

*Registry's translation,  
the French text alone  
being authoritative.*

## **108th Session**

## **Judgment No. 2900**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first and second complaints filed by Mr D. Q. and Mr D. M. W. against the European Telecommunications Satellite Organization (EUTELSAT) on 17 March 2008 and corrected on 23 June, the Organization's replies of 23 October 2008, the complainants' rejoinders of 20 April 2009, EUTELSAT's surrejoinders of 29 July, the further submissions entered by the complainants on 19 October in the context of their second complaints and the Organization's final observations of 27 October 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the application for hearings submitted by the complainants in their first complaints;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The Convention establishing EUTELSAT entered into force on 1 September 1985; it specified that the Organization's prime objective was to provide the space segment required for international public telecommunications services in Europe. The Organization adopted various social measures in the interests of its staff, and in that context a pension fund was established on 1 July 1987 to deliver the benefits for

which provision was made in the Pension Scheme Rules. In the January 1999 version of these rules, Article 33, dealing with the adjustment of benefits, laid down that:

“Each time the Board of Signatories<sup>[\*]</sup> of the Organization decides on an adjustment of salaries in relation to the cost and standard of living, it shall grant at the same time an identical proportional adjustment of the pensions currently being paid, and of pensions whose payment is deferred, by reference to the grades and scales taken into consideration for the calculation of such pensions.”

Article 40 of the Rules, concerning the guarantee of benefits, was worded as follows:

- “1 The Signatories of EUTELSAT shall guarantee, in proportion to their investment share in the Organization, expressed as a percentage, the payment of the benefits provided for under this Pension Scheme. Consequently, they shall undertake to provide subsidies in the Organization’s budget for any expenditure which cannot be covered by the Pension Fund.
- 2 In the event of a merger or other transformation or in the event of dissolution of EUTELSAT, the Board of Signatories, or any ad hoc body set up, where required, in one of the aforementioned cases, shall take the necessary measures to ensure uninterrupted payment of the Pension Scheme benefits until the cessation of entitlement of the last beneficiary.”

The telecommunications market underwent considerable liberalisation in the early 1990s. The European Commission therefore advocated reform of the intergovernmental telecommunications satellite organisations. In the case of EUTELSAT, the aim was to place its operations on a competitive footing. To that end it was decided to transfer its activities to a company governed by national law, but EUTELSAT continued to exist in order to exercise a supervisory role. It was necessary to amend the Convention in order to redefine the Organization’s privileges and powers. The draft

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\* For the purposes of the Convention, the term “Signatory” meant the telecommunications entity or the Party which had signed the Operating Agreement relating to EUTELSAT and “Party” meant a State for which the Convention had entered into force or had been provisionally applied. The Operating Agreement relating to EUTELSAT described the Organization’s methods of operation, especially from the technical and financial point of view.

Amended Convention was adopted by the Assembly of Parties in May 1999; the amendments concerned pensions inter alia. In this connection paragraph 3 of Annex A to the Amended Convention relevantly provides that:

- “b) With respect to persons who, at the date of the Transfer, are in receipt of benefits under the Rules of the EUTELSAT Pension Scheme, such benefits shall continue to be paid in accordance with all of the relevant provisions of those Rules which were in force as at the date of Transfer.
- c) With respect to persons who, at the date of the Transfer, have acquired rights to receive benefits under the Rules of the EUTELSAT Pension Scheme, appropriate arrangements shall be made in order to preserve those rights.”

It was further decided to set up a trust under the law of Guernsey, to which the assets of the EUTELSAT Pension Fund would be transferred in order that it might manage them and pay beneficiaries’ pensions. This new pension scheme was to be closed; it would then cover only those members of the staff who had already retired when the Organization changed form and those who had accrued more than five years of reckonable service under the previous pension scheme. An interim trust was set up by an interim trust deed on 17 April 2001. The establishment of this trust necessitated amendment of the Pension Scheme Rules. Article 33 of the new draft Rules specified that the amount of benefit payable in respect of pensions in payment and in respect of deferred pensions would be “adjusted annually in line with 100% of any increase in European inflation”. In response to representations made by some pensioners, it was then decided to reintroduce the reference to standard of living, as guidance, in Article 33 if the financial health of the Pension Fund permitted. At its ninety-sixth meeting, held from 2 to 4 May 2001, the Board of Signatories approved the changes to the Pension Scheme Rules.

The Definitive Trust Deed and Rules – the new Pension Scheme Rules – concluded between EUTELSAT, two professional trustees, a trustee representing the EUTELSAT management and another trustee representing the personnel entered into force on 14 June 2001. Under this deed the Organization would transfer its rights and obligations as guarantor of the pension scheme to a French limited company called

Eutelsat S.A. with effect from 2 July 2001. Provision was made for the winding up of the scheme in Rule 31 of the above-mentioned Rules. Several Rules envisage an automatic increase in pensions in line with the cost of living. Adjustment to keep pace with the standard of living forms the subject of Rule 29.4, which is worded in its relevant part:

“If following any valuation

- (a) the Trustees, having taken the advice of the Actuary, consider that the assets of the Fund would be more than sufficient for the reasonably foreseeable future to secure all the Trustees’ liabilities for pensions and lump sums under the Scheme by way of Annuity Policies<sup>[\*]</sup>, and
- (b) the Guarantor agrees, which agreement will not be unreasonably withheld,

the Trustees can increase the amount of the pensions payable and to be paid from the Scheme by an appropriate rate taking account of both (i) the amount they consider to be a surplus in the Fund and (ii) the difference between a) the upward movement in the gross national product per inhabitant of the countries using the Euro as their national currency and b) in respect of any period whichever is appropriate of either the rate at which Gross Salary is revalued under **7.1.1.1** and the rate at which pensions are increased.”

However, the authentic English text is different to the French version, which omits the phrase “under **7.1.1.1**” at the end of the paragraph.

The Transfer Agreement was also signed on 2 July 2001. Under this agreement EUTELSAT transferred through a partial transfer of assets all its commercial and technical activities and all its liabilities to Eutelsat S.A. At that juncture Eutelsat S.A. agreed to take over the performance guarantee given in respect of the closed pension scheme.

The complainants are former members of the staff of EUTELSAT; Mr Q. retired in 2000 and Mr W. has been drawing a retirement pension since 2003.

At the end of 2001 the retired staff of EUTELSAT expressed their concerns with regard to the Definitive Trust Deed and the new Pension Scheme Rules. In a letter of 14 December 2001 to the former Director

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\* Rule 2 of the new Pension Scheme Rules defines an annuity policy as a “contract or policy effected by the Trustees with an insurance company securing a pension or pensions payable under the Scheme”.

General of EUTELSAT, a retiree – Mr B. – took issue with the fact that henceforth pensions could be adjusted only in line with inflation, since the system proposed for adjustment in line with the standard of living seemed more hypothetical than real. The former Director General replied by a letter of 22 May 2002 that:

“– [Rule 29.4] was introduced in perfectly good faith [...] to replace the text of Article 33 of the old Rules, which could no longer be applied owing to the freezing of salary scales. It was necessary to find a means of retaining the possibility to make an adjustment for the general standard of living in addition to the adjustment for the cost of living which is identical in both sets of rules.

– We considered that this adjustment was applicable on the conditions laid down in new Rule 29.4. This is therefore a realistic system [...]”

In addition he advised Mr B. to ask the Trustee Body for its interpretation of Rule 29.4 and a simulation of its application. A fruitless exchange of correspondence then ensued between the Trustee Body, Eutelsat S.A. and Mr B., who was requesting the amendment of Rule 29.4, *inter alia*.

By a letter of 2 April 2005 the complainants and Mr B. sought the assistance of the Assembly of Parties. Relying on paragraph 3b) of Annex A to the Amended Convention, they held that, with regard to the adjustment of pensions in line with the standard of living, their rights under the original scheme had not been respected. They considered that it was impossible to apply Rule 29.4 in practice as no annuity policy had been taken out. The Assembly referred the matter to the Executive Secretary of EUTELSAT, who turned to the Deputy Chief Executive Officer of Eutelsat S.A. By a letter of 13 February 2007 the latter announced that it was not possible to make the slightest change to the Definitive Trust Deed. On 24 April Mr W. wrote a letter to the Executive Secretary in which he stated that the issue of the adjustment of pensions was inherently linked to that of the financial guarantee of the payment of pensions and that this guarantee had already been weakened. The Executive Secretary replied by a letter of 17 July that the Assembly was of the opinion that it was not incumbent upon the Executive Secretary or the Assembly to adopt a position on the issues of the guarantee of the payment of pensions or the mechanism for adjusting them and that it had instructed him to take all

the necessary steps to secure the Tribunal's agreement to retain jurisdiction to hear the dispute. By a letter of 19 December 2007 he informed the complainants that, since the former internal appeal body no longer existed, the Assembly, which wished to avoid a denial of justice, had undertaken "not to challenge the [Tribunal's] jurisdiction for any reason whatsoever and not to object to receivability on the grounds that internal means of redress have not been exhausted". In addition, he notified them of the final refusal of EUTELSAT to adopt a position on the above-mentioned issues and invited them to file a complaint with the Tribunal. The complainants impugn this decision in their first complaints insofar as it constitutes a refusal to review the issue of the guarantee of the payment of the pensions of former staff members of EUTELSAT and, in their second complaints, insofar as it constitutes a refusal to review the mechanism for adjusting these pensions.

B. The complainants are of the opinion that the new pension scheme is illegal. They submit that the Amended Convention and the rights they had acquired under Articles 33 and 40 of the old Pension Scheme Rules have been violated. In this connection they refer to a document of May 2001 which, in the section dealing with changes to these rules, stated that "[t]he approach that ha[d] been taken [wa]s to ensure that [...] there [wa]s no loss of rights that [we]re enjoyed [at that time] [by a former staff member] for past service". They contend that it is clear from this document and from the provisions of paragraph 3b) and c) of Annex A to the Amended Convention that the transition to the new pension scheme should not have had any repercussions on the rights of beneficiaries under the previous scheme.

In their first complaints the complainants point out that under Article 40 of the old Pension Scheme Rules the payment of their pensions was guaranteed by the Signatories. They say that under the

previous scheme the payment of pensions was ultimately guaranteed by the Parties, in other words by the Member States of EUTELSAT, since if a Signatory were deemed to have withdrawn from EUTELSAT owing to a failure to comply with one of its obligations, the Convention stipulated that the Party which had designated the Signatory in question had to assume its capacity. In their view, the fact that the payment of pensions is now guaranteed by Eutelsat S.A. has seriously weakened the guarantee. The complainants further hold that, whereas Article 40 guaranteed the uninterrupted payment of benefits until the cessation of the last beneficiary's entitlement, the new Pension Scheme Rules envisage the winding up of the scheme and hence the interruption of the payment of benefits, which "drastically" narrows the scope of the guarantee.

They ask the Tribunal to set aside the impugned decision and to draw all the legal consequences, in other words to order the Organization to adopt all the necessary measures (for example by obtaining an undertaking from the Assembly of Parties that it will "guarantee the guarantee" of Eutelsat S.A. that it will pay pensions) to restore the quality and scope of the guarantee of the payment of benefits, including their own, until the cessation of the last beneficiary's entitlement. They also claim costs.

In their second complaints the complainants submit that, despite the fact that under the previous scheme pensions were increased on the basis of two criteria, namely a rise in the cost of living and a rise in the standard of living, in practice they can now be adjusted only in line with inflation. They consider that a text has been adopted with a component which cannot be applied, i.e. the adjustment criterion of the standard of living, and they infer from this that the general legal principle of "the reciprocal duty of fairness and mutual trust" which stems from "respect for good faith" has been breached.

They ask the Tribunal to set aside the impugned decision and to draw all the legal consequences, in other words to order the Organization to adopt all the necessary measures (for example the amendment of the applicable texts) in order to ensure that pensions, including their own, can actually be adjusted not only in line with

inflation, but also in line with a rise in the per capita gross national product of the eurozone countries. They also request an award of costs and the holding of hearings.

C. In its replies the Organization relies on the Tribunal's case law in order to submit that the complaints are irreceivable, as they seek to obtain a judgment in favour of all the beneficiaries of the closed pension scheme. In its opinion, the complaints are also irreceivable because they are directed against EUTELSAT, an entity which, since 2 July 2001, has not had the slightest legal obligation in respect of the pensions paid to its former members of staff. Referring to the provisions of Article 3 of the Transfer Agreement it emphasises that, under French law, according to firm precedent, where an autonomous branch of activity is hived off by means of a partial transfer of assets governed by the legal regime applying to the hiving off of activities, this transfer includes all of the assets and liabilities relating to these activities, and in this connection it quotes several decisions of the French *Cour de Cassation*.

Subsidiarily, the Organization contends that the complainants' claims are ill founded and that their acquired rights have not been breached. In its reply to the first complaints, it holds that the transfer of the guarantee to Eutelsat S.A. does not breach the Amended Convention, since provision was made for it therein. It points out that under the previous pension scheme, pensions were guaranteed by the Signatories, and not by the Member States, and that the latter did not offer a collective guarantee if a Signatory failed to honour its obligations.

It adds that the measures requested by the complainants "are pointless"; in its opinion it is difficult to see what benefit the complainants would derive from EUTELSAT providing a counter-guarantee of the guarantee given by Eutelsat S.A. since, as EUTELSAT is now wholly funded by Eutelsat S.A., the latter would counter-guarantee itself. In this connection, it asserts that the Pension Fund is sound and that, to date, Eutelsat S.A. has fully honoured all its

obligations. Any risk of a deficit, or even of the trust going bankrupt and therefore of an end to the payment of pensions, must therefore be ruled out.

The Organization explains that the possibility of winding up the scheme was contemplated in order to give maximum protection to its beneficiaries' interests and that, if the trustees were to take such a decision, it would not entail the end of the payment of benefits, as responsibility for making up any shortfall between assets and liabilities would lie with Eutelsat S.A., which would make it possible to ensure the payment of pensions in the future. Moreover, it points out that the possibility of an interruption of the payment of benefits was already foreseen in Article 40, paragraph 2, of the old Pension Scheme Rules.

In its reply to the second complaints the Organization submits that the complainants cannot rely on an alleged failure to comply with the provisions of the Amended Convention, since the possibility of adjusting pensions in line with the standard of living, for which provision was made in Article 33 of the old Pension Scheme Rules, did not confer any right upon retirees. The undertakings given in Annex A to the Convention refer only to the protection and preservation of the existing rights of serving and former staff members. EUTELSAT adds that the power to adjust pensions in line with the standard of living was never exercised, but the possibility to effect such an adjustment has, however, been introduced in new Pension Scheme Rule 29.4. In the Organization's view, the fact that this rule has not yet been applied because of the current situation of the Fund does not mean that it is inapplicable, for if the financial conditions which it lays down were to be met – a perfectly conceivable hypothesis – the trustees would have no difficulty in applying it.

The Organization further holds that the complainants have not shown that it acted in bad faith or with intent to harm them. It considers that it has displayed a cooperative and transparent attitude to its former staff.

Lastly, it requests that the complainants be ordered to pay costs in respect of the two series of complaints.

D. In their rejoinders the complainants submit that their claims plainly relate to the adjustment of their respective pensions. They add that the second objection to receivability put forward by the Organization is drawn almost exclusively from French law, which the Tribunal does not apply. Similarly, they point out that the Tribunal is not bound by a decision of a national court.

They reiterate their submissions on the merits. In the context of their first complaints they state that there is a real risk of the guarantor defaulting, as Eutelsat S.A. is an ordinary private commercial company which could go bankrupt. Mr W. also emphasises that he has had to build up additional financial protection which would not be necessary if his pension were better guaranteed. The complainants draw attention to the fact that, in order to guarantee the payment of pensions, in addition to transferring the guarantee to Eutelsat S.A., it would have been possible to contemplate the – admittedly more expensive – solution of insurance through annuity policies.

In the context of their second complaints the complainants submit that the Organization has not acted transparently towards its former staff members, and they consider that they have been misled with regard to the following two points: the fact that the Definitive Trust Deed had supposedly been approved by the Board of Signatories and the fact that, according to the former Director General, the conditions for applying new Pension Scheme Rule 29.4 were realistic. In their opinion, it was the former Finance Director of EUTELSAT who inserted an additional condition into the above-mentioned rule, namely the guarantee by way of annuity policies, with the plain aim of rendering that rule inapplicable. They state that Article 33 of the old Pension Scheme Rules did not refer to a discretionary power of the Board of Signatories, but created an obligation for the latter.

Lastly, in both rejoinders the complainants point out that it is not usual for the Tribunal to order the complainant to pay costs, unless his or her complaint is manifestly frivolous, which is not true in the instant case.

E. In its surrejoinders the Organization reiterates its position.

With regard to the first complaints, it points out that most of the Signatories guaranteeing the payment of pensions under the previous pension scheme were commercial companies. In these circumstances it does not see how the transfer of the guarantee to Eutelsat S.A. – another commercial company which in fact has excellent prospects for growth – could have altered any of the complainants’ fundamental terms of employment. It explains that the possibility of guaranteeing the Pension Fund by means of insurance was contemplated, but that it had very quickly become apparent that that solution was rather unattractive. In its opinion the complainants’ fear that the guarantor might fail is unjustified and in this respect it stresses that an insurance company can also go bankrupt. It says that in the interests of the scheme’s beneficiaries it chose what it considered to be the most appropriate guarantee.

The Organization submits that Mr W.’s decision to build up additional financial protection was not prompted by any injury suffered on account of an alleged weakness in the guarantee of benefit payments, but was probably due to the fact that he applied for early payment of his benefits at the age of 55, in other words 13 years before the age at which he ought normally to have drawn his pension, which has resulted in a reduction in its amount.

With respect to the second complaints, the Organization maintains that it has always displayed a cooperative and transparent attitude towards its former staff, and it describes meetings in the past between the Staff Association and EUTELSAT management.

The Organization further explains that the wording of new Pension Scheme Rule 29.4 was not designed to deprive beneficiaries of the closed pension scheme of their rights but that, on the contrary, it met a legitimate, objective requirement, namely that of enabling the trustees to increase the amount of pensions in line with the standard of living without imposing more liabilities on the future guarantor, Eutelsat S.A., than those assumed by EUTELSAT under the previous scheme. In this connection the Organization appends to its surrejoinder a note of 18 July 2009 from its former Finance Director.

Relying on Judgment 1884, in which the Tribunal held that it would award costs against complainants “in appropriate cases if they are sought”, EUTELSAT considers that it would not be unreasonable if, in each case, each of the complainants were ordered to pay its costs in the amount of 500 euros.

F. In their further submissions concerning their second complaints, the complainants submit that EUTELSAT’s surrejoinder contains “new information likely to influence the outcome of the dispute”. They consider that, by producing the note of 18 July 2009, the Organization has for the first time supplied an explanation of the content of new Pension Scheme Rule 29.4 and that, for this reason, they have been unable “to defend their case with all the requisite information at their disposal”. In their opinion this note confirms that the former Finance Director unilaterally amended Rule 29.4 to protect the interests of Eutelsat S.A.

The complainants also contend that they gained access to a large number of documents through this surrejoinder and that through these they learnt of the “existence, content and extent” of the negotiations which had taken place between the serving staff and the management of EUTELSAT with regard to amendments to the Pension Scheme Rules. In their view, EUTELSAT retirees were not duly informed of these amendments and the “principle of transparency”, the adversarial principle and rights of defence have been breached.

In the letter which they sent to the Registrar of the Tribunal when forwarding their further submissions the complainants explain that, having been authorised to present those submissions, they withdrew their application for hearings.

G. In its final observations the Organization argues that the complainants cannot complain of a breach of the adversarial principle or of rights of defence. It stresses that it did not intend to withhold essential information until the end of proceedings; its sole purpose in producing certain documents in the context of its surrejoinder was to supply the Tribunal with all the information which it needs in order to understand that the complainants’ allegations are unfounded.

In the Organization's opinion, the definitive version of Rule 29.4 should under no circumstances be attributed to a single author. It contends that the final wording of this rule was chosen, not out of any wish to favour Eutelsat S.A. or to harm the interests of EUTELSAT retirees, but out of fairness.

## CONSIDERATIONS

1. The complainants, former staff members of EUTELSAT, are in receipt of a retirement pension – one since 25 April 2000, the other since 26 March 2003.

2. EUTELSAT was established by a Convention which was signed in Paris on 15 July 1982 and which entered into force on 1 September 1985. For the purposes of this Convention the term "Party" meant a State for which the Convention had entered into force or had been provisionally applied and "Signatory" meant the telecommunications entity or the Party which had signed the Operating Agreement relating to EUTELSAT, which was also dated 15 July 1982. This agreement described the Organization's methods of operation, especially from a technical and financial point of view.

States were represented by the Assembly of Parties, the main function of which was to determine the Organization's general policy and to supervise its activities in order to ascertain whether the provisions of the Convention were respected.

The Board of Signatories was responsible for determining the Organization's strategy and overseeing its management and operations. This body's decisions were carried out by an Executive Organ headed by a Director General.

In order to fulfil its purposes, EUTELSAT relied from the outset on international civil servants. On 1 July 1987 a Pension Fund was set up to deliver the benefits for which provision was made in the Pension Scheme Rules.

3. In 1993 it was deemed necessary to consider the evolution and restructuring of EUTELSAT. At its 24th meeting held from 12 to 14 May 1998, the Assembly of Parties therefore approved the bases of the requisite restructuring of the Organization, namely:

- the setting up of a limited company governed by French law (which subsequently adopted the name of Eutelsat S.A.) to which all the operations, assets and liabilities of EUTELSAT would be transferred by the end of 2001 at the latest;
- the transformation of the international organisation through amendments to the Convention;
- the introduction in the Amended Convention of transitional provisions governing the transfer to the above-mentioned company of the assets, staff, activities and corresponding liabilities; and
- the conclusion of a bilateral agreement between the international organisation and the French company (the “Arrangement”).

At its 26th meeting held in Cardiff (United Kingdom) in May 1999, the Assembly of Parties decided to:

- approve the draft Amended Convention and to note that the Operating Agreement would be terminated upon the entry into force of the Amended Convention;
- approve the text of the Arrangement between EUTELSAT and Eutelsat S.A.;
- note the draft text of the Articles of Association of Eutelsat S.A.; and
- approve in principle the Transfer Agreement and to note that it would be finalised later.

During this meeting the Assembly decided that the restructuring process should be conducted in such a way that EUTELSAT activities could be transferred to Eutelsat S.A on 2 July 2001.

4. After the meeting in Cardiff additional measures were taken in respect of the staff. In particular, it was necessary to determine how best to manage the pension scheme in the context of the Organization’s transformation, since the latter’s Pension Fund would

cease to exist. In June 1999 the Board of Signatories opted for the setting-up of a trust under the law of Guernsey, to which the Pension Fund's assets would be transferred. This new pension scheme would be closed, in other words it would cover only staff members who had already retired by the time of the transformation and those who had accrued more than five years of reckonable service under the previous scheme. After the creation of an interim trust by an interim trust deed in April 2001, it became necessary to amend the Pension Scheme Rules. Draft Pension Scheme Rules were therefore submitted to the Board of Signatories for approval. The Board, meeting in Paris from 2 to 4 May 2001, approved the proposals submitted to it with regard to the formation of a definitive trust and its financing strategy. It thus decided to approve the changes to the Pension Scheme Rules with effect from 2 July 2001 and to authorise the Director General to complete the formation of the Definitive Trust and to "transfer the Scheme's assets and obligations" to it.

The Definitive Trust Deed entered into force on 14 June 2001 together with the new Pension Scheme Rules, Rule 31 of which provides that, pursuant to the Definitive Trust Deed, the trustees may, in some circumstances, wind up the scheme and require the guarantor to make up the difference between the assets of the Fund and the liabilities of the scheme.

On 2 July 2001 Eutelsat S.A. and EUTELSAT signed the Transfer Agreement under which EUTELSAT transferred all its commercial and technical activities to Eutelsat S.A. through a partial transfer of assets which was expressly made subject to the provisions of Articles L.236-16 to L.236-21 of the French New Commercial Code, relating to the hiving-off of activities. In return, EUTELSAT received ordinary shares of Eutelsat S.A. together with a transfer premium. The Transfer Agreement expressly states that all EUTELSAT liabilities, including the performance guarantee of the closed pension scheme, shall be transferred to Eutelsat S.A.

Under Article III of the Amended Convention, EUTELSAT is made responsible for seeing to it that Eutelsat S.A. observes a number of basic principles and for ensuring continuity regarding rights

and obligations under international law for the use of the EUTELSAT space segment transferred to Eutelsat S.A. In the Arrangement provision is made for close collaboration between the two entities, and Article 4.1 thereof stipulates that “[i]n order to assist EUTELSAT in exercising its powers under the Convention and this Arrangement, the Company [Eutelsat S.A.] shall pay the approved costs of the establishment and operation of EUTELSAT [...] and provide certain other funds upon the conditions set forth in this provision”. EUTELSAT now consists only of an Assembly of Parties and a Secretariat headed by an Executive Secretary.

5. On 2 April 2005 three retired members of staff of EUTELSAT, including the two complainants, sent a letter to the Chairman of the Assembly of Parties to request the Assembly’s assistance in the resolution of a dispute relating to retirees’ beneficiary rights under the original EUTELSAT pension scheme and the manner in which those rights had been incorporated into the Definitive Trust Deed. As they did not receive satisfaction, on 24 April 2007 one of the complainants wrote to the Executive Secretary of EUTELSAT. He suggested that the cheapest, wisest and most logical solution would be to refer the dispute to the Tribunal. On 17 July the Executive Secretary replied that the Assembly of Parties considered that it “was not incumbent upon the Executive Secretary or the Assembly of Parties to weigh up the merits of the issues raised” in the letter of 24 April, but that it had decided to instruct the Executive Secretary to take all the necessary steps to secure the Tribunal’s agreement to retain jurisdiction to hear the dispute.

On 19 December 2007 the Executive Secretary announced the Organization’s final refusal to “adopt a position on the issues raised in [the] letter [of 24 April 2007], namely a review of the mechanism for adjusting the pensions of former members of staff of EUTELSAT and of the guarantee of the payment of the pensions, on the grounds that it was not incumbent upon the Assembly of Parties or the Executive Secretary to weigh up the merits thereof”. The Executive Secretary added that the Assembly of Parties undertook not to challenge the Tribunal’s jurisdiction, or to object to the receivability of any future

complaints on the grounds that internal means of redress had not been exhausted, because the complainants had not referred the matter to the EUTELSAT Internal Appeals Board before its terms of reference expired.

6. By separate complaints, all filed with the Registry of the Tribunal on 17 March 2008, the complainants impugn the decision of 19 December 2007 and ask that it be set aside.

In their first complaints they challenge the decision on the grounds that it constitutes a refusal to review the issue of the guarantee of payment of the pensions of former staff members of EUTELSAT. They enter two pleas, namely the breach of their acquired rights insofar as the payment of their pensions is no longer guaranteed by EUTELSAT but by Eutelsat S.A. and insofar as an interruption in the payment of benefits is now envisaged, and breach of the Amended Convention.

In their second complaints the complainants challenge the decision of 19 December 2007 in that it constitutes a refusal to review the mechanism for adjusting the pensions of the former staff members of EUTELSAT. In addition to the two above-mentioned pleas, they tax the Organization with a breach of the general legal principle of “the reciprocal duty of fairness and mutual trust”, because the competent authorities of the Organization and/or the entities to which these authorities have delegated their powers with regard to pensions adopted a text, one of the clauses of which, namely new Pension Scheme Rule 29.4, is impossible to apply.

7. The Tribunal considers that the two series of complaints should be joined, since they concern the same impugned decision, the same parties and similar legal issues.

8. Although the Organization points out that, in order to avoid a denial of justice, it has undertaken not to challenge the Tribunal’s jurisdiction and “not to object to receivability on the grounds that internal means of redress have not been exhausted”, since “the complainants have proved that they were unable to refer the matter to

the now defunct Internal Appeals Board of EUTELSAT in due time”, it nevertheless contends that the complaints are irreceivable on the grounds that the complainants’ claims are collective, and not of an individual nature, and that they are misdirected. The Organization submits subsidiarily that their claims are unfounded.

9. It is, however, for the Tribunal to determine whether it is competent to hear a dispute, and the Tribunal is by no means bound in this respect by the opinions expressed by the parties in the course of the proceedings. Article II, paragraph 5, of its Statute makes it clear that the Tribunal may hear only disputes between officials and the international organisations employing them. In the instant case it finds, in the light of considerations 3 and 4 above, that the dispute is not between the complainants and the international organisation EUTELSAT, but between them and Eutelsat S.A., a limited company governed by French law. Consequently, the dispute between these parties does not fall within the Tribunal’s jurisdiction and the complaints, as well as the Organization’s counterclaims, must be dismissed.

## DECISION

For the above reasons,

The complaints and the Organization’s counterclaims are dismissed.

In witness of this judgment, adopted on 13 November 2009, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Seydou Ba  
Claude Rouiller  
Patrick Frydman

Catherine Comtet