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Universal Global Interconnection After INTELSAT

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by

Kenneth Katkin
Assistant Professor of Law
Salmon P. Chase College of Law
Northern Kentucky University
(859) 572-5861 office
(513) 271-3846 home
katkink@nku.edu

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INTRODUCTION & SUMMARY

In 1962, the United States Congress initiated the formation of the International Telecommunications Satellite Organization "INTELSAT," a multilateral treaty organization. INTELSAT was charged with creating and operating a global fleet of international communications satellites in order to guarantee the universal interconnection of the world's telecommunications networks. At its peak in the mid-1990s, INTELSAT consisted of 150 member nations, and operated a global fleet of 25 geostationary satellites that served virtually every nation on earth.

Throughout the 1960s and 1970s, INTELSAT faced no competition in the provision of international satellite telecommunications services. In the 1980s, however, the United States and other nations began to authorize the deployment of separate satellite systems to compete against INTELSAT. By 2000, more than 200 operational geostationary commercial communications satellites orbited the earth, of which only 19 belonged to INTELSAT. Moreover, by 2000, only eight percent of U.S.-international telecommunications traffic traveled on the "thin routes" still served exclusively by INTELSAT.

As competition intensified, many commentators questioned the need for a public intergovernmental treaty organization to continue to provide telecommunications services that were now substantially provided by the private sector. In response, Congress enacted the ORBIT Act of 2000, which mandated the privatization of INTELSAT. This privatization was substantially accomplished in July 2001, when INTELSAT's satellite assets were transferred to Intelsat Ltd., a new Delaware corporation.

Although most international telecommunications routes are now served by more than one satellite or submarine cable provider, many low-volume "lifeline" routes are still served exclusively by Intelsat Ltd. For this reason, the governments of some "lifeline" nations expressed concern that INTELSAT privatization might threaten the global interconnection of the world's telecommunications systems, by rendering the future of global interconnection subject to both market forces and U.S. national trade policies.

To address these concerns, in executing its privatization, INTELSAT left in place a small residual International Telecommunications Satellite Organization, now known by the acronym "ITSO." ITSO's sole charge is to ensure that the privatized Intelsat Ltd. continues to satisfy INTELSAT's treaty-based obligation to serve those poor or underserved countries that remained highly dependent on INTELSAT for international telecommunications service. However, ITSO has no operational role in the privatized Intelsat Ltd., nor any satellites of its own. Thus, for the first time since 1971, the sole public international organization charged with ensuring that every country on earth receives international telecommunications service lacks the technological facilities to provide such service itself. Instead, ITSO must rely entirely on legal tools to accomplish its mandate.

To date, Intelsat Ltd. has faithfully maintained global universal service; indeed, it has no economic or political incentive to do otherwise. In addition, ITSO has executed "lifeline connectivity obligation" (LCO) contracts with Intelsat, Ltd. and with several carriers who provide international telecommunications service to eligible underserved nations. These LCO contracts obligate Intelsat Ltd. to maintain or expand service on its monopoly international routes. At present, no country is threatened with being cut off from the international network of telecommunications systems

While the former INTELSAT treaty organization was immune from U.S. trade policies, however, the private U.S.-licensed Intelsat Ltd. is fully subject to such policies. Accordingly, those "lifeline" countries which remain highly dependent on Intelsat Ltd. to carry their intercontinental telecommunications traffic (including, for example, Afghanistan, Pakistan, Sudan, North Korea, Somalia, and Cuba) now may be subject to being "cut off" from the global telecommunications network by any future U.S. economic sanctions that might be imposed.

This paper examines whether the arsenal of legal, rather than technological, tools available to ITSO are adequate to safeguard the broad availability of international telecommunications services to national populations in underserved countries.

I. INTELSAT's Formation and Structure

On May 14, 1959, a radio signal transmitted from Jodrell Bank, England, was bounced off the moon and received at the U.S. Air Force Cambridge Research Center in Bedford, Massachusetts.[1] This transmission proved that radio signals could be bounced off passive objects in space (either natural or artificial) and relayed to distant points on the earth.[2] Recognizing the practical implications of this demonstration, the United Nations General Assembly resolved in 1961 that "communication by means of satellites should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis."[3] In 1962, AT&T's experimental TELSTAR satellite performed the world's first intercontinental broadcast transmission of a television signal.[4] Very shortly thereafter, the United States Congress enacted the Communications Satellite Act of 1962 ("Satellite Act").[5]

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[1] Stephen E. Doyle, *Communications Satellites: International Organization for Development and Control*, 55 Cal. L. Rev. 431, 432 & n.3 (1967) (citing Eugene M. Emme, *Aeronautics and Astronautics 1915-1960*, at 55 (1961)).

[2] *Id.* The concept of an artificial geostationary communications satellite had first been proposed in 1945 by engineer-turned-science-fiction-writer Arthur C. Clarke. *See* Arthur C. Clarke, *Peacetime Uses for V2*, WIRELESS WORLD, Feb. 1945, at 58 (letter to the editor) (proposing that "[a]n 'artificial satellite' at the correct distance from the earth would . . . remain stationary above the same spot and would be within optical range of nearly half the earth's surface. Three repeater stations, 120 degrees apart in the correct orbit, could give television and microwave coverage to the entire planet."). *See also* Arthur C. Clarke, *Extra-Terrestrial Relays: Can Rocket Stations Give World-Wide Radio Coverage?*, WIRELESS WORLD, Oct. 1945, at 305-08 (expanding this proposal). Scans of both of Clarke's 1945 WIRELESS WORLD publications are available on the World Wide Web at <http://lakdiva.net/clarke/1945ww/>.

[3] U.N. General Assembly Resolution 1721 (XVI), Part D (Dec. 20, 1961). Several months before the United Nations adopted this resolution, President John F. Kennedy had called for the United States to spearhead an international effort to develop a global satellite communications system that would serve all the nations of the world on a nondiscriminatory basis. *See* Statement of the President on Communications Policy (July 24, 1961), *appended to* S. Rep. No. 87-1584, at 25 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2269, 2287.

[4] *See* Lucent Technologies Bell Labs Telstar Web Page, <http://www.lucent.com/minds/telstar/fit.html>. The TELSTAR I satellite, a sphere roughly a yard in diameter and weighing 175 pounds, was designed to process, re-transmit, and amplify signals that it received from the ground. *Id.* On July 11, 1962, an moving image of the American flag waving was transmitted from satellite earth stations in Pleumeur-Bodou, France and Goonhilly Downs, Cornwall, England up to the TELSTAR I satellite, which relayed the image down to an earth station in Andover, Maine, where it was transmitted to American television networks, and broadcast throughout the United States. *Id.*

[5] Communications Satellite Act of 1962, Pub. L. No. 87-624, 76 Stat. 425 (1962), *codified as amended at* 47 U.S.C. §§ 701-769 ("Satellite Act").

The Satellite Act declared it "the policy of the United States to establish, in conjunction and in cooperation with other countries, as expeditiously as practicable a commercial communications satellite system, as part of an improved global communications network, which will be responsive to public needs and national objectives, which will serve the communication needs of the United States and other countries, and which will contribute to world peace and understanding."[6] In effectuating this program, the Act directed that "care and attention . . . be directed toward providing [satellite communications] services to economically less developed countries and areas as well as those more highly developed. . . ."[7] It also directed "that all authorized users have nondiscriminatory access to the system."[8]

The Satellite Act created a new stockholder-owned District of Columbia corporation, COMSAT, and directed this corporation to raise private financing and to seek foreign partners with whom to establish the proposed satellite system.[9] In 1965, an *ad hoc* partnership led by COMSAT and involving 44 nations successfully launched into geostationary orbit the world's first commercial communications satellite, "Early Bird."[10] In 1971, after several more satellites had been launched by COMSAT-led *ad hoc* international partnerships,[11] 85 nations entered into an international agreement that established the International Telecommunications Satellite Organization "INTELSAT."[12] INTELSAT was established as a permanent intergovernmental treaty organization in order "to continue and carry forward on a definitive basis the design, development,

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6 Satellite Act § 102(a), 47 U.S.C. § 701(a).

7 Satellite Act § 102(b), 47 U.S.C. § 701(b).

8 Satellite Act § 102(c), 47 U.S.C. § 701(c).

9 *See* Satellite Act § 102(c), 47 U.S.C. § 701(c) ("United States participation in the global system shall be in the form of a private corporation."); *see also* 47 U.S.C. §§ 731-35 (setting forth structure and mission of the new private corporation). The new corporation that was formed pursuant to the Act was named "Communications Satellite Corporation," or "COMSAT." *See* 2 I.L.M. 395 (1963) (setting forth COMSAT's articles of incorporation). Later, the corporation formally changed its named to the Comsat Corporation.

10 *See Communications Satellite Corporation*, 5 Rad. Reg. 2d (P&F) 369, 371 (1965).

11 *See COMSAT Study*, 77 F.C.C. 2d 564, ¶¶ 63-65 (1980) (describing interim arrangements); Stephen E. Doyle, *Communications Satellites: International Organization for Development and Control*, 55 Cal. L. Rev. 431, 434-42 (1967) (same).

12 *See Agreement Relating to The International Telecommunications Satellite Organization "INTELSAT"*, done Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532, 1220 U.N.T.S. 22 ("INTELSAT Agreement") (establishing permanent intergovernmental treaty organization); *see also id.*, 23 U.S.T. at 4066-4083 (listing the 85 nations that founded INTELSAT). By 2000, just before INTELSAT was privatized, the number of member nations that had become Signatories to the INTELSAT Agreement had risen to 144. *See* United States Department of State, *Treaties In Force: A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2000* 457-58 (2000) (listing INTELSAT member nations), <http://www.state.gov/www/global/legal_affairs/tif_01e.pdf>.

construction, establishment, operation and maintenance of the space segment of the global commercial telecommunications satellite system. . . ."[13] As its "prime objective" INTELSAT was charged with providing, on a commercial basis, the satellite transmission capacity (also called "space segment") "required for international public telecommunications services of high quality and reliability to be available on a non-discriminatory basis to all areas of the world."[14] In addition, to the extent it could do so without impairing its prime objective, INTELSAT also was authorized to provide satellite transmission capacity for domestic public telecommunications services, and for specialized international or domestic telecommunications services, other than for military purposes.[15]

INTELSAT was governed via a complex, four-level structure that reflected the organization's dual nature as both a public international treaty organization and a commercial provider of telecommunications services.[16] At the top of this structure was the Assembly of Parties, "the principal organ of INTELSAT."[17] Populated by diplomats representing each INTELSAT member state, the Assembly of Parties met biennially to establish general policy and long-term objectives of INTELSAT, to consider "those aspects of INTELSAT which are primarily of interest to the Parties as sovereign States," monitor INTELSAT's compliance with other multilateral conventions adhered to by at least two-thirds of the Parties, and confirm the nomination of the "Director General" who exercised executive responsibility over day-to-day operations.[18]

Just below the Assembly of Parties was the Meeting of Signatories. Within INTELSAT, each member state was required to designate a single telecommunications entity known as a "Signatory" to make the capital contributions necessary to finance that state's share of the global satellite system, and to perform the commercial and technical operations necessary to furnish the transmission capacity and communications services of the satellite system to carriers and users located in their home state.[19] Most INTELSAT

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[13] *Agreement Relating to The International Telecommunications Satellite Organization "INTELSAT"* Art. II(a), done Aug. 20, 1971, 23 U.S.T. 3813, 3816, T.I.A.S. No. 7532, 1220 U.N.T.S. 22, 24 ("INTELSAT Agreement").

[14] *Agreement Relating to The International Telecommunications Satellite Organization "INTELSAT"* Art. III(a), done Aug. 20, 1971, 23 U.S.T. 3813, 3817, T.I.A.S. No. 7532, 1220 U.N.T.S. 22 ("INTELSAT Agreement").

[15] *Id.* Art. III(b)-(d). All such services, like INTELSAT's "prime" international public telecommunications services, were to be provided commercially on a non-discriminatory basis. *Id.*

[16] *See id.* Art. VI(a).

[17] *See id.* Art. VII(a). A "Party" to INTELSAT means "a State for which the Agreement has entered into force or been provisionally applied." *Id.* Art. I(f).

[18] *See id.* Arts. I(f), VII.

[19] *See id.* Art. I(g); These telecommunications were called "Signatories" because they "signed" a separate "INTELSAT Operating Agreement" on behalf of their member states. *See*

(continued. . . . .)

member states designated their government-owned Post, Telephone, and Telegraph Offices ("PTTs") to serve as Signatories.[20] Composed of representatives of the designated telecommunications entity from each INTELSAT member state, the Meeting of Signatories met annually to: establish rules governing the rates and allotments of INTELSAT satellite transmission capacity; adjust capital contribution ceilings; authorize new satellite earth stations; consider the estimated financial implications of proposed future programs; administer the withdrawal of member states from INTELSAT; and resolve complaints and disputes between member states.[21]

INTELSAT's third level of governance, the Board of Governors, was assigned principal responsibility "for the design, development, construction, establishment, operation and maintenance of the INTELSAT space segment and . . . for carrying out any other activities which are undertaken by INTELSAT."[22] Unlike the Assembly of Parties and the Meeting of Signatories, which each adhered to a one-vote-per-state rule, representation on the INTELSAT Board of Governors was apportioned based on Signatory ownership share, which, in turn, was apportioned based each Signatory's share of utilization of INTELSAT satellite transmission capacity.[23]

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id. Art. I(g), 23 U.S.T. at 3816 (defining "Signatory"); *see also Operating Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT"*, Art. 2, done Aug. 20, 1971, 23 U.S.T. 4091 ("INTELSAT Operating Agreement"). The INTELSAT Operating Agreement was a commercial agreement that set forth the commercial rights and obligations of Signatories within the INTELSAT cooperative. *See id.*

[20] The United States, in contrast, designated COMSAT (the new private corporation that had been created under the 1962 Satellite Act) to serve as "the U.S. Signatory to the Operating Agreement of INTELSAT." S. Rep. No. 95-1036, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5272, 5275. *See also Senate Report on International Maritime Satellite Telecommunications Act*, S. Rep. No. 95-1036, at 15 (1978), 1978 U.S.C.C.A.N. at 5286 ("COMSAT was created by the Communications Satellite Act of 1962 to foster the establishment of a global satellite system and represent the United States in the operation aspects of that system. COMSAT is therefore the U.S. Signatory to the Operating Agreement of INTELSAT."). As U.S. "Signatory" to INTELSAT, COMSAT signed the INTELSAT Operating Agreement on behalf of the United States, and represented the United States within the INTELSAT Meeting of Signatories.

[21] INTELSAT Agreement, Art. VIII, done Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532, 1220 U.N.T.S. 22.

[22] INTELSAT Agreement, Art. X(a), done Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532, 1220 U.N.T.S. 22. These "other activities" included virtually all of INTELSAT's business operations, including procurement, budgeting, allocation of satellite transmission capacity, rate setting, and securing patent rights. *Id.* The Board of Governors also was responsible for nominating individual candidates to serve as "Director General," subject to confirmation by the Assembly of Parties. *Id.* Art. XI(b)(iii).

[23] *See* INTELSAT Agreement, Art. IX(f) ("each Governor shall have a voting participation equal to that part of the investment share of the Signatory, or group of Signatories, he represents, which is derived from the utilization of the INTELSAT space segment"). Thus, for example, in 1999, 22% of INTELSAT traffic worldwide was carried to or from the United States. Because the United States' "INTELSAT utilization share" was 22%, the investment share of the United

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Finally, a unitary executive "Director General" served as "the chief executive and the legal representative of INTELSAT and [was] directly responsible to the Board of Governors for the performance of all management functions."[24]

During the 30 years that it existed (1971-2001), INTELSAT used its global fleet of international communications satellites to guarantee the universal interconnection of the world's telecommunications networks. At its peak in the mid-1990s, INTELSAT's 24 operational geostationary satellites served not only the organization's nearly 150 member nations, but, indeed, virtually every populated land mass on earth.[25]

II. Calls for INTELSAT's Dissolution.

A. Calls From Without.

When the Satellite Act was enacted in 1962, many Congressmen and Administration officials envisioned the proposed satellite system as a "natural monopoly."[26] Nonetheless, rather than ruling out future competition, the 1962 Act

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States Signatory, COMSAT, was correspondingly set at approximately 22%, meaning that COMSAT was responsible for making 22% of the capital contributions needed to operate the entire system. In exchange for these capital contributions, COMSAT obtained ownership of a 22% share in the global system, and was entitled to vote this entire share in the Board of Governors. *See* INTELSAT Operating Agreement, art. 6, done Aug. 20, 1971, 23 U.S.T. 4091. In the Assembly of Parties and the Meeting of Signatories, in contrast, the United States and its Signatory each were entitled to cast just one vote.

[24] INTELSAT Agreement Art. XI(b)(i).

[25] From its inception until its privatization in 2001, INTELSAT provided telephone, broadcast, internet, and specialized communications services to 214 countries and territories. *See* INTELSAT ANNUAL REPORT at i, 2-3 (2000). In 1998, INTELSAT operated a global fleet of 24 geostationary satellites in fixed orbit above the earth. *See generally In re New Skies Satellites, N.V.*, 14 FCC Rcd. 13003, ¶¶ 3-8 (1999) (noting that INTELSAT was left with 19 satellites after transferring 5 satellites to a separate but affiliated private company in 1998), *modified*, 16 FCC Rcd. 7482 (2001).

[26] *See*, *e.g.*, S. Rep. No. 87-1584, at 28 (1962), *reprinted* in 1962 U.S.C.C.A.N. 2269, 2289 (statement of President Kennedy) (characterizing COMSAT as "by nature a Government-created monopoly. . . ."); *id.* at 51 (1962), *reprinted* in 1962 U.S.C.C.A.N. at 2309 (minority views) (opposing proposal to "create a private corporation that would own and operate the U.S. portion of a worldwide satellite communications system" on ground that "[t]his corporation would be a Government-created monopoly."); *see also* 108 Cong. Rec. H7505 (daily ed. May 2, 1962) (statement of Rep. Cellar) (noting that in the Satellite Act, "we are creating here a private monopoly."); 108 Cong. Rec. H7515 (daily ed. May 2, 1962) (statement of Rep. Kowalski) ("Let us make no mistake about the bill before us—it proposes to place in private hands a Government-created monopoly. . . .").

In economic theory, a "natural monopoly" is defined as a firm that "can exist with decreasing returns if any specified required rate of output can be supplied most economically by a

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expressly provided for the eventual "creation of additional communications satellite systems."[27]

The 1971 accession of the United States to the INTELSAT Agreement, however, may have effectively delayed the deployment of separate communications satellite facilities capable of serving the United States. Article XIV(d) of that Agreement authorized the INTELSAT Assembly of Parties, upon recommendation of the Board of Governors, to veto the development within any member state of any separate international satellite systems projected to cause "significant economic harm" to the INTELSAT system.[28] In practice, INTELSAT probably lacked any means to enforce such a veto against an intransigent member state.[29] Perhaps for this reason, as international telecommunications traffic expanded rapidly during the 1970s and 1980s, INTELSAT

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single firm or single system." Thomas Hazlett, *The Curious Evolution of Natural Monopoly Theory*, in *Unnatural Monopolies* 1, 15 (Robert W. Poole, Jr. ed. 1985); *accord* William W. Sharkey, *The Theory of Natural Monopoly* 4 (1982); *see also McGraw-Hill Dictionary of Modern Economics* 394 (2d ed. 1973) (defining "natural monopoly" as "a natural condition that makes the optimum size of the firm so large in relation to the market that there is room for only one firm."). For an articulation of the reasons why international telecommunications service was historically thought to be a "natural monopoly", *see Regulatory Policies And International Telecommunications*, 2 FCC Rcd. 1022, ¶ 18 (1987), *modified in other respects*, 4 FCC Rcd. 7387 (1988), *and modified on further recon. in other respects,* 7 FCC Rcd. 1715 (1992).

[27] Satellite Act § 102(d), 47 U.S.C. § 701(d).

[28] *See Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT,"* Art. XIV(d), done Aug. 20, 1971, 23 U.S.T. 3813, 3854 ("INTELSAT Agreement") (No INTELSAT member state may "establish, acquire or utilize space segment facilities separate from the INTELSAT space segment facilities to meet its international public telecommunications services requirements" unless INTELSAT first determines that such proposed facilities would be technically compatible with INTELSAT *and* would not cause "*significant economic harm* to the global system of INTELSAT.") (emphasis added). The "economic harm" provision was justified as a means of protecting INTELSAT against "cream-skimming" in order to safeguard INTELSAT's ability to serve every country on earth, regardless of cost, on non-discriminatory terms and conditions. *See* Charles H. Kennedy & M. Veronica Pastor, *An Introduction To International Telecommunications Law* 79-80 (1996). For a discussion of the substantive criteria formerly used by INTELSAT to determine whether a proposed separate satellite system would cause "significant economic harm," *see Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046, ¶¶ 139-143, 159-169 (1985) ("*Separate Systems Order*"), *modified on recon.*, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon. denied*, 1 FCC Rcd 439 (1986).

[29] *See* Albert N. Delzeit & Robert F. Beal, *The Vulnerability of the Pacific Rim Orbital Spectrum Under International Space Law*, 9 N.Y. Int'l L. Rev. 69, 80-81 (Winter 1996) (lamenting INTELSAT's inability to enforce its determinations of "economic harm," and concluding that "[i]n light of the lack of INTELSAT's power over its own member states, . . . INTELSAT is a 'paper tiger'. . . .") (citing Francis Lyall, *The International Telecommunications Union and Development*, 22 J. Space L. 23, 106-09 (1994)).

did consent to the development of several competing "separate systems" that provided competitive regional international service in different parts of the world.[30]

On November 28, 1984, President Reagan "determine[d] that separate international communications satellite systems [were] required in the national interest."[31] Accordingly, he jointly directed both the Secretary of State and the Secretary of Commerce "to inform the Federal Communications Commission of criteria necessary to ensure the United States meets its international obligations [under the INTELSAT Agreement] and to further its telecommunications and foreign policy interests" by establishing separate satellite systems to compete against the INTELSAT system.[32] On January 31, 1985, INTELSAT responded to President Reagan's determination by adopting a resolution urging its members not to participate in establishing any separate international satellite systems linking the United States and Europe.[33] Nonetheless, shortly thereafter, the FCC authorized the development of the first separate international satellite systems to serve U.S.-international routes.[34] In 1988, the Connecticut-based Pan American Satellite

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30 *See* Charles H. Kennedy & M. Veronica Pastor, *An Introduction To International Telecommunications Law* 80 (1996) ("The first separate system to receive approval was [Western Europe's] EUTELSAT in 1979, which was soon followed by [Southeast Asia's] PALAPA and [the Middle East's] ARABSAT.").

31 Presidential Determination No. 85-2, 49 Fed. Reg. 46987, 1984 WL 88118 (Nov. 28, 1984). For discussions of the deliberations that led to this Presidential determination, *see* Bert W. Rein & Carl R. Frank, *The Legal Commitment of the United States to the INTELSAT System*, 14 N.C. J. Int'l L. & Com. Reg. 219, 225-27 (1989); Richard R. Colino, *A Chronicle of Policy and Procedure: The Formulation of the Reagan Administration Policy on International Satellite Telecommunications*, 13 J. Space L. 103 (1985); Richard R. Colino, *The Possible Introduction of Separate Satellite Systems: International Satellite Communications at the Crossroad*, 24 Colum. J. Transnat'l L. 13 (1985).

32 Presidential Determination No. 85-2, 49 Fed. Reg. 46987, 1984 WL 88118 (Nov. 28, 1984).

33 *See* Michael R. Gardner, *December 19, 1984—A Big Day in Telecommunications*, 34 Cath. U. L. Rev. 625, 633 n.23 (1985). The resolution, which was supported by every one of INTELSAT's 109 member nations except for the United States, asserted that that the prosperity and political harmony of the INTELSAT satellite system will be jeopardized if separate systems were licensed by the FCC. *Id.* Despite this unequivocal assertion, however, INTELSAT did not invoke the procedures set forth in Article XIV(d) of the INTELSAT Agreement to veto the development of separate international satellite systems linking the United States and Europe.

34 *See Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046 (1985) ("*Separate Systems Order*"), *modified on recon.*, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon. denied*, 1 FCC Rcd 439 (1986). Until 1996, to protect INTELSAT against significant economic harm, the FCC prohibited these separate international systems interconnecting directly with the Public Switched Telephone Network (PSTN) to provide standard international voice telephony service. *Compare id.* (imposing PSTN restriction) *with Permissible Services of U.S.-Licensed International Communications Satellite Systems Separate From INTELSAT*, 7 FCC Rcd. 2313 (1992) (sunsetting the PSTN restriction effective January 1, 1997). *See also In re COMSAT Corp. Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd.

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Corporation ("PanAmSat") launched the PAS-1 Atlantic Ocean Region satellite, the first U.S. private-sector satellite to provide international satellite services.[35] By 1999, more than 200 commercial geosynchronous satellites were in orbit above the earth, of which approximately 73 served the United States.[36] Of these, only 17 satellites belonged to INTELSAT, of which just 13 served the United States.[37]

At the same time, INTELSAT also began to face substantial intermodal competition in the market for international communications transmission capacity. In 1988, AT&T Corp. completed the world's first transoceanic fiber-optic cable.[38] Called TAT-8, the cable snaked more than 3,000 miles along the Atlantic floor from New Jersey to Great Britain.[39] Its two fibers, running through a cable as narrow as a man's wrist, could carry nearly 40,000 phone conversations at once, five times the capacity of the best undersea copper cables and comparable to all the trans-Atlantic voice traffic then handled by satellites.[40] The first trans-Pacific fiber-optic cable entered service in 1991.[41] During the 1990s, the entire world witnessed a proliferation of high-capacity transoceanic submarine fiber optic cables that are capable of delivering many of the same services that satellites can deliver, often at lower cost.[42] In fact, since the early 1990s, fiber-optic

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14083, ¶ 59 (1998) (noting that the PTSN restrictions did, in fact, sunset on January 1, 1997), *modified on recon*., 14 FCC Rcd. 3065 (1999).

35 *See* PanAmSat History Web Page, <http://www.panamsat.com/comp/ history.htm>. In 1996, PanAmSat was acquired by the Hughes Electronics Corporation, which is itself 81%-owned by the General Motors Corporation. *Id.* Today, Hughes/PanAmSat operates a fleet of 23 geosynchronous satellites—the same number as the privatized Intelsat. *Compare* PanAmSat Satellites Web Page, <http://www.panamsat.com/global_network/satellites.asp> (listing 23 operational satellites currently in orbit) *with* Intelsat Satellites Web Page, <http://www.intelsat.com/satellites/satellites_coveragemaps.asp> (same). On November 12, 2001, the Luxembourg-based company SES Global surpassed both Intelsat and PanAmSat and obtained the world's largest fleet when it purchased 12 operational geosynchronous satellites from General Electric for $4.3 billion dollars. Cynthia Boeke, *Via Satellite's Satellite Executive of the Year*, Mar. 1, 2002, Via Satellite, 2002 WL 8985450. The SES Global fleet now comprises 29 functioning satellites, with an additional 14 satellites under construction or on order. *Id. See also* SES Americom Web Page, <http://www.ses-americom.com/media/ sat_names_old.html>.

36 *See Phillips Satellite Industry Directory*, at 17-234, 279-413 (21st ed. 1999) (setting forth complete information about each of these satellites and their operators).

37 *See In re Availability of INTELSAT Space Segment Capacity To Users and Service Providers Seeking To Access INTELSAT Directly*, 15 FCC Rcd. 19160, ¶¶ 2, 5 (2000).

38 Neil King Jr., *Deep Secrets: As Technology Evolves, Spy Agency Struggles To Preserve Its Hearing*, May 23, 2001, Wall St. J., at A1.

39 *Id.*

40 *Id.*

41 *Id.*

42 In 1997, for example, the 17,000-mile-long "Flag Telecom" cable connected Europe with North Africa, the Middle East, Southeast Asia, and Japan. *Id. See generally In re COMSAT*

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cable systems have carried more traffic for U.S.-international switched voice and private line than satellite systems have.[43]

During the 1990s, the international telecommunications market began, for the first time, to experience vigorous competition. Not surprisingly, the special legal status of INTELSAT and its Signatories irritated many of INTELSAT's new private competitors. As an intergovernmental treaty organization, for example, INTELSAT was immune from paying taxes to any national government.[44] INTELSAT (and its Signatories) also enjoyed three categories of legal immunities not enjoyed by private satellite operators: "immunity from jurisdiction, which prevents courts from considering lawsuits of any type against INTELSAT; archival and testimonial immunity, which protects INTELSAT from being compelled to provide documents or testimony of its employees; and immunity of assets, which prevents courts from enforcing monetary judgments against INTELSAT."[45]

Corp. Reclassification as a Non-Dominant Carrier, 13 FCC Rcd. 14083, ¶¶ 11, 19, 32-39 (1998) ("*COMSAT Non-Dominant Order*"), *modified on recon*., 14 FCC Rcd. 3065 (1999) (characterizing satellites and submarine cables as fungible commodities serving the markets for switched voice, private line, and video services, and noting that cables compete effectively against INTELSAT satellites on every major international telecommunications route to or from the United States); *see also Changes in International Satellite Policy: Hearing Before the Subcomm. on Communications of the Sen. Committee on Commerce, Science and Transportation*, 1999 WL 170205 (March 25, 1999) (Testimony of INTELSAT Director General Conny Kullman) (providing detailed information about various submarine cable and separate satellite systems).

[43] *See COMSAT Non-Dominant Order*, 13 FCC Rcd. 14083, ¶ 56 (1998) ("Excluding traffic carried to Mexico and Canada over terrestrial networks, markets COMSAT does not serve, fiber-optic cable systems carried three times as much switched voice traffic and six times as much private line traffic than satellite networks in 1996."); *see also id.* ¶ 76 ("Intermodal competition leads us to believe that fiber-optic cables represent a substitute for satellites in the transmission of switched voice service.").

[44] *See* INTELSAT Agreement, done Aug. 20, 1971, 23 U.S.T. 3813, Art. XV(b) ("Within the scope of activities authorized by this Agreement, INTELSAT and its property shall be exempt in all States Party to this Agreement from all national income and direct national property taxation and from customs duties on communications satellites and components and parts for such satellites to be launched for use in the global system.").

[45] *In re INTELSAT L.L.C.*, 15 FCC Rcd. 15460, ¶ 7 & n.13 (2000), *recon. denied*, 15 FCC Rcd. 25234 (2000) (citing *Comsat Non-Dominant Order*, 13 FCC Rcd 14083, 14161-63 (1998) and *Amendment of the Commission's Regulatory Policies to Allow Non- U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, 12 FCC Rcd. 24094, 24149 (1997) ("*DISCO II Order*"), *recon. denied*, 15 FCC Rcd. 7207 (1999), *corrected by*, 15 FCC Rcd. 5042 (2000)). *See also* International Telecommunications Satellite Organization Headquarters Agreement, entered into force Nov. 24, 1976, 28 U.S.T. 2248, TIAS 8542 ("INTELSAT Headquarters Agreement") (providing that INTELSAT and the representatives of the parties and of the Signatories shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions, except as such immunity is waived by INTELSAT).

Some critics alleged that but for these immunities, INTELSAT's relationship with its Signatories would violate U.S. antitrust laws.[46] Others alleged that INTELSAT's unique "treaty status help[ed] ensure its access to the national markets of member countries"[47]—a valuable asset that INTELSAT's private competitors sometimes experienced difficulty in obtaining.[48]

In 1997, Rep. Thomas Bliley gave effect to such criticism by introducing in the 105th Congress a bill "to amend the Communications Satellite Act of 1962 to promote competition and privatization in satellite communications, and for other purposes."[49] The bill, which was supported by many of INTELSAT's competitors but opposed by INTELSAT, forthrightly sought "to eliminate the provision of commercial satellite communications by intergovernmental organizations . . . [and] to ensure that the

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[46] In *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 946 F.2d 168 (2d Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992), a putative competitor alleged that COMSAT and INTELSAT had violated antitrust law by allegedly boycotting competing satellite systems, delaying mandatory Article XIV(d) consultations, pricing satellite telecommunications services without regard to cost (*i.e.* on a nondiscriminatory basis), and purchasing excess satellite capacity. 946 F.2d at 172-73. Dismissing the case on the ground that INTELSAT and COMSAT were immune, the court opined: "Having created COMSAT to wield monopoly power, along with the other participants in a global satellite system, Congress did not expect that corporation to face antitrust liability in deciding, as a member of INTELSAT, whether and to what extent to permit competition." *Id.* at 174; *see also id.* at 175 ("[T]he mere doing of what [COMSAT is] permitted to do under this bill is not itself going to result in an offense against the Sherman Act.") (quoting *Antitrust Problems of the Space Satellite Communication System: Hearings Before The Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 87th Cong., 2d Sess. 58 (1962) (testimony of Asst. Atty. Gen. Katzenbach)) (brackets in original).

[47] *In re INTELSAT L.L.C.*, 15 FCC Rcd. 15460, ¶ 7 (2000), *recon. denied*, 15 FCC Rcd. 25234 (2000).

[48] *See, e.g.*, *Comsat Non-Dominant Order*, 13 FCC Rcd 14083, ¶ 51 (1998) (acknowledging complaints that private international telecommunications carriers faced barriers to foreign market entry, including: "not receiving authority to transmit and receive from an earth station within a country (sometimes referred to as landing rights); limitations on obtaining operating agreements from certain foreign governments; bottlenecks to interconnecting to the public switched telephone network in foreign markets; and unreasonable access charges, licensing fees, or other taxes imposed by foreign governments on the use of domestic facilities."); *id.* ¶ 52 ("in some cases, INTELSAT Signatories are the spectrum licensing authorities and monopoly providers of satellite services in their home markets, so they have an incentive to minimize the spectrum licenses that they issue to independent satellite systems seeking to compete in their markets."). *Accord* 145 Cong. Rec. H11933 (Nov. 10, 1999) (statement of Rep. Tauzin) ("Today, the owners of [INTELSAT] are often the same folks that control licensing decisions and foreign market access. Thus, they have the ability and the incentive to make it hard for U.S. satellite companies to enter and to compete in their national telecom markets.").

[49] H.R. 1872, 105th Cong, *introduced in* 143 Cong. Rec. H3796 (June 12, 1997).

privatized [successor] entities be independent of [INTELSAT's] 'signatories.'"[50] Rep. Bliley claimed that the elimination of INTELSAT would introduce "a level playing field for all competitors" in the satellite telecommunications marketplace, which "in turn would bring consumers lower prices, higher service quality, improved efficiency, innovative new products, and more choice."[51] For this reason, the bill would have privatized INTELSAT by requiring it to divest all of its foreign government ownership, and to sell its satellites and other assets to private stockholder-owned corporations.[52]

B. Calls From Within.

While Rep. Bliley and others alleged that INTELSAT's intergovernmental attributes provided unfair competitive advantages, "INTELSAT management and many Signatories [asserted] that these very same intergovernmental attributes [were actually] a handicap (particularly in getting Signatories to make the necessary capital investment commitments) in a dynamic and increasingly competitive global market."[53] Testifying before Congress in 1998, INTELSAT's Director General argued that:

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[50] House of Representatives Report on the Communications Satellite Competition and Privatization Act of 1998, H. Rep. No. 105-494, at 12 (1998).

[51] House of Representatives Report on the Communications Satellite Competition and Privatization Act of 1998, H. Rep. No. 105-494, at 12 (1998).

[52] *See* H.R. 1872, 105th Cong, § 102 (introducing proposed new Satellite Acts §§ 601-02, 621-22, which set forth these requirements).

[53] *Changes in International Satellite Policy: Hearing Before the Subcomm. on Communications of the Sen. Commerce Committee* (Mar. 25, 1999) (statement of John Sponyoe, CEO, Lockheed Martin Global Telecommunications), 1999 WL 194674; *see also id.* ("whatever perceived advantages INTELSAT may or may not have in its current incarnation, these advantages are certainly not reflected in its steadily decreasing market share. . . . Indeed, INTELSAT's current position in the US-international market vis-à-vis other satellite and terrestrial competitors is so far from anything that could be accurately termed 'dominant' that I have to wonder whether its current structure might not pose a greater threat to itself than to its competitors.").

Six months before the CEO of Lockheed Martin Global Telecommunications (LMGT) delivered this testimony, LMGT had entered into an agreement to purchase 100 percent of the outstanding stock ownership of COMSAT (INTELSAT's U.S. Signatory), pending receipt of regulatory approvals that needed to be obtained at two separate stages of the transaction. *See In re Lockheed Martin Corp., Regulus, LLC, & COMSAT Corp.*, 14 FCC Rcd. 15816, at ¶¶ 1-3 (1999) (describing proposed transaction), *vacated in part in other respects*, *PanAmSat Corp. v. FCC*, Nos. 99-1384, 99-1385, 2000 WL 621421 (D.C. Cir. Apr 20, 2000) (unpublished per curiam slip op.). In September 1999, the FCC approved the first phase of the merger, allowing LMGT to obtain a 49% ownership interest in COMSAT. *See id.* ¶¶ 53-56. In March 2000, Congress repealed a provision of the 1962 Satellite Act that had formerly prohibited any single entity from owning a majority interest in COMSAT. *See* ORBIT Act § 645(1), Pub. L. No. 106-180 § 645(1), 114 Stat. 48, 56 (2000), *codified at* 47 U.S.C. § 765d(1) (repealing former Section 304 of the Satellite Act, 47 U.S.C. § 734(b)). On July 31, 2000, the FCC authorized LMGT to acquire all remaining shares of COMSAT stock. *In re Lockheed Martin Corp., Comsat*

(continued. . . . .)

> INTELSAT faces intense competition, but is constrained in how it may react to that competition. For example, unlike its competitors, INTELSAT must provide connectivity to every point on the globe - even remote areas not served by others. In addition, our charter mandates non-discriminatory access and pricing. INTELSAT's charter also mandates a decision-making process characterized by consensus. This is a deliberative process that, depending on the issue, involves multilateral negotiations among our 143 Parties and Signatories. Obviously, such a process takes time. In addition, INTELSAT is limited to providing space segment only; we cannot provide vertically integrated solutions that deliver services directly to end users.[54]

In 1998, Rep. Bliley's bill passed the House of Representatives by a large majority.[55] The bill was not taken up by the Senate during the 105th Congress, however, and thus failed to be enacted as law.[56] Nonetheless, under pressure both from within and

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Government Systems, LLC, and Comsat Corp., Applications for Transfer of Control of Comsat Corp., Order and Authorization, 15 FCC Rcd. 22910 (2000), *corrected*, 15 FCC Rcd. 23506 (2000), *recon. denied*, 17 FCC Rcd. 13160 (2002). LMGT and COMSAT then consummated this acquisition on August 3, 2000. *In re Lockheed Martin Corp., Comsat Government Systems, LLC, and Comsat Corp., Applications for Transfer of Control of Comsat Corp., Order on Recon.*, 17 FCC Rcd. 13160, ¶ 4 n.5 (2002) (citing Letter to the FCC from Raymond G. Bender, Jr., Counsel for Comsat Corp., dated August 21, 2000).

In 2002, LMGT decided to cease providing international telecommunications services, and to seek FCC permission to assign to the now-privatized Intelsat the bulk of the licensed facilities and authorizations that LMGT acquired from COMSAT in 2000. *See Lockheed Martin/COMSAT and Intelsat Seek FCC Consent to Assign Licenses and Section 214 Authorizations*, *Public Notice*, 17 FCC Rcd. 7358 (2002). Whether or not LMGT's transfer application is approved, LMGT's parent corporation Lockheed Martin would continue to hold a 24% ownership interest in Intelsat. *See* Application of Lockheed Martin, COMSAT Corp.,& Intelsat Ltd. For Consent to Assignment of Earth Station Licenses and Section 214 Authorizations, *filed in* FCC IB Docket No. 02-87, at 9 (filed April 5, 2002).

[54] *International Satellite Issues: Hearing Before the Subcomm. on Communications of the Sen. Commerce Committee*, (Sept. 10, 1998) (statement of Conny Kullman, Director General and CEO-Designate INTELSAT), 1998 WL 778936; *see also id.* (characterizing INTELSAT "not as a privileged player in the global telecommunications market but as a somewhat handicapped player."); *accord In re INTELSAT LLC, Mem. Op. Order and Authorization*, 15 FCC Rcd. 15460, ¶ 24 (2000) (same), *recon. denied*, 15 FCC Rcd. 25234 (2000).

[55] The recorded vote was 403-16, with 2 absences. H.R. 1872, 105th Cong., H.R. Roll No. 129 (May 6, 1998), <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1998&rollnumber=129>.

[56] Rep. Bliley reintroduced substantially the same bill in the 106th Congress. *See* H.R. 3261, 106th Cong. (introduced Nov. 9, 1999), *reprinted in* 145 Cong. Rec. H11929-11933 (Nov. 10, 1999). The Senate's version of this bill (S. 376, 106th Cong.), which differed in some

(continued. . . . .)

from without, the Twenty-Fourth INTELSAT Assembly of Parties in 1999 resolved to transform INTELSAT from a public intergovernmental treaty organization into an ordinary private corporation providing international telecommunications services.[57] Within INTELSAT, the United States played a leading role in championing this resolution.[58] Shortly thereafter, the INTELSAT Board of Governors identified seven reasons why the existing IGO structure of INTELSAT was not viable in the medium term: (1) the prices for services were not flexible and responsive to the market because of the cumbersome nature of INTELSAT's organizational structure; (2) the existing unlimited liability of INTELSAT's owners to the IGO rendered commercial decisions conservative and unresponsive; (3) INTELSAT's governance procedure was slow and open to scrutiny by competitors; (4) access to public equity markets for capital was restricted; (5) investment in INTELSAT was linked to usage; (6) it was difficult for INTELSAT to leverage its intellectual property assets; and (7) distribution channels for INTELSAT were determined by governments.[59]

At the same time, and also with the support of the United States,[60] the Twenty-Fourth Assembly of Parties resolved that any such restructuring must preserve INTELSAT's core principles, which included "maintaining global connectivity and

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respects from Rep. Bliley's House version, was ultimately enacted as the ORBIT Act of 2000, Pub. L. No. 106-180, 114 Stat. 48 (2000). *See* Subpart III.A, *infra* (discussing ORBIT Act).

[57] *See In re INTELSAT LLC, Mem. Op. Order and Authorization*, 15 FCC Rcd. 15460, ¶ 8 & n.14 (2000) ("In response to competition, and the desire of governments to promote a more level playing field, INTELSAT and investing Signatories decided to restructure as a private commercial entity.") (citing 1999 INTELSAT Assembly of Parties Decision, AP 24-24-3E Final), *recon. denied*, 15 FCC Rcd. 25234 (2000). Under its 1999 resolution, the Assembly of Parties proposed to take final decisions on all significant aspects of the privatization by November 2000, after which the Board of Governors would implement the privatization. *Id.*

[58] *See Changes in International Satellite Policy: Hearing Before the Subcomm. on Communications of the Sen. Commerce Committee* (Mar. 25, 1999) (statement of Ambassador Vonya B. McCann, United States Coordinator for International Communications and Information Policy), 1999 WL 166941 ("The Administration, in partnership with the Congress, has worked tirelessly for more than five years to bring about the restructuring and privatization of . . . INTELSAT. . . . These efforts have borne fruit. . . . [D]iscussions within the INTELSAT Board of Governors on privatization are progressing favorably. The United States will continue to play a leadership role within the international community, to get a pro-competitive transition plan and an aggressive timetable for full privatization of INTELSAT.").

[59] *See* New Zealand House of Representatives Comm. on Foreign Affairs, Defence and Trade, Report on International Treaty Examination of the Amendments to the Agreement Relating to the International Telecommunications Satellite Organisation, at 2-3 (2001), <www.clerk.parliament.govt.nz/content/578/fdintelsat.pdf> (listing these reasons).

[60] *In re INTELSAT LLC, Mem. Op. Order and Authorization*, 15 FCC Rcd. 15460, ¶ 25 & n.96 (2000) ("The United States supported the 1999 Assembly decision that INTELSAT must continue to maintain global coverage and connectivities and ensure non-discriminatory access to the system.") (citing INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fourth Meeting, AP 24-3E Final August 10, 1999, at 8), *recon. denied*, 15 FCC Rcd. 25234 (2000).

coverage of the INTELSAT system, protecting lifeline users and connectivity, and ensuring continual non-discriminatory access to the global system."[61] It further determined "that lifeline users and connectivity must be protected through the creation of a residual intergovernmental organization that would ensure such connectivity to countries satisfying certain criteria."[62] As envisioned by the Twenty-Fourth Assembly of Parties in 1999, the residual IGO:

> would neither function as a commercial provider of space segment capacity nor a Signatory, as this role would cease to exist. Rather, it would supervise the commitment of Intelsat LLC to provide satellite capacity to lifeline users for a predetermined number of years with price protection during the life of the commitment. This commitment would be contained in an intergovernmental agreement creating the IGO and implemented through a 'public services' agreement between the company and the residual IGO.[63]

The proposal to divide INTELSAT into two components—a private corporation and a residual IGO—reflected "the underlying agreement among INTELSAT Parties . . . [that] INTELSAT's satellites and other assets and personnel necessary to operate the satellites will be transferred to a private company that no longer has privileges and immunities and is subject to a national licensing authority, as long as that company assures continued services to lifeline users under the 'core principles.'"[64] In conformity with this understanding, the United States supported the retention, post-privatization, of a residual IGO charged with ensuring continued service to "lifeline users."[65]

Shortly thereafter, INTELSAT formed a new Delaware corporation called "Intelsat L.L.C." On January 18, 2000, the new "Intelsat L.L.C." applied to obtain U.S. FCC licenses to operate the 17 existing and 10 planned satellites then owned and

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61 *In re INTELSAT LLC, Mem. Op. Order and Authorization*, 15 FCC Rcd. 15460, ¶ 3 & n.3 (2000) (citing INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fourth Meeting, AP 24-3E Final Aug. 10, 1999), *recon. denied*, 15 FCC Rcd. 25234 (2000); *accord id.* ¶¶ 25-27.

62 *In re INTELSAT LLC, Mem. Op. Order and Authorization*, 15 FCC Rcd. 15460, ¶ 26 & n.99 (2000) (citing INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fourth Meeting, AP 24-3E Final, Aug. 10, 1999, at 8, 10-12), *recon. denied*, 15 FCC Rcd. 25234 (2000).

63 *In re INTELSAT LLC, Mem. Op. Order and Authorization*, 15 FCC Rcd. 15460, ¶ 26 (2000) (footnotes omitted), *recon. denied*, 15 FCC Rcd. 25234 (2000).

64 *In re INTELSAT LLC, Mem. Op. Order and Authorization*, 15 FCC Rcd. 15460, ¶ 26 (2000), *recon. denied*, 15 FCC Rcd. 25234 (2000).

65 *In re INTELSAT LLC, Mem. Op. Order and Authorization*, 15 FCC Rcd. 15460, ¶ 26 & n.102 (2000) (citing 1999 Assembly Decision, AP 24-3E Final, Aug. 10, 1999, at 2), *recon. denied*, 15 FCC Rcd. 25234 (2000).

operated by INTELSAT.[66] In its application, Intelsat L.L.C. requested that the new U.S. licenses should become effective on the date on when INTELSAT transferred its satellite and associated assets to Intelsat L.L.C. and its ITU network filings (*i.e.*, orbital slot registrations) to the U.S. registry.[67]

III. INTELSAT Privatization

A. ORBIT ACT

In light of the progress towards privatization already being made by the INTELSAT Assembly of Parties, the U.S. State Department and some legislators warned that unilateral U.S. legislation purporting to mandate INTELSAT privatization would now be unnecessary and potentially counterproductive.[68] Nonetheless, in March 2000, a skeptical Congress enacted the "Open-Market Reorganization for the Betterment of International Telecommunications Act" ("ORBIT Act")[69] in order to mandate "fully privatizing the intergovernmental satellite organizations, INTELSAT and Inmarsat."[70] The Senate Report that accompanied the ORBIT Act explained the perceived need for the legislation thusly:

> Extraordinary technological and market changes have reshaped the global satellite communications marketplace in the thirty-seven years since enactment of the Communications Satellite Act of 1962

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66 *See In re INTELSAT L.L.C.*, 15 FCC Rcd. 15460, ¶¶ 1, 8 n.15 (2000), *recon. denied*, 15 FCC Rcd. 28234 (2000). Because INTELSAT was an intergovernmental organization ("IGO"), its global satellite system had never before been licensed by any national licensing authority. *Id.* ¶ 2.

67 *See In re INTELSAT L.L.C.*, 15 FCC Rcd. 15460, ¶ 38 (2000), *recon. denied*, 15 FCC Rcd. 28234 (2000).

68 *See Changes in International Satellite Policy: Hearing Before the Subcomm. on Communications of the Sen. Commerce Committee* (Mar. 25, 1999) (statement of Ambassador Vonya B. McCann, United States Coordinator for International Communications and Information Policy), 1999 WL 166941 ("the Administration does not believe any legislation is necessary to ensure that the privatization of INTELSAT . . . does not harm competition in the U.S. market . . . The Federal Communications Commission (FCC) and the Antitrust Division of the Department of Justice have ample authority to protect U.S. interests, and the Administration has been aggressive in ensuring that plans to restructure and privatize [INTELSAT] are pro-competitive."); *see also* 145 Cong. Rec. H11936 (Nov. 10, 1999) (statement of Rep. Dingell) ("Intelsat should be privatized as quickly as possible. Unfortunately, the U.S. cannot, by legislative fiat, simply impose its will on 143 foreign countries who are signatories to the Intelsat treaty. I believe the Bliley bill, as currently constructed, would actually undermine American diplomatic efforts currently underway to secure an Intelsat privatization.").

69 Pub. L. No. 106-180, 114 Stat. 48 (2000), *codified at* 47 U.S.C. §§ 761-69.

70 ORBIT Act § 2, Pub. L. No. 106-180 § 2, 114 Stat. 48 (2000), *codified at* 47 U.S.C. § 761 note.

> and the creation of COMSAT and INTELSAT. Where once only a treaty-based intergovernmental satellite system would be willing to undertake the enormous financial risks associated with developing, launching, and maintaining a global satellite system, there are now multiple commercial satellite systems providing an array of international telecommunications services in this increasingly competitive marketplace. However, in this mature, competitive satellite services environment, it is no longer appropriate for any single competitor to be advantaged by an intergovernmental structure accompanied by certain privileges and immunities; rather it must be transformed into a commercial structure comparable to that of any of the existing commercial satellite entities.[71]

To ensure that INTELSAT's restructuring was not merely cosmetic, the ORBIT Act set forth several criteria that INTELSAT was required to meet to demonstrate that it had achieved a "pro-competitive privatization."[72] First, ORBIT specified that any privatized successor of INTELSAT must be organized as an ordinary shareholder-owned corporation or other similarly accepted commercial organization under the laws of a single nation.[73] In response to the Assembly of Parties' decision to retain a residual IGO after privatization, ORBIT barred the residual IGO from owning even a scintilla of equity in the commercial successor corporation.[74] In addition, although the successor corporation would necessarily be owned by INTELSAT's Signatories at the moment of privatization, ORBIT mandated the substantial dilution of Signatory ownership through an initial public offering to take place shortly thereafter.[75]

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[71] Report of the Sen. Committee on Commerce, Science, and Transportation on the ORBIT Act, S. Rep. No. 106-100, at 1 (1999); *see also* 145 Cong. Rec. H11934 (Nov. 10, 1999) (statement of Rep. Markey) ("Back in 1962 . . . it took national efforts to build, to launch and to maintain satellites in orbit. But much has changed in the last 35 years, since President Kennedy signed the original COMSAT bill into law, since INTELSAT and subsequently Inmarsat were made a part of the international telecommunications infrastructure. Today, we have private individuals with their own money willing to build and to launch satellites into space. . . . [T]hat 1962 model . . . is counterproductive to American interests today. It is time to update the INTELSAT and Inmarsat law, two international governmental organizations who are not going to compete against U.S. satellite companies on even ground, or even space, to put it more accurately, simply because we ask them to do so politely.").

[72] ORBIT Act § 621, 47 U.S.C. § 763.

[73] ORBIT Act § 621(5), 47 U.S.C. § 763(5).

[74] ORBIT Act § 621(2), 47 U.S.C. § 763(2). The ORBIT Act further required any future transactions or other relationships between a residual INTELSAT IGO and a private successor entity to " be conducted on an arm's length basis." ORBIT Act § 621(5)(E), 47 U.S.C. § 763(5)(E).

[75] ORBIT Act § 621(2), 47 U.S.C. § 763(2). In 2000, 80 INTELSAT Signatories were agencies of foreign governments. *In re INTELSAT L.L.C.*, 15 FCC Rcd. 15460, ¶ 44 (2000), *recon. denied*, 15 FCC Rcd. 28234 (2000). These 80 foreign government-owned Signatories

(continued. . . . .)

The ORBIT Act also prohibited any privatized successor of INTELSAT from retaining any of the legal privileges or immunities from liability or regulation that INTELSAT, as an intergovernmental organization (IGO), had enjoyed.[76] Relatedly, ORBIT proclaimed that any privatized successor of INTELSAT would need to procure future orbital slot registrations and international frequency assignments from the national licensing administration of a government that subscribed to the World Trade Organization Basic Telecommunications Services Agreement, rather than through international legal channels.[77] Moreover, a privatized INTELSAT successor was not to receive preferential treatment in the assignment of orbital locations from any national licensing administration.[78] Finally, ORBIT required INTELSAT to put an end to the "consultation" process, under which applicants from INTELSAT member nations had not been permitted to launch new separate international satellite systems without first obtaining INTELSAT's certification that the new facilities would be technically compatible with INTELSAT.[79]

While ORBIT did not directly abrogate the 1971 INTELSAT Agreement, its enactment did exert substantial pressure on INTELSAT to privatize in conformity with

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collectively owned approximately 30 percent of INTELSAT's total equity. *Id.* The remaining 70 percent of INTELSAT's equity was owned by 63 private Signatories, including COMSAT. *Id.* Although ORBIT § 621(2) applied to all INTELSAT Signatories, its primary purpose was to dilute foreign government ownership of the private successor corporation.

[76] ORBIT Act § 621(3), 47 U.S.C. § 763(3).

[77] ORBIT Act § 621(6)-(7), 47 U.S.C. § 763(6)-(7). The FCC, for example, is such a national licensing administration. These provisions were significant because orbital slot registrations must be obtained from the International Telecommunications Union (ITU), a specialized agency of the United Nations that deals only with national governments. Historically, as a ministerial matter, INTELSAT's ITU applications for orbital slots were filed by the United States on behalf of INTELSAT. *See In re INTELSAT L.L.C.*, 15 FCC Rcd. 15460, ¶ 12 (2000), *recon. denied*, 15 FCC Rcd. 28234 (2000). However, the ITU always distinguished INTELSAT applications from other United States applications. Orbital slots earmarked for INTELSAT were shown in the ITU listing of network filings as "USA-IT" registrations, and non-INTELSAT U.S.-licensed satellites were precluded from using those orbital slots. *Id.* Orbital slots allocated to U.S.-licensed satellites, in contrast, were recorded as "USA" registrations, and could be used by any U.S. licensee designated by the FCC. *Id.*

[78] ORBIT Act § 621(3)(C), 47 U.S.C. § 763(3)(C).

[79] *See* ORBIT Act § 622, 47 U.S.C. § 763a ("Technical coordination shall not be used to impair competition or competitors, and shall be conducted under International Telecommunication Union procedures and not under Article XIV(d) of the INTELSAT Agreement."); *accord* ORBIT § 644, 47 U.S.C. § 765c ("The Commission and United States satellite companies shall utilize the International Telecommunication Union procedures for technical coordination with INTELSAT and its successor entities and separated entities, rather than INTELSAT procedures."). *Cf.* note [25], *supra* (discussing INTELSAT Art. XIV(d) consultation process).

ORBIT's "pro-competitive" criteria. As ORBIT's Senate sponsor declared, the Act "provide[d] new incentives for INTELSAT's privatization, while at the same time, carr[ying] tough consequences if INTELSAT fail[ed] to achieve this important objective."[80] Perhaps the most attractive incentive set forth in ORBIT was the automatic repeal, upon privatization, of a host of unique regulatory burdens to which INTELSAT and its U.S. Signatory, COMSAT, had long been subject under the 1962 Satellite Act.[81] In particular, ORBIT promised to lift a longstanding prohibition that had prevented INTELSAT from providing domestic communications services (including DBS television service) within the United States.[82]

On balance, however, the ORBIT Act relied more heavily on sticks than on carrots to achieve its ends. Effective on its date of enactment, ORBIT prohibited any further expansion of INTELSAT's U.S.-international service offerings or facilities until all of the Act's "pro-competitive privatization" criteria had been satisfied.[83] In addition, ORBIT set forth dates certain by which INTELSAT was directed to satisfy each of these privatization criteria.[84] If INTELSAT failed to meet these deadlines, ORBIT threatened to cut off the U.S. market for all of INTELSAT's existing services except for certain "core" international public-switched telephone network (PSTN) voice telephony and occasional-use television services.[85] By enacting these provisions, Congress undoubtedly hoped that the INTELSAT Assembly of Parties would keep these potential "tough consequences" in mind as it determined the shape of INTELSAT privatization.[86]

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80 145 Cong. Rec. S8052 (daily ed. July 1, 1999) (statement of Sen. Burns).

81 ORBIT Act §§ 645(2), (4), 47 U.S.C. §§ 765d(2), (4). *Cf.* 146 Cong. Rec. H905 (daily ed. Mar. 9, 2000) (statement of Rep. Tauzin) ("This compromise legislation unshackles COMSAT from the antiquated regulatory burdens that have to date hampered its success.").

82 *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, 12 FCC Rcd. 24094, ¶¶ 125-127 (1997) ("*DISCO II Order*") (INTELSAT satellites may not be used to serve U.S. domestic service market unless and until such market entry can be shown to promote competition and otherwise serve the public interest), *recon. denied*, 15 FCC Rcd. 7207 (1999), *corrected by*, 15 FCC Rcd. 5042 (2000).

83 ORBIT Act §§ 602, 621(4), 47 U.S.C. §§ 761a, 763(4).

84 *See* ORBIT Act § 621(1), 47 U.S.C. § 763(1) (setting forth deadlines for satisfying initial privatization criteria); *see also id.* § 621(5), 47 U.S.C. § 763(5) (setting forth subsequent deadlines for conducting initial public stock offerings).

85 ORBIT Act §§ 601(b), 621(1), 681(a)(11), 47 U.S.C. §§ 761(b), 763(1), § 769(a)(11). The Act contained an exception that would have allowed INTELSAT to continue existing service to United States government agencies who utilized INTELSAT service to protect the health and safety of the public. ORBIT § 601(b)(1)(C), 47 U.S.C. § 761(b)(1)(C). Another exception would also have enabled the FCC, under certain circumstances, to allow INTELSAT to continue existing service to U.S. customers who depended on the service and could not obtain comparable service elsewhere. ORBIT § 601(b)(3), 47 U.S.C. § 761(b)(3).

86 *See, e.g.*, 146 Cong. Rec. H906 (daily ed. Mar. 9, 2000) (statement of Rep. Pallone) ("[I]f INTELSAT thumbs its nose at the standards set forth in this bill for a pro-competitive

(continued. . . . .)

B. 25th Assembly of Parties (Nov 2000) Treaty Amendments

On August 8, 2000, the FCC conditionally granted the license applications that Intelsat L.L.C. had filed in January 2000, and thereby committed in principle to granting U.S. licenses to INTELSAT's commercial successor entity "Intelsat L.L.C." for the 17 existing and 10 planned INTELSAT satellites.[87] Intelsat L.L.C.'s new FCC licenses were to take effect "upon INTELSAT's transfer of the satellites and assets necessary to operate the satellites on the effective date of privatization."[88] Moreover, the August 8, 2000 *Intelsat L.L.C. Licensing Order* directed Intelsat L.L.C. "to supplement its application following the November 2000 Assembly of Parties decision to provide the details of INTELSAT's privatization as reflected in the Assembly decision."[89] The following month, the INTELSAT Board of Governors formally recommended that the Assembly of Parties accept the FCC licenses and select the United States to receive and license INTELSAT's orbital registrations upon privatization, based under the terms of the *Intelsat L.L.C. Licensing Order*.[90]

On November 13-17, 2000, the Twenty-Fifth INTELSAT Assembly of Parties unanimously "confirmed the decision of a 1999 Assembly of Parties that INTELSAT should restructure, decided on the terms and conditions that would apply to the restructuring, and approved amendments to the INTELSAT Agreement necessary to effect the privatization."[91] The Twenty-Fifth Assembly of Parties set a target date of July

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privatization, its ability to offer services in the United States could be hindered dramatically. However, this leverage is necessary to ensure that INTELSAT truly privatizes, and to ensure that we finally have a level playing field in the satellite services market.").

87 *See In re INTELSAT L.L.C.*, 15 FCC Rcd. 15460 (2000) ("*Intelsat L.L.C. Licensing Order*"), *recon. denied*, 15 FCC Rcd. 28234 (2000).

88 *See Intelsat L.L.C. Licensing Order*, 15 FCC Rcd. 15460, ¶ 2 (2000), *recon. denied*, 15 FCC Rcd. 28234 (2000); *see also id.* ¶ 38 ("The licenses we grant today will become effective only upon privatization when the applicant is no longer owned and controlled by an intergovernmental organization. Operating authority would be conferred upon Intelsat LLC only upon the date on which INTELSAT transfers its satellite and associated assets to Intelsat LLC and its ITU network filings to the U.S. registry.").

89 *Intelsat L.L.C. Licensing Order*, 15 FCC Rcd. 15460, ¶ 38 (2000), *recon. denied*, 15 FCC Rcd. 28234 (2000).

90 *In re INTELSAT L.L.C.*, *Second Mem. Op. Order & Authorization*, 16 FCC Rcd. 12280, ¶ 8 (2001). The Board selected the United Kingdom as a backup jurisdiction for licensing INTELSAT's existing and planned satellites operating in the C-band and Ku-band "should the terms of the U.S. license approval be adversely affected prior to privatization." *Id.* The Board also selected the United Kingdom as the licensing jurisdiction for future satellites that may be constructed for operating in the Ka-band, V-band and BSS band. *Id.* ¶ 8 n.22.

91 *FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190 at 9 (June 15, 2001). On June 1, 2001, the United States acceded to the amendments to the INTELSAT Agreement approved at the Twenty-Fifth Assembly of Parties, and thereby became a

(continued. . . . .)

18, 2001 for the transfer of INTELSAT's satellite assets to its private commercial successor entity.[92] It also decided that the commercial successor entity would be structured as a group of affiliated national subsidiary corporations all owned by "Intelsat Ltd.," a holding company organized under the laws of Bermuda.[93] Finally, it decided that the U.S. FCC licenses authorizing the operation of INTELSAT's existing and planned satellites in the C-band and Ku-band would be held by a subsidiary called "Intelsat L.L.C.," a Delaware corporation whose operations would be based in INTELSAT's former headquarters building in Washington, DC.[94]

In addition to approving the rapid privatization of INTELSAT's commercial operations, the Twenty-Fifth INTELSAT Assembly of Parties also reaffirmed the Twenty-Fourth Assembly's decision to leave in place, for at least twelve years, a small residual intergovernmental organization (IGO) to monitor performance of the new private company's public service obligations.[95] The residual IGO would retain the name "International Telecommunications Satellite Organization," but be known by a new acronym, "ITSO."[96] This residual IGO would retain an Assembly of Parties and an executive organ, headed by the Director General, responsible to the Assembly of

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Party to the residual IGO, discussed *infra*, immediately upon privatization of INTELSAT. *See* United States Department of State, Office of Treaty Affairs, 2001 Treaty Actions Web Site (updated Jan. 8, 2002), <http://www.state.gov/s/l/5234.htm> (reporting Acceptance of the United States on June 1, 2001 of Amendments to the Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" done at Washington, D.C. on Nov. 13-17, 2000).

92 *In re INTELSAT L.L.C.*, *Second Mem. Op. Order & Authorization*, 16 FCC Rcd. 12280, ¶ 8 & nn.23-24 (2001) (citing INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fifth (Extraordinary) Meeting, AP-25-3E FINAL, W/11/00 ¶ 34 (Nov. 27, 2000)).

93 *In re INTELSAT L.L.C.*, *Second Mem. Op. Order & Authorization*, 16 FCC Rcd. 12280, ¶ 9 (2001); *see also id.* Attachment A (graphic displaying holding company structure of Intelsat Ltd. and its affiliated national corporations).

94 *In re INTELSAT L.L.C.*, *Second Mem. Op. Order & Authorization*, 16 FCC Rcd. 12280, ¶ 9 (2001). In contrast, the United Kingdom authorizations for ITU registrations for planned future satellites in the Ka-, BSS-, and V-bands were to be held directly by Intelsat Ltd., the Bermuda holding company. *Id.*

95 *In re INTELSAT L.L.C.*, *Second Mem. Op. Order & Authorization*, 16 FCC Rcd. 12280, ¶ 10 (2001). *See also* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Art. XXI, <http://www.itso.int/agreement.htm> ("ITSO Agreement") ("This Agreement shall be in effect for at least twelve years from the date of transfer of ITSO's space system to the [privatized] Company. The Assembly of Parties may terminate [ITSO] effective upon the twelfth anniversary of the date of transfer of ITSO's space system to the Company. . . .").

96 *FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190 at 10 (June 15, 2001); *accord In re INTELSAT L.L.C.*, *Second Mem. Op. Order & Authorization*, 16 FCC Rcd. 12280, ¶ 10 (2001).

Parties.[97] Because the residual IGO "ITSO" was to have no operational or commercial role in the privatized commercial entity Intelsat L.L.C.,[98] ITSO did not retain the Meeting of Signatories or Board of Governors that had overseen INTELSAT's commercial operations.[99] Rather, its mission was to be fulfilled through its execution and enforcement of a contractual "Public Services Agreement" with Intelsat L.L.C.[100]

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[97] *See* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Art. VIII, <http://www.itso.int/agreement.htm> ("ITSO Agreement"). In addition, the Twenty-Fifth Assembly created a new, quasi-judicial branch of the residual IGO: an eleven-member "Panel of Legal Experts," elected by the ITSO Assembly of Parties, to resolve disputes in connection with the treaty Agreement between two or more current or former Parties, or between ITSO and one or more current or former Parties. *See id.* Arts. IX(d)(xiv), XVI, Annex A, Art.3.

[98] *FCC Report to Congress as Required by Orbit Act*, FCC 02-170, 2002 WL 1332760, at 8 (Jun 14, 2002); *accord FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190, at 10 (June 15, 2001); *In re INTELSAT L.L.C.*, *Second Mem. Op. Order & Authorization*, 16 FCC Rcd. 12280, ¶ 10 (2001) (same).

[99] *See* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Art. VIII, <http://www.itso.int/agreement.htm> ("ITSO Agreement"). Upon privatization, INTELSAT's Signatories were divested of their special legal status and transformed into ordinary shareholders in the new private corporation. For this reason, in addition to deleting all reference to "Signatories" or "Governors" from the amended INTELSAT Agreement (*i.e.* the ITSO Agreement), the Twenty-Fifth Assembly of Parties also approved the decision of the Thirty-first Meeting of Signatories (Nov. 9-10, 2000) to terminate the INTELSAT Operating Agreement, 23 U.S.T. 4091, done Aug. 20, 1971, which had governed commercial relations between the Signatories. *See* Amendment To The Operating Agreement, Attachment No. 2 to AP-25-3E FINAL W/11/00 (Nov. 27, 2000) (amending Art. 23(c) of the INTELSAT Operating Agreement to provide for automatic termination of entire INTELSAT Operating Agreement "when amendments to the [INTELSAT] Agreement deleting references to the Operating Agreement enter into force. . . .," *i.e.*, upon privatization of INTELSAT's satellite system). On June 1, 2001, the United States approved the termination of the INTELSAT Operating Agreement. *See* United States Department of State, 2001 Treaty Actions Web Page (updated Jan. 8, 2002) <http://www.state.gov/s/l/5234.htm>. The termination of the INTELSAT Operating Agreement did not, however, relieve the former Signatories of any existing obligations or liabilities that had previously vested under the Agreement. *Cf.* INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fifth (Extraordinary) Meeting, AP-25-3E FINAL W/11/00, at 16 ¶ 22 (Nov. 27, 2000) ("the termination of the Operating Agreement, agreed to above, do not constitute: (a) a withdrawal of the Signatories; nor (b) a substitution by the Parties for their designated Signatory under Article XVI of the INTELSAT Agreement, nor do the Parties assume or intend to assume any responsibility for the past or future liabilities of INTELSAT or ITSO.").

[100] *FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190, at 10 & n.42 (June 15, 2001) (citing INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fifth (Extraordinary) Meeting, AP-25-3E FINAL W/11/00 ¶ 34, at 6-8 (Nov. 27, 2000); *accord In re INTELSAT L.L.C.*, *Second Mem. Op. Order & Authorization*, 16 FCC Rcd. 12280, ¶ 10 & n.33 (2001) (same). *See also* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Art. III(b),

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Under the INTELSAT Agreement as amended by the Twenty-Fifth Assembly (now the "ITSO Agreement"), ITSO is charged with ensuring that the privatized Intelsat L.L.C. will continue to adhere to three "core principles."[101]

First, ITSO must safeguard the "global connectivity and global coverage" of the privatized satellite system.[102] This duty requires ITSO to ensure that the satellite system of the privatized Intelsat L.L.C. maintains the technical capability to carry communications to and from virtually every populated land mass on earth.[103]

Second, ITSO must safeguard "non-discriminatory access to the [privatized] Company's system."[104] This duty requires ITSO to ensure that all users and prospective users enjoy "fair and equal opportunity to access the [privatized] Company's system,"[105]

<http://www.itso.int/agreement.htm> ("ITSO Agreement") (setting forth these "core principles").

[101] *FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190, at 10 & n.42 (June 15, 2001) (citing INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fifth (Extraordinary) Meeting, AP-25-3E FINAL W/11/00 ¶ 34, at 6-8 (Nov. 27, 2000); *accord In re INTELSAT L.L.C.*, *Second Mem. Op. Order & Authorization*, 16 FCC Rcd. 12280, ¶ 10 & n.33 (2001) (same). *See also* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Arts. III(b), IX(c) <http://www.itso.int/agreement.htm> ("ITSO Agreement") (setting forth these "core principles").

[102] *See* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Arts. III(b)(i), IX(c)(i) <http://www.itso.int/agreement.htm> ("ITSO Agreement").

[103] *See* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Art. I(n), <http://www.itso.int/agreement.htm> ("ITSO Agreement") ("'Global connectivity' means the interconnection capabilities available to the Company's customers through the global coverage the Company provides in order to make communication possible within and between the five International Telecommunication Union regions defined by the plenipotentiary conference of the ITU, held in Montreux in 1965."); *id.* Art. I(m) ("'Global coverage' means the maximum geographic coverage of the earth towards the northernmost and southernmost parallels visible from satellites deployed in geostationary orbital locations."). *See also* ITSO Public Services Agreement, AP-25-3E FINAL W/11/00 Attachment No. 3, Art. 2, § 2.01(i) (Nov. 27, 2000) (obligating Intelsat L.L.C. to "provid[e] the capability for any country or territory to connect with any other country or territory through the provision of capacity from at least one satellite in each of the three ocean regions: the Atlantic Ocean region (304.5 to 359 deg. E), the Indian Ocean region (60 to 66 deg. E), and the Pacific Ocean region (174 to 180 deg. E) such that these satellites together provide global coverage to all ITU regions.").

[104] *See* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Arts. III(b)(iii), IX(c)(iii) <http://www.itso.int/agreement.htm> ("ITSO Agreement").

[105] *See* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Art. I(o), <http://www.itso.int/agreement.htm> ("ITSO Agreement").

both for existing services and for "future public telecommunications services offered by the Company when space segment capacity is available on a commercial basis."[106] With respect to this duty, ITSO's Public Service Agreement with Intelsat L.L.C. emphasizes that "the provision of international public telecommunications services on a commercial basis, in a manner consistent with the Public Service Obligations, is not met if any country or territory which seeks or permits the services provided by the Intelsat system is denied full and complete access to all services provided by the Intelsat system on any ground other than a commercial basis."[107]

Finally, ITSO has a duty to ensure that the privatized Intelsat L.L.C. "serve[s] its lifeline connectivity customers."[108] Although the revised ITSO Agreement does not define the term "lifeline connectivity customers," the Twenty Fifth INTELSAT Assembly of Parties resolved that "Lifeline Connectivity Obligation" (LCO) protection must be extended to any country that satisfies at least one of five alternative eligibility criteria.[109]

First, under the "Income/Teledensity Eligibility" criterion, a country that is a Party to ITSO qualifies for LCO protection if it either (i) is "low income" as defined by the World Bank,[110] or (ii) possesses a teledensity of less than three as defined by the

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[106] *See* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Art. V, <http://www.itso.int/agreement.htm> ("ITSO Agreement").

[107] ITSO Public Services Agreement, AP-25-3E FINAL W/11/00 Attachment No. 3, Art. 2, § 2.01 (Nov. 27, 2000).

[108] *See* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Arts. III(b)(ii), IX(c)(ii) <http://www.itso.int/agreement.htm> ("ITSO Agreement").

[109] Model LCO Contract (Terms and Conditions of the Lifeline Connectivity Obligation), AP-25-3E FINAL W/11/00 Attachment No. 4, at 2-3 (Nov. 27, 2000). Although there are five distinct bases, discussed *infra*, by which a country may qualify for LCO Protection, Intelsat L.L.C.'s "lifeline connectivity customers" have often been collectively described as "those customers in poor or underserved countries that have a high degree of dependence on INTELSAT." *FCC Report to Congress as Required by Orbit Act*, FCC 02-170, 2002 WL 1332760, at 8 & n.40 (Jun 14, 2002) (citing INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fifth (Extraordinary) Meeting, AP-25-3E FINAL W/11/00 ¶ 34, at 6-8 (Nov. 27, 2000)); *FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190, at 10 & n.42 (June 15, 2001) (same); *accord In re INTELSAT L.L.C., Second Mem. Op. Order & Authorization*, 16 FCC Rcd. 12280, ¶ 10 & n.33 (2001) (same).

[110] Model LCO Contract (Terms and Conditions of the Lifeline Connectivity Obligation), AP-25-3E FINAL W/11/00 Attachment No. 4, at 2 ¶ 3(a) (Nov. 27, 2000). In 2000, the World Bank defined a country as "low income" if its Gross National Income Per Capita was less than $755. AP-25-3E FINAL W/11/00 Attachment No. 5 (Nov. 27, 2000). That same year, the world's mean Gross National Income Per Capita was $5,170. World Bank, *The Little Green Data Book From The World Development Indicators*, No. 24521, at 8 (April 2002), *available online at* <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2002/08/09//000094946_0207270405410/Rendered/PDF/multi0page.pdf>. Gross National

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ITU.[111] In November 2000, the Twenty-Fifth Assembly of Parties identified 69 member nations that qualified for LCO Protection based on "Income/Teledensity Eligibility."[112]

Second, until August 1, 2000, INTELSAT member countries that did not qualify for "Income/Teledensity Eligibility" were permitted to petition the Assembly of Parties for LCO Protection "on the basis that there [was] no cost effective alternative provider of a service equivalent to the service" then being provided by INTELSAT.[113] Those countries who had such petitions granted remain eligible for LCO Protection under the "Petition Eligibility" criterion.[114] In November 2000, the Twenty-Fifth Assembly of Parties identified 27 countries or locations that qualified as "Petition Eligible" for LCO Protection for all of their international traffic, plus 14 additional countries or locations that qualified as "Petition Eligible" for LCO Protection for certain international links.[115]

Third, a country not otherwise eligible for LCO protection can qualify for limited "Correspondent Eligibility" to obtain LCO service for communications to or from a country that is a lifeline customer.[116] Fourth, a country that has temporarily lost

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Income Per Capita is defined as "gross national income (formerly called gross national product or GNP) divided by midyear population." *Id.* at 237. "GNI per capita is stated in current US dollars, converted using the World Bank Atlas Method." *Id.* In 2000, nearly 2.5 billion of the world's 6.1 billion people lived in countries characterized by the World Bank as "low income." *Id.* at 8, 16.

[111] Model LCO Contract (Terms and Conditions of the Lifeline Connectivity Obligation), AP-25-3E FINAL W/11/00 Attachment No. 4, at 2 ¶ 3(a) (Nov. 27, 2000). "Teledensity" measures the number of telephone access lines per one hundred inhabitants. *International Settlement Rates*, 12 FCC Rcd. 19806, ¶ 164 (1997), *aff'd*, *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). The ITU has noted that "a level of teledensity less than one is generally a strong indication that a country's telecommunications infrastructure is severely underdeveloped." *Id.* ¶ 164 & n. 295 (citing ITU, Telecommunications Indicators for the Least Developed Countries, at 4 (1st ed. 1995)). In 2002, ITU figures showed that "83 countries have a teledensity of less than 10% [and] 29 countries have a teledensity of less than 1%." Opening Address of Director General Ahmed Toumi Before the 27th ITSO Assembly of Parties (June 26, 2002), <http://www.itso.int/meetings.htm>.

[112] *See* AP-25-3E FINAL W/11/00 Attachment No. 5, at 1-3 (Nov. 27, 2000) (setting forth complete list).

[113] Model LCO Contract (Terms and Conditions of the Lifeline Connectivity Obligation), AP-25-3E FINAL W/11/00 Attachment No. 4, at 2 ¶ 3(b) (Nov. 27, 2000).

[114] Model LCO Contract (Terms and Conditions of the Lifeline Connectivity Obligation), AP-25-3E FINAL W/11/00 Attachment No. 4, at 2 ¶ 3(b) (Nov. 27, 2000).

[115] *See* AP-25-3E FINAL W/11/00 Attachment No. 6, at 1-2 (Nov. 27, 2000) (setting forth complete lists).

[116] Model LCO Contract (Terms and Conditions of the Lifeline Connectivity Obligation), AP-25-3E FINAL W/11/00 Attachment No. 4, at 3 ¶ 3(c) (Nov. 27, 2000) ("Contract is eligible for LCO Protection if . . . [t]he Contract(s) are not eligible under (a) or (b), above, but, pursuant to an approved service order or lease service transmission plan for the Contract(s), as of the

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connectivity through every international channel except for the Intelsat system due to an emergency (*e.g.*, earthquake, war, etc.) may obtain temporary LCO protection under the "Emergency Eligibility" criterion.[117] Fifth, a new country created after July 18, 2001 is eligible to join ITSO and obtain LCO protection under the "New Country Eligibility" criterion if the new country also satisfies the "Income/Teledensity Eligibility" criterion.[118]

A country or territory that qualifies for LCO protection under any of these five criteria is entitled to enter into an LCO Commitment with ITSO and Intelsat Ltd. Under these commitments, ITSO must ensure that Intelsat L.L.C. will keep capacity available to lifeline users at fixed pre-privatization costs for approximately 12 years.[119] The lifeline users, in turn, need only commit to purchase capacity on a year-to-year basis.[120] After twelve years, ITSO's financing will expire, and the IGO will terminate unless the Parties vote to recharter it and to provide additional financing for its operations.[121]

In addition to executing and enforcing LCO Commitments with Intelsat L.L.C. with lifeline users, ITSO may also pursue its public service mission by "promoting the development of telecommunications services and competition as an important means of securing international public telecommunications services to all countries in the long term."[122] In this regard, ITSO hopes to play "an important role in encouraging the

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Closing Date, Customer is a correspondent to one or more other customer(s) that are eligible under (a) or (b) for LCO Protection which other customer(s) has signed an LCO Contract, with respect to that service.").

[117] Model LCO Contract (Terms and Conditions of the Lifeline Connectivity Obligation), AP-25-3E FINAL W/11/00 Attachment No. 4, at 3 ¶ 3(d) (Nov. 27, 2000). The term of LCO Protection under the "Emergency Eligibility" criterion is not normally permitted to exceed six months. *Id.*

[118] Model LCO Contract (Terms and Conditions of the Lifeline Connectivity Obligation), AP-25-3E FINAL W/11/00 Attachment No. 4, at 3 ¶ 3(e) (Nov. 27, 2000). In addition, the "New Country Eligibility" criterion for LCO Protection also applies to a new country located in the geographic territory of a former country that had previously qualified for "Petition Eligibility." *Id.*

[119] *FCC Report to Congress as Required by Orbit Act*, FCC 02-170, 2002 WL 1332760, at 8 (Jun 14, 2002); *accord FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190, at 10 (June 15, 2001).

[120] *FCC Report to Congress as Required by Orbit Act*, FCC 02-170, 2002 WL 1332760, at 8 (Jun 14, 2002); *accord FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190, at 10 (June 15, 2001).

[121] *See* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, Arts. VII, XXI <http://www.itso.int/agreement.htm> ("ITSO Agreement"). For the twelve year period from 2001-2013, ITSO's operations will paid for out of certain financial assets of the former INTELSAT that were retained by the treaty organization (now ITSO) upon privatization of the satellite system. *Id.* Art. VII(a).

[122] ITSO Mission & Role Web Page, <http://www.itso.int/mission.htm>.

creation of a favorable environment for commercial satellite communications, . . . both the individual State level, [and] at the multilateral level at the International Telecommunication Union (ITU), the World Trade Organization (WTO), and other multilateral fora."[123] Within these multilateral organizations, ITSO "will promote equitable access to orbital / spectrum resources, notably for commercial satellite systems committing to international public service."[124]

C. Privatization and Licensing (July 2001)

On July 18, 2001, at 7:59:59 PM EDT, INTELSAT transferred all of its satellite assets, and virtually all of its other financial assets and liabilities, into the corporate holding company structure approved in November 2000 by the Twenty-Fifth INTELSAT Assembly of Parties.[125] Pursuant to the amendments to the INTELSAT Agreement (and the termination of the INTELSAT Operating Agreement) that had been approved by the Twenty-Fifth INTELSAT Assembly of Parties, the intergovernmental "International Telecommunications Satellite Organization" was transformed immediately upon transfer from "a treaty-based Organization [INTELSAT] that at one time enjoyed a monopoly position in providing international satellite services, to a treaty-based Organization [ITSO] that ensures international satellite public services [without itself providing any such services]. . . ."[126] At the same time, pursuant to the FCC's *Intelsat L.L.C. Licensing Order* issued May 29, 2001,[127] the privatized operator of the global satellite system was immediately transformed from an unlicensed, immune international treaty organization with unique public service responsibilities, into an ordinary U.S. telecommunications carrier, subject to the pressures of the market and the burdens of national government regulation.

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123 ITSO Mission & Role Web Page, <http://www.itso.int/mission.htm>.

124 ITSO Mission & Role Web Page, <http://www.itso.int/mission.htm>. For an example of ITSO's promotional activity, s*ee, e.g.*, INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Sixth (Extraordinary) Meeting, AP-26-3E FINAL W/4/01, at 5-6 ¶ 13(b) (May 1, 2001) (13(b) (establishing a "Frequency Working Party (FWP)" to develop ITSO positions on "equitable procedures for the management of the radio frequency spectrum and orbital locations" to recommend to the ITU).

125 *FCC Report to Congress as Required by Orbit Act*, FCC 02-170, 2002 WL 1332760, at 2 (Jun 14, 2002). See also *id.* at __ and pages __, *supra* (both describing this corporate holding structure in detail). In total, the assets transferred to the new holding company, Intelsat Ltd., were valued at approximately $3.5 billion dollars. Intelsat Ltd. Fast Facts (July 2002), <http://www.intelsat.com/news/mediakit/downloads/fastfacts.pdf>. At the time of transfer, 86 percent of the equity in Intelsat Ltd. was owned by INTELSAT's former Signatories, with the remaining 14 percent being held by other investors. 146 Cong. Rec. S7439 (daily ed. July 26, 2002) (statement of Sen. Hollings).

126 ITSO "About Us" Web Page, <http://www.itso.int/aboutus.htm>.

127 *In re INTELSAT L.L.C.*, 16 FCC Rcd. 12280, ¶ 72 (2001).

Since privatizing on July 18, 2001, Intelsat Ltd. "has competed in the marketplace as a U.S.-licensed space station operator on the same footing as its competitors—*i.e.*, free from any privileges and immunities derived from its former status as an Intergovernmental Organization (IGO)."[128] During the same period, Intelsat Ltd.'s "shareholders have elected a fiduciary board [and] company officials have begun preparing for an initial public offering (IPO). . . ."[129] On April 26, 2002, Intelsat Ltd. filed its IPO registration statement with the United States Securities Exchange Commission.[130] On June 21, 2002, Intelsat Ltd. received clearance from the New York Stock Exchange to file a listing application to trade its ordinary shares on that exchange.[131] Moreover, even without yet having conducted an IPO, Intelsat Ltd.'s share of non-Signatory ownership increased from 14 percent to 22 percent during the period July 2001 to May 2002, largely in consequence of privatization of the state telecommunications agencies of several foreign governments that owned shares of INTELSAT.[132]

Because of its unique legacy, Intelsat L.L.C. remains subject to certain regulatory burdens that do not apply to other U.S.-licensed satellite operators. In particular, the ORBIT Act, as amended in 2002, mandates that the ownership share of INTELSAT's former Signatories in the new corporate holding company structure must be substantially diluted by December 31, 2003.[133] The ORBIT Act also prohibits INTELSAT's former

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128 *FCC Report to Congress as Required by Orbit Act*, FCC 02-170, 2002 WL 1332760, at 10 (Jun 14, 2002).

129 *FCC Report to Congress as Required by Orbit Act*, FCC 02-170, 2002 WL 1332760, at 10 (Jun 14, 2002).

130 146 Cong. Rec. S7439 (daily ed. July 26, 2002) (statement of Sen. Hollings).

131 146 Cong. Rec. S7439 (daily ed. July 26, 2002) (statement of Sen. Hollings).

132 146 Cong. Rec. S7439 (daily ed. July 26, 2002) (statement of Sen. Hollings).

133 As enacted in 2000, the ORBIT Act required Intelsat Ltd. to conduct an initial public offering of securities "on or about October 1, 2001, except that the [FCC] may extend this deadline [until Dec. 31, 2002] in consideration of market conditions and relevant business factors relating to the timing of an initial public offering. . . ." ORBIT Act § 621(5)(a)(i), 47 U.S.C. § 763(5)(a)(i). On October 5, 2001, the FCC exercised its authority under the ORBIT Act to extend Intelsat Ltd.'s IPO deadline until December 31, 2002. *See In re Intelsat L.L.C., Request for Extension of Time*, 16 FCC Rcd. 18185 (2001). Subsequently, in September 2002, in consideration of "[r]ecent disastrous events in the telecommunications market [that would] now make this statutory deadline unrealistic and potentially contrary to the policy objectives of ORBIT," Congress amended the ORBIT Act to "give Intelsat another year in which to conduct its IPO and also provide[] the FCC authority to allow an additional extension of time if warranted by market conditions."146 Cong. Rec. S7439 (daily ed. July 26, 2002) (statement of Sen. Hollings) (introducing S. 2810, 107th Cong., which passed Senate on voice vote by unanimous consent); *see also* 146 Cong. Rec. H6142 (daily ed. Sept. 10, 2002) (ORBIT amendment passed in House, also by unanimous consent.). The amendment extends the initial deadline for Intelsat Ltd.'s IPO until December 31, 2003, and also vests the FCC with authority to extend that deadline by an

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Signatories from collectively repurchasing a controlling ownership interest in Intelsat Ltd. subsequent to the mandatory IPO.[134] No other U.S.-licensed satellite operator is subject to equivalent regulation of its ownership structure.

Similarly, the "direct access" provision of the ORBIT Act requires the FCC to ensure that U.S.-international telecommunications service providers and users "have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT to meet their service or capacity requirements."[135] While this "direct access" provision of ORBIT, correctly interpreted, should no longer apply to the privatized Intelsat L.L.C.,[136] the FCC has nonetheless continued to rely upon its authority to regulate Intelsat L.L.C.'s post-privatization domestic distribution arrangements.[137] No other U.S.-licensed satellite operator is subject to equivalent regulation of its distribution arrangements.

Finally, the ORBIT Act subjects Intelsat Ltd. to substantial reporting requirements that do not apply to any other U.S-licensed satellite operator. In particular, ORBIT requires the FCC and the President of the United States each to report annually to

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additional six months, to June 30, 2004. *See* S. 2810 § 1 (amending the deadlines in ORBIT Act § 621(5)(A)(i), 47 U.S.C. § 763(5)(A)(i)).

134 ORBIT Act § 621(5)(C), 47 U.S.C. § 763(5)(C).

135 ORBIT Act § 641(b), 47 U.S.C. § 765(b).

136 The ORBIT Act defines the privatized Intelsat Ltd. as a "successor entity," and not as "INTELSAT." *Compare* 47 U.S.C. § 769(a)(1) (defining "INTELSAT") *with* 47 U.S.C. § 769(a)(7) (defining "successor entity"). Because the ORBIT provisions that govern INTELSAT's domestic distribution arrangements apply only to the former intergovernmental treaty organization "INTELSAT" and not to its private "successor entity," the ORBIT Act does not require the FCC to continue to police Intelsat Ltd.'s domestic distribution arrangements post-privatization. *See FCC Report to Congress as Required by Orbit Act*, FCC 02-170, 2002 WL 1332760, at 7 (Jun 14, 2002) ("The concept of Direct Access became moot with privatization because Intelsat L.L.C., as a private company, does not have signatories.").

137 In September 2000, the FCC directed INTELSAT's U.S. Signatory (COMSAT) to negotiate commercially with U.S. non-Signatories to ensure that non-Signatory users had sufficient opportunity to obtain INTELSAT transmission capacity directly from INTELSAT. *See Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly*, 15 FCC Rcd. 19160, ¶¶ 37, 40, 43 (2000) (implementing ORBIT Act § 641(b), 47 U.S.C. § 675(b)). In so doing, the FCC threatened to regulate INTELSAT's domestic distribution arrangements if these commercial negotiations failed to satisfy the non-Signatories' demands for transmission capacity. *Id.* ¶¶ 47-48. While it acknowledged that the text of the ORBIT Act does not authorize ongoing regulation of Intelsat Ltd.'s post-privatization distribution arrangements, the FCC nonetheless asserted its inherent authority to do so. *See id.* ¶ 48. To this day, the Commission continues to regulate these arrangements. *See FCC Report to Congress as Required by Orbit Act*, FCC 02-170, 2002 WL 1332760, at 7 (Jun 14, 2002) (COMSAT and several non-Signatory U.S. carriers "have pursued negotiations and at this time the Commission is reviewing the issues to determine whether further [regulatory] steps may be appropriate.").

Congress concerning "the progress made to achieve the objectives and carry out the purposes and provisions of [the ORBIT ACT]."[138] These annual reports must discuss Intelsat Ltd.'s progress towards achieving each of the various privatization objectives set forth in the ORBIT Act; the annual impact of INTELSAT privatization on U.S. industry and U.S. jobs; and the impact of INTELSAT privatization on reducing barriers to entry in foreign telecommunications markets that may previously have been experienced by U.S.-licensed communications service providers.[139] In addition, under a separate 1998 statute, the Secretary of Commerce also must report annually to Congress on Intelsat Ltd.'s progress towards achieving a "pro-competitive privatization."[140] Each of these agencies must necessarily rely on Intelsat Ltd. to provide the underlying information that forms the basis of their various reports. Accordingly, these agencies have imposed substantial annual reporting requirements on Intelsat Ltd.

In addition to the unique regulatory burdens under U.S. law to which it is subject, Intelsat Ltd. is also subject to unique public service obligations, discussed *supra*, that derive from the legacy of the INTELSAT Agreement, and that remain enforceable against Intelsat Ltd. through its Public Service Agreement with the residual ITSO.

IV. Threats To Global Universal Service?

For different reasons, both INTELSAT and the operators of separate satellite systems championed INTELSAT privatization.[141] To the extent that INTELSAT privatization was expected to foster competition, it was also expected to yield benefits to the international telecommunications carriers that had been INTELSAT's principal customers, and, ultimately, to U.S. consumers who used international telecommunications services.[142] Once INTELSAT privatization came to be seen as

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138 ORBIT Act § 646(a), 47 U.S.C. § 765e(a). In both 2000 and 2001, the President delegated the authority to produce his annual report to the Secretary of Commerce. In 2002, the President transferred this authority to the Secretary of State.

139 ORBIT Act § 646(b), 47 U.S.C. § 765e(b).

140 International Anti-Bribery and Fair Competition Act of 1998 §§ 5(a), 6(a)(7), Pub. L. No. 105-366 §§ 5(a), 6(a)(7), 112 Stat. 3302, 3309-10, 3312 (1998), *codified at* 15 U.S.C. § 78dd-1 note (2000). Specifically, the Anti-Bribery Act requires the Secretary of Commerce to report annually on any "advantages, in terms of immunities, market access, or otherwise, in the countries or regions served by [INTELSAT], the reason for such advantages, and an assessment of progress toward . . . obtaining full and open competition to [Intelsat Ltd.,] and nondiscriminatory market access, in the provision of satellite services." *Id.* This reporting requirement will expire in 2004. *See id.* § 6(a) (requiring reports to be submitted "[n]ot later than July 1 of 1999 and each of the 5 succeeding years").

141 *See* Part II.A, *supra* (discussing considerations of INTELSAT's competitors); Part II.B, *supra* (discussing considerations of INTELSAT itself).

142 *See* House of Representatives Report on the Communications Satellite Competition and Privatization Act of 1998, H. Rep. No. 105-494, at 12 (1998) (asserting that INTELSAT

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beneficial to INTELSAT, to U.S. business, and to U.S. consumers, its implementation became all but inevitable.[143]

Less clear, however, was whether INTELSAT privatization would benefit users in "lifeline connectivity" nations, who remained heavily reliant on INTELSAT to keep them connected with the rest of the world. During the privatization debate, proponents argued that regulatory barriers to market entry imposed by the governments of "lifeline" countries were the primary reason why such countries were not served by non-INTELSAT separate satellite systems.[144] These proponents predicted that INTELSAT privatization, including the mandatory dilution of Signatory ownership, would erode foreign market entry barriers, and thereby bring the benefits of competition to "lifeline" routes where competition did not yet exist.[145]

By and large, the "lifeline" countries disbelieved that free markets alone could be relied upon to satisfy their international telecommunications needs. Instead, they insisted on retaining the residual IGO "ITSO" to maintain legal and political—rather than merely

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privatization "would bring consumers lower prices, higher service quality, improved efficiency, innovative new products, and more choice.").

143 *See* Rob Frieden, *Privatization of Satellite Cooperatives: Smothering A Golden Goose?*, 36 Va. J. Int'l L. 1001, 1003 (1996) ("analysis by the U.S. government of satellite carrier privatization appears to have proceeded according to a simple political calculus. Because both [INTELSAT and its competitors] desire a change in the status quo, U.S. officials have considered it reasonable to make some kind of change ostensibly promoting competition and private enterprise."); *accord id.* at 1015 ("the cachet of privatization, combined with support for privatization from most constituencies, including the U.S. government . . . make some sort of INTELSAT privatization inevitable.").

144 *See* House of Representatives Report on the Communications Satellite Competition and Privatization Act of 1998, H. Rep. No. 105-494, at 16 (1998) ("The Committee believes that INTELSAT and Inmarsat enjoy a substantial market advantage that harms the development of competition: the inherent incentive is for signatories to favor INTELSAT . . . over private satellite providers because the signatories own INTELSAT. . . . Since the regulatory agency or ministry responsible for telecommunications policy in IGO Member countries often owns the signatory, the agency or ministry with licensing authority has a disincentive to permit a private satellite provider to enter that country's market and compete against the signatory. The majority of signatories . . . are government-owned operators whose regulatory bodies have a financial interest in limiting competition.").

145 *See* House of Representatives Report on the Communications Satellite Competition and Privatization Act of 1998, H. Rep. No. 105-494, at 48 (1998) ("the privatized entities must have ownership and management that is independent of any signatories or former signatories that control access to national telecommunications markets, and ownership and management independent of any IGO remaining after the privatization. . . . If the privatized entities are owned by operators who can ensure new competitors are kept out of their national markets or raise barriers or otherwise impair market access, then such a privatization will harm competition.").

economic—means of protecting their interests.[146] This insistence reflects the "lifeline" countries' skepticism "that the private operator model can generate the same positive network externalities and global connectivity as are achieved through the cooperative [IGO] model."[147]

As it begins to define its "public service" mission, the residual IGO "ITSO" necessarily must "define the scope and the attributes of public service" that it will safeguard.[148] In a recent address before the Twenty-Seventh Assembly of Parties, ITSO's new Director General sought to establish a broad definition, stating:

> The concept of public service adopted in this process differs from that of Universal Service commonly defined in national regulations. And this distinction is sizeable. . . . [W]here [universal service] fills a social function (minimum telephony service, sometimes limited to receive only or emergency calls), public service has an economic purpose. . . . [T]he public service definition in the ITSO treaty . . . encompasses delivery of voice, data, image and multimedia services to all countries of the world, under conditions assuring universality, equality, quality and reliability, continuity and, lastly, adaptability.[149]

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[146] *See* Opening Address of Director General Ahmed Toumi Before the 27th ITSO Assembly of Parties (June 26, 2002), <http://www.itso.int/meetings.htm> ("[A]s with any liberalization and privatization involving performance of a public service, INTELSAT, now evolved into ITSO, saw its mission shift essentially towards control, oversight and promotion of international public satellite telecommunications services, whose legitimacy is enshrined in the international agreement governing the Organization. Those of us who were involved in the negotiations during the INTELSAT restructuring process understand the weight carried by the words used to define the scope and the attributes of public service.").

[147] Rob Frieden, *Privatization of Satellite Cooperatives: Smothering A Golden Goose?*, 36 Va. J. Int'l L. 1001, 1002 (1996); *see also id.* at 1002-03 ("The fact that both [IGO] cooperatives and their commercial competitors agree, for different reasons, that the cooperatives should be privatized suggests that more is at stake than simply fostering 'a level competitive playing field.'").

[148] Opening Address of Director General Ahmed Toumi Before the 27th ITSO Assembly of Parties (June 26, 2002), <http://www.itso.int/meetings.htm>.

[149] Opening Address of Director General Ahmed Toumi Before the 27th ITSO Assembly of Parties (June 26, 2002), <http://www.itso.int/meetings.htm>; *accord* ITSO Agreement Art. I(f) (defining the "public telecommunications services" safeguarded by ITSO to include "fixed or mobile telecommunications services which can be provided by satellite and which are available for use by the public, such as telephony, telegraphy, telex, facsimile, data transmission, transmission of radio and television programs between approved earth stations having access to the Company's space segment for further transmission to the public, and leased circuits for any of these purposes; but excluding [most] mobile services. . . .").

Facilitating deployment of the magnitude of telecommunications infrastructure that can lead underdeveloped nations to integrate economically with the wider world is a lofty and worthwhile goal for ITSO to pursue. Moreover, ITSO is well-situated to catalyze such deployment. Indeed, ITSO's role in fostering telecommunications deployment to the poorest and most isolated regions of the earth might be analogized to the role that the United States government has played in fostering telecommunications deployment to the poorest and most isolated regions of the United States.

Since the beginning of the twentieth century, the U.S. government has fostered "universal service" policies designed to facilitate the deployment of minimal voice dial-tone service to every American home. More recently, the government has expanded on earlier "universal service" policies by encouraging the deployment of broadband telecommunications facilities to schools, libraries, and rural health care providers. Even while the government's principal "universal service" focus has shifted from dial-tone deployment to broadband deployment, however, there remain pockets of (mostly rural and/or tribal) poverty in America where standard dial-tone service remains relatively rare. The FCC has not forgotten about these areas; it continues to work to bring dial-tone service to every American home.

ITSO, too—like INTELSAT before it—will likely seek to strike a balance between fulfilling its assigned "social function" of ensuring that every region on earth has access to "minimum telephony service, sometimes limited to receive only or emergency calls)," and fostering more advanced telecommunications deployment that can serve the "economic purpose" of facilitating growth in underdeveloped nations. The question thus arises: as "a treaty-based Organization that ensures international satellite public services" without itself providing any such services,[150] is ITSO likely to be as effective at promoting and protecting its "public service" mission was its predecessor (INTELSAT), "a treaty-based Organization that at one time enjoyed a monopoly position in providing international satellite services"?[151]

A. Economic Threats?

One of the most widespread concerns about INTELSAT privatization is that, notwithstanding ITSO's best efforts to enforce its Public Service Contracts with the privatized Intelsat Ltd., that "lifeline" countries will not be able to afford to purchase needed communications services from Intelsat Ltd. or from other market participants. As one leading commentator has stated:

> The original conception when space services were contemplated by the United Nations was of telecommunications as a public service. This is not the same as a service to the public. While it is equitable that payment us made for use of both a public service, and a

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150 ITSO "About Us" Web Page, <http://www.itso.int/aboutus.htm>.

151 ITSO "About Us" Web Page, <http://www.itso.int/aboutus.htm>.

> service to the public, a public service should be provided and maintained even if it is not itself profitmaking. A 'service to the public' will usually be provided only if there is a reasonable prospect of profit. Profits will normally be maximized.[152]

In substantial respects, the economics of global universal service following INTELSAT privatization can be analogized to the economics of universal dial-tone service in the United States following the Telecommunications Act of 1996. In both cases, changes in law were intended to replace implicit subsidies with explicit ones, in order to bring the benefits of competition to all consumers, while maintaining subsidies for the neediest.

Under the Telecommunications Act of 1996, all telecommunications carriers that provide interstate telecommunications service must pay, on an equitable and nondiscriminatory basis, into a Universal Service Fund that is used to support deployment of new lines bringing basic dial-tone service to underserved residential users. These new lines invariably are deployed by incumbent local exchange carriers (ILECs), who are compensated for the deployment out of the Universal Service Fund.

Under the revised ITSO Agreement, in contrast, Intelsat L.L.C. alone, and none of its competitors, must support ITSO's public service mission to bring basic telecommunications service to underserved global regions. In essence, Intelsat L.L.C.'s commercial operations must cross-subsidize Intelsat L.L.C.'s public service operations. Such an internal cross-subsidy appears more akin to the type of "implicit subsidy" that the Telecommunications Act of 1996 was meant to replace, than to an "explicit subsidy" that travels from one broad category of carriers to another.

On the other hand, it is less clear in the international satellite context than in the context of domestic telephony whether service to remote and/or underserved locations is costlier than other service to provide. While a domestic LEC may need to string and maintain miles of costly copper wire to reach a single remote residential customer, satellite telecommunications do not require any such additional physical facilities or resources to reach highly remote locations.[153] Indeed, Intelsat L.L.C.'s competitors have often purported to covet Intelsat's monopoly "thin routes," which are alleged to be a source of monopoly profits rather than a costly burden for Intelsat.

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[152] Francis Lyall, *Expanding Global Communications Services*, in PROCEEDINGS OF THE WORKSHOP ON SPACE LAW IN THE TWENTY-FIRST CENTURY: UNISPACE III TECHNICAL FORUM 63, 65 (2000).

[153] *See* Rob Frieden, *Privatization of Satellite Cooperatives: Smothering A Golden Goose?*, 36 Va. J. Int'l L. 1001, 1004 (1996) ("The unconcentrated signal from a geostationary orbiting satellite can illuminate as much as one-third of the earth's surface. Once a carrier incurs the substantial sunk cost to make this footprint available, the incremental cost for it to serve an additional point of communication and additional users via another earth station approaches zero.") (footnote omitted).

Further research is needed to determine whether Intelsat L.L.C. is burdened or benefited economically by its current public service obligations. However, at present, the privatization of INTELSAT does not appear to pose any economic threat to the ability of its satellite system to provide basic telecommunications service to every populated location on earth. Moreover, the market competition on many international routes that privatization has facilitated, and will likely continue to facilitate, should produce costs savings and other economic benefits for users worldwide.

B. Political Threats?

As a facilities-based IGO, INTELSAT was fully immune from all national laws and trade policies. Of course, large national governments (especially the U.S.) often were able to influence INTELSAT by participating in INTELSAT governance or, on occasion, by threatening to withdraw from INTELSAT. It is unlikely, however, that even the most powerful member of INTELSAT could have influenced the Assembly of Parties to renege on INTELSAT's core commitment to global universal service. Certainly, no such retrenchment ever occurred.

As a Delaware corporation, a District of Columbia domiciliary, and a U.S. FCC licensee, in contrast, the privatized Intelsat L.L.C. is fully subject to U.S. law and FCC policy.[154] At present, no existing U.S. law or policy purports to threaten the ability of Intelsat L.L.C.'s satellite system to provide basic telecommunications service to every populated location on earth. If, however, Intelsat L.L.C.'s obligations to ITSO or to a foreign "lifeline customer" should ever come to conflict with a subsequently enacted U.S. law or policy, the U.S. law will take priority over Intelsat L.L.C.'s prior obligations. Accordingly, those "lifeline" countries which remain highly dependent on Intelsat Ltd. to carry their intercontinental telecommunications traffic (including, for example, Afghanistan, Pakistan, Sudan, North Korea, Somalia, and Cuba) are now subject to being "cut off" from the global telecommunications network by U.S. economic sanctions that might potentially be imposed in the future.[155]

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[154] *Cf.* Francis Lyall, *Expanding Global Communications Services*, in PROCEEDINGS OF THE WORKSHOP ON SPACE LAW IN THE TWENTY-FIRST CENTURY: UNISPACE III TECHNICAL FORUM 63, 68 (2000) ("[W]e must recognize that incorporation of a legal entity within a legal system makes that entity subject to the law of that system, and to governmental pressures backed up, if necessary, by appropriate legal changes.").

[155] *Cf.* Francis Lyall, *Expanding Global Communications Services*, in PROCEEDINGS OF THE WORKSHOP ON SPACE LAW IN THE TWENTY-FIRST CENTURY: UNISPACE III TECHNICAL FORUM 63, 68 (2000) ("Will a global telecommunications system run by an incorporated private company be subject to the direction of the state of incorporation according to what that state's government considers to be its interests? To sharpen the point, would INTELSAT privatised and incorporated . . . in the US, be allowed without interference to continue service to Iraq or the Former Yugoslavia because its system is supposed to be global and accessible without discrimination?").

Intelsat Ltd. has several means of minimizing the threat to its public service obligation posed by the possibility of trade sanctions or restrictions being implemented by its national licensing jurisdiction. One such strategy is to provide service via some satellite space stations licensed in jurisdictions other than the United States, where its existing fleet of C-band and Ku-band satellites are now licensed.[156] From its inception, Intelsat Ltd. has pursued such a strategy of regulatory diversification, by opting to license its planned future Ka-, BSS-, and V-band satellites in the United Kingdom, rather than the United States.[157] Moreover, under arrangements set in place just before INTELSAT was privatized, Intelsat Ltd. now provides some service in the eastern hemisphere via satellite space stations owned by the governments of India[158] and the People's Republic of China.[159] In September 2002, Intelsat Ltd. also made a bid to acquire the recently European satellite operator Eutelsat S.A.,[160] which, like Intelsat Ltd., is the private

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156 *See In re Intelsat L.L.C.*, 16 FCC Rcd. 12280, ¶¶ 8-9 (2001) (granting U.S. licenses to Intelsat Ltd.'s fleet of 17 operational C-band and Ku-band satellite space stations).

157 *See In re Intelsat L.L.C.*, 16 FCC Rcd. 12280, ¶ 8 n.22 (2001) (noting that INTELSAT had "selected the United Kingdom as the licensing jurisdiction for future satellites that may be constructed for operating in the Ka-band, V-band and BSS band."); *see also id.* ¶ 9 (noting that Intelsat Ltd, the Bermuda holding corporation, "will hold the United Kingdom authorizations for ITU registrations in the Ka-, BSS-, and V-bands.").

158 On April 3, 1999, the "Insat 2E/ Intelsat APR-1" satellite space station was launched into fixed orbit at 83° E.L. by the Indian National Satellite (INSAT) program. It is owned by the Indian Space Research Organization (ISRO), an agency of the Indian government. The 83° E.L. orbital location is registered to India by the ITU. Even before the Insat 2E/ Intelsat APR-1 satellite was launched, INTELSAT leased nine of the satellite's 17 C-band transponders for a period of 10 years. Aparna Achar, *Insat 2E Impacts Indian Communications*, TELECOMMUNICATIONS INTERNATIONAL, Volume 33, Issue 5, at 22, 1999 WL 12495481 (May 1, 1999). By 2000, INTELSAT was using eleven of the satellite's seventeen transponders. *Insat-3B: Big Leap For Net Services*, COMPUTERS TODAY, Feb. 29, 2000, at 68, 2000 WL 3282501; *accord Space-Based Digital Embrace*, THE HINDU, July 25, 2002, 2002 WL 24723404 ("Interestingly Intelsat uses some of India's satellite capacity: ISRO has leased 11 C-Band channels on INSAT-2E to the global company.").

159 On July 18, 1998, the "Sinosat-1/ Intelsat APR-2" satellite space station was launched into fixed orbit at 110.5° E.L, an orbital location whose ITU registration is held by the Peoples' Republic of China. The "Sinosat-1/ Intelsat APR-2" satellite is owned by the SINO Satellite Communications Company Ltd. ("SINOSAT"), a state-owned telecommunications operator of the Peoples' Republic of China. *See* Sinosat English Language Web Page, <http://www.sinosatcom.com/english/company/index.htm>. On June 6, 2000, INTELSAT and SINOSAT announced that Intelsat Ltd. would use up to six of the Sinosat-1 satellite's twenty-three "36 MHz C-band transponders" to provide Internet backbone connections or ISP access, regional business voice/data networks, regional backbone networks, multimedia, VSAT/virtual private networks, and video contribution and distribution networks in the Asia Pacific Region. Intelsat Ltd. Press Release, *Intelsat to Lease Six Transponders on SINOSAT-1* (Singapore, June 6, 2000), <http://www.intelsat.com/news/releases/press/2000/2000-14e.asp>.

160 Yuki Noguchi, *Intelsat, PanAmSat Make Rival Bids for European Firm*, Wash. Post, Sept. 10, 2002, at E5, 2002 WL 100080909, <http://www.washingtonpost.com/wp-

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commercial successor entity of a former intergovernmental treaty organization.[161] Eutelsat S.A. currently owns and operates a fleet of French-licensed satellites,[162] and also uses transponder capacity leased from a satellite owned by an intergovernmental organization based in Russia,[163] a satellite owned by the French government,[164] and a

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dyn/articles/A59153-2002Sep9.html>. *Accord* Andy Pasztor, *PanAmSat, Intelsat Seek Eutelsat*, Wall St. J., Sept. 9, 2002, at A3, 2002 WL-WSJ 3405522.

[161] Eutelsat S.A. is the private commercial successor entity of the European Telecommunications Satellite Organisation "EUTELSAT," which was originally formed in 1977 by the governments of Western Europe. EUTELSAT was privatized on July 2, 2001, when its satellite assets were transferred to Eutelsat S.A., a limited liability company established under French law and headquartered in Paris. *See* EUTELSAT 2000 Annual Report, at 3, <http://www.eutelsat.com/about/pdf/report_an_00.pdf>. As with INTELSAT, the privatization of EUTELSAT left in place a residual treaty organization "to ensure that Eutelsat S.A. continues to observe basic principles of pan-European coverage, universal service, non-discrimination, and fair competition." *Id.* Notably, many of the "Signatory" owners of EUTELSAT were the same telecommunications entities that also served as the Western European "Signatories" to INTELSAT. Andy Pasztor, *PanAmSat, Intelsat Seek Eutelsat*, Wall St. J., Sept. 9, 2002, at A3, 2002 WL-WSJ 3405522. These telecommunications entities, which include British Telecom, France Telecom S.A., and Deutsche Telekom A.G., continue to own substantial equity in both Intelsat Ltd. and Eutelsat S.A. *Id.*

[162] As of September 2002, Eutelsat S.A.'s French-licensed fleet included twelve fully operational satellites in fixed geostationary orbit, three new satellites that have already been launched and are scheduled to become operational presently, and five additional satellites in inclined orbit that are still functioning, but are scheduled for retirement and are used only to provide ancillary services. "Eutelsat S.A.: How We Operate" Web Site, <http://www.eutelsat.com/about/1_1_2.html>.

[163] *See* "Eutelsat S.A.: How We Operate" Web Site, <http://www.eutelsat.com/about/1_1_2.html> (noting that Eutelsat S.A. has entered into a long-term lease to provide transponder capacity from, *inter alia*, the EXPRESS-3A satellite). The EXPRESS-3A satellite, located in fixed orbit above 11° W.L, is one of three Russian-licensed satellites owned and operated by the Intersputnik International Organization of Space Communities, a public international intergovernmental organization originally established in 1971 by the former Soviet Union. *See* Intersputnik Organization Web Page, <http://www.intersputnik.com/company.shtml>. Today, Intersputnik's 24 member governments include Afghanistan, Belarus, Bulgaria, Cuba, Czech Republic, Federal Republic of Germany, Georgia, Hungary, India, Kazakhstan, Korea, Kyrgyzstan, Laos, Mongolia, Poland, Romania, Russia, Syria, Tajikistan, Turkmenistan, Ukraine, Vietnam, Yemen, and Республика Никарагуа. *See* Intersputnik Members Web Page, <http://www.intersputnik.com/countries.shtml>. In addition to operating three Russian-licensed satellites, Intersputnik also participates in a joint venture with the U.S.-based Lockheed Martin Corp. to operate a Belarus-licensed satellite (the "LMI-1") located at 75° E.L. *See In re Lockheed Martin Corp., Comsat Government Systems, LLC, & Comsat Corp.*, 15 FCC Rcd. 22910, ¶ 4 nn.5-6 (2000).

[164] *See* "Eutelsat S.A.: How We Operate" Web Site, <http://www.eutelsat.com/about/1_1_2.html> (noting that Eutelsat S.A. has entered into long-term leases to provide transponder capacity from, *inter alia*, the TELECOM-2D satellite). The TELECOM-2D satellite, now located in fixed orbit above 8° W.L., is a French national

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privately-owned satellite licensed in the United States.[165] To the extent that Intelsat Ltd. (a Bermuda holding company) uses British-, French-, Russian-, Chinese-, or Indian-licensed satellites to provide communications services on international routes that do not begin, end, or pass through the United States, the nexus linking such services to the jurisdiction of the United States arguably might be so attenuated as to provide Intelsat Ltd. with a measure of insulation against U.S. national laws and trade policies.

In addition to providing some of its services via non-U.S.-licensed satellite space stations, Intelsat Ltd. has also recently begun to do the reverse: to lease transponder capacity on its U.S.-licensed satellites to foreign government users. Pursuant to a lease agreement negotiated in 2000, a telecommunications operator controlled by the Norwegian government ("Telenor A.S.")[166] has purchased the permanent right to use one quarter of the transmission capacity of the planned, U.S.-licensed Intelsat Ltd. "10-02" satellite, scheduled to become operational in 2003, whose spot beams will cover all of Europe and the Middle East and much of Central Asia and North Africa.[167] Although

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communications satellite operated jointly by France Telecom and the French Ministry of Defense. *See* Astrium Telecommunications Satellite Web Page, <http://www.astrium-space.com/en/programs/index_telecom.htm?/programs/part1/00000185.htm>. France Telecom was formerly a state PTT agency of the French government. Today, it is a partly privatized telecommunications carrier in which the French government retains a controlling ownership interest, but in which about one-third of the stock ownership is publicly traded. France Telecom Ownership Structure Web Site, <http://www.francetelecom.fr/vanglais/finances/f_finance.html>.

[165] *See* "Eutelsat S.A.: How We Operate" Web Site, <http://www.eutelsat.com/about/1_1_2.html> (noting that Eutelsat S.A. has entered into long-term leases to provide transponder capacity from, *inter alia*, the TELSTAR-12 satellite). The TELSTAR-12 (also known as the ORION-2), located in fixed orbit above 15° W.L., is a U.S.-licensed satellite operated by Loral Orion Services, Inc. ("Loral Skynet"). *See In re Loral Orion Services, Inc.*, 15 FCC Rcd. 12419 (FCC Satellite & Radiocommunication Div. 2000) (granting license).

[166] In September 2000, when it entered into the agreement with INTELSAT described herein, "Telenor AS" was an agency of the Norwegian government, but had already initiated a process of privatization. Telenor History Web Page, <http://www.telenor.com/about/history/chronology/>. Shortly thereafter, on December 4, 2000, Telenor was partly privatized, and its stock was listed on the Oslo Stock Exchange. *Id.* The Kingdom of Norway, however, continues to retain a 79% ownership interest in the partly privatized Telenor. *See In re Lockheed Martin Global Telecommunications, Comsat Corp., Comsat General Corp., & Telenor Satellite Services Holdings, Inc., Order on Reconsideration*, FCC 02-207, 2002 WL 1491677, ¶ 3 (FCC July 12, 2002).

[167] In September 2000, before either INTELSAT or Telenor had been privatized, INTELSAT leased to Telenor the right to use 10 high-power Ku-band transponders located on the planned "Intelsat 10-02" satellite, for the entire life of the satellite. INTELSAT Press Release, *Intelsat and Telenor Launch New Satellite Partnership at 359° E* (Sept. 21, 2000), <http://www.intelsat.com/news/releases/press/2000/2000-24e.asp>. Upon privatization of both parties, rights and obligations under this lease agreement were assigned to the respective private successor entities, Intelsat Ltd. and Telenor Satellite Services Holdings, Inc. The "Intelsat 10-02" satellite, which will be U.S.-licensed, is scheduled to be launched into orbit at 359° E.L.

(continued. . . . .)

Telenor currently plans to use this transmission capacity to provide digital TV and radio channels into Europe, nothing in its transponder lease appears to prohibit Telenor from providing other services, or even from using the spot beams to serve jurisdictions located outside of Europe.[168] In addition, a telecommunications agency of the Chinese government ("SINOSAT") has acquired similar rights to use two C-band transponders on the planned future "Intelsat 601" satellite scheduled to be launched into the 178° E.L. orbital location by October 2003.[169]

Although U.S. laws (including potential future trade sanctions against "lifeline" countries) could certainly be enforced against the U.S. satellite licensee (Intelsat Ltd.), it is possible that the FCC might forbear from doing so in order to minimize diplomatic ramifications. If so, then Intelsat Ltd.'s decision to lease some of its U.S.-licensed satellite capacity to at least one foreign government user may provide some incidental protection of Intelsat Ltd.'s continued ability to fulfill its "lifeline" service obligations, even in the event of adverse future U.S. national laws and trade policies.

On the other hand, the U.S. government recently blocked deployment of a planned Intelsat Ltd. satellite, of which some of the transponder capacity would have been leased to the Chinese government. In February 2001, INTELSAT announced plans to launch into fixed orbit at 85° E.L. a new U.S.-licensed Ku-band satellite (the "Intelsat APR-3")[170] capable of providing "strategic landmass coverage of China, Russia, India and the Middle East."[171] SINOSAT, a commercial telecommunications agency of the

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(1° W.L.) in 2003. *Id.*; *see also* Coverage Maps: Intelsat 10-02 @ 359°E Web Page, <http://www.intelsat.com/satellites/covmaps/10-02@359.asp> (illustrating the planned coverage of the satellite's spot beams in Europe, Central Asia, the Middle East, and North Africa).

[168] *See* INTELSAT Press Release, *Intelsat and Telenor Launch New Satellite Partnership at 359° E* (Sept. 21, 2000), <http://www.intelsat.com/news/releases/press/2000/2000-24e.asp>.

[169] *See* INTELSAT Press Release, *Intelsat Announces New Satellite at 85° E; Establishes Strategic Relationship with SINOSAT for Use of Capacity* (Feb. 8, 2001), <http://www.intelsat.com/news/releases/press/2001/2001-02e.asp>. *But see* page **[n+2]**, *infra* (discussing the failure of a separate but related joint venture under which SINOSAT would have leased transponders on the "Intelsat APR-3" satellite that was supposed to have been located at 85° E.L., but was never launched).

[170] *See* INTELSAT Press Release, *Intelsat Announces New Satellite at 85° E; Establishes Strategic Relationship with SINOSAT for Use of Capacity* (Feb. 8, 2001), <http://www.intelsat.com/news/releases/press/2001/2001-02e.asp>. Under earlier plans that were never implemented, the satellite to be located at 85° E.L. had also been called the INTELSAT "KTV satellite" or the New Skies Satellite "NSS-6 satellite." *See* Chris Bulloch, *Satellite Builders' Tough Times*, 57 INTERAVIA 4347, 2002 WL 17651360 (Mar. 1, 2002) (reviewing history).

[171] Nick Mitsis, *Asian Economic Tigers Re-Awaken Satellite Industry Pounces On Market Potential*, VIA SATELLITE, April 10, 2001, 2001 WL 11617138. The "Intelsat APR 3" satellite was intended to provide service to corporate Very Small Aperture Terminals Networks (VSATs), video distribution to cable head-ends, and Internet connections to ISPs. *Id.*

Chinese government, had purchased the right to use six of the new satellite's transponders for the entire orbital maneuver life of the satellite.[172] Launch services for the "Intelsat APR-3" satellite were to be provided by the China Great Wall Industry Corporation, another Chinese government agency.[173] While the proposed lease of Intelsat transponders to SINOSAT did not violate any U.S. law or policy, the U.S. State Department denied Intelsat Ltd.'s application for an export license that would have permitted China Great Wall Industry Corporation to perform the launch.[174] Rather than trying to launch the "Intelsat APR-3" satellite from somewhere else, Intelsat Ltd. instead terminated deployment of the satellite.[175]

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[172] *See* INTELSAT Press Release, *Intelsat Announces New Satellite at 85° E; Establishes Strategic Relationship with SINOSAT for Use of Capacity* (Feb. 8, 2001), <http://www.intelsat.com/news/releases/press/2001/2001-02e.asp>.

[173] *See* INTELSAT Press Release, *Intelsat Announces New Satellite at 85° E; Establishes Strategic Relationship with SINOSAT for Use of Capacity* (Feb. 8, 2001), <http://www.intelsat.com/news/releases/press/2001/2001-02e.asp>.

[174] *See* Chris Bulloch, *Satellite Builders' Tough Times*, 57 INTERAVIA 4347, 2002 WL 17651360 (Mar. 1, 2002) (the Intelsat APR-3 satellite "was denied an export license for a Chinese launch by the US State Department, and so is once more 'spare'."); *accord Intelsat Denies It Was Sending Message To State Dept*, COMM. DAILY, Vol. 21, Issue 170, Aug. 31, 2001, 2001 WL 5053923 ("Intelsat planned to launch APR-3 aboard Chinese Long March rockets, but after months of waiting was unable to obtain necessary presidential waiver that's provided after State Dept. recommendation.").

[175] *See Intelsat Denies It Was Sending Message To State Dept*, COMM. DAILY, Vol. 21, Issue 170, Aug. 31, 2001, 2001 WL 5053923 (" Intelsat . . . confirmed that . . . APR-3 had been terminated. . . . [but] insisted Intelsat wouldn't let U.S. licensing process deter it from procuring non-U.S. satellite launches in future.").