ON THE PRIVATISATION OF INTELSAT

Francis Lyall*

Introduction

The conversion of the International Telecommunications Satellite Organisation (INTELSAT) from an intergovernmental organisation into a private company is well advanced, and will most likely be completed in 2001. In light of the original hope for the development of a global space telecommunications system, this is an unwelcome development, seemingly driven by factors and considerations foreign to the intentions that lay behind early considerations of these matters, and, indeed arguably contrary to art. I of the Outer Space Treaty.[1] But this development seems unstoppable, if regrettable, and the purpose of this article is to review the developments and to ensure that some matters do not pass *sub silentio*.

1. History

Within the United Nations

When, following Sputnik 1 in 1957 and subsequent launches, space was first opening to exploration and use, the United Nations percipiently identified satellite telecommunications as a potential major benefit to be pursued in the world interest. By Part D of UNGA Res. 1721 of 1961 it was the UN view that 'communication by means of satellite should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis'.[2] Part E of the space resolution of the next year, 1962, stated *inter alia* the belief of the UN that 'communication by satellites offers great benefits to mankind, as it will permit the expansion of radio, telephone and television transmissions, including the broadcast of United Nations activities, thus facilitating contact along the peoples of the world.'[3] While one may smile at the 'broadcasting of UN activities' clause, clearly the UN saw that satellite telecommunications were to be highly important, and, in the light of the last forty years, only the ignorant would

---

* Professor of Public Law, University of Aberdeen, Scotland, U.K.; Director, International Institute of Space Law; Board Member, European Centre for Space Law.

1 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, 1967 610 UNTS 205; 18 UST 2410, TIAS 6347; 1968 UKTS 10, Cmnd. 3519; 1967 6 ILM 386; 1968 61 AJIL 644.

2 *International Cooperation in the Peaceful Uses of Outer Space*, GA Res. 1721 (XVI) Part D (1961).

3 *International Cooperation in the Peaceful Uses of Outer Space,* GA Res. 1802 (XVII) Part E (1962).

attempt to disparage that prediction. No matter how much some may feel that the 'benefit of all' clause of the first paragraph of Art. I of the Outer Space Treaty, 1967, has not been fully adhered to,[4] in the field of space telecommunications there has indeed been vast development to the benefit of all, and in particular to the benefit of states which were severely underdeveloped in their telecommunications infra-structure prior to the availability of satellite telecommunications. The developed have benefited - but arguably the underdeveloped have qualitatively benefited the more. Telecommunications for the developed countries have been massively improved and transformed, but the provision of telecommunications in many other countries has leapfrogged the stage of wire services, and gone straight to modern systems. There is much still to be done, and large sums of money are required, but the change within forty years has been massive. Although the purpose of this article is to discuss INTELSAT, recognition should also be given to the efforts towards development made through governments, as well as earlier informally through the ITU, and now through the Development Sector of that organisation.[5]

INTELSAT

The UN Resolutions noted above, however, could not and did not envisage the UN itself setting up the desired system for global space telecommunications. Only states had the technical and financial competence to engage in such activities. The US took the initiative, creating COMSAT, the Communications Satellite Corporation, in terms of the Communications Satellite Act of 1962, the COMSAT Act.[6] The policy and purpose of the Act set out in its s.201(a) called for the establishment of 'a commercial communications satellite system, as part of an improved global communications network, ... responsive to public needs and national objectives, which will serve the communications needs of the United States and other countries, and which will contribute to world peace and understanding.' Further the service to be provided was to be extended to provide global coverage at the 'earliest practicable date', and 'care and attention [was to] be directed toward providing such services to economically less developed countries and areas as well as those more highly developed ....' (Sec. 102 (b)). Private enterprise was to participate in the project,[7] and COMSAT was to be the US agent in setting up the system. However, it is clear also that the intention of some in the US was originally that while the US would create the system 'in conjunction and in cooperation with' others, the others would be 'authorised users' of the

---

[4] *Cf.* the General Assembly *Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries*, A/RES/51/122 4 February 1997.

[5] *Cf.* F. Lyall, *The ITU Reconstructed*, 36 PROC. COLLOQ. L. OUTER SPACE 78 (1993).

[6] Pub. L. No. 624, 87th Cong., 2d Sess., 76 Stat. 419, *approved* 31 Aug. 1962.

[7] Of course at the time only the USA had private enterprise providing telecommunication services.

system and their participation would be subject to the close US governmental control of the activities of COMSAT.[8] Under these circumstances other states were suspicious.[9] Thus the UK Postmaster General talked in the House of Commons of 'preventing an American monopoly'.[10] While therefore in theory the US could have proceeded to build the system, access to telecommunications networks in other countries was essential for commercial viability. In particular trans-Atlantic traffic had to be gained, that being the arena in which a space system stood to prosper with minimal competition, cable traffic being close to saturation already and the wire cables of those days being unable to offer the wider services available through satellites (*e.g.* television). Access to Europe was, however, precisely the weapon which was used to combat the idea of a solely-US created system. This was not mere chauvinism. Other countries wished a more active role and participation in the new arrangements, in part so as to gain technological expertise for their own space industries through sharing in the planning, building and operation of the global system, and in part simply so as to have a larger say in the decision-making for the new system.[11] A united European front was created through the European Conference on Posts and Telecommunications (CEPT) at a meeting in late 1963, which proposed setting up a counterpart to COMSAT to be financed from among CEPT members. Such an independent development would have been a serious, if not disastrous, blow to the ideal of a global system, and a major difficulty for either a US or a European system, so negotiations between the views held on opposite sides of the Atlantic were begun.

A conference was held whose participants from the USA, Western Europe, Australia, Canada and Japan, between them represented approximately ninety per cent of the telephone traffic of the world. The upshot was the creation of a joint venture, Interim INTELSAT, through two interlinked agreements, an Agreement between states for the one part and a Special Agreement between telecommunications entities (one per state, and for the most part the relevant government department).[12] The innovation in international affairs represented by these arrangements was that the

---

[8] *Cf.* F. LYALL, LAW AND SPACE TELECOMMUNICATIONS 34-36, 38-40 (Aldershot, Hants, Dartmouth Publishing Co.; Brookfield VT, Gower Publishing Co., 1989).

[9] F. Lyall, *ibid.*, 74-79.

[10] 690 *House of Commons Debates*, Oral Answers, cols. 420-422 (1963-1964). At that time the Post Office dealt with UK telecommunications, and was a governmental department.

[11] The restrictions in the COMSAT Act as to foreign participation in the company are very great. Officers must be US nationals, and foreign share-holding is restricted.

[12] Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, and Relative Special Agreement, 51 DEPT. STATE BULL., 281; 1964 Cmnd. 2436; III ILM 805 (1964). The participants, and agreed quotas were: Australia 2.75%; Austria 0.2%; Belgium 1.1%; Canada 3.75%; Denmark 0.4%; France 6.1%; West Germany 6.1%; Ireland 0.35%; Italy 2.2%; Japan 2.0%; The Netherlands 1.0%; Norway 0.4%; Portugal 0.4%; Spain 1.1%; Sweden 0.7%; Switzerland 2.0%; UK 8.4%; USA 61.0% and Vatican City 0.5%.

nineteen telecommunications entity participants were to share costs on a quota basis derived at first from ITU statistics on international telecommunications from each of their home states, and that decision-making within the most important governing body within the arrangements was also keyed to quota. This governing body, the Interim Communications Satellite Committee (the ICSC) was made up of representatives of all signatories to the Special Agreement with a quota of more than 1.5%, together with one representative from any two or more others whose combined quota would total more than 1.5%.

Over the next few years Interim INTELSAT was successful in establishing the first global telecommunications satellite system. COMSAT, the US signatory to the Interim Arrangements, was essential to the planning, design, creation and operation of the new facility, acting under a Management Services Contract. But Interim INTELSAT was always intended to be interim. Article IX of the Interim Agreement called for the ICSC to bring forward proposals for definitive arrangements within one year of the satellite system becoming operational, or in any event not later than January 1969. This was done, and a plenipotentiary conference convened by the US. Membership had risen by then to sixty-eight, and only one member was not in attendance. Definitive arrangements were agreed by May 1971 at a further conference which seventy-eight of the by then seventy-nine members attended, there being seventy-three affirmative votes, with France, the Malagasy Republic, Mexico and Monaco abstaining. These new arrangements were not as favourable to COMSAT as some within the US had hoped, largely because of distrust of the relationship between COMSAT and the US Department of State, and of general US space diplomacy.[13]

Be that as it may, the definitive arrangements met various requirements as to number and quota total for their implementation, and the Agreement (between states) and the Operating Agreement (between signatories designated by each state member) came into force on 12 February 1973.[14] INTELSAT in the form we know it at present came fully into being on 1 January 1979 after a five year transitional period when the Director General and the new Executive Organ fully took over responsibility for the system, a number of key personnel transferring from COMSAT to take on duties formerly the responsibility under the previous Management Services Contract. The quadripartite structure of INTELSAT with the Assembly of Parties, the Meeting of Signatories, the Board of Governors and the Executive Organ under the Director General is well

---

[13] *Cf.* WALTER A. MCDOUGALL, THE HEAVENS AND THE EARTH: A POLITICAL HISTORY OF THE SPACE AGE (1985),especially chapters 17 (pp. 34-60) and 20 (pp. 415-35).

[14] Agreement relating to the International Telecommunications Satellite Organisation (INTELSAT), 23 UST 3813, TIAS 7532; (1973) UKTS No. 80, Cmnd. 5610; (1971) 10 ILM 1909. Operating Agreement relating to the International Telecommunications Satellite Organisation (INTELSAT), 23 UST 4091, TIAS 7532; (1973) UKTS No. 80, Cmnd. 5461; (1971) 10 ILM 946.

known.[15] The retention of the quota mechanism now based on the use of the system, for determining shares of ownership, financial liability and profit-sharing, and its use within the Board of Governors appointment and decision-making, was excellent, and is a model which other international organisations could with profit copy.

So INTELSAT began, and it has prospered. A global satellite telecommunications system has been established.[16] The aspirations of the early UN Resolutions in favour of such a development have been in the main fulfilled, the exception being maritime services provided through the separate system, that of INMARSAT, for political and financial reasons. INTELSAT's public telecommunication services are open to all states, either by way of membership or by buying service. Direct access to the system, without the need to go through the signatory designated for the state concerned, has been permitted by many states since that possibility was introduced in the late 1980s.[17] In terms of art. V(d) of the Agreement, charges for a particular type of service are uniform throughout the world. As authorised by Art. III(b) of the INTELSAT Agreement, in addition to inter-state public telecommunications services, INTELSAT has provided domestic public service for states whose territories are geographically divided, and where there are natural barriers to normal telephony. In addition, as permitted by Art. III(c), having fulfilled its remit as to these services, INTELSAT has provided domestic service to some states without impairing its primary services. And INTELSAT made money. Signatories have not been asked for capital payments for the last two series of INTELSAT satellites. So why have matters now changed? Why will INTELSAT be transmuted into a private company in the coming year?

2. Why change?

The reasons why change is to occur are many and various. They are not entirely coherent, nor are they mutually consistent. Not all are clearly expressed or adequately revealed for others fully to weigh. However, there appears to be a sufficient common mind that privatisation should go ahead for the variant premises on which the different parties operate to be

---

[15] RICHARD R. COLINO, THE INTELSAT DEFINITIVE ARRANGEMENTS: USHERING IN A NEW ERA IN SATELLITE TELECOMMUNICATIONS (Geneva: European Broadcasting Union, 1973); MARCELLUS SNOW, THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE ORGANISATION (INTELSAT): ECONOMIC AND INSTITUTIONAL CHALLENGES FACING AN INTERNATIONAL ORGANISATION (Baden-Baden: Nomos Verlag, 1987); F. Lyall, *supra* note 8, at 91-122.

[16] Of course INTELSAT did not provide the full service that the UN Resolutions seem to have envisaged. For financial and political reasons INMARSAT had to be created to deal, at first at rate, with maritime communications.

[17] For the US authorisation of direct access for US companies, see *In the Matter of Direct Access to the INTELSAT System*, FCC Report and Order, adopted 15 September 1999, released 16 September 1999; 14 FCC Rcd 15703; 16 Comm. Reg. (P&F) 769; Release No. FCC 99-236; IB Docket No. 98-192. Other signatories and countries have permitted direct access by simpler procedures.

ignored, or at least to be not fully acknowledged. Those which I, as an outsider, think I observe include the following.[18]

First, as a matter of fact Thatcherism and Reaganomics have occurred. Ideas as to the proper role of the state have altered. Competition has been deemed preferable to monopoly in the public interest.[19] This doctrine (dogma?) has affected many of what were formerly considered as public services which it was the responsibility of the state to provide. Thus in many countries governments have divested or are in the process of divesting themselves of their responsibilities for operating rail and air services. Postal services have been privatised and opened to competition. A similar pattern is shown in telecommunications. As indicated above, when Interim and Definitive INTELSAT were being invented, in the bulk of states telecommunications were the responsibility of government. Only in the US were public telecommunications provided by private companies. Now many states have privatised their telecommunications services in whole or in part, and have encouraged or allowed the companies which have emerged to seek to share in both the national and the international telecommunications market. The deregulation of telecommunications services has significantly increased both the number of these rivals, and their ability to offer services. INTELSAT therefore now faces many competitors for customers within the market whose needs it was created to supply.

Second, as an international organisation INTELSAT cannot finance itself through the ordinary recourse that commercial enterprises can have to the international financial market. At present INTELSAT finances are very healthy. It has not had to call on capital from its Signatories to finance new satellites series for many years. But that could, of course, change if INTELSAT revenues were to lessen through loss of market share to its new competitors. It is, of course, prudent to anticipate such problems. It is also of course true that this argument is not as weighty as of itself to carry the day.

Third, as a matter of the dogma of competition it is alleged that INTELSAT does not compete on that mythical 'level playing field'.[20] This can be put in two ways. One is that INTELSAT's position as an inter-governmental organisation, with all the privileges of an international organisation, which includes tax exemptions, is an unfair distortion of competition. The alternative formulation is that INTELSAT's very existence, and the fact that its constitution calls for each member state to

---

[18] I will not fully source what follows. My views are formed by reading, and conversations with a good many in the telecommunications field. To source all would breach the terms on which some conversations occurred. But to source some and not all might lead to inaccurate deductions by others. Therefore, although this is an academic article, I invoke the journalist privilege of non-disclosure of interview sources.

[19] It is difficult to underestimate the effect within Europe of the requirements of the EU as to competition in what was originally conceived of as 'The Common Market'.

[20] It is curious how many advocates of the 'level playing field' consider the field level only when they are standing on the pitcher's mound.

designate a signatory to the Operating Agreement through which access to the INTELSAT system is given, affords it and its signatories a privileged position within a very competitive industry.[21] This is alleged to be wrong. Of course this argument has been weakened significantly since 'direct access' to the INTELSAT system is now permitted with the consent of the appropriate Signatory. Nonetheless, the argument is still made.

Fourth, INTELSAT itself is said to be inefficient, or not as efficient as it could or should be, and unable to meet the challenge of competitors who have been newly released from their cages. On this view INTELSAT procedures and the procedural requirements of its constituent documents mean that the organisation is hobbled, cribbed, cabinned and confined in its response to the changes of the marketplace, and the swift development of emergent telecommunications technologies. A 'better INTELSAT' should be created on the commercial models of private corporations, which would therefore be leaner, fitter, more responsive to market requirements. Such would be able to meet competition both from other satellite systems, as well as from the optical fibre networks, which were undreamed of until relatively recently.

But there are other elements in the story.

Fifth, I would not underestimate the element of Ego among those entrepreneurs (and some of them would say, buccaneers) active in the deregulated telecommunications business arena.[22] There is a fundamental difference between competition and competitiveness. Entering my sixth decade, I have little confidence in the so-called 'interplay of market forces' that serve to camouflage the real interest of many (not just in telecommunications), not in the actual provision of services but rather in the inter-action between commercial empires and alliances. The 'deal' provides an adrenalin surge as addictive as cocaine: the world interest in and dependence on the provision of a global telecommunication service with freedom of access to all without discrimination, and with a global uniformity of rate for a particular type of service, involving where necessary to acceptance of loss in providing a service to certain geographic areas (enshrined in art. 5 of the INTELSAT Agreement), is seen as an 'uneconomic' penalty on entrepreneurial flair.

Sixth, there are now Trojan horses within INTELSAT. Many of the Signatories to the Operating Agreement, which were formerly nationalised enterprises, have themselves become commercial companies. As commercial companies the interests of these Signatories have mutated. Formerly government departments dedicated to the provision of telecommunications services, they have become companies active in telecommunications, whose primary purpose is the running of an enterprise which makes profit for their shareholders. That affects their view of INTELSAT's activities. It is also darkly hinted that certain

---

[21] *Cf.* R. Frieden, *Privatisation of Satellite Cooperatives: Smothering a Golden Goose?* 36 VA. J. INT'L L. 1001 (1996).

[22] *Cf.* F. Lyall, *Privatisation, Jurisprudence and Space*, 1999 42 PROC. COLLOQ. L. OUTER SPACE 149 (1999), §4 dealing with Ego, while other sections consider divergent attitudes to 'law' and their pernicious effects.

Signatories see profit to be made through the commercial valuation of INTELSAT, and through the sale of the shares that privatisation would allocate to them, allowing them perhaps to detach themselves from INTELSAT at a profit which could then be re-invested in other activities.

Seventh, we should recognise that, as indicated above, there was a view that the US should build, manage and operate a global system from which others would take and pay for service. When, thanks to the unwillingness of other states to subscribe to such an 'American monopoly', the INTELSAT system was created, instead of COMSAT becoming the global provider, its role changed. Certainly its position as Management Services Contractor for some ten years was important, but the contracts had to be shared with other non-US space industries. The requirements of the Definitive Arrangements as to procurement enshrined the dispersion of contracts, and the availability of information as to patents and inventions among many states and enterprises.[23] As a result INTELSAT came to be viewed as a hobble and restriction on freedom of enterprise. Its removal, or at least its reduction, was therefore something to be sought.

Eighth, the question of the privatisation of INTELSAT, and indeed of its cognates INMARSAT,[24] and EUTELSAT,[25] should not be seen in isolation. Telecommunications has become part of global business, to be thought of in those terms. The fundamental move towards privatisation in many areas in many countries, has not left telecommunications unaffected. Telecommunications has come to be seen less as a service, and more as a commercial enterprise. It therefore has been swept into questions of international trade, as that arena has moved from trade in goods to trade in services. Interacting with the general trend towards freedom of competition within the market and accompanying moves towards deregulation, has been the drive within the context of the General Agreement of Tariffs and Trade towards liberalisation of the telecommunications market. This has lately manifested itself in the form of the Protocol on competition in telecommunications.[26] INTELSAT could not be immune from the underlying premises of such developments.

Ninth, over its existence COMSAT has been under attack. Others have wished to enter its markets, and have opposed what they perceive as COMSAT's privileged position within the US telecommunications market because of COMSAT's statutory role as the US Signatory in INTELSAT, and the gateway to INTELSAT facilities. Some of the argument for privatisation of INTELSAT has been deployed really as a stalking horse for diminishing COMSAT.

---

[23] INTELSAT Definitive Arrangements, *supra* note 12, Agreement, Art. XIII, Operating Agreement, Arts. 16 and 17.

[24] *See* D. Sagar, *The Privatisation of INMARSAT*, 41 PROC. COLLOQ. L. OUTER SPACE 205 (1998).

[25] EUTELSAT is likely to privatise as a French commercial company in 2001.

[26] World Trade Organisation: Agreement on Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services), 36 ILM 354 (1997).

Lastly, and as a strange amalgam of many of the above, together with its own elements of Tabasco sauce, we must note the US ORBIT legislation.[27] The Open-market Reorganisation for the Betterment of International Telecommunications Act of 2000[28] amends the 1962 Communications Satellite Act of 1962 by adding a new Title VI, dealing with Communications Competition and Privatisation. Dealing with both INTELSAT and INMARSAT,[29] this Title, and particularly sub-title B, as to the criteria which the Federal Communications Commission and the President of the United States are required to adopt to ensure a 'pro-competitive (sic) privatisation' of both international organisations, strike an outsider as extraordinary. It is difficult to see how the Act squares with the international obligations binding on the US through its ratification of the INTELSAT Definitive Agreements.[30] Apparently, for example, by the new sec. 644(b) the President and Commission are to 'take the action necessary to ensure that the United States remains the ITU notifying administration for the privatised INTELSAT's existing and future orbital slot registrations', a provision that cannot square with international law on the matter. Much will depend on where the new INTELSAT is incorporated. By sec. 624 the relationship between INMARSAT and its spun-off company ICO Global Communications Inc., is hedged with restriction. By sec. 625 rules are created through which non-members of the World Trade Organisation and states which do not support competition in telecommunications, can be penalised.

The various stages by which this legislation was arrived at, and the various Hearings involved, make it apparent that many interests in the US were and are intent upon the privatisation of INTELSAT with regard to US interests alone.[31] An outside spectator can find some relief in the Statement by the President on March 17, 2000, on signing the ORBIT Act into law. President Clinton did indicate that he construed certain of the Act's provisions as advisory rather than mandatory, and that the new INTELSAT should be permitted to compete within the US. However, bluntly, one must wait and see what happens in the carrying of the ORBIT Act into

---

[27] H. Wong, *Comment 2001: A Space Legislation Odyssey - a Proposed Model for Reforming the Intergovernmental Satellite Organisations*, 48 AM. U. L REV. 547 (1998), interestingly discusses the House and Senate bills that eventuated as the ORBIT legislation.

[28] Pub. L. No. 106-180, 114 Stat. 48 (2000).

[29] Many of the provisions of Title VI as to INMARSAT seem redundant, given the privatisation of INMARSAT was accomplished fifteen months earlier than the ORBIT Act.

[30] In 2000 INTELSAT did think about invoking the arbitration provisions of its Agreement to deal with this point. The decision not to proceed would appear to be commercially and politically motivated rather than on any fear that argument on the international lawfulness of the US legislation was not well-founded.

[31] *Cf.* P. Salin, *New US Space Legislation affecting World-wide Satellite Communication Regulations*, in INTERNATIONAL ORGANISATIONS AND SPACE LAW, PROCEEDINGS OF THE THIRD EUROPEAN CENTRE FOR SPACE LAW COLLOQUIUM 387, (ESA SP 442)(Noordwijk, The Netherlands: ESA, 1999); J. M. Logsdon, *The United States, the only space superpower*, SPACE POL'Y 273 (1997).

effect in practice. Not all Presidential statements stand the test of time.[32] And in any event, it remains extraordinary that the legislature of any state should seek in this way to pre-empt and also to influence the outcome of sensitive discussions of reform of an international organisation.

3. The probable change

Already, of course, in 1998 INTELSAT spun off a separate company, New Skies N.V., a company incorporated in The Netherlands, which operates as a Dutch company providing multi-regional video and interactive multi-media services for both business and individual customers.[33] It functions as a company independent of INTELSAT, though owned by the INTELSAT Signatories in proportion to their share in INTELSAT itself. The privatisation of INTELSAT is different, involving the provision of public telecommunications services, and all the other services that the new private entity or entities may decide to provide. Although circumstances may alter, and render what follows in this section obsolete, or partially erroneous, the broad picture of the privatisation of INTELSAT is likely to follow the INMARSAT privatisation model, and be the following.

New INTELSAT will in effect consist of three companies, a Holding Company (probably based, like many communications holding companies, in Bermuda), a company whose function it will be to hold the various licenses and permissions, including landing rights, required for the provision of services, a service company (likely to be in Washington, and incorporated in the USA) which will actually run the telecommunications satellite system,[34] and perhaps yet another company to handle other matters that the new INTELSAT will wish to deal with. Ownership of these will initially vest in the Signatories to the existing Operating Agreement. In due course shares in the main holding company will become tradeable, and a public offering made. The Holding Company will have a Board of Directors (probably seventeen in number) elected by shareholders, and it is possible that voting will be weighted by voting shares.[35] The existing Operating Agreement will terminate. The current intergovernmental Agreement will be amended so as to create what may well be called the International Telecommunications Satellite Organisation (ITSO). This would consist of an Assembly of Parties, and an Executive Organ headed by

---

[32] One recalls the suggestion that the Ariane programme was redundant as the US would accommodate payloads on the Shuttle. However, non-US launches on the shuttle were suspended in the aftermath of the Challenger incident.

[33] New Skies N.V. was created in a functional state, as it were, five satellites and appropriate contracts being transferred as at the time of incorporation. In addition, the ITU has accepted the transfer of appropriate frequency and orbital positions from the US to The Netherlands.

[34] ITU registered orbital locations and frequencies will be transferred to this company.

[35] The INTELSAT Board of Governors will recommend to the Assembly of Parties next year which form to adopt. I would hope that weighted voting is used. That was a strength of elections to and decisions by the existing Board.

a Director General. It would be otiose to discuss the detail of the ITSO until that has been finally decided, and it is enough for our purposes to say that the main purpose of ITSO would be to ensure, so far as possible, that the new INTELSAT companies comply with certain 'Core Obligations'. In order to do so it will enter into a Public Service Agreement with the new INTELSAT. Any dispute arising therefrom will initially be a matter for negotiation, then arbitration in accordance with the rules of the International Chamber of Commerce, and ultimately an award would be enforceable in all probability through the courts of the District of Columbia, USA (This point remains open as at the date of writing, August 2000).

That point must lead us to worries and concerns.

4. Worries and Concerns.

Many of the worries and concerns that arise from the above narrative are those raised earlier, but either remain or have been resuscitated by the drive for privatisation. To some extent they can be grouped on the model of UN Res. 1721.[36] This also conveniently reflects elements of the Core Obligations which the new INTELSAT arrangements seek to protect. However, first something separate has to be stated.

Irreversibility

One cause of worry is simply that the privatisation of INTELSAT will not be a reversible process. In some contexts when something is done that proves unwise, undesirable or better tackled in practice in a former manner, the process can be reversed, and the *status quo* restored. The present form of INTELSAT will never be resuscitated from a privatised company. Indeed, it is true that were the matter to arise now, the present INTELSAT would not be set up. But it was set up, and it operated successfully. If the ideal of a global public telecommunications system, available to all without discrimination on the basis of price or politics is significantly departed from, that will be to the general world loss. But we will not be able to rethink, and restore the present INTELSAT.

A global system

The hope of the 1960s UN Resolutions was the creation of a global system, available on a non-discriminatory basis to all. In the sphere of public international telecommunications INTELSAT has accomplished that. One would hope that the nature of INTELSAT business as it has been developed will result in the maintenance of the global system. That hope seems very likely to be fulfilled in the sense that INTELSAT's system is likely to continue to be capable of world-wide coverage, and indeed that is the intention in the privatisation arrangements. However, the ability to provide coverage is not the same as actually offering service to all. Access

---

[36] *Supra* note 2.

to the system is different from the system having for technical reasons a global coverage.

Access to the system - 1. non-discrimination as a policy

The non-discriminatory basis of access to INTELSAT is built into the INTELSAT Agreements. The provision of 'international public telecommunications services of high quality and reliability to be available on a non-discriminatory basis to all areas of the world' is spelled out as the prime objective of INTELSAT in Art. III(a) of the INTELSAT Agreement. Articles III(b)(i) and (ii) go on to equate with public international services, certain domestic public services where the state concerned has particular topographic problems.[37] Telecommunications entities and administrations enter into appropriate agreements with the Organisation for the provision of these domestic services.[38] INTELSAT has done well in both the international and domestic provision of such services. The only hiccup in such provision for those who wish them has been for non-payment of bills, and even that sanction has been unwillingly applied by the Organisation. But will such freedom to connect with the INTELSAT system continue?

According to the 'Core Principles' non-discriminatory connectivity will continue. However, the privatisation of INTELSAT will render the new companies subject to the legal systems and legislatures of the states in which they are incorporated.[39] Under those circumstances, can it be expected that the states of incorporation will always remain aloof and allow the provision of service to all customers? If, for example, INTELSAT does privatise its service-providing arm in the US, will the US Congress refrain from seeking to direct how services are provided? Will contentions with Iran, Libya, Yugoslavia, or Iraq not impel the use of telecommunications as an economic weapon?[40] The willingness of the US Congress to pass laws with extra-territorial effect is not reassuring. The Helms-Burton Act in relation to Cuba is a stark model, seeking as it does to coerce nationals of other states in their relationship with the Cuban government, a government recognised by their home states.[41] The rather hysterical opposition to

---

[37] This also raises the question of 'life-line services' to which we are coming. *See infra* note 45.

[38] *See* INTELSAT Agreement, *supra* note 14, Art. II(c).

[39] This point worried me early in the privatisation debate: F. Lyall, *Privatisation and International Telecommunications Organisations*, 38 PROC. COLLOQ. L. OUTER SPACE 168 (1995).

[40] EUTELSAT withdrew service for a Yugoslavian tv news broadcast through its facilities at the beginning of June 1999. This, however, is not quite the same as the withdrawal of telecommunications services.

[41] See the US Cuban Liberty and Democratic Solidarity (Libertad) Act (Helms-Burton Act), 35 ILM 357 (1996). *See also* Cuba's Foreign Investment Act, 35 ILM 331 (1996). The US - European Understanding re Libertad Act 91 AJIL 497 (1997); 36 ILM 529 (1997), does not tackle the legalities involved, and is not working satisfactorily; *see* the European Commission, *Report on United States Barriers to Trade and Investment, 2000,* at 8-13 (July 2000). The Commission Report also

INTELSAT manifested in the draft bills and the debates on what became the ORBIT Act is not reassuring.[42] The cynical question is whether any legislatures and governments of other states would behave otherwise. One might hope that the ITSO would be able to use the Public Service Agreement to prevent access to the INTELSAT system being used for political reasons. I have to say, however, that, if as seems likely, the US will have jurisdiction, the attitude to international law seen in recent US cases increases one's fears.[43] The residual body may have little actual power to secure INTELSAT's immunity from such pressures. Ultimately enforcement of any arbitral award would end up requiring the intervention of a normal judicial system. How would a court respond to an action to enforce an award under the Public Service Agreement if there is also either a governmental direction, or a congressional statute on the point?

Access to the system - 2. financial non-discrimination

For many countries a strength of the 1971 INTELSAT Agreements is art. V(d) which provides that utilisation charges for a particular type of service are uniform on a global basis for all applicants.[44] In short this means that low-traffic routes are subsidised by high traffic routes. Over the years there was debate about this both within INTELSAT, and outside it, particularly by those anxious to criticise INTELSAT either as not being sufficiently competitive because it otherwise could reduce charges on some routes, or as being anti-competitive in providing subsidised service since particular route charges did not reflect actual cost.

I fear that such arguments will hold sway within the new form of INTELSAT. The requirement of a commercial enterprise is to be profitable. Cost is allocated against identified revenue streams. Low traffic, and

---

takes issue with the US Iran and Libya Sanctions Act of 1996 (50 USC 1791; 104 P.L. 172; 110 Stat. 1541 (1996) for similar reasons. The equivalent Commission Report of 1999 makes the same points. Outsiders will also note the episode of Elian Gonzales in 2000 which, while ultimately correctly dealt with by the return of the boy to his father, provoked much rhetoric and odd proposals within the US Congress.

[42] See Congressional debates and Hearings relevant to Bills S. 2365 on International Satellite Communications Reform, and H.R. 1872 on Communications Satellite Competition and Privatisation (105th Cong., 2d Sess.).

[43] See the death penalty cases, Breard v Greene, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1999), and The Federal Republic of Germany v US, 526 U.S. 111, 119 S. Ct. 1016, 143 L. Ed. 2d 192 (1999). In both instances the International Court of Justice had been approached by the home state of the accused, and had issued a 'Provisional Measures' Order calling for postponement of the executions until the Court would have held a hearing as to whether the US authorities had breached the relevant terms of the Vienna Convention on Consular Relations (21 UST 77, TIAS 6820): *see* ICJ Orders of 9 April 1998 and 3 March 1999, 38 ILM 308 (1999). In both cases the executions were proceeded with: matters are still pending before the International Court. I appreciate the reasoning of the Supreme Court in both cases as to US municipal law: the point is what it says about US relationship with international law.

[44] Reference point for note 49, *infra*. See also below at that note.

therefore unprofitable, routes are not likely to have the same traffic rates as similar services on high-density routes. That would not be a commercial response to circumstances. Nonetheless, while it would be difficult lawfully to prevent such a different attitude to what would be the same technical service, I hope that this form of discrimination in charges to different customers for the same technical service will be resisted. The locale of the service should be the satellite, not the ground station: in that case to provide a service from Lome to Addis Ababa would be no different from a service from New York to Frankfurt.

That point takes us on to a further worry - the fate of the life-line service.

Life-line services

As indicated above,[45] the non-discriminatory access INTELSAT provides for international public telecommunication services in terms of Art. III(a) of the INTELSAT Agreement has equated with it domestic public telecommunication services between areas of a state split by another country[46] or by the high seas,[47] or where natural barriers impede terrestrial relays and there was sufficient capacity beyond that required for 'proper' international services on the INTELSAT system.[48] In fact, as INTELSAT quickly established its coverage with capacity greatly in excess of requirements for international services, and the 'separated state' categories, a good number of countries have come to rely on INTELSAT for domestic service. Simply put it is cheaper and more reliable to link villages and scattered communities by satellite than it is either to provide cabled telephony, or short or micro-wave links.

But, *ex natura* many of the Art. III(b)(i) and (ii) services are low traffic, and hence of low revenue generating potential. They are precisely many of the services that are subsidised through the application of Art. V(d).[49] A question therefore arises as to their continuation. Strict commercial logic would indicate either that these services are terminated, or that their cost is immediately reflected in an increase in their charges.

In fact, it is likely that the new INTELSAT arrangements will preserve such services for a period at least under the terms of its privatisation agreements. The US itself provides a model in that telecommunications services to the remoter areas of the US are considered as 'life-line services' and are either subsidised, or requirements are imposed on providers as to their maintenance as part of licensing for other services.[50] It is therefore good to understand that the 'Core Principles'

---

[45] Reference point for note 37, *supra*.

[46] For example, US mainland and Alaska, and East and West Pakistan as was.

[47] For example, Indonesia, Australia, US and Hawaii.

[48] For example, Peru, which extends from the Pacific at sea-level to the headwaters of the Amazon.

[49] *See supra*, note 44.

[50] See §151 of the Communications Act, 1934 as amended, 47 USC 141, and §254 of the Telecommunications Act 1996, also 47 USC; and various reports and orders

secured in the privatisation effectively not only repeat the power of INTELSAT to provide such services, but are in form creative of an obligation to continue to provide such services. This Life-Line Connectivity Obligation (LCO) will be constituted by agreement between INTELSAT and each relevant state and policed (if that is the right word) by ITSO's ability to review INTELSAT's decisions on such services. However, in the current state (Aug. 2000) of discussions, the requirement to provide life-line services is likely to be limited to a period of twelve years. Further, a definition will be adopted for the eligibility of a state for life-line service, and those states for which life-line service is to be provided will be established as at the date of privatisation. While one can see a commercial logic for these steps, and even perhaps a political logic, nonetheless such attitudes seem remote from the aspirations of UN Res. 1721 (D).

The state of incorporation

Of course, it could be that INTELSAT will privatise in some state other than the US thus avoiding some of the US-referent difficulties outlined above. I have to say that that seems unlikely. While there might be some tax advantages, and while for that reason some of the elements of the INTELSAT privatisation package are likely to be incorporated elsewhere, the pressure on the INTELSAT service element to become a US national are immense. One can see them in the background to the ORBIT legislation. That said, it would in the last resort be possible for INTELSAT to separate itself from US control by moving its entire operation elsewhere. One example that comes to mind is the relocation of the Jardine-Matheson companies from Hong Kong prior to the return of Hong Kong to China.

If such a step were to be taken, it takes no crystal ball to foresee that INTELSAT might run into major problems in getting its services licensed for provision within the US. The FCC scrutiny and its licensing processes might well alter. The recent EU Commission Report on US Barriers to Trade and Investment indicates the hurdles that non-US

---

on Access Charge Reform, e.g. Third Report etc., 11 FCC Rcd 21354, 5 Comm. Reg. (P&F) 604, released 24 December 1996, adopted 23 December 1999, Release No. FCC 96-488, CC Docket Nos. 96-262, 94-1, 91-213 and 96-263; Sixth Report and Eleventh Report and Order etc., (no Rcd citation available at time of writing) released 31 May 2000, adopted 31 May 2000, Release No. FCC 00-193, CC Dockets Nos. 99-249 and 96-45; Order, (no Rcd citation available at time of writing), released 14 July 20000, adopted 13 July 20000, Release No. FCC 00-249; Order, (no Rcd citation available at time of writing), released 28 July 2000, adopted 27 July 2000, CC Docket Nos. 96-262, 94-1, 91-213 and 96-263. *Cf.* also the Universal Service Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, released 8 May 1997, adopted 7 May 1997, 12 FCC Rcd 8776, Release No. FCC 97-157; *Idem.* Twelfth Report and Order, etc., (no Rcd citation available at time of writing) released 30 June 2000, adopted 8 June 2000, CC Docket No. 96-45, Release No. FCC 00-208. I would not pretend yet to have mastered all these, but clearly the US has given much thought to the problems of remoter areas and uneconomic public telecommunications services for them.

entrants face in FCC proceedings, despite the fact that these are contrary to US obligations under the WTO arrangements.[51] While there is much to be said for US procedures in terms of the Federal Administrative Procedure Act of 1946, there appears to be a use of legal and quasi-legal procedures in order to deter, discomfit and 'run interference on' competitors within FCC procedures through participation in licensing hearings.[52] Further, the FCC as custodian of the US interest is likely to listen to comments and argument made by US nationals,[53] and the very nature of these proceedings is culturally alien to most of the world and therefore their outcomes can be difficult to accept.

The General World Interest

The last sentence above has a corollary. The likely locus of privatisation of INTELSAT will mean that the new company will have to be licensed by the FCC. Indeed, successful steps have already been taken to that end.[54] However, it is to be noted that the decision involves various exemptions allowing the new company to use existing INTELSAT during a transitional period. Once that transition period is over INTELSAT will have to comply with FCC requirements.

That eventual requirement may be fair enough. But in licensing the FCC takes account of US interests. While it is true that it is supposed to have some regard to more general interests, it would be preferable to have INTELSAT's licensing done with regard to the world as a whole, and to leave

---

[51] *See supra*, note 41. A non-US INTELSAT would have to apply in terms of the FCC 'DISCO II' decision: see In the Matter of Amendment of the Commission's Regulatory Policies to Allow non-US Licensed Space Stations to provide Domestic and International Satellite Service to the US, 25 November 1997, 12 FCC Rcd 24094; 10 Comm. Reg. (P&F) 587; IB Docket No. 96-111; CC Docket No. 93-23; Release No. CC 97-399.

[52] *Cf.* F. Lyall, *Privatisation, Jurisprudence and Space*, 42 PROC INTL. INST. SPACE L. 149 (1999). I find illuminating the difference between soccer (real football) and American football. In soccer, the rules foster continuity of play with the ball. Obstructing an opponent is a foul. In American football 'running interference' on non-ball-carriers is not only tolerated, but, if successful, praiseworthy, and the use of the rules by coaches through time-outs, etc. is integral to the game.

[53] *Cf.* the problems cause by first the requirement of and then the grant only of 'special temporary authority' for New Skies N.V. (the Dutch based INTELSAT spin-off company) to be accessed by US ground stations in 1998. *See* In the Matter of New Skies Satellites N.V.; for Authorisation to Access the US Market, 6 August 1999; 14 FCC Rcd 13003; 17 Comm. Reg. (P&F) 109; Release No. 99-216 (1999). *Cf.* In the Matter of Market Entry and Regulation of Foreign-affiliated Entities, Report and Order, 11 FCC Rcd 3873, 1 Comm. Reg. (P&F) 459, released 30 November 1995, adopted 28 November 1995, Release No. FCC 95-475, IB Docket No. 95-22; RM-8355 and 8392.

[54] In the Matter of the Applications of INTELSAT ILC; For Authority to Operate and to Further Construct, Launch, and Operate C-band and Ku-band Satellites that Form a Global Communications System In Geostationary Orbit, FCC LEXIS 4158 (2000),Release No. FCC 00-287, (FCC Rcd citation not available at time of writing).

national interests aside. As it is, US ideas as to permissible requirements will be imposed on a global basis.

FCC requirements become world requirements

An element of making INTELSAT subject to FCC licensing has the implication that what the US body determines becomes the law for the rest of the world. As noted in the paragraph above the recent licensing of INTELSAT by the FCC was accomplished through the grant of certain exemptions to the nascent privatised organisation. Some of these related to frequency use, and orbital separations. For example the FCC usually requires a 2° separation between satellites. INTELSAT does not always place its satellites that far from others. In the future as new satellites replace the existing it will have to comply with US views. Other countries might take a different attitude. Of course, in that example a greater separation seems justifiable, but will it always be the case that US decisions are generally justifiable? Is it good that such decisions are taken by a national licensing authority? I recall the FCC frequency licensing for IRIDIUM. Although the FCC made it clear that IRIDIUM would have to get licenses from other administrations in addition to the FCC decision, nonetheless by its grant of licence the FCC at least prejudiced, if not actually pre-empted decisions by others. As things have turned out, the rest of the world has been spared that factual development, but the basic legal geology remains the same. Decisions by the FCC have global effect.[55]

A world authority

These considerations lead me to suggest yet again that in the spirit of the UN Resolutions of the 1970s, decisions that affect the world as a whole should be taken by a body whose primary, and perhaps exclusive, interest should be that of the world as a whole. National licensing authorities are bound to take their decisions with regard to their own national interest. The ITU should be given a quasi-FCC role in licensing systems that have global implications for spectrum use and orbital locations.[56]

---

[55] *Cf.* note 54, *supra*, and: In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2.Ghz for Use by the Mobile Satellite Service, Second Report and Order, released 3 July 2000, adopted 27 June 2000, ET Docket No. 95-18 (FCC Rcd citation not available at time of writing); In the Matter of The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2.Ghz Band, Report and Order, released August 25, 2000, adopted 14 August 2000, IB Docket No. 99-81; Release No. FCC 00-302 (FCC Rcd citation not available at time of writing).

[56] F. Lyall, *Space Law - What Law or Which Law?*, 34 PROC. COLLOQ. L. OUTER SPACE 240 (1991); *The International Telecommunication Union: A World Communications Commission?*, 37 PROC. COLLOQ. L. OUTER SPACE 42 (1994); *Expanding Global Communications Services*, Discussion Paper, PROCEEDINGS OF THE WORKSHOP ON SPACE LAW IN THE TWENTY-FIRST CENTURY, UNISPACE III, TECHNICAL FORUM, A/CONF.184/7, 64-80, and *see also* Comments by A. Noll, J. Galloway and R. Jakhu at 80-93.

Public service

Penultimately, I would again point out that a service to the public is not the same as a public service. I do fear that, even with the probable temporary securing of lifeline services for remote and under-developed areas, in fifteen years such services provided by the new INTELSAT structures on a subsidised basis will have disappeared on commercial grounds. Some other steps, not merely assurances (which history shows are never reliable) should be taken and secured to continue the idea of life-line and subsidised connectivity in appropriate cases. Perhaps recourse could be had to a small multi-lateral agreement between ITSO and the states of incorporation of the new INTELSAT companies, and its enforcement through the International Court of Justice - an uncertain remedy given recent history, but better than reliance on national law.

Provisional application[57]

Finally there is the point that neither the Agreement or Operating Agreement provide for the termination of alteration of either in quite the way that proposed arrangements require. INTELSAT has, of course, some experience in this area as the Definitive Arrangements had themselves a period of provisional application for some states during the transition from the Interim Arrangements. By art. 23(c) of the Operating Agreement its currency is that of the Agreement. However, the proposal is that the Agreement is amended *inter alia* to provide for the International Telecommunications Satellite Organisation (ITSO). Formally it will not terminate. So what happens to the Operating Agreement? Impliedly it simply ceases as the status of Signatory will not exist under the amended Agreement. The new Agreement's terms as to its provisional application seem at the time of writing to be those of the 1971 Agreement, which make reference to proportions of those states that were members of the Interim Agreement. There may be a *lacuna* here, into which fall all INTELSAT members which joined after the 1971 Agreement came into force. Of course, provisional application of the new arrangements and the amendment to the 1971 Agreement will be cured by lapse of time. However, for a period it will be open to a current (2000) INTELSAT member to halt the new arrangements on the ground that these prejudice its rights of property in the international system. I hope that that route is not followed. It would be very disruptive.

Conclusion

The heading may be inaccurate: there is no conclusion. Matters will move ahead, and development in technology and commerce will not stop. Our existing INTELSAT worked as well as it did through the willingness of its

---

[57] See the excellent article, D. Sagar, *Provisional Application in an International Organisation*, 27 J. SPACE L. 99 (1999).

members, state and telecom, to see the organisation function in the world interest. Its basic documents were, thanks often to David Leive, seen as a constitution rather than a statute. Politicians and lawyers played a background role, while the system was established and largely managed by technically qualified telecommunications engineers. In the new business climate, accountants and entrepreneurs hold the reins. I regret to say that, even with the likely steps to protect the 'Core Principles' that were Art. III, full attainment of the aspirations of UNGA Res. 1721, Part D, does not seem likely. Maybe my crystal ball is cloudy, but, whatever, it is certain that, once accomplished, the privatisation and commercialisation of a very significant organisation will not be rolled back.