CONTRIBUTION FROM THE DIRECTOR GENERAL ON TORS 1, 3 AND 5

OVERVIEW OF ISSUES FOR CONSIDERATION AT THE THIRD MEETING OF THE AP-41 WORKING GROUP (MAY 27, 2025)

The third meeting of AP-41 WG will address the first grouping of the terms of reference established at AP-41, which generally focus on the nature of the relationship between ITSO and Intelsat (or the combined SES/Intelsat) entity and between ITSO and the two Notifying Administrations, as established pursuant to the terms of the Public Services Agreement (PSA) between ITSO and Intelsat and the ITSO Agreement. The Direct General is providing the following analysis in support of the AP-41 Working Group's consideration of key elements to be addressed with respect to these three terms of reference.

ToR 1: Assessment of strengths, weaknesses and opportunities to ensure a more successful ITSO, including securing minimum funding levels.

ToR 1 is focused on a number of higher level considerations intended to better ensure ITSO's future success in fully meeting the needs of the Member States in light of a rapidly changing global telecom technologies and infrastructure.

In assessing ITSO's strengths, key ITSO characteristics would include credibility/leadership, adaptability, creativity, and resiliency.

- **Credibility and Leadership**. ITSO's credibility on the world stage is a direct result of the complete support that it commands from all Parties. ITSO is unique in this regard in that it represents a clear voice and vision on satellite related matters reflecting the interests and desires of its 149 Member States as stipulated in an international treaty, the ITSO Agreement. That broad-based support and commitment provides it with a uniquely credible voice on various issues which will help shape the optimum global telecom environment in many positive ways. ITSO can therefore be a major asset for the operator in the current very competitive satellite environment. In addition, ITSO is the only global international satellite organization and can be a useful resource to the Parties when it comes to discussing and addressing emerging satellite issues.

- **Adaptability.** ITSO throughout its existence has striven to be more efficient, cost effective and responsive to evolving Party needs. Looking forward, as the global telecommunications environment is rapidly evolving and ITSO's Parties face new challenges, ITSO's adaptability should position it well to further adjust its orientation in response to these developments.

- **Creativity.** ITSO has striven to meet the needs of member States in a number of creative ways that were not necessarily specified in the ITSO Agreement. For example, ITSO has developed a number of capacity building measures and programs, including in person and virtual training, designed to assist Parties in taking greater advantage of the technical capabilities necessary to optimally utilize satellite capacity as well as to help guide the establishment of regulatory policies that will better enable Parties to ensure that the benefits of technology achievements can be fully realized within their countries.

- **Resiliency.** ITSO has proven to be extremely resilient in meeting serious challenges throughout its existence since the time of restructuring. Even in the absence of necessary funding for certain time periods, ITSO has found ways to continue to function and remain relevant, weathering a number of storms over the past few years, obviously with the consequential intrinsic limitations.

Looking to the future, ITSO's greatest opportunity, in building upon these strengths, is to reorient its mission and relationship to Intelsat and in the future SES from one that is fundamentally characterized as primarily "supervisory" in nature to one that is more cooperative and collaborative in nature. Efforts were previously undertaken to move in this direction, particularly during the timeframe from 2016 through 2018, including the execution of two Cooperation Agreements between ITSO and Intelsat, but dissipated shortly thereafter for lack of continuing commitment or interest on Intelsat's part for reasons that remain unknown to ITSO. However, with the prospect of a new beginning on the horizon with SES as the owner of Intelsat, a real opportunity would appear to exist not only to revive but to significantly expand that reorientation process. This is the case for Eutelsat IGO and IMSO which have a much more collaborative relationship with the operators and that is what ITSO strives to achieve with SES.

However, this optimum approach remains very much dependent on the outcome of SES acquisition of Intelsat, which may not occur until third quarter 2025 at the earliest. As such, this means that current efforts in this regard remain more aspirational rather than concrete in the short run, until the acquisition has been completed. Assuming it does occur, the desired transformation would take the form of a relationship built upon a joint commitment between ITSO and SES to cooperate in the successful fulfillment of the Core Principles set forth in the ITSO Agreement.

Regarding ITSO's weaknesses or vulnerabilities, the principal one is that the language of the Public Services Agreement which was signed at the time of the restructuring leaves room for negotiation of funding. Although the PSA states that the funding needs to be *"negotiated, in good faith, by the Director General of ITSO and the Chief Executive Officer of Intelsat, **based upon the principles and financial expenditures of ITSO during the initial twelve period",*** Intelsat refused to use this formula and decided on an arbitrary amount to fund ITSO much lower than what ITSO is entitled according to the PSA and also lower than the budget approved by the Assembly of Parties. Absent adequate funding, ITSO is hamstrung in achieving the purposes for which it has been established. Therefore, there might be a need to consider revising the PSA to include some important elements such as setting a minimum level of funding, having multiyear funding and replenishing the contingency fund.

There are four elements to the funding challenge that ITSO must overcome, each of which is addressed below.

Annual Operational Funding. Regarding ITSO's funding, the objective should be to secure SES's agreement minimally to provide funding at a level that is sufficient for ITSO to fully discharge its obligations under the ITSO Agreement. Ideally, this would include the establishment of a multi-year funding approach that will enable that objective to be achieved while avoiding the current difficulties associated with dealing with funding on a year-to-year basis. Such a multi-year funding approach offers advantages to both parties, which is why it would be so desirable to achieve. In the case of ITSO, it relieves the uncertainly associated with having to renegotiate funding on a year-to year basis, which would afford ITSO greater flexibility in developing strategies and programs that are not limited to a single funding year in duration. This increased certainty and the accompanying flexibility that it would bring should also allow ITSO to function in a more efficient and cost-effective manner, which could have the salutary effort of reducing the funding levels that might otherwise be required when reliance is solely on year-to-year funding. These same considerations would also inure the benefit of SES in that SES would not have to deal with re-negotiations about funding every year and also potentially serve to reduce the overall funding levels that otherwise might be required. It should be noted in this regard that this is not a new or novel concept, nor would it be inconsistent with the existing PSA terms for funding, which would not restrict such flexibility. Indeed, Intelsat and ITSO had previously agreed to two sequential three-year funding agreements over the time period 2013-2019, with the benefits described above realized by both parties. But once again this approach ceased to be followed by Intelsat for reasons that still remain unknown to ITSO.

Funding to Address Possible Disputes. Funding to address potential expenses incurred in the event of invocation of the dispute resolution mechanism contained in Article 6 of the PSA was provided by the creation of a specific fund known as the Contingency Fund. The original amount of the Contingency Fund was set at $500,000, which was fully funded at the time of restructuring, and the PSA allowed for a one-time replenishment and readjustment of the Contingency Fund in 2013, which resulted in the Contingency Fund amount being re-set at about $620,000. At that time, through a spirit of cooperation, ITSO actually agreed that replenishment would not need to occur unless and until an actual dispute arose. This meant that from 2013 through 2019, Intelsat was effectively relieved of this replenishment obligation. Intelsat was only obligated to actually provide replenishment when ITSO was forced to invoke the dispute resolution mechanism late in 2019.

While the PSA did not provide opportunities for any further replenishment, further replenishment could still occur if ITSO prevailed in the arbitration proceeding and the arbitrator awarded reimbursement of costs to ITSO, which would be permissible if ITSO prevailed. Unfortunately, ITSO was prevented from securing a final judgement in its favor in the arbitration proceeding because Intelsat prevented a final resolution from being achieved as a result of its bankruptcy proceeding. Thus, while the PSA does not expressly allow for any further replenishment opportunity, from an equity perspective, particularly in light of what happened previously, some mechanism that would allow for funding in the event of a future dispute, were one to occur, is absolutely necessary and appropriate. While actual replenishment in some amount would be the most desirable outcome, this would not be essential so long as a mechanism could be established that would cover the reasonable costs associated with invocation of Article 6 if that were to occur, perhaps similar to what happened in 2013 or an alternative that would cover ITSO's reasonable costs in bringing an arbitration proceeding. While ITSO would hope that with an improved relationship likely to emerge with SES it would never be necessary to again invoke the dispute resolution mechanism contained in Article 6, of the PSA, as a precautionary measure, some back-up funding arrangement remains essential.

Repayment of Past Debts. With regard to ITSO's debts to some Member States that supported ITSO when appropriate funding was not provided through the duration of the Intelsat bankruptcy, and which remain outstanding as of this time, this had continued to be an unresolved issue at this time. In the event that agreement cannot be reached for a one-time payment to cover such debts, at a minimum, an agreement spreading the recovery of an amount sufficient to discharge these debts over a multi-year period should be pursued.

Timing of ITSO Funding Payments. Although Intelsat used to agree to disburse funds in two installments, from 2013 to 2019, it is now disbursing funds in four installments, which leaves ITSO with even less stability. In the case of IMSO funding is disbursed in the beginning of the year in full. Ideally funding should be disbursed in full or in no more than two instalments.

Another weakness of ITSO is the lack of a mechanism for enforceability of the PSA obligations, including not only funding issues but also Intelsat's obligations to honor the Public Service Obligations and sharing information with ITSO. Although Article 6 of the PSA provides for arbitration, ITSO would need the funds to take Intelsat or the operator to arbitration if the need arises. It would be desirable to include appropriate language in the funding agreements to ensure that ITSO has the necessary funds in case it needs to start arbitration against the operator. In addition, it would be advisable to simplify the dispute resolution mechanism as suggested below under ToR 3.

Potential Recommendations Under ToR 1:

1. ITSO needs to secure agreements with SES that will resolve all outstanding funding issues, including reaching agreement with SES on multi-year funding agreements, on arrangements that would cover the costs of any future dispute resolution proceeding brought under Article 6 of the PSA, and on supporting ITSO's ability to reduce past indebtedness incurred during the pendency of the Intelsat bankruptcy proceeding as well as to cover any expenses for FY 2026 that Intelsat refuses to pay.

2. In preparing the Strategic Plan and the Goals and Objectives documents and other AP documents, ITSO should consider additional ways in which its strengths can be leveraged for the benefit of the Parties and the operator as well as potentially consider developing a broader vision statement focusing on what the organization should look like over the next 4 years, assuming that sufficient funding is provided.

<u>ToR 3</u>: Potential Improvements in the Current Public Services Agreement (PSA) between ITSO and Intelsat; Development of a PSA framework if needed for entities other the Company (Intelsat/SES)

ToR 3 focuses specifically on the relationship between ITSO and Intelsat as governed by the terms of the PSA, and the extent to which that relationship can be improved or strengthened going forward.

<u>Amendment of the Existing PSA.</u> It should initially be noted that any formal changes to the PSA can only be adopted by mutual agreement of ITSO and Intelsat; as such, formal amendments may be difficult to achieve. Having said that, in the case of Eutelsat IGO, due to the collaborative relationship between Eutelsat IGO and the operator, their PSA has been amended seven times since 2001. Therefore, in the future, once a better relationship has been established with the operator, amending the PSA could be feasible.

There is also the accompanying issue which AP-41 Working Group may wish to consider further, which is the role that the Assembly of Parties would need to play in reviewing and agreeing to any formal PSA amendments. Presumably, before any changes can be made to the existing PSA, those changes would need to be approved by the Assembly of Parties. The question is whether proposed changes should be approved by the Assembly of Parties first, before proceeding with the amendment process, or whether the Assembly of Parties should approve the changes to the PSA, including the amendments, all at once. However, even in the absence of formal amendment of the PSA, many changes could be achieved through separate side agreements reached between ITSO and SES.

The primary open issues with respect to the PSA as currently in force, other than funding, which has already been addressed in connection with TOR-1, include the current relevance and need for certain aspects of Article 3 and for Article 4 in its entirety relating to the LCO Contract, which is no longer in force; the vagueness in Article 3 of the nature of the information that needs to be provided to ITSO by Intelsat and in the future by SES to enable ITSO to assess whether the Core Principles are being achieved; and a minor revision of the Article 6 dispute resolution mechanism dealing with the ability to utilize the Expedited Procedure Rules now contained within the Rules of Arbitration of the International Chamber of Commerce that did not exist when the PSA was originally executed in 2001.

In Article 3, certain provisions deal specifically with ITSO's role in reviewing petitions for eligibility to participate in the LCO contract (LCO eligibility and assisting LCO customers in the resolution of disputes with Intelsat (Articles 3.02(ii) and (iii)). Article 4 in its entirety deals with ITSO's role in resolving any disputes arising under the LCO Contract. Given that the LCO Contract in its entirety terminated at least three years ago, these provisions are no longer necessary at this time and their retention would no longer be necessary.

Article 3 also contains language requiring Intelsat to provide ITSO with sufficient information necessary to perform its assessment of whether the Core Principles are being achieved. The scope and nature of such information required has been the subject of ongoing concern at various times in the past. While an agreement was reached previously at AP-30 on this matter, it ceased to be honored by Intelsat in more recent times, reopening the prior controversy over the scope and nature of information that needed to be provided. The matter was also the subject of further deliberation by the Working Groups established by AP-40 and continues at present to be a matter of some concern. At the same time, if an improved relationship with SES can be established, given that SES, as a public company, has disclosure obligations that Intelsat currently does not, the nature and extent of information required by ITSO for these purposes may also be adjusted. This is a matter that will need to be addressed further in the ongoing discussions with SES once the acquisition has taken place. Ultimate resolution of this issue may also be affected by certain considerations arising under TOR-5, which relate to additional information that may be made available to ITSO by the two Notifying Administrations.

With respect to Article 6 dealing with dispute resolution matters, while the experience with the operation of the International Chamber of Commerce (ICC) procedures have raised a number of concerns as to how Article 6 was drafted, the Director General is sensitive to not seeking a major redrafting of Article 6 at this time, but would envision a proposed revision to just one element. Specifically, the Director General believes that adding specific language allowing for the Expedited Procedure Rules contained within the Rules of Arbitration of the International Chamber of Commerce ("ICC") to be utilized within Article 6 of the PSA would be advisable.

This provision in ICC Rules of Arbitration allowing for expedited arbitration is a recent development took effect as of March 1, 2017. These expedited procedures, among other things, provide for a streamlined arbitration with reduced scales of fees. In light of that, the Director General believes it would be appropriate to insert, as the first sentence in Article 6.04, the following text:

> The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply irrespective of the amount in dispute.

In addition, due to the lack of mechanisms for enforceability of non-performance by the operator of the Core Principles, it might be desirable to have some sort of penalties (preferably financial) for non-performance or partial performance imposed via appropriate provisions in the PSA.

Lastly, while not specifically tied to a particular Article in the PSA, should the overall relationship between ITSO and SES evolve away from a purely supervisory one to one based on collaboration and cooperation, this change could certainly be reflected in the terms of the PSA as well.

New PSAs with Other Entities. A detailed template for this was previously developed and presented at AP-38 (AP-38-14), and should serve as the basis for what would be considered by the AP-41 Working Group on this subject. That document addressed a number of revised provisions from the original PSA with Intelsat that would be needed in differentiating the PSA with an entity other than Intelsat from the existing PSA (whether or not amended as discussed above).

- The prefatory clauses would need to be modified, as much of the history of the Intelsat restructuring currently reflected therein would not be relevant in the case of a PSA with a new operator.

- It would be necessary to adjust the manner in which the Core Principles would be described, particularly where, for example, the PSA might apply only to a single satellite. For example, it would be necessary to adjust the obligation to provide global coverage and connectivity to one of contributing to the provision of global coverage and connectivity, although the obligation to provide nondiscriminatory access should definitely remain as stated in the PSA with Intelsat.

- The references in the current PSA to the specifics of the LCO arrangement would also no longer be necessary.

- With respect to dispute resolution, and much narrower and precisely tailored approach would be appropriate, where invocation of Article would only occur in the context of a determination by ITSO not to continue the PSA and the basis upon which this could be adjudicated through an arbitration proceeding.

- Lastly, the financial arrangements would need to be specific in nature, including the Contingency Fund, and also tied to the number of satellites to which the PSA would apply.

One issue that was not specifically addressed was how a new PSA with an entity other than Intelsat would relate to the current PSA with Intelsat, including a means for resolving any potential conflicts between the two operators and a determination of how joint funding would be handled with respect to satisfying minimum operational funding requirements.

Relevance of the Experience of Other International Government Organizations (“IGOs”). Consideration should also be given to potential benchmarking of ITSO’s relationship with Intelsat to the relationship established by IMSO and EUTELSAT IGO with the companies over which they have oversight and how those relationships have evolved over time. The existing Memorandum of Understanding between ITSO, IMSO and EUTELSAT IGO may provide a basis for facilitating this effort. For example, IMSO previously had oversight responsibilities over a single operator, but now has relationship with two additional satellite GMDSS providers that have been recognized by the International Maritime Organization – Iridium, and recently BeiDou and as a result have gone through a process of updating their respective service agreements analogous to the PSA between ITSO and Intelsat. IMSO has also had to adjust its funding mechanism to reflect its expanded oversight over multiple operators. IMSO also had to review the settlement of the different contribution from the different operators. Inmarsat has gone through an acquisition process by Viasat, which may be similar to the SES acquisition of Intelsat. And while Eutelsat has not been acquired by another company, its acquisition of One Web and how that has affected the role and responsibilities of EUTELSAT IGO could also be instructive to consider.

<u>Potential Recommendations Under ToR 3</u>:

1. While there are some potential amendments to the PSA that could be undertaken, given the difficulties associated with formal amendment, ITSO should also explore alternate means for dealing with these matters, including entering into multi-year funding agreements and cooperation agreements.

2. The work previously done with regard to developing a template for a PSA with an operator other than Intelsat as contained in AP-38-14 should serve as the basis for formal adoption of such a PSA at AP-42.

3. ITSO should take account of the experiences of IMSO and Eutelsat IGO including how they deal with other entities in addition to the original operators for which they were created to oversee.

<u>ToR 5</u>: Issues Affecting Common Heritage from Bankruptcy, Merger or Change of Control

ToR 5 focuses on certain external events or factors that can have an adverse impact on ITSO and on the Common Heritage, and the measures necessary to protect against such events.

Of paramount concern is the need to establish more formal protections from any possible adverse impacts of bankruptcy on ITSO's ability to function, including in particular the possibility that the PSA would be treated as an executory contract that could be rejected in its entirety by Intelsat in a bankruptcy proceeding, which would then serve as the basis for a bankruptcy court to restrict ITSO funding at least during the pendency of a bankruptcy proceeding.

In rebutting any contention that the PSA should be considered to be an executory contract, the following points are most relevant:

- The PSA was not the result of negotiation between two parties on an arms-length basis with equal bargaining power, which is normal for a contractual relationship that could be considered as an executory contract. Indeed, neither of the two parties to the PSA were involved in its negotiation at all, but its contents were determined through a political process involving the governments of 143 countries (the number of Member States at the time that the PSA was signed).

- The individual who signed the PSA on behalf of ITSO was Conny Kullman, who also signed the PSA on behalf of Intelsat, Ltd. Conny Kullman signed the PSA on behalf of ITSO in his capacity as Director General of INTELSAT, a position that terminated moments after he signed the PSA, from which point forward, he functioned solely as the CEO of Intelsat, Ltd.

- One of the parties to the PSA (ITSO) did not even exist in its current incarnation when the PSA was signed and did not come into existence until moments after it was signed. While theoretically the identity of the international organization did not change with restructuring, the responsibilities assigned to ITSO as reflected in the PSA did not come into force until the Treaty amendments took effect, which did not occur until after the PSA was signed. Indeed, if the Treaty amendments had already taken effect, Conny Kullman would not have had legal authority to sign for ITSO because he would no longer have been Director General of ITSO, but rather the proper ITSO signatory would have been Ahmed Toumi as the Director General of ITSO, but that did not occur.

- The PSA contains no express termination provision as would otherwise be standard in a contract that can be considered to be an executory contract; indeed, Intelsat has no right to terminate the PSA whatsoever under the terms of the PSA. The PSA can only be terminated at such time that the ITSO Parties decide to terminate the ITSO Agreement, a decisional process that is governed by the terms of that Treaty.

- An executory contract is one in which both parties have remaining obligations to perform (and presumably these would involve performance with respect to the counterparty). That is not the case with the PSA. While Intelsat has functions that it is required to perform for the benefit of ITSO under the PSA, ITSO has no functions that it is required to perform for the benefit of Intelsat.

- The PSA is not described in the ITSO Agreement as being a commercial contract. Indeed, for purposes of the ITSO Agreement, the Treaty defines the PSA as a "legally binding instrument through which ITSO ensures that the Company honors the Core Principles." (ITSO Agreement, Article I(j).) As such, a more proper characterization for purposes of U.S. law would be that it is an instrument created pursuant to an international agreement to which the United States is a Party that imposes a series of obligations or conditions on Intelsat imposed pursuant to the provisions of an international treaty. It is entirely on this basis that Intelsat as a company was created and allowed to go into business as a private company, and was therefore even eligible to be licensed by the FCC.

- Guidance provided by the U.S. Department of Justice regarding the characteristics of an executory contract include that an executory contract is one in which the failure to perform by one party would excuse the performance of the other party. However, a failure to perform by Intelsat would in no way relieve ITSO of its performance obligations under the PSA.

To assure further protection of ITSO's status in the case of a merger or other change of control events, it would be essential to confirm that any new controlling entity is clearly and fully subject to the PSA and the obligations imposed on it pursuant to the ITSO Agreement. This should also include recommitment from United States that the conditions it has imposed on the licenses for satellites deployed at Common Heritage orbital locations would remain in place in the case of merger of a change of control.

Finally, in order to better position ITSO to be able to fully protect the Common Heritage, there are a number of matters that need to be included in the semi-annual reports from the two Notifying Administrations, including:

- Identification of licensed or authorized Intelsat satellite networks at each Common Heritage orbital location;
- Status of operational deployment of Intelsat satellites at each Common Heritage orbital location;
- Status of specific frequency assignments of Intelsat at each Common Heritage orbital location;
- Frequency assignments not in operation at each Common Heritage orbital location, and frequency assignments under suspension status at ITU and their risks of suppression at the ITU MIFR;
- Connectivity provided to each of the ITSO Regions as specified in the ITSO Agreement, evidenced for example by satellite footprint maps or by identification of the regions served from each satellite;
- Updating the use of each orbital position and satellites deployed at each orbital position;
- Identification of mechanisms to anticipate potential suspensions and suppressions and mitigate risks of subsequent potential suppressions of frequency assignments;
- Identification of scenarios under which suspension of frequency assignments could occur.

Potential Recommendations Under ToR 5:

1. ITSO should develop a document for AP-42 with all the reasons why the PSA should never be considered to be an executory contract that can be rejected under U.S. bankruptcy law.

2. Firm confirmation needs to be provided whenever there is a change in control of Intelsat to ensure that the new controlling entity is fully subject to the obligations set forth in the ITSO Agreement and PSA with respect to satisfying the Core Principles and to the licensing conditions imposed by the FCC on satellites deployed as Common Heritage orbital locations.

3. The Notifying Administrations should provide in their semi-annual reports submitted to ITSO sufficient information to accurately reflect the current usage of the Common Heritage orbital locations and associated frequency assignments over which they have jurisdiction and possible risks to the continued availability of those resources to support Intelsat’s (and SES’s) ability to meet the Core Principles.