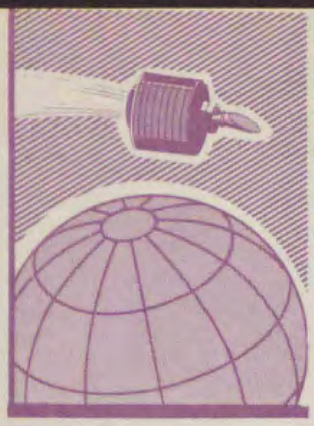

PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/1 (Rev. 1)(Add. 1)
March 6, 1969

COMMITTEE II - LEGAL AND PROCEDURAL QUESTIONS

Please add to the "Suggested Work Program" an additional item as follows:

X.	Number of Agreements Constituting the Definitive Arrangements	568-71

* * *

PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/1 (Rev. 1)
February 26, 1969

COMMITTEE II - LEGAL AND PROCEDURAL QUESTIONS

Terms of Reference

Legal and Procedural Questions, including definitions, legal status, entry into force, duration, amendment, withdrawal, settlement of disputes.

Suggested Work Program

Pursuant to its terms of reference, the Committee presumably will wish to study and make recommendations with respect to legal and procedural questions associated with the structuring and entry into force of the definitive arrangements. Included could be the definitions to 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 Committee presumably will wish to adopt an appropriate work program to facilitate consideration of the matters included in its terms of reference and, after due discussion and deliberation, to report its recommendations to the Plenary. The following work program is suggested by the Secretariat to facilitate the Committee's consideration of its tasks:

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- B. Operating
- C. Recommendations

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ICSC Report Par

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* * *

PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/2
February 25, 1969

LEGAL STATUS OF INTELSAT UNDER
THE DEFINITIVE ARRANGEMENTS
(Submitted by the United States Delegation)

The purpose of this paper is to compare the present legal structure (joint venture) of INTELSAT with an independent legal status for INTELSAT, with a view to determining the necessity, if any, for modification of the present legal structure.

I. COMPARISON OF PRESENT LEGAL STRUCTURE (JOINT VENTURE) WITH AN INDEPENDENT LEGAL STATUS FOR INTELSAT

INTELSAT's juridical status under the interim arrangements is that of a joint venture, and, as such, it does not have legal status or personality independent of the legal personality of its participants. The alternative is to create a legal status for INTELSAT which is comparable to the status of a public international organization. Committee II should give primary consideration to whether such independent international legal status is necessary for the effective conduct of INTELSAT's business functions.

A. ABILITY TO CONDUCT BUSINESS

1. Contracting

INTELSAT need not have independent legal status to carry out effectively its contracting functions. Utilizing the concept of agency, which is recognized by virtually all legal systems, contracts for and on behalf of INTELSAT, using the consortium name, can be entered into by any signatory, either as manager or as signatory. The consortium may also contract through an individual or an outside entity acting as agent for the signatories. The legal ability of the individual to act as agent on behalf of sovereigns and commercial entities, and to obligate them in the conduct of significant business activities, has long been recognized.

INTELSAT business has been effectively carried out in this manner under the interim arrangements, and it could continue to be so conducted under the definitive arrangements. For example, in contracts for the lease and operation of INTELSAT's TT&C facilities in Italy and Australia, and in the INTELSAT IV contract, Comsat, as manager, acted for and on behalf of INTELSAT. Moreover, in all of the standard agreements for allotment of satellite capacity between INTELSAT and the users, Comsat, by authority of the Interim Communications Satellite Committee (ICSC), acted for and on behalf of INTELSAT. Also, the three-year, $25 million contracts for the allotment of satellite capacity in connection with the NASCOM service (e.g., with Her Majesty's Postmaster General, The Spanish Telephone Company and OTC (Australia)) were signed by the Chairman of the ICSC as agent on behalf of the Committee.* Under such contractual arrangements, the rights and obligations are those of the individual signatories, in proportion to their respective quotas.

As is the case with INTELSAT's present manager,** any entity or individual acting on behalf of the consortium on a continuing basis should have an instrument, for example, an agency agreement with the Board of Governors, to evidence its authority to obligate, and acquire rights on behalf of, the signatories. Such evidence of authority should enable an agent to conduct business activities of INTELSAT under the definitive arrangements, particularly because a signatory who would be obligated by such an agency agreement would be resident in almost any jurisdiction where INTELSAT business would be conducted.

If INTELSAT were established as a separate international legal entity, that entity would itself enter into contractual arrangements. Under such contractual arrangements, the rights and obligations of INTELSAT would rest with the legal entity rather than the individual signatories.

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* The Committee is, of course, empowered by all the Signatories to the Special Agreement to act on their behalf in allotting satellite capacity.

** All the parties to the Interim Agreement designated Comsat as the manager of the joint venture, empowered to act on behalf of the consortium.

Because there would be substantial doubt whether the individual signatories would be directly liable for INTELSAT's contractual obligations, potential contractors may be reluctant to contract directly with INTELSAT as a legal entity, unless substantial liquid assets are maintained to meet contractual obligations as they arise.

2. Acquisition of Property

There is no significant difference between INTELSAT's ability to acquire property interests in its present status and its ability to do so as a legal entity. Contracts to acquire property interests are generally governed by the same principles as other contracts; as discussed above, lack of legal personality does not impede the conclusion of contracts.

3. Protection of Property Interests

INTELSAT's lack of legal personality does not hamper adequate protection of the property interests of the signatories. With respect to disputes between signatories, the Supplementary Agreement on Arbitration provides an exclusive mechanism for settlement of such disputes. It is proposed to continue those provisions in the definitive arrangements. With respect to acts of third parties involving INTELSAT property interests, all contracts and agreements relating to the acquisition or utilization of INTELSAT property interests incorporate provisions requiring the settlement of disputes by final arbitration. With respect to acts of third parties not in privity with INTELSAT, there is no bar to INTELSAT instituting legal proceedings through an authorized agent.

Although it may be necessary to join some or all of the signatories in a legal proceeding, as a practical matter joinder is only required in name; the signatories may be represented in court by local counsel acting on their behalf.* The necessity

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* For example, in the U. S., INTELSAT could institute proceedings in some instances through local counsel in the name of the Consortium without joining the signatories; in other jurisdictions, the signatories must be named as parties.

for local counsel will not be affected, whether or not INTELSAT has legal personality.

With respect to the protection of such property interests as rights in inventions, it is doubtful that independent legal status for INTELSAT would offer any advantages.

4. Other International Joint Ventures

The concept of the international joint venture, not created as a legal entity separate from the participants, is often used in international business operations. Such international joint ventures, which include participation by both private entities and governments, have successfully engaged in interational operations in many fields, including communication, navigation, nuclear energy, and the exploitation of natural resources.

B. RAMIFICATIONS

1. Ownership

In its present status, INTELSAT assets are owned jointly in undivided interests by the signatories. If INTELSAT becomes a legal entity separate from its participants, the assets of INTELSAT would presumably be held by that entity. Signatories would no longer have a direct undivided ownership interest in the assets; rather, they would have an interest in the legal entity INTELSAT, which would itself own the assets.

2. Liabilities

Under INTELSAT's present status, the participants are liable either jointly or jointly and severally for the obligations of INTELSAT to third parties. This does not, however, result in any one participant ultimately paying more than his share of an obligation, since the arrangements require the indemnification of such a party by the other partners in proportion to their interest.

If INTELSAT has legal personality, there is substantial doubt as to the liability of the individual participants. Although this might be considered beneficial with respect to the tort and contractual liabilities of the signatories, this could have an adverse impact upon INTELSAT's ability to do business.

3. Taxation

An INTELSAT with separate legal personality would be, under the laws of some INTELSAT members, a taxable entity distinct from its signatories. This has at least two adverse consequences. First, INTELSAT will be subject to income taxation in some member states, unless immunity is granted from such taxation; under INTELSAT's present status it is not regarded as a taxable entity. Second, those signatories who are taxable entities might suffer various tax disadvantages which would be avoided if INTELSAT remains a joint venture. For example, Comsat may no longer be able to deduct from its gross income its share of INTELSAT expenses, including depreciation of assets.

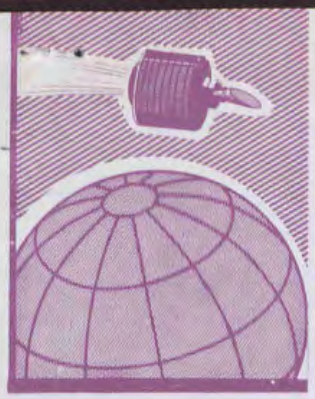
4. Privileges and Immunities

As a matter of international law, INTELSAT need not have independent legal status to enjoy privileges and immunities. Moreover, it is very doubtful that either the absence or existence of legal personality would create problems in conferring privileges and immunities under the domestic laws of the various INTELSAT members. Of course, the makeup of INTELSAT and the functions that it would perform could affect the privileges and immunities that are appropriate to grant to INTELSAT.

II. CONCLUSION

INTELSAT, a joint venture without independent legal status, provides an appropriate framework for the conduct of INTELSAT's business, even if the Board of Governors were to employ an individual, or an entity other than a signatory, to act on its behalf. Moreover, the ability of INTELSAT to conduct efficiently its business activities would not appear to be enhanced through the establishment of a legally independent status for INTELSAT. On the contrary, creating an independent legal status for INTELSAT could have certain undesirable ramifications for both INTELSAT and the individual signatories.

* * *



PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR
THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM
Washington, D.C., February - March 1969

Com. II/4
March 1, 1969

LEGAL STATUS OF INTELSAT UNDER THE DEFINITIVE ARRANGEMENTS

(Submitted by the Delegation of Switzerland)

The Interim Communications Satellite Committee unanimously recommended in its Report on Definitive Arrangements for an International Global Communications Satellite System (166) that the principal aim of the definitive arrangements is to create a world organization entrusted with the design, development, construction, establishment, maintenance and operation of a network of satellites with global coverage for international public telecommunication services. Of necessity, such an organization must have a legal form.

Since legal concepts are not the same in all countries, it seems of great importance to find a legal structure known to the laws of all or most participants, so that the operational functions of the System will be eased and unnecessary difficulties avoided.

After having had a careful study made by experts familiar with the system of the civil law as well as that of the common law, the Swiss Delegation has come to the conclusion that the structure best suited for such purposes is that of an international organization with legal or juridical personality.

Legal Entity-Concept Known to All

To the countries of the so-called civil law system, such as the countries of continental Europe and Latin America, the legal personality is known as a general overall concept. This enables many types of associate ventures to act as legal entities by acquiring legal personality.

While the countries of the so-called common law system, such as England and the United States, do not know the legal personality as a general overall concept, they have, however, an institution which has all the characteristics connected with a legal personality, namely the incorporated company or corporation. It is a legal entity with all the attributes of the legal capacity of a natural person except those inseparably connected with the natural quality of human beings.

Example of International Legal Entity - "The International Bank for Reconstruction and Development."

An excellent example of an international organization also engaged in business activities and having legal personality is the "International Bank for Reconstruction and Development." It seems logical that an institution in which governments both from the civil law as well as common law countries participate should select for its structure a legal form known to them all.

Thus, the Bank's "Articles of Agreement" (as amended effective December 17, 1965) provide in Article VII, section 2, that the Bank shall possess full juridical personality and, in particular, the capacity to contract, to acquire and dispose of property, to institute legal proceedings. In section 3, the Bank is made amenable to suit in a court of competent jurisdiction in the territories of a member in which the Bank has an office or agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. In section 10 each member assumed the obligation to take such action as is necessary on its own territories for the purpose of making effective in terms of its own law the above-mentioned principles, and to inform the Bank of the detailed action which it has taken. Otherwise, the Bank is not subject to local law. In order to permit it to fulfill its functions and to guarantee its independence, the Bank has been assured by the Agreement of the customary privileges and immunities of international organizations.

Choice of Legal Status of INTELSAT

The question to be determined is what legal form would be best suited for the functioning of the future INTELSAT as a worldwide organization.

In the Report of the Interim Communications Satellite Committee (233 and 236), a substantial majority of the Interim Committee recommended the corporate form, that is that the organization should have legal personality.

The Report further shows that there was some support in the Interim Committee for the proposal that the future organization should remain a joint venture. A comparison of the main features of the two forms is, therefore, indicated.

Legal Form

An Organization with legal personality or in corporate form has a legal status known to all legal systems. It will, therefore, have no difficulty in being understood in all nations where INTELSAT may do business and will easily fit into their legal institutions. This is important when questions arise with respect to property rights, rights and duties under a contract, the right to bring legal action, and in many other situations.

A joint venture, on the other hand, has no legal personality. Complicated substitutes are necessary to acquire and dispose of rights or property on the joint venture's behalf. As will be shown more fully below, this creates problems for the organization's soverign participants.

Capacity to Contract

An international organization with legal personality has capacity to contract and, therefore, it becomes itself a party to the contract.

A joint venture, on the other hand, has no contractual capacity and, therefore, cannot be a party to the contract. Consequently, a joint venture as such cannot act through an agent because, lacking legal personality, it cannot appoint one. In the case of INTELSAT, Comsat is strictly speaking not the agent of the joint venture, but that of all the Signatories.

Contracts under the interim arrangements have been concluded between an outside party and Comsat "acting in its capacity as Manager on behalf of International Telecommunications Satellite Consortium (INTELSAT)." However, the rights and duties between Comsat and the Signatories with respect to the rights and obligations arising under such contracts are nowhere clearly defined. Neither INTELSAT nor the Signatories have been parties to such contracts, and none of them have any rights or claims against the other party to the contract which they could assert without going through one particular partner. It is a rather unclear and confusing situation, as experience in the past four years has shown. The result is that the sovereign Signatories are in practice dependent on a private corporation controlled by local law.

Ownership of Property

An international organization with legal entity can hold title to property in its own name. Since it also has full capacity to contract, it can acquire and dispose of property rights through contracts to which the organization itself can be a party. Thus, its rights will be derived directly from such contracts without the intervention of complicated agency arrangements.

A joint venture cannot own property. In case of INTELSAT, the assets are owned jointly in undivided shares by the Signatories. Under the present arrangement, they are not in a position to act themselves for that property but have to rely on a private company to act on their behalf. Similarly, difficulties have arisen with respect to title to patents and ownership of data and know-how. If patents, data and know-how were owned by an international organization with legal personality, no such difficulties would arise.

As to the question how the members will own the assets in the future organization, there is no practical difference, whether they own them through a commonly financed legal entity, or directly as joint owners on the basis of undivided shares.

Capacity to Sue and Be Sued

It may be necessary for INTELSAT to resort to legal action to protect important rights. Again, the situation is clear with respect to an international legal person: it can itself appear as party to a suit.

On the other hand, a joint venture's standing in the courts is, to say the least, doubtful. In most jurisdictions, it would be necessary for the Signatories to appear as parties.

An organization doing business must be amenable to suit. In case of a legal entity, there can be no doubt as to who the party defendant will be.

In case of a joint venture with sovereign participants, the difficulties are overwhelming. While most governments may be sued in their own territories, they enjoy immunity from suit in all other countries. It is, therefore, not possible to bring suit against all Signatories jointly. This alone should be a reason for potential contractors to prefer to do business with an international legal entity rather than with a joint venture of no legal personality with many sovereign governments as participants.

Freedom from Taxation and Other Privileges and Immunities

Freedom from taxation and other privileges and immunities enjoyed by public international organizations should be provided for under the definitive arrangements in order to enable the organization to be independent and to fulfill its functions properly and efficiently. Whether such provisions will be binding on all member nations will depend on whether or not the new agreement will be a duly ratified international treaty or merely an executive agreement as distinguished from a treaty.

Many nations see no difference in these two forms and give both the force and effect of a treaty.

The United States of America, however, makes a clear distinction between treaties and agreements: a treaty, approved by the Senate and ratified by the President, becomes the supreme law of the land by virtue of the U.S. Constitution. An executive agreement, on the other hand, does not bind the United States without implementing legislation.

For instance, the Articles of Agreement of the Bank for Reconstruction and Development are not a treaty. It was therefore necessary to insert Article VII, section 10 (mentioned above) obliging the members to take necessary action to make the provisions effective in their territories. In the United States this obligation was met by an Act of Congress of July 31, 1945, called the "Bretton Woods Agreements Act" (Public Law 79-171, 59 Stat. 512) which in section 11 expressly provided that Article VII, sections 2-9 of the Articles of Agreement of the Bank (providing for freedom from taxation and other immunities) shall have full force and effect in the United States and its territories and possessions.

Conclusion

It follows from the above that the form of an international organization with legal personality is clearly the more desirable alternative because of its tangible advantages and because the universal acceptability of its legal form assures that no unnecessary legal difficulties will arise as would be the case with a joint venture.

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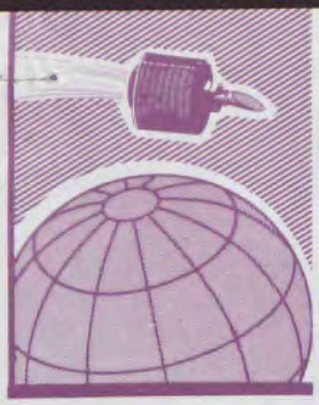

PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/5
March 4, 1969

ACCESSION, SUPERSESSION AND BUY-OUT UNDER THE DEFINITIVE ARRANGEMENTS (Submitted by the United States Delegation)

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

I. ACCESSION AND SUPERSESSION

A. FORMULA FOR ENTRY INTO FORCE

The Interim and Special Agreements do not stipulate how many or what proportion of the parties and signatories hereto must sign the definitive agreements in order for the latter to enter into force and

supersede the interim arrangements. It is the position of the U. S. Delegation, as reflected in the draft articles set forth in Attachments 1 & 2, that the definitive arrangements can enter into force and supersede the interim arrangements when signed by two-thirds of the parties to the Interim Agreement whose designated signatories to the Special Agreement held at least 80% of the total investment quota under the Special Agreement, provided certain conditions are met, most important of which is an equitable settlement with non-continuing parties.

1. General Principles of International Law

Under prevailing principles of international law and practice regarding the revision of international agreements, there is no requirement that all of the parties to an earlier agreement must accede to a later agreement in order for the later agreement to come into force and supersede the earlier one. While historically the general rule of international law may have required unanimous accession for such revision, over the last half-century that rule has of necessity evolved such that unanimity is not required, at least for the revision of multipartite non-political agreements, so long as (1) the superseding agreement is acceded to by at least a majority of the parties having a substantial interest in the subject matter of the agreement, and (2) prior non-acceding parties are not bound by the new agreement and their rights acquired under the earlier agreement are not prejudiced.

The formula for entry into force of the definitive arrangements which is expressed in the attached draft articles more than satisfies the first of these preconditions. The second is satisfied if non-continuing

parties are not bound by the definitive arrangements and if they are fairly compensated for their space segment investment under the interim arrangements by an equitable buy-out arrangement.*

2. Requirements of Article IX(b)

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

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

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

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

B. TRANSFER OF RIGHTS AND OBLIGATIONS UNDER THE INTERIM ARRANGEMENTS

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

II. OBLIGATIONS AND RIGHTS OF NON-CONTINUING PRIOR SIGNATORIES

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

A. ARTICLE IX(b)(iii)

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

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

General legal principles pertaining to partnerships and joint ventures also require that the investment of a prior signatory be safeguarded. Absent an agreement to the contrary--and none is apparent in the interim arrangements--it is fundamental that a partner has a right not to continue under the new and revised agreement and a right to an accounting for its investment in the enterprise.

C. FINANCIAL OBLIGATIONS AND RIGHTS

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

In addition to the right to obtain an equitable financial settlement, each prior member should be afforded a reasonable period of time, following the entry into force of the definitive arrangements, to accede to those arrangements. The U. S. Delegation is of the view that a one year period is appropriate. During such period, the value of the investment of the non-acceding prior member would be retained in the Consortium at a rate of interest, for that period, equivalent to the cost of money. At the end of the period, the prior member, if its government has still not acceded, would be paid a total sum calculated on the basis of the principle outlined above, plus accumulated interest during the one year grace period.

D. PATENT AND DATA RIGHTS

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

III. CONCLUSION

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

INTERGOVERNMENTAL AGREEMENT
ARTICLE XI[1]

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

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

(ii) the Government of any other State which is a member of the International Telecommunication Union.[2]

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

(c) This Agreement shall enter into force on the date on which it has been signed without reservation as to approval, or has been approved after such reservation, by two-thirds of the parties to the Interim Agreement, except that such two-thirds must include Parties who hold or Parties whose Signatories hold at least eighty percent (80%) of the total investment quota under the Special Agreement. For each Government signing this Agreement after it has entered into force, the Agreement shall be effective upon signature or, if it signs subject to a reservation as to approval, on approval by it.

(d) Any Government which signs this Agreement subject to a reservation as to approval may, as long as this Agreement is open for signature, declare

1. This Article, dealing with signature, accession, entry into force and other matters is based primarily on Article XII of the Interim Agreement.

2. ICSC-36-58E, paragraph 229(M).

that it applies this Agreement provisionally and shall thereupon be considered a Party to this Agreement. Such provisional application shall terminate:

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

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

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

(f) If this Agreement has not entered into force for, or has not been provisionally applied by, the Government of a State which has signed it in accordance with this Article within a period of one year from the date when it is first opened for signature, the signature shall be considered of no effect.

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

(h) Upon entry into force of this Agreement, the Government of the United States of America shall register it with the Secretary General of the United Nations in accordance with Article 102 of the Charter of the United Nations.3/

3/ Interim Agreement, Article XIV.

OPERATING AGREEMENT
ARTICLE 16[1]

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

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

1/ See Article 16, Special Agreement.

INTERGOVERNMENTAL AGREEMENT
ARTICLE II[1]

(a) The Parties shall cooperate in providing, in accordance with the principles set forth in the Preamble to this Agreement, for the design, development, construction, establishment, operation, and maintenance of the INTELSAT space segment and such other space segments as may be provided by INTELSAT pursuant to this Agreement and the Operating Agreement.[2]

(b) The Parties agree that all of the rights and obligations of the signatories to the Special Agreement created under the Interim Agreement and the Special Agreement and outstanding on the date of entry into force of this Agreement and the Operating Agreement shall be assumed by the Signatories to the Operating Agreement under the terms and conditions set forth in the Operating Agreement. Effective as of the date the Operating Agreement enters into force, the Signatories in accordance with the provisions of the Operating Agreement, shall own the INTELSAT space segment in undivided shares in proportion to their respective investment shares in the INTELSAT space segment.[3]

1/ This Article states in general terms the decision of the Parties to continue the operation of INTELSAT and lays down the principle that the rights and obligations of signatories of the Special Agreement pass to Signatories of the Operating Agreement.

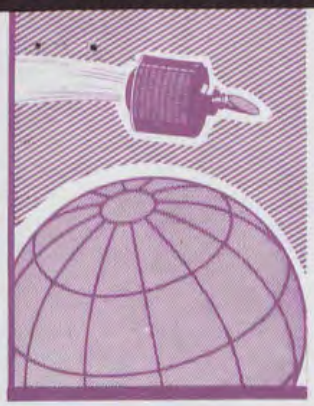
2/ Interim Agreement, Article I(a). See also ICSC-36-58E, paragraph 190(U).

3/ ICSC-36-58E, paragraph 518(SM).

OPERATING AGREEMENT
ARTICLE 2[1]

Each Signatory undertakes to fulfill the obligations placed upon it by the Agreement and this Operating Agreement and thereby obtains the rights provided for Signatories in each Agreement. Each Signatory further agrees to assume, in proportion to its investment share, all of the obligations created pursuant to the Special Agreement and outstanding on the date of entry into force of this Operating Agreement, and the Signatories shall obtain, in proportion to their respective investment shares, all right, title and interest in the space segment owned by the signatories of the Special Agreement, subject to the requirements of Article 4(i) of this Operating Agreement.

1/ See Article 2 of the Special Agreement.



PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/3
February 26, 1969

PRIVILEGES AND IMMUNITIES
(Submitted by the United States Delegation)

This paper presents the position of the United States Delegation concerning the privileges and immunities which should be granted, under the definitive arrangements, by participating states to INTELSAT and its participants, and the means by which such benefits could be provided.

The U. S. believes the most preferable means of providing privileges and immunities under the definitive arrangements would be an Article* in the intergovernmental agreement:

(a) providing certain benefits for INTELSAT in all states;

(b) requiring the conclusion of a headquarters agreement between the Board of Governors and the government in whose jurisdiction the INTELSAT headquarters are located; and

(c) providing that such additional privileges and immunities as are appropriate for the proper functioning of INTELSAT may be obtained from other governments, at the request of the Board of Governors, either by means of an agreement between the Board of Governors and the government, or by other appropriate action of the government.

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* The text of a proposed Article is set forth in Attachment A.

This approach has several benefits. First, by specifically providing for certain privileges and immunities in the Agreement, it assures INTELSAT the minimum privileges in all member states.

Second, it provides for obtaining the additional privileges and immunities that may be needed at INTELSAT's headquarters; and

Third, it recognizes that the need for additional privileges and immunities in other member states will vary and should be treated on an ad hoc basis.

I. Privileges and Immunities in all States

The U. S. proposes that immunity from national income and national property taxes be accorded to INTELSAT, its assets, property and income, by all the governments who are parties to the intergovernmental agreement. This would require the inclusion in that agreement of a provision which directly affords this immunity to INTELSAT, as is reflected in paragraph (b) of Attachment A.

II. Headquarters Agreement

INTELSAT's ties to the host state, that is, the state in which it meets, has its headquarters, and in which its Manager resides, necessarily will be greater than its ties to other states, and accordingly certain privileges and immunities are appropriate which are not needed in such other states. Because this issue concerns only the organization and the host state, it is deemed inappropriate to include all such specific privileges and immunities in the intergovernmental agreement. Rather, the host state should obligate itself in the intergovernmental agreement to conclude a separate "headquarters agreement" with the Board of Governors. (See paragraph (c) of Attachment A.)

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

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* For a description of the privileges and immunities which are presently afforded to INTELSAT, its organs and participants in the United States, see Attachment B.

1. INTELSAT: Immunity of its assets and property from confiscation; privilege of communication; exemption from District of Columbia 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 District of Columbia property taxes.

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

The U. S. Delegation believes that the negotiation of such a headquarters agreement would be in furtherance of the recommendation of a substantial majority of the Interim Communications Satellite Committee, which in its Report on the Definitive Arrangements (para. 597) stated 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."

III. Additional Privileges and Immunities

The U. S. Delegation contemplates that any additional privileges and immunities needed by the organization and not provided for in either the intergovernmental agreement or the headquarters agreement could be obtained, if and when deemed necessary by the Board of Governors, by means of an agreement with one or more Parties to the intergovernmental agreement, or by other appropriate action of such Party (see paragraph (e) of Attachment A). It should be noted that this approach does not obligate those

states who do not house the headquarters to grant privileges and immunities, beyond those specifically provided for in the intergovernmental agreement.

The U. S. Delegation believes that this represents a flexible and sensible approach, which gives the Board of Governors the authority to seek appropriate benefits from member states as specific needs therefore develop in specific states. At the same time this approach avoids the necessarily difficult task of having to anticipate and set down in the agreement specific privileges and immunities which might subsequently be needed in one or more member states.

* * *

Attachments A and B

ATTACHMENT A to
Com. II/3

Proposed Article for Intergovernmental Agreement

(a) The headquarters of INTELSAT shall be in Washington, District of Columbia, United States of America.

(b) INTELSAT, its assets, property, and income shall be immune in all States Party to this Agreement from all national income and property taxation.

(c) 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 Board of Governors, acting on behalf of INTELSAT, an agreement 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.

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

(e) Such additional privileges and immunities as may be appropriate for the proper functioning of INTELSAT under this Agreement and the Operating Agreement may be obtained

at the request of the Board of Governors from one or more other Parties, either by means of an agreement or agreements which the Board of Governors, acting on behalf of INTELSAT, may conclude with one or more such Parties, or by other appropriate action of such Party or Parties.

* * *

ATTACHMENT B to
Com. II/3

PRIVILEGES AND IMMUNITIES AFFORDED TO INTELSAT IN THE UNITED STATES

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 of the United States 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, by Executive Orders of the President (Nos. 11227 and 11277), with some of the privileges, exemptions, and immunities authorized by the IOIA. Following are the privileges, exemptions and immunities 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).

In addition to the benefits outlined above, INTELSAT and its signatories also enjoy certain tax exemptions. Since INTELSAT has been determined by the U. S. 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 exempts INTELSAT from this filing requirement. In addition, special Federal tax legislation has been passed by Congress exempting the signatories to the Special Agreement from federal income taxation on income earned within the United States from INTELSAT (and

legislation exempting the signatories from District of Columbia taxation has been recommended to the Bureau of the Budget).

* * *

PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/6
March 6, 1969

CONSIDERATIONS REGARDING THE LEGAL STATUS OF INTELSAT UNDER THE DEFINITIVE ARRANGEMENTS

(Submitted by the Delegation of Mexico)

1. The Delegation of Mexico believes that any of the systems or methods proposed up to now for carrying out the purposes of INTELSAT, including the one that has been followed provisionally by the Committee which is still functioning, is juridically viable if all or the great majority of the interested States so determine and so agree. Out problem is rather to find what legal form or status most effectively meets the wishes and interests of the Member States, offers fewer obstacles and is best adapted to fit into the pattern of existing international institutions whose characteristics have already been established by the practice of the States.

2. Approaching the problem in this way, it appears to the Delegation of Mexico that the most appropriate thing to do is to create an international organization, properly speaking, whose structure would be generally similar to that of the many varied organizations functioning at present, but having its own particular functions and organs, in order to enable it to carry out its mission effectively in the commercial field.

3. It is being ably and persuasively advocated that this Conference accept the idea that INTELSAT should continue as a consortium or joint venture without legal status. Various agreements, all for very limited purposes and having few participants, have been cited by way of background or examples. Now, what we are doing is preparing the constitution of a body or association to which we want <u>all</u> countries in the world to belong some day. Furthermore, the very subject we are dealing with relates to all of the space that surrounds our globe, for in no other way can we conceive of the sum total of all possible space segments. Moreover, the General Assembly of the United Nations in its Resolution 1721 makes its preference known indirectly.

4. Many authors of treatises have studied the process of the growth of international cooperation and have almost unanimously observed that the evolution that has taken place tends toward the establishment of international organizations or agencies (designated in one or the other manner depending on their greater or lesser degree of independence) which contemporary international law has analyzed, recognized, and incorporated into theory and practice. In international life this fact is of capital importance, since international law, which is essentially consuetudinal, neither easily embraces new concepts nor indefinitely retains those it has gone beyond. The latter is what has occurred with regard to consortiums, which originated perhaps in the Italian republics and in the cities of the Hanseatic League about the end of the Middle Ages, and of which we find various examples in the 19th century and even in our own day. Now the fact that they have not proliferated to any great extent and their slight development indicate that States have shown a preference for other methods, that is, those that have been followed in creating international organizations, properly speaking.

5. The authors agree that the general characteristics of international intergovernmental agencies are as follows:

(a) Legal personality distinct from that of each of the members;

(b) Permanent governing and executive bodies established in accordance with the guidelines under which the organization was established;

(c) Delegation of powers of the founding States, which enables the organization to operate spontaneously and relatively independently of the former, within a framework of well defined powers; and

(d) An international aim or inter-State objectives that are being pursued.

Transcribed below are the definitions that three eminent British jurists of world-wide reputation have given:

Professor Brierly: "An international organization is an association of States with common organs which is established by treaty."

Judge Lauterpacht: "International Organizations are entities which have permanent organs, whose membership is composed primarily of States which have permanent organs of their own, and whose international personality is recognized either by the terms of their constituent instrument or by virtue of express recognition by a treaty concluded by them with a State."

Judge Fitzmaurice: "An international organization is a collectivity of States established by a treaty, with a constitution and common organs, having a personality distinct from that of its member States and being a subject of international law."

Distinguished publicists of other countries and other legal systems are purposely not mentioned in order to emphasize that what separates us at present is not so much the diverse concepts of Roman or civil law on the one hand and English common law on the other hand, but two distinct approaches, one from the standpoint of public international law and the other from the standpoint of mercantile law or, at most, of private international law.

6. The legislation of some countries provides that any international convention or arrangement that creates an international organization must be approved by the parliaments or congresses, which furnishes a basis, among other things, for the pertinent government's obligation to include in its budget the item or items needed to pay the dues or expenses of the new inter-State organization. In this way, moreover, the pecuniary or financial liability of the State is determined and limited in the terms fixed by the treaty under which the agency was organized.

7. To sum up, the Mexican Delegation believes that it is perfectly feasible and in all respects advisable, from the juridical standpoint, to create an international organization having the characteristics which theory and practice attribute to such institutions, whose constituent instruments would clearly set forth the fundamental de jure imperii provisions and the secondary de jure gestionii provisions, such as the administration of assets, functioning, commercial operations, etc., which, although they are of predominant practical interest in the present case, should not take precedence over those that emanate directly from the sovereignty of the States.

The Question of the Privileges and Immunities of the Organization

8. The matter of privileges and immunities, although of secondary practical importance in the present case, is closely linked to the juridical nature of the international association which it is sought to create.

The document of the United States Delegation (Com. II/2) states on page 5:

"4. Privileges and Immunities

As a matter of international law, INTELSAT need not have independent legal status to enjoy privileges and immunities. Moreover, it is very doubtful that either the absence or existence of legal personality would create problems in conferring privileges and immunities under the domestic laws of the various INTELSAT members. Of course, the makeup of INTELSAT and the functions that it would perform could affect the privileges and immunities that are appropriate to grant to INTELSAT."

It should be made clear, to begin with, that traditional public international law, de lege lata, does not recognize anything other than the privileges and immunities of States and their representatives, that is, diplomatic agents.

Only in the last few decades, through the conventions or treaties under which international organizations and agencies have been established, or through the agreements that supplement them, have the privileges and immunities attaching to such juristic persons begun to become part of international law de lege ferenda. The reason is obvious, since the privileges and immunities granted by a State to a foreigner, whether a natural or juristic person, necessarily reduce or limit the exercise of its sovereignty and create a discriminatory difference between such foreigner and the nationals. In order that INTELSAT may enjoy certain privileges and immunities, it is possible to put it on the same footing as the international organizations, properly speaking, through a legal fiction or by mere analogy. Such appears to be the case with INTELSAT at its present headquarters. But there are countries in which such equating is not legal and in those countries it would be extremely difficult to grant the said immunities and exemptions except through a law authorizing them unilaterally and gratuitously, and obviously this would not constitute a legally binding international obligation.

9. As it is not going to be possible to know until the closing days of the Conference just what the final character of the bylaws we are writing is to be, it appears desirable to limit outselves to the inclusion in the treaty of a general article on privileges and immunities, similar to those contained in various constituent charters and conventions. The Governing Board or its equivalent would also be empowered to conclude with the Government of the headquarters country as broad an agreement as possible, and it would be left to the Assembly, or its equivalent, to consider and to negotiate, if need be, the preparation of an agreement or protocol to be submitted in due time to the Member States for approval.*

* * *

*The texts of the articles of the Charter of the United Nations and of the Charter of the Organization of American States referred to above are transcribed below:

Article 105 of the Charter of the United Nations

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

Article 103 of the Charter of the Organization of American States

The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes.

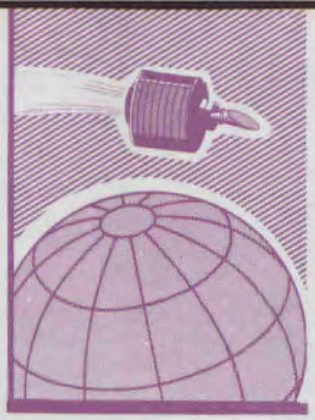
Article 104 of the Charter of the Organization of American States

The Representatives of the Governments on the Council of the Organization, the representatives on the organs of the Council, the personnel of their delegations, as well as the Secretary General and the Assistant Secretary General of the Organization, shall enjoy the privileges and immunities necessary for the independent performance of their duties.

Article 105 of the Charter of the Organization of American States

The juridical status of the Inter-American Specialized Organizations and the privileges and immunities that should be granted to them and to their personnel, as well as to the officials of the Pan American Union, shall be determined in each case through agreements between the respective organizations and the Governments concerned.

* * *



PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/7
March 6, 1969

FINAL CLAUSE (ACCESSION, SUPERCESSION) UNDER THE DEFINITIVE ARRANGEMENTS
(Submitted by the Japanese Delegation)

The Japanese Delegation, pursuant to the discussion of the Committee II on March 5, submits this paper as a working document to be considered by the Committee under Item IV.

I. Proposal

The Japanese Delegation proposes that the following provisions shall be included in the Intergovernmental Agreement. "Any Government which is a Party to the Interim Agreement and which has signed this Agreement subject to approval, acceptance or ratification, shall be considered provisionally as a Party thereto after the entry into force of this Agreement until such time the instrument of approval, of acceptance or of ratification be deposited with the Government of _____, or until the end of one year after the entry into force of this Agreement, whichever is earlier. During such period, the Signatory to the Second Agreement designated by such Government shall also be considered provisionally as a Signatory thereto."

II. Justification

It seems that a considerable number of governments are required, in accordance with its constitutional procedures, to seek a parliamentary approval before they finally adhere to the Agreement. Such governments shall sign the Agreement subject to approval, acceptance, or ratification.

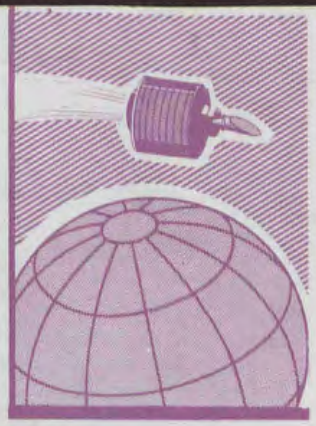
However, if the Intergovernmental Agreement is such that it will enter into force by the signature without reservation, or by the subsequent approval, acceptance or ratification in case of the signature with reservation, of a given number of prior members as proposed in the United States Draft (Article XI(c)), those governments which have not been able to complete their constitutional procedures by then shall be, in spite of their desire to continue their participation, obliged to be thrown out of the whole arrangements, since Article XV of the Interim Agreement provides that upon entry into force of the definitive arrangements the Interim Agreement shall cease to be in force. Such situation shall create an enormous difficulty on the part of the governments and on the part of their designated Signatories which have indicated

their intention to continue to participate in the arrangements and, furthermore, it will endanger the effective, smooth and continuous operations of the function of the system.

In order to resolve this situation, the Japanese Delegation proposes that the appropriate provisions as drafted above shall be included in the Intergovernmental Agreement.

In this connection, the "provisional application" formula as proposed in the United States Draft (Article XI(d)) may be of some help to some governments. However, the Japanese Delegation favors to see such provisions as proposed above shall be included on the ground that some governments will find even the declaration of the provisional application of an international treaty by the administrative authority prior to the parliamentary approval will create a serious constitutional problem.

* * *



PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/9 (Corr. 1)
March 10, 1969

REPORT OF COMMITTEE II - WORKING GROUP ON LEGAL STATUS

Please correct the title of Annex A to read, simply, "Statement of Majority Members." This appears at the bottom of the first page of the document and at the top of the Annex.

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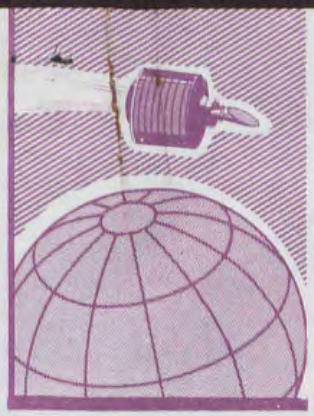

PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/10
March 13, 1969

REPORT OF WORKING GROUP ON ACCESSION, SUPERSESSION, BUY-OUT, OBLIGATIONS AND RIGHTS OF NON-CONTINUING MEMBERS AND ENTRY INTO FORCE (ITEM IV OF THE AGENDA)

Committee II in its session of March 10, 1969 established a Working Group consisting of Representatives of Brazil, Japan, Sweden, the United Kingdom and the United States to begin drafting the Committee report to the Plenary session on Item IV of the Agenda.

The Working Group met on March 11, 12, and 13. The Working Group appointed Mr. A. M. Greenwood to serve as its Chairman.

A draft of the report which the Working Group suggests should be rendered by the committee is attached hereto. It is in the form of (i) draft articles to be inserted in the agreement; (ii) commentary on these articles; (iii) a statement of principles.

Attachment:
Annex

* * *

Annex to
Com. II/10

Draft Report of Committee II on Item IV of Agenda
Accession, Supersession, Buy-Out, Obligations and
Rights of non-continuing members and Entry into
Force

Accession, supersession and entry into force

In submitting the following draft Articles to be inserted in the Agreement, the Committee considers it would be useful to preface them with the following commentary:

1. The suggested Article XI(a), which lengthens the six month period available for signature under the Interim Agreement to a maximum of eighteen months, is intended to avoid cutting off the signature period before the necessary number of governments have had the opportunity to sign. The maximum period of eighteen months was deemed adequate to permit sufficient signatures while not encouraging undue delay.

In order to ensure an open period during which governments can decide whether and on what terms to sign, the Committee has provided in its recommended Article XII(a) that the Agreement will not enter into force before six months have elapsed from the date it is opened for signature.

2. Article XII(a) represents the recommendation of the majority. That majority further recommends that the plenary fill in the blank with a substantial percentage figure. The Committee points out that, in the absence of a substantial percentage, the parties to the new agreement would be open to the risk of being obliged to buy out a large and unknown percentage of the prior investment. A minority of the Committee considers that the Interim Agreement could not be interpreted to provide for a majority decision with regard to its supersession by the Definitive Arrangements. A further minority considers that the entry into force of the Definitive Arrangements should not be dependent on any percentage of investment quota being reached.

3. A minority of the Committee believes that Article XII(b)(ii) of the recommended Articles should be replaced with a text which distinguishes between the termination of provisional application and withdrawal. They feel that this distinction may be important for parties to the Interim Agreements in whose case it may result in different treatment. They propose that Article XII(c)(ii) be replaced by the following:

(ii) If that Government signifies that it does not intend to continue to be a party to this Agreement.

4. The Committee noted that unless provision is made elsewhere in the Agreement for the Interim Committee to remain in being for a further period after termination of the Interim Agreement, a gap will occur after entry into force of this Agreement and before the Board of Governors can meet.

ARTICLE XI

(a) This Agreement shall be open for signature in Washington from _____, 1969, until it enters into force, or until a period of 18 months has elapsed, whichever occurs first, by:

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

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

(b) Any State referred to in paragraph (a) shall be bound by the signature of this Agreement unless that signature is declared to be subject to ratification, acceptance or approval.

(c) The Government of any State referred to in paragraph (a) of this Article may accede to this Agreement after it has entered into force.

(d) No reservation may be made to this Agreement.

ARTICLE XII

(a) This Agreement shall enter into force on the date on which it has been signed not subject to ratification, acceptance or approval, or has been ratified, accepted or approved by two-thirds of the parties to the Interim Agreement, provided that such two-thirds includes parties who hold or parties whose signatories hold at least _____ percent (_____%) of the total investment quota under the Special Agreement. This Agreement shall not in any event enter into force on a date earlier than six months following the date it is opened for signature.

(b) For the Government of a State whose instrument of ratification, acceptance, approval, or accession is deposited after the date this agreement enters into force under paragraph (a) of this Article, this Agreement shall enter into force on the date of such deposit.

(c) Upon entry into force of this Agreement pursuant to paragraph (a) of the Article, it shall enter into force provisionally for any government which signed it subject to ratification, acceptance or approval unless that Government declares otherwise at the time of signature. Such provisional application shall terminate:

(i) Upon deposit of an instrument of ratification, acceptance or approval of this agreement by that government; or

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

(d) Notwithstanding anything contained in this Article, this Agreement shall not enter into force for any Government nor be applied provisionally by any Government until that Government or its communications entity designated pursuant to Article III of this Agreement shall have signed the Operating Agreement. The Board of Governors may determine the financial conditions under which the Operating Agreement shall be signed by a Government, or by the designated communications entity of a Government, which, having signed without provisional application, deposits an instrument of ratification, acceptance or approval after the Agreement has entered into force, or which accedes to this Agreement.

(e) Upon the entry into force of this Agreement it shall replace and terminate the Interim Agreement dated August 20, 1964.

ARTICLE XIII

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

ARTICLE XVII

(a) Instruments of ratification, acceptance, approval or accession, and notifications of acceptance of amendments and of intention to withdraw shall be deposited with the Government of the United States of America.

(b) The Government of the United States of America shall notify all signatory and acceding States of signatures and declarations attendant thereto, the deposit of instruments of ratification, acceptance, approval or accession, and notifications of acceptance of amendments and of intention to withdraw.

TRANSFER OF RIGHTS AND OBLIGATIONS UNDER THE INTERIM ARRANGEMENTS

The Committee considers that, assuming that the new organization has legal personality, then, subject to considerations which will appear later in the Committee's report there are two possible methods of transfer of rights and obligations of signatories of the Special Agreement.

(i) Assumption by the Signatories to the Operating Agreement of these rights and obligations in undivided shares;

(ii) Assumption by INTELSAT.

In the case of (i), Article II(b) of the Agreement would read as follows:

> "The parties agree that all of the rights and obligations of the signatories to the Special Agreement created under the Interim Agreement and the Special Agreement and outstanding on the date of entry into force of this agreement and the Operating Agreement shall be assumed by the Signatories to the Operating Agreement under the terms and conditions set forth in the Operating Agreement. Effective as of the date the Operating Agreement enters into force, the Signatories in accordance with the provisions of the Operating Agreement, shall own the INTELSAT space segment in undivided shares in proportion to their respective investment shares in the INTELSAT space segment, subject to the requirement of Article 4(i) of the Operating Agreement.

In the case of (ii), Article II(b) would read as follows:

> "The parties agree that all of the rights and obligations of the signatories to the Special Agreement created under the Interim Agreement and the Special Agreement and outstanding on the date of entry into force of this agreement and the Operating Agreement shall be assumed by INTELSAT. Effective as of the date the Operating Agreement enters into force, INTELSAT shall own the INTELSAT space segment, subject to the requirement of Article 4(i) of the Operating Agreement."

Whilst (i) and (ii) are both possibilities, the majority of the Committee considers that alternative _____ should be adopted.

The view, however, was expressed that alternative (i) was not a practical possibility if the Organization is to have legal personality.

If the Organization does not have legal personality, the Committee agrees that alternative (i) should be adopted.

BUY-OUT

The Committee considers that the following principles should apply to the buy-out of signatories under the Special Agreement who do not become Signatories under the Definitive Arrangements:

1. Fair compensation should be paid with reasonable expedition to non-continuing signatories for their investments in the space segment as at the time of takeover.

2. In the case of patents, data and know-how, such signatories should either be fairly compensated or should continue to enjoy the rights to which they had become entitled under the Interim Arrangements, subject to the obligations thereunder.

3. The amount of compensation should be settled by negotiation between the non-continuing signatory and INTELSAT. Failing agreement, the non-continuing signatory should have the right to challenge any determination of the Governing Body before a neutral arbitration tribunal.

* * *

PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/11
March 13, 1969

His Excellency Eduardo A. Roca
Chairman, Committee I

At the request of the Steering Committee I forward for Committee I consideration the report of Committee II's Working Group on Legal Status.

Discussion of this report has not been completed by Committee II which will in due course submit it to the Plenary. As agreed at the eighth meeting of Committee II, appended to this interim report is a copy of the Provisional Summary Record of the eighth meeting of Committee II which contains further views of Delegations on the Working Group report on Legal Status.

Motoo Ogiso
Chairman, Committee II

Attachments:
Com. II/9 (As Corrected)
Com. II/SR/8 (Pertinent Pages--1 through 4 and 10)

Com. II/11
(Com. II/9 (Corr. 2))
March 10, 1969

REPORT OF COMMITTEE II - WORKING GROUP ON LEGAL STATUS

1. Committee II, in its meeting of February 27, 1969, in considering Item II--Legal Status of INTELSAT--decided to establish a Working Group made up of the Representatives of Brazil, Chile, Federal Republic of Germany, the Philippines, Sweden, Switzerland, the United Kingdom and the United States, and charged them with the task of "preparing a comparative table of the different legal forms for presentation to the Committee" (Com. II/SR/3). Chairman Ogiso appointed the Delegate of Brazil, Prof. Dunshee de Abranches, to serve as Chairman of the Group.

2. The Working Group held five meetings and considered the following documents: Report of the ICSC (paragraphs 232-236), Doc. 8 (pertinent parts), Com. II/2, Com II/4, and two draft working group reports to Committee II that were circulated among the members of the Group. The Group listened to statements by the Representatives of Mexico, Australia, Venezuela and Italy.

3. Inasmuch as there was no agreement as regards the language of the report, the Working Group voted:

(a) to forward to Committee II the statement of the majority members or the drafting of a report (Annex A) and the text of the statement by the United States member (Annex B);

(b) to ask the Chairman of the Working Group to transmit this report and the two Annexes to Committee II.

* * *

Attachments:
Annex A - Statement of majority members on the drafting of a report

Annex B - Statement submitted by the United States member

REPORT OF COMMITTEE II WORKING GROUP ON LEGAL STATUS
(Statement of the Majority Members on the Drafting of a Report)

INTRODUCTORY

1. ICSC Majority View

In the Report of the Interim Communications Satellite Committee on Definitive Arrangements for an International Global Communications Satellite System a substantial majority of the Interim Committee recommended that the Organization be a partnership in corporate form (233), that it should be either an international or intergovernmental organization, that it should possess legal personality and, on the territory of each participating State, the juridical capacity necessary to exercise its functions and reach its objectives, including the capacity to conclude agreements, to own property and to exercise rights against third parties in its own name (236).

The Working Group has been informed that these recommendations were made largely on the basis of the Interim Committee's experience with difficulties encountered through the lack of legal status under the Interim Arrangements.

2. ICSC Minority View

There was also support in the Interim Committee for the proposal that the Organization be, as under the interim arrangements, a partnership in the form of a joint venture. Such a joint venture would not be in corporate form (234).

PRESENT STATUS OF INTELSAT

Under the Interim Arrangements INTELSAT has no legal personality.

The name of "joint venture" has been used to describe INTELSAT's present status, although a "joint venture" has no legal status or significance, and that designation appears neither in the Interim nor in the Special Agreement.

Under the interim arrangements INTELSAT consists of (1) sovereign States which signed the Interim Agreement, (2) Governments and communications entities, public as well as private, designated by the parties to the Interim Agreement (Art. II) which signed the Special Agreement, (3) an Interim Committee composed of representatives of the Signatories (Art. IV) and (4) a private corporation organized under the local law of INTELSAT's headquarters, namely the District of Columbia, which shall "pursuant to general policies of the Committee and in accordance with specific determinations which may be made by the Committee, act as Manager in the design, development, construction, establishment, operation and maintenance of the space segment" (Art. VIII). The assets are owned by the Signatories in undivided shares.

Examination of the interim arrangements shows that they are rather indeterminate. They are, moreover, merely an internal arrangement between the parties and have no force as a status in relation to third parties. They may have been suitable for an experimental period, but they cannot suffice for a permanent and already world-wide international organization with increasing membership and responsibilites, public as well as commercial.

As will be shown more fully later, under the present arrangements it is in practice impossible for the participants, although sovereign States, to perform legal actions except through a private corporation subject to local law or a Signatory.

FUTURE STATUS OF INTELSAT

Consideration of the following major aspects illustrates the advantages and disadvantages of the two possibilities contemplated by the Interim Committee, namely legal personality and joint venture.

1. Legal Personality

A legal or juridical personality is a legal status granted by law or treaty to an associate or organizational structure. It is called that way because by conveying legal personality the law vests in an association or organization all the attributes of the legal capacity of a natural person except those inseparably connected with the natural quality of human beings, that is the association or organization becomes a legal entity.

The status of a legal personality conveyed upon an organization by law is known to the two great legal systems of the world: in the countries having the so-called civil law system it is known as legal or juridical personality, in the countries having the so-called common law system it is known as incorporated company or corporation.

Consequently, the legal personality appears as the most suitable form for a large scale international organization consisting of, and operating in, countries with different legal systems. For that reason it has been chosen by international banks, such as the International Bank for Reconstruction and Development, and the specialized

agencies of the United Nations, as well as by other international organizations. Examples are given in Attachment.

2. Capacity to Contract

An international organization with legal personality has capacity to contract and, therefore, it becomes itself a party to the contract.

A joint venture, on the other hand, has no contractual capacity and, therefore, cannot be a party to the contract. Consequently, a joint venture as such cannot act through an agent because, lacking legal personality, it cannot appoint one. In the case of INTELSAT, Comsat is strictly speaking not the agent of the so-called joint venture, but that of all the Signatories, although even this may be doubtful owing to the different conception of "Agency" in different countries.

Contracts under the interim arrangements have normally been concluded between an outside party and Comsat "acting in its capacity as Manager on behalf of the International Telecommunications Satellite Consortium (INTELSAT)." The phrase "on behalf of the International Telecommunications Satellite Consortium (INTELSAT)" is meaningless because INTELSAT as such has no legal existence. The Signatories are not named in the Contract at all. Consequently, it is doubtful whether they are parties to such contracts and have any rights or claims against the other party to the contract which they could assert without going through one particular partner. Thus, the rights and duties between Comsat and the Signatories with respect to the rights and obligations arising under such contracts are not clearly

defined. It is a rather confusing situation as experience in the past four years has shown. Also, the result is that normally the sovereign Signatories are dependent on a private corporation controlled by local law.

If INTELSAT had legal personality, it could contract itself as a party in its own name and acquire directly all the rights under the contract.

As far as the willingness of contractors to do business is concerned, there is no danger that they might be reluctant to deal with an international organization with legal personality. On the contrary, in that case the organization would own all the properties and assets and should have ample means to meet its obligations. Actual practice of existing international organizations with legal personality, such as international banks, international space organizations (ESRO and ELDO) and others, such as the European nuclear research center (CERN), have encountered no difficulties whatsoever. If however the joint venture system should be adopted for the future organization but should not include a private corporation as Manager, then contractors would certainly be reluctant to do business with the joint venture.

Furthermore, the future INTELSAT needs legal personality in order to avoid problems when making international agreements with other international organizations or sovereign governments, because doubts will arise under international law whether such agreements can be made through an independent private agent. There will be no

such doubts if the organization is a legal personality which itself concludes the agreement.

Finally, an international organization with legal personality is in a better position to control and implement its procurement policy because it will be less susceptible to control by local administrative and regulatory agencies than a private corporation under local law.

3. Ownership of Property

An international organization with legal personality can hold title to property in its own name. Since it also has full capacity to contract, it can acquire and dispose of property rights through contracts to which the organization itself can be a party. Thus, its rights will be derived directly from such contracts without the intervention of agency arrangements, which would be complicated and confusing if the agent is not itself a part of the organization.

A joint venture cannot own property, except in the individual name of partners who are liable to change. In case of INTELSAT, the assets are owned in undivided shares by the Signatories. For dispositions over property they would all have to act together unless they all wish to appoint an agent to represent them. Where the joint owners are numerous, any joint property transaction may become cumbersome or impractical. For practical reasons therefore title must be in an agent.

In the case of work done for INTELSAT, patents cannot be vested in INTELSAT and problems arise with respect to free access of all the owners to the technical data and know-how. It would be much more practical and equitable towards the participants if INTELSAT's property were owned by INTELSAT itself.

It would also be very impractical for INTELSAT to own immovable property, for instance its headquarters, if it decided to do so. If INTELSAT had legal personality, none of these difficulties would arise.

4. Capacity to Sue or Be Sued

It may be necessary for INTELSAT to resort to legal action to protect important rights. Also, since the organization carries on business, the question of it being sued must be taken into account.

Again the situation is clear with respect to an international legal person: it can itself appear as a party to a suit.

On the other hand, a joint venture's standing in the courts is, to say the least, doubtful. In many jurisdictions it would be necessary for the legal persons participating in the venture to appear as parties.

In the case of contracts, the position could be regulated by the contract providing for arbitration, thus avoiding law suits.

Where there is no such contract, then, in order to protect INTELSAT's rights, the governments would have to sue and thereby waive their sovereign immunity. To sue through an agent, if possible at all, would present difficulties.

In case of suits against INTELSAT, for instance for injury to persons or damage to property caused by a vehicle owned by INTELSAT, that is to say jointly by the Signatories, an action against the owners with binding effect on all will practically be impossible. While in some jurisdictions it may be possible to proceed against one Signatory, in others all would have to be joined, and the sovereign immunity would make that impossible.

Evidently, none of these problems would arise if INTELSAT has legal personality, because it could itself appear as party to a legal action and thereby keep control over the suit.

5. Privileges and Immunities,
Including Freedom from Taxation

From the debates in the full Committee it has become fairly clear that a number of countries will find themselves in great difficulties to grant privileges and immunities if the organization does not have legal personality. In most countries special legislation will be required for this

purpose. It may prove impossible to obtain such legislation if the organiz tion is not a legal personality. In any event, this may be a long, time consuming process. For instance, in case of INTELSAT it took four years to obtain limited tax exemption by special legislation for those Signatories which were not already exempt under general law.

If it should be decided to grant certain immunities and privileges to foreign employees of the organization , it is well accepted international practice that such immunities and privileges be granted in the case of an international organization with legal personality, but it is not normally accepted with regard to employees of international organizations without legal personality or of private organizations. This in turn, would also have repercussions if it should be decided to internationalize the management personnel in case this management body were notan integral part of the organization but were a separate legal entity under local law.

6. Liabilities

Internal liability is covered by the agreement between the participants. The type of organization would therefore be irrelevant.

With regard to outside liability, contractual liability will depend on the contractual provisions and can usually be limited. If this is not possible, however, legal personality gives the advantage of limiting liability to the assets of the corporation.

Extra-contractual liability to third parties cannot be excluded. If the organization is a joint venture, the liability is unlimited. If, however, the organization has legal personality, liability is limited to its assets.

S U M M A R Y

In conclusion, the majority of the Working Group sees no disadvantages arising from the status of legal personality of the future organization. On the contrary, the following advantages exist if Intelsat were an international organization with legal personality:

1. Legal personality or legal entity is a concept known to all legal systems. The concept of joint ventrue is not known to any legal system.
2. An organization with legal personality can receive equal treatment under all legal systems. A joint venture consisting of constituent parts with different legal status cannot receive equal treatment.
3. For an organization comprising many sovereign states an international organization with a legal personality has become an accepted and well-tried system.
4. An international organization with legal personality can contract as a party. With a joint venture either all participants must join in appointing an agent or they must all enter into the contract. Being a party to a contract would have, among others, the following advantages:
   a) INTELSAT could acquire rights under contracts directly.
   b) INTELSAT would be less susceptible to control by local administrative and regulatory agencies than would be a private corporation acting on its behalf and subject to local law.

5. INTELSAT could enter into international agreements with other international organizations or sovereign governments.
6. INTELSAT could own and dispose of property and avoid the complication of agency arrangements in connection therewith. Its identity would not change whereas the identity of a joint venture changes with changing membership.
7. There would be no problem as to title to patents and accessibility to data and know-how.
8. INTELSAT could own its own headquarters and other immovable property.
9. INTELSAT could be a party to a law suit. In the case of a joint venture, in many jurisdictions all the participants would have to be parties to the suit. In the case of governments, this necessitates waiving of sovereign immunity. In some cases some Signatories could be sued while others could not which would be inequitable.
10. The difficulty could be avoided that many governments cannot grant privileges and immunities unless the organization has legal personality.
11. Following accepted international practice employees could be granted privileges and immunities thus facilitating recruitment on an international scale.
12. Liability to third parties could be limited to the extent of the assets of INTELSAT.

CONCLUSION

There are substantial advantages, as set out in the summary, for conferring legal personality on the organization. No disadvantages can be seen.

The following members of the Working Group therefore support the view that the future organization should have legal personality:

Brazil

Chile

Federal Republic of Germany

Philippines

Switzerland

United Kingdom

Sweden concurred in the conclusion

* * *

Com. II/11
(Attachment to Annex A to
Com. II/9)

1. Article 49 - Legal Status - of the Agreement establishing the Asian Development Bank.

Legal Status

The Bank shall possess full juridical personality and, in particular, full capacity:

(i) to contract;
(ii) to acquire, and dispose of, immovable and movable property; and
(iii) to institute legal proceedings.

Manila, 4 December, 1965 - 31 January, 1966.

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2. Part XIII, Article 50 - Legal Capacity, Privileges and Immunities. Convention for the Establishment of the Intergovernmental Maritime Consultative Organization.

Legal Capacity, Privileges and Immunities

The legal capacity, privileges and immunities to be accorded to, or in connection with, the Organization shall be derived from and governed by the General Convention on the Privileges and Immunities of the Specialized Agencies approved by the General Assembly of the United Nations on the 21st November 1947, subject to such modifications as may be set forth in the final (or revised) text of the Annex approved by the Organization in accordance with Sections 36 and 38 of the said General Convention.
Geneva, March 6, 1948.

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3. Article II, Section 3 - Juridical personality. Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, adopted by the General Assembly of the United Nations on November 21, 1947.

Juridical Personality

The specialized agencies shall possess juridical personality. They shall have the capacity (a) to contract, (b) to acquire and dispose of immovable and movable property, (c) to institute legal proceedings.

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4. Chapter VI - General Provisions. Article 20 - Legal Status and Privileges.
Convention for the Establishment of a European Organization for the Development and Construction of Space Vehicle Launchers.

Legal Status and Privileges

The Organization shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings. A Protocol to be concluded among Member States shall define the privileges and immunities which the Organization, its officials and such categories of persons taking part in its work as shall be specified in the Protocol shall enjoy in the territory of those States, and the privileges and immunities which the representatives of Member States to the Council and the members of subordinate bodies shall enjoy.

London, March 29, 1962.

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5. Article 1. Protocol on the Privileges and Immunities of the European Launcher Development Organization.

The Organization shall have legal personality. It shall in particular have the capacity to contract, acquire and dispose of movable and immovable property and to institute legal proceedings.

London, 29 June to 31 July, 1964.

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6. Article XIV - Legal Status and Privileges.
Convention for the Establishment of a European Space Research Organization.

Legal Status and Privileges

1. The Organization shall have legal personality.

2. The legal status and the privileges and immunities of the Organization, of the persons employed by it, and of the representatives of Member States, shall be defined by a Protocol to be concluded between the Member States.

3. Agreement concerning the Headquarters of the Organization, and the Establishment of the Organization to be created in accordance with the provisions of Article VI, shall be concluded between the Organization and the Member States on whose territories such Headquarters and Establishments shall be situated.

Paris, June 14, 1962.

Com. II/11
(Annex B to
Com. II/9)

REPORT OF COMMITTEE II WORKING GROUP ON LEGAL STATUS

(Statement of U.S. Member)

The Working Group on Legal Status was charged by Committee II with "the task of preparing a comparative table of the different legal forms for presentation to the Committee." Attached to this document is such a comparative examination in the form of a description of the various ways in which INTELSAT would conduct its activities under the alternative legal forms presented for consideration of the Conference and Committee II in Doc. 8 (Swedish), Com. II/2 (U.S.) and Com. II/4 (Swiss). This comparison indicates that there could be certain significant differences in the methods which would be utilized in the conduct of INTELSAT's business under the alternative legal forms proposed. For example, the international organization with explicit legal personality could itself own the property interests of INTELSAT.*

Despite any differences that may exist in the method of conduct of INTELSAT's business under the proposed alternative legal forms, any one of these alternatives can, including the present consortium structure of INTELSAT, serve as a juridically viable means of carrying out the purposes of INTELSAT. The consortium or partnership structure has been effectively utilized by the INTELSAT signatories during the past five years and has been the traditional method by which communications entities have conducted their international business activities for many years. Further, the legal form of the consortium does not in any way predetermine or preclude various organizational arrangements to effect both the commercial and public interests of INTELSAT and its sponsoring states.

There are, of course, various policy considerations of a non-legal nature which give rise to the preferences for one or the other of the alternative approaches. The Report of the Interim Communications Satellite Committee on Definitive Arrangements is reflective of these policy considerations in its recommendations dealing with legal form and personality,

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* However, the Report of the Interim Communications Satellite Committee on Definitive Arrangements states that a substantial majority of the Committee recommends that the property interests of INTELSAT be "owned in undivided shares by the signatories...." (Para. 518).

as there have been no significant legal deficiencies encountered during the last five years of INTELSAT's business activities. These policy considerations are, however, clearly within the purview of Committee I. Committee II should compare the legal differences and consequences of the various alternative approaches.

The comparative examination set forth in the Attachment to this document, as well as that comparison reflected in the majority report of the Working Group, should be made available to Committee I as background material for its policy considerations. Unfortunately, the legal representatives to the Working Group were not able to reach unanimity on the various legal comparisons, but this fact does not necessarily render these comparisons useless as background material for the considerations of Committee I and the Conference itself. There are, however, certain statements and reflections in the majority report which the United States Delegation believes should not stand uncontroverted. These are as follows:

1. The statement is made that the signatories, within the consortium structure, cannot perform legal actions except through a private corporation. As is reflected in Article 10(a) of the Special Agreement, a consortium or partnership can as a matter of law conduct its business activities through any one of its partners, regardless of whether that partner is a private or public entity. The consortium may also carry out its business activities through juridical or natural persons who would be appointed to act on behalf of the signatories. In any case the business activities are conducted by a legal personality recognized by all legal systems.

2. The statement is made in the majority report that a joint venture has no contractual capacity. On the contrary, the consortium structure has a multiplicity of contractual capacities through the utilization of its various partners who may be designated to act in their separate legal capacities on behalf of all the signatories. This is the method by which INTELSAT has conducted its business activities to date, principally, but not exclusively, utilizing the Communications Satellite Corporation.

3. The statement is made that signatories have no rights or claims directly against the INTELSAT contractors, in view of the fact that most of the contracts have been entered into by Comsat on behalf of INTELSAT. The rights of signatories to proceed directly against any particular INTELSAT contractor is a matter for the contract language to determine and is in no way dependent upon the legal structure of INTELSAT. If INTELSAT were explicitly imbued with separate juridical personality, signatories would have no direct right of action against the organization's contractors, unless the contracts so specified.

4. With respect to the statement in the majority report concerning relations with other international organizations, it should be made clear that INTELSAT is today viewed as an international organization by the ITU and other significant international organizations. Further, contrary to the majority report, it is not necessary that INTELSAT establish such international relations through an independent private agent. Our relations with other international organizations to date have not been accomplished through such a medium.

5. The statement is made that in order to protect the property interests of INTELSAT in judicial proceedings the signatories would be required to waive their sovereign immunity. The communications entities, both public and private, who make up the membership of INTELSAT have engaged in commercial transactions throughout the world for many decades. The public entities have demonstrated their ability to protect their property interests in any necessary judicial proceedings without jeopardizing whatever sovereign immunity they may have.

6. With respect to the question of privileges and immunities, the United States recognized INTELSAT as a public international organization and has extended certain immunities to the INTELSAT signatories and has indicated its willingness and ability to continue to extend appropriate immunities to the INTELSAT signatories during the period of the definitive arrangements.

7. It is implied in several statements of the majority report that there is some legal problem with respect to the distribution of patent and data rights. The Interim Communications Satellite Committee has established a system of distribution of patent and data rights which permits each signatory to acquire within its own jurisdiction the title to inventions and data obtained under INTELSAT contracts. This system has worked well, and it is unlikely that there would be any advantage to the signatories in shifting the ownership of such property interests to a separate international legal entity.

There are other statements in the majority report with which the United States Delegation cannot concur. The views of the United States Delegation with respect to these matters are set forth in the Attachment to this document and in the paper submitted to Committee II, Com. II/2.

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Com. II/11
(Attachment to
Annex B to
Com. II/9)

The following is a comparative examination of the various ways in which INTELSAT would conduct its activities under the alternative legal forms presented for consideration of the Conference and Committee II in Doc. 8 (Swedish), Com. II/2 (U.S.) and Com. II/4 (Swiss):

1. Contracting - As a matter of law, the international organization in the form of a joint venture (INTELSAT's present status), the international organization with explicit and separate legal personality from that of its participants, and the international corporation can serve as a workable means of carrying out the contemplated contract activities of INTELSAT. In the case of the joint venture, contracts are entered into in the name of the Consortium but through an agent or agents appointed by the Board of Governors. The agent may be one of the partners or a natural person, or persons, acting under, for example, an employment agreement with the Board of Governors authorizing the individual to act on behalf of the signatories as a whole.

On the other hand, the international organization, and the international corporation, with legal status separate from its participants, may be given capacity in the international agreements to contract itself, without the necessity of any further legal authorization from the signatories. Such capacity is, of course, exercised through natural persons--its employees and agents--and may also be exercised through another juridical entity as agent.

2. Acquisition of Property - Under the INTELSAT joint venture structure, assets and property are acquired by the agent "for and on behalf of" the Consortium (the signatories as a whole). Consequently, the property interests run directly to the signatories, the agent being a conduit. Under the existing international agreements, such property interests are owned by the signatories in undivided shares; however, patent and data rights may be, and have been in many instances, acquired directly by the signatories on a divided basis within their separate jurisdictions.

In the case of the international organization, or corporation, the assets and property could be owned by the organization or corporation, with the signatories, presumably, having an ownership interest in the international organization, or corporation. As patent and data rights would be owned by

the international organization, or corporation, the signatories would, within their respective jurisdictions, become licensees of those interests rather than owners.

3. Protection of Property Interests - In the case of a joint venture, legal actions against third parties must be instituted by appropriately authorized legal counsel acting on behalf of the Consortium. In some jurisdictions, the signatories would be listed in the proceedings, except for those that are reluctant to do so. The actual physical participation of the signatories in the proceedings is not required.

The international organization with separate legal status and the international corporation would institute court proceedings through appropriate legal counsel on its own behalf, rather than on behalf of the signatories, as such. Consequently, the signatories do not have to be named in the proceeding and would have no standing to actually appear or be individually represented.

4. Ownership - As noted previously, ownership of assets and property within an international organization with joint venture structure resides directly with the signatories in undivided shares. Under both the international organization and the corporate structure proposals of the Swiss and Swedish delegations, the assets and property would be directly owned by the international entity, rather than the signatories. The latter's ownership interests would be in the international organization as distinguished from the specific property and assets of that organization.

5. Financial - Under the joint venture structure, the financial obligations and consequences bear directly upon the signatories. Under the existing international agreements, the signatories commit themselves to bear directly the costs of the establishment and operation of the space segment (Article 3 of the Special Agreement). This obligation of the signatories is implemented as the obligations of INTELSAT are incurred. Depreciation reserves and other capital funds have not been maintained by the Consortium. The component of the utilization charge established by INTELSAT which represents depreciation is credited to the signatories upon its receipt by INTELSAT (Article 9 of the Special Agreement), and the signatories are billed on a net basis monthly.

Although an international organization with separate legal personality could maintain the same financial arrangement, the international corporation proposed by the Swedish Delegation, in order to be financially as well as legally separate from the signatories, would commence its activities on the basis of subscribed capital and would presumably maintain depreciation reserves for the replacement of depleted facilities (see Article 3 of Annex A of the working document submitted by the Swedish Delegation, Doc. 8).

6. Taxation - With respect to taxation, under the joint venture the financial transactions are those of the signatories acting in concert and, consequently, the tax implications directly affect the signatories. Thus, under the existing international agreements INTELSAT is not taxable as such. On the other hand, an international organization having the principal attributes of a commercial corporation may, unless granted immunity, be a taxable entity distinct from its signatories.

Aside from the tax implications to INTELSAT, certain of the signatories (as discussed in document Com. II/2) may be adversely affected should INTELSAT be established with the attributes of a corporate entity.

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Com. II/11
(Com. II/SR/8
March 12, 1969)

PROVISIONAL SUMMARY RECORD - EIGHTH SESSION OF COMMITTEE II
WEDNESDAY, MARCH 12, 1969

Convening of the Session

Chairman Ogiso convened the session at 2:50 p.m. He announced that the Steering Committee today requested all committees to complete their work by Monday, March 17, in order to report to the Plenary. It requested the Working Group report on Legal Status be submitted to Committee I for consideration in connection with the structure of the organization. As this report had already been broadly discussed in the Committee and Working Group, he asked if there was any further discussion prior to its referral to Committee I.

The Representative of Chile asked whether Committee II would make a decision on the report prior to referring it to Committee I or the Plenary.

Chairman Ogiso said that the Steering Committee had expressed its desire that Committees not vote on differing views but submit them to the Plenary, as it had been generally agreed to operate by consensus so far as possible. The Chairman suggested this procedure be followed for the Working Group report.

The Representative of the United Kingdom could not agree to submit an unamended report to Committee I because he felt it contained criticism by the minority of the majority position. A balanced presentation would require criticism of the minority position and he could only agree to a report where both sides were equally and freely presented. He felt the criticism of the majority position contained several inaccuracies, not only of what the majority advocated but also for what its report would contain. He referred to paragraph 1, page 2 of Annex B which disputes the statement that within the Consortium structure a signatory cannot perform legal actions except through a private corporation. The majority report on this subject states, on page 2, as follows: "As will be shown more fully later, under the present arrangements it is in practice impossible for the participants, although sovereign States, to perform legal actions except through a private corporation subject to local law or a Signatory." Thus, the unqualified statement in Annex B is incorrect. In Annex B, paragraph 2, the statement is made that the majority report alleges

Note: Any changes or corrections in this Summary Record must be submitted to the Secretary General within 48 hours.

a joint venture has no contractual capacity. This apparently refers to the statement on page 4 of the majority report which says a joint venture has no contractual capacity and, therefore, cannot be a party to a contract. The majority report statement was intended only to indicate that the joint venture could not contract as such, it did not deny it had capacity to contract through other parties. In the third paragraph of Annex B the statement is made that Signatories have no rights or claims directly against INTELSAT contractors. This refers to page 4 of the majority report which states it is doubtful at all whether the Signatories are parties to contracts and have any rights or claims against the other party to the contract which they could assert without going through one particular partner. This is different from the unqualified statement in paragraph 3 of Annex B. For these reasons the United Kingdom could not support the two parts of the Working Group report going to Committee I in unamended form.

The Representative of Korea suggested the Working Group meet again to try to resolve the differences. Chairman Ogiso felt that after so much effort, another Group meeting would probably not be fruitful. He asked the Chairman of the Working Group for his opinion. Speaking as Working Group Chairman, the Representative of Brazil felt that, despite every effort, consensus had been impossible; it was even difficult to agree on the manner in which the report should be presented.

The Representative of Chile felt the Working Group had concluded its task. He saw no contradiction in two opposing views being presented in the report; it should now be considered and if agreement could not be reached the Committee should vote on the report.

The Representative of the Philippines stated that the Working Group had discharged its responsibilities. He believed the report to be self-explanatory, presenting the two sides, and a reading of the criticism in the minority report would easily reveal its shortcomings. He, therefore, felt that the Summary Record of this debate should be included in the report submitted to Committee I and the Plenary. Chairman Ogiso agreed with this suggestion and said he would arrange for the Summary Record to be included in the report referred to Committee I and the Plenary.

The Representative of the Federal Republic of Germany supported the criticisms by the Representative of the United Kingdom regarding the submission of the report of the Working Group.

The Representative of France agreed with the Representative of the Federal Republic of Germany. He believed the normal procedure regarding working group reports had not been followed; opinions differing from a majority position were ordinarily presented in footnotes rather than in an independent critique.

The Representative of Switzerland supported the Philippine proposal and associated himself with the comments by the Representatives of the Federal Republic of Germany and the United Kingdom. He believed the procedure followed by the minority, to say the least, was extraordinary. If the minority position

had been presented in objective form, it could have taken the form taken by the majority position. If that course had been followed the advantages and disadvantages of either position would have clearly been set forth in a fair and objective manner.

The Representative of Argentina supported some of the views already expressed but reserved the right to comment on the substance of the report when such discussion is held before this or some other committee.

Chairman Ogiso felt there was a consensus in the Committee to follow the procedure earlier suggested by him. He hoped the substance of the report could now be discussed and he suggested that those delegations that had not participated in the Working Group express their views.

The Representative of Sweden endorsed the position presented by the Representative of the United Kingdom.

The Representative of the United Kingdom agreed that the summary record of this discussion be attached to the report of the Working Group. Paragraph 4 of Annex B of the minority report referred to relations with other organizations. The majority report was concerned with agreements not informal relations. No member of the majority would question that the joint venture could conduct informal relations and arrive at informal arrangements with an international specialized agency. What concerned the majority was that it was not possible to enter into an agreement.

The Representative of Switzerland endorsed the statements of the United Kingdom. There was in addition another area of misrepresentation in Paragraph 7 of the minority report regarding inventions, data, title to patents and the distribution of know-how. While a procedure had been worked out for the transfer of title from COMSAT to other signatories, there was considerable doubt that the distribution of know-how had been worked out and that this recently-adopted procedure worked well. It had encountered some difficulties and resistance. As to complete and non-discriminatory access by other parties, it has been suggested that a signatory could not go directly to the contractor but must go through a particular signatory to obtain data. In the process of doing so, a certain amount of censoring could be involved. The question was whether the partners of the consortium actually are co-owners of the patents, data, and know-how who can make use of patents, data and know-how without further permission.

The Representative of the United Kingdom, referring to paragraph 5, of the minority report, noted the statement that telecommunications entities have demonstrated their ability to protect their property and investments. But the point is overlooked that what is at issue is the protection of the property, not only of the telecommunications entities, but also of INTELSAT and its 68 co-owners. While certain telecommunications entities may sue in the courts of their own countries, very grave difficulties would be confronted in the courts of other countries. A problem would arise in the courts of some countries where

sovereign immunity was not waived. Another difficulty would be the necessity in some instances of bringing representative actions where authorization for such actions might be required or where the defense might wish to join other members. With regard to paragraph 6, it is stated that the United States would be capable of granting privileges and immunities; but the majority report reverted to previous statements that a number of countries would have difficulty in granting privileges and immunities if no legal personality were granted, or, if it were possible to do so, it would require a lengthy process involving legislation.

The Representative of Sweden pointed out that difficulty would arise with respect to sovereign immunity. Other than a tax exemption,no privileges and immunities would be granted.

The Representative of Canada believed the majority recommendation of the ICSC Report was significant in taking a position favoring legal personality. The joint venture had been an appropriate form to begin with but now that the organization had 68 members and contemplated definitive arrangements, it should be given truly international status. An international organization with legal personality offered clear functional and legal advantages in terms of capacity to contract and to own and dispose of property. With respect to privileges and immunities, there was doubt whether Canada could grant them unless a legal personality were involved.

The Representative of Mexico recalled his delegation's Document Com. II/6, dealing with the legal status most appropriate to the organization. After considering the discussion and Documents Com. II/8 and Com. II/9 the Mexican Delegation agreed with the majority position.

The Representative of France agreed that the organization should have a distinct legal personality for three specific reasons: (1) to attract new members to the organization it is psychologically essential that it be recognized by all countries; (2) partnership or joint ventures, while frequently used in the past, have been abandoned for more modern and flexible forms; (3) legally, for decisions taken by the organization to be easily implemented in all countries, it was necessary to have a form acceptable in all countries. A partnership or a joint venture is a much more complicated form. It would also be difficult to grant privileges and immunities to an organization without a legal personality.

The Representative of Austria favored a structure more in conformity with the purposes of the organization. A separate legal status was widely supported by a majority of the members and he associated his delegation with the majority view.

The Chairman said he would refer the report of the Working Group along with the Summary Record of the discussion just concluded to Committee I.

report from this Committee to the Plenary, it being understood that the Committee would have the right to amend or revise any or all of the report as it desired before it was submitted to the Plenary.

Discussion of Procedure

In response to inquiries from the Representatives of Chile and Mexico, the Chairman explained that the Steering Committee had agreed that because the report of the working group on legal status bore a close relationship to the question of structure, it be sent to Committee I for its use and information during its consideration of the question of structure. He reiterated that the Summary Record of today's session would be attached to the submission. The Chairman noted that the report was provided to Committee I to enable it to consider the question of the structure of INTELSAT in the broadest possible scope and was not meant to be a conclusive report of this Committee, and agreed to so indicate in his transmission to Committee I. The Chairman noted that this was an exceptional case and was not intended to establish a precedent in regard to other reports which, unless otherwise decided, would be sent by this Committee to the Plenary.

The Representative of France had no objection to exchange of documents for information purposes between the various Committees. As to working group documents, divergent views should all be reflected in order to assist the Committee and permit the Plenary to note the various views.

Establishment of the Working Group on Privileges and Immunities

The Chairman suggested that the same working group also concern itself with the question of privileges and immunities, Item III. He noted that this had already been discussed in the Committee but that reference to a working group had been deferred until the report on the legal status had been submitted.

The Representative of Japan sought to determine whether the working group would consider the question of INTELSAT's immunity from taxation as proposed in Article XIII(b) of the U.S. draft Intergovernmental Agreement. The Chairman stated that this would be left to the working group.

Agenda for the Ninth Session

The Chairman proposed that the Committee take up first at its next session Item IV (Accession, Supersession and Buy-Out) if the report of that working group is available. The Committee could next take up Item VIII (Amendment Processes), Item IX (Reservations) and Item VI (Liability of Partners Inter-Se). If Committee III has reached some conclusions on the subject of withdrawal, Item V (Withdrawal Provisions) might be discussed.

Adjournment

This session was adjourned at 6:30 p.m. The next meeting was scheduled for 2:30 p.m. on Friday, March 14, 1969.

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PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR

THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/12
March 14, 1969

STATEMENT BY THE REPRESENTATIVE OF SWEDEN IN COMMITTEE II
FRIDAY, MARCH 14, 1969

Accession, Supersession, Buy-Out, Obligations and Rights
of Non-Continuing Members and Entry into Force

In the view of the Swedish delegation, the Interim Agreement cannot be interpreted so as to be said to provide for a majority decision with regard to its supercession by the definitive arrangements. In our view the fact that the system is owned in undivided shares, together with the provision in Article IX of the Interim Agreement that the definitive arrangements should safeguard the investments made, speak clearly against the assumption that a majority decision could validly be taken with the effect of expropriating the shares in the system held by a minority. The provision in Article XII (c) whereby a reduction of the quotas could be effected as a result of accession of new members is to be regarded as an exhaustive indication of the cases in which the Parties have accepted to see their shares in the common property modified by way of voting.

The fact that the Interim Agreement does not provide for amendments seems to support the conclusion that the legal relationship between the Parties as reflected in the Agreement was not expected to be altered against the will of any of them. Moreover, nothing in the Agreement could be cited in support of any determination of the majority required. Finally, the suggestion that the majority could be based not only on a number of votes but also on the investment shares, leaving one particular Party alone to protect its share by not accepting the definitive arrangements and exposing any of the other Parties to the application of expropriation measures in case they would do the same, must be seen as an element of interpretation which speaks against the assumption expressed in the annex to document Com. II/10, Article XII (a).

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PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR
THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM
Washington, D.C., February - March 1969

Com. II/13 (Corr. 1)
March 18, 1969

DEFINITION OF TERMS "INTERNATIONAL" AND "DOMESTIC"
IN RESPECT OF TELECOMMUNICATIONS SERVICES
(Paper by the Delegation of Pakistan)

Please change the word "district" to "distinct" in line 5 of paragraph 2.

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PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/13
March 17, 1969

DEFINITION OF TERMS "INTERNATIONAL" AND "DOMESTIC"
IN RESPECT OF TELECOMMUNICATIONS SERVICES
(Paper by the Delegation of Pakistan)

At its meeting of February 27, 1969, Committee II had decided that consideration of Item I--Definitions be deferred to a later stage of its work.

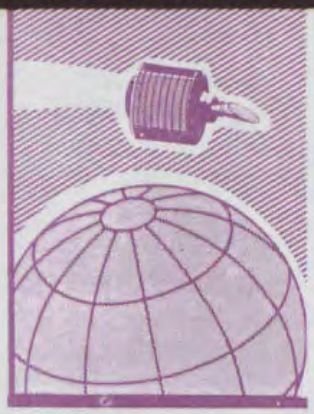
The Delegation of Pakistan had noted in this connection that in paragraphs 146 to 162 of Document 6, the definition of the term "International" in respect of Telecommunication Services has not been included. The Delegation of Pakistan is of the view that since Pakistan as a sovereign state constitutes two district parts separated by the territories of another state, it is necessary that the term "International" be defined and accordingly proposes that the following definition be introduced as a new para:

> "International" in respect of telecommunication services refers to communications among and between any two states or among and between two parts of the same State which are geographically separated by the territory of another State."

As a corollary, the Delegation of Pakistan would like to submit that the definition of the term "Domestic" as proposed in para 161 of Document 6 should also be suitably amended in order to distinguish purely domestic traffic from the domestic traffic across national frontiers which has the character of international traffic as proposed in the preceding definition. Accordingly, the Delegation of Pakistan would propose the following definition for the term "Domestic":-

"Domestic" in respect of telecommunication services refers to communications other than "International."

* * *



PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/14
March 17, 1969

AMENDMENT AND REVIEW PROCESSES

(Submitted by the Delegations of Canada, the Federal Republic of Germany and India)

The Delegations of Canada, the Federal Republic of Germany, and India submit the following suggestions:

I. The duration of an international agreement and its review and amendment are closely interrelated.

The Governments as Parties to an international agreement in undertaking commitments, should at the same time be sure that possibilities for amending and reviewing the agreement are guaranteed. The longer the duration of an agreement, the more adequate and practicable provisions are needed for its revision and amendment. Such provisions should allow for a flexible adjustment of the agreement to any change of circumstances. This general experience of international treaty practice applies all the more where the object of an international agreement is in a stage of so rapid and vaguely predictable a development, as is the case with space technology.

There are two cases to be dealt with:

a. the amendment which aims at a specific alteration of a provision of the Agreements,

b. the review which would not be limited to specific amendments to the Agreements, but would consist of a general analysis of the functioning of the Organization and of the relationship between the provisions of the Agreements and the factual situation. This review could either result in amendments of the Agreements or in their confirmation.

The amendment and review of the Agreements (both intergovernmental and operational) are the responsibility of the Parties (Governments members).

II. The following procedures are suggested for the amendment and review of the Agreements:

1. Amendments:

a. Amendments to both Agreements may be proposed by any Party or Signatory and shall be submitted to the Governing Body for consideration.

b. The Governing Body shall submit the proposed amendments, together with its comments, to the Assembly.

c. The Assembly shall submit the proposed amendments to the Parties, together with its own recommendation as to whether the amendments should be adopted and whether the Assembly shall be convened as a Plenipotentiary Conference.

d. Notwithstanding the recommendation of the Assembly, a group of at least 20 Parties may request that the Assembly meet as a Plenipotentiary Conference of Parties to consider any amendment to the Agreements proposed pursuant to the procedure mentioned above.

e. Amendments proposed either by the Assembly or by a group of at least 20 Parties shall be submitted to the Parties at least ninety days prior to the convening of the Assembly as the Plenipotentiary Conference.

f. Upon approval of two-thirds of the Parties convened at the Plenipotentiary Conference the proposed amendment shall be referred to all the Parties for final acceptance.

g. An amendment to the Agreements shall enter into force for all Parties 90 days after the Depositary Government has received notice of acceptance of the amendment by a majority of two-thirds of the Parties, provided that such two-thirds include Parties who hold, or Parties whose Signatories hold, at least .... percent of the investments in the INTELSAT space segment (similar to the provisions for the entry into force of the Agreements).

2. Review:

Mandatory Plenipotentiary Review Conferences shall be convened at regular intervals of not more than 10 years.

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PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/15
March 18, 1969

REPORT OF WORKING GROUP II B

Committee II established a Working Group consisting of Representatives of Australia, Brazil, Chile, France, Japan, Mexico, Philippines, Sweden, Switzerland, Tunisia, United Kingdom and the United States, to consider matters relating to Immunities and Privileges, Settlement of Disputes, Amendment Processes, Withdrawal Provisions and Liability of Partners Inter Se.

The Working Group met on March 14, 15, 17 and 18. The Working Group appointed Mr. Lemaitre to serve as its Chairman and Mr. A. M. Greenwood to act as rapporteur.

The Working Group submits its report in the form of a report to be rendered by Committee II to the Plenary, as attached in Annexes A (Immunities and Privileges) and B (Settlement of Disputes).

No votes were taken in the Working Group, and the words "majority" and "minority" are only the reflection of opinions expressed during the deliberations.

* * *

Attachments:

Annexes A and B.

REPORT OF COMMITTEE II

Agenda Item III: Privileges and Immunities

The Committee considered draft articles on privileges and immunities submitted by the delegation of Sweden (Doc.8, Art. XVI) and the delegation of the United States (Doc.10, Art. XIII; also Com. II/3), and also considered ICSC-36-58E, paragraphs 595 and 597.

A majority believed that the Intergovernmental Agreement should include an article on privileges and immunities, and that the article should include provision for a privileges and immunities agreement between INTELSAT and the state in which the INTELSAT headquarters is located, and a provision to allow INTELSAT to obtain privileges and immunities in other states where it operates. Some delegations expressed the view that this article should be included in a separate protocol rather than in the Intergovernmental Agreement.

A majority believed it was neither necessary nor desirable to enumerate in the article the precise privileges and immunities to be granted by the headquarters state or other states. However, some delegations believed the article should include certain basic privileges and immunities that would be provided by the host state, and others that would be provided by all states.

A majority noted that privileges and immunities could be granted in their countries under existing law only if INTELSAT had legal personality.

A privileges and immunities article for inclusion in the Intergovernmental Agreement was drafted. This article (attached) was supported by the majority, subject to the following comments:

1. When the Conference determines where the INTELSAT headquarters is to be, the blank in para (a) should be filled in.

2. Some delegations believed the members of the arbitration panel should be included in para (b) as prospective recipients of privileges and immunities since they may not be considered "officers" of INTELSAT.

3. Although the article does not list certain basic privileges and immunities (i.e., immunity from national income and national property taxation) to be granted INTELSAT in all states, it was recognized INTELSAT should be able to obtain these privileges and immunities.

4. The article does not include reference to the organs of INTELSAT which shall be responsible for negotiating and concluding the agreements and obtaining privileges and immunities, on the understanding this would be decided on by Committee 1 or the Plenary and appropriate language inserted either in the articles enumerating responsibilities of organs or in this Article.

Proposed Article for Intergovernmental Agreement

(a) The headquarters of INTELSAT shall be in _____.

(b) The Government of the Party in which the headquarters of INTELSAT is situated shall grant appropriate privileges, exemptions, and immunities to INTELSAT and to its officers and employees, to Parties, to representatives of Parties, and to Signatories and representatives of Signatories, and shall as soon as possible conclude an agreement covering this subject with INTELSAT.

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

(d) Such privileges, exemptions, and immunities as may be appropriate for the proper functioning of INTELSAT under this Agreement and the Operating Agreement may be obtained at the request of INTELSAT from one or more other Parties, either by means of an agreement or agreements between INTELSAT and one or more such Parties, or by other appropriate action of such Party or Parties.

* * *

Annex B to
Com. II/15

DRAFT REPORT OF COMMITTEE II ON ITEM 7 OF THE AGENDA -
SETTLEMENT OF DISPUTES

There is a consensus:

1. that provisions would be required in the definitive arrangements for the settlement of disputes between the Signatories to the Operating Agreement and between such Signatories and INTELSAT (on the assumption that it has legal personality).

2. that provisions to this effect should be inserted in the Operating Agreement.

3. that Signatories could be parties to arbitration and that this would apply to a Signatory which was a Government, provided that the arbitration related to a situation where the Government was acting in the capacity of a Signatory. It was recognized, however, that it would be difficult to determine whether this situation existed.

4. that although an organ of INTELSAT may represent the Organization in arbitration proceedings, INTELSAT, rather than any of its organs, would be the named party in any such arbitration, assuming that INTELSAT has legal personality.

5. that subject to the penultimate paragraph of page 2 of this Annex B, no provisions would be required in the Article on arbitration in the definitive arrangements concerning arbitration between INTELSAT, or the parties or Signatories to INTELSAT, and third parties.

6. that some method should be provided for settlement of disputes between States as Parties.

7. that if Parties to the Intergovernmental Agreement were to be parties to arbitration proceedings, provisions would have to be included in the Agreement.

8. that different procedures may be required for settlement of disputes between Governments in their capacity as Parties to the Intergovernmental Agreement (should such provisions be inserted) than for arbitration between Signatories.

9. that the members of the panel of arbitrators should consist of a sufficiently large number of persons.

There is a difference of view whether Governments in their capacity as Governments would need to be parties to arbitration. Some delegations consider that this would depend on rights and obligations of Governments under the definitive arrangements. Other delegations consider that in any event Governments would need to be Parties.

A majority of delegations would find no difficulty in agreeing to their Governments being parties to arbitration. A minority would not be able to agree to their Governments being parties to arbitration provided for under the definitive arrangements.

There is a difference of view as to what disputes should be arbitrable. Some delegations consider that all disputes in connection with the interpretation or application of the Operating Agreement should be arbitrable. Other delegations wish to limit the scope to legal disputes, that is those concerning the legality of actions or failure to act by INTELSAT or its organs or parties or signatories. Some of these other delegations would be against any arbitration provisions if these are not limited in scope to legal disputes. The Committee noted that Article XX in Doc. 8 supports the wider view and that Article 15 in the Operating Agreement in Doc. 10 supports the narrower view.

The Committee also considered a third possibility in the form of draft articles relating to arbitration prepared by Working Group II B. These articles are annexed hereto, together with comments on them. (Appendix I)

A [majority] of the Committee would be able to accept these Articles, subject to re-examination in the light of the contents of the two agreements when completed. A minority of the Committee would prefer Article 15 of the Operating Agreement in Doc. 10.

The Committee further considered the procedures to be adopted for arbitration.

In this connection the Annexes contained in Doc. 8 and Doc. 10 were taken into consideration, and the Committee also took account of a Draft Annex prepared by the delegate of Brazil during the course of the deliberations of Working Group B. This Annex is attached (Appendix II) but it should be noted that it was drawn up at short notice and with insufficient time to put into perfect form.

The Committee did not have sufficient time to examine Appendix II fully, but on points of principle common to all three proposals about arbitration procedures, the views of the Committee are as follows:

The majority believed that the members of the panel of arbitrators should be appointed by the Assembly without the use of weighted voting.

A majority of the Committee considered that some method should be provided for settlement of disputes between INTELSAT and its Manager should the Manager be an entity separate from INTELSAT. However, there was a difference of opinion whether this should be by means of arbitration under the procedures provided in the Article in the Agreement and its Annex or by means of different procedures. The view was also expressed that in any event it was necessary to make provision in the Agreement for arbitration between INTELSAT and the Manager, if an independent entity, for the interim period before the Manager's contract could be signed.

There was some support for the view that some method of arbitration should be provided between INTELSAT and a Party or Signatory to the difinitive arrangements which had withdrawn, whether voluntarily or involuntarily, concerning disputes about the terms and conditions of withdrawal.

* * *

Suggested Article to be inserted in inter-Governmental Agreement

ARTICLE

(a) All legal disputes arising in connection with the rights and obligations under this Agreement of the Parties with respect to each other, or the rights and obligations between INTELSAT and a Party or Parties, not included among the disputes contemplated in Article 15 of the Operating Agreement, if not otherwise settled, shall be decided by arbitration.

(b) These disputes may be submitted for a decision to an arbitration tribunal to be established in accordance with Annex provided the Parties in any given dispute agree to confer such a competence.

Footnote: A minority of the Committee favors the possibility that the Panel of Arbitrators should be enabled to give advisory opinions and would add the following paragraph:

(c) The Assembly and the Governing Body, or any Party or Signatory, subject to approval of the Governing Body, may request the Panel of Arbitrators referred to in Annex to give an advisory opinion on any legal question in connection with the interpretation or application of this Agreement and the Operating Agreement.

Draft Article to be inserted in the Operating Agreement

Article _____

All legal disputes arising in connection with the rights and obligations under the Agreement or this Operating Agreement of Signatories with respect to each other, or the rights and obligations between INTELSAT and a Signatory or Signatories, if not otherwise settled, shall be submitted to the decision of an arbitration tribunal to be established in accordance with Annex .

Footnote: A [minority] of the Committee favours an additional provision, providing for settlement of legal disputes arising under the Special Agreement and would add the following paragraph to the above Article:-

(b) All legal disputes arising in connection with the Special Agreement or in connection with the rights and obligations of its Signatories, if not otherwise settled, shall be submitted for a decision by an impartial tribunal to be established in accordance with Article 14 of the Special Agreement on Arbitration of 4 June, 1965

* * *

SETTLEMENT OF DISPUTES
(Submitted by the Delegate of Brazil
as requested by Working Group II B)

ARTICLE I (Definitions)[1]

The words and phrases defined in the /Constituent/ Agreement and the Operating Agreement shall have the same meaning for the purposes of this Annex.

ARTICLE 2 (Parties and competence)

(a) An arbital tribunal constituted under this Annex is competent to give a decision in any legal dispute:

(i) as provided in Article X (b) of the /Constituent/ Agreement;

(ii) as provided in Article 15 of the Operating Agreement.[2]

(b) In the event of a dispute as to whether the arbital tribunal has competence, the matter shall be settled by the decision of the tribunal.[3]

(c) Only the following may be parties in arbitration proceedings instituted under this Annex:

(a) Any Party (Article 2 paragraph (a)(i));

(b) Any Signatory (Article 2 paragraph (a)(ii));

(c) The INTELSAT;[4]

(d) The Manager, as long as this function should be exercised by an entity independent of the INTELSAT.

1/ New.
2/ See Article 2, para. (a) 1965 Agreement.
3/ New.
4/ On the assumption that INTELSAT has legal personality.

ARTICLE 3 (Appointment of the panel)

(a) Within 30 days of the entry into force of the /Constituent/ Agreement and the Operating Agreement and every two years thereafter, each Signatory shall submit to the Governing Body the name of a legal expert of generally recognized ability who will be available for the succeeding two years to serve as president of tribunals constituted under this Annex. From such nominees the Governing Body shall prepare a list in alphabetical order of all the persons thus nominated and may attach to this list the observations and recommendations that it deemed appropriate.

(b) The Assembly shall appoint seven individuals to a panel from which presidents of the tribunal shall be selected or, if not so appointed within three months from the entry into force of the Agreements and every two years thereafter, the members of the panel shall be appointed by the Board of Governors. The members of the panel shall be appointed for a term of two years, and may be reappointed.

(c) For the purpose of designating a chairman, the panel shall be convened to meet by the chairman of the Board of Governors as soon as possible after the panel has been appointed. The quorum for a meeting of the panel shall be six members. After discussion among its members, the panel shall designate one of its members as its chairman by a decision taken by the affirmative votes of at least four members, cast in one or, if necessary, more than one secret ballot. The chairman so designated shall hold office as chairman for the rest of his period of office as a member of the panel. The cost of the meeting of the panel shall form part of the costs to be shared by the signatories in accordance with the Operating Agreement.

(d) Vacancies on the panel shall be filled by appointment made by the Board of Governors, if the Assembly does not meet in the subsequent 30 days. Vacancies in the office of the chairman of the panel shall be filled by the panel by designation of one of its members in accordance with the procedure set out in paragraph (c) of this Article. A member of the panel appointed to replace a member or designated to replace a chairman whose term of office has not expired shall hold office for the remainder of his predecessor's term.

(e) In appointing the members of the panel the Assembly or the Governing Body shall seek to ensure that its composition is drawn from the various principal legal systems as they are represented among the signatories.

ARTICLE 4 (Submission of a dispute)

(a) The party wishing to submit a legal dispute to arbitration shall provide each party and the Governing Body with a document which contains the following items:

(i) A list of the parties against which the case is brought;

(ii) A statement which fully describes the dispute being submitted for arbitration, the reasons why each party is required to participate in the arbitration, and the relief being requested;

(iii) A statement which sets forth why the subject matter of the dispute comes within the competence of a tribunal to be constituted under this Annex, and why the relief being requested can be granted by such tribunal if it finds in the petitioner's favor;

(iv) A statement explaining why the petitioner has been unable to achieve a settlement of the dispute by negotiation or other means short of arbitration;

(v) The name of the individual designated by the petitioner to serve as a member of the tribunal.

(b) Within 21 days from the date copies of the document described in paragraph (a) of this Article have been received by all the parties against which the case is brought, the respondents' side shall designate an individual to serve as a member of the tribunal.

(c) In the event of failure by the respondents' side to make such a designation, the chairman of the panel, within ten days following a request by the applicant's side which shall not be made before the expiration of the 21 day period aforesaid, shall make a designation from among the experts whose names were submitted by the Signatories pursuant to Article 3 (a) of this Annex.

(d) Within 15 days after such designation the two members of the tribunal shall agree on a third individual selected from the panel constituted in accordance with Article 3 (b) of this Annex, who shall serve as the president of the tribunal. In the event of failure to reach agreement within such period of time, the chairman of the panel, within ten days after a request from one of the sides, shall designate a member of the panel other than himself to serve as president of the tribunal.

(e) The tribunal shall commence its functions as soon as the president is selected.

(f) Should a vacancy occur in the tribunal for reasons which the president or the remaining members of the tribunal decide are beyond the control of the

parties, or are compatible with the proper conduct of the arbitration proceedings, the vacancy shall be filled in accordance with the following provisions:

(i) Should the vacancy occur as a result of the withdrawal of a member appointed by a side to the dispute, then that side shall select a replacement within ten days after the vacancy occurs.

(ii) Should the vacancy occur as a result of the withdrawal of the president of the tribunal or of another member of the tribunal appointed by the chairman, a replacement shall be selected from the panel in the manner described in paragraph (d) or (c) respectively of this Article.

(g) Except as prescribed in this Article, vacancies occurring in the tribunal shall not be filled.

(h) If a vacancy is not filled, the remaining members of the tribunal shall have the power, upon the request of one side, to continue the proceedings and give the tribunal's final decision.

ARTICLE 5 (Procedure of tribunal)

(a) The time and place of the sittings of the tribunal shall be determined by the tribunal.

(b) The proceedings shall be held in private and all material presented to the tribunal shall be treated as confidential, except that the parties to the Agreement whose designated signatories are parties to the dispute shall have the right to be present and shall have access to material presented. When the INTELSAT is a party to the proceedings, all parties to the Agreement

and all signatories shall have the right to be present and shall have access to material presented, except where the tribunal shall in exceptional circumstances decide otherwise.

(c) The proceedings shall commence with the presentation of the petitioner's case containing its arguments, related facts supported by evidence and the principles of law relied upon. The petitioner's case shall be followed by the respondent's counter-case. The petitioner may submit a reply to the respondent's counter-case. Additional pleadings shall be submitted only if the tribunal determines they are necessary.

(d) The proceedings shall be conducted in writing, and each side shall have the right to submit written evidence in support of its allegations of fact and law. However, oral arguments and testimony may be given if the tribunal considers it appropriate.

(e) The tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute provided the counter-claims are within its jurisdiction as defined in Article 2 of this Supplementary Agreement.

(f) At any time during the proceedings, the tribunal may terminate the proceedings if it decides the dispute is beyond its competence as defined in Article 15 of the Operating Agreement.

(g) The tribunal's deliberations shall be secret and its rulings and decisions must be supported by at least two members.

(h) The tribunal shall support its decision by a written opinion. A member dissenting from the decision may submit a separate written opinion.

(i) The tribunal may adopt additional rules of procedure consistent with those established by this Annex which are necessary for the proceedings.

ARTICLE 6 (Failure to present the case)

(a) If one side fails to present its case, the other side may call upon the tribunal to accept its case and to give a decision in its favor. Before doing so, the tribunal shall satisfy itself that it has competence and that the case is well-founded in fact and in law.

(b) Before giving the decision, the tribunal shall grant a period of grace to the side which has failed to present its case, unless it is satisfied that the party in default does not intend to present its case.

ARTICLE 7 (Intervention of other parties)

Any signatory, group of signatories, or the Board of Governors, on behalf of INTELSAT, which considers that it has a substantial interest in the decision of the case may petition the tribunal for permission to become a party to the case. If the tribunal determines that the petitioner has a substantial interest in the decision of the case, it shall grant the petition.

ARTICLE 8 (Experts)

Either at the request of a party, or upon its own initiative, the tribunal may appoint such experts as it deems necessary to assist it.

ARTICLE 9 (Request of information)

Each of the Signatories Parties and the Board of Governors shall provide all information determined by the tribunal, either at the request of a party to the case or upon its own initiative, to be required for the proper handling and determination of the dispute.

ARTICLE 10 (Provisional recommendation)

During the course of its consideration of the case, the tribunal shall have power, pending the final decision, to make recommendations to the parties to the case with a view to the protection of their respective rights.

ARTICLE 11 (Base for decision and its binding effect)

(a) The decision of the tribunal shall be based on

(i) interpretation of the Constituent Agreement, the Operating Agreement and this Annex;

(ii) general principles of law widely accepted and compatible with the provisions referred in subparagraph (i).

(b) Should the parties reach an agreement during the proceedings, the Agreement shall be recorded in the form of a decision of the tribunal given by the consent of the parties.

(c) The decision of the tribunal shall be binding on all the parties to the dispute and shall be carried out by them in good faith. However, if, in a case in which the INTELSAT is a party, the tribunal decides that a decision of one of its organs is null and void as not being authorized by or in compliance with the Constituent Agreement and the Operating Agreement, the decision of the tribunal shall be binding on all signatories.

ARTICLE 12 (Expenses)

Unless the tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of the members of the tribunal, shall be borne in equal shares by each side. Where a side consists of more than one party, the share of that side shall be apportioned by the tribunal among the parties on that side.

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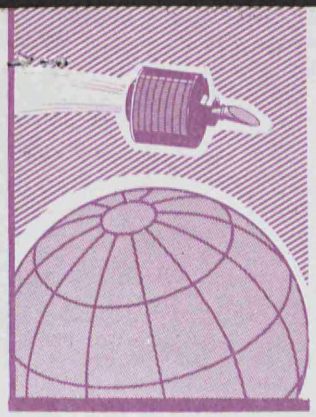

PLENIPOTENTIARY CONFERENCE ON DEFINITIVE ARRANGEMENTS FOR

THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE CONSORTIUM

Washington, D.C., February - March 1969

Com. II/16
March 19, 1969

REPORT OF WORKING GROUP II B ON AGENDA ITEMS VIII - AMENDMENT PROCESSES, V - WITHDRAWAL PROVISIONS, AND VI - LIABILITY OF PARTNERS INTER-SE

Working Group B met on March 18 and 19 to consider Item VIII - Amendment Processes - of the agenda. The Working Group consisted of Representatives of Brazil, France, Japan, Mexico, Philippines, Sweden, Switzerland, Tunisia, the United Kingdom, and the United States. The Representative of France, Mr. Lemaitre, was elected Chairman of the Working Group. The Representatives of Mexico, Mr. Rozental, and the United Kingdom, Mr. Greenwood, acted as rapporteurs.

In its two meetings on Item VIII - Amendment Processes - the Working Group considered the following documents: Report of the ICSC, paragraphs 581-90, Document 8, Document 10, and Com. II/14. Although the Working Group was unable to consider fully this Item for lack of time, there was general consensus on the general principles outlined in the attached annex.

Due to the shortage of time the Working Group was unable to consider Items V - Withdrawal Provisions, and VI - Liability of Partners Inter-Se. Thus, no report on these subjects are submitted to the Committee.

* * *

Attachment:

Annex

Annex to
Com. II/16

Draft Report of Committee II on Its Agenda Item VIII

There was a consensus on the following general principles:

1. That there be a separate amendment article for each of the Agreements, subject to the ultimate decision on the structure of the Organization and the content of the Agreements.

2. That organs per se of INTELSAT should not be able to initiate amendments to the Agreement.

3. That amendment proposals should be channeled through the Organization in a manner to be decided upon once the structure of INTELSAT is defined and the content of Agreements is known.

4. That adequate notice of the proposed amendment be given to the Parties and Signatories of both Agreements, regardless of which Agreement is to be amended, in no case less than three months before that organ eventually responsible for adopting the amendment meets.

* * *

A (majority) of the Committee felt that no amendment to the Operating Agreement should be made without the consent of Parties. A (minority) expressed the view that any amendment to the Operating Agreement should be approved only by Signatories. There was disagreement as well as to whether it is possible for the amendment to enter into force without the approval of Signatories. A reason given for amendments being able to enter into force without the approval of Signatories was that otherwise Signatories could prevent a Government from carrying out its international responsibilities by not agreeing to the entry into force of an amendment. A reason given for amendments not being able to enter into force without the approval of Signatories was that it would be against traditional rules of law for a different group of parties from those which had originally concluded an agreement, and from those who are parties to the agreement, to put into force an amendment to that agreement. Another reason given for amendments to the Operating Agreement not being able to enter into force without the approval of Signatories was that it would also be against the traditional rules of law for any amendment to obligate Signatories who did not have any possibility of having a say on that amendment.

In principle it was agreed that Parties should have the right of initiating amendments to the Intergovernmental Agreement and that Signatories should have that right for the Operating Agreement. No agreement was reached, however, on the question as to whether Parties could initiate amendments to the Operating Agreement or whether Signatories could initiate amendments to the Intergovernmental Agreement.

A (majority) considered that the amendments to the Intergovernmental Agreement should enter into force in a manner similar to that by which that Agreement itself enters into force.

A (minority) felt that it was impossible to consider this question until a decision is taken on the procedure for the entry into force of the Definitive Agreements.

With respect to review, a (majority) believed that there should be provisions for a mandatory review conference within a certain period of years, on the understanding that the Assembly could cancel such a conference if it were not necessary. No definite decision was made concerning the time period between review procedures. Some Delegations believed it would be sufficient to authorize the Assembly to undertake a review or to call a review conference when it was deemed advisable. Some Delegations also consider it necessary to provide for the possibility of a review conference being called by a certain number or proportion of Parties.

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