February 23, 1969

MEMORANDUM

TO: Distribution

FROM: W. English

SUBJECT: U.S. Delegation Papers for Committee II

Further to my memorandum of February 22, there is attached the proposed U.S. contribution on accesssion, supersession and buy-out. The draft briefly reviews the principles of international law applicable to supersession and includes a discussion of the requirements of Article IX(b) of the Interim Agreement. Based upon these considerations, it concludes that the definitive arrangements can come into effect without the accession by all prior members, provided that any non-acceding prior member is afforded an equitable financial settlement. With the exception of a specific buy-out provision, draft articles implementing accession and supersession are incorporated in the draft identical to those produced by the Drafting Group.

Although no specific financial buy-out formula is included in the paper (I do not consider Article 4(h) of the draft operating agreement a reasonable approach), the general principle under which financial settlement would have to be made is stated in the paper on page 7. Bruce Matthews should take particular note of the principle, particularly in view of the fact that the financial committee should develop the specific formula of financial settlement.

Again, I urge that we table this and the other Legal Committee contributions as soon as possible.

W. D. E.

Attachment

Distribution: Executive Committee Members and
Messrs. Frank, Greenburg, O'Malley and Doud

U.S. Delegation Contribution

COMSAT
DRAFT
2/23/69

ACCESSION, SUPERSESSION AND BUY-OUT UNDER THE DEFINITIVE ARRANGEMENTS

Although the Interim Agreements provide that they shall remain in effect until the entry into force of the definitive arrangements, they are silent with respect to a number of important matters: when the definitive arrangements shall be deemed to have entered into force, the rights and obligations of non-continuing prior members of INTELSAT, and the transfer of rights and obligations from the old to the new members. This paper analyzes these matters and presents recommendations of the U.S. Delegation with respect to their solution. (Appropriate draft articles for inclusion in the definitive agreements are attached hereto).

I. ACCESSION AND SUPERSESSION

A. FORMULA FOR ENTRY INTO FORCE

The Interim and Special Agreements do not stipulate how many or what proportion of the parties and signatories hereto must sign the definitive agreements in order for the latter to enter into force and supersede the interim arrangements. It is the position of the U.S. Delegation, as reflected in the draft articles set forth in Attachments 1 & 2, that the definitive arrangements can enter into force and supersede the interim arrangements when signed by two-thirds of the parties to the Interim Agreement whose designated signatories to the Special Agreement held at least 80% of the total investment quota under the Special Agreement, provided certain conditions are met, most important of which is an equitable settlement with non-continuing parties.

1. General Principles of International Law

Under prevailing principles of international law and practice regarding the revision of international agreements, there is no requirement that all of the parties to an earlier agreement must accede to a later agreement in order for the later

agreement to come into force and supersede the earlier one. While historically the general rule of international law may have required unanimous accession for such revision, over the last half-century that rule has of necessity evolved such that unanimity is not required, at least for the revision of multipartite non-political agreements, so long as (1) the superseding agreement is acceded to by at least a majority of the parties having a substantial interest in the subject matter of the agreement, and (2) prior non-acceding parties are not bound by the new agreement and their rights acquired under the earlier agreement are not prejudiced.

The formula for entry into force of the definitive arrangements which is expressed in the attached draft articles more than satisfies the first of these preconditions. The second is satisfied if non-continuing parties are not bound by the definitive arrangements and if they are fairly compensated for their space segment investment under the interim arrangements by an equitable buy-out arrangement.*

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* The requirements for such a buy-out arrangement are discussed in Part II of this paper.

2. Requirements of Article IX(b)

In considering entry into force with less than unanimous accession, Article IX(b) of the Interim Agreement is relevant. The provisions of Article IX(b) state that, regardless of the form of the definitive arrangements, they shall preserve certain fundamental principles of the interim arrrangements with respect to policy aims (Article IX(b)(i)), membership (Article IX(b)(ii)), and the opportunity to contribute to determinations of general policy (Article IX(b)(iv)), and shall "safeguard the investment made by signatories to the Special Agreement" (Article IX(b)(iii)).

These requirements are in large part coextensive with, and a specification of, the second precondition that exists under international law for entry into force under the proposed formula, namely that rights acquired under the Interim Agreements not be prejudiced. This is particularly so with respect to Article IX(b)(iii), which evidences the need for an equitable buy-out of the interest in INTELSAT of non-continuing parties.

As they bear upon the concern of this paper, the other aspects of Article IX(b) are not seen as likely sources of difficulty unless, of course, radical departures from the principles reflected in the Preamble of the Interim Agreement are seriously entertained by the Conference.

B. TRANSFER OF RIGHTS AND OBLIGATIONS UNDER THE INTERIM ARRANGEMENTS

Assuming that INTELSAT is to be continued under the definitive arrangements with the undivided ownership of the space segment vested in signatories to the Operating Agreement, those signatories should assume, under terms and conditions set forth in the Operating Agreement, the rights and obligations created under the interim arrangements that are outstanding on the date of entry into force of the definitive arrangements. Language effecting such a transfer of rights and obligations under the definitive arrangements is set out in Attachments 3 and 4 hereto.

II. OBLIGATIONS AND RIGHTS OF NON-CONTINUING PRIOR SIGNATORIES

This section discusses the rights and obligations of any signatory to the Special Agreement who fails to accede to the definitive arrangements, and suggests "buy-out" mechanisms by which such prior signatories would be compensated for their investment. Consideration is given to the relevant provisions of the Interim Agreement, as well as to general principles of law and equity applicable to cooperative enterprises of a nature similar to INTELSAT.

A. ARTICLE IX(b)(iii)

As previously discussed, this provision does not require that the investment share of a signatory to the Special Agreement be transferred to the definitive arrangements and continued thereunder without diminution. Instead, it requires that the new arrrangements not impair the value of the investment, and that a signatory whose government decides not to accede to the new arrangements, shall be entitled to recover the value of its investment.

B. GENERAL PRINCIPLES OF EQUITY AND LAW APPLICABLE TO PARTNERSHIPS AND JOINT VENTURES

General legal principles pertaining to partnerships and joint ventures also require that the investment of a prior

signatory be safeguarded. Absent an agreement to the contrary--and none is apparent in the interim arrangements--it is fundamental that a partner has a right not to continue under the new and revised agreement and a right to an accounting for its investment in the enterprise.

C. FINANCIAL OBLIGATIONS AND RIGHTS

The accounting to non-continuing prior members must reflect their share of the outstanding INTELSAT obligations incurred under the interim arrangements, as well as the value of their investment shares in the Consortium. There are a number of ways in which such investment shares may be calculated, but, as a guiding principle, any such calculation must reflect the net capital paid in during the interim period, plus a reasonable return on such capital. A specific financial formula, based upon this principle, should properly be developed by the financial experts at the Conference.

In addition to the right to obtain an equitable financial settlement, each prior member should be afforded a reasonable period of time, following the entry into force of the definitive arrangements, to accede to those arrangements. The U.S. Delegation is of the view that a one year period is appropriate. During such period, the value of the investment

of the non-acceding prior member would be retained in the Consortium at a rate of interest, for that period, equivalent to the cost of money. At the end of the period, the prior member, if its government has still not acceded, would be paid a total sum calculated on the basis of principle outlined above, plus accumulated interest during the one year grace period.

D. PATENT AND DATA RIGHTS

Under Article 10(f) of the Special Agreement each signatory thereto obtains rights to inventions, technical data and information arising directly from work performed under contracts and subcontracts, let during the life of the interim agreements, pertaining to the design, development and procurement of equipment for the space segment. A non-continuing signatory will retain these rights. It must, of course, continue to observe the terms and conditions with respect to the use of such rights in inventions, technical data and information as set forth in Article 10(f) and contained in the Patent and Data distribution policies of INTELSAT and the assignment agreements by which these rights were conveyed.

III. CONCLUSION

The definitive arrangements can enter into force without accession by all prior members provided that the acceding members constitute a majority of the prior members having a substantial financial interest, and that an equitable financial settlement is made with those prior members who do not wish to continue in the Consortium.

ATTACHMENT 1

INTERGOVERNMENTAL AGREEMENT

ARTICLE ____

(a) This Agreement shall be open for signature for six months from _____, 1969 in Washington by:

(i) the Government of any State which is a party to the Interim Agreement;

(ii) the Government of any other State which is a member of the International Telecommunication Union.

(b) The Government of any State referred to in paragraph (a) of this Article may accede to this Agreement after it is closed for signature. The financial conditions under which the Signatory of a Government acceding to this Agreement shall sign the Operating Agreement shall be determined by the Board of Governors.

(c) This Agreement shall enter into force on the date on which it has been signed without reservation as to approval, or has been approved after such reservation, by two-thirds of the parties to the Interim Agreement, except that such two-thirds must include Parties who held or Parties whose Signatories to the Operating Agreement held at least eighty percent (80%) of the total investment quota under the Special

Agreement. For each Government signing this Agreement after it has entered into force, the Agreement shall be effective upon signature or, if it signs subject to a reservation as to approval, on approval by it.

(d) Any Government which signs this Agreement subject to a reservation as to approval may, as long as this Agreement is open for signature, declare that it applies this Agreement provisionally and shall thereupon be considered a Party to this Agreement. Such provisional application shall terminate:

(i) upon approval of this Agreement by that Government; or

(ii) upon withdrawal by that Government in accordance with this Agreement.

(e) Notwithstanding anything contained in this Article, this Agreement shall not enter into force for any Government nor be applied provisionally by any Government until that Government or its communications entity designated pursuant to this Agreement shall have signed the Operating Agreement.

(f) If this Agreement has not entered into force for, or has not been provisionally applied by, the Government of a State which has signed it in accordance with this Article

within a period of one year from the date when it is first opened for signature, the signature shall be considered of no effect.

(g) No reservation may be made to this Agreement except as provided in this Article.

(h) Upon entry into force of this Agreement, the Government of the United States of America shall register it with the Secretary General of the United Nations in accordance with Article 102 of the Charter of the United Nations.

OPERATING AGREEMENT

ARTICLE ____

(a) This Operating Agreement shall enter into force for each Signatory upon entry into force of the Intergovernmental Agreement or, if the Intergovernmental Agreement is not then provisionally or definitively in force for the Party designating the Signatory, when the Intergovernmental Agreement enters into force for such Party, either provisionally or definitively.

(b) This Operating Agreement shall continue in force for as long as the Intergovernmental Agreement is in force.

ATTACHMENT 3

INTERGOVERNMENTAL AGREEMENT

ARTICLE ____

The Parties agree that all of the rights and obligations of the signatories to the Special Agreement created under the Interim Agreement and the Special Agreement and outstanding on the date of entry into force of this Agreement and the Operating Agreement shall be assumed by the Signatories to the Operating Agreement under the terms and conditions set forth in the Operating Agreement. As of the date the Operating Agreement enters into force, the Signatories shall own the INTELSAT space segment in undivided shares in proportion to their respective investment shares in the INTELSAT space segment subject to the Operating Agreement.

ATTACHMENT 4

OPERATING AGREEMENT

ARTICLE ____

Each Signatory undertakes to fulfill the obligations placed upon it by the Intergovernmental Agreement and this Operating Agreement and thereby obtains the rights provided for Signatories in each Agreement. Each Signatory further agrees to assume, in proportion to its investment share, all of the obligations created pursuant to the Special Agreement and outstanding on the date of entry into force of this Operating Agreement, and the Signatories shall obtain, in proportion to their investment shares, all right, title and interest in the space segment and other property and assets owned by the signatories under the Interim Agreement and the Special Agreement, subject to the requirements of this Operating Agreement.

February 22, 1969

MEMORANDUM

TO: Distribution

FROM: W. English

SUBJECT: U.S. Delegation Papers for Committee II

If Committee II is to function in any meaningful sense, and if the U.S. legal positions are to be effectively projected, it is essential in my view to table with Committee II at the outset of its deliberations discussion papers explaining the U.S. point of view. Unlike many of the important policy issues discussed in the report of the ICSC, the meaning and significance of the legal issues have not been discussed or elaborated upon in prior documentation. It is most desirable, therefore, to provide a written basis for consideration by the Conference of the U.S. legal positions.

Based upon the proposed agenda for Subcommittee II, four areas require explanatory papers: legal status; privileges and immunities; accession, supersession and buy-out; and settlement of disputes. The other areas could, I believe, best be handled by the tabling of the draft Articles. Attached are proposed U.S. contributions dealing with legal status, privileges and immunities, and settlement of disputes. The fourth paper, on accession, supersession and buy-out, should be ready for your consideration Monday morning.

The attached draft contributions are closely patterned on the papers produced by the Legal Committee, with, of course, an appropriate diminution of pro and con discussion. One addition has been made, namely, to the legal status paper, in the form of an annex setting forth some examples of other international joint ventures. With the exception of legal status, there is attached to each of the papers a proposed text for inclusion in

the international agreements. These texts are taken from the draft agreements submitted to the Executive Committee the end of last week.

As I understand Committee II will most likely commence its substantive deliberations on Wednesday, comments on the attached papers from the U.S. delegation legal advisers, and any other members, will have to be in hand by Monday night, so that the papers can be reassembled, translated and distributed. As there is very little new material in these papers, the task is hopefully not as impossible as it may seem.

W. D. E.

Attachments

Distribution: Executive Committee Members and
Messrs. Frank, Greenburg, O'Malley and Doud

MR. O'MALLEY
Mr Mark
Col. Olsson

Comsat Draft- R.R. Colino
February 28, 1969

COMMITTEE I

SCOPE OF INTELSAT ACTIVITIES

1. Prior to completing work on the Preamble, it would appear necessary to examine certain aspects of the scope of services which INTELSAT will be authorized to provide under the definitive arrangements.

2. It is desirable in considering the scope of services to put aside initially considerations of the "exclusivity" or "non-exclusivity" to be accorded the future Organization in its provision of various services. Similarly, consideration of "geographic" characteristics of service may usefully follow when discussion of functional scope of services has been completed. The threshhold question, therefore, is what services the INTELSAT Organization shall be authorized to provide through the facilities it establishes.

3. The United States holds to the view that INTELSAT should have authority to furnish all kinds of service, not only the traditional (public international) long-distance communications services, but all services that can be provided by means of communications satellites. This position was developed with careful consideration of a number of factors:

a. The desirability of authorizing INTELSAT to engage in activities leading to the provision of expanded, improved and hig hly-efficient telecommunications services for the benefit of all nations was recognized in 1964. The Preamble of the Interim Agreement reads:

> "Desiring to establish a single global commercial communications satellite system as part of an improved global communications network which will provide expanded telecommunications services to all areas of the world and which will contribute to world peace and understanding."

b. The reasons for this provision are manifold. However, they, in the view of the United States, include the following considerations:

(i) The benefits to be derived from a pooling of resources for the common good [redacted] WERE recognized as being enhanced

by a single cooperative institution and system. It may be said that it was contemplated that all nations which are members of INTELSAT, lesser developed and more highly developed, would obtain economic and financial, technical, operational and administrative benefits through the exploitation of the new technology. This cooperative venture would attract contributions from its various participants to be shared by all. These include technical and economic knowledge, services and facilities. It would also provide the means for minimizing conflicts and avoiding wasteful duplication, which no country desires or can afford.

(ii) These fundamental concepts led to the establishment of INTELSAT and has governed its activities since 1964.

They are as applicable for the future as they are today, regardless of the kind of system (synchronous or medium altitute) which has been or may be established. The successful deployment of the INTELSAT system attests to the validity of the cooperative and centralized Organization.

(iii) One of the more difficult TASKS in exploiting an advanced and rapidly changing technology for the benefit of nations throughout the world, is the determination of the purposes of the Organization and scope of its activities and the tailoring of an institutional structure to achieve these goals. INTELSAT has successfully met these challenges and the fundamental concepts which have contributed so greatly to its success should not be altered without good and sufficient reason. They will be as pertinent to the success of the definitive arrangements as they have been to the success of the Interim Arrangements.

4. Thus, the United States believes that the definitive arrangements should provide INTELSAT with full authority to engage in the provision of all "international public telecommunications services" so as to permit the fullest sharing of the benefits of economies of scale. There is technical and operational flexibility contained in the present INTELSAT system, as well as economical, high quality, reliable and efficient communications services.

5. The foregoing considerations are also applicable to "specialized telecommunications services" (as defined in the ICSC Report). While the technology of today may require satellites somewhat different from the satellites designed to provide public services, the common benefits to be derived from a single cooperative venture ~~may~~ WILL prove to be important. However, the technological capability of future generations of satellites is, of course, at this time unknown. It may be assumed that there will continue to be significant advances in the state of the art and that satellites which may be used commercially will become increasingly sophisticated. There can be no benefit to INTELSAT partners, to retain concepts based on early technological patterns with respect to a later era, unless they remain pertinent. Thus, it would appear desirable that the organization be provided with the flexibility necessary to enable it to keep pace with technological advances. For example, multipurpose satellites

soon be available (viz. ATS experiments) which will be capable of meeting increasingly diversified needs.

(a) An existing organization with a large membership from all areas of the world and proved performance provides the institutional framework for the application of future and more specialized technology. As we all know, the establishment of an organization to exploit successfully new technology can frequently be a difficult task.

(b) An experienced organization authorized to provide specialized services can offer resources from which all nations can benefit and through which extensive sharing is possible. For example, facilities may be shared such as tracking, telemetry, and command stations and monitoring facilities, as well as launch sources, administrative ability (including procurement and management services) and personnel. It also provides the structure for making the necessary decisions in a timely manner.

(iii) The INTELSAT Organization has proved effective in taking into account the variety of interests and organizations which are concerned with the application of satellite technology. Over the past several years, various groups, subcommittees, etc., have been established by the ICSC to provide flexibility in considering and meeting the needs of various users of communications facilities, both present and future. There is no reason why the Organization to be established by the definitive arrangements will not be equally effective in responding to the requirements of organizations interested in specialized services.

6. The United States Delegation offers these views in the context of Committee I's consideration of the services which INTELSAT should be authorized to provide. At a subsequent time, the United States will submit for consideration its positions with respect to questions of "exclusivity" of INTELSAT authority and "geographic" scope of services to be provided.

Copies Olsson
Clark
JP O'Connell
O'Malley