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The Intelsat Arbitration Agreement—A Pattern for the Future?†

In 1962 Congress enacted the Communications Satellite Act as the first step toward establishment of a worldwide commercial communications satellite system.[1] That system became an operational reality in June 1965. The Communications Satellite Corporation, or Comsat, was organized under the 1962 Act and is the United States participant in the International Telecommunications Satellite Consortium, commonly known as Intelsat, which owns the system. Comsat also acts as manager for the consortium.

Comsat is a corporation not quite like any other, though in many ways it is trying to become as much like other corporations as possible. The principal difference is that in addition to its normal business functions, it is the chosen agent of the United States to participate in a single global communications satellite system.[2] This infusion of private business into what are customarily inter-governmental negotiations has already had some interesting results. One of its more noteworthy contributions has been the Intelsat Arbitration Agreement. Some understanding of the factors that led to the creation of Comsat and Intelsat will be useful to an appraisal of the significant features of this agreement.

I. Creation of Comsat and Intelsat

The original bill to create the special corporation that is now Comsat was drafted in the Office of Legal Counsel while Nicholas

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[1] 76 Stat. 419 (Aug. 31, 1962), 47 U.S.C. 701 *et seq.* See Sen. Rep. No. 1584, 87th Cong., 2d Sess. (Commerce Committee) and H. Rep. 1636, 87th Cong., 2d Sess. (Committee on Interstate and Foreign Commerce).

[2] *See* Throop, *Some Legal Facets of Satellite Communications,* 17 AM. UNIV., L. REV. 12 (1967).

Katzenbach was Assistant Attorney General in charge of the Office. Since then the office has had a continuing interest in the significant legal problems arising under that legislation and the ensuing international agreements. It has no connection with the management or operation of Comsat itself, however, because the basic function of the office is inside government. The office assists the Attorney General in his role as legal adviser to the White House and the Executive branch, particularly in connection with executive orders, the Administration's legislative program, and questions of legality, statutory interpretation and constitutionality. The Executive branch has a continuing role in connection with several aspects of the satellite communications programs.

The Comsat Act embodies the Congressional compromise resolving numerous conflicting views and policy goals raised by the decision to go ahead with a commercial communications satellite system. The resulting legislation is hardly a prototype of clarity. This is not a criticism; it is an acknowledgment of the inevitable. The law was at least enacted, and so far it has managed to get the job done.

The basic controversy over whether the system should be publicly or privately owned was resolved in favor of private ownership. At the same time, it was desired to make the benefits of this technological advance, developed at great public expense, available to the broadest possible public participation. It was also expected that the high cost and large capacity of the system, as well as the limitations of the radio frequency spectrum, would make competing satellite systems impractical. Since the purpose of the system was to provide international communications, it was clear that the cooperation of other countries would be essential.

These considerations resulted in a decision to set up a private corporation under the District of Columbia Corporation Code. The stock ownership was to be evenly divided between communications common carriers and the public. The fifteen-man board included six directors representing the public and six representing the common carrier shareholders, all chosen by cumulative voting, as well as three directors appointed by the President.[3] Control over international negotiations was reserved to the Department of State.[4] A further check on the corporation's policies was provided by authorizing the

[3] 47 U.S.C. 733(a).
[4] 47 U.S.C. 742.

Attorney General to enforce all provisions of the 1962 Act through court injunction.[5]

The creation of Comsat was the first step in the creation of an international system, but the shape of that system could not be dictated by the United States. The Act recognized this by authorizing Comsat to own and operate the system either itself or in cooperation with foreign governments or business entities.[6]

The corporation's role as an international negotiator assumed full proportion in 1964. Both Comsat and the Department of State participated in negotiating the 1964 executive agreement that created Intelsat. In view of the novelty of the experiment, the agreement was designed to be temporary and called for definitive arrangements to be negotiated in 1969 and take effect in January, 1970.[7]

Intelsat is a joint venture of both government and business entities which jointly own the satellite portion of the international system. Ground stations are something else again. The Intelsat agreement, like our domestic legislation, separated the thorny question of ground station ownership from that of the satellites.[8]

The executive organ of Intelsat is the Interim Communications Satellite Committee. Voting rights in the Committee are based on the relative investment quotas of the members. These quotas were a central issue in the negotiations, and were resolved on the basis of what was deemed a fair estimate of the prospective traffic attributable to each participant. Comsat owns the United States share, which amounts to a little more than 50% of the total, and has been designated as manager of the entire system for the term of the interim agreements. Comsat's vote is essential, but not sufficient by itself, to authorize Committee action.[9]

The intergovernmental agreement which set up the consortium was only one of three international agreements that govern Intelsat, and it is the only one to which the U.S. Government is a signatory. This is the basic "Intelsat Agreement." The Special Agreement,[10] which was concluded simultaneously, is an operating agreement

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[5] 47 U.S.C. 743(a).

[6] 47 U.S.C. 735(a)(1).

[7] International Telecommunications Satellite Consortium (Intelsat), August 20, 1964, TIAS 5646. Art. IX.

[8] 47 U.S.C. 702(1), (2), (4); Intelsat Agreement, Art. I; see generally, Colino, *Intelsat: Doing Business in Outer Space* 6 COL. J. TRANS. L. 17 (1967).

[9] Intelsat Agreement, Art. V.

[10] TIAS 5646.

between the various entities, both public and private, which actually participate in the system. Only Comsat signed this agreement, which it also negotiated, on behalf of the United States.

The arbitration agreement, for which Comsat was also the U.S. negotiator and signatory, was concluded several months after the Intelsat and Special Agreements.[11] Article 14 of the Special Agreement specifically called for arrangements to be made for the submission of legal disputes to the decision of an impartial tribunal which would decide such questions "in accordance with generally accepted principles of law."

II. The Intelsat Arbitration Agreement

The Intelsat Arbitration Agreement implements this understanding by providing for the establishment of *ad hoc* tripartite tribunals. In this respect it is unexceptional. The agreement, however, departs from previous comparable agreements in three respects:

(1) It establishes an outside tribunal which can review the legality of the Interim Committee's actions or failure to act;

(2) It contains an unusual provision for the appointment of the impartial arbitrator; and

(3) The arbitral procedure is set forth in clear and specific detail to an extent rare in agreements of this type.

The writer would like first to summarize these features of the agreement and then add a few comments about their possible relevance to other international agreements.

1. Possible Legal Review of the Committee's Actions.

Earlier international agreements involving organizations such as the World Bank, the International Monetary Fund and the International Finance Corporation, vested final decision-making authority in their respective executive bodies.[12] The only circumstances in which resort to an outside tribunal was permitted involved former parties to the agreements or occasions when the organizations themselves are not functioning. This follows logically from the fact that the execu-

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[11] The agreement was opened for signature on June 4, 1965 and entered into force Nov. 21, 1966, 50 Dept. of State Bull. 906 (1966).

[12] Articles of Agreement of the International Bank for Reconstruction and Development, Art. 9; the International Monetary Fund, Art. 18; International Finance Corporation, Art 8; collected in 2 PEASLEE, INTERNATIONAL GOVERNMENTAL ORGANIZATIONS (2d ed. 1961).

tive organs, which have the technical expertise essential to a meaningful understanding of their needs, are the decision-making bodies of these organizations.

Intelsat, like these organizations, manages substantial capital assets, and voting control is proportionate to investment. It is perhaps even more dependent on technical expertise than the older, financial institutions. In view of the relatively experimental character of the Intelsat arrangements, however, it was agreed that there should be some effective means of assuring that the governing committee could be forced to comply with the terms of the basic agreements.[13]

One of the issues considered during the negotiations was whether there should be a continuing tribunal with the power to give advisory opinions. It was concluded that this might pose a threat to the effective management of the consortium by the governing committee called for in the Intelsat and Special Agreements. As further assurance that the operating effectiveness of the Committee would not be unduly affected, the Agreement provides that the Committee, if it is to be bound by a decision declaring one of its actions invalid, must be a party to the proceeding.[14]

The real achievement of the drafters of the arbitration agreement consists in reconciling the need for an impartial *ad hoc* tribunal, in which a high degree of technical expertise can be assured, with the need for some control by the Interim Committee in the selection of the impartial arbitrator.

2. Selection of the Impartial Arbitrator.

The major difference between the Intelsat procedure and the traditional means of selecting the umpire is that the governing committee may in effect veto any person who might fill that role, but is committed in advance to agree that any of seven persons may become a deciding arbiter. This commitment is itself balanced by the relatively short two-year term for which experts are appointed, though renomination is permitted.[15]

The agreement calls for each party to name one arbitrator—who need not be on any approved list—and for the two arbitrators thus

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[13] Throop, note 2, *supra* at 19.

[14] Arbitration Agreement, Art. 11(c). The Arbitration Agreement is bound together with the Intelsat and Special Agreements in a pamphlet edition of TIAS 5646, but does not appear in the TIAS series.

[15] Art. 3.

chosen to agree on a third, as is typical of such agreements. However, the two arbitrators are required to choose the third from a preselected group. If they cannot agree or if the party respondent fails to designate its own arbitrator, there is a relatively unusual procedure for making these selections.

In brief, each signatory to the agreement is required to designate one legal expert who will be available to serve as the president of arbitral tribunals for a period of two years. From this group the Intelsat Committee chooses a panel of seven, which are supposed to represent the major legal systems represented among the signatories. The panel elects one of its own members to act as chairman.[17] If the two party-appointed arbitrators to an *ad hoc* tribunal cannot agree on a third member to be chosen from this panel, the chairman is required to appoint a panel member other than himself. If the respondent party fails to appoint its own arbitrator, the chairman of the panel appoints one from among the larger group of experts from which the panel itself has been chosen.[18] The use of the word "panel" follows the usage of the Agreement, in using it to refer to a group of preselected arbitrators, and not to the arbitral tribunals themselves. The present panel consists of the experts appointed from Brazil, Norway, the United States, Australia, Spain, Malaysia and Japan. The chairman is Jens Evenson of Norway.

This procedure differs considerably from the more typical provision for selecting an umpire when the parties cannot agree, which is to leave the selection to some official such as the President of the International Court of Justice. Under such a provision the person finally appointed is not subject to prior approval by either party. Here, the Intelsat Committee has approved the entire panel. Impartiality is nevertheless promoted by: (1) appointment by the individual signatories of the group from which the committee must select the panel; (2) the requirement that the panel be representative of the major legal systems, which protects against packing the panel with representatives of any one point of view; (3) the panel's appointment of its own chairman from within its ranks; and (4) the fact that this much of the selection procedure takes place before any dispute arises.

The use of a panel is not itself unusual. For example, the

[16] Art. 4.
[17] Art. 3.
[18] Art. 4.

Permanent Court of Arbitration[19] of 1899 and the World Bank's Centre for the Settlement of International Investment disputes of 1965[20] employ preselected groups of arbitrators from which an umpire is ultimately chosen. In both cases, however, the panel members from whom the final choice is made consist of the relatively large group including the nominees of all parties. The World Bank's Investment Dispute Centre, for example, presently has 84 persons in its standing panel.

The unique feature of the Intelsat arrangement thus lies in the advance selection of a very small panel from among the larger group appointed by all signatories to the agreement. This gives the parties a fairly good idea in advance of what they are getting.

3. Detailed Procedure for Arbitration

The third principal feature of the Intelsat arbitration agreement is the degree of procedural detail that it includes. These provisions were designed to make the arbitration as simple, expeditious and inexpensive as possible.

The agreement applies to all legal disputes as to whether an action or failure to act by the Interim Committee or any signatory is proper under the Intelsat agreements or any related agreement.[21]

An arbitration proceeding is commenced by the simple filing of what is blandly called a "document," setting forth the grounds of complaint and designating an arbitrator to represent the complaining party. The party complained against is not required to file an answering document, but must designate its own arbitrator within 21 days. If it fails to do so, an arbitrator is appointed on its behalf in the manner described above within ten days after a request by the applicant's side.[22]

Times and places of sittings are left to the tribunal. Proceedings are held in private, and material presented to the tribunal is to be treated as confidential.[23] This latter provision is of great potential importance in view of the "discovery" provision which requires that parties "shall provide all information determined by the Tribunal

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[19] 2 PEASLEE, note 12, *supra* at 1700.

[20] Convention on the Settlement of Investment Disputes between states and Nationals of other states, March 18, 1965.

[21] Art. 2(a), (b).

[22] Art. 4.

[23] Art. 5.

. . . to be required for the proper handling and determination of the dispute.[24]

The practical businessman's understandable concern with holding down the cost of litigation is reflected in the attempt to discourage oral hearings—which are permitted only if "the tribunal considers it appropriate."[25] Provision is also made for the equivalent of discovery,[26] counterclaim,[27] default judgments,[28] intervention[29] and interim measures.[30] The applicable law is stated to be the Intelsat Agreement and the Special Agreement, interpreted "in accordance with generally accepted principles of law"[31]—a standard that sounds reminiscent of those well-known "generally accepted accounting practices."

Deliberations of the tribunal are secret, but decisions must be supported by a written opinion. Dissenting opinions are expressly permitted.[32] Decisions are binding on the parties to the dispute and are to be carried out by them in good faith.[33] There is, however, no provision for injunction.

There is one respect in which the procedures could have been more complete: the question of disputes over the interpretation of the award itself. The simple answer would appear to be that such interpretations should be given by the tribunal itself. However, the detailed provisions of the agreement leave room for several potentially awkward questions that are not likely to solve themselves. Is there, for example, any time limit on when the tribunal can be reconvened? Can the chairman oblige the old tribunal to reconvene? Does it make any difference if the two-year term of a panel member has expired? Does the same tribunal have continuing jurisdiction, or is a question of interpretation of an award an independent dispute as to which the entire arbitration proceeding, including the formation of a new tribunal, is available? Is the chairman of the panel obliged to appoint a new (or the old) president and a substitute arbitrator for a recalcitrant party in such cases? If a member dies or refuses to serve

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[24] Art. 9.
[25] Art. 5(d).
[26] Art. 9.
[27] Art. 5(e).
[28] Art. 6.
[29] Art. 7.
[30] Art. 10.
[31] Art. 11(a).
[32] Art. 5.
[33] Art. 11(c).

is he to be replaced according to the procedure for this contingency prior to award?[34] Must a new tribunal be chosen? Some clarification of these points would be desirable if the agreement is reviewed in connection with the negotiations for the definitive Intelsat arrangements to be conducted in 1969.[35]

III. Pattern for the Future?

How has it all worked? Any analysis of the Intelsat arbitration agreement at this time suffers from one unavoidable shortcoming: No arbitrations have yet been completed or initiated—which certainly doesn't bother Comsat, or me. An appraisal of the Agreement may nevertheless be worthwhile, because some of its provisions may provide useful precedents in the evolving pattern of international agreements.

There is already one situation in which the approach used by the drafters of the Intelsat arbitration agreement may prove useful even though its specific provisions may not be appropriate.

Last spring the writer had the privilege of serving briefly as a member of the U.S. Delegation to a United Nations Conference on the Law of Treaties which was held in Vienna. Starting from a draft prepared by the International Law Commission, the representatives of more than 100 nations hammered out a proposed convention covering the entire range of treaty law, including the conclusion, application, interpretation, validity and termination of treaties. This convention will be submitted to the U.N. member for final action at the second and final session of the conference held in Vienna in April–May, 1969.

If the convention is adopted, international law will be changed in several important respects. For the first time an authoritative international convention will sanction a broad range of legal bases on which a party to a treaty may purport to terminate or assert the invalidity of the treaty. Part V of the proposed convention expressly authorizes such grounds for avoidance or termination as that a party's consent

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[34] Art. 4(f) provides for filling a vacancy on the part of the president in accordance with the initial procedures. Party designated arbitrators may be replaced by the party which chose the arbitrator whose seat becomes vacant. *Id.* If no substitution is made, the remaining members are empowered to continue, Art. 4(g), (h). Presumably, the president alone could continue if both parties leave vacancies unfilled.

[35] See generally Washburn, *Arbitration Procedures for Intelsat's Legal Disputes,* 23 ARB. J. 97 (1968).

was obtained by fraud or corruption, coercion of its representative, or the threat or use of force; that the treaty is no longer valid because of a "fundamental change of circumstances" *(rebus sic stantibus)*; or that it is void because it conflicts with a previous or newly developed fundamental international norm from which no derogation is permitted—the relatively new and controversial doctrine of *ius cogens.*

The United States delegation was concerned that regardless of the substantive merits of these provisions, their phrasing is so general that they might be open to serious abuse by countries unjustifiably seeking to escape their treaty obligations unilaterally. Our proposed amendments seeking to make these provisions more precise were almost uniformly rejected. The general stability of treaty relationships could well be undermined unless the convention provides for mandatory third party settlement procedures where claims of invalidity can be objectively evaluated. Our concern was shared by a great many other countries, but there was not nearly enough concensus to permit the shaping of such procedures. Consequently, final action was deferred until next year's session, with the approved text simply providing that disputing parties shall seek a peaceful solution under Article 33 of the U.N. charter[36] as suggested in the International Law Commission's text.

It is not suggested that the Intelsat Arbitration Agreement will resolve this thorny dilemma. The Intelsat provisions were designed to meet a much more defined category of problems than the proposed Convention on the Law of Treaties. In both approach and substance, however, it has aspects which may prove useful in the context of intergovernmental treaty disputes as well as international business disputes.

In terms of approach, one of the most interesting things about the Intelsat provisions is that the businessmen who were going to have to live with it did not accept a skeletal arrangement of the kind so typically concluded between governments. The provision for the selection of Intelsat arbitrators represents a careful compromise between interests which knew that they would be bound by the proceedings of the *ad hoc* tribunals. The detailed procedural provi-

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[36] "Art. 33. 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

sions serve to narrow the number of problems that have to be resolved after a dispute arises.

Substantively, the use of a preselected panel—not just the appointment of a large group of prospective arbitrators, but the advance selection of a smaller panel from among such a group—has a great potential. The choice of a chairman by the panel itself and of the third arbitrator by the chairman could provide an interesting alternative to selection of the third arbitrator by the U.N. Secretary General or the President of the International Court of Justice.

A panel of this kind can provide much greater flexibility than a standing court or other tribunal. Different panels, for example, could be tailored to deal with different areas of jurisdiction requiring different expertise. This is true whether we are dealing with disputes between business or governments—and as Comsat and Intelsat illustrate, that difference can sometimes be a pretty fine line.

As hard as it may be for lawyers to admit, binding third party resolution of important international business or government disputes may prove more acceptable if some of the arbitrators are selected for other than legal qualifications. Effective settlement may require participation of statesmen of recognized international stature, or technical experts who may not be lawyers at all.

The need to develop conciliation and arbitration procedures adapted to the settlement of critical international disputes—in which questions of law are typically mixed with other considerations which can be much more important—is clearly one of the major challenges facing us today. If this challenge is to be met successfully, it will be through adapting old and shaping new techniques for arbitration and selecting arbitrators, creatively and resourcefully, as the parties did in negotiating the Intelsat arbitration agreement. In this sense, that agreement may well provide a pattern for the future in areas even more crucial than the one with which it deals.