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Captain Esteban Pacha-Vicente
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International Mobile Satellite Organization
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United Kingdom

Dear Captain Pacha:

We are in receipt of your letter of 20 July 2007 to the Secretary-General of the International Maritime Organization (IMO), seeking IMO views on the amendments to the IMSO Convention proposed by the United States of America, as well as the 24 July 2007 response to that letter from the Director of Legal Affairs at the IMO. Both documents were circulated to all Parties to the International Mobile Satellite Organization (IMSO) Convention by your communication dated 28 August 2007.

We are pleased to learn that the IMO Director of Legal Affairs appears to agree that the amendments proposed by the United States are consistent, in substance, with the decisions taken by the Maritime Safety Committee (MSC) regarding the introduction and operation of Long-Range Identification and Tracking of ships (LRIT). We believe that the amendments proposed by the United States to the IMSO Convention are fully consistent with the decisions taken by the MSC regarding LRIT and have the best chance of timely advancing implementation of LRIT on a sound legal basis. However, we must take issue with her assertion that the amendments proposed by the United States can pose a problem as a matter of treaty-making because they are "amending amendments that are not yet in force." This is simply not the case. There is no problem with the amendments proposed by the United States as a matter of international law.

First, there is no limitation in Article 18 of the IMSO Convention that would restrict the consideration by the IMSO Assembly of such amendments. Article 18(1) of the IMSO Convention¹ that is currently in force between the Parties states as follows:

¹ We would note that the IMO Director of Legal Affairs refers in her letter to "Article 19" of the IMSO Convention, which appears to be in error. The relevant Article of the IMSO Convention currently in force is Article 18, which deals with amendments to the Convention. Article 19 of the IMSO Convention currently in force concerns the duties of the Depository of the Convention (which is the Secretary-General of the IMO). Article 19 is not, so far as we have been able to ascertain, relevant to this discussion.

Amendments to this Convention may be proposed by any Party and shall be circulated by the Director to all other Parties and to the Company. The Assembly shall consider the amendment not earlier than six months thereafter, taking into account any recommendation of the Company. This period may in any particular case be reduced by the Assembly by a substantive decision by up to three months.

As is evident, there are no restrictions in Article 18 on the nature of the amendments which may be offered by any party. Rather, the only restriction concerns the period of time after which the amendments may be considered by the Assembly of Parties. Hence, the amendments offered by the United States are fully consistent with IMSO procedures concerning consideration of amendments.

Second, there is no prohibition in the IMSO Convention or elsewhere in applicable international law to adopting amendments to previously adopted treaty text before that treaty text has formally entered into force. As one treatise on the subject notes, providing several examples, “[i]t may be necessary to amend a multilateral treaty even before it has entered into force” and “it is not uncommon for bilateral treaties to be amended before they have entered into force.” A. Aust, Modern Treaty Law and Practice 222-23 (Cambridge 2000). The examples provided by Aust of multiple amendments in the context of multilateral treaties include a 1958 amendment to the 1956 Olive Oil Agreement (prior to its entry into force) and a 1994 Agreement amending implementation of Part IX of the 1982 U.N. Convention on the Law of the Sea (also prior to its entry into force). The United States is also aware of another example that concerns amendments to the 1971 Agreement Relating to the International Telecommunications Satellite Organization or INTELSAT. In August, 1995, the 20th INTELSAT Assembly of Parties held in Copenhagen agreed to an amendment to the INTELSAT Agreement that would allow for Multiple Signatory arrangements to the INTELSAT Agreement for countries that wished to adopt such arrangements. In November, 2000, while this Multiple Signatory amendment was pending ratification, the 25th INTELSAT Assembly of Parties in Washington, D.C. adopted a package of amendments that privatized the operations of INTELSAT and entirely eliminated the provisions in the INTELSAT Agreement relating to signatories. The 2000 amendments received the necessary number of acceptances/ratifications from INTELSAT member states and came into force in 2003, notwithstanding the continuing pendency for ratification (even to this day) of the 1995 Multiple Signatory amendment.

In sum, there is no legal prohibition to adopting amendments to previously adopted treaty text before that treaty text has formally entered into force and, as Aust notes, in some cases such amendments are necessary. As the United States explained in the Explanatory Notes submitted with its amendments to the IMSO Secretariat for circulation to all IMSO Parties and Observers, the United States believes that the package of amendments that it submitted are needed to provide the necessary legal framework to allow IMSO to carry out LRIT Co-ordinator functions and duties:

[T]he United States strongly believes that the one sentence amendment adopted at the Eighteenth Session of the IMSO Assembly is substantively deficient and does not provide the necessary legal framework for IMSO to undertake the necessary functions and duties of the LRIT Co-ordinator, as established by the IMO.

The one sentence amendment does not comprehensively address issues facing IMSO in taking on the role of LRIT Co-ordinator. It does not provide for essential elements of governance, it does not provide for essential accounting between IMSO's role as GMDSS overseer and as LRIT Co-ordinator, and, it does not provide any guidance or authority with regard to entering into contractual relationships for LRIT services.

In short, the United States sees no legal bar to consideration and adoption of the amendments it has proposed by the IMSO Assembly once the six month period established by Article 18 of the IMSO Convention has expired (approximately 20 January 2008). In our 22 June 2007 letter transmitting those amendments to you, we requested that an Assembly meeting be scheduled in as early in 2008 as possible in order to meet the IMO's schedule for the implementation of LRIT. We reiterate that request at this time.

In fact, notwithstanding her statement that the United States proposal "can pose a problem," the IMO Director of Legal Affairs ultimately agrees that there is no legal bar and states that the IMO Assembly could "consider, and if appropriate, adopt the proposed amendments subject to certain conditions." We are sensitive to the concern expressed by the IMO Director of Legal Affairs about avoiding a situation with incompatible sets of amendments entering into force. The United States believes that such a result must and can be avoided. The amendments proposed by the United States are consistent with the amendments adopted by the Assembly in 2006 and build on the work already carried out by the Assembly at that time (while making minor adjustments to those amendments to accommodate the new provisions proposed by the United States concerning LRIT). As the IMO Director conceded at the end of her letter, there are several possible approaches to resolving these technical matters, including adoption by the Assembly of a new "package" of amendments (presumably containing the 2006 amendments, as modified by the most recent United States proposals) or inclusion of language in an Assembly resolution clarifying for Parties the order in which amendments adopted by the Assembly both in 2006 and subsequently would enter into force. In that connection, we would note that the United States has already proposed an Assembly resolution to clarify certain administrative matters and perhaps these concerns could also be reflected in that resolution. We are prepared to discuss these (and other possible approaches) with you as we move forward to a prompt Assembly meeting in early 2008.

Lastly, we would note that the IMO Director of Legal Affairs expressed concern about the United States proposal for Article 11(h), which would authorize the Assembly "to review and approve any amendment made by the MSC to section 14 of the Annex to Resolution MSC.210(81)." In that connection, we would note that, while the IMSO has expressed its willingness to the IMO to perform the LRIT Co-ordinator functions, the IMSO is a separate and distinct international organization from the IMO. The United States has previously expressed its concern about

creation of a situation where “the functions of the IMSO could expand based on decisions of a separate international organization,” a situation the United States would view as unacceptable. As a separate and distinct organization, the IMSO is not subject to the control of any other body and has the final determination over what tasks it will (and will not) perform. Article 11(h) simply seeks to preserve that state of affairs

Finally, we would like to observe that we respect and appreciate the efforts made by the IMO Director of Legal Affairs in addressing the request of the IMSO Director. However, we believe that the IMSO Director should in the first instance seek such advice from the IMSO Parties directly rather than seeking it from the legal counsel of a separate and distinct international organization.

We would request that you circulate a copy of this letter to all Parties to the IMSO Convention for their consideration.

Sincerely,



J.G. LANTZ
Director of Commercial Regulations
and Standards
U.S. Coast Guard