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IISL-98-IISL.3.08

THE PRIVATIZATION OF INMARSAT*

by David Sagar, Senior Attorney
International Mobile Satellite Organization (Inmarsat)
London, United Kingdom

Abstract

The privatization of Inmarsat, a global intergovernmental organization (IGO), with the retention of a limited degree of IGO regulatory oversight, is probably a unique occurrence. This paper traces the process which started in the early 1990s against the background of a changing telecommunications environment and competitive pressures. The process witnessed various phases ranging from proposals to modify the financial and governance structure to the realization that full scale privatization was necessary for Inmarsat's long-term financial viability. It was necessary to reconcile widely differing policies of its members, as many smaller countries wanted to retain the IGO structure, while others were committed to a private entity competing equally with other operators. A major satellite handheld communications market opportunity was allowed to slip mainly because of the outdated structures. Important public international law problems, notably provisional application of treaties and limited liability in treaty-based corporations, were confronted. The transition to the new UK-based multinational corporation is expected to take place on 1 April 1999. Small and developing countries will have Board representation, and the shares will be listed before long. There will be ongoing IGO oversight of certain public service obligations, especially continuance of maritime safety communications. These achievements will represent a new relationship between the private sector and governments in providing global mobile-satellite communications, and are likely to be followed by similar changes to Intelsat and Eutelsat.

Introduction

1 1998 has been a landmark year in Inmarsat's history. In April, the Inmarsat Assembly of Parties approved the restructuring of the Organization as a privatized corporate entity, but retaining intergovernmental oversight of maritime distress and safety services and other public service obligations.

2 The process has taken some nine years, and it was quite unlike

* The views expressed in this paper are those of the author and not necessarily those of Inmarsat.

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the familiar privatization of national telecommunications entities. As a global intergovernmental organization (IGO) serving public interests, the transformation of Inmarsat into a private sector corporation traversed new territory in international corporate life and overcame many obstacles. It also tracked the dismantling of telecommunications monopolies generally, and has shared the experience with Intelsat and Eutelsat which are not far behind in restructuring.

3 This paper outlines the background and special features of the Inmarsat organization, the particular forces which led it inexorably to change, the key elements of the new structure, the differing interests of the membership and the main political, commercial and legal issues encountered.

The Path to Privatization

4 Inmarsat was set up by governments in 1979, under the auspices of the International Maritime Organization (IMO), to harness space technology for worldwide maritime communications, especially for safety of life at sea.[1]

5 In the first ten years of its existence, no clouds appeared on its commercial horizons. As the only global operator of mobile satellite communications, Inmarsat had an assured maritime market, and also extended its services to aeronautical and land mobile communications[2]. Revenues grew steadily, and the members were content to invest the capital needed for new generations of satellites with little demur.

6 However, from around 1990, questions were raised as to whether the institutional and business structures that had served Inmarsat well, could cope with the new trends in the telecommunications world.

7 Inmarsat's special institutional make-up has been described before at these Sessions and elsewhere but a brief reminder here is desirable. [3] Inmarsat is an IGO, established by the Inmarsat Convention, with a global membership. In essence it is a form of co-operative, financed and governed by government-designated public or private telecommunications entities which are Signatories to the Inmarsat Operating Agreement. It operates geostationary satellites for providing mobile satellite communications on a commercial, but cost-recovery, basis. Though having separate international legal identity, it does not confer limited liability on its Signatories[4], nor does it have many other normal corporate features, such as the power to raise capital for new ventures on world markets.

8 Three imperatives driving the need for structural change were summed up by Warren Grace, Inmarsat Director General as being flexibility for investment in new systems and programmes, speed of decision-making and ensuring equitable competition[5]. In particular, factors that made such changes inevitable include:

- the advent of competing satellite systems which has affected the

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risks associated with investment in the Organization;

- a need for a normal corporate structure, with limited liability for investors and a small, fiduciary Board able to raise capital from the financial markets for the major new ventures which will be able to stand up to the competition;

- increasing privatization of the telecommunications industry generally;

- proposals by regulators including the European Commission for wider access to space segment capacity[6];

- demand by many members for removal of tax and other privileges and immunities to require the Organization to compete on a level-playing field with other mobile satellite system operators.

9 The realization gradually sunk in that the long-term financial viability of the Organization could be jeopardized if changes of this magnitude were not undertaken.

10 Privatization has occurred in three broad phases, firstly, experiments with internal changes to the IGO; secondly, a diversion from restructuring to consider whether Inmarsat should provide personal handheld satellite communications, an exercise which exposed the structural shortcomings and affected a major commercial opportunity; and, thirdly, overcoming resistance to full scale privatization in the face of competitive challenge.

The first phase- Tinkering with the structure (1991 - 1993)

11 The first glimmering of change came at Inmarsat's Seventh Assembly Session in Lisbon in October-November 1989 when Olof Lundberg, Inmarsat's first Director General spoke of the need for making structural changes to Inmarsat, in order to free it to act in a more commercial manner, in response to the changing telecommunications environment[7].

12 Subsequent consideration of possible changes by some Parties, the Council and the Director General led to the formal start of the restructuring process at Inmarsat's Eighth Assembly Session in Canberra in September 1991. Taking into account papers submitted by certain Parties[8], the Assembly set up an Intersessional Working Group (IWG) of Parties and Signatories "to review the objectives and processes of Inmarsat in view of the changing telecommunications environment and the challenges of competition"[9].

13 The IWG's mandate was extended at the Assembly's Ninth Session in Paris on October 1993.[10]

14 During 1991 - 1993, the IWG concentrated initially on streamlining the provisions for granting limited protection to Inmarsat's maritime services, and on reviewing other commercial, operational and organizational arrangements. Complementary work was carried on by the Inmarsat Council and its working Groups on subjects of special concern to Signatories.[11]

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15 The Council, in particular, reviewed in detail Inmarsat's financial structure including possible revision of the investment share system and the ability to raise capital for future space segment from external sources or from a limited number of Signatories on a voluntary basis.[12]

16 This phase witnessed studies, proposals and debate on a variety of topics including improving governance and decision-making; examining the economic impact on Inmarsat of performing its public service functions in a competitive age; improving access to the Inmarsat system; adapting to new markets and reviewing pricing policies to meet competition; taking steps to improve Inmarsat's access to national markets where regulatory barriers existed; improving confidentiality for Inmarsat's commercially sensitive information; easing restrictions on Inmarsat's commercial use of its industrial and intellectual property rights; considering Inmarsat's right to enter into joint ventures with private entities; reviewing the scope of privileges and immunities, and simplifying the amendment procedure in the Convention.[13]

17 The range of these subjects, now largely superseded, gives an idea of the wide-ranging search during the first phase for a structure which would be suited to the new telecommunications environment yet would retain intergovernmental oversight. More details can be traced in the relevant Reports of the Eighth and Ninth Assembly Sessions, and the working papers and reports of the IWG, Council and subordinate groups cited in those Reports.

The Second Phase - The Challenge of Satellite Personal Communications (1993-94)

18 This phase was something of a divergence from the mainstream restructuring effort, but the outcome reinforced the need for major changes.

19 As early as Inmarsat's Tenth Anniversary Conference in London in July 1989, the first Director General had predicted that by the year 2000 a worldwide system of satellite personal communications (S-PCS) through handheld phones would be in common use, eventually in competition with Inmarsat.[14]

20 By 1993, it had become apparent that Inmarsat's enviable position as sole global provider of mobile satellite communications could not last. Its financial viability and ability to maintain its public maritime distress services obligations would be threatened if it did not adapt to the new technology to satisfy user demands.

21 Competition loomed from the Iridium and Globalstar systems and regional systems, planning to offer handheld satellite services through non-geostationary satellites.

22 Inmarsat itself had, around this time, started development on a range of a S-PCS services, originally called Project 21 and later, Inmarsat-P, planned to start up early in the new century. A detailed account of the way Inmarsat-P was handled has been given at an earlier

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Proceeding of this Institute and elsewhere, but an outline is given here[15].

23 Institutional problems arose when some Inmarsat Signatories refused to contribute to the large capital needed for the project, on a mandatory basis according to their investment shares as required under the Operating Agreement. They wanted to choose the level of their own investment. Some felt that the business risks associated with the undertaking were too great, particularly in the absence of limited liability for the Signatories. Access to external sources of capital was not possible under the Operating Agreement. Other Signatories which were mainly maritime communications providers saw S-PCS as primarily a land mobile service, and not of direct interest to them. Some Signatories or their Parties required a "level playing field" among all S-PCS competitors, and did not want Inmarsat-P to benefit from Inmarsat's privileges and immunities or by cross-subsidization from its other revenues. Another worry was that the cumbersome governance procedure through the Inmarsat Council would be inadequate to manage the project with the decisiveness needed to match competition.

24 As a result, the Inmarsat Council decided that the Inmarsat-P service should be provided through a separate, affiliated, private limited company under national law[16].

25 However, this decision raised the issue whether, under treaty law, an IGO could, in the absence of explicit authority under its Convention, create a national law affiliate and transfer business assets (i.e., the Inmarsat-P goodwill and intellectual property) to it. The matter was resolved at the Inmarsat Assembly's Tenth (Extraordinary) Session in December 1994. The Assembly decided that the Council's action was consistent with the Convention. In doing so, the Assembly interpreted the Convention in a dynamic and evolutionary way, taking into account the development of satellite technology and the competitive business environment[17].

26 The former Inmarsat-P system will now be operated by a separate company, ICO Global Communications (ICO). Many of its shareholders are Inmarsat Signatories. Inmarsat has a minority shareholding, and arrangements have been made for Inmarsat to act as a wholesaler of non-handheld maritime and aeronautical services, using ICO satellites.

27 Notwithstanding these links, ICO will compete for some of the same mobile satellite communications markets that Inmarsat serves. There is a view that Inmarsat lost a valuable business opportunity in not retaining the Inmarsat-P system within its service portfolio.

28 Another such opportunity was rejected in early 1996, when the Inmarsat Council decided not to undertake a global Inmarsat Satellite Navigation Service because many Signatories were not prepared to invest further capital in Inmarsat

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under the present institutional structure[18].

Phase Three - The Final Lap (1995-1998)

The Task Redefined

29 Once the Inmarsat-P issue had been disposed of, the attention of the membership turned back to restructuring but the final decision on privatization did not come easily. The years since the Tenth (Extraordinary) Assembly Session in December 1994 have seen a variety of possible solutions, long negotiations and shifting positions.

30 The fate of Inmarsat swung back and forth between the Council and the IWG in this period. The Council's task was to recommend a viable commercial structure. The IWG's role was to ensure that the structure satisfied the many policy concerns of Parties.

31 The emphasis changed, also, with the clear realization that investment in new systems would not take place without major structural change, and from the mid 1990's key elements driving restructuring were the threat to future financial viability from competition and the insistence on giving up privileges and immunities, together with the demand by Parties that the maritime safety services and other public obligations must continue under governmental oversight.

32 During this period, the debate revolved around several main restructuring models. The key features of these models, and their fate in the negotiations may be summarized thus:

i) a multi-tier structure, involving a continuation of the existing organization to provide current services, with a subsidiary or affiliate to provide new services; this was seen as failing to meet the core problems or likely to lead to another "ICO" solution, and did not have extensive support among the membership (note: distinguish this from the multi-tier structure of the new Company, cf para 42(i));

ii) a revitalized Inmarsat, whereby the IGO would continue with significant amendments to its governance and financing provisions, but this fell short of the demands of some key members;

iii) a treaty-based international public corporation (IPC), which would retain the intergovernmental organization but would have replicated many of the features of a commercial corporate entity under national law. While this would have satisfied many of the restructuring financial and governance demands, two weaknesses were that limited liability for investors could not be guaranteed, and the prospect of a floating of shares on a stock exchange was not high;

iv) a national law company model, with retention of the IGO to oversee the performance by the company of the public service obligations. This was the model finally accepted.

33 This paper cannot trace the negotiations in detail[19], but will

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describe the three main landmarks that occurred during this period, namely the outcome of the Eleventh and Twelfth Assembly Sessions, and the formal proposal of restructuring amendments. It will then summarize the main issues in the political debate and the legal problems which had to be overcome.

The Eleventh Assembly Session (27 February-1 March 1996)

34 A decisive step in the restructuring process was taken when the Eleventh Assembly Session decided that there was an urgent need to change the Organization's structure to enable Inmarsat to remain commercially viable in the long term.

35 The challenge was how to restructure fundamentally while preserving crucial governmental interests. The Assembly decided that five basic principles should underlie any new structure, namely:

- continued provision of services for the Global Maritime Distress and Safety System (GMDSS) co-ordinated by the International Maritime Organization (IMO);
- non-discriminatory access to services;
- service to all geographical areas where there is a need, including rural and remote areas;
- peaceful purposes;
- fair competition.

36 The Assembly also decided that certain essential elements must be taken into consideration in any future structure, including preserving the intergovernmental character of the Organization; continuing Assembly oversight of the basic principles; and ensuring broad ownership and investment, limited liability for shareholders, representation of developing countries, and removal of privileges and immunities[20].

37 These basic principles and essential elements underlay all work thereafter carried out by the IWG, the Council and their subsidiary bodies.

Formal Proposal of Amendments (February 1997)

38 In February 1997, the United Kingdom Party formally proposed amendments to the Convention and the termination of the Operating Agreement. The amendments were designed to implement the national law company model referred to above. Although this model had not at that stage been definitely recommended by the Council or IWG, it was the one which appeared from the negotiations during 1996 to have the widest support and the most prospect of final acceptance[21].

39 The next stage of the process, as required by the Convention, was for the Council to express views to the Assembly on the Convention amendments and to approve the termination of the Operating Agreement, subject to confirmation by the Assembly[22].

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40 The subsequent negotiations during 1997 and early 1998 revolved around this model and its conformity to the requirements of the Eleventh Assembly. Many of the key political and other issues outlined below dominated the debates during this period; there was a hiatus for some months in 1997 when the Council deadlocked over acceptance of the model; meetings of legal experts from the membership and the IWG reviewed and refined the amendments and other documentation. Finally, the Council, at its Seventy-First Session in March 1998, recommended that the Assembly approve the amendments, and the road to privatization lay open[23].

Twelfth Assembly Session (20-24 April 1998)

41 At its Twelfth Session, held in April 1998, the Assembly approved the restructuring amendments to the Convention and confirmed the termination of the Operating Agreement, as proposed by the United Kingdom, with some changes in detail but not to the substantial model. In brief, the Inmarsat system will in future be operated by a privatized national law company, though its public service obligations will be subject to governmental oversight[24].

42 The principal elements of the new structure will be as follows

(i) The Inmarsat business will henceforth be carried on under a multi-corporate structure, consisting of a holding company and an operating company registered under English law, and will continue to be based in London;

(ii) The existing Inmarsat Signatories will receive ordinary shares in the holding Company in a cash-free exchange for their current investment shares. They will also have limited liability;

(iii) All of INMARSAT's assets and commercial business will be transferred to the operating Company;

(iv) The Companies' objects will be to continue to provide global, regional and domestic satellite services, especially maritime, aeronautical and land mobile commercial services, and distress and safety and navigation services;

(v) The Companies will have no privileges and immunities;

(vi) The Companies will have the same status under national regulation and in IGOs such as the ITU and the World Trade Organization, as any private competitor;

(vii) There are some special features in the structure of the companies intended to reflect the varying interests of the current membership and the global scope of Inmarsat's operations; the fiduciary Board of Directors of the holding Company will have up to 15 members, including shareholder directors, independent directors, and three directors from smaller shareholders or developing countries; there will be an identical Board in the operating Company;

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(viii) Other special features are that there will be a limit on shareholding by any one investor to 15% of the issued capital, except that the United States Signatory will be able to retain its existing share of about 22% for the time being;

(ix) There will also be a requirement for the company to hold regional meetings to consider local interests;

(x) During the initial 12 months after transition, trading of shares will only be possible among the existing shareholders; thereafter, it will be possible for the Company to issue shares to multiple investors from any country and to strategic investors. The Company will make an initial public offering on appropriate stock exchanges within approximately two years after restructuring;

(xi) The intergovernmental organization (IGO) will continue to exist, with an amended Convention, but its only organs will be the Assembly and a small Secretariat. The purpose of this IGO will be to ensure that the Company continues to provide space segment for GMDSS and meets the other basic principles and public service obligations referred to in paragraph 35 above. The continuing existence of the IGO will be reviewed when there are alternative providers of GMDSS services;

(xii) The IGO will own a Special Share in the holding Company, entitling it to veto changes to specified parts of the Memorandum and Articles of Association that relate to GMDSS and the other public service obligations.

43 There will also be a contract, called the Public Services Agreement (PSA), between the IGO and the Company, enabling the IGO to oversee the Company's performance of the basic principles and public service obligations, and, if necessary, take certain enforcement action[25].

The Political Debate

44 The wide diversity in the large Inmarsat membership (84 States as at end of August 1998), meant that the road to fundamental restructuring would not be easy.

45 The diversity lay, inter alia, in the size of the member States and of their investment shares in Inmarsat; in the scope of their mobile telecommunications services (some predominantly maritime, others land mobile); whether their national telecommunications policy favoured a government monopoly or a regulated private service provider; and their differing perceptions of the role of IGOs as global operators.

46 The period between the Eleventh and Twelfth Assembly sessions witnessed intense activity at many meetings of the IWG, the Council and its working groups, and meetings of Legal Experts from the membership. The final outcome was by no means certain at this stage, and indeed there was a hiatus in the process for six months during 1997 when the Council deadlocked on a decision to approve the basic model; one key element at this point was the issue whether restructuring should proceed without imposing an obligation on the future company to

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"go public", i.e., to list its shares on a stock exchange within a defined period.

47 Broadly, the debate was between two broad categories of members.

48 One category of members, including developed countries with large investments at stake in Inmarsat, and which had privatized their telecommunications industries, were committed to fundamental restructuring for the reasons referred to in paragraph 8 above.

49 The other category comprised a mixed range of members, including large, small and developing countries, with smaller investment shares. These countries accepted the need for varying degrees of change in governance and financial mechanisms, but favoured a continued operation of the system through the intergovernmental organization which they considered would better protect their interests in the basic principles, including the maritime safety services and the needs of rural and remote areas. Some were also concerned that a privatized, profit-oriented Inmarsat might decide that the markets in their countries were not worth serving, and could leave them without satellite services. Some, though not all, of this group were newer members and may have felt that their interests were better protected in an IGO, where they could participate equally with all members in the Assembly in deciding broad policy aims, in contrast to a Company with only a small shareholding and little voice in governance.

50 There were many themes running through the long debate, but the principal issues on which Inmarsat's destiny lay are outlined in the following paragraphs[26].

<u>The Land Earth Station Operator (LESO) Agreement</u>

51 One of the most crucial and difficult issues, resolved only in mid-1998, was to conclude a standard Land Earth Station Operator Agreement, to be signed between the future Company and each Signatory LES Operator.

52 It should be recalled that Inmarsat is at present a wholesaler of space segment capacity to the LES Operators at cost, who provide the services to the end users and set the retail charges. As most LESs in the system are owned by Signatories who also sit on the Council and take executive decisions on services and pricing, a certain conflict of interest was built into the system.

53 The LESO Agreement will be a distributor agreement guaranteeing that for five years after restructuring, the Company is committed to providing the existing range and type of services at a steadily reducing cost to those LES Operators. The Company will also, during that period, continue to act as wholesaler of such services and will not be able to compete as an LES operator or a reseller of services.

54 The current LES Operators sought the protection of this Agreement in order to preserve their investments and business in their

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LESs, once their control of services and pricing policy in the Inmarsat Council had passed to the Company. For them, it was a *sine qua non* of restructuring. Ideally, the Agreement should have reflected a balance of interests between the LES Operators and the Company. However, the Agreement as it stands may inhibit the maximisation of the Company's business opportunities, for example by limiting flexibility in managing its distribution outlets and its service portfolio, and in constraining its charging policy. At least, in the long term, the Agreement does not restrain the introduction of new services by the Company, which is where its future viability lies[27].

Investor Value and an IPO

55 A vital aim of restructuring for many Signatories, especially the large investors, was to maximise the value of their investment shares and to be able to trade in their shares freely, as well as to obtain access to external capital for current and future systems. At present, investment shares cannot be traded, except in a limited way through annual redeterminations of shares, and if a Signatory withdraws from Inmarsat, reimbursement for its share would be at book value. There was a strong demand that the Company should undertake to list its shares on a stock exchange within two years of restructuring.

56 While this was debated at length and opposed by some Signatories, particularly smaller ones who wanted to delay dilution of their shareholding in the Company, the agreed result was to provide that the Company would work towards an initial public offering (IPO) within two years of transition.

Convergence with ICO Global Communications

57 Another concern expressed was that Inmarsat's links with ICO would not distort competition, for example, by a merger which would give them a dominant position in the S-PCS market or monopolize the use of the limited, valuable mobile-satellite frequency spectrum available for those services.

Composition of the Company Board

58 Various corporate issues were also prominent in the debate. A hard-fought compromise on the composition of the Board was reached, balancing the need for a workable size on the one hand, with independent directors and representation for small and developing countries, on the other, as described in paragraph 42(vii) above.

Use of the Name "Inmarsat"

59 The view was expressed that the use of the name "Inmarsat" by the Company would confer a competitive advantage on it and cause confusion with the IGO. The Council, conscious of the global reputation of the name, established by Signatories at great cost, insisted that it was an integral part of the business passing to the Company.

60 Eventually, the Parties decided that the legal ownership of the name would remain with the IGO

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but it will be licensed without charge to the Companies. The name has also been dropped from the full title of the IGO, which will remain "The International Mobile Satellite Organization".

Competition Law

61 Compliance of the restructuring with competition law is, of course , necessary, and is one of the basic principles. Notification of the process was given to the European Commission which has now given its endorsement, as indicated in paragraph 89 below. This decision was not unexpected, considering that the Commission's policy towards the international satellite organizations has been to improve access to space segment and remove tax exemptions and other competitive advantages.

Legal and related Issues

Provisional application

62 The legal issue *par excellence* which shadowed the whole restructuring process was the need for provisional application of the amendments.

63 Analysed at an earlier Proceeding of the Institute and elsewhere[28], it suffices to note here that the entry into force of amendments to the Convention adopted by the Assembly normally takes some years, due to the requirement of formal acceptance of the amendments by a two-thirds majority of the membership, representing two-thirds of the investment shares at the time of the adoption of the amendments. As this delay would have defeated the commercial purposes of restructuring, there was need to resort to the concept of provisional application.

64 Though provisional application is well established in interstate treaty practice, as reflected in Article 25 of the 1969 Vienna Convention on the Law of Treaties, its use by decision of a supreme body of an IGO such as the Assembly is not so extensive. Analysis of the problem by Legal Experts, taking into account advice from a leading treaty lawyer, led the Council and the IWG to recommend that the Assembly decide to implement the amendments provisionally, subject to eventually formal entry into force[29].

65 Consultations with Parties over this issue disclosed that, while many accept provisional application, others are precluded by their constitutions from doing so without special legislation, particularly where the Convention does not itself provide explicitly for provisional application. For these countries, practical solutions were proposed whereby a provisional application decision by the Assembly would be subject to the internal laws of each Party. This, it was argued, would enable them to participate in the restructuring, including the exchange of their Signatories' investment shares for ordinary shares in the Company, without being forced to oppose the decision.

66 The Assembly eventually took the historic step of deciding on

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provisional application of the amendments, as mentioned in paragraph 85 below.

Limited Liability of the IPC model

67 As already mentioned, limited liability for investors emerged as an essential condition of restructuring, taking into account the large capital which would be needed for future systems and the associated commercial risks in an age of strong competition.

68 Examples exist of international public corporations, such as those discussed in the IPC model in paragraph 32 (iii) above, which have been established by treaty, with many structural similarities to national law companies, and in which the treaty limits the liability of shareholders.

69 However, expert advice cast doubt on whether limited liability under a treaty would be recognized under domestic law generally[30]. Even if the law of a State where the IPC established its headquarters explicitly accorded limited liability, this might not necessarily be recognized in other States where the IPC operated. It was considered that the limited liability of a corporate body established under a treaty was not sufficiently acknowledged as a general principle of law so as to guarantee automatic recognition in jurisdictions which were either not Parties to the treaty or in which the treaty had not been incorporated into domestic law[31].

70 The Signatories, who would be the initial investors in the Company, were not prepared to risk actions in any such jurisdiction, so the IPC model was not pursued.

The Intergovernmental Element of the New Structure

71 One of the essential elements for restructuring laid down at the Eleventh Assembly Session was that the "intergovernmental character of the Organization must be preserved".

72 The dilemma was how to privatize the system while keeping faith with this element.

73 The elements of the new structure designed to maintain governmental interests, as outlined in paragraphs 42 (xi) and (xii), and 43 above are a pragmatic response to Party needs, and must be almost unique in interstate practice.

74 There was at no time any challenge to the continued provision of the maritime distress and safety services or observance of the other basic principles. These requirements will be included in the Companies' Memoranda and Articles of Association, and the Public Services Agreement (PSA).

75 After some debate, the IWG and the Twelfth Assembly Session concluded that although a private sector company would henceforth own and operate the Inmarsat system, the continuation of the IGO and the arrangements made under the PSA and through the IGO's special share in the Company satisfactorily met the requirement of the Eleventh Assembly Session as to the intergovernmental character of the Organization .

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76 The PSA itself is a fairly unique instrument in providing a regulatory mechanism whereby 84 States will, through an IGO, oversee and enforce the activities of a nationally incorporated multi-national company. It will be governed by English law, and give the IGO effective enforcement remedies, including specific performance and injunctive relief, in the event of failure by the Company to observe most of its obligations. The PSA also requires the Company to fund the IGO's Secretariat to the extent of £300,000 per year initially plus a contingency fund of £100,000 for enforcement costs. The Agreement may be terminated by the company when competing systems are permitted by IMO to satisfy its requirements for maritime distress and safety satellite communications. This prominence given to IMO's role under this Agreement is another unique feature of the restructured Inmarsat.

The IMO Dimension

77 Special mention must be made of the importance to IMO of Inmarsat's restructuring. As already mentioned, IMO's action led to the establishment of Inmarsat, and close cooperation between the two organizations in the early 1980's led to the Inmarsat system being specified in the Safety of Life at Sea Convention (SOLAS) as satisfying IMO's requirements for its Global Maritime Distress and Safety System (GMDSS).

78 The intergovernmental character of Inmarsat gave IMO the necessary assurances of continuity of the system, consistent with IMO's standards. However, the possible privatization of the system was of serious concern to IMO. Consequently, throughout the restructuring process, close consultation was maintained with IMO, and assurances were given by Inmarsat that the maritime services would be maintained, whatever the final structure would be.

79 IMO's Maritime Safety Committee eventually expressed satisfaction that the continued government oversight of the maritime services under the PSA, and the other commitments in the Company's constituent instruments, were sufficient to meet IMO's concerns[32].

Relations with Other International Organizations

80 Inmarsat, as an IGO, has long cooperated with IMO, ITU and ICAO and certain regional IGOs under Agreements of Cooperation, with observer status at meetings, as well as industry and user entities such as the ICS, SITA and IATA. This has greatly facilitated Inmarsat's work in establishing its global services, compliant with the regulatory standards of those organizations.

81 Transition to private sector status requires a change in these arrangements for the Company, though they will remain in place for the IGO. The IMO and ICAO, as UN specialized agencies, do not accord observer status to, or conclude formal cooperation agreements with private companies. The situation at ITU is different where the Company is expected to be accorded the

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status of a Recognized Operating Agency. The growth of private sector global and regional system operators which service public interests could well lead to a reappraisal by those IGOs of the participation of such companies in their work, such as occurs at the ITU.

The Transition Mechanism

82 Owing to the commercial necessity of implementing the new structure urgently, to allow large investments in future systems to take place, it was necessary to resort to the concept of provisional application of the amendments. This was a crucial legal and political issue as referred to in paragraph 62 above.

83 The legal mechanics of transferring the assets and business to a new Company are too detailed to recount here. Suffice it to say that a major due diligence process has been undertaken by an investment bank, tax advisers and lawyers to advise on the likely acceptability of the restructuring arrangements to future investors, and to ensure the financial, economic and legal soundness of the transaction.

84 Extensive negotiations were needed with the United Kingdom Government on many matters including bringing the Organization and its staff within the UK corporate and personal tax regimes, immigration aspects for non-UK staff, the status of the Company at the ITU, and the obtaining of licenses for operating a space telecommunications system, including those needed as a result of the UK's obligations under the outer space treaties.

The Final Phase

85 At the Thirteenth (Extraordinary) Session of the Assembly, held in Rhodes from 23-25 September 1998, the Inmarsat Assembly finally decided that the amendments would be implemented as from 1 April 1999, or such later date as the Inmarsat Council decides, pending and subject to entry into force of the amendments in accordance with the procedures set forth in the Convention and Operating Agreement.[33]

86 It had been emphasized by some Parties and the Director General during the preceding debate that it was important that the Assembly's decision should be taken by consensus, given the substantial nature of the amendments which affected the rights and interests of all Members of the Organization, and the need for certainty in implementing the complicated legal arrangements needed to be taken to give effect to the restructuring.

87 The Assembly's decision was taken without a vote. Statements made by a number of Parties during the debate were attached to the official Report of the Assembly, in accordance with the Assembly's Rules of Procedure.[34]

88 The decision to apply the concept of provisional application to amendments to the constituent instruments of an intergovernmental organization for its restructuring, mainly as privatized entity,

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represents a major contribution to inter-State practice in this field, and may well be followed by other organizations as the trend towards privatization continues.[35]

89 The transition is subject to various legal and regulatory conditions, which are expected to be finalized before 1 April 1999. The European Commission has already declared that the restructuring agreements do not to any appreciable extent affect competition within the Common Market, although one issue which could cause the Commission to reconsider the matter would be if the Company's intention to carry out an initial IPO, as mentioned in paragraph 56 above, did not take place within three years.

90 Privatizing Inmarsat has been a long trek - longer than it took States to draw up the original Convention and Operating Agreement in the mid-1970's. The deceptive tool of hindsight suggests that the present outcome was inevitable, and that the forces seen dimly in 1990 gathered pace and left no realistic option by 1998. That assessment, though not obvious in the earlier years, draws comfort from the fact that Intelsat and Eutelsat have comparable restructuring programmes, drawing to some extent on Inmarsat's experience.

91 The future commercial success of the Company, and thus its ability to maintain the maritime distress and safety services and other public service obligations, will not depend just on continuing to provide the existing range of maritime, aeronautical and land mobile services. Long term service expansion will be critical to the Company's future viability, and this is currently centred on a project called Horizons, aimed primarily at providing laptop PC users with a wide range of mobile multimedia services via satellite by the year 2000.[36]

92. It remains to be seen how this vision unfolds, but Inmarsat, its Parties and Signatories may feel satisfied that Inmarsat's restructuring experience will help to forge a new chapter in international cooperation, based on a constructive relationship between the private sector and governments in the provision of space telecommunications to the world community.

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[Inmarsat documents cited below may be obtained on request, subject to any confidentiality restrictions, from the Inmarsat Conference Services, 99 City Road, London, England, EC1Y 1AX, Fax: + 44 (0) 171 728 1000]

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N Jasentuliyana, *"The Establishment of an International Maritime Satellite System,"* Annals of Air and Space Law, (1977) Vol. II, 323.

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2 D. Sagar, *Inmarsat*, Annals of Air and Space Law, Vol. X1 (1986), 331 and Vol. XIV (1989), 473.

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W. Von Noorden and P. Dann, *Public and Private Enterprise in Satellite Telecommunications: The Example of Inmarsat* Proceedings of the Twenty-Ninth Colloquium on the Law of Outer Space 193 (1986)(an IISL Colloquium).

4 Article XI of the Operating Agreement.

5 Speech by Warren Grace, Inmarsat Director General to the *Inmarsat Users Conference*, May 12, 1997.

6 Under Articles XIV and XV of the Inmarsat Operating Agreement, applications for access to the Inmarsat space segment are required to be through Signatories, or authorized telecommunications entities in non-member countries. Signatories may be required to

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transmit applications for access by other entities to Inmarsat if their government regulators so direct, in accordance with the instructional process set forth in Article 4 of the Convention. Although demand-assigned services are Inmarsat's primary service configuration, access is also provided through leases for certain services, subject to availability of capacity.

7 Assembly/7/14, Report of Seventh Session, section 10.5 (b).

8 Assembly/8/13, (Germany) and Assembly/8/14 (Australia).
9 Assembly/8/16, Report of Eighth Session, section 8.4.3.

10 Assembly/9/15, Report of Ninth Session , sections 8.1.5 & 6.

11 Assembly/9/1, Report of the IWG to the Assembly.

12 cf. Articles III (e) and V (e) of the Intelsat Agreement and Articles III (f) and V (f) of the Eutelsat Convention, which enable those Organizations to provide satellites separate from their own space segment, under certain conditions including financing of the satellites by those requesting them. It is not known if any such separate satellites have been provided.

13 Council/43/30, Council Report on the Future Shape of Inmarsat; Assembly/9/1, Report of the IWG to the Assembly; IWG/3/11, Comparison with a Commercial Company; IWG/4/2, Inmarsat Participation in Joint Ventures; IWG/5/5, Inmarsat's Privileges and Immunities. See also later studies by the Inmarsat Directorate on topics raised during the restructuring debate, namely, IWG/11/4, Conflict of Interests, dealing with the potential conflict of interests of Signatories in their different roles as investors, land earth station operators, Council members and participants in competing enterprises, and IWG/12/1, Intellectual Property Rights, dealing with the need to ease restrictions in the Convention on Inmarsat's use of its IPR.

As to Inmarsat's efforts to improve access to national markets, see D Sagar, *Mobile Satellite Communications: Challenging the Regulatory Barriers,* Journal of Space Law, Vol. 25 No.2, (1997), 150.

14 O. Lundberg *Cutting the Cord,* in the book Never Beyond Reach", Ed. B Gallagher, published by Inmarsat , June 1989.

15 A. Auckenthaler, *Recent Developments at Inmarsat,* Proceedings of the Thirty-Eighth Colloquium on the Law of Outer Space, 149 (1995) (an IISL Colloquium).

D. Sagar, *Recent Developments at Inmarsat*, Annals of Air and Space Law, Vol. XX1.II (1996), 421 and Vol. XXII (1997), 363

16 Assembly/10/7, Report of the Council on the Inmarsat-P Affiliate

17 Ibid, Note 15, and Assembly/10/18, Report of the Tenth (Extraordinary) Assembly Session section 4.

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18 Council/59/SR/Final, Summary Record of the 59th Session of the Council, section 16.1 and Assembly/11/23, Report of the 11th Assembly Session, section 7.5.

19 See D. Sagar, *Recent Developments at Inmarsat*, Annals of Air and Space Law, Vol. XX1.II (1996), 421 and Vol. XXII (1997), 363.

See also Assembly/11/3, Interim Report of the IWG to the Assembly

20 Assembly/11/23, Report of the 11th Assembly Session, section 8.

21 Inmarsat Verbal Note to Inmarsat Parties and Signatories dated 5 February 1997.

22 Article 34 (1) of the Convention and Article XVIII(1) of the Operating Agreement.

23 Council71/SR/Final, Summary Record of the 71st Council Session , section 8.

24 Assembly/12/20, Report of the 12th Assembly Session, section 8 and relevant Annexes.

25 Assembly/13/INF/6, Commercial Restructuring Documentation and Assembly/13/Report, Annex 34.

26 Examples of the views of some individual Parties can be seen from papers or statements attached to Assembly/11/3, Interim Report of the IWG to the 11th Assembly Session.

27 Assembly/13/INF/6, Annex XI.

28 Ibid. Note 15.

29 IWG/8/3, Annex II, Legal Opinion of Professor S Rosenne.

30 Ibid, Note 25.

31 IWG/16/INF/5, Jurisdiction-Limited Liability, attaching Legal Opinion of Professor M H Mendelson QC.

32 Assembly/12/14, IMO Position on Restructuring.

33 Assembly/13/Report of the 13th (Extraordinary) Session, section 4.2 and relevant Annexes. See also Article 34 (2) of the Convention and Article XVIII (2) of the Operating Agreement.

34 Ibid, Note 33.

35 For a detailed review of evolving international practice concerning decision-making by consensus in international organizations, see H. Schermers and N Blokker, *International Institutional Law*, 3rd revised edition (1995), Chapter 6.

36. For the long-term business implications of the privatization for Inmarsat and its future commercial prospects, see keynote speech by Warren Grace, Inmarsat Director General, at the Inmarsat Mobile-Satellite Communications Conference, Marbella, Spain, October 1998.