THE LEGAL PROBLEMS OF INTERNATIONAL TELECOMMUNICATIONS WITH SPECIAL REFERENCE TO INTELSAT*

The session was convened at 10.00 am in the DIORI room of the Institute for International Co-operation, Mr Allan E. Gotlieb, deputy minister of Communications, government of Canada, presiding.

Mr Gotlieb formally opened the conference. He welcomed all the participants and expressed the hope that this conference would not be an isolated event, but that it would set a pattern of similar events in the Canadian international law community.

He considered that in several ways the conference was unique. It was the first time that a conference had been held in Canada on the broad subject of international communications. It was also the first time in North America that a conference had been called which had as one of its main topics the international legal aspects of problems arising from the storage and transfer of data. Once again, it was the first time that a joint conference had been sponsored on the one hand by a branch of the government and, on the other, by the International Law Association. Lastly, it was probably one of the few occasions in which a conference on international legal problems had been convened in the capital of our country. He hoped that this would mark the beginning of a rapid expansion of co-operation between lawyers and other experts from government, industry, the universities, and the public at large.

Mr Gotlieb then introduced the rapporteur of panel I, Mr Alan Beesley, head of the Legal Division, Department of External Affairs, government of Canada. Mr Beesley made the following opening remarks.

MR BEESLEY: I think this audience has sufficient expertise that I need not spell out the details of how Intelsat came into being. We all know that it is an intergovernmental organization created in 1964 for the purpose of developing an international global commercial telecommunications system. These objectives have already been accomplished to a remarkably successful degree through the establishment of telecommunications satellites over the Atlantic, Indian, and Pacific oceans. These steps have been carried out by virtue of the 1964 interim arrangements, pursuant to which the United States, through its governmental agencies and the Communications Satellite Corporation (Comsat) have played a large role. These interim arrangements are, however, no longer adequate, and Intelsat is now in the throes

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'blanketing' an area from a point, and ultimately, satellites were capable of blanketing vast areas. They could link any two points on earth and in a multitude of different combinations, through 'switching.' The switching phenomenon would develop as the art developed and as multiple access procedures became more generalized; and switching obviously meant that mankind required a multi-lateral operating organization for satellite communication. This technological imperative sharply distinguished the kind of organization and ownership appropriate to satellites from that appropriate to submarine cables or other end-to-end linking of terrestrial systems. Undivided ownership had been eminently suitable for the bilateral relations of the past; it was quite unsuited to the multilateral relations implicit in the satellites.

Dr Smythe then raised the legal question of rights in the radiofrequency spectrum and the geostationary orbit (the former essential to all types of radiocommunication and the latter the most desirable location for most types of communications satellite). He made the point that, for the spectrum to be used at all, each of its uses must be conducted on terms which were compatible with other uses around the world, and that there must be firm reciprocal obligations of non-interference. This was the basic principle of the ITU.

The spectrum was not susceptible of ownership, in the classic legal sense, based on notions of physical property. Rather, it was considered the inalienable property of all mankind. Allocations in the spectrum did not confer 'title,' but were, rather, *functional* licences to *use* one of mankind's resources, subject to the technical conditions necessary to prevent harmful interference to other users.

This, Dr Smythe suggested, should be the same for all of outer space, and the celestial bodies. And in fact the Outer Space Treaty had declared these to be the common property of all mankind and not subject to national appropriation.

As a final point, the panelist supported the United Nations' request to the Intelsat Conference for the allocation of some modest part of its satellite capacity for the conduct of UN business with the peoples of the world.

The Chairman next introduced the final panelist, Mr Barry Mawhinney, of the department of External Affairs, Legal Division. Mr Mawhinney delivered the following statement, on the main legal issues before the Intelsat Conference on Definitive Arrangements.

MR MAWHINNEY: Intelsat, to a degree unprecedented in international co-operative endeavour, has combined governments and commercial entities in a global enterprise to utilize and exploit a dramatically new form of communications. As a result, the negotiations for the definitive arrangements have given rise to unique and often difficult legal issues relating to the structure of the permanent communications satellite organization, and

to the relationships between governments and entities, between each and the proposed Intelsat organization, and between Intelsat and the outside world. It is the purpose of this paper to review some of the more important and contentious of these issues, which have arisen in the negotiations at the first session of the Plenary Conference in February/March of 1969 and at the subsequent Preparatory Committee meetings in June and September.

Legal Personality

A large number of the states participating in the Intelsat enterprise have been critical of what they consider to be an imbalance in the structure and allocation of decision- and policy-making functions in the consortium. These, by favouring the few major investors in the organization, tend to undermine the international character and purpose of the global communications system. In an attempt to overcome this problem under the definitive arrangements, proposals have been made to restructure the Intelsat organization in order to permit greater participation of governments in the formulation of policies for the system, a more even distribution of voting powers and the integration and progressive internationalization of management. Central to these proposals has been the view that juridical status distinct from the participants is essential for Intelsat if it is to conduct its operations as a genuinely international organization. Since structural reform and legal personality were inseparably linked and a small but significant minority favoured retention of the joint venture approach, juridical status for Intelsat proved to be among the most keenly debated of the legal questions at the conference.

Under the interim arrangements, Intelsat's juridical status is that of a joint venture or partnership and, as such, it does not have legal status or personality independent of the legal personalities of its participants. Each signatory owns a portion of the space segment in an undivided share proportionate to its capital investment in the system (Appendix 1, p. 304). Since it does not possess a juridical status of its own, Intelsat cannot dispose of rights and properties on the joint venture's behalf. However, any signatory, either as manager or signatory, may contract as an agent for Intelsat in the consortium's name. As an example, in all of the standard agreements for allotment of satellite capacity between Intelsat and the users, the Communications Satellite Corporation (Comsat), the designated communication entity of the United States, by authority of the Interim Communications Satellite Committee (ICSC) acts as an agent for and on behalf of the Intelsat consortium.

Under this system the signatories are liable either jointly or jointly and severally for the contractual and extra-contractual obligations of Intelsat to third parties. But no signatory is liable to pay more than an amount proportionate to its investment quota, since the interim arrangements require the indemnification of such a signatory by the other partners in proportion to their interest.

The ICSC report on the definitive arrangements laid before the plenary conference pursuant to article IX(a) of the Interim Agreement (Appendix 2, p. 304), recorded a substantial majority of the consortium in favour of a legal personality for Intelsat in the form of a corporate partnership with the juridical power necessary on the territory of each participating state to exercise its functions and attain its objectives, including the capacity to conclude agreements, to own property, and to exercise rights against third parties in its own name.

The recommendations of the ICSC report attracted strong support at the Plenary Conference, but a small minority continued to urge retention of the present system. The latter argued against replacing a system which had not only proven its effectiveness over the five-year life span of the interim arrangements, but was also the traditional method by which communications entities conducted their international business activities. Attention was drawn to the fact that Intelsat is a co-operative venture where all members join and pool resources to meet the needs of each. In these circumstances it was argued the preferable form was that of a partnership in which each member would make a contribution or investment, proportionate to its use or expected use, and would own an undivided share proportionate to its investment. There was concern that by adopting a corporate juridical status for Intelsat, distinct from its members, these co-operative attributes would be undermined and the pattern of ownership best suited for this type of enterprise seriously distorted or replaced by a system less responsive to commercial needs.

There was also some hint that juridical status for Intelsat would pose possible tax problems for the participating communications entities in their respective domestic jurisdictions. Some representatives expressed particular concern in this regard, believing that, if Intelsat were to become a corporate entity distinct from its members, the entities would no longer be able to deduct from their gross income their share of Intelsat expenses, including depreciation of assets, thus placing them at a tax disadvantage in their domestic systems.

Several delegations took the lead in advocating a legal personality for Intelsat. They insisted that juridical status was essential for the organization if it was to continue as a viable international commercial enterprise. Vested with legal personality, Intelsat would have the power to act in its own name in contracting, in acquiring or disposing of property, in instituting legal proceedings, in entering into agreements with governments or other international organizations, and in enjoying appropriate privileges and immunities in the territories of the member states. An international organization in corporate legal form was a judicial concept known and recognized by most legal systems whereas the joint venture arrangement was unfamiliar to several domestic legal regimes. In this connection they pointed to the numerous examples of international organizations with legal personality, including the UN itself and the International Bank for Reconstruction and Development,

which engaged in a form of international business activity. As a legal person Intelsat would no longer be required to operate under the cumbersome and confusing agency arrangements, for purposes of contracting, which are presently employed in the joint venture. Unlike the present system where either all participants must join in appointing an agent or all be parties to the contract, Intelsat, as an international legal person, could itself be a party to the contract and acquire rights and obligations in its own name just as a corporate enterprise conducts its affairs in domestic systems. Finally, it was asserted, Intelsat as a juridical entity, would be less susceptible to control by local administration and regulatory agencies.

Despite protracted discussion in the legal committee and a working group of the Plenary Conference, attempts to narrow or reconcile the differences between the two positions were unsuccessful at the Plenary Conference.

In an effort to break the impasse on this question, a compromise proposal was put forward at the first session of the Preparatory Committee meeting in June. Under this proposal Intelsat would possess a juridical personality and the legal capacities necessary for the exercise of its functions and the realization of its objectives. More specifically, the organization would have the capacity to contract and acquire rights directly under such contracts, acquire and dispose of property, institute and otherwise participate in legal proceedings, and have the competence to enter into agreements with sovereign governments and other international organizations. However, this proposal expressly precluded according Intelsat the attributes of an international corporation which was considered neither necessary or desirable for a venture of this type.

This compromise proposal went some distance in meeting the majority position on legal personality. However, it still left a number of unanswered questions relating to the form of ownership which would flow from juridical status. Why, for instance, was there a reluctance to accord Intelsat the status of a corporate enterprise, and would this necessarily preclude centralized ownership of the assets of the corporate venture?

In response to these queries the proponents of the compromise solution stipulated that their position on corporate status stemmed not from any reluctance to accord Intelsat the necessary contractual powers to exercise commercial tasks on behalf of the enterprise, but rather from a concern that some delegates seemed to equate corporate status with limited liability and this many delegations could not accept. (This aspect of legal personality will be explored in the next section.) While still convinced that a joint venture with undivided ownership was still the most appropriate form for Intelsat, those advocating the minority view were prepared to examine other types of ownership on their merits.

On the question of ownership, the ICSC report, apart from recommending a partnership in corporate form, had offered no clear guidance. A number of delegates have still not reached firm conclusions on this point and entertain certain reservations about centralized ownership, a concern which

though not clearly articulated seems to stem from possible financial and accounting implications, the effect on the domestic tax positions of communications entities, and, perhaps most importantly, from a reluctance to entrust such substantial assets and the direction of a sophisticated communications network to an untried legal entity.

Nevertheless a majority of the representatives at the Conference appeared to favour centralized ownership, viewing it as a logical concomitant to legal personality. In their estimate, Intelsat could only have the necessary substance and credibility as a commercial enterprise if it owned all of the assets of the satellite communication network and possessed the attributes of a corporate body.

The second session of the Preparatory Committee meeting in September adjourned without resolving the question of ownership. However, with legal personality now accepted in principle there appeared no insurmountable obstacle to reaching a compromise on this subsidiary issue.

Liability

In their preliminary discussions on this item, delegates have attempted to define the general principles which will govern Intelsat's responsibilities to third parties with respect to contractual and extracontractual liability. Considerable uncertainty has been expressed about the extent of Intelsat's liability, assuming it possesses a corporate juridical status, and the bearing article VII of the Outer Space Treaty, discussions in the UN Committee on the Peaceful Uses of Outer Space and General Principles of International Law may have on this matter.

It has been suggested that if the assets of Intelsat are to be centrally owned by an international corporate enterprise, as the majority of delegates seemed to favour, then it was conceivable that the organization could impose a limitation on its liability similar to that of a corporation in domestic legal systems except, of course, that states parties to the definitive agreements who are also parties to the Outer Space Treaty would continue to have a residual and unlimited obligation to third parties respecting damage arising out of the launching of space communications vehicles.

However, as was noted in the previous section, a number of representatives expressed strong doubt that it was either appropriate or meaningful to create a limited liability international corporation. Such an entity, they argued, would exist only in the eyes of such states as are parties to the definitive agreements or who grant recognition to it. Otherwise, there was no regime of international law which would oblige third parties to recognize the limited liability of an international enterprise. In any event, according to this point of view, the question of limited liability was an unreal issue, since it was inconceivable that Intelsat would undertake obligations to third parties which it was unable to fulfil. The organization would be adequately protected against all normal risks of operation by various commercially accepted methods which are presently employed by the consortium, that is,

contractual disclaimers of liability, indemnification provisions, and public liability and property damage insurance. The only conceivable circumstance under which a liability in excess of the normal safeguards and insurance, as well as the assets of the system, might be incurred would be a major catastrophe during the launch of a satellite. If by remote chance such a catastrophe did occur, the states which are parties to Intelsat and are responsible for the launching of the space vehicle will be liable for ensuing damage to third parties by virtue of the Outer Space Treaty, if they are parties thereto, and general principles of international law relating to state responsibility.

Aside from the foregoing considerations, it was contended that such a concept was inappropriate for an international enterprise whose specific purpose was the commercial exploitation of outer space. Intelsat is sponsored by governments and its activities are carried on by its chosen instruments. It was therefore unwise for the signatories to place themselves in a position where, on the one hand, they are deriving a profit from their activities in outer space and, on the other hand, they are seemingly seeking to avoid total responsibility and liability for the consequences of such activity.

Settlement of Disputes

It was generally agreed that the present compulsory third party adjudication procedures governing disputes between signatories to the Special Agreement and between signatories and the ICSC arising out of the application of the Interim Agreements should continue, with minor procedural changes, under the definitive arrangements. There was also general concurrence that similar arbitration provisions should cover potential disputes among states parties to the definitive agreements. Although this item did not provoke any sharply conflicting views, brief reference might be made to one proposal which served to underline a recurring question in these negotiations, namely the problem of defining in juridical terms the relationship between governments and commercial entities collaborating in an international enterprise.

It was suggested that the arbitral procedures of the definitive agreements should be formulated so as to cover disputes between states parties and signatories and that the latter be given the option of intervening as an additional disputant in an arbitration if it considered that it had a substantial interest in the decision of a case in which the state party designating such signatory is a disputant. Those favouring this provision contended that because the rights and obligations of parties and signatories arising out of the definitive agreements would be so intertwined, signatories must be in a position to intervene directly in a dispute in the event their rights were adversely affected by the actions of a party.

A number of delegates found difficulty in defining conceptually the basis of the legal relationship between state parties and entities, noting that arbitration in such a situation would be predicated on the notion that the two disputants ranked pari passu in an international legal sense. Since the desig-

nated communications entities were not, as such, subjects of international law and derived their status, rights, and obligations under the agreement from the states parties of which they are the designated entities, it was difficult to conceive of the circumstances in which a dispute between a designated entity of one party and another party could be arbitrable since the rights and obligations of the party related to sovereign states and those of the signatory to commercial matters. It was doubtful whether disputes between the two could in law be equated. In light of these considerations, it was argued that arbitration between states parties to the agreements on the one hand and signatories on the other should be kept separate and distinct. If an occasion should arise where a signatory wishes to assert a claim against another party then under normal international legal procedures it would seek to enforce or arbitrate that claim through the government of which it is the designated entity.

Supersession

In formulating the entry into force provisions of the definitive agreements the question has arisen as to the number of parties to the Interim Agreement necessary to bring the new arrangements into force and thereby terminate the earlier instruments (article XV of the Interim Agreement states, 'this Agreement shall remain in effect until the entry into force of the definitive arrangements referred to in Article IX of this Agreement'). Although establishing expressly temporary arrangements, the Interim and Special Agreements are silent on this point.

It was the position of the majority of representatives at the first session of the Plenary that the present agreements could be interpreted so as to permit the definitive arrangements to enter into force and supersede the interim arrangements when a substantial majority, probably two-thirds (including the major investors), adhere to the new instruments on condition that parties to the earlier agreements not adhering to the new arrangements are fairly compensated for their space segment investment under the Interim Agreements by an equitable buy-out arrangement pursuant to the requirement of article IX of the latter instrument.

However, a small but vocal minority disputed the above interpretation of the Interim Agreements. It was their contention that, since the existing intergovernmental agreement contained no provision to the contrary, the principle of unanimity must apply to supersession of the present arrangements. According to this view, the fact that the system is owned in undivided shares, together with the provision in article IX of the Interim Agreement that the definitive arrangements should safeguard the investment made, spoke clearly against the assumption that a majority decision could validly be taken with the effect of expropriating the shares in the system held by a minority. In addition, the fact that the Interim Agreement does not provide for amendments supports the conclusion that the legal relationship between

the parties, as reflected in the Agreement, was not expected to be altered against the will of any of them. It was recalled by the proponents of this view that at the negotiations for the interim arrangements there was a general presumption among the small number of states participating that the agreements, then coming into force, could only be superseded by the unanimous consent of all the parties and that this assumption was given added weight two years later when the Supplementary Agreement on Arbitration was brought into effect only after all signatories of the Special Agreement had registered their adherence.

The majority considered it the better view that under prevailing principles of international law and practice regarding the revision of international agreements, there is no requirement that all of the parties to an earlier agreement must accede to a later agreement in order for the later agreement to come into force and supersede the earlier one. Provided that the superseding agreement is acceded to by at least a majority of the parties having a substantial interest in the subject matter of the agreement, and that prior non-acceding parties are not bound by the new agreement and their rights acquired under the earlier agreement are not prejudiced, there is nothing to preclude the later agreement entering into force by less than unanimity. In further support of this interpretation of the Interim Agreement, it was noted that article IX stipulates the safeguarding of investments of the members, a provision which would be meaningless if unanimous consent to supersede was intended.

This question, though not of substantive importance for the negotiations since most representatives reject as impractical the notion of unanimity, was nevertheless of some academic interest to legal experts at the conference from the standpoint of the law of treaties.

Appendix 1

The Intelsat agreements of 1964 comprise two interrelated instruments: (a) the Interim Agreement signed by governments, officially termed 'parties,' setting forth the basic principles of organizational guidelines of the global satellite system, and (b) the Special Agreement signed by designated communications entities of the parties, officially termed 'signatories,' containing the detailed provisions of the business undertaking. These signatories can be either governments, such as the government of the French Republic, government-operated communications entities, such as Her Britannic Majesty's Postmaster General, government-owned corporations, such as the Canadian Overseas Telecommunications Corporation, or private corporations, such as Comsat.

Appendix 2

Article IX

A Having regard to the program outlined in Article I of this Agreement, within one year after the initial global system becomes operational and in

any case not later than 1st January 1969, the Committee shall render a report to each Party to this Agreement containing the Committee's recommendations concerning the definitive arrangements for an international global system which shall supersede the interim arrangements established by this Agreement. This report, which shall be fully representative of all shades of opinion, shall consider, among other things, whether the interim arrangements should be continued on a permanent basis or whether a permanent international organization with a General Conference and an international administrative and technical staff should be established.

B Regardless of the form of the definitive arrangements:

i their aims shall be consonant with the principles set forth in the Preamble to this Agreement;

ii they shall, like the Agreement, be open to all States members of the International Telecommunication Union or their designated entities;

iii they shall safeguard the investment made by signatories to the Special Agreement; and

iv they shall be such that all parties to the definitive arrangements may have an opportunity of contributing to the determination of general policy.

C The report of the Committee shall be considered at an international conference, at which duly designated communications entities may also participate, to be convened by the Government of the United States of America for that purpose within three months following submission of the report. The Parties to this Agreement shall seek to ensure that the definitive arrangements will be established at the earliest practicable date, with a view to their entry into force by 1st January 1970.

The Chairman then stated that a question likely to preoccupy many members of the international community was that of the relationship between the operating function and the regulatory function in international communications. He thought there should be an attempt to define and clarify the ITU regulatory role in international communications. Communications systems utilized outer space which, in turn, belonged to all mankind. There must be a forum in which questions relating to the communications uses of outer space could be debated by all states. However, insofar as operations were concerned, the Canadian position was that Intelsat should be the body to operate satellites for international space communications purposes.

Mr Gotlieb stated that this operating body should be made as consistent as possible with both the principle of universality and the principle of efficiency. How to do this was the heart of the problem underlying the issues involved in the Intelsat negotiations. If, as he believed, regulation must be looked at separately from operations, it was then clear that in view of the increasing uses of space for communication purposes there would be both a need to strengthen the regulatory body, the ITU, and a need to ensure that

the operational consortium, Intelsat, was as universal as possible, with voting structures and techniques for decision-making reflecting the requirements of operational efficiency and fairness in international relations. There had to be a blend between the dictates of the older concept of state sovereignty and of the new requirements of technological change.

Mr Gotlieb said that Intelsat had been very effective in extending a world-wide communications system and that nobody could fail to realize the significance of that fact. At the same time there were features of the existing arrangements which were not satisfactory. For example, there was no general assembly where every state could express a view or cast a vote on some of the important issues. Voting power was such that one country could cast a majority of the votes. A half-dozen or so countries had over two-thirds of the voting power. There was, however, a lot of goodwill on the part of countries engaged in the current negotiations. He thought it likely that the new arrangements, when they came into being, would provide for much more equitable voting arrangements. He emphasized that these negotiations were prolonged and difficult. There were very genuine interests at stake and profoundly difficult problems involved. They related not only to voting power and to the structure of the governing body and the assembly but to the even more difficult issue of the nature of the management authority. At the present time, the management authority was Comsat, a United States corporation. It was not an international body, although it was answerable both to the governing body of Intelsat and to the United States Congress. The key issue was how the management organization could reflect the need for a broader base for decision making without endangering or weakening the extraordinarily complex space segment of Intelsat and its continued growth and efficiency. Satellite systems were not getting any simpler. Research and development were continuing and getting ever more expensive. New generations were replacing older ones and this was not going to stop. There would soon be a fourth generation of Intelsat satellites; then a fifth, and a sixth, and so on.

Mr Gotlieb added a brief comment on domestic satellites systems. There was, he said, really no difference of view anymore in the international community about domestic systems. This could be seen by the positive response shown in Intelsat (the ICSC) to the Canadian decision to proceed with a domestic system. A number of countries were now planning to have them. For example, India was pursuing a domestic system. The United States broadcasters wanted to have their own system, as did the Ford Foundation. General Electric, it seemed, wanted to have one for data, and AT&T had been quoted as having said that they would welcome anybody establishing a satellite system. He thought there was a very wide acceptance of the fact that domestic systems were necessary and should be allowed, provided that the state with the system was prepared to comply with its international obligations with regard to frequency allocations.

The Chairman then thanked the panelists for their statements and opened the meeting to questions and comments from the floor.

ME JACQUES R. ALLEYN, general counsel of the Canadian Broadcasting Corporation, commented that the matter of ownership of a communications satellite system was of no great concern to the users so long as the system was operated according to fairly fundamental principles, revolving around the right of access, the protection of transmissions and the acceptance of the concept of the common carrier role. From the point of view of the users, it was not important whether they used one Intelsat system or that one in combination with the Inter-Sputnik system, or eventually with a Chinese system (if any such system were established). What was important was that any message should be able to be transmitted across the various systems and arrive at its point of destination. This was the same as in the case of terrestrial communications (including submarine cables), where a message should be able to go from Canada to Tokyo, making use of the Atlantic cable, the United Kingdom's GPO system, the French PTT's, the Trans Siberian cable, and possibly some other link that would take a signal down to Tokyo. What was important in both cases, and through all the systems, was that the message not be tampered with, that reasonable and competitive rates applied and that the transmission be protected. The matter of ownership was secondary to these considerations.

International lawyers, in lieu of trying to achieve a single operational system in which all the countries of the world would have an ownership share, and which obviously would provide an extraordinary pleasant esthetic solution, should concentrate on securing from the other countries not participating in Intelsat, agreement on the basic principles outlined above.

MR SPENCER MOORE, international liaison officer of the Canadian Broadcasting Corporation, commented on the need for protection of satellite transmissions against their unauthorized interception and use or rebroadcast. The problem, he stated, emerged where there was, for example, a televised transmission of a sports programme via an Intelsat satellite, between Germany and the United States. If that programme were 'poached,' that is, tapped from the satellite by an unauthorized party and rebroadcast, then there would be a major rights problem. There already had been such an occurrence and the proliferation of this type of activity could well lead to the serious curtailment of intercontinental broadcasting. There were now over twenty earth stations in the Atlantic Basin which could pick up satellite transmissions. Mr Moore therefore stressed the need for international protection against this unauthorized poaching, perhaps through Intelsat to begin with, and then possibly through a comprehensive and universal international agreement.

DR R. H. MANKIEWICZ, professor of law at McGill University made the point that, ideally, there should be one international satellite telecommunications system. In a field such as this, which belonged to mankind, private

business – or even powerful industrial states – should not be allowed to establish a *de facto* monopoly and to control all satellite communications by occupying all the strategic points, just because they got there first. Dr Mankiewicz suggested that while Intelsat, in its definitive form, might be more detached (than it is under the interim arrangements) from United States legislation, this might not be enough. There must still be a clear distinction between the operation and the regulation of space telecommunications. Intelsat should not do both. It should be an operating agency (and a truly international one). It should, however, be regulated by another international agency, as to its rates and services (which should be non-discriminatory and not conditional upon the content of messages transmitted.) At the present time, Intelsat could accept or refuse transmissions and was not regulated as to the fees it charged. Hence the need for regulation, possibly by the ITU or the WMO or perhaps a new body.

Finally, Dr Mankiewicz raised the question of whether a commercial agency, in order to have international personality, must be incorporated. His answer to this was negative, since incorporation took place in a specific country and an international organization would lose its 'internationality' if it were incorporated in a particular country. It would have to be established by governments as an international organization under general international law. Nor would this preclude it from having a commercial function; there were operating agencies in other fields which have been established under international law and exercise commercial activities.

PROFESSOR MCWHINNEY then stated that he had been struck by Mr Alleyn's comments which had really suggested, it seemed to him, a functional approach to the development of an international law governing telecommunications satellites. He had himself always tried to apply the functional approach to the development of the constitutional law of federal-provincial relations in Canada, and that approach applied equally to international law. He had the impression that the international regulation of telecommunications satellites which would emerge would be very similar to that which Mr Alleyn had indicated, that is to say, functionally, and one or two steps at a time. There would not be any over-arching international organization or control mechanism yet.

On the copyright issue raised by Mr Alleyn, Professor McWhinney did not think that the Soviet bloc countries would adhere, at this stage, to the general copyright conventions. But the Soviet Union might perhaps be prepared to make *ad hoc* arrangements, having much the same effect as recognizing a species of copyright. His impression was that copyright was a much less significant issue to the USSR than was the control of propaganda, and it might be of interest to the soviets to try and use the telecommunications satellites issue as a sort of back-door method for securing a general international convention, or principle of international law, outlawing 'warlike propaganda.' If that were the case, then they had to be told that this problem did not worry most states and that the plan would not work.

It seemed to him that the big powers were unnecessarily worried about this problem of potential propaganda through direct satellite television broadcasts, and that the little powers tended much more to take it in their stride; the difficulties here might be less real or insurmountable than the Russians and the Americans were inclined to think. He did not think it should hold up, in any case, some more fundamental and comprehensive accord on the international control and regulation of telecommunications satellites generally.

On this issue of the property concept and the 'ownership' of a 'national' satellite or satellites, he considered that Professor Mankiewicz was quite correct in saying that countries did not want to be at the mercy of the big powers in international organizations that the latter might control or dominate. But an indefeasible right of user (and he used the term advisedly, in its property connotations) was not some fleeting, evanescent thing, revocable at the mere whim or caprice of the grantor. It all depended on the contract one made. If Canada decided to forego a Canadian-owned satellite and to contract for use of somebody else's satellite, it would depend on the contract that the Canadian representatives chose to make. One did not agree to a contract that was negotiable every year, but there was no real difficulty, in his view, with long-range contracts as to user, with proper guarantees.

Professor McWhinney then turned to the related issue of American dominance of Intelsat, which he considered a past issue. His general impression was that the Americans had already decided in principle to sacrifice their 53 per cent voting rights, and that the discussion was now proceeding along the lines of the actual modalities of new voting formulae. If the Russians came in, something like the UNCTAD voting formula might be generally acceptable, and certainly, including the Russians would be very desirable at the present time. In any case, he did not really think we had to worry about the American voting rights, although the departments of External Affairs and Communications were right to discuss it publicly. But he suspected that it had already been conceded privately and that therefore the real argument was over what form of internationalisation should now emerge for control and regulation of international telecommunications satellites. Mr Alleyn had suggested a hope of building up the ITU. But if one were considering a comprehensive international control organization for telecommunications satellites and their broadcasting, there were other candidates as well as the ITU. He had reservations about the ITU because of what he called the professional, bureaucratic, special-interests-oriented thinking within it after one hundred years.

Of course, there was the UN General Assembly Committee on the Peaceful Uses of Outer Space. However, as presently constituted, it was not entirely suitable in his opinion; maybe the restructuring of that Committee might be as promising as any proposed restructuring of ITU. At any rate there were other people in the same act. ICAO had certain interests in the telecommunications area. So had WHO, and numerous others. He hoped that

the departments of External Affairs and Communications would not be too rigid and insist that, if there was to be any further and more comprehensive internationalization, it must proceed through the ITU. The ITU had always had a very limited function and had no power to enforce its decisions at the moment. To restructure it might be a considerable contribution to the constitutionalism of international organization; but it might also involve expenditure of too much social energy, where the same results could be achieved by other, less socially expensive, means.

The last issue Professor McWhinney raised was the working relationship between the two comprehensive, global systems of telecommunications satellites, Intersputnik and Intelsat. Intersputnik had perhaps been started to challenge the American power in Intelsat, but to go ahead with an entirely separate and distinct world system (which was the Russians' right), was a terrible expenditure of money and resources for a country with far greater internal competition as to priorities in the allocations of scarce scientific and technological resources than the west had. One got the impression, he felt, that provided sensible terms were offered, the Russians might be prepared to forego their isolationist policy on telecommunications satellites. Even China, for similar reasons, might eventually want to negotiate for some sort of reasonable accommodation, involving either direct participation in, or else working co-operation with, Intelsat.

MR RALPH REYNOLDS, head of the Transport, Communications, and Energy Division, Department of External Affairs, next stated that from his experience, the Intelsat and soviet-initiated Intersputnik organizations were not very close to forming one global system. Canada, he suggested, would welcome this development and had in fact been instrumental in Intelsat inviting the USSR and other countries to attend its Plenipotentiary Conference. However, there remained the fundamental problem of the paramount United States role in Intelsat, based on its investment and related voting power (at the time it still had 53 per cent). This was not likely to diminish appreciably; and thus, despite various efforts at making the organization as world-wide as possible, Mr Reynolds had no great faith in Intelsat becoming the sort of organization that the Soviet Union would be willing or able to join.

PROFESSOR IVAN VLASIC of McGill University then raised three questions in order to gain more information about some of the questions currently being discussed in the process of renegotiating Intelsat. He recognized the confidentiality of certain information but stressed that more facts were necessary for intelligent discussion.

On the important question of the voting power in Intelsat, Professor Vlasic stated that rumour had it that, under the definitive arrangements, the United States might be willing to accept a reduction of its quota to as low as 40 per cent. Also, the United States would be ready to accept the establishment within Intelsat of an assembly of members. What was not known, however, was the function of such an assembly and its decision-

making procedures. France had reportedly placed before the Intelsat conference an elaborate proposal which in some respects significantly departed from the Interim Arrangements but, again, the details of this alleged proposal did not appear to have been published.

Professor Vlasic's second question dealt with the relationship between Intelsat on the one hand, and the regional and national communications satellite systems, such as Symphonie and Telesat, on the other. He stated that the jealousy with which Intelsat and Comsat viewed their monopolistic position in the world and in the United States respectively was well known. In fact, Comsat had been fighting various potential American competitors almost from its inception and had until recently maintained that it was the only authorized United States operator of satellite communications facilities. He thought that Intelsat might similarly wish to control the global satellite network. However, should that prove impossible (as seemed likely), then it would want to make sure that all such separate systems were compatible with the objectives of the global organization. What was not clear was the meaning of the term 'compatible' – what kind of compatibility would be involved? Was it technical compatibility of the systems, or were there economic and political factors involved as well? Did Intelsat have to approve a system such as Canada planned to build? Had Canada entered into any arrangements with Intelsat in regard to its Telesat? If so, what kind of arrangements?

Professor Vlasic's third and final question dealt with legal personality. How would this be conferred upon an organization such as Intelsat – by a mere declaration in its constitutive act, or by its being incorporated in a particular country under the laws regulating corporate bodies of that country? Further, what was achieved by conferring legal personality upon Intelsat? Would it be the same treatment as that accorded under international law to intergovernmental organizations such as ITU or ICAO? Professor Vlasic stated that some might doubt the benefits of this, given the structure and objectives of Intelsat. It was primarily a commercial, profit-oriented enterprise managed and operated by a semi-private national corporation – Comsat. Perhaps problems of legal categorization would be less severe if international lawyers were to abandon the tendency to fit any new creation of modern life into the traditional patterns. Just as Comsat was a novel and unique corporate body in the American experience so, he argued, Intelsat could rightly be regarded as a unique organizational phenomenon on the international scene which might require unique legal solutions.

THE CHAIRMAN took the opportunity to respond to Professor Vlasic. He stated that the Intelsat negotiations, unlike UN discussions, were not open to the public [a principle since altered for the resumed Plenipotentiary meetings, which the press and public may attend]. As a result, not even the press had been able to keep informed except through press releases. Nor were the proceedings published at a later date as was the case in disarmament discussions. So it was difficult for public opinion to know what the issues were.

This he regretted, although he recognized that negotiations in confidence did have a great number of advantages. Canada was thus inhibited from simply getting up and announcing publicly everything that it had been doing in Intelsat since the beginning of the negotiation. Mr Gotlieb could say, however, that Canada had played a very active role in these negotiations from their inception. Not that active roles were good per se, but he thought Canada's role had been constructive. In combination with certain European and Asian powers Canada had put forward what were considered to be workable middle views between positions espoused by certain countries on both sides, with the aim of finding a common ground that the organization could move to in the long run. He thought that Canada had not been unsuccessful. It had pursued this approach in formal documentation submitted to the conference, touching on virtually all the important areas of Intelsat's work. The dominant theme of those proposals had been to suggest ways in which a greater degree of international representation and control could be introduced in all the organs of Intelsat. From this standpoint, Canada had focused on the governing body, on the Assembly and on the manager. Now if, as a part of the dynamics of these nogotiations, a number of countries had shifted, this showed some hope for a favourable outcome in the long run.

With regard to Telesat, Mr Gotlieb stated that the discussions within Intelsat had been harmonious. They had been directed towards technical compatibility only, as the interest of the consortium had been in this context alone. Those members having a very large investment in Intelsat wished to ensure that other countries which were bound by the same treaty should take into account the necessity of not interfering with the system that was already there or planned. So there had to be a co-ordination of plans in terms of the utilization of both systems.

With respect to legal personality, the Chairman thought one could distinguish between the technical problem and the political problem. Technically, he thought that Intelsat could achieve legal personality in the same way that the UN had – through conferral by treaty. And then, of course, this personality would have to be recognized in the national laws of such states as were willing to recognize it. But the political problem – the manager of Intelsat – was greater. The manager at the moment was a corporation, incorporated under United States laws, with its own separate legal personality. What would be the structure of the manager in the future? Would it be Comsat, would it be a modified Comsat, would it be a new body altogether, would it have its own legal personality or would its legal personality be derived from the totality of the legal personality of the over-all organization? All these were questions for negotiation. And nothing had really been settled yet.

MR SPENCER MOORE then made the comment that from the CBC's point of view, Comsat had been a very efficient manager of Intelsat, fair to broadcasters and reasonable in setting rates. If there was a cost problem, it lay with European poste-télégraphe-téléphone (PTT) authorities, who had not

passed on to users the savings made possible through satellite communications. It was, for example, cheaper to send a message from New York to Tokyo via satellite than from New York to London. There seemed to be no problem of freedom of transmission; Comsat would send messages through the Intelsat system irrespective of their content, whereas particular administrations had been known to refuse access to earth stations because of the content of a particular TV programme to which they had objected.

DR G. F. FITZGERALD, senior legal counsel of the International Civil Aviation Organization, then referred to the need for three types of international organizations in the field of space communications. On the technical and regulatory side, there was a need to strengthen the ITU. On the operational and management side there were Intelsat and Comsat. In the middle there should be an international body to develop an over-all policy on the economic use of space communications. This policy-making body, while taking care not to hinder the operating agency, would attempt to perform the important function of reconciling the various interests – including those of the non-space powers – concerned with space communications.

MR GORDON NIXON, director general of the Telecommunications Management Bureau, Department of Communications, mentioned that under both the interim and definitive Intelsat arrangements members who were non-space powers had and would have equal access to the *space* segment of the system with space powers. Earth stations, however, were owned not by Intelsat but by individual states. Therefore, countries without earth stations would have to conclude bilateral agreements for their use with those states who had them.

MR ALAN BEESLEY was then called upon by the Chairman to summarize the morning's discussion. In his opinion, consensus had been reached on the following items.

First, the desirability (if not the likelihood in the near future) of Intelsat-Intersputnik co-operation. Second, that domestic, regional, and global systems were not mutually exclusive, although there was need for compatibility both on the technical and the legal planes. Third, that the protection of transmissions was a different problem from the protection of authorship in programmes transmitted and that accordingly the Berne Union and Rome Convention arrangements might not be applicable. Fourth, that there ought to be universality of access to satellite communications. Fifth, that the operation and regulation of satellite systems were different, and that there should be a regulatory body (although whether this should be the ITU, Intelsat itself, a UN body, or some other body was not agreed upon). Sixth, that the management function in Intelsat should be discharged in a broader and more international way than at present. Seventh, and finally, that international personality should be conferred upon Intelsat (either by state practice or by treaty coupled with national legislation or by some other means).

The Chairman then adjourned the session at 12:45 pm.

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THE LEGAL PROBLEMS OF INTERNATIONAL TELECOMMUNICATIONS WITH SPECIAL REFERENCE TO INTELSAT*

The session was convened at 10.00 am in the DIORI room of the Institute for International Co-operation, Mr Allan E. Gotlieb, deputy minister of Communications, government of Canada, presiding.

Mr Gotlieb formally opened the conference. He welcomed all the participants and expressed the hope that this conference would not be an isolated event, but that it would set a pattern of similar events in the Canadian international law community.

He considered that in several ways the conference was unique. It was the first time that a conference had been held in Canada on the broad subject of international communications. It was also the first time in North America that a conference had been called which had as one of its main topics the international legal aspects of problems arising from the storage and transfer of data. Once again, it was the first time that a joint conference had been sponsored on the one hand by a branch of the government and, on the other, by the International Law Association. Lastly, it was probably one of the few occasions in which a conference on international legal problems had been convened in the capital of our country. He hoped that this would mark the beginning of a rapid expansion of co-operation between lawyers and other experts from government, industry, the universities, and the public at large.

Mr Gotlieb then introduced the rapporteur of panel I, Mr Alan Beesley, head of the Legal Division, Department of External Affairs, government of Canada. Mr Beesley made the following opening remarks.

MR BEESLEY: I think this audience has sufficient expertise that I need not spell out the details of how Intelsat came into being. We all know that it is an intergovernmental organization created in 1964 for the purpose of developing an international global commercial telecommunications system. These objectives have already been accomplished to a remarkably successful degree through the establishment of telecommunications satellites over the Atlantic, Indian, and Pacific oceans. These steps have been carried out by virtue of the 1964 interim arrangements, pursuant to which the United States, through its governmental agencies and the Communications Satellite Corporation (Comsat) have played a large role. These interim arrangements are, however, no longer adequate, and Intelsat is now in the throes

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of attempting to establish definitive arrangements which, hopefully, will make it a truly international organization. As rapporteur I propose to draw your attention to five of the central issues – of interrelated legal, cultural, political, and social significance – with which Intelsat is attempting to cope.

One of the basic legal problems for Intelsat is structural – the necessity of reconciling the widespread desire of many states to make Intelsat a truly international, virtually universal, organization of states, with the imperatives of efficient management of extremely costly and complex resources. Can Intelsat be developed in a manner comparable to other existing intergovernmental institutions or must there be a radical departure from the one country/one vote practice of virtually all intergovernmental organizations? This problem is particularly acute because Intelsat, unlike most other international organizations, is an essentially operational organization, rather than merely consultative or regulatory. Much could be said on this, but I want merely to raise the problem for your consideration.

A second major issue with important legal implications is how to marry in one organization extremely important governmental interests touching, for example, on foreign policy (including the delicate question arising out of the possibly uncontrollable diffusion of ideas or programmes with political, social, cultural, and economic implications) with the important commercial interests which also must necessarily be reflected in the organization and, I might add, whose co-operation is probably indispensable to the organization. Perhaps Comsat can exist without Intelsat. Can Intelsat exist without Comsat? Obviously not. How, therefore, can the functions of Comsat be reconciled with those of Intelsat and, presumably, in a way that gives Intelsat overriding control?

A third basic problem with important legal aspects is that of the legal status of the organization. Should it have a corporate personality which would enable it to play a positive and direct role in the operations of the communications system or can it function effectively under its consortium system? Which system is likely to be more effective? Which will be acceptable to governments? Without a legal identity in its own right will Intelsat have to operate exclusively through the instrumentality of Comsat? Are there compelling legal reasons why Intelsat must have a corporate personality? On the other hand are there compelling reasons why it should not? Should it be lesser than the International Telecommunication Union which has the ability to make contracts and is recognized on the international plane for most purposes as having an independent personality? Here again the fact that Intelsat is an operational and not merely a regulatory organization is of direct significance.

A fourth problem of particular interest to Canada from both a political and a legal point of view is how to accommodate regional communications satellite organizations with Intelsat. It seems evident that there will be pressures to develop regional organizations, whatever happens in Intelsat.

In respect of this issue economic considerations are of prime importance. If Intelsat is to be a commercial undertaking on a global scale in which all governments are to be invited to participate and to invest, regional arrangements must be carried out in a way which does not prejudice the investment of governments in the Intelsat system. In the light of this factor, regional systems would have to be developed in a way which would meet peculiarly regional needs and not in any way duplicate, supersede, or compete with Intelsat. All of the problems of reconciling conflicts of interest between governments and between governments and commercial enterprises will be multiplied in any approach to this question.

Finally, a fifth point – already touched on by Mr Gotlieb, and perhaps one of the most interesting to international lawyers – is the extent to which Intelsat may become a model for international organizations established for the uses of outer space. Whether we think of earth resource satellites or all the many economic, cultural, and political implications of development of space platforms, or of the complex and costly problems of establishing a world weather watch, the question is, what approach will the international community adopt? Clearly some of the growing pains being experienced by Intelsat may ultimately find their justification in the manner not only in which Intelsat develops, but in the extent to which it proves a precedent or example for other new endeavours by man to utilize outer space for the benefit of mankind.

The Chairman then introduced the first panelist, Professor Edward McWhinney, director of the Institute of Air and Space Law of McGill University. Professor McWhinney made the following statement.

PROFESSOR MCWHINNEY: This Conference's perspectives on the legal problems of international communications in a conference held in the federal capital will tend, somewhat inevitably perhaps, to be those of national, Canadian decision-makers rather than those of the world community as a whole. There is nothing, of course, that is inherently wrong in having the perspectives of a national decision-maker. It can, in fact, be argued that rational community decision-making, in international no less than in national arenas, demands in the first instance clear and precise identification of the differing *de facto* interests and claims actually advanced – the perspectives of the various national participants in the international power process; the correct solution will be that which most effectively harmonizes or reconciles the multitude of competing interests pressed by those participants. In this sense, and to paraphrase President Eisenhower's first Secretary of Defence, what is good for Canada may also be good for the rest of the world community. However, it is essential as a starting point, that the policies advanced for Canada should make sense in terms of Canada's own distinctive national needs and distinctive community expectations.

A rational Canadian national policy on international telecommunications

satellites, it might be postulated, would seek to achieve the following goals. First, a continuingly high rate of scientific and general technological advance and growth. Second (and this, especially, at a time when our federal government is politically committed to drastic economies in federal public expenditures, both for international and for domestic purposes), as low as possible a capital investment or capital commitment for Canada, consistent with the maintenance of the scientific and technological progress already referred to. Third, as wide as possible political commitment to the principle of free access to and free dissemination of information and ideas, without artificial restrictions or barriers imposed solely on account of national boundaries and the like. Fourth (this being in some respects simply a more specific application of the first three points already mentioned), the ensuring of the provision, through international telecommunication facilities on the speediest and most economical basis possible, of comprehensive television and telephonic and related communication coverage for all main geographical regions of Canada.

Assuming that such a roster of policy objectives for Canada can be agreed upon in advance, the practical political achievement of these goals in the relevant international organizational and commercial and scientific arenas is very much simplified. I take it that Canadian foreign-policy-makers have long ago been freed from the dead-hand control of 'institution-itis'– a concept which may be defined as the pursuit of abstract institutional forms and organizations and patterns as ends in themselves, without regard to the concrete social purposes and objectives for which those institutions were designed and which alone give those institutions their meaning and raison d'être. On this basis we can afford to be calmly pragmatic in our approach to existing international or supranational institutions and organizations in the telecommunications area, examining on a purely experiential basis whether they have achieved the purposes for which they were originally created and also whether they can usefully (that is, on a balance of pains and gains) be adapted to Canada's current national policy objectives on telecommunications.

Applying such an empirical approach to existing international telecommunications organizations, without any particular ideological preconceptions based on considerations of national pride or the pursuit of a distinctively Canadian 'politique de grandeur,' it must be conceded, immediately, that the existing prime international telecommunications organization, Intelsat, deserves very high marks in terms of all four Canadian national policy objectives postulated above. Indeed, to be more specific, in respect to the first two objectives (continuingly high rate of scientific and technological advance and growth, and low cost to the Canadian tax-payer), it may be suggested that no other conceivable form of international control in this area could have performed so expertly and at such relatively low cost to its members.

The main attacks on Intelsat today, of course, do not relate to its technical performance, for even its severest critics are forced to concede that they could not in any respect match this. These attacks are upon Intelsat's alleged lack of a genuinely international character, due, of course, to the substantial American-based control of its internal voting and decision-making powers and the American monopoly of its managerial functions. Weighted voting is not, by any means, a new phenomenon in contemporary (post second world war) international organization. In fact, it might even be suggested that the current trends in the constitutionalism of international organization are rather against the overly literal pursuit of the one state/one vote principle, this in reaction to some of the political excesses thought by many countries to be inherent in recent UN General Assembly, majority-imposed resolutions on some of the major international tension-issues of the day. Certainly, in those international organizations whose political viability depends upon the continuing goodwill of the big powers, and more importantly perhaps on continuing capital financing by them (the International Monetary Fund and the UN Conference on Trade and Development, for example, and even the International Coffee Agreement), the principle of one state/one vote has been perforce abandoned in favour of the politically realistic acceptance of a voting power that will be more or less proportional to the expected capital contribution by a particular country or the general economic and financial support and underwriting offered by it.

The one state/one vote system, pursued to a purely abstract, 'logical' conclusion in the case of Intelsat, might certainly yield a more 'democratic' international control organization, but surely also an intellectually and scientifically more sterile one if, for example, as a direct political consequence, the big powers with the technological 'know-how' and the concomitant capital support should, as a result, decide henceforward to employ their main scientific and commercial energies within their own domestic telecommunications systems, possibly accompanied by direct bilateral agreements with other countries or groups of countries with a parallel advanced technological base.

The most serious limitation to the 'representative' character of Intelsat is in fact constituted, not by its failure to defer more or less to the one state/one vote principle, but by the fact that Intelsat represents, among the advanced technological societies, only the west and western-leaning countries. The Soviet Union and the soviet bloc countries in eastern Europe are notably absent; as of course (though it is, by comparison, at a much less advanced telecommunications technology level) is communist China.

One is aware, of course, that an effective, integrated world system of telecommunications satellites can function, under the aegis of Intelsat, without the Soviet Union and its own special Intersputnik organization. Yet the advantages of a scientific and technical co-operation between the United States and the leading Intelsat countries on the one hand, and the Soviet

Union and the Intersputnik countries on the other, rather than having cut-throat competition and mutual frustration, seem clear.

If the Soviet Union should be disposed to bid to join Intelsat (and there have been several indications, in international scientific reunions at least, that the idea may at least be being considered by Moscow), then any such initiative should be welcomed by the west. It would almost certainly be followed by internal constitutional and structural changes within Intelsat which would do much to meet some of the essentially western-based criticisms of Intelsat's current organizational features. In particular, some degree of special voting powers in Intelsat for the Soviet Union (perhaps, on the UNCTAD model, approaching, though not exceeding, those of the United States), with the consequent disappearance of the current American voting majority in Intelsat, would seem to be in order. Any such measure would almost certainly be followed by some substantial modifications in the managerial character and capacities of Comsat, to avoid the claimed 'conflict of interest' situation under which Comsat has been functioning, in effect, at the same time, both as the manager of the Intelsat consortium and also as a United States domestic common carrier for profit.

A Soviet Union bid to join Intelsat, assuming it were favourably received by Intelsat, would undoubtedly act as a sort of catalyst for far-reaching internal structural changes within Intelsat. Beyond that, it would certainly introduce a degree of political equilibrium into Intelsat, paralleling that sort of United States-Soviet balance of power and tacit understanding that we have seen in other important areas of soviet-western inter-bloc relations in the era of the détente. What is important, however, is the principle of soviet-western understanding in the telecommunications field, and not the particular institutional form or modalities that that might take. Remembering the progress from an essentially negative and hostile east-west 'co-existence,' in the very early years of the détente, to some far more affirmative and concrete exercises in active east-west co-operation in more recent years, we need not bother too much if any such co-operation in the field of telecommunications satellites should take the form of an actual Soviet bid to join Intelsat, with consequent search within Intelsat for new constitutional formulae and international organizational solutions; or, if it should take the form simply of ad hoc direct dealings between the Soviet Union and the west, limited to particular immediate and specific problems, only. The latter approach would be a far more modest one, looking to bilateral, contractual-type dealings and arrangements, perhaps linking Intelsat and Intersputnik through conventional, private law arrangements. In the long run, however, if our experience in the International Law Association in the early 1960s in the 'Coexistence' debate between soviet bloc and western jurists is any example, we are likely to achieve far more results through a series of concrete and specific, relatively low-level, contractual relations than by the search for holistic solutions involving the establishment of overarching constitutional-

institutional patterns. Certainly the successful technical co-operation so far achieved in very concrete, joint Soviet-French exercises in recent months suggests once again that, in areas involving high technical and scientific competence or expertise, two technologically sophisticated organizations located in different countries can work together effectively in their common interest, with the factor of ideological differences between the two countries tending to recede into the background.

So far, we have discussed only the first two postulated national policy objectives for Canada in the international telecommunications satellites field, and we may now turn to the remaining ones. The third objective was free access to and free dissemination of information and ideas, without artificial restrictions or barriers imposed solely on account of national boundaries and the like. We recognize immediately, of course, that in talking of freedom we talk in the same sense that we do in our own internal, municipal Canadian constitutional law; it must be, at base, a relative or qualified freedom, conditioned in its concrete exercise by proper deference to the freedoms of other peoples. There is the striking example, first suggested by a Soviet jurist with a sense of humour, Dr Gennady Zhukov, at an international scientific conference in the late summer of 1969 (the story has, of course, by now made the rounds and been pirated by others without due acknowledgment of the original source); our Soviet colleague pointed out that while the direct television transmission, by satellite, of a bull-fight actually taking place in a Spanish arena to television viewers in Mexico City might be viewed as a cultural enrichment for Mexico, the same programme, seen at the same time by Indian viewers, might be considered as an affront or harm to group religious feelings in India; and he offered this as an example of the need for some sort of preliminary agreement on programme content and norms, before the era of direct television transmission by satellites into home receivers should be reached. To this, I should add, that the Indian delegate, to whom, among others, Dr Zhukov directed his remarks, at once replied with the suggestion that the problem could of course be exaggerated, and that Indians, in the field of radio broadcasting, had already learned to live with direct broadcasts from their neighbouring countries, even on issues as politically sensitive as the India-Pakistan dispute over Kashmir.

Nevertheless, it is very likely that there will be considerable pressures, from now on, for some sort of general, multilateral international convention in this area, paralleling the pressures in the area of the coexistence-friendly relations debate (usually soviet-sponsored or soviet-supported pressures) for a general convention outlawing 'warlike propaganda' and similar things. If this should occur, I hope that Canada will not too readily pass over the dangers of an overly protective, 'controlled information' approach, and that we will bear in mind our own more long-range national position in favour of maximizing Open Society values in the speech and communication area.

This particular controversy, of course, directs attention to the fact that the international law of telecommunications satellites is likely to get us increasingly into 'regulatory' activities (to use a formal classification well known to administrative lawyers) separate and distinct from the essentially managerial, operational activities with which Intelsat has been concerned up to date. These regulatory activities, of course – particularly when they get into the freedom of information versus outlawing of hostile propaganda, interests-conflicts – take us into heady, philosophical questions for which the current Intelsat control group and managerial personnel may have little inclination or taste. A general international convention does not, of course, need a control or enforcement agency to make it work: ordinary international comity, and the mutuality and reciprocity of interests of the cosignatories will normally be sufficient for most multilateral conventions, without need for more formal sanctions to ensure application or enforcement. If, however, there should be significant further developments in this area, pointing to further regulatory measures designed to influence or to control direct satellite broadcast programme content or policy by the prescription of 'standards,' then there is absolutely no need for such a power of regulation to be entrusted to Intelsat. We have absolutely no need to create one vast administrative monopoly for the management and control of telecommunications satellites. We have, in fact, a plurality of international organizations bearing on the problem in various ways; and there are political and technical advantages in keeping it that way, even if these other international organizations may not always be completely suited for the task. Apart from Intelsat itself, ICAO has some interests in the telecommunications area; and there also remain such bodies as the International Telecommunications Union (ITU), and the UN General Assembly Committee on the Peaceful Uses of Outer Space.

The ITU has an immediate advantage of near-universal membership; but in terms of the constitutional law of international organization it remains a somewhat under-developed, 'immature' organization, and one in any case that is overly dominated by the narrowly technical (posts and telegraphs) character of most of the national delegations taking part in its proceedings. Without some radical change in the composition and make-up of the ITU's decision-making and managerial personnel, and without also some radical restructuring of its basic constitutional powers and internal organization, it seems doubtful that the ITU could assume additional major responsibilities in relation to the new field of telecommunications satellites without impairing its existing specialized competence or damaging its political usefulness in relation to its present somewhat limited and modest functions. The UN General Assembly Committee on the Peaceful Uses of Outer Space might be a more promising candidate as a regulatory control authority for telecommunications satellites; but it has, of course, the political liability, like many other current General Assembly activities, of being the object of some

certain big power disfavour, as a result of the General Assembly's increasingly 'political' tone in recent years vis-à-vis the big powers. Nevertheless, in spite of these limitations to two of the more obvious candidates for a telecommunications regulatory role, it does seem reasonable to believe that in the future institutional developments in terms of the 'regulatory' aspects of telecommunications, will most likely take place outside of Intelsat, either by building on other, existing international bodies at present peripheral to the telecommunications satellites field, or else by developing special new international committees or similar bodies.

There remains for consideration the last of our postulated objectives, and that is ensuring, on the most speedy and economical basis possible, the utilization of international telecommunication facilities to promote strictly national, Canadian needs. A little earlier in this discussion, I warned against any temptations to the pursuit of a purely nationalistic or 'jingoistic' policy, unless it could be conclusively demonstrated, on a concrete, empirical basis, that such national chauvinism would yield better results, operationally, than quieter or more modest methods.

I must say, in this regard, that at first sight I have been a little distressed by some of the newspaper discussion and reports as to the development of the federal government's policy on telecommunications satellites. Why should there be this old-fashioned, essentially nineteenth-century, property-law-oriented, emphasis on a distinctively 'Canadian' satellite, as if there was something magical in legally 'owning' some particular hardware floating around in outer space, with or without appropriate national insignia or symbols trailing behind it? Originally, according to press reports, there were to be three 'Canadian' satellites: now, apparently, because of expense there will be only *one*. What happens if that *one* Canadian satellite should break down? Would we, in such case, then seek to salvage our national pride by trying to lease an American, or a Russian, satellite? Anyway, who would launch the Canadian satellite? At the moment, it would have to be either the Americans or the Russians who would do it; for we do not now have the technological capacity to do it ourselves.

I mention all this simply to draw attention to the anachronistic legal conceptual thinking on which any dreams of a national, one hundred per cent pure (and presumably bilingual) Canadian satellite might be based. All that Canada could achieve through the archaic legal symbolism of 'ownership' of the actual metal hardware encasing and thus composing any telecommunications satellites, could be achieved by purchasing, contractually, an indefeasible right of user of the facilities of someone else's satellites: American or Russian or Intelsat satellites or even satellites operated by some completely different organization. To those (usually non-legal), sceptics who would contend that a contractual right – even an indefeasible contractual right – of user, is not enough and that one needs something more concrete and more tangible, the obvious answer is that a Canadian-'owned'

satellite that has to be launched and controlled and directed and (if need be, in an emergency) replaced or supplemented by someone else, is not so terribly concrete or tangible, from the practical viewpoint. Of course, a 'Canadian' satellite would undoubtedly provide something of a political focus for public support and also for giving our Canadian scientific and commercial manufacturing community a more specific psychological sense of involvement in the space age. This is presumably the reason why so forceful and colourful a man as the new minister for Communications, Mr Eric Kierans, has, so far, gone along with these specific details of a programme that he inherited from his immediate predecessor in ministerial responsibility. All the same, it seems clear that the original decision of the federal government, taken before Mr Kierans took over the Communications department, was based on the outmoded scientific concept of the existence of a limited number of 'parking spaces' for satellites in outer space; and on the further concept, posited on the first, that it was necessary, so to speak, to get into the act and to establish a sort of legal easement upon orbiting slots in outer space, if all available places were not to be preempted by others. This particular scientific concept of the quite recent yesteryear has, of course, by now been exploded by new advances in space technology. But the outmoded legal concept, founded on the outmoded scientific concept, remains, like the terms of action, to haunt us from the grave. For all the foregoing reasons, but also because, above all, outer space is, in the spirit of the Moon Treaty of January 1967, a natural resource of all mankind that is still relatively free from the competing claims of narrow nationalism, one wonders if Canada could not, here, give a lead to other countries in seeking to eschew old-fashioned nationalistic symbols, in favour of the shaping and sharing of common values in the interests of a more inclusive, integrated world community.

Mr Gotlieb next introduced Professor Dallas W. Smythe, chairman of the Department of Social Studies at the University of Saskatchewan, Regina Campus.

DR SMYTHE's first observation was that in attempting to conclude definitive arrangements for Intelsat, states were undertaking to establish an organization to operate a multilateral communications facility. This was novel, in that other international organizations in the field were limited to technical co-ordination and consultation functions at the diplomatic level.

Not only was the organizational function different, but so was the nature of satellite communications, which was essentially multilateral. In the case of transportation, there was an essential linearity, a movement of an object from one point to another. In traditional communications, by wire or cable, linearity was again the central feature, though objects such as records could send off messages and yet not move, and there could be simultaneous reciprocal communication. With microwaves, we were now talking about

'blanketing' an area from a point, and ultimately, satellites were capable of blanketing vast areas. They could link any two points on earth and in a multitude of different combinations, through 'switching.' The switching phenomenon would develop as the art developed and as multiple access procedures became more generalized; and switching obviously meant that mankind required a multi-lateral operating organization for satellite communication. This technological imperative sharply distinguished the kind of organization and ownership appropriate to satellites from that appropriate to submarine cables or other end-to-end linking of terrestrial systems. Undivided ownership had been eminently suitable for the bilateral relations of the past; it was quite unsuited to the multilateral relations implicit in the satellites.

Dr Smythe then raised the legal question of rights in the radiofrequency spectrum and the geostationary orbit (the former essential to all types of radiocommunication and the latter the most desirable location for most types of communications satellite). He made the point that, for the spectrum to be used at all, each of its uses must be conducted on terms which were compatible with other uses around the world, and that there must be firm reciprocal obligations of non-interference. This was the basic principle of the ITU.

The spectrum was not susceptible of ownership, in the classic legal sense, based on notions of physical property. Rather, it was considered the inalienable property of all mankind. Allocations in the spectrum did not confer 'title,' but were, rather, *functional* licences to *use* one of mankind's resources, subject to the technical conditions necessary to prevent harmful interference to other users.

This, Dr Smythe suggested, should be the same for all of outer space, and the celestial bodies. And in fact the Outer Space Treaty had declared these to be the common property of all mankind and not subject to national appropriation.

As a final point, the panelist supported the United Nations' request to the Intelsat Conference for the allocation of some modest part of its satellite capacity for the conduct of UN business with the peoples of the world.

The Chairman next introduced the final panelist, Mr Barry Mawhinney, of the department of External Affairs, Legal Division. Mr Mawhinney delivered the following statement, on the main legal issues before the Intelsat Conference on Definitive Arrangements.

MR MAWHINNEY: Intelsat, to a degree unprecedented in international co-operative endeavour, has combined governments and commercial entities in a global enterprise to utilize and exploit a dramatically new form of communications. As a result, the negotiations for the definitive arrangements have given rise to unique and often difficult legal issues relating to the structure of the permanent communications satellite organization, and

to the relationships between governments and entities, between each and the proposed Intelsat organization, and between Intelsat and the outside world. It is the purpose of this paper to review some of the more important and contentious of these issues, which have arisen in the negotiations at the first session of the Plenary Conference in February/March of 1969 and at the subsequent Preparatory Committee meetings in June and September.

Legal Personality

A large number of the states participating in the Intelsat enterprise have been critical of what they consider to be an imbalance in the structure and allocation of decision- and policy-making functions in the consortium. These, by favouring the few major investors in the organization, tend to undermine the international character and purpose of the global communications system. In an attempt to overcome this problem under the definitive arrangements, proposals have been made to restructure the Intelsat organization in order to permit greater participation of governments in the formulation of policies for the system, a more even distribution of voting powers and the integration and progressive internationalization of management. Central to these proposals has been the view that juridical status distinct from the participants is essential for Intelsat if it is to conduct its operations as a genuinely international organization. Since structural reform and legal personality were inseparably linked and a small but significant minority favoured retention of the joint venture approach, juridical status for Intelsat proved to be among the most keenly debated of the legal questions at the conference.

Under the interim arrangements, Intelsat's juridical status is that of a joint venture or partnership and, as such, it does not have legal status or personality independent of the legal personalities of its participants. Each signatory owns a portion of the space segment in an undivided share proportionate to its capital investment in the system (Appendix 1, p. 304). Since it does not possess a juridical status of its own, Intelsat cannot dispose of rights and properties on the joint venture's behalf. However, any signatory, either as manager or signatory, may contract as an agent for Intelsat in the consortium's name. As an example, in all of the standard agreements for allotment of satellite capacity between Intelsat and the users, the Communications Satellite Corporation (Comsat), the designated communication entity of the United States, by authority of the Interim Communications Satellite Committee (ICSC) acts as an agent for and on behalf of the Intelsat consortium.

Under this system the signatories are liable either jointly or jointly and severally for the contractual and extra-contractual obligations of Intelsat to third parties. But no signatory is liable to pay more than an amount proportionate to its investment quota, since the interim arrangements require the indemnification of such a signatory by the other partners in proportion to their interest.

The ICSC report on the definitive arrangements laid before the plenary conference pursuant to article IX(a) of the Interim Agreement (Appendix 2, p. 304), recorded a substantial majority of the consortium in favour of a legal personality for Intelsat in the form of a corporate partnership with the juridical power necessary on the territory of each participating state to exercise its functions and attain its objectives, including the capacity to conclude agreements, to own property, and to exercise rights against third parties in its own name.

The recommendations of the ICSC report attracted strong support at the Plenary Conference, but a small minority continued to urge retention of the present system. The latter argued against replacing a system which had not only proven its effectiveness over the five-year life span of the interim arrangements, but was also the traditional method by which communications entities conducted their international business activities. Attention was drawn to the fact that Intelsat is a co-operative venture where all members join and pool resources to meet the needs of each. In these circumstances it was argued the preferable form was that of a partnership in which each member would make a contribution or investment, proportionate to its use or expected use, and would own an undivided share proportionate to its investment. There was concern that by adopting a corporate juridical status for Intelsat, distinct from its members, these co-operative attributes would be undermined and the pattern of ownership best suited for this type of enterprise seriously distorted or replaced by a system less responsive to commercial needs.

There was also some hint that juridical status for Intelsat would pose possible tax problems for the participating communications entities in their respective domestic jurisdictions. Some representatives expressed particular concern in this regard, believing that, if Intelsat were to become a corporate entity distinct from its members, the entities would no longer be able to deduct from their gross income their share of Intelsat expenses, including depreciation of assets, thus placing them at a tax disadvantage in their domestic systems.

Several delegations took the lead in advocating a legal personality for Intelsat. They insisted that juridical status was essential for the organization if it was to continue as a viable international commercial enterprise. Vested with legal personality, Intelsat would have the power to act in its own name in contracting, in acquiring or disposing of property, in instituting legal proceedings, in entering into agreements with governments or other international organizations, and in enjoying appropriate privileges and immunities in the territories of the member states. An international organization in corporate legal form was a judicial concept known and recognized by most legal systems whereas the joint venture arrangement was unfamiliar to several domestic legal regimes. In this connection they pointed to the numerous examples of international organizations with legal personality, including the UN itself and the International Bank for Reconstruction and Development,

which engaged in a form of international business activity. As a legal person Intelsat would no longer be required to operate under the cumbersome and confusing agency arrangements, for purposes of contracting, which are presently employed in the joint venture. Unlike the present system where either all participants must join in appointing an agent or all be parties to the contract, Intelsat, as an international legal person, could itself be a party to the contract and acquire rights and obligations in its own name just as a corporate enterprise conducts its affairs in domestic systems. Finally, it was asserted, Intelsat as a juridical entity, would be less susceptible to control by local administration and regulatory agencies.

Despite protracted discussion in the legal committee and a working group of the Plenary Conference, attempts to narrow or reconcile the differences between the two positions were unsuccessful at the Plenary Conference.

In an effort to break the impasse on this question, a compromise proposal was put forward at the first session of the Preparatory Committee meeting in June. Under this proposal Intelsat would possess a juridical personality and the legal capacities necessary for the exercise of its functions and the realization of its objectives. More specifically, the organization would have the capacity to contract and acquire rights directly under such contracts, acquire and dispose of property, institute and otherwise participate in legal proceedings, and have the competence to enter into agreements with sovereign governments and other international organizations. However, this proposal expressly precluded according Intelsat the attributes of an international corporation which was considered neither necessary or desirable for a venture of this type.

This compromise proposal went some distance in meeting the majority position on legal personality. However, it still left a number of unanswered questions relating to the form of ownership which would flow from juridical status. Why, for instance, was there a reluctance to accord Intelsat the status of a corporate enterprise, and would this necessarily preclude centralized ownership of the assets of the corporate venture?

In response to these queries the proponents of the compromise solution stipulated that their position on corporate status stemmed not from any reluctance to accord Intelsat the necessary contractual powers to exercise commercial tasks on behalf of the enterprise, but rather from a concern that some delegates seemed to equate corporate status with limited liability and this many delegations could not accept. (This aspect of legal personality will be explored in the next section.) While still convinced that a joint venture with undivided ownership was still the most appropriate form for Intelsat, those advocating the minority view were prepared to examine other types of ownership on their merits.

On the question of ownership, the ICSC report, apart from recommending a partnership in corporate form, had offered no clear guidance. A number of delegates have still not reached firm conclusions on this point and entertain certain reservations about centralized ownership, a concern which

though not clearly articulated seems to stem from possible financial and accounting implications, the effect on the domestic tax positions of communications entities, and, perhaps most importantly, from a reluctance to entrust such substantial assets and the direction of a sophisticated communications network to an untried legal entity.

Nevertheless a majority of the representatives at the Conference appeared to favour centralized ownership, viewing it as a logical concomitant to legal personality. In their estimate, Intelsat could only have the necessary substance and credibility as a commercial enterprise if it owned all of the assets of the satellite communication network and possessed the attributes of a corporate body.

The second session of the Preparatory Committee meeting in September adjourned without resolving the question of ownership. However, with legal personality now accepted in principle there appeared no insurmountable obstacle to reaching a compromise on this subsidiary issue.

Liability

In their preliminary discussions on this item, delegates have attempted to define the general principles which will govern Intelsat's responsibilities to third parties with respect to contractual and extracontractual liability. Considerable uncertainty has been expressed about the extent of Intelsat's liability, assuming it possesses a corporate juridical status, and the bearing article VII of the Outer Space Treaty, discussions in the UN Committee on the Peaceful Uses of Outer Space and General Principles of International Law may have on this matter.

It has been suggested that if the assets of Intelsat are to be centrally owned by an international corporate enterprise, as the majority of delegates seemed to favour, then it was conceivable that the organization could impose a limitation on its liability similar to that of a corporation in domestic legal systems except, of course, that states parties to the definitive agreements who are also parties to the Outer Space Treaty would continue to have a residual and unlimited obligation to third parties respecting damage arising out of the launching of space communications vehicles.

However, as was noted in the previous section, a number of representatives expressed strong doubt that it was either appropriate or meaningful to create a limited liability international corporation. Such an entity, they argued, would exist only in the eyes of such states as are parties to the definitive agreements or who grant recognition to it. Otherwise, there was no regime of international law which would oblige third parties to recognize the limited liability of an international enterprise. In any event, according to this point of view, the question of limited liability was an unreal issue, since it was inconceivable that Intelsat would undertake obligations to third parties which it was unable to fulfil. The organization would be adequately protected against all normal risks of operation by various commercially accepted methods which are presently employed by the consortium, that is,

contractual disclaimers of liability, indemnification provisions, and public liability and property damage insurance. The only conceivable circumstance under which a liability in excess of the normal safeguards and insurance, as well as the assets of the system, might be incurred would be a major catastrophe during the launch of a satellite. If by remote chance such a catastrophe did occur, the states which are parties to Intelsat and are responsible for the launching of the space vehicle will be liable for ensuing damage to third parties by virtue of the Outer Space Treaty, if they are parties thereto, and general principles of international law relating to state responsibility.

Aside from the foregoing considerations, it was contended that such a concept was inappropriate for an international enterprise whose specific purpose was the commercial exploitation of outer space. Intelsat is sponsored by governments and its activities are carried on by its chosen instruments. It was therefore unwise for the signatories to place themselves in a position where, on the one hand, they are deriving a profit from their activities in outer space and, on the other hand, they are seemingly seeking to avoid total responsibility and liability for the consequences of such activity.

Settlement of Disputes

It was generally agreed that the present compulsory third party adjudication procedures governing disputes between signatories to the Special Agreement and between signatories and the ICSC arising out of the application of the Interim Agreements should continue, with minor procedural changes, under the definitive arrangements. There was also general concurrence that similar arbitration provisions should cover potential disputes among states parties to the definitive agreements. Although this item did not provoke any sharply conflicting views, brief reference might be made to one proposal which served to underline a recurring question in these negotiations, namely the problem of defining in juridical terms the relationship between governments and commercial entities collaborating in an international enterprise.

It was suggested that the arbitral procedures of the definitive agreements should be formulated so as to cover disputes between states parties and signatories and that the latter be given the option of intervening as an additional disputant in an arbitration if it considered that it had a substantial interest in the decision of a case in which the state party designating such signatory is a disputant. Those favouring this provision contended that because the rights and obligations of parties and signatories arising out of the definitive agreements would be so intertwined, signatories must be in a position to intervene directly in a dispute in the event their rights were adversely affected by the actions of a party.

A number of delegates found difficulty in defining conceptually the basis of the legal relationship between state parties and entities, noting that arbitration in such a situation would be predicated on the notion that the two disputants ranked pari passu in an international legal sense. Since the desig-

nated communications entities were not, as such, subjects of international law and derived their status, rights, and obligations under the agreement from the states parties of which they are the designated entities, it was difficult to conceive of the circumstances in which a dispute between a designated entity of one party and another party could be arbitrable since the rights and obligations of the party related to sovereign states and those of the signatory to commercial matters. It was doubtful whether disputes between the two could in law be equated. In light of these considerations, it was argued that arbitration between states parties to the agreements on the one hand and signatories on the other should be kept separate and distinct. If an occasion should arise where a signatory wishes to assert a claim against another party then under normal international legal procedures it would seek to enforce or arbitrate that claim through the government of which it is the designated entity.

Supersession

In formulating the entry into force provisions of the definitive agreements the question has arisen as to the number of parties to the Interim Agreement necessary to bring the new arrangements into force and thereby terminate the earlier instruments (article XV of the Interim Agreement states, 'this Agreement shall remain in effect until the entry into force of the definitive arrangements referred to in Article IX of this Agreement'). Although establishing expressly temporary arrangements, the Interim and Special Agreements are silent on this point.

It was the position of the majority of representatives at the first session of the Plenary that the present agreements could be interpreted so as to permit the definitive arrangements to enter into force and supersede the interim arrangements when a substantial majority, probably two-thirds (including the major investors), adhere to the new instruments on condition that parties to the earlier agreements not adhering to the new arrangements are fairly compensated for their space segment investment under the Interim Agreements by an equitable buy-out arrangement pursuant to the requirement of article IX of the latter instrument.

However, a small but vocal minority disputed the above interpretation of the Interim Agreements. It was their contention that, since the existing intergovernmental agreement contained no provision to the contrary, the principle of unanimity must apply to supersession of the present arrangements. According to this view, the fact that the system is owned in undivided shares, together with the provision in article IX of the Interim Agreement that the definitive arrangements should safeguard the investment made, spoke clearly against the assumption that a majority decision could validly be taken with the effect of expropriating the shares in the system held by a minority. In addition, the fact that the Interim Agreement does not provide for amendments supports the conclusion that the legal relationship between

the parties, as reflected in the Agreement, was not expected to be altered against the will of any of them. It was recalled by the proponents of this view that at the negotiations for the interim arrangements there was a general presumption among the small number of states participating that the agreements, then coming into force, could only be superseded by the unanimous consent of all the parties and that this assumption was given added weight two years later when the Supplementary Agreement on Arbitration was brought into effect only after all signatories of the Special Agreement had registered their adherence.

The majority considered it the better view that under prevailing principles of international law and practice regarding the revision of international agreements, there is no requirement that all of the parties to an earlier agreement must accede to a later agreement in order for the later agreement to come into force and supersede the earlier one. Provided that the superseding agreement is acceded to by at least a majority of the parties having a substantial interest in the subject matter of the agreement, and that prior non-acceding parties are not bound by the new agreement and their rights acquired under the earlier agreement are not prejudiced, there is nothing to preclude the later agreement entering into force by less than unanimity. In further support of this interpretation of the Interim Agreement, it was noted that article IX stipulates the safeguarding of investments of the members, a provision which would be meaningless if unanimous consent to supersede was intended.

This question, though not of substantive importance for the negotiations since most representatives reject as impractical the notion of unanimity, was nevertheless of some academic interest to legal experts at the conference from the standpoint of the law of treaties.

Appendix 1

The Intelsat agreements of 1964 comprise two interrelated instruments: (a) the Interim Agreement signed by governments, officially termed 'parties,' setting forth the basic principles of organizational guidelines of the global satellite system, and (b) the Special Agreement signed by designated communications entities of the parties, officially termed 'signatories,' containing the detailed provisions of the business undertaking. These signatories can be either governments, such as the government of the French Republic, government-operated communications entities, such as Her Britannic Majesty's Postmaster General, government-owned corporations, such as the Canadian Overseas Telecommunications Corporation, or private corporations, such as Comsat.

Appendix 2

Article IX

A Having regard to the program outlined in Article I of this Agreement, within one year after the initial global system becomes operational and in

any case not later than 1st January 1969, the Committee shall render a report to each Party to this Agreement containing the Committee's recommendations concerning the definitive arrangements for an international global system which shall supersede the interim arrangements established by this Agreement. This report, which shall be fully representative of all shades of opinion, shall consider, among other things, whether the interim arrangements should be continued on a permanent basis or whether a permanent international organization with a General Conference and an international administrative and technical staff should be established.

B Regardless of the form of the definitive arrangements:

i their aims shall be consonant with the principles set forth in the Preamble to this Agreement;

ii they shall, like the Agreement, be open to all States members of the International Telecommunication Union or their designated entities;

iii they shall safeguard the investment made by signatories to the Special Agreement; and

iv they shall be such that all parties to the definitive arrangements may have an opportunity of contributing to the determination of general policy.

C The report of the Committee shall be considered at an international conference, at which duly designated communications entities may also participate, to be convened by the Government of the United States of America for that purpose within three months following submission of the report. The Parties to this Agreement shall seek to ensure that the definitive arrangements will be established at the earliest practicable date, with a view to their entry into force by 1st January 1970.

The Chairman then stated that a question likely to preoccupy many members of the international community was that of the relationship between the operating function and the regulatory function in international communications. He thought there should be an attempt to define and clarify the ITU regulatory role in international communications. Communications systems utilized outer space which, in turn, belonged to all mankind. There must be a forum in which questions relating to the communications uses of outer space could be debated by all states. However, insofar as operations were concerned, the Canadian position was that Intelsat should be the body to operate satellites for international space communications purposes.

Mr Gotlieb stated that this operating body should be made as consistent as possible with both the principle of universality and the principle of efficiency. How to do this was the heart of the problem underlying the issues involved in the Intelsat negotiations. If, as he believed, regulation must be looked at separately from operations, it was then clear that in view of the increasing uses of space for communication purposes there would be both a need to strengthen the regulatory body, the ITU, and a need to ensure that

the operational consortium, Intelsat, was as universal as possible, with voting structures and techniques for decision-making reflecting the requirements of operational efficiency and fairness in international relations. There had to be a blend between the dictates of the older concept of state sovereignty and of the new requirements of technological change.

Mr Gotlieb said that Intelsat had been very effective in extending a world-wide communications system and that nobody could fail to realize the significance of that fact. At the same time there were features of the existing arrangements which were not satisfactory. For example, there was no general assembly where every state could express a view or cast a vote on some of the important issues. Voting power was such that one country could cast a majority of the votes. A half-dozen or so countries had over two-thirds of the voting power. There was, however, a lot of goodwill on the part of countries engaged in the current negotiations. He thought it likely that the new arrangements, when they came into being, would provide for much more equitable voting arrangements. He emphasized that these negotiations were prolonged and difficult. There were very genuine interests at stake and profoundly difficult problems involved. They related not only to voting power and to the structure of the governing body and the assembly but to the even more difficult issue of the nature of the management authority. At the present time, the management authority was Comsat, a United States corporation. It was not an international body, although it was answerable both to the governing body of Intelsat and to the United States Congress. The key issue was how the management organization could reflect the need for a broader base for decision making without endangering or weakening the extraordinarily complex space segment of Intelsat and its continued growth and efficiency. Satellite systems were not getting any simpler. Research and development were continuing and getting ever more expensive. New generations were replacing older ones and this was not going to stop. There would soon be a fourth generation of Intelsat satellites; then a fifth, and a sixth, and so on.

Mr Gotlieb added a brief comment on domestic satellites systems. There was, he said, really no difference of view anymore in the international community about domestic systems. This could be seen by the positive response shown in Intelsat (the ICSC) to the Canadian decision to proceed with a domestic system. A number of countries were now planning to have them. For example, India was pursuing a domestic system. The United States broadcasters wanted to have their own system, as did the Ford Foundation. General Electric, it seemed, wanted to have one for data, and AT&T had been quoted as having said that they would welcome anybody establishing a satellite system. He thought there was a very wide acceptance of the fact that domestic systems were necessary and should be allowed, provided that the state with the system was prepared to comply with its international obligations with regard to frequency allocations.

The Chairman then thanked the panelists for their statements and opened the meeting to questions and comments from the floor.

ME JACQUES R. ALLEYN, general counsel of the Canadian Broadcasting Corporation, commented that the matter of ownership of a communications satellite system was of no great concern to the users so long as the system was operated according to fairly fundamental principles, revolving around the right of access, the protection of transmissions and the acceptance of the concept of the common carrier role. From the point of view of the users, it was not important whether they used one Intelsat system or that one in combination with the Inter-Sputnik system, or eventually with a Chinese system (if any such system were established). What was important was that any message should be able to be transmitted across the various systems and arrive at its point of destination. This was the same as in the case of terrestrial communications (including submarine cables), where a message should be able to go from Canada to Tokyo, making use of the Atlantic cable, the United Kingdom's GPO system, the French PTT's, the Trans Siberian cable, and possibly some other link that would take a signal down to Tokyo. What was important in both cases, and through all the systems, was that the message not be tampered with, that reasonable and competitive rates applied and that the transmission be protected. The matter of ownership was secondary to these considerations.

International lawyers, in lieu of trying to achieve a single operational system in which all the countries of the world would have an ownership share, and which obviously would provide an extraordinary pleasant esthetic solution, should concentrate on securing from the other countries not participating in Intelsat, agreement on the basic principles outlined above.

MR SPENCER MOORE, international liaison officer of the Canadian Broadcasting Corporation, commented on the need for protection of satellite transmissions against their unauthorized interception and use or rebroadcast. The problem, he stated, emerged where there was, for example, a televised transmission of a sports programme via an Intelsat satellite, between Germany and the United States. If that programme were 'poached,' that is, tapped from the satellite by an unauthorized party and rebroadcast, then there would be a major rights problem. There already had been such an occurrence and the proliferation of this type of activity could well lead to the serious curtailment of intercontinental broadcasting. There were now over twenty earth stations in the Atlantic Basin which could pick up satellite transmissions. Mr Moore therefore stressed the need for international protection against this unauthorized poaching, perhaps through Intelsat to begin with, and then possibly through a comprehensive and universal international agreement.

DR R. H. MANKIEWICZ, professor of law at McGill University made the point that, ideally, there should be one international satellite telecommunications system. In a field such as this, which belonged to mankind, private

business – or even powerful industrial states – should not be allowed to establish a *de facto* monopoly and to control all satellite communications by occupying all the strategic points, just because they got there first. Dr Mankiewicz suggested that while Intelsat, in its definitive form, might be more detached (than it is under the interim arrangements) from United States legislation, this might not be enough. There must still be a clear distinction between the operation and the regulation of space telecommunications. Intelsat should not do both. It should be an operating agency (and a truly international one). It should, however, be regulated by another international agency, as to its rates and services (which should be non-discriminatory and not conditional upon the content of messages transmitted.) At the present time, Intelsat could accept or refuse transmissions and was not regulated as to the fees it charged. Hence the need for regulation, possibly by the ITU or the WMO or perhaps a new body.

Finally, Dr Mankiewicz raised the question of whether a commercial agency, in order to have international personality, must be incorporated. His answer to this was negative, since incorporation took place in a specific country and an international organization would lose its 'internationality' if it were incorporated in a particular country. It would have to be established by governments as an international organization under general international law. Nor would this preclude it from having a commercial function; there were operating agencies in other fields which have been established under international law and exercise commercial activities.

PROFESSOR MCWHINNEY then stated that he had been struck by Mr Alleyn's comments which had really suggested, it seemed to him, a functional approach to the development of an international law governing telecommunications satellites. He had himself always tried to apply the functional approach to the development of the constitutional law of federal-provincial relations in Canada, and that approach applied equally to international law. He had the impression that the international regulation of telecommunications satellites which would emerge would be very similar to that which Mr Alleyn had indicated, that is to say, functionally, and one or two steps at a time. There would not be any over-arching international organization or control mechanism yet.

On the copyright issue raised by Mr Alleyn, Professor McWhinney did not think that the Soviet bloc countries would adhere, at this stage, to the general copyright conventions. But the Soviet Union might perhaps be prepared to make *ad hoc* arrangements, having much the same effect as recognizing a species of copyright. His impression was that copyright was a much less significant issue to the USSR than was the control of propaganda, and it might be of interest to the soviets to try and use the telecommunications satellites issue as a sort of back-door method for securing a general international convention, or principle of international law, outlawing 'warlike propaganda.' If that were the case, then they had to be told that this problem did not worry most states and that the plan would not work.

It seemed to him that the big powers were unnecessarily worried about this problem of potential propaganda through direct satellite television broadcasts, and that the little powers tended much more to take it in their stride; the difficulties here might be less real or insurmountable than the Russians and the Americans were inclined to think. He did not think it should hold up, in any case, some more fundamental and comprehensive accord on the international control and regulation of telecommunications satellites generally.

On this issue of the property concept and the 'ownership' of a 'national' satellite or satellites, he considered that Professor Mankiewicz was quite correct in saying that countries did not want to be at the mercy of the big powers in international organizations that the latter might control or dominate. But an indefeasible right of user (and he used the term advisedly, in its property connotations) was not some fleeting, evanescent thing, revocable at the mere whim or caprice of the grantor. It all depended on the contract one made. If Canada decided to forego a Canadian-owned satellite and to contract for use of somebody else's satellite, it would depend on the contract that the Canadian representatives chose to make. One did not agree to a contract that was negotiable every year, but there was no real difficulty, in his view, with long-range contracts as to user, with proper guarantees.

Professor McWhinney then turned to the related issue of American dominance of Intelsat, which he considered a past issue. His general impression was that the Americans had already decided in principle to sacrifice their 53 per cent voting rights, and that the discussion was now proceeding along the lines of the actual modalities of new voting formulae. If the Russians came in, something like the UNCTAD voting formula might be generally acceptable, and certainly, including the Russians would be very desirable at the present time. In any case, he did not really think we had to worry about the American voting rights, although the departments of External Affairs and Communications were right to discuss it publicly. But he suspected that it had already been conceded privately and that therefore the real argument was over what form of internationalisation should now emerge for control and regulation of international telecommunications satellites. Mr Alleyn had suggested a hope of building up the ITU. But if one were considering a comprehensive international control organization for telecommunications satellites and their broadcasting, there were other candidates as well as the ITU. He had reservations about the ITU because of what he called the professional, bureaucratic, special-interests-oriented thinking within it after one hundred years.

Of course, there was the UN General Assembly Committee on the Peaceful Uses of Outer Space. However, as presently constituted, it was not entirely suitable in his opinion; maybe the restructuring of that Committee might be as promising as any proposed restructuring of ITU. At any rate there were other people in the same act. ICAO had certain interests in the telecommunications area. So had WHO, and numerous others. He hoped that

the departments of External Affairs and Communications would not be too rigid and insist that, if there was to be any further and more comprehensive internationalization, it must proceed through the ITU. The ITU had always had a very limited function and had no power to enforce its decisions at the moment. To restructure it might be a considerable contribution to the constitutionalism of international organization; but it might also involve expenditure of too much social energy, where the same results could be achieved by other, less socially expensive, means.

The last issue Professor McWhinney raised was the working relationship between the two comprehensive, global systems of telecommunications satellites, Intersputnik and Intelsat. Intersputnik had perhaps been started to challenge the American power in Intelsat, but to go ahead with an entirely separate and distinct world system (which was the Russians' right), was a terrible expenditure of money and resources for a country with far greater internal competition as to priorities in the allocations of scarce scientific and technological resources than the west had. One got the impression, he felt, that provided sensible terms were offered, the Russians might be prepared to forego their isolationist policy on telecommunications satellites. Even China, for similar reasons, might eventually want to negotiate for some sort of reasonable accommodation, involving either direct participation in, or else working co-operation with, Intelsat.

MR RALPH REYNOLDS, head of the Transport, Communications, and Energy Division, Department of External Affairs, next stated that from his experience, the Intelsat and soviet-initiated Intersputnik organizations were not very close to forming one global system. Canada, he suggested, would welcome this development and had in fact been instrumental in Intelsat inviting the USSR and other countries to attend its Plenipotentiary Conference. However, there remained the fundamental problem of the paramount United States role in Intelsat, based on its investment and related voting power (at the time it still had 53 per cent). This was not likely to diminish appreciably; and thus, despite various efforts at making the organization as world-wide as possible, Mr Reynolds had no great faith in Intelsat becoming the sort of organization that the Soviet Union would be willing or able to join.

PROFESSOR IVAN VLASIC of McGill University then raised three questions in order to gain more information about some of the questions currently being discussed in the process of renegotiating Intelsat. He recognized the confidentiality of certain information but stressed that more facts were necessary for intelligent discussion.

On the important question of the voting power in Intelsat, Professor Vlasic stated that rumour had it that, under the definitive arrangements, the United States might be willing to accept a reduction of its quota to as low as 40 per cent. Also, the United States would be ready to accept the establishment within Intelsat of an assembly of members. What was not known, however, was the function of such an assembly and its decision-

making procedures. France had reportedly placed before the Intelsat conference an elaborate proposal which in some respects significantly departed from the Interim Arrangements but, again, the details of this alleged proposal did not appear to have been published.

Professor Vlasic's second question dealt with the relationship between Intelsat on the one hand, and the regional and national communications satellite systems, such as Symphonie and Telesat, on the other. He stated that the jealousy with which Intelsat and Comsat viewed their monopolistic position in the world and in the United States respectively was well known. In fact, Comsat had been fighting various potential American competitors almost from its inception and had until recently maintained that it was the only authorized United States operator of satellite communications facilities. He thought that Intelsat might similarly wish to control the global satellite network. However, should that prove impossible (as seemed likely), then it would want to make sure that all such separate systems were compatible with the objectives of the global organization. What was not clear was the meaning of the term 'compatible' – what kind of compatibility would be involved? Was it technical compatibility of the systems, or were there economic and political factors involved as well? Did Intelsat have to approve a system such as Canada planned to build? Had Canada entered into any arrangements with Intelsat in regard to its Telesat? If so, what kind of arrangements?

Professor Vlasic's third and final question dealt with legal personality. How would this be conferred upon an organization such as Intelsat – by a mere declaration in its constitutive act, or by its being incorporated in a particular country under the laws regulating corporate bodies of that country? Further, what was achieved by conferring legal personality upon Intelsat? Would it be the same treatment as that accorded under international law to intergovernmental organizations such as ITU or ICAO? Professor Vlasic stated that some might doubt the benefits of this, given the structure and objectives of Intelsat. It was primarily a commercial, profit-oriented enterprise managed and operated by a semi-private national corporation – Comsat. Perhaps problems of legal categorization would be less severe if international lawyers were to abandon the tendency to fit any new creation of modern life into the traditional patterns. Just as Comsat was a novel and unique corporate body in the American experience so, he argued, Intelsat could rightly be regarded as a unique organizational phenomenon on the international scene which might require unique legal solutions.

THE CHAIRMAN took the opportunity to respond to Professor Vlasic. He stated that the Intelsat negotiations, unlike UN discussions, were not open to the public [a principle since altered for the resumed Plenipotentiary meetings, which the press and public may attend]. As a result, not even the press had been able to keep informed except through press releases. Nor were the proceedings published at a later date as was the case in disarmament discussions. So it was difficult for public opinion to know what the issues were.

This he regretted, although he recognized that negotiations in confidence did have a great number of advantages. Canada was thus inhibited from simply getting up and announcing publicly everything that it had been doing in Intelsat since the beginning of the negotiation. Mr Gotlieb could say, however, that Canada had played a very active role in these negotiations from their inception. Not that active roles were good per se, but he thought Canada's role had been constructive. In combination with certain European and Asian powers Canada had put forward what were considered to be workable middle views between positions espoused by certain countries on both sides, with the aim of finding a common ground that the organization could move to in the long run. He thought that Canada had not been unsuccessful. It had pursued this approach in formal documentation submitted to the conference, touching on virtually all the important areas of Intelsat's work. The dominant theme of those proposals had been to suggest ways in which a greater degree of international representation and control could be introduced in all the organs of Intelsat. From this standpoint, Canada had focused on the governing body, on the Assembly and on the manager. Now if, as a part of the dynamics of these nogotiations, a number of countries had shifted, this showed some hope for a favourable outcome in the long run.

With regard to Telesat, Mr Gotlieb stated that the discussions within Intelsat had been harmonious. They had been directed towards technical compatibility only, as the interest of the consortium had been in this context alone. Those members having a very large investment in Intelsat wished to ensure that other countries which were bound by the same treaty should take into account the necessity of not interfering with the system that was already there or planned. So there had to be a co-ordination of plans in terms of the utilization of both systems.

With respect to legal personality, the Chairman thought one could distinguish between the technical problem and the political problem. Technically, he thought that Intelsat could achieve legal personality in the same way that the UN had – through conferral by treaty. And then, of course, this personality would have to be recognized in the national laws of such states as were willing to recognize it. But the political problem – the manager of Intelsat – was greater. The manager at the moment was a corporation, incorporated under United States laws, with its own separate legal personality. What would be the structure of the manager in the future? Would it be Comsat, would it be a modified Comsat, would it be a new body altogether, would it have its own legal personality or would its legal personality be derived from the totality of the legal personality of the over-all organization? All these were questions for negotiation. And nothing had really been settled yet.

MR SPENCER MOORE then made the comment that from the CBC's point of view, Comsat had been a very efficient manager of Intelsat, fair to broadcasters and reasonable in setting rates. If there was a cost problem, it lay with European poste-télégraphe-téléphone (PTT) authorities, who had not

passed on to users the savings made possible through satellite communications. It was, for example, cheaper to send a message from New York to Tokyo via satellite than from New York to London. There seemed to be no problem of freedom of transmission; Comsat would send messages through the Intelsat system irrespective of their content, whereas particular administrations had been known to refuse access to earth stations because of the content of a particular TV programme to which they had objected.

DR G. F. FITZGERALD, senior legal counsel of the International Civil Aviation Organization, then referred to the need for three types of international organizations in the field of space communications. On the technical and regulatory side, there was a need to strengthen the ITU. On the operational and management side there were Intelsat and Comsat. In the middle there should be an international body to develop an over-all policy on the economic use of space communications. This policy-making body, while taking care not to hinder the operating agency, would attempt to perform the important function of reconciling the various interests – including those of the non-space powers – concerned with space communications.

MR GORDON NIXON, director general of the Telecommunications Management Bureau, Department of Communications, mentioned that under both the interim and definitive Intelsat arrangements members who were non-space powers had and would have equal access to the *space* segment of the system with space powers. Earth stations, however, were owned not by Intelsat but by individual states. Therefore, countries without earth stations would have to conclude bilateral agreements for their use with those states who had them.

MR ALAN BEESLEY was then called upon by the Chairman to summarize the morning's discussion. In his opinion, consensus had been reached on the following items.

First, the desirability (if not the likelihood in the near future) of Intelsat-Intersputnik co-operation. Second, that domestic, regional, and global systems were not mutually exclusive, although there was need for compatibility both on the technical and the legal planes. Third, that the protection of transmissions was a different problem from the protection of authorship in programmes transmitted and that accordingly the Berne Union and Rome Convention arrangements might not be applicable. Fourth, that there ought to be universality of access to satellite communications. Fifth, that the operation and regulation of satellite systems were different, and that there should be a regulatory body (although whether this should be the ITU, Intelsat itself, a UN body, or some other body was not agreed upon). Sixth, that the management function in Intelsat should be discharged in a broader and more international way than at present. Seventh, and finally, that international personality should be conferred upon Intelsat (either by state practice or by treaty coupled with national legislation or by some other means).

The Chairman then adjourned the session at 12:45 pm.

University of Toronto

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