

PRIVATISATION
AND
INTERNATIONAL TELECOMMUNICATIONS ORGANISATIONS

by

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Abstract

Moves towards the privatisation of international space telecommunications enterprises to meet the commercial challenges by new private entrants into the field may be contrary to earlier agreements which recognise a need for a global system, and certainly threaten economically the global systems that have been established. The existing global systems are international public utilities which could be destroyed, and steps to privatise may contradict their own basic instruments. Even if change is possible, there are other problems to be coped with in changing the forms and natures of the international entities. Is it wise to incorporate, thus giving a single municipal legal and political system rights of control of a previously independent international facility?

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Preliminary

A problem of giving in a title or topic on which one wishes to present a paper at the IISL is that things can move on between the date a possible title or topic is submitted and the time the paper has to be delivered. There is a risk that one's paper may turn into 'current affairs' or that developments falsify one's thesis, and there is a further risk that others may deal with matters in the same area, and be better fitted to treat of them. That is the case with this paper. The Legal Advisers of each of the telecommunications organisations involved were present at the Oslo session, and this paper has been re-written taking advantage of their presentations.¹ The thrust of the argument has not altered, but the supporting construction has been adjusted.

The inroads of privatisation into international telecommunications require attention. First, there is the whole question of privatisation, the international community having earlier determined against providing the global communications system in that way. Second there are questions as to the ways in which privatisation may be accomplished. Third there is the intrusion (to use a loaded word) of ordinary private companies into the arena of what were in effect international public utilities. These are questions of policy. There are also questions which might to some extent run contrary to the treaty basis and context of some of the entities presently involved.

Introduction

As a matter of history, telecommunications were early identified as a major use of space.² The United Nations saw the potential,³ as did many governments including that of the US, both Presidents Eisenhower and Kennedy⁴ making statements on the matter. Technical problems limiting other methods of long-range communications encountered both by the then cable and the short-wave radio links could be obviated, were the new ideas to prove to be capable of implementation. And, not unimportantly in the early days, for scientists, the development of satellite communications was a useful way in which governments could be persuaded to finance developments and experiment.

The Decisions: INTELSAT, INMARSAT and others

The question, of course, was how might this new technology be best established. Should the matter be left to private enterprise? The fact is that privatisation was then a possibility and the privatisation route was deliberately not followed.

When space telecommunications began, only the US and the USSR had the ability to launch satellites, and only the US looked as though it might be able to set up a system which the other telecommunicationally (sc.?) developed countries would participate. President Kennedy had in a lengthy statement devoted to communications matters, indicated that the US then favoured the private ownership and operation of the US portion of the global system.⁵ But, while existing private US telecommunications companies were willing to undertake the task, it was thought that a special company would be the best vehicle, and the Communications Satellite Act 1962, was passed.⁶ The Communications Satellite Corporation was created and its Articles of Incorporation established.⁷ Stock went on public offer in 1964, its Prospectus⁸ being characterised as 'a litany of caveats'.⁹ Although some foreign ownership of Comsat stock is permitted, the Directors of the Company must all be US nationals.¹⁰

Of course the US decisions did not determine the form of the international developments. There is evidence that the US would have been happy itself to create a satellite

system, to which other countries would become subscribers.¹¹ Certainly other countries feared that possibility.¹² Europe and the British Commonwealth were obvious groups with interests in the system not being US owned.

The long and the short of the matter was the setting up of the International Telecommunications Satellite Organisation in an interim form in 1964.¹³ Negotiation of the permanent arrangements was provided for in the Interim Agreements, and the INTELSAT Agreements were opened for signature in 1971, coming into force in 1973.¹⁴ The development of the international global system by private enterprise was therefore looked at, and decided against.

It is not necessary here to outline or discuss the INTELSAT structure in either its interim or permanent form in any detail. Suffice it to note that Interim INTELSAT was legally constructed of an intergovernmental agreement and an agreement between telecommunications entities, most but not all of which were state departments. The same was true of the 1973 arrangements. Note also that the 1964 Interim Intelsat arrangements were adopted prior to the Outer Space Treaty of 1967, though not the UN Principles of 1963.

INMARSAT went through a different gestation.¹⁵ While INTELSAT might have introduced a maritime system, the USSR and its group had proved unwilling to join that body, and it was thought better that a separate institution should deal with such matters. The INMARSAT arrangements, which also comprise an intergovernmental agreement, the Convention, and an Operating Agreement between telecommunications entities, were opened for signature in 1973 and came into force in 1976.¹⁶

Other systems have followed. EUTELSAT provides telecommunications services in Europe.¹⁷ There are ARABSAT,¹⁸ PALAPA and INTERSPUTNIK.¹⁹ And we now have the more recent arrivals on the international scene such as Panamsat and the systems that use Tongan assigned geostationary slots.²⁰

Other Systems and Privatisation

The first international arrangements were, therefore, set up by way of international organisations. These were, and are, not multinational companies. It is true they were

hybrid beings, but they were specifically not companies registered and established according to the requirements of any municipal legal system. Interim INTELSAT was an association of joint-venturers. Definitive INTELSAT is an international organisation, with legal personality, and with the privileges of an international organisation. So are the others. I will use INTELSAT as the model to discuss, although others could ground the same arguments.

From the beginning, it seems, some were unhappy with the international arrangements. Further, even as the first international arrangements were set up, it was clear that once the technology was developed into reliability, members of INTELSAT and of INMARSAT might wish to enter into other arrangements. To make sure that such developments were not disruptive to, and were tied in satisfactorily with existing arrangements, procedures were specified in the basic agreements to require the technical and the economic coordination of a new system involving a member with the existing. Even so, in the last resort the sanctions deployable in the case of intransigence on the part of a member that wished to enter into another system were recognised to be ineffective.²¹ However, the INTELSAT coordination burden became unrealistic as new systems developed and required to be coped with.²² It was agreed, after a number of years, that INTELSAT could accept 'significant economic harm' to its own system.

But progress in telecommunications systems has been even swifter within the last few years. It is now a question whether the concept of a 'single global system' or even a single regional system can remain. Telecommunications used to be a state monopoly in most countries, except the US. Now most countries have privatised their telecommunications, and permitted a number of other telecommunications entities to come into being to compete within their national markets. Naturally, these entities are also seeking international business. Some, indeed, such as a number of US companies, exist in effect only to provide international service. Smaller entities offering more specialised services are therefore being licensed by states, are being 'coordinated' with their big brothers, and are making incursions into the services and revenue that the older institutions might otherwise see.

Strategies

As I understand it the reaction of the three larger international bodies varies.²³ One point is, however, general. The three major systems are moving towards a dynamic interpretation of their constituent documents. As a principle of interpretation of the US Constitution puts it, 'the constitution must work', and interpretations of the constitution will be sought which, although apparently stretching the terms of the language, do permit the body to work as well as possible. Thus, now that many countries have abandoned prior monopolistic organisation and privatised their telecommunications services, non-Signatories must be afforded direct access to the space segment of the international institutions. To date the UK has gone furthest down this road, British Telecom's Signatory Affairs Office being well on the way to making itself obsolete.

Slightly different considerations on other matters have resulted in the stances taken by the three main international organisations as to other developments.

EUTELSAT looks as though it can continue more or less as it is.²⁴ Much of EUTELSAT's income is from television distribution, a facility its competitors cannot easily provide. Modelling itself on recent INTELSAT practice, EUTELSAT will make it easier for telecommunications entities, other than the members of the Operating Agreement, to use its services (provided that the appropriate member agrees). But it will remain basically a provider to a fairly discrete set of customers within a reasonably unified geographical area.

INMARSAT has budded off INMARSAT-P, a private company owned by members of INMARSAT, and on whose Board INMARSAT itself has two seats.²⁵ The purpose of INMARSAT-P, created in January 1995, is to establish and run a low-level circular orbit satellite system, communicating with hand-held telephones. It is interesting to note that another company sought to patent the idea, and to prevent INMARSAT proceeding further.

INTELSAT, I believe, has discussed whether to turn its entire operation over into a private company to be owned by its members, but participating in international telecommunications just like any other communications provider. Such a transmutation from an international legal person, with a treaty as one of its major bases,

into a company for profit, seems extraordinary. However, at present INTELSAT is more likely to remain in being and to form subsidiaries. These matters remain under consideration.²⁶

Consequential questions

Such developments and possibilities raise a number of questions. These may be thought irrelevant nitpicking in the context of international business and the rapidly movement of the telecommunications marketplace, but it is true that things are moving on quickly, and these matters do not seem to have been properly and fully explored and exposed to general discussion. In the traditional phrase: there is cause for concern. It is a truism that often Space Law has lagged too far behind the situations that require regulation. Are we seeing another example in space telecommunications? I identify certain matters.

International Public Policy?

According to its Preamble, the Outer Space Treaty of 1967 was brought into being because its parties believe that the exploration and use of space be carried to the benefit of all peoples irrespective of their economic or scientific development. Article 1 of the Treaty converts that statement of belief into a rule of law. In so providing the 1967 Treaty repeats statements that were earlier contained in General Assembly Resolutions 1721 (XVI) 1961, and 1962 (XVIII) 1963, the latter being the Principles that were later to be developed into the 1967 Treaty. The 'interest of all' principle has therefore both a treaty base *and* a root in customary international law.

One wonders whether and if so how far possible future privatisation developments fit within the aspiration of 'benefit of all peoples irrespective ...'. Indeed, one might wonder whether the development of private telecommunications companies itself fits the concepts of thirty years ago.

Of course, the answer to the question may reside in the question just formulated. When the previous international space telecommunications arrangements were being established the concept of an international public utility serving the needs of mankind was an attractive one. Nowadays the criticisms of such entities based on their cost and efficiency are given credence. To an extent these criticisms

may be justified, but does that justify the remedy being advocated - private enterprise intended to serve only a limited market?.

But what may be being sacrificed in such a massive change of international public policy, a change that does not seem to have been fully argued in the public forum? For a variety of reasons, including that of the space available, I confine what follows to the INTELSAT question, as that raises the points in a starker form.

Strengths of INTELSAT are the requirements of its constituent documents, which have been met, that it offer a global system; that it provide international public telecommunications services of high quality and reliability;²⁷ that these are available to all parts of the world without discrimination;²⁸ that it provide domestic services on the same basis as international services in certain circumstances, including those of 'difficult terrain';²⁹ and that its rates are the same for each service irrespective of the origin and destination involved.³⁰

Perhaps all this does mean that on some routes INTELSAT charges are higher than that route itself strictly requires to break even. Perhaps it does mean that high density traffic routes to an extent subsidise the less dense traffic from the smaller or less-developed countries. Perhaps it does mean that INTELSAT has been slower in developing some newer forms of service because it was bringing others into use, or maintaining less efficient services that nonetheless were the sort of thing that less-developed countries could afford.

But precisely that sort of approach was and is needed so that the terms of Article 1 of the Outer Space Treaty are complied with. That approach also helps meet the recommendations of various ITU reports which have been concerned with the provision of telecommunication services in the developing countries,³¹ to say nothing of the possibilities as the ITU's new Telecommunication Development Sector gets under way.³² I would be pleased to hear that any INTELSAT development along the lines of privatisation will safeguard these merits for the future.

My own feeling, however, is that the best safeguard for the concept of a global system, serving the world without discrimination, would be for INTELSAT to continue, more or less as an international public utility, deemed to be owned by

mankind, for the benefit of mankind, and irrespective of the technical legalities.

Mutatis mutandis, the same sorts of point could be made by way of critical examination of other possible changes to the international telecommunications organisations.

Other points

Other points occur, which would need to be safeguarded in any development towards privatisation. What happens to the intellectual property that has been gained by the international organisation in its activities to date? Will there be a valuation, and compensation paid to members who decide not to participate in any new entity, but merely to buy service from it? They at present share ownership of an asset, which they ought not simply to lose.³³

In the case of fuller forms of privatisation of the international organisations, or of parts of their activities, we must also ask which legal system will have jurisdiction over any new creation? There are merits and demerits in each potential choice. But beyond that, is it right that the courts of a single state (or of a legal system within a state, particularly of a US state within the US) have technical jurisdiction over the affairs of an entity whose activities can reach into so many different countries, and affect them potentially very severely? Again, suppose that the country of registration of the company were to require persons under its jurisdiction to withdraw service from or otherwise blockade a country with which it has an argument? What would have happened to the concept of the global service provided without discrimination? It is not sensible to rely on a service provided by an entity which could be shut down by a political decision taken elsewhere. That, for example, can be proved by the history of the US's offer to provide launch services for others, which was intended to forestall the development of Ariane. After the Shuttle ran into problems, President Reagan was only too willing to postpone prior contracted launches of non-US payloads to those deemed necessary in the US interest. In short, no state should fully trust another, particularly in commercial matters.

Last, I find myself also wondering how far states have looked at their treaty obligations under such as the INTELSAT Agreement when exercising their duty to licence and supervise the activities of their nationals under Arts. III and VI of

the Outer Space Treaty. Adherence to a treaty implies that the policy of that treaty is the policy of the ratifying state. Developments in some countries, fuelled by the demands of entrepreneurs, seem not to accord with the policies that undergird a number of the existing international telecommunications agreements.

Conclusion

Putting these matters a different way one may ask certain questions. First, has there been a change in international public policy, involving the abandonment in whole or in part of the concept of what amounted to an international public utility created and paid for on behalf of and for the benefit of all mankind? Second, has that change been fully argued and brought to public attention so that everyone knows what is happening? Third, if there has been a change in policy, soon to be followed by a change in structures, what steps have been taken to preserve or even enhance compliance with the requirements of art. 1 of the Outer Space Treaty?

NOTES

1. In each case I have assumed that these papers are printed elsewhere in this volume. However, their IAF identifiers have also been given, so, if necessary, the papers can be retrieved through the IAF Offices at 3-5 rue Mario Nikis, 75015 Paris, France.
2. See F. Lyall, *Law and Space Telecommunications* (Aldershot: Dartmouth Publishing; Gower Press: Brookfield VT, 1989), 31-6.
3. Cf. Part D of GA Res. 1721 (XVI)(1961) indicating the Assembly's 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'; and Part E.3 of GA Res. 1802 (XVII)(1962) emphasising '... the importance of international cooperation to achieve effective satellite communications which will be available on a world-wide basis.'

4. Statement on Communication Satellites by President Eisenhower, Department of State Bulletin, 16 January 1961; *Documents on International Aspects of the Exploration and Use of Outer Space, 1954-1962*, Staff Report, Committee on Aeronautical and Space Sciences, US Senate, 1963, 88th Cong., 1st Sess. Doc. no. 18 at 186. Cf. President Kennedy's *Special Message to Congress on Urgent National Needs*, 25 May 1961, which, apart from setting the famous objective of putting a man on the Moon by the end of the decade, also asked for additional funding to speed 'the use of space satellites for world-wide communications.' See *Public Papers of the President: John F. Kennedy* (US Gov Printing Office, 1961) pp. 403-5, or the *Documents* cited in this footnote, 202-4 at 203.
5. *Statement on Communication Satellite Policy*, 24 July 1961; see the *Kennedy Public Papers*, above n.4 at 529-32, and excerpted in *Documents*, above n.4 207-8.
6. Public Law No. 624, 76th Cong., 2d Sess., 76 Stat. 419; (1962) 1 ILM 331-8. Note the Act has been subsequently amended.
7. Available from the Company. The Articles in their initial form are printed (1963) 2 ILM, 395-416 and in the Hearings on the nomination of the incorporators; *Nomination of Incorporators*, Hearing before the Committee on Aeronautical and Space Sciences, US Senate, 19 March 1963, 88th Cong. 1st Sess., 43-51. In that source the Bye-laws of the Corporation are at 51-63, and an annotated 'legislative history' and an annotation of the Articles appears at 112-23.
8. A preliminary form of the Prospectus is printed (1964) 3 ILM, 571-605. The final form is in *Satellite Communications - 1964, Part 1*, Hearings before a Subcommittee of the Committee on Government Operations, US House of Representatives, 1964, 88th Cong. 2d Sess., 597-657.
9. *Newsweek*, 18 May 1964, 87.
10. Communications Satellite Act, 1962, s.303(a); Communications Satellite Corporation Articles, art. VIII. s.8.02.
11. *Satellite Communications - 1964*, cited above n.8 Part II at 660.
12. Cf. Statement by the UK Postmaster General, (1963-4) 690 *House of Commons Debates*, 421.
13. Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, and Relative Special Agreement, (1964) 3 ILM 805-14.
14. Agreement relating to the International Telecommunications Satellite Organisation (INTELSAT) (1971) 10 ILM 909, with relative Operating Agreement at 946. These documents are also respectively, (1973) UK Cmnd. 5461; 23 UST 3813, TIAS 7532; and (1973) UK Cmnd. 5461; 23 UST 4091, TIAS 7532.
15. See F. Lyall, *Law and Space Telecommunications* (above, n.2), 209-19.
16. Convention on the International Maritime Satellite Organisation (INMARSAT) (1979) UK Cmnd. 7722; 31 UST 1, TIAS 9605; (1976) 15 ILM 1051-71.
17. Convention and Operating Agreement of the European Telecommunications Satellite Organisation (EUTELSAT), 1982.
18. *Space Law and Related Documents*, 2d ed., Committee on Commerce, Science and Transportation, US Senate, 101st Cong. 2d Sess. 395.
19. *Space Law* (above, n.18) 379.
20. D. Riddick, 'Why does Tonga own Outer Space?', (1994) 19 *Air and Space Law*, 15-29.
21. Art. XIV of the INTELSAT Agreement provides the most numerously used procedure. INMARSAT, EUTELSAT and ARABSAT went through those requirements. These bodies have their analogue procedures as well.
22. On the INTELSAT experience to 1988, see Lyall (above, n.2) 154-78.

23. The various positions are indicated in the papers by the legal advisors which are cited immediately below.
24. C. Roisse, 'Recent developments at EUTELSAT', IISL-95-IISL.3.05, printed elsewhere in this volume.
25. A. Auckenthaler, 'Recent Developments at INMARSAT', IISL-95-IISL.3.04, printed elsewhere in this volume.
26. D.G. Wear, 'INTELSAT: Evolving to Meet the Challenges of a New International Telecommunications Marketplace', IISL-95-IISL.3.01, printed elsewhere in this volume.
27. INTELSAT Agreement, art. III(a).
28. INTELSAT Agreement, art. III(a).
29. INTELSAT Agreement art. III(b).
30. INTELSAT Agreement, art. V(d).
31. A number of ITU documents are significant, including 'The Missing Link' (the Report of the Maitland Commission), 1985, and 'The Report of the Secretary General's Advisory Group on the Changing Telecommunications Environment', (the Report of the Hansen Committee)(February 1989).
32. Cf. F. Lyall, 'The International Telecommunication Union Reconstructed' (1994) 36 Proc. IISL, 78-88.
33. Cf. Bradford L. Smith, 'An Industry Perspective on Space-related IPR', IISL-95-IISL.1.02, printed elsewhere in this volume.