THE IMPLICATIONS OF THE PRIVATIZATION OF SPACE TELECOMMUNICATIONS ON INTERNATIONAL ORGANIZATIONS

by

STEVE BOCHINGER

Institute of Air and Space Law
McGill University, Montreal
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ABSTRACT

If the privatization of space telecommunications, because of its impacts, has been subject to various studies, this thesis focuses the analysis of this phenomenon on a particular point: its implications on international organizations.

Because of the evolution of the sector, international satellite organizations have undertaken for around ten years several internal reforms that lead today to the privatization of the three major organizations: Intelsat, Inmarsat and Eutelsat. These transformations constitute a particular sensitive issue as these organizations have been initially established so that to exploit satellite systems for the general interest of their members.

The impact of this phenomenon is no less considerable on the ITU, in charge of the international regulation, from a regulatory but also structural point of view. Moreover, the liberalization of telecommunication market undertaken under the aegis of the WTO grants to this organization a new major place in space telecommunication regulation.

RESUME

Si la privatisation des télécommunications spatiales a fait l'objet, de par son impact, d'un grand nombre d'études, cette thèse concentre son analyse sur un point particulier : ses impacts sur les organisations internationales.

L'évolution du secteur a poussé les organisations internationales de satellites à entreprendre depuis une dizaine d'années une série de réformes internes qui mènent aujourd'hui à la privatisation des trois principales organisations : Intelsat, Inmarsat et Eutelsat. Ces transformations représentent un sujet particulièrement sensible puisque ces organisations ont été initialement mises en place afin d'exploiter des systèmes satellites dans l'intérêt de leurs membres.

L'impact de ce phénomène est non moins considérable pour l'UIT, responsable de la réglementation internationale applicable, tant d'un point de vue réglementaire que structurel. De plus, la libéralisation du marché des télécommunications entreprise sous l'égide de l'OMC confie à cette organisation une place majeure dans la réglementation des télécommunications spatiales.

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INTRODUCTION

"The Space Revolution of the mid-twentieth century must be regarded as the most significant of all those great revolutions of history which have affected the fate of man".[1] This statement in 1965 by James G.Allen illustrates perfectly the enthusiasm resulting from the first endeavours in space. The space revolution is unique because it represents an extraordinary challenge in many fields, technically, financially, politically, and the pace with which it occurred commands admiration if one looks back one or two decades before its advent. If space was for a long time recognized as the land of the gods and exalted mystical feelings, it is today used as an efficient mean to improve everyday life. Space conquest has been marked by several stages that shows the evolution of the relation between man and this new environment from a political, socio-cultural as well as economical point of view, and as Byrnes stresses, space programs are today less a matter of romanticism as it used to be in the 60's than of a real pragmatism.[2]

The first stage constitutes the space exploration period. During the first two decades a kind of excitement was attached to space discovery. Politics and programs developed by NASA typify the willingness to confer a romantic feature to the first space explorations. That was translated by multiplications of references to explorers of the 15th century, as Christopher Columbus, but also to the Greek and Roman mythologies, particularly by the names given to space programs (Mercury, Gemini and Apollo).[3] In addition, these programs lay within the framework of the confrontation between the two superpowers during the cold war. As part of political and military strategies, space programs had to demonstrate the superiority of a nation over the other. We can recall that the successful launch in October 1957 of the first artificial satellite Sputnik 1 by the Soviet Union was

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[1] J.G. Allen, "Historical and Philosophical Background of the Space Age", in A.A.S. Science and Technology Series, *Impact of Space Exploration on Society* (San Francisco: William E. Frye, 1965) 13 at 13.

[2] M.E Byrnes, *Politics and Space Image Making by NASA* (Westport: Praeger, 1994) at 47ff.

[3] *Ibid.* at 63.

perceived as a real shock by the American population and had as a direct consequence the creation of NASA.

After the time of attempts and first discoveries, came space exploitation for scientific and industrial purposes in the early 70's once enough experience was gained.[4] Exploration was then considered of secondary importance, tangible benefits and economic returns from the exploitation of space becoming the primary objective. Even though military applications remain a major part of activities undertaken in outer space, this rational vision led to an impressive development of commercial activities with terrestrial applications and as a result to a decreasing implication of the public sector to the benefit of the private sector ever more involved since the 80's.

Telecommunications represent this evolution perfectly. By the potential it offered, this new technology was soon considered as a real revolution as it could meet the increasing needs of man in the field of communication, that could not be satisfied until then by terrestrial applications.[5] Satellite technology showed all the advantages of communications via space and even though it was first used for long distance applications, technical improvements allowed fantastic growth of satellite capacity, decreasing cost and diversifications of services.[6] Then, while satellite telecommunications, for their political and strategical implications, were undertaken mainly by States until the 70's, they constitute today by far the major commercial space activity, counting for around 80%, with an increasing involvement of the private sector.

The analysis of the implications of the telecommunications privatization phenomenon requires first and foremost a clarification of this concept which has been subjected to

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[4] L. Benzoni, "Club, monopole, marché : enjeux de l'organisation économique de l'espace", in P. Kahn, ed., *L'exploitation commerciale de l'espace : droit positif, droit prospectif* (Paris: Litec, 1992) 19.

[5] The writer Edward Everett Hale is considered to be the first to have conceptualized the notion of artificial satellite in a serial in the Atlantic Monthly in 1869. The idea was to launch an artificial moon to help sailors to navigate (the "Brick Moon"). Before Arthur C. Clarke discovered the geostationary satellite orbit and demonstrated its usefulness, a German writer, Herman Oberth, proposed in 1923 that a crew in a rocket in orbit could communicate with the Earth with signals sending by mirror. In the early 40's, George O. Smith wrote an article in which an artificial planet would function as a relay station between Venus and the Earth. See D.D. Smith, *Communication Via Satellite: a Vision in Retrospect* (Leyden: A.W. Sijthoff, 1976) at 15-18 [hereinafter *Communication Via Satellite*].

[6] See A.Dupas, *L'âge des satellites* (Paris: Hachette, 1997).

many confusions, particularly with the notion of commercialization.[7] Commercialization and privatization are two different notions, however they are strongly connected.

Commercialization means the action to commercialize, that is to make something the object of a commerce. Then, commerce can be define as the purchase, sell or exchange of goods or services. As stressed Silvestrov, commercialization is a functional concept which can characterize any activity under some criteria. One main element of commercialization is the payment of a pecuniary compensation for the provision of services or goods under contract.[8] As a result, under He Qizhi "space commercialization denotes the rendering or selling of services, such as satellite communication, remote sensing, launching of space objects, etc., as well as the manufacture, transfer or exchange of space products for certain remuneration".[9] However, Silvestrov points out that the payment is not sufficient to characterize, by itself, a commercial activity, and that another essential factor is the goal of the provision of the service or goods, profit-making.[10]

Commercialization must be distinguished from privatization since a public entity can undertake a commercial activity. Privatization is the action to transfer to the private sector what was the responsibility of State. In the space field, privatization expresses "the transition of government owned and operated civilian space activities to strictly private ownership and operation, or civilian space activities originated through private ownership".[11] This general evolution has largely concerned telecommunications. Thus, private sector investment in telecommunications satellites was evaluated to US$ 54.3 billion (including launch) between 1996 and 2000, with additional US$ 70 billion in

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[7] The "Land Remote Sensing Commercialization Act" of 1984 illustrated this confusion since it used the term "commercialization" whereas its main purpose was to privatize the Landsat program. G. Silvestrov, "The Notion of Space Commercialization", in *Proceedings of the Thirty-Third Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1990) 33 at 91.

[8] *Ibid.* at 90.

[9] H.E Qizhi, "Legal Aspects of Commercialization of Space Activities", in *Proceedings of the Thirty-Third Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1990) at 58.

[10] Silvestrov, *supra* note 7 at 90.

[11] Qizhi, *supra* note 9.

satellite communications ground stations.[12]

Development of telecommunications has been characterized for 40 years by a strong influence of international organizations and their latest developments might have fundamental consequences in the industry. Actually, two kinds of international organizations must be distinguished, which explains, that we will study them separately. On the one hand, as telecommunications were a new technology, States decided to exploit in common satellite networks, in the form of international cooperatives. Then, international organizations in question here are those which have been created for the purpose of operating satellite systems. Intelsat has been the first organization of this kind and is historically the most important one. Other similar international satellite organizations (ISOs) were created either at international level, like Inmarsat or Intersputnik, or at regional level, as Arabsat or Eutelsat. Privatization of telecommunications implies fundamental consequences for these organizations since conditions under which they have been created have disappeared and they must adapt themselves to this new environment. Our analysis on the impact of this phenomenon on this kind of organizations will primordially focus on Intelsat, Inmarsat and Eutelsat for two principal reasons : firstly, they constitute the major international satellite organizations, and secondly, they react in a similar way since the direct consequence of the privatization of telecommunication is their own privatization.

On the other hand, we will consider "traditional" UN-type international organizations. The International Telecommunication Union (ITU) has been traditionally the central international organization in the telecommunication field by setting up the applicable regulation. The impact of the privatization phenomenon on this kind of organization is no less important and will be examined from two angles. First of all, it has direct effects on ITU's regulation and structure since it is becoming imperative to take into account these new actors. Moreover, the quasi-exclusive role the ITU played in the past in telecommunication is challenged by the emergence of the World Trade Organization (WTO) as a new regulator in this field.

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[12] It does not include Russian and Chinese investments. E J. Reinstein, "Owning Outer Space" (1999) 20 J. Int'l L. & Bus 59 at 59.

CHAPTER I/ INTERNATIONAL SATELLITE ORGANIZATIONS

This kind of organizations appeared in the 60's with the creation of Intelsat and represents a great achievement of their time since States decided to exploit jointly in a cooperative form a new technology which implied considerable financial involvement in an era of political turmoil. The enrollment of private corporations to a market traditionally reserved to States progressively has changed the face of telecommunications services and has led to the privatization of the three major organizations: Intelsat, Inmarsat and Eutelsat. Because they have been predominant in the telecommunication market and are the object of the same process, the study of the ISOs will focus on these three organizations, even though some developments will be dedicated to Interputnik which has engaged different but decisive modifications.

SECTION 1/ COMPARATIVE ANALYSIS OF INTELSAT, EUTELSAT AND INMARSAT AS INTERGOVERNMENTAL ORGANIZATIONS

Notwithstanding that Intelsat, Inmarsat and Eutelsat were set up on different grounds, their structures and functions have many identical aspects. Indeed, they were built on the same model, which explains that, in order to avoid unnecessary repetitions, the analysis of these common aspects will be done simultaneously.

All these three organizations have been created by Agreements comprising :

- an Intergovernmental Treaty ratified by States, dealing with the structure and functions of the organizations,
- an Operating Agreement signed by States or their Signatory, concerning operational, technical and financial aspects.

The choice to set up the organizations by two separate instruments was motivated to take

into consideration the different role of governments and their designated entities.[13] The original concept of Signatories is common to these organizations and finds its genesis in the Intelsat Agreements. It designates the public/private entities (the national telecommunications operators) entrusted by their national States to participate in the operational field of the organization on their behalf.[14] Each Signatory contributes to the capital of the organization in proportion to its investment share determined in the Operating Agreement. Relations between a State and its Signatory are governed by national law. State Parties are not liable for obligations under the Operating Agreements, which met the opposition of the Soviet Union during negotiations of Inmarsat's Agreements, and they must give their instructions (to which Signatories are bound) to ensure that the Signatory would not act contrary to the constitutive instruments.[15] Finally, should a Signatory withdraw from the Agreement, it would not affect the membership of the State concerned (which must accept the withdrawal).

I/ Origin and purposes

A/ Historical background

1/Intelsat

1.1) Intelsat as part of the US foreign policy

Following, the resounding success of the launch of Sputnik 1, which placed the Soviet Union in a leader position in the space run, the United States had to address a quick and strong reply in order to keep pace and not to be overtaken. It is in this context that appeared in the United States the project to set up a world wide communication system. Because of the utmost importance of telecommunications technology, considered as a

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[13] D.M. Lieve, "INTELSAT in a Changing Global Environment", in *Proceedings of the Thirty-First Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1988) 361 at 362.

[14] For instance France Télécom for France, and Comsat for the United States.

[15] N. Jasentuliyana *et al.*, *Manual on Space Law*, vol. 1 (New York: Oceana, 1979) at 444-445.

strategic issue during the cold war, and because of the willingness on the part of the US to anticipate and thwart an eventual Soviet satellite system, it seems that, as Mr Colino asserts, "the origins of INTELSAT Organization are thus, in a sense, rooted in the worldwide rivalry between the Soviet Union and the United States in all its dimensions".[16]

It was not conceivable in the 60's to undertake any satellite telecommunication system out of an intergovernmental framework for several reasons. It contained fundamental political implications, required extraordinary investments and involved a new technology. Furthermore, telecommunications were considered to be a State monopoly and private company could not support the inherent risks of such activity.[17] As a consequence, the satellite system the United States intended to launch had to be set up at the intergovernmental level.

The first step toward the creation of such an organization came from President Kennedy in 1961 who invited the international community, including the Soviet Union, "to participate in a communication satellite system, in the interest of world peace and close brotherhood among people throughout the world".[18] By this invitation to an international cooperation, the US wanted to attract as many countries as possible, particularly developing countries, and to isolate the Soviet Union.[19]

After the Kennedy proposal, several entities (US agencies, Congress, firms) met to discuss on the form of such communication system, whether the Government should be involved and to what extent.[20]

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[16] Richard R. Colino, as cited in M.C. Prémont, "L'Entreprise Privée sur la Scène des Télécommunications Internationales par Satellite" (1986) XI Ann. Air & Sp. L. 259 at 264-265.

[17] C. Roisse, Discussion Paper ("The Role of International Organizations in Privatization and Commercial Use of Outer Space", Third United Nations Conference on the Exploration and Peaceful Use of Outer Space, July 1999) 131 [hereinafter *Discussion Paper*].

[18] Prémont, *supra* note 16 at 264.

[19] See *Ibid.*

[20] See W. Bahar, *Coordination of Separate Communications Satellite System under the INTELSAT Agreements: Legal Analysis* (LL.M. Thesis, Institute of Air and Space Law, McGill University, 1991) at 6ff [unpublished]; A.M. Field, "INTELSAT at Crossroads" (1994) 25 Law & Pol'y Int'l Bus. 1335.

By the Communications Satellite Act in 31 August 1962,[21] the Congress affirmed the national interest in establishing, in cooperation with other countries, a commercial satellite system to improve global communications for public needs and peaceful purposes,[22] and settled the question of the participation of the United States in such a system. The question was to know whether, regarding the activity concerned and its implications, US interests should be represented through a governmental entity or a commercial system. The Act did not opt for any of these radical solutions and by creating Comsat, it set up an hybrid entity, in the form of a private corporation best suited to carry the technology but with public obligations.

Because of its particular obligations, Comsat was subject to special government regulation and enjoyed privileges so as to be able to fulfill its requirements.[23] This was translated into a monopolistic position in the market that already stressed all the ambiguity that would characterize the Intelsat system.[24] Comsat was often denominated as "carrier's carrier" since it provided satellite communications services on an exclusive basis in the United States not directly to end users but to "traditional" carriers.[25]

Under the Act Comsat is charged to ensure the respect of some principles as non-discriminatory access and maintenance of competition. The corporation is supervised by the government (President, NASA, FCC, Congress) and foreign participation in the

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[21] For an historical background of the Act, see J.T Kildow, *INTELSAT: Policy-Maker's Dilemma* (Toronto: Lexington Books, 1973) at 3ff; J.C. Glassie , "Analysis of the Legal Authority for Establishment of Private International Communications Satellite Systems" (1984) 18 Geo. Wash. J. Int'l L. & Econ. 355.

[22] *Communications Satellite Act*, Pub. L No. 87-624, 76 Stat. 423 (1962) [hereinafter *Comsat Act*]. Section 102 a) provides that:

> it is the policy of the United States to establish, in conjunction and in cooperation with other countries, as expeditiously as practicable commercial communication satellite system, as part of an improved global communication network, which will be responsible to public needs and national objectives, which will serve the communications needs of the United States and other countries, and which will contribute to world peace and understanding.

[23] *Ibid.*, § 102(c) "in order to facilitate this development and to provide for the widest possible participation by private entreprise, United States participation in the global system shall be in the form of a private corporation, subject to appropriate regulation".

[24] Kildow, *supra* note 21 at 43ff.

[25] Glassie, *supra* note 21 at 357.

company is limited.[26]

1.2) From the Interim to the Definitive Agreements

After negotiations on the form of this global communication system, a compromise was finally reached between the United States and European partners.[27] The establishment of the international telecommunication system Intelsat results from the conclusion of the Interim Agreements signed by eleven States in Washington on 20 August 1964.[28] Since satellite telecommunications were not a mature technology, it was not foreseeable at this time to create definitively and directly an operational organization. It was then decided to conclude interim agreements, which would be renegotiated if the experience turned out to be successful.[29]

Under the Interim Agreements, Intelsat is a consortium of telecommunication entities whose membership is conditioned upon an investment in the system. The system consists of a space segment, owned by all Signatories and operated by Intelsat, and the ground segment, property of each State.

Comsat, designated as the US entity in international satellite organizations, was granted a dominant position in the system.[30] With more than 50% investment share in Intelsat's capital, the corporation enjoyed a veto and, as a result, controlled the decision-making process. Under the Interim Agreements, Comsat had the responsibility of the design, development, construction, operation and maintenance of the space segment, since the consortium had no legal personality. It characterized a conflict of interest as the company

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[26] See Bahar, *supra* note 20 at 10-14.

[27] Comsat expressed three initial propositions: to own the system and lease channels to foreign agencies, (which was unacceptable for Europeans); to create an intergovernmental universal organization; to adopt a mixed solution from the former propositions. European were favourable for an intergovernmental organization from which they could gain technological spin-off. *Ibid* at 17-19. However, Comsat imposed two unnegotiable characters of the entity: its single and commercial nature. See Kildow, *supra* note 21 at 8.

[28] They comprised an intergovernmental agreement, "Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System", and an agreement among entities designated by States.

[29] N.M. Matte, *Aerospace Law : Telecommunications Satellite* (Toronto: Butterworth, 1982) at 108.

[30] Kildow, *supra* note 21 at 49.

played the role of Signatory and manager at the same time.

By establishing a US corporation as manager of the system, the United States placed Intelsat under the American regulation. The international character of the system could be justified solely by its composition but was entirely dominated economically, politically and legally by the United States.[31]

Nevertheless, many changes occurred after the conclusion of the Interim Agreement: Intelsat developed its activities and its fleet to four satellites, the membership grew up to 80 States in early 1969 with an increasing participation of developing countries and a majority of countries did not accept any more the control and domination by Comsat. European countries undertook negotiations until the definitive Agreements during which the opposition between their interests and those of the US showed up clearly. While the latter wanted to retain to the maximum extent as possible control of the system and technological spin-off, the former entered in the system to catch up on the American technology and called for the recognition of the possibility to set up separate regional systems.[32]

These new negotiations led to the conclusion of the Definitive Agreements signed in Washington on 20 May 1971: the Agreement Relating to the International Telecommunications Satellite Organization (Intelsat Agreement), signed by States, and the Operating Agreement Relating to the International Telecommunication Satellite Organization (Operating Agreement), signed by Governments or public/private telecommunication entities that they had designated.[33] They entered into force on 12

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[31] "INTELSAT became an extended version of the Comsat Corporation for its interim period, a kind of joint venture with a dominant partner, the United States, instead of an international organization based on equal international participation". *Ibid.*, at 9.

[32] Bahar, *supra* note 20. Europeans, participated to 25% of the capital of the consortium, but were allocated only 4 % of the hardware contract for Intelsat III satellite. They claimed that contracts had to be attributed on the basis of the capital invested by the countries. As for Comsat, it asserted that contracts should be awarded to the manufacturer which provided best services, quality and prices (which meant the American industry). *Communication Via Satellite*, *supra* note 5 at 142.

[33] *Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT)*, 20 August 1971, 23 U.S.T. 3813, T.I.A.S. No 7532 [hereinafter *Intelsat Agreement*]; *Operating Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT)*, 20 August 1971, 23 U.S.T. 4091, T.I.A.S. No. 7532 [hereinafter *Intelsat Operating Agreement*].

February 1973 and they determine Intelsat objectives and functioning.
The Definitive Agreements ended Comsat's control on the Intelsat system and established a transition period. A Secretary General was named until 31 December 1976 and Comsat managed technical and operational services of Intelsat under the supervision of the Board. At this date, a Director General replaced the Secretary General and was entrusted more powers. Then, Comsat operated the system under the supervision of the Director General until the end of its six year contract, in January 1979.[34]

2/Inmarsat

The creation of Inmarsat was motivated by the necessity to improve communications for ships at sea following maritime tragedies of the XXth century.[35] Moreover, maritime transportation was a huge industry involving high levels of investments. Therefore, traffic had to be optimizing, its management improved and delays reduced.[36] Safety and financial considerations led to the conclusion that ships could not be let with insufficient reliable communication links with the ground. Even though, wireless telegraphy was at the end of the XIXth century the first real mean of communication between ships and the land, satellite communications appeared to be a revolution. Indeed, it would allow a global coverage and continuous service, relieve congestions in traditional HF bands, improve the reliability, quality and speed of communications.[37]

Then, under the auspices of the International Maritime Consultative Organization (IMCO), today the International Maritime Organisation (IMO), discussions were undertaken in order to set up a maritime global communications system, and in March 1972 a panel of experts was set up to study this issue.[38]

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[34] *Communication Via Satellite*, *supra* note 5 at 151. From the loss of the management of the system by Comsat, the US policy changed from asserting the need of a single global telecommunications provider to supporting competition for international telecommunications services. See *infra*.

[35] See A.A. Majid, *Legal Status of International Institutions: SITA, INMARSAT and EUROCONTROL Examined* (Aldershot: Dartmouth, 1996) at 65 [hereinafter *Legal Status*].

[36] *Manual on Space Law*, *supra* note 15 at 439.

[37] *Ibid.*

[38] See *ibid.*, at 440ff.

Due to their attachment to the dogma of single global satellite system, the United States were categorically opposed to the creation of another international organization separate from Intelsat and expressed several propositions.[39] First, they suggested to set an international consortium opened to national and international entities, and without legal personality. Before the general opposition of the other nations, the United States then supported the notion of "user organization" within the IMCO which did not meet either any success. Finally, they proposed to carry maritime communications through Intelsat. As one could have expected, this alternative met the absolute opposition of the Soviet Union since it was not party, with its "satellite" States, to the organization controlled at this time by Comsat. Despite all these attempts, the United States remained in a minority position and it was concluded that a separate and independent body should be created.

A Conference on the "Establishment of an International Maritime Satellite System" took place in London on April-May 1975 and recognized the need for an international organization carrying out a world wide maritime satellite communication system. Due to some disagreements on key issues, as the investment share or the responsibilities of major organs, a second session met in February 1976. Finally, the Inmarsat Convention and Operating Agreement were signed on 3 September 1976 and instituted the International Maritime Satellite Organization (renamed International Mobile Satellite Organisation in December 1994) which came into being on 16 July 1979.[40]

Inmarsat was not directly operational and before the organization operated its own satellite system, maritime communications were carried by MARISAT satellites, managed by Comsat since 1976. Finally, Inmarsat took the control of MARISAT on 1 February 1982 and became operational.[41]

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[39] *Ibid.*

[40] *Convention on the International Maritime Satellite Organization (INMARSAT)*, 3 September 1976, 1143 U.N.T.S. 105 [hereinafter *Inmarsat Convention*]; *Operating Agreement on the International Maritime Satellite Organization (INMARSAT)*, 3 September 1976, 1143 U.N.T.S. 213 [hereinafter *Inmarsat Operating Agreement*]. The third session gathered forty-seven States and twenty-three intergovernmental agencies.

[41] *Legal Status*, *supra* note 35 at 70-71. Inmarsat started its services by using MARISAT, MARECS and Intelsat V satellites.

3/ Eutelsat

The idea to create a regional satellite communication system came up very early in Europe. Indeed, it represented the major claim of European countries during negotiations of the Intelsat Definitive Agreements which were strongly opposed to the American willingness to submit all satellite communications to the monopoly of Intelsat. Then, Eurospace, a European aerospace consortium, emphasized the necessity of such a system as early as 1967.[42]

Eutelsat was created on the initiative of the European Conference of Postal and Telecommunications Administrations (CEPT), and under the auspices of the European Space Agency (ESA), which decided in 1977 to establish an organization for the conception and exploitation of a European commercial space telecommunications system.[43] Following this decision, a provisionary Agreement was signed on 13 mai 1977 and created Eutelsat (European Telecommunication Satellite Organisation). As Intelsat, the European system, composed by seventeen PTT administrations, took in a first step an interim form and came into being on 30 June 1977.

3.1) Interim Eutelsat

Two objectives were assigned to Interim Eutelsat: to develop a regional European satellite communications system, expected to carry one third of European public traffic, and to set up a mobile satellite telecommunication service.[44] It was decided that the system should comprise two space segments, controlled by ESA, one for fixed satellite service (European communication satellite, ECS) and another for mobile maritime service (MAROTS).[45]

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[42] *Communication Via Satellite*, *supra* note 5 at 142. France and Germany experimented the first satellite communication program, "Symphonie", that showed the ability of European countries to cooperate in a strategic field. This program set the basis for a European communication system with the "OTS" project, a prototype telecommunications satellite, build by ESA and launched by NASA in 1977. S. Courteix, "EUTELSAT: Europe's Satellite Telecommunications" (1984) Michigan Y.B. of Int'l. Legal Studies 87 at 89 [hereinafter "Europe's Satellite"].

[43] See C. Morrow, "Le système EUTELSAT" (1986) Ann. fran. dr. int. 803.

[44] "Europe's Satellite", *supra* note 42 at 88.

[45] *Ibid.* The first additional agreement on fixed satellite service was adopted in March 1978 and entered into force on 14 September 1978. The second agreement related to MAROTS entered into force on 22 October 1977.

Interim Eutelsat signed a contract with the European Broadcasting Union (UER) in 1982 to fulfill its goals. It gave UER full-time and exclusive use of two transponders of the space segment for a ten-year period. Finally, we can note that four countries financed half of the ECS system: France and United Kingdom 16,4% each; Italy 11,48%; Federal Republic of Germany 10,82%.[46]

As far as its provisionary structure was concerned, Interim Eutelsat, composed by twenty States, consisted of an Assembly of Parties which dealt with general policies; an Administrative Board entrusted with the management of the space segment of ECS and a General Secretariat. Since the Interim organization had no legal personality, the French PTT was designated as its representative.

3.2) The Definitive Agreements

The intergovernmental conference, meeting in Paris in May 1982 and composed by the twenty member States plus Liechtenstein, Monaco, St Marino and St Siege, adopted the final Agreements, clearly inspired by Intelsat and Inmarsat.[47] The constitutive instruments consist in two agreements: the Intergovernmental Convention Establishing the Organization and the Operating Agreement. They were opened for signature on 15 July 1982 and permanent Eutelsat came into being and succeeded to Interim Eutelsat, on 1 September 1985.

B/ Missions

Intelsat, Inmarsat and Eutelsat systems have found themselves entrusted with missions that are on many aspects similar. Besides, the fulfilment of their objectives is subject to the same principles.

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[46] *Ibid.*, at 90.

[47] Some authors have wondered if the best solution was to follow the model of an organization like Intelsat whose convention was written eleven years earlier. They have pointed out that it could not allow Eutelsat to adapt itself adequately to further telecommunications developments. Morrow, *supra* note 43 at 804.

1/ Scope of activities

Created for the purpose of providing world wide or regional, for Eutelsat, telecommunications services, the International Satellite Organizations act as cooperatives of national telecommunications operators financed and managed by Signatories of the Operating Agreement to which they wholesale their space segment. Thus, Intelsat was not established to provide services directly to end-users but to public or private entities designated by governments, the Signatories, which provide the services within their national market. To this end, these organizations carry the design, development, construction, operation and maintenance of a space segment of a telecommunication satellite system on a commercial basis.[48]

The main purpose of Intelsat is to pursue the development of a "single" world satellite telecommunication system necessary for public services of international telecommunications.[49] Intelsat must develop a satellite system to provide its services in all areas of the world (universality principle) and shall be the unique world satellite telecommunication system. However, the term "single" does not appear in the agreement itself which allows, as we will see, the creation of other systems under conditions. The space segment may be also available for domestic and specialized services, other than military, under the conditions that it does not impair Intelsat's prime objectives and services.[50] Today, the organization operates services to more than 400 customers in more than 200 countries, in addition, more than 60 countries still depend entirely on Intelsat for their international communications.[51]

Eutelsat's broad objectives are more or less similar to Intelsat but at the European level.[52]

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[48] *Convention Establishing the European Telecommunications Satellite Organization "EUTELSAT"*, 15 July 1982, reprinted in (1986) XI. Ann. Air & Sp. L. 416, Art. III [hereinafter *Eutelsat Convention*]; *Inmarsat Convention*, *supra* note 40, Art. 3; *Intelsat Agreement*, *supra* note 33, Art. II(a). The space segment gathers the satellites but also tracking, monitoring and controlling facilities that are necessary for the functioning of the satellites.

[49] *Intelsat Agreement*, *supra* note 33, Preamble para. 4.

[50] *Ibid.*, Art. III(c) & (d).

[51] There are 143 members.

[52] See "Europe's Satellite", *supra* note 42 at 91.

Its main purpose is to provide a space segment necessary to international public telecommunications services in Europe, including television (Article III(a) of the Convention).[53] As Intelsat, this space segment can also be used for domestic public telecommunications services for areas separated by others "which do not fall under the jurisdiction of the same party" or separated by the high sea (Article 3(b)). Moreover, the organization may make its space segment available for specialized public telecommunications services (excluding military purpose system).[54] Eutelsat provides services of several kinds to Europe, Asia, Africa and America, as the delivery of Internet backbone, satellite news gathering, telephony, mobile voice, data and positioning services. The major activity of the organization remains television (80%),[55] but Eutelsat has to face in this field a growing competition, particularly from Astra, operated by SES (Société Européenne des Satellites). The organization membership has been enlarged to non CEPT members, comprises fifty member States and work through a close collaboration with the European Space Agency and national space agencies.

As far as Inmarsat is concerned, the organization, composed of eighty-six members in 1999, was initially entrusted with the development of a "space segment for the improvement of maritime communications, distress and safety life at sea, efficiency and

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[53] A Coordination was necessary between Eutelsat and Intelsat under Article XIV of the Intelsat Agreement to ensure the compatibility between the two networks and to avoid a significant economic harm to Intelsat. In 1979 a Resolution of the Intelsat Assembly accepted the establishment of competing systems and in 1980 the Assembly admitted the creation of Arabsat and Eutelsat. A technical coordination occurred between Intelsat and Eutelsat in 1982. For the coordination procedure, see *infra*.

[54] The Eutelsat Convention gives to public and specialized services a definition close to the Intelsat Agreement. *Eutelsat Convention, supra* note 48, Art.1:
Public telecommunications services are

> fixed or mobile telecommunication services which can be provided by satellite and which are available to the public, as telephony, telex, facsimile, data transmission of radio and television programs between approved earth stations having access to the Eutelsat space segment for further transmission to the public; multiservice transmissions; and leased circuits to be used in any of these services.

Specialized services are defined as those

> provided by satellite, other than those defined [above], including, but not limited to, radio navigation services, broadcasting satellite services, space research services, meteorological services, and remote sensing of earth resources.

[55] See "Eutelsat Income and Usage Jumped in 1990 Due to TV" *Communications Daily* (6 June 1991).

management of ships, maritime public correspondence services and radio determination capabilities".[56] Beside these traditional services, Inmarsat has extended its activities in the 80's to provide global mobile satellite communications to ships, land users and aircrafts.[57] By an amendment to the two constitutive instruments in 1985, the Assembly charged the organization to undertake aeronautical mobile satellite telecommunications services. In January 1989 another amendment allowed the organization to provide land mobile satellite communications services.[58] Today, Inmarsat provides a wide range of mobile services,[59] the most important of which is undoubtedly the Global Maritime Distress and Safety System (GMDSS). While the former system for maritime distress and safety communications made ships able to alert other ships for assistance, the GMDSS allow them to contact shore and authorities for rescue as well. The system was put into service on 1 February 1992 and consists of several safety related services.[60]

2/ Guiding principles

The constitutive agreements of Intelsat, Inmarsat and Eutelsat, which establish the organizations under a same model, set a number of common principles that must be respected when the ISOs lead their activities.[61] A major character of these organizations is their hybrid nature: while being granted an intergovernmental structure they shall provide public economically viable telecommunications services. As provides the Intelsat

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[56] *Inmarsat Convention*, *supra* note 40, Art. 3(1).

[57] A.A. Majid, "Modernization of the INMARSAT Constitution" (1996) XXI: 6 Air & Sp. L. 271 at 274-275 [hereinafter "Modernization of Inmarsat"].

[58] The first amendment came into force in 1989, the second in 1997.

[59] To over 150 000 users.

[60] Other maritime services provided are: Internet services and electronic mail; ship management applications, SMA, including inventory monitoring and control, engine and hull performance monitoring; telephony; data and video transmission; maritime safety information... Aeronautical satellite services include phone, fax and data services for passenger, air traffic control, operational and administrative communications... See B. Mullan, "Inmarsat's Role in the Global Maritime Distress and Safety System (GMDSS)", *Inmarsat Corporate Fact Sheets* (November 1999), on line: <http://www.inmarsat.com/newsroom/facts/factsheets/gmdrole.pdf> (last update: 23 October 2000); D. Featherstone, "Inmarsat Aeronautical Services", *Inmarsat Corporate Fact Sheets* (September 1999), on line: <http://www.inmarsat.com/newsroom/facts/factsheets/aerofact.pdf> (last update: 23 October 2000).

[61] *Discussion Paper*, *supra* note 17 at 132.

Agreement, the organizations "shall have as [their] prime objective the provision, on a commercial basis, of the space segment required for international public telecommunication services of high quality and reliability to be available on a non-discriminatory basis".[62]

– Respect of the Outer Space Treaty and peaceful purpose;

Preambles refer to the Outer Space Treaty of 1967 and assert the attachment to the principles it stipulates, including the principle of the exploitation of outer space for the benefit and interest of all countries.[63] Particularly, the organizations have to provide their services for peaceful purposes only and specialized services that Intelsat or Eutelsat are allowed to provide through their space segment exclude military services. Moreover, Inmarsat can not provide any of its services for ships involved in a military operation. They follow regulations established by the ITU and must cooperate closely with other international organizations which deal within their field of competence. Eutelsat is the only one to have formulated a declaration of acceptance of the Convention on International Liability for Damaged Caused by Space Objects of 25 March 1972. For the number and diversity of their members, Intelsat and Inmarsat could not express such acceptance, subordinated by Article XXII of the 1972 Convention to the condition that the majority of State members of the organization are Parties to this Convention and to the Outer Space Treaty.[64]

– Equality and non discrimination;

The organizations shall allow access to and utilization of their system on a non-discriminatory basis.[65] Then, the charge for an identical utilization of the space segment must be the same for all countries (members and non-members) irrespective of their

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[62] *Intelsat Agreement*, *supra* note 33, Art. III(a).

[63] *Ibid.*, Preamble.

[64] *Discussion Paper*, *supra* note 17 at 133.

[65] *Eutelsat Convention*, *supra* note 48, Art. III(d); *Inmarsat Convention*, *supra* note 40, Art. 3(2).

geographical location or investment share in the system.[66] However, membership and investment in the system may be subject to conditions, as the participation to other international organizations, as the ITU for instance.[67]

– Commercial management;

The commercial management principle highlights the dual aspect of Intelsat, Inmarsat and Eutelsat that are public intergovernmental institutions as well as commercial services providers. Thus, the organizations must undertake their activities "on a sound economic and financial basis, having regard to accepted commercial principles"[68] and provide "the most efficient and economic facilities possible"[69] on a cost-recovery basis. However, this commercial management does not imply that their objective is to make a profit[70] and the revenue is dedicated to cover the operating, maintenance and administrative cost of the system.[71]

II/ Constitutional provisions

The three ISOs enjoy an international personality, which enables them to pursue their purposes. Article 25 of the Inmarsat Convention provides that it includes "the capacity to contract, to acquire, to lease, to hold and to dispose of moveable and unmoveable property; to be a Party to Legal Proceedings; and to conclude Agreements with States and

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[66] *Inmarsat Convention*, *supra* note 40, Art. 7; *Intelsat Agreement*, *supra* note 33, Art. V(d).

[67] *Intelsat Agreement*, *supra* note 33, Art. XIX. Eutelsat membership was initially opened to States member to the CEPT and the ITU.

[68] *Inmarsat Convention*, supra note 40, Art. 5(3).

[69] *Eutelsat Convention*, *supra* note 48, Preamble para.5.

[70] Matte, *supra* note 29 at 111; W.D. von Noorden & P.J Dann, "Public and Private Enterprise in Satellite Telecommunications: the Example of Inmarsat", in *Proceedings of the Twenty-Ninth Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1986) 193 at 196. See *contra* C. Rourk, "Analysis of the Technical and Economic Issues Raised in the Consideration of International Telecommunications Satellite Systems Separate from INTELSAT (1994) 46 Fed. Comm. L.J. 329.

[71] Inmarsat reduced its space segment charges when it generated surplus in 1986. *Legal Status*, *supra* note 35 at 83.

international organisations".[72] Moreover, they enjoy immunities and privileges traditionally granted to international organizations by a Headquarters Agreement signed with the States of the territory where their Headquarters is established, and a Protocol on privileges and immunities.[73] As a consequence, the organizations are exempted from tax and antitrust regulation.

A/ Structure

The three organizations are characterized by an original structure which reflects their hybrid nature: an Assembly, plenary organ in which all States are represented; a Board composed of Signatories; and a permanent executive organ headed by a Director General.[74] Since their structure is almost similar, we propose to study them together.[75]

1/ The plenary organs

The Assembly of Parties constitutes the plenary organ as in any standard intergovernmental organization. As far as Intelsat is concerned, powers traditionally attached to the plenary organ are divided according to the matters between the Assembly of Parties and the Meeting of Signatories where all designated national entities are represented.

Competences that should to be allotted to the Assembly had been a controversial issue

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[72] The ICJ recognized the international personality of international organizations in *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174. The Court used a functional criteria to assert that they enjoy a legal personality in order to pursue their missions, and all competences necessary to this end. See N.Q. Dinh, P. Daillier, A. Pellet, *Droit International Public*, 5th ed. (Paris: L.G.D.J, 1994) at 570.

[73] Intelsat has its Headquarters in Washington D.C. The Headquarters Agreement was signed with the United States on 24 November 1976. The Protocol on Privileges, Exemption and Immunities signed in 1978 entered into force only on 9 October 1980. Eutelsat has its Headquarters in Paris, its Protocol on Privileges and Immunities was signed on 13 February 1987. Inmarsat has its Headquarters in London and its Protocol was signed on 25 February 1980.

[74] *Discussion Paper*, *supra* note 17 at 132.

[75] It should be noted that Intelsat has a four-tier structure, but as most institutional aspects of the organization displays similarities, we group, for convenience, the study of the Assembly of Parties and the Meeting of Signatories in the same organ category.

during negotiations of Intelsat and Inmarsat Agreements.[76] On the one hand, European, socialist and developing countries wished the Assembly to be the supreme organ and to be granted the most important powers. They asked that decisions from the Council be reviewed and confirmed by the Assembly.[77] On the other hand, the United States and Japan wanted the Assembly to have competences limited to issues concerning State Parties interests, the Council having principal powers so as to manage the system in the most efficient manner. Finally, the latter point of view prevailed and the Assembly, although the plenary organ, is not the supreme body of the organizations. It was decided that the Assembly should not deal with commercial aspects as it is first and foremost a political organ.

Composed by all State members, the Assembly of Parties has competence in the aspects "which are primarily of interest to the Parties as sovereign States".[78] It meets every two years unless an extraordinary session is requested by the Council/Board or by one third of States Parties. It takes recommendations, without per definition any binding force. The Assembly determines the general orientation of the organization, its policy and long-term objectives, considers its relations with States and other international organisations.[79] Moreover it can amend the Agreements, gives its authorization of utilization of separate systems, examines the withdrawal of a Party, and controls the conformity of the activities of the organization with its basic instruments.

Decisions and recommendations are taken under the "one State, one vote" principle, which is favourable to developing countries in Intelsat and Inmarsat Assembly. Decisions on substantive matters must be taken by a two-third majority, while decisions on

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[76] *Manual on Space Law*, *supra* note 15 at 446-447.

[77] Position which is connected to the equality and sovereignty principles.

[78] *Intelsat Agreement*, *supra* note 33, Art. VII(b).

[79] *Ibid.*; *Inmarsat Convention*, *supra* note 40, Art. 12; *Eutelsat Convention*, *supra* note 48, Art. IX. See *Legal Status*, *supra* note 35 at 72ff; M.S. Snow, *The International Telecommunications Satellite Organization (Intelsat): Economic and Institutional Challenges Facing an International Organization* (Baden Baden: Nomos Verlagsgesellschaft, 1987) at 52; "Europe's Satellite", *supra* note 42 at 93.

procedural matters need the simple majority.[80] The quorum for a meeting of the Assembly consist of the majority of States members.

The Meeting of Signatories is an institutional feature of Intelsat.[81] Composed by all Signatories of the Operating Agreement meeting once a year, its competences are enumerated in Article VIII of the Agreement. It gives its views and recommendations regarding matters to Signatories interests: financial implications of programs, general rules concerning earth stations, allotment of space segment capacity and utilization charge, withdrawal of a Signatory, annual determination for the purpose of representation on the Board of Governors... Vote conditions are identical to those of the Assembly.

2/ The Board/Council

Whatever its name (Board of Governors in Intelsat, Board of Signatories in Eutelsat or Council of Signatories in Inmarsat), this body has equivalent competences in the three organizations but its composition differs. Most important organ, the Board or Council is composed of the Signatories and deals with operational, financial and commercial decisions.

Intelsat's Board of Governors "the desirability of the number of Governors being approximately twenty",[82] and Inmarsat's Council, that groups generally twenty-two members, are characterized by a restrictive composition. There are three kinds of members:

- Signatories which own the largest investment shares (Intelsat's Meeting of Signatories determines annually the minimum investment share necessary to seat at the Board). The maximum level of investment share that a Signatory can hold is, in principle, of 40% in Intelsat and 25% in Inmarsat.
- Group of Signatories which combined their investment share in order to reach the level

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[80] The decision whether a matter has a substantive or procedural interest is taken by the Assembly at the simple majority.

[81] See Snow, *supra* note 79 at 53.

[82] *Intelsat Agreement*, *supra* note 33, Art. IX(b)(ii).

required and secure a joint representation.

- Representatives of Signatories regardless of their investment share: for Intelsat, Governors who represent at least five Signatories under regional groups determined by the ITU in 1965, and for Inmarsat, four Signatories representatives, elected by the Assembly under geographical criterion.[83]

As far as Eutelsat is concerned each Signatory has a representative at the Board of Signatories.

The Board or Council takes the most important decisions and is in charge of the design, establishing, construction, exploitation and maintenance of the organization's space segment. It adopts the budget and financial policies, considers procurement procedure for satellites, charge for the utilization of the space segment, regulations, terms and conditions of contract, intellectual property rights, appoints the Director General...[84] Moreover, the Board or Council is only asked to give due and proper consideration for views and recommendations of the Assembly, and the Meeting of Signatories as far as Intelsat is concerned. Intelsat and Eutelsat Boards meet at least three times a year, while Inmarsat Council has at least four annual meetings.

Members enjoy a vote proportional to the investment share owned by the Signatories,[85] which concentrates the decision-making process in the hands of the major investors. The Board or Council is encouraged to take its decisions at unanimity but if it fails to reach it, decisions on substantial matters (as operational issues for instance) are taken by an affirmative vote of members corresponding at least to two-thirds of the total voting participation of all Signatories and groups of Signatories.[86] Decisions on procedural

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[83] The equitable representation in this organ was an important issue of negotiations during the draft of Intelsat Definitive Agreements. Matte, *supra* note 29 at 118-119.

[84] See *Intelsat Agreement*, *supra* note 33, Art. X; *Inmarsat Convention*, *supra* note 40, Art. 15; *Eutelsat Convention*, *supra* note 48, Art. XII.

[85] No Eutelsat Signatory can hold more than 20% of the total shares.

[86] Affirmative vote of members representing at least four Signatories having at least two-thirds of the voting participation, for Intelsat and Eutelsat Board. The decision can also be taken by an affirmative vote by at least the total number of present, or represented, Signatories minus three. *Eutelsat Convention*, *supra* note 48, Art. XI(g)(i); *Intelsat Agreement*, *supra* note 33, Art. IX(j)(i).
Affirmative vote by the majority of the representatives corresponding at least to two-thirds of the voting participation for Inmarsat Council. *Inmarsat Convention*, *supra* note 40, Art. 14(2).

matters are taken at the simple majority on a "one Signatory, one vote" basis. The quorum is the majority of representatives corresponding to at least two-thirds of the total voting participation or the total number of representatives minus three (for Intelsat and Eutelsat).

3/ The executive organ

Each organization has a permanent executive organ, the Directorate carrying administrative, financial, coordinative functions. It is headed by a Director General appointed by and responsible before the Board or Council. He is the legal representative of the organization.[87]

B/ Financing

Activities undertaken by these organizations require a strict financial management. Financing is ensured by investments of Signatories in the organizations as well as charges paid by space segment users dedicated to cover exploitation costs.[88]

Since ISOs act as cooperatives, Signatories contribute to the capital in order to finance the space segment and are subject to unlimited liability. This mandatory contribution is determined in proportion to each Signatory investment share based on the degree of utilization of the space segment. Investment shares are reevaluated annually so as to square with Signatories' actual use. Capital repayments and compensations for use of capital are redistributed to Signatories according to their investment share.[89]

Furthermore, utilization of the space segment, provided on a non-discriminatory basis, is subject to fees paid by all users. The charge rate is identical for all same kinds of users and determined on a global scale. As a consequence, the price corresponds to a type of service and not to its real cost. Thus, it has often been argued that Intelsat subsidized low-

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[87] *Intelsat Agreement*, *supra* note 33, Art. XI; *Inmarsat Convention*, *supra* note 40, Art. 16; *Eutelsat Convention*, *supra* note 48, Art. XIII.

[88] *Intelsat Agreement*, *supra* note 33, Art. V; *Inmarsat Convention*, *supra* note 40; *Eutelsat Convention*, *supra* note 48, Art. 5. See "Europe's Satellite", *supra* note 42 at 94ff.

[89] Intelsat's Signatories receive usually at least 14% compensation. See D.D. Wear, "Intelsat: Evolving to Meet the Challenges of a New International Telecommunications Marketplace", in *Proceedings of the Thirty-Eight Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1995)123 at 125.

traffic areas since its system allows developing countries routes to be charged the same price than those between developed countries, even though their exploitation is more expensive.[90] The objective of utilization charge is to earn "sufficient revenues to cover operating, maintenance and administrative costs of [the organizations], and the amortization of investments made by Signatories and compensation for use of capital by Signatories" (Article 8 of Eutelsat Operating Agreement).

C/ Coordination procedure

All basic instruments of the ISOs granted the organizations a privileged position so as to protect them against potential consequences of competing systems. They contained initially a coordination procedure relating to the establishing of separate satellite systems for the provision of similar services, which were based on the model of the Intelsat Agreement, which explains that we will focus on its provisions.[91] It consists of technical and/or economic coordination according to the type of the system.

Before the divergences during the negotiations on the concept of "single satellite communications system",[92] the Intelsat Agreement came to a compromise: separate

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[90] I.B. Schwartz, "Pirates or Pioneers in Orbit? Private International Communications Satellite Systems and Article XIV(d) of the Intelsat Agreements" (1986) IX:1 Boston College Int'l & Comp. L. Rev. 199.

[91] Coordination procedures are contained in Article XVI of the Eutelsat Convention and Article 8 of the Inmarsat Convention. Article 8(1) of Inmarsat Convention provides :

> A Party shall notify the Organization in the event that it or any person within its jurisdiction intends to make provision for, or initiate the use of, individually or jointly, separate space segment facilities to meet any or all of the purposes of the INMARSAT space segment, to ensure technical compatibility and to avoid significant economic harm to the INMARSAT system.

See von Noorden & Dann, *supra* note 70 at 195; S. White, S. Bate & T. Johnson, *Satellite Communications in Europe: Law and Regulation* (London: Longman, 1994) at 115 [hereinafter *Satellite Communications in Europe*].

[92] The United States strongly supported during Intelsat Agreements negotiations the concept of single global satellite communications system. They asserted that several satellite systems would lead to technological and financial waste, as well as political confrontation, whereas a single global system would allow technical compatibility, flexibility and efficiency. But, the main motivation of the United States was that such a system would protect and develop the position of the American space industry. B.W Rein & C.R Frank, "The Legal Commitment of the United States to the INTELSAT System" (1989)14 N.C.J. Int'l. L. & Com. Reg. 219.

satellite systems were authorized under the condition that they be subject to a coordination procedure which safeguarded Intelsat's interests by protecting the organization from any technical or economic prejudice.

The coordination procedure for separate satellite system acquired, established or used by any Intelsat member is determined by Article XIV of the Intelsat Agreement which became over the years the cornerstone of the system and its most controversial principle.[93] Three different types of services are to be distinguished.[94]

Domestic public telecommunications services and specialized telecommunications services (Article XIV(c) and (e)): these services are subject to a coordination relating only to the technical compatibility of the separate systems with Intelsat space segment. In case of a domestic public system, the State concerned must enter into consultation with the Board of Governors which takes its decision through a recommendation. If the system is dedicated to provide specialized telecommunications services, relevant information given by the State to the Board of Governors are transmitted to the Assembly which takes a recommendation. We can stress that no definition has been given to the vague term "technical compatibility".[95]

International public telecommunications services (Article XIV(d)): These services are subject to a more rigorous procedure, the object of which is not only to ensure technical compatibility but also to avoid any significant economic harm to the Intelsat system. Following the advice of the Board, the Assembly gives a recommendation on the economic impact of the separate system that must not impede the establishment of direct

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[93] Article XIV found its first applications in the late 70's with the creation of regional intergovernmental systems. In 1979 Eutelsat had to coordinate its ECS system and Palapa, the Indonesian domestic system used by ASEAN countries, its first three satellites (Palapa B1, B2, and B3). Arabsat and Intersputnik (because of the Algerian participation) had been subjects to the same procedure in 1980. See Snow, *supra* note 79 at 83-89.

[94] For the definition of specialized and public telecommunications services, see *supra* note 54. These provisions are not applicable for systems solely dedicated to "national security purpose", term which seems broader than "military purpose". The State concerned is the only responsible to determine whether its system correspond to this classification. See Matte, *supra* note 29 at 130-131.

[95] The Board of Governors undertook the procedure of coordination under its own guidelines and criteria.

telecommunications links among all the participants. Once again, the Agreement gives no details on what constitutes a "significant economic harm" and several studies have been undertaken on this matter to propose criteria to delimit this notion. It is generally admitted that since the organization must ensure the cost recovery of its services, any system that would be deemed to jeopardize its financial balance should be considered to imply a "significant economic harm".[96]

The Assembly and the Board shall express their findings within six months from the beginning of any procedure. As it is admitted in international public law, recommendations have no binding force and State members have no obligation of compliance. However, we may note that States must consider recommendations in good faith and that Article XIV(a) of the Agreement provides that members "must exercise their rights and meet their obligations under this Agreement in a manner fully consistent with and in furtherance of the principles stated in the preamble and other provisions of the Agreement". Moreover, the practice has shown a general respect of these recommendations.[97]

SECTION 2/ THE NEW ORDER

The institutional structure of the international satellite organizations was justified by their mission to carry public telecommunications services in a perspective of common interest as well as by the environment in which they evolved at this time. However, telecommunication environment has radically changed from the mid 80's and circumstances which motivated the creation of these organizations do not characterize telecommunications anymore. Then, their ability to fit all developments in the

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[96] Rein & Frank, *supra* note 92 at 235. Several criteria are used to assess the economic impact of a system: date of entry into service, type of service, zone of coverage, member participating, traffic expected to be carried... Schwartz, *supra* note 90 at 215.

[97] See Bahar, *supra* note 20 at 57. One could even wonder if this constant practice had led to a customary principle.

telecommunication field structurally, economically and technically was questioned. To understand the privatization of these organizations, we have first to look at these mutations within the telecommunication industry.

I/ A new competitive environment

The emergence of competition in a market traditionally characterized by monopolies challenged the activities, and even the existence of the ISOs since it has entailed fundamental modifications of the market. As Conny Kullman, Chief Executive and Director General of Intelsat, asserted, " Intelsat is privatizing for one reason, and one reason only: to be more competitive in the burgeoning international communications marketplace".[98]

A/ Entry of competing private satellite communication systems

The entry of privately owned systems competing with Intelsat has been, without doubt, the most controversial issue discussed in the 80's, giving rise to a wealth of literature.[99] Even though it was recognized that the Intelsat system worked well until then, its position was challenged by the deregulation engaged by the United States and followed by other western countries.

1/ Evolution of the US telecommunication policy

The willingness to open telecommunications to competition appeared first in the US in the early 80's through the impetus given by the Reagan Administration who determined

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[98] "INTELSAT CEO Provides Overview of Organization's Privatization Plans To UN Conference in Vienna" *PR Newswire* (20 July 1999).

[99] See Bahar, *supra* note 20; Schwartz, *supra* note 94; S. Potamitis, "Competition in International Satellite Telecommunications Services" (1986) 44:1 U.T. Fac. L. Rev. 33; Glassie, *supra* note 21; K.A. Godwin, "The Proposed Orion and ISI Transatlantic Satellite Systems: a Challenge to the Status Quo" 24-25 Jurismetrics J. 297; Prémont, *supra* note 16; R. Frieden, "Getting Closer to the Source: New Policies for International Satellite Access" (1985) 37 Fed. Comm. L.J. 293; S. Z. Chiron & L.A. Rehberg, "Fostering Competition in International Telecommunications" (1986) 38 Fed. Com. L.J 1; L.A. Caplan, "The Case for and against Private International Communications Satellite Systems" (1986) 26-27 Jurismetrics J. 180.

new objectives for international telecommunications.[100] The first steps consisted to change the policy with respect to Comsat, which was authorized in 1982 to provide services directly to end-users, and to introduce on a national scale competition for domestic telecommunications services. Moreover, the FCC moved a step toward the authorization of the provision of international communications services when it allowed in 1981 domestic systems to extend their services to Canada, Central America and Caribbean by assessing that such services were only incidental to those initially proposed by these domestic systems and were not undertaken by Intelsat.[101] This new stance regarding domestic services foretold a more radical modification of the US policy which opened the door for competition at the international level.

Although the creation of Intelsat was a US initiative, their policy had for objective to extend their national deregulation at an international level.[102] It seemed that the reasons that justified the creation of Intelsat, as the single global telecommunications provider, had to be reconsidered. Actually, the United States had no interest anymore in maintaining a single global organization, preferring competition and development of international communications satellite systems separate from Intelsat in the interest of their national industry. This position was part of the US general policy, favourable to a maximum liberalization and privatization of space programs. Then, even though Mr Kullman stated that "it is global market forces that are driving the privatization of INTELSAT, not the will of any one Member, including the United States",[103] it is obvious that one can not deny that the US have, at least, largely influenced the restructuring of the organization by changing their policy.

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[100] See Prémont, *supra* note 16.

[101] See Glassie, *supra* note 21 at 369-373.

[102] See S. Courteix, "Les systèmes commerciaux de télécommunications par satellite", in J. Dutheil de la Rochère, ed., *Droit de l'espace*, (Paris: Pedone, 1988) 197.

[103] C. Kullman, Oral Testimony (Hearing Before the Subcommittee on Communications Committee on Commerce, Science and Transportation, United States Senate, 25 March 1999), on line: <http://www.intelsat.com/ news/policy/tes99-01.htm> (last update: 26 March 1999) [hereinafter "Oral Testimony"].

2/ The applications

From 1983, several US companies filed applications for international satellite systems to the FCC:[104]

- Orion Satellite Corporation (Orion), for non-tariffed, leased or sold transponders between Europe and North America dedicated to provide video, data and audio services to multinational companies;

- International Satellite Inc (ISI), for tariffed common carrier services and leased or sold transponders between the United States and Europe. Services proposed were video, high speed data and teleconferencing;

- RCA American Communications, Inc (RCA), for tariffed, common carrier services and leased transponders for continental United States, Europe and Africa via the use of capacity of a domestic satellite. Services proposed were video, teleconferencing and business communication.

- Cygnus Satellite Corporation (Cygnus), for leased and sold transponders between United States and Europe, with a spot beam to the Caribbean and a part of Central America. Services proposed were teleconferencing, high speed facsimile, data transmission, voice services and computer-to-computer.

-Pan American Satellite Corporation (PanAmSat), for sold and long-term leased transponders between North and Latin America and domestic services in some South American countries. Services proposed were voice, audio, video, facsimile, electronic mail, high speed data and computer-to-computer.

-Financial Satellite Corporation (Finansat), for sold or long-term leased transponders to major business on a non-common carrier basis via two satellites over Atlantic and Pacific oceans.[105]

These proposals found the support of the Reagan Administration who wanted to extend as far as possible deregulation in telecommunications services. President Reagan signed

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[104] See Bahar, *supra* note 20 at 149-153; Snow, *supra* note 79 at 89.

[105] Columbia Communications Satellite (Columbia) which proposed services between Western North America, Hawaii and Japan by sale and long-term lease of transponder, and McCaw Space technologies, Inc, (McCaw), which proposed principally services in United States, Pacific, Asia, Middle-East filed also applications later. *Ibid.*

on 28 November 1984 the Presidential Determination 85-2 by which he declared that international communications satellite systems separate from Intelsat were required in the national interest.[106] Departments of State and Commerce were asked to define criteria under which US international obligations would be respected. The following criteria were transmitted to the FCC: (1) each system must limit the provision of services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks; (2) foreign authorities are to authorize use of each system and must enter into consultation procedures in respect of Article XIV(d) of the Intelsat Agreement. By these criteria, the United States intended to limit competition to the Intelsat system and impacts on its revenues.[107]

Following these statements a large debate took place so as to know whether the proposed separate systems fell under these criteria and whether they should be subject to economical or technical coordination.[108] It was commonly objected that the upcoming of such private systems would challenge Intelsat ability to fulfill its universal service obligation. Indeed, these private competitors would focus the provision of their services on lucrative traffics, contrary to Intelsat which could not compete fairly. Then, Comsat was categorically opposed to the establishing of these systems as well as Intelsat whose Assembly urged its Members by resolutions in 1983, 1984 and 1985 not to take part in these ventures.

Finally, in July 1985, the FCC in its Separate Systems decision confirmed the national interest in the establishing of separate satellite systems and the criteria issued by the Executive Branch. Then, the Commission authorized provisional construction and

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[106] Under Section 102(d) of the Comsat Act, separates systems can be created "if required to meet unique governmental needs or if otherwise required by the national interest". *Comsat Act*, *supra* note 22.

[107] Rein & Frank, *supra* note 92 at 226-227.

[108] See Schwartz, *supra* note 90 at 220ff; Godwin, *supra* note 99 at 312ff; Chiron & Rehberg, *supra* note 99 at 27ff; Glassie at 376ff. Some applicants (Orion, Cygnus) claimed that because their systems were not dedicated to offer common carrier services, they did not intend to provide international public telecommunications services and could not be subjected to the significant economic harm criterion. Others (RCA, PanAmSat, ISI) recognized the applicability of Article XIV(d) but asserted that their system would not cause any significant economic harm.

operation of ISI, PanAmSat and RCA systems.[109]

To be effective, these systems had to follow the coordination procedure with Intelsat. In April 1987, PanAmSat was successfully coordinated with Intelsat and the Assembly of Parties finally authorized the satellite system to operate five transponders with Peru.[110] In September 1988, it received the authorization to use five transponders to extend its services to Dominican Republic and Costa Rica, and one year later its network covered the major part of the Latin American continent.[111] It became the first private satellite system dedicated to provide international services, and incarnated the end of Intelsat monopoly, the end of an era.[112]

B/ Market mutation

1 /Technological developments

Technological developments in telecommunications can be considered as a new industrial revolution and has entailed fundamental social, political, cultural and economical implications these last decades. Development of direct broadcasting, VSAT, broadcasting through telecommunication satellites or mobile communications has permitted the providing of new kinds of services largely followed by an ever-growing demand. In addition, the digitization of communications leads to technological convergence among computer, telecommunication and radiodiffusion. These factors have led to decreasing costs for providers and final users as well as to a better quality and growing capacity.

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[109] Rein & Frank, *supra* note 92 at 227. Cygnus, Finansat, Columbia and McCaw were granted a similar authorization subsequently.

[110] Snow, *supra* note 79 at 91.

[111] See Bahar, *supra* note 20 at 120-121.

[112] Orion was the second separate system to be successfully coordinated with Intelsat. The Board of Governors during its meeting in June 1989 gave its approval confirmed by the Assembly on 12 July. See "July Assembly Meeting; Intelsat Says Orion Won't Cause Significant Economic Harm" *Communications Daily* (23 June 1989) 8. It became the first transatlantic private satellite communication system to compete directly with Intelsat. The organization assessed a loss of revenues of at least US $ 369 million in the next ten years. "Intelsat Requests Protection; Intelsat Gives Go-Ahead for Orion Satellite System" *Communications Daily* (14 July 1989) 3.

Besides, the global market explosion has entailed new requirements from customers, as real time communication services for instance.[113]

Because of these developments, new conditions of exploitation and intensification of competition appeared and influenced the structure of the telecommunication industry. As notes Irvin Goldstein, telecommunications have split into two radically different markets, with different needs and actors. On the one hand there is the traditional market of international public telecommunications services for wholesale of space segment and on the other hand appeared new services for customers as multimedia and video.[114]

Besides, Intelsat had to face the emergence of fibre-optic cables, alternatives to its system and competing directly on its traditional services.[115] First to file an application in September 1984, Tel-Optik Limited was granted authorization by the FCC to lay and operate a submarine cable between Europe and North America, and in 1988 entered into service the first transoceanic fibre-optic cable, TAT 8. Since then, traffic could be carried out by other providers than Intelsat or public cables.

From the time of their apparition, fibre-optic cables never stopped carrying out an increasing traffic, their capacity doubling each year in the early 90's.[116] Studies showed that cable was expecting to move from 45 % market share to 62%, satellite services providers dropping from 55% to 38%.[117] By way of illustration, in the late 90's the largest fibre-optic cable could carry three times as much traffic as the largest satellite system.[118]

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[113] See Benzoni, *supra* note 4.

[114] I. Goldstein, "INTELSAT and Competition In International Telecommunications", (Remarks presented to the American Enterprise Institute, 14 April 1998), on line: <http://www.intelsat.com/news/policy/sp-aei.htm> (last update: 8 March 1999) [hereinafter "INTELSAT and Competition"].

[115] In the late 80's, about 60% of Intelsat revenues came from full-time international telephony.

[116] I. Goldstein, "INTELSAT: Transforming a Market Leader to Meet Changing Global Telecommunications" (1994) 47 Fed. Com. L.J. 243 at 244 [hereinafter "Transforming a Market Leader"].

[117] Wear, *supra* note 89 at 126.

[118] I. Goldstein, "International Satellite Reform: Is Technology Outpacing Regulation?" (Written Testimony at a Hearing Before the Subcommittee on Communications Committee on Commerce, Science and Transportation, United States Senate, 30 July 1997), on line: < http://www.intelsat.com/news/ policy/ p7-27tes.htm> (last update: 8 March 1998) [hereinafter "International Satellite Reform"].

However, this technology presents some drawbacks: its exploitation is expensive, it is not suitable for some services as mobile communications, and it focuses mainly on long-distance services.

2/ Necessary transformations

From the launch of its first commercial satellite "Early Bird" in 1965 until the 80's, Intelsat was found to be "the most successful space organization in the world".[119] The organization succeeded to overcome oppositions among its members which reflected larger political confrontations: Europe and the United States on the one hand, and developed and developing countries on the other hand. Its satellite system had grown from 75 circuits with Early Bird which carried out 80 hours of TV programs to 45,000 circuits in the late 80's with 61,000 hours of colour programs for occasional use TV.[120] At the end of this period, Intelsat provided services to 160 countries, 27 using its facilities for their long-distance telephone, data and television services within their territory. Its network carried two-thirds of international telephony communications and around 97% of intercontinental TV broadcasting.[121]

However, it appeared that the organization was not flexible enough to ensure its adaptation to a new competitive environment characterized by better funded corporations.[122] If activities of Intelsat's competitors were in a first time restricted, they largely developed their services which had considerable impacts on the organization. Thus, PanAmSat, major Intelsat competitor, developed a fleet equivalent to the one of the intergovernmental organization up to nineteen satellites in 1999 and could prevail to be

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[119] J.N. Pelton, "Organizing Large Space Activity: Why the Private Sector Model Usually Wins" (1992) 8 Space Policy 233 at 239.

[120] Lieve, *supra* note 13 at 361.

[121] Prémont, *supra* note 16 at 260.

[122] The world revenue of telecommunication reached US$ 600 billion in the mid 90's. (75% of this revenue came from Europe-America communications). "Transforming a Market Leader", *supra* note 116.

the first private global satellite system, covering 98% of the globe.[123]
Moreover, revenues from Intelsat's traditional activity, core business Public Switched Network, did not grow anymore, the most lucrative market becoming video, Internet, private and business network services.[124] However, Intelsat could not respond adequately to this new kind of demand since the organization did not provide services to end-users and its access was limited. In addition, the political nature of an organization constantly in search of consensus among its members did not allow Intelsat to adopt an efficient commercial strategy. As recognized Mr Kullman, "Intelsat operates in a commercial market with a structure that prevents us from being an agile competitor".[125]

Eutelsat has had to face an increased competition as well, particularly in the field of its major activity, TV broadcasting. If national satellite systems were set up in the late 80's (TV-SAT in Germany, TDF-1 in France, or Italsat in Italy), its principal competitor is SES, private company from Luxemburg created in 1985 to set up and exploit a direct broadcasting satellite service, Astra.[126]
The private system was authorized to operate a fixed and a direct broadcasting system after coordination with Eutelsat. Astra developed and expanded geographically its services, becoming a European leader in direct broadcasting satellite services. Indeed, Astra offered in 1993 fifty TV channels on three satellites providing services to forty-two million households while Eutelsat provided thirty-six TV channels on one satellite dedicated especially to TV services.[127] This growing competition in the European telecommunication market made necessary for Eutelsat to react. Nevertheless, its intergovernmental structure appeared again as an obstacle to this imperative adaptation.

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[123] R. Frieden, "Privatization of Satellite Cooperatives: Smothering a Golden Goose?" (1996) 36 Va. J. Int'l L. 1001 at 1013. Sixty satellites provided international telecommunications services and were in competition with Intelsat. Wear, *supra* note 89 at 126.

[124] L.S. Dooley, Commentary Paper ("The Role of International Organizations in Privatization and Commercial Use of Outer Space", Third United Nations Conference on the Exploration and Peaceful Use of Outer Space, July 1999) 143; "Transforming a Market Leader", *supra* note 116 at 248.

[125] L. Millstein, "Intelsat Restructuring" *Outer Space Newsletter* (July 1999) 2.

[126] E. Ducasse, *L'Europe des Télécommunications par Satellite: entre Libéralisation et Coopération* (Paris: ECSL, 1993) at 57-62.

[127] K. Maddox, "Eutelsat Eyes U.S. Networks" *Electronic Media* (13 July 1993) 24.

The entry of consortia which propose to provide global mobile personal communication services (GMPCS) via constellation of satellites challenged Inmarsat's position in the field of mobile communication services (which would represent around US$ four billion in 2004 and US$ eight billion in 2009),[128] and implied an imperative reaction from the organization if it did not want its viability, even existence, to be endangered. As a consequence, Inmarsat decided to respond to these new services by developing its personal satellite communications system (project 21, later know as Inmarsat-P).

However, it was assessed that the Council could not set up this program within Inmarsat itself due to its inherent financial and technical risks. Moreover, the very nature and composition of the Council prevented it to take quick and efficient decisions, and many States claimed for a Fiduciary Board, to allow the organization to respond promptly to the market environment.

Furthermore, Signatories refused to participate to these kinds of projects within Inmarsat, because firstly, they wanted to invest on a voluntary basis and not to be bound by their investment share, and secondly, they asked for the removal of the unlimited liability in view of risks implied.[129]

Finally, States and competitors have called for the end of privileges and immunities enjoyed by the three organizations, pointing out that they have been granted unfair advantages. They contested the monopoly concept and asserted that there was no justification anymore for privileges and immunities. PanAmSat has been one of the most

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[128] D. Sagar, "Inmarsat Since Privatization" (Paper presented to Project 2001, Legal Framework for the Commercial Use of Outer Space, Working Group on Telecommunication, Berlin, 8-9 June 2000) [unpublished version] [hereinafter "Inmarsat Since Privatization"]. These services are provided via constellation of satellites in low earth orbit (LEO). Two major competitors have been Motorola with its Iridium system (sixty-six satellites at an altitude of 780 km) and Globalstar (forty-eight satellites at an altitude of 1,414 km) for telephony and data services. Iridium was the first operational system but its financial difficulties have entailed the bankruptcy of the company which stopped its activities. Other LEO systems as Skybridge or Teledesic are expected to offer a wide range of multimedia and high speed data services.

[129] A. Auckenthaler, "Recent Developments at Inmarsat" (1995) XX: II Ann. Air & Sp. L. 53 at 57 ; D. Sagar, "The Privatization of Inmarsat", in *Proceedings of the Forty-First Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1998) 205 at 206-207 [hereinafter "Inmarsat Privatization"]. In 1996, Inmarsat's Members refused to participate within Inmarsat to another project for Satellite Navigation Services.

active in this field, filing an antitrust action against Comsat as soon as 1989 before the District Court of New York.[130] In April 1992, PanAmSat claimed for a restructuring of the organization in its white paper submitted to the US Congress, "A New Private Enterprise INTELSAT", PanAmSat President, Rene Anselmo, recognizing: "I hope to dismantle the INTELSAT system entirely".[131]

II/ The reaction: ISOs structural transformation

The organizations had to reply strongly if they wanted not to be marginalised in the market and ensure the continuity of services they provided. Before considering their privatization, they decided to undertake some fundamental changes within their traditional framework. The case of Intersputnik was not studied earlier since its features were really distinct from the three major ISOs. However, even though it did not decide to turn into a private corporation, its recent reforms reveals an important mutation for the organization.

A/ The first steps

1/ The EU action

Following deregulations in the United States, the United Kingdom and Northen Europe, the European Community decided to intervene in the telecommunication regulation in Europe. Then, the European Union's action in the telecommunication sector was initiated by two Green Papers, one in 1987 and one in 1990.[132]

The first real incursion of the EEC in telecommunications dates from the publication in 1987 of a Green Paper, followed by an action plan. This Green Paper advocated

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[130] R.A. LaCroix, "Development in International Satellite Communications in the International Space Year" (1993) 1 CommLaw Conspectus 99 at 100ff.

[131] As cited in Benzoni, *supra* note 4.

[132] See C. Roisse, "Les rapports entre EUTELSAT et l'Union Européenne" (1993) 185 R.F.D.A.S. 401 [hereinafter "EUTELSAT et l'Union Européenne"]; Ducasse, *supra* note 126 at 67-96.

liberalization, harmonization and separation between regulation and exploitation, nevertheless it should be stressed that satellite communications were not directly concerned. Several Directives were taken by the Commission and the Council in application of the Green Paper (for example Directives of 16 May 1988 on the liberalization of terrestrial equipments, of 28 June 1990 on competition in telecommunications markets). The Council Resolution of 30 June 1988, endorsing principles of the Green Paper, called for the determination of a common position on satellite communications necessary for the development of this technology.[133]

The Green Paper of 20 November 1990, "Towards Europe-wide Systems and Services-Green Paper on a Common Approach in the Field of Satellite Communications in the European Community", marks the will of the Commission to determine principles applicable to satellite communications. This Green Paper stressed that some provisions of Eutelsat's Convention (as well as Intelsat and Inmarsat for which the Commission asked for a joint action of State members to initiate amendments to the constitutive texts) were not compatible with the Rome Treaty regarding competition principles (Articles 59, 85, 86 and 90).[134] The Satellite Green Paper underlined some key issues: direct access to the space segment on an equal and non-discriminatory basis; open access to the organization; broader membership; deletion of the significant economic harm concept; commercial independence of the organization; cost-oriented policy for charge of tariffs; separation of regulatory and operational functions in State Members to avoid conflict of interest.[135]

Several Directives and Resolutions were adopted in accordance with the 1990 Green Paper:

- Resolution of the Council on 4 November 1991 on liberalization of terrestrial ground segment and access to the space segment, and the abolition of monopoly

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[133] "EUTELSAT et l'Union Européenne", *ibid.* at 404.

[134] Some scholars expressed their doubts on the preeminence of the Community Treaty on these conventions in views of principles related to successive Agreements and of the "specialia generalibus derogant" principle. See *Ibid.* at 205.

[135] See *Ibid.*; E.M. de Rivery, "Community Legal Framework for Satellite Communications: Certain Issues of Concern to the Industry", in *Proceedings of the Thirty-Eight Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1995) 37; *Satellite Communications in Europe*, *supra* note 91 at 117ff.

on terminals.

- Directive of 29 October 1993 on the harmonization of satellites earth stations equipments.
- Directive of 13 October 1994 on the liberalization of satellite earth station equipments and satellite communications services.
- Resolution of 22 December 1994 on access to space sector capacity.[136]

2/ First adaptations

The ISOs undertook their first adaptations to this changing environment in the early 90's and began to initiate several studies in this way. Thus, Inmarsat's Director General Olof Lundberg recognized as soon as 1989 that modifications were necessary, and in September 1991 the 8th Session of the Assembly created an Intersessional Working Group (IWG), which put forward its first propositions one year after, notably on commercial and operational issues. The Council decided as well to examine some financial aspects, particularly with respect to investment shares.[137] The three organizations started their modernization by deleting or reforming the significant economic harm notion, and introducing direct access and the multiple Signatories concept.

The progressive reform of the coordination procedure appears as a fundamental change, as it was a cornerstone of the systems. Intelsat and Inmarsat decided first to relax their procedures before their definitive deletion.[138] Eutelsat undertook a study on Article XVI after the Green Paper issued by the European Union. The European organization did not choose a complete removal of its procedure but rather its reinterpretation by introducing a distinction among services for its application.[139] Then, only "reserved services" remain

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[136] See de Rivery, *Ibid.*

[137] "Inmarsat Privatization", *supra* note 129 at 207-208.

[138] *Discussion Paper*, *supra* note 17 at 133; L. Ravillon, "Les organisations internationales de télécommunications par satellite: vers une privatisation ?" (1998) Ann. fran. dr. int. 533 at 540 [hereinafter "vers une privatisation ?"].

[139] C. Roisse, "Recent Developments at Eutelsat", in *Proceedings of the Thirty-Eight Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1995) 160 at 162-163 [hereinafter Developments at Eutelsat].

subject to the coordination procedure, while Members are allowed to set up separate "non-reserved" services, opened to competition (the State just has an obligation of information to the Assembly). Delimitation between "reserved" and "non-reserved" services has not been clearly drawn by the Assembly which wanted to keep a flexible notion so as not to be bound by too rigid a classification. It seems that "reserved" services concern basic telephony services.

Another evolution is the enlargement of membership and use of the space segment. For the liberalization of telecommunications and pressures of Governments to increase competition in their domestic market, it was decided to accept the access to the space segment of non-signatories entities (concept of "direct access).[140] If traditionally, only Signatories enjoyed the access to the organizations' space segment, direct access allows non-signatories to bypass these "carrier's carriers". However, we shall note that the access must be authorized by the national Signatory which determines the extent of rights and obligations of the direct access customer, which may comprise the right to invest directly in the system proportionally to its use, to participate to technical meetings...[141] However it can not enjoy any vote power. Intelsat and Eutelsat decided then to go further by adopting amendments for the authorization of multiple Signatories, concept which allows States to designate several Signatories. However, these amendments have not entered into force.[142]

3/ Intersputnik's legal and constitutional developments

3.1) Intersputnik initial structure

The creation of Intersputnik is the result of the refusal form the Soviet Union to join Intelsat, largely dominated by the United States.[143] In April 1967, nine socialists countries

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[140] Moreover, non-member States may appoint entities to cooperate with Intelsat. These "Duly Authorized Telecommunications Entities" (DATEs) can use the space segment but not invest in the system. See "vers une privatisation ?", *supra* note 138 at 543; Wear, *supra* note 89 at 125.

[141] Wear, *ibid.*, at 129-130.

[142] *Discussion Paper*, *supra* note 17 at 134.

[143] Moreover, they could not accept the principle of weighted vote or the obligation to be Member of the ITU (China and the German Democratic Republic were not party to the ITU).

(Bulgaria, Hungary, German Democratic Republic, Cuba, Mongolia, Poland, Romania, Czechoslovakia and the Soviet Union) adopted a multilateral program for cooperation in space activities, including communications, which gave birth to Intercosmos in 1970, by which they asserted their will to set up a satellite communication system.[144] The Intergovernmental Agreement on the Establishment of the "Intersputnik" International System and Organization of Space Communications was signed in Moscow the 15 November 1971 and entered into force on 12 July 1972.[145] If Intersputnik was initially established for the cooperation between States politically linked with the Soviet Union, its membership has been enlarged since then to other countries as Algeria, Yemen, Laos, Nicaragua, Germany (who succeeded to the GDR).[146] The organization, whose Headquarters is in Moscow, has a legal personality and enjoys privileges and immunities.[147]

Under its Article 1, the objective of the Agreement is "[t]o ensure co-operation and co-ordination of efforts in the design, establishment, operation and development of the communications system".[148] The space segment may be the property of the organization or leased by a State member, while earth stations are the property of the States or their operating entities.[149] Intersputnik, as Arabsat, does not know the concept of Signatories, and, unlike Intelsat, Inmarsat and Eutelsat, was founded under one single Agreement without an Operating Agreement. Then, States are the only members and are responsible for all political and economic decisions. However, States may designate a ministry or

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[144] *Manual on Space Law*, *supra* note 15 at 401-402.

[145] *Agreement on the Establishment of the "Intersputnik" International System and Organization of Space Communications*, 15 November 1971, 862 U.N.T.S. 3 [hereinafter *Intersputnik Agreement*].

[146] There were twenty-three members in 1999 and more than 100 States and private companies users (including the US and western Europe).

[147] Agreement on the Legal Capacity, Privileges and Immunities signed in Berlin on 20 September 1976.

[148] *Intersputnik Agreement*, *supra* note 145, Art. 1(2).

[149] *Manual on Space Law*, *supra* note 15 at 405. On 20 September 1976, a Protocol was concluded in Berlin between the Organization and the Ministry of Telecommunications of the USSR under which the organization uses satellites of the USSR under leases.

agencies responsible for space telecommunications to participate to the work of organization. States contribute financially to the system proportionally to their use of the space segment, and any excess of revenues is shared among Members according to their contribution.[150]

The Board (Articles 11 and 12 of the Agreement), central organ of the organization, regroups all member States on a "one State, one vote" basis. The Board seeks unanimity to take its decisions, and if it fails, the two-third majority is required. These decisions are binding only to States which accepted them. Its powers are very broad since it deals with all matters covered by the Agreement (establishing, acquiring, leasing and operating the space segment, distribution of channels among countries, election the Director General, examination of notification of adhesion by countries...).[151] The Directorate is the permanent executive and administrative body. It is headed by a Director General who is the legal representative of the organization and enjoys traditional functions.

3.2) The reform

Since the late 80's, Intersputnik had to face fundamental changes that led to the conclusion that the organization had to change its strategy. From the collapse of the USSR, but also of Czechoslovakia, to the succession of Germany to the GDR, the political situation that motivated the creation of the organization as well as the choice of its institutional structure changed radically.[152] Moreover, growth of competition and development of new kinds of services required a more attractive organization and new financial means. On the model of the three previous ISOs, Intersputnik has been granted recently a commercial nature so as to compete in the world market. However, it retains its intergovernmental character contrary to reforms undertook by Intelsat, Inmarsat and Eutelsat.

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[150] *Ibid.* at 409.

[151] See *ibid.* at 406; M. Hošková, "Intersputnik - New Legal Developments", in *Proceedings of the Thirty-Eight Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1995) 139 at 141.

[152] The USSR joined Intelsat in 1991.

The process toward reforms was initiated in 1993 during the 22nd session of the Board when it was decided that the space segment should be provided on a commercial basis.[153] A group of experts drafted a Protocol on Amendment to the Agreement and an Operating Agreement, which have been accepted by 7th meeting of the Committee of Plenipotentiaries at Warsaw on March 1994 and by the Board at its 25th session in 1995.[154] These new instruments, which totally transform the organization, will enter into force when ratified by two-thirds of States Parties. The reform introduces the concept of Signatory which signs the Operating Agreement and assumes financial liability.[155]

The new structure comprises now four organs: the Board, the Operations Committee, the Auditing Commission and the Directorate.[156]

Even though it remains a central organ, Board's competences are now limited to long term policy and objectives of the organization.[157] It is still composed of every member States and meets at least every two years. Henceforth, the Board approves resolutions on a two-third majority, each State having one vote, with a mandatory character.

The Operations Committee acts as manager of the organization and is responsible for all its operational issues. Under Article 10 of the Protocol on Amendments, the Operations Committee is responsible for acquisition, lease and operation of the space segment,

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[153] V.S. Veshchunov, "Transformation of Intersputnik's Regulatory Basis at the Phase of Commercial Operation of its Space Segment"(Commentary Paper presented to "the Role of International Organizations in Privatization and Commercial Use of Outer Space", Third United Nations Conference on the Exploration and Peaceful Use of Outer Space, July 1999) 140 [hereinafter "Transformation of Intersputnik]. In 1992 the FCC authorized AT&T and IDB to use Intersputnik as a separate system from Intelsat for communications between the USA and Russia. Hošková, *supra* note 151 at 139.

[154] G. Zukhov & V.S. Veshchunov, "Intersputnik: Developing Legal Basis of Activity", in *Proceedings of the Thirty-Seventh Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1994) 63 at 65 [hereinafter "Developing Legal Basis"].

[155] The concept of multiple Signatories is also recognized.

[156] See Hošková, *supra* note 151; "Developing Legal Basis", *supra* note 154; V.S. Veshchunov, "Legal Reform of Intersputnik in the Light of Commercialization of its Activity", in *Proceedings of the Third ECSL Colloquium* (Perugia: ESA, 1999) 78 [hereinafter "Legal Reform of Intersputnik"]; "Transformation of Intersputnik", *supra* note 153.

[157] Under Article 7 of the Operating Agreement, "resolutions concerning the goals, general policy and prospects of the Organization's activity are subject to the approval by the Board...[t]he Board can cancel or review any resolution of the Operations Committee", as cited in V.S. Veshchunov, "Reorganization of INTERSPUTNIK", *Outer Space Newsletter* (July 1999) 9 at 10 [hereinafter "Reorganization of INTERSPUTNIK"].

financial matters, and oversees Directorate's activity...[158] The Committee, which meets at least three times a year, is composed of seventeen Signatories: thirteen according to their investment share and four elected without consideration of their shares. The reform introduces a fundamental modification since the weighted vote principle prevails contrary to the traditional opposition of the Soviet Union (the maximum voting share being 25%). The Committee must seek to proceed by consensus but, if it fails, substantive matters must be voted by at a two-third majority, while procedural matters are approved by a simple majority (each member having one vote).[159] Moreover the Auditing Commission, supervisory organ on financial matters, is responsible before the Operating Committee which elect its three members.

One question the organization had to face was the "dual membership" in case members would not accept the new instruments: should they be deemed to withdraw from the organization or continue their membership under the initial structure? Several propositions have been made by some members as the automatic withdrawal of States that would not accept the new Agreement (proposition from Poland) or the dual membership (supported by Germany) which was finally approved.[160] Then, if a State does not accept the Protocol, it remains member to the original organization, which would not be without difficulties in term of efficiency since some States would be members of an organization with different bodies and rules of law-making process. Even if this solution follows traditional rules of international law, its application to a satellite operating organization may lead to several problems of management.

Finally, one important development is the joint venture concluded on 18 April 1997 between Intersputnik and Lockheed Martin, first alliance between an intergovernmental

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[158] "Legal Reform of Intersputnik", *supra* note 156 at 81.

[159] *Ibid.*

[160] "Transformation of Intersputnik", *supra* note 153; G. Zukhov & V.S. Veshchunov, "Fundamental Agreements of Intersputnik", in *Proceedings of the Thirty-Eight Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1995) 135. Under Article 30 of the Vienna Convention on the Law of Treaties, an amendment to a convention enters into force only among Parties who expressed their consent, the initial text remaining in force for States who did not accept it.

organization and a corporation. The aim of Lockheed Martin Intersputnik (LMI) is to cover all stages for the implementation of a satellite communication project from its manufacture to its operations.[161] Under Article 3 of the Agreement, the company is established to

> a) provide organisation, financing, service marketing, acquisition and operation of one or several regional or global satellite communication systems so that the customers of any country of the world could use them and
> b)execute all other legal actions required or considered to be reasonable for the above purpose.[162]

Under this Agreement, the intergovernmental organization brings its satellite operator experience, its orbital slots and marketing of transponder capacity, while Lockheed Martin provides its satellites and investments (Intersputnik does not invest in LMI).[163] LMI Board of Directors is composed of nine members, seven designated by Lockheed Martin and two appointed by Intersputnik (including the Director General). Its functions are to control the activity of the company and the execution of the Agreement. It takes the major decisions at a 80% majority.[164]

The Board of Directors admitted in July 1998 the partial participation of Khrunichev State Research and Production Space Center of Russia in LMI.[165] It enjoys no vote in the shareholding's meeting or financial rights in the venture. However, it appoints one Director in the Board which had for consequence to raise the majority to 81%. LMI expects to launch four satellites based on the A2100 platform conceived by Lockheed Martin and launched its first satellite in mid-1999.[166]

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[161] "Reorganization of INTERSPUTNIK", *supra* note 157.

[162] Agreement cited in"Legal Reform of Intersputnik", *supra* note 156 at 83.

[163] "Transformation of Intersputnik", *supra* note 153 at 142.

[164] *Ibid.*

[165] *Ibid.*

[166] "Legal Reform of Intersputnik", *supra* note 156 at 84.

B/ The privatization

The privatization of international telecommunication organizations is a general trend and marks a new stage in the cooperation between States and the private sector. This process does not affect all organizations, Intersputnik and Arabsat being not concerned for the moment. As far as Inmarsat, Eutelsat and Intelsat are concerned, they decided, more or less at the same time, to revolutionize their structure. However, they have not adopted the same form of privatization. Whereas Inmarsat and Eutelsat maintain, beside the creation of a private company, a remaining intergovernmental form, Intelsat is going into a complete privatization process.

1/ Inmarsat and Eutelsat, a similar choice

1.1) Inmarsat: an achieved privatization

Inmarsat has been the first intergovernmental organization to have restructured itself into a private entity so as to pursue its maritime, aeronautical and terrestrial mobile communications activities. After nine years of difficult negotiations among its eighty-four Members, States Parties agreed to divide the organization into a private corporate structure while keeping an intergovernmental regulatory body. The new structure entered into being on 15 April 1999.

a) The affiliate:

The first decision was to create ICO Global Communication, whose creation is the direct result of the above mentioned refusal in 1994 by major Inmarsat's Signatories to finance under the framework of the intergovernmental structure the personal satellite communications system (Inmarsat-P).[167] Instead, it was chosen to develop and operate this system by a separate and independent company incorporated under English law, ICO Global Communications, affiliate, and not subsidiary, of Inmarsat.[168] Some principles must be respected by this company when it undertakes its activities: global services,

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[167] See text accompanying note 128.

[168] "Inmarsat Privatization", *supra* note 129 at 209. The system uses twelve satellites (ten operational and two in-orbit spares) at an altitude of 10,000km in two intermediate circular orbit planes inclined at 45 degrees.

peaceful purposes, non-discrimination, confidentiality of information.[169]

The creation of ICO raised several legal issues, notably on the capacity of Inmarsat, as an intergovernmental organization, to create such private company and to transfer partially or fully its activities.[170] To answer this question, an examination of the convention of the organization became necessary. At first sight, it would seem that such a power was not granted since it was not explicitly determined by its status or justified by the *travaux préparatoires*. However, the Assembly gave in December 1994 a favourable interpretation to enable this creation, through the theory of implicit powers. Under this concept, an organization enjoys all competences necessary to the fulfilment of its purposes, even non-explicitly provided by its constitution.[171] It was assessed that in order to keep pace with technological and economic developments in the telecommunication sector, the creation of this private corporation was imperative to carry activities the organization was entrusted with.

Despite the independent character of the company, it was decided in order not to jeopardize Inmarsat's interests that a strong link between the intergovernmental organization and the affiliate had to be preserved. Therefore, Inmarsat and its Signatories retain 70% of ownership and appoint nine of the thirteen members of the Board.[172] On the other hand, in order to ensure an equitable competition, the affiliate must not enjoy any advantages from the privileged position of Inmarsat.

It became obvious that no major projects and investments would be accepted without a real and fundamental structural modification of Inmarsat. Then, the privatization was a *sine qua non* condition to keep Inmarsat viable in the mobile telecommunication satellite market.

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[169] "Vers une privatisation ?", *supra* note 138 at 151

[170] Auckenthaler, *supra* note 129 at 62.

[171] The theory finds its origin in the *Mc Culloc v. Maryland* decision of the Supreme Court of the United States in 1819. It has been largely confirmed by the international jurisprudence. See *supra* note 72.

[172] Inmarsat has a minority shareholding of no more than 15% and appoints two seats. Auckenthaler, *supra* note 129 at 61ff.

b) A controversial privatization:

This restructuring was not achieved without difficulties since many members were at loggerheads with respect to the reform to adopt. Thus, the consensus among Parties with different economical and political situations, and then different interests, was hard to reach and the several propositions for restructuring that had been submitted displayed these conflicts among members.

Contrary to developed countries, major shareholders who called for liberalization, the necessity to value their investments and the creation of a private entity, developing countries as well as former socialists States wanted to retain an intergovernmental structure and to avoid an "hegemonic financial control of the Organization".[173] Indeed, turning the organization into a corporation was equivalent to a devaluation of their influence in the decision-making process, since they did not have large shares in the capital of Inmarsat.[174] Moreover, they assessed that only an intergovernmental structure would guarantee universality and non-discrimination, principles to which they have been traditionally strongly attached.

Several propositions were suggested to reform Inmarsat. Some developing countries, in their document "The preferred option - INMARSAT revitalized", expressed their will to keep the intergovernmental aspect of the organization while bringing some modifications to allow its adaptation, and put forward their fears of entrusting a private corporation with a public service obligation.[175] They proposed to redefine the public service obligation of the organization, to maintain its integrity, to enlarge its membership, to replace the Council with a Fiduciary Board (elected by an Assembly of Signatories) and the Assembly of Parties by a Ministerial Conference with more powers, to reduce the maximum investment share to 15 % and to add a Deputy General Director (being from a developing country if the Director General is from a developed Country).[176] This

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[173] "Modernization of Inmarsat", *supra* note 57 at 278.

[174] D. Sagar, "The Privatization of Inmarsat - Special Problems", in *Proceedings of the Third ECSL Colloquium* (Perugia: ESA, 1999) 127 at 128 [hereinafter "Special Problems"].

[175] See "Modernization of Inmarsat", *supra* note 57 at 279.

[176] *Ibid.* at 279-280.

proposal met a strong opposition from developed countries and seemed not to satisfy the necessary modifications needed by the organization.

Another proposition was to turn the organization into an International Public Corporation (IPC) that would have taken characteristics of national commercial company but established by a Treaty signed by its members. This solution was not retained since studies undertaken showed that limited liability of shareholders in such a structure was not covered by a sufficient general principle of law to ensure its recognition worldwide.[177] Finally, the solution to create a national law company while keeping a remaining intergovernmental organization was found to meet the most suitably all requirements.

One of the most important stake of this privatization lay in the integrity of maritime distress and safety communication services, *raison d'être* of the creation of the organization. The restructuring could not affect these fundamental services of public interest. IMO's Maritime Safety Committee warned that any institutional changes decided should not have any consequence on the provision of such services.

c) The privatization decision:

The decision to privatize the organization has been achieved in two major stages.

The 11th session of the Assembly (27 February-1 March 1996) recognized the necessity to grant the organization a new structure as soon as possible, and adopted five fundamental basic principles as a guide to the restructuring process.[178] The new structure shall ensure continued provision of GMDSS services; a non-discriminatory access to services while taking into special consideration needs of developing countries; the provision of services to all geographical areas including rural and remote areas; and the respect of peaceful purpose and fair competition.

In addition, it was decided that some essential elements must be respected by the future structure whatever its form: preservation of the intergovernmental character of the organization, substitution of the Council by a Fiduciary Board; broad and voluntary investments; authorization of multiple investments per country; participation of external

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[177] "Inmarsat Privatization", *supra* note 129 at 210.

[178] *Ibid.*

investors; broad ownership and participation of small investors; representation of developing countries; limit of liability; fair competition; deletion of privileges and immunities.[179]

Then, the Council recommended to the Assembly in March 1998 the approval for the amendment presented by the United Kingdom in February 1997. Following this recommendation, the Assembly in its 12th session on 20-24 April 1998 officially amended the Convention and terminated the Operating Agreement.[180] It decided the privatization of the organization while retaining an intergovernmental supervision on maritime distress and safety services and other public service obligations.

In order to be efficient, the restructuring had to be quickly implemented, but Inmarsat knew because of experience potential delays for the entry into force of amendments. [181] Provisional application was found to be a solution to apply these modifications without waiting for the completion of the common procedure.[182] Recognized by Article 25 of the 1969 Vienna Convention on the Law of Treaties, provisional application has been already used to implement agreements, as for the creation of the ICAO, IMCO and Intelsat, or amendments, as the Universal Postal Union in 1964, or the ITU in 1992.[183] The question to determine whether Inmarsat Assembly had competence to decide the provisional application of the reform was controversial, since the Convention did not provide an explicit answer. However, a flexible interpretation allowed the plenary organ in its 13th Session in September 1998 to pronounce the provisional application of these amendments from 1 April 1999 (the Council was authorized to extend this date).[184] Finally, the

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[179] "Special Problems", *supra* note 174 at note vi.

[180] See *Amended Convention on the International Mobile Satellite Organization*, reprinted in *Proceedings of the Third ECSL Colloquium* (Perugia: ESA, 1999) at 191.

[181] Ratification for the aeronautical amendment took four years. The amendment for land mobile communication services took more than a decade to enter force.

[182] See D. SAGAR, "Provisional Application in an International Organization", (1999) 27 J. Space L. 99.

[183] *Ibid.* at 104..

[184] D. SAGAR, "Inmarsat Goes Private", (1999) 18-19 E.C.S.L. News 2 at 4 [hereinafter "Inmarsat Goes Private"].

amendments to the Inmarsat Convention and Operating Agreement were applied provisionally on 15 April 1999.[185]

d) The new structure:

The privatization of Inmarsat was finalized through the transfer of Inmarsat's system to two private corporations, the Holding and the Operating companies which entered into being on 15 April 1999. The restructuring contains the following main elements.[186]

A Holding and an Operating companies are created and incorporated under English law: Inmarsat Holdings Limited (the Holding) and Inmarsat Limited (the Company), which act under the principle of limited liability. The Operating Agreement is terminated and replaced by the Memorandum and Articles of Association of the Holding and Operating companies. The Holding and the Company have an identical Fiduciary Board of Directors. Since the former Council, by its composition, was not able to manage the system in a sufficiently efficient manner, it was necessary to reduce the number of members of this new Board. Because of the opposition of developing countries which did not accept a board with less than ten members, it was decide to set up a Fiduciary Board composed of fifteen members elected by the shareholders but including three members from developing countries and up to two independent members.

Inmarsat's space segment, assets and business, and the Directorate staff are transferred to the Company which continues to wholesale the space segment to earth stations operators and provides maritime, aeronautical and land mobile satellite communications services (including distress and safety services) in respect to the basic principles.[187]

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[185] Another issue concerned the fate of members that would not have accepted the reform. Could they have remained members to Inmarsat in its former structure, or should their membership have been terminated ? Contrary to Intersputnik, it was decided that, with regard to the radical change of the organization structure and functions, the amendment was binding upon all State Parties whether they accepted it or not.

[186] See D. SAGAR, "Recent Developments at the International Mobile Satellite Organization (Inmarsat)" (1998) XXIII Ann. Air & Sp. L. 343; "Inmarsat Goes Private", *supra* note 183; D. Sagar, "INMARSAT: a New Beginning" *Outer Space Newsletter* (July 1999) 6; "Special Problems", *supra* note 174; "Inmarsat Since Privatization", *supra* note 128.

[187] At the time of the transfer, Inmarsat's wholesale revenues were estimated to US$ 400 million, with more than 140,000 end-users for services available in 160 countries. It encompassed nine operational satellites and eleven communications systems.

In return of their former investment shares in the organization, Signatories receive ordinary shares in the Holding to a maximum extent of 15%, except the United States which retain their 22% share. The Holding which undertakes all commercial activities is free to raise capital even though restrictions on the trading of shares was temporarily decided so as to keep in a first time the ownership in the hands of former Signatories. Then, an Initial Public Offering (IPO) will occur in the first half 2001 to enlarge the ownership.

The companies have no immunity or privilege and enjoy the same status under national legislation, the WTO and the ITU, as other private competitors.

The amended Inmarsat Convention remains in force between the eighty-six member States. An intergovernmental organization (IGO), the International Mobile Satellite Organization (IMSO), oversees the public service activities of the new companies which must respect the five basic principles asserted by the Assembly (these principles are recalled in the Preamble and in Article 3 of the amended Convention)

The IGO operates with a "light" structure: an Assembly and a small Secretariat headed by a Director General (Article 5 of the amended Convention). The Assembly (Article 6), plenary organ, meets every two years. It has the same decision-making process that its predecessor and has for purpose to consider long-term objectives of the organization and its activities relating to the basic principles. Finally, it regards every matter concerning States relations. The Director General is granted traditional functions and ensure the day-to-day oversight of the basic principles.[188]

The IGO is granted a special share in the Holding so as to exercise its control and possesses a veto over some specific parts of the Memorandum and the Articles of Association. Finally, the IGO continues to cooperate with the UN and the Committee on the Peaceful Uses of Outer Space, and Specialised Agencies.

A Public Services Agreement (PSA) is concluded between the IGO and the companies, providing a list of detailed safeguards to ensure the respect by the companies of their public service obligations, which correspond to the basic principles set by the Assembly,

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[188] "Inmarsat Since Privatization", *supra* note 128.

and international standards and regulations.[189] To this end, the IGO is entitled to take enforcement mechanisms to monitor the company's activities.

Finally, it is necessary to mention the conclusion of the Land Earth Station Operator Agreement (LESO) between the Company and Signatories.[190] This was a sensitive issue of Inmarsat's privatization since it concerns the provision of services to the earth stations operators. In its traditional form, Inmarsat supplied the space segment at cost to the States operators, the Signatories, which owned the Land Earth Stations and provided services to end-users. Since they would not control the policy of the Company, former Signatories wanted to save their interests. The LESO Agreement guarantees that during five years, the Company provides the services at a progressive reducing cost to the earth station operators, on a non exclusive basis. Moreover, the Company cannot at this time compete with the earth station operators and resell services.

As Mr Sagar, Senior Attorney at Inmarsat, stressed:

> Inmarsat's restructuring offers an opportunity for ensuring its future viability...It also establishes a new form of constructive relationship between the private sector and governments as to the way in which space telecommunications are provided to the world community, which is expected to be followed soon by restructuring of Intelsat and Eutelsat.[191]

1.2) Eutelsat: toward privatization[192]

After consultations on potential evolutions of the organization, five major alternatives were foreseeable for the future structure of Eutelsat: keeping the organization as it was, amending the Agreements on key elements (commercialization and financing), creating an affiliate, creating a private company with a remaining intergovernmental organization,

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[189] *Public Services Agreement Between the International Mobile Satellite Organization, Inmarsat One Limited and Inmarsat Two Company*, reprinted in *Proceedings of the Third ECSL Colloquium* (Perugia: ESA, 1999) at 211.

[190] "Inmarsat Privatization", *supra* note 129 at 214.

[191] "Inmarsat Goes Private", *supra* note 183 at 4.

[192] See "Recent Developments at Eutelsat", *supra* note 139; *Discussion Paper*, *supra* note 17; C. Roisse, "EUTELSAT Privatization" *Outer Space Newsletter* (July 1999) 4 [hereinafter "EUTELSAT Privatization"]; C. Roisse, "Les Conséquences de la Libéralisation des Télécommunications en Europe sur les Activités et la Structure d'Eutelsat", 14 *E.C.S.L. News* (November 1994).

turning the organization into a purely private corporation.[193]
Considering the evolution of the European telecommunication market and the EU Green Paper, the forty-seven members agreed on May 1998 to head the organization for privatization while retaining a reduced form of intergovernmental body. The decision to privatize Eutelsat was finalized in May 1999 at the 26th meeting of the Assembly of Parties which adopted the amended Eutelsat Convention proposed by France.

It was decided to set up a private company incorporated under French law, Eutelsat SA, while retaining an intergovernmental organization that would have close functions to the IMSO. The privatization shall be effective no later than 2 July 2001, or at an earlier date in case the amendment is ratified 120 days before the original date. Eutelsat had to face the same legal problem than Inmarsat regarding provisional applications.[194] As it wanted to ensure within the deadline the application of the Amended Convention, the Assembly decided that it would enter into force through provisional application even though ratification conditions were not satisfied.

While Inmarsat privatization led to the creation of two independent companies, Eutelsat gives birth to one independent company, Eutelsat SA, whose stockholders will be actual shareholders. The Operating Agreement is terminated and replaced by the Articles of Association which determines its structure. Eutelsat SA will be composed of a General Meeting of shareholders, a Supervisory Board composed by fifteen members and a Directorate. The Assembly approved the Transfer Agreement which grants Eutelsat SA operational activities, associated assets, staff and responsibilities of Eutelsat.

The intergovernmental organization has for remaining duties to ascertain that the company leads its operations in conformity with the basic principles defined by the Assembly (non-discrimination, pan-European coverage to all geographical areas, fair competition, public and universal service) and to ensure the respect of ITU's regulation

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[193] "Recent Developments at Eutelsat", *supra* note 139 at 166.

[194] *Discussion Paper*, *supra* note 17 at 135.

for the space segment transferred to the private corporation.[195] Contrary to Inmarsat's privatization, the IGO does not hold any share in the private company, moreover it should not interfere with its commercial activities.

An Arrangement between Eutelsat SA and the IGO (equivalent to the PSA of Inmarsat) determines relationships between the two entities and defines their rights and obligations regarding the basic principles. Finally, the Assembly amended the Agreement to the Protocol on Privileges, Exemptions and Immunities and approved a draft Headquarters Agreement with France.

2/ Intelsat: privatization in progress

The privatization of Intelsat has been marked by two stages: first, members decided the creation of a purely separate commercial company, New Skies, and then formalized the own privatization of the organization in late 1999. Contrary to Inmarsat and Eutelsat, it was not decided to keep a remaining IGO, but instead to turn Intelsat into a fully private corporation. The challenge for the intergovernmental organization is to create a "New Intelsat" that meets requirements for efficiency and competitiveness while safeguarding its public services obligations. New Intelsat is expected to be formally established by 1 April 2001.[196]

2.1) Early propositions

Several propositions were formulated to restructure Intelsat. The United States were particularly active and in a joint proposal submitted in March 1996, The US government and Comsat recommended the division of Intelsat into two separate entities: an affiliate company and a remaining IGO.[197] The new company would have been publicly traded and have undertaken its activities, mainly broadcast services and private network leases, on a commercial and competitive basis. The intergovernmental structure would still have provided basic public network services, and occasional use of broadcast services as a

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[195] "EUTELSAT Privatization", *supra* note 192 at 4.

[196] As restructured, neither Intelsat nor New Skies will have the largest satellite system. They will have smaller in-orbit fleets than systems of other private global satellite operators as the PanAmSat system.

[197] "COMSAT and U.S. Government Propose Formation of Commercial INTELSAT Affiliate" *Comsat News* (15 February 1996).

cooperative. The private company would have fully been owned by the organization the first year, before a public exchange of 60% of stocks. Then, 20% more would have been sold to external investors two years after. Intelsat assets and space segment would have been divided between the organization and the new affiliate company.

A Working Party set up by Intelsat's Assembly started to study several propositions of structural modifications. The Porlamar Working Party raised three possible evolutions of the organization: a *status quo* with minor changes, the subsidiary model and the privatization.[198] During the early consultations, the full privatization of Intelsat was not the most supported option and the Working Party was largely favourable to the subsidiary model.[199] Under this scheme, Intelsat would have owned, in a first time, one or several subsidiaries that would have acted on a commercial basis and undertaken profitable activities without any privileges or immunities. The IGO would have kept a veto on specific matters and been entrusted with the original missions of Intelsat.

2.2) New Skies

The decision adopted at unanimity by the 143 members of the Assembly on 31 March 1998 to spin off a new company, New Skies NV, constitutes the starting point of Intelsat restructuring. Referred sometimes as "Dark Skies", New Skies has been created to provide the space segment for direct broadcast and multimedia services without privileges or immunity.[200] This spin-off company is registered in the Netherlands and is independent from Intelsat, even though the organization initially owns 10% shares (but without voting power). Signatories of Intelsat or entities which enjoy direct access to the space segment are in a first time the sole investors in the capital of the company, no one holding more than 17 % shares, before a public offering occurred to enlarge the ownership.[201]

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[198] Wear, *supra* note 89 at 130.

[199] *Ibid.*

[200] See "INTELSAT and Competition", *supra* note 114.

[201] Millstein, *supra* note 125. COMSAT owns 16% of New Skies. See "COMSAT Applauds New Skies Satellites, N.V. as Privatized Company Begins Commercial Service Today" *Comsat News* (1 December 1998). On 15 September 1999 the FCC approved the merger between Lockheed Martin and Comsat (Lockheed Martin holds 49% of Comsat and participates indirectly to New Skies). See "Department of Justice clears COMSAT-Lockheed Martin Merger" *Comsat News* (16 September 1999).

New Skies Board of Directors, expected to be a temporary body only, is composed by seven members elected by the shareholders, before its extension to eleven. Furthermore, there is strict separation between New Skies and Intelsat directors, officers, staff, and headquarters (a member of Intelsat Board, as well as an officer or employee of the organization, can not seat at New Skies Board).[202] Nevertheless, in order to facilitate the transition, Intelsat has temporarily assisted New Skies in information, financial, commercial, administrative and engineering issues. It has also provided tracking, telemetry, control and monitoring services to New Skies for eighteen months on a contract basis.

The transfer of ownership of space and ground segment was official on 30 November 1998. It consisted in five operational satellites plus one in construction granting the private corporation a world wide coverage (excepting transatlantic zone).[203]

2.3) New Intelsat

Intelsat undertook the process of its own privatization after the Assembly of Parties affirmed the necessity to restructure the organization during the meeting in Puerto Vallarta, Mexico, in April 1997.

The privatization of the organization has been characterized by hard negotiations among members to find a compromise between flexibility to compete in the market and the assurance to fulfill public interests obligations. As an organization of 143 member States, Intelsat privatization could be achieved only through consensus which implied multiplication of multilateral negotiations. Some fundamental principles have been specified to guide the privatization as the continuity of lifelines connectivity, fair competition, and to maximize value to customers and shareholders.[204]

After consultations, the Board determined in December 1998 four options to restructure

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[202] "INTELSAT and Competition", *supra* note 114.

[203] Millstein, *supra* note 125. The satellites concerned are: Intelsat 513 (183 degree E), Intelsat 703 (57 degree E), Intelsat 803 (338.5 degree E), Intelsat 806 (319.5 degree E), Intelsat K (338.5 degree E) and K-TV which was under construction (95 degree E). "Intelsat Transfers Satellites to New Skies Satellites N.V.", *PR Newswire* (30 November 1998).

[204] Millstein, *supra* note 125 at 3.

Intelsat: to keep the IGO structure with a flexible interpretation of its constitutive instruments, to amend specific provisions of the Agreements, to create a private corporation while maintaining a remaining IGO or to fully privatize Intelsat with mechanisms to ensure the fulfilment of Lifeline Connectivity Obligations (LCO).[205] The Board concluded in March 1999 that the last two alternatives had to be retained, leading the organization toward its privatization.

On 6-9 April 1999, the 29th Meeting of Signatories endorsed the Board position, and asserted its willingness to turn the organization into a full commercial corporation and recommended to the Board to determine the form of this privatization for the Assembly of Parties of October 1999.[206] In June, the Board of Governors reviewed several corporate models : 1) pure corporate structure, 2) modified corporate model, 3) special purpose corporation, 4) cable consortium model, and 5) modified cable consortium model.[207] It expressed preferences for the first two models and called for further studies.

The 143 members of the Assembly, meeting in Penang, Malaysia, in October 1999, ratified the schedule for the privatization of Intelsat.[208] It was decided that by April 2001, the organization shall be turned into a commercial company without privileges and immunity. In the same time, the Assembly reaffirmed that Intelsat fundamental purpose would still be to provide world wide coverage and global connectivity. The protection of lifeline users shall be guaranteed in the LCO which establishes a mechanism, for eligible countries, to continue to have capacity available on the Intelsat system after the privatization.

The final structure of the corporation was determined by the Board of Governors in December 1999. New Intelsat will take the form of a holding company, incorporated in

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[205] See D.S. Hinson, "A New INTELSAT for the New Millenium", in *Proceedings of the Third ECSL Colloquium* (Perugia: ESA, 1999) 247; Dooley, *supra* note 124 at 144.

[206] See "INTELSAT" Owners Endorse Move Towards Full Privatization" *Intelsat News* (15 April 1999).

[207] "INTELSAT Board Moves Step Closer to Privatization: Decides to Focus Its Further Analysis on Corporate Model", *Intelsat News* (18 June 1999); Dooley, *supra* note 124 at 144.

[208] "INTELSAT Members Decide to Privatize" *Intelsat News* (1 November 1999).

Bermuda.[209] The holding will own subsidiaries, namely :

- a service company that will retain the majority of the staff and operation. It will probably have its Headquarters in the United States unless no agreement is reached with respect to the satellite communications legislation of the US Congress,[210] to the immigration status of Intelsat's staff; or to its ability to remain in the current building of the organization;
- a licensing company that will manage orbital registrations. The State of jurisdiction seems not to be yet determined (it will be probably the United States or the United Kingdom).

3/ Appreciation of the privatization

3.1) The ORBIT Act

The privatization process of Intelsat is marked by tensions between the organization and the United States which may have serious consequences for the future private corporation. As we have seen, the United States have played a particular role since the creation of Intelsat. While they had been the initiators of the organization and imposed the concept of "single" global communication system, they began to question its place and role in the telecommunication market by liberalizing international satellite communications services in the 80's and have unconditionally supported its privatization. A legislation undertook by the US Congress on the privatization of the organization has led this relation to a turning point.

The controversy finds its origins in the Bill S.376 presented by Senator Burns, the *"Open-market Restructuring for the Betterment of International Telecommunications Act"* or ORBIT Act, amending the 1962 Comsat Act, by which the Congress has taken

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[209] See "INTELSAT Board Decides to Implement Holding Company Structure for the Organization Following Privatization" *Intelsat News* (8 December 1999). Intelsat LLC filed to the FCC an application to operate Intelsat's C and Ku-band global satellite system. The application concerned licenses for seventeen in-orbit satellites, ten replacement satellites, and thirteen orbital redeployment. "Intelsat LLC Files Application for U.S. Licenses" *PR Newswire* (20 January 2000).

[210] See *infra*.

provisions and set up criteria regarding the privatization of the organization.[211] This Bill, dealing directly with Intelsat, entails direct effects for the organization and may impair its restructuring process.[212]

Under its section 2, the ORBIT Act has for purpose to "promote a fully competitive global market for satellite communication services for the benefit of consumers and providers of satellite services and equipment by fully privatizing the intergovernmental satellite organizations, INTELSAT and Inmarsat". Even though provisions of the Bill apply to both organizations, it concerns above all Intelsat since Inmarsat has already been privatized. The restructuring of the organization must respect the following main requirements :

- Intelsat must be privatized by 1 April 2001,[213] otherwise the President of the United States is required to withdraw the US from the organization.
- Creation of an independent commercial company with pro-competitive structure.[214] There must be an initial public offering under the terms and conditions of the Act controlled by the FCC when licensing.
- Elimination of Intelsat privileges and immunities.[215]
- Prohibition of expansion of activities of the organization until it is privatized.[216] To this end, the FCC takes all necessary measures, including denial of licensing and the United States shall oppose to applications for any additional orbital locations.
- Conversion of Intelsat into a stock corporation, on 1 October 2001.[217]

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[211] *Open-market Reorganization for the Betterment of International Telecommunications Act*, 106th Congress of the United States, 24 January 2000, [Hereinafter *Orbit Act*]. See "Oral Testimony", *supra* note 103.

[212] Letter of C. Kullman to all Parties, Signatories and Members of the Board of Governors, *Update on U.S. Legislative Issues* (17 November 1999), on line: <http://www.intelsat.com/news/ policy/ pletter17nov.htm> (last update: 19 November 1999).

[213] *Orbit Act*, *supra* note 211, s.621(1)(A).

[214] *Ibid.*, s.621(2).

[215] *Ibid.*, s.621(3).

[216] *Ibid.*, s.621(4).

[217] *Ibid.*, s.621(5)(A)(i).

- Arms-length dealings between a privatized Intelsat and New Skies.[218]
- No transfer to any separated entity of frequencies assigned after the enactment of the Act to the organization.[219]

If Intelsat does not comply with these requirements, the Act foresees sanctions applicable to the international organization. Besides the loss of the recognition of privileges and immunities by the United States, two radical sanctions are provided: the withdrawal of the United States from the organization and the refusal of access to the US market.

As early as 1997, Intelsat Director warned the United States of an attempt to dictate the form of the restructuring :

> it would in INTELSAT's view be inappropriate and ultimately counterproductive for the US ... [to] resort to domestic initiatives that attempt to mandate specific elements of reform and threaten the imposition of severe sanctions if the specified elements are not met. Such actions may both violate the letter of US international obligations, and isolate the US in the INTELSAT forum. The result could be a dissipation of the enormous international goodwill the US has built up over more than 30 years as the principal sponsor of INTELSAT.[220]

We may express our reservations about the compatibility of the ORBIT Act with international law.[221] The United States justify their legislation by arguing that the Act concerns only the future corporation and sets conditions if this company wants to enter their national market and be incorporated under American law. However, the extraterritorial character of this so controversial Act can be raised. Indeed, its purpose is no more no less, to guide, if not to impose unilaterally, the form the international

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[218] *Ibid.*, s.621(5)(E).

[219] *Ibid.*, s.623(3).

[220] "International Satellite Reform", *supra* note 118.

[221] See P.A. Salin, "Impact of Recent US Legislation and Regulations on International Satellite Communication Regulation" (1999) 48 Z.L.W. 50 [hereinafter "Impact of US Legislation"]; "Oral Testimony", *supra* note 103.

organization must adopt for its restructuring. The Congress has not determined provisions for a private corporation subject to the US jurisdiction but, it assumed that Intelsat and Inmarsat fall under the US national legislation. It deals with international organizations that per definition are not subject to any national jurisdiction but governed by sovereign States. Then, Intelsat privatization must be accomplished through a global consensus of its 143 members and not by the will of one of its members. Illustrations of this extraterritoriality are the conditions and sanctions set for Inmarsat while the organization has its Headquarters in the United Kingdom.[222] As "US law is not international law",[223] it is regrettable that such attempts impair a process already difficult to achieve. Intelsat and its members constantly have expressed their disagreement with this Act, but despite all criticisms the US President signed recently the ORBIT Act. It seems that next developments will be decisive for the near future of Intelsat.

The direct consequence of this legislation is the potential transfer of Intelsat's Headquarters from the United States to another country. In March, tensions between the United States and Intelsat increased. The Board replied to the pending US legislation by deciding an emergency meeting of the Assembly and called for an arbitration tribunal to state if this legislation violates US international obligations, particularly the Intelsat Agreements.[224] Then, the Board is considering the option of a jurisdiction outside the United States (probably the United Kingdom or the Netherlands) and Intelsat CEO assessed that

> the possibility of selecting the US as a jurisdiction for New Intelsat is very directly affected by actions taken in the US Congress and by other US governmental agencies. Many of Intelsat's shareholders have repeatedly expressed strong discomfort with the notion that New Intelsat might remain in a country that appears, in their view, to be openly hostile.[225]

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[222] "Impact of US Legislation", *ibid.* at 53.

[223] *Ibid.*

[224] See "INTELSAT Board Voices Concern Regarding Pending U.S. Legislation; Buys Another Satellite; and Continues Progress on Privatization" *Intelsat News* (2 March 2000).

[225] C. Kullman, "Export Licence Control Briefing" (1 November 1999), on line: <http://www.intelsat.com/ news/ policy/cksp11-1.htm> (last update: 19 November 1999). The position of US authorities *vis-à-vis* New Skies has been also criticized, in particular by Mr Kullman, since the FCC has permitted US earth stations formerly serviced by Intelsat to connect with New Skies at a temporary basis "at their own risk". Mr. Kullman asked: "will the United States allow a privatized INTELSAT to compete on a level playing field or will it erect roadblocks similar to those faced by New Skies?". "Oral

3.2) Public interest services

Public interest services constitutes the cornerstone of the ISOs, their *raison d'être*. This function has been strengthened by references in the preamble of their constitutive instruments to the Outer Space Treaty of 1967, and particularly to its Article 1 and the common interest principle.[226] The legal force of this principle is subject to a large controversy, but it seems that it constitutes more a guiding principle than a full binding provision.[227] It is interesting to stress that the ISOs' Agreements do not incorporate into their *corpus* the reference to the common interest principle but only into their preamble, traditionally without any binding force. Nevertheless, we may recall that States and Signatories are required to act in compliance with the Agreements, including their preamble (Article XIV(a) Intelsat Agreement). As a consequence, the organizations shall have due regard to the common interest principle when leading their activities.[228]

Their Privatization entails a fundamental interrogation: if these essential missions were ensured by the institutional nature of the organizations, how would private corporations, whose primary purpose is to be competitive and make profits, pursue their activities without threatening public interest services?[229]

One direct consequence of this privatization is that the new private entities are not subjects of international law but incorporated under national jurisdictions. As a result, national States will have now the international responsibility for the conformity of their activities with international law and the "appropriate State" will exercise the adequate

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Testimony", *supra* note 103.

[226] "The exploration and use of the outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind". *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies*, 27 January 1967, 610 U.N.T.S. 205, Art.1 para.1. [Hereinafter *Outer Space Treaty*] This principle finds application to all space activities, including satellite telecommunications.

[227] See J. M. Filho, "Private, State and International Public Interests in Space Law" (1996) 12 Space Policy 59.

[228] See F. Lyall, "Privatisation and International Telecommunications Organisations" (1996) XXI:2 Air & Sp. L. 74 [hereinafter "Privatisation and Organisations"].

[229] *Ibid.*, at 77.

supervision.[230] Furthermore, if Eutelsat had declared its acceptance to the rights and obligations provided for in the 1972 Convention on International Liability for Damages Caused by Space Objects under its Article XXII, Eutelsat SA, as a French law private corporation, will not be subject anymore to the provisions of this convention. However, these new private entities are not released from all obligations ensued from the Outer Space Treaty, as it is largely recognized, except from a minority of scholars, that provisions of the Outer Space Treaty applies to private companies as well.

It has often been asserted that entrusting private companies with a public interest service went against their very nature and, as result, that privatization could not be seen as the best alternative. For Francis Lyall "the best protection for the concept of a global system, serving the world without discrimination, would be for INTELSAT to continue, more or less as an international public utility, deemed to be owned by mankind, for the benefit of mankind, and irrespective of the technical legalities".[231]

Full privatization was not seen as an adequate solution and it was commonly considered that the model which would ensure the respect of these public interest obligations would be: a private corporation undertaking commercial activities and an intergovernmental organization either carrying out public services activities or overseeing their respect by the private company.[232]

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[230] *Outer Space Treaty*, *supra* note 226, Art. 6. See P. Malanczuk, "Actors: States, International Organizations, Private Entities", in G. Lafferranderie & D. Crowther, eds., *Outlook on Space Law over the Next 30 Years* (The Hague: Kluwer, 1997) 23.

[231] "Privatisation and Organisations", *supra* note 228 at 78 Some scholars expressed their doubts on the ability of a private company to ensure services of public interest. Particularly, they argue that such private corporation would be at a disadvantage in comparison with its competitors and would tend to focus on profitable routes and markets. For Francis Lyall,,a private company holding a global satellite system could not guarantee a strict independence since it would be registered under one national jurisdiction. See *ibid.*

[232] "International Satellite Reform", *supra* note 118. "Vers une privatisation ?", *supra* note 138 at 151-152. Laurence Ravillon, in 1998, stated :

> [p]uisque les télécommunications internationales par satellite sont essentielles dans le développement économique, donc essentielles pour les pays en voie de développement, et que les Organisations Internationales de télécommunications par satellite ont des "obligations de service universel", l'évolution des Organisations Internationales de télécommunications par satellite, au départ des organisations hybrides, mi-politiques mi-commerciales, vers des entreprises purement privées, est impossible. Une privatisation complète ne peut donc être envisagée.

Actually, we have seen that two different solutions have been chosen for the restructuring of the three organizations since Inmarsat and Eutelsat maintain a form of Intergovernmental organization, while Intelsat opts for a full privatization. If the necessity of such fundamental structural reform is indisputable, it will be imperative to make sure that the successors of the organizations will not stray from these essential missions. It seems that the ISOs have taken all measures to ensure the provision of public interest services. Intelsat has strongly determined obligations for the future company to comply with the basic principles and, through the LCO, secured the provision of these services. Then, the challenge for these new entities will be to find a compromise, a balance, between competitiveness and public interest obligations, which will be the stake of the years to come.

3.3) Inmarsat's first year as a private corporation[233]

The company has taken several decisive decisions upon its commercial evolution and determined some market orientations for the next years. The first commercial strategy is to continue the development of global mobile satellite services (maritime, aeronautical and land mobile), particularly for wireless high speed data. After several years of indecisiveness in the former Council, the Company decided to command a fourth generation of satellites. To develop the Broadband Global Area Network (B-GAN), Inmarsat ordered three new satellites expected to be operational by 2004 to provide among others Internet, video-on-demand and video conferencing.[234]

The Company decided to enter the fixed VSAT services market, which entailed the acquisition of the company EAE Limited. This activity is led by the subsidiary of the company: INVSAT limited. Finally, Internet and e-commerce services are an important field of interest and the company acquired the Canadian company Rydex Industries Corporation which operates in e-mail services to maritime customers.

The first financial report of Inmarsat, as a private company, announced in March 2000 shows a total revenue of US$ 406.2 million with a profit on ordinary activities of US$

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[233] "Inmarsat Since Privatization", *supra* note 128.

[234] To this end, the Board approved in December 1999 an investment of US$ 1.4 billion. Inmarsat Holdings Ltd., Annual Report and Financial Statement 1999, on line: <http://www.inmarsat.org/results/index. htm.> (last update: 4 April 2000).

119.4 million and a customer growth of 32 % (over 183,000 at the end of 1999).[235] Finally, it seems that the transition from the intergovernmental status to a private corporation was operated serenely. A principal matter of interest was the provision by the private company of GMDSS services and the respect of the PSA. This first year shows an effective cooperation among the Director General of IMSO, the Company and the IMO. A report on GMDSS services submitted in June 2000 for the first Assembly since the privatization stressed the successful implementation of the PSA.[236]

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[235] *Ibid.*

[236] "Inmarsat Since Privatization", *supra* note 128.

CHAPTER II/ TRADITIONAL INTERNATIONAL ORGANIZATIONS: RECASTING THE PARTS?

SECTION 1/ THE INTERNATIONAL TELECOMMUNICATION UNION

As the ITU is traditionally the institution in charge of telecommunications regulations, any change affecting this sector has a backlash in this organization. Consequently, the telecommunications privatization phenomenon concerns directly the ITU and has a significant impact on its activities. In view of the features of the sector it is entrusted with, the ITU must be flexible enough to evolve simultaneously. Then, ITU's structural and regulatory aspects are subject to constant adaptation. Even though, the organization proved its ability to evolve *vis-à-vis* telecommunications privatization, some further major modifications are necessary in the near future if the ITU wants to keep its place and role in the sector.

I/ The ITU : an international regulatory authority in constant evolution

A/ Institutional aspects

Considering the evolution of telecommunications, including the privatization phenomenon, it was imperative for the ITU to initiate structural transformations. In comparison with traditional structures of international organizations, the ITU is endowed with some distinctive characteristics, which can be explained by its field of action. Its different bodies are classified by sector which led some to speak about a federal structure.[237]

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[237] G. A. Codding, Jr, "The International Telecommunication Union: 130 Years of Telecommunications Regulation" (1995) 23 Denv. J. Int'l L. & Pol'y 501.

1/ General background[238]

Realizing the need to set up harmonized conditions of telegraph exploitation, European States decided to create the International Telegraph Union on 17 May 1865 at the Paris Conference. Since then, the ITU showed an impressive ability to adapt itself to an ever-changing environment. As early as its infancy, the ITU took the initiative in elaborating the first regulation for telephony in 1885. With the apparition of wireless telegraphy, the Union in the 1906 Berlin Conference established the first International Radiotelegraph Convention with a separate institution, the International Radiotelegraph Union. The ITU in its modern form was set up at the 1932 Madrid Conference which decided to unify the 1865 and 1906 Conventions in order to create the International Telecommunication Union. After the second World War, it seemed imperative to modernize the organization and the 1947 Atlantic City Conference created the International Frequency Registration Board (IFRB) which led a fundamental action in telecommunications regulation. Since October 1947, the ITU is the oldest specialized agency of the United Nations and is composed today of 189 Member States.

Missions of the ITU are determined in Article 1 of its Constitution[239] and may be divided into two categories. First, the Union shall maintain and encourage as far as possible cooperation among its members for a rational and efficient use of telecommunications. This cooperation shall particularly take into account the special needs of developing countries and favour the development of telecommunications to all areas of the world. Moreover, The ITU manage the utilization of frequencies and orbital positions so as to avoid harmful interferences among users. To this end, the organization established the Radio Regulations (RR), which constitutes along with the International Telecommunication Regulations the Administrative Regulations, which has a binding force.

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[238] For a detailed overview of the history of the ITU and its conferences, see *Ibid.*; *International Telecommunication Union* (Geneva: ITU, 1993) [hereinafter *ITU*]; R.L White & H.M. White, Jr, *The Law and Regulation of International Space Communication* (Boston: Artech House, 1988); R.S. Jakhu, "The Evolution of the ITU's Regulatory Regime Governing Space Radiocomunication Services and the Geostationary Satellite Orbit" (1983) VIII Ann. Air & Sp. L. 381 [hereinafter "The Evolution of the ITU"].

[239] *Constitution of the International Telecommunication Union, Final Acts of the Additional Plenipotentiary Conference (ITU, Geneva),* 1992 (Geneva: ITU, 1993) [hereinafter *ITU Constitution*].

The 1989 Nice Plenipotentiary Conference decided to divide the International Telecommunication Convention into two instruments : the Constitution and the Convention. The former defines the purpose and structure of the ITU, rights and obligations of its members. The latter contains rules of functioning of its various organs.

2/ The 1992 structural reform

Before the reform of 1992, The structure of the ITU could be characterized by organs meeting at intervals and those which were permanent.[240]

Three organs met at intervals. The Plenipotentiary Conference, major organ of the organization, gathered all State Members and revised the International Telecommunication Convention. World or Regional Administrative Radiocommunication Conferences established the regulation applicable to telecommunications, WARCs having the ability to modify fully or partially the RR and the RARCs dealing with regional issues. The Administrative Council was a kind of executive organ.

Beside the General Secretariat, three organs were permanent. The IFRB, cornerstone of the regulation, was the most important body for the day-to-day management of the ITU regulation since its main function consisted in controlling notifications of frequencies and orbital positions assigned by States to operators. Despite the willingness of some scholars to see the IFRB as a quasi-judicial branch of the ITU,[241] this organ reflected the inability of the organization to take mandatory decisions and could be better designated as an organ of conciliation. Finally, two Consultative Committees studied technical issues: the International Radio Consultative Committee (CCIR) and the International Telegraph and Telephone Consultative Committee (CCITT).

As we have seen above, the telecommunication sector has witnessed fundamental mutations. Because telecommunications have become less of a public service but a real industry generating huge profits, the environment in which the ITU evolves is today

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[240] See Matte, *supra* note 29; A. Macpherson, *International Telecommunication Standards Organizations* (Boston: Artech House, 1990).

[241] J. I. Ezor, "Cost Overhead: Tonga's Claiming of Sixteen Geostationary Orbital Sites and the Implications for U.S. Space Policy", (1993) 24 Law & Pol'y Int'l Bus. 915 at 932.

radically different. Notably, while until the 80's the ITU represented a forum held by political considerations, it had from this time to face new factors: private and commercial interests. Then, the ITU had to make a choice, to follow this evolution or to opt for a status quo and to risk to loose its position and authority.

The 1989 Nice Plenipotentiary Conference gave the impetus for a thorough reform by mandating a Committee of Experts to undertake studies for the restructuring of the Union. The High Level Committee proposed to divide the Union into three sectors in charge of its spheres of activities: standardization, development and radiocommunication. The following Plenipotentiary Conference of 1992 endorsed this new structure.[242]

The Plenipotentiary Conference is the supreme organ of the Union (Article 7(a) of the Constitution). Composed of all Member States, the Plenipotentiary Conference is in charge of the general policy of the ITU, exercises financial functions, considers reports of the Council, revises the constitutive instruments... It meets in principle every four years.

The Council meets once a year to consider the regulation with respect to telecommunication evolutions.[243] It takes all necessary measures for the execution of the constitutive instruments, the Administrative Regulations and decisions of Conferences, controls the finances and approves the budget. Forty-six Members elected by the Plenipotentiary Conference under geographical criteria compose this organ.[244]

World conferences on international telecommunications determine principles applicable

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[242] See F. Lyall, "The International Telecommunication Union Reconstructed", in *Proceedings of the Thirty-Six Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1993) [hereinafter "The ITU reconstructed"]; *ITU, supra* note 238; B. Tchikaya, *Droit international des télécommunications* (Paris: P.U.F., 1997) at 30ff.

[243] *ITU Constitution*, supra note 239, Art. 10.

[244] Africa: 13 seats; America: 8 seats; Asia and Australia: 12 seats; Northen Asia and Eastern Europe: 5 seats; Western Europe: 8 seats. Tchikaya, *supra* note 242 at 33.

to administrations and operators.[245] They can revise partially, or exceptionally fully, the International Telecommunication Regulations.

The Telecommunication Development Sector promotes, facilitates and implements technical assistance and cooperation to expand the benefits of telecommunications, particularly for developing countries.[246] The sector is composed of regional and world conferences which meet every four years and determine general orientations and policies, as well as a Bureau headed by the Director.

The Telecommunication Standardization Sector carries out the fundamental functions of the former CCITT and CCIR.[247] It is necessary to set up universal standards so as to ensure compatibility among equipment and services, and to this end the Standardization Sector studies technical, operational and tariff issues and makes recommendations. Beside a Bureau headed by a Director, conferences examine every four years projects elaborated by study groups and formulate recommendations. Even though these recommendations constitute soft law and are not binding, States generally comply with them in order no to be technically isolated.

The Radiocommunication Sector is entrusted with the key function of the ITU: the management of the orbit/spectrum for its rational, equitable, efficient and economical use.[248] World radiocommunication conferences (WRC) revise every two years the Radio Regulations on the basis of the technical work of radiocommunication assemblies, while regional radiocommunication conferences (RRC) focus on regional issues. Former missions of the IFRB are transferred to the Radio Regulation Board (RRB) composed of nine independent members meeting four times per year.[249] Among others, the RRB

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[245] *ITU Constitution*, supra note 239, Art. 25.

[246] *Ibid.*, Chap. IV.

[247] *Ibid.*, Chap. III.

[248] *Ibid.*, Chap. II.

[249] See *ITU*, *supra* note 238. Criticisms have been formulated against the non-permanent character of this organ. See "The ITU reconstructed", *supra* note 242 at 83ff.

approves rules of procedure for the record of assignments proposed by the Radiocommunication Bureau, and study any other issues that can not be resolved by these rules. The day-to-day management of the Master International Frequency Register is the responsibility of the Bureau, headed by a Director, which is entrusted with administrative functions.

The General Secretariat headed by the Secretary General is responsible for the financial and administrative management of the organization. It implements policies and strategies of the Union, submits reports to the various organs, ensures coordination with other international organizations, relations with States...

3/ The law making process

The ITU is characterized by a strong vertical structure within its sectors guiding the normative process, from the elaboration to the adoption.

Study groups hold an essential place in the law-making process.[250] They are set up by decisions of world conferences (by radiocommunication assemblies in the Radiocommunication Sector) to study specific issues and elaborate draft recommendations. These study groups meet usually twice a year and achieve their work through another subdivision, the working parties. Each meeting of working parties is subject to a detailed report on the content of the work session to the Secretariat. Work accomplished by these bodies leads to a draft recommendation presented to the study group. Drafts should be adopted by consensus, but, if the case arises, minority opinions are reported in the document.[251]

After examination of and potential amendments to the text of the proposition, the study group presents the final version of the draft recommendation to the world conference. The text is then debated within the plenary organ which can adopt, amend or reject the proposition. Recommendations are taken at the majority of voting States, on a "one State,

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[250] K. Jayakar, "Globalization and the Legitimacy of International Telecommunications Standard-Setting Organizations" (1998) 5:2 Ind. J. Global Legal Stud. 711 at 725ff. Radiocommunication Sector study groups are : 1- Spectrum management, 3- Radiowave propagation, 4- Fixed-satellite service, 6- Broadcasting services, 7- Science services, 8- Mobile, radiodetermination, amateur and related satellite services, 9- Fixed service.

[251] *Ibid.* at 727.

one vote" basis in respect of the principle of equality among States.[252] One of the ITU's weaknesses, over which we will go back subsequently, lies in the non-mandatory character of recommendations adopted by conferences, that are soft law with a sole permissive functions. However it must be noted that the Radio Regulations adopted by WRCs have the binding force of an international instrument.

The ITU's law-making process remains imperfect and is subject to many criticisms. Then, despite structural reforms already adopted, the ITU is considering new possible institutional transformations in order to improve its efficiency. Indeed, it seems that rhythm of meetings of the various conferences and assemblies, most important events of the organization in which are discussed the essential parts of telecommunication regulations, does not correspond with modern telecommunications expectations, since these fora gather only every two or four years.[253] This industry is marked by a predominant place of private actors reasoning in terms of market, commercial and technological strategies and profits. These delays are too long to evaluate and solve critical issues linked to a sector expecting quick and efficient reactions according to its evolutions. Moreover, if study groups play already an essential role in the law-making process of the ITU, a higher flexibility in their creation seems to be imperative.

B/ Regulatory aspects

The examination of the regulation set by the ITU is essential in the analysis of the organization. However, as a multitude of literature has been dedicated to this issue, our purpose here is to give an overview rather than devoting large developments.[254] Then, we will study the evolutions this regulation is facing and the impacts of the privatization/commercialization of telecommunications on it.

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[252] *ITU Constitution*, supra note 239, Art. 3. The quorum required is the majority of the delegations authorized to vote. Adhesion of States non-Members of the United Nations or the amendment to the Constitution by the Plenipotentiary Conference require a two-thirds majority.

[253] Jayakar, *supra* note 250 at 735 .

[254] For an analysis of the ITU regulation, see L. Ravillon, *Les télécommunications par satellite: aspects juridiques* (Paris: Litec, 1997)[hereinafter *Les télécommunications par satellite*]; J. Wilson, "The International Telecommunication Union and the Geostationary Orbit: an Overview"(1998) XXIII Ann. Air & Sp. L. 241.

1/ Regime of access to the orbit/spectrum resource

1.1) Brief technical overview

First of all, to understand the regulation set up by the ITU, it is important to present, even briefly, characteristics of its central object : the orbit/spectrum. As a satellite operates as a relay which reflects waves that it has been sent, its orbit and the frequencies it uses are decisive for its exploitation.

Discovered by Arthur C. Clarke in 1945 in its article "Extraterrestrial relays", the geostationary satellite orbit (GSO) is by its characteristics the privileged orbit for satellite communications. The ITU Radio Regulations defines a geostationary satellite as a geosynchronous satellite (an earth satellite whose period of revolution is equal to the period of rotation of the Earth), "whose circular and direct orbit lies in the plane of the Earth's equator and which thus remains fixed relative to the Earth; by extension, a satellite which remains approximately fixed relative to the Earth".[255] Then, a satellite placed on the geostationary orbit, at an altitude of 35,786 km above the equator, will remain fixed relative to its zone of coverage, despite a slight drift corrected periodically by on-board engines, which explains its advantages for telecommunications. Moreover, it can cover up to one third of the Earth, three geostationary satellites allowing a world-wide coverage.

However, the GSO constitutes a limited natural resource, since it is a definite zone of the outer space with a circumference of 265,000 km. Even though some zones may be overcrowded above areas representing the most important markets, technological developments have increased the capacity of the GSO by reducing the space necessary between satellites. The GSO comprises 180 orbital positions, on which 1800 satellites can be placed.[256]

Indispensable element for telecommunications operations, frequencies are radio waves which can carry several kinds of information as data, sound and picture.[257] Frequency unit

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[255] *Radio Regulations* (Geneva: ITU, 1990), Art.1 n°181.

[256] P. Achilleas, *La télévision directe par satellite, aspects juridiques internationaux*, 2d ed. (Paris: Montchrestien, 1997) at 26. Today around 250 geostationary satellites have been launched.

[257] Artificial electromagnetic waves were first produced in 1886 by Heinrich Hertz. *Ibid.*, at 27.

of measure is the Hertz, which is the number of cycles performed by the wave per second (Hertz, Kilohertz, Megahertz, Gigahertz...) and determines the capacity to carry information. Radio waves are comprised in the electromagnetic spectrum up to 3,000 GHz.[258] Allocation of frequencies has been done up to 400 GHz but traditional use of the spectrum concerns frequencies up to 30 GHz. Most used bands for satellite communications are bands C (6/4 GHz), Ku (18-14/12-11 GHz) and ka (30/20 GHz). The spectrum is limited and inexhaustible: its use does not entail its disappearance but as the GSO, it can carry only a definite number of users at the same time. The aim of the regulation set up by the ITU is then to avoid harmful interferences to ensure the quality of satellite communications activities.

1.2) "First come, first serve", a general principle

Traditionally, the assignment of a frequency and orbital position in compliance with the ITU's regulation is recorded and protected when there is no harmful interferences with other services. In other words, rights of users lies on the anteriority. This "first come, first serve" principle applies largely for fixed services (FSS), a particular regime having been established for broadcasting services since 1977, and supposes three stages.[259]

First, the ITU allocates frequencies for specific services. The Union has divided the spectrum into nine bands and allocates them in the WRCs to the various services (fixed, mobile, broadcasting, radionavigation, research...).[260] Regional conferences allot frequencies to geographical areas according to services. The ITU divided the globe into three regions (region 1: Europe, Africa et Middle-East; region 2: America; region 3: Asia, Pacific and Indian Peninsula). Then, an operator who intends to set up a satellite system must apply to its national administration which proceeds to the assignment of frequencies and orbital positions in accordance with the ITU regulation. The administration notifies afterwards the assignment to the Bureau for a record in the Master International

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[258] A.D. Roth, *La prohibition de l'appropriation et les régimes d'accès aux espaces extra-terrestres* (Paris: P.U.F., 1992) at 180. Only about 13% of the spectrum is used.

[259] See S. Courteix, "La conférence administrative mondiale des radiocommunications de 1979 et le nouvel ordre de l'éther", (1980) Ann. fran. dr. int 629 at 630 [hereinafter "le nouvel ordre de l'éther].

[260] First allocations for space applications were decided in 1959.

Frequency Register.

Before the user being protected by the record of the assignment in the Master International Frequency Register, a coordination procedure must be followed in order to avoid interferences with existing systems.[261]
The national administration shall inform the Bureau of the assignment made to the expected system between two and six years before its intended entry into service (advance publication). Parameters of the future system are published in the ITU weekly bulletin to allow a coordination with the existing systems and avoid any interferences between them. Then, the administration which thinks that the planned system might cause harmful inferences to their recorded system should enter into negotiations with the administration concerned (with the possible assistance of the RRB) to define technical parameters allowing compatibility between them. However, the administration of the existing system is not obliged to coordinate or to support modifications. Once the coordination is successful, the administration notifies the system with its technical parameters to the Bureau which proceeds to the registration in the Master International Frequency Register granting the system international protection.

1.3) The *a priori* approach: a regime of exception

By fear of a *de facto* appropriation of the orbit/spectrum resource by industrialized States, developing countries claimed from the 60's for the recognition of an equitable access to the geostationary orbit.[262] Then, they called for the adoption of an *a priori* plan in order to share the orbit/spectrum, regardless of the effective needs of countries, which has been accomplished progressively through several stages.[263]

The *a priori* distribution of frequencies and orbital positions among ITU's Members was for the first time debated during the 1971 WARC-ST which adopted the Resolution Spa2-

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[261] *ITU Constitution*, supra note 239, Art. 45.

[262] The geostationary orbit is occupied at 90% by developed countries. See Roth, *supra* note 258 at 188.

[263] See "le nouvel ordre de l'éther, *supra* note 259 at 632ff; "The Evolution of the ITU", *supra* note 238.

1 and provided that "the registration with the ITU of frequency assignments for space radiocommunication services and their use should not provide any permanent priority for any individual country or group of countries and should not create an obstacle to the establishment of space systems by other countries".[264] It was recognized that the orbit/spectrum constituted a limited natural resource and should be used in an efficient and economical manner.

The 1973 Malaga-Torremolinos Plenipotentiary Conference went a step further by recognizing the special status of the orbit/spectrum in a new Article 33(2) of the ITU Convention under which "Members shall bear in mind that radio frequencies and the geostationary satellite orbit are limited natural resources, that they must be used efficiently and economically so that countries or group of countries may have equitable access in conformity with the provisions of the Radio Regulations according to their needs and the technical facilities at their disposal".[265]

Under the pressure of developing countries, this Article was revised by the 1982 Nairobi Plenipotentiary Conference which precises that the equitable access should take into account the special needs of the developing countries and the geographical situation of particular countries.

This debate on the equitable access led to the adoption of a dualistic regulation, according to the type of services, compromise between developed and developing countries.

A general plan was accepted for broadcasting satellite services to allow each State Member to exploit such services.[266] The 1977 WARC for Broadcasting Satellite Services followed by the 1979 Conference set up a plan in the 12 GHz band for regions I and III (the 1983 RARC accomplished it for region II). This plan grants five channels per country (four in the region II), radio frequencies and an orbital position.[267] The WRC

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[264] *Final Acts of the World Administrative Radio Conference for Space Telecommunications (ITU, Geneva)*, 1971, Resolution Spa2-1" relating to the Use by all Countries, with equal Rights,of Frequency Bands for Space Radiocommunication Services".

[265] *Final Acts of the Plenipotentiary Conference (ITU, Malaga-Torremolinos)*, 1973.

[266] See Roth, *supra* note 258 at 229; "le nouvel ordre de l'éther, *supra* note 259 at 638.

[267] 11,7-12,5 GHz for region I; 12,2-12,7 GHz for region II; 11,7-12,2 GHz for region III. Achilleas, *supra* note 256 at 90.

meeting in Istanbul in May 2000 operated a revision of the plan for broadcasting satellites in region I and III. Despite the strong opposition of operators like Eutelsat, the WRC has doubled the number of channels per country (ten channels for region I and twelve for region III).[268] It was decided that a conference should examine the issue of general access to the geostationary orbit. It took place in two sessions in 1985 and 1988.
The process was achieved by the WARCs ORB'-85 and -88 which decided a partial plan for fixed services. An allotment plan was established in some frequency bands, each State having at least a position in a pre-determined arc without consideration of its ability to exploit a satellite service.[269]

The *a priori* plan system has been largely criticized. On the one hand it has been asserted that this system freezes resources since some States can not use frequencies and orbital positions they have been attributed because they do not have the capacity to launch a satellite system, whereas other operators may need them for their services. On the other hand, this regulation set up by the ITU twenty years ago seems to be obsolete considering technological developments in satellite telecommunications.[270] Indeed, distribution of spectrum resources by services is not relevant today to convergence of technology and services. A compartmentalized regulation, a distinction among mobile, broadcasting and fixed services, does not seem suitable anymore since hybrid satellites provide at the same time different services subject to radically different regulations.

2/ Speculation in orbit

2.1) The paper satellites challenge

The last decade saw the emergence of a new phenomenon which calls into question rules

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[268] ITU, Press Release, "World Radiocommunication Conference Concludes on Series of far-Reaching Agreements" (2 June 2000); P.B. de Selding & S. Silverstein, "Eutelsat Rallies Against Radio Spectrum Proposal" *Space News* (15 May 2000) 1.

[269] See M.L Smith, "A New Era for the International Regulation of Satellite Communication" (1989) XIV Ann. Air & Sp. L. 449. The plan concerns only some services in the 6/4 GHz,14/11-12GHz and 20/30 GHz bands. See S. Courteix, "De l'accès «équitable» à l'orbite des satellites géostationnaires" (1985) Ann. fran. dr. int. 790.

[270] *Les télécommunications par satellite*, *supra* note 254 at 55.

and procedures established by the ITU, and perhaps even the ability of the organization to fulfill its major mandate, the management of space telecommunications resources. A speculation phenomenon on the orbit/spectrum has shown up, resulting form the willingness of some to take advantage of the regulation gaps.

As competition is growing in the satellite telecommunication market, the need for orbital positions and associated frequencies has exploded in the 90's. Even though we can not speak about full saturation, it is becoming more and more difficult to satisfy all demands for some attractive locations over areas representing the major markets (Pacific and Atlantic mainly). Then, reservation of parts of the orbit/spectrum through notifications appears for States and operators as an efficient mean to ensure their access to these resources in the event their system would be launched. By this practice, national administrations notify non-existing satellite systems which will probably never see the light of day, hence their name: "paper satellites".[271]

Astonishment came from the little Pacific Island of Tonga who notified sixteen orbital positions over Pacific, Asia and America to the ITU. The Kingdom of Tonga did not operate on its own but established a joint venture, Tongasat, with an American businessman, Matt Nilson, to manage the positions.[272] It was obvious that the aim of this notification, with respect of respect of the "first come, first serve" principle, was not for Tonga to operate satellite telecommunications for its own needs but to lease or sell the attributed positions to foreign firms. Besides, Tonga and Nilson did not choose any orbital slots but strategic ones, which Intelsat expected to exploit, the Members of the organization committing themselves not to claiming them.[273] As a consequence, Intelsat was a fervent opponent of the project. Tonga's claim could be considered as an abuse of procedure and led to a large controversy. Its compatibility with international law is doubtful, particularly regarding the principle of good faith, the non-appropriation principle (the geostationary orbit constitutes a *res communis*, States rights are limited to

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[271] See *Ibid.*, at 80ff; F. Lyall, "Paralysis by Phantom: Problems of the ITU filing Procedures", in *Proceedings of the Thirty-Ninth Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1996) 187 [hereinafter "Paralysis by Phantom"].

[272] Ezor, *supra* note 241 at 920.

[273] *Ibid.* Nilson decided the association with Tonga since this State was not member of Intelsat.

a right to use which does not allow any property rights, in other words the correlation of the *usus*, *fructus* and *abusus*) and Article 44 of the ITU Constitution (rational, efficient and economical use of the orbit/spectrum).[274] However, the IFRB had no legal mean to refuse the registration of the notifications. This case underscored all the incapacity for the IFRB to enforce its regulation and the limits of the management of the orbit/spectrum by the ITU. Then, the IFRB opted for a consensual solution by requesting Tonga to reduce its claim to six orbital positions.[275] As one could have feared, the Tongasat case opened the door to the development of a practice comparable to flags of convenience in the maritime field. Then, other countries decided to make notifications to the ITU following the steps of Tonga, as Thailand, Malaysia or the Phillippines. Papua New Guinea and Gibraltar entered into discussions respectively with Loral for the use of three orbital slots and General Electric for twelve slots.[276]

The ITU had to face these last years a considerable increase of notifications complicating its work of coordination. Since under the "first come, first serve" principle, international protection is granted to the first registered systems, administrations are notifying satellite systems that are only in an embryonic state in order to be granted a priority by anticipation and be subject as less as possible to coordination with existing systems.[277] The "paper satellite"rush has for consequence to make the ITU not able to differentiate fictive systems from those which are really expected to be launched and to block the coordination procedure. As an illustration, 1800 satellite networks were notified to the ITU in 1996. 1500 were filed by 54 Administrations in the most attractive bands (Ku, Ka

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[274] See J.C. Thompson, " Space for Rent, The International Telecommunication Union, Space Law, and Orbit/Spectrum Leasing" (1996) 62 J. Air. L. & Comm 279 at 299-302; *Les télécommunications par satellite*, *supra* note 254 at 73ff; R.S. Jakhu, "The Legal Status of the Geostationary Orbit" (1982) VII Ann. Air & Sp. L. 333 [hereinafter "legal status"].

[275] Ezor, *supra* note 241at 933ff. Tonga has leased orbital position to Unicom, a U.S. company, moved two Soviet satellites on its slots and finally auctioned two other slots. F. Lyall, "Telecommunications and Outer Space",in *Proceedings of the Fortieth Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1997) 385 at 387-388 [hereinafter "Telecommunications and Outer Space"]. The cost of an orbital position has been evaluated to US$ two millions a year. D. Riddick, "Why Does Tonga Own Outer Space?" (1994) XIX:1 Air & Sp. L. 15 at 20.

[276] H.Wong, " The Paper Satellite Chase: the ITU Prepares for its Final Exam in Resolution 18" (1998) 63 J. Air. L. & Comm 843 at note 46.

[277] "Paralysis by Phantom", *supra* note 271 at 189.

and C), one administration even notifying more than 300 systems.

Provisions had to be taken to limit to the maximum extent possible this phenomenon. The concept of due diligence was proposed to make States responsible for their assignations. It could take the form of an administrative or financial diligence, but only the first one has been adopted.[278]

The administrative diligence principle has for purpose to require national administrations to provide several kinds of information so as to ensure that notified systems are effective, in an advanced stage of construction. The 1994 Kyoto Conference introduced the principle of administrative diligence in its Resolution 18 by which it ordered a study on it, and charged the Director of the Bureau to present a report at the 1997 WRC. To this end, a Commission was set up to examine the impact of this principle and recommended the adoption of the administrative diligence. On the other hand it did not retain the concept of financial diligence.

The 1997 WRC adopted broadly these recommendations in the Resolution 49.[279] The notifying administration must provide several kinds of information on their systems, the most important being: name of the manufacturer, of the operator, number of satellites, date of delivery and launch provided in the contracts, identity of the launch provider... In case these data would not be provided within the deadline, assignments would be cancelled, orbital positions and frequencies becoming available to other operators.

Financial diligence, consisting in requiring a payment for each notification, has been claimed as a more efficient mean to reduce fictive systems. It can be refundable or not, fixed or proportional to the number of satellites. The 1998 Minneapolis Plenipotentiary Conference examined this concept, strongly supported by Australia, but decided to wait for the first impacts of the administrative diligence before implementing or not the financial diligence. Then, the issue will be redebated in 2002. However, the Minneapolis Conference put an end to the free feature of notifications that are now charged under a cost-recovery principle.[280]

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[278] *Ibid.*, at 190.

[279] ITU, Communiqué des Presse 97/20, "CMR 97: des accords importants" (21 November 1997).

[280] ITU, Communiqué des Presse 98/30, "La Conférence de Minnéapolis ouvre la voie à un accroissement des droits du secteur privé" (6 November 1998).

2.2) Auctioning outer space?

Pointing out the weaknesses of the international regulation, some voices have been rising up for a radical change of the regime of access to the orbit/spectrum. Some authors consider that commercialization of space activities would be a real success only through the own geostationary orbit commercialization, and claim to put orbital slots up for auction as well as the recognition of property rights.[281]

Under these propositions, the present regulation would be more adequate if it would apply market mechanisms by attributing parts of the orbit/spectrum through competitive biddings. Then, according to Martin A. Rothblatt "perhaps now is the time to forego a satellite slots market as a new model for global resource development in the next millennium", scheme under which orbital slots and frequencies would be attributed to those who would value them most.[282] These mechanisms are already applied at the national level and some administrations, like the FCC, have decided to proceed to frequencies attributions via competitive biddings (most European administrations recently have resorted to this solution for UMTS, Universal Mobile Telecommunications System).[283] Then, it has been notably put forward that the ITU should manage such market, serving as a clearing-house, and proceed to competitive biddings for unused orbital slots.

Then, there is one step from asking the implementation of market mechanisms to claiming property rights over the geostationary orbit. For risks supported by private corporations and long-term investments they consent to, it is necessary to set up a regulation ensuring an efficient protection of their rights, which content enables to foresee long-term commercial strategies according to market evolutions. Then, it is argued that since the

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[281] See M.A Rothblatt, "New Regulatory Ideas and Concepts in Space Telecommunications" (1992) 20 J. Space. L. 27; G L. Rosston & J. S. Steinberg, "Using Market-Based Spectrum Policy to Promote the Public Interest" (1997) 50 Fed. Comm. L.J. 87; F. Kosmo, "The Commercialization of Space: a Regulatory Scheme that Promotes Commercial Ventures and International Responsibility" (1988) 61 S. Cal. L. Rev. 1055.

[282] Rothbaltt, *Ibid.* at 31.

[283] T. Kosuge, " Commercialization of Space Activities and Applications of the Space Treaty...Geostationary Orbit and Frequency Spectrum", in *Proceedings of the Fortieth Colloquium on the Law on the Outer Space* (International Institute of Space Law, 1997) 330 at 333-335.

current regime does not secure such adequate protection, property rights should be recognized to enable private corporations to enforce their rights over the orbit/spectrum.[284]

Nonetheless, these mechanisms may come up against some fundamental principles of the Outer Space Treaty or the Article 44 of the ITU Constitution. Thus, the common interest and the non-appropriation principles, which apply to States but also to private entities, preclude any claim of sovereignty,[285] and by analogy any property rights.[286] To justify the legitimacy of property rights over the GSO, advocates of this concept assert that, firstly the common benefit principle is not binding, and secondly that the non-appropriation principle should not be relevant anymore.[287] The establishment of an orbital slot market managed by the ITU implies also the consideration of the legal status of the geostationary orbit. It is largely accepted that the GSO is characterized by a *sui generis* status. The GSO is not a *res nullius* that would have authorized any appropriation by the first come but a privileged portion of outer space that enjoys an hybrid legal status, taking at the same time some aspects of the *res communis* and the common heritage of mankind.[288] The growing willingness to avoid a waste of unused orbital slots by a commercialization of the orbit/spectrum within the ITU will represent certainly a major challenge to the regulation, even though it has not been officially included in the agenda of the Union. Should such a system come into being, a set of efficient and strict safeguards would have to guide its implementation to avoid any excess.

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[284] Kosmo, *supra* note 281 at 1082ff; Reinstein, *supra* note 12 at 72.

[285] The attempt in 1976 by thirteen equatorial countries to claim sovereignty over the geostationary orbit in the Bogota Declaration was unanimously rejected and considered as a violation of the Outer Space Treaty. See "legal status", *supra* note 274; Roth, *supra* note 258 at 197ff.

[286] Thompson, *supra* note 274 at 302ff.

[287] See T. S. Twibell, "Circumnavigating International Space Law" (1997) 4 ILSA J. Int'l & Comp. L. 259. The author assimilates the non-appropriation principle as a"virus" and suggests to "vaccinate" international space law...

[288] *Les télécommunications par satellite*, *supra* note 254 at 109.

II/ Meeting the new challenges for a better efficiency

A/ Private sector involvement: from lobbying to integration

Commonly publicly owned, interests of telecommunication operators were strongly linked to those of their governments and as a consequence their representation was ensured as such. Due to liberalization and privatization of telecommunications, the emergence of competition among private entities, it has become necessary to enable these private operators, major actors in the telecommunication area, to participate to the elaboration of the regulation and to the work undertaken within the ITU. This challenge the ITU has to face typifies the complexity of today policy-making in this sector, and as observed Pekka Tarjanne, at the time Secretary General of the ITU, "[t]he role of the private sector in the ITU is perhaps the single most strategic issue which we at the ITU have to face".[289]

1/ A *de facto* implication

The ITU represents certainly one of the international organizations that has the most promoted the participation of private entities. As early as the second ITU Conference in Vienna in 1868, it was foreseen that the private sector had to play a role within the organization and first private members were admitted in 1871.[290]

Even though only Member States are allowed to fully participate to ITU's conferences, the place of private corporations representatives has significantly increased this last decade, acting as powerful lobbies. Private companies are largely involved in national delegations of their country in WRCs, in providing their expertise to their government during negotiations.[291] Decisions taken during these conferences entail fundamental impacts on private operators since they determine frequencies allocations to services or their extension. Consequently, the fate of their activities depends to a great extent on the

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[289] Tarjanne P., " The Limits of National Sovereignty: Issues for the Governance of International Telecommunications"(Lecture to the Law School, University of California, Berkeley, 28 September 1995).

[290] *Ibid.*

[291] When being member of a national delegation, the employee represents his country and not the company.

results of negotiations and even become their principal stake.

This role of private corporations in WRCs has reached a considerable magnitude since the WRC-95 and -97. As an illustration, the WRC-2000 gathered 2037 delegates from 150 countries including 83 companies that were part of their national delegations and 326 observers from 95 organizations (manufacturer, service providers, international organization...).[292] The US delegation during the WRC-97 was a striking example of this evolution since beside government employees it was largely composed of satellite industry representatives (Motorola, Teledesic, Leo One...) who exercised a strong lobbying.[293] In addition, during the WRC-95, which allocated part of the spectrum for LEO systems, Teledesic put a lot of pressure on the US delegation to obtain allocation of frequencies meeting the needs of its system and even succeeded to incorporate this issue in the agenda of the conference.[294] We must conclude as the Chairman of the working group ITU 200 that "[c]onsidering the importance of the lobbying and the impact of informal negotiations outside the formal meetings...the Radiocommunication Sector Members are playing nearly a leading role in Radiocommunication Conferences".[295] However, it should be stressed that only governments own the competence to authorize a private entity to be part of a national delegation. Then, unless it assists to the conference as an observer, participation of a private company remains conditioned by governmental decision.

Beside these representations within national delegations, private companies may also have the opportunity to defend their interests upstream. The United States created a World Radio Conference Advisory Committee composed of representatives of the

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[292] ITU, Press Release, *supra* note 268. The ITU is composed of 189 State Members and 600 Sector Members.

[293] Wong, *supra* note 276 at 875-976.

[294] This has been referred to as the "Teledesic issue". A. Noll, "The Space Law Related to the Role, Activities and Contributions of the International Telecommunication Union (ITU) in the Last Decade of the 20th Century", in *Proceedings of the Third ECSL Colloquium* (Perugia: ESA, 1999) 110 at 115. FSS non-GSO were allocated 400 MHz in the 19 GHz and 29 GHz bands. The following conference, the WRC-97, was subject to the same kinds of pressures, notably from Skybridge, fervently denounced by Teledesic! "Impact of US Legislation", *supra* note 221 at 59-60.

[295] *Report by the Chairman of ITU 2000*, 3rd Mtg, ITU Doc. 71-E (Geneva, 1997) [hereinafter *ITU 2000 Report*].

satellite industry by which private companies participate to the elaboration of the US agenda for the WRC. An identical forum can be found in Europe with the Conference Preparatory Group which expresses advice to the CEPT.[296]

However, "giving only satellite operators a voice in the ITU is not enough"[297] and it has been considered that the private sector should be granted an institutional recognition within the organization.

2/ The institutionalization of the private sector involvement

Traditionally, full membership of the ITU has been reserved to States, the big "M" Members, while other entities involved in the ITU were referred to as small "m" members. These private entities "m" members, have been particularly active in the radiocommunication and standardization sectors. The ITU had in 1995 184 State Members and 375 private members (category in which were included telecommunication services providers, international organizations operating satellites, manufacturers, broadcasting companies, financial institutions...) which contributed to the financing of the Union.[298] This system has been criticized due to the fact that "m" members enjoyed very limited rights and could not be involved in the law-making process, contrary for instance to regional standardization organizations as ETSI (European Telecommunications Standards Institute) in which the private sector participates to the elaboration of standards.[299]

The necessity to reconsider conditions, rights and obligations of non-Member participants was already stressed by the High Level Committee, created at the Nice Conference in 1989, in its Recommendation 5. Following a Resolution of the Additional Plenipotentiary Conference in December 1992 on the enhancement of the participation of the private

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[296] M.R. Moore, "Business-Driven Negotiations for Satellites System Coordination: Reforming the International Telecommunication Union to Increase Commercially Oriented Negotiations over Scarce Frequency Spectrum" (1999) 65 J. Air L. & Com. 51 at 65.

[297] Wong, *supra* note 276 at 876.

[298] *Ibid.*

[299] Jayakar, *supra* note 250 at 732 & 735-738.

sector, the Kyoto Conference officially recognized rights and obligations of non-governmental entities, already accepted in practice, particularly with respect to their involvement in the decision-making process by their participation to study groups.[300] However, this participation remained unsatisfactory regarding the limited extent of their rights and the number of private entities represented, basically the dominant carriers. Then, the Kyoto Conference adopted a second Resolution, the Resolution 15, by which it set up a Review Committee (RevCom) to study this issue.[301] The Committee was composed of forty members, States (including France, Russia, South Africa, USA), organizations operating satellite telecommunications (including Eutelsat, Inmarsat, Intelsat) and private companies (including Nokia, BT, AT&T, France Telecom).The RevCom submitted its final report in 1996 in which it proposed several recommandations for the enhancement of the private sector participation in the ITU.[302]

First, the report, stating that the ITU should remain an intergovernmental organization, assessed that if only State Members should be involved in the final adoption of decisions with respect to treaty-related matters, these kinds of activities constitute a little part of ITU's work. The RevCom called for a stronger role of "m" members in all other activities and pointed out that rights of both States members and members of Sectors should be equal in non-treaty related activities. Then, under Recommendation 3, approved by the Council in 1996, membership should be comprised of Treaty Members, who are automatically members of the three Sectors, and Sector Members (the "m" members). Besides, there should be only one category of Sector Members, gathering States and non-governmental entities, with equal rights, excepting voting rights (Recommendation 4).

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[300] Tarjanne, *supra* note 289.

[301] *Final Acts of the Plenipotentiary Conference (ITU, Kyoto)*, 1994 (Geneva: ITU, 1994), Resolution 15 [hereinafter *Final Acts*]:

> Considering...that continued participation by non-administration entities and organizations is a prerequisite for achievement of the ITU's purposes...resolves that the rights and obligations of members should be reviewed, with the aim of enhancing their rights in recognition of their contribution to the work of the ITU, in such a way that their active and effective participation is promoted in order to make the ITU more responsive to the rapidly changing telecommunication environment.

[302] ITU, Council, *Note by the Secretary General on the Final Report of the Review Committee*, ITU Doc. C96/18 E, Geneva: ITU, 1996.

So that the ITU reflects to the maximum extent possible the telecommunication industry, its membership should be enlarged to all entities dealing with ITU-related activities, including small entities.

Access to the membership of the organization is an important issue of concern as well, if it does not want to see non-governmental entities to turn toward other forum. For the ITU enjoys legitimacy in the telecommunication sector and attracts as many entities as possible, Sector membership should be more flexible, particularly regarding the control of State Members. Then, beside the traditional procedure by which the entities apply to their national authority, an alternative procedure should be available (the Treaty Member choosing the procedure which to apply).[303] This proposed procedure allows any entity to apply for Sector membership directly to the Secretary General without having to refer to its Treaty Member State. The ITU would then inform the State concerned with a presumption of approval, and should the State remain silent and make no objection within two months, the membership would be considered as approved. However, Treaty Members retain the power to refuse the membership, in which case the entity must enter into negotiations with its government.

The Council created in 1996 the ITU 2000 working group to continue the work of the Review Committee for the 1998 Minneapolis Plenipotentiary Conference. ITU 2000 formulated equivalent recommendations on membership, rights of Sector and Treaty Members or access procedure.[304] Sector Members should be recognized the right to participate to the works of the Radiocommunication Assembly, World Standardization and Development Conferences as well as their subsidiary meetings (Recommendation 14/1). Furthermore, it recommended the creation of the status of "Associate" for small entities which can not become Sector Members :

> It is recommended that to increase participation by smaller entities in the work of a Sector a form of membership termed "Associate" should be established. Should an Assembly or Conference decide to admit an

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[303] *Ibid.*, Recommandation 5.

[304] *ITU 2000 Report*, *supra* note 295.

> Associate in a Sector concerned, the following principles should apply :
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> 1. that the process for becoming an Associate should be the same as that applicable to a Sector Member of that Sector;
>
> 2. that the rights of an Associate would include the right to participate in the work of one study group in a Sector, but excludes rights applicable to Sector Members including participation in the decision-making processes of the study group and study group liaison activities;
>
> 3. that the level of financial contribution applicable to Associates should be such that it at least covers the full allocated cost of their participation.[305]

The Minneapolis Conference endorsed broadly these recommendations and marks an important stage for the modernization of the Union and the participation of the private sector within.[306] The status of Associates was adopted and confirmed by the Radiocommunication Assembly of May 2000. Associate members are authorized to participate to a pre-determined study group and its sub-groups, working parties, joint working parties, task groups and joint groups. They are allowed to attend meetings, to submit contributions and comments as well as to participate in the elaboration of recommendations within a study group.[307] However, Associates rights are limited and do not include any vote power.

In addition, the Minneapolis Conference, in its Resolution 82, intended to speed up the process of adoption of technical recommendations and to increase the involvement of private sector during their elaboration. The proposition made by the Plenipotentiary Conference was to confer the decision-making of recommendations without regulatory or policy impact (technical recommendations) to study groups, more flexible and composed by public and private representatives who have equal rights, avoiding the long process of the classical procedure.[308] Obviously, the major problem here is to define what constitutes a technical recommendation without regulatory or policy content. The Istanbul

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[305] *Ibid.*, Recommandation 6.

[306] See ITU, Communiqué de Presse, *supra* note 280.

[307] See ITU, Press Release, "Radiocommunication Assembly Gives New Directions for Future Work of ITU Radiocommunication Sector" (5 may 2000).

[308] *Ibid.*

Radiocommunication Assembly of May 2000 decided that each study group will determine to what kind of matters this procedure should apply.

The ITU is still currently working on reforming the role and status of the private sector. The Minneapolis Conference urged in its Resolution 74 a reform of management, functioning and structure of the Union as well as the rights and obligations of Member States and Sector Members. A Working Group on Reform (WGR) has been created by the Council and the Secretary General set up a Reform Advisory Panel (RAP), both composed of governments, regulatory administrations and private sector representatives. The RAP gave its conclusions in its second meeting on 10 March 2000.[309] Following studies undertaken since then, the RAP concluded that the decision-making process of the ITU should reflect the modern competitive telecommunications environment and even recommended the introduction of representatives in the Council. The WGR final report will be submitted to the Council for its 2001 session and the RAP recommendations to the 2002 Plenipotentiary Conference.

To conclude, we may say that the private sector is largely involved in the work undertook within the sectors. If the final adoption of norms remains State Members' preserve, the private sector exercises a growing influence over the norm formation process.[310] Notwithstanding this evolution, the ITU must reinforce this participation in order to preserve its credibility, and has engaged further reforms in this way. As it is and must remain an international organization, the Union will have to find the right balance between its intergovernmental nature and the role granted to the private sector.

B/ Enforcement of regulation: the major gap

A law without any mandatory mechanism to ensure its respect can hardly pretend to any credibility *vis-à-vis* subjects of law at whom it is aimed. Then, the major ITU's weakness

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[309] See G.E Orbest, Jr, "Reforming the ITU" *Via Satellite* (12 May 2000).

[310] This influence can be illustrated by the World Conference Preparatory Meetings, organized six months before world conferences, which examine points that will be part of the agenda of the conferences, each member (States or Sector members) possessing equal rights.

is certainly its inability to enforce its regulation since it relies on the good will of States for its implementation.[311] Excepting Radio Regulations established in World Radiocommunication Conferences, recommendations of ITU's conferences correspond to soft law, that is, they do not have binding force. In addition, the ITU does not possess any legal instrument that would enable the organization enable to ensure enforcement of its resolutions, recommendations or even decisions, provisions of general international law being the sole mean available. However, because it is in their interest, resolutions adopted by ITU's standardization or radiocommunication conferences are traditionally respected by States. Non-compliance with international standards would be synonymous for the State concerned to be technically isolated and as a result not to have access to foreign markets.

The absence of legal means to enforce ITU's regulation might be explained by the fact that this organization is initially considered as a technical institution. Contrary to other international organizations with political (United Nations, North Atlantic Treaty Organization) or economical/financial (International Monetary Fund, World Bank) purposes, the ITU has been primarily created to set up standards for compatibility of telecommunication networks. As other standard-making organizations (International Atomic Energy Agency for instance) whose competences are more to propose than to impose norms, the ITU has not been granted efficient tools to ensure applications of its regulation.[312] Its implementation is the responsibility of national administrations and the Union has no mean at its disposal to settle potential conflicts.[313]

Because it evolves in an industry where efficient management of the orbit/spectrum and resolution of potential conflicts among operators are fundamental, the ITU's coordination procedure is highly criticized. Thus, the RRB has no mean to enforce any resolution

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[311] *Les télécommunications par satellite*, *supra* note 254 at 119; Wong, *supra* note 276 at 873-874.

[312] The limits of its ability to enforce its regulations can be illustrated by the Bogota Declaration, since the ITU did not react and remained silent on this issue. See Kosmo, *supra* note 281 at 1064.

[313] In case of a dispute between State Members on the interpretation or application of the constitutive instruments or Administrative Regulations, Article 56 of the ITU Constitution provides traditional means of dispute settlement (diplomatic negotiations, application of bilateral or multilateral agreements on dispute settlement, arbitration). An optional Protocol on dispute settlement is also available.

during the coordination but rather acts as a mediator among national administrations.[314] Moreover, it can not refuse to register assignations, but only controls their conformity with the Constitution, the Convention and the RR. Even though the recent administrative diligence procedure enables now the RRB to require regular disclosure of information on the systems, it remains largely insufficient since once these information are given the RRB can not refuse to record the assignation in the Master International Frequency Register.

Several conflicts among satellite operators highlighted ITU's incapacity to assert its authority, conflicts which were finally settled outside the organization. In 1992 a conflict arose between SES and Eutelsat, the former claiming that Eutelsat II disrupted signals sent by Astra 1B. Even though a conciliation was undertaken within the IFRB, on request from the two operators, they admitted that until then they deliberately acted without complying with the Radio Regulation.[315] In 1994 BskyB came into conflict with Eutelsat regarding an orbital position covering German and French speaking European areas which they both claimed.[316] Eutelsat decided to place its Hotbird 2 satellite in the litigious position and undertook tests without reaction from the ITU.

Above all, the Tongasat case and its subsequent developments highlighted the weakness of the ITU and its inability, for lack of means, to settle the matter. On 21 July 1994, Hong Kong Apstar 1 satellite, partially financed by China, was launched at 131°East, one degree away from Japan and Tongan satellites filed at the ITU.[317] This satellite was dedicated to offer services to various companies as Turner Broadcasting, Time Warner and Viacom International. A Russian satellite, Rimsat 1, operated by a American firm, Rimsat Ltd, was placed on the Tongan position and the Japanese one was registered in favour of Telecommunication Advancement Organization of Japan, for governmental and

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[314] For a more efficient coordination procedure, some proposals are put forward to entrust the operator of the system with the leading of the coordination, instead of the national regulatory authority. Moore, *supra* note 296 at 69.

[315] *Les télécommunications par satellite*, *supra* note 254 at 116.

[316] Wong, *supra* note 276 at 862.

[317] "Telecommunications and Outer Space", *supra* note 275 at 398; P. Seitz,"Apstar Draws Fire From Other Asian Operators", Space News (25-31 July 1994) 3.

private entities operations. Notwithstanding that Apstar 1 took position in violation of ITU's regulation since it did not respect filings of Tonga and Japan, the Union was not able to settle this conflict and even to prevent Hong Kong to position the satellite. Finally the conflict was resolved by negotiations among the States concerned and led to real provocation to the ITU since Apstar leased a Tongan position...[318]

Previously, Indonesia placed its Palapa Pacific 1 satellite on an orbital slot filed by Tonga in January 1993 (Tongastar 1 was planned to be launched in March 1993), claiming that Tonga had been granted the position in violation of ITU's regulation. Once again the ITU was not able to assert its authority and a solution was reached by the two protagonists in October 1993, through a share of the orbital slot between the two satellites.[319]

These observations lead us to conclude, like the Kyoto Plenipotentiary Conference, that to "empower the ITU to settle disputes arising from unsuccessful satellite coordination exercises"[320] is today imperative. Stakes ensuing from private ventures in satellite telecommunications are so considerable that it is necessary to secure the enforcement of the regulation in order to avoid an "anarchy in space". However, one may wonder whether there is a real political willingness from national administrations to do so.[321]

Besides, the ITU has to face another evolution, the emergence of the WTO as a new forum of telecommunications regulation. Then, as recognized the ITU's strategic plan for 1999/2003:

> it is no longer realistic to believe that the Union can be the focal point for all matters relating to telecommunications in the global information economy and society. The world is now too complex and telecommunications too pervasive for a single organization to be the focus of all issues of concern to the international community.[322]

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[318] *Les télécommunications par satellite*, *supra* note 254 at 119.

[319] *Ibid.* at 85.

[320] *Final Acts*, *supra* note 301, Resolution 18.

[321] The ITU 2000 group has recommended to grant the Bureau the power to refuse to register a satellite system under a "global public interest" criteria or if it appears that the notifying State would not respect its international obligations.

[322] *Strategic Plan for the Union 1999-2003*, on line:<http://www.itu.int /newsroom/press/ PP98/ Documents /StratPlan9903.html >.

SECTION 2/ THE WORLD TRADE ORGANIZATION AND THE LIBERALIZATION OF TELECOMMUNICATIONS

The increasing commercialization of telecommunications has entailed that technical considerations could not anymore guide singlehandedly regulations and policies in this sector. Telecommunications represent today the backbone of globalization and their conditions of exploitation will have repercussions on provisions of services of almost all industries. As a consequence, its regulation interests directly international economic law governing rates, interconnection, competition... This regulation has been set within the WTO which, despite having been established only five years ago, plays today a fundamental role and is even designated by some as the new major regulator in this field.

I/ Presentation

A/ From GATT to WTO

1/ The GATT

After the second World War, States decided that international cooperation was the condition to avoid past failures which led the world to disaster. Following the 1944 Bretton Woods Conference which gave birth to the World Bank and the International Monetary Fund, and the San Francisco Conference establishing on 26 June 1945 the United Nations, an international institution in charge with trade relations was foreseen as an essential tool of the post-war period.[323]

To this end, the General Agreement on Tariffs and Trade (GATT) was concluded at Geneva on 30 October 1947 and had to be part of the framework of the International Trade Organization (ITO), resulting from the Havana Charter signed on 24 March 1948. The GATT was, at first, expected to be only temporary when it entered into force on 1

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[323] J.H. Jackson, "Appraising the Launch and Functioning of the WTO" (1996) 39 German Y.B Intl'l L. 22 at 24. For a interesting review of the GATT and WTO, see C. Lafer, "Réflexions sur l'OMC lors du 50ème anniversaire du système multilateral commercial: l'impact d'un monde en transformation sur le droit international économique", (1998) 4 J.D.I. 933.

January 1948, until the Havana Charter was ratified. However, due principally to the opposition of the US Congress to ratify the text, the ITO never came into being and let the GATT without institutional structure for its implementation and development. Then, it was decided to maintain the GATT as an atypical hybrid structure, without legal capacity, to promote the cooperation among its Parties in international trade.[324] As the sole general commercial agreement, the GATT was progressively developed and institutionalized to manage regulations adopted under its framework. It operated with organs at the basis dedicated to the never born ITO: the Council of Representatives and the Interim Commission for the International Trade Organization.[325] Decisions were taken during multilateral negotiations, the rounds (eight since the creation of the GATT), the last one, the Uruguay Round, being certainly the most important ever to be negotiated.

2/ The Uruguay Round and the Marrakesh Agreement

Along the years, the GATT, which was "[a]t the beginning of the 1980's...still widely regarded as a rich man's club that addressed problems of interest to the industrialized countries",[326] showed the limits of a non-institutionalized framework to manage and develop international cooperation and regulation on commerce. Despite the failure of the Tokyo Round to engage the necessary adaptations to mutations of the 80's, it was largely recognized that it was time for a real institution to relieve the GATT in order to set up a more efficient system. The collapse of the socialist block, the ever growing globalization, along with the acceptation from developing countries of free market, put an end to the cold war period and allowed the emergence of a climate at last favourable to the creation of an institution hardly conceivable in the past.[327]

In this context, States met for the Uruguay Round launched at Punta del Este with a very broad agenda, which however did not include initially negotiations for the creation of a

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[324] Dinh, *supra* note 72 at 1016-1017.

[325] *Ibid*; M. E. Footer, "The Role of Consensus in GATT/WTO Decision-Making" (1996-1997) 17 J. Int'l L. & Bus 653 at 656.

[326] M. Hart, "The WTO and the Political Economy of Globalization" (1997) 31:5 J. World. T. 75 at 76.

[327] Lafer, *supra* note 323.

world trade organization. It consisted rather to reinforce the institutional character of the GATT and to deal with new sectors implied in international trade (services, intellectual property...). The creation of an international organization to succeed to the GATT was first launched by Canada and the European Community during the round,[328] and despite the slight support from their partners, at first, including the United States, the Uruguay Round gave birth after eight years of negotiations to the World Trade Organization. The WTO was created by the Marrakesh Agreement signed on 15 April 1994 by 120 States and entered into force on 1 January 1995 with 76 ratifications.[329] Work accomplished may be summed up by these few data : negotiations led to 28 agreements representing a total of 500 pages to which it should be added 26,000 pages of States commitments.[330]

Several agreements are annexed to the WTO Agreement and are gathered in two categories. Multilateral Trade Agreements are "integral parts of [the WTO] Agreement, binding on all Members" [331] and include: the Agreements on Trade in Goods (to which thirteen Agreements on specific areas are attached as the 1994 GATT);[332] the General Agreement in Trade in Services (GATS);[333] the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS);[334] the Memorandum of Understanding on Rules and Procedures Governing the Settlement of Disputes;[335] and the Trade Policy Review Mechanism.[336] On the other hand, Plurilateral Trade Agreements are only binding on

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[328] Hart, *supra* note 326.

[329] *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M 1144 (1994) [hereinafter *WTO Agreement*].

[330] T. Flory, "Remarques à propos du nouveau système commercial mondial issu des Accords du cycle d'Uruguay " (1995) 4 J.D.I. 877 at 878.

[331] *WTO Agreement*, *supra* note 329, Art. II(2).

[332] Annex 1A.

[333] Annex 1B.

[334] Annex 1C.

[335] Annex 2.

[336] Annex 3.

Members who accepted them.[337] They encompass the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Diary Agreement and the International Bovine Meat Agreement.[338]

The Marrakesh Agreement integrates the 1947 GATT, which text is part of the 1994 GATT, into the WTO framework.[339] Contrary to the ITO, the WTO is not a subsidiary organ from the United Nations and, from lessons of past failure, no minimum number of ratifications was required for the Marrakesh Agreement to enter into force.[340]

The purpose of the WTO is to provide the institutional framework, that in the past was lacking, to conduct trade relations among Members in matters related to the several concluded Agreements (Article II(1)). The general objective is to reduce barriers and eliminate discrimination in trade relations in order to expand production and trade for the common interest, in respect to the sustainable development principle, the preservation of the environment, and in taking into special consideration the needs of developing countries.[341]

The organization, as an integrated system,[342] is in charge with the general management (implementation, administration and operation) of the Agreements adopted within its framework and provides the forum for trade negotiations among its Members.[343]

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[337] *WTO Agreement*, *supra* note 329, Article II(3).

[338] Annex 4.

[339] Footer, *supra* note 325 at 654. The 1994 GATT is distinct from the 1947 GATT (Article II(4) of the WTO Agreement) but integrates it with all modifications, amendments and new texts that have been adopted at the Uruguay Round. A transitional period was decided following an agreement between the Interim Committee of the International Trade Organization and the Preparatory Committee of the WTO. Flory, *supra* note 330 at 880-881.

[340] Membership is open to any State.

[341] *WTO Agreement*, *supra* note 329, Preamble.

[342] Flory, *supra* note 330 at 881.

[343] *WTO Agreement*, *supra* note 329, Art. III(1) & (2).

B/ Institutional aspects

1/ Structure

The WTO is composed of three major organs: a Ministerial Conference, a General Council and a Secretariat, as well as several Committees and Councils (Article IV).[344] The Ministerial Conference is the assembly of the organization and, as such, is its supreme organ. It regroups representatives of all Members and meets every two years. Article IV(1) gives to the Ministerial Conference very broad powers since it has competence to carry out the functions of the WTO, it is granted "the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member", and it can amend the WTO Agreement or the Multilateral Trade Agreements. Three Committees are established by the Ministerial Conference: the Committee on Trade and Development, the Committee on Balance-of-Payments Restrictions and the Committee on Budget, Finance and Administration (other Committees may be set up when appropriate).[345]

The General Council is composed of all Members. It meets between the Ministerial Conference, carries out all functions of the latter when not meeting, and approves the budget. As a consequence, it is the major organ of the organization.[346] Three Councils operate under its general authority (Article IV(5)): the Council for Trade in Goods in charge with the functioning of Agreements in Annex 1A (1994 GATT, Agriculture, Application of Sanitary and Phytosanitary Measures, Textiles and Clothing, Technical Barriers to Trade, Trade-Related Investment Measures, Implementations of Articles VI and VII of the 1994 GATT, Preshipment Inspection, Rules of Origin, Import Licensing Procedures, Subsidies and Countervailing Measures, Safeguards); the Council for Trade in Services in charge with the functioning of the GATS; and the Council for TRIPS.[347] Moreover, the General Council manages the dispute settlement system and the Trade

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[344] A.H Qureshi, *The World Trade Organization: Implementing International Trade Norms* (Manchester: Manchester University Press, 1996) at 3-9.

[345] *WTO Agreement*, *supra* note 329, Art. IV(7).

[346] Qureshi, *supra* note 344 at 6.

[347] They can establish subsidiaries organs.

Policy Review Mechanism.

The Secretariat is headed by the Director General appointed by the Ministerial Conference which determines its powers, duties, conditions of services and term of office (Article VI).

2/ The consensus, cornerstone of the decision making process

The institutionalization of the consensus as the common decision-making procedure is one of the main characteristics of the WTO. It was decided that the organization should keep some elements and principles developed by its predecessor, the Marrakesh Agreement asserting that "[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947".[348]

Consequently, consensus is the normal procedure of decision-making. It consists in the adoption of a decision without vote, which means that a proposition is deemed to be accepted if there is no express opposition from one member. Then, it implies the discussion of the text as long as points of disagreements persist among negotiators. It may be qualified as a reverse vote process in the sense that a decision does not have to be supported through a positive vote but by an implicit acceptation.[349] In a footnote in its first paragraph, Article IX of the WTO Agreement specifies that "[t]he body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision".

If one regards the evolution of the decision-making process within international organizations, one may notice the progressive acceptance of consensus.[350] Unanimity was established as the common procedure in the original international organizations because they occupied a fragile position in the international society. At this time, voluntarism, particularly held by Soviet and Italian doctrines, was a preeminent principle and guided international law. Then, as no norm could be opposed to a State which had not expressed

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[348] *WTO Agreement*, *supra* note 329, Art. IX(9). See Footer, *supra* note 325.

[349] Dinh, *supra* note 72 at 603-604. "Le consensus répond à un objectif d'unanimité au stade de l'adoption d'un texte et n'est, par nature, concevable que dans le cadre d'un système majoritaire dont on désire neutraliser les effets".

[350] *Ibid.*, at 601ff; Footer, *supra* note 325 at 658ff.

its consent, unanimity found logically its legitimacy in international fora. This principle found its application in the framework of the League of Nations and is maintained in certain specific organs as the OECD Council, for particular matters at the EU Council, but also at the Security Council of the UN with respect to substantial matters, on which permanent members enjoy a veto (Article 27 of the Charter). Step by step, international organizations became more mature, occupied a more important place in the international arena, and were recognized an own legal personality. Furthermore, with the decolonization process, international organizations saw their membership increase to a considerable extent. Then, it became more and more difficult to reach unanimity among members with constantly growing different interests.

In this context, the majority principle was found to be best suited, more democratic, and has been established as the general rule followed in international organizations. However, simple majority contains weaknesses and corrective mechanisms as weighting vote or permanent seats are sometimes adopted. Qualified majority is often required so as to preserve interests of a minority. It may be generalized to all issues or reserved for most important ones as the modification of the constitutive instruments.

The evolution of the international society, with the intensification of the decolonization process, but also the ever growing complexity of issues discussed within international fora, has implied the necessity for a more flexible normative process and motivated the adoption of the consensus in several international organizations.[351]

Early adopted in the International Labour Organization, International Monetary Fund and World Bank, the consensus has been introduced in 1964 in the United Nations Assembly when it had to decide the suspension of rights of the USSR for non-compliance with its financial obligations. With its institutionalization in 1971 by the Resolution 2837 (XXVI) of the Assembly, consensus has become a widespread process of decision-making in the United Nations system, as during the third Conference of the United Nations on the Law of the Sea.[352]

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[351] Dinh, *Ibid.* Common criticisms regarding consensus point out that it reverses the democratic process by setting a presumption in favour of the adoption of the text, that it corresponds to a compromise on a disagreement and leads to endless negotiations, and as a consequence empties a text of its very content.

[352] The Conference combined consensus and "package deal". Under the"package deal" concept, agreement of a delegation on a specific point is conditioned to its agreement on all the other points covered. Until this, it can revoke its position. *Ibid* at 130.

The WTO reflects this trend after the GATT, and consensus appears even as a cornerstone of its system, notably due to the complexity and diversity of issues that are discussed, but also because it ensures a better respect by States of decisions, since no opposition are finally expressed.

However, if no consensus can be reached among Members, the matter at issue is decided by voting, each State holding one vote. Then, the principle is that decisions, whether from the Ministerial Conference or the General Council are taken at the simple majority. However, some special issues require qualified majority. Interpretative decisions on the Agreement and the Multilateral Agreements or decisions on the waiver of a Member's obligation need a three-fourth majority (Article IX (2) and (3)), and amendments to the Agreement and the Multilateral Agreement are generally adopted at a two-third majority (Article X), excepting some provisions which require unanimity (Article X(2)) or consensus (Article X (9)).

II/ The WTO: a (the?) new major actor in telecommunications

A/ WTO telecommunications regulation

Telecommunications represent today on a world wide scale the third economic sector and its market is assessed around US$ one thousand billion, attracting more and more private investors.[353] This tremendous expansion necessitates a framework regarding provisions of telecommunication services, whose efficiency and reliability have become a fundamental stake for the other industries. In the late 80's, many developed countries assessed that discussions on liberalization of telecommunications could not take place

[353] ITU, Press Release 98/8 (16 March 98). Studies undertaken show that annual growth rate for direct-to-home services would be 19% in 2002 and that demand for broadband service would grow at 164%. S. McGuire & A. Hansson, "Regulating Commercial Space: Is the WTO the Answer?" (2000) 16 Space Policy 7.

within the ITU which deals primarily with technical aspects of the sector.[354] Then, the creation of the WTO represented the opportunity to undertake negotiations in a more suitable forum. The regulation set up within its framework is of considerable importance for the industry, some even claiming that the WTO has surpassed the ITU as the principal organization regulating telecommunications.

1/ The GATS and the Annex on Telecommunications

1.1) The GATS

Before the GATS, no multilateral convention regulated trade in services, and as exchanges of services took an increasing place in international trade, States asserted their objective to define a set of relevant principles before the end of the Uruguay Round. The GATS consists of a broad agreement applicable to any services, national commitments of States and annexes on specific fields (movement of natural persons supplying services, air and maritime transports, financial services and telecommunications).[355]

Purpose of the GATS are determined in its Preamble which recognizes the growing importance of trade in services in the global economy and stresses the willingness of State Parties to implement a multilateral framework of principles and rules notably through conditions of transparency and progressive liberalization for the benefit of all partners. Trade in services are defined as a supply of a service:

> (a) from the territory of one Member into the territory of any other Member;
> (b) in the territory of one Member to the service consumer of any other Member;
> (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
> d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.[356]

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[354] The willingness not to undertake negotiations within the ITU can be also explained by the fact that developed countries felt that developing countries enjoyed a too much important bargaining power within the ITU. See M. C.E.J. Bronkers & P. Larouche, " Telecommunications Services and the World Trade Organization" (1997) 31:3 J. World. T. 5 at 6.

[355] There are 29 Articles, 8 Annexes and 128 schedules of commitments.

[356] *General Agreement on Trade in Services*, 15 April 1994, 33 I.L.M 1167 (1994), Art. I(2) [hereinafter *GATS*].

The Agreement embodies two kinds of obligations: those applying directly to State Members and those subordinated to States commitments.

Major provisions having general implications are Article II on the Most-Favoured Nation (MFN) treatment and Article III on transparency.[357] The MFN principle, cornerstone of the WTO system and derivative from the non-discriminatory principle, is of particular relevance for telecommunications. Under this principle, a country which grants to another one an advantage must extend it to all other countries (in other words, no privilege should be conferred to a specific nation). Other provisions of the GATS affect particularly telecommunications, notably due to the structure of national markets, as Article VI on domestic regulation, Article VII on monopolies and Article IX on restrictive business practices.[358]

Schedule of commitments were the object of strong negotiations since they determine the level of access to national markets. States submit their schedule on specific commitments for the application of market access (Article XVI) and national treatment (Article XVIII), principally sector-by-sector.[359] Moreover, additional commitments may be formulated. Commitments on market access must be done in respect to the MFN principle and Article XVI provides several kinds of restrictions that States can not impose (as limitations on the number of service suppliers).

Fifty-six schedules, including the common schedule of the European Union Members, were submitted concerning telecommunications. Nevertheless, negotiations, and as a consequence commitments, embraced only value-added services and no agreement was reached during the Uruguay Round on basic telecommunication services (which may be defined as the provision of transmission capacity, the relay of voice or data from sender

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[357] Bronkers & Larouche, *supra* note 354 at 14. They are applicable to services on a general basis.

[358] Global Information Infrastructure Commission, *The WTO Telecom Agreement: Engineering the Global Information Highway* (Conference Report, Washington D.C., 1997) at 82 [hereinafter *GIIC Conference*].

[359] *Ibid* at 83. National treatment implies that a State applies to a services and service suppliers of any Member a "treatment no less favourable than that it accords to its own like services and services suppliers". *GATS*, *supra* note 356, Art. XVII(1).

to receiver).[360]

1.2) The Annex on Telecommunications

The Annex on Telecommunications provides a set of supplementary provisions with respect to measures of Members "affecting access to and use of public telecommunications transport networks and services".[361] Then, its main provision is aimed at ensuring that providers of various services (banking, insurance, finance...) would have access to telecommunications services in WTO Members.[362] Thus, "[e]ach Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule".[363] Then, when a service is covered by one of its commitments, a State does not have to specify the access of the suppliers to telecommunications networks and services in order to lead their activity since this access is already ensured by the Annex.[364] Nonetheless, conditions of access to and use of public telecommunications services may be determined providing that they are justified to safeguard the availability of public services, their integrity or to ensure the respect of commitments. It is necessary to underline that the Annex does not intend to impose further obligations to States than those already accepted in their commitments regarding the access of their telecommunications market.[365]

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[360] Voice telephony, data transmission, facsimile, fixed and mobile satellite systems are examples of basic telecommunications services. On-line data processing, e-mail, data storage or retrieval are kinds of value-added, enhanced, telecommunications services. See Bronkers & Larouche, *supra* note 354 at 16.

[361] *GATS*, *supra* note 356, *Annex on Telecommunications*, 33 I.L.M. 1192 (1994) [hereinafter *AT*], para.1.

[362] P. Malanczuk, "The Relevance of international Economic Law and the World Trade Organization (WTO) for Commercial Outer Space Activities", in *Proceedings of the Third ECSL Colloquium* (Perugia: ESA, 1999) 305 at 312.

[363] *AT*, *supra* note 361, para. 5.

[364] Bronkers & Larouche, *supra* note 354 at 20.

[365] *AT*, *supra* note 361, para. 2(c).

2/ The WTO Telecommunications Agreement

If discussions on telecommunications appeared in 1989 under pressure of the United States, most domestic markets were characterized by monopolies and many States were opposed to the introduction of basic telecommunications in the negotiations of the Uruguay Round, which were limited to value-added services. Then, a Negotiating Group on Basic Telecommunications (NGBT) was created to carry out negotiations on this issue and reach an agreement by April 1996 (the application of the MFN treatment to the telecommunications was suspended during this period.).[366] Negotiations failed in 1996, the United States notably criticized the reluctance of developing countries to fulfil their commitments, and it was decided to extend the deadline to 15 February 1997 and to replace the NGBT by the Group on Basic Telecommunications (GBT). Discussions within the GBT among its sixty-nine State Members led to the conclusion on 15 February 1997 of the WTO Agreement on Basic Telecommunications Services which takes the form of a protocol to the GATS, the so-called "Fourth Protocol", to which are attached fifty-five schedules of commitments from the sixty-nine countries on the liberalization of their market.[367] The Fourth Protocol was expected to enter into force on 1 January 1998 after ratification of all contracting parties. The Agreement finally came into force on 5 February 1998 and was received as a milestone for the telecommunication industry.

The Fourth Protocol sets several principles applicable to telecommunications services and contains national commitments on the liberalization of domestic markets.

Cornerstone GATS principles as the MFN and the national treatment have been definitely extended to basic telecommunications. Derogations to the MFN obligation may be formulated (Annex on Article II Exemption), but are subject to periodical review, until their supposed termination ten years after the entry into force of the WTO Agreement (1 January 2005).[368] Thus, some adjustments were consented since the full liberalization of basic telecommunications services could not been conceivable in some countries,

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[366] See L B. Sherman, "«Wildly Enthusiastic» About the First Multilateral Agreement on Trade in Telecommunications Services" (1998) 51 Fed. Comm. L.J. 61 at 66-72.

[367] *Fourth Protocol to the General Agreement on Trade in Services*, 15 February 1997, 36 I.L.M. 354 (1997).

[368] Bronkers & Larouche, *supra* note 354 at 34-35.

particularly the developing countries. Application of the MFN obligation may not be without difficulties. For instance, a country may consent to large commitments for the liberalization of its market while others express some reserves and be obliged to extend to them advantages that it would not enjoy. This "free rider" effect can be minimized by filing an exemption under the Annex on Article II Exemption. Resulting from the refusal from Canada to relax limits on foreign ownership of telecommunications carriers, in order to protect Teleglobe, the United States used this exemption on foreign ownership of US companies operating satellite services (direct-to-home, direct broadcasting and digital audio services).[369]

Sixty-nine WTO Member States representing 90% of telecommunications market submitted fifty-five schedules of commitments attached to the Fourth Protocol and opened fully or partially their national basic telecommunications services market, including forty-two countries which agreed to open foreign investment in telecommunications services and facilities[370] and fifty-two which opened their international service sector (some are deferred or limited to specific sectors).[371]

As pointed out Mr Abelson, chief negotiator for communications and information in the office of the US trade representative, these commitments are "technology neutral",[372] unless otherwise provided, which means that they concern the access to telecommunications services whatever the mean of transmission (wire, microwave or satellite). During the NGBT negotiations, there was no homogenous positions upon satellite communications: while the US schedules explicitly foresaw to cover satellite services, other countries as Japan avoided any reference to satellites and others excluded them from their commitments.[373] It was finally recognized that unless explicitly provided, the means by which the services are supplied did not matter.

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[369] *Ibid.*

[370] Some countries limited (Canada, France, Mexico...) or refused (India, Thailand, Turkey, South Africa...) foreign investments. Bronkers & Larouche, *supra* note 354 at 22.

[371] For a summary of schedules, see D. Abelson, *GIIC Conference*, *supra* note 358 at 33; Sherman, *supra* note 366 at 100.

[372] *GIIC Conference*, *ibid.*

[373] Sherman, *supra* note 366 at 90.

Fifty-two offers were directly aimed to open the satellite sector (fixed, mobile, geostationary and non-geostationary).[374] However, it is important to underline that direct-to-home and direct broadcast satellite services were not concerned by the negotiations, the United States grant to these services a special status, considering them as telecom services contrary to the other countries which do not share this classification. As a sensitive issue, with its political and cultural implications, it was decided that these services would not be covered by the commitments.[375]

3/ The Reference Paper

During the negotiations within the NGBT, several States (Australia, Japan, Korea, New Zealand, United States and the European Union) met under the impetus of the United States to study the implementation of regulatory principles to prevent anti-competitive practices. This led to the adoption of the Reference Paper,[376] largely inspired by a document drafted by the United States,"Procompetitive Regulatory and Other Measures for Effective Market Access in Basic Telecommunications Services", in which were described some desirable principles to be implemented to ensure market access.[377] The RP has been signed by fifty-five States, some eight countries (as Morocco or Turkey) refusing to adopt it, while four (Bangladesh, Brazil, Mauritius and Thailand) postponed its application.[378] An important issue was the legal force of the RP, since, as such, it could not have any binding force and an amendment to the GATS or the AT was not feasible. Then, it was concluded that it should be included as an additional commitment in order to be binding and subject to the Dispute Settlement System.

Objectives of the RP are to determine competitive safeguards for market access and foreign investments in basic telecommunications services. Traditionally two kinds of

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[374] *GIIC Conference*, *supra* note 358 at 33.

[375] *Ibid.*

[376] *Reference Paper to the Fourth Protocol to the General Agreement on Trade in Services*, 36 I.L.M. 367 (1997) [hereinafter *RP*].

[377] Sherman, *supra* note 366 at 71-72.

[378] Bronkers & Larouche, *supra* note 354 at 22.

regulations provided by the RP are distinguished, those relating to major suppliers and those containing general regulatory issues.[379]

Under the RP, a major supplier is

> a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of :
>
> a) control over essential facilities; or
>
> b) use of its position in the market.[380]

Under this definition the major supplier has a significant impact in the market, enjoys a dominant position, which allows him to influence the participation of other suppliers in the market.[381] This influence has been made possible through its position in the market or the control of essential facilities, "public telecommunications transport network or service that: a) are exclusively or predominantly provided by a single or limited number of suppliers; and b) cannot feasibly be economically or technically substituted in order to provide a service".[382]

Provisions relating to major suppliers concern competitive safeguards and interconnection. Regarding the former, paragraph 1 stipulates that adequate national measures shall prevent major suppliers from adopting anti-competitive practices.[383] Obligations relating to interconnections concern the linking between two networks, two telecommunications services providers, for services subject to specific commitments.[384] The RP provides that interconnection with a major supplier shall be ensured at a technically feasible point, under non-discriminatory, timely fashioned and reasonable

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[379] See *Ibid.*; Sherman, *supra* note 366 at 73-88.

[380] *RP*, *supra* note 376.

[381] Bronkers & Larouche, *supra* note 354 at 24-26.

[382] *RP*, *supra* note 376.

[383] A non-exhaustive list of anti-competitive practices are provided by paragraph 1.2: anti-competitive cross-subsidization, use of information obtained from competitors with anti-competitive results, no availability for other services suppliers on a timely basis of technical information about essential facilities and of commercially relevant information which are necessary for them to provide services. *Ibid.*

[384] See Sherman, *supra* note 366 at 78.

terms, condition and rates. Moreover, the national treatment principle is recalled with respect to its quality. If it is requested, interconnection shall be provided to additional points offered to the majority of users at the cost of construction of necessary additional facilities.[385]

Moreover, procedures applicable as well as major supplier's interconnection agreements and reference interconnection offer shall be publicly available.[386] Finally, a domestic independent dispute settlement body shall be available to resolve conflicts on terms, condition or rates for interconnection.[387]

General regulatory provisions concern universal services, licensing, independent regulators and allocation and use of scarce resources.

Paragraph 3 of the RP recognizes the right for each State to maintain universal service obligations, which would not be anti-competitive providing that they are "administered in a transparent, non-discriminatory and competitively neutral manner"and "not more burdensome than necessary".

Licensing criteria, terms and conditions must be publicly available, but reasons for the denial of a licence are communicated upon request of the applicant.[388] However, some have deplored that no provisions on mutual recognition of licence had been adopted.[389] Finally, there shall be an independent and impartial regulatory body and allocation of use of scarce resources, as frequencies, shall be undertaken under objective, timely, transparent and non-discriminatory conditions.[390]

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[385] *RP*, *supra* note 376, para.2.

[386] *Ibid.*, para. 2.3 & 2.4.

[387] *Ibid.*, para. 2.5.

[388] *Ibid.*, para. 4.

[389] See Bronkers & Larouche, *supra* note 354 at 30-31.

[390] *RP*, *supra* note 376, para.5 & 6.

B/ The dispute settlement system

As we have seen previously, the major gap of the ITU is its inability to resolve within its framework disputes that may arise among States or operators. The efficiency of the WTO dispute settlement system is part of the reasons for which some claim to grant this organization general competences in the regulation of satellite communications. Dispute settlement procedures are an essential element in economic organizations since they allow to insure the proper implementation of measures adopted within their framework and thus, guarantee their credibility.

The GATT was granted a dispute settlement system which, despite its development along the years showed some inadequacies. Then, at its very beginning, the GATT provided more a political than a judicial settlement of conflicts. Despite its progressive institutionalization, with the establishment of an arbitration procedure and the creation of a panel, the system remained imperfect particularly due to its non-binding character.[391] Negotiations during the Uruguay Round led to the conclusion that it was necessary to improve these mechanisms for the WTO.

The dispute settlement system of the WTO is described in the Understanding on Rules and Procedures Governing the Settlement of Disputes, which purpose is to establish an institutional framework as "a central element in providing security and predictability to the multilateral trading system" to clarify and preserve rights and obligations of State Members according to customary rules of interpretations of public international law.[392] Contrary to the GATT, in which several organs carried out conflicts on specific agreements, the Understanding sets a unified system for resolution on disputes on all matters covered by the organization and intends to prevent eventual external international jurisdictions to interfere in WTO regulations, forum shopping and unilateral retaliations. The dispute settlement system is available to any State Member which consider that any benefit resulting from the agreements, any objective of these agreements, are jeopardized

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[391] Jackson, *supra* note 323 at 29.

[392] *Understanding on Rules and Procedure Governing the Settlement of Disputes*, 15 April 1994, 33 I.L.M. 1226 (1994), Art. 3.2 [hereinafter *DSU*].

by a behaviour from another Member (whether resulting from a violation of its obligations or not).[393]

Three bodies may intervene in the procedure: a panel, an Appellate Body and the Dispute Settlement Body (DSB) which approves reports of the two former.
The DSB is the principal organ of the system. Under Article 2 of the DSU, it administrates rules and procedures, oversees measures taken by State Members and has jurisdiction on all agreements covered by the WTO. However, it has no competence to interpret Multilateral Trade Agreements or the WTO Agreement which fall within the Ministerial Conference and the General Council remits.[394]

The dispute settlement system of the WTO is characterized by a "two-track approach".[395] States are encouraged to undertake diplomatic procedures (consultations, good offices, mediation...), "a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred".[396] In case of a failure of negotiations, one of the Parties to the conflict may enter into a pre-determined procedure of settlement.
The first step of this judicial procedure is the creation of a panel, unless denied by the DSB by consensus,[397] whose functions are to assist the DSB and to make an objective assessment of the matter.[398] It is composed of well-qualified independent members who have no interest in the conflict.[399] The Panel is composed of three members, but the parties may decide within ten days from its establishment to extend it to five and may agree to nominate a representative each. After hearings and comments of Parties, and

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[393] Qureshi, *supra* note 344 at 98-99.

[394] *Ibid.*

[395] Lafer, *supra* note 323.

[396] *DSU*, *supra* note 392, Art. 3(7).

[397] *Ibid.*, Art. 6(1).

[398] *Ibid.*, Art. 11.

[399] *Ibid.*, Art. 8(1) & 8(2).

third parties which may have any interest in the resolution of the conflict, the panel gives its report within six months from its establishment (three months in case of an urgent situation). Deliberations are confidential and opinions of panellists are anonymous.[400] Then, the report of the panel is adopted by the DSB, unless it is rejected by consensus or a Party decides to appeal.

The Appellate Body is composed of seven well-qualified members designated by the DSB, being broadly representative of the WTO membership and having no interest in the resolution of the conflict.[401] The appeal is limited since it can only concern issues of law covered in the panel report and legal interpretations. Its report must be presented within 90 days and may also be rejected by the DSB by consensus within the following 30 days. Otherwise, the report is adopted and is automatically accepted by the Parties.[402]

Several kinds of sanctions may be recommended by the two organs: withdrawal of the litigious measure, authorization to the complainant to suspend its concessions and obligations concerning the offending State, compensations... The implementation of the recommendation or ruling must be done in a "reasonable period of time" (which may be defined on case-by-case basis) and is subject to surveillance from the DSB.[403]

A large controversy has taken place with respect to the legal force and effect of reports adopted by panels or Appellate Bodies once adopted by the DSB, whether a State has the obligation to bring its legislation in conformity or only to give compensation.[404] The point remains discussed and some Members, as the United States, asserted that reports could only entail an obligation to compensate but in no case any obligation to perform. Some scholars point out that the spirit of the DSU implies an obligation to perform from State Parties, compensation being not the aim of the dispute settlement system.[405] Actually, it seems that two cases should be defined: in case of a non-violation complaint, there is no

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[400] *Ibid.*, Art.14.

[401] *Ibid.*, Art. 17(1) & (3).

[402] *Ibid.*, Art. 17(14).

[403] Qureshi, *supra* note 344 at 104-105.

[404] Jackson, *supra* note 323 at 32-33.

[405] *Ibid.*, The DSB remains in charge with the dispute until the withdrawal of the measure even if there has been compensation.

obligation to perform and to withdraw the measure, but *a contrario* in case of a violation complaint, the State has the obligation to perform.[406] Nevertheless, it should be stressed that as an international "jurisdiction", the WTO dispute settlement system does not have at its disposal effective means to ensure the implementation of recommendations and ruling.

Even though the WTO offers a dispute settlement system which is obviously more developed and efficient than the ITU, it is still open to criticisms, notably regarding telecommunications requirements.

It is argued that with respect to the evolution of telecommunications, in terms of market and technology, there is a need for adequate and quick decisions for any conflict. However, the time between the birth of a conflict and first implementations of a decision (which may take one year) is too long in the WTO dispute settlement mechanism to ensure a prompt resolution.[407]

In addition, even though they may be the central subject of a dispute, private entities are not granted access to the settlement mechanism. Since they are not subject of international law, private entities must obtain from their national State to bring their interests at the international level and use their diplomatic protection. Due to the private sector influence in the global economy in general, and in telecommunications in particular, it is pointed out that time has come to allow private entities to defend their case and interest before such international judicial forum.[408] Role of private entities in the WTO is becoming, as in the ITU, more and more important and although they are not allowed to be directly involved in the dispute settlement system, they may present their position by amicus briefs attached to State submissions.[409] Even if advantages of full access of the private

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[406] *Ibid;* Qureshi, *supra* note 344 at 104.

[407] Bronkers & Larouche, *supra* note 354 at 41-42.

[408] See M. Laidhold, " Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO?" (1999) 12 Transnat'l Law. 427.

[409] See *Ibid* at 434. The author details the influence of private companies during the "Banana case", among the European Union, the United States and Latin America countries, and the Shrimp-Turtle Decision between the United States and Asian countries.

sector to the dispute settlement system are raised by various authors, it seems that it is hardly conceivable to see a private corporation bringing a case before the DSB like any State. Thus, the WTO can only evolve within limits traditionally attached to international organizations, and as such, access, rights and obligations of private entities can only be granted within a strictly determined scope.

C/ For a complementary role

Should the WTO replace the ITU in the management of telecommunications? This question certainly constitutes the most important debate since the telecommunication regulation has been set up and its outcome would be decisive for the future of this sector. We have seen that the regulation set up by the ITU is subject to several criticisms from authors who consider that it does not correspond anymore to realities and requirements of a sector in mutation. Entry of new private actors, technological and economical developments entail radical changes of a sector in constant evolution. The emergence of a certain willingness to introduce a market of frequencies and orbital positions coincide with the wish to grant the WTO competences in this matter, while the ITU would be relegated to strictly technical competences, like elaboration of standards for example.[410] This redefinition of competences does not seem however desirable. Even though the ITU shall adopt additional substantial reforms, the ability that it showed along the years to adapt itself, as well as competences it acquired in the field, enable the Union to act in the sector with success. In fact, rather than a conflict of competences, a cooperation between the two organizations is desirable. Then, during NGBT negotiations the frequencies issue was raised and it was assessed that the WTO would not be an appropriate forum for the management of the orbit/spectrum.[411] Nevertheless, it was recognized that one of the functions of the WTO should be to avoid that frequencies assignations be used as barriers to trade. Thus, each organization shall play a complementary role while staying within their scope of competences. As what the ITU's strategic plan for the 1995/1999 period provided, the Union should have close relations with the WTO so as to identify critical

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[410] McGuire & Hansson, *supra* note 353 at 8.

[411] *GIIC Conference*, *supra* note 358 at 80.

issues and avoid overlapping and inconsistencies. Then, we have been witnessing an increasing interdependence between the two organizations: commercial negotiations within the WTO have important repercussions on ITU's activities and vice versa. Negotiations undertaken within the framework of the trade organization must take into account connected technical features developed by the ITU, while works and regulations of the Union must endeavour to respect commercial commitments.[412]

This cooperation between the two organizations may take the form of information exchange between respective secretariats; the ability for an organ of one of the organizations to inquire on certain issues advisory opinions by an organ of the other; the institution of common working groups and committees of experts (with the eventual participation of private sector).[413]

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[412] *Accords commerciaux sur les télécommunications et réglementation*, Rapport du 5ème colloque sur la réglementation (ITU: Geneva, 1995) at 51-52.

[413] *Ibid.*, at 53.

CONCLUSION

Telecommunications privatization reflects a mutation of policies followed from around forty years not only in this sector but more generally in the space field as a whole. Since the 80's, the growing, and today the massive participation of private actors has radically changed the face of space activities (launch industry, remote sensing, telecommunications...). If space law had been marked for several decades by international public law to a large extent, being one of its component as maritime law for instance, it has been knowing a progressive "privatization", private law (commercial and insurance law, industrial property...) having major implications on space activities.[414]

Since they have been playing a fundamental role in the telecommunication area, international organizations are directly concerned by this evolution. Because outer space was a State affair, it was considered, on one hand that satellite systems exploitation should be undertaken in the framework of an international cooperation and, on the other hand that international regulation should be developed by an organization of technical and political character.

Created under the same model of intergovernmental organizations, Intelsat, Inmarsat and Eutelsat have fulfilled their missions with success. Intelsat has become the first global satellite network, many countries relying on its system for their communication needs. Inmarsat has largely improved maritime communications and even though this has constituted its main activity, the organization extended its services to aeronautical and land mobile services. Finally, as far as Eutelsat is concerned, it allowed European countries to set their own satellite system and has become even a major player in world telecommunications market, extending its services geographically.

However, It has been quasi-unanimously recognized that international satellite organizations had to adapt themselves to the new competitive environment first, to pursue

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[414] "Vers une privatisation ?", *supra* note 138 at 158.

their commercial activity more adequately, but also to put an end to a privileged position that was not justified anymore. Intelsat distinguished itself from the other organizations by deciding a full privatization, confirmed in September by the Board, which stresses a radical change of its philosophy in the way to pursue its activities. Stakes of this transition are considerable and it has been necessary, particularly for Intelsat and Inmarsat, to set up mechanisms to ensure the provision of services of public interest. If it will certainly not be easy for these new private entities to conciliate adequately these obligations with their own commercial interests, it would be premature to draw conclusions on consequences of this privatization since only Inmarsat has been privatized for about one year. Nevertheless, it seems that this first year of Inmarsat as a private corporation is encouraging for the future.

In addition, we have seen that present ITU's position is totally different from the one it enjoyed at the end of the 70's. In the past largely characterized by political oppositions, the Union evolves today in a sector driven by economical considerations. Then, private actors are playing an increasing role which sets up a new balance within the organization which has to consider further institutional reforms. Moreover, the ITU must adapt its regulation subject to criticisms, particularly from those who see in the privatization/commercialization of telecommunications a natural outcome: the establishing of a commercial regulation for the access to resources. With the appearance of the WTO, two international organizations have the authority to regulate telecommunications, and it will be imperative to avoid conflicts of competences.
The ITU must react strongly if it wants to maintain its authority in the sector. Some claim the establishment of an international commission, either within or outside the ITU, which like national commissions would be vested of real mandatory powers. Above all, the ITU should endow itself with adequate means for the fulfilment of its functions, unless recent developments in telecommunications sound the knell of its authority. This extension of the powers of the Union would not face particular legal problems, notably through the theory of implicit powers. However, it seems that such a reform is not topical for the moment.

Recent developments of these international organizations typifies both the general

evolution of the relation between man and outer space and the one between public and private actors. These transformations of the role and structure of these international organizations will constitute undoubtedly a milestone in telecommunications history. After a transitional period, a page is going to be turned. Telecommunications are entering in the new millennium with a new face.

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