USPos/8
February 17, 1969

INTELSAT Conference

Position Paper

SUBJECT: Privileges and Immunities

U.S. Position:

The U.S. position is reflected in Article XIII of the draft Agreement and includes the following:

1. INTELSAT, its assets, property and income should be immune in all Party states from national income and property taxes.

2. The host Government should negotiate a "headquarters" agreement with INTELSAT.

3. Additional privileges and immunities as appropriate should be obtained by agreement with other Parties.

Interim Agreements: No provision.

ICSC Report: Paragraphs 594-597.

Papers: Legal Committee report of 2/3/69 on "Privileges and Immunities Status Under the Definitive Arrangements"; issues papers on "Legal Personality", State, 11/14/68; and "Legal Status of the Organization", ComSat draft, 12/16/68.

Executive Committee: Minutes of February 6, item 5; February 13, 1969, item 4 (E).

Draft Agreements: Article XIII.

E/CD:[illegible]:ep

USBP/7
February 3, 1969

MEMORANDUM FOR AMBASSADOR MARKS

FROM: Legal Committee on Definitive Arrangements*

SUBJECT: Privileges and Immunities Status Under the Definitive Arrangements

This memorandum analyzes the question of what privileges and immunities should be granted, under the definitive arrangements, by participating states to INTELSAT and its participants.**

The memorandum first describes INTELSAT's present privileges and immunities status in the United States and then discusses what benefits should or could be included in the definitive arrangements and in what form such benefits could be incorporated in the agreement.

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*. Comprised of representatives of the Department of State (Richard Frank, Asst. Legal Advisor); FCC (Henry Geller, General Counsel, and Asher Ende, Deputy Chief, Common Carrier Bureau); DTM (John O'Malley, Jr., Legal Counsel), and Comsat (William D. English, Asst. General Counsel).

** The question of the legal personality of the organization (i.e., the capacity to contract, acquire property in its own name, and to institute legal proceedings) is dealt with in a separate memorandum.

INTELSAT'S PRESENT STATUS IN THE UNITED STATES***

1. Source of Privileges and Immunities

The Interim Agreements contain no provision explicitly granting to INTELSAT, its organs, or its participants (including Comsat) any privileges or immunities or exemptions from the laws of participating states.

INTELSAT, nonetheless, has been granted certain privileges and immunities within the United States. Both the ICSC and INTELSAT have been designated by the President as "international organizations" within the meaning of the International Organizations Immunities Act (22 USC 288, hereinafter referred to as the IOIA) and have been provided with some of the privileges, exemptions, and immunities authorized by the IOIA (Executive Orders No. 11227 and 11277). In addition, special Federal tax legislation (26 USC 883) regarding the signatories of the Special Agreement has been passed by Congress (and legislation exempting the signatories from local taxation has been recommended to the Bureau of the Budget). Finally, INTELSAT and Comsat (in its role as Manager) have been administratively given exemptions from certain regulations and expedited treatment.

*** We do not at present know whether INTELSAT enjoys any privileges and immunities in foreign countries.

2. Substance of Privileges and Immunities Enjoyed

Executive Order No. 11227 (Annex A) makes the following sections of the IOIA applicable to the ICSC:

(1) "Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments." (Section 2(d))

(2) "Pursuant to regulations prescribed by the Commissioner of Customs with the approval of the Secretary of the Treasury, the baggage and effects of alien officers and employees of international organizations, or of aliens designated by foreign governments to serve as their representatives in or to such organizations, or of the families, suites, and servants of such officers, employees, or representatives shall be admitted (when imported in connection with the arrival of the owner) free of customs duties and free of internal-revenue taxes imposed upon or by reason of importation." (Section 3)

(3) "Persons designated by foreign governments to serve as their representatives in or to international organizations and the officers and employees of such organizations, and members of the immediate families of such representatives, officers, and employees residing with them, other than nationals of the United States, shall, insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, and the registration of foreign agents, be entitled

to the same privileges, exemptions, and immunities as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families." (Section 7(a)).

(4) "Representatives of foreign governments in or to international organizations . . . shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives except insofar as such immunity may be waived by the foreign government or international organization concerned." (Section 7(b))

Other significant parts of the IOIA applicable to the ICSC are, briefly stated, as follows:*

(1) the enjoyment of the immunities is conditioned upon notification to and acceptance by the Secretary of State of the persons who will enjoy the immunities; (Section 8(a))

(2) the Secretary of State may determine that certain individuals enjoying the immunities are persona non grata; (Section 8(b))

(3) the enjoyment of these immunities does not necessarily depend upon reciprocal recognition of similar immunities by foreign governments; (Section 9) and

(4) the exemption of ICSC non-US citizen employees from US income and other related employment taxes. (Sections 4 and 5).

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* Although we are not discussing legal personality in this paper, we should note that the Executive Order grants the ICSC the capacity to contract, acquire property, and institute legal proceedings (Section 2(a) of the IOIA) "to the extent consistent with the instrument creating" the ICSC.

In addition to the benefits outlined above, INTELSAT and its signatories also enjoy certain tax exemptions. Since INTELSAT has been determined by the Treasury Department to be a partnership for federal income tax purposes, it does not itself have taxable income but would still be required to file an information return. Executive Order No. 11277 (Annex B) exempts INTELSAT from this filing requirement. Moreover, Congress has passed special tax legislation exempting all INTLESAT signatories from federal income taxation on income earned within the United States from INTELSAT. Since the vast majority of INTELSAT signatories are foreign governments or agencies of foreign governments and therefore not taxable (26 USC 892), this legislation affected only a few signatories.

Besides the privileges and immunities enjoyed by INTELSAT and the ICSC, there are two significant instances of special regulatory procedures to accommodate Comsat in its role as Manager for INTELSAT. The FCC has amended its procurement regulations to make it clear that procurements by Comsat for and on behalf of INTELSAT are not subject to FCC

regulation. Also the Office of Munitions Control of the State Department has provided an expedited procedure for the clearance of technical documents for distribution by Comsat as Manager to the members of the ICSC and its subcommittees.

Attached at Annex C is a chart setting forth the significant privileges and immunities available under the IOIA with a notation of those presently granted to INTELSAT and its participants.

ALTERNATIVE FORMS FOR GRANTING PRIVILEGES AND IMMUNITIES

The privileges and immunities issue could be addressed in the definitive arrangements along the following lines. The intergovernmental agreement could:

1. have no provision relating to privileges and immunities. States, at the request of INTELSAT, could then grant privileges and immunities if they believe appropriate to the organization and its participants. This is the procedure under the interim arrangements.

2. have a provision that INTELSAT can negotiate with Parties to obtain appropriate privileges and immunities, e.g., the International Coffee Agreement, 1968, Article 22(5). The provision could include an obligation on the part of the Parties to provide appropriate privileges and immunities.

3. provide that the state where the organization has its headquarters should provide appropriate privileges and immunities. Those privileges and immunities would normally then be articulated in a separate headquarters agreement negotiated between the organization and the headquarters state, e.g., the United Nations Headquarters Agreement Act (61 Stat. 756).

4. provide that all participating states are obligated to confer a specified list of privileges and immunities, e.g., the International Cotton Institute Agreement, Article VI, TIAS 5964.

The present arrangement (i.e., Alternative 1: no provision in the intergovernmental agreement but with certain states, i.e., the United States, unilaterally granting certain privileges and immunities) has apparently worked satisfactorily. The primary benefit in keeping this arrangement is that it avoids a negotiation now of privileges and immunities, and it permits changes in privileges and immunities status should such changes become appropriate as the organization develops. It does, however, make uncertain INTELSAT's uniform enjoyment of appropriate privileges and immunities

in all countries in which INTELSAT does business. Moreover, certain countries, e.g. the United Kingdom, may find it difficult to grant privileges and immunities if they are not enumerated in either the multilateral agreement or an agreement, authorized by the multilateral agreement, between the country and the organization. The advantages of the first alternative would also pertain to the second alternative. While under Alternative 2 there would be no advance assurance as to which privileges and immunities would be enjoyed by INTELSAT in each member state, this alternative would provide greater assurance that countries like the United Kingdom would be able to make available appropriate privileges and immunities. The third alternative would not obligate those states that do not house the headquarters to grant privileges and immunities. It leaves open the possibility of these states refusing to grant privileges and immunities on an ad hoc basis and the organization thus being subjected to undesirable impositions, e.g., property and customs taxes. The benefit of the fourth alternative is that it clearly obligates participating states to grant the organization enumerated privileges and immunities. On the other hand, it is not clear that the same privileges and immunities

are required in every member state, or that all members will be willing to grant the same privileges and immunities. Alternatives 2, 3, and 4 could be used in various combinations.

RECOMMENDATION

The scope of the privileges and immunities granted to other international organizations has varied considerably. In determining which privileges and immunities should be granted INTELSAT and its participants three guidelines were followed:

1. Privileges and immunities are traditionally granted to foreign governments (and their representatives) Parties to international organizations and to the organizations themselves and their employees. It would be appropriate for certain privileges and immunities to be provided for in the definitive arrangements.

2. Although INTELSAT is an international organization with public purposes, it is also a commercial venture. Consequently, all of the privileges and immunities received by Parties and representatives to organizations having only governmental functions are not appropriate in this case.

3. Other governments will probably insist that certain privileges and immunities be granted by the headquarters State. In order to retain the headquarters in the United States, we will want to accommodate this insistence of other Parties to a reasonable extent.*

Form of Agreement

We believe the preferable means of providing privileges and immunities would be an article in the international agreement (a) providing certain benefits for the organization in all states, (b) requiring the conclusion of a headquarters agreement between the organization and the host state, and (c) providing that such additional privileges and immunities as are appropriate for the proper functioning of INTELSAT may be obtained from other Parties at the request of the Governing Body, either by means of an agreement between INTELSAT and a Party, or by other appropriate action by a Party. This combination of alternatives 2, 3 and 4 has

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* The Report of the Interim Committee stated that "The subject of the privileges, immunities and exemptions to be accorded the Organization merits careful consideration." A substantial majority of the Committee (except for the U.S.) recommended that, "in order to better exercise its functions and reach its aims, the Organization should enjoy privileges and immunities determined by the Parties to the Intergovernmental Agreement and should be exempt, to the extent possible, from the law of the headquarters of the Organization."

several benefits. It assures the organization in all member states the minimum privileges and immunities, hopefully satisfies those parties who will insist on additional privileges and immunities at the headquarters; allows for the fact that the need for privileges and immunities will vary with the state; and avoids a negotiation now on most privileges and immunities issues.

Privileges and Immunities in all States

There are certain minimum benefits that should be conferred on INTELSAT by all States, and which would be set out in the international agreement: exemption from customs duties and taxes, and exemption from national income and property taxation.* A draft article setting out these exemptions and providing for a headquarters agreement is attached at Annex D.

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* The proposed exemptions from customs duties and taxation have not yet been cleared with the Department of the Treasury. No immunity would be granted from any state and local taxation since the IOIA does not provide the President with authority to excuse an international organization from such taxes. While there is no federal property taxation in the United States, Section 6 of the IOIA provides for exemption from D. C. property taxes.

Headquarters Agreement

The following is a list of recommended privileges and immunities to be included in a headquarters agreement: **

1. INTELSAT: Immunity of its assets and property from confiscation; privilege of communication; exemption from D. C. property tax.

2. OFFICERS AND EMPLOYEES OF INTELSAT (except nationals or permanent resident aliens of the host state): Exemption from customs duties and taxes as to their baggage and effects on first entry; exemption from immigration, registration and other entry and departure restrictions.

3. REPRESENTATIVES TO THE ASSEMBLY (except nationals or permanent resident aliens of the host state): Privilege of communications; exemption from immigration, registration and other entry and departure restrictions.

4. SIGNATORIES (except signatory of host state): Exemption from national income and D. C. property taxes.

5. REPRESENTATIVES OF SIGNATORIES TO THE GOVERNING BODY (except nationals or permanent resident aliens of the host

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** These are also set out in chart form at Annex E.

state): Privilege of communication; exemption from immigration, registration and other entry and departure restrictions; exemption from national income taxation attributable to his official capacity as representative.

Certain privileges and immunities that have been granted by the United States during the interim period are not now recommended. In the proposed article representatives to the Assembly and to the Governing Body and officers and employees of INTELSAT have not been granted immunity from civil or criminal process for acts performed in their official capacity, even though these benefits are presently enjoyed by comparable individuals. Since the functions of the organization are primarily commercial, such immunity does not seem appropriate. Moreover, since the individuals would be acting in an official capacity, the doctrine of respondeat superior would require INTELSAT to be the principal Party liable.

Additional Privileges and Immunities to Consider

Furthermore, in an effort to maintain the INTELSAT headquarters and the Manager's residence in the United States, there are certain privileges and immunities that we are not recommending, but that may need to be considered if raised by other Parties.

1. Immunity of representatives to the Assembly and Governing Body from legal process for acts committed in their official capacity. This immunity is presently enjoyed by these individuals under the interim arrangements, so that governments at the Conference might insist that they be retained. It would not apply, however, in the case of a motor traffic vehicle offense or in the case of damage caused by a motor vehicle.

2. Immunity of INTELSAT's property and assets from search, seizure, attachment and execution before delivery of final judgment against the organization; INTELSAT would still be liable to suit; also, inviolability of INTELSAT's archives.

3. Immunity of officers and employees of INTELSAT from civil process for acts committed in their official capacity. If such an immunity is granted, INTELSAT as principal would still remain liable for the acts of its agents. There is precedent for such immunity in present agreements (e.g., Cotton Institute Agreement).

4. Immunity of officers and employees of INTELSAT from national income and D. C. property taxes. The Department of the Treasury has raised objections to granting this immunity to such individuals in an effort to limit the tax immunities of non-governmental individuals.

Exemption from Regulatory Jurisdiction

Other Governments at the Conference may be concerned over the question of FCC regulatory jurisdiction over INTELSAT and Comsat as Manager. While the Commission under both the 1934 Federal Communications Act and the 1962 Satellite Act has extensive jurisdiction to regulate Comsat as a U.S. domestic carrier, it does not assert jurisdiction to regulate Comsat as Manager of INTELSAT. It has amended its procurement regulations to make it clear that procurements for or in behalf of INTELSAT are not subject to FCC regulation. The sole exception requires FCC licensing of non-governmental radio facilities located on United States territory. Should this issue arise, the above facts would be pointed out. As other Governments insist on a provision granting immunity from regulatory jurisdiction, we would need a clear understanding of what exactly these Governments require in the way of immunity in order to decide whether we would be willing to agree to such a provision and whether it could be done by Executive Agreement.

IMPLEMENTATION

We have recommended only privileges and immunities covered by the IOIA. Under the IOIA the President may by executive order confer on an international organization any or all of the privileges and immunities set out in the Act if United States participation in the organization has been authorized by an Act of Congress (Section 1). The 1962 Communications Satellite Act (47 USC 701) authorizes U.S. participation in INTELSAT. Therefore, all of the privileges and immunities recommended and any of the proposed forms suggested can be implemented on the part of the U. S. by executive order, without further congressional action (i.e., legislation or advice and consent).

ANNEXES:
A. Executive Order No. 11227
B. Executive Order No. 11277
C. Chart of Existing Privileges and Immunities
D. Draft Article
E. Chart of Proposed Privileges and Immunities

cc: Chairman Rosel H. Hyde
Mr. James McCormack
General James D. O'Connell
Mr. Frank E. Loy
Mr. John A. Johnson
Mr. Ward P. Allen
Mr. William K. Miller

ANNEX H

Presidential Documents

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Title 3—THE PRESIDENT

Executive Order 11227

DESIGNATING THE INTERIM COMMUNICATIONS SATELLITE COMMITTEE AS A PUBLIC INTERNATIONAL ORGANIZATION ENTITLED TO ENJOY CERTAIN PRIVILEGES, EXEMPTIONS, AND IMMUNITIES

By virtue of the authority vested in me by Section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288), and having found that the United States participates in the Interim Communications Satellite Committee pursuant to the authority of the Communications Satellite Act of 1962 (76 Stat. 419; 47 U.S.C. 701-744) and the Agreement Establishing Interim Arrangements for a Global Commercial Communications System, August 20, 1964, TIAS 5646, I hereby designate the Interim Communications Satellite Committee as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act, with the following exceptions:

1. The Interim Committee shall not enjoy the privileges, exemptions, and immunities conferred pursuant to Sections 2(b), 2(c), and 6 of that Act.

2. The officers and employees of the Interim Committee shall not enjoy the privileges, exemptions, and immunities conferred pursuant to Section 7(b) of that Act, but representatives to the Interim Committee and their alternates shall enjoy the privileges, exemptions, and immunities conferred pursuant to said Section 7(b).

The designation of the Interim Communications Satellite Committee as a public international organization within the meaning of the International Organizations Immunities Act is not intended to abridge in any respect privileges, exemptions, or immunities which such organization may have acquired or may acquire by treaty or Congressional action.

LYNDON B. JOHNSON

THE WHITE HOUSE,
June 2, 1966.

[F.R. Doc. 66-5992; Filed, June 2, 1966; 5:25 p.m.]

Executive Order 11277

DESIGNATING THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM AS AN INTERNATIONAL ORGANIZATION ENTITLED TO ENJOY CERTAIN PRIVILEGES, EXEMPTIONS, AND IMMUNITIES

By virtue of the authority vested in me by Section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288), I hereby designate the International Telecommunications Satellite Consortium, an organization in which the United States participates pursuant to the authority of the Communications Satellite Act of 1962 (76 Stat. 419; 47 U.S.C. 701–744) and which was established pursuant to the Agreement Establishing Interim Arrangements for a Global Commercial Communications System of August 20, 1964, TIAS 5646, and the Special Agreement signed pursuant thereto, as an international organization, as that term is defined in Section 4(i) of the International Organizations Immunities Act, entitled to enjoy, from and after August 20, 1964, all of the privileges, exemptions, and immunities provided by Section 4(a) of that Act.

The foregoing designation is not intended to abridge in any respect any privileges, exemptions, or immunities which such organization or the Interim Communications Satellite Committee (provided for by the above-mentioned Agreements) may have acquired or may hereafter acquire by treaty, Congressional action, or other Executive order.

LYNDON B. JOHNSON

THE WHITE HOUSE,
April 30, 1966.

[F.R. Doc. 66–4899; Filed, May 2, 1966; 1:43 p.m.]

EXISTING PRIVILEGES AND IMMUNITIES*

ANNEX C

	ICSC	REPRE. OF SIGNATORIES OF ICSC	OFFICERS & EMP. OF ICSC	INTELSAT	SIGNATORIES
Immunity from Civil Process in Official Capacity		Yes			
Immunity from Criminal Process in Official Capacity		Yes			
Immunity of Assets and Property from Search, Seizure, Attachment and Execution					
Immunity of Assets and Property from Confiscation					
Inviolability of Archives					
Privilege of Communications	Yes				
Exemption from Customs, Duties and Taxes	Yes	Yes	Yes		
Exemption from Immigration, Registration and other Entry and Departure Restrictions	Yes	Yes	Yes		
Immunity from National Income Taxation				Yes	Yes
Immunity from DC Property Taxation					

*None of these privileges and immunities apply to COMSAT in the United States.

Proposed Article

(1) INTELSAT, its assets, property, and income shall be immune in all States Party to this Agreement from all national income and property taxation. With respect to customs duties and taxes imposed upon or by reason of importation and the procedures in connection therewith, each Government Party to this Agreement shall accord to INTELSAT the privileges, exemptions and immunities that such Party accords under similar circumstances to foreign Governments.

(2) The Government of the country in which the headquarters of INTELSAT is situated (hereinafter referred to as "the host Government") shall as soon as possible conclude with the Governing Body, acting on behalf of INTELSAT, an agreement to be referred to and approved by the Assembly relating to the status, privileges and immunities of INTELSAT, of its officers, employees, and participants, and of representatives of Parties while in the territory of the host Government for the purpose of exercising their functions.

(3) The agreement concluded under paragraph (2) of this Article shall be independent of the present Agreement and shall prescribe the conditions of its termination.

(4) Such additional privileges and immunities as may be appropriate for the proper functioning of INTELSAT under this Agreement may be obtained at the request of the Governing Body from one or more other Parties, either by means of an agreement or agreements which the Governing Body, acting on behalf of INTELSAT, may conclude with one or more such Parties, or by other appropriate action of such Party or Parties. 2/

ANNEX E

PROPOSED PRIVILEGES AND IMMUNITIES*

	INTELSAT	OFFICERS & EMP. OF INTEL	REPRE. TO ASSEMBLY	SIGNA-TORIES	REPRE. OF SIGNATORIES TO GOVERNING BODY
Immunity from Civil Process in Official Capacity	No	No	No**	No	No**
Immunity from Criminal Process in Official Capacity	n.a.	No	No**	n.a.	No**
Immunity of Assets and Property from Search, Seizure, Attachment and Executive	No	n.a.	n.a.	No	n.a.
Immunity of Assets and Property from Confiscation	Yes	n.a.	n.a.	No	n.a.
Inviolability of Archives	No	n.a.	n.a.	No	n.a.
Privilege of Communications	Yes	n.a.	Yes	No	Yes
Exemption from Customs, Duties and Taxes	Yes	Yes (first entry)	No	n.a.	No
Exemption from Immigration, Registration, and other Entry and Departure Restrictions	n.a.	Yes	Yes	n.a.	Yes
Immunity from National Income Taxation	Yes	No	n.a.	Yes	Yes
Immunity from National (and DC in US) Property Taxation	Yes	No	n.a.	Yes	No

*None of these privileges and immunities apply to COMSAT in the United States.

**These immunities are presently enjoyed by the corresponding individuals under the Interim Arrangement.

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USPos/9
February 17, 1969

INTELSAT CONFERENCE

Position Paper

SUBJECT: Financial Arrangements

U.S. Position:

In our October 1967 paper (ICSC-28-40) we proposed investment related to use of the system, meaning use of the INTELSAT-financed space segment. We elaborated our proposals in ICSC-29-33 and supplemented them in ICSC-32-46 to provide for minimum investment shares of 0.05% instead of 0.025%. We suggested adjustment of shares annually in relation to the previous year's use, but have indicated that the adjustment interval could be longer. We also have supported compensation for use of capital in the intervals between adjustments.

The U.S. continues to advocate the investment/use approach as set forth in these papers. Our position is reflected in 498, 511 and 521 of the ICSC report.

Interim Agreements: Articles III, VI and XII(a) (ii) of the Agreement and Article 3 of the Special Agreement and the annex thereto are relevant.

ICSC Report: Section F (489-531) applies.

Papers:
1. The pertinent issues paper is entitled "Criteria for Investment", State revised draft 1/2/69.

2. ComSat is preparing a simplified explanation of the investment/use proposal.

Executive Committee: See minutes of January 13, 1969, item 5.

Draft Agreements: Articles II (b), III (b), IV (2) (iii), V (a) (iv) and (vii), VIII (c) and (d), and IX; Articles 3, 4, 5 and 6 of the Operating Agreement.

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USPos/10
February 17, 1969

INTELSAT Conference

Position Paper

SUBJECT: Procurement Policy

U.S. Position:

We favor primary emphasis on considerations of price, quality and delivery (536) with distribution of contracts a secondary consideration. The following wording, incorporated in the draft agreement, reflects the U.S. position:

> "The Governing Body shall endeavor to insure that all contracts are awarded on the basis of the best quality, best price, and timely performance. The Governing Body shall endeavor to insure the widest practicable international participation in contracts and subcontracts consistent with the foregoing principle."

Interim Agreements: Article X and Article 10 (a), (b) and (c) are pertinent.

ICSC Report: Section G (532-543) applies.

Papers: Issues paper on "Procurement Policy", State revision 12/27/68, ComSat 11/19/68.

Executive Committee: See minutes of January 13, 1969, item 4.

Draft Agreements: Article X; Article 7 of Operating Agreement.

E/TD:WKMiller:sp

USBP/8
December 27, 1968

INTELSAT Conference Issues (State revision 12/27/68)

Procurement Policy

Issue

Under what principle or policy should INTELSAT place contracts to obtain hardware for the space segment of the global system? Should procurement be on the basis of quality and price or should there be a conscious policy of spreading contracts among members? Should there be any understanding on contract-spreading in or outside the agreements?

An additional question is whether non-industrial countries should be "compensated", as Argentina has proposed, for the additional costs to them of procurement which is not at minimum cost.

Position U.S. Has Taken

Our October 1967 proposal did not expressly deal with this question. We did refer to it rather obliquely by stating the view that it is in the interest of each country to develop its industrial competence and to share in the benefits of satellite technology. In President Johnson's August 1967 message to Congress on Telecommunications, he said that "We will continue the exchange of technical information, share technological advances and promote a wider distribution of procurement contracts among members of the consortium (emphasis added). There has been no other public declaration of our policy or publication of U.S. proposals on this issue.

Views of Others

In an early joint European submission tabled for the CETS countries by Netherlands/Belgium it was suggested that the 1969 agreements should protect the interests of all participants and, in particular, should make possible the development of the technology of member countries. This wording is repeated in the CETS paper of October 1968. Japan suggested that "procurement of the space segment should be carried out on the basis of the best quality and the cheapest price through international tender which is open to all member countries, and adequate measures should be taken to promote a wider distribution of procurement contracts among the member countries".

France uses procurement as a reason justifying separate ownership of particular satellites. France observes that separation of ownership "would preserve the industrial interests of signatories more effectively than Article X of the Interim Agreement which, as shown by experience, has proven to be inapplicable due to a basic inconsistency between participation proportionate to quotas and the necessity to procure the best equipment at the best price". The French argue that all expenditures agreed upon by each State should contribute as much as possible to increase the capacity of its industry.

The only other country that has expressed specific views on this issue is Argentina. In ICSC Document 34-47 (September 25, 1968) Argentina proposed a system of compensation to the non-industrial countries through technical assistance programs, the cost of which would be added to procurement contracts, so that the development of industrial competence by some members would be balanced by technical assistance to others.

Objective

Considered from an exclusively business point of view, it seems apparent that procurement above certain dollar levels should be pursuant to international competitive bidding with the selection on the basis of quality, price, and timely performance. However, the political reflection of national and regional industrial interests, particularly in Europe, suggests that we are not likely to obtain a procurement article reflecting this position in its pure form without a clear understanding that some contract-spreading will be done. Realistically, our objective should be to stay as close as possible to normal business criteria, both in the text of the agreement and in any related understandings that may be necessary.

Discussion

The 1964 Agreement provides:

> "In considering contracts and in exercising their other responsibilities, the Committee and the Corporation as manager shall be guided by the need to design, develop and procure the best equipment and services at the best price for the most efficient conduct and

operation of the space segment. When proposals or tenders are determined to be comparable in terms of quality, c.i.f. price and timely performance, the Committee and the Corporation as manager shall also seek to ensure that contracts are so distributed that equipment is designed developed and procured in the States whose Governments are Parties to this Agreement in approximate proportion to the respective quotas of their corresponding signatories to the Special Agreement; provided that such design, development and procurement are not contrary to the joint interests of the Parties to this Agreement and the signatories to the Special Agreement. The Committee and the Corporation as manager shall also seek to ensure that the foregoing principles are applied with respect to major sub-contracts to the extent that this can be accomplished without impairing the responsibility of the prime contractor for the performance of work under the contract."

The provision for distribution of contracts was included at the insistence of European countries which hoped to ensure their participation in contracts. It has been impossible to carry it out fully, however, both because of the U.S. lead in space technology and because of the impracticality of distribution of contracts among many countries. The growth of INTELSAT from an originally small number of members, mostly industrialized, to 63 members, many with little or no aerospace industrial capability, has accentuated the problem.

However, in practice ComSat, as Manager, has facilitated constantly increasing levels of foreign participation in INTELSAT procurement, particularly in the major satellite procurement contracts, INTELSAT II, III and IV. The INTELSAT I contract (Early Bird) was negotiated between ComSat and Hughes without foreign participation before INTELSAT was created. Subsequent INTELSAT procurement has produced foreign participation in the indicated amounts:

Procurement Program	(7/31/68) Total Cost	Foreign Share	% of Whole
INTELSAT II	$32,728,000	$ 289,029	0.9%
INTELSAT III	32,448,000	2,151,711	6.5%
INTELSAT IV	54,801,600	19,418,000	35 %

Further details on foreign shares in INTELSAT programs are shown in the Annex to this paper.

The increasing percentage of non-U.S. participation is a product of several factors. First, the Europeans have been working very hard at increasing their competence. Second, U.S. space hardware manufacturers have set up various working relationships or partnerships with European and Japanese firms and have thus contributed to the foreign capability. Third, there has been considerable bending of the first principle of Article X.

The cost of the European participation in INTELSAT IV raised the cost of that program an estimated $4.4 million. Australia, New Zealand, Indonesia, and countries in Latin America that have no interest in building a satellite manufacturing capability of their own, much less financing one in Europe, have expressed concern over this bending of principle, although the extra cost has to date been in amounts they could accept.

Balancing European concerns against those of other countries, it appears probable that the definitive arrangements cannot stray very far, if at all, from the principles underlying Article X. No one in Europe, other than France, proposes seriously that INTELSAT adopt procurement rules explicitly taking greater account of their problem, although they are pushing to make it a factor in determining the outcome. Members other than European members, on the other hand, appear unlikely to press very seriously for strict interpretation of the price-quality criteria. Our expectation is that the Europeans, particularly France, will push to obtain substantial INTELSAT spending in Europe, but this

push will be counter-acted to some extent by the interest of other countries in INTELSAT economy. We cannot predict with certainty that Latin America will stand up to Europe as a block, however, because other economic and political considerations may lead them to accept the European position in some degree.

It would be in the U.S. interest both from the carrier standpoint and the manufacturer standpoint if the definitive arrangements reemphasized the policy of procurement on the basis of price, quality, and timely performance. This certainly is appropriate to an organization which is pledged by its preamble to provide communication facilities on the most economic basis possible. It is reasonable, therefore, for us to advocate a procurement policy under the definitive arrangements which, while recognizing the value of promoting wide international participation, gives primacy to best price and quality. To this end, the U.S. might propose wording along the lines of the following:

> "The Governing Body shall endeavor to insure that all contracts are awarded on the basis of the best quality, best price and timely performance. The Governing Body shall endeavor to insure the widest practical international participation in contracts and subcontracts consistent with the foregoing principle."

The proposed language retains the emphasis upon securing the best equipment at the best price and still encourages international participation provided it can be accomplished on a competitive basis. The Governing Body would have complete flexibility to determine the best means of distribution of contracts on an international basis provided that the requirements of price, quality and timely performance are met. However, there would be somewhat more emphasis on the price-quality principle than under the present formula and the distribution principle would be more clearly secondary.

This wording could be included in a draft agreement if we circulate one, or could be put forward in low key in some other way. However, we should not really press this issue, for the time being, at least, or until we see how the positions of the opposing sides develop. We will be in a better position then to appraise whether any improvement in the present provisions is likely to be obtainable and with what, if any, understanding outside the agreements.

If the U.S. is to be successful in getting maximum support for the "economically pure" procurement policy proposed above, and to do so while at the same time minimizing pressures to authorize a regime that would lead to undesirable separate systems, it must be prepared to be quite clear, simple and forthcoming in its position on industrial cooperation between the U.S. and others. It should state that it will authorize and encourage U.S. industry to cooperate with industries of other countries in assisting them to develop technology that they can use in bidding on INTELSAT contracts or in developing satellites for other purposes not inconsistent with the INTELSAT agreement. Hopefully this statement would be subject only to national security limitations.

The Argentine proposal for "compensation" to non-industrial countries in the form of technical assistance has not received any support to date and probably does not have to be taken too seriously in itself, as a specific proposal. However, a broader question that it suggests should be taken more seriously; whether there is something INTELSAT can or should do for the LDCs to assist in their technical development. This is a separate subject which should be dealt with elsewhere than in the procurement context.

ComSat: 11/19/68
E/TD:SEDoyle/WKMiller:sp 12/27/68

ANNEX

Table I

Implementation of Article X

1.	Total INTELSAT contract costs (excluding INTELSAT IV)	$97,837,591.
2.	Total foreign contracts and subcontracts outside U.S. (excluding INTELSAT IV)	$ 3,058,138.
3.	Foreign contracts and subcontracts % of total	c. 3.1%

COUNTRY BY COUNTRY BREAKDOWN OF FOREIGN PARTICIPATION

COUNTRY	VALUE OF CONTRACTS	% OF TOTAL	INTELSAT QUOTA
U.K.	$945,717.	c. 0.96%	7.321701
France	$884,083.	c. 0.93%	5.1316949
Germany	$579,375.	c. 0.6%	5.1316949
Japan	$271,227.	c. 0.27%	1.743262
Belgium	$265,180.	c. 0.27%	0.958794
Switzerland	$ 52,056.	c. 0.053%	1.743262

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Belgium	$265,180.	c. 0.27%	0.958794
Switzerland	$ 52,056.	c. 0.053%	1.743262

Table II

Implementation of Article X,
Cost Breakdown for INTELSAT II

1.	Total contract price	$32,728,000.
2.	Total subcontracted outside U.S.	$ 289,029.
3.	Foreign subcontracts % of total	c. 0.9%

COUNTRY BY COUNTRY BREAKDOWN OF FOREIGN PARTICIPATION

COUNTRY	APPROX. VALUE	% OF TOTAL	QUOTA
U.K.	$159,029.	c. 0.5%	7.321701
France	$130,000.	c. 0.4%	5.1316949

Table III

Implementation of Article X,
Cost Breakdown for INTELSAT III

1.	Total contract price (spent as of 7/31/68)	$32,448,000.
2.	Total subcontracted outside U.S.	$ 2,151,711.
3.	Foreign subcontracts % of total	c. 6.5%

COUNTRY BY COUNTRY BREAKDOWN OF FOREIGN PARTICIPATION

COUNTRY	APPROX. VALUE	% OF TOTAL	INTELSAT QUOTA
U.K.	$475,963.	c. 1.4%	7.321701
France	$740,000.	c. 2.2%	5.1316949
Germany	$579,375.	c. 1.7%	5.1316949
Belgium	$265,180.	c. 0.8%	0.958794
Japan	$ 38,637.	c. 0.12%	1.743262
Switzerland	$ 52,056.	c. 0.15%	1.743262

Table IV

Implementation of Article X,
Cost Breakdown for INTELSAT IV

1.	Total Hughes price	$54,801,600.
2.	Total foreign subcontracted outside U.S.	$19,418,000.
3.	Foreign subcontracted % of total	c. 35%

COUNTRY BY COUNTRY BREAKDOWN OF PROPOSED FOREIGN PARTICIPATION

COUNTRY	APPROX. VALUE	% OF TOTAL	INTELSAT QUOTA
U.K.	$7,355,000.	c. 13.4%	7.321701
France	$3,954,000.	c. 7%	5.1316949
Germany	$2,716,000.	c. 5%	5.1316949
Japan	$1,154,000.	c. 2.1%	1.743262
Italy	$ 794,000.	c. 1.4%	1.917588
Switzerland	$ 777,000.	c. 1.4%	1.743262
Belgium	$ 849,000.	c. 1.5%	0.958794
Canada	$1,366,000.	c. 2.5%	3.268616
Sweden	$ 419,000.	c. 0.76%	0.610142
Spain	$ 34,000.	c. 0.062%	0.0958794

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USPos/11
February 17, 1969

INTELSAT Conference

Position Paper

SUBJECT: Inventions and Data

U.S. Position:

The definitive arrangements should include a policy provision along the lines of that proposed in the attached memorandum of the Legal Committee (February 3, 1969), with details of implementation left to the Governing Body.

Interim Agreements: Article 10(f) (g) of the Special Agreement.

ICSC Report: Section H (544-549).

Papers: 1. Legal Committee report, February 3, 1969 (attached).

2. Issues paper on "Data and Inventions", ComSat, November 19, 1968.

Executive Committee: Minutes of January 13, 1969, item 6; February 6, 1969, item 6.

Draft Agreements: Article 8 of the Operating Agreement.

Attachment:

Legal Committee memorandum.

E/TD:WKMiller:sp

USBP/9

February 3, 1969

MEMORANDUM TO: Ambassador Marks

FROM: Legal Committee on Definitive Arrangements*

SUBJECT: Inventions and Data

The Legal Committee has examined the attached provision relating to inventions and data which has been jointly prepared by Comsat and the Federal Communications Commission and is of the opinion that its inclusion in the definitive arrangements would pose no legal problems under U.S. law. Specifically, the General Counsel of the Federal Communications Commission has been informally advised by the Antitrust Division of the Department of Justice that it believes that a provision along the lines of the attached does not present any antitrust problems.

cc: Chairman Rosel H. Hyde
Mr. James McCormack
General James D. O'Connell
Mr. Frank E. Loy
Mr. John A. Johnson
Mr. Ward P. Allen
Mr. William K. Miller

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* Comprised of representatives of the Department of State (Richard Frank, Asst. Legal Adviser); FCC (Henry Geller, General Counsel, and Asher Ende, Deputy Chief, Common Carrier Bureau); DTM (John O'Malley, Jr., Legal Counsel), and Comsat (William D. English, Asst. General Counsel).

PROPOSED COMSAT-FCC PATENT AND DATA ARTICLE

FOR OPERATING AGREEMENT

OF

DEFINITIVE ARRANGEMENTS

1/22/69

1. The Governing Body, taking into account the principles and objectives of Intelsat, as well as generally accepted industrial practices, shall acquire for Intelsat appropriate rights in inventions and technical data arising directly from any work performed on behalf of Intelsat.

2. Inventions and technical data to which Intelsat has acquired such rights:

(a) Shall be made available to any signatory or any person in the jurisdiction of a signatory, or the government which has designated that signatory:

(i) on a royalty-free basis, for use in connection with the design, development, construction, establishment, operation, and maintenance of equipment and components for the Intelsat space segment;

(ii) on fair and reasonable terms and conditions prescribed by the Governing Body, for use in

connection with other purposes, provided the Governing Body determines that the proposed use would not be incompatible with the principles and objectives of Intelsat;

(b) May be made available to other persons and entities at the discretion of the Governing Body and under such terms and conditions as the Governing Body determines, provided the Governing Body determines that the proposed use would not be incompatible with the principles and objectives of Intelsat.

3. Except as it may otherwise determine, the Governing Body shall endeavor to have included in all contracts or other arrangements for design and development work appropriate provisions which will ensure that inventions and technical data owned by the contractor and its subcontractors which are directly incorporated in work performed under such contracts or other arrangements, may be used on fair and reasonable terms by each signatory or any person in the jurisdiction of a signatory or the Government which has designated that signatory, provided that such use is necessary, and to the

extent that it is necessary to use such inventions and technical data for the exercise of the rights obtained pursuant to Paragraph 1. of this Article.

USPos/12
February 12, 1969

INTELSAT CONFERENCE

Position Paper

SUBJECT: Rules of Procedure - CETS Consensus Issue

Problem:

There is at least one potentially serious problem with regard to the U.S. proposed Provisional Rules of Procedure. In an Aide Memoire from The Netherlands, dated January 29, 1969, the sixteen member countries of the European Conference on Satellite Communications (CETS) urged that the Conference rules provide that decisions taken during the Conference be on the basis of consensus rather than voting.

U.S. Position:

In a circular message to our INTELSAT member posts we instructed the posts to inform host governments that we agree that maximum effort should be given to obtain agreement by consensus. However, at a negotiating conference, such as this one, there must be some provision for reaching decisions if efforts to obtain consensus prove futile. We mentioned the UN Conference on Road Traffic and on the Law of Treaties as examples of recent international conferences with two-thirds majority voting rules.

We should make quite clear that the U.S. takes the intention of seeking consensus seriously and has no intention of railroading any positions by means of voting, particularly not over the opposition of a major group of member countries, but that we cannot accept rules which have no provision for the ultimate resolution of issues and would permit one or a few members to block the conclusion of definitive arrangements.

References:

1. Conference Doc. No. 2 (Provisional Rules) Rule 8, para. 20.

2. Netherlands Embassy Aide Memoire of January 29 (attached).

Attachment.

E/TD:SEDoyle/WKMiller:sp

AIDE MEMOIRE

Duration of the Conference

The United States Government have proposed that the Conference be concluded on 21 March 1969. In the view of CMTS Governments, the setting of such a deadline, if it be intended thereby to indicate the conclusion of the negotiations, would not be desirable. The CMTS Governments naturally agree that it is essential that Definitive Arrangements be drawn up as soon as possible and that the negotiations should take as short a period of time as is reasonable. But, if agreement is to be reached on Definitive Arrangements of a satisfactory and lasting nature, it seems essential that opportunity be given for adequate discussion of all aspects of the Arrangements. It is envisaged by CMTS Governments that the negotiations should begin with a general debate in a Plenary Meeting of the Conference to discuss the main points. This would presumably lead to the establishment of appropriate working groups to consider particular questions in more detail. The reports of these working groups or committees would then be submitted to the Plenary Conference; and this would lead to further negotiations there, of which there might be several rounds.

Procedure of the Conference.

The United States Government have proposed, in the provisional rules of procedure for the Conference, that although the Conference should endeavour to act unanimously, a formal vote could be taken on procedural and substantive questions and upon the text of the Definitive Arrangements themselves. The CMTS Governments would favour a rather different approach. Their feeling is that it would be greatly preferable, at least in the initial rounds of negotiations, to make every endeavour to reach agreement on substantive questions, and indeed on the text of the Definitive Arrangements, by means of a consensus. It is their view that Parties to the Interim Arrangements, who have invested substantial sums of money in the system, should not be obliged, by the immediate adoption of formal voting procedures, to accept the redeployment of their investments in a way contrary to their wishes. The Interim Arrangements are of indefinite duration, and it is laid down that they should continue in force until agreement is reached on the Definitive Arrangements. It seems important that the Definitive

Arrangements be drawn up and adopted in such a way that all Parties to the Interim Arrangements are in fact able to sign them. There is also the point that the consensus procedure, which is more flexible than any voting arrangement, might make it easier for Governments which are not Parties to the Interim Arrangements to indicate their views as to the contents of the Definitive Arrangements. If sustained endeavours during the early rounds of the negotiations do not lead to a consensus on all points, the CSTS Governments do not rule out the possibility that formal voting procedures on substantive questions might be introduced at a later stage.

Washington D.C.
January 29, 1969.

INTELSAT Conference Issues (Revised 11/12/68)

How to Bring New Agreements into Effect, Replacing the Interim Agreements

Issue

How should the new agreements be brought into effect, replacing the interim agreements?

Position U.S. Has Taken

None.

Views of Others

Unknown - not discussed.

Discussion

The Interim Agreements remain in effect until entry into force of the definitive arrangements (Article XV of the governmental Agreement). However, they make no provision as to how the definitive arrangements become effective; Article IX of the governmental Agreement requires the U.S. to convene a conference and calls on all the parties to the Agreement to "seek to ensure that the definitive arrangements will be established at the earliest practicable date, with a view to their entry into force by 1st January 1970", but the Agreement does not say how. The Special Agreement provides in Article 15 for amendment upon recommendation by the Interim Committee approved by two-thirds of the signatories.

Unanimous agreement at the Conference to bring the new agreements into effect would answer the problem, but this hardly seems possible since delegations are unlikely to be authorized to do this. Unanimous agreement at the Conference on provisions (less than unanimity) to bring the new agreements into effect, followed by the necessary acceptances or ratifications, also would solve the problem. This might possibly be attainable, though it seems unlikely since only one dissident could block action.

The best sequence of steps that appears likely to be obtainable might be something along these lines:

1. The U.S. circulates in advance of the Conference proposed rules of procedure providing for

a) acceptance of the rules of procedure by a two-thirds majority, and

b) other voting rules, including acceptance of final texts by a two-thirds majority.

2. The Conference accepts the proposed rules of procedure, by consensus or by a two-thirds vote, or, preferably, unanimously.

3. The agreement approved by the Conference by the agreed required vote, or by consensus, or, preferably, unanimously, provides that it comes into effect upon acceptance by a stated number of parties to the interim Agreement (e.g. two-thirds).

4. The necessary number of parties accept the new agreement.

Since the interim Agreement provides for its own demise, no further step would be needed to accomplish this, although there would have to be some provision for settlement with any member which does not accept.

The flaw in this procedure is that a dissident objecting to the rules of procedure and at each subsequent stage could argue that he is not bound. Counterarguments could be developed. There are, for example, the fact that replacement by definitive arrangements clearly is contemplated in the Interim Agreements (Article IX of the intergovernmental Agreement) and the provision of the Special Agreement for amendment by recommendation of the Interim Committee and approval by two-thirds of the signatories. However, reliance probably will have to be placed more on avoiding a situation where there is a dissenter with strong enough views to take this line. This suggests efforts to meet dissenting views, large majorities, and the assurance of liquidation on reasonable conditions of the interest of any ultimate non-participant. A separate paper is to be prepared on buying out any non-participants.

E/TD:WKMiller:sp
10/17-11/8/68

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INTELSAT Conference Issues

Amendment Process

Issue

What provision for amendment should be included in the definitive arrangements, specifically, in the intergovernmental agreement and in the operating agreement?

Position U.S. Has Taken

None.

Views of Others

Not very much has been said on this subject, and some of the views that have been expressed are not clear. A role for the proposed Assembly has been suggested, but the composition of the Assembly (i.e., governments or telecommunications entities or both) is not clear. Some suggestions also are not clear as to whether they apply to the intergovernmental agreement or the operating agreement or both and whether or not acceptance by governments would be required in addition to Assembly action.

The European countries (the CETS group) have proposed that "the definitive arrangements" should be subject to review and amendment by the signatory governments. The Assembly could make proposals and

"a review conference of the parties to the agreement should be convened if necessary". We assume this means the Assembly or a conference of governments would pass on proposed amendments, which would then be subject to approval by a specified majority of governments. Presumably this would apply to the intergovernmental agreement. Whether it also would apply to the operating agreement is not clear.

Canada proposed that the Assembly "amend the agreement as required". This proposal does not specify which agreement (if there are two) or whether subsequent acceptance by governments would be required.

Japan proposed that the Assembly could revise the entities' agreement.

Australia has proposed a conference of governments, to be convened at stated intervals or upon request, which could amend the intergovernmental agreement. This would be a separate fourth tier in the organizational structure.

Since it is the accepted practice to require approval by a specified majority of governments as the last step in the amendment process for an intergovernmental agreement, we can reasonably assume that most of our partners will expect this.

Objective

Our obvious objective is a procedure or procedures making amendments neither too difficult nor too easy.

Discussion

Since it seems clear that almost all the INTELSAT partners contemplate two separate agreements, an intergovernmental agreement and an operating (telecommunications entities') agreement, the proposed amendment procedure for the two agreements can be discussed separately.

Intergovernmental Agreement

An amendment procedure for a multilateral intergovernmental agreement usually consists of two steps. The first of these is consideration and approval of proposed amendments by a specified majority in a body designated by the agreement for this role (in several cases, the assembly of a sponsoring organization) or in a conference of contracting governments called for the purpose. The second step usually is acceptance by a specified majority of the contracting parties. Two-thirds is the usual majority requirement in both cases.

We see no reason why this procedure should not be followed for the intergovernmental agreement. It is

normally slow and often difficult, but the INTELSAT intergovernmental agreement should not be written in such a manner that it is likely to require early or frequent amendment.

The body to which consideration and approval of amendments would be assigned should be the assembly if there is an assembly which represents all of the contracting governments or a conference of governments called for the purpose if there is not.

In either case, any proposed amendments should be considered first by the governing body, which should be required to pass on to the assembly with its comments any amendments which are proposed and are not withdrawn as a result of the governing body's discussion. If the assembly represents governments, it would consider the amendments and approve or not approve. If it consists of signatory entities and not governments, it could pass on proposed amendments to governments with the comment of the governing body and any comment of its own, including its recommendation as to whether a conference should or should not be convened. It probably would be desirable to provide for calling a conference if either the assembly so recommended or a third of the contracting governments so requested.

There probably should be a provision to require distribution to governments of any proposed amendments well in advance (e.g. six months) of consideration by the prospective approving body.

Operating Agreement

The interim Special Agreement includes an amendment procedure. Article 15 of that Agreement provides that any proposed amendment shall first be submitted to the Interim Committee, and, if recommended by the Committee for adoption, shall enter into force for all the signatories when approved by two-thirds of the signatories. There is a provision, however, that no amendment may impose any additional financial obligation upon a signatory without its consent.

A generally similar procedure would be appropriate under the definitive arrangements.

As in the case of proposed amendments to the intergovernmental agreement, consideration by the governing body would be a useful first step. However, there are questions whether the governing body's approval should be required, and, if so, by what vote, and what, if any, role the assembly should play and by what vote.

If the Assembly does not represent signatories of the special agreement, then it should have no role.

If it is made up or includes representatives of all of them (whether or not governments also are represented), it would be appropriate for it to consider and approve proposed amendments. If approval of two-thirds of the signatories is required in any case, assembly approval, by a two-thirds vote, would not be a substantial additional obstacle. In fact the reverse is true - if a two-thirds vote of the assembly is not obtainable there is no reason to expect approval by two-thirds of the members. Hence, we are led to recommend that the approval of such an assembly by a two-thirds vote should be required.

Whether or not assembly approval is required, approval, or an affirmative recommendation, by the governing body would be a reasonable first step. It would give the U.S. more control if this were done on a weighted vote basis, requiring, for example, a two-thirds weighted vote or a simple majority weighted vote, in addition to or instead of a required numerical majority. The decision on this point, however, might follow the decision on voting in the governing body on other important issues.

After approval by the governing body and by the assembly, if required, acceptance by two-thirds of the signatories should be required. This could be accomplished by the act of voting in the assembly for any member that is willing or by subsequent written approval.

The final element in Article 15 of the present agreement is that no amendment may impose an additional financial obligation on any signatory without its consent. Whether some similar provision will be needed may depend on the content of the agreement, i.e. to what extent it establishes limits.

The same question can also be posed more broadly: What provision should be made for a participant which is unwilling to accept an amendment? (We do not mean here a participant that merely has not acted affirmatively to accept an amendment, but rather one that has declared its unwillingness to be bound by an amendment.) It can hardly remain in the organization and not be bound by an amendment, nor can it be forced to abide by an amendment (in effect a new agreement) it is not willing to accept. Probably this problem could best be met by a provision for opting out of the organization in such a situation, on the basis of an equitable financial settlement.

E/TD:WKMiller:sp 11/18/68

DEPARTMENT OF STATE

Washington, D.C. 20520

MEMORANDUM February 10, 1969

TO: INTELSAT - Ambassador Marks

FROM: IO/UNP - Joseph P. Lorenz

SUBJ: Precedents of Voting Procedures for the Amendment and Entry into Force of International Agreements

In accordance with your request, set forth below are provisions from a number of international agreements which describe the procedures for amending multilateral instruments and bringing them into force. The agreements covered are the IMCO Convention, the IAEA Statute, the Convention for Safety of Life at Sea, the WMO Convention, and the Outer Space Treaty. In two cases (IMCO and SOLAS), the amendment process is weighted in favor of states having the principal interest in the convention, requiring the approval of the governing body of the organization as wellas the assembly. In the WMO and Outer Space Treaty voting for amendments is not weighted, but only those states which accept the amendments are bound by them. Finally, in the case of the IAEA, the sole power to amend lies with the assembly and members, with the governing body having only an advisory role. Entry into force, in every case except the WMO Convention, requires acceptance by a certain number of principally interested states as well as by a specified number of other governments.

The pertinent provisions of the agreements follow:

IMCO

1. Amendments: (Article 52)..Amendments shall be adopted by a two-thirds majority vote of the Assembly, including the concurring votes of a majority of the Members represented on the Council....

2. Entry into Force: (Article 60) The present Convention shall enter into force on the date when 21 States of which 7 shall each have a total tonnage of not less than 1,000,000 gross tons of shipping, have become parties to the Convention in accordance with Article 57.

International Convention for Safety of Life at Sea

1. Amendments: (Article XI) ...An amendment to the present Convention may be proposed to the Organization at any time by any Contracting Government and such proposal if adopted by a two-thirds majority of the Assembly of the Organization (hereinafter called the Assembly), upon recommendation adopted by a two-thirds majority of the Maritime Safety Committee of the Organization (hereinafter called the Maritime Safety Committee), shall be communicated by the Organization to all Contracting Governments for their acceptance.

2. Coming into Force: (Article XI) The present Convention shall come into force twelve months after the date on which not less than fifteen acceptances, including seven by countries each with not less than one million gross tons of shipping, have been deposited in accordance with Article X.....

IAEA

1. Amendments: (Article XVIII C) Amendments shall come into force for all members when: (i) Approved by the General Conference by a two-thirds majority of those present and voting after consideration of observations submitted by the Board of Governors on each proposed amendment, and (ii) Accepted by two-thirds of all the members in accordance with their respective constitutional processes. ...

2. Entry into Force: (Article XXI E) This Statute, apart from the Annex, shall come into force when eighteen States have deposited instruments of ratification in accordance with para B of this article, provided that such eighteen States shall include at least three of the following States: Canada, France, the USSR, the UK and Northern Ireland, and the USA. ...

WMO

1. Amendments: (Article 28) Amendments to the present Convention involving new obligations for Members shall require approval by the Congress, in accordance with the provisions

International Convention for Safety of Life at Sea

1. Amendments: (Article IM) ...An amendment to the present Convention may be proposed to the Organization at any time by any Contracting Government and such proposal if adopted by a two-thirds majority of the Assembly of the Organization (hereinafter called the Assembly), upon recommendation adopted by a two-thirds majority of the Maritime Safety Committee of the Organization (hereinafter called the Maritime Safety Committee), shall be communicated by the Organization to all Contracting Governments for their acceptance.

2. Coming into Force: (Article XI) The present Convention shall come into force twelve months after the date on which not less than fifteen acceptances, including seven by countries each with not less than one million gross tons of shipping, have been deposited in accordance with Article X.....

IAEA

1. Amendments: (Article XVIII C) Amendments shall come into force for all members when: (i) Approved by the General Conference by a two-thirds majority of those present and voting after consideration of observations submitted by the Board of Governors on each proposed amendment, and (ii) Accepted by two-thirds of all the members in accordance with their respective constitutional processes. ...

2. Entry into Force: (Article XXI E) This Statute, apart from the Annex, shall come into force when eighteen States have deposited instruments of ratification in accordance with para B of this article, provided that such eighteen States shall include at least three of the following States: Canada, France, the USSR, the UK and Northern Ireland, and the USA. ...

WMO

1. Amendments: (Article 28) Amendments to the present Convention involving new obligations for Members shall require approval by the Congress, in accordance with the provisions

of Article 10 of the Seabed Convention, by a two-thirds majority vote, and shall come into force on acceptance by two-thirds of the Members which are States for each such Member accepting the amendment.....

2. Entry into Force (Article 35) The present Convention shall come into force on the 30th day after the date of the deposit of the 30th instrument of ratification or accession....

Outer Space Treaty

1. Amendments: (Article XV) ...Amendments shall enter into force for each State Party to the Treaty accepting the amendments upon their acceptance by a majority of the States Parties to the Treaty and thereafter for each remaining State Party to the Treaty on the date of acceptance by it.

2. Entry into Force: (Article XIV (3)) This Treaty shall enter into force upon the deposit of instruments of ratification by five Governments including the Governments designated as Depositary Governments under this Treaty (US, UK, USSR).

IO/UNP:JPLorenz:avw 2/10

INTELSAT Conference Issues

Special Benefits for the LDCs

Issue

Should INTELSAT provide special benefits to the LDCs that would make the organization more attractive or rewarding to LDCs?

This refers to benefits that are essentially financial rather than organizational arrangements that might be advantageous to smaller countries. Two specific proposals have been considered. The first, discussed in Attachment A hereto, considers whether INTELSAT should finance earth stations, capital contributions to INTELSAT, or even terrestrial communications projects for LDCs. The second proposition is discussed in a separate Issue Paper dealing with INTELSAT procurement, and asks whether LDCs should be compensated by INTELSAT for their share of any additional costs incurred by INTELSAT by reason of procurement which has not been done at minimum cost (such as procurement in Europe). This question was raised in a paper submitted to the ICSC by Argentina, which suggested that compensation be given through a technical assistance program of equivalent value.

Discussion

We can expect at least some LDCs to argue at the Conference that benefits to them of INTELSAT membership are not significant, and that INTELSAT is dominated by and its services geared toward the richer countries. We can also expect the argument that the organization will never be truly global until the less developed countries have an opportunity to participate more meaningfully in INTELSAT.

The large number of LDCs that have, in fact, joined INTELSAT would seem to prove the second proposition largely wrong. There are relatively few countries with sufficient (or significant) international or long haul communication requirements that are not members of INTELSAT today, other than the Soviet Union, the eastern European countries and China, all of which are influenced by political rather than economic factors. In the rest of the world, there

are few countries that are logical candidates for membership that have not shown some interest in participating.

With respect to the first question, we think that Attachment A demonstrates that there is not much advantage to be gained by the U.S. from financing LDC telecommunications via INTELSAT.

We nevertheless believe that while the U.S., in its preparation for the INTELSAT Conference, has been focusing largely on the needs of Europe, the demands of the LDCs will in fact be heard quite clearly at the Conference. Consequently we need a paper which is not so much an issues paper as a brief that seeks to marshal the arguments why INTELSAT, as envisioned by the U.S. is beneficial to the LDCs. Such a paper is attached as Attachment B. [Paper to be prepared.]

Attachments:

A. INTELSAT and Telecommunications Financing.
B. INTELSAT Advantages to LDCs [to be prepared].

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Attachment A

INTELSAT and Telecommunications Financing

The purpose of this paper is to consider the possible need for new or improved financing facilities for telecommunications for the less developed countries and, particularly, the possibility of a special relationship between INTELSAT and the international loan agencies, the IBRD and its affiliates, the IDB, the ADB, etc.

The objects of new or improved financing facilities could be (1) earth stations, (2) capital shares for the (INTELSAT) space segment, or (3) terrestrial telecommunications projects.

The purposes of a special relationship could be (a) to strengthen INTELSAT by making it attractive in the sense that it could offer something that might not be obtainable through other channels, and (b) to channel more funds from the loan agencies into telecommunications.

Earth Stations

At present the biggest expenditure for satellite communications that the LDCs face is in the construction of earth stations. Total costs are now running, on the average, around $4 million, including local costs for land, access roads, buildings, etc., which usually amount to some 30% of the total outlay. Variations in total cost depend upon the amount of terminal equipment placed in the station. Stations in developed countries cost more as they are equipped to handle more channels than stations located in the developing countries.

To date, financing has been available on reasonable terms for the foreign exchange costs of an earth station in every case, so far as we are aware, where the project is considered economically sound. This is usually done through a financing agency of the exporting country, e.g., in the case of the United States, the Export-Import Bank. ComSat already has good working relations with these agencies on an informal basis. Tie-ins with other countries' earth stations through other means often will be possible where traffic prospects are not sufficient to warrant building a separate station.

There is no reason to believe this situation will change. Hence, there appears to be no problem with respect to earth stations, unless we wish to encourage construction of stations which are not economically viable, and this is a proposition we would not wish to endorse.

Space Segment

Capital inputs of LDCs for the space segment in INTELSAT do not appear to have been a problem to date, at least not a problem of serious proportions. The amounts involved are much smaller - now about $100,000 for the minimum contribution which will be required over a period of some time of most new LDC members. Possibly some countries may have been deterred by the need for a contribution on this order, but if this is so, they are certainly not countries which at this stage would have any practical use for the organization.

In any case, the question arises whether we would want INTELSAT, or international agencies, or the United States to meet or finance capital subscriptions. We would answer this negatively. To do so would have the appearance of bribing new members to join and could certainly contribute an air of phoniness to the members numbers game, and we do not see sufficient value in numbers to compensate for this drawback. There probably would also be problems as to which countries should and should not have financing made available.

Other Telecommunications Projects

The questions here are principally whether there is an unsatisfied need for financing and, if so, whether INTELSAT could help in meeting such a need.

On the first question, while we have not made a detailed study, our strong impression is that present facilities are ready to finance new projects about as fast as they should be financed if they are rated objectively in the overall spectrum of LDC assistance projects. AID, the international lending agencies, and national lending agencies all have done a great deal in this area. As with earth stations, there is a question of the soundness of the project, and going too far in this area could encourage manufacturer-salesmen to go too

far with unsound or premature projects. A major question, and perhaps the major problem in LDC telecommunications development, is the readiness of many countries to handle advanced types of equipment. This is a training and technical assistance problem, which is being partly, not fully met, but one which takes time and which financing alone will not solve.

INTELSAT Role

As noted above, ComSat already has good working relationships with national export financing agencies with respect to earth station financing. It also makes available advice and technical assistance. Certainly in this area there appears to be neither need nor substantial possibility for making INTELSAT more attractive.

There might be greater possibilities with respect to other telecommunications equipment since there appears to be somewhat more scope for additional financing. However, this is sort of a more than nothing situation; the more does not appear to be much more, or even clearly of any measurable volume, nor worth any unusual costs or efforts.

Costs and efforts would be involved in developing an INTELSAT role. INTELSAT is by concept and by charter a space communications organization. To develop a concern and a capability in conventional terrestrial communications would certainly involve efforts both in obtaining agreement to partially reorient the agency and to develop capabilities. How great these efforts would be we do not know. However, the question does not appear worth pursuing in view of the marginal nature of the benefits, if any, to be gained.

In summary, if our impressions are sound, there is no financing problem that requires a change in existing institutions and no reason to pursue the possibility of a new special role for INTELSAT with respect to financing of terrestrial communications.

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Terms of Reference for Subcommittee I(A)

Subcommittee I(A) shall study and make appropriate recommendations with respect to purposes and objectives of Intelsat; Intelsat membership; scope of Intelsat activities; rights and obligations of members: structure of the organization; number and duration of agreements, as well as signatories thereto; and relationships with the ITU.

The Subcommittee shall adopt an appropriate agenda to facilitate consideration of the matters included in its terms of reference and shall, after due discussion and deliberation, report its recommendations to Committee I for appropriate action and forwarding to the Plenary.

PROPOSED AGENDA FOR SUBCOMMITTEE I(A)

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II.	Eligibility for INTELSAT membership	228-230
III.	Relationships with non-member States	550-556
	a) Non-member States eligible for membership	
	b) States ineligible for membership	
IV.	Number of agreements constituting the definitive arrangements	568-571
V.	Signatories of the agreements	572-576
VI.	Duration of the agreements	577-580
VII.	Scope of INTELSAT's activities	188-227
	a) International public telecommunications services	193-195
	b) International specialized telecommunications services	196-202
	c) Domestic telecommunications services	203-225
	d) Meeting needs of national security nature	226-227
VIII	Rights and obligations of members	
	a) General	599-605
	b) In relation to satellites providing domestic services	215-225 609-611
	c) In relation to satellites for specialized services	612-617
	d) In relation to satellites intended to meet national security needs	618-621
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IX. Structure of the Organization	237-244
a) The Governing Body	
1) Functions	197,200-202,205, 207,209,212-225, 227,367-390, 481-486
2) Size, composition and organization	271,300, 328, 344-366,424-430,48
3) Voting	391-423,481
b) Assembly	
1) Functions	264-281, 293-309 318-333, 480
2) Composition	246-260
3) Frequency of meetings	288-291,315-317, 340-343
4) Voting	283-287, 310-314, 334-339
c) Management Body	
1) Functions	463-477
2) Identity,character and designation	431-462, 487-488
3) Relationship to the Governing Body	255-256
X. Relationship with the ITU	216-217, 561, 563 565, 607, 610,614 615

Terms of Reference of Subcommittee I.B

Subcommittee I.B shall study and make recommendations with respect to legal and procedural questions associated with the structuring and entry into force of the definitive arrangements. Specifically, the subcommittee will include in its considerations what definitions should be specified in the agreements, the legal status of INTELSAT under the definitive arrangements, privileges and immunities, the mechanisms for accession and supercession, appropriate withdrawal provisions, the liability of partners, amendment processes and the means of settlement of disputes.

The Subcommittee shall adopt an appropriate agenda to facilitate consideration of the matters included in its terms of reference and shall, after discussion and deliberation, report its recommendations to Committee I for appropriate action and forwarding to the Plenary.

TENATIVE AGENDA FOR SUBCOMMITTEE I.B

I. Definitions (146-162)*

A. Intergovernmental

B. Operating

C. Recommendations

II. Legal Status of INTELSAT (231-236)

A. Comparison of present legal structure (Joint Venture) with an Independent Legal Status for INTELSAT

1. Ability to conduct business

a. Contracting

b. Acquisition of property

c. Protection of property interests

2. Ramifications

a. Ownership

b. Liabilities

c. Taxation

d. Other

3. Implementation

B. Conclusions

C. Recommendations

III. Privileges and Immunities (594-596)

A. Present Status of INTELSAT

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*Paragraph references are to sections of the Report of the Interim Communications Satellite Committee on Definitive Arrangements for an International Global Communications Satellite System.

B. Categories of Immunities

1. Taxation

2. Customs

3. Civil and Criminal Process

4. Search, seizure and attachment

5. Confiscation of assets

C. Implementing Arrangements

1. Headquarters Agreements

2. Other Mechanisms

D. Recommendations

IV. Accession, Supersession and Buy-Out (626)

A. Accession and Supersession

1. Formula for Entry Into Force - Unanimity vs. Less Than Unanimity

a. General principles of International Law

b. Requirements of Article IX(b)

2. Transfer of Rights and Obligations under Interim Arrangements

B. Obligations and Rights of Non-Continuing Prior Members

1. Article IX(b)

2. General Principles of Equity and Law applicable to Partnerships and Joint Ventures

3. Financial Obligations and Rights

4. Patent and Data Rights

V. Withdrawal Provisions (622-625)

A. Voluntary Withdrawal - Permissive?

1. Obligations and Rights of Withdrawing Signatory

B. Involuntary Withdrawal

1. What constitutes Default?

a. Non-payment - grace period

b. Non-compliance with Terms of Agreements

2. Consequences

a. Suspension of Rights - Automatic?

b. Expulsion - Role of Assembly and Governing Body

VI. Liability of Partners Inter-Se

A. Article 13 of Special Agreement

B. For Obligations on behalf of INTELSAT

VII. Settlement of Disputes (591-593)

A. Adequacy of Existing Supplementary Agreement on Arbitration

1. Proposed Amendments

B. Operating Agreement or Separate Agreement?

VIII. Amendment Processes (581-590)

A. Intergovernmental Agreement

B. Operating Agreement

IX. Reservations

Committee II - Operational Arrangements

Subcommittee A - Financial Arrangements

Terms of Reference

Subcommittee IIA will study and make recommendations concerning financial arrangements to be included in the agreements. Such provisions will include financial principles of investment and the method of determining investment shares, consideration of the financial aspects of the transitional arrangements, and treatment of financial implications of withdrawal.

The Subcommittee shall adopt an appropriate agenda to facilitate consideration of the matters included in its terms of reference, and shall, after discussion and deliberation, report its recommendations to Committee II for appropriate action and forwarding to the Plenary.

Proposed Agenda

		ICSC Report Par.
I.	Principles underlying the financial arrangements of the organization	492-496
II.	Principles for determining investment shares of signatories	497-506
III.	Methods of determing investment shares	507-515
IV.	Financial rights and obligations of investors	516
	A. Property rights and interests	517-519
	B. Compensation for use of capital	520-523
	C. Contribution to maintenance and operating expenses	524-525
	D. Conditions of use	526-531
V.	Financial aspects of system access by non-members	553-556
VI.	Financial aspects of provisions relating to withdrawal	622-625
VII.	Financial aspects of transition from interim arrangements to definitive arrangements	626-636

Committee II - Operational Arrangements

Subcommittee B - Other Arrangements

Terms of Reference

Subcommittee IIB will consider and prepare recommendations on the subjects of procurement; inventions, data and technical information; earth station authorization provisions; and any other operational aspects of the draft agreements.

The Subcommittee shall adopt an appropriate agenda to facilitate consideration of the matters included within its terms of reference and shall, after discussion and deliberation, report its recommendations to Committee II for appropriate action and forwarding to the Plenary.

Proposed Agenda

		ICSC Report Par.
I.	Procurement policies	532-543
II.	Inventions, data and technical information	544-549
III.	Authorization of earth stations and initial and continuing verification and monitoring of system performance.	---
IV.	Any other operational aspects of proposed agreements	---

USEP/1
January 29, 1969

MEMORANDUM FOR AMBASSADOR MARKS

FROM: Legal Committee on Definitive Arrangements*

SUBJECT: Arbitration Provisions Under Definitive Arrangements

This memorandum considers the type of arbitral machinery that should be established under the definitive arrangements.

The memorandum first focuses on the substance of the existing Supplementary Agreement on Arbitration and concludes that, in general, an arbitration arrangement patterned closely after the Supplementary Agreement would be most desirable from the United States point of view. It recommends certain minor changes in the present Supplementary Agreement, and sets forth reasons why significant changes which may be recommended by the Europeans should be opposed by the United States.

The memorandum also raises the question whether the United States Government should have the opportunity to participate directly in arbitral processes arising under the intergovernmental agreement. As is noted below, there is disagreement within the Legal Committee on this issue.

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* Comprised of representatives of the Department of State (Richard Frank, Asst. Legal Adviser); FCC (Henry Geller, General Counsel, and Asher Ende, Deputy Chief, Common Carrier Bureau); DTM (John O'Malley, Jr., Legal Counsel), and Comsat (William D. English, Asst. General Counsel).

1. Summary of Present Supplementary Agreement on Arbitration.

Under the present Supplementary Agreement on Arbitration, if a "legal dispute" is brought to arbitration an arbitral tribunal is established with competence to decide "whether an action or a failure to act by the [Interim] Committee or by any signatory or signatories [to the Special Agreement] is authorized by or is in compliance with the [intergovernmental] Agreement and the Special Agreement." Only a signatory of the Special Agreement or the Interim Committee is authorized to institute and to be a party in proceedings. (Article 2).

The arbitral tribunal is composed of three members. The opposing sides to a dispute each designate one member, and if one side fails to do so, the chairman of the panel makes the selection. The third member, the president of the tribunal, is selected by the other two from a panel of seven experts appointed every two years by the Interim Committee from a list of names submitted by the signatories of the Special Agreement. (Articles 3 and 4). In the event the two members of the tribunal fail to agree on a third member, within a specified period of time,

the chairman of the panel of seven experts designates the third member.

The tribunal has the power to determine its own jurisdiction. (Articles 5(f) and 6). The proceedings are held in private and all materials presented are kept confidential. Decisions require approval of two of the three members and must be supported by a written opinion. (Article 5). They are to be based on interpretation of the Agreement, the Special Agreement and the Supplementary Agreement "in accordance with generally accepted principles of law." The tribunal's decision is binding on all parties to the dispute. (Article 11). Pending final decision, the only interim relief which the tribunal may grant is in the form of recommendations to the parties in order to protect their respective rights. (Article 10).

2. Recommended United States Position.

The Supplementary Agreement on Arbitration has not been invoked during the life of the interim arrangements. In general, we believe that the substantive provisions in the Agreement provide a reasonable and effective arbitration procedure, and, with the exception

of the minor changes noted below and the issue raised in paragraph 4 herein, we do not believe that there is any need to change these provisions.

a. Changes in INTELSAT.

The arbitration provisions will need to reflect changes made in the INTELSAT organization under the definitive arrangements. Some of these will require no more than editorial changes; for instance, "Government Body" should replace "Committee". Other changes may be necessitated as a result of structural changes in the organization. For instance, the creation of an Assembly with certain decision-making functions may necessitate its being included as a proper party to arbitration proceedings.

b. When a panel member's period of service commences.

It is not clear under the present agreement whether a panel member's period of service commences on the date of his appointment, the date of the appointment of the seventh and last member, or the date when the panel is convened for the purpose of choosing a chairman. We

recommend that the member's period of service commence upon the appointment of the seventh and last member, and that language to that effect be included in the provisions.

c. Procedure for filling a vacancy on the panel.

Under the present agreement, the Interim Committee fills a panel vacancy from the list of nominees supplied by the signatories. But it is not clear whether a signatory whose nominee is no longer available or whose nominee is being replaced is permitted to submit a new nomination for the list before the vacancy is filled. We recommend that Article 3(a) of the Supplementary Agreement be amended to permit such signatory to submit a new nomination under those circumstances.

d. Relaxation of quorum requirement.

At present the quorum requirement for a meeting of the panel is six out of seven members. The panel only meets to choose its chairman, who designates panel members under certain circumstances. (Article 3(c)). This is an important act, since the arbitration machinery can function only after the panel has convened and selected a chairman. Accordingly, it may be desirable (and acceptable

if there is widespread geographic representation on the panel) to make it somewhat easier for the panel to convene and select a chairman by reducing the quorum requirement from six to five members.

3. Recommended United States Position Regarding European Efforts to Make Major Changes in the Arbitration Arrangements.

During the 1964 negotiations of the interim arrangements, several European countries put forth proposals which would have created a standing arbitration tribunal with a different jurisdiction provision and with authority to issue interim orders. We believe they were motivated by a desire to reduce United States influence in the consortium by establishing a powerful organ with authority, in effect, to review and to supplant Committee decisions.

With respect to a standing tribunal, the European view seems to have been that the immediate availability of a permanent tribunal would be likely to encourage actions and decision-making in accordance with the Agreement, thus avoiding the necessity of litigation. The United States questioned the workability of a standing

tribunal on the grounds that it would be an open invitation for unnecessary and impeding litigation in an organization which necessarily granted wide discretion to the Interim Committee on behalf of the signatories.

The proponents of interim relief powers* maintained that the possibility of interim relief must be available for application in exceptional and important cases where it was absolutely necessary to prevent a fait accompli with damaging consequences. The United States objected to the provision for interim relief, viewing it as an extreme form of relief reserved for cases where the possibility of irreparable damage could be firmly established, and inappropriate to a complex commercial organization making practical and technical decisions. We feared

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* The proposed Article 8 of the European Draft read as follows:

> The Tribunal shall have power to issue provisional measures and interim orders during the course of its consideration of the dispute but only if it finds this indispensable to protect the rights of the complaining party. Except in such cases, the operations or activities which have given rise to the dispute may be continued, pending the decision, which shall include appropriate provisions to compensate the prevailing party for any damage suffered on this account.

such a provision would permit interruption of INTELSAT operations as a result of an unfounded complaint. Finally, a compromise was agreed upon (Supplementary Agreement, Article 10) which gave the arbitration tribunal the authority during the course of its consideration of a case to make "recommendations to the parties with a view to the protection of their respective rights."

With respect to the scope of jurisdiction, the Europeans had originally proposed that the tribunal have competence concerning the "interpretation or application of the Special Agreement." We feared the Europeans intended to interpret this language to allow the tribunal to review the Committee's policy determinations rather than being limited to determining whether it acted within the scope of its authority. They finally accepted a United States proposal which was incorporated as the present definition of the competence of the tribunal. (Article 2(a)).

We believe the establishment of an arbitral tribunal which is a standing tribunal, has interim relief powers, or has broader jurisdiction is not desirable from a United States point of view.

With regard to a standing tribunal, the existence of such a tribunal could lead to constant harassment of the Governing Body and interference in the normal business operations of INTELSAT; and it would require a new procedure for selecting permanent members which would presumably not allow the parties to arbitration to select an arbitrator.

The United States should oppose interim powers greater than the present authority to issue recommendations for the following reasons: such powers are inappropriate in a complex commercial organization in which many decisions which are grounded on business judgment and discretion might be inhibited by the existence of a tribunal with power to suspend decisions on an interim basis; the organization could well suffer considerable loss of revenues due to delays in the execution of the Governing Body's decisions; the tribunal would be required to formulate its interim relief in the absence of a full and detailed assessment of all the facts; because of the extraordinary nature of interim relief measures our legal system requires a determination of irreparable harm subject to the safeguard of judicial review, a safeguard not

possible in the present context; the present interim relief measures are adequate and appropriate.

If the tribunal's jurisdiction were broadened beyond that now provided in the Supplementary Agreement, the business judgment and policy determinations of the Governing Body would be constantly subject to review, revision and even rejection by the tribunal. This is not the purpose of a bona fide arbitration provision. The competence of the tribunal should be limited to legal issues, such as whether the Governing Body is acting within the scope of the Agreements, as presently set forth in the Supplementary Agreement.

As an argument applicable to all three of the above considerations, although there has been no resort to arbitration, no serious questions have arisen as to the meaning or scope of the Supplementary Agreement on Arbitration; it is not anticipated that the definitive arrangements will differ from the interim arrangements to such an extent as to require a substantively different arbitration arrangement.

One last point should be emphasized. The Legal Committee's conclusion that the permanent agreements

should establish an arbitration procedure is based on the assumption that arbitral arrangements substantially similar to the present ones can be negotiated. If, however, proposals for standing arbitral tribunal possessed of wide jurisdiction and broad powers are tabled by our partners and gain any widespread support, we would have to reconsider our position on the arbitration issue. The United States interests may be better served by no arbitration arrangements at all than by an arbitral tribunal as described above.

4. Party to Arbitration.

As noted above, there is disagreement within the Legal Committee concerning whether the United States Government should be a party to arbitration processes involving the intergovernmental agreement. Set forth below are the differing viewpoints.

a. State Department View (as drafted by the State Department).

Under the present Supplementary Agreement, the jurisdiction of the arbitration tribunal extends to disputes arising under the intergovernmental agreement as well as under the Special Agreement. However, the United States Government is not able directly to initiate or to be a party to any

arbitration, even those under the intergovernmental agreement. Only the Interim Committee (on which Comsat represents the United States) or a signatory of the Special Agreement (Comsat for the United States) is authorized to institute and to be a party to an arbitration.

The Department of State believes that the United States Government cannot abandon the right to institute or to be a party to arbitration of a dispute arising under an agreement to which it is a party.

In addition, under the present intergovernmental agreement, there is no dispute settlement mechanism when the acts of parties to that agreement are drawn into question. The Department of State believes that the arbitration provisions for the definitive arrangements should cover disputes relating to acts of parties.

No one can seriously challenge the proposition that the Government of the United States has an important and justified interest in the definitive arrangements. The 1962 Act directs the President to --

> "exercise such supervision over relationships of the corporation with foreign governments or entities or with international bodies as may be appropriate to

> assure that such relationships shall be consistent with the national interest and foreign policy of the United States;" (47 U.S.C. 721 (a)(4)).

In the definitive negotiations, the President has chosen to carry out his responsibility not by issuing instructions to Comsat, but by having his designee take charge of the negotiations and carry them to fruition and by having the United States Government sign the agreement. This choice was made despite Comsat's undeniable financial interest in the outcome of the definitive negotiations.

It would hardly be in keeping with this interest for the United States to abandon its direct control over the interpretation of the agreements once they have been negotiated. The resolution of disputes arising out of factors unforeseen at the time of negotiation could radically change the character of the intergovernmental agreement. For example, the character of the interim arrangements and of general United States communications policy could have been dramatically affected by arbitration of the issue of the permissibility of separate domestic satellites. We will, of course, do our best to foresee all potential issues of this kind, but we should be foolish to believe that all important

issues can be anticipated, especially in this area of rapid technological development. The permanence of the definitive arrangements makes arbitration all the more important to the United States Government; while most issues may be dealt with satisfactorily by Comsat, this procedure can no longer suffice as the exclusive means to protect the interests of the United States Government.

Although we recognize the INTELSAT arrangements are to a certain extent sui generis, we know of no precedent where the United States Government delegates all its responsibilities for active participation in arbitration arising out of an international agreement to which it is a party. On the contrary, the Government often engages in international arbitrations on behalf of private interests.

The Department of State also recognizes that Comsat has distinct interests in any disputes arising under either agreement and may have the primary interest in particular cases.

In order to accommodate both interests, the Department of State recommends that the arbitration provisions provide that disputants in arbitration proceedings may be parties

to the intergovernmental agreement (e.g., the U.S. Government for the U.S.), signatories, or the Governing Body; that signatories may institute proceedings only with consent of its Party; and that a Party may choose to participate on behalf of or jointly with its signatory named as a respondent. We also recommend that the arbitration provision encompass acts by Parties. In practice, the United States in consultation with Comsat, would decide whether the United States should institute arbitration or whether Comsat could institute arbitration, and whether the United States or Comsat should defend an action instituted by someone else.

This is an issue only for the United States and a small number of other countries whose governments are parties to the intergovernmental agreement but who have authorized private entities, rather than government ministries, to accede to the Special Agreement. We doubt consequently that this would be considered a major or meaningful change to the other parties, or that they would object to the change.*/

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*/ The Committee has recommended that the "Second Agreement" incorporate arbitration provisions. Whether or not the Department of State recommendation is accepted, we believe the arbitration provisions, since they cover disputes arising under the intergovernmental agreement, should be in that agreement rather than the subordinate agreement.

b. Comsat View.

The views presented by the State Department are inappropriate and unnecessary when viewed in the context of the unique arrangements governing the United States participation in INTELSAT. Moreover, these views present certain serious disadvantages and risks as discussed below:

(1) Comsat should, subject to appropriate supervision and instruction, be the United States party to any arbitration proceedings under the definitive arrangements.

(a) It does not appear appropriate or necessary for the Government to participate as a party in arbitration proceedings under the definitive arrangements. The Satellite Act envisioned the United States participation in the establishment and operation of the global communications satellite system through a private corporation, Comsat, subject to appropriate governmental supervision and regulation. The language of the Act serves to negate direct Government participation in the establishment and operation of the system, and there is no reason to regard arbitration as an exception to this approach. On the other hand, the Act provides an adequate legal basis for supervision by the Government of Comsat's relationships with foreign governments or entities

such as INTELSAT, and there is no reason to suspect that such supervision would not continue to be effective with respect to any arbitration proceedings which involved the intergovernmental agreement.

It should be recognized that the provisions of the two agreements are so intertwined and interrelated that a dispute which arises out of either agreement inevitably will involve some significant aspects of the other. For example, the three disputes in which recourse to arbitration has been threatened -- the aeronautical satellite program, exceeding the $200 million amount set in the Interim Agreement, and the French request for a general license with respect to INTELSAT inventions and data -- encompass interpretive issues under both the Interim and Special Agreements.

(b) Since Comsat is the United States instrument for participation in the establishment and operation of the global system, invests its stockholders' money in that system, and bears the financial risks, it is appropriate that it should be the party to all arbitration proceedings involving the consortium's disputes, since such disputes will nearly always have a financial impact. The Government has no

financial liability with respect to the outcome of any disputes referred to arbitration, yet, it seeks a unilaterial right to determine in each instance whether Comsat, with its substantial financial and operational investment in the system countenanced by a congressional act, may represent itself in INTELSAT disputes.

(c) Moreover, State's proposal fails to take into account the fact that the necessity for arbitration will most likely be determined by what transpires in the nature of negotiations and conciliatory efforts in the Governing Body where the grievances of a signatory will first be raised and the opportunity first afforded to formulate arguments in reply with a view towards avoiding an arbitral dispute. During such proceedings the Government could protect its interest in the same manner as it does in other INTELSAT matters, by issuing appropriate instructions to Comsat. Should the matter move on to arbitration, the Government can also protect its interests by precisely the same means, without shifting the party which has been representing the United States in the pre-arbitral considerations.

(2) Serious disadvantages would result if the arbitration provisions were included in the intergovernmental agreement rather than the operating agreement.

(a) The State Department's recommendation would place Comsat at a serious disadvantage vis-à-vis its foreign partners in the Governing Body, since nearly all such partners would, unlike Comsat, be potential parties to any arbitration proceedings. In view of its heavy financial and operational investment in INTELSAT, Comsat regards as unacceptable any suggestions which would place it on a less than equal basis with its partners in arbitration proceedings involving INTELSAT.

(b) Although we cannot envision an arbitral dispute which would be exclusively or primarily of concern to the parties to the intergovernmental agreement (nor has the State Department cited any such example), we can appreciate State's concern that it be in a position to effectively respond to sovereign differences arising in the organization. However, INTELSAT should not adopt mechanisms which could encourage political or sovereign disputes, for to do so may seriously impair its commerical viability. While it was established

by intergovernmental agreement, its success is largely attributable to the fact that it is composed of signatories whose primary function is communications and who attempt to minimize political controversy in favor of keeping matters on a commercial basis. Having these communications entities arbitrate their own disputes (Comsat subject, of course, to appropriate governmental supervision) serves this basic aim and is in furtherance of the basic thrust of the interim agreements and the Satellite Act. Moreover, the Government has available to it diplomatic channels through which purely sovereign differences can be resolved.

(c) The State Department's recommendation, if adopted as the United States position, would raise a major issue with our foreign partners for no discernible reasons. The Interim Committee has unanimously recommended (see its Report on the Definitive Arrangements, para. 593) that the "Operating Agreement," successor to the Special Agreement, should incorporate provisions on arbitration procedures. For the United States to reverse its position now and propose to the Conference a basically different approach to the arbitration question could open the door to European proposals

for undesirable changes in the entire arbitration procedures, the very result which the State Department agrees we should avoid.

(3) The State Department's argument, that they know of no precedent where the government delegates all of its responsibilities for active participation in arbitration arising out of an international agreement to which it is a party, is irrelevant and misleading.

(a) In making this argument, State has overlooked an obvious example where the Government is not a disputant to an agreement which it signed: namely, Comsat's participation as the United States party under the existing Supplementary Arbitration Agreement which encompasses disputes arising under both the Interim and Special Agreements. Moreover, the alleged dearth of precedent is not really relevant when the uniqueness of the Comsat-Government relationship established by the Satellite Act is considered.

(b) Furthermore, Comsat's status as the direct party to arbitration would not constitute an abdication by the Government of its overall responsibilities under the Satellite Act. As noted previously, these responsibilities are met through the furnishing of supervision and instructions

to Comsat with regard to INTELSAT matters that affect the foreign policy and national interest of the United States. This has included interpretation of the intergovernmental agreement and would, presumably, include, where appropriate, supervision and instructions with respect to arbitral matters relating thereto, and there is, of course, no question that Comsat would continue to comply with applicable governmental instructions.

(4) The relationship between a party and its signatory with respect to arbitration is a domestic matter that should not be included in the permanent agreements.

(a) The State Department's recommendation, which would provide the parties to the intergovernmental agreement a unilateral right to determine (i) whether arbitral proceedings should be instituted and (ii) the proper parties to a proceeding, would place before an international conference a purely domestic matter, the relationship between a party and its signatory. Such matters are wholly inappropriate for resolution in an international agreement. The present Interim Agreement specified, for instance, that the relations between a party and its designated signatory "shall be governed by the

applicable domestic law." (Article II (a)). In addition, it could only be viewed as an attempt by the United States to resolve its unique internal problems in an international forum.

(b) The finely balanced and unique relationship of the foreign policy interest of the United States on the one hand and the commercial interest of Comsat on the other should not be made a part of the United States position at the Conference. To do so for the purpose proposed by the State Department could only serve to impair this relationship without achieving any concrete goals not already possessed by virtue of domestic law.

(5) Conclusion.

Of prime importance is the continuance of INTELSAT as a stable and viable commercial organization. One means of better assuring a commercial basis of operation is to confine disputes to the signatory communications entities themselves, thereby helping to avoid, wherever possible, political implications. The State Department has failed to demonstrate any substantive advantages to be derived from changing the present arbitral arrangements to provide the parties to the intergovernmental agreement, the unilateral

right to determine the parties to disputes arising under the definitive agreements. In fact, there are substantial disadvantages and risks in adopting State's position.

Further, State has not provided any evidence in support of its apparent concern that the Government's position would not be adequately preserved through continuation of Comsat's direct participation in INTELSAT disputes. Comsat, although the designated entity with the financial and operational interests at stake, is subject to supervision and instruction by the Government. The mechanisms which have been developed to provide for such supervision have functioned effectively, and Comsat fully anticipates they will continue so under the definitive arrangements.

Accordingly, Comsat's position vis-à-vis the status of most of its partners, the uniqueness of its relationship with the Government, and its responsibilities to its shareholders, all dictate that Comsat should remain the direct party in interest to arbitral proceedings under the definitive arrangements.

c. FCC View, as concurred in by Legal Counsel, DTM.

The Commission is not convinced that it is necessary for the U. S. to be a party to the INTELSAT arbitral processes, and it appears that there could be undesirable results if such a course is pursued.

Basic to this entire question is the thoroughly unique relationship between Comsat and the Government, which is established by the Satellite Act and which has governed the U. S. participation in INTELSAT under the interim arrangements. Thus, Comsat is the sole U. S. participant in INTELSAT and on its governing body where all significant decisions, many of which are vital to the U. S. Government, are made. The interests of the U. S. Government are protected by the instructions issued to Comsat as the U. S. participant. Thus, we feel there would be a basic inconsistency, in proceeding solely through Comsat in the vital governing body in which all issues, including any of those which might ultimately go to arbitration, are debated and decided, and then make a provision to have the Government injected into the arbitral process.

We believe that the instructional processes should serve to protect U. S. interests just as adequately

in the arbitral process as in the matters coming before the Governing Body. Indeed, the Government is in a better position to effectuate its instructions during the arbitral process since, under Section 5(b) of the Arbitration Agreement the Government has a right to be present at and receive all papers pertaining to the arbitral proceedings.

Also relevant is the fact that the existing arbitral agreement does not provide for the Government to be a party to the arbitral process. The Government was willing to agree to the arbitral arrangements at that time and we know of nothing which has changed in the interim. It would seem most likely that the foreign partners would construe any proposal of this sort as a lack of confidence by the U. S. Government in Comsat. In this regard, it should be noted that the Government has considered, and rejected, on other occasions, having a Government representative participate in the ICSC proceedings. The latest example of this was in connection with ICSC consideration of the definitive arrangements, which were, of course, of critical importance to the Government.

Except for the question of Government participation, all are agreed that it is in the best interest

of the U. S. Government to basically repeat the present arbitral arrangements. This being so, it would seem in the best interests of the U. S. not to open this question of Government participation unless it is considered of such importance as to justify the weakening of our position against other fundamental amendments, e.g., scope of jurisdiction, standing tribunal and interim relief.

Along the same lines, it appears that U. S. interests would be best served by not emphasizing or enhancing the arbitral process but rather to maximize the authority of the governing body with its weighted voting. The proposal for Government participation would seem to lend stature to the arbitral process and might open the door to political disputes.

As has been indicated this is almost uniquely a U. S. problem. A foreign signatory who wished to bring Comsat to arbitration might be upset if the U. S. had the power to substitute itself for Comsat. On the other hand, we feel that we should not afford foreign entities the possible option of proceeding against either Comsat or the U. S. Government as it pleased. This could elevate political as

against commerical considerations, a possibility we wish to avoid.

cc: Chairman Rosel H. Hyde
Mr. James McCormack
General James D. O'Connell
Mr. John A. Johnson
Mr. Frank E. Loy
Mr. Ward P. Allen
Mr. William K. Miller