법학박사학위를 취득한 후 한국해양연구원 해양정책연구실장을 역임하고 현재 한국해양대학교 해사법학부 교수로 재직중이다. 주요연구 활동분야는 국제해양법과 해양정책분야이다.

국제해양법 현안의 토의 동향과 분쟁해결 결과 분석

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Abstract

국제해양법질서는 1982년 제3차 유엔해양법회의에서 채택되고 1994년 발효한 유엔해양법협약에 의해 유지되고 있다. 비록 동 협약이 해양의 모든 질서를 규정하고 있는 것은 아니지만, 국가 간 해양질서의 기초를 제공하고 있으며 구체적인 질서는 후속협약 또는 개별조약에 의하여 보충되고 보완되어 오고 있으며, 관련 당사국 및 국제기구의 활동에 의해 실천되고 있다.

국제해양법과 관련된 정부 간 국제기구로서는 심해저와 그 자원의 관리를 전담하고 있는 국제해저기구, 선박의 운항과 관련된 국제질서를 담당하고 있는 국제해사기구 등이 대표적 국제기구라고 볼 수 있다. 또한 국제해양법의 해석과 적용과정에서 국가 간의 분쟁이 빈번히 나타나고 있다. 국가 간의 해양분쟁은 해양관할권분쟁, 해양자원개발분쟁, 해양환경분쟁 등 다양한 형태로 나타나고 있는데 이러한 분쟁은 유엔헌장의 원칙과 국제관습법상 국가의 기본적 의무로서 평화적으로 해결되어야 한다. 평화적인 해결방법으로서는 당사자 간의 직접협상, 주선, 중개, 사실심사, 조정 등의 임의적 분쟁해결절차가 우선적으로 적용되지만,

이러한 절차에 의해서도 해결되지 않는 법률분쟁에 대해서는 국제해양법재판소, 국제사법재판소, 유엔해양법협약 제7부속서 따른 중재재판소 등이 해결기관으로서 역할을 수행하고 있다.

지난 2016년도에도 이러한 국제기구들을 중심으로 국제해양법적으로 유의미하며, 국내입법 및 독도 영유권문제에 영향을 줄 수 있는 사안들이 다수 발생하여 진행되었다.

국가 간 해양분쟁과 관련하여서도 의미있는 판결이 유엔해양법협약 제5부속서 제2절에 따른 강제조정위원회 및 유엔해양법협약 제7부속서에 따른 중재재판소에서 내려진 바 있다. 유엔해양법협약 제5부속서 제2절에 따른 강제조정위원회는 동티모르가 호주를 상대로 개시한 티모르해 영구적 배타적 경제수역 및 대륙붕 경계획정 청구사건에 대해서 호주가 제기한 관할권 존부 및 수리가능성에 대한 결정을 내린 바 있다. 동 사건은 유엔해양법 분쟁해결절차상 최초로 개시된 강제조정사건이라는 점, 해양경계획정에 관한 구속력있는 강제적 분쟁해결절차 적용배제선언을 한 호주에 대해 강제조정절차가 개시되었다는 점에서 시사점이 큰 사건이다.

유엔해양법협약 제7부속서에 따른 중재재판소는 이탈리아가 인도를 상대로 제기한 엔리카렉시에호사건과 관련하여 인도에 보석상태로 머물고 있는 자국 해병의 이탈리아 송환을 청구하는 잠정조치명령 청구사건에 대해 잠정조치명령을 내렸다. 또한, 남중국해에서 중국이 일방적인 구단선 주장에 따른 관할권 행사와 남중국해 영유권분쟁이 발생하고 있는 산호초 또는 수중암초에 인공섬을 건설한 것을 쟁점화하여 분쟁을 부탁한 필리핀의 청구에 대한 본안판정을 하였다. 엔리카렉시에호사건에 대한 잠정조치명령사건은 동일 사안으로 국제해양법재판소의 잠정조치 명령을 청구한 사건을 다시 본안을 심리하는 중재재판소에 유사사안에 대하여 잠정조치를 또다시 청구한 사건으로서 그 수리가능성과 인용가능성이 국제법상 큰 관심을 가져온 사건이다. 한편, 남중국해사건에 대한 본안판정은 세계적인 관심사 속에 진행된 사건으로서 유엔해양법협약 규정을 넘는 일방적 해양관할권의 수용여부, 남중국해 해양지형물의 법적 지위와 관련된 섬과 암석의 판단 기준, 해양환경 보호 및 보존의무의 이행 범위, 영해에서의 전통적 어업권 인정 여부, 법집행행위를 통한 선박항행 안전 위해행위의 적법성 등 많은 국제법적 쟁점에 대한 사법적 판단을 제시한 매우 중요한 사건이다.

한편, 새로운 국제해양질서의 형성과 관련하여 중요한 국제회의가 2016년에도 개최된 바 있다. 먼저, 국가관할권 이원의 공해 및 심해저에 존재하는 해양생물다양성을 보존하고 지속가능한 이용을 구현하기 위해 유엔해양법협약 하의 구속력있는 국제문서 작성을 위한 회의 로서 '국가관할권 이원영역에서의 해양생물다양성의 보전 및 지속가능한 이용에 관한 법적 구속력 있는 국제문서의 성안을 위한 준비위원회'가 유엔총회의 결의에 의거하여 2016년 2차례 개최되었다. 동 회의는 유엔해양법협약과 기타 관련 국제조약에 규율되고 있는 기존 공해 및 심해저질서를 수정하거나 발전시킬 수 있는 새로운 국제법질서를 생성한다는 측면 에서 국제법적으로 유의미한 외교적 협상으로 평가되고 있다.

또한, 2015년 12월 미국 주도로 개시된 중앙북극공해에서의 비규제 공해어업을 방지하기 위한 구속력있는 국제조약 체결을 위한 국제회의인 '중앙북극해 공해어업회의'가 2016년에도 미국, 캐나다, 덴마크에서 제2차에서 제4차까지 회의가 개최되었다. 이 회의는 아직 실현되고 있지 않고 가까운 시일내에 실현될 것 같지 않은 중앙북극공해에서의 비규제 어업을 금지하는 것을 내용으로 하는 국제조약 체결을 의도하고 있다. 이는 극단적인 사전 예방적 접근주의 적용, 북극연안국들의 이해관계를 잠재적 어업국이 수용하도록 압력을 행사하는 부정적 요소를 포함하고 있으며, 동시에 우리나라 원양어업산업의 미래어장을 제한하는 효과를 내포하고 있어 국익적 측면에서 면밀히 살펴보아야 할 다자간 협상회의이다.

Ⅰ. 국제해양법 관련 국제기구 및 국제회의 동향

1. 유엔해양법협약 제5부속서 제2절에 따른 강제조정위원회

유엔해양법협약 제5부속서에 따른 강제조정위원회는 유엔해양법협약 고유의 분쟁해결절차이다. 동 협약은 동 협약 규정의 해석과 적용에 관한 분쟁을 전속적으로 다루는 분쟁해결절차를 제15부에 규정하고 있다. 협약 당사국 간 협약의 해석과 적용에 관한 분쟁이 발생한 경우 제15부 제1절의 규정에 따라 당사국이 합의로 선택한 평화적 분쟁해결절차에 따라 분쟁해결을 시도하고, 합리적인 기간 동안 해결되지 않은 경우에는 분쟁당사국 일방의 청구에 의하여 절차가 진행되는 구속력있는 결정을 수반하는 강제적 분쟁해결절차를 제2절에 규정하고 있다. 그러나, 제3절에서는 구속력있는 결정을 수반하는 강제적 분쟁해결절차의 적용 예외와 배제 가능성을 인정하고 있다. 그것에 해당되는 분쟁은 협약 제297조와 제298조에 규정 되어 있는 3가지 종류의 분쟁이다. 먼저, 연안국 배타적 경제수역에서의 해양과학조사와 관련하여, 특정 조사계획에 관하여 연안국이 제246조와 제253조에 의한 권리를 협약과 양립하는 방식으로 행사하고 있지 않다고 조사국이 주장함으로써 발생하는 분쟁이다. 두 번째는 연안국 배타적 경제수역에서의 생물자원에 대한 주권적 권리 행사와 관련하여, (i) 연안국이 적절한 보존·관리조치를 통하여 배타적 경제수역의 생물자원 유지가 심각하게 위협받지 아니하도록 보장할 의무를 명백히 이행하지 아니하였다는 주장이 제기된 경우, (ii) 연안국이 다른 국가의 어획에 관심을 가지고 있는 어종의 허용어획량과 자국의 생물자원 어획능력 결정을 그 다른 국가의 요청에도 불구하고 자의적으로 거부하였다는 주장이 제기된 경우, (iii) 연안국이 존재한다고 선언한 잉여분의 전부나 일부를 제62조, 제69조 및 제70조에 따라, 또한 연안국이 이 협약에 부합되게 정한 조건에 따라 다른 국가에게 할당할 것을 자의적으로 거부하였다는 주장이 제기된 경우이다. 세 번째는 해양경계획정과 관련된 제15조, 제74조 및 제83조의 해석이나 적용에 관한 분쟁 또는 역사적 만 및 권원과 관련된 분쟁으로서, 분쟁당사국이 동 종류의 분쟁에 대하여 구속력있는

결정을 수반하는 강제적 분쟁해결절차의 적용을 배제하는 선언을 하여 동 절차가 적용되지는 않지만 이러한 분쟁이 이 협약 발효 후 발생하고 합리적 기간내에 당사자 간의 교섭에 의하여 합의가 이루어지지 아니하는 경우이다.

위와 같은 경우에 해당하는 경우 비연안국 또는 분쟁당사자 일방의 요청에 의하여 연안국 또는 타방당사자의 동의없이 구속력있는 결정을 수반하지 않는 조정절차가 개시되는데 이를 강제조정절차라 한다. 1994년 11월 16일 협약이 발효한 이래 강제조정절차는 진행된 바가 없으나 2016년 동티모르의 청구에 의해 호주와의 티모르해 해양경계획정에 관한 분쟁이 강제조정절차에 청구되었다.

동티모르와 호주와의 영구적 해양경계획정에 관한 강제조정사건

동티모르와 호주 간 강제조정사건은 2016년 4월 11일 동티모르가 호주를 상대로 유엔해양법협약 제298조 및 제5부속서 제2절에 따라 "양국 간 영구적 해양경계획정을 포함하여 배타적 경제수역 및 대륙붕의 경계획정에 관한 협약 제74조와 제83조의 해석과 적용에 관한 분쟁" 해결의 부탁을 강제조정위원회에 부탁한 사건이다.

동티모르와 호주는 모두 유엔해양법협약 당사국이며, 동티모르는 2013년 2월 7일, 호주는 1994년 11월 16일 당사국 지위를 각각 획득하였다. 양국은 티모르해를 사이에 둔 대향국으로서, 양국 간 거리는 약 300해리 정도로서 배타적 경제수역 및 대륙붕 중복주장해역이 존재하여 경계획정의 필요가 발생하였다.

동티모르는 2002년 5월 20일 인도네시아로부터 독립하고, 독립 당일 동티모르와 호주는 티모르해조약을 체결하였는 바, 양국 간 중복주장해역을 대상으로 공동석유개발구역(JPDA)을 설정하고, 동 구역에서의 석유생산 90%는 동티모르 몫으로 배분한다는 내용에 합의하였다. 2003년부터 양국은 해양경계획정을 협상 개시하였으나 이를 변경하여 2006년 티모르해 특정해사약정조약(CMAT)을 체결하였다. CMAT는 1) 2002년 조약 유효기간을 CMAT 발효 후 50년으로 연장, 2) JPDA 상부수역에 대한 동티모르의 관할권 인정, 3) Greater Sunrise 유전 생산량을 양국이 동일하게 분배하도록 규정하였다. 또한, 양국은 Greater Sunrise 유전을 단일화(unitisation)하는 협정을 2003년 3월 6일 서명하고 CMAT과 같은 날인

2007년 2월 23일 발효토록 조치하였다. 그러나 CMAT 체결과정에서 호주측이 동티모르 대리인을 도청하고 불법적으로 협상자료를 압수하는 등의 사건이 있었으며, 이를 이유로 동티모르는 국제사법재판소와 중재재판소에 압수된 서류의 반환과 호주의 사기에 의한 조약 체결을 이유로 한 CMAT 무효소송을 제기한 바 있다. 이것과는 별도로 동티모르는 2016년 4월 11일 호주에 대한 통보를 통하여 협약 제298조와 제5부속서 제2절에 따른 양국간 배타적 경제수역 및 대륙붕 경계획정에 관한 사건을 강제조정위원회에 부탁하도록 하였다. 2016년 5월 2일 호주가 동 통보에 대해 답변서를 제출하였고, 2016년 5월 11일 상설중재재판소로 하여금 강제조정의 서기업무 수행을 부탁하였다. 마침내 2016년 6월 25일 5인의 조정위원회가 구성되자 2016년 8월 12일 호주가 강제조정위원회의 관할권(competence)에 반대 주장을 하였고, 8월 25일 동티모르가 호주 주장에 대한 의견을 제시하였다. 2016년 8월 29일부터 31일까지 구두절차를 거쳐 9월 19일 조정위원회가 관할권 여부에 대한 결정을 제시하였다. 호주의 관할권 부존재 주장의 논거는 다음과 같다.

1) CMAT 제4조가 협약에 따른 강제조정절차 개시를 배제한다.
2) CMAT은 협약 제74조와 제83조에서 규정한 실질적 성격의 잠정약정에 해당하기 때문에 협약 발효로 CMAT가 대체되지 않는 것을 의미한다.
3) CMAT상 분쟁은 협상에 의거 해결하도록 규정하고 있으므로 협약 제281조에 따라 조정위원회의 관할권은 배제된다.
4) 양국 간 해양경계획정분쟁은 2002년 발생하였고, 따라서 협약 발효 후 발생 분쟁만을 대상으로 한다는 협약 제298조의 강제조정 개시를 위한 첫번째 조건을 충족하지 못하였다.
5) 양국은 CMAT 제4조 제7항의 규정에 따라 해양경계획정에 관한 교섭을 진행하지 않았으므로 협약 제298조의 강제조정 개시를 위한 두번째 조건도 충족하지 못하였다.
6) 동티모르가 조약상 호주에 대한 준수의무를 위반하여 강제조정위원회를 점령하려고 하기 때문에 청구의 수리가능성이 인정되지 않으며, CMAT의 유효성에 관한 중재재판이 종료될 때까지 강제조정절차를 기다려야 하는 예양의 원칙이 존재한다.

이러한 호주의 주장에 대하여 동티모르는 다음과 같이 반론하였다.

1) CMAT 제4조 제1항이 양국 간 영구적 경계획정 협상을 배제한 것이 아니며, 비구속적 강제조정은 제4조 제4항이 의미하는 분쟁해결절차가 아니므로 협약에 따른 강제조정절차의 개시가 가능하다.
2) CMAT가 실질적 성격의 잠정약정이라 하여도 그 자체로 협약과 양립가능한 것이 되지 않으며, CMAT는 협약 제311조에 따라 협약과 불일치한 조약에 해당한다.
3) 2003년 교환공문은 협약 제281조에 규정된 구속력있는 문서가 아니며, CMAT는 경계획정에 관한 양국 간 합의가 아니므로 협약 제281조의 위반 주장은 부적절하다.
4) 협약 제298조에 규정된 '협약 발효 후 발생한 분쟁'의 조건은 협약이 발효된 1994년 11월 16일을 의미하므로 협약 제298조의 강제조정 개시를 위한 첫번째 조건은 충족된다.
5) 협약 제298조에 규정된 '합리적인 기간 동안의 교섭 진행 조건'은 분쟁당사국의 일방이 교섭을 거부한 경우에는 미적용되므로 협약 제298조의 강제조정 개시를 위한 두번째 조건도 충족된 것이다.
6) 강제조정은 비구속적 성격을 가지므로 CMAT의 유효성에 관한 중재재판에 영향을 주지 않으며, 필요하다면 CMAT를 종료시킬 수 있음을 지적하였다.

강제조정위원회는 CMAT가 강제조정절차 개시를 배제한다는 호주의 주장과 관련하여, 동 조약의 그러한 효과는 협약의 틀 속에서 판단되어야 한다고 생각하였다. 먼저, 협약 제281조의 요건 충족 여부를 판단하고 제298조의 강제조정절차 개시 요건 충족 여부를 판단하기로 심리의 우선순위 설정하였다.

협약 제281조는 분쟁 발생 시 당사국이 합의로 선택한 평화적 방법이 우선적으로 적용되며, 그 방법으로 실패하였고 당사자 간 추가적인 절차를 합의로 배제하지 않은 경우에만 협약상 분쟁해결절차가 적용된다는 의미라고 해석된다. 이때 분쟁당사국간 합의는 협약의 성격과 제282조 규정과의 관계를 고려할 때 구속력있는 합의(binding agreement)만을 의미한다고 해석하였다. 이러한 판단에 따라, 호주가 주장한 2003년 양국 수상 간 교환

각서는 구속력있는 문서가 아니므로 협약 제281조의 요건 충족 여부의 판단 대상이 아니라고 판단하였다. 다음으로, 호주가 주장한 CMAT 제4조가 협약 제281조의 요건을 충족하는 지 검토하였다. 강제조정위원회는 CMAT 제4조가 협약 제281조에서 요구하는 분쟁의 평화적 해결수단의 선택을 위한 합의라고 볼 수 없다는 판단(오히려 분쟁해결의무의 무력화 합의라고 판단)에 따라, 호주가 주장하는 협약 제281조에 근거한 강제조정위원회의 관할권 부존재 주장을 기각하였다.

협약 제298조 강제조정절차의 첫번째 개시 요건인 '협약 발효 후 발생한 분쟁' 여부에 대한 판단에 대하여, 협약초안과정에서 분쟁당사국 모두에게 발효된 후의 분쟁으로 명시하고자 한 이스라엘의 제안이 채택되지 않은 점과 협약 성안과정에서의 외교대표단이 1994년 협약 발효시점을 의도했다는 동티모르측의 주장을 채택하고 조약의 소급효원칙에 반한다는 호주의 주장을 배척하였다. 결과적으로 '협약 발효 후 발생한 분쟁'의 시기적 기준을 협약이 일반적으로 발효한 1994년 11월 16일로 판단하였다. 다음으로, 협약 제298조 강제조정절차의 두번째 개시 요건인 '합리적인 기간내에 협상에 의해 합의에 이르지 못한 것일 것'이라는 기준의 충족 여부에 대한 판단을 시도하였다. 호주는 CMAT 제4조의 모라토리움 규정에 의거하여 해양경계획정에 관한 어떠한 협상도 진행된 바가 없으므로 두번째 요건을 충족시키지 못하였다고 주장하였지만, 강제조정위원회는 이 조건이 실질적인 사전협상이 진행될 것으로 요구하는 것은 아니며, 그런 것일 경우 의도적으로 협상을 회피하여 강제조정 개시를 막는 권리를 부여하는 결과를 야기하는 것이어서 부적절하다고 보았다. 즉, 합리적인 기간동안 협약 경계획정 관련규정의 해석과 적용에 관한 분쟁이 해결되지 않았을 때를 의미한다고 해석하였다. 따라서, 2003년부터 2006년까지 협상이 진행되었으며, 2006년 CMAT가 분쟁을 해결한 합의에 해당하지 않으며, 2013년에도 동티모르가 협상 개시를 요구한 점, 2014년부터 2015년까지 중재재판에서 분쟁해결을 위해 노력한 점을 고려하였다. 또한, CMAT 제4조가 당사자간 모든 형태의 협상을 배제한 것이 아니라고 해석하여, 협약 제298조의 강제조정 절차 개시 요건을 모두 충족하였다고 판단하였다. 한편, 강제조정위원회는 CMAT와 협약 제311조의 관계에 대한 판단도 CMAT가 협약상 권리와 의무를 배제하고자 한 것이 아니므로 검토할 필요성이 없다는 결론에 도달하였다.

다음으로, 강제조정위원회는 호주가 주장한 소의 수리가능성측면을 검토하였다. 호주는 동티모르가 CMAT에 위반하여 강제조정을 개시하였으므로, 강제조정위원회가 이 절차를 진행해서는 안된다고 주장하였다. 이에 대하여, 동티모르는 수리가능성문제는 강제조정 단계에서는 고려대상이 아니고, CMAT를 위반하지도 않았고, CMAT는 무효의 조약이라고 주장하였다. 또한, 호주는 중재재판이 CMAT를 무효로 판단할 때까지 동 조약은 유효하며, 중재재판이 끝날 때까지 강제조정 절차를 정지하던지 절차 자체를 기각하여야 한다고 주장하였다. 강제조정위원회는 CMAT가 협약상 분쟁해결절차를 배제하고 있지 않으며, CMAT의 유효성 여부는 다른 재판소의 문제라는 점을 들어 호주의 주장을 배척하였다.

다음으로, 강제조정위원회는 조정의 범위에 대해서 판단하였다. 동티모로는 최초발언을 통하여 강제조정위원회가 영구적인 해양경계획정에 이르도록 도와줄 것을 넘어 CMAT와 티모르해조약이 무효될 경우의 잠정조치도 도와줄 것을 요구하였다. 이에 대하여, 호주는 동티모르가 당초 통보한 강제조정의 내용을 벗어나는 사안이라고 주장하였다. 강제조정위원회는 부탁된 분쟁이 협약 제74조 및 제83조의 해석과 적용에 관한 분쟁이며, 동 조문에는 잠정약정이 포함되어 있으므로 동티모르의 요구는 강제조정의 범위를 벗어난 것이 아니라고 판단하였다.

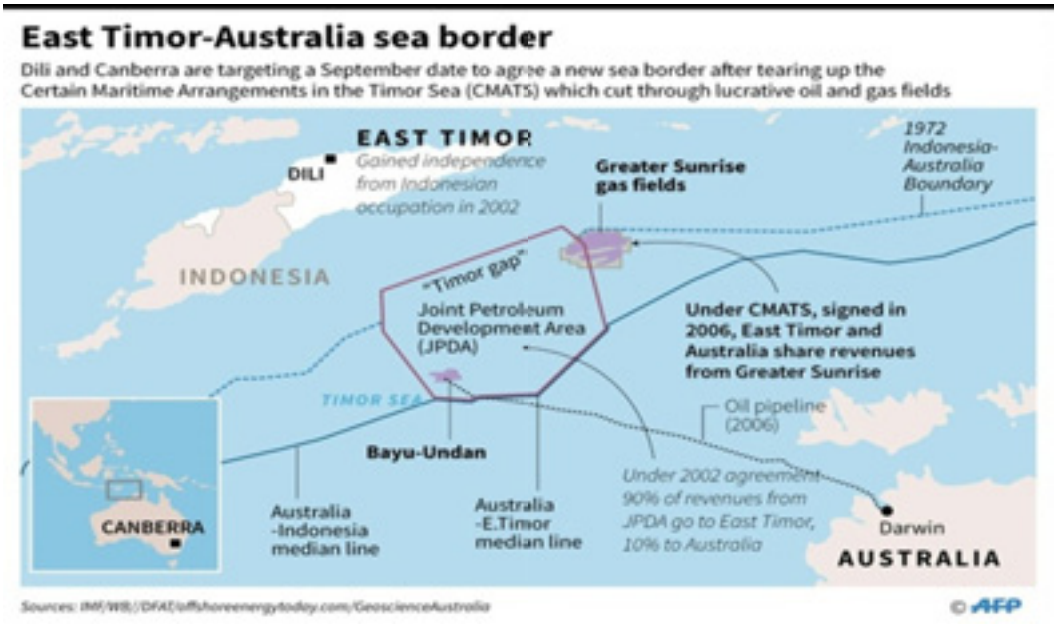
마지막으로, 강제조정위원회는 동 위원회의 활동기간 12개월의 개시시점에 대하여 판단하였다. 동티모로는 위원회가 구성된 시점부터 12개월이 기산되어야 하고, 기간을 연장하는데 반대한다는 입장을 표명한 반면에 호주는 협약 제5부속서 제1절 임의조정과 제2절 강제조정은 구분된다는 점을 언급하고, 관할권에 관한 판단이 끝난 시점부터 조정이 개시된 것으로 보아야 한다고 주장하였다. 강제조정위원회는 호주의 주장을 인용하였다.

위와 같은 심리를 거쳐 강제조정위원회는 전원일치의 결정으로 관할권 존부 및 청구의 허용성 여부에 대하여 다음과 같이 결정하였다.

조정위원회는 2016년 4월 11일 협약 제5부속서 제2절에 따른 조정 개시에 관한 동티모르의 통보에 청구된 내용에 대하여 강제조정의 권한이 있다.

이 조정절차의 계속을 배제할만한 수리가능성의 문제 또는 예양의 문제는 없다.

협약 제5부속서 제7조의 12개월 기간은 이 결정일로부터 기산한다.



2. 유엔해양법협약 제7부속서에 따른 중재재판소(Arbitral Tribunal constituted in accordance with Annex 7)

유엔해양법협약 제7부속서에 따른 중재재판소는 유엔해양법협약 제15부 분쟁해결절차에 의거하여 협약의 해석과 적용에 관한 협약당사국간 분쟁에 대해 구속력있는 결정을 수반하는 강제적 분쟁해결절차를 담당하는 4개의 재판소 중 하나이다. 동 중재재판소의 구성과 절차에 대해서는 협약 제7부속서에서 규정하고 있다. 동 중재재판소는 2016년에 이탈리아와 인도 간 엔리카렉시에호에 대한 제2차 잠정조치사건에 대한 명령과 필리핀과 중국 간 남중국해 사건에 대한 본안사건에 대한 판정을 내린 바 있다.

엔리카렉시에호 사건에 관한 제2차 잠정조치사건

엔리카렉시에호사건은 2015년 6월 26일 이탈리아가 인도를 상대로 하여 유엔해양법협약 제7부속서의 중재재판소에 소송을 청구한 후 2015년 12월 11일에 유엔해양법협약 제290조

제1항에 의거하여 중재재판소에 잠정조치 명령을 청구한 사건이다. 이 잠정조치 청구이전에 이탈리아는 2015년 7월 21일 유엔해양법협약 제290조 제5항에 근거하여 국제해양법재판소에 잠정조치 명령을 요청하였으나, 국제해양법재판소가 잠정조치의 명령은 각각의 권리를 형평하게 살펴야한다는 취지로 이탈리아의 요청을 사실상 기각한 바 있었다. 이에 다시 본안을 심리하는 중재재판소에 인도에 보석 상태로 머무르고 있는 하사 Salvatore Girone를 이탈리아로 잠정적으로 귀환시키도록 하는 잠정조치명령을 요청한 것이다.

엔리카렉시에호사건은 2012년 2월 15일 이탈리아선적 유조선 엔리카렉시에호가 인도 연안으로부터 20.5해리 떨어진 해역(인도의 접속수역에 해당)을 항행하던 중 약 2.8해리 떨어진 곳으로부터 동 선박에 빠르게 접근하는 선박을 레이더로 발견하고 해적선으로 추정한데서 비롯되었다. 즉, 접근하는 선박의 양태가 해적선의 접근방식과 유사하였으며 접근이 계속되는 경우 충돌의 가능성이 발생한 시점에서, 동 선박에 해적퇴치를 목적으로 승선한 이탈리아 해병 중 2명이 경고신호에도 접근을 계속한 선박에 대해 경고사격을 실시 하였다. 경고사격 후 접근하던 선박을 방향을 선회하여 다른 방향으로 항진하였으나, 경고사격의 결과로 인도 국적의 어선 '안토니(the ST Anthony)'호에 탑승중이던 어부 2명이 사망하는 결과를 초래하였다. 이에 인도정부는 엔리카렉시에호를 자국 코치항으로 항해토록 하고, 입항한 후 경고사격을 시행한 2명의 해병을 살인죄로 체포하여 감금하였다. 이러한 사건을 배경으로 인도는 자국 국적선박에서 발생한 사망사건에 대하여 형사관할권이 있음을 이유로 경고사격을 행한 이탈리아 해병에 대한 형사소송절차를 진행하였고, 이탈리아는 공해상에서 발생한 선박 관련사건에 대한 형사 및 행정관할권은 유엔해양법협약상 기국에 있음을 근거로 하여 자국이 형사관할권을 행사하여야 한다는 점을 주장하고 있다.

이와 같은 본안사건과는 별도로 이탈리아가 중재재판소에 인도를 상대로 요청한 잠정조치 청구의 내용은 다음과 같다.

> 인도는 제7부속서에 따른 중재재판의 최종결정시까지 하사 Salvatore Girone를 이탈리아 당국의 책임하에 이탈리아로 귀환할 수 있도록 보석조건의 완화에 필요한 조치를 취할 것

이러한 이탈리아의 제2차 잠정조치 청구에 대하여 인도는 다음과 같이 중재재판소에 요청하였다.

> 중재재판소는 잠정조치 명령을 요청한 이탈리아의 청구를 기각하고 현 사건에 관련된 어떠한 새로운 잠정조치 요청도 거절할 것

이상과 같은 이탈리아의 잠정조치 청구에 대하여 중재재판소는 우선적으로 일응관할권의 존재 여부에 대하여 판단하였다. 중재재판소는 ① 중재재판소에 대한 분쟁부탁 절차의 적절성, ② 당사국 간 분쟁의 존재 여부, ③ 동 분쟁이 협약의 해석과 적용에 관한 분쟁인지 여부에 대하여 검토하고 이를 모두 인정하여 중재재판소가 본안사건에 대한 일응관할권이 있음을 확인하였다. 다음으로 이탈리아의 잠정조치 청구의 수리가능성(admissibility)에 대하여 판단하였다. 동 사안에 대해 인도는 국제해양법재판소 잠정조치 명령 후 변경된 사정이 없음에도 불구하고 제290조 제1항에 따라 또다시 유사한 목적의 잠정조치명령을 청구한 것은 협약 규정에 대한 오해에서 비롯된 것이라고 주장하였다. 그러나, 중재재판소는 제290조 제1항과 제5항의 잠정조치 청구는 각각 다른 것이며, 국제해양법재판소 잠정조치 명령에 따라 각국 국내소송절차가 중단되었고, 잠정조치 청구취지도 국제해양법재판소에 요청된 내용과 비교할 때 변경되었으므로 새로운 잠정조치 청구의 정당성을 인정하였다.

중재재판소는 다음으로 잠정조치를 위한 긴급성 요건의 필요성에 대하여 판단하였다. 협약 제290조 제1항의 명문상 긴급성을 규정하고 있지 않으나 긴급성 요건이 반드시 고려되어야 할 요소라는 점을 확인하고 제290조 제5항의 긴급성과 동일한 성격을 가진다고 판단하였다. 중재재판소는 다음으로 인도가 2명의 해병에 대하여 적용하고 있는 범죄 수사 및 재판절차가 국제인권법상 타국 국민에 대하여 기대하는 적정절차(due process)를 위반하였다는 이탈리아의 주장(보석조건의 완화 필요성 주장 근거)에 대해 판단하였다. 이에 대하여 중재재판소는 동 사안에 대해 인도는 2명의 해병에 대한 소송절차의 지연에 이탈리아가 기여한 점, 2명의 해병에 대한 자비적 처분 등을 하고 있는 점을 이유로 항변하였다. 중재재판소는 실질적이고 급박한 권리 보전의 필요성이 관건인 잠정조치 사건에서 인신구속의 정당성을

다루는 것은 불필요하며, 장기간의 중재재판으로 개인에게 부당한 제약이 있어서는 안 된다는 점(가족의 별리로 인한 고통)을 확인하였다. 중재재판소는 이탈리아의 잠정조치 청구가 인권적 차원에서 이유 있음을 인정하는 한편, 보석 조건을 완화함으로써 침해될 수 있는 인도의 권리를 보완하는 차원에서 다음과 같은 3가지 잠정조치를 명령하였다.

1) 이탈리아와 인도는 인도 대법원 소송절차를 포함하여 인권적 고려의 개념이 효과를 발휘할 수 있도록 하사 Salvatore Girone의 보석 조건을 완화하여 그가 여전히 인도 대법원의 권한하에 있는 조건으로 제7부속서에 따른 중재재판이 진행되는 동안 이탈리아로 돌아갈 수 있도록 협력하여야 한다.
2) 중재재판소는 중재재판소가 하사 Salvatore Girone에 대한 관할권을 인도가 보유한다는 판정을 한 경우 그를 인도로 돌려보내야 하는 이탈리아의 의무를 확인한다.
3) 중재재판소는 이탈리아와 인도가 이 잠정조치의 준수에 관하여 중재재판소에 각각 보고할 것을 결정하고, 중재재판소의 재판장으로 하여금 이 명령이 있은 이후 3개월 내에 보고서가 제출되지 않거나 그 이후 재판장이 필요하다고 판단하는 경우 각 당사자에게 정보를 요구할 수 있는 권한을 부여한다.

남중국해 중재재판사건 본안판정(필리핀 vs. 중국)

필리핀은 2013년 1월 22일 유엔해양법협약 제286조와 제287조 및 제7부속서 제1조에 따라 중국을 상대로 한 유엔해양법협약 제7부속서에 따른 중재재판절차를 개시하였다. 분쟁의 배경은 필리핀과 중국이 영유권 분쟁을 하고 있는 황옌다오(영어면 Scarborough Shoal) 인근해역에서 양국 간 어업 갈등이 2012년 이래 증대되고 있으며, 중국이 남중국해에 대하여 관할권 주장 근거로 활용하고 있는 구단선(nine dash line)의 법적 근거와 중국이 신속하고 대규모로 진행하고 있는 인공섬 건설의 적절성 등에 대한 필리핀의 반대주장이 그 근간을 이루고 있다.

필리핀은 중재재판소에 대하여 다음과 같은 15개 청구취지에 대하여 판단하고 선언하여 달라는 것이었다.

1) 남중국해에 대한 중국의 해양권리는 필리핀과 마찬가지로 유엔해양법협약에서 허용하는 범위를 초과하여 확장될 수 없다.

2) 소위 구단선(nine-dash line)에 포함된 남중국해 수역에 대하여 중국이 주권적 권리와 관할권 및 역사적 권리(historic rights)를 주장하는 것은 유엔해양법협약에 반하는 것이므로 유엔해양법협약하에서의 중국의 해양권리의 지리적 및 실질적 한계를 초과하는 범위에서는 법적 효과가 없다.

3) Scarborough Shoal은 배타적 경제수역 또는 대륙붕에 대한 권리를 생성할 수 없다.

4) Mischief Reef, Second Thomas Shoal and Subi Reef는 영해, 배타적 경제수역 또는 대륙붕에 대한 권리를 생성할 수 없는 간조노출지(low-tide elevations)이며, 점유 또는 다른 방법으로 전유할 수 있는 지리적 형상이 아니다.

5) Mischief Reef and Second Thomas Shoal은 필리핀의 배타적 경제수역 및 대륙붕의 일부분이다.

6) Gaven Reef and McKennan Reef (including Hughes Reef)는 영해, 배타적 경제수역 또는 대륙붕에 대한 권리를 생성할 수 없는 간조노출지(low-tide elevations)이지만, Namyit and Sin Cowe의 영해측정기선을 결정하는데 사용될 수 있다.

7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef는 배타적 경제수역 또는 대륙붕에 대한 권리를 생성할 수 없다.

8) 중국은 필리핀이 자국 배타적 경제수역과 대륙붕의 생물 및 무생물자원에 대한 주권적 권리를 향유하여 행사하는 것을 위법적으로 침해하여 왔다.

9) 중국은 필리핀의 배타적 경제수역의 생물자원을 채취하는 자국 국민과 선박을 방지하여야 하는 것을 위법적으로 실패하였다.

10) 중국은 Scarborough Shoal에서의 필리핀 어부의 전통적 어업활동을 침해함으로써 그들의 생계를 유지하는 것을 위법적으로 방해하였다.

11) 중국은 Scarborough Shoal and Second Thomas Shoal의 해양환경을 보호하고 보존하여야 할 유엔해양법협약상의 의무를 위반하였다.

12) Mischief Reef에 대한 중국의 점유 및 건설활동은

a) 인공섬, 시설 및 구조물에 관한 유엔해양법협약의 규정을 위반하였다.

b) 유엔해양법협약 하의 해양환경 보호 및 보존에 관한 중국의 의무를 위반하였다.

c) 유엔해양법협약을 위반하여 시도된 전유는 위법한 활동이다.

13) 중국은 Scarborough Shoal 부근을 항해하는 필리핀 선박에 충돌할 수 있는 심각한 위험을 야기하는 위험한 방법으로 자국 법집행선박을 운용한 것은 유엔해양법협약 하의 의무를 위반한 것이다.

14) 2013년 1월 이 중재재판이 개시된 이래 중국은 다음과 같이 행동하여 분쟁을 위법적으로 악화시키고 확대하였다.

a) Second Thomas Shoal 수역 및 그 부근에서의 필리핀의 항행권을 침해하였다.

b) Second Thomas Shoal에 위치한 필리핀 국민의 교체 및 재공급을 방해하였다.

c) Second Thomas Shoal에 위치한 필리핀 국민의 건강과 복지를 위험에 처하게 하였다.

15) 중국은 추가적인 위법한 주장 및 활동을 중지하여야 한다.

이러한 필리핀의 제소에 대하여 중국은 2013년 2월 19일 필리핀 외교부에 대한 구상서(Note Verbale)를 통하여 중재재판을 거부하고 필리핀이 송부한 소송통보서를 되돌려 주었다. 중국은 구상서에서 남중국해에 대한 중국의 입장은 일관되며 명백하고, 남중국해에서의 중국과 필리핀 간 분쟁의 핵심은 남사군도의 일부 섬과 산호초에 대한 영유권 분쟁이며, 양국이 남중국해에서 중첩되는 해양관할권 주장을 하고 있으며 동 문제는 양자 간 협상과 우호적인 협의로 해결할 것을 합의한 바 있음을 강조하였다. 즉, 필리핀이 제기한 분쟁은 해양분쟁이 아니라 영유권분쟁에 해당하므로 유엔해양법협약상의 분쟁해결절차의 적용대상이 아니며, 또한 필리핀이 양국 간 합의한 분쟁해결절차를 위반하여 중재재판소에 제소한 것은 절차상 흠결이 있음을 지적한 것이다. 또한, 중국은 2013년 7월 29일 구상서를 통하여 필리핀이 개시한 중재재판을 수용하지도 참여하지도 않겠다는 입장을 전달하였으며, 동시에 동 구상서가 중재절차에 대한 중국의 수락 또는 참여로 간주되어서는 안된다는 점을

강조하였다. 또한, 2014년 12월에는 '필리핀이 제기한 남중국해 중재재판의 관할권문제에 대한 중국의 입장'이라는 문서를 통하여 중재재판소가 필리핀의 제소를 다룰 수 있는 관할권이 없음을 반복하여 주장하였다. 그러나, 유엔해양법협약 제7부속서 제9조는 "일방당사자가 재판소에 출정하지 않거나 사건을 변호하지 아니하는 경우, 다른 당사자는 소송절차를 진행하여 판정을 내리도록 중재재판소에 요청할 수 있다. 어느 한 당사자가 출정하지 아니하거나 사건을 변호하지 않아도 소송절차의 진행은 방해받지 아니한다"고 규정함으로써 중국의 소송 불참여가 소송절차의 진행에 하등 영향을 주지 않음을 명시적으로 규정하고 있다.

그러나, 일방당사자의 출석 여부 또는 공식적인 반대의 의사표시 여부와 관계없이 중재재판소는 유엔해양법협약의 규정에 따라 재판소에 부탁된 문제에 대하여 스스로 관할권이 있는 지 여부를 판단하여야 할 의무가 있다. 동 의무에 따라 중재재판소는 2015년 10월 29일 관할권 및 수리가능성에 대한 판정을 내렸다. 이어서, 2016년 7월 12일에는 5인 중재재판관 만장일치로 다음과 같이 본안에 관한 판정을 내렸다.

1) 필리핀과 중국 간에 협약은 남중국해 해양권리의 범위에 관하여 정의하고 있으며, 그 권리의 한계를 넘어 권리가 확장되지 않는다는 점을 확인한다;
2) 필리핀과 중국 간에 중국이 구단선에 둘러싸인 남중국해 해역에 대하여 역사적 권리 또는 주권적 권리나 관할권을 주장하는 것은 협약에 배치되는 것이며, 협약에 따른 중국의 해양 권리의 지리적 및 실질적 한계를 초과한 것에 대해서는 법적 효과가 없음을 선언한다. 또한, 협약이 협약상 한계를 초과하는 어떠한 역사적 권리 또는 기타 주권적 권리나 관할권을 대체하였다는 것을 확인한다;
3) 남중국해 지형물의 지위와 관련하여 다음과 같이 확인한다;
   가) 재판소는 2015년 10월 29일자 관할권 및 수리가능성에 대한 재판소의 판정 제401항과 제403항에서 언급된 수직기준면과 조석모델의 선택에 관한 실질적 고려가 지형물의 지위를 확인하는데 방해를 주지 않을 정도로 남중국해 조석조건에 관한 충분한 정보를 확보하였다;
   나) Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef,

Cuarteron Reef, Fiery Cross Reef는 현재 또는 자연적 조건상에서 과거에 협약 제121조 제1항의 의미 범위내에서 자연적인 육지로 형성되었으며 사면이 물로 둘러싸여 있고 고조 시 수면 위에 존재하는 조건을 포함하고 있다;

다) Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef, Second Thomas Shoal은 협약 제13조의 의미범위내에서 간조노출지이다.

라) Subi Reef는 Thitu 서쪽의 고조노출지 지형물인 Sandy Cay의 12해리 이내에 위치하여 있다;

마) Gaven Reef (South)는 고조노출지 지형물인 Gaven Reef (North) and Namyit Island의 12해리 이내에 위치하여 있다;

바) Hughes Reef는 고조노출지 지형물인 McKennan Reef and Sin Cowe Island의 12해리 이내에 위치하여 있다;

4) 간조노출지인 Mischief Reef와 Second Thomas Shoal은 영해, 배타적 경제수역 또는 대륙붕에 대한 권리를 생성하지 않으며 전용할 수 있는 지형물이 아니라고 선고한다;

5) 간조노출지인 Subi Reef, Gaven Reef (South), Hughes Reef는 영해, 배타적 경제수역 또는 대륙붕에 대한 권리를 생성하지 않으며 전용할 수 있는 지형물이 아니다. 그러나, 영해 폭을 초과하지 않는 거리에 위치한 고조노출지의 영해 폭을 측정하는 기선으로 사용할 수 있다고 선고한다;

6) Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef는 자연조건상 협약 제121조 제3항의 의미 범위내에서 인간이 거주할 수 없거나 독자적인 경제생활을 영위할 수 없는 암석이며, 따라서 이 지형물은 배타적 경제수역 또는 대륙붕에 관한 권리를 생성할 수 없다고 선고한다;

7) 남중국해 기타 지형물의 지위와 관련하여 다음과 같이 확인한다;

가) 스프래틀리제도의 어떠한 고조노출지도 그 자연적 조건상 협약 제121조 제3항의 의미범위내에서 인간이 거주할 수 있거나 독자적인 경제생활을 영위할 수 있는 것은 없다;

나) 스프래틀리제도의 어떠한 고조노출지도 배타적 경제수역 또는 대륙붕에 관한 권리를 생성할 수 없다;

다) 그러므로, Mischief Reef와 Second Thomas Shoal지역에서 필리핀의 권리와 중복되는 중국이 주장하는 어떠한 지형물에 의해서도 배타적 경제수역 또는 대륙붕에 관한 권리가 생성되지 않는다;

Mischief Reef와 Second Thomas Shoal은 필리핀의 배타적 경제수역 또는 대륙붕의 범위내에 위치한다고 선고한다;

8) 중국은 2011년 3월 1일과 2일에 M/V Veritas Voyager호에 대한 해양감시선의 운용을 통하여 Reed Bank 지역의 대륙붕 무생물자원에 관한 필리핀의 주권적 권리측면에서 협약 제77조의 의무를 위반하였음을 선고한다;

9) 중국이 필리핀의 배타적 경제수역에 해당하는 남중국해지역을 제외함이 없이 또한 중국국적선에 대한 모라토리움의 적용없이 2012년 남중국해 어업에 관한 모라토리움을 입법함으로써 배타적 경제수역 생물자원에 대한 필리핀의 주권적 권리측면에서 협약 제56조의 의무를 위반하였다고 선고한다;

10) Mischief Reef와 Second Thomas Shoal에서의 중국선박의 어업에 관하여 다음과 같이 확인한다;

가) 2013년 5월 중국국적선의 어민이 Mischief Reef와 Second Thomas Shoal의 필리핀 배타적 경제수역에서 어업에 종사한 것; 및

나) 중국이 자신의 해양감시선 운용을 통하여 자국적선의 어업을 인지하고도 어업을 방지하는데 적절한 주의의무에 실패한 것;

다) 그러므로 중국이 자국의 배타적 경제수역에서 어업에 관한 주권적 권리를 행사하는 필리핀의 권리에 대한 적절한 고려를 보여주는데 실패하였다는 것

중국이 협약 제58조 제3항하의 의무를 위반하였다고 선고한다;

11) Scarborough Shoal이 다수 국적의 어민들을 위한 전통적 어장이었음을 확인하고, 중국이 2012년 5월부터 Scarborough Shoal에서 자국 공용선박의 운용을 통하여 Scarborough Shoal에서 전통적 어업에 종사하는 필리핀어민을 불법적으로 방해하였다는 것을 선고한다;

12) 남중국해 해양환경의 보호와 보존과 관련하여 다음과 같이 확인한다;

가) 중국국적선으로부터 어민이 상당한 규모로 위험종 채포에 종사하여 왔다는 것

나) 중국국적선으로부터 어민이 산호초 생태계를 심각하게 파괴하는 방법으로 Giant clams을 채포하는데 종사하여 왔다는 것

다) 중국이 위의 해로운 활동을 인지하고 보호하여 방지하는데 실패하였다는 것

중국이 협약 제192조와 제194조 제5항하의 의무를 위반하였다고 선고한다;

13) 남중국해 해양환경의 보호와 보존과 관련하여 다음과 같이 추가적으로 확인한다;

가) Cuarteron Reef, Fiery Cross Reef, Gaven Reef(North), Johnson Reef, Hughes Reef, Subi Reef, Mischief Reef에 중국이 매립하고 인공섬, 시설 및 구조물을 건설한 것은 산호생태계에 심각하며 회복시킬 수 없는 해를 주었다;

나) 중국이 그러한 활동과 관련하여 해양환경의 보호와 보존에 관한 문제를 남중국해 인접국과 협력하거나 조정하지 않았다;

다) 중국이 협약 제206조의 의미범위내에서 해양환경에서의 그러한 활동의 잠재적 효과에 대한 평가에 관한 의견교환에 실패하였다;

중국이 협약 제123조, 제192조, 제194조 제1항과 제5항, 제197조 및 제206조하의 의무를 위반하였다고 선고한다;

14) Mischief Reef에 중국이 인공섬, 시설 및 구조물을 건설한 것과 관련하여

가) 중국이 필리핀의 허가없이 Mischief Reef에 인공섬, 시설 및 구조물을 건설하였다;

나) ⅰ) Mischief Reef가 간조노출지라고 확인한 점, ⅱ) 간조노출지는 전유의 대상이 될 수 없다는 재판소의 선고, ⅲ) Mischief Reef가 필리핀의 배타적 경제수역과 대륙붕에 속한다고 선고한 것을 상기한다;

다) 중국이 필리핀의 배타적 경제수역과 대륙붕에 관한 주권적 권리측면에서 협약 제60조와 제80조를 위반하였다고 선고한다.

15) Scarborough Shoal 부근에서 중국 법집행선박의 운용과 관련하여 다음과 같이 확인한다;

가) 2012년 4월 28일과 5월 26일 중국 법집행선박의 운용은 필리핀 선박과 인원에

대하여 중대한 충돌의 우려와 위험을 발생시켰다;

나) 2012년 4월 28일과 5월 26일 중국 법집행선박의 운용은 1972년 해상에서의 충돌 예방에 관한 국제규칙 제2조, 제6조, 제7조, 제8조, 제15조 및 제16조를 위반하였다;

중국이 협약 제94조 하의 의무를 위반하였다고 선고한다;

16) 이 분쟁해결절차가 진행되는 과정에서 중국이 다음과 같이 하였음을 확인한다;

가) 필리핀 배타적 경제수역에 위치한 간조노출지인 Mischief Reef에 대규모 인공섬을 건설하였다;

나) 매립과 인공섬, 시설 및 구조물의 건설을 통하여 Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef와 Subi Reef의 산호생태계에 중대하고 회복할 수 없는 해를 주었다;

다) 매립과 인공섬, 시설 및 구조물의 건설을 통하여 Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef와 Subi Reef의 자연조건의 증거를 영구적으로 파괴하였다;

또한, 중국이 다음과 같이 하였음을 확인한다;

라) Mischief Reef지역에 대한 분쟁당사자 각각의 권리에 관한 분쟁을 악화시켰다;

마) Mischief Reef의 해양환경 보호 및 보존에 관한 양당사국의 분쟁을 악화시켰다;

바) 해양환경의 보호와 보존에 관한 양당사국의 분쟁의 범위를 Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef와 Subi Reef까지 확대시켰다;

사) 스프래틀리제도의 지형물의 법적 지위와 해양수역을 생성할 수 있는 그것들의 능력에 대한 양당사국의 분쟁을 악화시켰다;

중국이 재판소 판정의 집행과 관련하여 해로운 효과를 야기할 가능성이 있는 어떠한 조치도 삼가고 분쟁해결절차가 진행중인 기간동안 분쟁을 악화시키거나 확장시킬 수 있는 어떠한 행위도 일반적으로 허가해서는 안된다는 협약 제279조, 제296조 및 제300조와 일반국제법에 따른 의무를 위반하였다고 선고한다.

3. 국가관할권 이원지역에서의 해양생물다양성의 보전 및 지속가능한 이용에 관한 법적 구속력 있는 국제문서의 성안을 위한 준비위원회 (Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction)

'국가관할권 이원지역에서의 해양생물다양성의 보전 및 지속가능한 이용에 관한 법적 구속력 있는 국제문서의 성안을 위한 준비위원회(이하에서 '준비위원회'라 함)'는 2015년 유엔 총회 결의 69/292에 의거하여 설치된 정부 간 비공식협상회의이다. 동 결의를 통하여 유엔 총회는 국가관할권 이원지역에서의 해양생물다양성의 보전 및 지속 가능한 이용에 관한 유엔해양법협약하의 구속력있는 국제법률문서를 작성하기로 하였다. 이를 위하여 공식적인 정부 간 회의를 개최하기 전에 준비위원회를 개최하기로 한 것이다. 준비위원회의 참석 범위는 유엔의 모든 회원국, 특별기구의 회원, 유엔해양법협약 당사국과 유엔의 과거

관행에 따라 초청되는 옵서버로 결정하였다.

준비위원회의 임무는 "유엔해양법협약하의 구속력있는 국제법률문서 초안의 요소(the elements of a draft text of an internationally binding instrument under the Convention)"에 관한 실질적 권고를 유엔총회에 하는 것이다. 이를 위하여 준비위원회는 2011년에 합의된 패키지에 확인된 주제, 즉 이익 공유문제를 포함한 해양유전자원, 해양보호구역을 포함한 지역에 기초한 관리수단과 같은 조치, 환경영향평가, 능력 배양 및 해양기술의 이전을 '모두 함께 전체적(together and as a whole)'으로 협상하여야 한다.

준비위원회의 개최시기 및 기간은 2016년에 개시하되 2017년 말까지 그 진도에 대하여 유엔총회에 보고하도록 하였으며, 2016년과 2017년에 각각 10일 기간의 회의를 2회 이상 개최하도록 하였다. 이에 따라, 2016년에는 3월 28일부터 4월 8일까지 제1차 회의가, 8월 29일부터 9월 12일까지 제2차 회의가 개최되었다.

2016년에는 3월 28일부터 4월 8일까지 뉴욕 유엔본부에서 개최된 제1차 회의는 Eden Charles 트리니다드토바고(TNT) 차석대사 겸 대사대리의 주재하에 진행되었으며, 우리나라를 포함 미국, 중국, 일본, 러시아, 호주, EU 등 70여개 유엔회원국, IUCN (International Union for Conservation of Nature), CBD(Convention on Biological Diversity) 사무국, ISA(International Seabed Authority) 등 10여개 IGO 및 Ocean Care, Greenpeace, NRDC(National Resources Defense Council) 등 10여개의 NGO가 참석하였다. 회의 초반에 진행된 각국대표단의 일반토론과정에서 대다수의 참가국들은 유엔총회 결의 69/292를 환영하고 국가관할권 이원지역 해양생물다양성의 보존 및 지속가능 이용을 위한 새로운 국제문서 성안의 필요성을 상기시키면서 참가국들이 향후 토의과정에서 적극적으로 참여하여야 한다는 점을 강조하였다. G77+중국, 아프리카 그룹, 필리핀 등은 새로운 국제문서를 통한 법적 체제의 근간은 인류공동유산 원칙이 되어야 한다는 점을 강조한 반면, 우리나라를 포함한 중국, 일본 등은 준비위원회에서의 논의가 기존의 국제문서와 체제, 기구 등을 약화시키지 않아야 한다는 유엔총회 결의 69/292의 내용을 상기시키면서 새로운 국제문서는 기존의 규범을 대체하는 것이 아니라 보완하는 것이어야 한다는 입장을 표명하였다. 아이슬란드, 러시아, 일본 등 일부 국가는 공해에서의

어업에 대한 규율이 논의과정에서 제외되어야 한다는 입장을 표명한 반면, 미국은 공해 어업을 포함한 국가관할권 이원지역에서의 모든 행위에 대한 규율이 포함되어야 한다는 입장을 표명하여 이견이 발생하였다.

이익공유를 포함한 해양유전자원분과 토의에서는, 해양유전자원의 정의(definition), 범위(scope), 이익공유(benefit-sharing)를 중심으로 논의가 진행되어, △인류공동유산 개념 적용 가능성, △수산(fisheries)과 수산 유전자원(fisheries resources)간 구분의 필요성, △해양과학조사(MSR)와 생물탐사(bio-prospecting)간 구분의 필요성, △과학조사활동의 중요성, △지리적 적용범위에 공해 수역(water column)의 포함 여부 및 200해리 이원의 대륙붕과의 관계, △데이터화된 유전자원(in silico)에 대한 접근, △출처공개(disclosure) 등 지적재산권(IPRs) 등에 대해 의견을 교환하였다. 특히, 일본은 해양유전자원의 범위에서 상품(commodity)은 제외되어야 한다는 입장을 표명하였고, 나우루는 상품(commodity)과 파생물(deliberative)까지 고려해야 함을 강조하였다. 또한, 일본, 멕시코, 페루 등은 해양과학조사와 생물탐사 간 구분이 필요함을 강조하였고, EU, 미국, 캐나다, 노르웨이 등은 해양과학조사의 자유가 보장될 필요가 있다는 입장을 표명하였다. 반면에, 태국(G77+중국), 코스타리카, 나우루, 자메이카 등은 in-situ, ex-situ 및 유전자원의 데이터(in silico)에 대한 접근까지 고려되어야 함을 주장하였다.

해양보호구역을 포함한 지역기반 관리수단분과 토의에서는, 해양보호구역(MPA)을 포함한 지역기반관리수단(ABMT)의 정의 및 개념, 목적, 원칙, 기준, 절차 등에 대한 논의를 진행하여, △UNCLOS, RFMOs 등 현행 규범 체제의 보완 필요성, △ABMT의 유용성 및 지침과 원칙, △생태계서비스 유지 등을 포함한 보전 및 지속가능한 이용 간의 균형 등을 중심으로 논의가 진행되었다. 대다수의 국가들은 국가관할권 이원지역에서의 해양생물 다양성의 보존과 지속가능이용이라는 목적을 달성하기 위해 ABMT가 유용한 수단이라는 점에 대해 공통된 의견을 제시하였다. 미국, 남아공, 베네수엘라 등 일부 국가들은 ABMT/MPA 논의 시 수산도 포함되어야 함을 주장한 반면, 노르웨이, 뉴질랜드 등은 국제문서에서 수산이 어떻게 다루어질 것인가에 대한 추가적인 논의가 필요하다는 입장을 표명하였다. 다수의 국가들은 FAO 지침, IUCN 지침, 아이치 타켓 11, SDG 목표 14, 생물학적·생태적

중요해역(EBSAs) 등이 ABMT/MPA에 대한 지침이 될 수 있음을 언급하면서, ABMT는 사전예방원칙, 오염자부담 원칙, 생태계 접근 원칙, 과학적 기반원칙, 투명성 원칙 등에 기반하여, 시민 사회 등 모든 이해당사자의 참여가 보장되어야 한다는 의견을 제시하였다.

환경영향평가분과 토의에서는, 환경영향평가(EIA), 월경성환경영향평가(Transboundary Environmental Impact Assessment, TEIA), 전략환경평가(SEA)의 개념, 포함 요소, 절차 등을 중심으로 논의를 진행하여, △평가보장을 위한 임시기구, RFMO의 임무, 정보처리기관체계 뿐 아니라 △EIA의 유용성, △EIA/SEA의 범위, △cross-cutting issues에 대한 의견을 교환하였다. 대부분의 국가들이 EIA가 ABNJ에서의 해양생물다양성의 보전과 지속가능한 이용을 위한 유용한 수단이며, EIA는 국가가 이용·개발행위의 허가여부를 판단하는데 도움을 주는 절차적 수단이라는 입장을 제시하였다. EIA 수행주체는 관련 사업의 제안자이며, 국가는 EIA/SEA가 제대로 이행되었는지에 대해 보장할 책임이 있으며, UNCLOS, 생물다양성협약 지침, ISA규정, FAO 심해저어업 지침 등 다양한 지구적, 지역적 차원의 지침이 참고 가능하다는 의견을 제시하였다. TEIA와 관련, 호주, 칠레, 필리핀 등은 연안국의 권리가 존중되어야 하며, 연안국이 관할권 내에서 행하는 환경영향평가 등을 저해하거나 부정적인 영향을 미쳐서는 안 된다는 의견을 제시하였다. EIA/SEA에 포함되어야 하는 정보의 내용으로는, 관련 활동, 대상 지역, 미치는 영향(부분적/전체적 영향, 단기/중기/장기적 영향 등), 환경관리계획 등이 제시되었고, 절차적 측면에서 통보, 공공협의, 보고, 모니터링, 이행 준수 등이 중요하다는 의견이 제안되었다. 한편, EIA의 실제 이행 및 평가와 관련, 멕시코, 모리셔스 등은 독립된 기구 설립을 통해, 모니터링, 이행준수 등을 관리하는 시스템도 고려해 볼 필요가 있음을 제안하였다.

능력배양 및 해양기술이전분과 토의에서는 국가관할권 이원지역 해양생물다양성의 보존 및 지속가능 이용을 위한 개도국의 능력배양 및 해양기술이전의 중요성에 기초하여, △UNCLOS 규정 등 기존 의무 이행(operationalize)의 중요성, △ 의미있는 능력 배양 및 가시적인 조치의 필요성, △정보공유시스템 구축 및 임시기구 등 기구적(institutional) 측면, △기금 문제 등에 대해 의견을 교환하였다. 남아공, 알제리, 피지 등 G77 개도국들은 능력배양의 중요성, 능력배양이 갖는 cross-cutting 성격을 강조하면서, UNCLOS 규정,

아디스아바바 아젠다, IOC 지침 등 다수의 국제 문서에 능력배양 관련 규정이 있으나, 실제로 이행이 되지 않고 있는 것이 문제임을 강조하였다. UNCLOS 제14부에 해양기술이전 관련 규정이 있음에도 이에 대한 이행상의 흠결이 있으므로, 국제문서는 이러한 이행상의 흠결을 극복하는 방향으로 성안되어야 함을 강조하였다. 특히, 남아공, 트리니다드토바고 등은 의미 있는(meaningful) 능력배양이 중요함을 강조하고, EU는 가시적인(tangible) 조치가 필요하다는 의견을 제시하였고, 피지, 바베이도스 등은 ISA의 훈련규정 등이 국제문서의 능력배양 활동이 좋은 모델이 될 수 있음을 강조하였다. 정보공유메커니즘(Clearing House Mechanism)의 필요성에 대해 긍정적인 의견이 많았으며, 트리니다드토바고는 능력배양 및 해양기술이전에 관한 재원 마련과 관련해서, 기금은 해양유전자원의 상업화로부터 발생하는 이윤을 포함한 자발적인 기여와 의무적인 분담을 통합하는 것이 필요하다는 의견을 제시하였다.

이상과 같이 진행된 제1차 회의는 과거 실무작업반 회의 논의와 비교해 볼 때, UNCLOS, UNFSA 관련 규정, 생물다양성협약, FAO 지침, IMO, IOC 등 관련 주장에 대한 법적, 실질적 근거 제시가 보다 구체적이고 강화된 변화가 나타났다. 그러나 모든 사안 및 이슈에 대해 심도 깊은 논의가 진행되지는 못했으며, 특히 분과장들이 보다 세부적이고 구체적인 논의를 도출하기 위해 노력함에도 불구하고 참가국들의 입장이 정리되지 않아 집중적인 논의가 제대로 이루어지지 못하였다. 특히, 4대 핵심의제의 쟁점사항에 대해서는 보다 구체화작업이 진행되었으나, 선진국과 개도국 간 이견은 지속되었으며, ⅰ) 기존 국제문서나 국제기구를 약화시키지 않는 범위 내에서 국제문서를 성안하는 방법, ⅱ) 기존 국제기구와의 협력과 조정을 어떻게 할 것인지, ⅲ) 적용범위, 용어정의, 원칙, 재정체계 등에 대한 세부적인 사항에 대해서는 이견의 폭이 상당하다는 점을 확인하는 시간이 되었다.

제2차 회의는 2016년 8월 26일부터 9월 9일까지 뉴욕 유엔본부에서 개최되었다. 제2차 회의도 제1차 회의와 마찬가지로 Eden Charles 트리니다드토바고(TNT) 차석대사 겸 대사대리의 주재하에 진행되었으며, 우리나라를 포함 미국, 중국, 일본, 러시아, 호주, EU 등 70여 개 유엔회원국, IUCN(International Union for Conservation of Nature), CBD(Convention on Biological Diversity) 사무국, ISA(International Seabed Authority)

등 10여 개 IGO 및 Ocean Care, Greenpeace, NRDC(National Resources Defense Council) 등 10여 개의 NGO 및 지역수산기구들이 참석하였다.

제2차 회의도 제1차 회의에서의 4개 분과 이외에 교차이슈분과(cross-cutting issues)가 추가되어 5개 분과회의 중심으로 진행되었다.

해양유전자원분과 토의에서는, 해양유전자원의 개념, 정의, 범위와 관련하여 대다수의 국가들이 CBD, 나고야 의정서 등 기존 국제문서에서의 정의를 활용해야 한다는 입장을 표명하였으나, 중국, 러시아는 동 협약과 새로운 국제문제는 적용범위가 상이함을 지적하며, 이에 반대하였다. 코스타리카, 모리셔스 등 일부 국가들은 working definition임을 전제로, 해양유전자원의 정의 규정 초안을 제안하였으나, 그에 대한 심도깊은 논의가 참가국 간 이루어지지는 않았다. 개도국들은 이익공유를 염두에 두고 해양유전자원 정의를 폭넓게 인정하기 위하여 현지 내(in situ) 유전자원은 물론이고 현지 외(ex situ), in silico, 파생물, 어류까지도 망라하여 MGR에 포함시켜야 한다는 입장을 표명하였다. 이에 대하여 우리나라, 미국, 일본은 파생물과 상품에 해당하는 어류는 정의에서 제외되어야 한다는 입장을 표명하였고, 특히 우리나라는 UNCLOS 규정 등을 근거로 해양유전자원의 지리적 범위를 in situ로 한정하여야 한다는 입장을 표명하였다. 미국은 더 나아가 심해저 상부수역을 제외한 심해저만의 in situ 유전자원으로 한정하여야 한다는 입장을 표명하였으나, 이에 대한 지지의사를 표명한 국가는 없었다.

기본원칙 및 접근법, 이익공유 및 접근과 관련하여 G77+중국, 아프리카 그룹, 태평양 소도서국가연합, 카리브공동체 등 개도국들은 국가관할권 이원지역 해양유전자원에 대하여 인류공동유산원칙이 적용되어야 한다고 주장하면서, 그 연장선상에서 금전적·비금전적 이익공유가 이루어져야 한다고 주장하였다. 반면, 미국, 일본 등 일부 선진국은 UNCLOS의 해석 등을 근거로, 인류공동유산원칙의 적용에 명시적 반대의사를 표명하였으나, 반드시 인류공동유산원칙이 적용되어야만 이익공유가 가능한 것은 아니므로, 인류공동유산원칙 적용에 관한 법적 논쟁을 피하면서 이익공유 메커니즘을 논의하자는 EU의 제안에 대하여는 수용적 태도를 보였다. 한편, 해양유전자원에 대한 접근과 관련해서는 개도국들이 대체로 선진국이 보유하고 있는(ex situ, in silico) 해양유전자원에 대한 접근 필요성을 강조한 반면, 선진국

들은 국가관할권 이원지역(in situ) 해양유전자원에 대한 접근에 제한이 가해져서는 안 된다는 점을 강조, 미묘한 입장 차이를 보였다.

해양보호구역 등 지역기반 관리수단분과 토의에서는, 개념과 정의에 관련하여 대부분의 국가들은 새로운 국제문서가 기존의 법적 문서와 체제에 반하여서는(undermine) 안 된다는 점을 강조하면서, CBD, IMO, RFMOs 등에서 운영 중인 지역기반 관리 수단(ABMT; Area-Based Management Tool)의 개념과 정의 등을 활용할 것을 제안하였다. 일본, 중국 등은 ABMT는 다양한 수단을 포함한 개념으로써, 목적, 지리적 범위, 해당 구역의 상황 및 환경에 최적화되어 운영되어야 한다고 강조하였다. 기본원칙으로서는 △최선의 과학 기반, △투명성 및 신뢰성, △사전예방주의, △생태계 중심 접근, △협력의무 등 일반적인 사항이 제시되었다. 일본은 ABMT 관련 접근법을 top-down 방식(상위의 기구·국제문서 등을 통한 운용)과 △수평적(horizontal) 방식(이해당사자 간의 협력, 조정, 지속적인 의견교환을 통한 운용)으로 나누면서 수평적 방식에 대한 선호를 표명하였다. 개도국을 중심으로 다수의 국가들이 기존 지역별, 기능별 기구들의 임무와 범위의 한계 및 다양성을 고려할 때, 그 공백을 메우고 포괄적인 규율을 위한 일정한 메커니즘의 도입이 바람직하다는 입장을 취하면서도, 협력과 조정의 필요성에 대해서는 부인하지 아니하였다. 우리나라는 MPA 지정 이후의 운영·관리의 중요성을 강조하는 한편, top-down방식보다는 협력과 조정을 통한 방식이 바람직하며, 국가관할권 이원지역의 해양생물다양성 보존과 지속가능 이용 사이의 균형 유지가 필요하다고 주장하였다.

다음으로, 환경영향평가(EIA)분과 토의에서는 TEIA와 관련하여 아프리카 그룹, 카리브 공동체, 트리니다드토바고 등이 TEIA 역시 새로운 국제문서에 포함되어야 한다고 주장하였다. 반면, 우리나라, 미국, EU, 중국, 캐나다 등은 새로운 국제문서의 적용범위는 국가관할권 이원지역에 한정한다는 점을 강조하면서 국가관할권지역의 활동은 동 국제문서의 적용범위에서 제외되며 여전히 UNCLOS 제194조 제2항의 적용을 받는다고 주장하였다. 그러나, 노르웨이는 행위가 발생한 지역에 관계없이, 그로 인한 영향이 미치는 지역이 국가관할권 이원지역이라면 새로운 국제문서에서 다루어져야 한다고 언급하였다. EIA 필요성 판단기준과 관련하여서는 G77+중국, 아프리카 그룹 등은 EIA의 대상이 되는 행위 유형의 목록화가

바람직하다고 주장하였으며, EU, 일본, 미국 등은 UNCLOS와의 정합성, 기존 국제문서와의 중복적용 가능성 등에 유의해야 한다고 언급하였다. 코스타리카, 싱가포르 등은 행위유형 목록을 마련하더라도, 목록은 한정적 열거 목록이 아니라 예시적 목록이어야 한다는 입장을 표명하였다. 일본은 해운 및 해저전선 부설행위는 해양환경에 미치는 영향이 미미하므로 EIA의 대상에서 제외되어야 한다는 입장을 표명하였고, 미국은 국가관할권 이원지역에서의 행위를 중대한 영향이 없는 것부터 시작해서 단계적으로 분류하고, EIA 여부와 수준 등을 해당 단계에 따라 비례적으로 하도록 하는 tiered approach를 제안하였다.

역량강화 및 해양기술이전분과 토의에서는, G77+중국, 아프리카 그룹 등 개도국과 소도서국을 중심으로 대다수의 국가들이 수혜국 중심적 역량강화 및 "의미있는 역량강화(meaningful capacity building)"의 중요성을 언급하였다. 우리나라, 미국, 일본은 역량강화와 기술이전이 자발적 참여의 전제 하에서 지적재산권을 존중하면서 이루어져야 한다고 강조하였다. 특히, 우리나라는 △역량강화와 기술이전은 국가 간의 상호 신뢰 하에 자발적으로 이루어질 것 △각국은 공정하고 합리적인 조건에 따라 역량강화와 기술이전을 위해 협력할 것, △역량강화 및 기술이전 과정에서 모든 이해관계자의 이익, 특히 지적재산권 등에 대한 고려가 수반되어야 한다는 입장을 표명하였다. 개도국은 해양기술을 광범위하게 정의해야 한다고 주장한 반면, 일본은 직접적으로 연관되는 기술로 구체화할 것을 주장하였다.

교차이슈분과 토의에서, 목적 및 가이딩 원칙/접근과 관련하여 국제문서의 목적에 있어 노르웨이 등 일부 국가는 보호의무, 협력의무를 제안하였고, 파라과이 등은 해양의 재활 및 복구를 제안한 반면 알제리 등 일부 개도국은 해양유전자원의 이익공유를 제안하기도 하였다. G77은 인류공동의 이익, 조정 및 협력, 공정한 이익공유, 개도국의 특별한 고려 등을 주장하였고, 그 외 많은 국가들이 대륙붕에 관한 연안국의 권리 존중, 과학기반, 생태계기반, 사전예방주의 접근, 공해의 자유, UNCLOS 및 결의 69/292 존중 등 다양한 제안을 하였다. 이에 대해 호주, 일본, 미국 등 선진국들은 원칙과 접근을 논의함에 있어 정확한 문언의 사용과 함께 각 분야의 적용가능성에 대한 신중한 고려가 필요함을 강조하였다. 우리나라는 사전예방 접근, 생태계기반, 과학기반 등에 동의하는 반면, 남아공 등이 주장한 인류공동유산원칙은 적절하지 않다는 점을 강조하였다. 한편, 용어의 정의, 범위, 타 문서와의 관계와

관련하여 G77을 비롯한 개도국은 해양유전자원을 포함한 패키지 구성요소에 관한 정의의 필요성과 함께 관련 타 문서(협약)상의 해당 조항을 기반으로 용어의 정의(use of terms)가 다루어질 것을 제안하며, 이에 the Area, 해저 및 하층토와 상부수역 등의 추가를 주장하였다. 반면, EU와 캐나다 등 선진국은 새로운 국제문서가 UNCLOS의 이행협정임을 감안할 때 본 협약과 동일한 용어를 정의할 필요성에 의문을 제기하며, UNCLOS와의 조화 및 일관성을 강조하였다. 문서의 범위에 관하여 G77은 협약 당사국 및 비당사국을 포함한 보편적 참여보장을 제안하였으며, 이에 대해 이란은 비당사국에게 인센티브를 부여함으로 당사국으로의 참여를 유도하는 방안을 제안하였다. EU와 일본은 모든 국가에 개방될 것을 주장하였으며, 특히 일본은 정당한 연구의 보장을 위해 인센티브 제공에 반대한다는 입장을 분명히 하였다. 새로운 기구의 설립과 관련하여서는, 남아공은 현존하는 메커니즘(ISA)의 역할 확대 또는 완전히 새로운 기관의 마련 두 가지 선택안을 제시하였다. 일본과 러시아는 ISA 역할 확대에 반대하였으며, EU와 미국은 기구의 기능에 대한 생각이 정리되기 전에는 구체적인 구조를 논하는 것은 무리이며, 효율성 및 비용 효과성, 투명성, 과학의 중요성 등을 강조하였다. 분쟁해결 및 최종조항에 관하여 개도국들은 UNFSA의 관련 조항을 기반으로 최종조항에 분쟁해결, 서명, 효력발생, 수정, 폐지, 정보기관 등을 포함할 것을 제안하였다.

4. 중앙북극해 공해어업회의(Meeting on High Seas Fisheries in the Central Arctic Ocean)

중앙북극해 공해어업회의는 해수 온도의 상승과 북극해 해빙의 면적 축소 등으로 인하여 중장기적으로 북극해가 상업적 어장으로서 기능할 것으로 예상되고 있으나, 중앙북극해에서의 공해어업을 관리하고 규제할 수 있는 아무런 국제제도가 마련되어 있지 않다는 우려를 배경으로 하고 있다. 미국, 캐나다, 러시아, 덴마크, 노르웨이와 같은 북극연안 5개국은 중앙북극해에서 상업적 공해어업이 아무런 규제 없이 이루어질 경우, 오염에 취약한 북극해 환경에 되돌릴 수 없는 피해를 가져 올 수 있다고 우려하였다. 현재는 북극의 어족

자원과 해양생태계에 미치는 영향에 대한 과학적 정보가 존재하지 않으나, 가까운 미래에 형성 가능한 어장을 보호해야 한다는 것에 의견을 모으고 이에 대한 회의를 진행하였다. 이 회의에는 북극연안 5개국뿐만 아니라 우리나라와 일본, 중국, 아이슬란드, 유럽연합(이하 EU)도 참석하여 함께 논의하기를 희망하였다.

중앙북극해 공해어업회의가 열리기 전에 우선적으로 북극연안 5개국은 2015년 7월 16일 '중앙북극해 비규제 공해어업 방지에 관한 선언'을 채택한 바 있다. 동 선언은 사전예방적 접근에 기반하여 과학적 정보가 부족한 현 상황에서 상업적 어업이 행해짐에 따라 발생할 수 있는 피해를 미연에 방지하는 것을 목적으로 하고 있으며, 중앙북극해 공해지역 비규제 상업어업을 방지하기 위해 4가지 잠정조치를 제시하였다.

이와 같은 북극연안국간의 합의로는 규제되지 않는 중앙북극해 공해어업을 효과적으로 규제할 수 없음을 인지한 북극연안국은 미국의 주도로 북극연안국 이외에 잠재적 북극공해 어업국인 우리나라와 일본, 중국, 아이슬란드, EU를 포함하는 구속력있는 국제조약형태의 국제문서 생산을 의도하였다. 이러한 의도하에 2015년 12월 1일부터 3일까지 미국 워싱턴 D.C.에서 제1차 중앙북극해 공해어업회의를 개최하였다. 이 회의에서 미국은 개념보고서를 통해 중앙북극해 공해지역의 비규제 상업어업에 대한 국제적인 시스템이 확립되기 전까지 상업적 어업을 금지해야한다고 주장하였다. 이에 오슬로 선언을 기본으로 하여, 여기에 부합되는 국제협정을 체결해야 한다고 주장하면서 '중앙북극해 비규제 공해어업방지 협약 초안'을 제시하였다. 미국이 제안한 협약초안은 오슬로 선언을 기본 내용으로 하고 있으며, 전문과 총 9개의 조항으로 구성되어 있다. 동 협약 초안 전문은 기후변화로 북극해의 해빙의 양이 줄어들고 있으며, 이로 인해 1년 내내 얼음으로 덮여 있던 중앙북극해의 공해어업 가능성에 대해 언급하고 있다. 그러나 오슬로 선언과 마찬가지로 가까운 미래에 중앙북극해에 상업적 어업이 어려울 것이라고 여기며, 추가적인 지역 수산기구의 설립은 불필요하다는 견해를 피력하였다. 그럼에도 불구하고 변화하는 북극 해양생태계에 대해 완전히 알지 못하므로, 북극 공해지역의 해양생물자원의 보전과 관리를 위하여 사전예방적 접근을 적용하여 동 해역을 관리해야한다는 필요성에 대해 언급하였다. 동 협약 초안은 대상 어족을 유엔해양법협약 상의 정착성 어족을 제외한 연체동물과 갑각류라 정의(제1조)하고 있으며,

캐나다, 덴마크령 그린란드, 노르웨이, 러시아, 미국에 둘러싸인 중앙북극해 공해지역(제2조)으로 협약 적용해역의 범위를 정하고 있다. 제3조는 협약 당사국들의 의무로 오슬로 선언의 4가지 잠정조치 방법들과 동일한 내용을 규정하고 있다. 즉, 첫째 협약의 당사국들은 오직 하나 또는 그 이상의 지역 및 소지역 수산기구 또는 국제기준 하에 제정된 협정에 따라 자국의 국기를 게양한 선박에게 동 해역에서 상업적 어업을 수행할 수 있도록 허가할 수 있다. 둘째, 당사국들은 협정지역의 생태계에 대한 이해를 증진시키고, 현재 또는 미래에 존재할 수 있는 어족자원의 지속가능한 이용 및 그러한 어업이 동 해역 생태계에 미칠 수 있는 영향에 대해 결정하기 위하여 공동과학조사 프로그램을 설립하는 것에 동의한다. 셋째, 당사국들은 협정지역에서의 모니터링, 통제 및 감시 활동의 조정을 통해 이 협정의 준수를 촉구하는 데에 동의한다. 마지막으로 각 당사국들은 협정지역에서 자국의 국기를 게양한 선박에 의해 수행될 수 있는 어떠한 비상업적 어업도 적절하게 모니터링 될 수 있도록 보장해야 하며, 그러한 모든 어업은 공동과학조사 프로그램에 의해 공지된 과학적 권고에 부합하는 방법으로 수행되어야 한다. 또한 각 당사국은 어떠한 어업도 이 협정의 목적을 훼손하지 않도록 보장하여야 하며 그러한 어업을 통해 획득된 데이터를 공유해야 한다고 규정하고 있다. 동 협약안 제4조는 당사국들이 동 협정안의 비당사국을 기국으로 하는 선박과 관련하여 동 협정안에 부합하는 조치를 취하도록 격려해야 한다고 규정하고 있다. 또한 비당사국을 기국으로 하는 선박들이 동 협약안의 이행을 방해하는 활동을 억제하기 위하여 국제법에 부합하는 조치를 취해야 한다고도 규정하고 있다.

제2차 회의는 2016년 4월 19일부터 21일까지 미국 워싱턴 D.C.에서 개최되었다. 동 회의는 제1차 회의의 연장선으로 '단계적(stepwise)'으로 중앙북극해 비규제 상업어업 금지조치를 위한 잠정조치(interim measures)에 대해 논의하였다. 그와 동시에 2015년 11월 회의에 상정되었던 3가지 접근 가능한 방법에 대해서도 고려하였다. 첫 번째 고려는 오슬로 선언에 관한 것으로 북극연안 5개국과 타 이해당사국이 받아들일 수 있도록 조정하는 것이다. 두 번째는 미국이 제안한 '중앙북극해 비규제 공해어업방지 협약초안'에 대한 교섭이며, 세 번째는 가까운 미래에 제정 가능한 협약이나 하나 또는 그 이상의 지역수산기구에서 제정된 협약에 대한 교섭에 관한 것이다. 이 회의에서 각국은 미국의 협약 초안을

수정하고자 하는 제안서를 제출하였다.

제3차 회의는 2016년 7월 6일부터 8일까지 캐나다 이칼루이트(Iqaluit)에서 개최되었다. 동 회의에서는 지난 2차례 회의에서 논의한 중앙 북극해 비규제 상업어업 방지를 위한 잠정조치에 대해 다시 확인하면서, 동 해역의 생물자원 보전과 지속가능한 사용에 대해서도 언급하였다. 각국의 대표들은 이러한 회의가 중앙 북극해에 하나 또는 그 이상의 지역수산기구 또는 관련 협약 제정을 위한 과정 중의 한 단계로 보는 견해를 가지고 있었다. 또한 동 회의는 제2차 회의에서 언급한 3가지 접근 가능한 방법에 대한 논의의 계속과 함께, 구속력이 없는 선언으로 발전시킬 것인가 또는 구속력을 가진 국제협약으로 발전시킬 것인가에 대한 선택의 문제를 토의하였다. 특히 동 회의에서는 과학조사와 모니터링에 대한 공동 프로그램 및 지역적 지식의 향상에 대한 논의도 함께 되었다. 이와 함께 어업의 방법, 중앙 북극해를 위한 하나 또는 그 이상의 지역수산기구에 대한 협상 개시 결정의 조정, 의사결정 과정 등의 문제는 추후의 과제로 제시하였다.

제4차 회의는 2016년 11월 29일부터 12월 1일까지 덴마크령 페로제도에서 개최되었다. 동 회의에서는 2016년 10월 회람된 의장 초안을 기초로 하여 참가국간 표출된 이견을 해소하기 위한 토의가 진행되었으며, 많은 진전을 보였다고 평가되었다. 법적으로 구속력 있는 조약형태의 의장 초안을 기초론 한 성공적 토론에도 불구하고 아직 시험조업의 허용에 관한 합의방식, 중앙북극해 지역수산관리기구의 설립 협정을 위한 협상 개시시점 결정조건, 의사결정절차 등이 미해결과제로 남게 되었다.

향후 계획으로서, 의장이 회의 종료후 수정초안을 회람시키면, 이에 대하여 각 참가국이 2017년 1월 23일까지 수정초안에 대한 서면제안서를 타 참가국에게 회람시키도록 하였다. 이 과정이 종료되는 시점에 의장이 각국의 서면제안을 반영한 새로운 초안을 2017년 2월 6일까지 각 참가국에게 회람시키도록 하였다. 이를 바탕으로 한 제5차 회의는 2017년 상반기중 아이슬란드에서 개최할 것을 예정하였다.

Ⅱ. 시사점 및 입법적 필요성

현행 국제해양법질서는 1982년 채택되어 1994년 발효한 유엔해양법협약을 근간으로 유지되고 있다. 2016년 현재 동 협약의 당사국수가 168개국에 이르고 있어 국제법상 보편적 지위를 확보하고 있다. 본문 320개 조문과 9개 부속서로 구성된 유엔해양법협약은 해양에서의 모든 국가활동을 규율하는 법적 근거를 제공하고 있지만 그 내용의 추상성 내지는 협상과정에서 곤란한 사항을 의도적으로 회피한 결과로 인하여 해석과 적용상 많은 쟁점을 야기하고 있다. 또한, 동 협약의 협상시점이 1970년대였다는 점을 감안할 때, 협상시점에서 고려하지 못하였거나 그 이후 새롭게 발생한 현상에 대해서는 적절히 대처하기 어려운 한계를 노출하고 있다. 이러한 문제점들을 해소하기 위하여 많은 국제기구와 국제재판소 및 국제협상회의가 지속적으로 진행되어 오고 있다. 그러한 문제점 속에는 우리나라가 직면하고 있는 여러 가지 해양법문제에 직접 또는 간접으로 영향을 미치는 사안들이 포함되어

있다. 대표적인 사안으로서는 중국 및 일본과의 해양경계획정문제, 일본과의 독도 문제, 강제적 분쟁해결절차의 적용가능성, 새로운 공해질서의 태동과 기존 공해자유의 제한가능성, 북극해 이용의 제한가능성 등을 들 수 있다.

2016년에 진행된 국제해양법 관련 국제기구와 국제재판소 및 국제협상회의의 활동에서도 향후 국제해양법 발전과 우리나라의 국내법 정비에 많은 영향을 주는 사안들이 많이 발견된다.

먼저, 인도와 호주간 개시된 유엔해양법협약 제5부속서에 의한 강제조정절차는 배타적 경제수역 및 대륙붕의 경계획정문제에 대해 동 협약 제298조에 따라 구속력있는 결정을 수반하는 강제적 분쟁해결절차 배제선언을 한 국가에 대하여 제기된 최초의 사건이라는 점에서 주목을 받고 있다. 즉, 호주가 제298조에 따라 해양경계획정사건에 대한 구속력있는 결정을 수반하는 강제적 분쟁해결절차를 배제하였으나 동티모르가 제298조의 예외규정을 근거로 제3자가 개입하는 강제조정절차에 호주를 당사국으로 강제적으로 참여하게 한 것이다. 우리나라도 협약 제298조에 따라 구속력있는 결정을 수반하는 유엔해양법협약상의 강제적 분쟁해결절차를 전면적으로 배제하였으므로, 중국 또는 일본이 해양경계획정협상의 진전이 부진할 경우 우리나라를 대상으로 강제조정절차를 개시할 가능성을 배제할 수 없게 된 것이다. 따라서, 강제조정절차의 개시요건인 협약 발효 후 발생한 해양분쟁일 것과 합리적인 기간동안 협상하였음에도 해결되지 않았다는 요건의 충족 여부를 검토하고 강제조정절차의 진행절차상 염두에 두어야 할 사항에 대한 추가적이고 지속적인 분석이 요구된다.

다음으로, 유엔해양법협약 제7부속서에 따른 중재재판소가 내린 엔리카렉시에호사건에 대한 잠정조치 청구사건에 대한 판단도 향후 우리나라가 체포하거나 나포한 외국인 또는 외국선박의 처리문제에 간접적 기준을 제시하고 있다고 판단된다. 재판소는 이탈리아가 국제해양법재판소에 부탁하여 사실상 거절된 잠정조치명령청구를 중재재판소에 다시 제기하는 것을 법리적으로 허용되는 것으로 판단하였을 뿐만 아니라 인도적 관점에서 인도에 보석상태로 체류중인 이탈리아 해병을 조건부로 이탈리아로 귀환할 수 있도록 양국이 협력하라는 명령을 내렸다. 이러한 명령은 이전의 국제해양법재판소 잠정조치명령과 정면으로

배치되는 것이며, 잠정조치명령의 요건으로서 유엔해양법협약에 명문의 규정이 없는 인도적 배려를 중요한 판단기준으로 하였다는 점이 주목된다. 한편, 동 재판소가 내린 남중국해 사건에 대한 중재판정은 많은 점에서 우리나라에게 시사점을 제시하고 있다. 한국은 2006년 4월 18일 유엔해양법협약 제298조 제1항에 따라 강제적 분쟁해결절차 배제선언을 기탁한 바 있으며, 동 배제선언을 통해 우리나라가 동의하지 않는 한 해양 경계획정, 군사활동, 해양과학조사 및 어업에 대한 법집행 활동, 유엔 안보리의 권한수행 관련 분쟁은 동 협약상의 강제적 분쟁해결절차에 배제된다고 보았다. 그런데 남중국해 중재판정에서는 협약 제297조와 제298조에 관한 해석론에 따르면 강제적 분쟁해결절차의 관할권을 매우 넓게 해석하여 적극적으로 관할권을 행사하였다. 또한 중국이 해양환경 보호 및 보전의무를 위반했는지 여부와 중국의 군사활동 및 법집행활동에 관한 필리핀의 청구에 대해 중재재판소는 관할권 문제를 판단함에 있어 이를 적극적으로 수용하는 태도를 보였다. 따라서, 이런 기준이 지속적으로 유지되고 확립된다면 우리나라의 배제선언에도 불구하고 우리나라가 회피하고자 한 사안들이 협약상 강제적 분쟁해결절차의 대상이 될 가능성도 완전히 배제할 수 없게 되었다는 점이다. 이 점을 고려할 때 우리나라는 향후 주변해양에 대한 의사결정 및 행동을 행함에 있어 강제적 분쟁해결절차의 피소가능성에 대해 보다 면밀히 검토할 필요성이 인정된다. 한편, 중재재판소가 제시한 해양법협약 제121조의 해석기준 즉, 도서와 암석의 법적 지위를 판단하는 기준은 독도의 법적 지위에 대하여 중요한 함의를 가지고 있다. 중재재판소는 제121조에 대한 상세한 해석론을 제시하고 지형의 크기에 의한 판단을 부정하고 가장 중요한 기준으로서 '안정적인 인간 공동체의 지속'과 그 해양지형 자체에서 기인하는 '독립적인 경제활동'을 제시하였다. 이러한 점을 고려하여 향후 독도의 법적 지위에 대한 우리나라의 입장을 검토하고 향후 관리방안에 대해 고민하는 것이 필요하다고 판단된다.

국가관할해역 외측의 해양생물다양성 보전을 위한 새로운 구속력있는 국제문서 작성을 위한 준비위원회는 공해에서의 해양보호구역 설정, 공해 및 심해저 해양유전자원을 인류 공동유산으로 지정하고 이에 대한 접근과 이익공유제도의 신설, 공해상 활동에 대한 다양한 환경영향평가 의무의 부여, 구체적이고 강제력있는 개도국 능력배양 및 해양과학기술 이전의무의 이행을 위해 구체적 고려요소에 대해 2차례의 회의 기간동안 논의하였다.

그러나, 현재까지는 이전 실무작업반회의에서 보여준 각국의 입장을 지속적으로 주장하는 것 이외에 많은 타협점을 찾고 있다고는 평가할 수 없다. 그러나, 이미 구속력있는 국제문서 작성을 유엔총회 결의로 결정한 바 있으므로 향후 짧지 않은 기간동안 이에 대한 논의가 지속될 것으로 보인다. 동 문서의 내용에 따라 기존의 공해질서를 뒤흔드는 커다란 변화가 예상된다. 따라서, 우리나라는 새로운 국제문서의 내용이 유엔해양법협약의 기본 틀을 변경하지 않으며, 기존 국제기구 또는 국제적 합의를 훼손하지 않도록 토의에 적극적으로 대처하여야 할 것으로 판단된다. 이를 위해서는 외교부, 해양수산부가 대책위원회를 설치하고, 각 쟁점별로 전담기관 내지는 전담전문가를 지정하여 실무작업반을 구성하여 운영하는 것이 장기간의 국제협상에 대응하기 위한 중요한 조치로 생각한다.

마지막으로 '중앙북극해 공해어업회의'는 혹독한 자연환경으로 인하여 가까운 장래에 실현되지 않을 것으로 확신하는 중앙북극공해에서의 비규제어업을 사전에 방지하는 구속력 있는 국제적 합의를 도출하고자 하고 있다. 사전예방적 접근을 적용하여 북극공해어업을 규율할 수 있는 지역수산관리기구가 설치되고 이들이 효과적으로 북극공해어업을 관리할 수 있을 때까지 상업적 어업을 금지하는 내용을 담고자 하고 있다. 이와 같은 북극연안 5개국의 시도는 북극 공해에서 비연안국의 활동을 사전에 차단하고자 하는 의도를 담고 있으며, 더 나아가 북극 공해이용의 주도권을 북극 연안국이 갖겠다는 의도로 해석된다. 우리나라는 동 조약이 체결되는 경우 북극문제에 대해 북극연안국과 대등한 당사국으로 협상에 참여할 수 있다는 긍정적 요소를 감안하고, 무기한적으로 북극공해어업을 금지하는 내용을 배제하고, 컨센서스방식에 의한 의사결정절차 채택을 통한 발언권 강화 및 자율적인 시험조업의 시행여건 확보 등을 주요 협상전략을 채택하여 대응하는 것이 긴요한 사안으로 판단된다.

부 록

〈부록〉 관련 Cases, Legislation, Books & Articles, Key Activities 주요 내용 소개

1. Legislation

(1) 중앙북극해 비규제 공해어업방지에 관한 협정 미국 초안(U.S. Draft on the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean)

중앙북극해 비규제 공해어업방지에 관한 협정
(미국 초안)
2015년 11월 2일

이 협정의 당사국들은,

최근 중앙북극해 공해지역 대부분이 1년 내내 얼음으로 덮여있을 때에는 이러한 지역에서의 어업이 불가능하였음을 인식하고,

기후변화로 인해 결빙분포가 변화되었고 그와 관련된 현상들이 발생하였으며 북극해의 해양생태계가 변화되고 있지만 그러한 변화들의 영향을 완전히 이해하지 못하고 있음을 인정하며,

북극해 생태계가 현재까지는 인간의 활동에 상대적으로 덜 노출되어 있음을 주목하면서,

어족자원 및 기타 해양 동물들이 북극해에서 발견되고 있음을 고려하고,

우리의 먹거리와 영양에 있어서 건강한 해양생태계 및 지속가능한 어업의 결정적인 역할을 인식하며,

경계왕래성 어족을 포함하는 북극해의 어족자원이 연안국들의 어업관할권 및 중앙북극해 공해지역 모두에서 발생됨을 인식하면서,

중앙북극해 공해지역을 포함하여 북극해를 덮고 있는 해빙이 최근 줄어들고 있음을 주목하고,

다음의 국제조약들을 포함하여 중앙북극해 공해지역에 이미 적용되고 있는 어업과 관련한 국제문서들의 조항들을 상기하며:

1982년 12월 10일 해양법에 관한 국제연합협약;

1995년 경계왕래성 어족 및 고도회유성 어족의 보존 및 관리에 관한 1982년 12월 10일 해양법에 관한 국제연합협약의 이행협정("1995년 협정");

1995년 책임있는 어업을 위한 수행규범 및 관련 국제 실행계획;

2001년 불법, 비보고 및 비규제 어업 방지, 억제 및 제거를 위한 국제 실행계획;

1995년 협정에 따라 사전예방 원칙을 적용하여야 할 의무를 포함하여 공해 지역의 해양생물자원의 보존 및 관리를 위해 국제법 하에서 서로 협력하여야 할 국가들의 의무를 상기하면서,

최소한 하나의 현존하는 지역적 수산관리기구인 북대서양 수산위원회(the North East Atlantic Fisheries Commission)가 중앙북극해 공해지역의 보존 및 관리조치를 채택할 권한을 갖는다는 것을 인식하고,

가까운 미래에 중앙북극해 공해지역에서 상업적인 어업이 이루어지기는 어렵다는 것을 고려할 때 현재로서는 그 지역을 위한 어떤 추가적인 지역수산관리기구를 설립할 필요는 없다고 믿으며,

그럼에도 불구하고 중앙북극해 공해지역에서 규제되지 않는 어업이 시작되는 것을 방지하기를 열망하면서,

북극해 연안국들에서는 해양생물자원의 자급 어획이 이루어지고 있으며 이러한 자원의 사용자들 사이에 전통적이고 지역적인 지식이 존재하고 있음을 인식하고,

또한 북극해의 해양생물자원과 그 생태계에 대한 이해를 증진시키기 위하여 과학연구를 촉진하고 전통적이며 지역적인 지식을 과학적 지식과 통합시키기를 열망하며,

북극해의 해양생물자원의 적절한 관리에 있어서 북극거주민, 특히 북극 원주민들의 이해관계를 인식하면서,

다음에 합의한다:

제1조
용어의 사용

이 협정의 목적에 따라

(a) "어족"이란 1982년 해양법에 관한 국제연합협약 제77조에 정의된 정착성 어족(sedentary species)을 제외한 연체동물과 갑각류를 포함한다.

(b) "어획"이란 어족을 탐색, 유집, 설치, 포획 또는 수확하는 것 또는 합리적으로 어족을 유집, 설치, 포획 또는 수확할 것으로 기대될 수 있는 활동을 의미한다.

제2조
협정의 범위

이 협정은 캐나다, 덴마크령 그린란드, 노르웨이, 러시아 및 미국의 어업관할수역에 완전히 둘러싸여있는 중앙북극해의 단일 공해지역에 적용되며, 이하 "협정지역"이라 칭한다.

제3조
당사국들의 의무

1. 당사국들은 자국의 국기를 게양할 권리가 있는 선박들이 오직 하나 또는 그 이상의 지역적 또는 소구역 수산관리기구 또는 어업관리방식에 따라 협정지역에서 상업적인 어업을 수행하도록 허가하여야 하며, 그러한 수산관리기구는 승인된 국제적 기준에 따라 그러한 어업을 관리하기 위하여 설립된 것이어야 한다.

2. 당사국들은 협정지역의 생태계에 대한 이해를 증진시키기 위하여, 특히 현재 또는 미래에 협정지역 내에 존재할 수 있는 어족자원이 지속가능한 기초 위에 수확될 수 있을지, 그리고 그러한 어업이 협정지역의 생태계에 미칠 수 있는 영향을 결정하기 위하여 공동 과학 프로그램을 설립하는 것에 동의한다. 이 프로그램에 따른 활동들은 당사국들의 자발적인 기부로부터 자금을 마련할 것이며 각국의 자금 지원에 따라 변동될 수 있다.

3. 당사국들은 협정지역에서의 모니터링, 통제 및 감시 활동의 조정을 통해 이 협정의 준수를 촉구하는 데에 동의한다.

4. 각 당사국들은 협정지역에서 자국의 국기를 게양한 선박에 의해 수행될 수 있는 어떠한 비상업적 어업도 적절하게 모니터링 될 수 있도록 보장하여야 한다. 그러한 모든 어업은 위 제2항에 언급된 공동 과학연구 프로그램에 의해 공지된 과학적 권고에 부합하는 방법으로 수행되어야 한다. 각 당사국은 어떠한 어업도 이 협정의 목적을 훼손하지 않도록 보장하여야 하며 그러한 어업을 통해 획득된 데이터를 공유하여야 한다.

제4조
비당사국

1. 당사국들은 이 협정의 비당사국들이 자국의 국기를 게양할 권리가 있는 선박과 관련하여 이 협정의 조항에 부합하는 조치를 취하도록 격려하여야 한다.

2. 당사국들은 비당사국의 국기를 게양한 선박들이 이 협정의 효과적인 이행을 방해하는 활동을 하는 것을 억제하기 위하여 국제법에 부합하는 조치를 취하여야 한다.

제5조
검토 및 추가 이행

1. 당사국들은 이 협정의 이행을 검토하고, 협정 지역에서의 어업을 관리하기 위한 하나 또는 그 이상의 추가적인 지역적 또는 소구역 수산관리기구나 어업관리방식의 설립을 정당하게 하는 상황의 변화가 있는지 결정하기 위하여 격년으로 또는 그보다 더 자주 회의를 개최하여야 한다.

2. 당사국들은 이 협정 제3조에 따라 수행되는 관련 공동 과학연구 프로그램 및 모니터링, 통제 및 감시활동을 포함하여 이 협정의 이행을 촉진하기에 적절하다고 여겨지는 위원회 또는 그와 유사한 기관들을 구성하여야 하며 여기에는 북극 원주민 대표들이 포함될 수 있다.

제6조
서명

이 협정은 [국가 이름'에 의해 [일자]부터 [장소]에서 서명을 위하여 공개되어야 하며 이 협정이 서명을 위하여 공개된 날로부터 12개월 동안 공개가 유지되어야 한다.

제7조
발효 및 탈퇴

1. 이 협정은, 이 협정에 의해 구속되는 것에 동의한다고 서명한 [다섯번째] 서면공지가 외교적 채널을 통해 기탁국에 의해 수령된 날로부터 30일 후에 발효된다.

2. 모든 당사국은 최소한 6개월 이전에 외교적 채널을 통해 기탁국에게 서면 공지를 송부함으로써 언제든지 이 협정을 탈퇴할 수 있으며 그러한 서면공지에는 탈퇴의 발효일자를 명기하여야 한다. 이 협정의 탈퇴는 다른 당사국들 사이의 적용에 영향을 미치지 않는다.

제7조bis

가입

1. 이 협정은 이 협정에 관심을 갖고 있는 모든 국가들에 의한 서명을 마친 후에 가입을 위하여 공개되어야 한다.

2. 가입 문서는 기탁국에 보관되어야 한다.

3. 발효 후에 가입하는 국가에 대하여 이 협정은 그 가입문서가 기탁된 날로부터 30일 후에 발효한다.

제8조

다른 협정과의 관계

1. 이 협정의 어떠한 조항도 1982년 해양법에 관한 국제연합협약 또는 1995년 이행협정에 반영된 국제법의 관련 조항에 따른 당사국의 권리, 관할권 또는 의무를 침해하지 않는다.

2. 이 협정은 이 협정과 양립될 수 있는 다른 협정으로부터 발생되는 당사국들의 권리 또는 의무를 변화시키지 않으며, 다른 당사국들이 이 협정에 따라 그들의 권리를 향유하거나 의무를 이행하는 데에 영향을 미치지 않는다.

제9조

기탁국

_____ 가 이 협정의 기탁국이 된다.

2015년 ____월 ____일 _____에서 채택된 이 협정은 영어, 프랑스어 및 러시아어 모두 동일한 정본이다.

2017

글로벌 법제 동향 모니터링 이슈 분석 보고서

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정보통신분야

국제전기통신연합의 위성궤도 관리 제도 동향

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신홍균 교수는 파리 제1대학에서 법학박사학위를 취득했고, 현재 한국항공우주정책법학회 부회장이며 국민대학교에 근무하고 있다.

국제전기통신연합의 위성궤도 관리 제도 동향

신 홍 균 국민대학교 법과대학 교수

Abstract

국제전기통신연합은 위성궤도와 주파수의 공평하고 효율적인 이용을 도모하기 위해서 국제조약에 근거한 권한과 의무를 이행하고 있다. 특히 국가간 합의에 따라서 수립된 무선규칙이 위성궤도와 주파수의 이용신청과 등록 및 국가간 이해조정에 대해서 규정하고 있다. 국제전기통신연합의 규정위원회는 무선규칙의 해석과 적용에 관한 사안을 심의하고 유권해석하는 기능을 수행하고 있다.

위성궤도의 수요가 공급을 추월하는 상황에서, 무선규칙은 위성궤도를 신청한 자는 반드시 7년 이내에 사용개시하여야 하고, 그렇지 않으면 이용할 권리를 취소하는 규정을 두고 있다. 이에 국가들은 권리 보전을 위해서 다양한 조치를 강구하고 있다. 국적이 다른 인공위성을 임차하여 임시적으로 규정을 준수하기도 하고, 또는 여러가지 사정을 이유로 7년 시한의 연장을 주장하기도 한다. 시한 연장은 그 궤도를 둘러싸고 국가간의 이해가 상충되고 권리가 경합되는 상황을 불러오기도 하며 이에 규정위원회가 해당 사안을 심의하여 사실상의

분쟁해결 기능을 수행한 사례도 있다.

규정위원회는 2016년도에 불가항력을 이유로 시한의 연장을 허용한 바 있고, 궤도의 이용권을 취소하기도 하였다. 그럼에 있어서 동 위원회는 해당 사안별 결정에서의 선례가 다른 사안에 대해서 구속력이 없음을 지적하면서 사안별 심의 원칙을 유지하고 있다. 이에 규정위원회의 판단 논리 및 국가들의 주요한 관행 등을 모니터링할 필요성이 대두되고 있다.

서언

국제전기통신연합은 유한한 천연자원으로서의 지구정지궤도의 공평하고 효율적인 이용을 도모하기 위한 다양한 기능을 수행하고 있다. 특히 동 국제기구는 관련 국제조약을 비롯한 각종 규범의 해석과 적용을 통해서 궤도의 이용을 둘러싼 국가간의 권리의 조정과 책임의 분배를 도모하고 있다.

그럼에 있어서 국제전기통신연합은 궤도의 이용 신청, 및 권리 등록 등에 관한 절차적 규정을 마련하여 시행하고 있다. 아울러 동 국제기구는 이를 위한 조직과 제도를 운용하고 있다. 이러한 기능은 국제기구 고유의 입법 및 집행 기능으로서 특정한 논리와 관행이 법적 결정의 기초가 되는 사례를 보여주고 있다.

이에 본 연구는 위성궤도를 둘러싼 법률적 쟁점에 대해서 최근에 국제전기통신연합이 취한 결정 사례들에 대해서 살펴보고자 한다.

Ⅰ. 국제전기통신연합의 조직 및 임무

1. 국제전기통신연합의 조직 및 기구

(1) 국제협약 및 규칙

국제전기통신연합(International Telecommunication Union, 이하 "ITU"라 칭함)은 유선과 무선을 포함한 모든 종류의 전기통신을 통한 협력의 도모를 목표로 설립된 정부간 국제기구이다.

ITU의 법률적 근거로서는 국제전기통신연합헌장(the Constitution of the International Telecommunication Union, 이하 ITU헌장이라 함) 제3조는 ITU의 근거 문서로서 ITU

헌장, 국제전기통신협약(the Convention of the International Telecommunication Union) 및 행정규칙(Administrative Regulations)이라고 규정하면서, 헌장은 협약의 조항에 의해서 보완되면서 ITU의 기초 근거라고 규정하고 있다. 또한 무선규칙(Radio Regulations)이 위 행정규칙에 포함된다고 규정되어 있다. 헌장, 협약 및 행정규칙간에는 상하 체계가 있기에, 협약과 행정규칙간의 상충시에는 협약이 우선하고 협약과 헌장간의 상충시에는 헌장이 우선한다.

ITU의 설립 목적에 따라서 헌장 제2조는 ITU의 기능을 무선주파수대역의 용도별 분배(allocation), 유해한 간섭의 배제를 위한 노력의 조정, 통신 표준의 촉진 등이라고 규정하고 있다. 협약과 헌장의 당사자국가는 ITU가 정하는 무선규칙(Radio Regulations)을 준수할 의무를 부담한다.

(2) 무선통신 관련 주요 기구

ITU헌장 제2장은 무선통신부문의 기구에 대해서 규정하고 있다.

가. 무선통신회의

ITU헌장 제13조에 따라서 세계무선통신회의(world radiocommunication conference)는 무선규칙의 제·개정 권한을 가지며 3년 내지 4년에 한 번씩 개최됨을 원칙으로 한다. 협정 제17조에 따라서 회의의 의제에는 규정위원회 및 사무국의 활동에 대해서 지시 및 검토 등이 포함된다.

나. 규정위원회

ITU헌장 제14조는 무선규정위원회(the Radio Regulations Board, 이하 "RRB"라 칭함)에 관해 규정하고 있다. RRB 위원은 회원국들이 자국민들중에서 추천한 자들중에서 전권회의(Plenipotentiary Conference)에서 선출되며 RRB 위원은 국가를 대표(representing)하여 행동해서는 안 될 의무를 부담한다. RRB의 주요 임무는 절차규칙(the Rules of

Procedure, "ROP"라 칭함)의 제정, 절차규칙의 적용으로 해결되지 않는 사안에 대한 심의(consideration) 및 주파수의 지정 및 이용과 관련되어 발생되는 추가 임무의 수행 등이다. 추가 임무는 ITU 이사회(Council) 및 회원국이 참석하는 각종 회의(conference)에 따라 정해진다.

다. 무선통신사무국

ITU헌장 제16조는 무선통신사무국(Radiocommunication Bureau, 이하 "사무국"이라 칭함)의 설치를 규정하고 구체적 사항을 협정에 위임하고 있다. 협정 제12조는 사무국의 주요한 기능을 규정하고 있다. 사무국은 무선규칙의 적용에 관해서 주관청들로부터 받은 정보를 처리하고 주파수등록대장을 관리한다. 유해한 간섭에 있어서 사무국은 주관청의 요청에 따라서 그 해결을 지원하고, 필요한 경우에는 사실조사를 수행하여 규정위원회(RRB)에 보고한다.

2. 국제전기통신연합의 임무

(1) 지구정지궤도에의 공평한 접근

ITU 헌장 제44조는 주파수와 지구정지궤도를 한정된 천연자원이라고 규정하고 그 사용이 합리적, 효율적 및 경제적이어야 하며 아울러 모든 국가들이 공평한 접근(equitable access)을 할 수 있어야 한다고 규정하고 있다.

공평한 접근의 개념에 대해서 ITU의 관련 문서가 간접적으로 규정하고 있다. 첫째 궤도의 이용권은 영구적이지 않다. WRC-03에서 채택된 Resolution 2의 제1조는 무선통신사무국에의 주파수 등록 및 그 사용은 해당 국가에게 영원한 우선권을 부여하는 것이 아니며 타국의 위성망 수립에 장애를 형성하지 않는다고 규정하고 있다. 또한 위 Resolution은 사무국에 이미 등록한 국가는 새로운 위성망의 수립을 용이하게 할 모든 실무적 조치를 취할 필요가 있다는 점을 사무국이 고려하여야 함을 규정하고 있다.

둘째, 선점자 우선원칙에 대해서 무선규칙이 규정하고 있다. 즉 무선규칙 제9.6조에 대한

절차규칙은 무선규칙 제9조 전체에서 먼저 신청한 국가가 여하한 우선권도 갖지 않는다고 규정하고 있다.[1)]

(2) 분쟁의 해결과 조정

ITU 헌장에 따른 분쟁해결의 대상은 헌장, 협정, 및 무선규칙과 같은 행정적 규칙 등의 해석과 적용을 둘러싼 분쟁이다. 헌장은 외교적 경로를 통한 해결, 또는 양자간 또는 다자간 조약에 의한 해결, 또는 상호 합의한 방식에 의한 해결, 또는 ITU협정이 정한 중재절차에 따른 해결 등을 규정하고 있다. 이를 규정하고 있는 헌장 제56조는 분쟁 해결 방식을 강제하는 것은 아닌 것으로 해석되며, 반면에 분쟁해결에 관한 선택적 강제 의정서(The Optional Protocol on the Compulsory Settlement of Disputes)에 서명한 ITU 당사국들은 ITU협정이 정한 중재절차에 따라야 할 의무를 부담한다. 분쟁 해결의 당사자는 조약의 당사국, 즉 주관청이다.

유해한 전파간섭의 경우에는 무선규칙 15.43 내지 15.46에 따라서 당사국의 요청에 따라 사무국의 개입하여 전파간섭의 원인을 판별하는 등의 역할을 한다.

지구정지궤도 확보를 둘러싼 분쟁에 대해서는 헌장, 협정 및 무선 규칙 등에서 사무국이 분쟁 해결에 대해서 권한 또는 임무를 부여받은 것으로 해석되는 조항은 없다. 다만, RRB가 사실상의 분쟁해결기능을 수행하고 있다. 즉, 특정 사안에 대해 RRB는 무선규칙에 따라서 구속력있는 결정을 할 권한을 갖고 있으며, 이는 분쟁해결의 효과를 가져오고 있다.

1) b) the intent of Nos. 9.6 (9.7 to 9.21), 9.27 and Appendix 5 is to identify to which administrations a request for coordination is to be addressed, and not to state an order of priorities for rights to a particular orbital position;
c) the coordination process is a two way process. This understanding was included in the Radio Regulations by WARC Orb-88 with the adoption of the former RR provision No. 1085A which was confirmed by WRC-97 in No. S9.53 ;
d) in the application of Article 9 no administration obtains any particular priority as a result of being the first to start either the advance publication phase (Section I of Article 9) or the request for coordination procedure (Section II of Article 9).

Ⅱ. 위성궤도와 주파수 확보를 둘러싼 주요 쟁점 및 동향

1. 무선규칙의 주요 내용

(1) 위성망의 신청 및 사전공표

자국 정부 또는 기업이 위성궤도를 사용하고자 하는 국가(ITU 헌장 및 협정상 이를 Administration으로 표시하는바, 이하 "주관청"이라 칭함), 즉 주관청은 ITU에 사용하고자 하는 궤도의 내역 및 사용하고자 하는 주파수 등을 신청하고 등재하여야 한다. 일반적으로 위성의 궤도와 사용하는 주파수를 총괄하여 "위성망"이라고 하며 ITU에 대한 그러한 신청을 "위성망신청"이라고 한다. 특히 인공위성의 제작 기간, 및 전파간섭의 탐지 등의 어려움 등의 특성을 고려하여 무선규칙은 위성망신청을 함에 있어서 위성망의 "사전공표"(Advance Publication) 제도를 수립하고 있다.

무선규칙 제9조의 제1항(Section)은 사전공표의 절차와 조건에 대해 규정하고 있다. 제9.1조는 주관청의 사전공표 일정에 관한 의무를 규정하고 있다. 즉 주관청은 사무국에 위성망의 "사전공표 정보"를 해당 위성망의 실제 사용"("bringing into use" 이하 "BIU"라 칭함) 개시 빠르면 7년 전에 그리고 아무리 늦어도 2년 전에 제공하여야 한다. 또한 사전공표 정보에는 "위성망의 사용 개시일"(the notified date of bringing into use) 등과 같이 Appendix 4에 나열되어 있는 관련 정보가 포함되어야 한다. 이 정보를 일반적으로 API/A 문서라고 한다. 사전공표를 위한 요건이 충족된다고 사무국이 판단하면 사무국은 사전공표 정보를 격주간으로 각 주관청에게 회람시키는데 이를 BR International Frequency Information Circular (Space Services) (이하 "BR IFIC"라 칭함)이라고 한다.

(2) 위성망의 조정

신청에 이어서 위성망들간의 주파수 간섭 문제 등의 사전 해결을 위해서 이른바 조정 단계가 개시된다. 조정단계는 무선규칙 제9조의 Section II에 규정되어 있다. 주관청은

BIU하기전에 타 주관청과 주파수의 간섭 문제 등에 대해서 협의하고 조정하여야 한다. BR IFIC를 통해서 공표된 위성망 정보를 인지한 주관청이 해당 위성망이 자신의 위성망과의 조정을 필요로 한다고 판단하면 조정요청을 사무국에 통지한다.(무선규칙 9.30) 이러한 사전공표정보와 조정요청 등을 접수하면, 즉 관련 정보가 완성되면(complete information, 무선규칙 9.34) 사무국은 그 정보를 주파수 분배표 및 무선규칙 등의 준수여부를 심사하고 그 결과를 신청접수 4개월 이내에 BR IFIC에 공표한다.(무선규칙 9.34, 9.35 및 9.38)

BR IFIC에는 사무국이 판단하기에 조정이 필요한 주관청의 명단이 포함된다(무선규칙 9.36) 사무국이 판단한 명단에는 없지만 자신이 생각하기에 조정이 필요하다고 생각하는 주관청은 BR IFIC의 공표 4개월 이내에 해당 주관청 및 사무국에 조정 요청을 통보하여야 한다.(무선규칙 9.41) 사무국은 관련 정보를 검토하여 조정에의 포함 여부를 결정하고 그 사실을 Special Section에 공표하여야 한다.(무선규칙 9.42) 한편 조정 요청을 접수한 주관청이 조정에 동의한다면 그 동의한다는 의사를 BR IFIC의 공표 4개월 이내에 사무국 및 해당 주관청에 통보하여야 한다.(무선규칙 9.51) 동의하지 않는 경우에는 그 근거에 관한 정보 등을 포함하여 BR IFIC의 공표 4개월 이내에 사무국 및 해당 주관청에 통보하여야 한다.(무선규칙 9.52) 조정 요청을 받은 주관청이 이러한 동의 또는 부동의의 결정을 안하거나, 부동의하는 경우에 조정 요청 주관청은 사무국에 지원을 요청할 수 있다.(무선규칙 9.60) 지원 요청에 따라 사무국은 해당 주관청에 조정 신청에 응할 것을 요청할 수 있다.(무선규칙 9.62) 또한 만약에 조정 당사자간의 조정이 실패하는 경우에 사무국이 전파 간섭에 대해서 평가하고 그 결과를 해당 주관청에 통보하여야 한다.(무선규칙 9.63)

조정이 실패하는 경우에 사전공표 자료를 공표한 주관청은 BR IFIC의 공표로부터 6개월 동안은 주파수등록대장(the Master International Frequency Register, 이하 “주파수 등록대장”이라 칭함)에 자신의 주파수 등록 신청을 연기하여야 한다.(무선규칙 9.64) 6개월 경과일에도 조정이 실패한다면(무선규칙 9.65), 사무국은 주파수등록대장에 등재함에 있어서 그 간섭가능성(무선규칙 11.32A 및 11.33)에 대해서 검토하고 검토결과가 긍정적이라면 등록대장에 등재한다.(무선규칙 11.38)

그런데 위성망 신청서가 폭주하여 사무국의 업무과중이 발생하고, 위와 같은 심사를

4개월내에 수행할 수 없음을 경험한 결과, ITU는 무선규칙을 WRC-2000에서 개정하여, 심사결과 등을 공표할 수 없는 경우에는 주관청들에게 그 사실을 공지할 수 있도록 하였다.[2] 예컨대, 사무국은 위성망을 신청한 주관청이 보내온 자료를 검토하지 않고 그대로 회람시키는 경우에 "접수된 대로"("as received")임을 명시하여 BR IFIC를 공표하고 있다.

(3) 위성망 등재 삭제

무선규칙 제11.44조에 따라서, 사전공표 정보를 사무국이 접수한다고 인정한 날(the date of receipt, 이하 "접수 일자"라 칭함)로부터 7년 이내에 위성망이 실제 사용되어야 (bringing into use, 이하 "BIU"라 함)한다. 또한 동 조항은 7년 이내에 BIU 실적이 없는 주파수 지정은 사무국에 의해서 취소된다("shall be canceled", 이하 "삭제"라고 칭함)고 규정하고 있다. 여기서의 삭제 대상은 등록원부에 등재된 정보가 아니라 위성망 신청에 포함된 정보이다. 그 정보가 삭제되는 것은 해당 위성망 신청이 아예 존재하지 않았음과 같은 의미이다. 이를 구체적으로 살펴보면 다음과 같다.

BIU 이전에 사전공표된 위성망의 전파지정은 7년의 시한내에 등록대장에 임시 등재되는 지위를 갖는다. 임시 등재는 BIU가 확인되지 않으면 삭제된다. 즉 해당 주관청의 별도의 통지가 없는한, 사무국은 7년 시한의 만료 늦어도 15일 이전에 해당 위성망이 실제사용(BIU)되었음을 확인하라는 촉구 문서를 해당 주관청에 송부하여야 하고 해당 주관청이 BIU하겠다는 날짜로부터 30일 이내에도 위 확인을 통보받지 않는 경우에 등록대상에의 임시 등재를 삭제하여야 한다. 단 이 경우에 사무국은 주관청에 사전에 통보하여야 한다. (무선규칙 11.47)

BIU의 구체적 요건으로서 제11.44B조에 따르면, 인공위성이 지정된 주파수를 수신 및 발신하는 성능을 갖추고 해당 궤도에 90일 동안 끊김없이 유지되어야 한다. 또한 90일 만료전 30일 이내에 해당 주관청은 그 사실을 사무국이 인지하도록 하여야 한다. 이를 인지하게 된 사무국은 가능한한 조속히 이를 BR IFIC를 통해서 회람시켜야 한다. 만약에 신뢰할 수 있는 정보에 기초해서 볼 때에 BIF가 아닌 것으로 보인다면, 무선규칙 13.6조가 적용된다.

2) 무선규칙 9.38

무선규칙 제11.48조에 따르면 위성망 신청의 접수 일자로부터 7년의 시한이 만료된 후에 위성망 신청 정보가 삭제될 수 있는 사유는 다음과 같다. 첫째 주관청이 위성망을 사용하지 않고 있는 경우, 둘째 위성망 사전공표 및 조정의 결과 등을 사무국에 통보하지 않은 경우, 셋째 WRC-12의 Resolution 49에 따른 "필수정보"(due diligence information)을 제출하지 않는 경우이다. 다만 이러한 사유에 따라 삭제하는 경우에 사무국은 해당 주관청에 7년의 시한 만료 6개월 전에 이를 통보하여야 한다.

무선규칙 제13.6조에 따라 BR은 주파수 등록원부에 등재된 위성망을 삭제, 또는 수정할 권한을 갖는다. 등재된 위성망이 사용되지 않고 있다는 신뢰할만한 정보, 또는 실제 운용이 사전공표된 위성망 정보(즉 Appendix 4에 따른 정보)상의 조건 및 특성과 다름을 나타내는 신뢰할만한 정보 등의 요건이 충족되면 RRB는 삭제 또는 수정할 수 있다. 정보가 확보되면 사무국은 해당 주관청과 협의(consulting)하고 아울러 위성망의 사용여부에 대해 해명(clarification)을 요청하는 절차를 거쳐서 사실관계를 확인한다. 그 결과에 따라서 사무국은 삭제 등의 조치를 취할 수 있다. 한편 일정 기간동안 사무국의 요청에 해당 주관청이 불응할 경우에 사무국은 RRB에 통지하고 RRB의 결정이 적용되게 된다. 다만 이 경우에도 해당 주관청이 불응하거나 합의하지 않고, 한편 RRB가 삭제 또는 수정을 심의하는 동안에도 사무국의 검토는 배제되는 것은 아니다.[3] 즉 사무국과 해당 주관청간에 사실관계 등에 대한 판단이 일치하지 않는 경우에 RRB가 사안을 조사하게 된다. 특히 RRB는 해당 주관청으로부터 관련 자료를 사무국을 통하여 제출받되, 그 제출 기한을 정할 수 있다.[4]

3) 13.6 b)
...
In the event of non-response or disagreement by the notifying administration, the entry will continue to be taken into account by the Bureau when conducting its examinations until the decision to cancel or modify the entry is made by the Board.

4) 13.6 b)
...
In case of disagreement between the notifying administration and the Bureau, the matter shall be carefully investigated by the Board, including taking into account submissions of additional supporting materials from administrations through the Bureau within the deadlines as established by the Board. (WRC-12)

2. 주요 쟁점

(1) BIU의 시한연장 문제

무선규칙 11.44에 따라서 BIU는 사전공표를 위해 제공된 정보가 요건을 충족한다고 사무국이 판단하여 접수를 인정한 날(the date of receipt, 이하 "접수 일자"라 칭함)로부터 7년 이내이어야 하고, 7년 이내에 BIU 실적이 없는 주파수 지정은 사무국에 의해서 취소된다.

무선규칙 11조에 따른 BIU의 시한은 WRC-03 이전에서는 5년이었고 최대 연장 기간은 2년이었다. 연장 사유는 발사실패 또는 연기, 위성망 조정에 따른 위성의 설계변경, 재정적 문제 및 불가항력으로 특정되어 있었다. 그러나 사무국은 거의 모든 위성망이 2년의 연장을 신청한다는 점을 경험하고 WRC-03에서 제11조가 개정되어 관련 내용이 삭제되고 시한이 7년으로 규정되었다.

WRC-03 이후에 시한연장은 각 신청별로 이루어졌다. WRC-12에서는 co-passenger로 인한 시한연장을 보다 제한한다는 내용의 결의를 채택하고, 특히 불가항력의 경우에도 시한연장이 허가됨을 문서화하는 결의를 채택하자는 의견도 제시되었었다. 그러나 RRB가 개별 신청별로 심사할 수 있다는 점, 특히 결의를 채택하게 되면 다루어야 할 사안이 많다는 점을 이유로 결의 채택 방식은 선택되지 않았다.[5)]

RRB 60차 회의에서 ITU의 법률고문은 WRC-12의 위와 같은 결정은 주관청들이 불가항력을 이유로 시한연장을 신청한 경우에 RRB가 심사할 권한을 가짐을 인정한 것이라고 해석하였다.[6)] 또한 RRB는 불가항력의 개념을 정하기 보다는 ITU가 UN의 특별 기관인 만큼, RRB는 국제법위원의 불가항력 개념에 관한 결정에 따라야 한다고 회의 의장은 지적하였다.

법률고문은 불가항력의 해당 사유를 나열하는 것보다는 국제법상 불가항력이라고 생각되는 사건의 조건을 설명하였다. 불가항력이 인정되기 위해서는 다음의 조건들이 모두 충족되어야 한다고 그는 설명했다. 첫째 사건이 의무자의 통제를 벗어나는 것이고, 의무자

5) RRB 60차 회의록 7면
6) 위 회의록 8면

스스로의 작위 또는 부작위가 아니며, 둘째 예상되지 않았던 사건이고, 또는 예상가능했더라고 피할 수 없거나 막을 수 없는 사건이어야 하며, 셋째, 그 사건으로 인해서 의무자가 의무를 이행하는 것이 불가능해야 하며, 넷째 불가항력을 구성하는 사건과 의무의 불이행간에는 실질적인 인과관계가 있어야 하며, 마지막으로 불가항력은 추정될 수 없다. 따라서 의무자는 불가항력을 주장하려면 구체적이고, 가시적인 증거를 제시하여야 한다

2012년 WRC plenary meeting의 2월 15일 자 회의록은 BIU 여부에 따라 주파수 지정의 취소여부를 결정하는 시한의 연장 문제는 RRB가 사안별로 결정할 수 있다고 기록하고 있다. (para.3.20, Document 554)

또한 WRC-15의 제7조 Plenary meeting의 2015년 11월 20일자 회의록은 불가항력의 경우에 RRB가 시한의 연장여부를 처리할 권한이 있다고 기록하고 있다.(para. 3.19, Document 504)

(2) 위성궤도와 주파수 확보를 위한 위성의 편의치적

가. 무선국에 대한 관할권의 근거

ITU협약, 구성조약 및 무선규칙상 주관청이 무선국에 대한 관할권을 갖는 것으로 해석된다. 무선규칙을 보면 주관청의 권리와 의무는 다음과 같이 규정되어 있다.

- 전파의 송출을 검사하여야 할 주관청(무선규칙 제3.14조),
- ITU 협약, 구성조약 및 무선규칙의 위반시에 해당 무선국에 대한 관할권을 갖고 있는 주관청(무선규칙 제15.20조),
- 간섭을 주는 무선국에 대해 관할권을 갖고 있는 주관청 및 간섭을 받는 무선국에 대해 관할권을 갖고 있는 주관청(무선규칙 제15.31조)

위 규정들에서 무선국이 특정 주관청의 관할권하에 있음이 전제되고 있다. ITU 무선규칙상 지구정지궤도상의 인공위성은 우주국(Space Station)으로 분류되는데, 우주국도 무선국에 속하는 것이므로 주관청의 관할권에 속한다고 해석된다.

그러나 무선규칙은 그 관할권을 갖는 주관청과 무선국과의 연결관계(link)에 대해서는 아무런 규정도 두고 있지 않다. 달리 말하면 해당 주관청이 왜 그 무선국에 대해서 관할권을

갖는지에 대해서는 무선규칙은 규정하고 있지 않다. 그 이유는 무선국들이 해당 주관청의 영토내에서 운용되기에 영토관할권이 적용되기에 무선국에 대한 관할권이 명시될 필요가 없기 때문이라고 추론될 수 있다. 그러나 우주국의 경우에는 우주공간에 주관청의 주권이 미친다고 볼 수 없기에, 영토관할권 밖에서 우주국이 운용되는 것이므로 관할권의 근거가 있어야 한다.

나. 관할권과 국적

1967년 우주조약, 1972년 우주물체의 등록조약 및 1972년 우주물체로 인한 손해배상 책임에 관한 조약은 우주물체에 대한 관할권을 전제로 규정하고 있지만, 어느 한 조약, 어느 한 조항도 국적에 대해서는 명시하지 않고 있다. 우주물체의 등록이 사실상의 국적 부여에 해당한다고 해석되기도 하지만, 등록의 명시적인 효과가 제8조에 따라 "관할권 및 통제권"인데, "관할권 및 통제권"이 1982년 UN해양법 협약의 경우처럼 국적의 부여에 해당하는가에 대해서는 학설은 양분된다. 관할권을 가진다는 것은 선박이나 항공기와 같이 국적을 갖는다는 의미가 함축되어 있다고 해석된다(mutatis mutandis)고 보는 설과 국적 부여에 이르지 않는 "관할권 및 통제권"에 한정된다고 보는 설 등이다.[7] 궁극적으로는 1967년 우주조약이 우주물체의 등록을 의무화하고 있다고 볼 수 없다는 점, 또한 1972년 우주물체 등록 조약의 체약 국가의 수가 제한적이라는 점을 고려하면, 우주물체의 국적 문제는 국내법에 따른다고 보는 것이 타당하다.

다. 주요 관행

과거의 사례를 살펴보면 통가 왕국이 그러한 방식의 위성망 신청을 공개적으로 행한 최초의 국가다.[8] 1993년 통가 왕국은 자국이 주관청으로 확보한 지구정지궤도 6개 중에

7) Bin Cheng, "International Responsibility and Liability of States for National Activities in Outer Space Especially by Non-Governmental Entities", *Essays in Honour of Wang Tieya*, Ronald St. John MacDonald, Martinus Nijhoff Publishers, 1994, 148면

8) 캐나다 산업성(Industry Canada), *"Study on the Global Practices for Assigning Satellite Licences and Other Elements"*, 용역보고서 , 2010년11월, 56면

한 개를 미국 기업에 사실상 임대(rent)했고, 러시아에서 구입한 위성 2기를 두 궤도에 위치시킨 바 있다. 당시에 인도네시아는 통가의 위성확보가 법리상 부적절하다고("wrong in law") 주장하면서 통가가 사용하지 않는 1개 궤도에 위성을 위치시키기도 하였다.[9] 통가왕국 사례는 지구정지궤도 사전신청 및 조정절차 규정이 무력해지는 이유로서 당초에 조정 대상과 원인에 포함되어 있지도 않던 인공위성을 기업이나 주관청이 확보하고자 하는 궤도에 상대방보다 먼저 이동시키는 최초의 사례에 해당하는 것으로 보인다.[10]

우주물체의 국적을 불문하고 주관청이 변경되는 관행의 획을 그은 중요한 사례는 Intelsat의 민영화 과정에서 영국과 미국이 주관청이 된 사례이다.[11] 1997년 Intelsat의 회사 분리(spin-off)로서 New Skies Satellites사가 수립되어 네덜란드에 본사를 두게 되었다. Intelsat은 2000년 11월 총회에서 민영화 이행방안으로 위성 자산을 별개의 법인으로 이전하기로 결정하고 그 법인의 관할 소재 국가를 Bermuda로 선정하였다. 그리고 영국과 미국을 ITU에의 위성망 통지를 위한 주관청으로 정하였다. 그래서 미국이 22개의 위성과 그 궤도의 주관청이 됐다.[12]

또한 국내법령상 국적을 불문하고 자국이 주관청으로 등록되어 있는 위성망 사용이 허가되기도 한다. 미국 FCC는 미국 위성을 위한 궤도가 있는 경우에 대체 위성의 사용을 허가할 것이라고 위성허가 관련 규정을 제정하면서 공식화 하였다.[13] 또한 위 규정에서 기술적으로 동일한 위성만이 대체 위성이 되는 것은 아니고 ITU 조정 의무를 이행할 수 있는 위성이 대체위성 조건을 충족한다고 밝히고 있다. 예컨대, 2003년에 네덜란드 정부가 주관청이었던 New Skies의 NSS-7 위성을 대체위성으로 사용하는 것을 허가한 바 있고, 2005년에는 당초 미국이 주관청 이었다가 허가 만료후에 캐나다가 주관청이 되었던 DIRECTV 5 위성을 다시 미국 주관청으로 바꾸는 것을 허가한 바 있다. 2010년에는 ProtoStar사의 파산 후에

9) Tiyanjana Maluwa, "*International Law in Post-Colonial Africa*", Martinus Nijhoff Publishers, 1999년, 346면

10) Ibid. 310면

11) Intelsat의 민영화에 대해서는, 김종복 저, 「신 우주법」, 한국학술정보(주), 2011년, 124 - 126면

12) Patricia McCormick, and Maury J. Mechanick, *"The Transformation of Intergovernmental Satellite Organisations: Policy and Legal Perspectives"*, Martinus Nijhoff, 2013년, 97면

13) *Amendment of the Commission"s licensing rules and policies, first report and order*, 18FCC Rcd 10795 2003

Intelsat이 인수한 위성을 미국 정부가 주관청이 되는 것을 허가하였다.

이러한 관행에 나타난 바와 같이 한 국가가 타 국적 인공위성을 기업이 구매 또는 임대하는 것을 허용하고 자국의 명의로 지구정지궤도를 확보한다. 또는 기업이 자신의 국적이나 시장 지역과 관련이 없는 주관청의 명의로 지구정지궤도를 확보한다. 이는 세계적으로 운항되고 있는 상용 선박의 절반 이상이 국적 획득에 있어서 이용하고 있는 편의치적(便宜置籍, flag of convenience)과 같다.[14)]

라. 관련 사건 : 이란 Zohreh-2 위성망과 Eutelsat의 동경 25.5도 분쟁

기초 사실

동경 26도에 이란은 10여 년 전에 Zohreh-2 위성망 신청을 수행한 상태였고 Eutelsat은 2013년에 동경 25.5도에 카타르와 공동으로 위성을 발사할 계획이었다. Eutelsat과 프랑스는[15)] 이란의 동경 26도에 대한 위성망 신청은 3년 동안 "실제 사용" 실적이 없으므로 삭제되어야 한다고 주장했다. 프랑스는 이란이 ZOHREH-2 위성망을 2009년 5월 21일 운용 휴지 이전에 주파수대역 14.0-14.5GHz, 10.95-11.2GHz 및 11.45-11.7GHz 에서 정규적으로 운용했는지에 대한 확인을 2011년 7월에 사무국에 요청하였고 사무국은 이러한 요청에 대한 확인 결과 이란이 확실한 증거를 제시하지 못함으로 등록원부에 등록된 이란의 ZOHREH-2 위성망 신청을 전파규칙 제13.6조에 따라 삭제하였다.

이에 이란은 Eutelsat의 Eurobird 위성을 Arabsat이 임대하였고 그 중 일부를 Zohreh-2 위성망이 재임대받아 사용하고 있으므로 이는 실적으로 인정되어야 한다고 주장했다. 이란은 Arabsat의 중계기 단위가 아니라 주파수 대역의 일부를 사용하였다고 주장하였다. 또한 이란은 2001년~2010년 동안 대체위성으로 러시아의 GORIZONT-38, 미국의 PAS-5, 프랑스의 EUROBIRDTM2 위성을 사용하여 왔다고 주장했다.

14) 선박과 국적 부여 국가간의 진정한 연결관계(genuine link)의 존재를 1982년 UN 해양법 협약이 규정하고 있음에도 불구하고 편의치적 국적이 사실상의 관행이 된 것에 비추어보면, 우주물체와 국적 국가간의 연결관계에 관한 명시적인 규정이 없는 상태에서 이러한 편의치적 행태는 일반적 관행으로서 정당화 될 가능성이 크다고 판단된다. ; 편의치적에 대해서는 유병화 외 2인 공저, 「국제법 II」, 법문사, 2000년, 5면 참조

15) 국가만이 주관청 자격으로 ITU에 대표권을 가지므로 Eutelsat의 위성망 신청을 프랑스 정부가 수행했다

프랑스로서는 자신이 대리하는 위성망을 상대방이 사용하여 이용실적이 있다고 주장하면서 자신의 위성망 이용계획에 대항하는 상황에 처한 것이다. 프랑스는 EUROBIRDTM2 위성을 ZOHREH-2 위성을 위해 사용하도록 이란에 허용한 적도 없으며 그렇게 운용된 적도 없음을 사무국에 통보하였다.

사무국은 Zohreh-2 위성망 신청의 삭제 결정을 잠정적으로 유보하고 양측에게 상호 수락할만한 이해로 가능한 해결책을 찾을 수 있도록 노력해 줄 것을 권고하고 RRB 회의에 이 문제의 해결을 요청하였다.

RRB의 논의와 결정

RRB는 제55차 회의(2010년 11월 29일-12월 3일))에서 이 문제를 검토하여 Zohreh-2 위성망의 권리를 인정하되 분쟁은 당사자간의 해결에 따른다는 결정을 하였다.[16] 뒤이어 열린 제56차 RRB 회의에서는 사무국의 결정에 대해서 각국의 반대와 이의가 제기되었다.

프랑스는 특정 주관청이 타 주관청의 책임하에 있는 우주국을 해당 주관청의 허락 없이 사용하여 자신의 위성망의 주파수 할당을 사용개시 하였다고 통고하거나 혹은 자신의 위성망의 주파수 할당을 정규적으로 사용하였다고 주장할 수 있는지에 대하여 RRB가 입장을 표명할 것을 요구하였다. 아울러 프랑스는 현행 ITU협약 및 무선규칙상 타 주관청의 동의 없이 그러한 사용은 금지되어 있다고 주장했다. 미국은 이란이 PAS-5 (26.15°E) 위성으로 2002~2008 기간 동안 ZOHREH-2 할당을 사용하여 왔다는 주장에 대하여 PAS-5의 운용 주파수가 ZOHREH-2 할당 주파수와 일치하지 않을뿐더러 PAS-5 위성을 이란에 대여한 적도 없으며 PAS-5 위성 운용자는 미국 연방통신위원회(Federal Communications

16) RRB의 결정을 요약하면 다음과 같다.
첫째, ZOHREH-2 위성망의 주파수 할당에 무선규칙 제13.6조를 적용하지 않을 것과 그 위성망 신청을 등록원부(MIFR)에 그대로 유지할 것. 따라서 사무국은 이 결과에 대하여 후속조치 할 것;
둘째, 지구정지궤도 동경 26도 주변에 여러 위성들이 운용중에 있다는 것과 조정(coordination)은 양방향이라는 것 및 무선규칙 제9조의 적용에서 사전공표나 혹은 조정절차를 위한 요청을 먼저 시작하였다는 결과로 어느 주관청이든 특정한 우선권을 가지지 못한다는 점(전파규칙 제9.6호 참조)을 인식하고
셋째, RRB는 이란, 프랑스 및 사우디아라비아 주관청들에게 동경 26도 주변에서 위성망들을 운용할 수 있는 만족할 만한 합의가 이루어질 수 있도록 하기 위해 최상의 호의와 상호존중 및 결의 2(WRC-03개정)의 정신에 입각하여 조정협의를 계속할 것을 촉구함.

Commission, 이하 "FCC"라 함)가 인가한대로 위성을 운용하고 있었음을 확인하는 서한을 제56차 RRB 회의에 제출하였다. 카타르는 향후 위성망운용을 계획하고 있는 국가로 지구정지궤도와 스펙트럼의 합리적인 사용과 공평하고 효율적으로 사용토록 하기 위해서 EUTELSAT을 대표하는 프랑스를 지지한다며 이 문제에 대한 RRB의 재고를 요청하였다.

또한 프랑스는 이란이 미국의 PAS-5와 EUROBIRDTM2를 대여하여 ZOHREH-2 위성망의 주파수 할당을 사용했다는 2004년 12월부터 2008년 7월까지 3년 6개월 동안에는 사실상 ZOHREH-2 위성은 운용휴지 상태에 있었으며 이는 전파규칙 제11.49조에 규정된 운용 휴지기간 2년을 초과한 것이므로 이 위성망의 주파수할당은 주파수등록원부에서 취소되어야 하며 RRB는 프랑스가 제공한 자료와 주장을 근거로 재검토하여 줄 것을 요청하였다.

이러한 각국의 반대와 이의 제기에 대해서 RRB는 주관청간 조정을 우선시 한다는 입장을 표명하였다. 즉 RRB는 지난 제55차 RRB회의의 결론들은 하나의 패키지(package)로 결정된 것이므로 모든 사항들이 함께 속행되고 이행되어야 함을 강조하고, 만족할 만한 해결을 위해 모든 관련 당사국들의 동일한 노력이 필요하다는 점을 지적하였다.

앞에서 살펴 본 바와 같이 주파수등록대장에 등재된 주파수를 삭제함에 있어서 ITU의 사무국과 주관청은 합의하여야 하고, 합의되지 않는 경우에 RRB는 조사할 권한을 갖는다. Zohreh-2 위성망 사건에서 RRB는 위성망의 BIU 여부에 대해서 주관청인 이란이 사용한 실적을 입증하지 못하자 등록원부에 삭제하면서 무선규칙 제13.6조에 따른 권한과 의무를 이행하였다. 그러나 이란이 중계기 단위가 아닌 주파수 대역 단위로 사용한 실적을 주장하자, RRB는 무선규칙 13.6을 적용하지 않기로 결정하였다. 즉, 당사자간의 조정을 촉구하는 것으로 RRB는 자신의 업무를 한정했다.

무선규칙 제13.6조의 문언 해석상 주관청과 사무국이 합의하지 않는 경우에는 삭제 또는 수정 결정을 RRB가 취할 수 있다. 그러나 Zohreh-2 위성망 사건에서 RRB는 삭제 또는 수정이 아니라, 아예 제13.6조의 적용을 배제하는 결정을 하였다.

마. 관련 사건 주관청 변경 Spectrum Five사와 SES사의 서경 96.2도 분쟁[17)]

지구정지궤도의 공평한 접근을 위해서 ITU가 정한 분배 plan상 Bermuda는 서경 96.2도 상의 32개의 BSS채널중에 16개를 할당받고 있다. 이 분배 Plan에서 16개가 아닌 32개를 BSS용으로 버뮤다가 사용하겠다는 변경 신청, 즉 Bermudasat-1 위성망신청을 버뮤다 정부를 대리하여 영국이 ITU에 제출하였다. 이 위성망 신청의 접수일은 2005년 4월 15일이며 따라서 2013년 4월 14일까지 BIU하여야만 삭제되지 않는다.

버뮤다 정부는 룩셈부르그 소재의 SES사의 위성망 사용을 원했고, SES사는 미국 국적 위성인 EchoStar 6호를 영국이 위성망 신청한 그 궤도에서 사용하기로 결정하였다. 결정 당시에 EchoStar 6호는 서경 76.8도에 위치하고 있었으며, 이에 EchoStar 6호 위성이 이동하여야 했다.

반면에 네덜란드 소재의 Spectrum Five사를 대표하여 네덜란드 정부가 2011년도에 서경 95.15도에 BSSNET3-95W 위성망 신청을 하였다. Spectrum Five사는 Bermudasat-1 위성망과의 간섭이 없어야만 했고, 이를 위해서 2013년 4월 14일까지 Bermudasat-1 위성망 신청의 BIU가 안되면 삭제되어야 한다고 주장하려 했다. Spectrum Five사는 삭제 요건중의 하나인 "송출 및 수신 능력의 미확보"가 정부 허가를 득하지 않는 경우를 뜻하는 것이라고 주장하였다. 특히 미국 국내법상의 변경허가를 득하지 않으면 삭제 요건이 충족되는 것이라고 주장하려고 했다.

한편 EchoStar사는 위성 궤도변경신청 절차를 긴급한 경우, 또는 실험용 무선국 등의 사용에 대해서 임시로 특정된 기간 동안만 사용을 허가하는 특별임시허가(Special Temporary Authorization. 이하 "STA"라 함)제도를 통해서 2013년 2월 20일에 FCC에 STA를 신청하였다. 이에 Spectrum Five사는 미국 FCC에 STA 허용에 반대하는 이의(petition)를 접수시켰다. 그러나 미국 FCC는 해당 지역의 위성방송 수신이 끊기지 않아야 할 긴급한 상황이 존재함을 인정한다고 판단한다면서 STA를 부여하였다.

17) 2015년 발표 논문 "지구정지궤도의 사적 거래의 국제법상 지위에 관한 연구"에 실린 내용의 일부입니다.

RRB 결정

Spectrum Five사는 FCC의 결정이 재량 일탈로서 STA 처분 무효를 청구하는 소를 미국 법원에 제기하였다. Spectrum Five사는 ITU 무선규칙 11.44B가 규정하고 있는 BIU의 판단 요소인 송출 및 수신 능력(capability)이 필요한 정부 허가의 획득 여부를 포함하는 것으로 해석된다고 주장했으나,[18] 법원은 이를 배척하였다.[19] 또한 Spectrum Five사는 ITU의 2013년 1월자 회원국들에 보낸 서신에서 "ITU는 위성운용자가 해당 주관청에 신청하였는지를 물을 수도 있다"고[20] 밝히고 있으므로 정부 허가가 중요하다고 주장하였다. 그러나 미국 법원은 Spectrum Five사의 주장은 ITU 서신의 문맥상 의미와 다르다고 판단하였다. 즉 ITU는 2012년 5월에 회원국들에 보낸 서신에서 위성임차인 경우에 주관청은 타 주관청의 책임하에 있는 우주국을 사용하여 자신의 위성망 신청상의 위성망을 사용할 수 있고, 우주국을 책임하에 두고 있는 주관청은 그 우주국의 사용에 대해서 90일 이내에 반대할 수 있고, 반대가 없으면 사용할 수 있는 것이라고 밝히는 바, 문맥상 여기서 주관청이 발부하는 허가증을 ITU가 요구한다는 것의 의미는 단지 조사용이라고 판단했다. 또한 "ITU는 국내법에 따른 규제 제도에 대해서는 직접 관여하지 않으며 위성의 임대사용에 대해서 사무국은 해당 주관청이 송부한 정보 및 국제적 규칙에 따라 판단한다. … 중요한 것은 ITU에 등재된 주파수와 궤도를 사용하는 우주국을 두고서 특정 주관청이 자신이 아닌 타 주관청이 사용하는 것에 대해서 반대하는 경우에 사무국은 해당 주파수와 궤도의 법적 지위에 대해서 조사하는 방법 이외에 사무국으로서는 대안이 없다는 점이다. 조사 결과 예컨대 주어진 유효 기간 내에 BIU가 되지 않았다는 등의 사유가 발생한다면 위성망은 등록원부에서 삭제될 수도 있다."고 밝히고 있다.

18)무선규칙 제11.44B "A frequency assignment to a space station in the geostationary-satellite orbit shall be considered as having been brought into use when a space station in the geostationary satellite orbit with the capability of transmitting or receiving that frequency assignment has been deployed and maintained at the notified orbital position for a continuous period of ninety days."

19) *Spectrum Five LLC v. Federal Communications Commission*, United States Court of Appeals, District of Columbia Circuit. July 11, 2014758 F.3d 254

20) "the ITU may request "the satellite network operators' license application to the administration."

요컨대 ITU는 주관청의 허가가 없으면 해당 우주국을 사용할 수 없다는 입장을 밝히지는 않았다. 2013년 9월 3일 ITU는 Bermudasat-1 위성망 신청을 주파수등록대장에 등재하였다.

Ⅲ. 2016년도 RRB의 주요 결정

1. 위성망 사전조정 자료의 수정 문제 :

프랑스 주관청의 설명에 따르면 2015년 11월 28일자로 프랑스 주관청이 WRC-15에 따라서 신규로 할당받은 13.4-13.65GHz의 FSS용 위성망을 사용하고자 사무국에 사전공표 자료를 통보하는 등의 공표 절차를 이행하였다.

카타르 주관청에 따르면, 위 "as received"로서의 사전공표자료를 검토한 결과 무선규칙이 정한 규격을 준수하지 못한다고 판단하고 있었는데, ITU 사무국은 BR IFIC 2823회람에서 위 위성망을 "formally published" 위성망으로 취급하면서 사무국의 검토결과 의견은 "문제없음"(favourable)이었다. 카타르 주관청이 RRB가 검토하여 as received 사전공표자료에 대한 사무국 검토결과를 철회하고, 또한 프랑스의 위성망 신청은 무선규칙 9.58가 규정하고 있는 수정절차가 적용되어, 수정된 후에 다시 사전공표 신청을 거쳐야 한다고 주장했다.

사무국의 설명에 따르면, 2015년 11월 29일에 프랑스 주관청으로부터 사무국 위성망 신청을 접수하였고, 사무국이 공식적인 검토를 시작하기 전인 2015년 12월 7일에 사무국은 기제출된 데이타에 착오가 있음을 알리는 문서를 프랑스로부터 접수하였고, 뒤이어 2016년 1월 5일자로 사무국은 BR IFIC 2810을 회람시켰는데, 프랑스가 지적한 착오를 수정하지 않고 "as received" 상태 그대로였다. 카타르 주관청은 2016년 7월 26일자로 이의제기를 접수시켰다.

또한 사무국 설명에 따르면 2016년 7월 5일자 BR IFIC 2823은 착오를 수정한 데이터를 담고 있으며 검토결과 "문제없음"이었고, 카타르는 수정되지 않은 as received 데이터를

사용하여 검토하였다.

프랑스는 경미한 착오가 있는 경우에 사무국이 수정하여 회람시키는 것이 1960년대 이래 지속되어온 관행이라고 주장했다. 이어서 프랑스는 카타르의 주장은 ITU 구성문서 제1조에 명시된 국제협력을 위반하는 것이라고 주장했다.

RRB는 무선규칙을 위반한 사실을 발견하지 못했다고 결정하고 카타르 주관청의 요청을 거부하였다. 특히 RRB는 "as received" 정보를 주관청들이 간섭여부를 평가하는 정보로 사용하지 않을 것을 권고한다고 밝혔다.

2. BIU 시한 연장 문제

(1) 인도네시아 사례

인도네시아의 Telkom-3 위성의 발사가 실패하여 위성은 전손되었고, 이에 인도네시아 주관청은 이를 불가항력으로 보아서 위의 시한이 연장되어야 한다고 주장했다.

파푸아 뉴기니아는 2009년 8월 28일자로 NEW DAWN 21 위성망 신청을 ITU에 접수하였다. 따라서 위성망의 실제 사용개시 시한은 2016년 8월 28일이었다. 위 위성망을 사용할 위성의 제작계약이 2013년 체결되고 발사 계약도 2013년에 체결되어 위성발사가 진행되고 있었으나 발사서비스 제공사인 프랑스의 ArianeSpace사가 발사체에 같이 탑재하고갈 위성이 확보되지 않았음을 이유로 발사 연기를 결정하였다. 그 결과 실제 사용개시 시한을 파푸아 뉴기니아 주관청은 준수하지 못하게 되었고, 그러한 사정이 주관청의 통제 밖에 있음을 이유로 RRB 시한연장을 요청하였다.[21)]

RRB는 인공위성의 제작은 완료되었다는 점에서 해당 주관청은 가능한 모든 노력을 다한 것으로 평가된다는 점, co-passenger 문제는 주관청의 통제 밖 사항의 전형적인 예 라는

21) RRB 73차 회의 보고서 2016년10월 17-21, Document RRB16-3/11-E 21 October 2016

점, 베트남의 VINASAT 위성망 쟁점에 대해서 WRC-07회의는 RRB에게 co-passenger 문제에 대한 권한을 인정한 바 있었다는 점 등을 고려하여 4개월 연장하였다.[22)]

(2) 브라질 사례

브라질 주관청은 발사체의 발사일정 연기를 이유로 BIU 시한의 연장을 요청하였다. 2016년 3월부터 6월까지로 예정되어 있던 발사 일정이 co-passenger 위성의 제작 지연으로 인해서 2016년 11월에서 2018년 2월로 연기되었다고 주관청은 통보하였다. BIU 시한은 2016년 10월 7일이었다.

co-passenger 문제로 인한 발사일정의 연기를 예견할 수 없는 사건으로 취급하여 불가항력에 속한다고 보아야 하는가에 대해서 RRB는 검토하였다. 다만 불가항력 사유 및 co-passenger 사유 둘 중의 하나만 충족하여도 시한연장은 허가될 수 있다고 RRB는 판단했다.

한편 브라질 주관청은 co-passenger 지연을 입증하는 자료를 제3자 비밀로 취급할 것을 요청하였는데, RRB의 검토는 투명하게 이루어져야 한다는 점에서 이를 받아들일 것인가가 쟁점이 되었다. 즉 브라질 주관청은 입증 자료를 사무국에는 제출하였지만 이를 RRB에는 전달되지 않도록 요청하였고 RRB는 자료를 보지 않고는 결정할 수 없었다. 이에 RRB는 입증 자료를 검토한 사무국의 의견을 신뢰하고 판단하기로 하고 시한연장을 결정하였다.

(3) 러시아 사례

러시아 주관청이 동경 17도 상의 INTERSPUTNIK-17E, INTERSPUTNIK-17E-CK 및 INTERSPUTNIK-17E-B 위성망의 BIU 시한 연장을 요청하였다. 위 위성궤도에 2011년 12월 11일자로 AMOS-5 위성이 발사되어 운용되고 있었는데 2015년 11월 21일에 급작스러운 전력공급 이상으로 인해서 위성의 운용이 완전히 정지되는 전손(total failure) 상태가 되었다. 러시아 주관청은 2015년 11월 22일자로 위 위성망의 운용 유예에 대해서

22) RRB 비공개 회의록, Document RRB16-3/12-E, 23면, 9 November 2016, MINUTES OF THE 73rd MEETING OF THE RADIO REGULATIONS BOARD, 17-21, October 2016

사무국에 2016년 2월 3일자로 통보하였다. 러시아 주관청은 불가항력을 이유로 2019년 11월 21일까지로 1년 연장을 요청하였다.

(4) 파푸아 뉴기니아 사례

위성이 발사되어 발사체로부터 분리된 후에 궤도로 진입하기 위해서 현재까지는 전화학 추진체계(All-Chemical Propulsion)를 사용하고 있으나, 이를 전기로 대체하는 전전기 추진체계(All-Electric Propulsion)가 실용화 되었다. 통상 기존의 6kw 클래스 통신위성의 경우 발사할 때의 질량이 4톤 정도에서 2톤 정도까지 줄일 수 있다. 위성에 들어가는 가격요소로, 통신위성 자신의 가격은 전체의 45~65%를 차지하고, 다음으로 발사비용이 전체의 25~45%, 그리고 위성보험이 10% 정도라고 한다. 발사비용은 전화학추진 위성(All-Chemical Propulsion Satellites)과 전전기추진 위성(All-Electric Propulsion Satellites)을 비교하면 발사비용만도 6,250만~7,500만 달러 정도의 절감이 가능하다.

파푸아 뉴기니아 주관청은 그 추진체계를 사용하는 위성을 사용하기 위해서는 6 내지 8개월이 더 소요되기에 BIU 시한을 준수하지 못할 것으로 예상함을 이유로 하여 무선규칙의 적용 완화를 요청하였다. 즉 위성의 발사 자체는 BIU 시한을 준수하지만 발사체로부터 위성이 분리되어 궤도에 진입하는 데에 그러한 시간이 더 소요되므로 BIU의 준수여부를 궤도진입하여 운용이 아니라 발사로 판단하여 달라는 것이 파푸아뉴기니아 주관청의 요청이었다.

RRB는 WRC-15에서 전전기추진체계에 관한 검토가 있었으나 추가 검토가 필요하다고 결정된 바 있다고 지적하였다. RRB는 그러한 적용 완화의 문제는 RRB의 권한을 넘어서는 것이라고 판단했다. 그래서 현재로서는 주관청이 전전기추진체계를 사용하더라도 BIU 시한을 준수하여야 함을 고려하여 일정을 계획하여야 한다는 입장을 택했다.

이에 RRB는 파푸아뉴기니아 주관청의 요청을 거부하였다.[23)]

23) RRB 제71차 회의록, Document RRB16-1/22-E 23 February 2016

(5) 이집트 사례

이집트는 동경 14도, 35.5도 및 44도에 위성망신청을 하였고, BIU 시한은 2019년 5월 11일이다. 이집트 주관청은 불가항력에 해당하는 사건을 이유로 BIU 시한의 연장을 요청하였다.

이집트 주관청은 2011년 1월에 발생한 혁명과 2013년에 발생한 테러 공격으로 인해서 이집트 경제가 악화되고 국가신용도가 하락 하였으며 외환보유고도 매우 낮은 수준이기에 이집트 정부가 위성사업을 재정적으로 부담할 수가 없음을 불가항력에 해당한다고 주장하였다.

이에 대해서 RRB 위원들은 경제적 사정을 불가항력으로 간주한다면 많은 주관청들이 똑같은 사유를 주장할 우려가 있다고 지적하였다. 반면에 다른 위원들은 혁명 등의 사건은 예견할 수 없는 것이고 따라서 이집트 정부의 통제밖의 상황이므로, ITU법률고문이 제시하였던 불가항력의 판단 기준을 충족한다는 의견도 제시하였다. 또한 ITU는 후진국에 대한 지원에 관한 결의를 채택한 바 있기에 이집트 주관청의 요청을 수락하자는 의견도 제시되었다.

RRB 의장은 과거 이란 공화국의 사례에서 경제적 제재는 불가항력에 해당하지 않는다고 RRB가 판단했었다는 점, 과거 후진국에 대한 고려로서 인정되었던 BIU 시한 연장사례인 멕시코 사례에는 발사 실패를 불가항력으로 간주했었다는 점, 그래서 불가항력의 주된 판단 기준은 기술적 요인과 자연적 재난이라는 점 등을 이유로 제시하면서 불가항력 인정에 반대하였다.

ITU법률 고문은 국제사법법원 및 중재재판 등에서의 법리는 혁명과 반란은 분명히 불가항력의 사유에 해당한다고 밝혔다. 특히 그러한 논리의 첫째 요소는 그러한 상황이 통제밖인가의 여부, 둘째, 예견가능한 상황이더라도 회피할 수 있는가의 여부, 셋째, 그러한 사유로 인해서 해당 의무자가 의무를 이행할 수 없는가의 여부라고 지적하면서, 신용도 하락 등으로 인해서 이집트 정부가 위성사업을 할 수 없음을 입증하여야 한다고 지적했다. ITU 법률고문은 그러한 점을 고려하여 판단하는 주체는 RRB이지 자신은 아니라고 주장했다.

이에 RRB는 ITU 법률고문이 제시한 기준이 충족된다고 판단하고, 이집트 주관청의 해당 BIU 시한을 3년 연장하기로 결정하였다. 다만 RRB는 이와 같은 상황이 다시 제기되어도 그 사안별로 판단한다는 점을 명시하였다.[24)]

3. 위성망 등재 취소 및 복원 문제

(1) 나이제리아 위성망 취소 사례

나이제리아 주관청은 NIGCOMSAT-1R 위성망을 BIU 하겠음을 2015년 8월 14일자로 사무국에 통보하였다. 또한 사무국이 2015년 4월 19일은 무선규칙 11.44B에 따라서 BIU 시한종료라는 사무국의 제안이 나이제리아 주관청은 2015년 10월 19일자로 동의하였다.

2015년 11월 11일자로 사무국은 나이제리아 주관청에 공개된 정보에 따르면 동경 42.5도에 NIGCOMSAT 1R 위성의 존재를 확인할 수 없음을 통보하고 위 위성이 BIU인지의 여부, 아울러 현재 해당 궤도에서 운용중인 위성의 식별에 대해서 무선규칙 13.6에 따라서 나이제리아 주관청의 해명(clarification)을 요구하였다. 나이제리아 주관청이 응답하지 않자 사무국은 2016년 3월 23일 및 5월 26일자로 다시 요청하였다. 2016년 7월 11일자로 사무국은 무선규칙 13.6에 따라서 RRB에 궤도지정 취소 결정을 요청하였고 아울러 나이제리아 주관청에도 이를 통보하였다.

RRB는 사무국이 무선규칙의 관련 조항의 적용에 있어서 틀림이 없으며 따라서 해당 위성망의 위성궤도 지정을 무선규칙 13.6에 따라서 취소하는데에 합의한다고 결정하였다.[25)]

(2) 이태리 위성망 등재 복원 사례

이태리의 SICRAL-4-21.8E 위성망은 2015년 10월에 사무국에 의해서 그 주파수 지정이 취소되었었다. 당시 취소 사유는 위성망이 BIU되지 않았기 때문이다. 그런데 2016년 초에 이태리 주관청은 그 위성망이 군사용으로 사용되고 있으며, 이는 ITU Constitution 제48조가

24) RRB 제71차 회의록, Document RRB16-1/22-E 23 February 2016
25) RRB 제73차 회의 Document RRB16-3/11-E 21 October 2016

보장하는 군사적 용도에 관한 주관청의 전적인 재량에 속하는 사항이라고 ITU에 통보하였다.

취소 당시에 ITU 사무국이 해당 위성망이 BIU 하였는가를 이태리 주관청에 질의하자, 이태리의 국방성이 회신하여 왔는데, 이태리 주관청이 제48조를 당시에는 원용하지 않았었고, 이에 사무국은 취소 의견을 표시했었다. RRB도 당시에는 이태리 주관청이 제48조를 명시적으로 원용하지 않는 한, ITU가 제48조를 적용할 수는 없다는 입장을 취했고, 결국 위성망 지정은 취소되었었다.

또한 RRB는 무선규칙 13.6조는 취소 당한 주관청이 취소 결정에 대해서 이의를 제기하는 등의 불복에 관한 절차가 명시적으로 규정하고 있지는 않지만, RRB가 자신의 결정을 번복할 수 없다고 해석되지는 않는다고 판단했다.[26)]

이에 RRB는 해당 위성망 지정에 대한 이태리 주관청의 요청을 받아들이고 위성망을 다시 등재하기로 결정하였다.

4. 주관청 변경 문제

노르웨이 주관청이 위성운용사인 Steam Systems의 요청에 따라서 STEAM-0, STEAM-1 STEAM-2, 및 STEAM-3 위성망의 주관청을 미국으로 변경함을 승인했다고 RRB에 통고하였다. 노르웨이 주관청은 RB가 주관청이 노르웨이에서 미국으로 2016년 7월 1일자로 변경됨을 International Frequency Information Circular에 공지할 것을 요청하였다.

노르웨이 주관청과 미국 주관청은 다른 위성망에 대해서는 조정권이 변경되지 않음을 상호 확인했다고 ITU에 통고하였다. 또한 미국 FCC는 위 위성망에 대해 주관청으로서의 기능을 수행하겠다고 ITU에 통고하였다. 아울러 미국 FCC는, 원칙상의 문제로서, 궤도 자원과 주파수 자원의 불법거래로 간주될 수 있는 여하한 행위에도 반대한다는 의사를 표시하였다. 특히 미국과 노르웨이 주관청간에는 이 거래에 관련된 여하한 보상도 없었다고 미국 FCC는 확인하였다.

26) RRB 제71차 회의록, Document RRB16-1/22-E 23 February 2016

RRB는 이 요청이 첫번째 사례임을 확인하였다. 과거에는 국제기구가 위성망을 운영하는 경우에, 당해 국제기구의 회원국 중의 하나가 주관청 역할을 수행하다가 다른 회원국 주관청에 업무를 이전하는 경우는 있었지만, 국가가 주관청으로 관리하던 위성망에 대해서 주관청 업무를 다른 국가에 이전하는, 달리 말하면 위성망의 관리를 다른 국가로 이전하는 경우는 처음이었다. 또한 RRB는 전자의 경우를 다루는 ROP는 제56차 및 제57차 RRB 회의에서 채택된 바 있었으나 이러한 경우를 고려한 ROP 규정은 없고, 아울러 RR에도 이를 다루는 규정은 없다고 확인했다.[27)]

이에 RRB의 위원들은 노르웨이 주관청과 미국 주관청의 요청을 ITU가 수용하면 위성궤도 자원의 거래를 인정하는 결과를 낳을 수 있다는 점, 여러 가지 사정을 고려하면 이 안건을 WRC나 전권회의가 다루어야 하거나, 또는 RRB는 이 요청을 심의하지 않고 각하하는 방안이 타당하다는 점 등의 주장을 제기했다.

결국 RRB는 두 주관청의 선량한 의사는 인정되는 바이나, 무선규칙의 어떤 규정도 이를 다루고 있지 않고 있으며, 이 사안은 권능있는 회의체가 다루는 편이 타당하지 RRB가 다룰 사안이 아니라고 결정했다.

Ⅳ. 결론 및 시사점

RRB의 2016년 주요 결정을 요약하면 다음과 같다.

- BIU 시한의 연장에 있어서 위성의 발사실패 등의 기술적 요인을 불가항력의 주된 사유로 인정하되, 다른 사유에 관해서는 RRB의 권한에 따라서 판단할 수 없다는 입장이 견지되고 있으며, 또한 RRB의 결정은 선례구속의 효과를 갖지 않는다는 입장이 강조되고 있다.

27) RRB 비공개회의록, 2016년5월, 9면

- 주관청들이 BIU 기준을 준수하기 위해서 타 주관청의 위성을 사용하는 편의치적에 대해서 RRB는 그 위성이 BIU 기준에 맞는가에 대해서 위성의 국적이나 관할권에 대해서 심사하지 않고, 단지 위성이 해당 궤도에서 운용되고 있는가의 기술적 사안에 대해서만 심사한다는 입장을 견지하여 왔다. 또한 RRB는 주관청들이 위성궤도의 주관청을 변경을 공식적으로 요청하는 경우에는 RRB의 권한밖의 사안이라는 입장을 취하였다.

이러한 RRB의 입장 및 결정에서 도출되는 시사점은 다음과 같다.

- 위성의 국적, 관할권 또는 위성궤도의 신청 주관청 등에 관련된 편의치적 문제에 대해서 RRB의 결정 근거가 될 수 있는 원칙이나 규칙이 아직 없다.
- 우리나라의 경우 무궁화 위성의 해외 판매로 인해서 해당 궤도에 대한 권리가 상실될 수도 있었는 바, 그러한 문제에 대처하기 위해서는 RRB 및 각국의 관행 등에 대한 지속적인 모니터링이 필요하다고 판단된다.

부 록

〈부록 1〉 2016년 RRB 주요 Cases

1. Submission by the Administration of Papua New Guinea requesting a decision from the Radio Regulations Board on the bringing into use of frequency assignments to a satellite network with an all-electric satellite when the launching of the satellite is completed prior to the regulatory deadline
2. Submission by the Administration of Egypt regarding the status of the NAVISAT satellite networks
3. Submission by the Islamic Republic of Iran regarding the status of the IRANDBS4-KAFL satellite network
4. Submission by the Administration of the United States regarding the status of the ACS-1 and MCS-1 satellite networks
5. Submissions by the Administrations of Norway and the United States on the change of the notifying administration for the satellite systems STEAM-0, STEAM-1, STEAM-2 and STEAM-3C
6. Submission by the Administration of Malaysia regarding the status of the MEASAT-91.5E-30B satellite network
7. Submission by the Administration of Brazil regarding the status of the STAR ONE D1 satellite network
8. Submission by the Administration of the Russian Federation regarding the status of the INTERSPUTNIK-17E, INTERSPUTNIK-17E-CK and INTERSPUTNIK-17E-B satellite networks
9. Submission by the Administration of Indonesia requesting an extension of the regulatory time-limit to bring back into use the frequency assignments of the PALAPA-C3-K satellite network
10. Submission by the Administration of Papua New Guinea requesting an extension of the regulatory time-limit to bring into use the frequency assignments of the NEW DAWN 21 satellite network at 60°E

10. Submission by the Administration of Israel requesting an extension of the regulatory time-limit to bring into use the AMS-CK-17E satellite network
11. Submission by the Administration of France concerning a request for an extension of the regulatory time-limit for the bringing into use of frequency assignments to the F-SAT-N-E-70.5E satellite network in the 30/20 GHz range
12. Request for a decision by the Radio Regulations Board for cancellation of frequency assignments in the band 3 702-6 420.5 MHz to the NIGCOMSAT-1R satellite network under No. 13.6 of the Radio Regulations
13. Submission by the Administration of Papua New Guinea requesting a decision from the Radio Regulations Board to reinstate the Part B and notification filings of the AFRISAT 3W-PKU satellite network
14. Submission by the Administration of Qatar on the examination of the F-SAT-N5 satellite networks (B1FR transmit beam)
15. Submission by the Administration of Luxembourg requesting the revision of the examination of the LUX-30B-G4-19.2E satellite network under Articles 6 and 8 of Appendix 30B

Radio Regulations Board
Geneva, 1-5 February 2016

INTERNATIONAL TELECOMMUNICATION UNION

Document RRB16-1/22-E
23 February 2016
Original: English

MINUTES*

OF THE

71st MEETING OF THE RADIO REGULATIONS BOARD

1-5 February 2016

Present: Members, RRB
Ms L. JEANTY, Chairman
Mr I. KHAIROV, Vice-Chairman
Mr M. BESSI, Mr N. BIN HAMMAD, Mr D.Q. HOAN, Mr Y. ITO, Mr S.K. KIBE, Mr S. KOFFI, Mr A. MAGENTA, Mr V. STRELETS, Mr R.L. TERÁN, Ms J.C. WILSON

Executive Secretary, RRB
Mr F. RANCY, Director, BR

Précis-Writers
Mr T. ELDRIDGE and Ms A. HADEN

Also present: Mr Y. HENRI, Chief, SSD
Mr A. MÉNDEZ, Chief, TSD
Mr A. GUILLOT, ITU Legal Adviser
Mr A. MATAS, Head, SSD/SPR
Mr M. SAKAMOTO, Head, SSD/SSC
Mr J. WANG, Head, SSD/SNP
Mr B. BA, Head TSD/TPR
Ms I. GHAZI, Head, TSD/BCD
Mr N. VASSILIEV, Head, TSD/FMD
Mr D. BOTHA, SGD
Ms K. GOZAL, Administrative Secretary

* The minutes of the meeting reflect the detailed and comprehensive consideration by the members of the Radio Regulations Board of the items that were under consideration on the agenda of the 71st meeting of the Board. The official decisions of the 71st meeting of the Radio Regulations Board can be found in Document RRB16-1/21.

(394543)

	Subjects discussed	Documents
1	Opening of the meeting	-
2	Late submissions	-
3	Report by the Director of BR	RRB 16-1/5 + Add.1-6
4	Application of No. 13.6 of the Radio Regulations for cases where frequency assignments are used in space services with a direct or indirect reference to the provisions of Article 48 of the ITU Constitution	RRB16-1/5, RRB16-1/14, RRB16-1/15, RRB16-1/DELAYED/1
5	Request by the Bureau to the Radio Regulations Board to consider the possible reinstatement of frequency assignments of the SICRAL-4-21.8E satellite network in the band 2204.2249-2204.8249 MHz	RRB16-1/3
6	Submission by the Administration of Papua New Guinea requesting a decision from the Radio Regulations Board on the bringing into use of frequency assignments to a satellite network with an all-electric satellite when the launching of the satellite is completed prior to the regulatory deadline	RRB16-1/8
7	Receivability of requests for coordination or notification of satellite networks prior to the entry into force of WRC-15 decisions	RRB16-1/4, RRB16-1/9, RRB16-1/10, RRB16-1/11, RRB16-1/13, RRB16-1/16, RRB16-1/17, RRB16-1/18, RRB16-1/19, RRB16-1/20, RRB16-1/INFO/1, RRB16-1/INFO/2, RRB16-1/INFO/3
8	Request by the Bureau for a decision by the Radio Regulations Board for the cancellation of frequency assignments to the ACS-1 and MCS-1 satellite networks under No. 13.6 of the Radio Regulations	RRB16-1/6, RRB16-1/DELAYED/3, RRB16-1/DELAYED/4
9	Rules of procedure	RRB16-1/7; Circular Letters CCRR/53 and CCRR/54
10	Submission by the Administration of Egypt regarding the status of the NAVISAT satellite networks	RRB16-1/12, RRB16-1/DELAYED/2, RRB16-1/DELAYED/5
11	Submission by the Islamic Republic of Iran regarding the status of the IRANDBS4-KAFL satellite network	RRB16-1/1
12	RRB tasks following WRC-15 decisions	CR/389
13	Confirmation of the dates of the next meeting and indicative dates of future meetings	-
14	Approval of the summary of decisions	RRB16-1/21
15	Closure of the meeting	-

(394543)

1 Opening of the meeting

1.1 The **Chairman** opened the meeting at 1400 hours on Monday, 1 February 2016. She welcomed participants and wished them a fruitful meeting, noting the importance of the outcome of the recent WRC-15 and its impact on the work of the Board.

1.2 The **Director**, welcoming participants on his own behalf and that of the Secretary-General, stressed how important it was for the Board to take consistent decisions that would ensure a stable framework conducive to investment in telecommunications. He noted that the recent WRC-15 had endorsed all the decisions taken by the Board prior to the conference, thus confirming the ITU membership's recognition of the Board's valuable work.

2 Late submissions

2.1 When adopting its agenda, the Board **agreed** that three late submissions (RRB16-1/DELAYED/1-3), from the Administrations of Norway, Egypt and the United States, pertained to items on its agenda and would be taken up, for information, under those items. **Mr Strelets** nevertheless noted that RRB16-1/DELAYED/3 was available in English only, and comprised well over twenty pages. It was unreasonable to expect all Board members to be able to assimilate it completely in order to discuss it properly.

2.2 Following the start of the meeting, the **Chairman** drew attention to two further late submissions (RRB16-1/DELAYED/4 and 5), received on 2 February from the Administrations of the United States and Egypt, respectively, pertaining to items on the Board's agenda. The Board **agreed** to take those late submissions into consideration, for information, since, in accordance with its working methods in Part C of the Rules of Procedure, late submissions received after the start of a meeting could be taken into consideration by the Board "if so agreed by Board members" (see discussion under §§8 and 10 of these minutes).

3 Report by the Director of BR (Documents RRB16-1/5 and Addenda 1-6)

3.1 The **Director** introduced his customary report in Document RRB16-1/5, drawing attention to Annex 1 summarizing the Bureau's actions to implement the decisions taken by the Board at its 70th meeting. With regard to harmful interference caused by Italy to television and FM broadcasting stations in neighbouring countries, he noted that Malta (Addendum 1), Croatia (Addendum 2), Slovenia (Addendum 3) and Switzerland (Addendum 4) reported a lack of progress. That was hardly surprising, as the Administration of Italy (Addenda 5 and 6) did not expect the switch-off of interfering stations to be completed before the end of April 2016.

3.2 **Mr Ba (Head TSD/TPR)**, introducing the sections of the Director's report related to terrestrial systems, noted that Annex 2 described the work of the Bureau in processing filings related to terrestrial services. Reports of harmful interference or infringements of the Radio Regulations were dealt with in §4 of the report, and in particular §4.2 focused on harmful interference caused by Italy to neighbouring countries. In addition to the reports in Addenda 1-4, the Administration of France had also informed the Bureau that interference caused by Italian stations continued.

3.3 The **Chairman** suggested that the Board should review the situation regarding interference caused by Italy at its next meeting, on the basis of a report by the Bureau.

3.4 **Mr Bessi** suggested that the Board should ask the Administration of Italy to work with the Bureau in order to provide a full account of progress to the next meeting. Affected neighbouring administrations should also provide input on the status of interference.

(394543)

3.5 **Mr Strelets** questioned the purpose of the multi-bilateral meetings that Italy called for at the end of its road map in Addendum 6.

3.6 **The Director** said that it was not encouraging that Italy appeared to be casting doubt on the spectrum requirements of neighbouring countries for FM frequencies.

3.7 **Mr Henri (Chief SSD)**, introducing those parts of the Director's report dealing with space systems, drew attention to Annex 3 on the processing of notices for space services. He provided updated information covering December 2015. With regard to cost recovery for satellite network filings, he drew attention to Annex 4 listing satellite network filings where payment had been received after the due date but prior to the BR IFIC meeting dealing with the matter.

3.8 **Mr Terán** pointed out that in Annex 4 the ARGOS-4A satellite was incorrectly listed as belonging to Argentina.

3.9 **Mr Henri (Chief SSD)** confirmed that the administration for ARGOS-4A satellite network should refer to France instead of Argentina, and that the Bureau continued to take the filing into account. With regard to the PEGAS-4-30B satellite network, the Bureau had in fact cancelled the filing due to non-payment but the Russian Federation had finally met its obligation by paying the invoice, without asking the Bureau to reinstate the cancelled filing.

3.10 **Mr Strelets** observed that some administrations were unable to recoup cost-recovery payments from operators.

3.11 The **Director** noted that an administration was responsible for cost-recovery payment, even if a satellite network filing was cancelled for non-payment. To avoid this, some administrations only submit filings if the money has already been deposited with them by the operator.

3.12 **Mr Henri (Chief SSD)** drew attention to the tables in §5 of the Director's report, providing statistics on the suppression of satellite network special sections and submissions under Article 4 of Appendices 30 and 30A and Article 6 of Appendix 30B under various provisions of the Radio Regulations, in particular No. 13.6. The aim was to ensure that the MIFR reflected reality.

3.13 **Mr Bessi** congratulated the Bureau on cleaning up the MIFR.

3.14 **Mr Strelets** suggested that, to avoid misleading readers, the title of the first table in §5 should refer to the suppression either of all frequency assignments to satellite networks or of a part of the frequency assignments to satellite networks.

3.15 **Mr Henri (Chief SSD)** invited the Board to note the action of the Bureau in regard to frequency assignments recorded in the MIFR with missing due diligence information under Resolution 49, as described in §6 of the Director's report. Responding to a query by **Mr Bessi**, he explained that the action was part of the Bureau's effort to update the MIFR and that it concerned old assignments. Nowadays, the problem would not arise because administrations had to provide due diligence information under Resolution 49 and confirm bringing into use. **Mr Strelets** said that, from an editorial standpoint, the Board should note the actions taken by the Bureau (not the "course of actions").

3.16 The **Chairman** noted that Article 48 of the ITU Constitution, although the subject of §7 of the Director's report, would be discussed fully under a separate agenda item (see §4 of these minutes) but invited Chief SSD to introduce the matter briefly.

3.17 **Mr Henri (Chief SSD)** said that in their submissions to the present meeting the Administrations of France, Luxembourg, the United Kingdom and Norway questioned the Bureau's treatment of cases under No.13.6 of the Radio Regulations, outlined in the last paragraph of §7, where an administration confirmed that frequency assignments were being used for governmental purposes but did not cite Article 48 of the ITU Constitution. With regard to the Bureau's practice in

applying No. 5.532B and No. 5.535 to frequency assignments, as agreed with the administration that had raised the matter at WRC-15, the Bureau was bringing the issue to the attention of the Board, in §8 of the Director's report.

3.18 **Mr Bessi** said that the Bureau's practice explained in §8 was in line with the Radio Regulations and should be maintained.

3.19 **Mr Strelets** observed that, from an editorial standpoint, the last line of §8 should refer to a "course of action", not an "issue". He endorsed the approach described.

3.20 **Mr Henri (Chief SSD)**, referring to §9 of the Director's report, said that the Board was invited to note the Bureau's decision to accept requests for suspension under No. 11.49 received more than six months from the date on which use had been suspended. He noted that, as from 1 January 2017, there should be no further information of the type provided in the table in that paragraph, taking account of the modifications of No. 11.49 agreed by WRC-15.

3.21 The **Chairman** thanked the Director for the extensive information contained in his report and congratulated the Bureau on meeting the regulatory deadlines. She suggested that the Board conclude as follows:

"The Board discussed in detail Document RRB16-1/5 containing the Report of the Director, Radiocommunication Bureau, on the issues on general activities covered by the BR and thanked the BR for the complete and detailed information provided.

The Board also considered Addenda 1 to 6 of Document RRB16-1/5 concerning the issue of harmful interference to the sound and television broadcasting services caused by Italy to its neighbours. The Board appreciated the continued efforts of the Administration of Italy, its neighbouring countries and the Director, Radiocommunication Bureau, on this issue. Noting the time frame indicated in the road map provided by the Administration of Italy regarding the situation of the television broadcasting stations in relation to the date of the next meeting of the Board, the Board requested for a detailed report following the process described in the road map of actions to be completed by the end of April 2016. The Board noted that the neighbouring countries of Italy indicated in Addenda 1-4 that no progress in resolution of the problem had been experienced yet. The Board encouraged the administrations to continue their efforts to resolve the situation and the BR in its supporting role. However, the Board expressed its concern in relation to the situation of the FM broadcasting stations and the fact that the road map of actions did not provide clear indications as to its resolution."

3.22 It was so **agreed**.

3.23 The Director's report in Document RRB16-1/5 and Addenda 1-6 was **noted**.

4 Application of No. 13.6 of the Radio Regulations for cases where frequency assignments are used in space services with a direct or indirect reference to the provisions of Article 48 of the ITU Constitution (Documents RRB16-1/5, RRB16-1/14, RRB16-1/15 and RRB16-1/DELAYED/1)

4.1 **Mr Henri (Chief SSD)** drew attention to §7 of the Director's report in Document RRB16-1/5. The last paragraph of that section set forth how the Bureau would apply No. 13.6 to frequency assignments to a satellite network for which the notifying administration indicated their use for governmental purposes without mentioning either Article 48 or military radio installations: the Bureau would consider that a clarification by an administration in response to a request under No. 13.6 confirming that the frequency assignments in question were being used for governmental purposes and had been brought into use on a specific date or had been in continuous use since that date in accordance with the notified characteristics would be sufficient for the Bureau to conclude

the matter and retain the frequency assignments in the MIFR. In their contributions, the Administrations of France and Luxembourg (Document RRB16-1/14), the United Kingdom (Document RRB16-1/15) and Norway (Document RRB16-1/DELAYED/1) questioned the Bureau's approach, and maintained that in such cases filings being investigated under No. 13.6 could be closed only if the administration concerned explicitly invoked Article 48. They requested that the matter be brought before the Board with a view to instructing the Bureau not to apply the approach outlined in §7 of Document RRB16-1/5, but to apply No. 13.6 in a consistent manner regardless of whether the network concerned was used for commercial or governmental purposes, and to consider that a case could be concluded without further investigations by the Bureau only when Article 48 be explicitly invoked by the administration concerned.

4.2 **Ms Wilson** said that the basic question that needed to be addressed by the Board appeared to be: when responding to inquiries by the Bureau under No. 13.6, what benefit could administrations hope to gain by referring to "governmental purposes" but not explicitly invoking Article 48?

4.3 **Mr Henri (Chief SSD)** said that when an administration confirmed bringing into use in accordance with the notified characteristics, but indicated nothing further other than use for governmental purposes, the Bureau had no means of gathering any other data on the network – name of satellite, for example – and of processing the network further.

4.4 **Mr Strelets** said that in its report under Resolution 80 (Rev. WRC-07), the Board had asked WRC-15 certain questions regarding the application of Article 48 of the Constitution, and the conference's answers to those questions had been perfectly clear: for Article 48 to apply, it had to be explicitly invoked by the administration concerned; and "there should be no restriction in terms of class of station and nature of service for a station eligible to operate under Article 48." To his mind, the essential problem was how to avoid abuse in the application of the conference's decisions, i.e. how to ensure that administrations did not notify as military installations stations that were in fact used for commercial purposes. Nevertheless, the administrations that had made submissions to the present meeting appeared to have no problem with the decisions taken by the WRC.

4.5 The **Director** said that the basic problem was not related to the application of Article 48, but to how to deal with networks not covered by Article 48 but involving classified systems for which the only information available to the Bureau in its application of No. 13.6 was what the administration concerned saw fit to provide. The approach reflected in §7 of Document RRB16-1/5 sought to provide a solution to the dilemma.

4.6 **Mr Bessi** said that the decisions taken by the conference appeared to be clear, and did not confer the same status on government installations as on military installations covered by Article 48. The approach advocated by the Bureau, however, did appear to give both kinds of installation the same status, and therefore appeared not to be line with the WRC's decisions. Moreover, to call a halt to inquiries under No. 13.6 on the grounds that the installations investigated were governmental would run counter to the overall drive to clean up the Master Register. The Board must look into how to handle governmental systems that were not covered by Article 48.

4.7 **Mr Ito** said that to adopt an approach that drew no distinction between military installations and governmental installations would be highly questionable, as it would obviate the need for administrations to provide evidence even of the existence of a satellite as soon as an administration claimed that governmental installations were involved. Surely at least the existence of a satellite should be proven. The Board might usefully discuss what minimum evidence must be provided of the network's existence.

(394543)

4.8 **Mr Khairov** said that, with the approval of WRC-15 Document 416 (sixth report from Committee 5 to the plenary), as reflected in the minutes of the eighth plenary meeting (WRC-15 Document 505), WRC-15 appeared to provide clear guidance that No. 13.6 was not applicable to military installations covered by Article 48, whereas it was applicable to governmental and commercial installations. It was less clear what precisely constituted "military installations", and it might therefore be useful, for all parties concerned, especially administrations when submitting their filings or answering the Bureau's inquiries under No. 13.6, to establish a definition of such installations, possibly with the help of the ITU Legal Adviser. For many administrations, there could be considerable overlap between military and governmental installations.

4.9 **Ms Wilson** said that WRC-15 had made it clear that "there should be no restriction in terms of class of station and nature of service for a station eligible to operate under Article 48", thus any station or service was eligible. The WRC had also made it clear that administrations had to explicitly invoke Article 48 in order for it to apply, and the Bureau was not to infer such application. The WRC had not indicated any special measures that should apply to installations notified as "governmental" but for which Article 48 was not invoked. The Board should not, however, seek to micromanage the Bureau. It should simply recognize that the decisions taken by WRC-15 were clear, particularly in regard to the need for Article 48 to be explicitly invoked, and should instruct the Bureau to apply No. 13.6 in a coherent and consistent manner through the necessary dialogue with administrations.

4.10 **Mr Ito** endorsed previous speakers' comments, particularly with regard to the requirement for administrations to explicitly invoke Article 48 in order for it to apply. The approach reflected in the last paragraph of §7 of Document RRB16-1/5 did not appear to be in line with the decision taken by WRC-15. The Board must nevertheless recognize that some cases might be less than straightforward or on the borderline between different classifications; for example, "security" installations might sometimes qualify as "military". A basic framework of some kind should therefore perhaps be introduced in order to avoid abuse. Accordingly, he wished to put forward the following text as a possible basis for the appropriate approach:

"According to the decision of the WRC-15, administrations are not allowed to infer or insinuate that their system is under the category of CS48 by using the terminology of governmental use. If the words "governmental use" or similar expression is used the said satellite system must respect all relevant Radio Regulations including RR 13.6."

4.11 **Mr Hoan** agreed with the previous speakers, and expressed concern with the approach put forward in §7 of Document RRB16-1/5. To his understanding, no provisions of the Radio Regulations or Rules of Procedure exempted frequency assignments used for governmental purposes from the application of No. 13.6. The decisions taken by WRC-15 were perfectly clear, and should be applied by the Bureau and Board. He therefore supported the text proposed by Mr Ito as the approach that should be adopted.

4.12 **Mr Strelets** agreed with previous speakers – and with the administrations that had made contributions to the present meeting – that the decisions taken by WRC-15 were perfectly clear. Article 48 had to be invoked in order to be applied. If it was not invoked, No. 13.6 was fully applicable, and it made no difference whether or not administrations defined their services as "governmental". He would be against entering into debate on what might or might not constitute "military installations", thus he endorsed Ms Wilson's comments in regard to micromanagement, and he would also prefer not to seek to provide detailed guidance on the numerous different categories of state services that could come under the heading "military installations" or "governmental services". The Board did not have the expertise to enter into such definitions, and it was up to the notifying administration to decide under what heading its installations came.

(394543)

4.13 **Mr Bessi** agreed with the previous speakers and generally supported the formulation proposed by Mr Ito. The decision now to be taken by the Board must make it clear that the situation had been clarified by the decisions taken by WRC-15, must draw a distinction between military and governmental systems, and must make it clear that No. 13.6 applied as much to governmental as to commercial installations. It should refer to installations, and not be restricted to satellite systems. Lastly, the Board's decision should be applicable as from the same date as the WRC-15 decisions to which it related, i.e. as from the end of the WRC.

4.14 **Mr Magenta** said that the Board's decision could be broader, indicating simply that when Article 48 was invoked, No. 13.6 was not applicable, whereas when it was not invoked, No. 13.6 and all other relevant provisions of the Radio Regulations were applicable; **Ms Wilson** agreed. Mr Magenta added that he could also agree to consulting the ITU Legal Adviser as proposed by Mr Khairov and seeking legal confirmation of the Board's decision.

4.15 Responding to the comments made and to a question by Mr Ito, **Mr Henri (Chief SSD)** stressed that WRC-15 had not established any link between whether or not investigations under No. 13.6 should or should not be continued and the fact that an administration referred to "military" or "governmental" services or installations, with or without reference to Article 48; it had merely provided clarifications regarding the application of Article 48 and the scope of the stations and services it could apply to. In that regard, he noted that a number of cases in which Article 48 had been applicable had been dealt with prior to WRC-15, and they had been handled in a way consistent with the decision taken by that conference. In line with the decision the Board appeared to be reaching, the Bureau would henceforth apply No. 13.6 and request additional information, as necessary, to all networks, including those that referred to "governmental purposes", unless Article 48 was explicitly invoked by the administration concerned. When administrations declined to provide the full information requested and did not invoke Article 48, the Bureau would be in a position to refer to the decision now being taken. If administrations persisted in not providing the missing information, the cases would have to be brought before the Board, possibly with a view to cancellation of the filings concerned. The decision being reached by the Board was clear, but was not identical to the decision taken by WRC-15. The Conference clarified the application of Article 48 but did not establish an unequivocal link between this Article and the application of No. 13.6. With respect to the date of application of the RRB decision, it could be made applicable as from the first day after WRC-15 (i.e. 28 November 2015), and the few related cases dealt with by the Bureau since the end of the conference could be reviewed accordingly.

4.16 **Mr Strelets**, endorsing previous comments by Board members, noted that the decisions taken by the Board prior to WRC-15 regarding the application of Article 48 had been very much in line with the decisions taken by that conference. The conference's decisions and the decision now being taken by the Board should be applicable as from the same date, i.e. the end of the conference.

4.17 **Mr Bessi** stressed that the decision being reached by the Board did not represent a decision *per se*, but an interpretation of a decision taken by the WRC. That conference decision was clear, and drew a distinction between military installations on one hand, to which Article 48 was applicable and had to be invoked, and other installations, which included "governmental" installations, and to which all provisions of the Radio Regulations were applicable, including No. 13.6. Moreover, Article 48 itself was clear, and he therefore saw no need to seek the ITU Legal Adviser's advice in that regard.

4.18 **Ms Wilson** said that, although the decision taken by the conference was clear, perhaps the Bureau required some form of guidance from the Board, for example regarding the application of No. 13.6 and what might or might not constitute "reliable information". She nevertheless reiterated her earlier comment that the Board should not seek to micromanage the Bureau.

(394543)

4.19 **Mr Magenta** agreed with Mr Bessi, noting that the WRC had made it clear that Article 48 was applicable only to military installations, and all relevant provisions of the Radio Regulations remained applicable to all other installations. If an administration did not invoke Article 48 and then failed to provide the information required by the Bureau, it must assume the consequences of possibly seeing its filing cancelled subsequently.

4.20 **Mr Ito** said that the matter under discussion was relatively straightforward, and did not require the Board to re-open past discussions on what constituted "reliable information" and how to be sure of obtaining it: quite simply, in line with the decisions taken by WRC-15, if an administration did not invoke Article 48, but referred to "governmental" installations and subsequently refused to provide any further information as requested by the Bureau, the case might be brought before the Board.

4.21 Responding to Ms Wilson's comments, **Mr Henri (Chief SSD)** said, that following WRC-15 and the clarifications it had provided in response to the Board's report under Resolution 80, the Bureau did not require any further guidance on the application of No. 13.6.

4.22 **Mr Strelets** said that, as discussed by WRC-12, the real problem relating to the application of Article 48 was the fact that installations used for commercial purposes could be filed under that article. That, however, was not the issue now under discussion. The issue before the Board, related to §7 of Document RRB16-1/5, regarded simply whether or not Article 48 was explicitly invoked and the consequences thereof. The Board had discussed the matter sufficiently and could now conclude. However, the concept "military installations" should not be contrasted with "governmental use". Military installations could be used only with the authorization of the State, that is, for government purposes. Governmental use, on the other hand, meant not only defence but also security and maintenance of public order, as well as other applications. For that reason, only in cases where an administration explicitly invoked Article 48, did the Bureau have to act in accordance with the decision of WRC-15. If the ITU Legal Adviser's opinion were requested, it would represent the view of one individual who was not an expert in military matters. Indeed, ITU and the Board should restrict themselves to their mandates and areas of expertise.

4.23 The **Chairman** suggested that the Board conclude as follows:

"The Board discussed in detail Documents RRB16-1/14 and RRB16-1/15, and also for information Document RRB16-1/DELAYED/1, dealing with comments on § 7 of the Director's Report contained in DocumentRRB16-1/5.

The Board recognised the difficulties of the BR in applying RR No. **13.6** in relation to spectrum use for governmental purposes in general, but was of the opinion that the decisions of the WRC-15, as laid down in the Minutes of the 8th Plenary, were clear;

Administrations have to explicitly invoke CS Article 48, if it applies. In all other cases RR No. **13.6** should continue to be applied;

The Board understood that this decision applies as of 28 November 2015."

4.24 It was so **agreed**.

5 Request by the Bureau to the Radio Regulations Board to consider the possible reinstatement of frequency assignments of the SICRAL-4-21.8E satellite network in the band 2 204.2249-2 204.8249 MHz (Document RRB16-1/3)

5.1 **Mr Matas (Head SSD/SPR)** introduced Document RRB16-1/3, containing a request to the Bureau by the Administration of Italy for reinstatement of the frequency assignments of the SICRAL-4-21.8E satellite network in the frequency band 2 204.2249-2 204.8249 MHz that had been cancelled by the Board at its 70th meeting (19-23 October 2015) under No. 13.6 of the Radio

Regulations. On 16 November 2015, the Administration of Italy had informed the Bureau that those assignments were operating under Article 48 of the ITU Constitution. That being so, the Bureau invited the Board to consider the possible reinstatement of the assignments.

5.2 **Mr Strelets** recalled that at its 70th meeting the Board had decided to cancel the assignments because Article 48 of the ITU Constitution had not been explicitly invoked. Now the Administration of Italy had provided additional information mentioning Article 48, so the Board should reinstate the assignments.

5.3 **Mr Khairov** said that, in the light of the Board's earlier discussion (see §4 of these minutes) and the decisions by WRC-15, the Board had to respond positively to the request by the Administration of Italy because it had clarified that the assignments were being operated under Article 48 of the ITU Constitution.

5.4 **Mr Bessi** recalled the exchange of correspondence between the Bureau and the Administration of Italy under No. 13.6 of the Radio Regulations. He said that the Board had decided at its previous meeting to cancel the frequency assignments because they had not been brought into use. The only reason for the Board to reverse its decision now was the new information provided by the Administration of Italy.

5.5 **Mr Bin Hammad** and **Mr Koffi** agreed with Mr Bessi. The Board had no other option but to reinstate the frequency assignments.

5.6 **Ms Wilson** endorsed the comments made by Mr Strelets and Mr Khairov. Given the new information provided by the Administration of Italy and the decision of WRC-15, the Board had to reinstate the networks, which were clearly being used for military purposes.

5.7 **Mr Ito** recalled that in its discussion at its previous meeting, the Board had noted that the information had come from the Ministry of Defence and had asked whether Article 48 would apply. Having been told that Article 48 had to be cited explicitly, the Board had accepted the cancellation proposed by the Bureau. Now, with new information from the Administration of Italy citing Article 48, the situation had changed and under the Radio Regulations the Board had to accept reinstatement of the frequency assignments.

5.8 **Mr Strelets**, referring to the comments by Mr Bessi, drew attention to §6.2 and §6.3 of Document RRB15-3/12 (minutes of the 70th meeting) and noted that an administration was free to appeal against a decision taken under No. 13.6. From a regulatory point of view, there was no obstacle to reversing a previous decision of the Board.

5.9 **Mr Bessi** said that the conference had confirmed the Board's view that the Bureau could not infer military use unless Article 48 was cited explicitly. Now that the administration had cited Article 48, the Board had no choice but to reinstate the frequency assignments. He hoped that other administrations would not use the case as a precedent.

5.10 The **Chairman** suggested that the Board conclude as follows:

"The Board discussed the request of the Administration of Italy to reinstate the assignments of the satellite network SICRAL-4-21.8E in the band 2 204.2249-2 204.8249 MHz in Document RRB16-1/3.

The Board concluded that:

- The Administration of Italy had in Document RRB16-1/3 invoked CS Article 48;
- WRC-15 has taken the decision that CS Article 48 has to be explicitly invoked by an administration.

(394543)

The Board therefore decided to instruct the BR to reinstate the frequency assignments of the SICRAL-4-21.8E satellite network in the band 2 204.2249-2 204.8249 MHz."

5.11 It was so **agreed**.

6 Submission by the Administration of Papua New Guinea requesting a decision from the Radio Regulations Board on the bringing into use of frequency assignments to a satellite network with an all-electric satellite when the launching of the satellite is completed prior to the regulatory deadline (Document RRB16-1/8)

6.1 **Mr Henri (Chief SSD)** introduced the request in Document RRB16-1/8 from the Administration of Papua New Guinea. The submission described in detail the different stages involved in the orbit raising of all-electric satellites and the advantages such launches offered over chemical launches, along with the fact that such launches could take six to eight months as compared with one to two weeks for chemical launches. In view of that time-related drawback, as a consequence of which the relevant regulatory deadline for bringing into use might not be met, Papua New Guinea was requesting the Board to consider providing some flexibility regarding the application of the Radio Regulations pertaining to the bringing into use of frequency assignments to a satellite network with an all-electric satellite when the launch of the satellite was completed prior to the bringing-into-use regulatory deadline.

6.2 The **Chairman** recalled that, based on the Director's report to the conference, WRC-15 had discussed the matter but had concluded that more studies were required and thus had not taken any substantive decision on it. The discussions had presumably taken place at committee or working group level, since they were not reflected anywhere in the plenary meeting minutes. Although sympathetic towards the issue raised, she failed to see what the Board could do to satisfy Papua New Guinea's request, as it could not simply grant extensions with no regulatory basis for doing so; only the WRC could alter the application of the Radio Regulations in the manner suggested.

6.3 **Mr Kibe**, commenting on the request before the Board and the Chairman's reminder of what had occurred at WRC-15, said that despite the advantages of all-electric satellites as described by Papua New Guinea, the Radio Regulations as they currently stood were technology-neutral, and the Board had no grounds for extending bringing-into-use periods or for ruling that date of launch should be taken as date of bringing into use in the manner suggested. The Board could not alter the deadlines set down in the regulations, except in very specific cases as provided for by WRC-12. Further studies were required on the subject, and the Administration of Papua New Guinea should therefore perhaps take the matter to the relevant ITU-R study group with a view to possibly resubmitting it to the WRC when studies on it were mature.

6.4 **Mr Ito** said that he had sympathy with the case put forward by Papua New Guinea and recognized the advantages of all-electric satellites as compared with chemically launched satellites. He nevertheless agreed with Mr Kibe's comments, and considered that the seven-year deadline for bringing into use was adequate for all types of satellite. It was the prerogative of administrations to opt for the use of new technologies, but they must take all aspects into account in order to meet the relevant deadlines. The Board had no grounds for changing those deadlines in the manner suggested, and if any administration wished to see those deadlines changed, it must take its request to the WRC.

6.5 **Mr Bessi** said that the request submitted by the Administration of Papua New Guinea represented a relaxation of the provisions of the Radio Regulations, which went beyond the Board's mandate, as was made clear in No. 13.12A*g)* of the Radio Regulations relating to the development of rules of procedure. Only the WRC could take decisions providing the kind of flexibility

requested. Papua New Guinea could take the matter to the WRC, and could request that further studies be conducted within ITU-R.

6.6 **Ms Wilson** endorsed all the comments made by the previous speakers.

6.7 **Mr Strelets** noted that the technology presented in the submission by the Administration of Papua New Guinea presented numerous advantages, and he would therefore not want the Board simply to respond that the request fell outside its mandate. Rather, while making it clear that it was an administration's responsibility to take all aspects into account when choosing their launch technology, the Board should recognize that the current regulations did not necessarily provide adequate timeframes to accommodate new technologies – indeed, for example, the period of suspension offered by No. 11.49 was only three years, whereas six to eight months were needed just to launch an all-electric satellite. He fully agreed with the conclusions reached by previous speakers, but said that the Board's decision should provide encouragement to the administration to continue working on the matter through the appropriate ITU-R body, recognizing that only the WRC could take the kind of decision sought.

6.8 In the light of the views expressed, the **Chairman** suggested that the Board conclude as follows:

"After consideration of the request from the Administration of Papua New Guinea as reflected in Document RRB16-1/8, the Board concluded that:

The introduction of more energy efficient technology in radiocommunications is welcomed and should be promoted;

Modifying the Radio Regulations to promote such technologies is within the mandate of a competent WRC;

It is not within the mandate of the Board to provide flexibility or a relaxation of the Radio Regulations;

This issue may require further study within ITU-R.

Consequently, the Board is not in a position to accede to the request from the Administration of Papua New Guinea."

6.9 It was so **agreed**.

7 Receivability of requests for coordination or notification of satellite networks prior to the entry into force of WRC-15 decisions (Documents RRB16-1/4, RRB16-1/9, RRB16-1/10, RRB16-1/11, RRB16-1/13, RRB16-1/16, RRB16-1/17, RRB16-1/18, RRB16-1/19, RRB16-1/20, RRB16-1/INFO/1, RRB16-1/INFO/2, RRB16-1/INFO/3)

7.1 The **Chairman** noted that one of the documents on the topic of receivability had been submitted by the Administration of the Russian Federation and asked whether or not the Board member from that country should speak on the subject. She recalled that, as previously discussed, if the Board was considering a topic that affected all administrations, such as a rule of procedure or Resolution 80, then all members of the Board could take part even if his or her country or origin had made a submission on the matter.

7.2 **Mr Ito** said that, of the documents submitted by administrations regarding receivability, four favoured one approach and five another. If Mr Strelets spoke for one side, then the opponents would be disadvantaged by having no Board member to speak on their behalf. Board members should follow No. 98 of the ITU Constitution (CS98) to the letter. **Mr Magenta** endorsed those comments.

(394543)

7.3 **Mr Strelets** recalled that, according to CS98, Board members served "not as representing their respective Member States nor a region, but as custodians of an international public trust". Also, Board members were to "refrain from intervening in decisions directly concerning the member's own administration". The matter to be discussed affected all administrations, but he was willing not to take the floor if the other Board members so wished.

7.4 **Mr Koffi**, **Mr Bessi** and **Mr Khairov** considered that the question of receivability was of general interest, affecting many countries, and that all Board members should be able to speak.

7.5 The **Chairman** concluded that, as all administrations were potentially involved, the Board saw no difficulty in the participation of a Board member from a country whose administration had submitted a document.

7.6 **Mr Henri (Chief SSD)** introduced Document RRB16-1/4, concerning the receivability and treatment by the Bureau of coordination requests under Article 9 of the Radio Regulations for the new FSS allocation in the frequency band 13.4-13.65 GHz prior to the effective date of entry into force of the allocation, which was 1 January 2017. He also stressed that in addition to the WRC-15 outcome on the new FSS allocation in the band 13.4-13.65 GHz, the issue of receivability of requests for coordination or notification under Articles 9 and 11 prior to the entry into force of WRC-15 decisions, may also be topical for other conference decisions listed under §2 of the document. Document RRB16-1/INFO/1 contained an extract of the minutes of the thirteenth plenary meeting of WRC-15, at which the matter had been discussed and referred to the Board for study. Annex 1 to Document RRB16-1/4 described the provisional treatment by the Bureau of requests for coordination under Article 9 or notification under Article 11 of the Radio Regulations submitted as of 28 November 2015 (the first day after the conference) and before the effective date of entry into force of WRC-15 new or updated frequency allocations. In order not to delay treatment of satellite network filings and to respect the regulatory four-month time limit under No. 9.38 for publication in the BR IFIC, the Bureau had started treating requests applying the approach described in Annex 1. The practice dated back to WARC-ORB-88, with the Bureau in the early days issuing "favourable" and later on "qualified favourable" findings.

7.7 Drawing attention to the documents submitted by administrations, he said that in summary the Administrations of France (Document RRB16-1/13), Israel (Document RRB16-1/16), Turkey (Document RRB16-1/17) and Sweden (Document RRB16-1/19) wanted the current practice to continue, with notices being treated on the actual date of receipt up to the coming into force of the allocation. In contrast, the Administrations of Norway (Document RRB16-1/9), Algeria, Bahrain, Jordan, Oman, Kuwait, Qatar, Saudi Arabia and Sudan (Document RRB16-1/10), Spain (Document RRB16-1/11), Luxembourg (Document RRB16-1/18) and the Russian Federation (Document RRB16-1/20) wanted notices to be treated not on the date of receipt but on the date of coming into force of the allocation. Whatever the Board's decision, he confirmed that the Bureau would apply it to all coordination requests, including those already processed.

7.8 The **Chairman** invited Board members to consider the arguments advanced in the documents submitted by administrations.

7.9 **Mr Bessi** said that the rule of procedure on No. 9.11A of the Radio Regulations addressed the receivability of coordination requests in frequency bands that were not yet allocated to the corresponding service, but the rule concerned only coordination of or with non-GSO networks where the requirement to coordinate was included in a footnote to the Table of Frequency Allocations referring to No. 9.11A. Some administrations correctly pointed out that, as none of the footnotes to the new allocation to the FSS in the 13.4-13.65 GHz band referred to No. 9.11A, the rule of procedure on that provision should not be applicable.

(394543)

7.10 **Mr Ito** considered that the applicability or not of the rule of procedure on No. 9.11A was not the essence of the problem, although rules and practice should obviously be consistent. There was nothing in the Radio Regulations to prevent administrations submitting API notices and coordination requests prior to the entry into force of frequency allocations, and those submissions were receivable. The question was what findings the Bureau should give those submissions: unfavourable, qualified favourable or favourable. Several examples of the Bureau's past practice were given in §5 of Document RRB16-1/4, for example following WARC-92 where the Bureau issued qualified favourable findings to frequency assignments received prior to the date of entry into force of the allocation to BSS in Region 2 in the band 17.3-17.8 GHz, with the findings becoming favourable as of 1 April 2007, the date of entry into force of that allocation. The annex to Resolution 46 (WARC-92) (published in 1994) showed that the intention was not to limit the procedure to a particular band, but to solve the problem of how to treat notices when the date of receipt preceded the date on which the allocation came into effect. He was in favour of maintaining the existing practice.

7.11 **Mr Bessi** said that the Board had to find a way of dealing with the problem that was in conformity with the Radio Regulations. He suggested that the Board review the Bureau's treatment of previous cases, which presumably all related to No. 9.11A since no administrations had objected. If the rule of procedure on No. 9.11A did not cover all cases, then perhaps the best approach would be to develop a new rule of procedure.

7.12 **Mr Henri (Chief SSD)** provided a list of filings with qualified favourable findings (Document RRB16-1/INFO/2) and cited several examples of such findings where there had been no reference to No. 9.11A.

7.13 **Mr Kibe** observed that now, as at WRC-15, opinion was divided among administrations. There was an existing practice, and nothing in the Radio Regulations prevented the Bureau from receiving notices, but perhaps some compromise could be found, for example by setting a date of receipt six months after each conference. One possible approach would be to tweak the rule of procedure on No. 9.11A to take account of the concerns raised by the Administration of the Russian Federation.

7.14 **Mr Strelets** recalled that WRC-15 had been unable to reach consensus on the matter. From a regulatory standpoint, the rule of procedure on No. 9.11A did not apply to the frequency band 13.4-13.65 GHz, and some administrations were unaware of the Bureau's practice. There should be a rule of procedure to clarify the practice. According to Article 4 of the Radio Regulations, assignments had to be in conformity with the Table of Frequency Allocations and other provisions, the only exception being under §4.4. It was understandable that the Bureau needed to get ahead with processing the large number of advance publications that had come in, but coordination requests were another matter. A whole slew of other services might be concerned, as indicated in §2 of Document RRB16-1/4, and a practice that might favour one service over another was unacceptable. As the Director had pointed out during the conference, investments had to be supported by clear regulatory provisions.

7.15 **Ms Wilson** agreed that the rule of procedure on No. 9.11A did not apply to the new FSS allocation in the band 13.4-13-65 GHz. Nevertheless, the Bureau's practice respected the general principle of treatment by date order of receipt. She had heard no strong argument for departing from that practice. Bearing in mind the Director's point about the need for a stable regulatory environment to attract investment, she considered that the existing practice should be maintained.

7.16 The **Director** said that there were two opposing sides with regard to the approach to be taken. He did not see a middle way that would leave each side equally happy or unhappy.

(394543)

7.17 **Mr Bin Hammad** agreed with the Director and suggested that the Board's decision might be deferred to the next meeting in order to leave time to examine fully the information provided.

7.18 **Mr Khairov** said that the Director had rightly pointed out that there were two opposite camps, and that there was little hope of bringing them together in a middle way. The Board had to help the Bureau, and it made no sense to defer the decision, because a number of networks needed certainty now. Studies on the bands had started after WRC-12, giving administrations plenty of time to react. The existing practice had been in existence for more than twenty years, but for greater clarity the Board would have to adopt a new or modified rule of procedure. He was in favour of maintaining the existing practice so that there would be no retroactivity in the Bureau's decisions.

7.19 **Mr Strelets** said that everyone agreed that no rule of procedure currently existed to treat coordination requests or notification of satellite networks in the band 13.4-13.65 GHz prior to the entry into force of WRC-15 decisions. The existing rule of procedure applied to a different case. As pointed out by several administrations, for example the Administration of Spain (Document RRB16-1/11), it was not evident that the Bureau would accept advance publications and coordination requests on the basis of Article 9 for the band in question. Furthermore, in preparing for the conference, three different frequency bands had been considered, none of which had been generally supported by all regions, so it had been impossible to anticipate the decision that WRC-15 would take. He suggested the following compromise solution: the Bureau should examine and publish coordination requests received, and indicate the administrations with which coordination had to take place. The Bureau would analyse the coordination requests received as at 1 January 2017, taking account of newly submitted requests, and give all requests the same date of receipt, namely 1 January 2017. Administrations that had submitted coordination requests before that date would at least have had the chance to start coordination procedures.

7.20 **Mr Magenta** observed that the Bureau had applied the existing practice for years without any adverse reaction. For transparency, the Board should instruct the Bureau to prepare a rule of procedure on the practice. The approach suggested by Mr Strelets was one option for an interim procedure.

7.21 The **Director** said that the Bureau, on the basis of Article 9 of the Radio Regulations, accepted advance publications and coordination requests, since there was nothing in Article 9 that enabled the Bureau to reject such notices.

7.22 **Mr Ito** said that everyone enjoyed equal rights under the Radio Regulations and stressed the need to preserve equal rights in any rule of procedure.

7.23 **Ms Wilson** said that it would be a good idea to create a rule of procedure covering the general case of a new allocation but it would be wise to resolve the specific case of the 13.4-13.65 GHz band first, otherwise administrations might examine the general rule in the light of their own advantage in the specific case. She agreed with Mr Ito about preserving equal rights and added that first entrant priority (first come, first served) should also be preserved.

7.24 **Mr Bessi** said that the rule of procedure should deal with current and future cases. He agreed that there should be equality between administrations and thought that setting a date for the receipt of notices would achieve such equality. Receivability under Article 9 should be the subject of a separate rule or should be dealt with on a case by case basis. The sending of advance publication information before the conference had taken a decision was a form of speculation, and administrations should not be able to submit coordination requests that were not in conformity with the Radio Regulations.

7.25 **Mr Strelets** said that the Board was faced with a philosophical dilemma in regard to Article 9. The Director considered that something that was not forbidden was therefore permitted. He himself held the opposite view: if something was not permitted, then it was forbidden. At

WRC-15, the Bureau's practice had been called into question. If the Board told administrations that they could submit coordination requests that were in breach of the Table of Frequency Allocations (outside of §4.4 of Article 4 of the Radio Regulations), then it would be sending the wrong message. The receipt of notices prior to the entry into force of the allocation enabled administrations with funds to block the spectrum. It would be interesting to see more detailed examples of administrations that had benefited from qualified favourable findings in the past.

7.26 The **Director** pointed out that the Bureau could not invent new regulations. The Bureau's practice was to apply the Radio Regulations, and the Bureau could not reject a notice under Article 9. Receivability was dealt with under Article 11.

7.27 **Mr Ito** supported the Director. A new rule of procedure that did not respect current practice might in effect create a new regulation.

7.28 **Mr Hoan** said that the exchange of views in the Board mirrored the discussion that had taken place at WRC-15. Clearly the rule of procedure on No. 9.11A did not apply to the frequency band 13.4-13.65 GHz. Nevertheless the Bureau had acted in the spirit of §3.3 of that rule and given qualified favourable findings. He favoured a rule of procedure along the lines of that suggested by the Director in Annex 1 to Document RRB16-1/4.

7.29 **Mr Bessi** said that equitable access was essential but that it could only be achieved if the rules were set in advance. Hence, the rule of procedure to be developed should not be based fundamentally on the principle of first come, first served.

7.30 Further to the request by Mr Strelets, **Mr Henri (Chief SSD)** introduced Document RRB16-1/INFO/3, containing a list of examples of filings with qualified favourable findings, giving the date of the last day of the relevant conference, the date of receipt of advance publication and coordination information and the date of entry into force of the allocation. The rule of procedure on No. 9.11A applied to some, while others had been treated in the spirit of §3.3 of that rule. The Director added that the list also indicated the name of the administration and operator, some of whom had claimed at WRC-15 not to know about the Bureau's practice.

7.31 **Mr Strelets** said that there was no coordination procedure for bands that had not come into force, hence no way to take account of the space research service, which would be upgraded from secondary to primary, with effect from 1 January 2017 with regard to the new FSS allocation.

7.32 The **Director** explained that that concern was taken into account by the new footnote 5.A161 added by WRC-15. The Bureau examined all coordination agreements to check their coherence with the Radio Regulations, but the Bureau's findings with regard to coordination requests had no regulatory impact.

7.33 **Mr Bessi** said that under No. 11.31 of the Radio Regulations the Bureau had the power to reject notices that were not in conformity with the Table of Frequency Allocations, but Article 9 of the Radio Regulations did not allow such notices to be rejected. Consequently the general question of receivability of coordination requests needed to be dealt with.

7.34 The **Chairman** suggested that the Board should instruct the Bureau to develop a rule of procedure on the receivability of filings submitted before the effective date of entry into force of an allocation, based on the current practice outlined in Annex 1 to Document RRB16-1/4.

7.35 **Ms Wilson** expressed concern that administrations might react to a general rule of procedure from the specific standpoint of the band 13.4-13.65 GHz, making it difficult to adopt the rule. It might be preferable to decide first on the specific band.

7.36 **Mr Bessi** said that if the Board first adopted a decision on the specific band, it would set a precedent for the rule of procedure.

(394543)

7.37 **Mr Ito** was in favour of instructing the Bureau to develop a rule of procedure, as suggested by the Chairman.

7.38 **Mr Strelets** also supported the Chairman's suggestion, because administrations would have the opportunity to comment on the draft rule.

7.39 **Mr Koffi** endorsed the comment made by Ms Wilson, fearing that it might take the Board until 2017 to reach a decision. He could, however, accept the Chairman's suggestion if that was the view of the majority.

7.40 The **Director**, like Mr Koffi, saw some urgency in reaching a decision. The role of the Board was to create certainty, not uncertainty. The longer it took to adopt a rule of procedure, the longer the period of uncertainty.

7.41 The **Chairman** said that it appeared to be impossible for the Board to take a decision at the present meeting but that it should do so at its next meeting.

7.42 **Mr Kibe** said that, meanwhile, the Bureau should continue to treat coordination requests as described in Annex 1 to Document RRB16-1/4.

7.43 **Ms Wilson** agreed with Mr Kibe, adding that whether or not the Board managed to adopt a rule of procedure at its next meeting, it should in any event take a decision in regard to the frequency band 13.4-13.65 GHz.

7.44 **Mr Strelets** said that the Board should refrain from including any instruction to the Bureau regarding the processing of notices in the interim, as that would skew neutrality in the development of the rule of procedure.

7.45 **Mr Bessi**, supported by **Ms Wilson**, observed that, if the Board did not forbid the Bureau to apply its existing practice, it would continue as before.

7.46 The **Chairman** suggested that the Board conclude as follows:

"The Board considered extensively the contributions from the BR (Document RRB16-1/4, and INFO/1, INFO/2 and INFO/3) and those from administrations (Documents RRB16-1/9, 10, 11, 13, 16, 17, 18, 19 and 20).

The Board considered that the Rules of Procedure (ROP) on 9.11A do not apply to the frequency band in question.

The Board noted however that the practice by administrations to submit advance publication information for satellite networks, including frequency ranges not yet allocated in the RR, 6 months before the end of a conference has been regularly used since 1988, both in relation to frequency bands covered by the ROP on 9.11A and not covered by this ROP.

The Board noted also that the BR in these cases has acted in the spirit of section 3.3 of this ROP.

The equal treatment of the Coordination Request is guaranteed as is expressed in the ROP of RR No. **9.6**.

The Board considered that this practice was well established and has not given rise to difficulties.

Based on the above findings, the Board decided:

To instruct the BR to develop a draft new ROP for the receivability of filings submitted to the BR before the effective date of entry into force of a frequency allocation after the adoption of a decision of a WRC;

That this draft new ROP be based on current practice as outlined in Annex 1 to Document RRB16-1/4 and will be considered for adoption at the Board's 72nd meeting."

(394543)

7.47 It was so **agreed**.

7.48 **Mr Henri (Chief SSD)** informed the Board of requests for coordination of satellite networks received by the Bureau from the Administration of Sweden on 27 November 2015 that requested the Bureau to "take date of receipt of the CR/C submissions…from the earliest date when CR/C can be received by the BR with a qualified favourable finding". Under the existing practice, the earliest date for which the Board would give a qualified favourable finding was 28 November 2015, whereas the actual request from Sweden had been stamped as received on 27 November 2015 under the Rule of Procedure on the receivability of forms of notice, on which date the Bureau would give an unfavourable finding. The request was unusual and the Bureau was unsure how to respond.

7.49 **Mr Strelets, Mr Bessi** and **Ms Wilson** said that the problem would be resolved once the Board had adopted a rule of procedure.

7.50 The **Director** said that the Bureau would consider Sweden's request to have been received on 28 November 2015 and would review the matter when the Board had taken a decision on the rule of procedure.

8 Request by the Bureau for a decision by the Radio Regulations Board for the cancellation of frequency assignments to the ACS-1 and MCS-1 satellite networks under No. 13.6 of the Radio Regulations (Documents RRB16-1/6, RRB16-1/DELAYED/3 and RRB16-1/DELAYED/4)

8.1 **Mr Matas (Head SSD/SPR)** introduced Document RRB16-1/6, containing a request by the Bureau for the Board to cancel the ACS-1 and MCS-1 satellite networks under No. 13.6 of the Radio Regulations. He also drew attention to late submissions in Documents RRB16-1/DELAYED/3 and RRB16-1/DELAYED/4, received respectively on 1 and 2 February 2016. Given that the Bureau had not had time to analyse the information contained in Document RRB16-1/DELAYED/4, one possible way forward might be for the Board to instruct the Bureau to carry out such an analysis and defer its consideration of the case to the Board's 72nd meeting.

8.2 **Mr Magenta** said that to his understanding of the rules and practice governing submissions to ITU meetings, submissions received after the start of a meeting were deemed unreceivable for that meeting. He therefore questioned whether the late submissions in Documents RRB16-1/DELAYED/3 and RRB16-1/DELAYED/4 should be taken into consideration by the Board for the purposes of the case now under discussion.

8.3 The **Chairman** noted that the Board had already agreed to take into consideration RRB16-1/DELAYED/3 as an information document. It had not yet decided whether or not to take into consideration Document RRB16-1/DELAYED/4, which had been received on the second day of the present meeting. The Board might consider deferring the entire matter to the Board's 72nd meeting, on the understanding that the Bureau would take no action on the networks concerned in the meantime.

8.4 **Mr Strelets** expressed concern: based on its investigations under No. 13.6, the Bureau had prepared a submission to the Board, in regard to which it had received no timely response from the administration concerned despite having sent reminders to that administration over a period of several months. Now that the request for cancellation of the networks concerned had been submitted to the Board, two late submissions had been received. One of those (Document RRB16-1/DELAYED/3) simply requested the Bureau not to request the Board to cancel the networks, but contained no evidence of use of the frequency assignments in question. He therefore saw no justification for deferring consideration of the case in hand to the next meeting. The Board must base its decisions on the documents formally included on the agenda at the start of the meeting, otherwise it would set a dangerous precedent whereby administrations could always make late

submissions with a view to having items that concerned them and related to No. 13.6 deferred to the subsequent meeting.

8.5 **Mr Ito** said that he largely shared Mr Strelets' concerns and that, based on Documents RRB16-1/6 and RRB16-1/DELAYED/3, he would have seen no reason not to cancel the frequency assignments concerned. His own further research, however, now caused him to believe that such a decision might mean the cancellation of a real system. In the present case, therefore, to defer the matter to the Board's 72nd meeting might be the best way forward.

8.6 **Mr Strelets** said that he fully shared Mr Ito's desire not to cancel networks that might really exist, and always advocated taking steps – including the deferral of cases if necessary – in order to ensure that all relevant information was available to the Board before it took decisions to cancel networks. Based on the documentation before the Board, however, and even the information in Document RRB16-1/DELAYED/4, he saw no evidence of use of the bands concerned, and the Board could not base any decision – including a decision to defer consideration of the matter – on the vague possibility that there *might* be a system in place. As with the case of INSAT-2(55) at its 70th meeting, therefore, the Board should take a decision based on the documentation before it, recognizing that the administration concerned could always request the Board to review that decision if it disagreed with it.

8.7 **Mr Kibe** asked on what precise basis the Bureau was suggesting that its request regarding the case now before the Board be deferred to the 72nd meeting.

8.8 **Mr Magenta** reiterated his earlier concerns about the receivability of late submissions (Documents RRB16-1/DELAYED/3 and RRB16-1/DELAYED/4, both received after the start of the present meeting), and stressed that the Board must be clear and consistent in the way it dealt with late submissions.

8.9 **Mr Bin Hammad** drew attention to §1.6 of the Board's working methods set forth in Part C of the Rules of Procedure, which drew a clear distinction between late submissions that related to items on the approved agenda of a Board meeting, and late submissions that did not. With regard to the former, the Board could agree to take them into consideration as information documents; with regard to the latter, they were to be placed on the agenda of the following Board meeting.

8.10 **Mr Strelets** said that the Board's practice regarding "delayed submissions" was now well established and was clearly set forth in §1.6 of Part C of the Rules of Procedure. In fact, according to the Board's established method, the concept of "delayed submissions" applied only to submissions related to items already on the Board's agenda, since those were the only late submissions taken into consideration by the Board at a given meeting; any other late submissions were automatically placed on the agenda of the following meeting as normal submissions. The approach enshrined in §1.6 of Part C functioned perfectly well, and should not be changed. Responding to comments by **Mr Magenta**, **Ms Wilson** and the **Chairman** regarding the possibility of reopening debate on a subject on which the Board had already concluded in order to take into consideration a late submission received during a meeting, he said that such an eventuality was covered by §1.6 of Part C in its indication that delayed submissions could be accepted for information "if so agreed by Board members". In fact, that wording covered all possible eventualities regarding late submissions, and there was therefore no need to amend §1.6 of Part C of the Rules of Procedure.

8.11 It was so **agreed**.

8.12 The **Chairman** proposed that since, in the light of Document RRB16-1/DELAYED/4, there appeared to be some doubt as to whether or not a satellite system was operating the frequency assignments in the case under consideration, the Board might agree to defer consideration of the case to its 72nd meeting, requesting the Bureau to study the matter further in the meantime. **Mr Ito**

and **Mr Magenta** supported that proposal; so too did **Mr Koffi**, who added that the voluminous Document RRB16-1/DELAYED/3, which was available in one language only, might also contain undetected elements with a bearing on the matter.

8.13 **Mr Strelets** expressed reservations regarding the Chairman's proposal. He reiterated that none of the documents before the present meeting contained anything to suggest that the assignments concerned had been brought into use, and therefore he saw no justification for deferring consideration of the matter to the 72nd meeting. Rather, to defer it would set a dangerous precedent. If the Board took a decision which it was subsequently required to review, so be it.

8.14 There being no further comments, the Board **agreed** to conclude as follows:

"The Board took note of Document RRB16-1/6, in which the BR requested a decision by the Board for the cancellation of the frequency assignments to ACS-1 and MCS-1 satellite networks, in accordance with RR No. **13.6**.

The Board considered Documents RRB16-1/DELAYED/3 and RRB16-1/DELAYED/4 as information documents and concluded that the information contained in RRB16-1/DELAYED/4 gave a basis for further study by the BR.

The Board regretted that this information had been received at such a late stage.

The Board decided to defer the issue to its next meeting."

9 Rules of procedure (Document RRB16-1/7; Circular Letters CCRR/53 and CCRR/54)

9.1 The **Chairman** recalled that, as agreed by the Board previously, all Board members were free to participate in the discussion and decision-making on draft new and modified rules of procedure even if their administration had made a submission on them, since the subject was of a general nature of interest to the entire ITU membership and thus was not considered to relate directly to the interests of any individual administration.

Draft modification to the rules of procedure concerning the method for calculating the probability of harmful interference between space networks (*C/I* ratios) contained in Part B, Section B3, of the Rules of Procedure) (Document RRB16-1/7; Circular Letter CCRR/53)

9.2 **Mr Ito** said that he did not intend to participate in the discussion of the draft modified rule of procedure in Circular Letter CCRR/53, given that the Japanese Administration had submitted comments on it.

9.3 **Mr Strelets** said that, as agreed previously by the Board, nothing in the basic texts of the Union, including CS98, prevented Mr Ito from participating in the Board's discussions on matters of a general nature, such as rules of procedure, even if his country of origin had made a submission thereto. He hoped Mr Ito would reconsider his position.

9.4 The **Chairman** agreed with Mr Strelets, but said that if Mr Ito had decided not to participate, this should be respected.

9.5 **Mr Sakamoto (Head SSD/SSC)** introduced the draft modified rule of procedure contained in Circular Letter CCRR/53, which had been prepared in response to a request for clarification addressed to the Director of BR (Annex 15 to Document 4A/669). As outlined in the introductory section of Annex 1 to the circular letter, the draft text included clarifications provided by Working Party 4A along with additional elements to further clarify the rules. These proposed modifications to the rule did not change the method which had been used by the Bureau and just clarified the description of the method. It was proposed that the modified rule, if approved, should enter into force immediately following the present meeting. He went on to draw attention to the comments submitted by six administrations, as presented in Annexes 2-7 to Document RRB16-1/7. Myanmar

(Annex 2) made no comments as such. Japan (Annex 3) put forward various editorial amendments to Attachment 3 to the rule, which the Bureau deemed acceptable, but also proposed to use the minimum value of the peak envelope power, rather than the maximum, for calculation purposes. Working Party 4A had discussed a similar proposal at its meeting in June 2015, and had concluded that changes to the draft rule should simply clarify the existing method. Mexico (Annex 4) proposed that consideration should be given to referring to the polarization table and the polarization isolation factor in the terms indicated in §2.2.3 of Appendix 8 of the Radio Regulations; in that regard, however, he noted that consideration of the polarization isolation factor was subject to consent by the administrations responsible for each network. Working Party 4A had not discussed that proposal. Mexico also commented that the margins or levels used in the calculation methodology were too conservative, and might indicate harmful interference where it did not exist. France (Annex 5) supported the draft modified rule, and suggested editorial amendments affecting only the French text. The Russian Federation (Annex 6) objected to the draft modified rule, saying that before the rules were revised the relevant ITU-R Recommendations should first be updated and account should be taken of the studies carried out by Working Party 4A. China (Annex 7) put forward editorial amendments, including some affecting the Chinese text only, which the Bureau deemed could be accepted in combination with the editorial amendments suggested by Japan.

9.6 **Mr Bessi** observed that according to §2.2.1.4 of the Board's working methods (Part C of the Rules of Procedure), comments from administrations on draft rules of procedure should suggest specific text when seeking to amend a draft rule. In the absence of any specific text from Mexico, he would find it difficult to consider Mexico's proposals, which involved a complex issue.

9.7 **Mr Magenta** said that he found various things confusing in regard to the proposals before the Board. First, it would have been more correct for the French Administration to refer to exchanges with Study Group 4, rather than Working Party 4A; after all, the RA itself dealt with the study groups, which were responsible for the approval of Recommendations, and not directly with the working parties. Second, Mexico was proposing changes that had not been studied by the relevant ITU-R study group. The Board had to base its decisions on the Recommendations in force, and could not start discussing technical proposals put forward by individual administrations, not least because it did not have the necessary expertise to do so. Nor could the Board tell the study groups what to study; it was up to Mexico to submit its proposals to the study group if it saw fit. **Mr Bessi** endorsed those comments.

9.8 **Mr Strelets** said that it was strange for the French Administration to suggest that the Bureau continue exchanges with Working Party 4A with a view to modifying the rule of procedure under consideration. The usual practice was for working party studies to lead to the drafting of new or revised Recommendations which then had to be approved by administrations, whereas rules of procedure were developed at the initiative of the Bureau, administrations or the Board itself. The Board could not be expected to participate in working party deliberations with a view to preparing draft rules of procedure. Having said that, although he did not think that the proposals under discussion had been brought to the attention of Study Group 4, he was aware of the Bureau's active participation in discussions in Working Party 4A, and of exchanges taking place between the Director of BR and the chairman of the working party. As to Mexico's proposals, the Board could obviously discuss them if it wished, in so far as they related to the Radio Regulations, but it could not base its development of rules of procedure on discussions taking place in working parties or even the study groups; in that regard, it had to base itself on the output of the study group work in the form of approved Recommendations formally associated with the Radio Regulations by reference. Turning to the draft modified rule of procedure, he said that clearly it was intended to reflect the current practice, without incorporating the polarization isolation factor, which was subject to consent by the administrations responsible for each network. Whether or not to incorporate that factor would have to be discussed and decided by the appropriate forum comprising

the necessary experts, with any positive outcome no doubt taking the form of a Recommendation. He also considered for much the same reasons that it would be difficult for the Board to discuss the substantive proposals put forward by Japan. The best approach would be to agree that the rule of procedure should reflect as clearly as possible the current practice, which was based on existing Recommendations in force, leaving it up to administrations to propose amendments to the relevant Recommendations if they wished to change the practice.

9.9 The **Director**, commenting briefly on the substance of the Mexican proposals, endorsed previous speakers' comments to the effect that the appropriate forum for discussion of those proposals would appear to be Study Group 4/Working Party 4A. The same was true of the substantive proposals made by Japan. **Mr Magenta** agreed, adding that the most appropriate forum might even be the WRC.

9.10 Regarding the views expressed by the Administration of the Russian Federation, that before the rules under consideration were revised the relevant ITU-R Recommendations should first be updated and account should be taken of the studies carried out by Working Party 4A, **Mr Bessi** said that rules of procedure had to be based on the relevant Recommendations in force, and revisions to existing Recommendations could only come further to contributions by administrations to the relevant study groups.

9.11 Based on the comments made, the **Chairman** proposed that the Board accept, where the Bureau deemed it appropriate, only the editorial amendments put forward by the administrations that had submitted comments, including in regard to specific language versions, and that the Board therefore conclude as follows:

"The Board discussed in detail the draft ROP circulated to administrations in Circular Letter CCRR/53, along with comments received from administrations (Document RRB16-1/7). The Board noted that the draft ROP is based on the current versions of the relevant ITU-R Recommendations. The Board decided not to include proposals of a technical nature that have not yet been approved in the relevant ITU-R study groups.

For this reason, the Board decided to include only the editorial revisions to Attachment 3 and other editorial revisions received relating to specific languages only.

The Rule of Procedure, as contained in Annex 1 hereto [Document RRB16-1/21], was thereafter approved by the Board and will be applied from 6 February 2016."

9.12 It was so **agreed**.

Draft rules of procedure on the GE06 Regional Agreement (Document RRB16-1/7; Circular Letter CCRR/54)

9.13 **Mr Méndez (Chief TSD)**, introducing the draft new rule of procedure in Circular Letter CCRR/54, said that the draft rule on Part A10 of the GE06 Agreement had been prepared further to the Board's discussion of the submission by the Islamic Republic of Iran to the Board's 70th meeting in Document RRB15-3/9, and related to the protection of a Plan entry from interference caused by a Plan entry of another administration with which the coordination procedure was not triggered in application of Article 4 of the GE06 Agreement, i.e. a "low-power" station. As presented in Document RRB16-1/7, comments on the draft new rule had been received from three administrations: Denmark (Annex 1) supported the draft rule; France (Annex 5) proposed various modifications in order to make the draft rule acceptable; and the Russian Federation (Annex 6) also proposed a few modifications, in which he suggested that the proposed reference to "footnotes" should be replaced by "Plan remarks". Responding to a question by **Mr Bessi**, he confirmed that the changes proposed by the Russian Federation to §§X.6 and X.8 reflected the way the Bureau worked.

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9.14 **Mr Bessi** inferred that the Russian Federation's proposed changes to §§X.6 and X.8 were acceptable, as were its proposed changes to §X.9, since the rule of procedure dealt only with coordination between TV assignments and not with other primary services in the bands concerned.

9.15 The changes proposed by the Russian Federation, as amended by Chief TSD, and excluding the reference to "allotments" (since only assignments were recorded in the Master Register) were **approved**.

9.16 **Mr Khairov** welcomed the draft rule of procedure put forward by the Bureau, which met the concerns raised by the Iranian and other administrations. He also welcomed the changes proposed by the administrations that had submitted comments, particularly those proposed by France, which would better ensure the protection of low-power assignments from interference from other administrations' stations. He nevertheless suggested a further amendment to §X.8 to take account of the conversion of allotments into assignments.

9.17 **Mr Bessi** said that in §X.8 of the draft rule as proposed by the Bureau, low-power stations entering the Plan were not to receive additional rights vis-à-vis assignments previously or subsequently included in the Plan. In the amendments proposed by France, that administration appeared to agree with the Bureau's draft in so far as assignments previously included in the Plan were concerned, but not in regard to assignments subsequently included; in other words, according to France's approach, which was in line with the basic principles of the Radio Regulations, low-power stations would not have the right to protection from assignments already in the Plan, but would have that right vis-à-vis assignments entering the Plan subsequently. He requested the Bureau to comment on his understanding.

9.18 **Mr Strelets** said that it seemed the changes being proposed by France would alter the concept that had constituted the basis for the draft rule in the first place. When the Iranian Administration had initially drawn the Board's attention to the issue, the problem had been identified in the following terms: when low-power stations entered the Plan, they were to be examined in terms not only of transmission but also of reception. In the original version of the draft rule put forward by the Board, both assignments previously recorded in the Plan (first subparagraph of §X.8) and assignments recorded subsequently (second subparagraph) were covered. With France's proposed amendments, however, the text would not cover assignments recorded subsequently. He too requested the Bureau to comment on his understanding.

9.19 **Mr Méndez (Chief TSD)**, recalling the Board's discussion on the matter at its 70th meeting, observed that it was necessary to draw a distinction between the Plan procedure and the concept reflected in Article 8 of the Radio Regulations (§X.5 of the draft rule referred to No. 8.3). Regarding the procedure for updating the GE06 Plan, low-power stations entering the Plan were not required to coordinate because their transmissions did not exceed certain limits, but no calculations were effected to ascertain how much they might be affected by entries already in the Plan; thus, in effect, they accepted the Plan situation they were entering. Such acceptance obviously might prove problematic for low-power stations near borders. The fact that low-power stations entering the Plan could not expect protection from previous entries was evident to the Bureau, and it was therefore not necessary to indicate it specifically in the draft rule. However, the Bureau would see no obstacle to accepting the modifications proposed by France to the draft rule.

9.20 **Mr Khairov** endorsed the changes proposed by France, adding that it was not clear what exactly was meant by the Bureau in the second subparagraph of §X.8. To his understanding, when it came to the protection of low-power stations under the GE06 Agreement, stations should not have more or less protection than that ensured through compliance with the limits set down in Article 4 of the agreement. The field strengths of low-power stations, including near borders, and the impacts of those field strengths in terms of reception and interference, derived from the limits in Article 4,

and it was up to administrations bringing in new low-power stations to come to terms with the existing interference situation they were entering.

9.21 **Mr Bessi** said that, to his understanding, the modifications proposed by France sought to address a situation in which a high-power station would have to coordinate with a low-power station already recorded in the MIFR as a coordinated assignment, and possibly already in service, if that low-power station were identified by the Bureau, in its examination based on protection of territory, as being affected by the new entry. The French proposal was thus intended to protect the low-power station because it was already in the MIFR. If such protection was not ensured, a balance would be lost in so far as entries in the MIFR would not have protection from interference. In his view, the French Administration's proposals were fully in line with the Bureau's practice, including the examination it carried out based on protection of territory in order to identify stations for which coordination was required.

9.22 **Ms Ghazi (Head TSD/BCD)**, adding to the explanations already provided, said that basically there were two possible scenarios when it came to modification of the GE06 Plan. In a first possible scenario, coordination would be triggered under Article 4 and a list would be established of administrations with which coordination was required. That scenario was clear. In the second possible scenario, an administration introducing a new station could ensure its field strength was restricted to the national territory, but in doing so it nevertheless remained responsible for being aware of the interference situation it was entering and accepting – in line with No. 8.3 of Article 8 of the Radio Regulations. That scenario was also clear. Under that scenario, a station would be recorded in the Master Register, but such recording would be meaningless if the station was not protected from interference from assignments included in the Plan subsequently, which would be contrary to the basic logic behind the Radio Regulations. It would therefore make sense to approve the amendments proposed by the French Administration.

9.23 **Mr Magenta** said that his understanding, from the explanations provided, was that numerous different situations could arise involving the entry of different stations, both low-power and high-power, in the Plan. The fairest approach might simply be to require all new entries to coordinate with stations already in the Plan.

9.24 **Mr Bessi** confirmed that any low-power station entering the Plan and recorded in the MIFR should, when it entered into service, ensure the protection of any high-power station entered before it, but should not have to ensure the protection of any subsequent entries. The amendments proposed by France reflected that approach, and should therefore be adopted.

9.25 It was so **agreed**.

9.26 The draft new rule of procedure on Part A1) of the GE06 Agreement, as amended (see Annex 2 to Document RRB16-1/21), was **approved**, with its date of entry into force set at 6 February 2016.

10 Submission by the Administration of Egypt regarding the status of the NAVISAT satellite networks (Documents RRB16-1/12, RRB16-1/DELAYED/2 and RRB16-1/DELAYED/5)

10.1 The **Chairman** noted that Document RRB16-1/DELAYED/5 had been received very late, during the course of the present meeting of the Board.

10.2 **Mr Henri (Chief SSD)** introduced Document RRB16-1/12, containing a request by the Administration of Egypt to extend the regulatory deadline until 11 May 2019 for three orbital location filings, namely NAVISAT-9A at 14°E, NAVISAT-12A at 35.5°E and NAVISAT-14A at 44°E. As indicated in the document, the end of the regulatory period for those filings, along with

three other filings, was 11 May 2016. He noted that to fulfil the requirements for bringing into use frequency assignments to these networks, there would have to be a satellite at each of the locations concerned by this date. The Administration of Egypt described the events that had taken place, explaining that a *force majeure* situation prevented it from meeting the regulatory deadline. Considering the foreseen improvement to Egypt's economic outlook, the administration asked the Board to grant an extension of the regulatory deadline. In Document RRB16-1/DELAYED/2, the Administration of Egypt repeated the *force majeure* argument given in Document RRB16-1/12 and explained that the request had not been made to WRC-15 because the operator had, at that time, been optimistic that a gap-filler satellite could be found to meet the regulatory deadline. That option had unfortunately not materialized. In Document RRB16-1/DELAYED/2, the Administration of Egypt emphasized that the initial project had been to deploy at least two payloads but that its request could be reduced or limited in order for the required extension to be granted. In Document RRB16-1/DELAYED/5, the Administration of Egypt informed the Board that since January 2016 negotiations had been ongoing between the Egyptian government and satellite manufacturers for the delivery of a satellite payload, launch services and ground segments, and that the contract was expected to be signed by the end of February 2016. In that regard, the administration confirmed its requirement for the exceptional extension of the regulatory time limit for only the satellite network filing at 35.5°E.

10.3 **Mr Strelets** said that the Board had the power to extend the regulatory deadline in circumstances of *force majeure*, but he was far from convinced that *force majeure* applied in the present case. If economic difficulties constituted *force majeure*, then most countries could today invoke that condition. He wondered why the Administration of Egypt had submitted six orbital positions when its intent seemed to be to launch not more than two satellites. He furthermore asked about the status of coordination in regard to the filing at 35.5°E. If the Board were to decide to grant the request by the Administration of Egypt, then it would confer an advantage on Egypt. In that context, he would like to know how such a decision would affect other administrations.

10.4 **Mr Koffi** noted that Egypt faced exceptional difficulties, with an internal revolution frightening off investors. The Board had to determine, on the basis of the conditions listed in the opinion of the Legal Adviser provided to the 60th meeting of the Board in Document RRB12-2/INFO/2(Rev.1), whether such an event constituted *force majeure*. If it did, the Board could consider extending the regulatory deadline.

10.5 **Mr Bessi** said that in upholding the Board's decision on a less serious case, WRC-15 had confirmed the Board's authority conferred by WRC-12 to provide a limited and qualified extension of the regulatory time limit for bringing into use the frequency assignments of a satellite network. Admittedly, all countries faced economic problems. In Egypt, however, political unrest had destroyed economic confidence, jeopardizing the financing of the satellite project. In his opinion, the circumstances fulfilled the conditions for *force majeure* since they were beyond the control of the Administration of Egypt, they were unforeseen, they made it impossible to meet the deadline, and there was a causal connection between the lack of investment and the inability to fulfil the obligation. The Administration of Egypt was serious about the satellite project and had reduced its request to a single orbital location, namely 35.5°E. Had the case been raised at WRC-15, the conference would surely have extended the regulatory deadline. In his opinion, the Board should accede to Egypt's request.

10.6 **Mr Khairov** recognized that Egypt faced difficulties but asked whether they could be considered *force majeure*. He supported the comments made by Mr Strelets and emphasized that the Board should be cautious in categorizing events as *force majeure*. Some 40 armed conflicts were currently taking place in the world, thus more than 40 administrations had the potential to claim that such events prevented them from fulfilling their obligations. The Board should take care not to set a

precedent that would undermine the Radio Regulations. Perhaps the Board might ask the ITU Legal Adviser whether the events in Egypt could be deemed to constitute *force majeure*. In his own view, *force majeure* arose from technical failures or natural events such as hurricanes.

10.7 **Ms Wilson** expressed a desire to assist Egypt, recalling that organization of the WTDC in that country had been cancelled as a result of the internal turmoil. She nevertheless shared the views expressed by Mr Khairov and suggested that the Board should ask the Legal Adviser, in the context of his advice in Document RRB12-2/INFO/2(Rev.1), whether ongoing political turmoil could be considered an "event" in terms of the conditions to be fulfilled for *force majeure*. She noted in particular that the third condition specified that mere difficulty in performing an obligation was not deemed to constitute *force majeure*. Had the Administration of Egypt brought the matter to WRC-15, the outcome would surely have been positive.

10.8 **Mr Bin Hammad** recalled that the Board had taken the correct decisions on two previous cases concerning developing countries, namely Mexico and the Lao People's Democratic Republic. Furthermore, WRC-15 had shown its trust in the Board's competence. The request by the Administration of Egypt concerned a matter of great importance to that country, and in his view the turmoil constituted *force majeure*. The Board should accede to the request, in line with its previous decisions.

10.9 **Mr Hoan** expressed sympathy for Egypt and said that the Board should find a way to support the administration of a developing country that was trying to comply with the Radio Regulations. He was not opposed to seeking legal advice but stressed that the matter was urgent because the contract was expected to be signed by the end of February. Endorsing the comments made by Mr Strelets, in particular on the need for information on the possible effect on other administrations, he said that the Board should not consider political or economic difficulties as constituting *force majeure* but should find another way of assisting Egypt.

10.10 **Mr Kibe** said that, given the resolutions adopted by ITU plenipotentiary conferences (Resolutions 32, 33 and 34) on assistance to developing countries, the Board should take a sympathetic approach in responding to the request by the Administration of Egypt. His initial reaction was that the circumstances described by the administration did indeed constitute *force majeure*.

10.11 **Mr Bessi**, referring to the opinion of the ITU Legal Adviser in Document RRB12-2/INFO/2(Rev.1), said that the conditions listed by the Legal Adviser gave the Board the basis on which to decide whether or not an event constituted *force majeure*.

10.12 **Mr Strelets** said that all members of the Board sympathized with Egypt, but the Board had to do its job. Having analysed the present case in the light of the written opinion of the Legal Adviser, he thought that virtually none of the conditions were met. He recalled the case of the Islamic Republic of Iran, when the Board had concluded that sanctions did not constitute *force majeure*. The case of Mexico, referred to by Mr Bin Hammad, had concerned launch failure, while in the case of the Administration of the Lao People's Democratic Republic copies of the contracts for the manufacture and launch of the satellite had been provided, but even here the Board had not based its decision on a situation of *force majeure*. Like Mr Khairov, he saw *force majeure* as arising predominantly in regard to technical factors and natural disasters. It was a pity that the Administration of Egypt had not raised the matter at WRC-15. After all, the conference had twice granted extensions to the Administration of Viet Nam. Even if, as indicated in Document RRB16-1/DELAYED/5, negotiations were under way with the satellite manufacturer, it would take at least four years to manufacture a satellite and the launch would not take place for four or five years. Perhaps the Board might suggest that the Administration of Egypt should submit a new filing, bearing in mind that one filing per year was exempt from cost recovery. There were already several operational satellites located close to 35.5°E, so by focusing its request on that orbital position the

Administration of Egypt was setting itself an almost impossible task with regard to coordinating the frequency assignments to its satellite network.

10.13 **Mr Henri (Chief SSD)** said that, based on coordination requests and notification of satellite networks received by the Bureau, it was clear that 35.5°E orbital position was critical to many satellite operators and administrations in regard to numerous frequency bands and services. There were several satellites within three degrees of Egypt's filing. The Bureau had no information on the status of coordination negotiations.

10.14 **Mr Ito** said that, like other members of the Board, he had analysed the present case in the context of the conditions for *force majeure*, and he had reviewed past decisions of the Board. So far, the Board had decided that just one case, related to the launch failure of a Mexican satellite, fulfilled the conditions for *force majeure*. The case of Viet Nam had concerned co-passenger delay, not *force majeure*. Broadly speaking, he agreed with Mr Bessi that the Board could determine whether or not a case constituted *force majeure*, but he would appreciate having a legal opinion on whether or not the circumstances described by the Administration of Egypt could constitute *force majeure*. Perhaps the Board could collect further information on the case, including on the reality of the contract, and defer its decision until its next meeting, scheduled for May 2016.

10.15 The **Director** pointed out that the contract would not be signed unless the Board gave the regulatory extension. Deferring the Board's decision until its next meeting would delay Egypt's project for a further three months.

10.16 **Ms Wilson** said that obviously the Board wanted to help Egypt but could not assume powers beyond its mandate. She hoped that the Legal Adviser could show that Egypt's circumstances met the criteria for *force majeure*, but she was dubious about those conditions being met. In particular she wondered whether political and economic turmoil over an extended period of time could be considered "an event" in terms of *force majeure*. She noted that the status of coordination negotiations was unrelated to *force majeure*.

10.17 **Mr Magenta** said that WRC-12 and WRC-15 had given the Board the power to extend the regulatory period, on a case by case basis. During the prolonged turmoil in Egypt, the government had surely focused on immediate needs, leaving aside its satellite project. Now the Administration of Egypt was asking for just one orbital slot and the Board should accede to the request.
Mr Bin Hammad supported that view.

10.18 **Mr Khairov** expressed sympathy for Egypt but reiterated his view that the Board should be wary of recognizing conflict as *force majeure*, as such a decision might open the door to a flood of similar requests.

10.19 **Mr Bessi** stressed that any administration had the right to ask for a regulatory deadline to be extended because of *force majeure* and the Board would deal with such requests on a case by case basis. Similar cases should lead to similar decisions. Administrations were obliged to coordinate, but the status of coordination negotiations had no relevance to the Board's decision concerning *force majeure*. In the present case, the Administration of Egypt could resubmit the filing or could have raised its request to WRC-15, but neither of those possibilities should have any impact on the Board's decision.

10.20 **Mr Strelets** said that the Administration of Egypt should provide information to support its request, such as details of the proposed satellite network and a copy of the contract. The Board was likely to receive similar requests in future and so should take care not to set a precedent on a shaky foundation.

10.21 The **Chairman** said that the claim of *force majeure* made by the Administration of Egypt rested on the argument that political unrest had caused financial problems. Referring to the

conditions listed in Document RRB12-2/INFO/2 (Rev.1), she invited the ITU Legal Adviser to give an opinion on whether political turmoil of long duration could constitute an external and unforeseen event.

10.22 The **ITU Legal Adviser** said that international jurisprudence based on decisions taken by international courts and arbitration tribunals clearly recognized that revolts and uprisings could constitute *force majeure*. With regard to the criteria to be met for exceptional treatment because of *force majeure* to be well-founded, the first condition was that the event must be beyond the control of the obligor and not self-induced. In situations of riot, revolt or civil war, an arbitrator could rule, and had ruled, that the State, although actively involved in the situation, was not deemed responsible for the actual occurrence of the riot, revolt or civil war. The reasoning followed by the arbitrator in such circumstances was not based on determining whether the acts in question were those of the State or were external to it, but on whether or not those acts could be attributed to it on the grounds of wilful behaviour on its part. With regard to the second condition (that the event must be unforeseen or, if foreseeable, must be inevitable or irresistible) it has to be kept in mind that international jurisprudence already considered that even if some uprisings or revolts could be foreseen they were often inevitable. The third condition (that the event must make it impossible for the obligor to perform its obligation) implied that mere difficulty in performing an obligation was not deemed to constitute *force majeure*. It seemed that the condition could be considered as fulfilled in the case of the Administration of Egypt if it is demonstrated that the loss of confidence of investors resulting from the uprising (termed "revolution" by the Administration of Egypt) had made the funding of the satellite project impossible. The issue would also be for the Board to consider whether this funding could have been achieved through other ways and means. The fourth condition (that a causal effective connection must exist between the event constituting *force majeure* and the failure by the obligor to fulfil the obligation) could be considered as being fulfilled in this case if it is clear that the impossibility of completing the project arose from the lack of investment, which in turn had been caused by the uprising. Those were the considerations on which the Board might wish to reflect, but it was not for him, however, to conclude that *force majeure* did or did not exist in the case of the Administration of Egypt.

10.23 **Mr Strelets** said that in the light of the information given by the ITU Legal Adviser, it was difficult to accept that the present case met the conditions of *force majeure*. Taking as an example the first condition, that the "event must be beyond the control of the obligor and not self-induced", he noted that any government bore responsibility for events arising within its country unless there was interference by outside forces. It could therefore be said confidently that the actions of the Egyptian government had provoked the uprising, and the uprising had been foreseeable and could have been avoided. Similar considerations could be applied with regard to the other conditions.

10.24 **Ms Wilson** expressed concern that, if political turmoil could be considered to constitute *force majeure*, then the Board might find itself in the untenable position of having to judge whether a government was responsible for the turmoil. She asked whether long-term political upheaval constituted an "event" in the context of the conditions that had to be met to recognize *force majeure*. Furthermore, no contract existed, and she was not sure that a satellite network filing constituted an obligation. It would be easier to argue the case of *force majeure* if political turmoil prevented a commercial company from fulfilling a contractual obligation.

10.25 **Mr Bessi** noted that, according to the Legal Adviser, at least three conditions had been fulfilled. The Board should accept that the engineers comprising the Egyptian Administration would not have been able to foresee the political turmoil, and should therefore conclude that the case fulfilled the conditions for *force majeure*.

10.26 **Mr Magenta** asked whether a revolution fulfilled the first condition.

10.27 **Mr Bin Hammad**, posing the same question as Mr Magenta, said that the Board should consider the outcome for Egypt and should not set a precedent of judging governmental responsibility for political turmoil.

10.28 **Mr Ito** considered that a revolution could be considered *force majeure* but that, after the revolution, the new regime might set different priorities. Rather than launching a satellite, the administration might decide to opt for leasing. Could a situation be categorized as *force majeure* when there was the possibility of taking a different approach to attaining the same result?

10.29 The **ITU Legal Adviser**, responding to Mr Strelets, Mr Magenta and Mr Bin Hammad, said that a revolution or uprising fulfilled the first condition for *force majeure*, and the Board had no need to judge a government's responsibility in that respect. Replying to Ms Wilson, he explained that respecting the terms of an international agreement constituted an obligation, albeit neither contractual nor commercial. Failure to notify bringing into use would entail a loss of rights; in counterpoint a country could invoke *force majeure* if circumstances made it impossible to fulfil the obligation. The question raised by Mr Ito was pertinent, bearing in mind that mere difficulty in performing an obligation was not deemed to constitute *force majeure*. It would be problematic to accept a *force majeure* argument if it was possible, although difficult, to achieve the same outcome in another way. He noted that there were cases where something was initially impossible but subsequently became merely difficult. Thus *force majeure* could be temporary. It did not have to be permanent.

10.30 **Mr Bessi** maintained that the case at present before the Board fulfilled the conditions for *force majeure*, since the change in priorities to which Mr Ito had alluded was clearly the result of *force majeure*.

10.31 **Mr Magenta** considered that the present case was probably one of *force majeure* because the first condition was fulfilled and the second, third and fourth conditions were more or less consequences of the first. He recalled that according to its Constitution, ITU had to assist countries in unfavourable circumstances.

10.32 **Mr Strelets** said that, while it was important for the Board to help Egypt, he adamantly rejected the *force majeure* argument. A government was in control of what went on in its country, and no external agent had been involved. The Egyptian Administration had not informed BR in good time that events had occurred as a result of unforeseen forces, and that it was not possible to meet its obligations with regard to the recording of satellite network frequency assignments. Furthermore, the impossibility condition had not been met because the Administration of Egypt could have raised the matter at WRC-15 but had not done so as it would have been all but impossible to reach an agreement on that issue at the Conference. Furthermore, it was questionable whether the Board should even be discussing the request presented in information Document RRB16-1/DELAYED/5, which proposed examination of one orbital position instead of the three orbital positions indicated in Document RRB16-1/12.

10.33 **Mr Bessi** said that the problem had arisen after WRC-15, and he stressed that following the decisions taken by the WRC any administration had the right to request the extension of a deadline on the grounds of *force majeure*. He said further that, for all requests for an extension made by administrations citing *force majeure*, where the Board's analysis concluded that such grounds existed, an extension of the deadline became a right for the administrations concerned in accordance with the decision of WRC-12 as confirmed by WRC-15.

10.34 **Ms Wilson** raised the matter of equitable access and the need to respect the rights of all administrations in that regard. By submitting a satellite filing, an administration reserved a place in line. If an administration saw that it was unable to respect the regulatory deadline for bringing into

use, it could suppress the filing or request an extension of the deadline. In her view, a filing established a right, not an obligation.

10.35 **Mr Kibe** said that, having listened to the Legal Adviser, he was convinced that the conditions for *force majeure* had been fulfilled in the present case and he proposed that the Board accede to Egypt's request.

10.36 The **ITU Legal Adviser**, responding to Ms Wilson, said that a filing was not a contractual obligation but, under international law, it was indeed an obligation. The country making the filing had to respect the deadline for bringing into use, since non-respect of that deadline resulted in loss of the right. A country could attempt to derogate from the obligation to respect the deadline in exceptional circumstances, for example by invoking *force majeure*. He emphasized that in the present case concerning the Administration of Egypt he was not saying whether or not *force majeure* applied.

10.37 Taking account of comments by **Mr Magenta**, **Mr Hoan**, **Mr Bessi**, **Mr Bin Hammad**, **Mr Koffi** and **Mr Terán**, who considered that the Board should accede to the request of the Administration of Egypt on the grounds of *force majeure*, and **Mr Khairov**, **Mr Strelets** and **Ms Wilson**, who considered that the information provided by the Administration of Egypt did not support a regulatory extension based on *force majeure*, the **Chairman** noted that the majority of the Board members were in favour of taking a decision at the present meeting to grant Egypt an extension for one orbital position, but that the views concerning *force majeure* diverged.

10.38 **Ms Wilson** proposed that the Board should adopt a decision drafted along the lines of the decision taken at its 69th meeting in regard to the submission by the Administration of the Lao People's Democratic Republic concerning the status of the LAOSAT-128.5E satellite network.

10.39 The **Chairman** suggested that the Board conclude as follows:

"The Board discussed in detail Document RRB16-1/12 containing the submission by the Administration of Egypt regarding the status of the NAVISAT satellite networks, the information contained in Documents RRB16-1/DELAYED/2 and 5, and its request to extend the regulatory deadline for the satellite network filing at 35.5° East by three years from 11 May 2016 to 11 May 2019. Furthermore, the Board took into account:

Its authority to provide a limited and qualified extension of the regulatory time limit for bringing into use the frequency assignments of a satellite network, which was confirmed at WRC-15;

That the NAVISAT-12A network will need to coordinate with all other satellite networks in full respect of the rules and procedures of the Radio Regulations (Art. 9 etc.);

That the exceptional difficulties faced by Egypt led to the delay with regard to this project.

Consequently, the Board decided:

To grant to the Administration of Egypt a three year extension of the NAVISAT-12A satellite network filing at 35.5° East;

To instruct the BR to extend the bringing into use period of the filing of the NAVISAT-12A satellite network at 35.5° East until 11 May 2019;

That the RRB decision does not give any specific advantage in coordination activities to the NAVISAT-12A satellite network;

To bring this decision to the attention of WRC-19.

The Board further indicated that it would consider other such situations on a case by case basis."

10.40 It was so **agreed**.

(394543)

11 Submission by the Islamic Republic of Iran regarding the status of the IRANDBS4-KAFL satellite network (Document RRB16-1/1)

11.1 **Mr Matas (Head SSD/SPR)** introduced Document RRB16-1/1, in which the Administration of the Islamic Republic of Iran requested the Board to change the date of receipt of the coordination request for its IRANDBS4-KAFL satellite network to align it with the original filing with which it was associated, dated 2 May 2012. Outlining the main elements of the case, he said that the Iranian Administration's original request for its network IRANDBS4-KA had been received on 2 May 2012, with a specific request for application of the special procedure under Resolution 553 (WRC-12) for an assignment for a BSS system in the 21.4-22 GHz frequency band in Regions 1 and 3, and the corresponding API had been published in June 2012. That part of the notice was thus complete. The feeder link portion of the coordination request, however, was not covered by the procedure under Resolution 553, and although the Bureau had immediately informed the Iranian Administration that it would be splitting its notice, thereby creating filing IRANDBS4-KAFL for the band 24.65-25.25 GHz, the Iranian Administration had never followed up on that feeder link portion despite having explicitly agreed to the splitting (letter of 2 June 2012) and despite the Bureau's reminders of 4 December 2012 and 16 January 2013 warning the administration that a new date of receipt would be established if the missing information for the feeder link portion was not provided by return. Subsequently, on 28 November 2015, the Iranian Administration had written to the Bureau requesting it to consider that all the filings relating to the network had the same date of receipt, and explaining the reasons for its oversight in not following up on the feeder link portion. Faced with the Bureau's reply proposing that a new date of receipt be given to the IRANDBS4-KAFL filing as the only course of action possible for the Bureau, the Iranian Administration had requested that its request be submitted to the Board for consideration.

11.2 **Mr Strelets** recalled the discussions at WRC-12 that had led to the decisions taken with regard to the application of Resolution 553, the regulatory consequences involved, and the consequent payment issues as discussed by the Board and the ITU Council, all of which had represented a difficult transition period in which it was hardly surprising that misunderstandings and oversights had occurred, as described by the Islamic Republic of Iran in its submission. He would be in favour of acceding to the Iranian Administration's request.

11.3 **Mr Bessi** asked whether, in its exchanges with the Bureau, the Iranian Administration had acknowledged that the information it provided concerned the downlink bands only. If the administration had not been aware of that, then it could be presumed that the information provided concerned both the uplink and downlink bands, and both portions should therefore be given the same date of receipt.

11.4 **Mr Matas (Head SSD/SPR)** drew attention to a letter from the Iranian Administration dated 2 June 2012 in which it explicitly accepted the splitting of the original network filing, the payment of the corresponding cost recovery fees and processing of the band 21.4-22 GHz in a separate notice. Moreover, in all its correspondence to the Iranian Administration, the Bureau had been perfectly clear about what information was missing and the regulatory consequences. Lastly, the Bureau had sent out a circular telegram in November 2013 drawing attention to No. 9.5D of the Radio Regulations and listing the Iranian filing as being directly concerned by application of that provision.

11.5 **Mr Ito** said that his analysis of the correspondence exchanged between the Bureau and the Iranian Administration made it clear to him that in June 2012 the administration had accepted the splitting and ramifications thereof, had subsequently received several requests from the Bureau for missing information concerning the feeder link and the consequences of not providing that information, and only in November 2015, well after expiry of the API deadline, had it brought the

matter up again and sought to come back on the splitting of the original filing. In his view, the Bureau had applied the relevant provisions of the Radio Regulations correctly.

11.6 Responding to further requests for clarification by **Mr Bessi**, who said that a date of receipt could be set only when complete data had been received, **Mr Henri (Chief SSD)** said that the information missing in respect of the IRANDBS4-KAFL filing had ultimately been provided, but only in November 2015 further to discussions between the Bureau and the Iranian Administration at WRC-15. As to possible misunderstandings and logistical malfunctions, from the outset the Iranian Administration had been well aware of how the different frequencies in its filing were to be treated, as borne out by its letter dated 2 June 2012, including the fact that different dates would apply to the uplink and downlink bands. As to accepting 2 May 2012 as the date of receipt for the uplink portion, such a request ran counter to the provisions of the Radio Regulations and decisions taken by WRC-12, and would remove the six-month period between API and coordination applicable to all networks. Lastly, since 2012, numerous coordination requests had been received for other networks in similar bands, and those requests obviously had not taken into account the Iranian network; to accede to the Iranian Administration's request could result in coordination difficulties for those other networks.

11.7 Adding to his earlier remarks, **Mr Ito** said that the entire subject relating to Resolution 553 had been discussed at length at WRC-12, and the Iranian Administration had been well aware of the issues involved. He considered that there had been a mistake on the part the administration, rather than a misunderstanding. It was a clear case of non-response to two reminders from the Bureau. According to the rules of procedure on receivability, a new date of receipt of the Appendix 4 data should be given, namely 16 November 2015.

11.8 **Mr Hoan** said that the Bureau had applied the Radio Regulations correctly, in particular No. 9.5D. However, it could prove very difficult to deploy a satellite network subject to two different regulatory dates, and with the change of regulatory regime following the decisions taken at WRC-12, it was entirely plausible that misunderstandings could have arisen. He could therefore support Mr Strelets' proposal to accede to the Iranian Administration's request.

11.9 **Mr Strelets** said that the decisions taken at WRC-12, further to proposals put forward by the RCC countries, had given rise not only to a complicated regulatory situation and process leading to complex discussions within the Board and ITU Council, but also to the splitting of filings and their subjection to different procedures. To his understanding, following the splitting of the original Iranian filing at the suggestion of the Bureau and with the assent of the Iranian Administration, all subsequent technical examinations had been carried out by the operator working on the basis of the original filing only and unaware of the new filing for the feeder link. The Iranian Administration noted that the Bureau was applying the Radio Regulations correctly, and the Administration admitted its mistake, but was now seeking the re-establishment of a single network. He saw no reason not to accede to the request.

11.10 **Mr Bessi** wondered why the filings had not been returned to the Iranian Administration based on the fact that information was missing from its submissions, thus giving it the opportunity to react.

11.11 **Mr Henri (Chief SSD)** said that the uplink component had never been entered in the Bureau's database because information had been missing from the filing. The Iranian Administration had been sent two reminders to provide the missing information, plus a warning in application of No. 9.5D. Thus, the Iranian Administration had been given ample warning and opportunity to provide the missing information. Moreover, there had never been any problems of communication or late replies as far as the Iranian Administration was concerned on any other networks, including the downlink component of the network in question, therefore there was no

reason to doubt that the Iranian Administration had received the Bureau's correspondence. The Iranian Administration had been well aware of all e ements involved.

11.12 **Mr Ito** said that the Iranian Administration had at first agreed to the splitting of its network, had subsequently failed to respond to at least two reminders, and then, faced with justified cancellation of the networks, appeared to wish to ccme back on its agreement to the splitting. Such an approach could not be put down to misunderstanding, but to pure negligence. A very dangerous precedent would be set if the Board, as custodians of the Radio Regulations, acceded to the request now before it.

11.13 **Mr Khairov** said that the Bureau had clear y applied the Radio Regulations correctly in the case under consideration. It also seemed, from the exchange of correspondence between the Bureau and the Iranian Administration over the years, that the Iranian Administration had understood the situation with regard to its filings in the first instance, had followed up the component of its network subject to Resolution 553, and had agreed to make the payments stemming from the splitting procedure. To now claim misunderstanding was therefore, to his mind, implausible. The Iranian Administration had had every opportunity to respond to the Bureau's reminders, and had it done so it would now have a fully coordinated network.

11.14 **Mr Magenta** endorsed the comments made by Mr Ito and Mr Khairov, adding that to accede to the Iranian Administration's request would be tantamount to saying that the Bureau had not acted correctly.

11.15 **Mr Bessi** said that in its letter dated 16 January 2013 the Bureau had made it perfectly clear to the Iranian Administration that under §3.8 of the rules of procedure on receivability its IRANDBS4-KAFL filing would be cancelled on the grounds of incomplete information and a new date of receipt established if complete information was received subsequently. The Bureau had applied the Radio Regulations correctly. He therefore considered that, in the absence of a response, within the period allowed, from the Iranian Administration, there were no grounds for acceding to its request.

11.16 **Mr Koffi**, supported by **Mr Kibe** and **Ms Wilson**, agreed that the Bureau had applied the Radio Regulations correctly, and he too therefore saw no grounds for acceding to the Iranian Administration's request. Thus, the date of receipt of the complete information for the IRANDBS4-KAFL filing should stand at 16 November 2015.

11.17 In the light of the comments made, the **Chairman** proposed that the Board conclude as follows:

"The Board considered the request from the Islamic Republic of Iran to change the date of receipt of the coordination request for the IRANDBS4-KAFL satellite network as provided in Document RRB16-1/1.

The Board took into account:

That the Administration of the Islamic Republic of Iran had been informed about splitting the network filing into two parts, one covered by Resolution **553 (WRC-12)** and the other by RR Article **9**, and had agreed to this action;

That the BR had informed the Administration of the Islamic Republic of Iran about the provisions of §3.8 of the Rules of Procedure related to the receivability of notification forms.

The Board also noted that the Administration of the Islamic Republic of Iran had not responded to requests from the BR to provide the required information concerning the request for coordination.

The Board therefore concluded that the BR correctly applied the provisions of RR.

(394543)

Given the above, the Board decided not to accede to the request from the Administration of the Islamic Republic of Iran."

11.18 It was so **agreed**.

12 RRB tasks following WRC-15 decisions (Circular Letter CR/389)

12.1 The **Chairman** drew attention to Circular Letter CR/389, containing the decisions taken by WRC-15 that were enshrined in the plenary minutes of the WRC but did not appear in the Final Acts of the conference.

12.2 The **Director** suggested that the Board might request the Bureau, in consultation with the Chairman of the Working Group on Rules of Procedure, to develop a document containing a list of all WRC-15 decisions that might require the development of new or modified rules of procedure and to submit that document to the 72nd meeting of the Board. In developing such a document, the Bureau would base itself on the decisions contained in Circular Letter CR/389, but also on any other areas of the Final Acts of WRC-15 for which the development of a rule procedure might appear to be appropriate. He drew particular attention to the need to approve new or modified rules of procedure in time to cover, where required, the new provisions of the Radio Regulations that would enter into force on 1 January 2017.

12.3 The Board **agreed** to conclude as follows:

"The Board requested the BR, in consultation with the Chairman of the Working Group on the Rules of Procedure, to develop a document containing a list of all WRC-15 decisions that may require the development of new Rules of Procedure and to submit this document to the 72nd meeting of the Board."

13 Confirmation of the dates of the next meeting and indicative dates of future meetings

13.1 The Board **agreed** to confirm the dates of its 72nd meeting as 16-20 May 2016, and to tentatively confirm the dates of its 73rd meeting as 17-21 October 2016.

14 Approval of the summary of decisions (Document RRB16-1/21)

14.1 The summary of decisions (Document RRB16-1/21) was **approved**.

15 Closure of the meeting

15.1 The **Chairman** thanked everyone who had supported her and contributed to the successful outcome of the meeting, which had been her first as Chairman of the Board.

15.2 **Mr Strelets** and **Mr Magenta** complimented the Chairman on her very able, professional and wise handling of some extremely difficult issues in the course of the present meeting.

15.3 The **Chairman** thanked those speakers for their kind words, and closed the meeting at 1720 hours on Friday, 5 February 2016.

The Executive Secretary:
F. RANCY

The Chairman:
L. JEANTY

(394543)

Radio Regulations Board
Geneva, 16-20 May 2016

INTERNATIONAL TELECOMMUNICATION UNION

Document RRB16-2/15-E
30 May 2016
Original: English

MINUTES[1]

OF THE

72nd MEETING OF THE RADIO REGULATIONS BOARD

16-20 May 2016

Present:

Members, RRB
Ms L. JEANTY, Chairman
Mr I. KHAIROV, Vice-Chairman
Mr M. BESSI, Mr N. BIN HAMMAD, Mr D.Q. HOAN, Mr Y. ITO, Mr S.K. KIBE, Mr S. KOFFI, Mr A. MAGENTA, Mr V. STRELETS, Mr R.L. TERÁN, Ms J.C. WILSON

Executive Secretary, RRB
Mr F. RANCY, Director, BR

Précis-Writers
Mr T. ELDRIDGE and Ms A. HADEN

Also present:

Mr H. ZHAO, ITU Secretary-General
Mr M. MANIEWICZ, Deputy Director, Chief, IAP
Mr Y. HENRI, Chief, SSD
Mr A. MÉNDEZ, Chief, TSD
Mr A. GUILLOT, ITU Legal Adviser
Mr A. MATAS, Head, SSD/SPR
Mr. M. SAKAMOTO, Head, SSD/SSC
Mr J. WANG, Head, SSD/SNP
Mr B. BA, Head TSD/TPR
Mr W. IJEH, BR Administrator
Ms I. GHAZI, Head, TSD/BCD
Mr N. VASSILIEV, Head, TSD/FMD
Mr D. BOTHA, SGD
Ms K. GOZAL, Administrative Secretary

[1] The minutes of the meeting reflect the detailed and comprehensive consideration by the members of the Radio Regulations Board of the items that were under consideration on the agenda of the 72nd meeting of the Board. The official decisions of the 72nd meeting of the Radio Regulations Board can be found in Document RRB16-2/14.

(400313)

	Subjects discussed	Documents
1	Opening of the meeting	-
2	Late submissions and agenda	-
3	Report by the Director of BR	RRB16-2/5 + Add.1-3
4	Submission by the Administration of the United States regarding the status of the ACS-1 and MCS-1 satellite networks	RB16-2/1
5	Submissions by the Administrations of Norway and the United States on the change of the notifying administration for the satellite systems STEAM-0, STEAM-1, STEAM-2 and STEAM-3C	RRB16-2/6, RRB16-2/INFO/2
6	Submission by the Administration of Malaysia regarding the status of the MEASAT-91.5E-30B satellite network	RRB16-2/7
7	Submission by the Administration of Brazil regarding the status of the STAR ONE D1 satellite network	RRB16-2/12
8	Submission by the Administration of the Russian Federation regarding the status of the INTERSPUTNIK-17E, INTERSPUTNIK-17E-CK and INTERSPUTNIK-17E-B satellite networks	RRB16-2/9
9	Submission by the Administration of Algeria concerning the receivability of correspondence sent by the Radiocommunication Bureau to administrations regarding the procedure for coordinating frequency assignments in conformity with the provisions of the regional agreements and the Radio Regulations	RRB16-2/11
10	Draft rule of procedure concerning the treatment of requests for coordination or notification notices of satellite networks received prior to the entry into force of a WRC decision	Circular Letter CCRR/55, RRB16-2/2, RRB16-2/4
11	Submission by the Administration of the United States on the priority of coordination requests of existing frequency assignments in the space research service in the frequency bands 13.4-13.65 GHz and 14.5-14.8 GHz	RRB16-2/13, RRB16-2/INFO/1
12	Impact of WRC-15 decisions on the Rules of Procedure	RRB16-2/3, RRB16-2/8, RRB16-2/10
13	Confirmation of the next meeting and indicative dates of future meetings	-
14	Approval of the summary of decisions	RRB16-2/14
15	Closure of the meeting	-

(400313)

1 Opening of the meeting

1.1 The **Chairman** opened the meeting at 1400 hours on Monday 16 May 2016 and welcomed all participants.

1.2 The **Director** welcomed the Board members, and wished them every success in what promised to be a busy meeting. The staff of the Bureau stood ready to assist the Board in any way they could.

1.3 The **Secretary-General** said that it was his pleasure to greet all the Board members and welcome them to Geneva. Stressing the importance of coming up with new technologies particularly in the field of satellite communications, he noted that radiocommunication involving both satellites and terrestrial services played a key and ever more important role in the provision of Internet services, in connecting the unconnected, in devising new approaches to economizing on scarce resources and in inter-sectoral cooperation. ITU was recognized as constituting the only forum for bringing all the relevant elements together, and the Board's work was fundamental to the radiocommunication side of ITU's mandate, and thus to ITU and its membership, in a world in which technical innovation was so essential. Moreover, individual Board members made valuable contributions within their own regions, for example in bilateral discussions, and at regional events. He wished the Board a successful and productive meeting.

2 Late submissions and agenda

2.1 The Board **agreed**, in accordance with No. 13.12A*f)*, that two late submissions from the Administrations of Bulgaria and France containing comments on draft rules of procedure, received before the present meeting but after the relevant deadline for such submissions, should not be considered by the Board.

2.2 **Mr Strelets** stressed that, when establishing and adopting its agenda for any given meeting, the Board should ensure that it allowed adequate time for considering any draft rules of procedure before it. In that regard, he drew attention to the order in which the items to be considered at Board meetings were listed in § 1.4 of the Board's working methods in Part C of the Rules of Procedure. It would be particularly important to bear his comments in mind for the Board's 73rd meeting, when the Board would be required to consider numerous draft rules.

2.3 The **Chairman** said that Mr Strelets' comments would be borne in mind for the future, particularly for the 73rd meeting, but pointed out that in the course of any meeting the Board did not always stick strictly to the order in which items appeared on its adopted agenda.

2.4 **Ms Wilson** said that § 1.4 of Part C of the Rules of Procedure simply listed the items that should be included on the Board's agenda, but did not dictate the order in which they should be considered. The Board must retain the necessary flexibility to address the matters before it as effectively as possible.

2.5 **Mr Bessi** said that Mr Strelets' comments were valid, but flexibility was essential too. For example, just prior to a WRC the Board had to ensure that it devoted adequate time to its report under Resolution 80. It was also useful at any given meeting to adhere to the order in which items appeared on its adopted agenda, so that the necessary Bureau staff knew more or less when they were required to attend the meeting, and to facilitate Board members' preparations to consider the various items.

2.6 The **Chairman** concluded that at its 73rd meeting the Board would consider the draft rules of procedure immediately following its consideration of the Director's report, but would decide the order of items on its agenda on a meeting by meeting basis thereafter.

2.7 **Mr Strelets** said that it was regrettable, and indeed an infringement of the Board's working methods, that not all parts of all the official documents before the present meeting had been made available in the different languages required by the Board members.

3 Report by the Director of BR (Document RRB16-2/5 and Addenda 1-3)

3.1 The **Director** introduced his customary report in Document RRB16-2/5, drawing attention to Annex 1 summarizing the Bureau's actions to implement the decisions taken by the Board at its 71st meeting. He noted that the three addenda to the report related to harmful interference caused by Italy to neighbouring countries, a subject that would be considered in the context of terrestrial systems.

3.2 **Mr Méndez (Chief TSD)**, introducing the sections of the report dealing with terrestrial systems, said that Annex 2 described the work of the Bureau in processing filings related to terrestrial services. Reports of harmful interference or infringements of the Radio Regulations were dealt with in § 4 of the Director's report, and in particular § 4.2 focused on harmful interference caused by Italy to neighbouring countries and summarized reports from the Administrations of Switzerland, France and Slovenia. On that topic, Addendum 1 to the report contained a letter from the Administration of Malta and Addendum 2 contained a letter from the Administration of Croatia. Addendum 3 reported on a meeting between the Bureau and the Administration of Italy, held in Rome on 5 May 2016. At that meeting, in addition to the steps described in Addendum 3, the Bureau had raised a case of interference to Switzerland's TDAB service on channel 12A, reported by Switzerland, and the Administration of Italy had transferred the case to the local offices, which would handle the matter directly with the Administration of Switzerland.

3.3 **Mr Bessi** congratulated the Italian authorities on the progress made with regard to interference to television broadcasting, although the Administrations of Croatia and Slovenia had as yet seen no improvement. He suggested that the Bureau, in its future contacts with Italy, should focus in particular on those two countries. He also expressed concern that the situation might deteriorate when countries started to use mobile in the 700 MHz band.

3.4 **Mr Strelets** commended the Bureau on the efforts undertaken in accordance with the Board's decisions. At last there was a practical plan, thanks to the Italian authorities, although much remained to be accomplished and various unknowns, such as that mentioned by Mr Bessi, might jeopardize progress. He asked whether the plan was adequately supported financially.

3.5 **Mr Kibe** was pleased to see the steps being taken towards resolving a long-standing problem and said that the Board should encourage Italy to pursue its efforts. He suggested that the Director should continue to monitor progress and report back to the Board at its next meeting.

3.6 **Mr Khairov** congratulated the Bureau and the Italian authorities on the progress achieved. There were reasons for optimism, with the new DVB-T2 standard offering opportunities to use frequency resources more economically, building up large synchronous networks. The Italian Administration was to be encouraged to pursue the new approaches it was adopting.

3.7 The **Director**, referring to Addendum 3 to his report, said that the meeting in Rome in May had been planned to review actions regarding television broadcasting that had been expected to be completed by 30 April 2016. That deadline had not been met, but some progress had been made, as indicated in the document. For each region, the Italian authorities had to issue decrees and orders determining how the process would unfold, so as to minimize the risk of a legal challenge. The process was now expected to be finalized by July 2016. Some 6.8 million euros had been disbursed by the Italian authorities out of a budget of nearly 51 million euros, and various measures were being taken to encourage the rational use of the spectrum. As could be seen in Attachment 1 to Addendum 3, channels had been cleared for Malta, France and Switzerland, but remained to be cleared for

Slovenia and Croatia, which will be the subject of the phases to be completed by July 2016. In regard to sound broadcasting, there was no new law, and a pragmatic approach was being adopted in order to resolve reported cases of harmful interference on a case by case basis. Looking to the future, countries wishing to use the 700 MHz band for mob le would have to coordinate with Italy and it was therefore in the interest of Italy to show its ability to use spectrum as agreed with its neighbours. The introduction of DVB-T2 would certainly provide further spectrum efficiency but this could only happen in a subsequent phase, once reorganization of the sub-700 MHz spectrum would have been agreed through multilateral frequency coordination.

3.8 The **Chairman** noted that progress was expected by July and said that further information should be provided to the Board at its next meeting.

3.9 **Mr Henri (Chief SSD)**, introducing those parts of the Director's report dealing with space systems, drew attention to Annex 3 showing the Bureau's work on the processing of filings related to space services. He provided updated information covering April 2016. With regard to coordination requests (Table 2 of Annex 3), he noted that a large number of requests had been received on 28 November 2015 with frequency bands allocated by WRC-15. This had required the Bureau's software to be updated, therefore delaying the publications. Resources had been redeployed within the department to bring the treatment time within the regulatory limit of four months as soon as possible, and certainly by the end of 2016. With regard to cost recovery for satellite network filings, he drew attention to Annex 4 listing satellite network filings where payment had been received after the due date but prior to the BR IFIC meeting dealing with the matter. No filings had been cancelled as a result of non-payment during the period under consideration. To ensure that the MIFR reflected reality, the Bureau reviewed the implementation of various provisions of the Radio Regulations, as described in § 5 of the Director's report, including provisions regarding the bringing back into use of satellite networks following suspension. He recalled that, at the previous meeting of the Board, the Bureau had requested the Board to decide on the cancellation of frequency assignments to the ACS-1 and MCS-1 satellite networks (§ 8 of Document RRB16-1/22 - Minutes of the 71st meeting) and the Board finally decided to defer the issue to its next meeting. Since then, as stated in § 6 of the Director's report, the Administration of the United States had provided additional evidence of the continuous use of the frequency assignments to the ACS-1 and MCS-1 satellite networks recorded in the Master Register and operated by the SKYTERRA-1 satellite. In view of that information, the Bureau considered that the matter was concluded, and had decided to retain the frequency assignments in the MIFR. Finally, § 7 of the report dealt with suspension of satellite networks when requests were received more than six months after the actual date of suspension. The table in that section listed the satellites of Luxembourg and Papua New Guinea that the Bureau would continue to take into account. Once the WRC-15 modification of § 5.2.10 of Article 5 of Appendices 30 and 30A of the Radio Regulations came into force, the Bureau would deal with such cases under the new provision and there would no longer be any need to report to the Board on the matter.

3.10 **Mr Hoan** suggested that, in view of the information provided in § 6 of the Director's report, the Board had no need to discuss the ACS-1 and MCS-1 satellite networks as a separate agenda item.

3.11 **Mr Ito**, recalling the Board's discussion and decision at the 71st meeting, said that he saw no additional evidence as such in the Director's report.

3.12 **Mr Bessi** said that, at the previous meeting, the Bureau had requested the Board to give it the go-ahead to cancel the networks. Now, based on additional evidence, the Bureau had implicitly withdrawn its request and decided to maintain the networks in the MIFR. The Board could simply note the Bureau's decision.

3.13 **Mr Strelets** supported the comment made by Mr Ito. The Bureau had brought a matter to the Board and the Board had decided to defer its decision on the case. Pending that decision, the Bureau should hold the case in abeyance. Perhaps the word ng of the Director's report was infelicitous.

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3.14 **Mr Koffi** agreed with Mr Ito and Mr Strelets. The Board would simply note the Director's report and should therefore take up the case for decision under a separate agenda item. **Mr Magenta** endorsed that view.

3.15 **Ms Wilson**, speaking on a procedural point, noted that at the Board's 71st meeting the topic of the ACS-1 and MCS-1 satellite networks had appeared on the agenda as a request by the Bureau for a decision, whereas on the agenda of the present meeting the topic came under the heading of consideration of the status of satellite networks. She suggested that, in general, when a topic was continued from one Board meeting to the next, the wording of the agenda item should remain the same.

3.16 **Mr Strelets** observed that the relevant agenda item for the present meeting (consideration of the status of satellite networks) in fact covered a variety of topics unrelated to status. With regard to the ACS-1 and MCS-1 satellite networks, he suggested that the Board should resume its deliberation of the matter and reach a decision under a separate agenda item. **Mr Bessi** agreed with that suggestion.

3.17 Referring to § 7 of the Director's report, **Mr Bessi** asked what the Bureau would do with requests for suspension received after 1 January 2017 that related to suspensions prior to 1 January 2017. In his view, the Bureau should treat any request for suspension received after 1 January 2017 in accordance with the new provision. **Mr Strelets** said that Mr Bessi had raised an interesting point that the Board might have to discuss at a later stage. **Mr Henri (Chief SSD)** said that for all requests for suspension received after 1 January 2017, the regulations in force when the request was received would apply, including for suspensions commencing prior to 1 January 2017. If any such requests were for suspension commencing over six months prior to 1 January 2017, the suspension would be granted, but subject to reduction as described in No. 11.49 as revised by WRC-15.

3.18 The **Chairman** suggested that the Board conclude on the Director's report as follows:

"The Board thanked the Director of the Radiocommunication Bureau for the Report and information provided in Document RRB16-2/5. Furthermore, the Board considered in detail the information provided in Addenda 1 to 3 to Document RRB16-2/5 and noted with satisfaction the considerable progress made by the Administration of Italy to resolve the issue of harmful interference to the sound and television broadcasting services caused by Italy to its neighbours. The Board noted that for television broadcasting stations positive results have been achieved in some regions and that the remaining regions are planned to be resolved by July 2016. The Board encouraged the efforts to continue and requested the Director of the Radiocommunication Bureau to report to its next meeting on the conclusion of the process to resolve this issue, while noting that the situation concerning sound broadcasting would be a continuous process to be solved gradually over a much longer time period."

3.19 It was so **agreed**.

3.20 The Director's report in Document RRB16-2/5 and Addenda 1-3 was **noted**.

4 Submission by the Administration of the United States regarding the status of the ACS-1 and MCS-1 satellite networks (Document RRB16-2/1)

4.1 **Mr Henri (Chief SSD)** introduced Document RRB16-2/1, containing a submission by the Administration of the United States providing information on the ACS-1 and MCS-1 satellite networks. That information had been received very late at the Board's 71st meeting and the Board had decided to defer consideration of the matter until the present meeting. On 26 February 2016, the Bureau had requested information from the Administration of the United States regarding the SKYTERRA-1 satellite. On 4 April 2016, the administration had replied providing evidence of the continuous use of the frequency assignments to the ACS-1 and MCS-1 satellite networks recorded in

the Master Register and operated by the SKYTERRA-1 satellite at 101°W. Having examined the information provided, the Bureau on 13 April 2016 had thanked the administration and stated that it would retain the frequency assignments in the MIFR. The full exchange of correspondence between the Administration of the United States and the Bureau had now been transmitted electronically to Board members.

4.2 **Mr Bessi**, supported by **Mr Magenta** and **Mr Kibe**, recalled that it had been the lack of information from the United States Administration that had prompted the Bureau, at the previous meeting, to request the Board to take a decision to cancel the assignments. Now information had been provided, the Bureau had decided to maintain the filings in the MIFR, and the Board could simply note that decision.

4.3 **Mr Strelets** said that the information presented by the Bureau to the present meeting showed that the networks had been brought into service and were in continuous use. Nevertheless, the Bureau had at the previous meeting requested the Board to take a decision to cancel the filings and the Board had deferred its decision to the present meeting. The case was therefore still being considered by the Board and it was up to the Board to decide.

4.4 **Mr Hoan** agreed that, based on the information provided, the assignments should be retained in the MIFR. From a procedural point of view, it was for the Board, rather than the Bureau, to decide on the case. The Bureau should have explicitly withdrawn the request it had made to the Board at the previous meeting.

4.5 **Mr Ito** thanked the Bureau and the Administration of the United States for clarifying the matter. The Board was lucky not to have mistakenly cancelled real satellite networks. If the information had been provided earlier, the Bureau would not have raised the case under No. 13.6 of the Radio Regulations and the Board would not have wasted its time. Administrations should be aware of the importance of following the No. 13.6 process. In the present case, the outcome had been a happy one, but it might not have been. He nevertheless felt uncomfortable about the Bureau taking a decision on a matter that was under consideration by the Board.

4.6 **Mr Bin Hammad** and **Mr Koffi** considered that the decision should be taken by the Board, not the Bureau.

4.7 **Mr Bessi** said that the Bureau had acted in conformity with the Radio Regulations. The administration had provided the required information, there was no disagreement between the administration and the Bureau, so no case arose under No. 13.6.

4.8 The **Director** said that, if that point had not been on the Board's agenda, the Bureau would simply have withdrawn its initial request to the Board for cancellation, since the conditions no longer existed for making that request. In any event, without a decision by the Board to cancel a network, the Bureau had no option but to continue taking that network into account.

4.9 The **Chairman** suggested that the Board conclude as follows:

"The Board carefully considered Document RRB16-2/1 and the additional information provided by the Bureau, and taking into account the results of the studies undertaken by the Bureau, the Board decided not to suppress the frequency assignments to the ACS-1 and MCS-1 satellite networks."

4.10 It was so **agreed**.

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5 Submissions by the Administrations of Norway and the United States on the change of the notifying administration for the satellite systems STEAM-0, STEAM-1, STEAM-2 and STEAM-3C (Documents RRB16-2/6 and RRB16-2/INFO/2)

5.1 **Mr Henri (Chief SSD)** introduced Document RRB16-2/6, containing correspondence from the Administrations of Norway (Attachment 1) and the United States (Attachment 2) requesting that the notifying administration for satellite systems STEAM-0, STEAM-1, STEAM-2 and STEAM-3C be changed from Norway to the United States as from 1 July 2016. He noted that Norway indicated that the change of notifying administration was being made at the request of the systems' operator; that the United States accepted the transfer; and that the coordination rights of other filings submitted by Norway would be preserved. The United States indicated that it agreed to the change of notifying administration; that neither administration considered the transfer as distortive or trafficking or had received any compensation for it; that a major reason for the change was that the Administration of the United States would be better resourced to engage in the increasingly complicated coordination process for non-GSO satellite systems; and that the systems' operator would remain the same.

5.2 The **Chairman** said that on several occasions in the past the Board had discussed a change of notifying administration acting on behalf of an intergovernmental organization, and indeed had developed a rule of procedure for such changes. To her understanding this was the first time the Board was discussing a change of notifying administration acting on its own behalf to another administration also acting on its own behalf.

5.3 **Mr Kibe** agreed with the Chairman: no rule of procedure existed to deal with the case now before the Board. The rule of procedure dealing with a change of administration acting on behalf of a group of administrations had been developed and approved by the Board at its 56th and 57th meetings. Despite the assertions of the Administrations of Norway and the United States, he feared that the request before the Board could give rise to accusations of trafficking in spectrum and orbital resources, and could cause difficulties for the Bureau and Board. The Board might request the Bureau to develop a rule of procedure dealing with such requests.

5.4 **Mr Ito** wondered precisely what was meant by the sentence in the Administration of Norway's correspondence reading: "The Administrations of Norway and the United States have confirmed in a separate exchange of letters that the coordination rights of other filings submitted by Norway will be preserved notwithstanding the transfer of notifying administration for these satellite networks, and they are committed to ensuring this result." Moreover, he agreed with the Chairman that a change of notifying administration had occurred in the past only in cases of administrations acting on behalf of other administrations where an intergovernmental organization was involved and where the administrations concerned found themselves obliged to request the change. The case before the Board was the first in which an administration acting on its own behalf requested a transfer of filings to another administration also acting on its own behalf, without facing any unsurmountable obligation to request the change. He feared that to accede to the request could give rise to various adverse effects and unwanted consequences, and perturb the entire situation regarding control of orbital systems.

5.5 **Mr Strelets** endorsed the comments made by Mr Ito and the Chairman. He also agreed with most of the points made by Mr Kibe. He added that he saw no grounds either for acceding to the request or for developing a rule of procedure to deal with it. In fact, no party had requested the development of a rule of procedure. The matter was not one that could be addressed by the Bureau or Board, but rather would have to be considered by a WRC or even the plenipotentiary conference as it related to the basic principles enshrined in the ITU Constitution regarding the rational and equitable use of spectrum and orbital resources.

5.6 **Mr Bessi** agreed with Mr Strelets and Mr Ito, and with Mr Kibe's first points. No provisions of the Radio Regulations covered the request now before the Board, and to accede to it could

jeopardize the balance ensured by the Radio Regulations. The rule of procedure approved by the Board at its 57th meeting did not cover the request. Moreover, the request did not comply with No. 9.6.1 of the Radio Regulations: that provision referred to an administration acting on behalf of a group of named administrations. Furthermore, as was made clear in Norway's letter, once Norway's assignments had been transferred Norway would be able to make comments on the satellite systems transferred in order to protect its own services, whereas it did not have that right as the notifying administration of the systems in question prior to their transfer.

5.7 **Mr Magenta** endorsed previous speakers' comments, and agreed that there were no grounds for the Board to seek the development of a new rule of procedure. The administrations concerned should take the matter to the plenipotentiary conference, if they so wished.

5.8 **Mr Hoan** agreed with previous speakers, and in particular Mr Ito and Mr Strelets. The matter had been covered in the Board's report to WRC-15, but had not been discussed at the conference. No provisions of the Radio Regulations or Rules of Procedure covered the request now before the Board.

5.9 **Mr Khairov** said that he by no means questioned the honesty and good intentions of the Administrations of Norway and the United States in their quest to implement a genuine non-GSO project, into which they had channelled much time and effort. However, for the Board to accede to a requested change of notifying administration that was not permitted by any regulatory texts might open the door to the Bureau and Board assuming functions that went well beyond their normal mandates. Moreover, a change of notifying administration must inevitably involve an exchange of resources, be they financial or other. He agreed with Mr Magenta that it was up to the plenipotentiary conference to decide the matter, thereby allowing all administrations to have a say in it.

5.10 **Mr Bin Hammad** said that he agreed that the Board could not decide the matter now before it, for all the reasons given by previous speakers. In formulating its decision, however, the Board must consider carefully whether it was to refer the matter to a higher body like the WRC or plenipotentiary conference, advise the administrations concerned to do so, or simply decide that it was not competent to address the matter. He also noted that there appeared to be some urgency to the request, which referred to the transfer taking effect on 1 July 2016.

5.11 **Mr Bessi** said that it was not for the Board to advise administrations to take matters to the conference; it was up to administrations to do so if they saw fit, and they were well aware of their right to do so. The Board should simply conclude that no provisions of the Radio Regulations or Rules of Procedure authorized the action requested.

5.12 Elucidating the meaning of the second paragraph of Norway's letter in Document RRB16-2/6, in response to Mr Ito's comment, **Mr Henri (Chief SSD)** said that to his understanding Norway meant that it had been agreed with the United States that, if the filings in question were transferred to the United States, Norway would not have to coordinate any other of its filings with those transferred filings. He went on to note that it would be inaccurate to state, for example in any decision formulated by the Board, that in the past a change of notifying administration had been accepted by the Board only where an intergovernmental organization had been involved. In that regard, he recalled the cases of networks being transferred from the former USSR to the Russian Federation, from Portugal to China, from the United Kingdom to China, and others, as listed in Document RRB16-2/INFO/2, made available to the Board.

5.13 **Mr Magenta** commented that it was not clear what the Administrations of Norway and the United States were requesting when asking the Bureau to transmit their correspondence to the Board if necessary – the development of a rule of procedure or a simple decision? Moreover, the transfer of filings from one administration to another entailed legal ramifications in regard to the rights of administrations and their powers vis-à-vis other administrations. If the Board were to consider acceding to the request, it would first have to seek clarification of all such ramifications from legal

experts, and of the competence of those submitting the request to actually do so. In that regard, he noted that one of the signatories of Norway's correspondence in Document RRB16-2/6 was a "senior engineer".

5.14 **Mr Strelets** said that there appeared to be no conflict between the two administrations submitting the request, which involved a straightforward transfer, with both administrations seeking to preserve the respective rights of the filings involved and other filings. He nevertheless continued to see no grounds for the development of a rule of procedure to cover the action requested.

5.15 The **Chairman** suggested that the Board conclude as follows:

"The Board discussed in detail the request as contained in Document RRB16-2/6 to transfer the functions of notifying administration from the Administration of Norway to the Administration of the United States of America for the satellite systems STEAM-0, STEAM-1, STEAM-2 and STEAM-3C and acknowledged the good intentions of the two administrations concerned. The Board noted however that there is no provision of the Radio Regulations that provides for the transfer of the function of notifying administration applicable to this specific situation. Furthermore, the Board considered that such a request could only be considered by a competent conference.

Consequently, the Board concluded that it was not in a position to accede to the request from the Administrations of Norway and the United States of America."

5.16 It was so **agreed**.

5.17 **Mr Ito** said that the matter should be noted with a view to including it in the Board's report to WRC-19 under Resolution 80 (Rev. WRC-07).

6 Submission by the Administration of Malaysia regarding the status of the MEASAT-91.5E-30B satellite network (Document RRB16-2/7)

6.1 **Mr Wang (Head SSD/SNP)** introduced Document RRB16-2/7, containing a submission from the Administration of Malaysia in which it contested the Bureau's finding for the network MEASAT-91.5E-30B. The attachment to the document comprised correspondence exchanged between the Bureau and the Malaysian Administration. Outlining the history of the case and the main reasons for which Malaysia was contesting the Bureau's finding, he said that the Bureau had received Malaysia's submission for the network in January 2015, and had informed Malaysia that, based on the Bureau's examination under § 6.22 of Article 6 of Appendix 30B, the Bureau had identified additional administrations with which coordination was required for Malaysia over and above those already identified and with which Malaysia had not concluded coordination. Malaysia, in its reply, maintained its conviction that no more potential interference was identified at the Part B than at the Part A stage. Malaysia had indicated its intention to apply § 6.25 of Article 6 of Appendix 30B vis-à-vis those administrations with which it had not obtained the required coordination, thus ensuring its network's provisional entry in the List. Since all the data pertaining to the filing were complete, the Bureau had published Part B for the network in BR IFIC 2795 of May 2015. Some four months later, in September 2015, the Malaysian Administration had contested the Bureau's finding; and despite the correspondence exchanged between it and the Bureau as presented in Document RRB16-2/7, it remained convinced that the Bureau's finding was wrong and requested, in its letter dated 25 April 2016, that the matter be submitted to the Board for decision. The basic reasons put forward by the Malaysian Administration to justify its position were that the BR software it had used at the Bureau's recommendation was precise only to 3 decimal places, whereas the increased interference was identifiable only with calculations precise to five decimal places. Malaysia therefore maintained that it could not be held accountable for the consequences of the additional interference identified. Second, the network involved was a national system that had already been brought into use. Third, the Malaysian Administration maintained that it had requested that its territory be excluded from the

service areas of those affected networks, but that request had not been taken into account by the Bureau when establishing its finding.

6.2 **Mr Strelets** said that the issue before the Board was mathematical, and hinged basically upon the decimal place to which figures were to be rounded. Annex 4 to Appendix 30B gave various indications as to the precision required for C/I calculations, and appeared to point to a required precision of two decimal places. To his mind, precision to two decimal places was sufficient for the operations concerned, and it was certainly illogical to employ two softwares for the same operations, one with precision to two decimal places and the other with precision to the sixth decimal place – as appeared to be the case in the submission now before the Board. It was essential that the same precision be adhered to in all the calculations, but he was unsure whether it should be up to the Board to decide the required precision, or, for example, Working Party 4A.

6.3 **Mr Ito** said that the matter before the Board was above all one of policy, and involved several issues. First, there was the threshold value not to be exceeded, and to allow even a small deviation was to open the door to the relaxation of applicable regulations, which should be avoided at all cost. The most straightforward solution could be simply to decrease power by a minor amount, say 0.0005 dB, rather than infringe the regulations. Second, there was the question of the software used for the calculations, and in that regard he sympathized with the Malaysian Administration, in so far as it had fallen victim to the fact that two softwares were used, one with lesser precision than the other. The Bureau must ensure that the precision of the two softwares was aligned so that similar problems did not arise in the future. Meanwhile, internal measures could be taken to adjust the two softwares to produce the same precision without contravening any regulations. Third, there was the question of the exclusion of territories from the service area of the network concerned. To his understanding, such matters should be sorted out through dialogue between the administrations concerned, without the involvement of the Bureau or Board, unless an administration requested the Bureau's assistance as provided for by the Radio Regulations. It seemed that considerable misunderstanding had arisen at various levels in the case under consideration. If everything was clearly explained to the Malaysian Administration, the latter would surely understand the situation, the options open to it, and the assistance that could be provided to it by the Bureau regarding coordination difficulties with any administrations identified as affected.

6.4 **Mr Wang (Head SSD/SNP)** said that the examination in accordance with Annex 4 to Appendix 30B did not represent the entire process regarding examination under § 6.22, but only the second part of that examination; in order to identify affected parties, it compared calculated values with specific criteria, with precision to three decimal places, which was why software with precision to three decimal places was used. That was relevant only for that part of the examination. The first part of the examination under § 6.22, on the other hand, which was effected in order to ascertain whether there was an increase in interference, compared two calculated values, and employed software with greater precision, which explained the confusion on the part of the Malaysian Administration regarding the softwares that should be used and their respective precision. As to the exclusion of territories from a network's service area, he drew attention to the rule of procedure on § 6.16 of Appendix 30B and noted that an administration had to explicitly submit to the Bureau a request for such exclusion; in the case under consideration, the Malaysian Administration had failed to do so, and therefore the Bureau had been unable to take the desired exclusions into account. Even if the exclusions had been taken into account, however, the results of the Bureau's finding would have been unchanged.

6.5 **Mr Strelets** reiterated that if precision to two decimal places was imposed for one part of a procedure, it made no sense to apply precision to six decimal places for another part. He therefore found Malaysia's arguments fairly convincing. It would seem that the Malaysian Administration had sought the Bureau's assistance regarding the MEASAT-91.5E-30B submission, and perhaps the

Bureau might have been more helpful. The Bureau should consider limiting the precision of calculations to three decimal places in the examinations involved.

6.6 **Mr Hoan** endorsed Mr Strelets' comments. The request submitted by Malaysia involved Malaysia's first submission under Appendix 30B and concerned a real satellite. Examination of the filing under Appendix 30B had produced misleading results, in a process which was far from clear for many administrations. Matters might have panned out more positively if the Malaysian Administration had received more helpful advice earlier on in the process. He asked the Bureau to clarify the following points. First, if the MEASAT-91.5E-30B submission was given a favourable finding under § 6.22, would its entry in the List be definitive rather than provisional? Second, if the territory of Malaysia was excluded from that of other administrations' networks, would the MEASAT-91.5E-30B network's entry in the List be definitive rather than provisional? Third, would application of the 0.05 dB computational precision referred to in footnote 16 to § 2.1 of Annex 4 to Appendix 30B make it possible to establish a favourable finding for the MEASAT-91.5E-30B network under § 6.22 of Article 6 of Appendix 30B? The examination procedure under Appendix 30B as revised by WRC-07 was still unfamiliar to many administrations, including Malaysia it seemed. Malaysia should be given the chance to reduce its power for the network in question and exclude its territory from the service areas of other networks, with a view to receiving a favourable finding under § 6.22.

6.7 **Mr Bessi** said that the Board should endeavour to find a solution for the Malaysian Administration: it was Malaysia's first Plan modification under Appendix 30B, and Malaysia had encountered understandable problems in using the software provided by the Bureau for the purpose. The Board could not derogate from the method correctly applied by the Bureau, with a precision to the sixth decimal place, as such derogation could undermine other similar decisions taken in the past. Given the relatively insignificant increase in potential interference involved, however, negotiations should be entered into with the additional administrations identified as potentially affected, with a view to achieving their agreement to the network's operation.

6.8 **Mr Khairov** said that it was evident that the software used by the Bureau and administrations for submissions and examinations must be the same. Moreover, the applicable margins of error and precision of calculations must be understood in the same way by all parties, and appeared to require clarification by the relevant ITU-R study group. The necessary studies would nevertheless require time, and in the meantime other administrations could encounter similar problems. The best way forward might be to request the Bureau to develop a rule of procedure reflecting the precision and margins of error to be applied in implementing Article 6 of Appendix 30B, pending the outcome of a study by an ITU-R study group. Once that outcome became available, the rule of procedure could be revised accordingly. As to the case before the Board, Malaysia should not bear the consequences of the use of different softwares in the application of Article 6 of Appendix 30B; the Board should therefore accede to the request and instruct the Bureau to review its finding under § 6.22 accordingly.

6.9 **Ms Wilson** said that she would be against relaxing the application of provisions of the Radio Regulations on the grounds that different software had been used. Recognizing that similar cases might arise in the future, she would prefer to pursue Mr Ito's approach of getting Malaysia to reduce the power of the network, based on which it could enter into the necessary coordination with the few networks identified as affected.

6.10 **Mr Strelets** noted that the Malaysian Administration had sent letters to the Administrations of the Netherlands, China, Sweden and the Russian Federation, reproduced in Document RRB16-2/7, requesting exclusion of the territory of Malaysia from the service areas of their networks. If Malaysia was exercising its rights in that regard, why was the Bureau taking account of the potential interference to those networks?

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6.11 Responding to the various points and questions raised, **Mr Wang (Head SSD/SNP)** recalled, first, that the question of requests to be excluded from the service areas of networks had been discussed at length at WRC-12, and had given rise to the rule of procedure on § 6.16 of Appendix 30B, according to which an administration must explicitly request that the Bureau take into account its objection to the inclusion of its territory in the service area of other administrations in order for that exclusion to be taken into account in the Bureau's examination of its own network under § 6.17. However, a distinction must be drawn between the submission of comments under § 6.6 of Appendix 30B on one hand, and the Part B processing of a network on the other. If at the Part B stage there was no request for exclusion, the Bureau had to conclude that no such request was intended. Second, regarding the software issue, the Bureau and administrations used the same software, producing the same precision and results. The problem in the case before the Board was that the Malaysian Administration believed that the same software package could be used for all examinations under Article 6 of Appendix 30B, which was not the case. The Appendix 30B reporting tools were applicable examination in Annex 4 of Appendix 30B, but not to all the Part B analysis. There was nothing new in the approach for Part-B examination, which, as administrations were well aware, was also applicable to Appendices 30 and 30A at the Part B stage. Third, a distinction must be drawn in regard to calculating degradation values. A degradation value could be as great as, say, 100 dB when measured against criteria in terms of possible interference caused by one network to another. In the case under consideration, however, the unfavourable finding was given due to the increase of interference at the Part B stage vis-à-vis the interference identified at the Part A stage, and the difference could be so small as only to be identifiable with precision to the seventh or eighth decimal place. Fourth, regarding the Bureau's processing of a submission, if mandatory data were missing, incomplete or required clarification, administrations could make changes to their submissions. Once the completeness of the mandatory data had been ascertained by the Bureau, however, the submission was given an official date of receipt and thenceforth no changes could be made to it – even if, for example, as in the case of Malaysia, it contained a very small difference in regard to interference. In the case of a possible unfavourable finding, the administration then faced the choice of whether to request application of § 6.25 – as Malaysia indeed had – or to ask for the submission to be returned. Lastly, regarding the application of § 6.16, the fact that the territory of Malaysia had been excluded from the service area of other networks reduced the potential interference effect of Malaysia's network, but did not lead to any change to the unfavourable finding. The comments of administrations at the Part A stage, including objections to inclusion in service areas, were not taken into account by the Bureau when establishing its finding; the Bureau took account of what was communicated to it for the Part B stage, including requests for exclusion and agreements reached with administrations identified as affected. Malaysia had not provided the necessary requests or information at the Part B stage.

6.12 **Mr Bessi** sought clarification regarding Mr Ito's proposal that Malaysia be invited to reduce the power of its network. To his understanding, such an approach would not be possible without a new modification request being submitted, with a new date of receipt. The best option might be to seek the agreement of the other administrations affected regarding the power reduction, and pending negotiations along those lines the Board might defer its decision on the case to its 73rd meeting. In all events, he noted that application of the rule of procedure on § 6.16 with its various ramifications, including Malaysia's requests to be excluded from the service areas of various networks of other administrations, did nothing to alter the fact that the Bureau's examination under § 6.22 had triggered the need for coordination with various administrations, and their agreement would have to be sought.

6.13 **Mr Strelets** said that the situation was somewhat absurd, in that various administrations wanted to include Malaysia in the service areas of their networks, whereas Malaysia wanted to be excluded from those service areas but was nevertheless obliged to coordinate with the administrations. Despite the rule of procedure on § 5.16, the situation faced by Malaysia reproduced

the situation that had prevailed at WRC-12, where a satellite that was in orbit and operational and had reached the registration stage was obliged to reduce its power on its own territory to meet interference requirements vis-à-vis other networks, despite having said that those networks could not operate over its territory. It would be far more logical for the other networks concerned to have to coordinate with Malaysia if they wished to operate on its territory.

6.14 **Mr Ito** said that the more he listened to the debate, the greater his conviction that there had been a lack of understanding between the Malaysian Administration and the Bureau; and that the Bureau should sit down with the Malaysian Administration with a view to identifying the best possible way forward for it.

6.15 **Mr Wang (Head SSD/SNP)** commented that Malaysia's network had been entered in the List provisionally, and could operate with the characteristics notified on the understanding that other administrations could demand protection if Malaysia's network caused interference to their networks. Despite his earlier indications that none of the data in Malaysia's submission could now be changed, the Board might see fit to treat the MEASAT-91.5E-30B network as an exceptional case, and instruct the Bureau to accept a minor adjustment of the network's power, while nevertheless making it clear that no other networks would be reviewed.

6.16 **Mr Khairov** said that the Board appeared to be forgetting the main thrust of Malaysia's arguments in submitting its request, namely that the results of the calculations effected pointed to no infringement of the applicable thresholds, taking three decimal places into account, and that the Malaysian Administration should not be penalized for having used software recommended by the Bureau. Coordination experts in his own country had informed him that they too used software recommended by the Bureau with precision to three decimal places. He considered that the Board should accede to Malaysia's request by recognizing that Malaysia's submission complied with § 6.22 and should be accepted by the Bureau accordingly.

6.17 **Mr Koffi** said that he would prefer the solution of assisting the Malaysian Administration by requesting it to reduce the power of its network and instructing the Bureau to accept that power reduction.

6.18 **Mr Strelets** said that he would find it strange for the Board to be seen as taking decisions for administrations. It was the sovereign right of the administration to decide for itself whether or not to reduce its network's power. If the Board could not accede to Malaysia's request, it should, while recognizing that the MEASAT-91.5E-30B filing was Malaysia's first under Appendix 30B, request the Bureau to press on with discussions with the Malaysian Administration with a view to identifying the best possible solution. Such a conclusion would not, however, resolve the point raised by Mr Khairov. It was anomalous that under the Radio Regulations *C/I* was calculated to the third decimal place with a margin of error of 5 per cent, whereas calculations to ascertain whether other values were exceeded were effected to the sixth decimal place. If administrations used software that was precise to three decimal places, surely the Bureau should do the same. He therefore supported Mr Khairov. The Board should indicate clearly that calculations should be precise to three decimal places, not least for the reasons given by the Malaysian Administration in § 4 of its letter dated 25 April 2016, and the software provided or recommended by the Bureau should be precise to three decimal places.

6.19 **Mr Koffi** said that he could support the proposal to request the Bureau to reopen discussions with the Malaysian Administration regarding the MEASAT-91.5E-30B network and to report the outcome to the Board at its 73rd meeting.

6.20 **Mr Bessi**, supported by **Mr Magenta**, said he could agree to that proposal, but not with a view to reopening the matter at the Board's 73rd meeting.

6.21 The **Chairman** noted that there appeared to be agreement for the Board to request the Bureau to continue to provide assistance to the Malaysian Administration regarding its MEASAT-91.5E-30B

satellite network with a view to finding a solution to the matter. As to the precision of calculations, she noted that various options had been suggested, including the possible drafting of a rule of procedure or referral of the matter to an ITU-R study group for study, and certain Board members had expressed their views on the precision that should be applied.

6.22 **Mr Bessi** said that precision to six decimal places would provide the best protection for Plan and List entries, and all administrations should be aware of the precision adopted. The matter should be decided by a WRC.

6.23 **Mr Magenta** said that the matter was essentially technical in nature and should be decided at a WRC where all administrations would be able to express their views.

6.24 **Mr Strelets** considered that the subject should be studied by Working Party 4A.

6.25 **Mr Khairov** agreed with Mr Strelets, the essential point being that all administrations must be aware of the precision applied by the Bureau. All parties should use the same tools with the same precision.

6.26 Commenting further at the request of the **Chairman**, **Mr Wang (Head SSD/SNP)** said that the Bureau could certainly take steps to ensure that administrations were provided with fuller information and guidance on the software used by the Bureau. As to what precision should be applied in the various calculations, a distinction must be drawn between the different comparisons. Where a threshold was involved, the degree of precision was already taken into account in the criteria, and precision to two or three decimal places was sufficient. Where two floating values were concerned, precision up to as many as 24 decimal places could usefully be applied in calculations, but he questioned whether administrations would accept that.

6.27 The **Director** said that he did not really see the matter as requiring a decision by a study group. It did not necessarily make too much difference what precision was applied, provided that the same precision was decided upon clearly and made known to and applied by everyone.

6.28 **Mr Magenta** asked when the Bureau had decided to adopt six-decimal-place precision rather than three-decimal-place precision in its Part B calculations.

6.29 **Mr Wang (Head SSD/SNP)** said that the Bureau had never taken any specific decision to apply six-decimal-place precision when comparing two calculated values (as opposed to comparing values with criteria); nor had it received any instructions in the form of provisions of the Radio Regulations or Rules of Procedure. When comparing two calculated values, it simply ascertained whether the difference between the two values was positive or negative, without considering the number of decimal places taken into account. He added that, when seeking to provide Malaysia with further assistance, the Bureau could look into precisely what Malaysia had modified between Part A and Part B and ascertain whether it really made a difference in terms of interference.

6.30 **Mr Ito** concluded from the explanations provided that there was no need to request a decision from an ITU-R study group on what was essentially BR policy regarding the truncation of values, and which called for a straightforward decision by the Bureau.

6.31 **Mr Strelets**, having commented further on the merits of the various degrees of precision possible, said that the Board should request the Bureau to study the matter with a view to aligning all the different values involved and updating the relevant software accordingly. Responding to a query by **Mr Henri (Chief SSD)** regarding the scope of such a study, he said that in his view the Bureau should focus on the elements evoked in § 4 of the Malaysian Administration's letter of 25 April 2016 (Document RRB16-2/7) and on whether or not Malaysia's assertions therein were valid.

6.32 The **Chairman** proposed that the Board conclude on the matter as follows:

"The Board considered thoroughly the request from the Administration of Malaysia to review the finding regarding the MEASAT-91.5E-30B satellite network as contained in Document RRB16-2/7. The Bureau acted correctly in this matter, but noting the difficulties arising from the use of the software that the Administration of Malaysia encountered in the processing of its satellite network, the Board requested the Bureau to continue to provide assistance to the Administration of Malaysia in the case of the MEASAT-91.5E-30B satellite network in an effort to find a solution to this matter.

Furthermore the Board instructed the Bureau to perform the necessary studies to clarify the issue of the precision of calculations and requested the Bureau to prepare suitable guidance to administrations on the use of the relevant software produced by the Bureau for these purposes.

The Board decided to request the Bureau to report on the outcome of these issues to the next meeting of the Board."

6.33 It was so **agreed**.

7 Submission by the Administration of Brazil regarding the status of the STAR ONE D1 satellite network (Document RRB16-2/12)

7.1 **Mr Matas (Head SSD/SPR)** introduced Document RRB16-2/12, containing a submission from the Administration of Brazil requesting a time-limited extension of the date of bringing into use of frequency assignments to the B-SAT-2N (84°W) satellite network. The administration stated that the launch of satellite STAR ONE D1, to be located at 84°W, had been scheduled to occur in the launch period 30 March - 30 June 2016 on Ariane V, but had been delayed until the new launch period 28 November 2016 - 28 February 2017 because of the late availability of the co-passenger spacecraft. Satellite STAR ONE D1 would operate the satellite network B-SAT-2N and the regulatory time limit for bringing into use the associated frequency assignments was 7 October 2016. As a consequence of the launch delay, which was beyond the administration's control, the deadline for bringing the assignments into use would expire before the satellite entered into operation.

7.2 **Mr Hoan** observed that the Administration of Brazil referred to four letters in § 7 of its submission, but those letters were not provided to the Board.

7.3 The **Chairman** noted that in § 8 of its submission the administration requested the Bureau to give confidential treatment to the information contained in those letters, hence in accordance with Part C of the Rules of Procedure those letters were not attached.

7.4 **Mr Bin Hammad** said that if the Board were to consider the request by the Administration of Brazil on the basis of *force majeure* then all the criteria set out in the legal guidance previously provided to the Board would have to be met. **Mr Magenta** asked whether the delay could be said to be unforeseen, in the context of the conditions to be fulfilled for granting an extension on the basis of *force majeure*.

7.5 The **Director** clarified that the Board could grant an extension on the basis either of co-passenger delay or of *force majeure*. It was not necessary for both conditions to be met. The present case hinged on co-passenger delay, and in his opinion the supporting evidence was convincing.

7.6 **Mr Kibe**, referring to § 1.6*bis* of Part C of the Rules of Procedure and Brazil's request for the confidential treatment of information, said that the Board could not conduct its work transparently in the absence of supporting evidence. He suggested that the Bureau should be instructed to return the submission to the administration and ask that it be resubmitted with unrestricted documentary support. The Board could then consider the matter at its next meeting. **Mr Koffi** also favoured that approach.

7.7 **Ms Wilson** agreed that the request for confidentiality made it difficult for the Board to consider the case but nevertheless thought that the Board should do so at the present meeting, given

that the next meeting was scheduled for dates in October 2016 after the expiry of the regulatory time-limit for bringing the assignments into use. Based on the information contained in the submission including the delayed launch date and the time-limited extension sought, as well as previous decisions by the Board, and the response of the conference to those decisions, she hoped that the Board could give comparable treatment to Brazil. She suggested that the Bureau might contact the administration to see whether redacted documents could be made available to the Board.

7.8 The **Chairman** suggested that the Bureau might summarize the confidential documents. **Mr Bessi** endorsed that suggestion.

7.9 **Mr Strelets** supported Ms Wilson's comments and the Chairman's suggestion. In his opinion, the request by the Administration of Brazil was well founded and it was in the Board's competence to grant a time-limited extension to the regulatory deadline on the basis of co-passenger delay. He stressed, however, that the Board's work had to be transparent and understood the difficulty posed by the unavailability of confidential documents. Perhaps the Bureau could simply confirm that the confidential documents referred to in § 7 of Brazil's submission supported the request made by the Administration of Brazil.

7.10 **Mr Bin Hammad** said that the Board should consider cases on an equal footing and was reluctant to set a precedent by taking a decision without seeing supporting evidence. He asked whether the Bureau had contacted the administration with a view to obtaining documents that could be made available to the Board.

7.11 **Mr Henri (Chief SSD)** said that the Bureau had indeed contacted the administration to inform them that, in accordance with the Rules of Procedure, confidential documents would not be circulated to the Board. The Bureau had asked whether any similar, non-confidential documents were available but the administration had not replied, possibly because it could not obtain authorization to publish the information. He personally had seen the confidential documents and confirmed that they provided information to support the administration's request. He said that the Bureau would not wish to provide a non-confidential summary of confidential information, given the sensitivity of concerns regarding confidentiality.

7.12 **Mr Ito** said that one way for the Board to overcome the difficulty of being unable to see confidential information was to trust the Bureau, which could see such information. In the present case, perhaps one of the vendors was insisting on confidentiality, and the Board might have to wait a long time for the information to become public. The Board should accept the assurance given by the Bureau and move forward to accede to the administration's request. **Mr Strelets** endorsed that approach.

7.13 **Ms Wilson** and **Mr Bessi** said that the confirmation provided by the Bureau was sufficient to validate the case as one of co-passenger delay. The power given to the Board by WRC-12 and confirmed by WRC-15 enabled the Board to extend the deadline. The Board should accede to the request by the Administration of Brazil.

7.14 **Mr Khairov** recalled that the Board worked on the basis of trusting the information provided by administrations. Only if there was reason to doubt the validity of such information was it necessary to demand evidence. In the application of No.13.6, the information provided by administrations was accepted. All cases should be dealt with in the same way. In the present case, he was in favour of acceding to the administration's request.

7.15 The **Chairman** suggested that the Board conclude as follows:

"The Board considered in detail the request by the Administration of Brazil for an extension of the date of bringing into use of the frequency assignments to the B-SAT-2N satellite network (84°W) as contained in Document RRB16-2/12. Taking into consideration the information provided and the

clarification by the Bureau of additional information, mentioned under point 7 of the document, the Board concluded that the case falls in the category of co-passenger delay and took into account that WRC-15 confirmed that the Board was granted the authority to address requests for time-limited extensions in such cases.

Consequently, the Board decided to grant the Administration of Brazil an extension of six months of the time limit for bringing into use of the frequency assignments to the B-SAT-2N satellite network (84°W) to 7 April 2017."

7.16 It was so **agreed**.

8 Submission by the Administration of the Russian Federation regarding the status of the INTERSPUTNIK-17E, INTERSPUTNIK-17E-CK and INTERSPUTNIK-17E-B satellite networks (Document RRB16-2/9)

8.1 **Mr Matas (Head SSD/SPR)** introduced Document RRB16-2/9 containing a submission by the Administration of the Russian Federation acting in its capacity as notifying administration on behalf of the International Organization of Space Communications INTERSPUTNIK and requesting the Board to extend the regulatory time-limit for bringing back into use the frequency assignments to satellite networks INTERSPUTNIK-17E, INTERSPUTNIK-17E-CK and INTERSPUTNIK-17E-B at orbital position 17°E on the basis of *force majeure*. As the administration explained in its submission, those satellite networks had been in use on the AMOS-5 satellite, launched on 11 December 2011. The guaranteed service life of the AMOS-5 satellite was supposed to have been 15 years, but on 21 November 2015, after a little less than four years in operation at orbital position 17°E, the satellite had suffered an abrupt outage resulting in its total failure and complete inoperability. In accordance with the requirements of the Radio Regulations, following the failure of the AMOS-5 satellite, the Administration of the Russian Federation on 3 February 2016 had informed the Bureau of the suspension of the operation of the frequency assignments to satellite networks INTERSPUTNIK-17E, INTERSPUTNIK-17E-CK and INTERSPUTNIK-17E-B effective 22 November 2015. The Administration of the Russian Federation explained in the document how each of the four conditions for *force majeure* were met. The administration also stated that, while the three years accorded by the Radio Regulations were sufficient for the planned replacement of an operational spacecraft, that period did not allow for completion of all the work involved in the preparatory activities, construction and launch of a new replacement satellite in a case in which the need to replace an operational spacecraft in orbit arose unexpectedly as a result of *force majeure*. The administration therefore requested the extension by one year, until 21 November 2019, of the regulatory time-limit for bringing back into use the suspended assignments.

8.2 **Mr Magenta**, supported by **Mr Khairov** and **Mr Koffi**, said that the four conditions for *force majeure* had been fulfilled and the Board should accede to the request by the Administration of the Russian Federation for a one-year extension of the regulatory time-period.

8.3 **Mr Ito** also supported extending the suspension period to four years, as requested by the Administration of the Russian Federation. He observed that the regulatory period had originally been two years, and had subsequently increased to three years. With advances in technology, it seemed that the investigation of failure and the replacement of satellites was now taking longer.

8.4 **Mr Bessi** said that the Board always had to ensure that the four conditions for *force majeure* were properly fulfilled, otherwise administrations would count on the granting of extensions. In the present case, he asked in the context of the third condition whether it was genuinely impossible, rather than simply difficult, to respect the regulatory period. An automatic reply from the Board in favour of extending the period would imply that three years was not enough time to replace a satellite.

8.5 **Ms Wilson** said that in the present case, given the large number of frequency assignments, it would be highly unlikely for a suitable replacement satellite to exist. The only possibility was to launch another satellite, and it was impossible to do so within the three-year regulatory period. She therefore considered that all the conditions for *force majeure* were fulfilled and that the Board should accede to the request by the Administration of the Russian Federation.

8.6 **Mr Hoan** agreed that in the present case three years was not enough for replacement of the satellite and that the Board should grant the requested extension.

8.7 **Mr Bessi** said that, in the present case, the failure of the satellite could not have been foreseen, making it impossible for a new satellite to be constructed within the time limit. He therefore agreed that the Board should accede to the request by the Administration of the Russian Federation. **Mr Magenta** endorsed that view.

8.8 The **Chairman** suggested that the Board conclude as follows:

"The Board discussed in detail the request from the Administration of the Russian Federation for an extension of the date of bringing back into use the frequency assignments to the INTERSPUTNIK-17E, INTERSPUTNIK-17E-CK and INTERSPUTNIK-17E-B satellite networks as presented in Document RRB16-2/9. The Board concluded that the case fulfils the four prerequisites to qualify for consideration as a case of *force majeure*. Noting also the decision of WRC-15 to grant the Board the authority to address such cases, the Board therefore decided to grant the Administration of the Russian Federation an extension of one year of the time limit for bringing back into use the frequency assignments to the INTERSPUTNIK-17E, INTERSPUTNIK-17E-CK and INTERSPUTNIK-17E-B satellite networks to 21 November 2019."

8.9 It was so **agreed**.

9 Submission by the Administration of Algeria concerning the receivability of correspondence sent by the Radiocommunication Bureau to administrations regarding the procedure for coordinating frequency assignments in conformity with the provisions of the regional agreements and the Radio Regulations (Document RRB16-2/11)

9.1 **Mr Méndez (Chief TSD)** introduced Document RRB16-2/11, containing a request by the Administration of Algeria for the Board to clarify matters regarding the receivability of communications from the Bureau addressed to ITU Member States, and the manner in which the Bureau confirmed receipt of those communications, in particular when they concerned coordination requests or reminders subject to time limits under the terms of regional agreements or the Radio Regulations, and specifically in the event of non-receipt of communications sent by the Bureau, including the corrective measures required and the applicable regulations. The Algerian Administration stated that it had been the victim of non-receipt of reminders sent by the Bureau to administrations affected by Algeria's draft modification of the GE06 Plan, published in BR IFIC 2798 of 7 July 2015. The Algerian Administration provided the full history of the case, and concluded its request by stating that it was important for the Board to elaborate rules of procedure defining the terms of receivability of communications sent by the Bureau, given the sensitivity of the deadlines and the undesirable consequences that could arise from failure to adhere to them.

9.2 Commenting on the details of the case, he drew attention to the relevant provisions of the GE06 Agreement, namely § § 4.1.4.8-4.1.4.11. He then outlined how the Bureau had dealt with Algeria's proposed modification to the Plan, and how its treatment of that proposed modification might have differed from its usual handling of proposed modifications. The publication of Algeria's proposed modification had triggered the start of the 75-day period for administrations identified as potentially affected to respond – namely Spain, France, Libya, Morocco Tunisia and the United

Kingdom. Under § 4.1.4.10, the Administration of Algeria had requested the Bureau to send reminders to those countries that should perhaps have responded but had not done so. The Bureau, for its part, had been well aware from which countries to expect a response because it had attended a meeting of the administrations belonging to the same region as Algeria (ASMG) at which the draft modifications to the GE06 Plan had been discussed and it had become apparent which administrations were potentially affected. For some unknown reason, however, not all the countries to which the Bureau had sent the reminder under § 4.1.4.10 had received it. Faced with no response from the potentially affected countries in question, the Bureau had contacted them and been informed by them that they had never received the Bureau's reminder. The Bureau had consequently decided to extend the deadline for the submission of comments, as a result of which the Bureau had subsequently received the comments it had expected.

9.3 The **Chairman** inferred that the basic point of disagreement between the Algerian Administration and the Bureau was the fact that the Bureau had sent an additional reminder to certain administrations and Algeria considered that to send such a reminder was not in compliance with the GE06 Agreement and that it affected Algeria's rights under the Agreement, which was based on tacit agreement meaning consent.

9.4 **Mr Magenta** said that the simplest solution to Algeria's request might be to amend existing rules of procedure to incorporate the despatch of an additional reminder, say, 10 days before expiry of the relevant deadline.

9.5 **Mr Strelets** said that the Administration of Algeria appeared to have followed the provisions of the GE06 Agreement to the letter, had nevertheless suffered unjustly in the course of doing so, and was turning to the Board to seek some kind of satisfaction. The Board should examine Algeria's request thoroughly, as it appeared to involve errors both in the transmission of correspondence and in the application of the GE06 Agreement. He would therefore be opposed to simply modifying the existing rules of procedure in response to Algeria's request, which could be seen as an appeal under Article 14 of the Radio Regulations against action taken by the Bureau. The Board must ascertain whether mistakes had been made, or whether the Administration of Algeria had simply fallen victim to circumstances. The problem of the receivability of correspondence was a recurring issue, and must be addressed. There might well be practical reasons for the problems encountered in the present case, even though it would seem from fax 31E(BCD)O-2015-001270 (Annex 9 to Document RRB16-2/11) that all the faxes sent by the Bureau had reached their destinations.

9.6 The **Chairman** agreed that the Board should look into the matter in depth, involving as it did the general question of the receivability of correspondence and the situation in which the Administration of Algeria had found itself.

9.7 **Mr Bin Hammad** agreed with the Chairman. The Board should discuss the practice with regard to correspondence from the viewpoint of both administrations and the Bureau, so as to avoid the occurrence of similar situations in the future.

9.8 **Mr Khairov** endorsed the previous speakers' comments. He further noted that the Administration of Algeria had encountered problems relating to correspondence in the past. Nevertheless, the system for submissions under the GE06 Agreement was both efficient and well known, involving numerous reminders, which in principle should all have been received by the administrations identified for receiving them. He asked whether the Bureau had received any response from administrations within the forty days stipulated in § 4.1.4.11, and if so from which; and why, in the absence of response within the forty days under § 4.1.4.11, the Bureau had not assigned the status of "coordination completed" to Algeria's assignments upon expiry of that period.

9.9 The **Chairman** said that the fundamental point of contention for Algeria appeared to lie in the extra reminder sent by the Bureau to certain administrations, thereby giving them extra time to

react when under the terms of the Agreement the procedure should have been finalized based on tacit agreement that removed the need for Algeria to coordinate with them.

9.10 **Ms Wilson** said that the key issue was what action the Bureau should take if its correspondence was not received by one or more administrations since, regardless of any additional reminders sent, non-receipt of correspondence entailed a potential loss of rights for the administration concerned. In the case before the Board, three administrations had not received correspondence, following which e-mails had been sent to them and a new deadline set. That course of action did not seem inappropriate to her. Thus, if several administrations said that they had not received correspondence, shouldn't the Bureau alter the procedure set down in the Agreement?

9.11 The **Chairman** noted that Circular Letter CR/366 did indeed refer to the sending e-mails if faxes failed.

9.12 **Mr Ito** said that non-receipt of correspondence had been a recurring problem for years. In the case of No. 13.6, the provisions were clear and strict, the consequences of non-compliance were loss of rights, and the provision appeared to be well understood, with all parties exerting great caution in its implementation. With other provisions, however, for example No. 11.49, countries were less compliant, leading the WRC to introduce penalties for non-compliance. In general, with the exception of No. 13.6, ITU was very generous regarding reminders, and provided for several to be sent in order to ensure that administrations did not forfeit their rights. In the case at hand, however, Algeria contested the action taken by the Bureau, insisting that the Bureau should strictly follow the provisions of the GE06 Agreement, and in that regard Algeria was right. In that case, however, various other administrations would lose their rights. To his mind, there was no solution to the dilemma, except to explain the situation to all parties concerned and seek a way to resolve the matter through dialogue, possibly even at the next WRC.

9.13 **Mr Strelets** said that to his understanding of the situation the Bureau had committed certain errors in its handling of Algeria's Plan modification, and Algeria had reason to be perplexed. For example, at one point Algeria had appealed to the Bureau under § 4.1.4.11, seeking confirmation that coordination had been completed, but had had to send further correspondence before receiving a response. That response had indicated a favourable finding except with regard to one administration, but when Algeria had sought further clarification the coordination status vis-à-vis other administrations had suddenly been changed from "completed" to "required". To his mind, it was one of the basic everyday duties of frequency service officials to check BR IFICs carefully, without waiting for reminders. As Mr Khairov had pointed out, several reminders had been sent to the administrations concerned prior to the one that was the point of contention; the administrations had had ample opportunity to receive the information and respond. Algeria had fulfilled all its obligations perfectly, whereas the frequency service officials were to blame for not having done their jobs. Lastly, the provisions of the GE06 Agreement were perfectly clear in the deadlines they set and consequences of non-compliance. To develop a new rule of procedure to deal with the issue would serve no purpose, since the situation would be the same no matter how many reminders were sent.

9.14 **Mr Khairov** endorsed those comments, and asked why, after expiry of the forty-day period set in § 4.1.4.11, the coordination status of Algeria's assignments had been changed from "completed" to "required".

9.15 **Mr Méndez (Chief TSD)** stressed that all the actions taken by the Bureau had been intended to clarify matters as far as possible for all administrations and protect their rights. The problem under consideration by the Board stemmed essentially from the action taken in implementation of § 4.1.4.10 and interpretation of that provision. For an unknown reason, the reminders prepared by the Bureau to be sent under that provision had been submitted by the Bureau to the fax transmission service but had never reached the three administrations concerned. Three other administrations consulted in parallel confirmed that they had not received the Bureau's faxes either. Tunisia in particular stood to obtain

no advantage by confirming that faxes sent had not been received: the Tunisian Administration had already earlier reacted to the Algerian assignments by communicating with the Bureau. Thus, various factors indicated that there had been a problem in transmitting the faxes. Addressing the questions asked by Mr Khairov, he confirmed that an administration, namely Spain, had received and responded to the Bureau's fax within the forty-day period under § 4.1.4.11, whereas the Administrations of France, Libya and Morocco appeared not to have received the faxes. It should also be noted that the action taken by the Bureau had been based on awareness of Morocco's position on the Algerian assignments from the outset: Morocco had reacted immediately, on 29 July 2015, to publication of the special section containing Algeria's Plan modifications by expressing its disagreement with the modifications and saying that any agreement on Morocco's part would be subject to a mutual agreement between Algeria and Morocco regarding Moroccan assignments. Also regarding action taken by the Bureau, he observed that a distinction should be drawn between the BR IFIC, which was the Bureau's official publication, and what was posted on the BR website, which involved an unofficial, automated facility made available to the membership. Regarding the latter, immediately following the forty-day period under § 4.1.4.11, an operator had launched the process regarding Algeria's assignments, automatically generating a "coordination completed" status because no response had been received from the other administrations concerned. Almost immediately thereafter, that status had been rectified to indicate "coordination required" because the Bureau was aware that responses were expected. Thus the sudden switch of status was attributable to the fact that the website facility was automated but could require correction. Lastly, the Bureau had not responded to Algeria's first reminder following expiry of the forty-day period under § 4.1.4.11 because the expiry had fallen in the final week of WRC-15, when all Bureau staff had been taken up by the conference.

9.16 **Mr Strelets** said that the workload of WRC-15 explained some things, but not everything. He failed to understand why the Bureau – following expiry of the forty-day deadline and the posting and subsequent reversal of findings on the website, and having received no correspondence from administrations – had taken it upon itself to write to administrations seeking their position regarding the Algerian assignments, and had set a new deadline for response that did not correspond to any provisions of the GE06 Agreement. He remained convinced that Algeria's complaint was justified, that the Bureau had committed certain errors in its handling of the submission in question, and that no rule of procedure was called for as the provisions of the Agreement and existing rules of procedure were perfectly clear. The administrations affected should be told that their objections to Algeria's assignment could not be taken into consideration because the deadline for response had expired.

9.17 **Mr Méndez (Chief TSD)** said that the Bureau, in the light of the information available to it, had taken the action that in its view had best corresponded to application of the GE06 Agreement. First, it had received a letter from the Administration of Morocco dated 29 July 2015 (just after publication of the IFIC containing Algeria's Plan modifications) in which Morocco clearly indicated its disagreement regarding Algeria's assignments. Second, the Bureau had participated in and coordinated various subregional meetings at which it had been agreed that the various administrations would not agree to Algeria's Plan modifications immediately, but might do so subsequently, simultaneously, within the framework of mutual agreements not yet finalized. Thus the Bureau had been aware of the position of the administrations concerned because it had attended and had indeed helped to organize coordination meetings at which those positions had been established. An error had perhaps indeed been made in regard to the unsupervised updating of the database, leading to coordination status appearing first as "completed" and then as "required". That had potentially prevented countries from responding and indicating their non-agreement. Consequently, in order to rectify the fact that the fax initially sent out by the Bureau under § 4.1.4.10 had not been received, the Bureau had sent a request to the administrations concerned requesting confirmation that they had received the reminder. Such had been the initiative taken by the Bureau in order to resolve a situation for which the provisions of the GE06 Agreement provided no solution.

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9.18 **Mr Magenta** observed that the Bureau had used a machine to send faxes to administrations, and that machine had confirmed that the faxes had been both sent and received at the other end. The administrations said that they had not received the faxes. It was consequently very difficult to ascertain who was to blame. Thus far, the debate had focused on the history of Algeria's Plan modification submission, and the dates involved, whereas he noted that Algeria's request, as clearly set out in the last paragraph of its letter dated 25 April 2016, was for the Board to elaborate rules of procedure defining the terms of receivability of communications sent by the Bureau. To his mind, the Board should concentrate on that request.

9.19 **Mr Koffi** said that the Board's discussion of the request before it had led to the identification of various anomalies in relation to the GE06 Agreement, and the Board should therefore consider whether or not to elaborate a rule of procedure to clarify matters, as requested by Algeria.

9.20 Responding to Mr Méndez's explanations, **Mr Strelets** said that the details or outcomes of negotiations between regional groups or any assumptions in that regard had no place within the framework of the GE06 Agreement and its procedure. The deadlines set down therein and consequences of non-compliance were clear, and he therefore saw no justification for the elaboration of rules of procedure to deal with them. If the at least four reminders provided for in the GE06 Agreement did not suffice, the development of rules of procedure would do nothing to resolve matters.

9.21 **Mr Méndez (Chief TSD)** reiterated that the Bureau had based its action on the information available to it. In that regard, he read out the letter from the Administration of Morocco to which he had referred, dated 29 July 2015, which was addressed to the Director of BR. In that letter, Morocco specifically requested to be deleted from the list of countries that had given their agreement to the assignments listed in the annex to the letter, which comprised Algeria's assignments. The letter went on to say that, during the exercise carried out to coordinate digital terrestrial TV frequencies in the band 470-694 MHz, led by ITU for the Arab countries, it had been agreed that the mutual agreements reached in the course of the exercise were provisional and would become definitive only upon completion of the coordination required with neighbouring countries. That letter constituted an official submission by Morocco to the Bureau and its Director, and related to a meeting in which ITU had been directly involved.

9.22 The **Chairman** suggested that, in view of all the explanations provided regarding the situation faced by Algeria and the other administrations concerned by its draft Plan modifications, and the fact that Algeria's request was for the elaboration of draft rules of procedure, the Board might conclude as follows:

"The Board studied the contribution from the Administration of Algeria very carefully as presented in Document RRB16-2/11 in regards to the difficulties that the Administration of Algeria had experienced. The Board requested the Bureau to continue providing assistance to the administrations involved in their efforts to find a solution to this matter.

The Board requested the Bureau to develop, for adoption at its next meeting, an updated version of Part A10 of the Rules of Procedure to ensure, prior to end of the corresponding deadlines, that the administrations, to which a reminder was sent pursuant to § 4.1.4.10 of the GE06 Regional Agreement, have received these reminders."

9.23 It was so **agreed**.

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10 Draft rule of procedure concerning the treatment of requests for coordination or notification notices of satellite networks received prior to the entry into force of a WRC decision (Circular Letter CCRR/55, Documents RRB16-2/2 and RRB16-2/4)

10.1 **Mr Henri (Chief SSD),** introducing Circular Letter CCRR/55, recalled that at its previous meeting the Board had instructed the Bureau (§ 7 of Document RRB16-1/22 – Minutes of the 71st meeting) to develop a draft new rule of procedure on the receivability of filings submitted to the Bureau before the effective date of entry into force of a frequency allocation and after the adoption of a decision by a WRC. The rule of procedure was to be based on current practice as outlined in Annex 1 to Document RRB16-1/4. The proposed draft rule was contained in annex to Circular Letter CCRR/55 and, as a consequence of adopting that rule, the current rule on No. 9.11A would have to be modified by suppressing its § 3.3, which was covered by the new rule. Following publication of Circular Letter CCRR/55, the Bureau had received comments from administrations, as presented in the annexes to Document RRB16-2/4. The Administrations of France (Annex 1), Sweden (Annex 2), Israel (Annex 3), the Russian Federation (Annex 6) and Turkey (Annex 7) favoured the draft rule. The ASMG administrations (Annex 4), namely Algeria, Saudi Arabia, Bahrain, Djibouti, Egypt, Jordan, Kuwait, Oman, Qatar and Sudan, proposed the date 1 July 2016 for the new FSS allocation in the bands 13.4-13.65 GHz and 14.5-14.8 GHz, while the Administrations of Luxembourg and Norway (Annex 5) said that the date 1 January 2017 should apply to the new FSS allocation. In Document RRB16-2/2, the Bureau provided for information a consolidated and detailed historical list of requests for coordination of satellite networks received prior to the entry into force of a WRC decision, which the Bureau had published with a "qualified" favourable finding (in a few cases with a "favourable finding").

10.2 **Mr Strelets** commended the Bureau for preparing and disseminating the draft rule of procedure so speedily, as requested by the Board. Referring to the comments by administrations, he queried the rationale for proposing the date 1 July 2016. The argument was surely stronger for selecting 1 January 2017, the date of entry into force of the provisions.

10.3 **Mr Henri (Chief SSD)** said that the same query had arisen in his own mind. During the lively debate at WRC-15, there had been support for 1 January 2017, the date of entry into force of the FSS allocation, as well as for 28 November 2015, the first day after the conference. No agreement had been reached on proposals for various dates in between. The Board's decision at its 71st meeting implicitly accepted the date 28 November 2015 for receivability of notices concerning new frequency bands allocated by WRC-15. Until those allocations came into force on 1 January 2017, such notices could receive "qualified" favourable findings.

10.4 **Ms Wilson** pointed out that the comments in Annexes 4 and 5 to Document RRB16-2/4 opposing the draft rule of procedure related specifically to the new FSS allocation in the 13.4-13.65 GHz and 14.5-14.8 GHz bands. There were no arguments in those annexes relevant to the general rule of procedure. The Board should however consider the additional text proposed by the Administration of the Russian Federation, which related to the general rule of procedure.

10.5 The **Chairman** invited the Board first to conclude its discussion on the draft rule in Circular Letter CCRR/55 and then to consider the supplementary text proposed by the Administration of the Russian Federation.

10.6 **Mr Bessi** said that he had analysed the draft rule of procedure prepared by the Bureau in response to the Board's decision at the previous meeting, bearing in mind that the date of entry into force of the new FSS allocation was 1 January 2017. The Bureau proposed 28 November 2015 as the effective date of application of the rule of procedure, but he questioned whether that date gave equal access to all administrations. Normally, a rule of procedure was effectively applied as from the date on which it was adopted, thus in the case now being considered the rule would apply as from the last day of the present Board meeting. He had seen no arguments from administrations to support 1 July

2016 or 1 January 2017 as the effective date of application of the draft rule. The proposed draft rule was general in scope and would apply in the future. In accordance with customary practice, he proposed that the rule be effective as from its date of adoption. He agreed that the Board should study the text proposed by the Administration of the Russian Federation.

10.7 **Mr Strelets** observed that the adverse comments from administrations related to the date of application of the proposed rule with regard to the FSS allocation. No administration had objected to the text of the general draft rule as such, the purpose of which was to cover the period from the end of the conference until the new provisions came into force.

10.8 **Mr Ito** noted that the draft rule dealt with requests for coordination or notification notices of satellite networks received prior to the entry into force of a WRC decision. He favoured consistency and maintaining the existing practice of the Bureau, from which numerous administrations had benefited in the past by receiving "qualified" favourable findings, among them some administrations that were now objecting to the current practice.

10.9 **Ms Wilson** pointed out that adopting the last day of the present Board meeting as the effective date of application of the rule would create confusion, and would oblige the Board to take a different decision in regard to the new FSS allocation in the 13.4-13.65 GHz and 14.5-14.8 GHz frequency bands to cover the interim period starting from 28 November 2015.

10.10 **Mr Khairov** said that the Board had taken a wise decision at its previous meeting, enabling administrations to comment on the proposed approach. He hoped that the current practice of the Bureau would be formalized in a rule of procedure which would be adopted at the present meeting.

10.11 **Mr Bessi** said that there seemed to be general agreement that the Board should adopt the draft rule of procedure prepared by the Bureau. The only point of debate was the effective date of application of the rule. To put all administrations on an equal footing, his view was that the date of application of the rule should be the date on which the rule was adopted.

10.12 **Mr Strelets** recalled that, at its previous meeting, the Board had not objected to the Bureau continuing to implement its existing practice. In the hypothetical case that the Board were to decide to choose the date of adoption of the rule as its effective date of application, the Bureau's practice would in fact be the same before and after that date. For clarity, the effective date of application of the rule should be the end of the conference.

10.13 **Mr Ito** supported the view expressed by Mr Strelets that the effective date of application of the draft rule of procedure should be the end of the conference. He recalled that the rule of procedure on No. 9.11A had been created to deal with a similar situation involving non-GSO allocations, and that the Bureau had subsequently used the same practice more broadly for a period of more than 20 years.

10.14 **Ms Wilson** shared the views expressed by Mr Strelets and Mr Ito that the proposed rule should be applicable as from the end of WRC-15. Adopting a different date would make no difference in practice but would create ambiguity.

10.15 **Mr Bessi** recalled the wide-ranging discussions at WRC-15 and that some filings had already been received by the Bureau during the conference. No consensus had been reached, and the problem had been handed over to the Board to solve. The Board should find a solution that was fair to all administrations, not one that favoured just a few administrations.

10.16 The **Director** recalled that the conference had run out of time to resolve the matter and had therefore handed it over to the Board to consider in tranquillity. The draft rule, which would apply to a slew of services, appeared to cause no problem. Two difficulties would arise, however, if the effective date of application of the rule were to be set at the date of its adoption. First, as Mr Strelets had pointed out, there would be a discontinuity between the period from the end of the conference to

the date of application of the rule and the period from the date of application of the rule to the entry into force of the provisions. Second, an accumulation point would be created with numerous networks having the same date of receipt, causing coordination problems among administrations. Cases previously discussed by the Board illustrated the type of difficulties to be expected.

10.17 **Mr Magenta** said that the Board had to look at the matter from the standpoints of legality and equity. If the Board decided that the effective date of application of the draft rule should be the end of the conference, then it would be giving an advantage to administrations that had already submitted notices or requests. He therefore preferred the approach proposed by Mr Bessi, in line with the Board's practice in dealing with rules of procedure, to set as the date of application of the rule the date of its adoption.

10.18 **Ms Wilson** said that the conference had specifically asked the Board to solve the problem of the receivability and treatment by the Bureau of coordination requests for the new FSS allocation in the frequency band 13.4-13.65 GHz and 14.5-14.8 GHz submitted prior to the date of entry into force of the allocation. Having discussed the matter at its previous meeting, the Board had concluded that the best approach would be to develop a general rule of procedure that could then be applied to the specific case. She reiterated that the rule should be applied as from the end of the conference.

10.19 **Mr Ito** supported the comments made by the Director regarding the date of application of the rule. Referring to Mr Bessi's concern about equality, he said that there were two kinds of equality: equality of opportunity and equality of result. The non-planned bands offered equality of opportunity: the door was open to all administrations. In the planned bands, every administration had an orbital position, thus there was equality of result. The Board was now discussing the non-planned bands. Since the CPM for WRC-15, administrations had known which specific bands were being considered, and some administrations had acted on that information while others had not. The list contained in Document RRB16-2/2, headed by ARABSAT with APIs received in 1992 and TONGASAT with APIs received in 1993, showed that the "first come, first served" approach worked satisfactorily. If the Board were to decide on a date other than the end of the conference, it would deprive administrations of the right of equal opportunity.

10.20 **Mr Bin Hammad** reminded the Board that three different dates had been mentioned. To offer equal opportunity and to put all administrations on an equal footing, the date of application of the rule of procedure should be its date of adoption by the Board, as proposed by Mr Bessi and Mr Magenta.

10.21 **Mr Strelets** recalled that, at the Board's 71st meeting, his view had been that all coordination requests sent to the Bureau prior to the entry into force of the new allocation should have the same date of receipt, namely 1 January 2017. In other words, his approach had been similar to that now being advocated by Mr Bessi. Nevertheless, as a compromise to reach consensus, and being convinced by additional material that the current practice of the Bureau was justified, the Board had instructed the Bureau to draft a rule of procedure based on its existing practice. The general draft rule had been circulated to administrations for comment and no administration had queried its proposed date of application, although some had asked for different dates for the specific FSS allocation. It was always possible that a rule of procedure might not suit some administrations, and under No. 13.14 of the Radio Regulations any administration that disagreed with a rule of procedure could submit its objection to the Director for inclusion in the Director's report to the next conference.

10.22 **Mr Bessi** observed that the conference had not decided on a date for receivability, yet some administrations had already submitted tens of filings which, in practice, could not all be accommodated. Such blanket submissions would result in a monopoly situation. There had been no agreement at the conference about the date of receivability, and Board members also held different views. There was, however, general agreement on the draft rule of procedure as such. The date of adoption of the rule of procedure should be taken as the date of its application, resulting in equality

of opportunity because administrations would have to coordinate in order to share the frequency spectrum.

10.23 **Mr Hoan** recalled that, at its previous meeting, the Board had decided that previous practice should be followed and the Bureau had drafted a rule of procedure accordingly. Any decision by the Board should avoid creating more difficulties, so adopting the draft rule would imply that the date of receivability of coordination requests would be the end of the conference, even if the date of application of the rule was the end of the Board's present meeting.

10.24 **Mr Koffi** suggested that the Board should deal first with the draft rule of procedure and then with the date of receivability.

10.25 **Mr Magenta** requested clarification of the legal validity of a retroactive rule of procedure.

10.26 **Mr Bessi** asked whether the Board could indeed adopt a rule of procedure with retroactive effect. In his understanding, no legal text could be adopted with retroactive effect and no WRC decisions were retroactive.

10.27 **Ms Wilson** recalled the information presented to the Board's previous meeting in Document RRB16-1/4, which showed that the draft rule might be applicable to various conference decisions unrelated to the FSS band. It would create confusion and difficulty for administrations if the Board gave the impression that there were two different dates for receivability.

10.28 **Mr Kibe** said that WRC-15 had not tasked the Board to decide on a date of application for a practice that the Bureau had implemented since 1988. The conference had asked the Board to decide on the receivability under Article 9 of filings submitted before the entry into force of the allocations. There had been no opposition to the draft rule of procedure as such and he saw no compelling reason not to retain 28 November 2015 as the date of application.

10.29 **Mr Magenta** said that he had sympathy with the idea of maintaining a long-standing practice that had not caused problems. But the Board was composed of experts who could not in good conscience take a legally suspect decision involving retroactivity. He requested legal advice on whether or not the Board could adopt a rule of procedure to be applied retroactively.

10.30 **Mr Ito** supported Mr Kibe and Ms Wilson. Having run out of time for discussion, WRC-15 had asked the Board to solve the problem, thereby giving the Board authority to set the date for application of the procedure as from the end of the conference.

10.31 **Mr Koffi** also supported Mr Kibe. He saw no problem with retroactivity, because the Bureau's practice before the adoption of the rule of procedure would be the same as its practice afterwards. He would, however, welcome legal advice.

10.32 **Mr Bessi** said that the Board must not take a retroactive decision and he too called for legal advice. WRC-15 had asked the Board to solve the problem of receivability with regard to the new FSS allocation before the entry into force of the allocation. It had not instructed the Board to develop a rule of procedure. If there was disagreement among Board members, the Board could simply instruct the Bureau to continue to implement its existing practice. There was no need for the Board to take a hasty decision, given that the new allocation only came into force on 1 January 2017.

10.33 **Mr Henri (Chief SSD)** observed that, in the absence of a decision by the Board, the Bureau would continue to implement the existing practice. Coordination requests received on 28 November 2015 would shortly be published in the BR IFIC. A rule of procedure would clarify matters for all administrations.

10.34 **Ms Wilson** urged the Board not to throw the baby out with the bathwater. WRC-15 had left the matter of the new FSS allocation in abeyance and tasked the Board to decide. The Board had noted that the existing procedure of the Bureau was not spelled out, except under No. 9.11A. If the

Board picked any other date for application than the end of the conference, then it would still have to decide on the receivability of FSS notices between the end of the conference and that date. She urged the Board to fix the date as 28 November 2015 to enable the Board to fulfil the task set by the conference and to avoid causing ambiguity for other services. The Board should avoid creating difficulties for administrations by delaying its decis on.

10.35 **Mr Khairov** saw no problem of retroactivity. The existing practice, which everyone was ready to adopt, would be the same at the end of the conference as now. However, if the Board were to adopt the date of the end of the present meeting for the application of the rule of procedure, then there would be a gap in applicability between 28 November 2015 and that date, and the Board would have to develop an interim rule to cover that period.

10.36 **Mr Bin Hammad** said that, because of the sensitivity of the matter, it would be preferable to have legal advice, even though some members of the Board saw no problem with retroactivity.

10.37 **Mr Strelets** said that there was general agreement about the need for a rule of procedure. The Board should now focus on deciding on its date of application.

10.38 It was **agreed** to request the ITU Legal Adviser to attend the meeting to give an opinion on whether, in the matter at present being discussed, the Board could adopt a rule of procedure with a date of application in the past.

10.39 The **Legal Adviser** explained that non-retroactivity was a basic principle of international law, although it was not an absolute principle. He drew a distinction between retroactivity in its strict sense, in other words applying a new measure to something that had happened in the past, and a slightly different set of circumstances, namely the act of applying a new measure to something that had started in the past and continued up to the present. It seemed that the Board was faced with the latter case. The situation to which the rule of procedure would apply had arisen on 28 November 2015 at the close of the conference and still continued today. The application of the rule of procedure to a continuing situation that had existed since 28 November 2015 was therefore not a retroactive application but an immediate application to an existing and continuing situation. That understanding was a legally acceptable way for the Board to resolve its current dilemma.

10.40 **Mr Bessi** thanked the Legal Adviser for his opinion but said that the condition for non-retroactivity did not apply to the matter before the Board. The situation had not remained the same because initially some administrations might not have been aware of the practice of the Bureau, a practice to be clarified by the rule of procedure. The Bureau had provided a list of around 20 administrations that had applied the practice, but there could well have been many administrations that had been unaware of it. The Board should not take a retroactive decision. If the conference had solved the problem, it could have adopted the date 28 November 2015, but there had been objections from many administrations.

10.41 The **Director** observed that the conference had taken an avenue open to it and delegated a difficult decision to the Board.

10.42 **Mr Magenta** said that he still had doubts about the difference between absolute and relative retroactivity. He also wondered whether the phrase "effective date of application" was correct from a legal standpoint. He hoped that the Board could come to a compromise and suggested that it might adopt a transitional rule of procedure to apply up to 1 January 2017.

10.43 The **Director** observed that the rule of procedure would be used for general purposes and thus could not be categorized as transitional, even if it was transitional for the new FSS allocation.

10.44 **Ms Wilson** saw no difficulty with the phrase "effective date of application". She thanked the Legal Adviser for his pertinent advice. If the matter had occurred in the past, nobody would be

awaiting the Board's decision. Clearly the situation that the Board was discussing had started in the past but continued to the future. In her understanding, retroactivity did not apply in such a case.

10.45 The **Chairman** stated that, according to the Legal Adviser, the Board could adopt the rule of procedure with 28 November 2015 as the effective date of application.

10.46 Responding to a query by **Mr Magenta**, the **Legal Adviser** explained that the rule of procedure would deal with a matter that had started, that was ongoing and that had not ended at the date on which the rule was adopted. He therefore confirmed that Ms Wilson's understanding was correct and that the case fell into the category of those that were slightly different from retroactivity. He also confirmed the Chairman's statement.

10.47 **Mr Strelets**, **Mr Ito** and **Mr Kibe** thanked the Legal Adviser for his useful advice and suggested that the Board adopt the rule of procedure with 28 November 2015 as its effective date of application.

10.48 **Mr Bessi** recalled that at WRC-15 administrations had opposed adoption of the date 28 November 2015. The Board would not satisfy all administrations by adopting a rule of procedure with that date.

10.49 The **Chairman** recalled that the Board had recognized at its previous meeting that it was impossible to merge the different views. Having looked at the regulations and past practice, the Board had decided that the best approach would be to adopt a rule of procedure. The Board had to seek the most reasonable outcome, even if some administrations would be unhappy with the result. She therefore took it that the Board approved the draft rule as presented in Circular Letter CCRR/55. She invited comments on the additional text proposed by the Administration of the Russian Federation in Annex 6 to Document RRB16-2/4.

10.50 Responding to comments by **Mr Strelets** and **Mr Ito**, **Mr Henri (Chief SSD)** said that the Administration of the Russian Federation mentioned the specific case of the steps taken by WRC-15 to protect existing and planned frequency assignments of data relay satellite systems (DRSS) operating on a secondary basis within the space research service (SRS) in the frequency band 13.4-13.65 GHz by changing the allocation conditions for individual applications of the service in question, ensuring equal (primary) status with respect to the new FSS allocation. However, in applying the rules of procedure on No. 11.50 to upgrade the status of SRS frequency assignments that were already recorded, it might be necessary to repeat procedures for coordination and recording in the MIFR, which meant that those frequency assignments, until their recording in the MIFR, would not be taken into account in applying No. 9.27 with respect to the frequency assignments of all the satellite systems notified within the new FSS allocation. He noted that the Administration of the United States had also raised the same specific case under a separate agenda item (see § 11 below). The additional text proposed by the Administration of the Russian Federation was general in nature, and he suggested that it might be included in the rules of procedure on No. 11.50, with appropriate amendments.

10.51 **Mr Bessi** said that the proposal by the Administration of the Russian Federation responded to concerns raised at WRC-15 and he saw no objection to including the text as part of the rules of procedure on No. 11.50.

10.52 The **Chairman** suggested that the Board conclude as follows:

"The Board discussed in detail the draft Rules of Procedure circulated to administrations in Circular Letter CCRR/55, along with comments received from administrations (Documents RRB16-2/2 and RRB16-2/4) and the advice from the Legal Advisor on the retroactive application of a Rule of Procedure. The Board adopted the draft Rules of Procedure without any modification.

Furthermore, the Board instructed the Bureau to develop a draft amendment to the existing Rules of Procedure on RR No. 11.50 in order to clarify the coordination requirements in the case where the

conference decided on a new allocation and the upgrade of the category of service of an existing allocation. The draft amendment to the Rule of Procedure on RR No. 11.50 (paragraph 5) should be developed, on the basis of the following principle:

"When a change to Article 5 results in the allocation to a new service (S2) and the upgrade of the category of an existing service (S1) in the same frequency band, the Bureau shall draw the attention of the administration operating service S1 on its assignments under service S1 which were previously recorded in the MIFR or received for coordination prior to the decision of the conference and propose to the administration that it submits new assignments to replace the previous ones. If the administration submits these new assignments to replace the previous ones, the Bureau shall consider that these new assignments do not have to coordinate with the assignments of the new service S2."

10.53 It was so **agreed**.

11 Submission by the Administration of the United States on the priority of coordination requests of existing frequency assignments in the space research service in the frequency bands 13.4-13.65 GHz and 14.5-14.8 GHz (Documents RRB16-2/13 and RRB16-2/INFO/1)

11.1 **Mr Sakamoto (Head SSD/SSC)** introduced Document RRB16-2/13 containing, in Attachment 1, a submission from the Administration of the United States on the priority of coordination requests of existing frequency assignments in the space research service (SRS) in the frequency bands 13.4-13.65 GHz and 14.5-14.8 GHz. The Administration of the United States requested the Bureau to confirm, based on the intent of the decisions of WRC-15, that the coordination requests for the upgrade of the category of service of the existing frequency assignments in the space research service in those bands that received a date of receipt of 28 November 2015 would receive priority over the coordination requests to fixed satellite service (FSS) systems proposed to operate under the new allocation. In a letter to the United States Administration dated 18 March 2016, contained in Attachment 2 to the document, the Bureau explained that the rule of procedure on No. 11.50 would be applied, including the relevant coordination procedures. The two annexes to that letter listed the satellite systems operating under two new footnotes (No. 5.499C and No. 5.509G) in the space research service in the bands concerned. The matter was brought to the Board at the request of the Administration of the United States. Responding to a query by **Mr Bessi**, he said that the addition to the rule of procedure on No. 11.50 based on the text proposed by the Administration of the Russian Federation (discussed under a separate agenda item, see § 10 above) gave equal priority to SRS and FSS and thus did not fulfil the request of the Administration of the United States.

11.2 **Mr Strelets** emphasized that SRS services were used for scientific purposes in the interests of humanity. Existing SRS systems in the frequency bands 13.4-13.65 GHz and 14.5-14.8 GHz that were recorded in the MIFR had already completed coordination and should not be required to coordinate with new FSS systems in those bands. The Bureau should not charge fees for doing the same coordination twice, especially as scientific services were usually underfunded. Referring to Document RRB16-2/INFO/1 containing a letter from the Bureau to the Administration of the United States dated 2 May 2016, he said that there appeared to be a contradiction between the second paragraph, which referred to specific frequency assignments having primary status, and the fifth paragraph, which referred to their secondary status.

11.3 **Ms Wilson**, taking the floor on the general matter of interpreting the conference's decisions affecting not only the Administration of the United States, said that the discussions at WRC-15 had clearly shown that the intent was to protect SRS while making the co-primary allocation to the FSS in those bands.

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11.4 **Mr Henri (Chief SSD)** confirmed that discussions in committees at WRC-15 had been in favour of protecting SRS but that wish had not been reflected in the Final Acts of the conference or in the minutes of the plenary meetings. In Document RRB16-2/13, the Administration of the United States was asking for special status for SRS assignments.

11.5 **Mr Sakamoto (Head SSD/SSC)** said that according to the rules of procedure, the Bureau could implement the status upgrade for SRS only after applying the coordination procedure requested in the rule of procedure on No. 11.50. The Bureau could not upgrade the assignments based on the intent of the decisions of the conference, but the Board could. He noted that the active spaceborne sensors which had higher status than other uses by SRS under previous No. 5.501A have now a co-primary status under new No. 5.499C but none were recorded in the MIFR.

11.6 **Mr Henri (Chief SSD)** observed that most members of the Board seemed to accept that SRS assignments recorded in the MIFR or communicated to the Bureau for coordination purposes under Article 9 before 28 November 2015 had no need to coordinate with FSS assignments. Further, Board members appeared to agree that coordination between SRS systems done when the assignments had secondary status need not be repeated when the SRS assignments were upgraded to primary status.

11.7 **Mr Bessi** noted that the conference had not given SRS priority over FSS. He asked on what basis could the Board adopt a decision protecting SRS from FSS.

11.8 The **Director** understood that the purpose of the rule of procedure on No. 11.50 was to "grandfather" all space research service (SRS) networks existing in the frequency bands 13.4-13.65 GHz and 14.5-14.8 GHz and recorded in the MIFR by 28 November 2015 vis-à-vis FSS. In other words, those SRS networks would not have to coordinate with FSS networks. WRC-15 had not accorded priority to SRS, but the Bureau could implement "grandfathering", while acknowledging that SRS and FSS had the same status, by deeming that "existing" SRS filings on 28 November 2015 would be considered as received fractionally ahead of FSS filings received on the same date. The concept could be covered in a text based on the proposal by the Administration of the Russian Federation, to be added to the rule of procedure on No. 11.50 (see § 10 above).

11.9 The **Chairman** suggested that the Board conclude as follows:

"The Board considered the request from the Administration of the United States of America on the priority of coordination requests of existing frequency assignments in the space research service (SRS) in the frequency bands 13.4-13.65 GHz and 14.5-14.8 GHz under RR Nos. 5.499C and 5.509G as presented in Documents RRB16-2/13 and RRB16-2/INFO/1. Taking into account the discussions during WRC-15 to protect the assignments in the SRS, the Board decided that it is not necessary for assignments in the SRS, recorded in the MIFR or communicated to the Bureau for coordination purpose under Article 9 before 28 November 2015, to coordinate with assignments in the fixed satellite service (FSS).

The Board also confirmed that, as the status of the category of service between all incumbent services in these frequency bands remains unchanged, there is no need for the Bureau to make any additional regulatory examinations or findings for the recorded assignments or coordination requests previously published."

11.10 It was so **agreed**.

12 Impact of WRC-15 decisions on the Rules of Procedure (Documents RRB16-2/3, RRB16-2/8 and RRB16-2/10)

12.1 Following suggestions by **Mr Strelets** and **Mr Bessi** that, given the importance of the present agenda item and the amount of work involved, it might be deferred to the Board's 73rd meeting, the **Director** said that the Bureau hoped to be able to publish a full new set of Rules of Procedure to

coincide with the entry into force of the new Radio Regulations as revised by WRC-15, namely 1 January 2017. That meant identifying at the present meeting what new or revised rules of procedure were required so that the drafts could be prepared and sent out to administrations for comments with a view to their consideration and approval at the Board's last 2016 meeting. He therefore encouraged the Board to proceed with its work under the agenda item at the present meeting.

12.2 **Mr Kibe** agreed with the Director, and drew attention to No. 13.12A*a)* of the Radio Regulations, which identified as one of the Board's fundamental tasks the publication of a list of future proposed rules and the time-frame for their consideration by the Board. The Board should not be seen to let too much time go by after the WRC before getting down to the task.

12.3 **Ms Wilson** agreed with the Director and Mr Kibe.

12.4 **Mr Henri (Chief SSD)** introduced Document RRB16-2/3, containing the now traditional document prepared after each WRC identifying the impact of WRC decisions – that of WRC-15 decisions in the present instance – on the current Rules of Procedure. The document presented four attachments listing, respectively: those WRC-15 decisions which could require review of existing rules or the addition of new rules relating to RR provisions; WRC-15 decisions which could require new rules; existing rules which might require updating but not as a result of WRC-15 decisions; and decisions reflected in the WRC-15 plenary meeting minutes which might call for rules of procedure. Regarding that last category, he drew attention to the second paragraph on the cover page of the document, which noted that "Due to this particular status, the corresponding text of the Rules of Procedure may not be opened to comments by administrations." He also noted that with the exception of the rule considered at the Board's present meeting, the document proposed that all the rules be considered at the Board's 73rd meeting, so that they would be in effect in time to guide the work of the Bureau and administrations when the new Radio Regulations came into force on 1 January 2017. Document RRB16-2/10 contained comments by the Administration of the United States on the draft rules listed in Document RRB16-2/3.

12.5 He also introduced Document RRB16-2/8, containing a list of editorial modifications to existing rules of procedure due to WRC-15 changes in the references to ITU-R Recommendations, WRC resolutions or provisions of the Radio Regulations. Given that those modifications in no way altered the substance of the rules concerned, it was proposed that the Board authorize the Bureau to proceed with those modifications without seeking comments from administrations.

12.6 **Mr Bessi** thanked the Bureau for the very complete documents made available to the Board. He nevertheless questioned the suggestion – which was a departure from the Board's practice in the past – that the rules in Attachment 4 to Document RRB16-2/3 might not be sent out to administrations for comment. He could, however, agree with the proposal for the Board to instruct the Bureau to proceed with the editorial modifications presented in Document RRB16-2/8. Lastly, he noted that the Board's 73rd meeting might have to be devoted essentially to the consideration of rules of procedure, given the amount of work involved and desirability of completing the task at that meeting.

12.7 **Mr Strelets** said that to his understanding of No 13.12A of the Radio Regulations, all draft rules of procedure should be sent out to administrations for comment,

12.8 **Mr Ito** said that practical measures would have to be taken to allow the Board to complete its task on the rules of procedure at the 73rd meeting. He recalled that following WRC-12, the task had been distributed over several Board meetings. **Ms Wilson** suggested that the Board's 73rd meeting might have to be extended by a few days in the light of the task. **Mr Strelets** stressed that the Board must ensure that it gave itself sufficient time to carry out the work properly. **Mr Magenta** agreed, adding that the Board might have to establish an order of priority regarding the rules of procedure it was to examine.

(400313)

12.9 The **Chairman** proposed that the Board note Document RRB16-2/8 and request the Bureau to proceed with the modifications it contained.

12.10 It was so **agreed.**

12.11 The **Chairman** invited the Board to break into the Working Group on Rules of Procedure, chaired by Mr Bessi and vice-chaired by Mr Bin Hammad, which would consider the Board's schedule for its consideration of rules of procedure on the basis of Documents RRB16-2/3 and RRB-16-2/10.

12.12 Following the meeting of the working group and its report to the plenary meeting of the Board, the Board **approved** its conclusions as follows:

"The Board noted the proposed editorial modifications to the Rules of Procedure as contained in Document RRB16-2/8 and instructed the Bureau to update the Rules of Procedure accordingly.

The Board approved the report from the Working Group on draft Rules of Procedure, which took into account Document RRB16-2/3 and the comments from the Administration of the United States of America as presented in Document RRB16-2/10 and instructed the Bureau to post the updated document on the RRB website. Furthermore, the Board also instructed the Bureau to prepare draft Rules of Procedure on the basis of the report and to circulate them to the administrations for comment. The Board decided to consider for adoption the draft Rules of Procedure at its 73rd meeting."

12.13 The **Chairman** thanked Mr Bessi and Mr Bin Hammad, Chairman and Vice-Chairman of the working group, respectively, for their valuable contributions to the Board's work on the Rules of Procedure.

13 Confirmation of the next meeting and indicative dates of future meetings

13.1 In the course of a discussion on the need to perhaps foresee more meeting time than usual at the Board's 73rd meeting in order to consider the draft rules of procedure prepared on the basis of the lists in Document RRB16-2/3, **Mr Strelets** stressed the importance of taking well discussed and well thought-through decisions on all items, failing which he would request deferral of items to a subsequent meeting.

13.2 **Ms Wilson** noted that it would be essential for the Board to get through its examination of the rules identified in Attachments 1 and 2 at its 73rd meeting, and that it could if necessary defer examination of those in Attachments 3 and 4 to the subsequent meeting.

13.3 The **Director** agreed with Ms Wilson, reiterating the need to have a strong regulatory framework comprising the Radio Regulations and accompanying Rules of Procedure, lest a climate of uncertainty emerge and the Bureau come under criticism for its action in implementing the decisions of the WRC.

13.4 **Mr Magenta** said that the Board should keep 17-21 October 2016 as the dates of the 73rd meeting, commencing at 0900 hours on the Monday and ending at 1730 hours on the Friday, as necessary, and decide at the 73rd meeting if the 74th meeting should be an extended meeting (extra meeting days).

13.5 It was so **agreed**.

13.6 The Board **agreed** to confirm 17-21 October 2016 as the dates of its 73rd meeting, and to tentatively confirm the dates of meetings in 2017 as follows:

74th meeting: 20-24 February 2017

75th meeting: 17-21 July 2017

(400313)

76th meeting: 6-10 November 2017.

14 Approval of the summary of decisions (Document RRB16-2/14)

14.1 The summary of decisions (Document RRE16-2/14) was **approved**.

15 Closure of the meeting

15.1 The **Chairman** said that it was with regret that she had learnt that Mr Méndez would be retiring from ITU in the interim between the Board's 72nd and 73rd meetings. She thanked him for his considerable contribution to the work of ITU-R and the Board in particular over the years.

15.2 **Mr Méndez (Chief TSD)** thanked the Chairman for her kind words, and said that it had been both a pleasure and an honour to work closely with the Board since 1995. He had learnt a great deal from his contact with Board members over the years, and hoped his path would cross with theirs in one way or another in the future.

15.3 **Mr Magenta** congratulated the Chairman for her able handling of a meeting in which several extremely sensitive issues had required the Board's consideration.

15.4 The **Chairman** thanked everyone who had contributed to the successful outcome of the meeting. She closed the meeting at 1740 hours on Friday, 20 May 2016.

The Executive Secretary:
F. RANCY

The Chairman:
L. JEANTY

(400313)

Radio Regulations Board
Geneva, 17-21 October 2016

INTERNATIONAL TELECOMMUNICATION UNION

Document RRB16-3/12-E
9 November 2016
Original: English

MINUTES*

OF THE

73rd MEETING OF THE RADIO REGULATIONS BOARD

17- 21 October 2016

Present:

Members, RRB
Ms L. JEANTY, Chairman

Mr I. KHAIROV, Vice-Chairman

Mr M. BESSI, Mr N. BIN HAMMAD, Mr D.Q. HOAN, Mr Y. ITO, Mr S.K. KIBE, Mr S. KOFFI, Mr A. MAGENTA, Mr V. STRELETS, Mr R.L. TERÁN, Ms J.C. WILSON

Executive Secretary, RRB
Mr F. RANCY, Director, BR

Précis-Writers
Mr T. ELDRIDGE and Ms A. HADEN

Also present:

Mr H. ZHAO, ITU Secretary-General
Mr M. MANIEWICZ, Deputy Director, Chief, IAP
Mr Y. HENRI, Chief, SSD
Mr N. VASSILIEV, Chief, TSD
Mr A. MATAS, Head, SSD/SPR
Mr M. SAKAMOTO, Head, SSD/SSC
Mr J. WANG, Head, SSD/SNP
Ms I. GHAZI, Head, TSD/BCD
Mr B. BA, Head, TSD/TPR
Mr K. BOGENS, Acting Head, TSD/FMD
Mr W. IJEH, BR Administrator
Mr D. BOTHA, SGD
Ms K. GOZAL, Administrative Secretary

* The minutes of the meeting reflect the detailed and comprehensive consideration by the members of the Radio Regulations Board of the items that were under consideration on the agenda of the 73rd meeting of the Board. The official decisions of the 73rd meeting of the Radio Regulations Board can be found in Document RRB16-3/11.

(408633)

	Subjects discussed	Documents
1	Opening of the meeting	-
2	Late submissions	-
3	Report by the Director of BR	RRB16-3/3 + Corr.1 + Add.1-4 + Add.2 (Add.1), RRB16-3/4 (Annex 10)
4	Consideration of draft rules of procedure – General comments	CCRR/56, CCRR/57; RRB16-2/3 (Rev.2), RRB16-3/4 + Corr.1
5	Consideration of draft rules of procedure	CCRR/56, CCRR/57; RRB16-3/4 + Corr.1
6	Consideration of draft rules of procedure - List of proposed rules	RRB16-2/3 (Rev.2)
7	Submission by the Administration of Indonesia requesting an extension of the regulatory time-limit to bring back into use the frequency assignments of the PALAPA-C3-K satellite network	RRB16-3/1 + Add.1
8	Submission by the Administration of Papua New Guinea requesting an extension of the regulatory time-limit to bring into use the frequency assignments of the NEW DAWN 21 satellite network at 60°E	RRB16-3/2 + Add.1
9	Submission by the Administration of Israel requesting an extension of the regulatory time-limit to bring into use the AMS-CK-17E satellite network	RRB16-3/6
10	Submission by the Administration of France concerning a request for an extension of the regulatory time-limit for the bringing into use of frequency assignments to the F-SAT-N-E-70.5E satellite network in the 30/20 GHz range	RRB16-3/10
11	Request for a decision by the Radio Regulations Board for cancellation of frequency assignments in the band 3 702-6 420.5 MHz to the NIGCOMSAT-1R satellite network under No. 13.6 of the Radio Regulations	RRB-16-3/5
12	Submission by the Administration of Papua New Guinea requesting a decision from the Radio Regulations Board to reinstate the Part B and notification filings of the AFRISAT 3W-PKU satellite network	RRB16-3/7
13	Submission by the Administration of Qatar on the examination of the F-SAT-N5 satellite networks (B1FR transmit beam)	RRB16-3/8, RRB16-3/DELAYED/1-3
14	Submission by the Administration of Luxembourg requesting the revision of the examination of the LUX-30B-G4-19.2E satellite network under Articles 6 and 8 of Appendix 30B	RRB16-3/9
15	Election of the chairman and vice-chairman of the Board for 2017	-
16	Confirmation of the dates of the next meeting and meeting schedule for 2017	-

(408633)

17	Celebration of the 110th anniversary of the Radio Regulations and ITU World Radiocommunication Seminar 2016	-
18	Approval of the summary of decisions	RRB16-3/11
19	Closure of the meeting	-

(408633)

1 Opening of the meeting

1.1 The **Chairman** opened the meeting at 0900 hours on Monday, 17 October 2016, and welcomed participants to a meeting that faced a very full agenda.

1.2 The **Director** also welcomed the Board members. He wished them every success in a meeting that was to address many important items, including numerous rules of procedure required in support of the new edition of the Radio Regulations, shortly to be published.

1.3 The **Secretary-General**, visiting the meeting briefly, stressed the importance of the Board's work in support of the vital activities of the Radiocommunication Sector, and in helping to resolve both straightforward and extremely difficult issues, while ceaselessly seeking to improve its working methods to enhance its efficiency. The ITU membership greatly appreciated the Board's work as a permanent organ of the Union, as was borne out by the fact that Board member candidacies for the PP-18 elections were already being prepared and discussed. He thanked all the Board members for their valuable contributions and assured them of his full support.

2 Late submissions

2.1 The Board noted that three late submissions (two from the Administration of Qatar and one from the Administration of France) were related to an item on the agenda of the present meeting, and **agreed** that they should be taken up under that item, for information.

2.2 Regarding Document RRB16-3/4, containing the comments received from administrations on the draft rules of procedure before the present meeting, the **Chairman** noted that Algeria's contribution in Annex 10 contained both comments on the draft rules and a request for the Board to issue a favourable finding for Algeria's assignments published in BR IFIC 2798/07.07.2015. Recalling that those assignments had been discussed by the Board at its 72nd meeting, she suggested that Algeria's comments on the draft rules be taken up when the Board addressed the draft rule on the GE06 Agreement (Circular Letter CCRR/56), and that the request for a favourable finding be dealt with separately.

2.3 **Mr Bessi** suggested that Algeria's request for a favourable finding be taken up under the Director's report to the present meeting, which touched upon the decision taken by the Board at its 72nd meeting.

2.4 It was so **agreed**.

3 Report by the Director of BR (Document RRB16-3/3 and Corrigendum 1 and Addenda 1-4 and Addendum 1 to Addendum 2; Annex 10 to Document RRB16-3/4)

3.1 The **Director** introduced his customary report in Document RRB16-3/3.

3.2 **Mr Vassiliev (Chief TSD)**, introducing the sections of the report dealing with terrestrial systems, drew attention to § 4 on harmful interference and, in particular, to § 4.2 dealing with harmful interference to broadcasting stations in the VHF/UHF bands between Italy and its neighbouring countries. Addendum 1 to the report contained a letter from the Administration of Croatia stating that there had been no improvement in the harmful interference situation. Addendum 4 contained an additional communication from the Administration of Croatia, mentioning reports of harmful interference to be sent on a compact disk (which had not yet been received). Addendum 3 contained a letter from the Administration of Slovenia stating that the harmful interference situation remained unchanged and that it awaited the switch-off of television channels. Addendum 2 contained a report of a meeting between the Bureau and the Italian Administration, with an annexed road map of actions by Italy (Addendum 1 to Addendum 2).

3.3 **Mr Strelets** said that the work done by the Italian Administration and Bureau was impressive, and he hoped that the positive momentum would continue.

3.4 The **Director**, referring to Addendum 2, said that with respect to television broadcasting the Italian Administration had been undertaking legal and regulatory efforts on three levels: financial compensation for the voluntary release of frequencies; rationalization of the use of the spectrum; and must-carry obligations. He noted that the process for the voluntary release of frequencies had been completed but not all frequencies had been ordered to be switched off, so as to avoid conflict with a 2005 law stipulating that at least one third of all frequencies assigned to television broadcasting had to be assigned to local content. Switch-off was now expected to occur at the end of November 2016. Efforts to rationalize spectrum use had been accelerated. A new challenge to be faced by the Administration of Italy in managing the UHF spectrum was the obligation, expected to be decided at EU level, to make the 694-790 MHz band available to the mobile service by 2020 and the Administration of Italy was also taking steps to address this challenge. Dealing with harmful interference to sound broadcasting was more difficult and would take longer. The efforts made by the Italian Administration were described in Addendum 1 to Addendum 2, but improvement would not be as dramatic as for television broadcasting because it was more difficult to change the related law.

3.5 **Mr Strelets** considered that, as a result of the efforts made by the Board, the Radiocommunication Bureau and the Administration of Italy, a considerable amount of practical experience had been acquired in tackling the issue of eliminating interference to broadcasting stations between Italy and its neighbouring countries. The methods for releasing the second digital dividend for the mobile service were also worth noting. That constituted an entire interrelated set of legal, technical, financial and organizational measures that could usefully be taken up in ITU-R Study Group 1, with a view to their study and use by other countries.

3.6 **Mr Bessi**, while welcoming the financial and regulatory efforts made, stressed that the Administration of Italy should respect its commitments. The date for ending harmful interference to television broadcasting appeared to have slipped from the end of July to the end of November 2016.

3.7 The **Director** said that the Administration of Italy was rightly proceeding with caution in order to avoid legal challenges that might stall progress.

3.8 **Mr Henri (Chief SSD)**, introducing those parts of the Director's report dealing with space systems, drew attention to Annex 3 showing the Bureau's work on the processing of filings related to space services. He provided updated information covering September 2016. As explained at the Board's previous meeting, the delay in processing coordination requests (Table 2 of Annex 3) had been caused by the large number of requests received at the close of WRC-15 relating to frequency bands allocated by the conference. Examination software has been since upgraded to process these new FSS bands and speed up the processing time that shows progress for a return to regulatory four-month time limits before the end of the year. With regard to cost recovery for satellite network filings, he drew attention to Annex 4 listing satellite network filings where payment had been received after the due date but prior to the BR IFIC meeting dealing with the matter. No filings had been cancelled as a result of non-payment during the period under consideration. Implementation of various provisions of the Radio Regulations to ensure that the MIFR reflected reality was described in § 5 of the Director's report. The application of § 6.6 and § 6.19 of Appendix 30B in the case of non-response by administrations was the subject of § 6 of the Director's report. The Bureau's practice to date had been to include the territory of another administration in the service area of a network only if the notifying administration had obtained explicit agreement from the responsible administration of that territory. The Bureau's practice was in line with WRC-07's endorsement of the output of Working Group 5B regarding the revision of Appendix 30B, requiring "explicit" agreement. That practice had been challenged by the Administration of Papua New Guinea, which argued that the notifying administration's obligation was limited to "seeking agreement". The matter was being brought before

the present Board meeting in Document RRB16-3/7 under a separate agenda item. As indicated in § 7 of the Director's report, in line with the Board's decision at its previous meeting in regard to a submission from the Administration of Malaysia, the Bureau had re-examined the MEASAT-91.5E-30B satellite network under Appendix 30B and was preparing a modification to the AP30B/A6B special section in order to publish updated characteristics, with favourable findings for the network. Finally, the Board was invited to note that the Bureau had accepted requests for suspension received more than six months from the date of suspension, as listed in Table 8 of § 8 of the Director's report.

3.9 The **Chairman** congratulated the Bureau on satisfactorily closing the case of the MEASAT-91.5E-30B satellite network. She said that the Board would take up the matter raised by the Administration of Papua New Guinea under a separate agenda item.

3.10 **Mr Koffi** not only congratulated the Bureau on its work on the case of the MEASAT-91.5E-30B satellite network but also thanked the Administration of Malaysia for agreeing to a reduction in power density values, thereby enabling the case to be closed once and for all.

3.11 **Mr Hoan** also congratulated the Bureau on resolving the case of the MEASAT-91.5E-30B satellite network but recalled that the Board's decision at its previous meeting had also requested the Bureau to perform studies and prepare guidance to administrations on the use of the relevant software. The follow-up to the latter part of the Board's decision had not been covered in the Director's report and he requested clarification of the activities undertaken.

3.12 **Mr Henri (Chief SSD)** said that the Bureau had continued to carry out studies since the Board's 72nd meeting as part of its efforts to update software to take account of the decisions of WRC-15. Version 8 of the software would be presented to administrations in detail at WRS-16 in December 2016.

3.13 **Mr Strelets**, referring to Table 2 of Annex 3 to the Director's report, expressed concern about the six month treatment time for coordination requests and the possible need by the Bureau for more resources to deal with increasingly complex processing.

3.14 The **Director** explained that peaks in the numbers of filings received had resulted for a while in more than 300 networks being under treatment. That number was being reduced and should soon be at a manageable level of around 150 networks. If the Bureau could not decrease the treatment time so as to respect the regulatory limit of 4 months, that would demonstrate the need for additional resources. **Mr Henri (Chief SSD)** added that a new engineer, who was a specialist in Appendix 30B, had been recruited to join SNP at the end of 2016 or early in 2017. He stressed the complexity of the software currently being developed by IAP in close collaboration with SSD and said that a beta version had already been tested by administrations.

3.15 **Mr Strelets** welcomed that clarification and asked whether, in future, the statistics provided by the Bureau could show separate statistics for GSO and non-GSO satellite networks. He said that such information would be useful, although he recognized that providing it would add to the Bureau's workload.

3.16 **Mr Henri (Chief SSD)** said that Table 2 of Annex 3 to the Director's report could in future indicate the number of GSO and non-GSO satellite networks received and published. He noted, however, that there were few non-GSO networks compared to GSO networks, and that satellite networks were dealt with in order of receipt. In other words, there were not separate queues, one for GSO and one for non-GSO. Lengthy treatment of GSO satellite networks might thus affect the treatment time for non-GSO satellite networks and vice versa.

3.17 **Mr Strelets**, referring to Annex 1 to the Director's report, said that the wording in the "Action taken" column corresponding to item 4.5 gave the impression that the BR IFIC meeting had approved

a decision already taken by a higher authority, namely the Board. Furthermore, the text of item 6.1/6.2 was incorrect as no rule of procedure on No. 11.50 was included in Circular Letter CR/402.

3.18 **Mr Henri (Chief SSD)** thanked Mr Strelets for pointing out the error in item 6.1/6.2. With regard to item 4.5, he noted that all information in the BR IFIC had to be adopted by the BR IFIC meeting prior to publication.

3.19 The **Chairman** said that the text of Annex 1 to the Director's report would be amended appropriately (Corrigendum 1 to Document RRB16-3/3).

3.20 **Mr Strelets**, referring to Annex 4 to the Director's report, observed that satellite network filings were apparently not being considered by the BR IFIC weekly meeting immediately following the date on which payment was due. For example, the invoice date for ACES was 18 July 2016, the payment date was 19 August 2016 and the date of the weekly meeting was 7 September 2016. As another example, the invoice date for YAMAL-55E was 17 June 2016, the payment date was 20 June 2016 and the filing had been considered only on 4 August 2016. He asked why the Bureau was delaying consideration of the filings.

3.21 **Mr Henri (Chief SSD)** recalled Council Decision 482 on cost recovery and late payment, and the Bureau's long-standing practice which had been covered in a rule of procedure approved by the Board. If there was no response to the Bureau's efforts to contact an administration about payment due, then the filing was cancelled because of non-payment. If, however, the administration confirmed that payment had been made, a grace period was allowed for the transfer of funds and for administrative procedures within the ITU Financial Resources Management Department (FRMD). The Bureau had to await formal confirmation from FRMD that payment had been received. Thus, if the Bureau knew that payment had been made but had not yet received confirmation from FRMD, then consideration of the filing by the weekly meeting was postponed.

3.22 The **Chairman** suggested that the Board conclude on the Director's report as follows:

"The Board thanked the Director of the Radiocommunication Bureau for the Report and information provided in Document RRB16-3/3 and its Addenda. Furthermore, the Board considered in detail the information provided in Addenda 1 to 4 of Document RRB16-3/3 and noted with great satisfaction that, compared to the situation at the previous meeting, considerable progress had been made by the Administration of Italy to resolve the issue of harmful interference to the television broadcasting services caused by Italy to its neighbours. The Board nevertheless noted that because of administrative reasons the deadline of July 2016 had not been met, and that therefore some neighbouring countries had not noticed improvements of the situation yet. The Board expected that, by the new deadline of November 2016, most of the remaining critical issues concerning television broadcasting would be solved. The Board noted that the situation concerning sound broadcasting would be a continuous process to be solved gradually over a much longer time period."

3.23 It was so **agreed**.

3.24 **Mr Strelets**, referring to item 5 in Annex 1 to Document RRB16-3/3 and to the decision taken by the Board regarding Algeria's submission to the 72nd meeting, asked what measures had been taken by "the Bureau to continue providing assistance to the administrations involved in their efforts to find a solution to this matter."

3.25 **Mr Vassiliev (Chief TSD)** said that assistance would be provided by the Bureau if a country requested assistance, but no request had been received. If the Board so instructed, the Bureau could contact the countries concerned to offer assistance.

3.26 **Mr Bessi** said that various steps had been taken by the Bureau to allow administrations to consult the coordination and notification status of their assignments in the procedures involved. As Mr Vassiliev (Chief TSD) had made clear, however, no assistance had been provided to Algeria, and

perhaps the Board should reiterate clearly the need for such assistance to be provided to the countries concerned.

3.27 **Mr Strelets** said that, along with comments on draft rules of procedure, Algeria's submission to the present meeting in Annex 10 to Document RRB16-3/4 accused the Board of failing to adequately address Algeria's submission to the Board's 72nd meeting, and now requested the Board to apply § 4.1.4.11 of the GE06 Agreement and issue a favourable finding for the assignments in question. It was an extremely sensitive matter, but the Board had no option but to address it.

3.28 The **Chairman** commented that at its 72nd meeting it had been the Board's understanding that Algeria had been requesting a rule of procedure to deal with the problems it had been encountering in the application of certain provisions of the GE06 Agreement. In responding to that request, the Board had seen fit to call upon the Bureau to offer assistance to the administrations concerned, including the Administration of Algeria. Faced with Algeria's present submission, the Board could seek to decide on Algeria's request for a favourable finding, or follow Mr Bessi's suggestion for the Board to reiterate its call for the Bureau to provide assistance.

3.29 **Mr Ito** said that, notwithstanding Algeria's request to the 72nd meeting and the follow-up given to it, Algeria's request to the present meeting touched upon an extremely sensitive issue, namely that of tacit as opposed to explicit agreement, which always gave rise to lengthy debate. Rather than seek to take a decision on the request, which would inevitably set a precedent for the future, the Board would be better advised to request Algeria, the other administrations involved and the Bureau to get together with a view to resolving the matter. Wrongs appeared to have been committed on all sides in a highly controversial case, and the Board was not in a position to judge precisely who was right or wrong.

3.30 The **Director** suggested that Algeria was unlikely to enter into discussions with the Bureau and other administrations before the Board finalized the rule of procedure on the GE06 Agreement, i.e. until such time as the Board had clarified the rules governing the procedures in question.

3.31 **Mr Hoan** said that Algeria's request to the Board's 72nd meeting appeared to have been for the development of a rule of procedure to clarify decisions taken by the Bureau; Algeria's request to the present meeting was a clear appeal for the Board to review the decision it had taken at the 72nd meeting. The Board had no option but to address that appeal.

3.32 **Mr Bessi** said that in effect the decision taken by the Board at its 72nd meeting had not been implemented, since no assistance had yet been provided. There was no need to change that decision; rather, it should be given every chance to yield results, as advocated by previous speakers, and should therefore be reiterated. **Mr Koffi** agreed.

3.33 **Mr Magenta** agreed with the previous speakers, stressing that every effort should be made to reach agreement through consensus. No decision should be taken on Algeria's appeal until the Board had dealt with the draft rule of procedure on the GE06 Agreement.

3.34 **Mr Strelets** agreed with previous speakers that the matter was extremely sensitive, requiring further reflection. Algeria's submission involved two distinct matters, namely comments on the draft rules of procedure before the present meeting and criticism of the decision taken by the Board at its 72nd meeting. In his view, the two matters were not interrelated. He could nevertheless agree to defer consideration of Algeria's appeal for a favourable finding until later in the present meeting.

3.35 The **Chairman** suggested that the Board defer further consideration of Algeria's appeal for a favourable finding for its assignments published in IFIC 2798 until the Board had considered the rule of procedure on the GE06 Agreement.

3.36 It was so **agreed**.

(408633)

3.37 Following the Board's subsequent approval of rules of procedure on the GE06 Regional Agreement, the **Chairman** invited the Board to resume its consideration of Algeria's appeal.

3.38 **Mr Koffi**, supported by **Mr Strelets** and **Mr Magenta**, proposed that the Bureau be requested to contact the Algerian Administration and the other administrations concerned with a view to resolving the matter.

3.39 The **Chairman** proposed that the Board conclude as follows:

"The Board considered the request from the Administration of Algeria in Document RRB16-3/4, Annex 10, to issue a favourable finding for Algeria's assignments published in BR IFIC 2798/07.07.2015. After consideration, the Board decided to instruct the Bureau to contact the Administration of Algeria and the other administrations concerned in an effort to resolve the matter and to report to the next meeting of the Board on the progress."

3.40 It was so **agreed**.

3.41 The Director's report in Document RRB16-3/3 and Corrigendum 1 and Addenda 1-4 and Addendum 1 to Addendum 2 was **noted**.

4 Consideration of draft rules of procedure – General comments (Circular Letters CCRR/56 and CCRR/57; Documents RRB16-2/3(Rev.2) and RRB16-3/4 + Corr.1)

4.1 The **Chairman** drew attention to the documents relating to draft rules of procedure before the present meeting. Circular Letter CCRR/56 contained a draft rule on the GE06 Regional Agreement. Circular Letter CCRR/57 contained, in Annex 1, draft new or modified rules consequential to the decisions taken by WRC-15 enshrined in the final acts of the conference and, in Annex 2, a compilation of WRC-15 decisions not appearing in the final acts of the conference but reflected in its minutes that might be candidates for rules of procedure. Document RRB16-2/3(Rev.2) contained, in its four attachments, respectively: those WRC-15 decisions which could require review of existing rules or the addition of new rules relating to RR provisions; WRC-15 decisions which could require new rules; existing rules which might require updating but not as a result of WRC-15 decisions; and decisions reflected in the WRC-15 plenary meeting minutes which might call for rules of procedure. Document RRB16-2/4 and its Corrigendum 1 contained comments received from 11 administrations on the draft rules contained in Circular Letters CCRR/56 and CCRR/57. She invited general comments on the documents before the meeting.

4.2 **Mr Strelets** drew attention to the comments by the United States Administration in Annex 11 to Document RRB16-3/4 relating to Annex 2 to Circular Letter CCRR/57, on the matter of incorporating in rules of procedure the decisions taken by WRC-15 reflected in its minutes regarding Nos. 11.32, 11.48, 11.49, 13.6, 21.14, 23.13B and Annex 3 to Appendix 30A. The United States' comments provided useful guidance on whether or not rules of procedure should be developed, based *inter alia* on whether the conference's decision called explicitly for a rule, whether or not the decision was sufficiently clear not to require a rule, etc. If the Board saw fit to follow the suggestions by the United States, it might save itself a considerable amount of time by not having to discuss a number of draft rules. He also noted that Circular Letter CCRR/57 presented draft rules on Nos. 1.112, 5.316B, 9.23 and A.17.d, even though the need for new or modified rules on those provisions had not been identified in Document RRB16-2/3(Rev.2) and had thus not been endorsed by the Board. Should the Board be taking up draft rules on those provisions at the present juncture?

4.3 Regarding Mr Strelets' second point relating to Document RRB16-2/3(Rev.2), **Mr Bessi** said that when the Board came to look at the draft rules on those four provisions it could decide, based on explanations from the Bureau, either to take the drafts up at the present meeting or to defer their consideration to a future meeting, republishing a further revision of Document RRB16-2/3 in the

meantime. Perhaps the Bureau had good reason to request the Board to consider the drafts at the present meeting rather than wait, for example because they related to new provisions that would enter into force on 1 January 2017. Regarding Mr Strelets' first point, concerning the matter raised by the United States Administration, he said that the Board could usefully decide in principle on the approach it would take before entering into detailed discussion of the material presented in Annex 2 to Circular Letter CCRR/57. **Mr Hoan** endorsed those comments.

4.4 Responding to the comments, **Mr Henri (Chief SSD)** said that Document RRB16-2/3 contained non-exhaustive and preliminary lists of rules providing a draft time-frame for their consideration by the Board, thus to the Bureau's understanding it was to be regarded as a living document to be updated from one meeting to the next in the light of needs identified for new or revised rules. Sometimes the need for a draft rule was identified by the Bureau and acted upon immediately. For example, the need for a revised rule on No. 1.112 had not been identified in Document RRB16-2/3(Rev.2), but following the latter's preparation the Bureau had noted changes that could usefully be made to the existing rule consequent to decisions taken by WRC-15 regarding suppression of the API procedure for satellite systems subject to the coordination procedure under Article 9 and on the submission of requests for coordination related to non-GSO satellite systems. The Bureau had therefore prepared the draft revised rule and included it directly in Circular Letter CCRR/57 as the most expedient means of proceeding with processing the draft rule with a view to its approval by the Board. A few other draft rules in Circular Letter CCRR/57 had been developed by the Bureau in a similar manner. On the other hand, some draft rules might not have been included in Circular Letter CCRR/57, possibly for reasons related to resources and time, but would be included in later circular letters. The Bureau stood ready to explain why any given draft rule had or had not been included in Circular Letter CCRR/57.

4.5 **Mr Bessi** said that he understood the Bureau's concerns and approach, but noted that No. 13.12A*a)* required the Bureau to publish on the ITU website a list of future proposed rules of procedure and the time-frame for their consideration by the Board and for comments by administrations. The United States Administration, in its comments to the present meeting, said that it required more time to consider the draft revised rule on No. 1.112 precisely on the grounds that prior to its inclusion in Circular Letter CCRR/57 it had not been identified for revision. The Board must take those comments into consideration.

4.6 **Mr Strelets** said that he too could regard Document RRB16-2/3 as a living document, but normally it was up to the Board to agree to the development of a given draft rule of procedure at the proposal of the Bureau, an administration or a Board member. Only under exceptional circumstances was any other approach admissible – such as the identification of an urgent need for a rule. The Board would now have to decide what to do with the rules developed and circulated to administrations for comment at the Bureau's sole initiative.

4.7 **Mr Henri (Chief SSD)** said that No. 13.12A*a)* referred to the publication of a list to provide administrations with an indication of what draft rules of procedure were to come, but made no reference to the list having to be exhaustive. Regarding the draft modified rule on No. 1.112, all those administrations that had commented appeared to support the draft rule, save one which appeared to invoke an administrative reason for opposing its consideration at the present meeting. In the past, draft rules had often been included directly in circular letters sent out to administrations for comment without having previously been published in the list of draft rules on the ITU website because their modification had been consequential to other draft new or revised rules developed. The Rules of Procedure had to be viewed as an interrelated whole, and to proceed with the revision of some rules while deferring that of others might be untenable.

4.8 **Mr Bessi** said that those comments could usefully be noted as justification for the Board's consideration of rules of procedure that had not necessarily been identified in the list of rules

published on the ITU website but whose modification was nevertheless required consequent to changes made to other rules. It would be useful to have a list of all such rules considered by the Board in the past.

4.9 **Mr Henri (Chief SSD)** said that such a list could be produced.

4.10 **Mr Strelets** said that he strongly disagreed with the approach put forward by Mr Henri (Chief SSD). Draft rules could be developed only as determined by the Board, at the proposal of the Bureau, an administration or a Board member. The list of rules to be considered was indeed a living document, and was monitored by the Chairman and Vice-Chairman of the Working Group on the Rules of Procedure, but he was unaware of any rules that had been considered by the Board without previously having been on the published list. He could agree to consider the four draft rules before the present meeting that had not been included on the published list provided it was acknowledged that such consideration was in infringement of established practice and the Radio Regulations.

4.11 **Mr Ito**, supported by **Mr Magenta** and **Mr Koffi**, said that the Board should proceed with consideration of the draft rules before the present meeting, deciding case by case, when it encountered a rule that had not been included in the published list, whether or not to consider the rule.

4.12 It was so **agreed**.

5 Consideration of draft rules of procedure (Circular Letters CCRR/56 and CCRR/57; Document RRB16-3/4 + Corr.1)

5.1 The **Chairman** invited the meeting to take up the draft rules in Circular Letter CCRR/57 along with the comments received from administrations in Document RRB16-3/4.

MOD rule on No. 1.112

5.2 **Mr Matas (Head SSD/SPR)** introduced the draft modified rule on No. 1.112 and drew attention to the comments received from France (Annex 1 to Document RRB16-3/4) and the United States (Annex 11 to Document RRB16-3/4).

5.3 **Mr Bessi**, referring to the comments from the United States, asked the Bureau whether suppression of the API procedure for satellite systems subject to the Article 9 coordination procedure justified the draft modification of the rule, and whether consideration of the draft modification could be deferred to the Board's 74th meeting, by which time it could have been published in the list of rules in a revised version of Document RRB16-2/3.

5.4 **Mr Henri (Chief SSD)** said that the draft modification was indeed consequent to the suppression of the API procedure for satellite systems subject to the Article 9 coordination procedure, and was intended to cover the inconsistency between No. 1.112 and the information required under Appendix 4 to the Radio Regulations. It was also intended to clarify the Bureau's approach regarding the acceptance and processing of coordination requests for extremely large numbers of non-GSO satellites endorsed by WRC-15 at its 8th Plenary Meeting, and to include a reference to the changes made to the rule of procedure on the receivability of forms of notice. Consideration might be given to France's comments on § *d)* of the rule, possibly with a view to deleting that subparagraph. He saw no objection to deferring consideration of the draft rule to the Board's 74th meeting.

5.5 **Mr Bessi** suggested that at the present meeting the Board could agree solely to add the words "or coordination" to the existing rule, and leave consideration of the remaining modifications to the 74th meeting, meanwhile publishing the draft modification in the list in Document RRB16-2/3. That would give administrations ample time to consider the draft modifications, as requested by the United States.

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5.6 **Mr Strelets** said that, as the Bureau might receive requests not only for API but also for coordination, the Board should agree to add the words "or coordination" at the present meeting. The **Director** suggested also adding the words "as appropriate". **Mr Henri (Chief SSD)** suggested that the Board also accept the cross-references to the rules of procedure on receivability in order to ensure consistency between the different rules of procedure.

5.7 It was **agreed** to accept those amendments.

5.8 Regarding the other changes to the rule on No. 1.112 proposed in Circular Letter CCRR/57, **Mr Strelets** said that they should not be taken up at the present meeting, but possibly at a future meeting. Regarding the comments by the Administration of France, however, he would not be able to agree to delete § *d)* of the existing rule, as to do so might imply ruling out various network configurations – GSO satellites working with fixed, mobile, mobile-platform stations, stations on-board aircraft and trains, GSO systems working with non-GSO systems, etc.

5.9 **Mr Kibe** said that the definitions in Article 1 of the Radio Regulations were fundamental to the activities of ITU-R and matters relating to them should ideally be taken up at a WRC. Nevertheless, there appeared to be a need to modify the existing rule on No. 1.112 before the next WRC, in order to take account of the decisions taken by WRC-15. Aside from the changes already agreed to, he would be in favour of instructing the Bureau to review the rule on No. 1.112 in the light of the comments received from France and the United States, with a view to the Board taking it up again at a subsequent meeting, as requested by the United States.

5.10 The **Director** supported that approach, noting that France was not proposing the deletion of § *d)* of the existing rule, but was requesting the Board to consider its consequences in the light of the decisions taken by WRC-15. Those comments merited consideration, and care should be taken not to overly narrow the scope of No. 1.112 in the terms established under the rule.

5.11 **Mr Ito** and **Mr Bessi** endorsed the previous speakers' comments; so too did **Mr Hoan** and **Ms Wilson**, who both said that the changes agreed to at the present meeting should be those required as a direct result of the decisions taken by WRC-15.

5.12 **Mr Henri (Chief SSD)** noted that consideration would also have to be given to the comments made by the Administration of Canada regarding the notion of satellite systems in terms of orbital characteristics and orbital planes.

5.13 The **Chairman** suggested that the Board confirm the changes it had already agreed to, and instruct the Bureau to further review the rule on No. 1.112 *inter alia* in the light of the comments received from administrations, with a view to its possible further consideration by the Board at a subsequent meeting.

5.14 It was so **agreed**.

5.15 On that understanding, the draft modified rule on No. 1.112, as amended, was **approved**, with effective date of application 1 January 2017.

ADD rule on Nos. 5.509D and 5.509E

5.16 The **Chairman** drew attention to the comment from France (Annex 1 to Document RRB16-3/4) supporting the draft rule on a temporary basis and proposing that it should be brought to the attention of the relevant ITU-R groups. She noted that the Russian Federation (Annex 3 to Document RRB16-3/4) and Canada (Annex 6 to Document RRB16-3/4) proposed wording to clarify the rule.

5.17 **Mr Sakamoto (Head SSD/SSC)** introduced the draft new rule, explaining that it was not clear what method was to be used for the examination of earth stations under No. 5.509D. The draft new rule therefore included a "line-of-sight" method that the Bureau would use until ITU-R

developed a more appropriate method. France's comment was thus covered in the reasons given for the rule. The Bureau considered that the modifications proposed by the Russian Federation and Canada were valid and might be incorporated in the rule.

5.18 **Mr Bessi** said that he had no difficulty with the comments from administrations.

5.19 **Mr Kibe** agreed that the comments from administrations were valid. He noted, however, that all rules of procedure were essentially temporary. If a new method was developed, then the rule would be modified.

5.20 The **Chairman** suggested that the Board generally had no need to discuss the temporary nature of the present or subsequent draft rules in response to comments from administrations, bearing in mind the point made by Mr Kibe.

5.21 It was so **agreed**.

5.22 **Mr Henri (Chief SSD)** suggested that, in the Canadian proposal, it would be preferable to say "any earth station using that frequency assignment", rather than "associated with".

5.23 **Mr Strelets** pointed out that "using" was incorrect, because the text also referred to the coordination stage, prior to use.

5.24 **Mr Henri (Chief SSD)** suggested retaining the text originally proposed by the Bureau, "any earth station associated with the filed satellite network", which was in line with § A.16 *c)* of Annex 2 to Appendix 4 adopted by WRC-15.

5.25 It was so **agreed**.

5.26 The **Chairman** said that, apart from that phrase, the comments from the Russian Federation and Canada were to be incorporated but, as emphasized by **Mr Strelets**, **Mr Kibe** and **Mr Magenta**, it would be inappropriate for the Board to request an ITU-R study group to develop a new calculation method.

5.27 On that understanding, the draft new rule on Nos. 5.509D and 5.509E, as amended, was **approved**, with effective date of application 1 January 2017.

ADD rule on No. 5.316B

5.28 **Mr Vassiliev (Chief TSD)** introduced the draft new rule on No. 5.316B proposed by the Bureau to avoid unnecessary application of the No. 9.21 procedure for administrations located at sufficiently large distances from the countries mentioned in footnote 5.312 (WRC-15). France (Annex 1 to Document RRB16-3/4) proposed adding the list of countries with territories less than 450 km from the countries mentioned in No. 5.312. The Bureau welcomed that proposed amendment, which could be reflected in an additional paragraph. The effective date of application of the rule should be aligned with the entry into force of the footnote and should therefore be 1 January 2017.

5.29 **Mr Hoan** and Mr **Kibe** supported the draft rule along with the amendment proposed by France.

5.30 **Mr Bessi** noted that the draft rule had not been listed in Document RRB16-2/3. No administration had however objected to the rule and the one administration that had commented had supported the rule. The rule would simplify the work of administrations and would not pose any difficulties to them. He proposed that the Board should adopt the draft rule as amended by France.

5.31 It was so **agreed**.

5.32 The draft new rule on No. 5.316B, as amended, was **approved**, with effective date of application 1 January 2017.

(408633)

ADD rule on 5.328AA

5.33 **Mr Sakamoto (Head SSD/SSC)** introduced the draft new rule, noting that it was supported by the Administration of France. Responding to a question from **Mr Bessi** regarding the need for ITU-R study groups to establish criteria for carrying out examinations, he said that a similar rule of procedure existed on No. 5.327A. No Appendix 4 data elements had been decided by the WRC, thus making it impossible to undertake examinations, but the approach proposed in the draft rule posed no problems. If any difficulties were reported, thought could then be given to studies to resolve matters.

5.34 The draft new rule on No. 5.328AA was **approved**, with effective date of application 1 January 2017.

ADD rule on No. 5.341A

5.35 **Mr Vassiliev (Chief TSD)** introduced the draft new rule on No. 5.341A, drawing attention to the proposal by France (Annex 1 to Document RRB16-3/4) to add a provision to § 1 to exclude the band 1 427-1 429 MHz from the application of No. 9.21, and to add a list of the countries with territories less than 670 km from the countries mentioned in No. 5.342 in regard to application of No. 9.21. France supported the draft rule on a temporary basis and requested the Board to ask the relevant ITU-R groups to examine the method used to calculate the distance. He noted that the band 1 427-1 429 MHz was not allocated to the aeronautical mobile service and that no coordination was therefore required in that band.

5.36 **Mr Hoan** supported the French proposals and request.

5.37 **Mr Strelets** opposed adding the provision proposed by France to exclude the band 1 427-1 429 MHz from the application of No. 9.21, since IMT stations operating in that band might overlap into the 1 429-1 535 MHz band, which was used by aeronautical telemetry in the aeronautical mobile service. He and **Mr Magenta** considered that such a substantive amendment should be reviewed by administrations.

5.38 **Mr Bessi** considered that there was no need to add the text proposed by France for § 1, as the draft rule in Circular Letter CCRR/57 was clear.

5.39 **Mr Hoan** understood the concern expressed by Mr Strelets but said that scalable technology for IMT made it possible to use bandwidth of less than 2 MHz.

5.40 **Mr Vassiliev (Chief TSD)** suggested amending the wording proposed by France for § 1 to indicate that "the use of IMT stations which operate in the frequency band 1 427-1 429 MHz and do not overlap into the band 1 429-1 535 MHz, used by aeronautical telemetry in the aeronautical mobile service, is not subject to the agreement obtained under No. 9.21".

5.41 It was so **agreed**.

5.42 The **Chairman** reiterated that it was not for the Board to call on ITU-R study groups to develop calculation methods but suggested that the list of countries should be added as proposed by France.

5.43 It was so **agreed**.

5.44 The draft new rule on No. 5.341A, as amended, was **approved**, with effective date of application 1 January 2017.

ADD rule on No. 5.346

5.45 **Mr Vassiliev (Chief TSD)** introduced the draft new rule on No. 5.346, recalling that the footnote had been discussed at length at WRC-15. As for the new rule on No. 5.341A, France (Annex 1 to Document RRB16-3/4) proposed adding a list of the countries with territories less than 670 km

from the countries mentioned in No. 5.342, subject to application of No. 9.21. France again supported the draft rule on a temporary basis and requested the Board to ask the relevant ITU-R groups to examine the method used to calculate the distance. The Russian Federation (Annex 3 to Document RRB16-3/4) proposed adding a list of all the countries with territories less than 670 km from the countries mentioned in No. 5.342. At WRC-15, the Director had explained that the footnote dealt with the relationship between the countries listed in it and the countries listed in No. 5.342. The conference had approved the footnote with that explanation (§ 22.37 of WRC-15 Document 511 – minutes of the fourteenth plenary meeting). At the conference, the CEPT countries had been invited to join the footnote but had declined. The list of countries that the Russian Federation was now proposing to add to the rule included some CEPT countries. Bearing in mind the explanation given by the Director at WRC-15, the act of including the names of those countries in the rule on No. 5.346 would implicitly oblige all the countries mentioned to coordinate under No. 9.21 with the countries listed in No. 5.342. According to the conference decision, the coordination procedure under No. 9.21 would apply only to countries specifically listed.

5.46 **Mr Bessi** said that the proposal by France (which in his understanding meant to list only Iraq) was acceptable but the proposal by the Russian Federation went beyond Article 5 of the Radio Regulations.

5.47 **Mr Strelets** said that in his understanding the proposal by France, to include "the list of countries whose territories are less than 670 km from that of the countries listed in No. 5.342", was the same as the proposal by the Russian Federation. The conference had identified certain bands for IMT but there were no regulatory provisions prohibiting IMT in other bands. He stressed the importance of protecting aeronautical telemetry, which was essential for flight safety. The full list of countries proposed by the Russian Federation would be helpful. An alternative would be to list all countries that did not need to coordinate under No. 9.21.

5.48 **Mr Magenta** and **Ms Wilson** preferred to list only the countries that had to coordinate under No. 9.21.

5.49 The **Chairman** suggested that the list should contain only Iraq.

5.50 It was so **agreed**.

5.51 The draft new rule on No. 5.346, as amended, was **approved** with effective date of application 1 January 2017.

MOD rule on band 2 605-2 655 MHz

5.52 **Approved**, subject to an amendment to the title of the draft rule further to a proposal by the Administration of the Russian Federation; effective date of application 1 January 2017.

MOD rule on No. 5.510

5.53 **Approved**, subject to a minor editorial amendment; effective date of application 1 January 2017.

MOD rules on the receivability of forms of notice

5.54 **Mr Matas (Head SSD/SPR)** introduced the draft modified rule, noting that most of the changes to it came further to WRC-15's suppression of the API procedure for satellite systems subject to the Article 9 coordination procedure and suppression of SpaceWISC. Comments had been received from the Administrations of France, the Russian Federation and Canada in Annexes 1, 3 and 6 to Document RRB16-3/4, respectively. He noted that the Russian Federation's comments related mainly to the Russian version of the draft rule. Commenting on each section of the draft revised rule, he said that Canada proposed not to retain the addition of "or 9.2" to § 3.2 of the existing rule; the Bureau had no problem accepting that proposal. Canada also proposed not to retain § 4.1, commenting that

the API information contained nothing regarding the date of bringing into use and that § 4.1 was therefore not implementable; the Bureau considered that proposal logical.

5.55 The Board **agreed** to accept Canada's proposals regarding § 3.2 and § 4.1 of the rule.

5.56 Regarding § 4.4.3, various suggestions were made with a view to improving the text in line with comments received from the Administrations of France and Canada, further to which **Mr Henri (Chief SSD)** said he would provide a revised text incorporating the best of those comments but more accurately reflecting precisely how the various provisions of the Radio Regulations were implemented.

5.57 On that understanding, the revised rule of procedure on the receivability of forms of notice, as amended, was **approved**, with effective date of application 1 January 2017.

Rules on Article 9: SUP rule on No. 9.2, SUP rule on No. 9.2B, SUP rule on No. 9.5B, SUP rule on No. 9.5D and MOD rule on No. 9.23

5.58 **Approved,** with effective date of application 1 January 2017.

MOD rules on Table 9.11A

5.59 **Mr Sakamoto (Head SSD/SSC)** drew attention to the proposal by France that the modification regarding the band 1 610-1 626.5 MHz should be effective immediately. The Bureau supported that proposal.

5.60 It was so **agreed**.

5.61 **Mr Sakamoto (Head SSD/SSC)** drew attention to the proposal by Canada to amend the draft rule in regard to the band 6 700-7 075 MHz, thus elegantly covering GSO and non-GSO together. The Bureau supported that proposal.

5.62 It was so **agreed**.

5.63 The rules on Table 9.11A, as amended, were **approved**, with effective date of application immediately after the approval of the proposed rules for the bands 149.9-150.05 MHz, 399.9-400.05 MHz and 1 610-1 626.5 MHz, and effective date of application 1 January 2017 for the other bands.

MOD rule on No. 9.47 and MOD rule on No. 9.62

5.64 **Approved**, with effective date of application 1 January 2017.

MOD rule on No. 11.28

5.65 **Mr Matas (Head SSD/SPR)** introduced the draft revised rule on No. 11.28 and drew attention to the comments received from the Administration of Canada in Annex 6 to Document RRB16-3/4.

5.66 **Mr Ito** said that the order proposed by Canada for paragraphs 1)-4) appeared to be more logical than the order proposed by the Bureau. Regarding content, he asked what limits were referred to in the expression "within the limits" in the text proposed by the Bureau.

5.67 **Mr Koffi** said that Canada's version of § 1 of the draft rule was clearer than that contained in Circular Letter CCRR/57.

5.68 **Mr Bessi** wondered what purpose was served by § 2 of the draft rule in Circular Letter CCRR/57, in that it did not indicate the consequences of failure to fall within the limits of the characteristics published in the API special section. New § 2 put forward by Canada was preferable in that it clearly indicated the possible need to re-apply Article 9. He deemed § 3 as put forward by Canada to be superfluous.

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5.69 **Mr Strelets** generally endorsed the text put forward by Canada as being clearer than the text proposed in Circular Letter CCRR/57. He supported Mr Bessi's comments regarding the text proposed by Canada for § 2, but questioned whether § 3 put forward by Canada should be deleted, as to do so would perhaps give administrations additional but unjustified freedom to change characteristics for the purposes of coordination and other reasons. Thought might be given to merging Canada's § 3 with § 2.

5.70 **Ms Wilson** said that there was a difference between indicating that characteristics were or were not "within the limits of those published" (wording proposed by the Bureau) and indicating that characteristics were or were not "different from those published" (wording proposed by Canada). She wondered which wording best reflected the intended meaning.

5.71 **Mr Sakamoto (Head SSD/SSC)** having endorsed the texts put forward by Canada for § 2 and § 3, the **Chairman** proposed, in the light of the comments made, that the entire text put forward by Canada be retained for the draft revised rule on No. 11.28.

5.72 On that understanding, the draft revised rule on No. 11.28 was **approved**, with effective date of application 1 January 2017.

MOD rule on No. 11.32 and MOD rule on No. 11.32A

5.73 **Approved,** with effective date of application 1 January 2017.

MOD rules on No. 11.44

5.74 **Mr Henri (Chief SSD),** introducing the draft modified rules on No. 11.44, drew attention to the comments by administrations in Document RRB16-3/4: France (Annex 1), the Russian Federation (Annex 3), the United Kingdom (Annex 5), Canada (Annex 6), Luxembourg (Annex 9) and the United States (Annex 11). The purpose of the draft rules was to clarify the treatment by the Bureau of information on the bringing into use of non-GSO satellite networks received between WRC-15 and WRC-19. Responding to a query by **Mr Strelets** as to which services were covered by the draft rules, he confirmed that the draft rules were intended to apply to FSS and MSS and agreed that the rules should specify FSS and MSS, as proposed by an administration.

5.75 The **Chairman** noted that no comments had been received on NOC 1 or SUP 2. She proposed that NOC 1 and SUP 2 should be approved, with 1 January 2017 as the effective date of application of SUP 2.

5.76 It was so **agreed**.

5.77 **Mr Strelets** observed that two non-GSO satellite networks, Globalstar and Iridium, were already operating and no problems had been encountered. It seemed that the existing procedure worked efficiently and he queried why it should be changed.

5.78 **Mr Henri (Chief SSD)** agreed that the few non-GSO satellite networks so far recorded in the MIFR had not yet caused difficulties but pointed out that the existing constellations comprised fewer than a hundred or so satellites operating in different frequency bands. The Bureau, however, was now faced with filings for non-GSO networks with constellations comprising hundreds up to thousands of satellites that would operate in the Ku or Ka bands and be brought into use prior to WRC-19 for some of them. The Bureau considered that, along with bringing into use one space station on one orbit, the notifying administration should provide a deployment plan for the other hundreds of satellite of the constellation and state the minimum number of satellites necessary to offer the proposed service, to demonstrate the sustainability and seriousness of the project. That information would be published without formal examination by the Bureau.

5.79 **Mr Bessi** referred to the variety of comments from administrations, with both support for parts of the draft rules and objections to other parts. Some of the comments concerned principles,

others related to terminology. He proposed that the Board consider the draft rules sentence by sentence. **Mr Ito** endorsed that approach, adding that the Bureau needed a procedure for defining the bringing into use of non-GSO systems. **Mr Hoan** agreed that the Board should approve rules on the bringing into use of non-GSO systems.

5.80 **Ms Wilson** said that the draft rules concerned a sensitive matter that was being studied by Working Party 4A. The Board should not overreach its authority in approving the rules.

5.81 **Mr Bessi** and Mr **Strelets** observed that WRC-15 had not called for a deployment plan or for information on the minimum number of satellites. **Ms Wilson** agreed and said that it would be wise to await the output of Working Party 4A.

5.82 Following consideration of a consolidated document introduced by **Mr Botha (SGD)** containing the texts proposed by administrations as well as the draft rule prepared by the Bureau, the Board **approved** an amended version of ADD 2 with effective date of application immediately after approval of the rules. The Board thus **approved** the entire rule, as amended.

MOD rule on No. 11.44B

5.83 **Approved**, subject to incorporation of the proposals put forward by the Administrations of France and Canada, with effective date of application 1 January 2017.

MOD rule on Nos. 11.49 and 11.49.1

5.84 **Mr Matas (Head SSD/SPR)** introduced the draft revised rule, drawing attention to the comments received from the Administrations of France and the United States.

5.85 **Mr Ito** said that the proposals by the Administration of France made WRC-15's decisions explicit in the rule of procedure, rather than simply implicit. He could therefore support those proposals.

5.86 **Mr Matas (Head SSD/SPR)** said that the Bureau would prefer to retain its proposed text for § 2.1, as it more accurately reflected the action taken by the Bureau, which published on the web the date of resumption of use indicated by the notifying administration.

5.87 **Mr Henri (Chief SSD)** requested that reference be added at the end of § 2.4.2 to "Appendices 30, 30A and 30B, as appropriate", in order to cover suspension of use in the Plans.

5.88 Subject to that amendment and to incorporation of the amendments put forward by the Administration of France to § 2.4.1 and § 2.4.2, the revised rule on Nos. 11.49 and 11.49.1 was **approved**, with effective date of application 1 January 2017.

MOD rule on No. 11.50

5.89 **Mr Henri (Chief SSD)** introduced the draft revised rule on No. 11.50, which the Bureau had prepared further to the instructions received from the Board at its 72nd meeting. He noted that the Administration of France had submitted comments (Annex 1 to Document RRB16-3/4).

5.90 Following comments by **Mr Strelets, Ms Wilson** and **Mr Bessi**, **Mr Henri (Chief SSD)** said that the amendment proposed by the French Administration to the last sentence of the text of § 5 in CCRR/57 was already covered by the text of the opening paragraph of the existing rule ("unless otherwise decided by the Conference").

5.91 The draft revised rule on No. 11.50 was **approved**, subject to deletion of the words "for the submission", as proposed by France, with effective date of application immediately after approval of the revised rule.

(408633)

ADD rule on Annex 2 to Appendix 4

5.92 **Approved**, with effective date of application immediately after approval of the new rule.

ADD rule on item A.17.d (Appendix 4)

5.93 **Mr Sakamoto (Head SSD/SSC)** introduced the draft new rule, noting that it had not appeared in the list of rules published in Document RRB16-2/3(Rev.2). No comments had been received from administrations.

5.94 The draft new rule was **approved**, with effective date of application 1 January 2017.

MOD rule on § 3.5.1 and § 3.8 of Annex 5 to Appendix 30

5.95 **Approved**, with effective date of application 1 January 2017.

MOD rule on § 1.7 of Annex 3 to Appendix 30A

5.96 **Approved**, with effective date of application 1 January 2017.

SUP § 8.17 of Appendix 30B

5.97 **Approved**, with effective date of application 1 January 2017.

ADD rules on Resolution 49 (Rev. WRC-15)

5.98 **Approved**, with effective date of application 1 January 2017.

MOD rules on Part B, Section B6

5.99 **Mr Bogens (Acting Head TSD/FMD)** introduced the draft revised rules, drawing attention to the comments received from the Administrations of France and the Russian Federation in Annexes 1 and 3 to Document RRB16-3/4, respectively.

5.100 The Board **agreed** to accept the Russian Federation's proposed amendments to the text, which were intended to improve its readability and facilitate subsequent references to it.

5.101 Regarding the French Administration's comments, the **Chairman** recalled the Board's decision taken earlier at the present meeting that except under exceptional circumstances no reference was to be made to the approval of rules of procedure on a temporary basis.

5.102 With respect to the request of the Administration of France to clarify the draft rule of procedure on Section B6 and the reasons for a different treatment of the frequency band 3 300-3 400 MHz compared with other frequency bands, the Board **noted** the following explanation provided by the Bureau:

"In the bands below 3 GHz the Bureau performs calculations of the interfering field strength for every station using its notified radiated power and effective antenna height using a software tool based on Recommendation ITU-R P.1546. This Recommendation applies in the band 30-3 000 MHz. This tool allows the Bureau to process a large number of notices, which are expected in the frequency bands allocated to the mobile service and/or identified for IMT by WRC-15.

However, for the band 3 300-3 400 MHz Recommendation ITU-R P.1546 is not applicable. Instead, Recommendation ITU-R P.528 is used. For this Recommendation the Bureau has no software to calculate the interfering field strength. If a large number of IMT stations are notified, it would be impossible to calculate the interfering field strength manually for every station in order to identify the affected countries. At the same time the Bureau has software based on the ITU Digitized World Map (IDWM) that calculates distances from the location of a notified terrestrial station to the borders of neighbouring countries.

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For these reasons, a single coordination distance value of 616 km is proposed for the band 3 300-3 400 MHz. This distance is calculated using typical values of IMT-Advanced stations and the protection requirements of stations in the radiolocation service."

5.103 Subject to incorporation of the Russian Federation's proposed amendments and to alignment of the French version of Table 1 with the English version as requested by France, the revised rules on Part B, Section B6, were **approved**, with effective date of application 1 January 2017.

5.104 Moving on to Annex 2 to Circular Letter CCRR/57, the **Chairman** drew attention to a general comment by the United States (Annex 11 to Document RRB16-3/4) that, with the exception of WRC-15 decisions specifically calling for the development of rules of procedure, WRC-15 decisions should not be directly included in rules of procedure.

5.105 The **Director** expressed sympathy with the comment made by the United States, noting that conference decisions could not be changed. Nevertheless, it would be helpful to administrations to bring RR interpretations by the Board and WRCs together in a single document. He therefore suggested that WRC-15 decisions taken in plenary should be reproduced verbatim for information in the Rules of Procedure, with a note (not part of the rules) simply indicating the origin of the decision.

5.106 **Mr Bessi** and **Mr Magenta** supported the approach suggested by the Director.

5.107 **Mr Strelets** welcomed the new approach suggested by the Director but said that the Board should nevertheless examine the specific comments received.

5.108 **Mr Henri (Chief SSD)** drew attention to comments from France (Annex 1 to Document RRB16-3/4) in regard to No. 9.19 and No. 11.48, and from Canada (Annex 6 to Document RRB16-3/4) in regard to No. 11.48. He pointed out that certain WRC plenary meeting decisions did not take account of subsequent decisions taken by the same WRC, and suggested that the Bureau should add the necessary explanation in the form of footnotes.

5.109 **Mr Strelets** observed that such an approach would work for No. 11.48 but that it would be more difficult to deal with No. 9.19 as the conference had not ruled on the matter. In its comments, France had queried the choice of 1 000 km in the draft rule proposed by the Bureau.

5.110 **Mr Vassiliev (Chief TSD)** said that, with a view to avoiding unnecessary coordination under No. 9.19 to protect the broadcasting-satellite service (BSS), the Bureau had considered a worst case scenario for the range 700 MHz to 76 GHz, which had led to a distance of 842 km, and being very cautious had rounded that up to 1 000 km. Working Party 4A was studying the problem and when the results became available, the Bureau could update its proposal for a rule of procedure.

5.111 **Mr Ito**, **Mr Bessi**, **Ms Wilson**, **Mr Magenta** and **Mr Strelets** thanked the Bureau for the explanation but stressed that the WRC-15 plenary meeting decisions should be left untouched, with explanatory notes as appropriate.

5.112 **Mr Vassiliev (Chief TSD)** pointed out that the current rule on No. 9.19 was in conflict with the WRC-15 plenary meeting decision and that some amendment was therefore necessary.

5.113 The **Chairman** suggested that the Bureau should draft a rule of procedure on No. 9.19 to be considered at the next meeting of the Board.

5.114 It was so **agreed**.

5.115 The **Chairman** suggested that the Board conclude as follows on Circular Letter CCRR/57:

"The Board discussed in detail the draft Rules of Procedure circulated to administrations in Circular Letter CCRR/57, along with comments received from administrations (Documents RRB16-3/4 and RRB16-3/4(Corr.1)). The Board adopted the Rules of Procedure with modifications as contained in Annex 1 [to the summary of decisions – Document RRB16-3/11].

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Concerning those decisions of WRC-15 reflected in the minutes of the conference that have an impact on the Rules of Procedure, the Board decided to refer to them in the Rules of Procedure as contained in Annex 2 [to the summary of decisions – Document RRB16-3/11], in the form of notes."

5.116 It was so **agreed**.

Draft rule of procedure on the GE06 Regional Agreement (Circular Letter CCRR/56; Document RRB 16-3/4)

5.117 **Mr Vassiliev (Chief TSD)** said that the draft rule of procedure on the GE06 Regional Agreement in Circular Letter CCRR/56 had been prepared further to the instructions issued by the Board at its 72nd meeting, specifically with a view to ensuring that, prior to the end of the corresponding deadlines, the administrations to which a reminder had been sent pursuant to § 4.1.4.10 of the GE06 Agreement had received those reminders. The Bureau's solution to the problem would consist in sending reminders to the administrations concerned and also posting the reminders and days remaining to respond on the ITU website, thus making all that information known to all GE06 Agreement administrations. He drew attention to the comments received from the Algerian Administration in Annex 10 to Document RRB16-3/4 and the changes proposed by Algeria to the draft rule proposed by the Bureau, noting that Algeria had based its comments and proposals on the wording in the draft rule "…the Bureau will make them [the reminders] also available for the administrations concerned using another means of electronic communication." Thus, Algeria had not been aware of the specific solution now proposed by the Bureau involving website publication, and appeared to assume from the reference to 'another means of electronic communication" that the Bureau intended to send out e-mails in addition to the fax reminders. Having recalled the exceptional circumstances obtaining in the case involving Algeria and other administrations as discussed by the Board at its 72nd meeting, representing the first time problems had arisen in the ten years since the provisions had first been implemented, he said that the Bureau's proposed solution was simple and should prove effective, whereas the text put forward by Algeria, which had not been seen by other administrations, would place an additional and unnecessary administrative burden on administrations and the Bureau. The Administrations of France, Armenia, the Russian Federation and Denmark had all submitted comments in support of the draft rule proposed by the Bureau.

5.118 **Mr Bessi** said that as Chairman of the Working Group on the Rules of Procedure he had examined the solution proposed by the Bureau and was convinced that it would resolve the problems encountered.

5.119 **Mr Strelets** noted that the exceptional circumstances referred to by Mr Vassiliev (Chief TSD) could not serve as justification for non-compliance with the provisions of the GE06 Agreement, and a clear rule of procedure was therefore called for. Reference to "another electronic means of communication" was vague, and Algeria's proposals were indeed clearer. Publication on the ITU website might provide the solution. The draft rule required further development, following which perhaps it should be sent out again to administrations for comment.

5.120 Responding to a question by **Ms Wilson**, **Ms Ghazi (Head TSD/BCD)** provided details of how transparency would be increased significantly under the solution proposed by the Bureau: the initial reminder sent by fax to an administration would also appear in the MyAdmin of the administrations concerned – both the administration requesting that the reminder be sent and those to which it was sent. At the same time an e-mail would be sent out automatically to the focal point identified under Circular Letter CR/408. If an administration failed to respond, a further reminder would be sent out by e-mail ten days before the deadline, with the correspondence again appearing in the MyAdmin of all the administrations concerned.

5.121 Following proposals by **Mr Bessi, Mr Hoan** and **Ms Wilson**, it was **agreed** that the solution being proposed by the Bureau, which they endorsed, would best be reflected in the draft rule by

adding the phrase "e.g. using the web application ""MyAdmin"" (see CR/408, dated 5 July 2016)" at the end of the fourth paragraph of the rule proposed by the Bureau. Moreover, it would be logical to reverse the order of the third and fourth paragraphs in the draft rule proposed by the Bureau.

5.122 **Mr Strelets** said that while the first of the two new paragraphs proposed by Algeria was now covered by the amendments agreed to, the second could remain relevant.

5.123 **Mr Bessi** said that the content of that paragraph already appeared in the GE06 Agreement itself, in § 4.1.4.11.

5.124 **Mr Vassiliev (Chief TSD)** reiterated that to introduce the two new paragraphs proposed by Algeria would increase the administrative workload of administrations and the Bureau in a manner that was unwarranted: the problems encountered had arisen only once in the ten years since the Agreement had been in force, and the solution proposed by the Bureau should amply suffice. Moreover, the GE06 administrations had not had the opportunity to comment on the implications of the texts proposed by Algeria. **Mr Khairov** endorsed those comments.

5.125 Subject to the agreed amendments and a few editorial refinements, the draft new rule on the GE06 Regional Agreement (Part A10) was **approved**.

6 Consideration of draft rules of procedure — List of proposed rules (Document RRB16-2/3(Rev.2))

6.1 Shortly before the closure of the meeting, **Mr Bessi**, speaking as the Chairman of the Working Group on the Rules of Procedure, said that it was proposed that Revision 3 of Document RRB16-2/3 be issued following the present meeting and approved by the Board members by correspondence. Revision 3 would include, *inter alia*, updates he had received from Mr Henri (Chief SSD) and Mr Vassiliev (Chief TSD).

6.2 **Mr Strelets** warned against the Board starting to approve documents by correspondence between meetings, but said that he could agree to do so with the document in question on an exceptional basis, since there was insufficient time to consider it properly at the present meeting.

6.3 **Mr Henri (Chief SSD)** noted, following the Board's review of the rule of procedure on No. 1.112, that certain amendments were being agreed to at the present meeting, whereas the consideration of other proposed amendments was being deferred. The future consideration of the deferred amendments of that rule of procedure would therefore be reflected in the next version of Document RRB16-2/3, and included in the next circular letter containing draft rules of procedure to be sent out to administrations for comment.

6.4 The Board **agreed** to conclude on the matter as follows:

"Based on information provided by the Bureau, the Board decided to update the list of proposed Rules of Procedure in Document RRB16-2/3(Rev.2) and requested the Chairman of the Working Group (WG) on the Rules of Procedure to circulate to the RRB members the list of proposed draft Rules of Procedure, for approval by correspondence, and instructed the Bureau to prepare the relevant draft Rules of Procedure."

7 Submission by the Administration of Indonesia requesting an extension of the regulatory time-limit to bring back into use the frequency assignments of the PALAPA-C3-K satellite network (Document RRB16-3/1 and Addendum 1)

7.1 **Mr Matas (Head SSD/SPR)** introduced Document RRB16-3/1 and Addendum 1, containing a request by the Administration of Indonesia for an extension of the regulatory time-limit for the

bringing back into use of the suspended frequency assignments of the PALAPA-C3-K satellite network. The request was based on the launch failure of the Telkom-3 satellite.

7.2 **Mr Bessi** pointed out that in Addendum 1 the Administration of Indonesia requested an extension until April 2017, as compared with an extension of one year until 6 July 2017 mentioned in Document RRB16-3/1.

7.3 **Mr Henri (Chief SSD)** suggested that, given the risks of possible delay in launching the replacement satellite Telkom-3S, an extension of one year would be preferable for the administration.

7.4 **Mr Strelets** said that the Board should respond favourably to the request by the Administration of Indonesia, recognizing the administration's effort to find a temporary solution by leasing a satellite which, however, did not cover the whole frequency range of the PALAPA-C3-K network. The loss of the Telkom-3 satellite constituted a *force majeure* event and the Board should grant a limited and qualified extension, respecting the three-year period set in No. 11.49 for bringing back into use.

7.5 **Mr Hoan** shared the concern expressed by Mr Strelets, noting that the launch failure and other difficulties had preventing the bringing back into use of certain frequency assignments within the three-year period specified in No. 11.49. Nevertheless, No. 0.3 referred to "taking into account the special needs of the developing countries and the geographical situation of particular countries". Bearing in mind that Indonesia was a developing country made up of more than 17000 islands, he considered that the Board should accept the administration's request.

7.6 Responding to a request for clarification by **Mr Kibe** concerning the several periods of suspension of the frequency bands of the PALAPA-C3-K satellite network, **Mr Henri (Chief SSD)** explained that the C bands had been in use for years at 118°E in conformity with the Radio Regulations but the Ku bands filed under the PALAPA-C3-K satellite network were to have been brought into use by the Telkom-3 satellite, which had been lost, triggering a few subsequent requests for suspension. As an interim solution to resume the Ku band operation, a leased satellite, ASIASAT-3S, was used but did not cover all the Ku bands of the PALAPA-C3-K network. For those bands in operation on the ASIASAT-3S satellite, at the end of the lease a new request for suspension was requested and accepted up to 1 June 2018. For the remaining frequency assignments not on-board the ASIASAT-3S satellite in the bands 11 452-11 628 MHz and 13 758-13 934 MHz, the deadline under No. 11.49 for bringing back into use was 6 July 2016. The new satellite to be launched, Telkom-3S, would cover all the bands of the PALAPA-C3-K network.

7.7 **Mr Kibe** said that, although the Administration of Indonesia mentioned some previous decisions by the Board, it was the Board's practice to consider each individual case on its own merits. The loss of the Telkom-3 satellite satisfied the conditions for *force majeure* and Indonesia had clearly demonstrated its commitment to launching the replacement satellite. The Board should grant an extension until July 2017 to cover unexpected circumstances.

7.8 **Mr Koffi** agreed that Indonesia had made enormous efforts to bring the frequency bands into use and to launch the replacement satellite. He was in favour of granting an extension until April 2017.

7.9 **Mr Bessi**, **Ms Wilson** and **Mr Magenta** recognized the efforts made by the Administration of Indonesia, as described by previous speakers, and favoured granting the administration's request for an extension until 6 July 2017.

7.10 Responding to a question by **Mr Khairov** concerning the frequency band capacity of the Telkom-3S satellite, **Mr Henri (Chief SSD)** said that the satellite was still under construction and its capacity was not known for certain, but according to information provided by the satellite

manufacturer and the administration the satellite would have the capacity to cover all the C and Ku bands of the PALAPA-C3-K satellite network.

7.11 **Mr Khairov** noted the importance of those frequency bands at 118°E for Indonesia and expressed the hope that the new satellite would have the requisite capacity. Certain of those bands had not been used for a decade, and would not be used for a few more years. Perhaps the Board should draw the attention of the conference to the importance of checking that administrations or operators were not holding on to frequency assignments without using them. If frequency assignments were being left unused, they should be freed for use by others.

7.12 **Mr Bin Hammad** said that Indonesia, as a developing country, had ambitious plans for satellite communications and had made huge efforts to achieve those plans. There was a clear case of *force majeure* and, like other speakers, he considered that the Board should grant an extension until 6 July 2017.

7.13 **Mr Ito** and **Mr Terán** agreed with previous speakers that the Board should grant an extension until 6 July 2017.

7.14 Responding to a query by **Mr Strelets**, **Mr Henri (Chief SSD)** assured the Board that confidential information available to the Bureau from the satellite manufacturer and launch service confirmed the details provided by the administration.

7.15 **Mr Strelets** expressed a general concern that administrations might try to use the Board's decisions to seek ever longer extensions of regulatory deadlines. He stressed that the Board's decisions to extend time-limits were taken on a case by case basis and did not set a precedent. **Mr Magenta**, **Mr Kibe** and **Ms Wilson** endorsed that opinion.

7.16 The **Chairman** suggested that the Board conclude as follows:

"The Board considered the request from the Administration of Indonesia contained in Documents RRB16-3/1 and RRB16-3/1(Add.1) and reiterated that any decisions made by the Board to extend the regulatory time-limit to bring frequency assignments into use would be based on the specific merits of each request and in line with the decisions and instructions of the WRC and should not serve as a precedent for any future decisions. The Board examined in detail the request from the Administration of Indonesia and noted that the case fulfilled the conditions of *force majeure*, that the administration made efforts to meet the regulatory time limit and that the request was for a defined and limited extension. Based on these considerations, the Board decided to agree to the request from the Administration of Indonesia and to grant an extension of the regulatory time limit for bringing into use the frequency assignments in the frequency bands 11 452-11 628 MHz and 13 758-13 934 MHz to the PALAPA-C3-K satellite network to 6 July 2017."

7.17 It was so **agreed**.

8 Submission by the Administration of Papua New Guinea requesting an extension of the regulatory time-limit to bring into use the frequency assignments of the NEW DAWN 21 satellite network at 60°E (Document RRB16-3/2 and Addendum 1)

8.1 **Mr Matas (Head SSD/SPR)** introduced Document RRB16-3/2 and Addendum 1 relating to the Administration of Papua New Guinea's request for the Board to extend the regulatory time-limit for bringing into use the frequency assignments to the NEW DAWN 21 satellite network at 60°E. Outlining the details of the case, he said that the original bringing-into-use deadline of 28 August 2016 had not been met owing to events beyond the control of the operator (ArianeSpace could not secure the co-passenger for the launch), resulting in the launch of the satellite involved, IS-33e, on 24 August 2016. The latest information available, in Addendum 1 to Document RRB16-3/2, was that the satellite had faced further delays in orbit-raising as a result of malfunction in the primary thruster,

and the satellite was now expected to arrive at the nominal orbital position 60°E in mid-December 2016.

8.2 **Mr Strelets** said that the Administration of Papua New Guinea appeared to have taken all possible steps to comply with the regulatory time-limit, the satellite had been ready, but launch had been delayed owing to co-passenger unavailability. Matters had been resolved, but now additional time was required for the satellite to reach its orbital position. He viewed the situation as involving a straightforward case of co-passenger delay, and would therefore see no reason not to accede to Papua New Guinea's request.

8.3 **Mr Bessi** expressed similar views, noting that the documentation before the Board included correspondence from ArianeSpace and Intelsat bearing out the fact that co-passenger issues had delayed launch of Papua New Guinea's satellite. To accede to the request fell within the competence of the Board, and the regulatory extension was of barely four months. The satellite was in orbit, and on its way to its orbital position. The Board should accede to Papua New Guinea's request to extend the deadline to mid-December.

8.4 **Ms Wilson** agreed with the previous speakers, adding that the operator had not only done all it could to meet deadlines but had also taken risks in accelerating the development of the second satellite to go on the same launch vehicle. **Mr Terán** expressed similar views.

8.5 **Mr Kibe**, **Mr Bin Hammad**, **Mr Koffi**, **Mr Magenta** and **Mr Ito** supported the previous speakers. So too did **Mr Hoan**, who noted the parallels between the case now before the Board and that of Viet Nam's VINASAT network discussed by WRC-07, where the conference had mandated the Board to grant an extension if co-passenger-related delays made it necessary.

8.6 **Mr Strelets** said that the WRC had made it clear that the Board could and in fact should grant extensions to regulatory time-limits when co-passenger issues caused delays. The Board could base its decision solely on that consideration.

8.7 The **Chairman** suggested that the Board conclude as follows:

"The Board considered the request from the Administration of Papua New Guinea as presented in Documents RRB16-3/2 and RRB16-3/2(Add.1). The Board noted that a delay was caused due to a problem related to a co-passenger issue, which qualified this request for consideration within the mandate of the Board based on the decisions of WRC-07. The Board decided to agree to the request of the administration and to grant an extension of four months of the regulatory time limit for bringing into use the frequency assignments to the NEW DAWN 21 satellite network at 60°E to 31 December 2016."

8.8 It was so **agreed**.

9 Submission by the Administration of Israel requesting an extension of the regulatory time-limit to bring into use the AMS-CK-17E satellite network (Document RRB16-3/6)

9.1 **Mr Matas (Head SSD/SPR)** introduced Document RRB16-3/6, containing a request by the Administration of Israel for extension of the regulatory deadline for bringing into use the AMS-CK-17E satellite network at 17°E. The request was based on a *force majeure* event, namely the pre-launch explosion of the SpaceX Falcon 9 rocket on 1 September 2016, which had completely destroyed the AMOS-6 satellite due to be launched on 3 September 2016. He noted that the regulatory deadline for bringing into use the AMS-CK-17E satellite network was 28 March 2017, and that a previous *force majeure* event had affected frequency assignments at 17°E when the AMOS-5 satellite had failed (§ 8 of Document RRB16-2/15 - Minutes of the 72nd meeting of the Board).

9.2 **Mr Ito** said that he had been saddened to hear of the loss of the AMOS-6 satellite in what was evidently a *force majeure* event. The request by the Administration of Israel was legitimate, and the Board should grant a qualified and limited extension of the deadline for bringing into use the AMS-CK-17E satellite network at 17°E. It appeared from Document RRB16-3/6 that, having brought into use the frequency assignments at 17°E, AMOS-5 was to have been positioned at 4°W. If in future the Board were to receive a request for the extension of a regulatory deadline in regard to 4°W on the basis of the same *force majeure* event, then the Board would have to consider the question of whether a single *force majeure* event could properly be the basis for extension of deadlines at two or more orbital positions.

9.3 **Mr Strelets** recalled that, in its work under Resolution 80, the Board had taken a dim view of satellite hopping. The document from the Administration of Israel showed an intent to hop, and thereby challenged the Board's opinion. He asked whether any due diligence information under Resolution 49 was available on the intended use of the 17°E orbital position by the AMOS-6 satellite. At its 72nd meeting, the Board had agreed to extend by one year the regulatory deadline for bringing back into use frequency assignments at 17°E affected by the failure of AMOS-5. If the Administration of Israel had difficulties with the Ka band, then it should submit to the Bureau a new notice for frequency assignments in the Ka band at orbital position 17°E.

9.4 **Mr Hoan** expressed sympathy for Israel on the total loss of the AMOS-6 satellite because of the explosion of the SpaceX Falcon 9 rocket. He nevertheless had the same concern as Mr Ito in regard to extending the regulatory deadline for two orbital positions on the basis of one *force majeure* event, and wished to raise the same question as Mr Strelets on Resolution 49 information for AMOS-6 at 17°E. It seemed that there was Resolution 49 information for AMOS-6 only at 4°W.

9.5 **Mr Bessi** supported the comments made by Mr Strelets and Mr Hoan. The Board should base its decision on a careful analysis of the situation arising from the fatal in-orbit anomaly that had befallen the AMOS-5 satellite on 21 November 2015, as well as the *force majeure* event that had destroyed the AMOS-6 satellite. The AMOS-17 satellite was intended to replace AMOS-5 but no documentation had been provided on AMOS-17, in particular regarding the launch service. Furthermore, AMOS-6 had been intended for 4°W, but the Administration of Israel stated that the satellite would have been positioned at 17°E for three months. The Board had to be cautious in dealing with the request by the Administration of Israel in order to avoid setting an undesirable precedent.

9.6 **Ms Wilson** recalled the discussion of satellite hopping at WRC-15 but noted that the conference had not changed the regulations in that respect. Thus nothing that Israel had intended to do was inappropriate in terms of the Radio Regulations. Two satellites had been lost, but the *force majeure* event impeding the bringing into use of frequency assignments at 17°E had been the publicly visible explosion of the Falcon 9 rocket. She was in favour of granting the extension requested by the Administration of Israel.

9.7 **Mr Khairov** supported the views expressed by Ms Wilson. Placing a replacement satellite in an orbital position to bring frequency assignments into use in no way violated the provisions of the Radio Regulations. If the due diligence information for AMOS-5 and AMOS-6 confirmed capacity for the AMS-CK-17E satellite network frequency assignments, then the Board should respond favourably to the request from the Administration of Israel.

9.8 **Mr Henri (Chief SSD)** explained that several satellite networks would operate at 17°E: the INTERSPUTNIK-17E, INTERSPUTNIK-17E-CK and INTERSPUTNIK-17E-B networks in the C, Ku FSS unplanned and Ku BSS Plan frequency bands, and the AMS-CK-17E network in several frequency ranges including the Ka band. Following the loss of AMOS-5, the Board had granted an extension for the bringing back into use of the INTERSPUTNIK networks. The AMS-CK-17E network was a new network, for which the Administration of Israel had until 28 March 2017 to submit notification and due diligence information and more importantly to bring into use the frequency

assignments. According to the information already provided by the Administration of Israel, AMOS-6 had been planned to bring into use in particular the Ka band frequency assignments of the AMS-CK-17E network at 17°E prior to moving to 4°W, its designated orbital slot. As Ms Wilson had pointed out, the use of one space station for a short period to bring frequency assignments at a different orbital position into use was in conformity with the Radio Regulations and decisions of WRC-15 on this issue. In that context, Resolution 40 (WRC-15) simply required administrations to provide information on the last orbital position, associated satellite network (or networks) and date on which the space station was no longer maintained at the orbital location, in case of a space station previously used at a different orbital position.

9.9 **Mr Strelets** said that Document RRB16-3/6 was unclear. He understood from informal consultations with the Bureau that the AMS-CK-17E satellite network comprised the C, Ku, Ka and X bands. Yet in the last paragraph of the document, the Administration of Israel simply requested an extension of the regulatory deadline for bringing into use the AMS-CK-17E satellite network, without specifying which bands were concerned. Was the Board to infer that the request covered all bands? Were two extensions to be granted at orbital position 17°E as a result of two *force majeure* events, one related to AMOS-5 and the other to AMOS-6?

9.10 **Mr Henri (Chief SSD)** confirmed that the AMS-CK-17E satellite network contained the C, Ku, Ka and X bands. He understood the request may concern all bands, but more particularly the Ka band.

9.11 **Ms Wilson** observed that the AMS-CK-17E satellite network was a different network from those considered by the Board at its previous meeting. Furthermore, it seemed from the fourth paragraph of Document RRB16-3/6 that the extension request from the Administration of Israel concerned only the bringing into use of the Ka band. No request was being made in regard to the 4°W orbital position.

9.12 **Mr Bessi**, supported by **Mr Magenta**, said that, along with clarifying whether the request from the Administration of Israel concerned only the Ka band or all the bands of the AMS-CK-17E satellite network, it would be helpful for the Board to understand the relationship between the AMOS-17 satellite, the INTERSPUTNIK satellite networks and the AMS-CK-17E satellite network, and whether the anomaly that had befallen the AMOS-5 satellite constituted a *force majeure* event in regard to the AMS-CK-17E satellite network. The regulatory deadline for bringing into use the AMS-CK-17E satellite network was 28 March 2017 and the Board's next meeting would be held in February 2017. Perhaps the Administration of Israel could be asked to provide further details and the Board could decide on the matter at its next meeting.

9.13 **Ms Wilson** drew attention to the penultimate paragraph of the document, in which the Administration of Israel stated that "The RRB approval of our current request is essential in order to avoid loss of the Israeli Administration's regulatory rights under the AMS-CK-17E satellite network, and to allow the satellite operator to include a Ka-band payload on the replacement satellite at 17°E". She proposed that the Board should grant the requested extension solely for the Ka band and leave it to the administration to request extension for other bands if it so wished, taking account of the points raised by Mr Bessi.

9.14 **Mr Hoan** recognized that the loss of the AMOS-6 satellite clearly met the conditions for *force majeure* in regard to the 4°W orbital position. Given that no Resolution 49 due diligence information had yet been provided for the filings at 17°E, however, it was not clear that the *force majeure* conditions were fulfilled for that orbital position. He supported the views expressed by Mr Bessi and said that the Board should take up the matter at its next meeting on the basis of further details to be provided by the Administration of Israel.

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9.15 **Mr Koffi** agreed with Ms Wilson that the request by the Administration of Israel related to the bringing into use of the Ka band for the AMS-CK-17E satellite network at 17°E. Nevertheless, in view of the comment by Mr Henri (Chief SSD), he could agree with Mr Bessi that the Board should defer its decision until its next meeting, in order to get further details from the Administration of Israel.

9.16 **Mr Bin Hammad** said that it was important for the Board to study and analyse requests for granting extensions to regulatory deadlines, and to reach consensus on any extension. The doubts of a single member of the Board could lead to clarification for many Board members. It would be better for the Board to discuss the request from the Administration of Israel at its next meeting on the basis of further details to be provided by the administration.

9.17 **Mr Khairov** said that it seemed clear that Israel had been struck by two *force majeure* incidents and was taking all possible steps to keep its assignments. If the Board were to defer the matter to its next meeting, then Board members who wanted further information would have to specify the details to be provided.

9.18 **Ms Wilson** emphasized that delaying the Board's decision would not be without cost to Israel. In the penultimate paragraph of the document, the administration stated that the decision was "particularly urgent for the satellite operator to be able to move forward with the satellite design freeze and execution of the replacement satellite project at 17°E". The request from the Administration of Israel concerned the bringing into use of a new assignment (not the bringing back into use of an assignment). Among the various frequency bands mentioned in the document, the only new assignment was in the Ka band for the AMS-CK-17E satellite network.

9.19 **Mr Strelets** said that, apart from the matter of satellite hopping, he could agree with Ms Wilson in regard to the Ka band assignment of the AMS-CK-17E satellite network. It would be unacceptable, however, to extend the regulatory deadline for frequency assignments in the other bands for the AMS-CK-17E satellite network, as the Administration of Israel suggested in the final paragraph of the document.

9.20 **Mr Magenta**, responding to the comments made by Ms Wilson and Mr Khairov, said that various points needed to be clarified, and that design studies could go ahead even if the Board delayed its decision for three months.

9.21 **Mr Henri (Chief SSD)** explained that the seven-year regulatory period for the frequency assignments in the C, Ku, Ka and X bands for the AMS-CK-17E satellite network would end on 28 March 2017. Unless the administration sent notification and due diligence information, and had a satellite that could bring the assignments into use, the filings would be cancelled. In Document RRB16-3/6, the Administration of Israel focused on the Ka band.

9.22 **Ms Wilson** noted that the AMOS-17 satellite was intended to bring back into use the suspended assignments of the INTERSPUTNIK networks, as well as to bring into use the Ka band assignments of the AMS-CK-17E satellite network.

9.23 **Mr Strelets** agreed with Ms Wilson's remark but said that agreeing to extend the regulatory deadline for the Ka band in response to Israel's request would be contrary to previous decisions of the Board in which the Board had refused to accept the use of a single satellite to bring into use two orbital positions.

9.24 **Mr Ito** said that in the present case the Board should agree to extend the regulatory deadline for the Ka band on the grounds of *force majeure*. Provided that the terms of No. 11.44B were complied with, namely deployment of a space station with the capability of transmitting or receiving the frequency assignment at the notified orbital position for a continuous period of ninety days, the use of a single satellite to bring into use multiple orbital positions was legitimate. He nevertheless

reiterated his concern about the possible future use of a single instance of *force majeure* to seek extension of the regulatory deadlines for several orbital positions.

9.25 **Mr Khairov** said that the Board had to examine each case individually. In the present case, Israel was reacting to two *force majeure* incidents, and was being open about its intended use of a satellite to bring into use its assignment at 17°E prior to moving the satellite to 4°W. A negative decision by the Board might encourage other administrations to be more secretive in the future. He said that the Board should agree to the requested regulatory extension for the Ka band and ask for further information as a basis for considering the other bands at its next meeting.

9.26 **Ms Wilson** supported the views expressed by Mr Ito and Mr Khairov.

9.27 **Mr Bessi** and **Mr Magenta** reiterated that it would be preferable to request further information in order to clarify the matter, and defer the Board's decision until its next meeting.

9.28 **Ms Wilson** and **Mr Khairov** considered that a delay by the Board in taking a decision would be prejudicial to the AMOS-17 satellite project.

9.29 **Mr Strelets** recalled that in adopting Resolution 40, WRC-15 had considered that "the use of the same space station to bring frequency assignments to geostationary-satellite networks located at different orbital locations into use within a short period of time could lead to inefficient use of spectrum/orbit resources". In the past, members of the Board had expressed the view that the use of one space station to bring frequency assignments at different orbital positions into use within a short period of time was not the intent of the regulations. WRC-15 had not contradicted that view.

9.30 **Mr Ito** recalled that prior to WRC-12 the Board had discussed the abusive use of satellite hopping, with some administrations claiming that assignments had been brought into use after a period of just a few days. The Board had raised its concern to WRC-12 and the conference had set the minimum period of ninety days.

9.31 **Mr Bessi** said that the conference had given the Board the authority to grant extensions to regulatory deadlines on the basis of *force majeure*. In order to grant an extension for the Ka band, the Board would have to accept the existence of *force majeure*. The Board should be circumspect in examining the scope of the *force majeure* argument, bearing in mind the possibility that the administration might request extensions for other bands as well. The Board had to assume responsibility for taking the correct decision and should do so on the basis of full information.

9.32 **Mr Hoan**, **Mr Magenta**, **Mr Koffi** and **Mr Bin Hammad** spoke in favour of seeking further information and deferring the Board's decision until its next meeting.

9.33 **Mr Strelets** emphasized that the Board should reach consensus on its decision.

9.34 The **Chairman** said that if the Board were to seek further information, then it should specify precisely what information was lacking. She invited Board members who so wished to forward their questions to Mr Strelets, who had volunteered to coordinate a list of questions.

9.35 **Mr Strelets** subsequently submitted the following list of proposed questions, to which Mr Magenta, Mr Bessi and he himself had contributed:

"1. At the 72nd meeting the RRB considered the submission from the Administration of the Russian Federation relating to a situation of force majeure which occurred with the AMOS-5 satellite at orbital position 17°E and resulted in total loss of this satellite. The Board decided to grant the Administration of the Russian Federation a one year extension of the time limit for bringing back into use the frequency assignments to the INTERSPUTNIK-17E, INTERSPUTNIK-17E-CK and INTERSPUTNIK-17E-B satellite networks until 21 November 2019 (frequency bands 3 400-4 200 MHz/5725-6725 MHz; 10.95-11.20 GHz, 11.45-11.70 GHz, 12.50-12.75 GHz/13.75-14.5 GHz; 11.70-12.50 GHz/14.50-14.80 GHz, 17.30-18.10 GHz). ***Question***: Does the

Administration of Israel consider that the question of future use by the AMOS-17 satellite in an orbital position 17°E of FSS non-planned bands C and Ku and BSS planned Ku band is closed?

2. RRB would like to ask Israel to present the documents confirming the plans to put AMOS-6 satellite to an orbital position 17°E before placement of this satellite in the declared position 4°W.

3. On the AMOS-5 satellite there were no repeaters in the Ka band. Consequently, the RRB understanding is that in case of further work of AMOS-5 in an orbital position 17°E the frequency assignments of satellite network AMS-CK-17E in the range of Ka would be removed from the MIFR on March 28, 2017.

4. How can the loss of the AMOS-6 satellite, which was intended to operate in the position 4°W, justify the application of Force Majeure at position 17°E?

5. Which bands have been coordinated for AMS-CK-17E?

6. Does the Administration of Israel plan to suspend the use of frequency assignments of the satellite network in an orbital position 4°W?

7. What was the date for the bringing into use of the satellite AMOS17E? Is the satellite ready? If not, when will it be ready?

8. Why the approval of the extension of the Ka-band is linked to the operator works?"

9.36 **Ms Wilson** said that, in reviewing the questions, the Board should ascertain both that it did not already have the answers and that the clarifications sought were relevant to the decision it had to take. She noted that the Board had information available not only in Document RRB16-3/6 submitted by the Administration of Israel, but also in Document RRB16-2/9 submitted to the Board's previous meeting by the Administration of the Russian Federation acting as notifying administration for INTERSPUTNIK. Turning to the list of proposed questions, she said that the first question related to the frequency bands of the INTERSPUTNIK satellite networks. The Board did not need that information in regard to its decision in the case before it. The second question, regarding plans to position the AMOS-6 satellite at 17°E prior to moving it to its declared orbital position of 4°W, was relevant but had already been answered by the Administration of Israel, and the Board's practice was to believe information submitted by administrations. The third question concerned AMOS-5 and the Board already knew the answer. The fourth question related to the second question. The fifth, sixth and eighth questions were not relevant to the Board's decision, and the seventh question was unclear.

9.37 **Mr Strelets** said that some members of the Board wished to have further information, and it had never been the Board's practice to limit the questions that its members could raise. Whether or not the questions were sent to the Administration of Israel, they would in any case appear in the minutes of the meeting.

9.38 **Mr Bessi** said that answers to the first three questions would provide the Board with useful additional information. Perhaps the Bureau could provide answers on the basis of available data, and the Board could consider the matter and defer its decision until its next meeting.

9.39 **Mr Henri (Chief SSD)** said that, in the opinion of the Bureau, the document submitted by the Administration of Israel was clear enough. If so requested, the Bureau could provide answers to all the questions raised, although members of the Board might want fuller information than that currently available.

9.40 Following further discussion which failed to produce consensus either on the list of questions or on the procedure for bringing the questions to the attention of the Administration of Israel, **Ms Wilson** again emphasized that the request from the Administration of Israel was based on *force majeure* and she urged Board members to consider the four conditions that had to be fulfilled. In her view, the loss of AMOS-6 would cause the Administration of Israel to fail to bring into use the AMS-

CK-17E satellite network Ka band. Thus, the fourth condition (a causal effective connection between the event and the failure to fulfil the obligation) was met, but only for the case of bringing into use the Ka band frequency assignment at 17°E. The only extension of the regulatory deadline that the Board was allowed to grant on the basis of *force majeure* in regard to the AMS-CK-17E satellite network at 17°E therefore related to the Ka band solely.

9.41 The **Chairman** suggested that the Board conclude as follows:

"The Board considered very carefully the request from the Administration of the State of Israel contained in Document RRB16-3/6. The Board reiterated that any decisions to extend the regulatory time-limit to bring frequency assignments into use would be based on the specific merits of each request and in line with the decisions and instructions of the WRC. The Board concluded that the case fulfilled the conditions of *force majeure* associated with the loss of the AMOS-6 satellite. Taking into consideration all aspects of the request, the Board decided to grant an extension for a period of three years of the regulatory time limit for the bringing into use of frequency assignments in the Ka-band to the AMS-CK-17E satellite network."

9.42 It was so **agreed.**

10 Submission by the Administration of France concerning a request for an extension of the regulatory time-limit for the bringing into use of frequency assignments to the F-SAT-N-E-70.5E satellite network in the 30/20 GHz range (Document RRB16-3/10)

10.1 **Mr Matas (Head SSD/SPR)** introduced the French Administration's request in Document RRB16-3/10 for an extension to 7 August 2019 of the regulatory time-limit for bringing into use the Ka-band frequency assignments to the F-SAT-N-E-70.5E satellite network following total failure of the satellite's solar panels, obliging the operator to de-orbit definitively the satellite just nine days short of expiry of the ninety-day period of operation required under No. 11.44B to confirm bringing into use of the assignments.

10.2 Responding to a question from **Ms Wilson**, **Mr Henri (Chief SSD)** said that the bringing-into-use deadline for the F-SAT-N-E-70.5E network had been 28 May 2016 for the Ka-band assignments concerned.

10.3 **Mr Strelets** said that to his understanding the documentation before the meeting contained a well-founded request based on *force majeure* for the extension of a regulatory time period which he would be inclined to accede to. The satellite involved had nevertheless been an old one that had been moved repeatedly from one orbital position to another, and appeared ultimately to have died a natural death. Given that it had been moved from one position to another, he asked the Bureau whether its beams corresponded to the filing whose use was being suspended.

10.4 **Mr Henri (Chief SSD)** said that even though beams were pre-configured for optimum operation at certain positions, their technology allowed them to be reconfigured for use at other orbital positions. It could thus be assumed that the EUTELSAT 70D satellite being used to bring the Ka-band F-SAT-N-E-70.5E satellite network assignments into use had been able to cover the service areas in the filing.

10.5 **Mr Bessi** said that the assignments in question appeared to have been brought into use by the relevant deadline of 28 May 2016, but the satellite used had broken down during the ninety-day bringing-into-use period. It further appeared that the conditions for *force majeure* were met. He therefore saw no reason not to grant the three-year extension requested.

10.6 **Mr Khairov** said that he too saw no reason not to accede to the French Administration's request, which met the conditions for *force majeure*. The Board might consider developing a rule of procedure to cover such cases which, though rare, could involve abuse. It would be useful for

administrations and operators to have guidelines on the extent to which satellites could be moved from one position to another and still be considered to be operating effectively.

10.7 **Mr Koffi** said that based on the arguments put forward by France, he could accede to the request on the grounds of *force majeure*. He nevertheless wondered what should have been the expected lifetime of the satellite concerned.

10.8 **Mr Magenta** said that he too was in favour of acceding to the French Administration's request, which appeared to have involved an unforeseeable breakdown.

10.9 **Ms Wilson** said that she was struggling to accept that the breakdown of a 14-year-old satellite was totally unpredictable.

10.10 The **Director** said that in his experience a satellite could be expected to have a station-keeping lifetime of at least 15 years. When breakdowns occurred, they were usually equipment failures for which back-up replacements had been foreseen – for example, transistors and the like. He had never witnessed the total failure of solar powers, which he would term a system failure rather than an equipment failure, and which could not be corrected.

10.11 **Mr Terán** said that he shared the same concerns as Ms Wilson, but found the Director's comments helpful. The Board must nevertheless be careful not to unreservedly accept equipment failure as grounds for *force majeure*. **Ms Wilson** agreed.

10.12 **Mr Magenta** said that he too found the Director's explanation useful. In his own experience, the lifetime of a satellite was related more to its control and management than to its equipment or age – for example, meteorite events were far more decisive than equipment events. The request submitted by France clearly fulfilled all the conditions to be met for *force majeure*, and he therefore confirmed his view that the Board should accede to it.

10.13 **Mr Strelets** said that Ms Wilson and Mr Terán had raised interesting points, and he noted that the Radio Regulations clearly covered the destruction of a satellite prior to bringing into use. Nevertheless, the French Administration had complied with the provisions of the Radio Regulations to the letter, its case met the conditions for *force majeure*, a satellite had clearly been in orbit and operational at the position concerned, and France had not sought to hide the fact that its satellite had fallen nine days short of fulfilling the ninety-day bringing-into-use requirement. Thought might have to be given to how long a satellite had to be in orbit in order for the concept of *force majeure* to be applicable; however, it was up to the WRC rather than the Board to decide the relevant periods. In the present case, while understanding the concerns raised, he was satisfied that the Radio Regulations covered the destruction of a satellite and that therefore the Board could accede to the French Administration's request.

10.14 **Mr Henri (Chief SSD)** said that, had the French Administration sought to hide the fact that it had fallen nine days short of fulfilling the ninety-day bringing-into-use requirement, satellite tracking would soon have prompted the Bureau to ask questions. He nevertheless confirmed that based on the information available to him satellite EUTELSAT 70D had been in perfect working order when it had taken up operation at 70.5°E and could be assumed not to have reached the end of its operational lifetime by any means. He knew of only two other cases of total failure of solar panels in the past, at least in so far as commercial satellites were concerned.

10.15 **Ms Wilson** said that with the explanations provided by the Director and Mr Henri (Chief SSD), she too could agree to accede to the French Administration's request on the grounds of *force majeure*.

10.16 The **Chairman** suggested that the Board conclude as follows:

"The Board considered the request from the Administration of France, contained in Document RRB16-3/10, for an extension of the regulatory time-limit for the bringing into use of frequency assignments to the F-SAT-N-E-70.5E satellite network in the 30/20 GHz range. The Board reiterated that any decisions to extend the regulatory time-limit to bring frequency assignments into use would be based on the specific merits of each request and in line with the decisions and instructions of the WRC. The Board concluded that the case fulfilled the conditions of *force majeure* and particularly noted that the total failure of the solar panels of a satellite was confirmed by the Bureau as being a very rare event. Taking into consideration all aspects of the request, the Board decided to grant an extension of the regulatory time limit for the bringing into use of frequency assignments in the bands 29.5-29.678 GHz/19.7-19.878 GHz to the F-SAT-N-E-70.5E satellite network until 7 August 2019."

10.17 It was so **agreed.**

10.18 **Ms Wilson** said that, although she could readily support the decision taken by the Board on the present case, she would not like the decision to be taken as a precedent in the examination of future cases of requests for extensions based on *force majeure* involving old satellites.

10.19 **Mr Strelets** said that he understood Ms Wilson's concern, but noted that it would be difficult to establish regulatory provisions dealing with the question, since the lifetimes of satellites could vary considerably depending on numerous factors, and what was considered the normal lifetime for a satellite some years ago might well seem short now.

11 Request for a decision by the Radio Regulations Board for cancellation of frequency assignments in the band 3 702 – 6 420.5 MHz to the NIGCOMSAT-1R satellite network under No. 13.6 of the Radio Regulations (Document RRB16-3/5)

11.1 **Mr Matas (Head SSD/SPR)** introduced the Bureau's request in Document RRB16-3/5.

11.2 The Board **agreed** to conclude on the matter as follows:

"The Board examined the request from the Bureau for a decision for the cancellation of frequency assignments in the frequency band 3 702-6 420.5 MHz to the NIGCOMSAT-1R satellite network under RR No. **13.6** as contained in Document RRB16-3/5. The Board considered that the Bureau had applied the relevant provisions of the Radio Regulations correctly and agreed to the cancellation of frequency assignments in the frequency band 3 702-6 420.5 MHz to the NIGCOMSAT-1R satellite network under RR No. **13.6.**"

12 Submission by the Administration of Papua New Guinea requesting a decision from the Radio Regulations Board to reinstate the Part B and notification filings of the AFRISAT 3W-PKU satellite network (Document RRB16-3/7)

12.1 **Mr Wang (Head SSD/SNP),** introducing Papua New Guinea's request in Document RRB16-3/7, outlined the details of the case, which were also set out in the letter dated 23 September 2016 from the Administration of Papua New Guinea to the Director of BR. Papua New Guinea based its request for reinstatement of the Part B filing for the AFRISAT 3W-PKU satellite network on the grounds that it had complied with the provisions of § 6.6 of Appendix 30B, and stated that: "Specifically, the administration of Papua New Guinea sought the agreement of affected administrations under No. 6.6 of Appendix 30B, which is the only requirement of this provision of the ITU Radio Regulations. There is nothing in the Radio Regulations or the Rules of Procedure that specifies that agreements are explicitly required or how the Bureau should proceed if an administration does not provide a response." The Bureau's understanding of the provisions in question differed from Papua New Guinea's: the agreement of affected administrations under § 6.6 had to be explicit, and that approach had been applied throughout the years in the implementation of Appendix 30B, notwithstanding the numerous changes that had been made to the appendix by

different conferences. Indeed, it was borne out by WRC-07 documentation dealing with principles associated with the implementation of Appendix 30B, in particular documentation produced by WRC-07 Working Group 5B. Thus, the basic question to be addressed by the Board in response to the case now before it was whether or not the agreement of affected administrations under § 6.6 had to be explicit.

12.2 **Mr Ito** commented that Papua New Guinea's approach to implementation of the provisions in question appeared to involve the assumption of tacit agreement based on affected administrations' failure to reply within four months. The issue of tacit agreement always raised problems and had been discussed at length at WRC-15. The key word in § 6.6 was "seek", giving rise to the question, which he addressed to the Bureau, of whether Papua New Guinea had diligently sought the agreement of the 185 countries and geographic areas included in the service area of its network.

12.3 **Mr Strelets** said that the issue was extremely complex, involving the difference between seeking agreement and actually obtaining it explicitly, as explained in § 6 of the Director's report to the present meeting (Document RRB16-3/3). The rights of administrations were directly affected both in the event of the territory of an administration being included in the service area in the absence of a response, and in the event of the territory of an administration being excluded from the service area in the absence of a response. He also questioned why the Administration of Papua New Guinea had not received the assistance it had requested under No. 13.1

12.4 Responding to the questions asked, **Mr Wang (Head SSD/SNP)** said that Papua New Guinea had sent correspondence to numerous administrations identified under § 6.6, seeking their agreement. Regarding assistance, he said that when Papua New Guinea had initially sought the Bureau's assistance, the Bureau had understood the request was made under §§ 6.13-6.15 of AP30B, and had responded that assistance under those provisions was not applicable to the seeking of agreements under § 6.6. Only subsequently had Papua New Guinea invoked § 13.1, further to which the Bureau had requested Papua New Guinea to provide a list of administrations identified under § 6.6 but did not give response to request for seeking agreement. The Bureau had also reminded Papua New Guinea of the nineteen administrations that had objected to the inclusion of their territory in the service area of its network based on their comments on Special Section AP30B/A6A/154. He stressed that a general distinction must be drawn between agreements relating to interference on one hand, regarding which either tacit or explicit agreement might apply, and agreement relating to inclusion in a service area on the other, for which explicit agreement was required.

12.5 **Mr Khairov** said that he had sympathy for Papua New Guinea's case, and it was logical not to encourage inaction on the part of administrations, which should be monitoring notices in regard to service areas. Nevertheless, the provisions of the Radio Regulations had to be adhered to, and according to his reading of the various provisions of Article 6 of Appendix 30B and § 6.17 in particular, agreement had to be obtained from affected administrations in the case under consideration. The issue could usefully be submitted to the WRC for consideration; but as things stood, the Board could not accede to the request.

12.6 **Mr Ito** said that the issue under discussion involved both the rights and duties of administrations. Administrations could ask for assistance from the Bureau, but it was their duty under § 6.6 to seek the explicit agreement of affected administrations, even if there were more than one hundred. Simply asking the Bureau for assistance did not constitute evidence of fulfilling that duty. He therefore could not agree to accede to Papua New Guinea's request.

12.7 **Mr Bessi** said that he too had sympathy for Papua New Guinea's case. According to his reading of the various provisions of Article 6, however, assistance could be requested by administration for filings under § 6.17 in regard to § 6.5 but not in regard to § 6.6. Moreover, it was insufficient for an administration to simply request agreement, such agreement had actually to be obtained. Such was the understanding of the international radiocommunication community regarding

the implementation of Appendix 30B to date. He too could not agree to accede to Papua New Guinea's request.

12.8 **Mr Strelets** observed that, rather than focusing on Papua New Guinea's request, the Board should focus on clarifying the application of § 6.6 and § 6.19 of Appendix 30B in the case of non-response, as requested by the Bureau in Document RRB16-3/3. Indeed, Papua New Guinea was not the only party that had encountered the problem in hand: numerous operators would surely welcome the clarifications requested. There was no rule of procedure on the issue, nor was the Bureau's practice set down anywhere. Papua New Guinea had been quite right in requesting the Bureau for assistance on the matter under § 13.1, further to which the Bureau had turned to the Board for clarification. The Board should consider whether under § 6.6 agreement had simply to be sought, or had to be both sought and obtained.

12.9 **Mr Magenta** endorsed the comments made by Mr Khairov and Mr Strelets. The Board could only help to clarify the issue, however, by establishing one or more possible interpretations and submitting its findings to the WRC for decision, or by advising the Director to ask the WRC to clarify matters. The Board could not decide on the matter itself. Although § 6.8 and § 6.17 would seem to invalidate the approach adopted by Papua New Guinea, the consequences of an administration's failure to obtain agreement under § 6.6 were not to be found in the Radio Regulations.

12.10 **Mr Henri (Chief SSD)** said that, based on the work of its Working Group 5B, WRC-07 had agreed that explicit agreement had to be obtained in regard to inclusion in a service area. Since then – and indeed previously – the Bureau had applied that approach. In matters relating to assistance to administrations in the event of non-reply, WRC-15 had established a clear distinction between § 6.5 and § 6.6, namely that in cases of non-reply regarding coordination based on technical considerations, the notifying administration could request assistance under § 6.13 and § 6.15, whereas assistance could not be requested under those provisions in cases of non-reply to requests regarding inclusion in service areas. In view of the numerous AP30B additional system filings treated by the Bureau with a growing number of administrations identified under § 6.6 but not responding to the seeking agreement procedure, further consideration could be given to this issue.

12.11 Having commented further on the application of §§ 6.5-6.8, including as compared with provisions in Appendix 30A, Mr **Strelets** said that any output from WRC-07 Working Group 5B could not be considered as a WRC decision if it had not been included in the final acts of the conference. There was clearly a lacuna that had to be filled, as administrations' rights were affected. A rule of procedure was called for.

12.12 **Mr Bessi** said that to his mind § 6.6 was perfectly clear that in the absence of explicit agreement from a given administration, its territory had to be excluded from the service area in question; the Board could not adopt a rule of procedure altering that provision's application. Thought might be given to the need for a rule of procedure on § 6.16.

12.13 **Mr Magenta** considered that § 6.6 was clear, and that the need for a notifying administration to both "seek and obtain" agreement under that provision was confirmed by § 6.8. Perhaps a rule of procedure on § 6.16 and § 6.17 might be needed.

12.14 **Mr Strelets** said that, notwithstanding previous speakers' comments, administrations evidently were not clear in their understanding of § 6.6, and nor were numerous operators. In particular, § 6.8 indicated that following the examination under § 6.5 and § 6.6, the Bureau shall immediately send a telegram or fax to the administration, drawing attention to the requirement to seek and obtain the agreement of those administrations identified in the special section of the BR IFIC published under § 6.7. According to his understanding, however, the requirement to seek and obtain agreement applied only to § 6.5, and only the requirement to seek agreement applied to § 6.6. The

Bureau had a different interpretation. It would therefore be advisable to clarify those matters in a rule of procedure.

12.15 The **Chairman**, supported by **Mr Koffi** and **Mr Khairov**, suggested that the best way forward might be to confirm that the Bureau had applied the provisions of the Radio Regulations correctly in the present matter, and request the Bureau to develop a rule of procedure clarifying that non-response under § 6.6 meant disagreement on the part of the administration failing to respond. She suggested that the Board conclude as follows:

"The Board considered the request from the Administration of Papua New Guinea as contained in Document RRB16-3/7 to reinstate the Part B and notification filings of the AFRISAT 3W-PKU satellite network. The Board considered that the Bureau had applied the relevant provisions of the Radio Regulations correctly but expressed sympathy for administrations seeking agreement with other administrations and not receiving any reply to their correspondence. In order to address this problem and the application of No. 6.6 of Article 6 of Appendix **30B**, the Board instructed the Bureau to prepare a new draft Rule of Procedure on the basis that no response received on requests under No. 6.6 would mean disagreement. The Board further instructed the Bureau to circulate the draft Rule of Procedure to administrations for consideration at the 74th meeting. The Board further decided not to accede to the request from the Administration of Papua New Guinea."

12.16 It was so **agreed**.

13 Submission by the Administration of Qatar on the examination of the F-SAT-N5 satellite networks (B1FR transmit beam) (Documents RRB16-3/8 and RRB16-3/DELAYED/1-3)

13.1 **Mr Matas (Head SSD/SPR)** introduced Documents RRB16-3/8 and RRB16-3/DELAYED/1 from the Administration of Qatar concerning the examination of the F-SAT-N5 satellite networks (B1FR transmit beam), Document RRB16-3/DELAYED/2 from the Administration of France in response to those documents, and Document RRB16-3/DELAYED/3 from the Administration of Qatar responding to the document from France. The matter concerned satellite networks submitted by the Administration of France in the new FSS allocation approved by WRC-15. The Administration of Qatar had examined the "as received" data for the B1FR transmit beam using the GIBC software tool, resulting in unfavourable findings. When the networks had been formally published in BR IFIC 2823, however, the findings had been favourable. The Administration of Qatar asked the Board to revoke those favourable findings, noting the significant reduction in power between the "as received" and published findings. He explained that the Bureau had received the filings from the Administration of France on 29 November 2015. On 7 December 2015, before starting its formal examination of the filings, the Bureau had received a letter from France pointing out a human error in the submitted data. On 5 January 2016 the Bureau had made the "as received" data available in BR IFIC 2810, not incorporating the correction made by France, and the Administration of Qatar had sent a complaint on 26 July 2016.

13.2 The **Director** said that the request from the Administration of Qatar was surprising, given that "as received" data had no regulatory status. The practice of making "as received" data available had started at a time when there had been a significant backlog in the Bureau for processing filings, and had been a way to flag projects and alert administrations.

13.3 **Mr Matas (Head SSD/SPR)** added that Resolution 55, under which the Bureau had to make coordination requests and notifications available "as received" within 30 days of receipt, had originally been adopted by WRC-2000 at a time when the Bureau was dealing with 1600 networks and there had been a three-year delay. The information was copied and made available as originally received, untouched by the Bureau. The information was subsequently checked for correctness and

examined by the Bureau, and officially published in a BR IFIC. The Bureau had attempted to explain that process to the Administration of Qatar.

13.4 **Mr Strelets** expressed confidence in the Director and Bureau to always abide by and be guided by the Radio Regulations. Nevertheless, the matter raised by Qatar was sensitive. Since WRC-15, a number of administrations had practically blocked the possibility for other administrations to use frequency bands re-allotted to FSS. The Board had discussed the receivability of notices in those frequency bands at great length. It was unfortunate that the Bureau had not been more open about the communication from France identifying the error.

13.5 **Mr Bessi** noted that the letter from the Bureau dated 22 September 2016 mentioned assistance. He asked whether the Administration of France had asked for assistance and whether the Bureau had helped to detect the error. He further asked whether the data provided by France had been examined in accordance with No. 21.16 of the Radio Regulations and the associated rule of procedure. Finally, noting that 28 November 2015 had been the last day of the conference, and that France had sent a modification on 7 December 2015, he asked what data the Administration of Qatar had used for its first simulation.

13.6 **Mr Matas (Head SSD/SPR)** confirmed that the Bureau had not provided assistance to France, and that the letter identifying the error had been sent voluntarily and spontaneously by the French Administration. The corrected filings had been published in BR IFIC 2823 on 5 July 2016, and had received favourable findings. The Administration of Qatar had carried out its first simulation on the uncorrected "as received" data. The exchange of comments between the Administration of Qatar and the Bureau had started in May 2016, during which he had urged the administration to await the official publication but had declined to show Qatar the correspondence from France. He noted that Council Decision 482 allowed administrations to withdraw a filing within 15 days of the receipt of the filing, removing the obligation to pay the cost recovery fee. The decision gave administrations the flexibility to revise their filings during the 15-day period, and it was not uncommon for administrations to take advantage of such flexibility to correct errors.

13.7 **Mr Henri (Chief SSD)** observed that correspondence between an administration and the Bureau was treated confidentially and bilaterally. If a third administration raised a question, then the Bureau invited that administration to get in touch with the administration concerned.

13.8 Following comments by **Mr Strelets** and **Mr Bin Hammad** on the need for transparency, in particular with regard to the communication by the Administration of France dated 7 December 2015, the **Chairman** said that the Bureau should make the e-mail concerned available to any member of the Board who wished to see it.

13.9 **Ms Wilson**, referring to the documents submitted by the Administration of Qatar, said that the specific frequency bands were irrelevant to the matter before the Board. The Administration of Qatar had used the "as received" data and then complained that the published information had produced different findings. She could not imagine a process in which human error could not be corrected and was not persuaded to support the request by the administration.

13.10 **Mr Ito** asked why the information in the letter from the Bureau dated 12 August 2016 had not been included the Bureau's first response to Qatar. Perhaps the matter need never have been brought to the Board.

13.11 **Mr Bin Hammad** said that there might have been some misunderstanding between the Bureau and the administration, with a lack of clarity giving rise to a feeling of unfair treatment. Perhaps a way could be found to avoid such misunderstandings in the future.

13.12 **Mr Koffi** asked whether, in the absence of any regulatory basis for the request by the Administration of Qatar, the Board should be considering the matter at all.

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13.13 The **Director** suggested that, given that there was no longer a backlog, suppressing the requirement to make "as received" information available would save time for administrations as well as the Bureau.

13.14 **Ms Wilson** suggested that future misunderstandings could be avoided by adding a note recommending against examining the "as received" information.

13.15 The **Chairman** suggested that the Board conclude as follows:

"The Board considered the request from the Administration of the State of Qatar on the examination of the F-SAT-N5 satellite networks (B1FR transmit beam) as presented in Document RRB16-3/8 and further considered for information Documents RRB16-3/DELAYED/1, RRB16-3/DELAYED/2 and RRB16-3/DELAYED/3. The Board did not notice any infringements of the provisions of the Radio Regulations by actions of the Bureau and noted that the Administration of France provided the corrected information in a timely manner. The Board noted that it is not recommended for administrations to use the "as received" information for examination purposes and instructed the Bureau to add such a warning to the SNL Part C database. Based on these considerations, the Bureau decided not to accede to the request from the Administration of the State of Qatar."

13.16 It was so **agreed**.

14 Submission by the Administration of Luxembourg requesting the revision of the examination of the LUX-30B-G4-19.2E satellite network under Articles 6 and 8 of Appendix 30B (Document RRB16-3/9)

14.1 **Mr Wang (Head SSD/SNP),** introducing the request from the Administration of Luxembourg for review of the examination of the LUX-30B-G4-19.2E satellite network in Document RRB16-3/9, drew particular attention to the Administration of Luxembourg's request under section 3 under item C.11.a in its letter dated 24 May 2016 to replace seven test points initially submitted under Articles 6 and 8 by the test points indicated in the table provided. Despite what appeared in the table, the Bureau had assumed that Luxembourg's request contained a typographical error and in fact concerned the RKG uplink and TKG downlink beams (and not the TCG beam), as the Bureau had assumed that the seven new test points were supposed to be used for the same service area of the two beams involved (uplink and downlink), and had published Luxembourg's requested change accordingly in BR IFIC 2822 of 21 June 2016. Luxembourg had reacted in its letter of 4 July 2016 by saying that the change of test points concerned only the transmitting beam, and not the RKG receiving beam. With the new service area, however, only three of the fourteen test points of the RKG uplink beam fell inside the service area whereas 11 fell outside. Luxembourg had nevertheless insisted that for the RKG beam the Bureau should retain the three test points that fell inside the service area and ignore the eleven other test points – that being the only option available to it given that the 8-year regulatory period had been about to expire – and that the examination of the network be reviewed on that basis. The basic difficulty of the case lay in the fact that, with the change of test points, the Bureau's examination had produced an unfavourable finding, and as Part B had been submitted only two weeks before expiry of the 8-year regulatory period, Luxembourg could not make a resubmission. Responding to questions by **Mr Ito**, he said that Luxembourg had submitted the seven new test points in reaction to the fact that some administrations had not given their agreement to inclusion in the initial service area.

14.2 **Mr Ito** questioned whether an administration could say which test points should be examined and which should not. Surely if test points had been identified, they had to be examined.

14.3 **Mr Khairov** said that the Board must be very careful with the case now before it, as it involved an existing network that was operational. He asked whether test points had to be the same for both the uplink and downlink.

14.4 **Mr Wang (Head SSD/SNP)** said that the test points did not necessarily have to be the same, as there were no established provisions on the matter, but if the service area was the same for different beams, the Bureau encouraged administrations to have the same test points. The definition of "service area" in Appendix 4 referred to its identification by a set of a maximum of twenty test points and by a service area contour on the surface of the Earth or defined by a minimum elevation angle, which thus established a link between the size and shape of the service area and the locations of test points.

14.5 **Mr Khairov** asked why the Bureau, in its correspondence dated 25 April 2016, had not informed the Administration of Luxembourg that test points for the uplink also fell outside the service area. If it had done so, Luxembourg would have had time to react to the Bureau's understanding of matters and, if it had so wished, could have provided new test points.

14.6 **Mr Wang (Head SSD/SNP)** said that there was no link between the fact that two test points fell outside the service area for the downlink and Luxembourg's submission of new test points. Luxembourg had been obliged to change the service area because other administrations had not given their agreement regarding it.

14.7 Responding to a further question by **Mr Ito, Mr Wang (Head SSD/SNP)** said that, of the initial set of test points submitted, 11 fell outside the territory of other countries identified in the new service area and therefore did not have to be examined. **Mr Ito** said that to his understanding of the Appendix 30B procedures, administrations could not simply indicate that they did not wish test points to be examined if it didn't suit them. Surely all test points had to be examined.

14.8 **Mr Strelets** noted that a considerable period of time (almost 6 months) had elapsed between Luxembourg's submission of 11 November 2015 and the Bureau's reaction to it requesting clarifications, thus giving the Luxembourg Administration too little time to rectify the situation. He wondered why the Bureau had not reacted sooner. That provided further evidence that the Bureau was overburdened. Perhaps the Bureau could have been a bit more helpful in dealing with Luxembourg's submission, especially given that it involved an existing, operational network. The Plans and Master Register must reflect the actual situation in space, and the Board's decision on the present case must endeavour not only to resolve this particular case but also to ensure that similar problems did not arise again in the future.

14.9 **Mr Bessi** said that the case before the Board appeared essentially to involve a problem of communication between the Bureau and the Luxembourg Administration.

14.10 The **Chairman** agreed with Mr Bessi, and said that, as pointed out by Mr Wang (Head SSD/SNP), the basic problem was that the Luxembourg Administration had run out of time to rectify the situation within the regulatory time period. One solution might therefore be to extend the regulatory time period, although that might not be within the Board's authority.

14.11 **Mr Khairov** said that in his view the unfavourable finding issued regarding Luxembourg's network had come as the result of incorrect action by the Bureau in the assumptions it had based its calculations on, in particular regarding the RKG uplink beam. The Board might usefully focus on that aspect in seeking to resolve the issue.

14.12 **Mr Kibe** suggested that, although the Board could not extend the applicable regulatory time period, Luxembourg might be allowed to resubmit its modification while retaining the date of the initial filing.

14.13 **Mr Bessi** suggested that one solution might be to request the Bureau to review its examination under § 6.17 of Appendix 30B, only taking into account the test points in the countries as requested by Luxembourg.

14.14 **Mr Wang (Head SSD/SNP)** said that the Bureau would have no problem effecting the relevant calculations even if it took account of only one test point initially submitted by Luxembourg.

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However, questions of principle arose, in that the location and distribution of test points should properly represent the service area: among the initial test points, only three test points located inside countries in Europe, whereas in fact on the territories of several countries in both the Middle East and Africa would have no test point fell within it. Issues of workload also arose, in that if the Part B publication was revised the Bureau would have to reprocess all the networks processed in the interim. It might be worth noting that Luxembourg had two other entries in the List and MIFR at 19.2°E that could probably support the operation of Luxembourg's network under discussion.

14.15 **Mr Ito** said that the Board could not simply accede to Luxembourg's request to change its network's finding from unfavourable to favourable, as that could open the door to abuse. Administrations would assume they could ask the Bureau not to examine certain test points, or indeed only submit the test points they wanted examined. Perhaps the only way forward would be to pursue Mr Kibe's proposal, instructing the Bureau to continue taking the network into account pending clarification of certain points with Luxembourg.

14.16 **Mr Strelets** said that, notwithstanding the regulatory aspects under discussion, in its correspondence Luxembourg put forward some convincing arguments which the Board had not really considered, relating for example to the versions of software that should have been applicable to its filing under the rules of procedure on receivability and the consequences of having considered other versions applicable. Luxembourg's basic conclusion was that the Bureau should have sought clarification regarding the test points outside the service area, and if it had done so an unfavourable finding would not have been issued. The other basic problem encountered had been the time taken for the Bureau to process Luxembourg's notice, resulting in insufficient time for consultations between Luxembourg and the Bureau. An alternative to Mr Kibe's proposal would therefore be to rescind the unfavourable finding issued and request the Bureau to consult with the Administration of Luxembourg with a view to finding a solution that was in conformity with the Radio Regulations and inform the Board of the outcome at its next meeting. He noted that the Board could not both rescind the unfavourable finding and state that the Bureau had applied the Radio Regulations correctly.

14.17 **Mr Hoan** said that he agreed with the points made by Mr Ito, since to his understanding of item C.11.a of Appendix 4 the test points for a network had to be located within the service area. In that regard, therefore, he considered that the Bureau had applied the regulations correctly. As Mr Bessi had said, however, problems of communication had arisen, owing *inter alia* to a typographical error and the Bureau's inferences therefrom. With a real satellite involved at the orbital position concerned, the Board should tell the Bureau to help Luxembourg change the test points if no disagreement was received from the four other countries involved.

14.18 **Mr Magenta** said that two sets of calculations had been effected by the Bureau based on two different scenarios, and it was still somewhat unclear which scenario was correct and produced the most pertinent results. The Board should tell the Bureau and Luxembourg Administration to consult with a view to reaching an understanding on the matter, and report back to the Board at its next meeting. **Mr Koffi** supported that way forward.

14.19 **Mr Henri (Chief SSD)** confirmed that the Bureau could enter into consultations with the Luxembourg Administration to confirm the exact information to be taken into account in the Bureau's calculations. If the unfavourable finding was consequently replaced with a favourable finding, the Bureau would have to reprocess all networks received since Luxembourg's one.

14.20 The **Chairman** suggested that the Board conclude as follows:

"The Board considered in detail the request from the Administration of Luxembourg as presented in Document RRB16-3/9. The Board instructed the Bureau to review the examination of the LUX-30B-G4-19.2 satellite network taking into account the clarifications received from Luxembourg in this document. The Board further instructed the Bureau to re-examine the network accordingly with no

change in the date of receipt of the filing and to review the findings for the filings received subsequently that may be affected as a result of this change."

14.21 It was so **agreed**.

15 Election of the chairman and vice-chairman of the Board for 2017

15.1 Having regard to No. 144 of the ITU Convention, the Board **agreed** that Mr Khairov, Vice-Chairman of the Board for 2016, would serve as its chairman in 2017.

15.2 The Board **further agreed** to elect Mr Bessi as its vice-chairman for 2017 and thus as its chairman for 2018.

15.3 The Board **further agreed** on a preliminary basis that the Board's vice-chairman for 2017 should be from Region A.

15.4 **Mr Khairov** and **Mr Bessi** thanked their fellow Board members for the honour and trust thus placed in them, and said that they would carry out their duties to the best of their abilities.

16 Confirmation of the dates of the next meeting and meeting schedule for 2017

16.1 The Board **agreed** to confirm the dates of its 74th meeting as 20-24 February 2017 and to tentatively confirm the dates of its other meetings in 2017 as 17-21 July (75th meeting) and 6-10 November (76th meeting).

17 Celebration of the 110th anniversary of the Radio Regulations and ITU World Radiocommunication Seminar 2016

17.1 The **Director** informed the Board that the 110th anniversary of the Radio Regulations would be celebrated on the morning of 12 December 2016. All those who had contributed to the Radio Regulations over the years, including the present Board members, were invited to attend. It would obviously be good for the Board to be represented by its chairman.

17.2 The Board **agreed** that the Chairman, Ms Jeanty, would represent the Board at the celebration.

17.3 The Board **further agreed** that the Chairman would give a presentation on the work of the Board at the ITU World Radiocommunication Seminar 2016, to be held from 12 to 16 December 2016.

18 Approval of the summary of decisions (Document RRB16-3/11)

18.1 The summary of decisions (Document RRB16-3/11) was **approved**.

19 Closure of the meeting

19.1 **Mr Magenta, Mr Strelets, Ms Wilson** and **Mr Ito** took the floor to congratulate the Chairman for her very able, patient and effective handling of the Board's meetings in 2016, at which a significant amount of work had been achieved.

19.2 The **Director** thanked the Chairman and all Board members for their valuable contribution to the work of ITU, and said he looked forward to seeing them again at the celebration of the 110th anniversary of the Radio Regulations and ITU World Radiocommunication Seminar 2016, or at the Board's next meeting, in 2017.

19.3 The **Chairman** thanked the speakers for their kind words, and expressed her appreciation to everyone who had contributed to the successful outcome of the meeting. She wished Mr Khairov and

Mr Bessi every success in their future roles as chairman and vice-chairman. She closed the meeting at 1750 hours on Friday, 21 October 2016.

The Executive Secretary:
F. RANCY

The Chairman:
L. JEANTY

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| 집필진 |

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