TELECOMMUNICATIONS POLICY:

A REVIEW OF GOVERNMENTAL INSTRUMENTS RELATIVE TO INTERGOVERNMENTAL TELECOMMUNICATIONS POLICY

CLARKSON, TETRAULT
Barristers and Solicitors,
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1.0 INTRODUCTION

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The international non-military telecommunications scene has traditionally been characterized by co-operation among countries. The principal reason for this historically has been the inescapable fact of limitations existing in the radio frequency spectrum and more recently, the realization that for fixed satellite service telecommunications, there was also a limit on the number of suitable geostationary orbital slots. The alternative to co-operation was chaos.

Countries have dealt with these issues at the state level or through state designated representatives. States have entered into contractual arrangements to provide for formal co-operation in international telecommunications and either they or their designated representatives have contracted to provide the services flowing from those arrangements.

Historically, the result has worked reasonably well, with states protecting their interests in the international context and the designated entities generally being regulated in some manner to accomplish either nationally desirable social goals through cross-subsidization of local rates from international traffic profits or alternatively simply making those profits available as general government revenues.

The 1980's have witnessed two major developments that have the potential to threaten this "quiet life": dramatic technological improvements; and resulting competitive pressures. Ironically, the very improvements that might have been expected to relieve international pressures in telecommunications, such as decreased orbital spacing, cross-polarization, network digitization etc., have in part been responsible for the increased interest in providing competitive alternatives to the state or its designated entity.

The thrust of this report is to examine the international organizations that are the results of or the vehicles for this co-operation and to consider what, if any, impact the emerging competitive threats will have on them. Specific attention will be directed to the United States and the United Kingdom, countries which are in the forefront of responding to this challenge, but in very different ways.

The first portion of this report deals with the international setting and the legal instruments that states have agreed upon to implement their co-operative approach to telecommunications. Specifically, it analyzes the legal and operational aspects of International Telecommunication Union (ITU), International Telecommunications Satellite Organization (INTELSAT), International Maritime Satellite Organization (INMARSAT) and Commonwealth Telecommunications Organization (CTO).

The second portion deals with the approach to the international scene by the United States and the United Kingdom viewed from those countries' national perspective. While the report does analyze the major pieces of legislation involved in each country, considerable emphasis has been placed on how the legislation actually works and how the key players actually fit into the over-all scheme of things. It also addresses areas where there is pressure for change, either to relevant national statutes or the manner in which they have been interpreted.

Because much of the analysis of how each system works in practice is very largely subjective, it was based to a considerable degree upon personal interviews with individuals who are involved directly in these areas. In these interviews, we were seeking candid opinions based upon experience rather than official corporate positions. This necessarily implies that some of the analysis is subjective, as interpreted by a participant having a particular perspective. In addition, in order to obtain total candour, the interviews were conducted on condition that the opinions expressed not be attributed to the speaker. While this may result in a report with little in the way of footnoted source material, we believe it provides a more intelligent picture of how international telecommunications the U.S. and U.K. actually work.

2.0 LEGISLATIVE AND REGULATORY INSTRUMENTS GOVERNING NATIONAL REPRESENTATION IN INTERNATIONAL TELECOMMUNICATIONS FORA

2.1 THE INTERNATIONAL TELECOMMUNICATION UNION (ITU)

2.1.1 Description Of Its Main Legal Instruments And Permanent Organs

The International Telecommunication Union (the ITU) is basically a technical organization:

> "The ITU does not and cannot consider the economic, legal, political, and social aspects of all outer space activities. But, within its competence it has been highly successful in assuring legal order in outer space and in implementing the principle of the Outer Space Treaty of 1967, according to which the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries irrespective of their degree of economic or scientific developments." (1)

This is an interesting commentary on the degree to which international "activities" have evolved since 1865 when the ITU was founded in order to establish international regulations for telegraphy! It is a credit to its members that the ITU has been able to evolve and adapt as it has since that time.

Having outlined what the ITU was not intended to do, what is it? In broad terms, it is an international, intergovernmental organization and by agreement in 1947, the United Nations' specialized agency for telecommunications.

The operative ITU Convention is the 1982 Nairobi International Telecommunication Convention, which provides that the ITU's main purpose is:

> (a) to maintain and extend international cooperation between all Members of the Union for the improvement and rational use of telecommunications of all kinds as well as to promote and to offer technical assistance to developing countries in the field of telecommunications;
>
> (b) to promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunications services, increasing their usefulness and making them, so far as possible, generally available to the public;
>
> (c) to harmonize the actions of nations in the attainment of those ends.

In a nutshell, the ITU accomplishes the goals through the orderly allocation and registration of new frequencies, with a view to avoiding harmful interference.

The main legal instruments are the Convention as revised from time to time and the Administrative Regulations regarded as annexed to the Convention. They contain the general basic principles as well as the very detailed regulatory provisions governing the field of international telecommunications. In case of inconsistency between a provision of the Convention and a provision of the Administrative Regulations, the Convention shall prevail.

a) The Convention

The Convention is completed by three annexes, a list of member states, a list of definitions of certain terms used in the Convention and regulations and a copy of the 1947 agreement between the ITU and the United Nations by which the ITU became a Specialized Agency. Since plenipotentiary conferences must, of necessity, perform a number of tasks in addition to the revision of the Convention, the results of their deliberations are appended to the current Convention. These take the form of additional protocols, resolutions, recommendations and opinions. As a general rule, the additional protocols contain elaborations and amplifications concerning provisions of the Convention, the resolutions are usually made up of directives to the other bodies of the Union and recommendations include such things as a directive to the Secretariat to publish an annotated edition of the Convention.

b) The Regulations

The general objectives of the Regulations are to eliminate harmful signal interference, allocate frequencies to services that will maximize their effectiveness and gain international recognition and protection for their frequency allocations. Member governments are bound to abide by the Regulations and to take the necessary steps to ensure observance

by private operating agencies within their territory.

The Radio Regulations include some forty-four appendices which supplement various provisions in the main document. The Radio Regulations are contained in Final Acts, the official final documents of the World or Regional Administrative Radio Conferences that revise and adopt them. These Final Acts also contain numerous resolutions and recommendations dealing with radio-communications, the convening of specialized administrative radio conferences, and directives to other bodies of the ITU such as the CCIR and the IFRB.

In contrast to the Radio Regulations, the Telegraph Regulations and the Telephone Regulations are a model of simplicity and brevity. The reason is the decision in 1973 to turn most standards making over to the CCITT to allow them to be more easily updated and thus more responsive to the rapidly evolving technology. It is intended that the 1988 World Administrative Telegraph and Telephone Conference (WATTC-88) will concern itself with the revision of these regulations. As a result it will "have the responsibility for revising the regulatory provisions for all the international services which provide the transborder flows by telecommunications".(2)

WATTC-88 will be a critical conference. The acceleration

of technological change has made it apparent that the existing rules simply do not cover the emerging public service offerings such as text communication services (Teletex, Telefax, etc.). Moreover, these services are being offered through previously unknown transmission media (fibre optics), new transmission techniques (digitization) and increasingly sophisticated terminals (as that word is used in its broadest sense).

The issue that will have to be confronted is this: is competition or regulation to prevail? The insight that participants bring to WATTC-88 will depend naturally enough on the national perspective of their government. Pro-competitive proponents will argue that the new services are activities with costs, and ought to be left to the market place or bilateral/ agreements. Pre-regulatory advocates will argue that they are public telecommunications services requiring over-all technical standardization.

On the basis of Resolution No. 10 of the Convention adopted at Nairobi by the Plenipotentiary Conference in 1982, it would appear that the forces advocating global regulation within the ITU have the upper hand. That Resolution reads in part as follows:

> "Considering further that the International Telecommunication Union, as the sole specialized agency responsible for telecommunications, should take the necessary action to deal with these problems". (Emphasis added).

The proposed draft regulations being considered by the Prepatory Committee in 1985 have joined the telegraph and telephone regulations into one comprehensive set of regulations dealing with "international public telecommunication services". (It should be noted that the CCITT Secretariat has emphasized that this phrase is not intented to have legal significance).

At the 1986 meeting it became evident that there was disagreement over the issue of whether or not the phrase "offered to the public" should be used to qualify "international telecommunication services" in draft Article 1. There was sufficient divergence of opinion over this and other issues, such as whether recognized private operating agencies (RPOA) should be bound expressly to compliance with the new regulations (see Article 44 of the 1982 Convention in this regard), that it was decided to hold an additional meeting in late 1986 to review the efforts of the various study groups to achieve consensus on the draft regulations. The regulations will then be submitted to the Administrative Council in June 1987 so that it can prepare the agenda for WATTC-88.

c) Permanent Organs

The Union has the following organs:

- the Plenipotentiary Conference

- the Administrative Conferences (World and Regional)
- the Administrative Council

In addition, the permanent organs of the ITU are:

- the General Secretariat
- the International Frequency Registration Board (IFRB)
- International Radio Consultative Committee (CCIR)
- International Telegraph and Telephone Consultative Committee (CCITT)
- the Coordination Committee

i) The Plenipotentiary Conference

The Plenipotentiary Conference is the supreme organ of the Union and is responsible for its basic policy and revising the Convention to keep it up to date with international developments affecting the Union. It revises the Convention, elects the members of the Administrative Council, the Secretary General, the Deputy Secretary General, the members of the IFRB and the Directors of the International Consultative Committees. It is composed of delegations representing the members of the Union and normally meets once every five years.

ii) The Administrative Conferences

The Administrative Conferences are normally convened "to consider specific telecommunications matters". Regional Conferences are limited to "specific telecommunication questions of a regional nature" as set out in Article 7.3(2). The World Administrative Conference has a broader mandate that includes any question "of a worldwide character within the competence of the Conference".

iii) The Administrative Council

The Administrative Council has approximately 45 members who are elected by the Plenipotentiary Conference, with due regard to the need for equitable representation of all parts of the world. This is accomplished by predetermining the number of Council members to be elected from each of the five regions. Those countries in each region receiving the highest number of votes are thereby selected for representation in the Council. The countries themselves select the individual to represent them. It should be noted that all countries vote for all regional elections and are not restricted to voting only in their own region.

The Administrative Council meets annually and is responsible for taking steps to facilitate the implementation of

the provisions of the Convention, the administrative regulations, the decisions of the Plenipotentiary Conference and, where appropriate, the decisions of the other conferences and meetings of the Union. Finally, it ensures the efficient coordination of the work of the Union, particularly from the administrative and financial points of view.

iv) The General Secretariat

The General Secretariat is directed by the Secretary General (SG) assisted by the Deputy Secretary General (DSG). The SG has only limited administrative powers over the other three organs (IFRB, CCIR, CCITT) and virtually no power over their substantive activities. The DSG is also elected by the Plenipotentiary Conference.

The SG is required to take all the actions required to ensure economic use of the Union's resources and shall be responsible to the Administrative Council for all administrative and financial aspects. He is also the legal representative of the Union.

v) The International Frequency Registration Board (IFRB)

The IFRB consists of five independent radio experts,

elected by the Plenipotentiary Conference so as to ensure equitable distribution amongst the regions of the world and working on a full-time basis at the Union's headquarters in Geneva. They are elected as "custodians of an international public trust". Here again, one member is elected from each of the five regions, but unlike the election procedure for the Administrative Council, the election to the IFRB involves nomination and election of individuals rather than countries.

The duties of the IFRB are set out in Article 10, paragraph 4 of the Convention, but essentially they involve recording frequency assignments and positions assigned for geostationary satellites and to furnish advice as to the corridors of interference and appropriate use of the geostationary satellite orbit.

At the practical level, the Board also collects and analyzes the data received from monitoring stations spread throughout the world, with particulars of observations on the transmissions made by radio stations and which, in summarized form, are distributed to all administrations. The Board also compiles and publishes four seasonal schedules per year on high frequency broadcasting operations and assists administrations in finding suitable frequencies for their high frequency broadcasting

services. The other important function of the Board is to carry out the technical preparation for radio conferences, assembling the necessary technical and operational data which may be required by the conferences for frequency planning or other purposes related to the use of the radio frequency.

In practice, the Board has organized itself as a collegial body. As such, all decisions are those of the Board as a whole and, in theory, must be defended by all of the members. Since it would be a practical impossibility for all of the members of such a body to have a complete knowledge of all of the aspects of the work involved, there is an allocation of responsibilities to the individual members based on preference, special knowledge, and the overall work load. The only area of continuity is the administration of the specialized secretariat which, by tradition, always falls on the shoulders of the chairman.

The procedure adopted is for the member in charge of a particular problem to study the problem with the assistance of a working group of the specialized secretariat and prepare a report on the matter for the Board. One or more informal meetings of the Board are held in which reports are presented and where suggestions are made and criticism can be raised. If necessary, a question can be sent back to the member for further study. When agreement has been reached or where no criticism is raised, the

reports are presented to the Board. The collegial atmosphere of the IFRB is reinforced by the Radio Regulations, which require that all formal decisions be made by unanimous agreement. However, if the Board fails in that endeavour, the Regulations provide that it shall thereafter decide the problem on the basis of a two-thirds majority vote of the members present and voting for or against.

The difficulties faced by the Board arise primarily from the fact that its "advice" under Article 10, paragraph 3(a) is not binding on members. The Board does not offer legal solutions and only provides technical answers. Accordingly, it is not empowered to compel a member to modify or withdraw an obstructing frequency on its notification.

vi) The International Consultative Committees (CCIs)

There are two separate bodies dealing respectively with technical radio problems and technical telegraph and telephone problems. They are:

i) the International Radio Consultative Committee (CCIR)

ii) the International Telegraph and Telephone Consultative Committee (CCITT).

Their respective duties involve studying technical and operating questions relating to radio communication and telegraphy and telephony respectively (and tariff questions in the case of CCITT) and issuing recommendations on them. Although these recommendations are not mandatory for administrations, as a practical matter experience has shown that they are widely observed in international telecommunications.

Interestingly, membership includes as of right all ITU members and also any "recognized private operating agency" which, with the approval of the Members which have recognized it, expresses a desire to participate in the work of the Committees.

The Committees work through Plenary Assemblies which normally meet every three years and which typically set up study groups to examine specific issues within that Committee's jurisdiction.

There are 11 study groups set up by the CCIR and 17 by the CCITT. In addition there are three joint study groups.

vii) The Coordination Committee

The Coordination Committee assists and advises the Secretariat General on all administrative, financial and technical cooperation matters affecting more than one permanent organ. The

Committee also considers any important matters referred to it by the Administrative Council.

The Coordination Committee is made up of the Deputy Secretary-General, the Director of the CCITT, the Director of the CCIR and the Chairman and Vice Chairman of the IFRB with the Secretary-General as its chairman.

2.1.2 Its Functioning And How The Different Governments Protect Their Respective National Interest.

It is clear from the outset that member states had no intention of relinquishing their sovereignty in telecommunications matters to the ITU. The first words of the preamble to the Convention begins:

> "While fully recognizing the sovereign right of each country to regulate its telecommunications ...".

There are actually two aspects to this issue of national versus international interests: the first involves the structure of the Union and the composition of its senior officials; the second involves action a state can take in opposition to the expressed will of the Union. The first aspect essentially involves a series of checks and balances to prevent undue influence being brought to bear by any one country or alliance of countries while the second is more of a reactive nature, taken in response to a specific decision of the Union or one of its organs. This latter action is expressed in the form of reservations.

a) Checks and Balances

Under the first heading each Member has one vote at all conferences of the Union, all meetings of the International Consultative Committees, all sessions of the Administrative Council (if it is a member of the Council) and in all

consultations carried out by correspondence. The only exceptions are in cases in which a member is more than two years in arrears in its payments to the Union or in cases in which a member has not ratified the Convention after two years have passed since its entry into force. This structure avoids the possibility of "buying" the Union, a situation which could potentially arise if voting power were related to financial support.

The structure of the Administrative Council is required to have "due regard to the need for equitable distribution of the seats on the Council among all regions of the world".

The members of the IFRB must be elected "in such a way as to ensure equitable distribution amongst the regions of the world" and as noted above, are required by the Convention, not to act "as representing their respective countries, or of a region, but as custodians of an international public trust".

Article 13 specifically prohibits elected officials and the staff of the Union from seeking or accepting instructions from any government or other non-Union authority and requires members to respect the "exclusively international character" of the duties of Union personnel.

The Article also requires that the SG, DSG, Directors of the International Consultative Committees and members of the IFRB

all be nationals of different countries that are members of the Union. In fact, the SG and DSG represent different regions.

Actual transmission of telecommunications traffic can also be subject to substantial control by individual members. Article 19 of the Convention permits the stoppage of any private telegram or telecommunications "which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency". In addition, Article 20 permits a member to suspend international telecommunication service of virtually any type for any period of time, provided the member notifies other members through the Secretary General. We are aware of only one instance in which traffic was stopped pursuant to Article 19 and that instance related to a political rather than technical matter. In that case Mexico stopped traffic involving Spain when that latter country executed a number of Basques.

While secrecy of international correspondence is to be the norm, members reserve the right to communicate such correspondence to appropriate authorities "in order to ensure the application of of their internal laws or the execution of international conventions to which they are parties".

Certainly the most sweeping reservation is contained in Article 31 which permits members to make special arrangements in

telecommunication matters "which do not concern members in Convention or Administrative Regulations regarding harmful interference which the operation of the special arrangement "might be likely to cause to the radio services of other countries". An example of this would be two countries agreeing that one country's network would extend into the other's to provide service to a border town. As well, members may, under Article 32, settle regional matters amongst themselves provided they do not conflict with the Convention.

Regarding the use of the radio frequency spectrum, members are simply required to "endeavour to limit the number of frequencies and the spectrum space used to the minimum essential to provide in a satisfactory manner the necessary services". Members are also directed to "bear in mind" that the limited material resources of radio frequencies and the geostationary satellite orbit are to be used such that all countries or groups of countries have "equitable" access to both. The only guidance as to what constitutes equitable access is the requirement that nmembers "take into account the special needs of the developing countries and the geographical situation of particular countries".

Determining what constitutes "equitable access" is perhaps the single most controversial issue facing the ITU today and because of the finite nature of the resources involved, the

division is, not unexpectedly, between developing and developed countries.

Developed nations have traditionally taken the position that the phrase means that space ought to be available when it is required. Developing nations interpret it as meaning that access ought to be available only when a state submits an a priori plan for development of several years (probably at least 10), similar to the process followed in the case of broadcast planning. The issues of the need for such planning and the minimum time period to be covered remain unresolved.

Not surprisingly, national defence is governed by separate rules. In fact under Article 38 members "retain their entire freedom with regard to military radio installations of their army, naval and air forces", although there are some attempts at circumscribing this apparently unfettered privilege.

With the exception of national defence, Article 44 provides that members are bound to abide by the Convention and Administrative Regulations in respect of all telecommunication offices and stations established or operated by them which engage in international services or which are capable of causing harmful interference to radio services of other countries. Notwithstanding this, Article 47 permits any member to denounce the Convention at any time, effective upon one year's notice.

It is interesting to note that disputes arising as to the interpretation or application of the Convention or Administrative Regulations may be settled through diplomatic channels, pursuant to bilateral or multilateral treaties or any other method mutually agreed upon and only if none of those methods is adopted, is it to be dealt with pursuant to the binding arbitration procedure described in the General Regulation or Optional Additional Protocol. This Article has rarely been invoked because compromises are usually reached.

One area of potential conflict relates to the establishment of a training and development resource centre for telecommunications services which was recommended by the Maitland Commission. Developed countries want it to be established outside of the ITU itself whereas developing countries would prefer that it fall within the ITU purview. The latter countries apparently believe that such a structure would suit their political goals while the former countries appear to be motivated by the belief that a separate structure would be more conducive to meeting their goals of exporting their technology and know-how.

b) Reservations

The General Regulations permit any member delegation to make a final or provisional reservation regarding any decision

that is "of such a nature as to prevent the government from ratifying the Convention or from approving the revision of the Regulations".

The Final Protocol to the Nairobi Convention includes over 100 reservations which are generally grouped into political, formula and technical categories.

Political reservations have concerned Israel and sovereignty over the Falkland Islands and reservations and counter-reservations concerning frequencies for various Antarctic territorial claims and for the U.S. naval base at Guantanamo Bay. Formula reservations state that the administration making the reservation will take all action it deems necessary to safeguard its interest should any Member of the ITU fail in any way to comply with the Convention. Finally, the technical reservations deal with the table of Frequency Allocations. Bluntly put, a reservation means that a member reserves the right not to be bound by a decision in certain circumstances.

However, it is fair to conclude that all participants have a similar ultimate interest in the success of the ITU. As has been stated:

> "The real legal scope of international telecommunication rules depends in the end

> on a dynamic factor, namely, the operational efficiency of telecommunication services. This is the reason why all the parties concerned, including Member States of the Union, non-contracting countries and international organizations, have a vested interest in complying with the Union's standards and directives, without which there is a danger of lapsing into total chaos"(3).

It is perhaps for this reason, as much as any, that the absence of any truly effective sanctions for infringements of established standards and rules is not seen as a serious weakness i the Convention.

FOOTNOTES

1. Matte in Rathi, K.L., The Role of ITU in Establishing Legal Control in Outer Space, Institute of Air Space Law, McGill University, Montreal, 1982, p.51.

2. Butler in Rada, Pipe Communication, Regulation and International Business, International Management Institute, The Netherlands, 1984, p.77.

3. Casspoglou, V.G., World Telecommunications Forum-Law, Regulation, Standards of Global Communications (1985), pp. 75-76.

2.2 INTELSAT, INMARSAT AND CTO

2.2.1 INTELSAT: Brief Factual Description

Since the inception of international telecommunications in the mid 19th century, there has been a pattern of international cooperation in this field. When the International Telecommunications Satellite Organization "INTELSAT" was created on August 20, 1964, communication satellite technology was still unproven and few nations had the resources to research and develop it sufficiently. Still, there was enthusiasm for the concept, and the overwhelming interest expressed by the global community is well reflected in the organization's membership which in approximately 20 years had grown from 11 original members to a total of 109 countries serving over 160 countries by 1985.

The driving force behind the creation of INTELSAT was the United States. It was the Communications Satellite Act of 1962 that provided the major impetus to form an international partnership to proceed with the establishment of a global communication satellite network. Amongst the arguments invoked were the benefits which a satellite system would make possible within relatively few years such as increased capacity to exchange information on a cheap and reliable basis with all parts of the world, be it by telephone, telegraph, radio or television. It was

predicted that the ultimate result would be to encourage and facilitate world trade and promote international peace and understanding. In order to implement this objective, the United States government began preliminary discussions with representatives from Europe and Canada in 1962 and 1963. The American initiative was generally well received as the preliminary contacts indicated that the highly developed countries were eager to actively participate in the establishment, management and operation of such an international telecommunications system. On August 20, 1964, two inter-related agreements creating INTELSAT were opened for signature in Washington, D.C.: the Agreement Establishing Interim Arrangements for a Commercial Global Communications Satellite System (the "Interim Agreement") and the Special Agreement.

A brief summary of the original concept of INTELSAT is fascinating in that it explains in large measure the pressures that today threaten to undermine its future viability.

At first, INTELSAT was created as a sort of experimental although operational joint venture. The interim agreement of 1964 called for a continuation of the traditional principles of international telecommunication cooperation. However in recognition of the United States' dominant position in space technology, Comsat was designated as the manager of the consortium

for the duration of the interim and put in charge of design, development, construction, establishment, operation and maintenance of the space segment.

In this capacity Comsat was subject to supervision by the Interim Communications Satellite Committee ("ICSC"). During this interim period, the views of the United States, which intended to retain control of INTELSAT, were strongly opposed by the Europeans who wished to internationalize the administration of the organization. The Europeans, who hoped to develop their own space research and technology, feared that American control of INTELSAT would consolidate and perpetuate American technological hegemony. However the United States position was that it wanted to establish an international satellite system, a goal which it felt would be hindered if INTELSAT procurement policies were geared to the careful nurturing of foreign industries.

The final text on definitive arrangements entered into force on February 12, 1973, ending and superseding the interim arrangements. The final agreement granted INTELSAT full juridical personality in an effort to reduce the prior reliance on the U.S. and in particular, upon Comsat.

The purpose of INTELSAT is set forth in Article II of

the Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT". It is "to continue and carry forward on a definitive basis the design, development, construction, establishment, operation and maintenance of the space segment of the global commercial telecommunications satellite system as established under the provisions of the Interim Agreement and the Special Agreement". This meant that communication by means of satellites should be made available as soon as practicable to the nations of the world on a global and non-discriminatory basis. It also included a reference to the relevant provisions of the "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies", and in particular Article 1, which states that outer space shall be used for the benefit and in the interest of all countries.

INTELSAT has been criticized for things that it has not been or done. However, the organization has made:

> "an unprecedented accomplishment in the field of international organizations and should not be minimized by protestations to the effect that any number of desirable social goals were not accomplished as well. If the economics discipline has a message to offer, it is that INTELSAT has functioned well precisely because it has functioned on an economic basis, and that it would have functioned less well if it had simultaneously been required to fulfil non-commercial purposes without subsidy. Other goals, many of which are of surpassing

> importance (for example, literacy and medical training by satellite television), can best be met either by entirely separate systems perhaps even more desirably, by a system under INTELSAT aegis, financed separately from public international traffic but benefitting from INTELSAT's past experience" (1).

In examining INTELSAT one can adopt a cynical or altruistic viewpoint regarding the real purpose of the Organization. From a cynic's perspective, the Organization could be described as an "electronic Marshall Plan" under which its prime mover - the U.S. - is able to export its telecommunications expertise and technology to non-aligned states who would otherwise either not have access to a similar quality of telecom service at similar cost or might be tempted to look to the Communist bloc for assistance. Certainly non-discriminatory rates favour these countries at the expense of the highly industrialized business centres of Europe and North America.

Moreover INTELSAT procurements represent significant job creating potential through the awards of satellite and earth station construction contracts. This is discussed below. It is significant that of the satellite contracts awarded by INTELSAT, the following have been the main contractors: INTELSAT I, II, IV,

IV-A and VI - Hughes; INTELSAT III - TRW; INTELSAT V AND V-A/B - Ford Aerospace. In total, the U.S. supplies about 70% of INTELSAT's purchases and developed countries in aggregate supply 97-98% of all the total.

On the other hand there are some inescapable realities of international telecommunications sophistication. There are approximately 565 million telephones throughout the world, of which 90% are located in 15% of the nations. Developing countries have 7% of the total and 50 African states have less than 0.5!

Given this disproportionate distribution, it is reasonable to assume that without some form of international co-operation the vast majority of the world's less wealthy nations would have no share of any telecommunications satellite systems and would be required to pay the rates charged by and accept the technical limitations of their wealthier neighbours that did possess such systems.

It is also reasonable to assume that there are some economies of scale associated with procurements on a unified basis through INTELSAT that would not exist if several individual states attempted to obtain similar telecommunications capabilities on their own. In this respect internationalism makes the service available to less developed states and makes it available at lower

cost to a greater number of people in the more highly developed states. The challenge of course, is to continue to make this capability available at attractive prices in the face of threatened international bypass of the entire system by the relatively few highly sophisticated, heavy users of telecommunications service for whom the INTELSAT system is more expensive than are the emerging competing cost-based satellite operators.

Having said this, it is interesting to note that in connection with the INTELSAT III procurement, there was initially some indication that the contract might be placed in a manner that provided expanded content participation but at a premium. In that case it was the developing countries that balked and refused to agree to the extra cost that such a contract would imply.

It ought also to be noted that the participation in ownership offered nations through INTELSAT may be an attractive medium term solution to the problem facing the ITU of allocating the finite geostationary orbit and radio spectrum. It is indeed ironic that while the U.S. is now the prime force behind competing international satellite systems - systems which further erode the remaining available orbital slots and radio spectrum - it was also a prime advocate at the October, 1982 Assembly of Parties of the principle of domestic service using INTELSAT facilities (a trend

which could reduce the pressure for allocation of additional (slots) and spectrum).

INTELSAT is moving in the direction of domestic service. In little more than a decade it has increased its domestic service offering from one to over two dozen countries and revenues from this segment have risen to 12% of the total. The Organization has now committed itself to incorporate planned domestic capacity, rather than continuing to rely solely on preemptible spare capacity in future satellites. Higher powered satellites which can be accessed by small earth stations will also assist in this trend. In addition, its decision to sell transponders may - at least in domestic situations - appear to the nationalistic sentiments of member states that could not afford or utilize an entire satellite.

To become a member of INTELSAT, a nation must be a member of the International Telecommunication Union better known as ITU. Paradoxically, members of INTELSAT may remain so even if they withdraw from the ITU. Should a State not be a member of ITU, it can still have access to the INTELSAT System facilities on a user basis. It should be emphasized that no reservations may be made to the INTELSAT Agreement in marked contrast to the ITU Convention. Although there is an inability to "let off steam" in the form of reservations members can state why they disagree with

a decision (although they are bound by it) and these statements are appended to the minutes of the relevant meeting.

The scope of INTELSAT's activities are described in Article III of the Agreement. It is essentially the operation on a commercial and non discriminatory basis, of the space segment required to provide international telecommunications services. Provision is also made for some domestic telecommunications services in certain circumstances.

It ought to be noted that while INTELSAT is a "commercial" enterprise, it is not a profit-making organization as such, any surplus or deficiency of revenues over costs is allocated to or received from the Signatories according to their contributions. Any profit making is done when the Signatory sells the service within its own jurisdiction.

The Parties and Signatories discussed below must execut their obligations and exercise their rights in such a manner as to respect the principles of the Agreements. Should a Party wish to establish an international satellite system independent of INTELSAT, it must first consult with the Assembly of Parties and ensure that (a) the proposed system is technically compatible with INTELSAT's space segment, (b) it does not cause significant economic harm to INTELSAT's global system, and (c) it must not

impede direct telecommunications provided by INTELSAT to members and users. Canada and the United States have done this twice in connection with their satellite telecommunications services offered by Telesat Canada and the U.S. domsats and which are permitted to cross the other country's borders in accordance with the terms of an exchange of letters in 1972 and an addendum executed in 1982. In addition, of course, Canada consulted with INTELSAT in 1968-69 when it was first establishing its own domestic satellite system.

Unfortunately, the phrase "significant economic harm" is undefined. The Board of Directors accordingly adopted the following tests:

> In assessing the economic impact on INTELSAT of separate satellite facilities for international public telecommunications, principal indicators should be the impact on projected INTELSAT space segment costs and utilization charges, INTELSAT planning and operations, and the resulting impact on Signatories' investment.
>
> Specifically, this impact would be measured by comparing the level of projected INTELSAT costs and utilization charges had the service requirements been met by existing or planned INTELSAT facilities, with the projected INTELSAT costs and utilization charges absent the service requirements being met by the INTELSAT system.
>
> In assessing the economic impact, INTELSAT should consider the extent to which Signatories not participating in the separate satellite system will have their investment shares

> increased as a consequence of international public telecommunications traffic or services, which might otherwise have been provided by INTELSAT, being provided by a separate satellite system. This would include assessment of the immediate and long-term additional capital payments, based on existing and planned INTELSAT facilities, required by Signatories.
>
> Other factors for assessing economic harm may be relevant on a case-by-case basis. (2)

It is the increasing emergence of "competing" as opposed to "complementary" systems that will subject INTELSAT to its most rigorous challenge and may ultimately threaten its financial viability. One writer has responded to the claim that there is no distinction between the systems as follows:

> "What [that] argument ignores, however, is the critical difference between a planned use of alternative facilities to meet a defined and controlled need and a policy shift to authorizing a competitive facility whose utilization will be determined largely by market forces.
>
> "When INTELSAT members who maintain full and unified power to control the allocation of their international traffic coordinate an alternative facility under Article XIV of the INTELSAT agreement, governments in the Assembly of Parties have a firm foundation for assessing the amount of traffic diverted from the INTELSAT system and its impact. By contrast, when the proposals being coordinated are limited only by amorphous and changeable conditions imposed by a regulatory agency on competitors with every incentive to test and evade them, INTELSAT members must either speculate on actual diversion or assume diversion to the full extent of proposed capacity. Thus, previous Article XIV coordinations are not necessarily parallels for the new proposals. (3)

In the past, the great majority of Article XIV(d) applications related to regional or transborder systems; the emerging applications are increasingly of an inter-regional nature and seeking to carry the "bread and butter" of INTELSAT's international telecommunications traffic. While no one such application might pose a significant threat to the INTELSAT system, the cumulative effect of a number of such systems might well be detrimental. To attempt to deal with this INTELSAT has developed a procedure to measure the cumulative effect of such systems. The practical result of this may be the introduction of conditional recommendations from the Assembly of Parties or positive recommendations for relatively short time periods i.e. 3 or 4 years.

In reality although there has been a considerable amount of discussion about competing systems, there has been little hard evidence of the perceived threat to date mainly because the potential competitors have not developed or implemented viable business plans.

PanAmSat is a good example as it is the first inter-regional systems to come before INTELSAT. It has no customers other than Peru which in actual fact has committed very little. None of the 13 channels intended for Latin America has been sold. It has no commitment on launch services although it intends to

launch in August 1987 on the first Arianespace IV rocket. This has obvious potential problems in terms of insurance coverage because of the lack of any track record.

Assuming that PanAmSat wishes to proceed with Article XIV(d) co-ordination notwithstanding its apparent financial difficulties, the following timetable will be followed. The Technical Committee of the Board meets in November 1986 to review all technical matters. If the application clears that Committee the Board examines technical and economic matters in December. It then provides its advice to the Assembly of Parties which meets in April 1987. The Assembly either accepts or rejects the Board's advice.

Even if the Assembly issues a negative recommendation, United States legislation provides for a 60 day period within which Congress can review the matter. Following its review and any expression by the Congress, the Administration makes the final decision on whether to accept the advice of the Assembly or to proceed in any event. It should be stressed that regardless of the political wisdom of proceeding against a negative recommendation the absence of any sanctions in the INTELSAT agreement makes it legally possible.

Even if competing systems do not materialize immediately in a significant way, the threat of their emergence is having a

noticeable affect on INTELSAT's operations. There has already been a redirection in the Organization's source of funds, largely in the form of increasing revenues from domestic services. There is increasing emphasis on small earth stations that can be located literally anywhere and much greater emphasis on the end to end service capabilities of satellite facilities. There is also an emphasis on planning the integration of domestic systems into the international system, something that INTELSAT, by its very nature, is uniquely positioned to do.

2.2.1.1 Description Of Its Main Legal Instruments And Permanent Organs

INTELSAT was established by means of two interrelated agreements. The Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT" and the Operating Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT".

The Agreement on INTELSAT is signed by the States themselves in their capacity as sovereign entities, and are known as "Parties". As for the Operating Agreement, it may be signed either by the Party itself or by a telecommunications entity, either public or private, designated by the Party and called a "Signatory".

(a) The Agreement

The Agreement on INTELSAT, in addition to providing an explicit definition of the purposes of the organization, settles such matters as the scope of activities, juridical personality, and financial principles under which INTELSAT functions. It also contains a very explicit description of the structure of the permanent organs of the organization. It outlines the procurement policy of INTELSAT, the rights and obligations of members, and describes the various privileges, exemptions and immunities which have been bestowed upon the organization.

The document is completed by four annexes which describe respectively:

(i) the Functions of the Secretary-General;

(ii) the Functions of the Management Services Contractor and Guidelines of the Management Services Contract;

(iii) the Provisions on Procedures Relating to Settlement of Disputes referred to in Article XVIII of this Agreement and Article 20 of the Operating Agreement; and

(iv) Transition Provisions.

b) The Operating Agreement

The Operating Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT", in turn, gives a comprehensive description of the financial aspect of INTELSAT describing financial contributions, capital ceiling, investment shares, financial adjustments between Signatories, utilization charges and revenues, transfer funds, overdraft and loans, audit, procurement, inventions and technical information, liability, settlement of disputes, and withdrawal of a Signatory from INTELSAT, amongst other matters.

c) Permanent Organs

INTELSAT has four permanent organs: the Assembly of Parties; the Meeting of Signatories; the Board of Governors, and an executive organ headed by the Director General, responsible to the Board of Governors.

i) Assembly of Parties

The Assembly of Parties is composed of representatives of governments of INTELSAT member countries. It is the principal organ of the INTELSAT organization. Its function is mainly to establish general policy and long term objectives of INTELSAT and

is concerned with those aspects of INTELSAT which are primarily of interest to the parties as Sovereign States.

The functions and powers of the Assembly of Parties are set forth extensively in Article VII(c). It is noteworthy that in its power of formulating general policy and long term objectives of the organization, it may formulate its views or make recommendations to the other organs of INTELSAT. It is also incumbent upon the Assembly to determine the measures which are to be taken in order to ensure that INTELSAT's activities are prevented from conflicting with any multilateral convention adhered to by at least two-thirds of the parties. It is up to the Assembly to consider and make decisions regarding proposals for amending the Agreement, formulated in accordance with Article XVII of this Agreement, as well as to propose, express its views and make recommendations on amendments to the Operating Agreement.

Utilization of the INTELSAT space segment is subject to the authorization of the Assembly. Furthermore, pursuant to Article XIV of the Agreement, the Assembly expresses recommendations with respect to intended establishment, acquisition or utilization of space segment facilities separate from the INTELSAT space segment facilities.

The Assembly considers and expresses its views in

relation to reports presented by other organs of the organization, namely the Meeting of Signatories and the Board of Governors, concerning the implementation of general policies, activities and long term program of INTELSAT. In addition, in order to ensure the application of the fundamental principle of non-discrimination within INTELSAT, the Assembly has the power to review the general rules established with respect to allotment of INTELSAT space segment capacity, approval of earth stations for access to the INTELSAT space segment, and the establishment and adjustments of rates charged for utilization of the space segment, such rules being established pursuant to Article VIII(b)(v) of the Agreement.

The Assembly also makes decisions connected with the withdrawal of a party from INTELSAT, decides upon questions concerning formal relationships between INTELSAT and States or International Organizations, considers any complaints submitted by Parties, and selects legal experts pursuant to Article III of Annex C with respect to settlement of disputes. The section also provides a general power for the assembly to exercise any other powers coming within the purview of the Assembly of Parties according to the provisions of the Agreement.

In the discharging of all these functions and powers, the Assembly of Parties shall give due and proper consideration to recommendations, resolutions and views addressed to it by the Meeting of Signatories or the Board of Governors. Thus, it must

be noted that although the Assembly of Parties constitutes the "principal organ" of INTELSAT, it is by no means the "supreme organ", as is generally the case in traditional international organizations of an inter-government nature.

Ordinary meetings of the Assembly are held every two years; however, the Assembly of Parties may meet in extraordinary meetings, convened upon request of the Board of Governors or upon the request of one or more parties receiving the support of at least one-third of the Assembly.

Recently the United States and Peru indicated that they intend to request an extraordinary meeting of the Assembly to act on the issue of the amount of information to be submitted to INTELSAT in connection with the requested coordination of Pan American Satellite Corp's proposed separate satellite system. The applicants have taken the position that technical and economic data relating only to the five transponders linking their countries are required while INTELSAT staff have insisted on data covering all 24 transponders. The Board of Governors overwhelmingly rejected the request. It should be noted that while Article XIV(f) of the INTELSAT Agreement provides that INTELSAT must make its recommendations on XIV(d) applications within 6 months from the commencement of consultation procedures, in practice this procedure does not start until INTELSAT has been furnished with all relevant information.

A quorum for any meeting of the Assembly consists of the majority of representatives of the Parties, each Party having one vote, (a structure which can give states with little financial investment a disproportionate influence). Decisions on matters of substance require a majority of at least two-thirds of the representatives of the parties present and voting. However, procedural matters are decided by a simple majority of the parties present and voting. It is up to the Assembly to qualify the nature of the problem before it.

(ii) Meeting of Signatories

The Meeting of Signatories is composed of representatives of the investors of INTELSAT, or the Signatories to the Operating Agreement. The functions and powers of the Meeting of Signatories are set out in Article VIII(b) of the Agreement. All these functions and powers are related to the financial, technical and operational areas of the INTELSAT system. Therefore, the Meeting of Signatories is the forum in which the investors of the system will be able to be heard with respect to the policies of the organization from a technical and financial point of view. This is in contrast to the meetings of the Assembly of Parties which is much more political and policy oriented.

The Meeting of the Signatories has a number of

functions and powers. It expresses views on the annual report and financial statements submitted to it by the Board of Governors; on proposed amendments to the Agreement, pursuant to Article XVII; on future programs, including their estimated financial implications, as submitted by the Board of Governors; on the report on permanent management arrangements submitted by the Board of Governors to the Assembly of Parties, as well as on complaints submitted to it by Signatories or users of the INTELSAT space segment. The Meeting of Signatories also prepares and presents to the Assembly of Parties and to the Parties, reports concerning the implementation of general policies, activities, and long term program of INTELSAT. The organ decides on any recommendation made by the Board of Governors concerning an increase in the ceiling of capital provided for in Article V of the Operating Agreement. It also makes decisions pursuant to Article XVI of the Agreement relating to the withdrawal of a Signatory from INTELSAT. Moreover, it is incumbent upon the Meeting of Signatories to establish general rules regarding the approval of earth stations for access to INTELSAT space segment, the allotment of INTELSAT space segment capacity and, finally, the establishment and adjustment of the rates of charge for utilization of the INTELSAT space segment on a non-discriminatory basis.

Finally, Article VIII(b)(xii) stipulates that the Meeting of Signatories is to exercise any other powers coming within its purview, according to the provisions of the Agreement

or the Operating Agreement. It is also specified that the Meeting of Signatories must give due and proper consideration to the resolutions, recommendations or views addressed to it by the Assembly of Parties or the Board of Governors.

An ordinary meeting is held in every calendar year; however, in addition to these ordinary meetings, extraordinary meetings may be held, either upon the request of the Board of Governors, or one or more of the Signatories, provided this latter request received the support of at least one-third of the Signatories. A quorum for a Meeting of Signatories, be it extraordinary or ordinary, consists of representatives of a majority of the Signatories and as with the Assembly of Parties, each Signatory being entitled to one vote. The Meeting of Signatories adopts its own rules of procedure, including the election of a chairman.

(iii) The Board of Governors

The Board of Governors is the central organ of INTELSAT, replacing the ICSC, the governing body of INTELSAT under the interim arrangements discussed above. Representation on the Board of Governors is determined by a rather complex scheme. There are three categories of Governors selected according to a formula which attempts to reconcile utilization with wide geographic representation.

Each Governor on the Board is assigned a voting participation equal to that of the investment share of the Signatory or group of Signatories which he represents. This investment share, as previously noted, is derived from the utilization of the INTELSAT space segment. This is a logical mechanism, in the view that the voice on the Board of Governors is proportionate to the investment made by the Signatory and encourages utilization of the system.

Broadly stated, the Board of Governors is an organ primarily concerned with the management and operational aspects of INTELSAT. Its main interest lies in the design, development, construction, establishment, operation and maintenance of the INTELSAT space segment. It is the most important and active decision-making organ in INTELSAT. Article X of the Agreement sets out the Board's specific functions.

In executing its functions, the Board of Governors must give due and proper consideration to resolutions, recommendations and views addressed to it by the Assembly of Parties or the Meeting of Signatories. It is further specified that it reports to the Assembly of Parties or to the Meeting of Signatories, informing these bodies on actions or decisions taken with respect to such resolutions, recommendations and views, and its reasons for such actions or decisions.

The Board of Governors meets as often as is necessary, but a minimum of four times per year. The Agreement specifies that this organ must endeavour to take unanimous decisions. However, should it fail to do so, all substantive questions shall be decided either by:

(a) an affirmative vote cast by at least four Governors having at least two-thirds of the total voting participation of all Signatories represented on the Board of Governors; or

(b) an affirmative vote cast by the total number constituting the Board of Governors minus three, regardless of the voting participating they represent.

On all procedural questions, the mechanism is much simpler, as these questions will be decided by an affirmative vote representing a simple majority of Governors present and voting, each having one vote. It is noteworthy that no representative on the Board of Governors may hold more than 40% of the total voting participation. The difference between the 40% ceiling and the actual proportion of investment represented must be divided and spread in equal parts amongst all other Governors. In instigating such a complex procedure, it was hoped to establish an equilibrium between the varied interests of all Signatories representing developed and developing nations. It has been demonstrated that

it is very difficult for a Signatory to dominate the decison-making process on the Board or to provoke a stalemate on certain points.

The quorum for any meeting of the Board of Governors consists of either (a) a majority of the Board of Governors holding at least two-thirds of the total voting participating, or (b) the total number of the Board of Governors minus three, regardless of the amount of voting participation they represent.

(iv) The Director General

The executive organ of INTELSAT is headed by the Director General, who is the chief executive and legal representative of INTELSAT. He is directly responsible to the Board of Governors for the performance of all management functions. The Director General is appointed by the Board of Governors, subject to confirmation by the Assembly of Parties. The paramount consideration in his appointment and in the selection of all other personnel of this executive organ is the necessity of ensuring "the highest standards of integrity, competence and efficiency". It is the Director General, in his capacity as chief executive on behalf of INTELSAT, who contracts out the technical and operation functions, with due regard to costs, competence, effectiveness and efficiency. It is the Director General's office which is responsible for the negotiation/

execution and administration of such contracts. The Director General is given the power to delegate his own powers to other officers in the executive organ as may be necessary to meet appropriate requirements.

Since January 1, 1979, all the supervisory powers of the Director General concerning the administrative and operational functions of INTELSAT are performed by INTELSAT personnel which is recruited on as wide a geographical basis as possible. All these administrative and operational functions had been assumed by Comsat, under the interim agreement. The implementation of this organizational structure has greatly reduced Comsat's influence within the INTELSAT organization, even though the unique technical facilities of Comsat are contributing in a lasting manner to the excellence of the system.

It has often been said that the relationships between the various organs of INTELSAT, especially the Board of Governors, Assembly of Parties and Meeting of Signatories, were very carefully drafted and circumscribed in the Agreement in order to achieve a delicate balance between them. It is interesting to note that Article VI is explicit on this point when it stipulates that except to the extent that the Agreement or the Operating Agreement provides specifically otherwise, the organs are not to make determinations or otherwise act in a manner likely to interfere with the exercise of a power or the discharge of a

responsibility or a function attributed to another organ by the Agreement or the Operating Agreement. However, paragraph (c) of the same Article states that the Assembly of Parties, the Meeting of Signatories and the Board of Governors are expected to take note of and give due and proper consideration to any resolution, recommendation or view made or expressed by another of these organs acting in the exercise of the responsibilities and functions bestowed upon it by the Agreement or the Operating Agreement. Therefore, the various organs are expected to cooperate without interfering with each other in order to promote maximum efficiency within the organization.

2.2.1.2. Its Functioning And How The Different Governments Protect Their Respective National Interests

a) Financial Operation

INTELSAT is the owner of the INTELSAT space segment. Financially, it is run something like a partnership. Each Signatory makes contributions to the capital requirements of INTELSAT, which include all direct and indirect costs for the design, development, construction and establishment of INTELSAT space segment and for other INTELSAT property. In return, each Signatory receives capital repayment and compensation for use of capital in accordance with the provisions of the Operating Agreement. As well, each Signatory receives an investment share

corresponding to its percentage of all utilization of the INTELSAT space segment in proportion to that of all Signatories. Investment shares are adjusted annually in order to ensure that they reflect recent utilization.

On the operating side, all users of the system (members or otherwise) pay space segment rates for each type of utilization that are the same for all applicants for capacity for that type of utilization. An emerging issue is the degree to which INTELSAT can or will be able or willing to adopt a flexible approach to rating its services to meet competition, for example, by increasingly narrow classifications of types of services or operation parameters. The Charging Policy Working Group has been addressing this matter.

b) Procurement

Procurement has been discussed above. The question of procurement of goods and services for the INTELSAT space segment was a point of contention between the United States government and many of the industrialized European countries from the outset. Several West European countries hoped to benefit directly from spin-offs of satellite technology by reason of their participation in INTELSAT. However, the concept of the United States government was rather to conduct procurement policies in the best commercial interest of the organization. The compromise reached between these divergent views was that contracts would be awarded to the

bidder the most favourable in terms of quality, price and timely performance. Should proposals be deemed to be comparable under these terms, contracts would be awarded so as to stimulate world-wide competition in the interests of INTELSAT.

Procurement policies remain a point of contention amongst members. Since the Board of Governors, which is responsible for the space segment design, is weighted in favour of heavy users of the system, it is these users who have the greatest say in the selection of that design.

The approval of the Board of Governors is required before invitations to tender for contracts which are expected to exceed U.S. $500,000.00 in value are issued. It is also required in the event of the awarding of any contract to a value exceeding U.S. $500,000.00. However, there are some circumstances under which the Board of Governors may decide to procure goods and services otherwise than on a basis of open international invitations to tender: contracts below U.S. $500,000.00 where procurement is urgently required to meet an emergency situation; where the requirement is of a predominantly administrative nature; or when there is only one source of supply to a specification.

c) Liability for Operations

Neither INTELSAT nor any Signatory is liable in case of

loss or damage sustained by reason of any unavailability, delay or faultiness of telecommunication services provided pursuant to the Agreement or the Operating Agreement. Should INTELSAT or any Signatory, by reason of a binding decision rendered by the competent tribunal or as a result of a settlement approved by the Board of Governors, be required to pay any claim, as a result of an activity conducted pursuant to either the Agreement or the Operating Agreement, the Signatories shall be required to pay to INTELSAT the amount on such a claim unsatisfied through indemnification, insurance or other financial arrangements.

d) Settlement of Disputes

All legal disputes arising in connection with rights or obligations incumbent under this Agreement between Signatories with respect to each other, or between INTELSAT and one or more Signatories, if not otherwise settled within a reasonable time, shall be submitted to arbitration. Such arbitration is compulsory. However, should legal disputes arise in connection with rights or obligations under the INTELSAT Agreement or the Operating Agreement between a party who has ceased to be a signatory and one or more Signatories or INTELSAT, it may be submitted to arbitration, provided that the parties involved agree to such arbitration.

As a matter of fact, arbitration has never been used,

because of the tradition of consensus and the great pressure that members bring to bear for potential dissenters to go along with the majority.

e) National Interests

When INTELSAT was created, two factions were actively involved in the negotiating process, with diametrically opposing views on the operation of INTELSAT. That these negotiations actually proved fruitful is an indication of how each country managed to reconcile both compromise and adequate protection of respective domestic intersts. In the case of the Canadian government, it was believed that all members should be represented in a general organ which would be a forum for the expression of views of the states as sovereign entities. Yet, in order to ensure the efficient operation of the organization and preserve its commercial character, Canada's position was that voting power would have to be proportional to both the investment and the use of the system. However, it was deemed inappropriate to allow the control of this organization to be exercised by one or few states. In 1970, it was assumed that policy objectives for Canada in the international telecommunications realm, would seek to achieve the following goals:

a) a high rate of scientific and technological advance;

b) as low as possible a capital investment for Canada;

c) a genuine political commitment to the principle of free circulation of information and ideas; and

d) a comprehensive communication system affording economical coverage for all main geographical regions of Canada.

With respect to these four national policy objectives, INTELSAT has served Canada's interests well. The organizational structure of INTELSAT organs with the corresponding voting arrangements ensure a dilution of the power of the financial and technological giants in the organization, yet has remained attractive enough for those entities to resist the temptation to withdraw from the organization to concentrate their scientific and commercial energies on a domestic system completed by direct bilateral agreements with other advanced countries, a move which would leave the developing nations without the access to the international satellite telecommunications services that they enjoy.

In the view of one writer:

> "It can be said that States seem to a certain extent to adopt a pragmatic approach in so far as telecommunications satellites are concerned, rather than clinging to the notion of absolute sovereignty. International cooperation in this field is best demonstrated on the institutional level in the ITU and on the operational level in INTELSAT." (3)

FOOTNOTES

1. Snow, M.S., International Commercial Satellite Communications: Economic and Political Issues of the First Decade of INTELSAT, (NY, 1976), p.144-5.

2. Intersystem Coordination Procedures: Proposed Procedures for Implementation of Article VIX(d) Requirements Concerning Significant Economic Harm, INTELSAT Document no. BG-28-63E M/6/77, June 29, 1977, p.2.

3. Rein, B.W., World Telecommunications Forum - Law, Regulation, Standards of Global Communications (1985), p. 180.

4. Matte, N.M., Aerospace Law - Telecommunications Satellites (Toronto, 1982), p. 141.

2.2.2 INMARSAT: Brief Factual Description

During the second half of the 1960's, the Inter-Governmental Maritime Consultative Organization (IMCO), a specialized agency of the United Nations dealing with maritime affairs, took a keen interest in the application of space technology to maritime communication purposes. Maritime traffic was on the rise, with corresponding increasingly heavy demands on an already congested communications system. Insufficient geographic coverage, coupled with the impossibility of expanding or improving the frequency band system, pointed to its growing inadequacy and obsolescence. Other problems included poor signal quality and long delays. Fiercely competitive, the shipping industry relied heavily on swift communication facilities in order to optimise its economic returns by rational coordination of routes and careful scheduling of arrival times. Another growing concern was the problem of safety as traffic of larger and faster ships laden with passengers and cargo, sometimes including toxic chemicals, inflammable oils or pollutant substances, increased the threat of collisions, environmental pollution and loss of life. The Maritime distress system needed thorough revision and improvement.

Satellite communication seemed to offer an ideal alternative which would circumvent these problems by providing

a swift, uncluttered and reliable communications system, so vital to the shipping industry.

In March, 1972, a Panel of Experts was formed by the Maritime Safety Committee of IMCO, on the advice of IMCO's Sub-committee on Radiocommunications, in order to study the possibility of establishing a maritime satellite communication system and facilitate the planning of a structure capable of meeting all the aforementioned needs. As a result of the sessions of the Panel of Experts, an International Diplomatic Conference of Governments was held in London from April 23 to May 9, 1975, called by IMCO. Delegates from 45 countries, representatives from the United Nations, UNESCO, I.T.U. and other organizations, as well as observers from several non-governmental and inter-governmental bodies attended the London Conference, in order to review the Draft Convention on the International Organization for a Maritime Satellite System prepared by the Panel of Experts. The Conference concluded that there indeed existed a need for a maritime satellite system as well as a need for an international intergovernmental organization in order to administer and manage it.

It was decided that the Conference should reconvene. Furthermore, an Inter-Sessional Working Group was established in order to prepare the second session. By the time the second

Conference convened, the working group had prepared two basic agreements. The second Conference reviewed these and adopted them with some alterations although three points of contention remained unresolved at the end of the Conference: (1) maximum voting power of a Party on Council, which pitted the U.S., favoring no limit against the rest of the world; (2) whether reservations to the Agreements would be allowed; and (3) choice and number of official and working languages. This forced the conference to convene a third time. When the third conference was held, the unresolved points were settled. There would be a 25% ceiling on voting power in Council; reservations to the Convention would not be permitted (although states could make dissenting statements, which would not relieve them from being bound by a decision); and it was decided to omit the question of languages, leaving it to the organs of the organization themselves to decide on a modus operandi. The Russians, Spanish and French governments had pressed the hardest on the last issue and it was ultimately decided that conferences would have interpreters, but all official documents other than the Convention and Protocols are in English only.

After a decade of efforts on the part of IMCO, the Convention on the International Maritime Satellite Organization and the Operating Agreement were opened for signature on September 3, 1976 and entered into force on July 16, 1979.

The purpose of INMARSAT (the International Maritime Satellite Organization) is set out in Article 3 of the Convention:(as most recently amended in 1985):

> "The purpose of the Organization is to make provision for the space segment necessary for improving maritime communications and, as practicable, aeronautical communications, thereby assisting in improving communications for distress and safety of life, communications for air traffic services, the efficiency and management of ships and aircraft, maritime and aeronautical public correspondence services and radio determination capabilities."

Article 3 further specifies that the organization shall seek to service areas on the basis of need and shall act exclusively for peaceful purposes. In the preamble, the parties refer to resolution 1721 (XVI) of the General Assembly of the United Nations, emphasizing that satellite communications should be made available to all nations of the world on a "global and non-discriminatory basis". It goes on to state that "outer space shall be used for the benefit and in the interests of all countries", quoting Article 1 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, concluded on January 27, 1967.

Thus INMARSAT was created in order to establish and administer a "space segment" which includes satellites, tracking,

telemetry, command, control, monitoring and related facilities and equipment for maritime communications purposes. This space segment interacts with the "earth segment", encompassing both ships and land station, which operate within the jurisdiction of a Party to the Convention. Under INMARSAT's arrangements, space segment facilities and equipment may be owned or leased.

It should be noted that the economic pressure from potential competitors to INTELSAT are not as great in the case of INMARSAT because the market is not as great and is more concentrated in North America. In an effort to diversify however, the Convention was amended in 1985 by Recommendation 3 to allow INMARSAT to provide the aeronautical telecommunications services referred to in Article 3 above.

INMARSAT is a hybrid institution, a compromise between a public service organization and a commercial enterprise. There is a clear bipolarity when one considers the objectives of global, non-discriminatory maritime satellite communication set forth in the preamble and the principle outlined in Article 5 of the Convention, to the effect that "the organization shall operate on a sound economic and financial basis having regard to accepted commercial principles".

This reflects the divergence of views which various

nations brought to the conference debates over INMARSAT's creation. On the one hand, the United States made it abundantly clear that it would only consent to participate in an economically viable enterprise. On the other end of the spectrum, the Europeans & other major maritime nations viewed the projected organization as a public service which would, amongst other things, promote safety and optimize fleet administration and public communications. As a result, their governments were more willing to inject considerable public funds into the system.

This gap was widened by the debate over whether INMARSAT should be a strictly inter-governmental agency or whether private commercial entities should be included as partners in the arrangements. This issue was particularly important for the United States and Japan where non-governmental entities were operating telecommunications systems. Other nations, such as the Soviet Union, objected to having non-governmental agencies participate in INMARSAT. The compromise reached is reflected in both the structure and functioning of the organization. Essentially, the United States agreed to form an inter-governmental agency, while the other countries accepted the active involvement of both private and public entities designated by each government as signatories to the Operating Agreement.

Unlike INTELSAT, INMARSAT is an organization open to all

states. Its headquarters are located in London (England). As of September 16, 1985, the countries with the largest investment share in INMARSAT, on the basis of utilization of the organization's space segment, were respectively: U.S.A., United Kingdom, Norway, Japan, USSR and Canada.

The organization is endowed with legal personality, in both national and international fora. It has the capacity to contract, acquire, lease, hold and dispose of movable and immovable property, be party to legal proceedings, and to conclude agreements with States or international organizations. It is responsible for its acts and obligations, whereas the parties, in their capacity as such are not, except where such liability may arise as a result of treaties in force.

INMARSAT also benefits from certain privileges and immunities. For instance, it is exempt in States parties to the Convention, from all national income and direct national property taxation as well as from custom duties on satellites and components or parts used in the INMARSAT space segment. All private enterprises acting in their capacity as signatories (see infra) except the signatory designated by the Party in whose territory the headquarters is located are exempt from national taxation on all income earned from INMARSAT in the territory of that Party.

2.2.2.1. Description Of Its Main Legal Instruments And Permanent Organs

Two legal instruments were adopted in order to create INMARSAT, determine its organization and activities and regulate the relations between each Party and their respective entities.

The treaty, the Convention on the International Maritime Satellite Organization, is open for signature only to governments, referred to as "Parties". As for the interrelating Operating Agreement on the International Maritime Satellite organization, it is open for signature to either Governments or entities designated by them. These entities may be public or private enterprise, but must be subject to the jurisdiction of the designating party. They are referred to as "Signatories".

(a) The Convention

This convention provides INMARSAT's infrastructure. It states INMARSAT's purpose, describes the administrative and executive organs as well as their procedural mechanisms, functions and composition. It underlines the organization's hybrid character by establishing both its public service objective and the commercial basis of its operations.

It touches the crucial topic of Relations between a Party and its Signatory. Article 4(a) of the Convention determines that such relations are governed by applicable domestic law. Furthermore, each Party must provide such guidance and instructions in order to ensure that the Signatory fulfills its responsibilities. Although Parties are not liable for obligations incumbent upon Signatories under the Operating Agreement, they must ensure that their respective Signatories, in carrying out their obligations, do not act in a manner which violates the Party's international obligations under the Convention.

The Convention also specifies the procurement policy of the organization, which is avowedly intended to stimulate worldwide competition in the supply of goods and services. The wording of this approval is similar in many ways to the procurement related Articles of INTELSAT.

(b) The Operating Agreement

This Agreement outlines the rights and obligations of Signatories and deals with the general financial aspects such as capital contributions, capital ceiling, investment shares and revenues. As in the case of INTELSAT, investment shares are determined on the basis of utilization of the space segment.

c) Permanent Organs

INMARSAT has three permanent organs: the Assembly; the Council; and the Directorate, headed by a Director General. Although in many respects the drafters of the INMARSAT consciously imitated the INTELSAT structure, they deliberately did not provide for a formal equivalent to the Meeting of Signatories, as this was felt not to be necessary in a practical sense.

(i) The Assembly

The Assembly is composed of all the Parties to the Convention and holds regular sessions once every two years, although extraordinary sessions may be convened upon request of one-third of the Parties or upon request of the Council.

The Assembly is responsible for general policy and long term objective planning of the Organization, and must ensure that INMARSAT's activities are consistent with its Convention, the purposes and principles of the United Nations Charter as well as any treaty which might eventually bind it in accordance with its decision. The Assembly has the power to authorize the establishment of additional space segment facilities whose essential purpose is to provide radio determination, distress or safety services. The Assembly is in charge of all questions

pertaining to relations between INMARSAT and other agencies, international organizations and states, whether the latter are or not Party to the Convention. It has the power to amend the Convention or the Operating Agreement and may also consider and decide upon termination of a Party's membership.

In addition, the Assembly exercises any other functions conferred to it by either the Convention or the Operating Agreement. In discharging these functions, the Assembly shall "take into account any relevant recommendations of the Council".

A quorum for any meeting consists of a majority of all Parties. The Convention provides for different rules depending on the nature of the matter debated. Decisions on matter of substance are taken by a two-thirds majority whereas procedural questions are decided by a simple majority of all Parties present and voting. It is noteworthy that a party which abstains from voting is considered as not voting. The Chairman of the Assembly decides whether a matter is procedural or substantive, but his decisions may be overruled by a two-thirds majority of all present and voting Parties. Each party has one vote.

ii) The Council

The Council is composed of twenty-two representatives of

Signatories, of whom eighteen essentially represent the largest investors and four represent signatories required to be represented "in order to ensure that the principle of just geographical representation is taken into account, with due regard to the interests of the developing countries".

Since the criteria under Article 13(1)(a) is the amount of investment shares, Signatories with proportionately small investments and who are not otherwise represented can group themselves for the purpose of agreeing to have a common representative for the aggregate of their investments. Furthermore, should two or more Signatories have equal investments resulting in a number of Signatories qualifying to serve on Council exceeding 22, all are nonetheless represented.

The Council is INMARSAT's managing body. It is the Council's function to arrange for the space segment necessary for carrying out the purposes of the Organization in the most economic, effective and efficient manner possible. Briefly stated, the Council is endowed with all the powers to make all technical arrangements, ensure proper management and monitor the activities and financial position of the INMARSAT Organization.

The INMARSAT Council meets as often as is necessary to efficiently execute its functions but not less than three times a year. The Convention provides that "The Council shall endeavour

to take decisions unanimously", however, should such a concensus prove impossible to attain, matters of substance shall be decided by a two-thirds majority of total voting participating of Signatories.

Unlike in the Assembly, where each party has one vote, each Signatory representative on Council has a voting participation equal to the proportion of investment shares he represents subject to a ceiling of sorts, in that in general, no representative may cast on behalf of one Signatory more than 25% of the total voting participation in the Organization (compared to 40% in the case of INTELSAT).

However, as in the case of the Assembly, decisions on procedural matters are taken by a simple majority of the representatives present and voting, each having one vote, regardless of investment share.

Quorum for any meeting of the Council consists in a majority of representatives representing at least two-thirds of the total voting participation.

iii) The Directorate

The Director General is appointed by the Council from amongst candidates proposed by Parties or by Signatories through

Parties. He reports to the Council. The appointment is subject to confirmation by the Parties.

The Director General is the chief executive and legal representative of the organization and, as such, is under the authority of the Council, to which he is responsible. He appoints members of the Directorate subject to Council approval, which also approves the structure, staff levels and standard terms of employment within the Directorate.

High standards of integrity, competence and efficiency are the paramount considerations in the appointment of both the Director General and other Directorate personnel. Currently, this post is held by Mr. O.L. Lundberg, of Sweden. He was re-appointed by the Council with the unanimous approval of the Parties. His term of office is for 6 years, commencing December 1, 1985. To object to an appointment, the Parties must so inform the Depositary in writing within 60 days of notification of the appointment by the Depositary. Unless more than one-third of the Parties object, the appointment is confirmed. The Director General may assume his functions after appointment and pending confirmation. Although there is no formal rule to this effect, it is intended that subsequent elections of the DG reflect the various regions of the world.

From the foregoing analysis, it can be seen that the INMARSAT Council is by far the predominant decision-making organ, at least insofar as the management and operation of the organization is concerned.

The structure of INMARSAT was engineered in such a way as to have two independent bodies with separate functions and a minimal amount of overlap and infringement upon each other's decisions. For example, the Council, in exercising its functions shall have "due regard for the views and recommendations of the Assembly" whereas the Assembly can only "express views and make recommendations" to the Council. In addition, the Assembly must "take into account" the Council's relevant recommendations. These gentlemen's agreements of sorts permit the Assembly, a body of sovereign entities, to freely elaborate broad policies within the realm of their prerogatives, leaving the Council, a body of Signatories comprising private enterprise representatives, to manage the Organization along those broad lines in the most economically viable manner.

2.2.2.2. Its Functioning And How The Different Governments Protect Their Respective National Interest

a) Financial Operation

The Organization, which operates on a sound commercial

basis, is financed by contributions of Signatories, who in return, receive a financial interest in INMARSAT proportional to their investment. The standard selected for determining the quantum of each Signatory's contributions is the party's investment share which in turn is based on the utilization of the INMARSAT space segment. The system was developed on the premise that capital investment and voting power should be proportional to actual use of the system.

In order to determine investment shares, utilization in both directions are divided into two equal parts, a ship part and a land part. The part associated with the ship is attributed to the Signatory of the Party under whose authority the ship sails, whereas the part associated with land stations will be attributed to the Signatory of the Party in whose territory it is located.

The revenues earned by INMARSAT, are applied:

(a) to meet operating, maintenance and administrative costs;

(b) to provide such operating funds as the Council may determine to be necessary;

(c) to pay Signatories with regard to amortization provision;

(d) to pay any sums which may be due to a withdrawn or terminated Signatory, pursuant to Article XIII of the Convention;

(e) to pay compensation for use of capital to the Signatories.

b) Liability for Operations

As previously noted, INMARSAT is responsible for its acts and obligations whereas Parties to the Convention are not, except in relation to non-parties as a result of other treaties in force. However, for non-space damage, should INMARSAT pursuant to a binding decision of a competent tribunal or a settlement duly approved, by required to pay a claim, Signatories will be required to pay any amount unsatisfied by previous arrangements such as insurance. Similarly, should a Signatory have to pay a claim, it is reimbursed by the Organization. It is worth pointing out that there is no liability arising from delay, unavailability or faultiness of services provided.

c) Settlement of Disputes

At the time of the drafting of the INMARSAT Convention, there was considerable disagreement amongst the participants over whether disputes should be settled by negotiation or arbitration, and if by the latter, whether it should be optional or compulsory.

The compromise reached was the following:

(1) Dispute between Parties or between the Organization and Parties should be settled through negotiation. Should a settlement not be reached within a year, Parties may submit to optional arbitration if both Parties consent;

(2) Dispute between a Party and a Signatory may be settled by optional arbitration, but no prior negotiation requirement;

(3) Dispute between Signatories or between the Organization and Signatories to be settled by negotiations, then compulsory arbitration upon request of one party after one year; and

(4) Disputes arising outside the Convention or Agreement by negotiations, then compulsory arbitration upon request of one party.

d) Other Systems

As in the INTELSAT Agreement, provision is made in the INMARSAT Convention for the use of other space segment facilities. An INMARSAT member must notify the Organization if it intends to

use other facilities in order to ensure technical compatibility and avoid significant economic harm to the INMARSAT system. Issues of a technical nature are decided by the Council while the economic harm issue is referred to the Assembly. It is interesting to note that whereas the recommendations of the INTELSAT Assembly of Parties are not specified as binding or otherwise on the affected parties, in the INMARSAT Convention, it is specifically stated that both the Council and Assembly are to express their "views in the form of a recommendation of a non-binding nature". In addition, the requirement of notification does not apply to space segment facilities used for "national security purposes" or those which were established or contracted for prior to the entry in force of the Convention. Accordingly, it would not apply to the pre-existing MARSAT system used by the U.S.

2.2.3 Commonwealth Telecommunications Organization (CTO): Brief Factual Description

In 1949, a corporate body called the Commonwealth Telecommunications Board was established with the principal purpose of promoting the efficient development of the external telegraph services of the Commonwealth. On April 1, 1967, the Board was replaced by the Commonwealth Telecommunications Organization (CTO) which has a similar purpose to that of its predecessor. The CTO's purpose is to promote the efficient

exploitation and development of Commonwealth external telecommunications as well as to provide a forum and to participate in consultation and exchange of advice and information between Commonwealth countries in the pursuit of this common goal. The CTO also provides administrative support for these financial arrangements. Since March 30, 1983, the CTO has had the status of an international headquarters.

Since the organization has legal personality, it has the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings. When operating within the scope of its official activities, the CTO is immune from jurisdiction and execution in national fora and is exempt from taxes and customs duties with respect to its member governments.

The Commonwealth Telecommunications Conferences are open to Commonwealth Governments only.

We would note that it was extremely difficult to obtain any information about the CTO and relevant documents simply were not available. Consequently our report on this Organization is cursory. The distinct impression we received in our research was that the CTO was oriented towards promoting Commonwealth unity, but was almost irrelevant in terms of the international telecommunications scene.

2.2.3.1. Description Of Its Permanent Organs

The Commonwealth Telecommunications Organization has three major organs: the Commonwealth Conference on Telecommunications, the Commonwealth Telecommunications Council and the Commonwealth Telecommunications Bureau.

(a) Commonwealth Conference on Telecommunications

The conferences take place tri-annually in order to elaborate Commonwealth external telecommunications policies and make recommendations to governments with respect to such policies. A chairman is elected at the beginning of each conference. An attempt is made to hold successive conferences in different countries, in accordance with the CTO constitution's recommendation.

(b) Commonwealth Telecommunications Council

The Commonwealth Telecommunications Council is a continuing body which meets at least once a year. In order to be entitled to send representatives to the CTO Council, Commonwealth governments must first fulfill certain requirements. They must be either:

(1) partners in the Commonwealth Telegraphs Agreements

1948 and 1963 or any such financial arrangements as may be agreed by the governments to replace them;

(2) partners in the Second Wayleave Scheme set up as a result of the Commonwealth Telecommunications Conference 1958, now replaced by the CTO Financial Agreement 1983; or

(3) partners in any other (future) Commonwealth collaborative arrangement.

Representatives must be officials of senior rank in external telecommunications agencies or administrations, or other officials of equal status.

The Council is responsible for the implementation of the policies agreed upon by the governments in response to the CTO Conferences' recommendations. It must take steps to ensure the continuity of its work between sessions, facilitate consultation with Commonwealth governments not represented on Council and deal on a prompt basis with such matters as systems development, exploitation and operations. The Council is endowed with the powers to appoint committees, specialist groups or other persons to advise it, assist it, or perform special tasks as it deems necessary.

At the end of each year, the Council prepares a report of its proceedings along with a statement of accounts and auditors' report which it forwards to each government represented on Council.

(c) The Commonwealth Telecommunications Bureau

The Bureau, also known as the Secretariat, is the CTO's permanent body, which operates under the aegis of the CTO Council. Its headquarters are in London, and it has the legal capacity of a corporate body.

Its staff includes a General Secretary, appointed by all the governments for a five-year term, re-eligible for the same or a shorter time period.

The prime considerations in the selection of Bureau staff are high standards of competence, integrity and efficiency. Efforts are made to ensure as wide a geographical basis as possible with respect to recruitment. Bureau staff positions are open exclusively to nationals of Commonwealth countries, but no discrimination on the basis of nationality within the Commonwealth should be exercised when considering eligibility for appointment.

Prior to the beginning of CTO's financial year, the Bureau is responsible for submitting an annual budget to the

Council, estimating the CTO's expenditures for the forthcoming year. In turn, the Council will forward the budget to each of the governments represented at Council in the form of a recommendation. Adoption of the budget is conditional on the approval of the governments represented on Council, which, on approval, make provision for their share of the funds required. The General Secretary assumes the responsibility for payment of Council current expenses out of those funds.

2.2.3.2 The Commonwealth Telecommunications Organization's Functioning

Each government which is a party to the Commonwealth Telecommunications Financial Agreement 1983 must designate a department, public corporation or other entity responsible for the operation of international telecommunications circuiting for that partner government.

These designated entities known as national bodies account with one another for the inter-change of international telecommunications traffic on the basis of the accounting practices generally accepted by international telecommunications operators known as "Parcours - based accounting". Any sums due are paid without delay by the national bodies.

Before taking any action which may substantially affect

other national bodies through provisions of the agreement, a national body must consult with the Council and the partner government concerned must give due consideration to the Council's recommendation on such matter.

Governments joining other groups outside the Commonwealth are expected to keep in view the Commonwealth's interest and must keep the Council informed of the policies elaborated by and agreements concluded within such groups.

3.0 THE U.S. AND U.K. EXPERIENCES

3.1 THE U.S. EXPERIENCE

3.1.1 Factual Context

A few words can describe the U.S. factual context with respect to international telecommunications services today: COMPETITION as well as FREE and FAIR TRADE.

The U.S. Administration has been promoting competition in international telecom services for a few years now. Inter-modal competition (submarine cables + satellites) is being fostered by allowing new entrants and by reducing regulatory requirements.

The U.S. context is also very much characterized by the dichotomy that results from the highly competitive U.S. open market philosophy and the conservative and protective attitude of almost every one of its trade partners. Open markets have been advocated in and by the U.S. as an important if not essential tool to promote growth in telecommunications services and technology. However starting in the 1980's the U.S. realized that many foreign firms were very active and successful in the U.S. whereas most if not all other foreign countries were not only closed to the U.S. firms but their governments were helping and

promoting their nationals to take advantage of the U.S. open market.

At present international telecommunication services to and from the U.S. are provided by means of satellites or submarine cables. In the case of satellites the Communications Satellite Corporation (Comsat) had until recently the exclusive right to carry, through INTELSAT, any type of telecommunication services be they interconnected with public-switched message networks or not. Comsat was then a "carrier's carrier". The situation, however, has now changed substantially in theory and in practice as well although not to the same extent.

In theory now Comsat has competitors. Five other satellite systems were conditionnally granted the right to compete with Comsat and with INTELSAT but only in telecommunications services that are <u>not</u> interconnected with the public switched message networks. Furthermore conditions put on the implementation of these would-be competitive systems make it plausible to believe that there will be no effective competition by satellite to Comsat for quite a while yet. The conditions that must be met by each one of these new entrants are the following:

a) each must find a concurring or landing "correspondent" in at least one other country;

b) each proposal must be the subject of consultations with INTELSAT to ensure that there will be technical compatibility between its specification and INTELSAT's;

c) each proposal must be the subject of consultations with INTELSAT to avoid significant economic harm to the global INTELSAT system.

It is our understanding that each one of these conditions poses serious difficulties to the new entrants.

Regarding condition a), the need for a new entrant to find a landing "correspondent" constitutes a serious obstacle in that the most appealing markets (Western Europe) remain under a PTT's type of organizational structure. The PTTs are not seen as budging from their monolithic stance of closed markets and accordingly it is not foreseeable in the very near future that a new entrant will find a landing partner amongst them. At the moment the U.S. is carrying Market Access Fact Finding (MAFF) talks with many countries around the world and more particularly in Eurepean countries in an effort to improve its understanding of the obstacle which the PTTs constitute. These missions also provide good opportunities to better explain the U.S. position and at the same time alleviate feelings of being threatened which account at leat in part for European countries' lack of

enthusiasm to open up their markets. As is well known PanAmSat has finally found a landing partner with Peru which has agreed to become PanAmSat's first foreign correspondent in South America. It may become easier from now on for PanAmSat to sign agreements with other South America countries. However we suspect that it will be more difficult for the other authorized "separate" satellite systems to break the European barrier given their apparent stronger attachment to a state owned and controlled monopolistic system and their long established business relationship with Comsat.

Regarding condition b) (the need to consult with INTELSAT on technical compatibility), it is our understanding that although this condition had been considered as posing little difficulty by the U.S. Administration it has proven to be a major source of contention during INTELSAT's 68th meeting during which the PanAmSat proposal was being discussed. Apparently the problem stems from the fact that the new entrants who are just now realizing that they are not holding on to a goose laying golden eggs keep changing their specifications which creates tensions and reduces the chances of coming to an understanding. It is foreseen that the next meeting will be as tough as the last one and that no agreement will be reached.

Regarding condition c) (the need to avoid economic harm to INTELSAT), delays are foreseen here due to the fact that entrants which are now confronted with the necessity to build their markets must satisfy the demands within the customized services type to which they are restricted. Any significant change in the offerings must be approved by the FCC and be the subject of discussion with INTELSAT. Both of these requirements add delays to the possibility of solving the issues.

However one must hasten to add that the U.S. having firmly adopted the position which promotes competition and open markets it is taking steps at every level to foster its position. For instance the FCC has adopted a manner of regulation which makes life a little harder to foreign companies wishing to enter the U.S. international telecommunicaion services market. On November 15, 1985 it adopted streamlined tariff and facility regulations only for "non dominant" international common carriers. On July 29, 1986 it reaffirmed its November 15, 1985 position and more specifically it confirmed its

> "classification of carriers as foreign-owned, and therefore dominant, on the basis of 15 percent direct or indirect foreign stock ownership. [It] reaffirmed its concerns over U.S. carriers' difficulties in obtaining operating agreements in many foreign markets and the lack of reciprocity, unequal interconnection and discrimination they face in many foreign markets. It, therefore, concluded that until it finds a greater degree of reciprocity and fairness in foreign markets, it must continue to scrutinize the activities

of foreign-owned carriers in the United States closely."

It is our understanding that at the recent Meeting of Signatories (Spring 1986) INTELSAT reaffirmed its opposition to separate international satellite systems. Comsat as the U.S. Signatory submitted a document entitled "Detailed Responses by the U.S. Delegation to Questions raised on separate systems." It is also interesting to note that the U.S. Government now has an official observer who attends these sessions. The U.S. President appointed this official representative in early 1985. His role is in fact "to monitor the meetings in order to assure that all of the instructions that have been given, will be complied with".(1) No doubt that Comsat is thereby less inclined to support directly or indirectly other Signatories' opposition to separate systems.

Comsat was authorized by the FCC to provide end-to-end international communications services as long as it did so under structural separation. To this end Comsat incorporated Comsat International Communications, Inc. (CICI) which also provides earth station services to Comsat. The FCC decision which allowed Comsat to deal directly with end users is generally referred to as the Authorized User II decision because the FCC thereby granted the right to any user to acquire INTELSAT space segment directly from Comsat. This decision of January 1985 however was

appealed to the U.S. Court of Appeals for the D.C. Circuit. No decision has yet been rendered on it at the time of writing.

Further, the FCC granted CICI classification as non-dominant for purposes of regulatory scheme which means that it is exempt from the traditional [read cumbersome] regulation. Upon application by Overseas Telecommunications, Inc. (OTI) to have CICI reclassified as dominant for the provision of INTELSAT Business Service or other end-to-end services on the ground that Comsat had the incentive and opportunity to subsidize CICI's offerings and thereby injure competitors, the Commission found that the structural separation it (the FCC) imposed on Comsat was sufficient protection to competitors.

It is also worth noting that the FCC promoted competition between giants in the international telecommunications services by satellite market by granting AT & T non-dominant status for all its non-IMTS offerings. Such a classification first issued by the Common Carrier Bureau staff, was affirmed by the Commission in July 1986.

Having granted to Comsat (i.e.C.I.C.I.) the right to provide end-to-end telecommunication services, stronger pressures were put on the U.S. Administration to deal with the issue of direct access to INTELSAT by other carriers. In an April 1984 by

Order the FCC had rejected proposals that would have allowed international carriers to acquire satellite capacity directly from INTELSAT and the FCC reaffirmed its stand on this subject in January 1985. Three international carriers have appealed that decision of April 1984. On the other hand, not only did the U.S. Executive branch recommend to the FCC in early 1985 that it examine cost based carrier and user direct access to INTELSAT with respect to customized services, but the Administration, through the Department of Commerce's National Telecommunications and Information Administration (NTIA) has filed a formal request for rule making in this regard. The FCC has yet to render a decision in this matter.

Furthermore, whereas until recently earth stations ownership was restricted to ESOC (a consortium of common carriers and Comsat) and whereas at least part of their ownership had to be with Comsat, the FCC decided in December 1984 that any U.S. international carrier could own and operate earth stations. Comsat's interest in earth stations were ordered to be transferred to a subsidiary i.e. CICI. CICI is now selling its newly acquired interest to AT & T (3 earth stations), to RCA Global Communications (1 earth station), 2 earth stations will be abandoned and the date of 2 others will be decided upon at a later date.

The acquisition by AT & T should allow its customers to know with more precision the cost of the earth station portion on account of the unbundling of rates to which AT & T is subjected, but also because of the account and cost allocation plan i.e. segregation of cost and revenues, identification of joint and common costs and a methodology for cost assignment which the FCC required from AT & T. The Commission views such a move as putting downward pressure on the earth link portion of satellite international communications which in turn should foster competition and increased usage.

It is also the view of Comsat that the CICI's use of teleports increases CICI's edge in competition with new entrants. In June 1985 CICI began service at its first station, located at the New York teleport. The flexibility that has been instilled in the satellite market over the last few years allows CICI to compete more effectively with hard wire services both domestically and internationnally.

International hard wire services are provided by means of submarine cables. Up until recently these cables were owned only by common carriers and were used according to FCC dictat ("balanced loading policy") in conjunction with satellite services provided by Comsat. Since its latest Atlantic facilities

plan in August 1985 the FCC has "liberalized" its "loading" policy by allowing AT & T to increase its usage of either satellite or cable circuits by 2% a year for 1986, 1987 and 1989. Also, providers of IMTS, other than At & T and all providers of non-IMTS services are free to use either satellite or cable circuits as they see fit. It is of interest to note that although the FCC has not yet issued a policy allowing other than Comsat direct access to INTELSAT it has confirmed in July 1986 a staff decision allowing CICI to acquire cable circuits instead of satellite circuits to provide non-IMTS services between various points in the Atlantic and Pacific Ocean regions and the U.S.

Also, since March 1985 the FCC has authorized non-common carriers to own and operate submarine telecommunication cables between U.S. and various points outside U.S. As these new cables are fiber optics, their competitiveness is increased many fold and could thereby constitute either an economic pressure in favor of direct access to INTELSAT by other than Comsat or some other regulatory device to favor intermodal competition.

The effect of such pressure can be inferred from recommendations to liberalize a previous FCC stand which was designed to avoid accumulation of reserved satellite capacity. In May 1985 the FCC indicated that it would require evidence that 80% of existing satellite capacity was already filled before allowing

construction and launching of new satellites. However it is now our understanding that the Commission may relax its requirements in this regard due in part to the competition of fibre optic cable.

One can also attribute to stronger competition by submarine cables a recent move (May 12, 1986) by Comsat to reduce by 3.3% the rates for all space segment services furnished by satellite between the U.S. and overseas points.

Equatorial Communications has initiated a private newswire message generation and delivery system incorporating its C-120 series Micro Earth Station. For the first time, any business or organization can originate text and graphics information from an IBM PC or compatible and distribute it instantly, simultaneously and inexpensively via satellite. Equatorial has established a flat rate of $25. per month per installation for networks of 100 or more locations, or $35. per month for less than 100 locations. The earth stations can be purchased outright for $3,350. each or rented for $130. per month.

3.1.2 General and Specific Legal Instruments To Deal With The Provision Of International Telecommunication Services

3.1.2.1 General Legal Instruments

Telecommunications law in U.S. is somewhat like an onion. It has a core to which are added skins year after year. The Communications Act of 1934 may well be considered as the legal instrument of general application in all matters of wire and radio communications. This statute constitutes chapter 5 of Title 47 of the United States Code Service (USCS). Title 47 regroups all statutes dealing with telecommunications.

The Communications Act of 1934 which was enacted in June 1934 provided for the creation of the Federal Communication Commission (FCC).

Chapter 2 of Title 47 is of particular interest when examining international telecommunications law because it provides for the conditions of licensing and operation of submarine cables. The Submarine Cable Act which was enacted in February 1888 is still in force today and it is its section 34 which gave the President of U.S. the power to grant licenses for landing or operating cables connecting the U.S. with any foreign country. By an amendment of 1954 these powers given to the President were delegated to the FCC.

Chapter 5 of Title 47 USCS contains 6 parts, each part dealing with one specific subject. Part I deals with General provisions such as definitions and establishment of the FCC per se it comprises §151 to §155 of Title 47 USCS.

Part II deals with Common carriers from service and charges to a carrier's liability for damages, from valuation of property of carrier to extension of lines or discontinuance of service; from certificate of public convenience and necessity to accounts, records, and memorandum as well as consolidations and mergers of telephone companies and pole attachments. It comprises §201 to §224 of Title 47 of USCS.

Part III deals with special provisions relating to Radio. In other words it is under this Part that one finds the legal provisions regarding conventional radio, television, mobile radio as well as public broadcasting facilities. It comprises §301 to §399 of Title 47.

Part IV deals with procedural and administrative provisions governing the FCC. It comprises §401 to §416 of Title 47. Of particular interest is §410(c) which provides for a Federal-State Joint Board to which proceedings regarding jurisdictional

separation of common-carrier property and expenses may be referred as well as any other matter relating to common-carrier communications of joint concern.

Part V deals with penal provisions and forfeitures. It comprises §501 to §510 of Title 47 whereas Part VI deals with miscellaneous provisions and comprises §601 to §609 of Title 47 USCS. It is by virtue of §606 that the President of the U.S. is given extensive powers over telecommunications when the President has proclaimed that "there exists war or threat of war, or a state of public peril or disaster or other national emergency, or [that there is a need] to preserve the neutrality of the U.S."

Provisions of the Communications Act of 1934 have been amended, added to, repealed or otherwise adopted from time to time to meet new requirements or new situations. They have also been affected by the interpretation given them by the courts and have been adjusted accordingly.

For the specific purpose of our study on statutory legal instruments dealing with telecommunications §214 of Title 47 USCS is of particular interest. It provides for the extension of lines or discontinuance of service by common carriers and the requirements respecting issuance of certificate of public convenience and necessity. It also provides for the FCC to give

notice of any such application to the Secretary of Defense and to the Secretary of State with respect to applications involving service to foreign points.

Of general application and particular interest to our study especially at this point in time are the Trade Act of 1974 and the Trade and Tariff Act of 1984. The Trade Act of 1974 is to be found at Title 14 of USCS. It is of interest in the context of our study because in many quarters in U.S. it is believed that American companies involved in telecommunications equipment and services are in an unfavorable position with respect to global competition because of the rigidity of U.S. trade laws. Pressure has built recently to have those trade laws reformed and in some ways relaxed in order to favour American companies wishing to export and compete worldwide.

In some other quarters the need to foster the exportations of American policies, services or products has been so strong that Bills in Congress have gone many steps towards being enacted. These bills generally would allow the President or the US Trade Representative to take action against any foreign country which does not have a sufficiently open market attitude towards U.S. services and goods. A good example of such a Bill is H.R. 3131 an "Act to identify and reduce barriers to, and distortions of, international trade affecting United States suppliers

of telecommunications equipment and services in interstate and foreign commerce". HR 3131 was introduced in July 1985 and reported in April 1986 by the Committee on Ways and Means. This Act, if enacted, would be known as the Telecommunications Trade Act of 1986". It would require the President of the United States as well as the U.S. Trade Representative to take action under certain circumstances happening in foreign trade of telecommunications products and services. Section 102 of the proposed Act states Congress' findings & the purposes of the Act. It reads as follows:

> "Sec. 102. FINDINGS AND PURPOSES.
>
> (a) FINDINGS. - The Congress finds that -
>
> (1) rapid growth in the world market for telecommunications products and services will continue for several decades;
>
> (2) the United States can improve prospects for -
>
> (A) the growth of -
>
> (i) United States exports of telecommunications products and services, and
>
> (ii) export-related employment and consumer services in the United States, and
>
> (B) the continuance of the technological leadership of the United States, by undertaking a program to achieve an open world market for trade in telecommunications products, services, and investment;
>
> (3) most foreign markets for telecommunications products, services, and investment are characterized by extensive government

intervention (including restrictive import practices and discriminatory procurement practices) which adversely affect United States exports of telecommunications products and services and United States investment in telecommunications;

(4) unfair and discriminatory trade practices in foreign countries have resulted in, and continue to threaten, the loss of jobs in the United States telecommunications industry;

(5) the open nature of the United States telecommunications market, accruing from the liberalization and restructuring of such market, has resulted, and will continue to result, in a dramatic increase in imports of telecommunications products and a growing imbalance in competitive opportunities for trade in telecommunications; and

(6) unless this imbalance is corrected through the achievement of fully competitive market opportunities for United States telecommunications products and services in foreign markets, the United States should avoid granting continued open access to the telecommunications products and services, and other products and services, of such foreign countries in the United States market.

(b) PURPOSES. - The purposes of the Act are -

(1) to foster the economic and technological growth of and employment in the United States telecommunications industry and all United States persons who benefit from a high quality telecommunications network;

(2) to ensure that countries which have made commitments to open telecommunications trade fully abide by those commitments; and

(3) to achieve a more open world trading system for telecommunications products and services through negotiation and achievement of fully competitive market opportunities for United States telecommunications exporters and their subsidiaries in those markets in which barriers exist to free international trade."

We understand that HR 3131 will die on the Order of the 99th Congress 2nd Session and if it does not it will be vetoed by the White House. However it represents accurately the views and feelings of a non-negligible segment of the House and Senate which may become more vocal and more powerful after the November 1986 election.

3.1.2.2 Specific Legal Statutory Instruments

1. The Communications Satellite Act of 1962.

It constitutes Chapter 6 (§701 to §757 (sic)) of Title 47 USCS. Its latest amendment was enacted in August 1985.

It starts with a Congressional declaration of policy which was originally enacted in 1962 and updated in August 1985. The original declaration provided for the establishment of a commercial communications global satellite system. It professed the need for this new system to be made available to highly developed countries as well as less developed countries. It also expressed as U.S. policy the favouring of private enterprise access and competition. Contained in this original congressional declaration was the express intention of Congress "not to preclude the creation of additional communications satellite systems, if required to meet unique governmental needs or otherwise required in the national interest" (emphasis added). This latter part of the

declaration was used in November 1984 by President Reagan as the basis of his Presidential Determination regarding satellite systems separate from INTELSAT.

Following President Reagan's Determination the Communications Satellite Act was amended and a new congressional declaration was added to the original one. This new Declaration sets out the policy respecting separate satellites in words very similar to the Presidential Determination.

The Declaration also adopts pre-conditions for the INTELSAT Consultation and the requirement of Congressional Consultation should the INTELSAT Consultation fails. An important policy towards the eventual establishment of direct access to INTELSAT by others than Comsat was adopted. It provides for the possible amendment of the INTELSAT Agreement to allow INTELSAT to establish cost based rates for individual routes.

Section §721 of Title 47 USCS stipulates the manner in which the policies are to be implemented. In short it grants the President of the U.S. responsibilities and powers necessary to carry out the policies. However it <u>does not</u> grant the President any directive power over the FCC.

The Communications Satellite Act of 1962 also provides for the creation of Comsat and for its process of organization, its directors and officers as well as the financing of Comsat, its powers, its status and obligations with respect to foreign business negotiations. It stiuplates that Comsat should report to the President and to Congress through the President. It is interesting to note that the Act provides for the President to give Congress in January of each year an evaluation of Comsat and to make any recommendations for additional legislative or other action which the President may consider necessary or desirable for the attainment of such objectives. (emphasis added)

2. The Record Carrier Competition Act of 1981

This Act may well be considered as an amendment to the Communications Act of 1934 and can be found at §222 of Title 47 USCS. The main features of this Act are that it directs the FCC to forbear from exercising its authority over record carriers and it provides for interconnection and cost allocation. It also removes for three months following an interconnection agreement between Western Union Telegraph Company and any other record carrier, any FCC authority over any Western Union's application to provide international record communications service.

3. Although it may be more appropriate to consider it only as an amendment to the Communications Act of 1934, Public Law 97-

259 of Sept. 13, 1982 can be of special interest. It is titled "Study of telecommunications and information goals" and it provides for the National Telecommunications and Information Administration to carry out a "comprehensive study of the long-range international telecommunications and information goals as well as the specific policies to promote those goals and the strategies required to achieve them. It is our understanding that a report following said study should be made public in the near future by NTIA. When published such report should be available from the Government Printing Office.

4. Also of special interest is Public Law 98-549 of October 30, 1984 which provides for the establishment of the Telecommunications Policy Study Commission. Such Commission is composed of the chairmen and ranking minority members of the relevant Committees and subcommittees of the House and Senate. Its terms of reference are to "compare various domestic telecommunications policies of the U.S. and other nations, including the impact of all such policies on the regulation of interstate and foreign commerce and to prepare a written report for the Congress, the President and the FCC. This report must be submitted not later than December 1, 1987. The Act also directs the heads of departments and agencies of the Executive branch to cooperate with this Commission.

3.1.3 General And Specific Role Of The Federal Communications Commission (FCC) And Other U.S. Government Agencies Such As Secretary Of State And NTIA In Matters Of Telecommunication Services

1. The Federal Communications Commission (FCC)

The FCC is a creation of the U.S. Congress and as such does not report to the President. It is directly responsible to Congress which ensures its independence from government. It is not subject to Presidential directives except where specifically provided such as in §606 of Title 47 USCS entitled "War powers of President". Although it is not legally bound to follow Presidential official pronouncements it will usually defer to Presidential Determination on policy matters as it did when President Reagan determined that separate satellite systems were in the national interest of U.S. provided certain restrictions and conditions were attached.

Its function is to oversee and regulate all aspects of interstate and international communications by wire or radio communication including satellite. It has broad licensing powers as well as powers to set rates and accounting methods.

The Chairman is designated by the President and he "represents the agency in legislative matters and in relations with other government departments and agencies".(3) (When the Chairman of the FCC is as close to the President (or Administration)

as Chairman Fowler is, some members of Congress express their concern that the FCC becomes too politicized and not neutral enough which could affect the credibility of the Commission in different fora.)

The FCC is now directed by five Commissioners (instead of seven) appointed by the President (subject to confirmation by Senate). Certains functions are delegated to staff units and bureaus. The Common Carrier bureau regulates wire and radio communications, common carriers such as telephone, telegraph and satellite companies. Each bureau is responsible for developing and implementing a regulatory program, processing applications for licences or other filings, analyzing complaints, conducting investigations and taking part in FCC hearings. Such a bureau has many direct responsibilities and a good measure of autonomy to carry them out. To some extent it can be seen as the court of first instance and the Commission as the Appeal division. A bureau has the power to take action (read "make decision") with respect to a large range of applications which may be qualified as not susceptible to create a precedent or to determine policy matters.

It is also interesting to note that the FCC representative is one of three vice chairpersons on U.S. delegations to ITU

Radio Conferences. Also of interest is FCC's role with respect to INTELSAT as can be evidenced from the following:

> "The FCC [plays] an active role in formulating U.S. position with INTELSAT. In its facilities planning process, the FCC considered a number of potential configurations for the INTELSAT VI series. Comsat was instructed to vote for the configuration that ultimately was selected, and the FCC took the lead in the instructional process." Even though the FCC has responsibility for the day-to-day oversight of international telecommunication services providers and has excellent technical expertise which it may wish to exercise to influence U.S. international policies, it remains "an independent agency without foreign policy expertise or responsibilities".(2)

In preparation for WATTC-88 the FCC has established, in July 1986, an informal Public File to receive "comments regarding a [U.S.] positio nfor the revision of the ITU's IT & T Regulations. This action by the FCC followed a recommendation of U.S. Study Group B and the request of the Chairman of the U.S. National Committee for the CCITT. The U.S. Study Group B is responsible for the development of positions and strategies to be used by the U.S. Delegation to PC/WATTC-88 regarding the revisions of the Regulations.

2. NTIA (Commerce) vs. BICIP (State) i.e. National Telecommunications and Information Administration vs. The Bureau for International Communications and Information Policy

NTIA.

Although these two groups are very distinct it is preferable to deal with them under the same heading because they are as intimately related as Siamese twins. Both have a direct interest in international telecommunication services, NTIA from the point of view of trade whereas State from the point of view of foreign relations.

Trade issues in telecom equipment and services were and still are the subject of very intense debate in Washington. The U.S., which has a very open door market policy has encountered serious difficulties in achieving the same degree of access for its telecommunications products and services in other countries, especially Japan. Faced with a growing trade deficit in a market which it literally had dominated for many years U.S. officials (Congressmen, Senators, some members of the Administration) became very vocal and determined to fight back. Under D. Markey as Assistant Secretary for Communications and Information i.e.

responsible for NTIA, international telecommunications trade issues became a high priority. He was helped in his quest for definitive solutions by Senator B. Goldwater as chairman of the Senate Subcommittee on Communications. It is our understanding that with the replacement in June 1986 of Mr. Markey by Mr. Sykes who prior to his appointment worked for Senator Danforth himself very much involved in trade issues the NTIA could become even more involved in the development of telecommunications policies with regards to trade. In other words Mr. Sykes is perceived as having an even deeper intererst in trade issues of telecommunications services than his predecessor.

BICIP.

The Bureau was created pursuant to a Reprogramming letter sent to Congress by Secretary of State Schultz in the Spring of 1985. The Secretary of State has, under the U.S. Constitution, certain powers which he may exercise for the management of the State Department. By an Act respecting State Department Authorizations in 1979 an amendment to the State Department Act was enacted. This amendment provided for the establishment of a Coordinator for Telecommunications policies within the State Department. The Reprogramming letter of 1985 elevated the Coordinator to the status of a Bureau. A Bureau is hierarchically superior to a Coordinator because it has at its head an Assistant Secretary. Since 1985 the Bureau and NTIA are of the same rank

in the U.S. Administration. It is our understanding that consequently the importance of the one in comparison to the other very much rests with the relative importance of the Secretary of State or the Secretary for Commerce to the powers that be in Washington at any particular point in time.

The Bureau's functions include the coordination and implementation of communications policies. Its statutory mandate provides that it shall promote and maintain a coherent dialogue with the private sector and with the Congress. It is also responsible for the development of telecommunications and generally is the agency which represents U.S. interests in every international organization involved in telecommunications and information. It is responsible for the elaboration and expression of U.S. foreign policies in these matters and it nominates the U.S. delegation to I.T.U. and other pertinent international forums.

The Bureau is presently headed by Assistant Secretary Diana Lady Dougan and very much involved in the preparation of WATTC-88. It provides its assistance on a regular basis to the Department of Commerce in matters of international trade in telecommunications services and equipment as it has done and continues to do in the MAFF talks (Market Access Facts Finding) and the MOSS process (Market oriented Sector Selective).

State Department has always been jealous of its prerogatives in matters of foreign relations and it occasionnally felt as an intrusion NTIA's action in matters regarding international telecommunications. This difficult (for everybody involved) situation was exacerbated if not provoked by President Carter's Executive Order #12046 of 1978. (An Executive Order is an instrument by which the President of the U.S. exercises the powers that are given him by virtue of a Reorganization Plan Act to arrange his administration, change or transfer responsibilities within the Executive branch).

Executive Order #12046 provided for the abolition of the Office of Telecommunications Policy (OTP) and the establishment of an Assistant Secretary for Communications and Information in the Department of Commerce.

Many of the functions which had previously been assigned to OTP were transferred to the Secretary of Commerce. The Secretary of Commerce was to "serve as the President's principal advisor on telecommunications policies pertaining to the nation's economic and technological advancement and to the regulation of the telecommunications industry". He is to develop and set forth telecommunication policies and coordinate the telecom activities of the Executive Branch.

The very same Executive Order #12046 also provided for "the Secretary of State [to] exercise primary authority for the conduct of foreign policy... coordinate with other agencies "and in particular, give full consideration to the FCC's regulatory and policy responsibility".

In many cases Executive Order created "impossible" situations such as can be evidenced by the following which is taken verbatim from the Executive Order:

> "5-202 The Secretary of State shall continue to perform the following functions...:
>
> a) Exercise the supervision provided for in Section 201(a)(4) of Communications Satellite Act of 1962...; be responsible, although the Secretary of Commerce is the chief point of liaison for instructing [Comsat] in its role as the designated U.S. representative to [INTELSAT];...
>
> b) Coordinate, in accordance with the applicable inter agency agreements, the performance of these functions with the Secretary of Commerce, the Federal Communications Commission, other concerned Executive agencies and [Comsat]".

and also within the same Executive Order one finds the following:

> "2-404 The Secretary of Commerce shall develop and set forth in coordination with the Secretary of State and other interested agencies, plans, policies and programs which relate to international telecommunications, issues, conferences and negotiations... The Secretary [of Commerce] shall provide advice and assistance to the Secretary of State on international telecommunications policies...

> in support of the Secretary of State's responsibility for the conduct of foreign affairs." (Emphasis added)

Such ambiguity did lead to duplication of effort and interdepartmental rivalry. The situation became so self defeating that an agreement had to be hammered out between Messrs. Balbridge (Secretary of Commerce) and Schultz (Secretary of State) in November 1984, a few weeks before President Reagan issued his Presidential Determination on separate satellite system. Said agreement provides as follows:

> "STATE/COMMERCE AGREEMENT ON RESPONSIBILITIES FOR INTERNATIONAL COMMUNICATION AND INFORMATION POLICY
>
> NATIONAL SECURITY COUNCIL, SENIOR INTERAGENCY GROUP, AND INTERNATIONAL COMMUNICATION AND INFORMATION POLICY
>
> *Structure*
>
> Co-Chair: Department of State - Under Secretary (T), Department of Commerce - Assistant Secretary (NTIA).
>
> Vice Chair: USIA.
>
> Members: AID, CIA, DOD, Justice, NASA, NSA, NSC, OMB, OPD, OSTP, USTR; as appropriate FCC, BIB.
>
> Executive Secretary Coordinator, Department of State.
>
> Steering Group: Co-Chairs, Vice-Chair - Executive Secretary, TCIP.
>
> Standing and ad hoc working groups as appropriate.

Operations

SIG meets quarterly or at request of one member. Meetings are alternately chaired by the Assistant Secretary of Commerce or Under Secretary of State. Agenda and supporting material are sent to members one week in advance by the Executive Secretary and approved by Co-Chairs or designees.

Steering Group meets monthly and at the request of one member. Meetings are chaired by the Under Secretary of State or the Assistant Secretary of Commerce in his absence. Summary minutes will be prepared and distributed at the direction of the Co-Chairs.

Standing and ad hoc groups: Intellectual Property Protection, chaired by Commerce; Transborder Data Flows, chaired by State; and Development and Communications, chaired by AID.

All SIG member agencies may have membership on any standing or working group;

Chair of any working group, unless otherwise agreed by State and Commerce, is a representative of the most appropriate agency; scope of work is endorsed by the Steering Group and/or the SIG.

Responsibilities

The primary responsibilities of the two Departments are as follows, with the understanding that responsibilities can and do overlap.

State:

Coordination and support on foreign relations and foreign policy issues for government-to-government relations;

U.S. delegations to intergovernmental meetings: final preparation, appointments, instructions, coordinating support during conference, submitting treaties and agreements for Congress;

Substantive preparation for foreign policy aspects of instructions for U.S. delegates to intergovernmental meetings;

Coordination of national security factors into the policy formulation process, involving e.g., NSC, DOD, CIA; LDC issues involving AID, USIA; media issues involving USIA; and

Interpretation of treaties and international agreements.

Commerce (NTIA):

Substantive preparation for the radio conferences on behalf of the Executive branch including technical and telecommunications policy aspects of instructions for U.S. Delegates to such conferences;

Consultations with foreign counterparts on domestic and international telecommunication and information regulatory and legislative issues;

Presentation of coordinated Executive branch views to the FCC on telecommunication issues;

Presentation of coordinated Executive branch views on facility planning and applications of emerging telecommunication technologies; and

International cooperation concerning telecommunications, related policy and trade matters.

It is agreed that the SIG is a group formed to coordinate the consideration of communications and information policy issues and that no action of the SIG binds the State Department or the Commerce Department (or other agency) to any particular point of view or course of conduct. Each Department retains the powers and responsibilities conferred by law or executive order and may draw upon SIG conclusions and recommendations consistent with such responsibilities."

It is our understanding that the rivalry between State's BICIP and Commerce's NTIA is still very much alive today so much so that the SIG (Senior Interagency Group) has held no meetings over the last several months because NTIA does not want to participate when BICIP chair and vice-versa.

NTIA being directly concerned with trade issues has been visible in international fora susceptible to foster the development of telecommunications worldwide. As an example one can refer to NTIA's preparation for August 1985 meeting of the Maitland Commission i.e. an independent ITU commission mandated to examine the issues and recommend methods which would stimulate telecommunications development internationally. NTIA submitted comments on, amongst others, trade and investment. These comments, in part, are as follows:

> "1. Trade and Investment
>
> *It is in the mutual interests of the developing world and the telecommunications industry to create an environment which stimulates trade and investment in telecommunications goods and services worldwide.*
>
> During the 1970s the amount of exports to the developing world expanded rapidly. While exports of telecommunications equipment within OECD countries increased by a factor of 3.5 from 1970 to 1978, exports of this equipment from the OECD countries to oil-exporting developing countries increased by a factor of 9, and exports to the other developing countries (primarily newly industrializing countries) increased by a factor of 4.5. Although this rapid growth pattern is expected

to slow during the 1980s, especially as purchases in the oil-exporting countries decline, growth in sales of telecommunication goods and services in such areas as developing Asia and Latin America will continue. This growth is due in large part to three factors:

Import substitution policies have not been a significant factor in most developing countries (exceptions exist among some newly industrializing countries);

Existing networks in developing countries are typically very limited and are obsolete legacies of colonial rule, creating substantial replacement opportunities and posing, at least initially, fewer network compatibility problems; and

The shift to digital switching technology has required a considerable research and development effort on the part of telecommunications manufacturers causing them to distribute the investment cost over international markets where demand for a variety of digital equipment is high.

Multinational corporations selling telecommunications equipment are engaged in a variety of commercial arrangements with developing countries. Traditionally, direct private foreign investment in developing countries has been typified by majority-owned or wholly-owned subsidiary arrangements. This has been changing in recent years. The "new" forms of investment include joint ventures, turnkey operations, international sub-contracting, licensing agreements, and management contracts.

Another area of increasing importance is consultancy services provided by private industry to developing countries:

(1) *Training*: The private sector provides needed technical assistance through training programs in installation, operation, and maintenance of telecommunications equipment.

The United States Telecommunications Training Institute (USTTI) is an example of technical cooperation among private industry, the government, and international organizations for the purpose of sharing advances in telecommunications technology with developing countries. Over 200 participants benefitted from tuition-free courses offered during the 1983-1984 training year by private corporations and government agencies. The ITU, through its Fellows Program, was one of several international organizations providing funding in support of trainees. The USTTI could be used by other countries as a model for their own training programs.

Other training approaches have also proven successful. For example, employees of multinational communications corporations in developing countries have spent time working at headquarters' locations. Such experience gives the employees from developing countries a broader perspective and understanding of telecommunications and related management activities.

(2) *Specifications*: One telecommunications firm offered the following, "It is our view that the single most important need in carrying out the work of the Commission and implementing any recommendation is an environment in which industry is encouraged by the developing countries to participate with them in all aspects of telecommunications development from the very initial requirements and planning steps through to actual implementation and evaluation." For example, it is necessary to explore ways to involve manufacturers in determing specifications from the content of a telecommunication project. Often there are problems with technical needs assessments and the accuracy of specifications drawn up by developing countries. Specific local environmental conditions may not be taken into account when determining specifications of complex equipment.

In addition, developing countries often encounter problems of incompatible equipment which has been sourced from a variety of vendors and for a variety of reasons.

Equipment is donated as a part of an aid package;

Equipment is chosen as a result of concessionary financing arrangements; and

Equipment is chosen because it is state-of-the-art technology.

Strategies for the adaptation of differing equipment need to be refined thus enabling developing countries to more fully take advantage of their current equipment while facilitating the introduction of new equipment for the modernization of the networks.

Regardless of the commercial or consultancy arrangement chosen, it is essential, as one major telecommunications firm stated, that developing countries "create an environment which encourages private sector investments". The firm's response then went on to say, "such an environment will act as a strong motivation for industry participation and assistance in enhancing the development of telecommunications."

This can be done by preventing or, if necessary, removing trade and manufacturing restrictions and promoting import activity. Some developing countries, especially the more advanced newly industrializing ones, once they have reached a critical mass in their telecommunications infrastructure have resorted to import substitution policies which restrict trade and investment. Restrictive tariffs and quotas are government procurement policies that exclude foreign suppliers or reduce competition to a preferred supplier are examples of these policies. These policies not only discourage capital investment, but they also restrict the transfer of goods, expertise and technology vital to development."

3. The U.S. Trade Representative (USTR)

Strangely enough the U.S. Trade Representative is, under the U.S. Constitution, an ambassador appointed by Congress. He does not report to the President. USTR must file with Congress, every fall, a report commonly referred to as Section 303 report in which will be listed problems or areas of concerns in trade matters which warrant attention. This list or the report itself is also of use to the USTR in bilateral negotiations, or GATT rounds. Over the years many of the powers the US Trade Representative would have exercised under the Constitution have been transferred to the President for the sake of better management or coordination of the affairs of the nation. However the USTR remains an important intervenor in matters of international trade and at this point in time in matters of telecommunications services because of their impact on trade.

The present U.S. Trade Representative is Ambassador Yeutter who has been very much involved with the fairly recent rounds of negotiations with Japan the objective of which were to convince Japan to open up its markets to U.S. telecommunications equipment and services. The talks and negotiations that were carried by the U.S. with Japan were part of a process referred to as MOSS discussions.

On September 23, 1985 the USTR issued the Administration Statement on International Trade Policy, a summary of which reads as follows:

"Summary of the Administration's Trade Policy

At this time of major challenge to the future of U.S. and world trade, the Administration will carry out an active program to address the key elements of its trade strategy -- maintenance of a strong and growing domestic and international economy and more open and fair conditions for U.S. trade. In summary, the Administration will do the following:

Domestic and International Economic Policies

1. The administration will, for the benefit of our international trade as well as our overall domestic economy, vigorously seek to bring federal spending under control. The Congress and public must clearly recognize the adverse impact of excessive government spending and budget deficits on the dollar's value and U.S. trade. As Congress wishes to contribute to reducing the trade deficit, it should focus its energies on cutting excessive spending and budget deficits rather than supporting protectionist legislation.

2. The Administration will continue to press for the adoption of the President's tax reform proposal, which is essential to strengthening our economy and making U.S. businesses more competitive in international markets.

3. The Administration will review, and will seek to amend, if warranted, our domestic anti-trust laws or regulations to the extent that they impede our international competitiveness.

4. The Administration will consider trade implications when reviewing proposed regulations and when developing further deregulation initiatives. The Administration will use the leverage created by its deregulatory process to seek to open foreign markets, thereby minimizing the problem of free rides for foreign suppliers.

5. The Administration will increase efforts to protect intellectual property rights (patents, copyrights, trademarks); we will accelerate work in this area with a view toward possible Administration legislative and administrative initiatives.

6. The U.S. will encourage our trading partners to adopt policies that will accelerate their economic growth, thereby expanding our export opportunities. Specifically we will urge Bonn Summit participants to act on their commitments to remove rigidities and imbalances in their economies. The U.S. will also continue to use discussions in the IMF and OECD to pursue this strategy.

7. The Administration will encourage debt-burdened LDCs to reduce government impediments to the functioning of markets in their economies, encourage production through market incentives to their business firms and employees, and substitute equity capital for debt by encouraging both domestic and foreign investment.

8. The 1984 yen-dollar efforts toward liberalizing Japan's financial markets and internationalizing the yen will continue.

Free and Fair Trade Policies

9. Because the United States depends upon both exports and imports for its prosperity and because protectionism is costly and counterproductive, the Administration's goal will be to work towards a more free and fair trading system.

10. The United States will vigorously pursue its rights and interests in international commerce under U.S. law and the GATT, and will see that other countries live up to their obligations and trade agreements with the United States.

11. The Administration will continue vigorous enforcement of U.S. antidumping and countervailing duty laws.

12. In the past, the United States has initiated Section 301 unfair trade investigations only in response to formal petitions for action from U.S. industries. The Administration will, as appropriate, also self-initiate such cases to address foreign unfair trade practices.

13. Where export subsidy rules are absent, inadequate, or unsatisfactory in their implementation, the U.S. will vigorously defend its exporters against the subsidy programs of other nations. Also, the Export-Import Bank will begin an aggressive targeted mixed-credit lending policy. At the same time, the Administration will seek a $300 million appropriation for grants to support up to $1 million in mixed-credit loans.

14. The Administration will take tactical measures aimed at eliminating unfair foreign trade practices and opening foreign

markets, if efforts to resolve such issues through consultations fail. The denial or limitation of access to the U.S. market may be a necessary measure in this process.

15. The administration will support the market-opening objectives of equitable access legislation; but it will oppose legislation that would require the President to close U.S. markets on the basis of sectoral reciprocity. The proper approach is to grant the Administration authority to negotiate foreign barrier reductions.

16. The United States will continue market-oriented sector selective (MOSS) discussions with Japan. However, time limits will be placed on existing sector discussions, at the end of which specific commitments will be evaluated and follow-up procedures begun. New sectors will be added that offer to promise of expanded U.S. exports.

17. The Administration will follow up on its reports to the Congress on the subject of foreign industrial targeting by continuing to examine the potential problems created by foreign targeting and, where appropriate, possible remedies.

U.S. Export Promotion Policies

18. The United States will seek to reduce our nation's trade deficit through increasing exports instead of restricting imports.

19. The Administraton will work with private sector advisory groups (e.g., the President's Export Council) to improve export promotion and to help U.S. companies expand their global marketing efforts.

20. The Administration will evaluate Federal export promotion activities during the fall budget review, and alter these activities as necessary to improve their effectiveness.

21. The Administration will again seek legislation to remove the export disincentives in the Foreign Corrupt Practices Act.

Multilateral and Bilateral Trade Negotiations for U.S. Exports and Fair Trade

22. There is a great need for a more comprehensive disciplined and effectrive system of world trade rules. The Administration will maintain efforts to launch a new GATT trade round.

23. The Administration will examine possible bilateral and plurilateral negotiating opportunities, both to improve market access and enhance fairness and promote wider interest in the multilateral negotiating process.

Safeguards and National Security Policies

24. The Administration is committed to market-based solutions to trade problems, at home and abroad; but occasional exceptions may be necessary.

25. Import relief, when undertaken, will be transparent, temporary, time-specific, and will decline over the period of relief, and lead to international competitiveness.

26. The Administration will review existing worker assistance programs in order to assure that they promote an effective human adjustment policy.

27. The Administration reserves the right to respond to economic conditions internationally and to levels of import penetration that threaten domestic industries essential to our long-term national security.

28. The Administration will vigorously enforce our export control laws in the interest of our own national security. At the same time, the Administration recognizes the reality of foreign availability and the importance of our reputation as a reliable supplier."

During Hearings on the US Trade Policy Agenda and Outlook for 1986 Ambassador Yeutter highlighted the following amongst its achievements and that of the Administration which may be of particular interest in the context of the present study.

> "the publication of our [USTR] first extensive study of foreign trade barriers, in accordance with section 303 of the Trade and Tariff Act of 1984. This report goes beyond unfair trade barriers to cover all significant barriers to trade."
>
> (...)
>
> The US has successfully negotiated modifications to Japanese practices in the ... Telecommunicaions industry as a part of the MOSS process... We believe that the changes create the potential for significant opportunities for U.S. business, although the ultimate value of the changes made can only be assessed in the light of actual sales experience."

Ambassador Yeutter appearing before the House of Representatives Subcommittee on Trade of the Committee on Ways and Means 99th Cong 2nd Session Serial 99-65 stated:

> "As part of our general review of trade policy, we will continue to consider legislation that would help us promote free and fair trade. In line with this, the Administration is reviewing proposals for changes in, and additions to, U.S. trade laws. The proposals which will get increasing attention during the year include: new trade negotiating authority, revisions to our laws protecting intellectual property, export promotion initiatives, and various amendments to our antidumping and countervailing duty laws. The Administration has also proposed significant reforms in the antitrust laws that will enhance the international competitiveness of U.S. firms... We will not allow desirable changes to be held hostage to counterproductive, protectionist measures..." p.13

During the course of the same Hearings Ambassador Yeutter very clearly indicated that the President would veto HR 3131 the proposed law on Telecommunications Trade Act should it be passed by Congress. It becomes obvious that Ambassador Yeutter as well as the Administration wants to avoid any legal action which may have a retaliatory or protectionist tint. Ambassador Yeutter puts it in these words with regards to HR 3131:

> "Yes, there are several elements of that bill, Mr. Matsui, that we would find objectionable.
>
> ... We really need to build in more discretion in the legislation of that kind than is present in the Dingell bill. And in the absence of the discretion so that we can come out with

> a sensible result, that legislation will inevitably be vetoed. No President wants to have his hands tied on telecommunications negotiations or any other negotiations; and as a USTR, I don't want to have my hands tied, either." p.64

The USTR also expressed the U.S. stand regarding the need to expand the GATT to include services. He expressed himself as follows:

> "We could spend a lot of time on that, but suffice it to say we really need to improve the GATT as an institution to generate confidence in it as the international trading body if you will, that provides surveillance over the conduct of international trade. The GATT's reputation is, indeed, tarnished today and it simply needs an uplift in a whole variety of ways.
>
> So we've got to deal with that issue in a very broad way.
>
> Then, in addition, we've got to broaded the jurisdiction of the GATT. It's not covering nearly enough of the trade of the world, Congressman Schulze brought that point out earlier, where so much of international trade does not even come under the aegis of the GATT, and it needs to get beyond trade into areas like investment and services which have heretofore been left for no one to provide any jurisdiction over. So the aegis of the GATT has to be expanded. It needs to be a stronger, more decisive, and effective organization internationally. It needs to be brought to the level of its peers in the IMF and the World Bank, and hopefully at maybe even a little higher level. So international trade needs to have greater prominence internationally, and that has to be done through this whole exercise.
>
> And then, in addition, of course, we've got to move to market opening measures for all of us."

It is obvious that the U.S. now feels the constraints of its negative trade balance, its too strong dollar and being the only country in the world strong enough to have a really open market. It is making every effort to convince other countries to open up to competition. It is our understanding that State Department adopts as its own the Administration's policy of open market and free trade whereas NTIA and the USTR seem to be the fathers of this policy and its proponents. State which is obviously more used to dealing with foreign countries seems to be taking a much lower key approach in trying to convince foreign countries to move away from their closed market towards a U.S. style market in telecommunications services.

FOOTNOTES

1. Re. James T. Broghill during H.R. Com. on Energy & Commerce Subcom. on Telecommunications, Consumer Protection and Finance Hearings, April 3, 1985 cit.

2. David C. Leach, managing director, Orion Telecommunications Ltd.

3. 50th Annual Report/Fiscal Year 1984 - Federal Communications Commission.

3.2 THE U.K. EXPERIENCE

3.2.1 Description of the factual context of international telecommunications to and from the United Kingdom

International telecommunications facilities and services have for years been viewed as having a dual role. On the one hand there is the obvious communications capability with the concommitant ability to reduce the significance of physical distance. That is the carriage portion of the service. On the other hand there is the content aspect which has the potential ability to influence the recipient. Carriage has traditionally been regarded as a natural monopoly requiring rate regulation, while content - at least in the international context - has been viewed as having national sovereignty implications.

While these statements may be self evident, it is this basic dichotomy between carriage and content, coupled with technological changes, that have been at least in part responsible for the radical alterations in the international telecommunications infrastructure in the 1980s.

Traditionally, European countries have regarded this infrastructure in a monolithic fashion and have typically structured telecom carriers with postal sytems as PTT monopolies, subject to direct government ownership and policy control.

Altering this arrangement could only occur if there were a number of elements present together at the same time: improvements in technology, both in terms of quality and price of product, thereby permitting greater possible diffusion of product by alternative suppliers; and acceptance of the fact that both ownership and regulatory/political control of a telecom carrier was not essential to the implementation of government policy and safeguarding of concerns regarding content noted above; acceptance of the fact that carriage and content could be divided and treated differently; and political leadership philosophically in favour of the benefits of free enterprise and competition together with a sufficiently stable mandate to implement such a change.

The confluence of these elements occurred in the U.K. beginning with the election of the Thatcher government in 1979 on a clearly stated platform of preference for the free market over a planned economy. The significance of this election was that it brought to power a government philosophically inclined towards less regulation at a time when technology had evolved to the extent that the traditional thinking about "natural monopolies" could legitimately be questioned.

Telecommunications was one of the first U.K. industries to experience the effects of this approach. Whereas it had been a government owned enterprise operated on a monopoly basis, in July,

1981, it was separated from the British Post Office and established as a separate corporation (British Telecommunications).

In a second step, in late 1984 the Government established British Telecommunications plc (public limited company), or BT, operating under the Companies Act and transferred the assets and liabilities of the old British Telecommunications to BT. The government subsequently sold 50.8% of BT's stock in a highly successful public offering. Furthermore, the government specifically ended the monopoly formerly held by British Telecommunications by permitting Mercury Communications Limited to construct new facilities and enter into direct competition with BT. This was done in order to promote a diversification of service providers and increase market place activity. However, while Mercury now has direct access to INTELSAT facilities, BT is still the spokeman in that organization's Meeting of Signatories.

The move to privatization is being tentatively adopted by other European countries. Italy sold 30% of its major network operator Societa Italiana per l'Esercizio Telefonico to private investors and the Netherlands is contemplating similar action.

The government does not intend the licensing of Mercury to initiate an era of total competition in telecommunications in Britain however. Under the present arrangements only BT and

Mercury will be licensed prior to 1990 to provide basic telecommunication systems operating on a national basis (this ignores the two national cellular radio services that have been licensed).

It should also be noted that the Government has divested itself of shareholdings in both of these enterprises. In addition to the reduction of its interest in BT, the Government sold approximately 50% of Mercury's parent corporation Cable and Wireless plc (which it had fully owned) in 1981 and reduced its holdings to 23% in 1983; in December, 1985 it sold the balance.

A factor in the shift in telecom towards reliance on the marketplace was concern over the falling of share of the U.K. in the world market for telecom equipment, which was attributed to overly elaborate technical specifications demanded by the Post Office, specifications which were not only higher than users wanted, but which also had the effect of pricing British products out of foreign markets. This concern was not without foundation. From 1982 to 1985 the size of Britain's telecom system on a world scale slipped from fourth to sixth.

One cannot therefore help but be struck by the irony of the decision to refer BT's proposed acquisition of control of Mitel Corporation to the Monopolies and Mergers Commission (discussed below). It was feared that this acquisition would

result in BT's ceasing to buy PBX equipment from unaffiliated manufacturers in the U.K., diverting all of its purchases to Mitel with obvious adverse implications for those local manufacturers.

Once the government decided to privatize the telecommunications industry, it was faced with the problem of regulating the industry in its new form. Furthermore, the government sought to retain BT as the basic provider of nationwide telephone services, in order to protect the public from the eventual negative consequences of BT's adapting to a liberalized market. In the 1981 Act, it opted to avoid traditional individual service rate regulation in favour of a more generalized control and supervision at the political level by the Secretary of State.

The government is realizing however, that in some instances, privatization and liberalization may conflict. On the one hand, the government must ensure that BT continues as a successful company. However, if an over-protective regulatory regime is implemented, that will preclude the emergence of effective competition, and frustrate the government's intent to install market forces as the primary regulators of the telecommunications industry.

The British Telecommunications Act of 1981, in addition to creating British Telecommunications as a separate public corporation, endowed the Secretary of State with the power to

issue licences for the exploitation of telecommunications systems. In February of 1982 the Mercury consortium was licenced by the government to provide basic services in direct competition with British Telecommunications, on the domestic front. In August 1983, the government expanded the scope of Mercury's licenced activities by allowing it to compete in the international services market, the market which is the one expected to see the most intense and immediate competition. Following its licensing Mercury initiated a transatlantic voice and data service (called AmeriCALL) in 1984 with Western Union Telegraph Company, employing digital satellite trunks.

Conversely, notwithstanding the fact that under the 1981 Act, the Secretary of State was required to consult with British Telecommunications prior to granting any license for the running of any such telecommunications system as is specified in the license, a proposal by British Telecommunications and IBM to provide an alternative network based on satellite links which would connect with SBS in the U.S.A. was rejected on the grounds that this would combine two very large and dominant companies into one joint venture. The government policy required each to develop its own proposal so as to compete with rather than co-operate with the other.

Mercury and BT International (a division of BT) have been waging a veritable international services war. Foreign carriers

have been quick to benefit from the competition between the two British carriers unlike the rest of Europe where the PTT's have been able to "whipsaw" foreign carriers into less and less profitable (or non-profitable) service arrangements. The whipsaw effect is not occurring in Britain however, for the reasons noted below.

This approach however, is paying off for Britain. The U.K. is already operating as a transatlantic telecommunications hub. Boasting the lowest rates between Europe and the United States, the British market has absorbed a large portion of multinational telecommunications traffic in Europe. Data bank centres are shifting from Frankfurt to London because of better service and lower costs. The Belgian government was recently forced to vote telephone rate cuts to prevent a similar exodus from Brussels.

The pot is a large one. Whereas there were just over 61 million international (including maritime) telephone calls from Britain in 1973-74, within a decade that volume had mushroomed to nearly 370 million. BT alone generated £ 1,225 million from international services in 1983-84 on total revenues of £ 6,876 million. This in a country that at that time had a telephone penetration rate of 77%! The unanswered question at this point of course is whether BT - or any competitor - can continue to generate that sort of growth pattern in the current environment.

Britain also took a lion's share of the world's satellite telecommunications in 1983, claiming a full 11%. When one considers that nearly 70% of intercontinental telephone traffic to or from Britain is carried by satellite, it is not surprising that it is the second largest shareholder in INTELSAT and the third largest shareholder of INMARSAT, discussed previously in this Report.

It is also noteworthy that fully 60% of American multinational corporations have their communications centres for their European operations based in Britain. Conversely, almost 1/3 of all multinationals based in Europe route their telecommunications traffic through Britain.

BT International is also responsible for that company's Maritime communications systems, systems that are also provided in competition with other carriers.

Britain's plans for a domestic satellite industry do not appear to have much priority with the Government, which is not too surprising, considering that the country's relatively small geographic area does not warrant the large investments required in a satellite system, since the main attractions of these systems are the low cost of long-distance transmission when compared with the cost of terrestrial transmission. Of course, were Britain permitted to use domestic satellite facilities to enter the

transatlantic market in direct competition with INTELSAT, the attractiveness of such plans would be greatly increased. However, there are no immediate plans in this respect.

3.2.2 General and specific legal instruments implemented in the United Kingdom to deal with the provision of international telecommunications services

The major relevant legislation still in force with respect to communications are the Telecommunications Act 1984 (the 1984 Act), the British Telecommunications Act 1981 (the 1981 Act), the Broadcasting Act (1981), the Cable and Broadcasting Act (1984), the Telegraph Acts (1863-1962) and the Submarine Telegraph Act (1885). In practical terms, the two major acts which deal with the provision of international telecommunications services are the 1981 Act and the 1984 Act.

(a) The British Telecommunications Act 1981

The main purpose of the 1981 Act was to establish a public corporation to be called British Telecommunications which would be separate from the Post-Office. Provisions were made with respect to its functions in order to transfer to it the power to provide telecommunication and data processing services. Extensive powers were bestowed upon the corporation by virtue of section 2 of the Act to be exercised both within and outside the U.K. It is

noteworthy that these powers were not repealed or altered with the passage of the 1984 Act.

Section 3 stipulated that it would be the duty of the corporation to exercise its powers in such a manner as to provide throughout the British Islands such telephone services as satisfy all reasonable demands for them. The corporation also had a duty, in exercising its powers, to have regard to efficiency and economy, the social, industrial and commercial needs of the British Islands, the desirability of improving and developing its operating systems, and finally the developments in the fields of telecommunications and data processing.

The powers conferred upon the corporation went beyond that of providing telecommunications service on a domestic and international basis, as the corporation was given power inter alia "to construct, manufacture, produce, purchase, take on hire or hire-purchase, install, maintain and repair anything required for the purposes of its business or the business of any of its subsidiaries" pursuant to section 2(a) of the Act.

It is clear from the foregoing duties that there was incorporated into the statute, the potential for conflicting goals, such as the imperative of efficiency and economy against the requirement to provide reasonable telephone services throughout the serving territory. Similarly, it is reasonable to expect

that social and commercial needs of the British Islands would not necessarily be coincidental. However, the legislators did have the foresight to deal with this potential for conflict by providing in s. 3(4) that:

> "Nothing in this section shall be construed as imposing upon the corporation, either directly or indirectly, any form of duty or liability enforceable by proceedings before any court".

In light of the subsequent repeal of portions of this Act by the 1984 Act, the 1981 legislation is an interesting mix of directive powers which, depending on their utilization, could enhance or restrict BT's competitive position in the international market. For example, section 6(4) of the Act, which was repealed in 1984, in effect gave the Secretary of State the power to issue a direction to the corporation (after consultation with it) either directing it to cease doing any particular thing or to do any particular thing (that it otherwise has the power to do). In fact, no directions ever were issued and the section was repealed as it was inappropriate following the issuance of BT stock to the public. Section 94 of the 1984 legislation provided a similar type of directive power, but it is applicable to any "person to whom this section applies" and not just BT. Furthermore, section 94(6) now provides for compensation to public telecommunications operators for losses incurred as a result of such directions.

Conversely , s. 7(1) and (2) of the Act (which were not repealed in 1984) required the corporation to consult with the Secretary of State before it constructed, manufactured or produced things of any kind to an extent substantially greater than what was constructed, manufactured or produced in the previous three years or things of a kind that it did not construct, manufacture or produce during the previous three years. In addition, s. 8 which still exists requires Secretary of State approval before the corporation can construct, manufacture, produce or purchase things of any kind to a substantial extent otherwise than for the purpose of use by the corporation or its subsidiaries.

In broad terms, these provisions place potentially severe restrictions on BT's ability to expand, diversify or generally react in a competitive manner to changes in a competitive environment. The aim of these sections was to ensure that BT did not extend its activities into other areas that the government wished to protect from competition. During the 1981-84 transition, consultations did take place with the original British Telecom but the Secretary of State never formally prohibited the company from undertaking a particular activity. Because of the close relationship of the company to the Secretary of State when it was a nationalized entity, company officers "took the hint" when the Department suggested that it had concerns with particular proposals. Needless to say, this would not be recorded.

Since the enactment of the 1984 legislation, these sections have not been used.

Under section 12(1) of the Act it was provided that the corporation would have,

> "throughout the British Islands, the exclusive privilege of running telecommunication systems, i.e. systems for the conveyance, through the agency of electric, magnetic, electromagnetic, electrochemical or electromechanical energy, of speech, music and other sounds, visual images, signals servicing for the importation of any matter otherwise than in the form of sound or visual images, and, signals serving for the actuation or control of machinery or apparatus."

It should be emphasized that this monopoly was limited to "throughout the British Islands" which raises the issue of whether international traffic originating within that territory but terminating outside it, was included in the grant of exclusivity.

Despite this section, it is interesting to note that the 1981 Act permitted the licensing of competitive services. Section 15(1) provided that a licence might be granted by the Secretary of State "after consultation with the corporation" for the running of a telecommunication system on terms and conditions as specified therein. It is this section that was used to grant the general license to provide for the competitive supply of Value Added Network Services (VANS) discussed below.

After BT's split with the Post-Office, its corporate structure underwent a major reorganization in order to decentralize the decision-making apparatus. BT's operations were split into four divisions in 1981 of which the international division operated all international communications.

Eventually, another reorganization created the five divisions that now make up British telecommunications. BT International (BTI) retains jurisdiction in that area.

BTI operates with a considerable degree of autonomy. It is run by a managing director who sits on the Board of Directors of BT itself and he together with senior executives of BTI sit on a BTI Board. The latter Board is responsible for the day to day management of BTI affairs, while matters of major strategic expense or corporate expansion require full BT Board approval.

(b) Telecommunications Act 1984

The 1981 Act was quickly outmoded. As early as 1982 new legislative developments occurred which eventually became the 1984 Act.

The most remarkable aspect of the Telecommunications Act (1984) is that from August 5, 1984, the exclusive privilege of running telecommunication systems conferred on British

Telecommunications ceased to exist. On August 6, 1984, all the property, rights and specified liabilities to which BT was entitled became property, rights and liabilities of a successor company. British Telecommunications, the original structure, continues to exist in order to honour pension obligations and to act as the transferor in foreign jurisdictions where formal transfers of patent and trade mark rights are required. It carries on no business as such and once the obligations have been honoured, will be wound up. The successor company, namely British Telecommunications plc was wholly owned by the Crown until the 1984 public offering of BT stock, discussed above.

The Act provides in section 1 that there shall be a Director General of Telecommunications, appointed by the Secretary of State and removable only for incapacity or misbehaviour.

The legislation regarding the duties and functions of the Secretary of State and the Director under the 1984 Act are drafted in such a way as to invite confusion as to the authority of each. Section 3(1) and (2) both state in part that "the Secretary of State and the Director shall each have the duty to exercise the functions assigned or transferred to him by or under part II or III of the this Act in the manner in which he considers is best calculated ...". There follows in each subsection a list of functions, none of which is specifically described as being under the authority of the Secretary of State or the Director. While in

theory one might reasonably expect that the Secretary of State would concentrate on political and policy aspects of these functions and the Director on the regulatory aspects, there is no such neat distinction in the legislation. In practice however, the division of powers set out in subsequent sections of the Act is sufficiently clear that there is no overlap in fulfilling the duties out in Section 3.

In the international telecommunications context, the Act is a surprisingly aggressive piece of legislation. Section 3(2) requires the Secretary of State and Director to exercise their respective functions in the manner in which they consider best calculated:

> "(e) to encourage major users of telecommunication services whose places of business are outside the United Kingdom to establish places of business in the United Kingdom;
>
> (f) to promote the provision of international transit services by persons providing telecommunications services into the United Kingdom;
>
> (g) to enable persons providing telecommunications services in the United Kingdom to compete effectively in the provision of such services outside the United Kingdom;
>
> (h) to enable persons producing telecommunication apparatus in the United Kingdom to compete effectively in the supply of such apparatus both in and outside the United Kingdom".

In actual fact however, neither the Secretary of State nor the Director has done anything in respect of these subsections since they came into force. The view is that these provisions were inserted as a result of lobbying from pressure groups who wanted a public signal that the Director in particular would not be totally inward looking in his approach to his duties.

The 1984 Act operates on a licensing basis, that is, it prohibits the running of a telecommunication system within the United Kingdom unless that person has been granted a license under s. 7 of the Act. It should perhaps be noted that this is not a license to utilize a particular frequency for transmission, but simply a license permitting the running of the system at all.

Under s. 5(2) of the Act, it is an offence to connect a telecommunication system within the United Kingdom to any other telecommunication system or any apparatus which is not authorized by a license to be so connected. Accordingly, this licensing system can restrict or increase the number and types of international interconnection of telecommunications systems transmitting into or out of the United Kingdom. In BT's case for example, that company is simply licensed to interconnect with foreign systems. It would be most unlikely for a licence to exclude a particular carrier from interconnection, although countries might be excluded on the basis of national security or diplomatic relations.

How does the licensing system work in practice? The value added network service (VANS) is a good example. While basic public telecommunication system licenses have only been issued to BT, Mercury and the City of Hull anyone may sell VANS or any of these systems as a result of a general licence i.e. one available to anyone meeting the relevant conditions, issued in 1982; at present there are more than 800 VANS in operation in Britain, provided by over 180 operators acting under this licence.

Because the general licence for VANS was issued under the 1981 Act, anyone wishing to offer the service must register; there are, however, no grounds to refuse registration.

On March 11, 1986, the Minister of State for Industry and Information Technology announced that a new licence would be issued to liberalize even further the provisions of VANS. A single class licence lasting 12 years would be issued under the 1984 Act, applicable to all but public telecommunications operators (PTO), authorizing provision of all VANS and of essentially all basic conveyance services other than voice and telex. Licensed services would have to be transmitted between premises by fixed links provided by the PTO's and simple resale would be prohibited. Different licence conditions would apply to operators depending upon their financial strength (and thus their potential to distort competition). Those affected by fair trading obligations because of their size would be required to register

with OFTEL. They would also be required over time to permit access and use of their services by means of Open System Interconnection (OSI) standards to guard against bottlenecking. Existing permitted uses of international private leased circuits would be extended and the Government has indicated that it will continue to press for the widest possible multi-lateral liberalization of international telecommunications.

A draft licence is being circulated for comment and it is intended to have the new license agreed to prior to August, 1986 when the existing licence expires. It is worth noting that BT and Mercury have agreed in principle to the modification of their existing licences by the Director General of OFTEL (referred to below) so as to prevent unfair cross-subsidization and to require the provision of OSI facilities, again to prevent bottlenecking.

In contrast to the VANS licensing procedure, a general licence was issued under the 1984 legislation in respect of "branch systems" (known as private branch exchanges or PBXs in Canada). Under this scheme anyone can operate such a system as of right without registration. The trend in the UK is to move toward the automatic licensing contemplated by the 1984 Act.

It is perhaps worth emphasizing that the licensing system of telecom carriers in the U.K. is political and totally discretionary. Subject to general common law provisions regarding

judicial review of administrative decisions, there is no appeal from a decision to license or refuse to license a particular applicant.

Although there is no statutory prohibition as noted earlier, the British government has made it clear, for example, that it will not issue any additional nationwide public fixed link licences until 1989 other than those already granted to BT and Mercury.

Licences are issued by the Secretary of State after "consultations" with the Director. This consultation takes the form of an exchange of letters, nominally on a confidential basis. There is no prohibition against the release of this correspondence and the personality of the incumbent Director is such that he has on more than one occasion released some of his correspondence to the public.

As might be expected in such a licensing process, there is no statutory right to object or otherwise intervene in the process. In practice, the Secretary of State tends to open the process to public comment if in his opinion the issues are of public significance. He has done so in the cases of licences being granted to public operators i.e. BT and Mercury and in the cases of public licences, as noted in the VANS discussion above.

There is also a statutory procedure involving Parliament in the case of public telecommunication systems, although this process can be restricted to one of information only should the government so choose.

3.2.3 General and specific role of OFTEL and other relevant U.K. government agencies highlighting the characteristics which may be of particular interest to Canada more particularly the coming into being of OFTEL at the time of the privatization of British Telecom and the transition to a competitive regime in telecommunications.

The efforts towards liberalization of the telecommunications market in the United Kingdom have brought forth a plethora of supervisory institutions which shall be briefly reviewed.

(a) The Secretary of State for the Department of Trade and Industry

The principal functions of the Secretary of State under the 1984 Telecommunications Act having international implications are:

(1) to appoint the Director General of Telecommunications (section 1);

(2) to grant licenses and approve contractors (sections 7 and 20);

(3) to designate public telecommunication systems (section 9);

(4) to approve telecommunication apparatus and meters; (sections 22 and 24) and to delegate these functions (section 25);

(5) to make grants and loans to persons exercising certain functions (section 26);

(6) to recognize bodies representing consumers, purchasers and users (section 17);

(7) to impose requirements as to information to be marked on telecommunication apparatus or given in advertisements (sections 28 and 29);

(8) to give directions in the interests of national security (section 94);

(9) to make orders and schemes (passim); and

(10) to modify, repeal or amend certain enactments and instruments (section 109).

In discharging these functions, he is to be guided by the factors noted above, contained in sections 3 (1) and (2) of the Act. Notwithstanding these extensive powers, the Secretary of State has really done little if anything in the international forum since the Act came into force. However, this may simply be a reflection of the U.K.'s general satisfaction with the functioning of international organizations such as the ITU and INTELSAT.

There is an ongoing debate with the Director regarding international traffic, the latter office pushing for more competition than currently exists. However, in the view of BT, Mercury may already have an advantage in some countries in that it is a subsidiary of Cable and Wireless plc which controls telephone operations in some overseas jurisdictions i.e. Hong Kong. If there was evidence of such a preference, BT would pressure the Director to take corrective measures.

(b) The Director-General of the Office of Telecommunications

A major innovation brought about by the 1984 Act was the creation of OFTEL as an independent office. The Secretary of State, as previously noted, appoints the Director-General which heads OFTEL. The current Director-General is Mr. Bryan Carsberg, an accounting professor from the London School of Economics, who is assisted by a staff of approximately 100 civil servants.

OFTEL was created as a check on the dominance that BT was expected to have for the foreseeable future in the competitive infrastructure in the U.K. Essentially, the office is designed to ensure fair competition and fair prices. OFTEL's relevant general powers and responsibilities with respect to international telecommunications under the 1984 Act include:

(1) licensing and attaching conditions thereto as it may be delegated by the Secretary of State of DTI (section 7);

(2) the modification of licence provisions (section 12);

(3) Referring specified matters to the Monopolies and Mergers Commission (section 13);

(4) The enforcement of license provisions (section 16);

(5) Approval of contractors and of apparatus and meters as may be delegated by the Secretary of State of DTI (sections 20, 21 and 24);

(6) To keep under review, the carrying on both within and outside the United Kingdom, of activities connected with telecommunications (section 47);

(7) To collect information with respect to commercial activities

connected with telecommunications carried on in the United Kingdom and the persons by whom they are carried on (section 47);

(8) To give information, advice and assistance to the Secretary of State or the Director General of Fair Trading with respect to matters within his jurisdiction (section 47); and

(9) To investigate complaints and exercise specific functions formerly vested in the Director General of Fair Trading (sections 49 and 50).

In practice, if the Monopolies and Mergers Commission makes an adverse finding against a telecom licensee, it is the job of the Director-General to negotiate terms for altering the offending conduct.

More importantly perhaps, it is OFTEL that is very largely responsible for determining the speed with which the U.K. transforms its telecom infrastructure from a monopoly environment to a competitive one.

While OFTEL has been reasonably aggressive in the intranational context, on the international scene it has been conspiciously quiet. This however, reflects the constraints on OFTEL's jurisdiction, in that international arrangements fall

within the purview of the Secretary of State and questions of local interconnection to provide such services - to the extent that they may be regarded as collusive agreements - lie within the sole jurisdiction of the Director-General of Fair Trading.

(c) The Monopolies and Mergers Commission

As noted above, the Director has the permissive power to submit references to the Monopolies and Mergers Commission for an investigation and report on the question

> "(a) whether any matters which relate to the provision of telecommunication services or the supply of telecommunication apparatus by a person authorized by a license under s. 7 above to run a telecommunication system and which are specified in the reference operate, or may be expected to operate, against the public interest; and
> (b) if so, whether the effects adverse to the public interest which those matters have or may be expected to have, could be remedied or prevented by modifications of the conditions of that license". (s. 13)

The Secretary of State has the power to require the Commission not to proceed with the reference but only if this is required in the interest of national security or relations with the government of a country or territory outside the United Kingdom. As a matter of fact there have been no such references or stop orders in connection with the BT licence.

If the reference proceeds, it is the Director's duty to assist the Commission in providing any information or other assistance available to him and the Commission, in considering the matter, is required to have regard for the matters respecting the duties imposed on the Secretary of State and the Director under s. 3 referred to above.

When the Commission reports on its reference, it is required in its conclusions to state what matters operate, or may be expected to operate, against the public interest and to specify those adverse effects. In such cases, it is also required to specify any licence modifications that could remedy or prevent these adverse effects.

The Commission's report is submitted to the Director who, in cases where licence modifications have been recommended, is required to make such modifications "as appear to him requisite for the purpose of remedying or preventing the adverse effects specified in the report" (s. 15(1)). However, prior to making such modifications, the Director must give notice to all affected parties with an opportunity to submit representations or objections and here again the Secretary of State is permitted to direct the Director not to make any modification on the grounds of the interest of national security or relations with foreign governments.

The 1984 Act assigns some of the previous responsibilities of the Director General of Fair Trading to the Director General of Telecommunications. It should be noted that the jurisidiction assigned to the Director General of OFTEL is limited to telecommunication matters and is specifically stated to be exercisable by that Director concurrently with the Director General of Fair Trading. Under s. 50(4) before either Director exercises any of this concurrent jurisdiction, he is required to consult with the other Director, "and neither Director shall exercise in relation to any matter, functions transferred by any of those provisions if functions transferred by that provision have been exercised in relation to that matter by the other Director".

(d) The Director of Fair Trading

Although the Director-General of Fair Trading was divested of its jurisdiction with respect to the monitoring of anti-competitive commercial practices, it still retains investigative power in the telecommunications industry over mergers and restrictive trade agreements. This jurisdiction is to the exclusion of that of OFTEL which has no power over these commercial practices. This decision has been severely criticized by the Monopolies and Mergers Commission among others as being illogical. It has never satisfactorily been explained although it

is conceded that the merger experience and expertise resides with the Director-General of Fair Trading.

It is also this Director-General who triggers action by the Restrictive Practices Court in determining agreements in restraint of trade and references to the Monopolies and Mergers Commission regarding proposed mergers and questions of public interest.

The best known recent example of this reference proceeding insofar as Canadians are concerned, was the recent reference to the Commission by the Director of Fair Trading of the issue as to whether or not British Telecommunications should be permitted to acquire a majority interest in Mitel Corp. The Director General of Fair Trading had jurisdiction because BT was proposing to acquire a significant stake in Mitel, a proposal which under British law, qualified as a merger (the Director has treated acquisitions of as little as 20% as mergers in the past).

The actual procedure is worth describing in some detail in order to understand the roles played by each party. Initially BT and Mitel signed an agreement for an agreed bid for treasury shares of Mitel. The Agreement was made public. The Director of Fair Trading advised the Secretary of State and referred the matter to the Monopolies and Mergers Commission.

The Commission issued its report recommending against approval of the agreement unless BT gave certain undertakings. The Secretary of State accepted this recommendation subject to additional undertakings. When those undertakings were given, the agreement was allowed to proceed.

The concerns that the Director had with regard to the agreement were threefold:

(1) BT might source its equipment acquisitions solely from Mitel, thereby harming U.K. manufacturers (General Electric Co., Plessey and Standard Telephones had about 90% of the market at the time);

(2) BT might deprive other distributors of access to Mitel products; and

(3) BT might use its market power to disadvantage consumers.

In response to these concerns BT was required to give and did give the following undertakings:

(1) It accepted a quota on the value of Mitel products that it would purchase for supply in the U.K.;

(2) It agreed that in any event the competitive tendering process would have to apply;

(3) It agreed not to cross-subsidize Mitel's U.K. activities; and

(4) It agreed not to engage in any joint operations (marketing, sales, etc) with Mitel.

These undertakings will be tracked at least in part by virtue of the audited statements that BT is required to provide to the Directors of Fair Trading and of Telecom in each year.

It is interesting to note that with regard to competition in the international scene, the licences issued to BT and Mercury require them to agree on a code of practice to prevent "whipsawing" or the practice whereby a foreign telecom operator bids one local operator against the other in order to obtain the best settlement price for traffic exchanged between those countries. Because this is a condition of licence, this otherwise collusive agreement is outside the scope of the Director of Fair Trading's jurisdiction.

4.0 CONCLUSION

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Pressure is steadily building up in the area of international trade of telecommunication services. The proponents of free trade have a titanesque challenge to meet. They are required to convince the proponents of the controlled closed market model that the advantages of free trade are so large for anyone involved in free trade that their monopolistic model should be abandonned. However, since the message for free trade is given by the U.S. it seems to be perceived more as advocacy for a social philosophy rather than a strictly economic thesis. Some countries appear to feel threatened by the U.S. position and will probably fight every battle they can to prevent the opening up of their market. Some other countries do not seem to believe that it is possible to protect one's own national interest without a government owned and operated monopoly over international telecommunications services.

At this point in time it is certainly not possible to say for sure whether the private enterprise, open market U.S. model allows a country to adequately safeguard its national interests. This matter is further complicated by the fact that there is neither a common nor easy definition of national interest. Furthermore it is not possible to say whether the U.S. trade

balance or any other aspect of its national interest would be improved should many of its trading partners open up their markets. The U.K. experience can be useful in evaluating whether an open market is better than a closed market in protecting or improving national interest. As we have seen in the preceding chapter U.K.'s experience in passing from a monopolistic model to a somewhat open market model has definitely been to its advantage. U.K. also seems to have retained a measure of control over the number of entrants it allows into the system through its licensing process which is characterized by the high degree of political discretion that can be exercised in the granting of these licenses. In the U.S. there exists also a licensing process although it appears to be fairly insulated from political influence.

It seems difficult therefore to understand why there would be so strong an opposition when there are mechanisms in place which would prevent an open sky situation to materialize. Faced with a situation that could be described in Harvard talk as a no-win situation, the U.S. government is left with little choice. It will most certainly increase its rounds of talks, negotiations and discussions on a bilateral basis and it will also participate more intensely in the coming international conferences. It certainly gives all the signs that it will be well prepared and fully briefed for the WATTC-88 which it considers

as a very major event and an excellent opportunity to put its views forward. The U.S. House of Representatives was apprised of the fact that the U.S. awareness of the importance of the ITU was not sufficiently recognized. The House's attention was brought to bear on the following evidence of U.S.'s lack of recognition of the ITU.

"- U.S. insistence on a no-growth budget for the ITU despite the constant escalation of requests by the U.S. for ITU consideration.

- Repeated threats to pull out of ITU.

- In certain instances, a lack of preparation for ITU conferences

- Inadequate representational efforts, such as making sure that proxies are submitted on behalf of absent administrations." (2)

Finally, one must also keep in mind that the U.S. body politic may become more determined to deal with the unfairness it perceives in international telecommunications services by adopting legislation in the nature of HR 3131. This would inevitably bring about real chaos in international trade. It is only after

the November 1986 election that it will become possible to assess whether the U.S. will continue in its attempts to persuade its trading partners or if it will attempt to force them to open their markets.

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