
10 November 2017

ANALYSIS RELATING TO APPLICATION OF THE GE84 TERRESTRIAL BROADCASTING AGREEMENT

1. At its 75th meeting, in considering harmful interference between FM sound broadcasting stations operating in the frequency bands and geographical area subject to the GE84 Regional Agreement, the Board instructed the Director of the Radiocommunication Bureau to perform an analysis of the application of the GE84 Agreement.

2. This document presents the results of the analysis carried out by the Bureau and the Legal Adviser with respect to the legal situation, rights and obligations of an administration that, being a signatory to the Agreement, has not formally approved it (Administration **A**), but has been actively engaged in the various procedures contained in this Agreement, in relation to another administration (Administration **B**), that has signed and approved this Agreement.

The analysis and conclusions contained in this document have been endorsed by the Radio Regulations Board at its 76th meeting.

I Situation of Administration A in this analysis with respect to the GE84 Regional Agreement

3 Administration **A**, while a signatory to the aforementioned Agreement, has to date not formally "approved" it pursuant to its Article 10. This Administration has therefore not notified the ITU Secretary-General of its consent to be bound by the GE84 Agreement.

4 Consequently, from a strict legal perspective, Administration **A** is not a "Contracting Member"¹ within the meaning of Article 1 of the GE84 Agreement and is therefore not bound to apply its provisions, in particular those of Articles 4 "Procedure for modifications to the Plan". Nor does the fact that this Administration is situated within the planning area make it a "Contracting Member", i.e. a party to the Agreement.

5 This status does not, however, make this Administration an "outsider" *vis-à-vis* the GE84 Regional Agreement, for two fundamental reasons.

¹ Article 1 of the GE84 Agreement defines "Contracting Member" as "any Member of the Union which has approved or acceded to this Agreement."

6 Firstly, the Administration's status as a signatory to the Agreement, while not making it a "Contracting Member" (party) to the Agreement, nevertheless imposes upon it some significant obligations².

7 And secondly, the fact that Administration has on several occasions applied Article 4 of the GE84 Regional Agreement is not without legal consequence.

II Legal implications of the status of a signatory to the GE84 Regional Agreement

8 As mentioned above, the binding effect of a treaty such as the GE84 Agreement stems, for the State concerned, from the latter's expression of its consent to be bound, not from mere signature.

9 Nevertheless, a signatory State is, by virtue of its signature, subject to certain obligations.

10 Thus, Article 18 of the 1969 Vienna Convention on the Law of Treaties (hereinafter "the 1969 Convention"), to which Administration A has been a party since before the GE84 Agreement was adopted, provides that "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty ... until it shall have made its intention clear not to become a party to the treaty".

11 The said Article 18 pursues a twofold objective, namely the legal security that is essential to the stability and viability of international treaties, and legal legitimacy, in the interests of which it is essential to avoid any actions being taken which are contrary to a treaty which is not yet even being applied.

12 Refraining from acts which would defeat the object and purpose of a treaty is a manifestation of the principle of good faith that is generally incumbent upon States, even where they are not bound at the treaty level.

13 The scope of Article 18, which, as stated, derives from the principle of good faith, must nevertheless be correctly understood: it does not mean that a signatory State is bound to comply with the substantive provisions of the treaty (which would be tantamount to according it the status of State party, or Contracting Member in the case of the GE84 Agreement), but only that that State may not engage in behaviour which would render meaningless its subsequent commitment when it came to express its consent to be bound.

14 The obligation stemming from Article 18a) of the 1969 Convention is, moreover, recognized as an obligation under general international law, any violation of which must, in accordance with general international law, entail liability on the part of a State that has signed the treaty in question.

15 Since Administration A signed the Final Acts of the GE84 Planning Conference, it should not authorize the bringing into use of a frequency assignment that is not in conformity with the Agreement or plan in question.

III Legal implications of application by Administration A of various provisions of the GE84 Agreement

16 Administration A, while not a "Contracting Member", has currently a number of frequency assignments recorded in the GE84 Plan, which have the international rights derived from such

² It may be noted that out of 121 administrations having territories in the GE84 planning area, only 30 administrations formally approved the Agreement. Nevertheless, the majority of those administrations, which have not approved the GE84 Agreement, still fully apply its provisions, thus acting, *de facto*, as Contracting Members of this Agreement.

recording. Administration A has also applied the GE84 Agreement on various occasions since 7 December 1984, which is the end date of the Regional Administrative Conference, Geneva, 1984. This includes:

- application of the GE84 plan modification procedure of Article 4;
- notification of its agreement to modifications of the GE84 Plan made by other administrations;
- provision of objections to frequency assignments of other administrations submitted for the modification of the GE84 Plan;
- notification of frequency assignments to FM stations to the Master Register. These assignments were recorded in the MIFR with a favourable finding with respect to No. 11.34 implying their conformity with the GE84 Agreement.

These facts are not without legal consequence.

In addition, Administration A has identified and implemented a number of measures aimed at the elimination of harmful interference with respect to the neighbouring administrations stations operating in conformity with the GE84 Agreement. For instance, Administration A presented a Road map of its actions to solve cases of interference with its neighbouring countries. These activities go in line with the application of Article 2 of the GE84 Agreement stipulating, *inter alia*, that "Contracting Members undertake to study and, in common agreement, to put into practice the measures necessary to eliminate any harmful interference that might result from the application of this Agreement". They also indirectly indicate the recognition by Administration A of the rights of the stations operating in conformity with the GE84 Agreement.

17 Article 36, paragraph 2, of the 1969 Convention provides that a third State *vis-à-vis* a treaty which nevertheless exercises a right stemming from the provisions of that treaty "... shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty".

18 This rule, established by Article 36.2 of the 1969 Convention, is founded, according to the Special Rapporteur (Sir Humphrey Waldock) of the International Law Commission, which introduced it into the draft convention, on "a fundamental principle of law" whereby "no one may at the same time claim to enjoy a right and to be free of the obligations attaching to it".

19 Here again, a State's failure to comply with this obligation could, under general international law, entail the liability of that State.

20 All of the foregoing with respect to the GE84 Regional Agreement notwithstanding, it is, moreover, to be recalled that the administration in question is also bound to comply with the provisions of the ITU Constitution, in particular Article 45 (Harmful interference) thereof, and those of the Radio Regulations (RR).

IV Legal implications of the status of Member State party to the Constitution, Convention and Radio Regulations (RR)

21 Even though Administration A has not formally notified its consent to be bound by the GE84 Regional Agreement, it is nonetheless bound, as an ITU Member State party to the Constitution, Convention and RR, to apply the provisions of those treaties.

22 In particular, pursuant to No. 38 of the Constitution, Administration A has the obligation to take the necessary steps to impose the observance of the provisions of the Constitution, the Convention and the RR upon the operating agencies it authorizes to establish and operate stations capable of causing harmful interference to the radio services of other countries.

23 Furthermore, pursuant to No. 197 of the Constitution, the stations authorized by Administration **A** must be established and operated in such a manner as not to cause harmful interference to the duly authorized stations of other Member States which operate in accordance with the provisions of the RR. Attention is equally drawn to Nos. 189A, 198 and 199 of the Constitution.

24 Moreover, the fact that a Member State is not bound by the GE84 Agreement does not exempt it from complying with the provisions of the RR that exist to protect the radio services of other countries.

25 This is so in regard to the notion of the international recognition of the frequency assignments recorded in the Master International Frequency Register, as provided for by No. **8.3** of the RR, the implication of which is that administrations shall take account of existing assignments when making their own assignments, in order to avoid harmful interference.

26 Similarly, pursuant to Article **11** of the RR, any frequency assignment to a transmitting station capable of causing harmful interference to any service of another administration shall be notified to the Bureau. According to the information provided by the Bureau, however, examination of the Master Register indicates that only a part of the operational frequency assignments have been notified by Administration **A** to the Bureau under the RR Article **11** procedure.

V Situation of Administration B with respect to the GE84 Agreement

27 Administration **B** signed and approved the aforementioned Agreement in accordance with its Article 10. Therefore, it is regarded as a Contracting Member of the GE84 Agreement and exercises the rights and obligations under this Agreement.

28 Administration **B** regularly applies the GE84 Plan modification procedure. As a result, its operational and planned frequency assignments are recorded in the GE84 Plan.

29 An examination of the Master Register shows that there are a number of assignments recorded in the MIFR on behalf of Administration **B**. These assignments have favourable Regulatory findings and favourable findings with respect to No. **11.34** implying their conformity with the GE84 Agreement.

VI Conclusions

30 The above analysis of the respective legal status of Administrations **A** and **B** *vis-à-vis* the treaties concluded under the auspices of the ITU and the application by them of the relevant procedures of the Radio Regulations leads to the conclusion that with the exception of the registered assignments mentioned in item 26, the operation in Administration **A** of FM broadcasting assignments is not in conformity with the obligations of the ITU Member States stipulated by Nos. **8.3**, **11.3** and **11.7** of the Radio Regulations. It follows that, because Administration **A** is bound by the Radio Regulations, such assignments have no right for international recognition hence, pursuant to No. **8.3**, no right for protection against harmful interference from any of the assignments of Administration **B** mentioned in item 29, and shall not cause harmful interference to any of these assignments.