PROVISIONAL APPLICATION IN AN INTERNATIONAL ORGANIZATION

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I. Introduction

1. On 15 April 1999, amendments to the Inmarsat Convention and Operating Agreement for the restructuring and substantial privatization of the Inmarsat Organization were applied provisionally, by decision of the Inmarsat Assembly of Parties.[1] Inmarsat was the first of the international satellite organizations (ISOs) to take this step.

2. Inmarsat was an intergovernmental organization (IGO), operating on a commercial basis. The Assembly decision enabled the assets and business of Inmarsat to be transferred to private law Companies incorporated under English law, while retaining the IGO to oversee certain public service obligations of the Company.

3. The use of the doctrine of provisional application to achieve this objective was indispensable to Inmarsat's commercial future. This article outlines the reasons for this, and the search to substantiate legally the use of the doctrine. The results represent a significant evolution of public international law on the subject.

II. The Reasons for Inmarsat's Restructuring

4. Inmarsat's restructuring has been described elsewhere, but a brief outline is given here to show the full implications of the Inmarsat Assembly's decision.[2]

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The Inmarsat documents cited in this article may be obtained on request, subject to any confidentiality restrictions, from the Inmarsat Legal Office, 99 City Road, London, England, EC1Y 1AX, Fax: + 44 (0) 171 728 1602.

1 Assembly/12/20, Report of the 12th Assembly Sess., sec. 8 and relevant Annexes. Assembly/13/Report of the 13th (Extraordinary) Sess., sec. 4.2 and relevant Annexes.

2 A. Auckenthaler, *Recent Developments at Inmarsat*, 38 Proc. COLLOQ. L. OUTER SPACE 149 (1995) (an IISL Colloquium) and 20 ANNALS AIR & SPACE L. 53 (1995). D. Sagar, *The Privatization of Inmarsat*", 41 Proc. COLLOQ. L. OUTER SPACE 205 (1999). D. Sagar, *The Privatization of Inmarsat-Special Problems*, Paper presented to the

5. Inmarsat was established in 1979 under the Inmarsat Convention and Operating Agreement[3]. The Member States were Parties to the Convention, and their designated telecommunications entities (some public, some private) were Signatories to the Operating Agreement. The purpose of the Organization was to provide a global mobile satellite system, initially for maritime commercial and safety communications (later extended to aeronautical and land mobile communications).[4]

6. Although operating on a commercial basis, the Organization functioned more like a cooperative. Governance and financing of capital requirements were the responsibility of the Signatories, who were also the main distributors of satellite services to the mobile end-users. The changing telecommunication environment in the 1990's, primarily the rise of competing systems, made radical institutional change necessary to enable Inmarsat to remain economically viable and competitive. The restrictive governance and financing methods of the Organization had to give way to a normal multinational corporate structure with a fiduciary board of directors, access to external finance and public markets, and limited liability for investors.

7. The amendments to the Convention to implement this restructuring were radical. Ownership of the satellite system and management of its future operation were transferred to nationally incorporated private Companies. The Operating Agreement was terminated, the rights of Signatories extinguished, and their investment shares exchanged for ordinary shares in the company structure. The IGO continues in existence under the amended Convention, but its functions are limited to overseeing the performance by the Companies of certain international public service obligations, primarily the provision of Global Maritime Distress and Safety System (GMDSS) services.

III. The need for Provisional Application of the Restructuring Amendments

8. Article 34 of the Inmarsat Convention established a two-step procedure for amending the Convention, *firstly*, adoption of amendments by the Assembly and, *secondly*, acceptance by two-thirds of the Parties representing at least two-thirds of the total investment shares (referred to hereafter as "a qualified majority"). Upon entry into force, the amendments

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ESA/ECSL Colloquium on International Organizations and Space law - Their Role and Contributions (Perugia, Italy, May 1999) (SP-442, 3rd ECSL Colloquium).

[3] The Convention and Operating Agreement on the International Maritime Satellite Organization (INMARSAT), 1143 UNTS 105 and 113 respectively, both of 3 September 1976 and entered into force simultaneously on 16 July 1979.

[4] D. Sagar, *Inmarsat*, 11 ANNALS AIR & SPACE L. 331 (1986), and 14 *id.* 473 (1989). W. Von Noorden and P. Dann, *Space Communications to Aircraft: A New Development in International Space Law*, 15 J. SPACE L. 25 and 147 (1987) and *Land Mobile Satellite Communications: A Further Development in International Space Law*, 17 J. SPACE L. 1 and 103 (1989).

were binding on all Parties and Signatories, including those which had not accepted them. Article XVIII of the Inmarsat Operating Agreement contained a broadly similar procedure. There was no explicit provision for provisional application of amendments.[5]

9. Inmarsat Parties and Signatories recognized very early that the restructuring amendments, whatever their scope, would need to be implemented promptly, so as to enable external finance to be raised for a new range of services and a fourth generation of satellites procured to ensure Inmarsat's future financial viability. The long delay normally taken for amendments to the Convention to enter into force, as described in paragraph 30 below, would have defeated the commercial purposes of restructuring and jeopardised the ability of Inmarsat to continue to fulfil one of its original purposes, i.e., to provide space segment capacity for GMDSS services. Therefore, the legal research and consultations concerning provisional application took place in parallel with the long drawn out negotiations among the membership on the form of the new structure.

10. Provisional application is well established in international law in relation to bilateral or multilateral treaties, and has also been used in respect of constituent instruments of IGOs, mainly in connection with the initial creation of the IGOs concerned. In such cases, its use has generally depended upon the individual decision of the Member States to apply the treaty provisionally.

11. Use of provisional application by decision of the supreme organ of an IGO to amend its constituent instrument has occurred in other cases but less frequently. The amendments to the Inmarsat instruments, and the implications for the Inmarsat Member States, were, however, more

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[5] Article 34 "Amendments" of the Convention reads:

> (1) Amendments to this Convention may be proposed by any Party. Proposed amendments shall be submitted to the Directorate, which shall inform the other Parties and Signatories. Three months is required before consideration of an amendment by the Council, which shall submit its views to the Assembly within a period of six months from the date of circulation of the amendment. The Assembly shall consider the amendment not earlier than six months thereafter, taking into account any views expressed by the Council. This period may, in any particular case, be reduced by the Assembly by a substantive decision.
> (2) If adopted by the Assembly, the amendment shall enter into force one hundred and twenty days after the Depositary has received notices of acceptance from two-thirds of those States which at the time of adoption by the Assembly were Parties and represented at least two-thirds of the total investment share. Upon entry into force, the amendment shall become binding upon all Parties and Signatories, including those which have not accepted it.

Article XVIII of the Operating Agreement required the approval of amendments by the Inmarsat Council, confirmation by the Assembly, and a qualified majority of Parties and Signatories to accept them.

fundamental than in those other cases, and in this respect the Inmarsat experience has broken new ground in the application of the doctrine in relation to IGOs.

IV Legal Questions Relating to the use of Provisional Application by Inmarsat

12. The legal questions were as follows:

(a) In the absence of explicit provision in the Convention, did the Assembly of Parties have inherent authority to decide that substantial amendments could be applied provisionally, pending and subject to their entry into force in accordance with the normal procedures?

(b) Would a consensus decision be sufficient, and could a dissenting Party block a consensus decision?

(c) In the absence of a consensus or unanimity, would a decision of the Assembly supported by two-thirds of the Parties present and voting be sufficient?

(d) What rights, if any, would a dissenting Party have?

(e) Was it possible under the Inmarsat Convention to have a dual regime, in which some Parties remained subject to the Convention as unamended, whilst others accepted provisional application of the restructuring amendments?

(f) What would be the effect, if any, on the provisional application decision, if the amendments did not eventually enter into force in accordance with the normal procedures, taking into account the fact that the restructuring, once implemented, would be practicably irreversible?

13. In seeking answers to these questions, the Inmarsat Director General initially examined the relevant provisions of the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention"), the precedents for the use of provisional application in connection with the establishment of IGOs and with amendments to their constituent instruments, including, in particular, the practice of the International Telecommunication Union ("ITU"), and Inmarsat's own prior practice. Written advice was also obtained from a leading expert in treaty law, and other legal sources were examined.

V. International Law and State Practice on Provisional Application

A. The Vienna Convention

14. Law and State practice on provisional application of treaties was codified in Article 25 of the Vienna Convention as follows:

Article 25

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

15. The *travaux préparatoires* for Article 25 recognized that the State practice of provisional application of treaties by various methods was widespread. Some State Representatives could not support the Article because their national Constitutions required prior legislative approval for acceptance of treaty obligations, provisionally or otherwise, which was an obstacle later encountered by Inmarsat, as shown in Section VI below. However, it was also recognized that the Article did not impose an obligation on any State that did not wish to apply the treaty provisionally. The purpose and scope of the Article were summed up thus: "The practice of provisional application was now well established among a large number of States and took account of a number of different requirements. One was where, because of a certain urgency in the matter at issue, particularly in connection with economic treaties, it was highly desirable that certain steps should be taken by agreement in the very near future"[6].

16. Other relevant articles of the Vienna Convention, which are referred to later, are Article 5 providing that the Convention also applies to a treaty which is the constituent instrument of an international organization, and Article 39 providing that the rules in Part II of the Convention (which includes Article 25) also apply to agreements to amend a treaty, unless the treaty otherwise provides.

B. State Practice on Provisional Application of Treaties Establishing International Organizations

17. There have been many examples of provisional application of treaties establishing IGOs, pending their entry into force. These included the provisional International Civil Aviation Organization (ICAO), the Preparatory Committee of the International Maritime Consultative Organization (IMCO) and the interim arrangements for the International Telecommunications Satellite Organization (Intelsat). A Study undertaken in 1973 by the United Nations Secretary General examined a number of examples of provisional application, pending their entry into force, of

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6 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

multilateral treaties, especially those establishing international organizations.[7]

18. The *reasons* for the provisional application varied but were generally intended to facilitate preparatory measures or early operations of the IGO. The *means* employed varied from explicit provisions in the treaty itself, separate Protocols signed by States, or Resolutions of Diplomatic Conferences. The *scope* of the activities authorized varied from administrative arrangements to the full range of rights and obligations. In most cases, only *those States which expressly approved* the provisional application were bound by it.

C. *State Practice On Amending the Constituent Instruments of International Organizations*

19. The examples of provisional application described in Section V.B above relate to the *creation* of international organizations rather than the *amendment* of the constituent instruments of existing organizations. It was the latter situation that was of special relevance to Inmarsat. As noted in paragraph 16 above, the Vienna Convention applies to the constituent instruments of an international organization, and Article 25 also applies in respect of amendments to a treaty.

20. There are instances in which the supreme organs of IGOs have applied provisionally amendments to their constituent instruments, without explicit power in their constitutions. One example is the General Congress of the Universal Postal Union (UPU). In 1964, the UPU adopted certain Acts relating to the organization and functioning of its governing bodies. As these were not due to enter into force until 1966, the UPU decided to apply the Acts immediately to enable work to begin work without delay. These precedents did not involve amendments as comprehensive as the Inmarsat restructuring amendments, but they demonstrated that the supreme organs of the IGOs concerned had inherent legal power to decide on provisional application of amendments.[8]

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[7] *See:* (i) United Nations General Assembly (Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National jurisdiction), *"Examples of Precedents of Provisional Application, pending their entry into force, of Multilateral Treaties which have Established International Organizations and /or Regimes"*, Report of the Secretary General, Doc. A/AC. 138/88, dated 12 June 1973; (ii) D. Vignes, *An Ambiguous Notion: The Provisional Application of Treaties,* 18 ANNUAIRE FRANCAIS DROIT INT'L 181-199 (1972); (iii) Law of the Sea Treaty, *"Alternative Approaches to Provisional Application"*, 13 I. L. M. 454-461 (1974); (iv) H.G. SCHERMERS & N.M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW paras. 798-9, at pp. 521-2 (3rd revised ed.); (v) 5 U.N. JUR. Y.B. 221-223 (1976).

[8] Other examples were: In 1951, the Committee of Ministers of the Council of Europe applied immediately certain resolutions that were intended subsequently to be incorporated in the Statute of the Council, including those relating to its organs and the procedures for the admission of new Member States. In 1964, the Inter-American Conference gave immediate effect (without explicit authority) to

21. Another category of precedents relates to decisions on provisional application which are expressly *subject to limits imposed under national law.* This concept played an important part in the final Inmarsat Assembly decision. An important example of this category is the International Cocoa Organization. In 1976, this Organization sought advice from the United Nations about the rights of countries to participate in the Organization on the basis of provisional application before they had completed internal implementing legislation. One government notified the Organization that it would apply the new Agreement on a *de facto* basis within its existing legislation. The UN advised the Organization that : "You may possibly find, in the practice of other organizations, that it is understood that "provisional application" means only that, pending ratification, States will do their best, within their existing legislation, to apply the agreement"[9]

22. Another example is found in the 1994 Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 1982 (concerning the International Seabed Authority) adopted by the UN General Assembly. Article 7 of the Agreement provided for States which had consented in the General Assembly to the adoption of the Agreement, or which had signed it, to apply the Agreement provisionally unless they notified the Depositary that they would not do so. Furthermore, States applying the Agreement provisionally would do so " in accordance with their national or internal laws and regulations". The purpose of the language was to overcome the difficulties of those States that had constitutional requirements for parliamentary authorization.[10]

23. One commentator has written: "As for the legal effects of provisional application, a distinction can be made between its effects at international level and the national level. Although it seems beyond any doubt that the agreement to apply a treaty provisionally is enforceable at the international level, the legal effects of provisional application at the national level are the

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amendments to the OAS Charter for the admission of new Member States. In 1967, the Council of Ministers of the Latin American Free Trade Association ("LAFTA") adopted a resolution immediately providing for Sub-regional Agreements, in effect amending the LAFTA Constitution, without using the amendment procedures specified in that Constitution.

[9] Other examples in this category are: the Statutes of the International Centre for Genetic Engineering and Biotechnology (Article 21.3), adopted in 1983 under the auspices of the UN Industrial Development Organization, provided that the Statutes would be applied provisionally "within the limits allowed by national legislation". The 1994 Energy Charter Treaty (ECT) provides that it is to be applied provisionally by a state "to the extent that such provisional application is not inconsistent with its constitution, laws and regulations."

[10] *See* UNGA Res., Meeting dated 28 July 1994 (A/RES/48/263), 101st Plenary Meeting and the Agreement in the Annex.

outcome of a complex legal equation that is likely to differ from state to state."[11]

24. An example of a failed attempt at provisional application is found in ICAO practice. The Convention on International Civil Aviation (Chicago Convention) does not contain explicit provision regarding provisional application of amendments. ICAO's former Legal Adviser, in describing a proposal for an Assembly consensus decision to apply provisionally an amendment to the Convention in 1989 stated that "such consensus was not forthcoming. One single objection in the Assembly frustrates the possibility of provisional application. Unanimity is required."[12]

D. International Telecommunication Union (ITU) Practice

25. For many years, ITU Plenipotentiary Conferences have provisionally applied new or revised constituent instruments of the ITU.[13] The most recent example was the adoption of a new ITU Constitution and Convention by the ITU Additional Plenipotentiary Conference (Geneva, 1992 (APP-92)), which made substantial changes to the structure of the Union as it existed under the ITU Telecommunication Convention (Nairobi, 1982).[14]

26. The 1992 Conference also adopted Resolution 1 providing that the provisions of the Constitution and the Convention relating to the new structure and working methods of the Union should be applied provisionally as from 1 March 1993.

27. In advising the Conference of its authority to adopt the Resolution, the ITU Legal Adviser stated that "the ITU, as any other international organization, was a living organism or body being in a constantly evolving

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11 R Lefeber, *The Provisional Application of Treaties, in* J. KLABBERS AND R. LEFEBER (EDS), ESSAYS ON THE LAW OF TREATIES 90, 95 (Kluwer Law Int'l 1998).

12 M. Milde, *The Chicago Convention: Are Major Developments Necessary or Desirable 50 Years Later,* 19 (1) ANNALS AIR & SPACE L. 413 (1994).

13 See, for example, Additional Protocol I to the International Telecommunication Convention, (Atlantic City, 1947) (which revised the 1932 Madrid ITU Convention), concerning transitional arrangements for the new Convention before it came into force.

14 Note that the Constitution and Convention of the ITU (Nice, 1989) did not enter into force, and was superseded by the 1992 Constitution and Convention. See, in this respect, the Analysis of the Legal Aspects Related to amending the Constitution and Convention of the ITU (Nice, 1989) by A. Noll, ITU Legal Adviser, ITU Doc. 131-E, 21 March 1991. It is also noted that many States which are Parties to the 1982 Nairobi Convention are not all Parties to the 1992 Geneva Constitution and Convention. The fact that States are legally subject to different ITU constitutions does not appear to prevent the effective functioning of the ITU. However, attention is drawn to Resolution 69 of the ITU Plenipotentiary Conference, Kyoto, 1994, urging Members which were not yet Parties to the 1992 Geneva Constitution and Convention, to provisionally apply them until they had become Parties.

process, thus adapting itself to the new telecommunications environment and the changing requirements of its Member States". At the ITU there was a "well-established practice with regard to the concept of provisional application". He further advised that, under Article 25.1 of the Vienna Convention, a treaty was applied pending its entry into force if either the treaty itself so provided, or the negotiating States have in some other manner so agreed. One "such other manner" would be the Resolution on provisional application under discussion.[15]

28. According to consultations between the Inmarsat General Counsel and the ITU Legal Adviser, the Resolution was adopted by consensus. The legal effect of the provisional application was that it governed the functions of the various policy making organs of the ITU and the Secretariat, and enabled the ITU to enter into commitments on the basis of the new provisions. Financial contributions payable by ITU Members to the Organization were not altered by the new instruments.

E. Inmarsat's Prior Practice concerning Amendments to its Convention and Operating Agreement

29. Prior to the restructuring amendments referred to in paragraph 7 above, Inmarsat had amended its constituent instruments three times. The first and second occasions were in 1985 and 1989 when the amendments to the Convention and Operating Agreement were adopted by the Assembly to extend the institutional competence of the Organization to enable it to provide aeronautical and land mobile services, respectively.[16]

30. On neither occasion did the Assembly decide to apply the amendments provisionally. Due to the time needed to obtain acceptances from a qualified majority, the aeronautical amendments only entered into force in 1989, and the land mobile amendments in 1997. These long delays were attributable to the legislative action required in some countries, or low priority or administrative impediments in others.

31. At its Tenth (Extraordinary) Session in December 1994, the Assembly adopted amendments to the Convention and Operating Agreement to change the name of the Organization and to make a small change to Article 13 of the Convention relating to the composition of the Council. The Assembly also decided that the amendments would be implemented *with immediate*

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[15] Statements by Alfons Noll, ITU Legal Adviser, reported in Minutes of the Ninth and Twelfth Plenary Meetings of the ITU Additional Plenipotentiary Conference, Geneva, December 1992, APP-92/204-E at 3-5 and 207-E, at 12-13.

[16] Reports of the Fourth and Sixth (Extraordinary) Sessions of the Inmarsat Assembly. See also *supra* note 4. In practice, Inmarsat started its aeronautical and land mobile services before for the respective amendments entered force, without objection from any Party. Although the introduction of the new services had some budgetary implications for Signatories, the amendments did not affect Inmarsat's structure or the interests of Parties and Signatories.

effect pending the formal entry into force of the amendments. The words "*provisional application*" were not used because several Parties were unable to agree to the use of the doctrine without prior legislative approval. In view of the minor character of the amendments, they did not oppose the consensus decision using the alternative wording. The discussions at the Tenth Session foreshadowed the more difficult negotiations later on the provisional application of the restructuring amendment.[17]

F. Other Legal Sources

(a) Expert Opinion

32. Inmarsat obtained written advice from an expert in treaty law as to the authority of the Assembly to adopt transitional arrangements to enable restructuring amendments to the constituent instruments to be applied provisionally, pending their formal entry into force. A summary of the advice is given in this Section.[18]

33. The advice took into account that Inmarsat had been specifically created to provide economically viable commercial services in the new field of satellite telecommunications and that to give the relevant provisions of the Convention a static or one-time meaning would lead to an unreasonable result. Reference was made to a leading treatise on international law stating that "There is room for the view that a treaty of a 'constitutional character' should be subject to somewhat different rules of interpretation, so as to allow for the intrinsically evolutionary nature of a constitution.[19] It was legitimate to take into account technological developments and changed commercial practices in telecommunications. In addition to the explicit purposes of the Organization, other provisions required it to act economically and efficiently, and these directives provided a sufficiently solid basis to apply restructuring amendments quickly in order to achieve the original purposes of the Organization in conditions which had substantially changed since its inception.[20]

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[17] *See* Report of the Tenth (Extraordinary) Session of the Inmarsat Assembly. The 1994 amendments had not entered into force at the time of the provisional application of the restructuring amendments, and were effectively superseded by those amendments.

[18] Legal Opinion dated 22 April 1994 of Professor S Rosenne, (IWG/8/3, Annex II), and supplementary Opinion contained in the Letter dated 11 April 1998 from Professor Rosenne to the Inmarsat General Counsel.

[19] 1/2 OPPENHEIM'S INTERNATIONAL LAW 1268 (Jenning & Watts eds., 9th ed., 1992).

[20] Article 3 (1) of the Convention set out Inmarsat's purposes, which were, inter alia, to provide maritime commercial, distress and safety of life services. Article 5 (3) required it to operate "on a sound economic and financial basis, having regard to accepted commercial principles". Article 15 required the Council to carry out Inmarsat's purposes "in the most economic, effective and efficient manner consistent with the Convention and Operating Agreement".

34. The Vienna Convention (Article 5) applied to Inmarsat, without prejudice to its relevant rules as found in its constituent instruments, and also its decisions and established practice. These relevant rules included the express powers of the Assembly of Parties under Article 12 (1) (g) and 34 (1) of its Convention to decide on amendments, and the requirement under Article 11 (2) that Assembly decisions on matters of substance be taken by a two-thirds majority of Parties present and voting.[21]

35. Therefore, the Assembly had *explicit* power to adopt the restructuring amendments to adapt the Organization to current conditions. The Assembly also had *inherent* power to decide to apply the amendments provisionally, without waiting for the amendments to enter into force, if this was found to be necessary in the circumstances. This quick implementation was an essential feature of the restructuring which would have been meaningless without it. There was also a previous practice of Inmarsat providing for immediate implementation of amendments pending formal entry into force (see paragraph 31) above.

36. It would be politically desirable for the decisions on both the amendments and their provisional application to be adopted by consensus or, if that could not be achieved, by a qualified majority required under Article 34 (2) for the amendments to enter into force. This would provide assurances that the amendments would formally enter into force as soon as possible. However, it would be legally sufficient for the Assembly's decision on provisional application to be taken by two-thirds of the Parties present and voting.

37. Parties that were unable to accept the amendments could not frustrate the will of the majority. They had a choice of remaining in the Organization without themselves ratifying the amendments or of withdrawing from the Organization pursuant to Article 29 of the Convention.[22]

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[21] The advice of Professor Rosenne also stated that, although technically the Vienna Convention entered into force on 27 January 1980, *i.e.*, after the Inmarsat Convention and Operating Agreement (*supra* note 3), the Vienna Convention was widely regarded for the most part as declaratory of customary international law, and could accordingly apply to Inmarsat. It was also confirmed that although some of the Signatories to the Operating Agreement were technically private law entities, the Agreement was a treaty for the purposes of the Vienna Convention, inter alia, because of its interdependence with the Inmarsat Convention, and because it contained various procedural provisions showing that the Parties regarded it as a treaty.

[22] A recent comment was that it would be unfair for any one member to be able to prevent the whole organization from introducing an amendment desired by its other members. In general it would be better practice to introduce the amendment and allow the dissenting member to withdraw from the organization. *See* H.G.SCHERMERS & N.M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW*, sec. 1171 at p.727 (3rd rev. ed.1995).

(b) Other Aspects

38. Taking into account the precedents outlined in Section V.C above, and the legal opinion given in Section F (a), the Inmarsat General Counsel advised Parties that the Assembly would have inherent power in the circumstances to decide on provisional application of the amendments particularly in order to ensure that one of the main purposes of the Inmarsat Convention, namely the provision of space segment capacity for GMDSS services, could be fulfilled.[23]

39. This advice was supported by the doctrine and practice relating to dynamic interpretation of treaties that are the constituent instruments of intergovernmental organizations, including the advice given by the ITU Legal Adviser, referred to in paragraph 27 above.[24] The growth in the number of IGOs with large memberships made the task of securing unanimous approval to amendments very difficult.[25] Inmarsat's prior experience with amendments showed that it was a very long process even to obtain the qualified two-thirds majority needed for acceptance of uncontroversial amendments.

40. The relevant provisions of the Inmarsat Convention provided that amendments which entered into force upon acceptance by the qualified two-thirds majority were binding on all Parties, including those which had not accepted them. This in fact occurred with both the 1985 and 1989 amendments, as indicated in section V (E) above. The dissenting Parties always retained the right to withdraw from the Organization if the amendments were unacceptable to them, though none did so.

41. Another legal issue was whether a dual regime was possible under the Inmarsat Convention. This issue was raised because a few Parties questioned whether they could remain subject to the Convention, as unamended, while most others would be subject to the restructured Convention. The ITU precedents show that while some States became Parties to the 1992 Geneva Constitution and Convention others remained Parties only to the 1982 Nairobi Convention. In the ITU such a dual regime was possible because the obligations on States as ITU Members were not significantly affected by the particular Constitution and Convention to which they were Parties, nor did it affect the continued operation and activities of the ITU in practice, despite the considerable internal structural changes to the Organization.

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[23] On the topic of inherent powers, see, for example, Seyersted, *International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon Their Constitutions?*, 4 INDIAN J. INT`L L. 1 (1964), especially at 4, 19-26, 40 and 54.

[24] On the topic of dynamic interpretation of treaties that are the constituent instruments of IGOs, see, for example, MALCOLM N. SHAW, INTERNATIONAL LAW 586-587 (3rd ed.,1991); D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 338 (4th ed., 1982) and E. Lauterpacht, Q.C., *The Development of the Law of International Organizations by the Decisions of International Tribunals*, IV Extrait R.C.A.D.I. 379 & 458-459 (1976).

[25] *See* E. Schwelb, *The Amending Procedure of Constitutions of International Organizations*, 31 BRIT. Y.B. INT'L L. 50-51 (1954).

42. However, the advice given by the Inmarsat General Counsel to Parties was that a dual regime was not possible in Inmarsat's case. Article 32(5) of the Convention did not permit any reservations to be made and Article 34 (2) provided that once amendments entered into force, they were binding even on Parties which had not accepted them.[26] Parties could not be subject to varying provisions, particularly because of the integrated nature of the investment share structure under the Operating Agreement and the related financial obligations of Signatories, as well as the rights of membership of Signatories in the Council.

VI. Consultations with Inmarsat Parties

43. It was essential that the support of Inmarsat Parties for provisional application be assured. The urgent need to restructure had been expressed by the Inmarsat Assembly at its Eleventh (Extraordinary) Session in February-March 1996.[27] The Intersessional Working Group of Parties and Signatories (IWG) which had been mandated by the Assembly to recommend the restructuring model, and the Inmarsat Council, had explicitly requested that Parties express views as to the provisional application of amendments. Without such support, the task of restructuring would have been pointless for the reasons set out in paragraph 9 above.

44. Therefore, in parallel with the negotiations on the form of the restructured Inmarsat, extensive consultations were held with Parties both through correspondence and meetings of legal experts. Parties were informed of the results of the research into the relevant law and the various precedents referred to in Section V above.

45. A Legal Panel held at Inmarsat in January 1996[28] as well as consultations with individual Parties found that a variety of practices existed. In some countries provisional application of treaty amendments could take place by government decision. In others, legislative approval may be required depending on the scope and nature of the amendments. In some countries, however, provisional application could not be approved without prior legislative approval.

46. Views expressed included the assertion that each Party retained the right to implement provisional application within its own jurisdiction in accordance with its domestic law. In the absence of explicit authority in the

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[26] In at least one State, Japan, the 1989 land-mobile amendments required parliamentary approval and as a result Inmarsat's land mobile services were not authorized in Japan until that approval was obtained. After the 1994 change of name amendment, the former name continued to be used in official documentation in Japan because the change also required legislative approval. These national legal requirements did not prevent the Japanese Signatory participating in Inmarsat Council decisions regarding the implementation of the Organization's land mobile service activities, nor did they lead to any objection by the Japanese Party to the use of the new name by the Organization internationally. This internal legal situation did not result in a "dual regime" but reflected the practice referred to in paragraph 59 of this article.

[27] Report of the Eleventh (Extraordinary) Session of the Inmarsat Assembly.

[28] IWG/13/8, Annex VIII.

Convention for provisional application, unanimity or at least a consensus in the Assembly would be needed. Even though amendments were binding on all Parties once they entered into force, the dissenting minority had a right to expect that the acceptance procedures under Article 34 (2) would not be effectively overridden by provisional application. Indeed, there was a view that such a decision could be subject to legal challenge.

47. In April 1997, a Meeting of Legal Experts from Inmarsat Parties and Signatories met and addressed the provisional application issue, against the background of the legal opinions and research, and the results of the consultations with Parties. For reasons referred to in paragraph 31 above, the terminology "rapid implementation" was used at that time, to ease the consideration of the subject for Parties who had difficulty with agreeing to provisional application. However, for consistency, the phrase "provisional application" is generally used in this article.

48. The Meeting noted that:

(a) according to public international law, the treaty amendments can be provisionally applied if the Parties decide to do so;

(b) there were differing views about whether the Parties may do so through the Assembly by a two-thirds majority or must use another procedure;

(c) some Parties have internal requirements that will make it difficult to use provisional application.

In light of these unresolved issues, the Meeting requested:

(a) Party and Signatory legal experts to work on pragmatic solutions to the matter of provisional application; and

(b) the IWG to give priority to resolving these issues, so that the model adopted by the Assembly can be rapidly implemented.[29]

49. The pragmatic solutions sought were intended to enable Parties, which could not vote in favour of provisional application but which supported politically the early restructuring, to refrain from obstructing an Assembly decision on provisional application.

50. Those Parties were informed that the restructuring amendments did not impose any additional financial or other obligations on them, although their Signatories, many of which were government-owned entities, would lose management rights as members of the Council. The only other consequences on the domestic plane for those Parties were that their Signatories would need to be authorized to exchange their investment shares under the Inmarsat Operating Agreement for an equivalent ordinary shareholding in the new corporate structure. If this authorization could not be given until the parliamentary processes had been completed for acceptance of the amendments, the ordinary shares to which the Signatory would be entitled would be held by the new Companies under a trust arrangement until the processes had been completed. The Party would also have the right to withdraw from membership of the Organization, in which case the value of its Signatory's investment shares would be repaid to the Signatory.

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[29] Report of the Meeting of Legal Experts, April, 1997, (IWG/18/2, Sec. 8.1 and IWG/19/3).

51. The Director General pursued the consultations with Parties. While many Parties indicated that they would be able to support provisional application, there were a number that were unable to do so for the reasons mentioned and would not give an indication as to whether or not they would actively oppose a decision of the Assembly. The discussions with Parties generally indicated that it would be desirable to seek a decision by consensus, which in this case was interpreted to mean the absence of any active objection to a decision to use provisional application.

VII. The Final Steps

A. Inmarsat Assembly Decisions

52. At further Meetings of Legal Experts in January 1998 and the IWG in February 1998, recommendations were made to the Assembly as to the provisional application of the restructuring amendments under conditions which recognized the overwhelming commercial imperatives necessitating the prompt restructuring. It was also recommended that the provisional application decision be accompanied by an express acknowledgement by the Assembly about the need for consistency of the decision with the national laws of each Party. The text of the wording is set out in paragraph 58 below. This became known as a "subordination clause", *i.e.* subordinating the decision to national law requirements at the national level.

53. At its Twelfth Session in April 1998, the Assembly (after a vote) adopted and confirmed amendments for the restructuring of the Organization. It deferred a decision on provisional application but (a) urged Parties with domestic legal constraints on the use of that doctrine to seek pragmatic solutions, consistent with their domestic law, and (b) as the restructuring would, in practice, be irreversible, urged all Parties to use best efforts to accept the amendments promptly, once a decision on provisional application had been taken.[30]

54. The question of deciding upon provisional application of the restructuring amendments therefore came before the Thirteenth (Extraordinary) Session of the Assembly in September 1998.

55. The legal advice given to the Assembly by the Inmarsat General Counsel on the issue of provisional application referred to international law and practice, and the recommendations of the Meeting of Legal Experts and the IWG as in paragraph 48 above. He advised that Inmarsat Assembly decisions are normally taken by a two-thirds majority of Parties present and voting, and that a consensus was not legally required under the Inmarsat Convention or Article 25 of the Vienna Convention. However, as it would be practicably impossible to reverse the restructuring, once implemented, it would be desirable to have the support of two-thirds of the Parties

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[30] Report of the Twelfth Session of the Inmarsat Assembly (Assembly/12/20), Secs. 8.3 and 8.4.

representing two-thirds of the investment shares to ensure that the amendments would ultimately enter into force.[31]

56. Prior to the Thirteenth Session, there was uncertainty about the actual outcome because, in addition to domestic legal obstacles for some Parties, there was a possibility that other Parties which were not fully satisfied with the form of the restructuring might decide on policy grounds to oppose a decision on provisional application, at least until their concerns had been addressed. As it turned out, however, there was an awareness that the form of the new structure represented a compromise among widely differing Party positions. As most Members were generally in favour of restructuring, no Party was, at the final hurdle, prepared to obstruct the process by formally objecting to a consensus decision.

57. Thus it was that the Thirteenth Assembly Session decided, by consensus, to apply the amendments provisionally on a date to be finally determined by the Council. In so doing, the Assembly emphasized the need for rapid action so as to ensure the future commercial viability of the Organization and thereby guarantee the continuity of the GMDSS services and other public service obligations.

58. The Assembly also noted: "that, in accordance with such decision, Parties "will conduct themselves, in their relationships with each other, the Organization and the Company, within the limits allowed by their national constitutions, laws and regulations."[32]

59. This acknowledgment by the Assembly reflected the practice of other IGOs, cited in paragraphs 21-23 above. It had the practical effect of enabling the amendments to the Convention and Operating Agreement to take effect on the international law plane, while permitting individual Parties to continue to participate in the Inmarsat Organization, consistently with their national law, even if this meant that the amendments had not yet been accepted in their national law.

60. Many Party Representatives at the Assembly made statements on this issue during the discussion which preceded the decision, and many attached written statements to the Assembly Report. Practically all statements supported the provisional application decision, though a few indicated that the question of provisional application was within the discretion of each Party or was a domestic matter.[33]

B. Commercial Implications of Provisional Application

61. The Director General advised Parties during the consultations that from a commercial perspective, there should be no doubts as to the legal effect of the provisional application decision. The legitimacy of the transfer of the assets and business, the disposition of the Signatories' investment shares, financial relations with banks and others, and negotiations with

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[31] Briefing Notes on Provisional Application to the Assembly by the Inmarsat General Counsel (Assembly/13/Report, Annex 12).

[32] Report of the Thirteenth (Extraordinary) Session of the Inmarsat Assembly, Sec. 4.2.

[33] *Supra* note 33, Annexes 11 and 13-31.

future investors and stock exchanges could have been seriously compromised if the legal basis of the provisional application decision was considered to be insecure. The treaty expert who advised Inmarsat on provisional application, also confirmed that as a matter of public international law, the restructuring amendments, as provisionally applied, were effective for the purpose of restructuring the Organization and transferring its business, assets and liabilities to the Companies.[34]

62. As a precaution, the Master Transition Agreement (MTA) signed between Inmarsat, the Companies and the Signatories, which was one of the key restructuring instruments, required the Signatories to waive any rights they might have to challenge the basis of the provisional application decision.

63. Notwithstanding the waiver, provision was made in the MTA for the situation in which either the amendments to the constituent instruments did not enter into force within 15 years of the restructuring date, or any Party to the Convention or a Signatory disputed the provisional application decision under the international arbitration procedures contained in the Convention. If, as a result, the provisional application was determined to be ineffective, the parties to the MTA are required to agree on arrangements to enable the Organization to fulfil its public service obligations under the Convention. This provision was included for completeness and as a long-term precautionary measure. However, as a consequence of the transfer of the assets and business to the Companies, the disposition of Signatories' shares, and the expected dilution of share ownership upon the raising of new capital, it would be extremely difficult if not impossible to completely undo the restructuring.[35]

VIII. Conclusions

64. In answering the legal questions set forth in Section IV above, the Assembly has demonstrated that it has inherent authority to decide on provisional application of substantial amendments to its constituent instruments, effectively transforming the structure of the Organization. It also demonstrated that a consensus decision was sufficient for that purpose. Precedents in other IGOs, including Inmarsat's own prior practice, supported these decisions, as did the legal advice obtained and legal writings cited.

65. It was unnecessary to decide whether, in the face of an objection by a Party in the Assembly to a consensus decision, the Assembly would have had authority to take the decision on provisional application by a two-thirds majority of Parties present and voting. The expert legal opinion obtained and the advice of the Inmarsat General Counsel, as referred to in paragraphs 32-37 and 55 above, was that a decision by such a majority would be valid under the Inmarsat Convention, but the issue is not one that has been legally tested.

66. It is apparent that a dissenting Party can block a consensus decision, and, if unsatisfied with a subsequent qualified majority decision, could

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[34] Letter dated 4 November 1998 from Professor S. Rosenne to the Inmarsat General Counsel.

[35] Master Transition Agreement between the International Mobile Satellite Organization, the new Companies and the former Inmarsat Signatories, Clause 13.

withdraw from the Organization. However, for the reasons given in paragraphs 41-42 above, it would not have been possible for the Party to remain in the Organization under the Convention, as unamended, thereby creating a dual regime.

67. The effect of a future successful legal challenge to the validity or effectiveness of the provisional application decision, or of the eventual non-entry into force of the amendments, is uncertain at this stage, except that the provisions of the Master Transition Agreement referred to in paragraph 63 above would come in to play.

68. The Inmarsat Assembly's decision has substantially furthered State practice in relation to the doctrine of provisional application as it applies to the amendments to constituent instruments of an IGO. It extends the scope of prior State practice, as referred to in the precedents in Section V above, including the practice at the ITU, because of the very substantial nature of the amendments which had the effect of totally transforming the Organization. It demonstrated that such a decision could be taken by consensus. There is no evidence yet that any Party or Signatory, or indeed a third party transacting with the Companies, intends to challenge the legal effect of the decision.

69. It is an encouraging postscript to this article that the Inmarsat Assembly decision was followed soon after by a comparable decision in another ISO. In May 1999, the Eutelsat Assembly of Parties adopted a Resolution authorising the provisional application of substantial restructuring amendments to its own constituent instruments in terms similar to the Inmarsat decision, including the acknowledgement about subordination of the decision to the national laws in respect of individual Parties.[36] This State practice augurs well for IGOs wishing to overcome lengthy amendments procedures in their constitutions in order to adapt themselves rapidly to changing economic and social conditions.

70. Finally, it may also be recalled that the successful outcome of the provisional application issue was due in large measure to the support of many Inmarsat Party and Signatory Representatives and their legal advisers, and to the Chairmen of the Assembly, Council, IWG and Meetings of legal experts. Also acknowledged is the expert advice of Professor S. Rosenne of Israel, whose opinions cited in this article played an important part in the resolution of the issue, the advice given to Inmarsat by Mr A. Noll, former ITU Legal Adviser about relevant ITU practice, and to the research undertaken and legal advice given by the Inmarsat General Counsel, Mr. A. Auckenthaler to the Assembly and other bodies.

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[36] Eutelsat Assembly of Parties, Twenty-Sixth Meeting, Record of Decisions, (AP26-3E), para. 9 (y) and Attachment 2.