

IISL-95-LLSL.3.01

THE INTERNATIONAL TELECOMMUNICATIONS SATELLITE ORGANIZATION (INTELSAT)
3400 International Drive, N.W., Washington, D.C., U.S.A.

**INTELSAT: EVOLVING TO MEET THE CHALLENGES OF A NEW
INTERNATIONAL TELECOMMUNICATIONS MARKETPLACE**
by Donald D. Wear, Jr., General Counsel

Abstract

INTELSAT is the result of an international effort to establish a global satellite telecommunications system to provide telecommunications services on a universal, non-discriminatory basis. A concerted effort by governments was required in order to develop the infant satellite industry. However, the circumstances which spawned the creation of INTELSAT have significantly changed. Telecommunications is no longer a fledgling industry requiring the patronage of national governments, but is now a mature market, rife with technological advances and increased national, regional and global competition for the provision of services. Given these and other changes, the INTELSAT cooperative is faced with new challenges and has undertaken efforts to meet those challenges. Some of those efforts include increasing direct access to INTELSAT by non-member users and re-engineering business processes to provide better service and products to our customers. Other efforts to change may, to some degree, be outside INTELSAT's current structure and require adaptation to the modern telecommunications environment by converting INTELSAT to a more commercial entity. Whatever the outcome, INTELSAT is proactively undergoing an internal examination, while keeping abreast of external engines of change with the dual goal of serving its re-affirmed mission of universal service and non-discriminatory charging, and also responding to new market opportunities.

Copyright © 1995 by the International Telecommunications Satellite Organization (INTELSAT). Published by the American Institute of Aeronautics and Astronautics, Inc., with permission. Released to IAF/AIAA to publish in all forms.

INTELSAT's Background, History & Structure

In 1964, the satellite telecommunications industry was in its infancy when a group of eleven nations came together to form an international cooperative that ultimately became the International Telecommunications Satellite Organization (INTELSAT). Those eleven nations conceived a unique experiment by which the global community would unite to undertake the common goal of developing and promoting the use of international satellite telecommunications "for the benefit of all mankind."¹ That unique experiment created the world's only truly global telecommunications satellite network. INTELSAT, from the time of its creation, has grown from an initial membership of eleven nations with one satellite, the "Early Bird," to a current membership of over 135 nations, owning and operating a 24-satellite fleet comprised of some of the world's most technologically advanced telecommunications satellites.

Constitutive Agreements. The INTELSAT Agreement and the INTELSAT Operating Agreement are INTELSAT's constitutive documents.² These Agreements created a unique organization that can be described as having elements of both a private, commercial entity and a public inter-governmental organization.

The INTELSAT Agreements establish INTELSAT's governing financial principles, including ownership of INTELSAT's assets³ and the link between system utilization and ownership share.⁴ The Agreements also establish the rights and obligations of both the

member governments⁵ and the Signatories they designate.⁶ The Agreements provide for INTELSAT to "possess juridical personality"⁷ and to have many of the privileges and immunities which are typically conveyed upon an international organization.⁸

In several respects, these constitutive documents, drafted at a time when the telecommunications industry was far less developed than it is today, did not anticipate the revolutionary changes that currently mark the telecommunications industry. In some ways, these documents may be reasonably interpreted and construed to accommodate certain market changes, but in other areas, these documents can be tightly restrictive.

Purpose & Mission. The purpose for establishing the INTELSAT cooperative was initially defined simply as the "design, development, construction, establishment, maintenance and operation of the space segment of a global commercial communications satellite system."⁹ This basic purpose was accomplished by an experimental operational phase whereby one satellite was placed in geosynchronous orbit, with additional satellites eventually added to achieve the global aspect of the INTELSAT system. This interim arrangement was followed by the definitive INTELSAT arrangements, which entered into force in 1973, four years after the achievement of global coverage. The purpose stated by the interim arrangements is closely mirrored in the Definitive Arrangements.¹⁰

Key elements to INTELSAT's mission, outlined in the Preamble to the INTELSAT Agreement, include the provision of "services to all areas of the world . . . for the benefit of all mankind" and the organization of the system "in such a way as to permit all peoples to have access to the global satellite system."¹¹ This general premise, together with other provisions within the INTELSAT Agreement, established universal service and non-discriminatory charging as INTELSAT's guiding principles.¹² The INTELSAT Agreements do not further define universal service and the negotiating

history of those Agreements is also silent. However, in practice, INTELSAT has implemented this aspect of its mission to include the following elements: global coverage; priority to basic Public Switch Network (PSN) service and enhancement of inter-connectivity; assured access to the system to provide "lifeline" services; and equitable service tariffs. The concept of non-discriminatory charging is closely tied to universal service as both concepts are committed to the provision of capacity on a "non-discriminatory basis," which essentially encompasses a basic fairness to all members in the operation of the system. In this regard, Article V(d) of the INTELSAT Agreement provides that space segment utilization charges "shall be the same for all applicants for space segment capacity for that type of utilization."¹³

Institutional Structure. INTELSAT is a four tiered organization: the Assembly of Parties, the Meeting of Signatories, the Board of Governors, and the Executive Organ.¹⁴ The Assembly of Parties is composed of all Parties to the INTELSAT Agreement¹⁵ and is concerned with "those aspects of INTELSAT which are primarily of interest to the Parties as sovereign states" including questions of general policy and long-term objectives of INTELSAT.¹⁶ The Meeting of Signatories (MS) is comprised of all Signatories to the INTELSAT Operating Agreement¹⁷ and ordinarily meets once each year. The functions and powers of the MS include, among other things, the review and comment on annual and financial reports, proposed amendments to the Operating Agreement, future programs, the establishment of general rules regarding the allotment of space segment capacity, and the establishment of utilization charges.¹⁸

The Board of Governors is comprised of those Signatories which hold at least the minimum investment share as determined under the INTELSAT Agreement, in addition to one Governor representing each of the regions as defined by the International Telecommunications Union, not to exceed five such Governors. Two or more Signatories may

group their investment shares in order to attain a seat on the Board of Governors. However, the number of Governors on the Board of Governors may not exceed 27.¹⁹ The INTELSAT Board of Governors routinely meets four times per year and is responsible for "the design, development, construction, establishment, operation and maintenance of the INTELSAT space segment, and . . . for carrying out any other activities which are undertaken by INTELSAT."²⁰ The Board has broad powers to make decisions which may further this mandate.

The INTELSAT Executive Organ, now commonly referred to as INTELSAT Management, reports directly to the Board of Governors and is responsible for the daily operation and management of the INTELSAT system. Irving Goldstein of the United States currently serves as the Director General and Chief Executive Officer of INTELSAT.

Users and Owners of the INTELSAT System. Presently, there are 136 Signatories to the INTELSAT Operating Agreement, but INTELSAT provides services to over 200 countries, territories and dependencies worldwide. Non-member governments may designate a telecommunications entity within their territory to deal with INTELSAT. Such entities, known as "Duly Authorized Telecommunications Entities" (DATE), may utilize the INTELSAT space segment. However, unlike Signatories, DATEs may not hold an investment share in INTELSAT. INTELSAT Signatories and DATEs traditionally comprised most of INTELSAT's closed user group. Signatories were the exclusive owners of the INTELSAT system, owning an investment share in INTELSAT in proportion to their relative utilization of the INTELSAT space segment system.²¹

Signatories are responsible for paying an initial investment share in INTELSAT and subsequent capital requirements. In return, Signatories enjoy a return on that investment, usually earning at least 14% compensation for the use of capital. However, as described more fully

below, INTELSAT's user group is changing. As a result of changes in the marketplace, INTELSAT has grown to permit usage of the system by entities that are neither Signatories nor DATEs. Some of those new users, known as Direct Access Customers, have even been authorized by Signatories to invest in INTELSAT. INTELSAT currently has eight non-Signatory investors, collectively holding approximately a 4% investment share.

Changes in the Marketplace

Growth in Competition. The INTELSAT cooperative grew and became successful in an era when the structure of most providers of international telecommunications services operated on a state-monopoly basis. INTELSAT acted as a "carrier's carrier," providing satellite services on a wholesale basis to this closed group of Signatories who, in turn, re-sold the services to their various customers.

In recent years, the telecommunications industry has evolved and continues to do so. Global trends of de-regulation and privatization of national telecommunications industries to liberalize market entry by competing firms have resulted in an overall restructuring of the telecommunications market and greater local, regional and global competition for the provision of basic and enhanced telecommunications services.

Although INTELSAT has an important position in the international telecommunications environment, it is, nonetheless, just one provider among many. The providers of international telecommunications are not limited to fixed satellite systems such as INTELSAT's. Other providers are the fiber-optic cable systems and, in the next few years, mobile satellite systems operating in low and middle earth orbits. Each of the three major sources of international telecommunications -- fixed satellites, fiber-optic cable, and mobile satellites -- enjoy competitive advantages over the others in some areas. But, today's reality

is that international telecommunications has become a highly competitive environment.

In the near future, the number of fiber-optic cables are expected to double. Fiber-optic cable enjoys some technological advantages over satellites, particularly in the provision of point-to-point communications. Additionally, fiber-optic cable enjoys a pricing advantage over satellite communications. For example, in 1992 the price of an INTELSAT 64 Kbps bearer channel was slightly less than the equivalent charge for a 64 Kbps channel on the TAT-10 transatlantic cable and less than half of the charge on the TPC-4 transpacific cable. By next year this price advantage will have been lost by INTELSAT with the charges on the TAT-12/13 transatlantic and TPC-5 transpacific cables being significantly below the cost of an equivalent amount of INTELSAT capacity.

Moreover, traffic has already begun to migrate from satellites to cable and this trend will, over the years to come, be increasingly apparent. Specifically, cable's share of international telecommunications is forecasted by industry and government studies to jump from today's 45% share to a 62% share by the end of the decade with satellite's share showing a corresponding drop from 55% today to 38%. Consequently, the percentage of INTELSAT's revenues derived from the provision of switched services, which lend themselves to being carried over fiber-optic cable, will drop from 52% in 1994 to only 37% by the end of the decade. As recently as 1988, 80% of INTELSAT's revenues were derived from the provision of switched services. Consequently, fiber-optic cable (which is dramatically increasing in capacity) is a major source of competition for fixed satellite systems, particularly those systems which rely heavily upon public switched network services -- such as INTELSAT.

The fixed satellite business environment is also competitive. In addition to INTELSAT, which is the largest of the fixed satellite systems, there are many other fixed satellite systems --

the so-called "separate systems." Today, there are over 60 satellites in orbit providing international telecommunications services in direct competition with INTELSAT. Dozens of other satellites soon will be built for these telecommunications providers. Also potentially added to the mix are over 30 US domestic satellites which contain hundreds of transponders that, if the FCC adopts a proposed rule,²² will be permitted to provide international services. Separate system satellites and INTELSAT satellites largely compete over non-public switched services such as video and business services where the advantage of satellites in providing point-to-multipoint and multipoint-to-multipoint services, compared to cables, is significant.

Another way of comparing the level of competition among fixed communications satellites is to look at the number of ITU registrations. As of June 1995, a total of 124 orbital locations were registered on behalf of non-INTELSAT satellite owners with another 29 and 118 in the Advance Publication and Coordination stages of the ITU process. INTELSAT, in comparison has 19, 7 and 14 orbital locations in the Registered, Advance Publication and Coordination stages, respectively.

In addition, over the next several years, there will be a significant new player that will make its presence felt in a major way. This new player is the mobile satellite system -- the LEO/MEO systems. Currently, no fewer than eight such systems, carrying a combined price tag of approximately US\$20 billion, have been proposed. Ranging in size from 12 satellites (the proposed Odyssey) to 840 satellites (the proposed Teledesic), these systems enjoy the backing of major companies such as Motorola, Lockheed Martin, STET-Italy, Alenia Spazio, France Telecom, Loral, TRW, Westinghouse, and Hughes Communications. While it is almost certain that not all of these mobile satellite systems will become operational, it is almost equally certain that some mobile satellite systems will become operational in the near future. Indeed, a recent study issued by

the U.S. Government states that deployment of two LEO/MEO systems in the 1995-2005 time frame is probable.

Governance Issues. INTELSAT's governance structure may present difficulties in effectively adapting to this increasingly competitive marketplace.

The governance of INTELSAT was founded on the traditional principles of an inter-governmental cooperative and served the public interest nature of INTELSAT. When INTELSAT's mission was limited to establishing a global satellite system to carry PSN traffic, the governance structure of INTELSAT was acceptable since the goal was common and focussed. In the past, conflicting interests and desires of INTELSAT's membership were not problematic since it did not hamper INTELSAT; the market was such that rapid movement was not critical and INTELSAT could take the time necessary to achieve a consensus. Today, the nature of telecommunications is no longer limited to PSN and levels of demand for other services differ among INTELSAT's membership, increasing the difficulty of obtaining a consensus. Also, the business interests of INTELSAT's membership is increasingly divergent. Many Signatories themselves have become privatized, commercialized and subject to increased competition, and they now view INTELSAT's role in relation to their companies differently. Some Signatories, through governmental regulation, are placed in the awkward position of having to provide their competitors with space segment capacity. All of these and other elements result in an increased potential for conflict among INTELSAT's membership. Consensus will become increasingly difficult to achieve and there no longer exists the luxury of time in which to achieve it.

Business Issues. In addition, INTELSAT is constrained in its ability to respond to business opportunities. Essentially, as noted above, the intergovernmental cooperative structure derives customers through a closed user group, but that user group increasingly

has other choices for telecommunications services. This structure also limits INTELSAT's access to its end users, since INTELSAT traditionally has been a "carrier's carrier." This distance from its end users limits INTELSAT's knowledge of existing and emerging markets and products and results in a decreased ability to meet market demand.

There are other elements of INTELSAT's current structure which limit business opportunities, including some reluctance to expand into markets outside of INTELSAT's mission-market, PSN. While access decisions (discussed below) have improved this situation incrementally and resulted in some increase in the size of INTELSAT's user group, these decisions have not resolved all problems completely, as they only address limited issues. Only structural change towards a more commercial entity would alleviate all of the business constraints on INTELSAT.

Growing Pressure for Change. INTELSAT has been under ever-increasing scrutiny by its competitors, which include separate satellite systems and cable operators. Some of these competitors have demanded that very dramatic changes be made to the INTELSAT system, ranging from straightforward privatization to complete dismantling of the INTELSAT global network. The criticism of these competitors most frequently targets INTELSAT's structure and its privileges and immunities. The charge is that the INTELSAT system structure is monopolistic, giving INTELSAT an unfair market advantage, and that INTELSAT's inter-governmental agreements provide INTELSAT with a mechanism to stifle competition. These accusations overlook certain truths, the most important of which is that vibrant, growing competition already exists.

What is typically ignored by INTELSAT's critics is that the INTELSAT structure may inherently limit INTELSAT's ability to respond to market demands and trends, which more than offsets any perceived advantage. For instance, INTELSAT's competitors are not bound by the

obligations of non-discriminatory charging. Therefore, they may freely negotiate contracts for capacity, offer discounts, incentives, etc. in order to attract customers. They may also maximize their revenues and profits by charging premiums for capacity on the heavily-demanded high density traffic routes. INTELSAT, conversely, is constrained in its service pricing and may not optimize revenues by charging a premium for high traffic routes. In fact, only INTELSAT is obliged to provide the PSN and life-line services for the thin traffic routes and for the links to and from small or lesser developed countries. Facilitated by the INTELSAT structure, INTELSAT has and remains committed to continuing to serve these markets through its globally interconnected network. INTELSAT's competitors do not invest in these markets as they are perceived as having little potential for an adequate return on the investment.

Accordingly, the pressure for change continues to grow. Therefore, rather than accept change imposed by external forces, INTELSAT is endeavoring, as detailed below, to be an engine for change in its own right by examining options both from within and outside of the current structure. What will be implemented is not yet determined, but what is certain is that change is required in order to allow INTELSAT to continue to compete in this rapidly changing telecommunications marketplace.

Efforts to Respond to Marketplace Developments

INTELSAT has undertaken a variety of efforts to change in order to create a re-vitalized INTELSAT that is able to optimize its inherent market strengths.

Immediate and Near-Term Activities

INTELSAT has implemented certain procedures which provide additional flexibility to INTELSAT Signatories in determining methods of access to the INTELSAT system by users within their territories. This is known as direct

access. In addition, INTELSAT is exploring options to streamline INTELSAT's business processes, with the aim of creating rational, customer oriented systems which promote increased productivity and customer satisfaction. Both of these programs are steps that have been or will be implemented largely within the existing INTELSAT arrangement, without substantial modifications to INTELSAT's constitutive documents or organizational structure.

Direct Access. Under the conventional scenario envisioned by the INTELSAT Agreements, a Signatory to the INTELSAT Operating Agreement served as the sole gateway within its territory to INTELSAT space segment capacity, since at the creation of INTELSAT and during much of INTELSAT's history, a Signatory was usually the sole provider of telecommunications services within its territory. Increasingly, however, as greater competition in the provision of telecommunications services is encouraged and arrangements for market entry by competing firms are made, this conventional scenario has resulted in a situation whereby competing firms were required to request INTELSAT space segment capacity through the national Signatory, which was often directly competing with those firms.

In response to this global trend of de-regulation and liberalization of telecommunications markets, and the increasing pressure brought to bear by many national governments wishing to encourage greater competition within their national telecommunications markets, the INTELSAT Board of Governors made a number of decisions which facilitated arrangements whereby Signatories (and DATEs) could allocate liability for use of the system to customers, within their respective territories, authorized to access INTELSAT directly. In taking these decisions and establishing procedures to allow for "direct access," the INTELSAT Board of Governors was able to meet the requirements of those Signatories facing domestic pressure to de-centralize the provision of telecommunications services and

enhance domestic competition in that arena. At each Signatory's option, the Signatory could remove itself to the degree desired from the commercial dealings between INTELSAT and customers authorized to access INTELSAT directly.

In order to accommodate this allocation of liability from Signatories and DATES to "direct access" customers authorized to access and utilize the INTELSAT system directly, there were no amendments made to the INTELSAT Agreements. Rather, the Board of Governors chose to view the Agreements dynamically, interpreting them in a modern context to adapt to a situation which was not specifically foreseen by the framers of INTELSAT's constitutive Agreements.

The basic provisions which relate to the actions taken by the Board are Articles 14(c), 15(c), 4(a), 6(a) and 18(b) of the Operating Agreement. Each of these provisions describes rights and obligations which are attributed to the Signatory of each member country.

Legal Issues Related to Direct Access.

The question of whether the Board of Governors' actions are consistent with the ordinary meaning of the terms of the Agreements centers on whether it is permissible under the terms of the Agreements for the Signatory to devolve, delegate, assign or contract certain of its rights and obligations under the Agreements to other entities. All of the Board's actions and the prior practice of the organization require Signatory involvement in designating others within its country to access INTELSAT. In each case, it is the Signatory, presumably in ultimate consultation with the Party, which determines and notifies INTELSAT of the way in which its rights and obligations under the Agreements will be divided within its country. Other entities are allowed to exercise Signatory rights and undertake Signatory obligations only to the extent authorized by the Signatory. The thrust of the Board's decisions is that the Agreements do not prevent a Signatory from sharing its rights and obligations within its

country as long as such sharing is consistent with its national law and regulations, and that the obligations of each member country to INTELSAT and to the other members are met.

There is no specific language in the Agreements prohibiting a Signatory from transferring its rights and obligations to others on terms considered satisfactory to the Signatory. Read in context (e.g. in conjunction with Article II(b) and (c) of the Agreement which permits a variety of differing domestic arrangements) the language of the Agreements together permits such Signatory action as long as other Signatories or Parties are not harmed.

The actions taken by the Board were consistent with the objective and purpose of the Agreements. They were intended to facilitate INTELSAT's continuing ability to thrive and meet its prime objective in a changing, more competitive telecommunications environment while permitting divergent national policies to be implemented. The actions are also consistent with the practice of the organization in the application of the Agreements. There is a long history of increasing flexibility in matters of access to the system.

Finally, the negotiating history confirms that the underlying purpose of Signatory responsibility under provisions such as Articles 14 and 15 of the Operating Agreement was to maintain INTELSAT's financial and operational viability. The Board's actions on earth station operation and utilization charges accomplish this purpose through establishing new operational and financial safeguards (e.g., credit examination and collateral requirements) which are considered adequate alternatives to enforcing Signatory liability.

Now, at a Signatory's option and within parameters set by a Signatory, a non-Signatory entity may be designated as a "direct access customer" and assume, within certain limits, many rights and obligations traditionally reserved for Signatories under the INTELSAT Operating Agreement. Depending upon the

authorization granted by the Signatory, a direct access customer may have very limited access rights (e.g., access only to technical and operational information), or very broad access rights (e.g., authority to order services, receive and pay utilization bills directly and even to invest in INTELSAT), together with the associated liabilities and obligations related thereto.

Business Processes Re-Engineering. In an effort to increase productivity and promote greater customer responsiveness under INTELSAT's current organizational structure, INTELSAT has initiated a "Business Processes Re-Engineering" project (BPR) to revolutionize INTELSAT's way of doing business. BPR is a three-stage project. Phase I entailed identifying and analyzing INTELSAT's existing processes to identify the key issues and shortfalls requiring re-engineering, as well as highlighting the positive elements that should be retained. In this phase, capacity management and customer management were identified as the areas ripe for re-engineering.

Building on the results of Phase I, Phase II, current efforts are focused on designing and planning implementation of new capacity management and customer management processes based on what "should be" in order to most effectively serve INTELSAT's customers. In addition, sub-groups working in tandem with the BPR project are also re-examining those policies and practices, like terms and conditions for service, which currently support the existing processes. Ultimately, Phase III of the project will implement the model processes developed in Phase II.

The business processes are designed to work within INTELSAT's current structure without significant modification or amendment to the constitutive documents. This effort is aimed at increasing internal orientation to customer service and commercial requirements and will enhance INTELSAT's ability to maintain its market presence, even if significant change is not forthcoming.

Longer Term Restructuring Efforts (Porlamar Working Party)

In addition to the changes described above, a Working Party was established and tasked by the Assembly of Parties with identifying areas of structural change needed in order for INTELSAT to adapt to the increasingly changing telecommunications market environment.

The primary focus of this Working Party has been the continuation of global connectivity and universal service at the present level of service quality with non-discriminatory charging. INTELSAT is committed to retaining these cornerstones in any course of action which may be implemented as a result of the Working Party's efforts while adapting itself to its changing environment.

In order to aid the Working Party in its efforts, INTELSAT's Assembly of Parties developed a task list, giving the Working Party direction to, among other things: analyze the barriers and impediments to INTELSAT's ability to remain competitive in the longer term, including examination of access arrangements (beyond the current Direct Access processes), Signatory arrangements, service development, financing and governance; evaluate the strengths and weaknesses of INTELSAT and suggest courses of action, including the possible amendment of the Agreements, to overcome barriers to opportunity optimization; and examine options for restructuring which will result in the streamlining of the organization to ensure efficient, low-cost provision of services in order to serve the re-affirmed INTELSAT mission.

As a result of the commitment to INTELSAT's re-affirmed mission and to these focus points, the Working Party has begun to formulate and flesh out options for INTELSAT's future structure. Initially, three prime options were under consideration by the Working Party: minor structural change (e.g., modifications to the constitutive agreements); the subsidiary model; and, privatization.

The Working Party analyzed the implication of each of these options on INTELSAT's business, financial and strategic operations. As a result of this analysis, the Working Party has focussed its consideration on the subsidiary concept, described below, and the Working Party will recommend to the Assembly of Parties that the subsidiary concept be given highest priority as the preferred option for INTELSAT's future structure.

Subsidiary Model: This option contemplates the creation of a subsidiary or affiliate to at least initially be owned by INTELSAT, but allowing for the subsequent introduction of external capital. Also under consideration is the concept of more than one subsidiary or affiliate. Other elements to the subsidiary model include the "Golden Share" concept which would give INTELSAT an effective veto power over specified activities of the subsidiary.

INTELSAT, the international organization, will remain in existence and will remain dedicated to the original mission of INTELSAT. The subsidiary(ies), however, will be truly commercial in nature and will be free to enter competitive markets and develop new ones. Such a commercial entity will not enjoy any of the privileges, immunities or exemptions held by the international organization.

If the subsidiary option is implemented, the resulting private entity would become subject to the regulatory control and competition laws of the appropriate national authorities. Therefore, the potential for unfair competition by such entities would be mitigated.

Included in its recommendation to the 20th Meeting of the Assembly of Parties, held in Copenhagen, Denmark in August-September 1995, the Working Party will have requested the Assembly to authorize the continuation of a Working Party to further develop and flesh out the subsidiary option.

Legal Issues Regarding Structural Change. In undertaking any of the changes

discussed above, the issue of treaty interpretation remains. As the INTELSAT Agreements are constitutive in nature, can they be interpreted in a contemporary context to allow for activities outside of the explicit scope set forth in those Agreements? How much flexibility is possible? As the Working Party has come to focus on the subsidiary option, INTELSAT has reviewed its ability to implement a subsidiary or affiliate model under the existing INTELSAT Agreements, without modification thereto. INTELSAT and outside counsel have come to the preliminary conclusion that INTELSAT may pursue the subsidiary option under a dynamic interpretation of the INTELSAT Agreements.

The powers of an international organization such as INTELSAT include express powers specified in the constituent treaty, and powers implied from the constituent documents, developed in practice and required by current and future circumstance. The express powers of an international organization are those specified in its treaty. Implied powers are those that may be reasonably deduced from the purposes and functions of the organization. In addition, certain basic international rights spring from the juridical personality of an international entity such as INTELSAT. Juridical personality permits an international organization to act on its own behalf under international and national law. However, an examination of the constituent treaty is required to determine if such a juridical personality has the capacity and the competence to take a particular action.²³

Both legal scholars and case law recognize the need for a flexible approach to interpretation of constitutive treaties, which takes into account the evolutionary nature of a constituent treaty by recognizing the importance of present day circumstances. Thus, the doctrine allows an international organization to utilize implied powers where necessary to fulfill its purpose and function in light of current conditions. INTELSAT's juridical personality and its implied powers provide the organization with the ability to undertake such activities.

Thus, it can be established that INTELSAT currently has the capacity or authority under the Agreements to implement the subsidiary option. But in addition to the capacity or authority to act, INTELSAT has undergone an examination of its competence to implement the subsidiary or affiliate option. This issue is approached from the perspective of whether these plans are consistent with INTELSAT's purpose and function.

Article III(a) of the INTELSAT Agreement establishes that the continued provision of public telecommunications services at non-discriminatory rates is the prime objective of the organization. INTELSAT may reasonably claim competence to implement a restructuring plan such as the subsidiary or affiliate option if it is consistent with this mission. As previously noted, under principles of international law, evaluation of a plan's consistency with INTELSAT's purpose must include consideration of the current conditions in which the organization operates. Indeed, consideration of such factors is necessary to recognize the evolutionary nature of international organizations and their need to respond to changing conditions. In this regard, the market in which INTELSAT must operate has undergone substantial transition. Originally operating in an industry characterized by monopoly telecommunications providers, INTELSAT must now function commercially in a highly competitive environment.

Article II(a) establishes the preferred means for accomplishing INTELSAT's prime objective -- "design, development, construction, establishment, operation and maintenance of the space segment." However, if the various organs of INTELSAT determine that under present market conditions the organization appears unable to adhere to the preferred means for carrying out the primary mission and still remain commercially viable, then the international law doctrine of implied powers could be relied upon to permit INTELSAT to restructure in order to perform its primary mission. In other words, if the creation of a subsidiary or affiliate is necessary to preserve

the organization's continued commercial viability and provision of international public telecommunications services on a global basis at nondiscriminatory rates, then INTELSAT should be competent to create and to transfer some or all of its space segment to a commercial subsidiary.

Optimism for the Future

The question has been asked as to whether anyone should be concerned with the demise of INTELSAT. The reality of the telecommunications environment today answers that question in the affirmative. INTELSAT is alone in providing global connectivity on a non-discriminatory basis for customers in over 200 nations, territories and dependencies. Most importantly, INTELSAT provides lifeline PSN service to those customers located in countries of the developing world and provides those services, as well as a variety of other services, at a price that is as low, if not lower, than separate satellite systems that may have coverage of those areas.

INTELSAT adds competition to the marketplace; it does not inhibit its development.

INTELSAT's good will among its members and users, its reputation for solid, reliable service, its ability to provide global connectivity and its strong history with developing countries are INTELSAT's competitive advantages that can be leveraged to ferment continued growth to serve its global users. Therefore, despite the numerous commercial, structural, organizational and legal challenges described above, INTELSAT is currently a viable, active participant in the international telecommunications marketplace and will remain so by creatively and aggressively pursuing change in order to remain an innovative leader in this industry.

ENDNOTES:

1. Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT," done at Washington, D.C. August 20, 1971, entered into force 12 Feb. 1973 [hereinafter "INTELSAT Agreement"], Preamble.

2. INTELSAT Agreement and the INTELSAT Operating Agreement relating thereto ("INTELSAT Operating Agreement"), also done at Washington, D.C. on 20 Aug. 1971.

3. INTELSAT Agreement, Article V.

4. INTELSAT Operating Agreement, Article 6.

5. INTELSAT Agreement, Article XIV.

6. *See generally* INTELSAT Operating Agreement.

7. INTELSAT Agreement, Article IV(a). Juridical personality includes "capacity to: (i) conclude agreements with States or international organizations; (ii) contract; (iii) acquire and dispose of property; and (iv) be a party to legal proceedings."

8. *See* INTELSAT Agreement, Article XV, the Headquarters Agreement, 28 U.S.T. 2248, T.I.A.S. No. 8542, the International Organizations Immunities Act, 22 U.S.C. §288, et seq. (U.S.) (INTELSAT was designated as an international organization for purposes of this Act by Executive Order No. 11966 on 19 January 1977, 24 F.R. 5331), Protocol on INTELSAT Privileges, Exemptions and Immunities, and the U.S. Internal Revenue Code, 26 U.S.C. §892(b).

9. *See* Agreement Establishing Interim Arrangements for a Global Commercial Satellite System signed by Governments at Washington on August 20, 1964, Article I(a) ["Interim Agreement"].

10. INTELSAT Agreement, Article II(a).

11. INTELSAT Agreement, Preamble.

12. This mission statement is further emphasized in the INTELSAT Agreement by Article II(a) which provides, ". . . INTELSAT shall have as its prime objective the provision, on a commercial basis, of the space segment required for international public telecommunications services of high quality and reliability *on a non-discriminatory basis to all areas of the world.*" [emphasis added].

13. INTELSAT Agreement, Article V(d).

14. INTELSAT Agreement, Article VI.

15. A "Party" is defined as "a State for which the Agreement has entered into force or been provisionally applied." Article I(f).

16. INTELSAT Agreement, Article VIII.

17. Each member government of INTELSAT (a Party) designates itself or another entity from within its territory to sign the INTELSAT Operating Agreement. Entities which sign the INTELSAT Operating Agreement are Signatories.

18. INTELSAT Agreement, Article VIII.

19. INTELSAT Agreement, Article IX.

20. INTELSAT Agreement, Article X(a).

21. INTELSAT Operating Agreement, Article 6.

22. Federal Communications Commission, "*In the matter of Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems,*" Notice of Proposed Rulemaking, IB Docket No. 95-41, Adopted: 5 April 1995, Released: 25 April 1995.

23. *See* Henry G. Schermers, International Institutional Law 776-777 (1980) and Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 180 ("Reparations Case").