

DEVELOPMENTS IN INTERNATIONAL TELECOMMUNICATIONS

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Abstract

The period 1997-8 has seen significant developments in international telecommunications, as the two global international satellite organisations have developed their responses to the requirements of modern conditions, INTELSAT by spinning off a separate company for certain of its activities, and INMARSAT by a more basic reformulation of its very structure as it converts its business into a private company supervised by a much attenuated international entity. In addition the ITU has held an important Administrative Radio Conference, which has not, however fully solved problems identified at the Kyoto Plenipotentiary Conference of 1994.

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1. Introduction

This paper, although intended to be free-standing, is in fact a continuation of discussion of matters which have previously taken up at earlier Colloquia of the Institute, in particular the meetings in Oslo in 1995 and Peking in 1996. Of the various developments that can be chronicled international telecommunications in the period 1997-8, two areas stand out, one the changes occurring in the global telecommunications satellite organisations, and the other certain of the results of the 1997 World Radiocommunication Conference (WRC) of the International Telecommunication Union (ITU).

2. Global telecommunications satellite organisations

The two major global telecommunications satellite organisations, INTELSAT and INMARSAT, were the result of discussions and negotiation which took place on the basis of presuppositions

and attitudes very different from those to be found today. At the time the satellite organisations were founded the telecommunications providers of most countries were government agencies - the US being the major exception. The interests, and the powers of such government agencies providing telecommunications services were not the same as those of the commercial companies of the 1990s. The broad criticism can be made that the recent huge developments of new services and technologies would not have occurred under the prior way of organising these matters, and that commercial initiative and risk-taking is a better way to proceed.

In one aspect, however, the introduction of satellite telecommunications itself produced innovation. In the 1960s inter-governmental organisations then reflected the view that sovereign states were equal, that each member state of an organisation therefore had one vote and therefore had an equal influence in its working. To some extent this changed with the new entities. The constitutions of the two satellite organisations were compromises, hybrids designed to accommodate the practical requirements of the new projects.¹ In both a distinction was made between the Parties involved in the Intergovernmental Agreement, which are states, and the Signatories to the Operating Agreement, which are individual telecommunications entities, a single Signatory being designated by each state Party for the

purpose. Formally speaking the Intergovernmental Agreement of each organisation retained the principle of 'one-state one-vote' for decision-making by the Parties, and this was also carried through into the Meeting of Signatories in INTELSAT, where each Signatory has one vote. However, the financial responsibilities of each organisation were laid on the Signatories in proportion to their use of each system, and this proportionate utilisation was carried forward to weight decision-making in both the INTELSAT Board of Governors and the INMARSAT Council.

This system worked very well. INTELSAT established its global system on a basis of universal access, uniform rates for the same service everywhere in the world, and a concept of public service. INMARSAT did likewise within its more restricted intentions of providing at first a maritime service, and more recently general mobile services. However, for the last few years the two organisations have had to cope with the pressures of competition from other service providers and the privatisation of their Signatories, as well as with the new tenets of commercialisation and the general urge towards privatisation that is to be seen in much of the world today. Whether commercialisation and privatisation are justifiable under all the circumstances in which they are urged is, of course, arguable. But such is the environment on which

INTELSAT and INMARSAT now have their being.

In response to these new circumstances, both organisations are undergoing changes. To an extent these have followed the indications given in the IISL Colloquium in 1995,² but there are variations. One organisation is to continue more or less as it is, but with part of its business separated off into an independent company. The other is to transform itself. In both instances to an observer what is important is the way in which each organisation copes with the commercial requirements which the new international telecommunications environment has laid on it, while at the same time retaining the general public service obligations which are also to be found within its *raison d'être*. International telecommunications are important. The improvement of world telecommunications was early identified by the United Nations as one of benefits of space. The experience of the last three decades, shows that the UN was not wrong.³

2.1 INTELSAT

INTELSAT has been under considerable pressure, much of it from US interests who have attacked both it and the Communications Satellite Corporation (COMSAT), the US company established by Act of Congress to act as the US Signatory and participant in the INTELSAT

system.⁴ The strength of newer providers of telecommunications services has built up both internationally and internally particularly in North America. Other telecommunications entities have wished to enter the general international telecommunications satellite business and have viewed both INTELSAT and COMSAT as obstacles in their way. INTELSAT has coped with these in a manner which was foreshadowed by INMARSAT - the creation of a separate company to provide some of the services in which it has encountered a good deal of its competition.

Of course competition was always something which INTELSAT was likely to encounter. It was for that reason the procedures of Art. XIV(d) of the INTELSAT Agreement allowed INTELSAT to make findings as to 'significant economic harm' which it might incur were an INTELSAT Signatory to enter into another satellite telecommunications system that might drain business from INTELSAT itself. Over the years the operation of Art. XIV(d) caused difficulty and debate, but INTELSAT itself was growing stronger and more able to sustain such possible diversion of traffic. The end of the process came in March 1997, when INTELSAT decided that the level of 'harm' at which it should register concern should be raised to infinity. In other words, INTELSAT then reckoned that it was sufficiently

healthy not to require the potential protection of an adverse Art. XIV(d) finding. But such a step was not the end of the story. The nature of the competition in some services required a different strategy.

Following extensive discussion and debate, not to say argument, a working party of INTELSAT in February 1998 proposed the creation of a new company, to be incorporated under the laws of The Netherlands. Originally this company was given the temporary name 'INTELSAT New Company' (INC) but it has subsequently been named New Skies Satellites NV. The INTELSAT Board of Governors recommended approval of this development, and the Twentieth Eighth Meeting of Signatories gave its approval on 27 March 1998 at a meeting in Salvador, Brazil. Four days later the Twenty-Second Meeting of the INTELSAT Assembly of Parties, also meeting in Brazil on 30-31 March 1998 also gave its approval and the new company has been created.

The New Skies Satellites company at first will operate five INTELSAT satellites, transferred to it at book value from INTELSAT. These satellites are those located at 57°E, 183°E, 319.5°E and two at 338.5°E, as well as a K-TV satellite which will be placed at 95°E. From these locations and in due course from additional satellites the company will operate multi-regional video and interactive multimedia services for both business and individual

customers. Of course there are some existing contracts relating to these satellites, and these have been safeguarded, as have any obligations as to public service and cable restoration. With these provisos, the orbital registration responsibilities for these satellites have been transferred to The Netherlands, together with the appropriate radio frequency assignments.

So much for the hardware; what about the new company and its relationship with INTELSAT? Throughout the new schema the intention has been that New Skies NV will operate as a wholly independent entity, detached from INTELSAT concerns. There will be no cross-representation between the INTELSAT Board of Governors and the New Skies Board, nor will any officer or employee of INTELSAT be represented on the New Skies Board. INTELSAT does retain a 10% shareholding in New Skies, but that shareholding, in name of INTELSAT, is held in a non-voting trust and with no possibility of representation on the New Skies Board. In other words INTELSAT is not in a position through share-ownership to exercise any influence on the activities of New Skies. The other shares in the company are owned by the individual Signatories to the INTELSAT Agreement, in proportion to their weighting within the INTELSAT system as at the date when the New Skies company was set up. However, the new company has power to

increase its share-holding by public offering. The first public offering is probable in about a year from the inception of the company, and it, and subsequent offerings, are likely to alter or dilute the original balance of share-holding in the company. It may be thought that such share-offerings and/or the sale of shares, may result in one share-holder becoming dominant. However, the maximum that any investor can own of the share capital of the company is set at 17%. This should prevent the company from becoming prey to one of the media empires. That said, presumably different provinces of an empire might become individual share-holders, but act in concert. I would be relieved to hear that such a possibility has been guarded against.

The new company is taking its chances in the international market for multi-regional video and interactive multimedia services. It is to operate as a normal company in the normal commercial environment, subject to the regulatory requirements of any country in which it may operate. It lacks the privileges and immunities which INTELSAT had as an international organisation, and INTELSAT and its Signatories have specifically waived any immunities which they might otherwise have been able to claim in their relations with New Skies NV. In addition, it is intended that, like INTELSAT, New Skies NV will operate in a non-discriminatory manner giving access to all who may wish it, and operating

within the bounds of fair competition. The News Release dealing with the Assembly's approval of the new company, contains a paragraph from a policy statement also adopted by the Assembly. The Assembly '... reaffirms its fundamental intent to ensure that New Skies will operate on a level playing field with its competitors. Parties therefore firmly resolve to ensure that all satellite service providers, consistent with national law and international obligations, will receive fair and non-discriminatory treatment in their markets.' I wish I could be confident that intent will be fulfilled. The phrase 'consistent with national law' in the Assembly resolution is not entirely reassuring.⁵

INTELSAT is left with its core business. The provision of global telecommunications services by satellite. The provision of public telecommunications services, non-discriminatory access to services, the principle of the same price for the same service in any part of the world - all continue. But it remains to be seen whether these steps are sufficient to repel those who would prefer to see INTELSAT cease to be, and leave the international telecommunications market open to commercial considerations only. I hope that INTELSAT continues. It fulfils in part at least the ideal of a global telecommunications facility open to all on terms of equality, and the principle of 'benefit to all' enshrined in Art. I

of the Outer Space Treaty is in measure implemented.

2.2 INMARSAT

INMARSAT has taken a different course.⁶ It anticipated INTELSAT in creating the ICO company some years ago to set up an independent a low earth orbit (LEO) satellite telephony system. It remains to be seen how that company will fare in competition with the other LEO systems which are coming on stream. But the question of the best manner in which to achieve its major purposes continued to be a question for INMARSAT.

In 1998 the matter was decided. The actual conduct of INMARSAT operations and the provision of its services is to be transferred to a Company, which, if it is incorporated in the United Kingdom, is likely to be called 'INMARSAT Plc'.

INMARSAT itself will continue to exist as an international organisation, charged with the responsibility of supervising the work of the Company, but the Operating Agreement between the Signatories designated by the Parties to the Convention terminates. Signatory status disappears under the new system. Accession to the Convention and membership of the Organisation will remain open to all states, The former provisions as to the linking of utilisation, investment, return and voting weight among Signatories within the decision making of INMARSAT will vanish. Shareholding will deal with investment and

return, and in addition the Company will be able to make ordinary commercial arrangements as to financing with Banks and other sources. The Company will be open to anyone who cares to invest in it, whether state, corporation or individual investor.

Under the new arrangements the Organisation will continue to have international personality and the usual privileges and immunities, together with those secured by an amended Headquarters Agreement with the United Kingdom. The new Organisation is to have only two Organs, an Assembly composed of all the Parties to an amended Convention on the International Mobile Satellite Organisation,⁷ and a Secretariat headed by a Director (Art. 5). The Assembly is to meet regularly every two years, and extra-ordinarily on the usual occasions for such rules (Art. 6). Each Party has one vote, and decisions on matters of substance are taken by a two-thirds majority of those present and voting (Art. 7) The main function of the Assembly is to deal with the purpose, general policy and long term objectives of the Organisation, and with the activities of the Organisation relating to certain basic principles (Art. 8(a)). These are expressed as Purposes of the Organisation in Art. 3 with their implementation being dealt with in Art. 4. The Purposes of Art. 3 include continuing to secure the provision of global maritime distress and safety services (GMDSS), the

provision of services without discrimination on the basis of nationality, acting exclusively for peaceful purposes, and acting in a manner consistent with fair competition, 'subject to applicable laws and regulations'.⁸ Interestingly there is also a separate principle of seeking to serve areas where there is need for mobile satellite services (which I would have thought is a global expression), but with an additional requirement to give due consideration to the rural and remote areas of developing countries. This last squares well with the ideas of UNGA 51/122 of 6 February 1997, the 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 the Developing Countries.

The matter of the developing countries provides a useful bridge to a short discussion of the Company, for within the fifteen member Board of Directors, which includes a Chief Executive Officer, a special place is reserved for three representatives of developing countries. The arrangements for nomination and the election procedures for the Board are designed to favour small investors and developing countries.

The Company will take over the assets of INMARSAT, including the satellite system, and operate as public company with limited liability. It will be subject to the normal controls of whatever is its country of

incorporation. At the time of writing this was not finally settled, but a decision will be made at an Assembly of Parties to be held in September 1998. The initial shares in the Company will be held in proportion by existing Signatories as at the date of transfer, but thereafter things can change. There will be no minimum share-holding in the Company, but a maximum of 15% will apply, except where the owner held a higher proportion as investment share in INMARSAT prior to the changes. In that case the voting weight of the share holding is to be limited to 15%. Further share offers are to be made to the general public and any would-be investor within two years of the formation of the Company. The intention is that share ownership will therefore be diffused, and smaller investors, including (or particularly) those from developing countries are thought likely to participate. The possible activity of predator 'empires' remains, but seems less likely than with the New Skies Satellites NV case.

As far as service pricing is concerned, the Company will set the rates for utilisation of its system, as is the case under the prior arrangements. However, as is normal within international telecommunications, the price to the user will depend on the decision of the land earth station (LES) operator, which connects the satellite system to the terrestrial or other systems. Prices for usage to the end customer could therefore vary

round the world depending on market conditions. That said, there is within the discussion of the new arrangements and the intention of those who have set it up, that emerging markets and the developing countries will be served - which argues for minimal pricing structures and add-ons.

It will be (almost) impossible to divert the Company from the purposes of the Organisation, even at the greatest urging of telecommunications empires and bean-counting accountants. To secure the objectives of the Organisation and the purposes of the Company, a Public Services Agreement is to be entered into between the Organisation and the Company. Public service obligations form an important element of the justification of INMARSAT, and, as already noted, these had to be safeguarded in the new developments. This is done through Art. 2 of the Agreement, which sets out the GMDSS obligations, non-discrimination on the basis of nationality, and the duty to seek to serve all areas where mobile satellite communications are needed. Article 3 binds the Company in carrying out its purposes to take into account relevant international standards, regulations, resolutions, of the International Maritime Organisation, and the International Civil Aviation Organisation, as well as to observe those of the International Telecommunication Union. The distinction between 'taking into

account' and 'observing' is intriguing. The Company is bound by Art. 4 of the Agreement to keep the Organisation informed of its compliance with the obligations as to public service, and the standards etc. set by the IMO, ICAO and the ITU. By Art. 7, if it faces 'irreparable injury' by a breach of the company's obligations as to GMDSS, non-discrimination and the service of areas of need, the Organisation can proceed to any form of equitable relief including injunctive relief. Other remedies are not excluded. However, it should also be noted that under Art. 16.3, there is provision for arbitral settlement of disputes in accordance with UNCITRAL Rules. One hopes, of course, that such remedies are never required.

One last technical point should be made. The changes to the INMARSAT Convention are, of course, being contained in a multi-lateral agreement should normally be subject to the ordinary provisions of law which require ratification for a state to be bound by them. However, in a change such as INMARSAT in undergoing, the time factor and the importance of all members moving simultaneously on to the new arrangements require a different solution. What is to happen is the 'provisional application' of the new agreement. States will agree to work 'as if' the full ratification requirements have been complied with, even when for a given state that requirement has not been met. The same solution is

used by the ITU when it changes its constitutional documents, or, perhaps even more importantly, the Radio Regulations. Provisional application is essential if such organisations are to function.

3. The ITU

The third area of international telecommunications which I wish to mention is the ITU. During the four weeks 27 October to 21 November 1997 a World Radiocommunication Conference was held in Geneva, and adopted various measures in its Final Acts. Of these I select some for comment.

First, as is well-known the question of direct broadcast satellites remains one of some contention. The Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, UNGA Res. 27/92 of 10 December 1982 were adopted by majority vote and against the will of the states able to engage in such broadcasting. To say that their status is weak is, perhaps an understatement. The 1997 amendments to the radio Regulations now include a modified art. 23.4 (S23.13), by which when a broadcasting satellite is being designed, 'all technical means available' are to be used 'to reduce to the maximum, the radiation over the territories of other countries, unless an agreement has previously been reached with such countries'. In addition Res. 536 of the Conference

takes matters further. It notes various factors and elements, including that an increasing number of systems already in the system, are undergoing modification, and that areas already covered by broadcasting satellites are being extended. The Conference therefore resolved that administrations should get the agreement of other countries before extending their services to them. As a counterpoint to this, in one of its Reservations to the Final Acts (No. 52), the US Delegation, while indicating its intention to enter voluntarily into some such agreements, dissociated itself from any requirement to do so, on the ground that the free flow of information allowed for under the Universal Declaration of Human Rights might be impeded. Israel supported that statement (Reservation No. 82).

The second matter I would comment on is the important provision in modification of Art. S22 of the Radio Regulations. The provisions of art. 22 are detailed, but for our purposes the point is made in art. S22.2 (art. 22.2) that non-geostationary systems shall not cause unacceptable interference to geostationary fixed-satellite and broadcasting-satellite services which are operating in accordance with the Radio Regulations. The precise implementation of such a provision will be technically difficult, and of course the qualifier 'unacceptable' of the noun 'interference' may well provide room for dispute. But, that

said, there is here the protection for the geostationary systems which is obviously necessary. Radio-communication with and by LEO systems could otherwise cause major problems for those in higher orbits.

A third matter is the action taken (or not taken) with regard to the problem of paper satellites, systems proposed and notified to the ITU, but whose chances of ever attaining reality are slender. The ITU procedures were getting clogged, and states were having to engage in coordination exercises which were widely recognised as futile. What was happening was in effect orbit and spectrum capacity was being reserved through notification to Geneva, but without actual use of the notified assets ever occurring. Resolution 18 of the Kyoto Plenipotentiary Conference instructed the Director of the Radiocommunication Bureau to investigate the matter. I discussed the problem in my paper to the Jerusalem Colloquium, and there outlined some of the suggestions that had been made to cope with it.⁹ These included the payment of a fee, which might or might not be returnable, assessed either as a standard amount or related to the number of satellites and/or the frequency requirements for a given system. There was also the point that were states to exercise true 'due diligence' in their scrutiny of the notifications they were requested to make to Geneva by telecommunications entities under their jurisdiction, the matter might be

solved. Of course, this last was the simplest suggestion of all, though perhaps it was rather idealistic. If every state properly discharged its international obligations in the matter the problem would not exist. On the other hand there is an argument that the lever of a fee, and the extra-long lever of a non-returnable fee, might have an increased effect. History had already shown that states were not in fact being as duly diligent as they should have been.

The 1997 WRC decided to impose an 'administrative due diligence procedure' in terms of its Res. 49 and its two annexes. In the appropriate cases, which are enumerated in the Resolution, notifications are required as to the identity of the satellite network, the spacecraft manufacturer and the launch services provider. Various data is required under each heading, but perhaps the most important of these are the dates of the contract for the manufacture and of the launch contracts, together with the contractual delivery window, and the anticipated launch or in-orbit delivery window. These elements tighten things up. Actual placed contracts are being looked for. This should to some extent at least provide a reality for the scrutiny which is to take place before a satellite system enters on the protected process within the ITU system. On the other hand some might argue that this means that entry to the ITU system is postponed too late, and that the use of a frequency is

something which has to be dealt with earlier, as an often integral part of designing of the system before going out to contract. So, it remains to be seen whether this will be an effective modification to previous procedures, whether something else will have to be added to it, or whether we will have to replace the procedure with something with more teeth, or even whether a different tooth design is needed. Suffice it to say that Res. 49 also provides that the 1999 World Radio Conference will receive a report from the Director of the Radiocommunication Bureau on the matter. In that the new procedure operated from 22 November 1997, that is probably too short a period on which to make final determination, but it does mean that the problem and this particular solution are being kept under review.

Lastly, one of the major changes that was introduced in the new ITU Constitution and Convention of 1992 was the adoption of a four year cycle of meetings, with a smaller two year cycle for Sector meetings intercalated between plenipotentiaries. Resolution 721 of the 1997 WRC established the agenda for the 1999 World Radio Conference, and Res. 722 is the preliminary agenda for that of 2001. There appears to be evidence that this timetable is too swift, that matters may be inadequately discussed and decisions taken which have to be re-considered at subsequent conference. This leads both to bad decision-taking and also

uncertainty as to the strength, vigour and permanence or mutability of rules. It is therefore interesting to note that Res. 50 of the 1997 WRC asks the Secretary General to include the question of the interval between Radiocommunication conferences on the 1998 Agenda for the ITU Council. The matter may require amendment of the ITU basic documents.

4. Conclusion

As far as the satellite organisations are concerned, the INMARSAT developments are the more radical, and therefore the more intellectually interesting. For an intergovernmental organisation so to change its being is an intriguing phenomenon. However, there remains an organisation, as the 'policeman' to see that the highly important functions served by the previous incarnation are still suitably carried out. The safeguards that have been put in place are useful. I still have a question as to whether the state of registry of the Company may be able to require the Company to cease service to another state for example, as part of UN sponsored sanctions, or in time of conflict.

INTELSAT, of course, will continue to face pressure from computers who wish to enter markets in which it dominates. As things stand, the INTELSAT Agreements preserve the principle of a global public telecommunications service, with ready access to all, and without discrimination in the pricing of

services. The aspirations of Part D of UNGA Res. 1721 of 1961, are therefore being met. I hope that will continue.

As far as the ITU is concerned, improvements in procedures have been made. Starting on 12 October, that is within days of the Melbourne Colloquium, the ITU will hold another Plenipotentiary Conference. Further developments may be looked for, both there, and in the 1999 World Radio Conference, whose agenda has already been set.

NOTES

¹ For simplicity I would refer to my *Law and Space Telecommunications*, (Aldershot: Dartmouth; Gower, Brookfield, VT, 1989) for a detailed discussion of the constitutional structures of INTELSAT and INMARSAT prior to the recent developments.

² See D. Wear, 'INTELSAT: Evolving to Meet the Challenges of a New International Telecommunications Marketplace' (1995) 38 *Proc. IISL* 123-33; A. Auckenthaler, 'Recent Developments at INMARSAT' (1995) 38 *Proc. IISL* 149-59; F. Lyall, 'Privatisation and International Telecommunications Organisations' (1995) 38 *Proc. IISL* 168-74. Cf. C. Roisse, 'Recent Developments at EUTELSAT' (1995) 38 *Proc. IISL* 160-7.

³ See International Cooperation in the Peaceful Uses of Outer Space, Part D, UNGA Res. 1721 (XVI) of 20 December 1961. Cf. Art. I of the Outer Space Treaty, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space 1967, 610 UNTS 205; 1968 UKTS 10, Cmnd. 3519; 18 UST 2410, TIAS 6347; 6 ILM 386, and, the 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, UNGA Res. 51/122, 13 December, 1996.

⁴ See, for example, the content of and debates on congressional initiatives such as in 1998, 105th Cong. 2d Sess., S. 2365, a bill on International Satellite Communications Reform, and H.R. 1872, on Communications Satellite Competition and Privatisation.

⁵ Cf. the Case concerning the Vienna Convention on Consular Relations (Paraguay v. US) and the Order of the International Court of Justice of 9 April 1998 on the Request for the Indication of Provisional Measures, the Per Curiam decision of the Supreme Court of the United States of 14 April 1998, and the decision of the Governor of Virginia in the case of Angel Francisco Breard.

⁶ David Sagar, Senior Legal Adviser with INMARSAT is to present a paper on the Privatisation of INMARSAT to the Colloquium, and that should appear in these Proceedings. Refer to that paper for further (and more accurate) data.

⁷ The amended Convention is available from the headquarters of the Organisation, 99 City Road, London EC1Y 1AY.

⁸ This last modifier is similar to that found in the INTELSAT Assembly Resolution mentioned above.

⁹ F. Lyall, 'Paralysis by Phantom: Problems of the ITU Filing Procedures' 1996 39 *Proc. IISL* 187-93.