Communication Breakdown?: The Future of Global Connectivity After the Privatization of INTELSAT.

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ABSTRACT

In 1971, 85 nations (including the United States) formed the International Telecommunications Satellite Organization "INTELSAT," a public intergovernmental treaty organization. INTELSAT was charged with operating the world's first global telecommunications satellite system, in order to guarantee the interconnectedness of the world's communications systems and the availability of international telecommunications service to every nation on earth. By the late 1980s, however, INTELSAT's operations began to experience substantial competition from the private sector. In 2000, the proliferation of privately-owned telecommunications satellites and transoceanic fiber optic cables led the U.S. Congress to mandate the privatization of INTELSAT. That privatization process began in 2001, and was substantially completed on January 28, 2005, when INTELSAT's former satellite system was sold to private investors for $5 billion dollars.

The privatization of INTELSAT has been said to threaten universal global connectivity and/or the continuation of international telecommunications service to developing countries. Are the legal safeguards instituted during the privatization (which include the maintenance of a residual treaty organization) sufficient to dispel such economic and political threats? Economically, the privatized satellite system is now legally obligated to serve developing countries at rates no higher than those charged prior to privatization. It likely will remain capable of honoring this legal commitment. Even if its business operations fail, however, this commitment would survive a bankruptcy. Politically, the privatized satellite system has been rendered subject to U.S. law., including U.S. international trade policies. Current U.S. law, however, strongly protects the satellite system's ability to serve every country on earth. Congress, of course, retains power to amend U.S. law. But certain political safeguards, including U.S. participation in the World Trade Organization, would interpose significant obstacles to any Congressional attempt to implement telecommunications sanctions as a means of advancing U.S. foreign policy. Accordingly, the privatization of INTELSAT is unlikely to undermine the universal global connectivity of the world's communications systems.

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INTRODUCTION

On January 28, 2005, a consortium of private investors paid $5 billion dollars to purchase a global fleet of 30 commercial communications satellites used to transmit a variety of mass communications—including television, radio, the Internet, and domestic and international telephone calls—to virtually every country or territory on earth. Despite its large price tag, the sale of these satellites passed largely unnoticed by the American media. In fact, however, the transaction marked the final major step in a remarkable four-year process in which the International Telecommunications Satellite Organization "INTELSAT," a multilateral intergovernmental treaty organization, was privatized.

The INTELSAT treaty organization was formed, in several stages, in the 1960s. Before anyone knew whether it was possible, INTELSAT was charged with creating and operating a global fleet of international communications satellites that would guarantee the universal connectivity of the world's telecommunications networks. In this, INTELSAT succeeded. By the mid-1990s, the INTELSAT treaty organization consisted of 148 member nations, and operated a global fleet of 25 geostationary satellites that served virtually every populated location on earth.

INTELSAT's success, however, also laid the seeds of the organization's eventual demise. In the 1980s, separate international satellite systems inspired by INTELSAT's success began competing against INTELSAT. By 2000, more than 200 operational geostationary commercial communications satellites orbited the earth, of which only 19 belonged to INTELSAT. As competition intensified, some commentators questioned why a public intergovernmental treaty organization was still needed to provide telecommunications services that by then were substantially provided by the private sector. Acting on such concerns, Congress enacted the ORBIT Act of 2000, which mandated the privatization of INTELSAT. The privatization process began in July 2001, and essentially ended with the sale of INTELSAT's satellites on January 28, 2005.

Although widely welcomed in the United States, the privatization of INTELSAT caused alarm in many developing nations. Particularly in "lifeline" nations not served by any other international telecommunications carrier, fears were voiced that the privatization of INTELSAT could threaten the interconnectedness of the world's communications systems, by rendering the future of global connectivity subject to both market forces and U.S. national trade policies.

To address such concerns, in executing its privatization, INTELSAT left in place a small residual International Telecommunications Satellite Organization, now known by the acronym "ITSO." ITSO's primary charge is to ensure that the new owners of INTELSAT's former satellite system preserve global connectivity and continue to serve those poor or underserved countries that remain highly dependent on INTELSAT for international telecommunications service. However, ITSO has no role in operating the privatized satellite system, 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 political and legal tools to accomplish its mandate.

To date, INTELSAT's private successor has continued to serve every country and territory on earth. Indeed, under the supervision of ITSO, the private successor has executed "lifeline connectivity obligation" (LCO) contracts that guarantee the maintenance or expansion of existing service to "lifeline" nations. At present, no country is threatened with being cut off from the global network of communications systems.

Concerns have been raised, however, that the global connectivity of the world's communications systems has been rendered less secure by the privatization of INTELSAT. Some of these concerns are economic in nature: will the private successor honor its commitments to serve "lifeline" countries at reduced rates?; will honoring such commitments threaten the successor's financial viability?; what will happen if the successor goes bankrupt? Other concerns are political in nature, and principally revolve around fears that the United States government might use its legal authority over the private successor to force the removal of certain "rogue states" from the world's communications grid.

In Part I, this Article briefly reviews the formation of the INTELSAT treaty organization in the 1960s, and explains its structure and the nature of its operations from the 1970s through 1990s. Part II surveys the pressures favoring privatization that arose in the 1990s, both from outside INTELSAT and from within. Part III provides a detailed narrative documentary history of the privatization of INTELSAT, from the enactment of the ORBIT Act in 2000 through sale of INTELSAT's satellites in January 2005. Part III also documents the formation of the residual treaty organization ITSO in 2001, and the activities ITSO has engaged in since its formation. In Part IV, this Article catalogues and evaluates certain specific claims that have been raised concerning the threat to global connectivity posed by INTELSAT's privatization. In particular, Part IV.A evaluates whether the financial and economic framework left in place following the privatization of INTELSAT provides a sufficient and viable means of providing international communications service to underserved and developing nations. Part IV.B then evaluates whether the legal and political framework under which INTELSAT's former satellites are now governed unduly empowers the United States government to interfere with global connectivity, and creates an intolerable risk that the United States government will do so to advance a political agenda. The Article concludes that while privatization does pose certain theoretical risks to global connectivity, the risks are sufficiently remote and improbable that, in practice, global connectivity remains highly secure.

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]

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

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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).

[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>.

[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"). For a legislative history of the Satellite Act, *see* Note, *The Communications Satellite Act of 1962*, 76 Harv. L. Rev. 388 (1962).

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]

To achieve these ends, 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 *ad hoc* international partnerships led by COMSAT,[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, 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

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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).

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*, at 457-58 (2000) (listing INTELSAT member nations).

13 INTELSAT Agreement, 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.

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 member states designated their government-owned Post, Telephone, and Telegraph Offices ("PTTs") to serve as Signatories.[20]

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14 *Id.* Art. III(a).

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 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." *Senate Report on International Maritime Satellite*

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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."[21] 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.[22]

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."[23]

During the 30 years that it existed (1971-2001), the INTELSAT treaty organization used its global fleet of international communications satellites to guarantee the universal global connectivity of the world's telecommunications networks. By the late 1990s, INTELSAT's satellites served not only the organization's nearly 148 member nations, but, indeed, virtually every populated land mass on earth.[24]

Telecommunications Act, S. Rep. No. 95-1036, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5272, 5275.

[21] 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).

[22] *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 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.

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

[24] 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).

II. Calls for INTELSAT's Dissolution.

From its inception, the INTELSAT satellite system was highly successful. Over time, however, the continuing need for INTELSAT to maintain its complex structure of governance and its quasi-governmental status was periodically questioned. By the 1990s, calls for the privatization of INTELSAT were regularly heard. In this Part, the causes of INTELSAT's privatization are reviewed. In Subpart II.A, some concerns raised by INTELSAT's competitors and potential competitors are discussed. Subpart II.B then sets forth some reasons why INTELSAT eventually came to favor its own privatization.

A. Calls From Without.

When the Satellite Act was enacted in 1962, many Congressmen and Administration officials envisioned the proposed international satellite system as a "natural monopoly."[25] Nonetheless, rather than ruling out future competition, the 1962 Act expressly provided for the eventual "creation of additional communications satellite systems."[26]

The 1971 accession of the United States to the INTELSAT Agreement, however, may have effectively delayed the deployment of separate international 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.[27] In practice, INTELSAT probably lacked any means to enforce such a veto

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[25] *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. . . .").

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

[27] *See* INTELSAT Agreement, Art. XIV(d), done Aug. 20, 1971, 23 U.S.T. 3813, 3854 (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*

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against an intransigent member state.[28] Perhaps for this reason, as international telecommunications traffic expanded rapidly during the 1970s and 1980s, INTELSAT did consent to the development of several competing "separate systems" that provided competitive regional international service in different parts of the world.[29]

On November 28, 1984, President Reagan "determine[d] that separate international communications satellite systems [were] required in the national interest."[30] 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.[31] On January 31, 1985, INTELSAT

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).

[28] *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)).

[29] *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."). *See also* 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, 105-06 n. 10 (1985) (listing all separate satellite systems approved by INTELSAT under the Art. XIV(d) coordination process from 1973 to 1983).

[30] Presidential Determination No. 85-2, 49 Fed. Reg. 46987 (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).

[31] Presidential Determination No. 85-2, 49 Fed. Reg. 46987 (Nov. 28, 1984). The following year, Congress endorsed and codified President Reagan's "separate systems" policy. *See* Foreign Relations Authorization Act for Fiscal Years 1986 and 1987, Pub. L. No. 99-93 § 146, 99 Stat. 425 (1985), *codified at* 47 U.S.C. § 701 note (2000) (declaring U.S. policy to utilize both INTELSAT system and also any separate international satellite telecommunications systems satisfying conditions established pursuant to Presidential Determination No. 85-2).

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.[32] Nonetheless, shortly thereafter, the FCC authorized the development of the first separate international satellite systems to serve U.S.-international routes.[33] In 1988, the Connecticut-based Pan American Satellite Corporation ("PanAmSat") launched the PAS-1 Atlantic Ocean Region satellite, the first U.S. private-sector satellite to provide international satellite services.[34] By 1999, more than 200 commercial geosynchronous satellites were in orbit above the earth, of which approximately 73 served the United States.[35] Of these, only 17 satellites belonged to INTELSAT, of which just 13 served the United States.[36]

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.[37] The first trans-Pacific fiber-optic cable entered service in 1991.[38] 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.[39] In fact, since the early 1990s, fiber-optic cable systems have carried

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[32] *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 the prosperity and political harmony of the INTELSAT satellite system would 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.

[33] *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).

[34] *See* PanAmSat History Web Page, <http://www.panamsat.com/company/timeline.asp>.

[35] *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).

[36] *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).

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

[38] *Id.*

[39] 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 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). By the end of the 1990s, transoceanic submarine fiber-optic cables had

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more traffic for U.S.-international switched voice and private line than satellite systems have.[40]

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.[41] As an intergovernmental treaty organization, for example, INTELSAT was immune from paying taxes to any national government.[42] 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."[43]

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proliferated so greatly that the TAT-9, TAT-10, TAT-11 and PTAT cables, which were laid in the early 1990s, collectively represented only 0.01% of trans-Atlantic capacity. Michelle Donegan, *Carriers Retire Cables*, COMMUNICATIONSWEEK INT'L, Oct. 7, 2002, at 4, 2002 WLNR 10584785.

[40] *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.").

[41] *See* Francis Lyall, *On the Privatisation of INTELSAT*, 5 Sing. J. Int'l & Comp. L. 111, 117 (2001) (noting that during the privatization debate, "as a matter of the dogma of competition, it [was often] alleged that INTELSAT [did] not compete on that mythical 'level playing field.'") (footnote omitted).

[42] *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."). *See also* Francis Lyall, *On the Privatisation of INTELSAT*, 5 Sing. J. Int'l & Comp. L. 111, 117-18 (2001) (during debate, proponents of INTELSAT privatization claimed "that INTELSAT's position as an inter-governmental organisation, with all the privileges of an international organisation, which includes tax exemptions, is an unfair distortion of competition.").

[43] *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

(continued. . . . .)

Some critics alleged that but for these immunities, INTELSAT's relationship with its Signatories would violate U.S. antitrust laws.[44] Others alleged that INTELSAT's unique "treaty status help[ed] ensure its access to the national markets of member countries"[45]—a valuable asset that INTELSAT's private competitors sometimes experienced difficulty in obtaining.[46]

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."[47] 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 privatized [successor] entities be independent of [INTELSAT's] 'signatories.'"[48] 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

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relating to acts performed by them in their official capacity and falling within their functions, except as such immunity is waived by INTELSAT).

[44] 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.

[45] *In re INTELSAT L.L.C.*, 15 FCC Rcd. 15460, ¶ 7 (2000), *recon. denied*, 15 FCC Rcd. 25234 (2000). *See also* Francis Lyall, *On the Privatisation of INTELSAT*, 5 Sing. J. Int'l & Comp. L. 111, 118 (2001) (noting competitor's allegations "that INTELSAT's very existence, and the fact that its constitution calls for each member state to designate a signatory to the Operating Agreement through which access to the INTELSAT system is given, affords it and its signatories a privileged position within a very competitive industry.") (footnote omitted).

[46] *See, e.g.*, *Comsat Non-Dominant Order*, 13 FCC Rcd 14083, ¶ 52 (1998) ("[I]n 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.").

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

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

lower prices, higher service quality, improved efficiency, innovative new products, and more choice."[49] For this reason, the Bliley 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.[50]

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."[51] Testifying before Congress in 1998, INTELSAT's Director General argued that:

> 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

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[49] *Id.*

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

[51] *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 approval. *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.). After receiving the necessary approvals, LMGT's acquisition of COMSAT was consummated 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 sold the bulk of the facilities and authorizations it had acquired from COMSAT in 2000 to the privatized Intelsat Ltd. *See Lockheed Martin/COMSAT and Intelsat Seek FCC Consent to Assign Licenses and Section 214 Authorizations, Public Notice*, 17 FCC Rcd. 7358 (2002).

> 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.[52]

In 1998, Rep. Bliley's bill passed the House of Representatives by a large majority.[53] The bill was not taken up by the Senate during the 105th Congress, however, and thus failed to become law.[54] Nonetheless, under pressure both from within and 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.[55] Within INTELSAT, the United States played a leading role in championing this resolution.[56] Shortly thereafter, the INTELSAT Board of Governors identified seven reasons why retention of INTELSAT's existing structure as an Intergovernmental

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[52] *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 of 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.").

[53] 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>.

[54] 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 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).

[55] *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.*

[56] *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.").

Organization (IGO) was not viable in the medium term: (1) INTELSAT's 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.[57]

At the same time, and also with the support of the United States,[58] the Twenty-Fourth Assembly of Parties resolved that any such restructuring must preserve INTELSAT's core principles, which included "maintaining global connectivity and coverage of the INTELSAT system, protecting lifeline users and connectivity, and ensuring continual non-discriminatory access to the global system."[59] 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."[60] 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,

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[57] *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). *Cf.* Francis Lyall, *On the Privatisation of INTELSAT*, 5 Sing. J. Int'l & Comp. L. 111, 118 (2001) (criticizing claims that INTELSAT was "inefficient, or not as efficient as it could or should be, and unable to meet the challenge of competitors who have been newly released from their cages. On this view INTELSAT procedures and the procedural requirements of its constituent documents mean that the organisation is hobbled, cribbed, cabined and confined in its response to the changes of the marketplace, and the swift development of emergent telecommunications technologies. A 'better INTELSAT' should be created on the commercial models of private corporations, which would therefore be leaner, fitter, more responsive to market requirements. Such would be able to meet competition both from other satellite systems, as well as from the optical fibre networks, which were undreamed of until relatively recently.").

[58] *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).

[59] *Id.* at ¶ 3 & n.3 (citing INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fourth Meeting, AP 24-3E Final Aug. 10, 1999); *accord id.* ¶¶ 25-27.

[60] *Id.* at ¶ 26 & n.99 (citing INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fourth Meeting, AP 24-3E Final, Aug. 10, 1999, at 8, 10-12).

> 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.[61]

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.'"[62] 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."[63]

III. INTELSAT Privatization

As calls for the privatization of INTELSAT intensified both inside and outside the organization, it perhaps became inevitable that privatization would occur. And so it did. This Part sets forth a narrative documentary history of the privatization of INTELSAT. Subpart III.A discusses the mandates imposed by Congress in the ORBIT Act of 2000, which codified comprehensive sets of benchmarks, yardsticks, carrots, and sticks, many of which substantially dictated the shape of INTELSAT's privatization. Subpart III.B describes the implementation of the privatization plan, a four-year process that culminated in January 2005 with the sale of INTELSAT's satellite fleet for $5 billion dollars to a consortium of private investors. Subpart III.C then surveys the creation, and ongoing work, of the residual intergovernmental organization ITSO that was left in place when INTELSAT was privatized.

A. The ORBIT ACT of 2000

In light of the progress towards privatization already underway within 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.[64] Nonetheless, in March 2000, a

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61 *Id.* at ¶ 26 (footnotes omitted).

62 *Id.*

63 *Id. at* ¶ 26 & n.102 (citing 1999 Assembly Decision, AP 24-3E Final, Aug. 10, 1999, at 2).

64 *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

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skeptical Congress enacted the "Open-Market Reorganization for the Betterment of International Telecommunications Act" ("ORBIT Act")[65] in order to mandate "fully privatizing the intergovernmental satellite organizations, INTELSAT and Inmarsat."[66] 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 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.[67]

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.").

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

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

[67] 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 . . . [was] 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 [Satellite Act].").

To ensure that INTELSAT's restructuring was not merely cosmetic, the ORBIT Act required INTELSAT to satisfy certain specific "pro-competitive privatization" criteria.[68] 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.[69] 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.[70] 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 soon thereafter.[71]

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.[72] 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.[73] Moreover, a privatized INTELSAT successor was not to

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68 ORBIT Act § 621, 47 U.S.C. § 763.

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

70 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).

71 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 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.

72 ORBIT Act § 621(3), 47 U.S.C. § 763(3).

73 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

(continued. . . . .)

receive preferential treatment in the assignment of orbital locations from any national licensing administration.[74] 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.[75]

While ORBIT did not directly abrogate the 1971 INTELSAT Agreement, its enactment did exert substantial pressure on INTELSAT to privatize in conformity with 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."[76] 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.[77] In particular, ORBIT promised to lift a longstanding prohibition that had prevented INTELSAT from providing domestic communications services (including DBS television service and retail Internet access) within the United States.[78]

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

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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. See also COMSAT Non-Dominant Order & NPRM*, 13 FCC Rcd. 14083, 14130-31 ¶ 92 (1998) (describing details of FCC's role in registering INTELSAT's orbital locations with the ITU).

74 ORBIT Act § 621(3)(C), 47 U.S.C. § 763(3)(C).

75 *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 **[27-28]**, *supra* (discussing INTELSAT Art. XIV(d) consultation process).

76 145 Cong. Rec. S8052 (daily ed. July 1, 1999) (statement of Sen. Burns).

77 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.").

78 *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*") (reiterating that 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).

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.[79] In addition, ORBIT established dates certain by which INTELSAT was directed to satisfy each of its privatization criteria.[80] 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.[81] By enacting these provisions, Congress undoubtedly hoped that the INTELSAT Assembly of Parties would keep ORBIT's "tough consequences" in mind as it determined the shape of INTELSAT privatization.[82]

B. Transfer of INTELSAT's Assets to a Private U.S.-Licensed Successor Entity

On January 18, 2000, two months *before* ORBIT was enacted, a newly formed Delaware corporation wholly owned by INTELSAT's Signatories applied to the FCC for U.S. licenses to operate the 17 existing and 10 planned satellites then owned and operated by INTELSAT.[83] In its application, the new corporation, "Intelsat L.L.C.," informed the

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

80 *See* ORBIT Act § 621(1), 47 U.S.C. § 763(1) (setting forth deadlines for satisfying initial privatization criteria); *see also id.* § 621(5)(A), 47 U.S.C. § 763(5)(A) (setting forth later deadline for dilution of Signatory ownership). Subsequent to ORBIT's enactment in 2000, Congress amended the statute several times to extend the IPO deadline set forth in Section 621(5)(A). *See, e.g.*, Pub. L. No. 108-228, 118 Stat. 644 (2004) (extending IPO deadline from 2004 to 2005); Pub. L. No. 107-233, 116 Stat. 1480 (2002) (extending IPO deadline from 2002 to 2004). In October 2004, Congress again amended ORBIT to permit Intelsat Ltd. to dilute its percentage of former Signatory ownership through a private stock transfer, rather than a through a public IPO. *See* Pub. L. No. 108-371 § 1(2), 118 Stat. 1752 (2004), *codified in pertinent part at* 47 U.S.C. § 763(5)(F) (Supp. 2005).

81 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 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).

82 *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 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.").

83 *See In re Intelsat L.L.C.*, 15 FCC Rcd. 15460, ¶¶ 1, 8 n.15 (2000) ("*Intelsat L.L.C. Licensing Order*"), *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.

FCC that INTELSAT hoped presently to transfer its satellites and associated assets to Intelsat L.L.C.[84] It therefore requested that its new FCC licenses become effective immediately upon consummation of the transfer.[85]

On August 8, 2000, after ORBIT had been enacted, the FCC conditionally granted the applications Intelsat L.L.C. had filed on January 18, 2000.[86] Under this conditional grant, 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."[87] In its Order, the FCC 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."[88] 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.[89]

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."[90] The Twenty-Fifth Assembly of Parties set a target date of July

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84 *Id.* In connection with the transfer of assets, the application stated that INTELSAT also planned to transfer its International Telecommunications Union (ITU) network filings (*i.e.*, orbital slot registrations) to the U.S. registry. *See id* at ¶ 38.

85 *See id* at ¶ 1, 8 n.15.

86 *See id.*

87 *See id.* ¶ 2; *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.").

88 *Id.* at ¶ 38.

89 *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.

90 *FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190 at 9 (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 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

(continued. . . . .)

18, 2001 for the transfer of INTELSAT's satellite assets to its private commercial successor entity.[91] 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 to be organized under the laws of Bermuda.[92] 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 an Intelsat Ltd. subsidiary called "Intelsat L.L.C.," a Delaware corporation whose operations would be based in INTELSAT's former headquarters building in Washington, DC.[93]

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.[94] At that moment, the intergovernmental "International Telecommunications Satellite Organization" was transformed immediately upon transfer

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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).

Formally, the amendments to the INTELSAT Agreement approved in November 2000 by the Twenty-Fifth Assembly of Parties could not "enter into force" until they were ratified by the governments of two-thirds of the INTELSAT's member countries–or 96 countries–that held at least two-thirds of INTELSAT's total investment shares as of November 2000. ITSO Press Release No. 2004-110, *Treaty Amendments Enter Into Force Related to Restructuring of the International Telecommunications Satellite Organization* (Nov. 30, 2004), *online at* <http://216.119.123.56/dyn4000/dyn/docs/ITSO/tpl1_itso.cfm?location=news22999&id=334&link_src=HPL&lang=english>. It was not until September 1, 2004, however, that the requisite 96th INTELSAT member country ratified the amendments, and thereby triggered the revised ITSO Agreement to enter into force on November 30, 2004. *Id.* As a practical matter, however, the restructuring of INTELSAT approved in November 2000 by the Twenty-Fifth Assembly of Parties began long before the treaty revisions were formally entered into force. *See id.* ("*Although the restructuring of the Organization took place in July 2001*, today's entry into force of the amendments to the Agreement fulfills the final treaty obligations for the restructuring process.") (emphasis added).

[91] *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)).

[92] *Id.* at ¶ 9; *see also id.* Attachment A (graphic displaying holding company structure of Intelsat Ltd. and its affiliated national corporations).

[93] *Id.* at ¶ 9. 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.*

[94] *FCC Report to Congress as Required by the ORBIT Act*, 18 FCC Rcd. 12525, FCC 03-131, at 3 & 12 (2003). *See also id.* at 12-13 (describing this corporate holding structure in detail). At the time of transfer, the assets transferred to the new Bermuda 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>.

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]. . . ."[95] At the same time, pursuant to the FCC's *Intelsat L.L.C. Licensing Order* issued May 29, 2001,[96] the private entity that received INTELSAT's assets, Intelsat Ltd., was immediately transformed from an empty corporate shell into a functioning U.S.-licensed telecommunications carrier, subject to the pressures of the market and the burdens of national government regulation.

Since it began operating on July 18, 2001, INTELSAT's private successor entity "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)."[97] For several years, technical constraints hindered the privatized company from capitalizing on its new legal right to offer domestic communications services in the United States.[98] In March 2004, however, Intelsat Ltd. purchased four operational satellites then in orbit above the North American continent, plus the right to launch a new satellite into one additional North American orbital location later that year.[99] Upon consummation of the transaction,

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

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

97 *FCC Report to Congress as Required by Orbit Act*, 17 FCC Rcd. 11458, FCC 02-170, at 10 (2002).

98 As discussed at footnote **[80?]** and accompanying text, Section 645 of the ORBIT Act, 47 U.S.C. § 765d, repealed upon privatization a rule that had prohibited INTELSAT satellites from being used to provide domestic communications services. Upon privatization, however, INTELSAT was not well-positioned to enter the domestic communications market. In part, this was because INTELSAT's satellites were located primarily over the oceans, rather than over the North American continental land-mass, and were thus not well-positioned to provide purely domestic service within the United States. In addition, INTELSAT's ability to enter the domestic communications services market upon privatization was hindered by its lack of excess transponder capacity on its existing satellites.

99 *See* Intelsat Press Release, Intelsat Completes Acquisition of Loral's North American Satellite Assets; FSS Leader Begins Executing Customer Transition and Satellite Integration Plan (Mar. 17, 2004), *online at* <http://www.intelsat.com/aboutus/press/release_details.aspx?year=2004&art=20040317_01_EN.xml&lang=en&footer=54>. In this $961.1 million dollar transaction, Intelsat Ltd. acquired, from the insolvent French-American satellite operator Loral Space & Communications Corporation, the U.S.-licensed "Telstar 5, 6, and 7," satellites, which were then located in geostationary orbit above the North American continent at 97º W.L., 93º W.L., and 129º W.L., respectively, and also an interest in the Papua New Guinea-licensed "Telstar 13" satellite, co-owned with EchoStar Communications Corporation, which had recently been launched into geostationary orbit above the North American continent at the 121º W.L. *Id.* In addition, Intelsat Ltd. also acquired Loral's rights to launch the planned future "Telstar 8" satellite into orbit at 89° W.L. *See Loral SpaceCom Corp., Debtor-in-Possession, & Intelsat North America L.L.C.*, 19 FCC Rcd. 2404, 2405-06 ¶ 4 & n.11 (2004), *corrected*, DA 04-612, 2004 WL 405787 (Int'l Bur. Mar. 4, 2004).

(continued. . . . .)

Intelsat Ltd. began using these four satellites to provide domestic video services throughout North America.[100] Both before and after being transferred to Intelsat Ltd., the satellites carried traffic for U.S. broadcasters, cable operators and private data network operators such as CBS and Fox Broadcasting,[101] as well as providing direct-to-home (DTH) and direct broadcast satellite (DBS) video services to end users in the United States.[102]

Although the FCC also approved the transfer of Loral's "Telstar 4" satellite to Intelsat Ltd., *id.*, that satellite was never transferred because it failed in orbit before the transfer could be consummated. *See* Intelsat Press Release, Intelsat Completes Acquisition of Loral's North American Satellite Assets; FSS Leader Begins Executing Customer Transition and Satellite Integration Plan (Mar. 17, 2004). For background on the Loral/Intelsat Ltd. transaction, see Andy Pasztor, *Intelsat Trumps Echostar in Bid For Loral Assets*, Oct. 21, 2003, WALL ST. J., at A2.

[100] *See* Intelsat Press Release, Intelsat Completes Acquisition of Loral's North American Satellite Assets; FSS Leader Begins Executing Customer Transition and Satellite Integration Plan (Mar. 17, 2004). *See also* Intelsat Press Release, Intelsat Launches Fiber-Based, Digital Video Delivery Network, Enabled by Level 3, at NAB 2004 (April 19, 2004) (announcing commercial launch of Intelsat's North American video fiber network, designed to support digital video transmissions for broadcast news and sports distribution, including distribution of NBA basketball broadcast programming for viewing within North America), *online at* <http://www.intelsat.com/aboutus/press/release_details.aspx?year=2004&art=20040419_01_EN.xml&lang=en&footer=55>.

[101] *Intelsat Signs Agreement to Purchase Loral's North American Satellite Services Assets*, CAMBRIDGE TELECOM REPORT, July 21, 2003, 2003 WL 7364453. See also Andy Pasztor, Anne Marie Squeo & J. Lynn Lunsford, *Satellite Ills Ground Industry Leaders: Loral Files for Chapter 11, Sets Asset Sale to Intelsat*, WALL ST. J., July 16, 2003, at A3 ("After years of unsuccessful efforts to get into the U.S. market, Washington-based Intelsat is poised to enter the still-lucrative segment for video services in North America. Buying Loral's U.S. orbital slots, still subject to regulatory approval and potential bids from others, amounts to a 'once in a lifetime opportunity,' according to Intelsat's Chief Executive Conny Kullman.").

[102] In the same Order in which it otherwise approved the transaction, the FCC initially ordered Intelsat Ltd. to terminate provision of direct-to-home (DTH) and direct broadcast satellite (DBS) video services within 180 days after acquiring the Loral satellites. *In re Loral Satellite, Inc., Assignors, & Intelsat North America, LLC, Assignee*, 19 FCC Rcd 2404, 2429 ¶ 65 (Int'l Bur.2004), *corrected*, 19 FCC Rcd. 4029 (Int'l Bur. 2004), *recon denied*, 19 FCC Rcd. 7014 (Int'l Bur. 2004). The FCC's order was predicated on a provision of the ORBIT Act that prohibits Intelsat Ltd. from providing any "additional services" before diluting the ownership of INTELSAT's former Signatories. *See* ORBIT Act §§ 602(a), 621(4), *codified at* 47 U.S.C. §§ 761a(a), 763(4); *see also* ORBIT Act § 681(a)(12)(B), *codified at* 47 U.S.C. § 769(a)(12)(B) (defining "additional services" for INTELSAT to mean "direct-to-home (DTH) or direct broadcast satellite (DBS) video services, or services in the Ka or V bands"). Subsequently, the FCC extended this deadline an additional 180 days, until March 14, 2005. *See In re Intelsat North America, L.L.C.*, 19 FCC Rcd. 14807, ¶ 6 (Int'l Bur. 2004). Finally, after Intelsat Ltd. complied with ORBIT's final ownership dilution benchmark on January 28, 2005, the FCC authorized Intelsat Ltd. to continue providing "additional services" indefinitely.

While beginning to function as an ordinary satellite carrier, Intelsat Ltd. also began working to comply with the ORBIT Act's mandate that Intelsat Ltd. dilute the share of its ownership held by INTELSAT's former Signatories.[103] After several false starts,[104] on August 16, 2004, Intelsat Ltd. announced that it had entered into an agreement to sell all of its assets to an international consortium of private investors.[105] This announcement appeared to be at odds with the ORBIT Act's mandate directing Intelsat Ltd. to dilute its ownership through an IPO.[106] On October 25, 2004, however, Congress amended ORBIT to permit Intelsat Ltd. to "forgo an initial public offering and public securities listing" if the company was able to "achieve[] substantial dilution of the aggregate amount of signatory or former signatory financial interest" through other means, such as a private equity transfer.[107] Accordingly, on December 22, 2004, the FCC tentatively approved the private international investment consortium's proposed acquisition of Intelsat Ltd.[108] On January 28, 2005, Intelsat Ltd. announced that it had

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[103] *See* ORBIT Act § 621(5)(A)(i), 47 U.S.C. § 763(5)(A)(i) (as amended in 2004) (mandating substantial dilution of former Signatories' ownership interest in Intelsat Ltd. by end of 2005). *See also* note **[80]**, *supra* (discussing past extensions of ownership dilution deadline).

[104] *See, e.g.*, Yuki Noguchi, *Intelsat Plans to Hold Long-Delayed Stock Sale before July*, WASH POST, Feb. 5, 2004, at E5 (discussing past plans for earlier Intelsat Ltd. IPO that had been abandoned, and reporting Intelsat Ltd.'s announcement of plans for a new IPO, which never subsequently occurred).

[105] Intelsat Press Release, *Intelsat to be Acquired by Consortium of Private Investors* (Aug. 16, 2004), *online at* <http://www.intelsat.com/aboutus/press/release_details.aspx?year=2004&art=20040816_01_EN.xml>.; *see also* Ellen Sheng, *Intelsat Strikes Deal to Be Bought By 4 Private Funds For $3 Billion*, Wall St. J., Aug. 17, 2004, at A12. On October 10, 2004, the proposed transaction was approved by a 99% majority of Intelsat's shareholders, most of whom at that time remained former INTELSAT Signatories. Intelsat Press Release, *Intelsat Shareholders Approve Proposed Acquisition by Zeus Holdings* (Oct. 10, 2004), *online at* <http://www.intelsat.com/aboutus/press/release_details.aspx?year=2004&art=20041010_01_EN.xml>.

[106] As enacted in 2000, ORBIT provided that an initial public offering (IPO) of stock was the sole permissible means by which Intelsat Ltd. could achieve its required dilution of Signatory ownership. *See* ORBIT Act § 621(5)(A)(i), *codified at* 47 U.S.C. § 763(5)(A)(i) (2000) (amended in 2004).

[107] Pub. L. No. 108-371 § 1(2), 118 Stat. 1752 (2004), *codified at* ORBIT Act § 621(5)(F)), 47 U.S.C. § 763(5)(F) (Supp. 2005).

[108] *In re Intelsat, Ltd., Transferor, & Zeus Holdings Ltd., Transferee*, DA 04-4034, IB Docket No. 04-366, 2004 WL 2973804, at ¶ 49 (FCC Int'l Bur. Dec. 22, 2004) (approving the transfer "subject to a future Commission decision that the transaction is consistent with the requirements of the ORBIT Act, as amended."); *accord id.* ¶ 47 (FCC approval of transaction is "conditioned on a future Commission finding that Intelsat has fully complied with the privatization requirements under section 621 of the ORBIT Act, as amended, by either conducting an initial public offering in accordance with sections 621(2) and 621(5)(A)(i) of the ORBIT Act, as amended, or making a certification to the Commission pursuant to section 621(5)(F) of the ORBIT Act, as amended, and that the Commission has determined, after notice

(continued. . . . .)

sold all its assets to private investors for $5 billion,[109] thereby satisfying the ORBIT Act's final ownership dilution benchmark.[110] Even subsequent to this acquisition, however, ORBIT continues to regulate Intelsat Ltd.'s ownership structure by prohibiting INTELSAT's former Signatories, individually or collectively, from reacquiring a controlling interest in Intelsat Ltd.[111]

C. Establishment of Residual Treaty Organization ITSO

For different reasons, both INTELSAT and the operators of separate satellite systems championed INTELSAT privatization.[112] 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.[113] Once INTELSAT privatization came to be seen as

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and comment, that Intelsat is in compliance with the certification requirements of section 621(5)(F) of the ORBIT Act, as amended").

[109] *See Intelsat Sale Completed*, WASH. POST, Jan. 29, 2005, at E2; Intelsat Press Rel. No. 2005-03, *Intelsat Announces Completion of Acquisition by Zeus Holdings Ltd.* (Jan. 28, 2005), <http://www.intelsat.com/aboutus/press/release_details.aspx?year=2005&art=20050128_01_EN.xml&lang=en&footer=87>. To acquire Intelsat Ltd., the buyers paid $3 billion in cash and assumed $2 billion in debt. *Id.* Much of the debt assumed by Intelsat Ltd.'s buyers appears to have been incurred just a few days before the acquisition. *See Satellite*, COMM. DAILY, Jan. 26, 2005, 2005 WL 62275807 (reporting that "Intelsat sold $2.55 billion of notes in 3 parts late Mon. [Jan. 24, 2005.] . . . [T]he company sold $1 billion of 7-year floating-rate notes to yield 487.5 basis points over the 6-month London interbank offered rate, $875 million of 8-year notes yielding 8.25% and $675 million of 10-year notes yielding 8.625%.").

[110] *See* ORBIT Act §§ 621(5)(A)(i), 621(5)(F) (as amended in 2004), *codified at* 47 U.S.C. §§ 763(5)(A)(i), 763(5)(F) (Supp. 2005).

[111] ORBIT Act §§ 621(5)(C), 621(5)(F)(i)(II), *codified at*47 U.S.C. § 763(5)(C), 763(5)(F)(i)(II) (Supp. 2005). In addition to promoting competition in the U.S. market for satellite communications services, ORBIT's prohibition against Signatory reacquisition of ownership in Intelsat Ltd. also appears to advance U.S. geopolitical objectives. *Cf.* UNITED STATES GENERAL ACCOUNTING OFFICE, MILITARY SPACE OPERATIONS: COMMON PROBLEMS AND THEIR EFFECTS ON SATELLITE AND RELATED ACQUISITIONS, GAO Rep. No. GAO-03-825R, at 22 (June 2, 2003), <http://www.gao.gov/new.items/d03825r.pdf> (noting that in 2002 and 2003, U.S. Department of Defense (DOD) officials raised "pointed objections . . . to the DOD's use of commercial satellite systems such as INTELSAT and INMARSAT because they were 'part owned' by countries such as Iraq and Iran.").

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

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

beneficial to INTELSAT, to U.S. business, and to U.S. consumers, its implementation was assured.[114]

Less clear, however, was whether INTELSAT privatization would benefit users in developing nations that relied heavily on INTELSAT to stay connected to the world. By and large, proponents and representatives of "lifeline" countries were wary of relying on free markets alone to satisfy those countries' international telecommunications needs.[115] Many disbelieved "that the private operator model [could] generate the same positive network externalities and global connectivity as are achieved through the cooperative [IGO] model."[116]

In consideration of such concerns, the Twenty-Fifth INTELSAT Assembly of Parties, in November 2000, reaffirmed the Twenty-Fourth Assembly's decision to leave in place, upon privatization, a small residual intergovernmental organization (IGO) to monitor performance of the new private company's public service obligations.[117] The Assembly decided that the residual IGO would retain INTELSAT's full name "International Telecommunications Satellite Organization," but now be known by a new

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[114] *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.").

[115] *See, e.g.*, Changes in International Satellite Policy, Testimony of Lockheed Martin Global Telecommunications CEO John Sponyoe Before the Subcomm. on Communications, Senate Commerce Comm. (Mar. 25, 1999), 1999 WL 194674 (acknowledging "the concerns of developing countries that do not view their small telecom service requirements nor those of their consumers as being of any great commercial interest to INTELSAT's commercial competitors. INTELSAT's treaty commitment to serving all countries, rich and poor alike, providing universal access under a regime of non-discriminatory pricing—for both lucrative and uneconomical routes—has led many of INTELSAT's less developed member countries to rely on INTELSAT as not only a carrier of last resort but as their only link to the world."); *accord* Statement of Sen. John D. Rockefeller IV at same Hearing (Mar. 25, 1999), 1999 WL 170199 ("INTELSAT has a history of serving all parts of the world at reasonable prices. We have an interest in making sure that developing nations are part of the global information infrastructure.").

[116] 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.'").

[117] *In re Intelsat L.L.C.*, 16 FCC Rcd. 12280, ¶ 10 (2001). *See also* Agreement Related To The International Telecommunications Satellite Organization, done Nov. 17, 2000, <http://www.itso.int/agreement.htm> ("ITSO Agreement").

acronym, "ITSO."[118] This residual IGO was envisioned as "the continuation of [the INTELSAT] intergovernmental organization and . . . the guarantor of 'permanent connectivity' of the world through satellite technology."[119] Through the residual IGO, "lifeline" countries would retain legal and political—rather than merely economic—means of protecting their access to the satellite system formerly operated by INTELSAT. Post-privatization, the residual IGO's actions would "continue to be framed by Resolution 1721 of the General Assembly of the United Nations as well as the principles embodied in the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space."[120]

To these ends, the Twenty-Fifth INTELSAT Assembly of Parties amended the INTELSAT Agreement (now the "ITSO Agreement") to establish the structure and responsibilities that would define the residual IGO "ITSO." Post-privatization, ITSO would retain an Assembly of Parties and an executive organ, headed by the Director General, responsible to the Assembly of Parties.[121] Because ITSO was to have no operational or commercial role in the privatized commercial entity Intelsat Ltd,[122] however, the Twenty-Fifth Assembly of Parties amended the INTELSAT Agreement to eliminate both the Meeting of Signatories and the Board of Governors that had previously overseen INTELSAT's commercial operations.[123]

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118 *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).

119 Presentation by ITSO Director General Ahmed Toumi Before The European Institute Roundtable on Telecommunications, E-Commerce & Audiovisual Policies (Feb. 25, 2004), <http://216.119.123.56/dyn4000/dyn/docs/ITSO/tpl1_itso.cfm?location=dir_general99&id=323&link_src=HPL&lang=english>.

120 *Id.*; *see also* note **[3]** and accompanying text, *supra* (setting forth text of UN General Assembly Res. 1721).

121 *See* ITSO Agreement, Art. VIII, done Nov. 17, 2000. 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.

122 *FCC Report to Congress as Required by Orbit Act*, 17 FCC Rcd. 11458, FCC 02-170, at 8 (2002).

123 *See* ITSO Agreement, Art. VIII, done Nov. 17, 2000. 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

(continued. . . . .)

As its primary responsibility, ITSO was charged with safeguarding three "core principles" concerning the ongoing operation of the privatized satellite system.[124] First, ITSO must protect the "global connectivity and global coverage" of the system.[125] This duty requires ITSO to ensure that, post-privatization, the satellite system always maintains the technical capability to carry communications to and from virtually every populated land mass on earth.[126]

Second, ITSO must safeguard "non-discriminatory access to the [privatized] Company's system."[127] This duty requires ITSO to ensure that all users and prospective users enjoy "fair and equal opportunity to access the [privatized] Company's system,"[128] both for existing services and for "future public telecommunications services offered by the Company when space segment capacity is available on a commercial basis."[129] 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

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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>.

[124] *FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190, at 10 & n.42 (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). *See also* ITSO Agreement, Arts. III(b), IX(c), done Nov. 17, 2000 (setting forth these "core principles").

[125] *See* ITSO Agreement, Arts. III(b)(i), IX(c)(i), done Nov. 17, 2000.

[126] *See* ITSO Agreement, Art. I(n), done Nov. 17, 2000 ("'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.").

[127] *See* ITSO Agreement, Arts. III(b)(iii), IX(c)(iii), done Nov. 17, 2000.

[128] *See id.* Art. I(o).

[129] *See id.* Art. V.

denied full and complete access to all services provided by the Intelsat system on any ground other than a commercial basis."[130]

Finally, ITSO has a duty to ensure that the privatized Intelsat L.L.C. "serve[s] its lifeline connectivity customers."[131] 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.[132]

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,[133] or (ii) possesses a teledensity of less than three as defined by the

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

131 *See* ITSO Agreement, Arts. III(b)(ii), IX(c)(ii), done Nov. 17, 2000.

132 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*, 17 FCC Rcd. 11458, FCC 02-170, at 8 & n.40 (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)).

133 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). Gross National 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 measured in current US dollars. *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.

ITU.[134] In November 2000, the Twenty-Fifth Assembly of Parties identified 69 member nations that qualified for LCO Protection based on "Income/Teledensity Eligibility."[135]

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.[136] Those countries whose petitions were granted became eligible for LCO Protection under the "Petition Eligibility" criterion.[137] 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.[138]

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.[139] Fourth, a country that has temporarily lost 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

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[134] 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>.

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

[136] 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).

[137] *Id.*

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

[139] 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 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.").

"Emergency Eligibility" criterion.[140] 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.[141]

ITSO's primary means of ensuring that the satellite system continues to abide by these "core principles" is through enforcement of a contractual "Public Services Agreement" that ITSO has executed with Intelsat Ltd.[142] Under this "Public Services Agreement," Intelsat Ltd. is contractually bound to adhere to ITSO's "core principles," and, specifically, to enter into individual "LCO Commitments" with every "lifeline" country or territory that qualifies for LCO protection under any of the five eligibility criteria. Although individual terms can vary, generally these LCO Commitments obligate Intelsat Ltd. to continue to serve "lifeline" users at fixed pre-privatization costs, at least until 2013.[143] The lifeline users, in turn, need only commit to purchase capacity on a year-to-year basis.[144] After twelve years, ITSO's financing will expire, and the Parties will need to decide whether or to retire or to retain it.[145]

In addition to monitoring Intelsat Ltd.'s performance of its public service obligations, 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."[146] In this regard, ITSO hopes to play "an important role in encouraging the 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."[147] Within these multilateral organizations, ITSO "will promote

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140 *Id.* The term of LCO Protection under the "Emergency Eligibility" criterion is not normally permitted to exceed six months. *Id.*

141 *Id.* 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.*

142 *FCC Report to Congress as Required by the Orbit Act*, 16 FCC Rcd. 12810, FCC 01-190, at 10 & n.42 (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). *See also* ITSO Agreement, Art. III(b), done Nov. 17, 2000 (setting forth these "core principles").

143 *FCC Report to Congress as Required by Orbit Act*, 17 FCC Rcd. 11458, FCC 02-170, at 8 (2002).

144 *Id.*

145 *See* ITSO Agreement, Arts. VII, XXI, done Nov. 17, 2000. *See also* Subpart IV.A.4, *infra* (discussing procedures for renewing or retiring ITSO after 12 years).

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

147 *Id.*

equitable access to orbital / spectrum resources, notably for commercial satellite systems committing to international public service."[148]

As it begins to define its mission, ITSO necessarily must "define the scope and the attributes of public service" that it will devote its efforts to safeguarding.[149] Addressing the Twenty-Seventh Assembly of Parties in 2002, 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.[150]

In support of this mission, ITSO's 27th Assembly of Parties in June 2002 set four overriding goals and objectives for the Organization to pursue from 2002 to 2007: (1) maintaining the continuity of the provision of "international public telecommunications services"; (2) contributing to the promotion of a global "information

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[148] *Id.* For examples 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) (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); ITSO Press Release No. 2005-2, *Satellite Industry Takes another Step to Shape Future of Satellite Broadband* (Jan. 18, 2005) (describing ITSO's Global Broadband Satellite Infrastructure Initiative, designed to provide affordable high-speed Internet access to users in remote and underserved areas by creating a harmonized technical and regulatory environment that promotes the emergence of a mass market for satellite broadband services).

[149] Opening Address of Director General Ahmed Toumi Before the 27th ITSO Assembly of Parties (June 26, 2002), <http://www.itso.int/htmldocs/speech_AP27_ENGLISH.htm>.

[150] *Id.*; *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. . . ."). *See also* ITSO Global Broadband Satellite Infrastructure Initiative (Dec. 17, 2002), <http://www.itso.int/htmldocs/BroadbandInitiative-FINAL-english-17Dec02.htm> ("It is now universally accepted that [information and communication technology] services are the engines for economic and social development.").

and communications infrastructure"; (3) improving affordability of satellite services "through the promotion of open standards"; and (4) serving as an information resource for gathering "and disseminating data about national market and policy environments."[151]

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. Still unclear, however, is whether ITSO will be fully effective in fulfilling its primary mission to safeguard the universal global connectivity of the world's telecommunications systems against political and economic threats that might possibly arise.

IV. Does INTELSAT's Privatization Threaten Global Universal Service?

During the debate over INTELSAT privatization, some commentators questioned whether ITSO, a residual "treaty-based Organization that ensures international satellite public services"[152] without itself providing any such services, could be as effective at promoting and protecting its evolving "public service" mission as was its predecessor INTELSAT, "a treaty-based Organization that at one time enjoyed a monopoly position in providing international satellite services."[153] To answer this question, both economic and political consequences of INTELSAT privatization must be assessed. Subpart IV.A addresses whether an economically viable framework in which satellite communications connectivity will continue to be provided to every populated location on earth at reasonable and affordable rates remains in place after the privatization of INTELSAT. Subpart IV.B then addresses whether the privatization of INTELSAT has left in place a legal framework in which global connectivity is now dangerously subject to disruption by the unilateral action of the United States government.

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151 ITSO, CELEBRATING 40 YEARS OF COMMITMENT TO INTERNATIONAL PUBLIC TELECOMMUNICATIONS SERVICES: 1964-2004, at 6-7 (2004), *online at* <http://www.itso.int/brochureDocs/english_web_ok.pdf>.

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

153 *Id.* For articles questioning whether ITSO can be as effective as INTELSAT at protecting the interests of underserved nations, *see, e.g.*, Rob Frieden, *Balancing Equity and Efficiency Issues In The Management of Shared Global Radiocommunication Resources*, 24 U. Penn. J. Int'l Econ. L. 289, 299 (2003); Ram S Jakhu, *Safeguarding the Concept of Public Service and the Global Public Interest in Telecommunications*, 5 Sing. J. Int'l & Comp. L. 71 (2001); Patricia M Sterns, *Safeguarding the Concept of Public Service in View of Increasing Commercialisation and Privatisation of Space Activities, with Particular Attention to the Global Public Interest & the Needs of Developing Countries*, 5 Sing. J. Int'l & Comp. L. 133 (2001); Francis Lyall, *On the Privatisation of INTELSAT*, 28 J. Space L. 101 (2000); Francis Lyall, *Expanding Global Communications Services*, in PROCEEDINGS OF THE WORKSHOP ON SPACE LAW IN THE TWENTY-FIRST CENTURY: UNISPACE III TECHNICAL FORUM 63 (2000); Rob Frieden, *Privatization of Satellite Cooperatives: Smothering A Golden Goose?*, 36 Va. J. Int'l L. 1001, 1004 (1996); Rob Frieden, *Should Intelsat and INMARSAT Privatize?*, 18 Telecommunications Pol'y 679 (1994).

A. Economic Threats To ITSO's "Public Service" Mission.

One widespread concern about INTELSAT privatization is that, notwithstanding ITSO's best efforts to enforce its Public Service Agreement with the privatized Intelsat Ltd.,[154] some "lifeline" countries will nonetheless be unable 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 is made for use of both a public service, and a 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.[155]

While such concerns are not without force, it must be remembered that even prior to privatization, the INTELSAT treaty organization did not—and could not—provide service to users who did not pay for the service.[156] Moreover, although profitmaking was never the primary goal of the INTELSAT treaty organization,[157] the organization always

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154 *See* notes **[142-43]** and accompanying text, *supra* (describing contents of Public Service Agreement).

155 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).

156 *See* INTELSAT Agreement Art. III(a) ("INTELSAT shall have as its prime objective the provision, *on a commercial basis*, of the 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.") (emphasis added); *Id.* Art. V(d) ("All users of the INTELSAT space segment *shall pay utilization charges* determined in accordance with the provisions of this Agreement and the Operating Agreement.") (emphasis added). *Cf.* Francis Lyall, *On the Privatisation of INTELSAT*, 5 Sing. J. Int'l & Comp. L. 111, 124 (2001) (acknowledging that the INTELSAT treaty organization did take sanctions against users for non-payment of bills, but characterizing such sanctions as a "hiccup" in INTELSAT's public service obligation that was "unwillingly applied by the Organisation").

157 *See* Rob Frieden, *Balancing Equity and Efficiency Issues In The Management of Shared Global Radiocommunication Resources*, 24 U. Penn. J. Int'l Econ. L. 289, 299 (2003) (INTELSAT's charter "emphasized the promotion of world peace and understanding through widespread access and use of satellites. [INTELSAT and other intergovernmental satellite] cooperatives operated as businesses, but had missions that emphasized access and service instead of profit maximization.").

was required to collect utilization charges that were at least sufficient to cover its costs.[158] Thus, although INTELSAT from its outset perhaps failed fully to implement the United Nations' original conception of space telecommunications services as a "public service," rather than a "service to the public," its recent privatization is not the original source of this failure.

Nonetheless, privatization has changed the economics of the satellite system's operation in certain significant respects. While the INTELSAT treaty formerly required uniform rates to be offered to all countries for all services,[159] the privatized Intelsat Ltd. now generally is permitted to set rates that reflect market conditions and market competition. Moreover, as a profit-driven commercial entity, the privatized Intelsat Ltd. now has incentive to charge rates that will maximize its profits. On monopoly routes, of course, maximizing profits would entail charging monopoly rents. For this reason, virtually all participants in the privatization process acknowledged the need to explicitly guarantee that those nations not served by any satellite systems other than INTELSAT would not face increases in their cost of obtaining service.[160]

Accordingly, as discussed above, qualified "lifeline" countries were granted rights to enter into Lifeline Connectivity Obligation (LCO) Commitments with ITSO and Intelsat Ltd.[161] These LCO Commitments guarantee that Intelsat Ltd. may not raise the rates it charges to "lifeline" users above pre-privatization levels until 2013.[162] In theory, this disposition renders INTELSAT's privatization Pareto-optimal by yielding the

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158 *See* INTELSAT Operating Agreement Art. 8(a) ("INTELSAT space segment utilization charges . . . shall have the objective of covering the operating, maintenance and administrative costs of INTELSAT, the provision of such operating funds as the Board of Governors may determine to be necessary, the amortization of investment made by Signatories in INTELSAT and compensation for use of the capital of Signatories.").

159 *See* INTELSAT Agreement Art. V(d) ("The rates of space segment utilization charge for each type of utilization shall be the same for all applicants for space segment capacity for that type of utilization.").

160 *See, e.g.*, See New Zealand House of Representatives, Report on International Treaty Examination of the Amendments to the Agreement Relating to the International Telecommunications Satellite Organisation, at 5 ¶ 11 (Dec. 14, 2001) ("The restructuring is unlikely to disadvantage New Zealand but raises issues for lifeline users (such as several Pacific Island states with no other international telecommunications circuit available other than INTELSAT) who rely on INTELSAT for all their international telecommunications needs. To overcome this possible threat, the interests of lifeline users are to be guaranteed by the implementation of the 'Lifeline Connectivity Obligation' by the new company, with oversight from the new intergovernmental organisation, the ITSO."), <www.clerk.parliament.govt.nz/content/578/fdintelsat.pdf>.

161 *See* notes **[131-141]**, *supra* (discussing LCO eligibility criteria and terms of LCO Commitments).

162 *Id.* In other words, "lifeline" users would continue to pay the same unit-price for transmission capacity, in nominal dollars, every year from 2001 to 2013.

benefits of market competition to consumers and investors located in developed nations, while making users in underserved countries no worse off. The question remains, however, whether the LCO Commitments, in practice, have left underserved countries in a worse position than if INTELSAT had never privatized.[163]

To answer this question, this Subpart catalogues several ways in which INTELSAT privatization arguably may have jeopardized or impaired the ability of underserved countries to obtain international satellite communications services, and evaluates the merits of each identified potential threat. Thus, Subpart IV.A.1 analyzes whether "lifeline" users will enjoy a fair share of any future cost decreases likely to be realized by the privatized Intelsat Ltd., as they would have if privatization had not taken place. Subpart IV.A.2 addresses whether "lower-middle-income" nations not poor enough to qualify for "lifeline" protection remain secure in their ability to obtain international communications service. Subpart IV.A.3 discusses whether the system of financing Intelsat's provision of service to "lifeline" users is secure, given that privatization has arguably eliminated certain implicit subsidies to such users while failing to replace them with explicit subsidies. Subpart IV.A.4 discusses how "lifeline" users will enforce their LCO contracts after 2013, when the endowment that finances the residual intergovernmental organization ITSO is scheduled to run out of funds. Finally, Subpart IV.A.5 considers whether, and how, global connectivity would survive the insolvency or bankruptcy of Intelsat Ltd.

1. Can "lifeline" countries be charged rates higher than the average rates paid by high-volume users?

Although the LCO Commitment now protects "lifeline" countries against rate increases for satellite communications services before 2013, one consequence of INTELSAT's privatization is that the rates paid by such countries are no longer tied to the rate paid by high-income countries for similar services.[164] Historically, however, global rates for international telecommunications services have tended to decrease over time, as technological advancement has steadily reduced the costs of providing such service, and has enabled growth in transmission capacity to outstrip growth in demand.[165]

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[163] *See* Rob Frieden, *Balancing Equity and Efficiency Issues In The Management of Shared Global Radiocommunication Resources*, 24 U. Penn. J. Int'l Econ. L. 289, 301 (2003) ("too little time has passed to confirm that spun-off and commercialized former [satellite] cooperatives will not further handicap developing nations and worsen the gap between nations in terms of access to telecommunications and information-processing services.").

[164] *Compare FCC Report to Congress as Required by Orbit Act*, 17 FCC Rcd. 11458, FCC 02-170, at 8 (2002) (describing Intelsat Ltd.'s obligation to supply transmission capacity to lifeline users at fixed pre-privatization costs for 12 years) *with* INTELSAT Agreement Art. V(d) (mandating, prior to privatization, that "[t]he rates of space segment utilization charge for each type of utilization shall be the same for all applicants. . . .").

[165] *See* Rob Frieden, *Balancing Equity and Efficiency Issues In The Management of Shared Global Radiocommunication Resources*, 24 U. Penn. J. Int'l Econ. L. 289, 299-300 (2003) ("As satellite technology evolved and as the marketplace for satellite services developed, the cost of

(continued. . . . .)

If the historic trend towards ever-decreasing average global prices continues into the future, then "lifeline" countries could have expected further rate *decreases* from 2001 through 2013, had INTELSAT's utilization charges remained uniform and cost-based. In contrast, while LCO Commitments protect "lifeline" countries against any rate *increases* until 2013, such Commitments do not guarantee that future cost savings will be passed through in the form of rate *decreases*. Accordingly, while privatization combined with the LCO Commitment essentially has preserved the pre-privatization *status quo ante* for "lifeline" countries, in comparative terms it may have curtailed those countries' opportunities to share in potential cost savings derived from continued technological advancement.

While the LCO Commitment itself does not require future decreases in cost to be shared with "lifeline" users, however, as a U.S.-licensed carrier Intelsat Ltd.'s rates remain subject to FCC regulation. Upon privatization, the FCC classified Intelsat Ltd. as a "dominant international carrier" on those U.S.-international "thin routes" that are not served by any other carrier.[166] Under this classification, Intelsat Ltd. must "provide at least a four percent annual [retail price] reduction . . . in its provision of capacity for switched voice services on thin routes, comparable to rates charged on thick routes, and [to] cap rates for private line service to thin routes at the rates offered on thick routes, with no future rate increases."[167] The requirement of an annual four percent reduction in price was originally imposed precisely to reduce the rates charged for INTELSAT transmission capacity "in 'non-competitive' markets to rates *below* those presently

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constructing, launching, and operating a satellite network dropped substantially. Demand for satellite services, particularly delivery of video content to broadcast and cable television networks, stimulated private entrepreneurs to think they could enter the market and thrive.").

166 Prior to privatization, INTELSAT's U.S. Signatory, COMSAT, had already been classified and regulated as a "dominant international carrier" on the same U.S.-international "thin routes." *See Comsat Non-Dominant Order*, 13 FCC Rcd 14083 (1998) (reaffirming 1985 Order classifying COMSAT as a dominant carrier on monopoly "thin routes," but reclassifying COMSAT as a nondominant carrier on competitive "thick routes"), *modified*, *Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, 14 FCC Rcd 3065 (1999). Subsequently, when COMSAT was merged into Intelsat Ltd. during INTELSAT's privatization process, the FCC transferred COMSAT's regulatory status to Intelsat Ltd. *See Lockheed Martin Corporation, COMSAT Corporation, & COMSAT Digital Teleport, Inc., Assignors, & Intelsat, Ltd., Assignee, Order and Authorization*, 17 FCC Rcd. 27732, 27746 ¶ 22 (Int'l Bur. & Wireless Tel. Bur. 2002) (classifying Intelsat Ltd., upon merger with COMSAT, "as dominant in its provision of space segment capacity for switched voice and private line service on thin routes.").

167 *See Lockheed Martin Corporation, COMSAT Corporation, & COMSAT Digital Teleport, Inc., Assignors, & Intelsat, Ltd., Assignee, Order and Authorization*, 17 FCC Rcd. 27732, 27747 ¶ 23 (Int'l Bur. & Wireless Tel. Bur. 2002). The FCC had originally adopted this regulation several years before INTELSAT was privatized. *See Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, 14 FCC Rcd 3065, 3072-75 ¶¶ 19-22, 25 (1999) (adopting regulation requiring 4% annual reduction in rates charged by the U.S. Signatory, COMSAT, for INTELSAT transmission capacity used to serve "thin routes").

charged . . . in 'competitive' markets."[168] Moreover, this mandatory annual price reduction will continue until "market conditions ha[ve] changed enough to warrant a modification."[169] Thus, although Intelsat Ltd.'s LCO Contracts do not require future cost savings to be passed through to "lifeline" users, longstanding FCC regulations that remain in effect do appear to ensure that "lifeline" users will never be charged rates that substantially exceed the average rates charged by Intelsat Ltd.

2. Are the LCO eligibility criteria so stringent that they fail to protect underserved "lower-middle-income" nations?

In 2000, 69 nations were determined to qualify for LCO protection under the "low income" or "low teledensity" LCO eligibility criteria established by INTELSAT's 25th Assembly of Parties.[170] Other underserved nations with very limited resources, however, were not sufficiently destitute to satisfy those criteria. Specifically, a country whose gross national income per capita in 2000 was more than $755 would not qualify for LCO protection under the "low income" criterion.[171] In comparison, however, the world's mean gross national income per capita in 2000 was $5,170.[172] Thus, countries whose 2000 gross national incomes were as low as $756 per person—less than 15% of the world average—were not granted LCO protection under the "low income" criteria.[173] Instead, despite their relative need, such countries now generally must pay market prices to obtain international satellite communications services.[174]

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168 *Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, 14 FCC Rcd 3065, 3072 ¶ 19 (1999) (emphasis added).

169 *Lockheed Martin Corporation, COMSAT Corporation, & COMSAT Digital Teleport, Inc., Assignors, & Intelsat, Ltd., Assignee, Order and Authorization*, 17 FCC Rcd. 27732, 27747 ¶ 23 (Int'l Bur. & Wireless Tel. Bur. 2002).

170 *See* notes **[132-38]**, *supra* (discussing these criteria). *See* also AP-25-3E FINAL W/11/00 Attachment No. 5, at 1-3 (Nov. 27, 2000) (setting forth complete list of 69 eligible countries).

171 *See* notes **[131-41]**, *supra* (explaining eligibility criteria).

172 World Bank, *The Little Green Data Book From The World Development Indicators*, No. 24521, at 8 (April 2002).

173 Examples of poor countries that did not qualify for LCO protection under the "low income" criteria are Bolivia, whose gross national income per capita in 2001 was $950, and Kiribati, whose gross national income per capita in 2001 was $830. See World Bank, *The Little Green Data Book From The World Development Indicators 2003*, at 47, 122 (April 2003). The World Bank refers to such countries as "lower middle income" countries. *See id.* at 15 (defining "lower-middle-income economies" as "those with a GNI per capita of more than $745 but less than . . . $2,975").

174 A country that did not qualify for LCO protection under the "low income" criteria might still qualify for such protection under the separate "low teledensity" criteria if it had fewer than three telephone access lines per one hundred inhabitants. *See* notes **[133-35]**, *supra* (discussing "low teledensity" eligibility criteria).

Presumably, of course, the market-based prices paid by such countries are kept in check by competitive forces.[175] But competition can do no more than force Intelsat Ltd. to match the terms and conditions of service offered by its competitors. Under conditions of oligopoly, low-volume, "lower-middle-income" countries may not enjoy sufficient bargaining power to obtain favorable terms from any of the handful of international telecommunications providers willing to serve them. INTELSAT privatization, however, provides a benefit to "lower-middle-income" countries only if the rates now available to such countries are set in a market that is truly competitive. If, in contrast, those rates simply reflect price-leadership in an uncompetitive oligopoly market, then even the advent of formal competition is not guaranteed to yield rates more favorable to "lower-middle-income" countries than those countries would have paid if INTELSAT's former uniform pricing policy had remained in effect.[176]

3. Have implicit subsidies to underserved nations been eliminated, without being replaced by explicit subsidies?

Before privatization, INTELSAT's rates for transmission capacity were uniform throughout the world.[177] Arguably, INTELSAT's uniform pricing policy caused the system's low-cost and high-volume users to implicitly subsidize its high-cost users.[178] In that respect, INTELSAT's historic pricing policy mirrored the system of implicit subsidies that was used to finance the deployment of wireline telephone service to high-

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[175] A country that could not qualify for "Income/Teledensity Eligibility" nonetheless remained eligible for LCO Protection if, at the time of INTELSAT privatization in 2000, that country could not obtain equivalent service from any cost-effective alternative provider. *See* notes **[136-38]**, *supra* (discussing "petition eligibility" criteria); *see also* AP-25-3E FINAL W/11/00 Attachment No. 6, at 1-2 (Nov. 27, 2000) (setting forth list of 27 countries or locations that are "petition-eligible" for LCO protection for all international traffic, plus 14 additional countries or locations "petition-eligible" for LCO protection for certain international links). Thus, any "lower-middle-income" countries ineligible for LCO protection should presumably be able to obtain equivalent service, cost-effectively, from providers other than Intelsat Ltd.

[176] *Cf.* Robin Cooper Feldman, *Consumption Taxes and the Theory of General and Individual Taxation*, 21 Va. Tax Rev. 293, 351-52 n.139 (2002) (discussing economic literature suggesting that prices frequently can be maintained at levels far in excess of marginal cost in markets characterized by oligopoly and price-leadership).

[177] INTELSAT Agreement Art. V(d). In practice, the uniform pricing policy ensured that INTELSAT's rates did not vary to reflect any differences in the organization's cost of providing service to different countries, nor to reflect competitive pressures on pricing brought to bear in particular national markets.

[178] *See* Francis Lyall, *Expanding Global Communications Services*, in PROCEEDINGS OF THE WORKSHOP ON SPACE LAW IN THE TWENTY-FIRST CENTURY: UNISPACE III TECHNICAL FORUM 63, 69 (2000) (Prior to privatization, "[i]n terms of Article V(d) of the INTELSAT Agreement, the charging rate for each type of utilisation of the INTELSAT space segment [was] the same for all users of that service. What this means is that routes and connections which [did] not themselves generate sufficient income to pay for their provision [were] charged at less than cost.").

cost, low-volume rural locations in the United States.[179] In both situations, users in low-cost, high-volume locations historically had little choice but to pay the implicit subsidies at issue; served by monopoly providers, these low-cost users had no ability to take their business elsewhere.

In the Telecommunications Act of 1996, Congress sought to bring the benefits of competition to U.S. telephone consumers by bringing an end to the "regulated monopoly" environment under which wireline local telephone service had long been provided.[180] At the same time, Congress recognized that the advent of competition would threaten the ability of incumbent local exchange carriers to continue to "overcharge" low-cost urban users as a means of implicitly cross-subsidizing service to high-cost rural users.[181] For this reason, the 1996 Act established a new, competitively neutral system of explicit subsidies designed to finance the continued provision of affordable telephone service to high-cost users.[182] Under the 1996 Act, every telecommunications carrier that provides interstate telecommunications service is required to contribute regularly into a Universal Service Fund.[183] The revenues paid into this fund are then used to underwrite "the provision, maintenance, and upgrading of facilities and services for which the support is

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179 *See generally In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, 11504 ¶ 7 (1998) (explaining that historically, "universal service was promoted through a patchwork quilt of implicit and explicit subsidies. . . . Charges to long distance carriers and rates for certain intrastate services . . . were priced above cost, which enabled local telephone companies to . . . [subsidize the cost of providing phone service to] residents in rural and high cost areas. . . .").

180 *See* Telecommunications Act of 1996, S. Conf. Rep. No. 104-458, at 113 (1996) (stating Congress's intent "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . .").

181 *See* Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-230, at 4-5 (1995) (stating 1996 Act's twin goals of "protect[ing] and advanc[ing] universal service" while also "allow[ing] competition for local telephone service").

182 *See In re Federal-State Joint Board on Universal Service, Report to Congress*,13 FCC Rcd. 11501, 11510 ¶ 18 (1998) (stating that "establishing an orderly transition from federal implicit subsidies to federal explicit subsidies" was the "intended goal" of the 1996 Act); *accord* Telecommunications Act of 1996 § 254(e), 47 U.S.C. § 254(e) (mandating that subsidies to support universal service "should be explicit"); *see also* Telecommunications Act of 1996, S. Conf. Rep. No. 104-458, at 131 (1996) (stating Congress's intention that universal service support mechanisms "continued or created under [the 1996 Act] should be explicit, rather than implicit as many support mechanisms are today.").

183 *See* 47 U.S.C. § 254(d) ("every telecommunications carrier that provides interstate telecommunications service shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.").

intended."[184] This system of explicit payments and explicit subsidies ensures that the burden of providing service to high-cost rural and low-volume users is apportioned across all industry participants in a competitively neutral manner.

The revised ITSO Agreement, in contrast, requires Intelsat Ltd. alone to support ITSO's public service mission to bring international communications service to underserved global regions.[185] None of Intelsat Ltd.'s competitors must meet any similar public service obligation. Nor are those competitors required to contribute any funds to help underwrite Intelsat Ltd.'s provision of service to high-cost, low-volume "lifeline" users. In essence, Intelsat Ltd.'s post-privatization commercial operations, while subject to substantial competition on all high-volume international routes, now must underwrite the company's costs of serving low-volume routes. Arguably, however, under conditions of competition, Intelsat Ltd. cannot continue to command rates from its high-volume route customers that are sufficiently high to cross-subsidize service to lifeline users. Rather, if the analogy to wireline telephony is apt, then Intelsat Ltd.'s competitors now have incentive to "cream-skim" Intelsat Ltd.'s customers by charging slightly lower rates than Intelsat Ltd. on profitable high-volume routes, while leaving Intelsat Ltd. alone with the burden of serving low-volume "lifeline" users at price-capped rates.[186] Such a paradigm would not be economically sustainable.

On the other hand, the marginal cost of providing satellite transmission capacity to low-volume users located in remote locations may not be as burdensome as the marginal cost of providing wireline telephone service to such users. While a domestic local exchange carrier may need to string and maintain miles of costly copper wire to reach a single remote residential customer,[187] satellite telecommunications do not require

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184 *See* 47 U.S.C. § 254(e). *See also* 47 U.S.C. § 214(e) (setting forth eligibility criteria for telecommunications carriers who seek to provide services financed by universal service fund).

185 See ITSO Agreement Arts. III, V (obligating Intelsat Ltd., post-privatization, to maintain global connectivity and global coverage; serve its lifeline connectivity customers; and provide non-discriminatory access to its satellite system to such customers).

186 *See* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 Harv. L. Rev. 1285, 1324 (2003) (defining "cream skimming" as "offering service only to the most profitable customers," and noting that competitive "cream skimming" poses a threat to universal service when telecommunications systems that formerly relied on implicit subsidies are privatized); *cf. In re Federal-State Joint Board on Universal Service, Report to Congress*,13 FCC Rcd. 11501, 11505 ¶ 8 (1998) (stating that Congress in 1996 created the Universal Service Fund to collect and administer explicit subsidies precisely because Congress "[r]ecogniz[ed] the vulnerability of . . . implicit subsidies to competition").

187 *See In re Federal-State Joint Board on Universal Service, Report to Congress*,13 FCC Rcd. 11501, 11504 ¶¶ 6-7 (1998) (without subsidies, consumers located in "remote and sparsely populated areas" would be "forced to pay prohibitively high rates for their phone service"; the high cost of serving "residents in rural and high cost areas" would have prevented such residents, if unsubsidized, "from receiving phone service because of prohibitively high telephone rates").

any additional physical facilities or resources to reach highly remote locations.[188] Moreover, technological innovation has tended to increase the transmission capacity of satellites, and thereby to continually reduce satellite operators' unit cost of providing service.[189] Indeed, for these reasons, Intelsat Ltd.'s competitors have often purported to covet Intelsat Ltd.'s monopoly "thin routes," which they often have characterized as a potential source of monopoly profits for Intelsat Ltd., rather than a costly burden.[190]

Only time will tell whether Intelsat Ltd.'s exclusive capability—and corresponding obligation—to serve "lifeline" countries at ever-decreasing regulated rates will prove, in fact, to be a burden or a benefit to the company financially. If it is a burden, however, then the burden is relatively light.[191] Specifically, shortly before privatization, the FCC determined that only thirteen percent of INTELSAT's U.S.-international circuits were deployed for service to the 63 "thin routes" that no other

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188 *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).

189 *See Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, 14 FCC Rcd 3065, 3071-73 ¶¶ 15-21 (1999) (assuming that the unit cost of providing satellite communications services declines by at least four percent per annum). *See also* Welcoming Address by ITSO Director General Ahmed Toumi at the Opening Session of the 28th Assembly of Parties (June 29, 2004), <http://216.119.123.56/dyn4000/dyn/docs/ITSO/tpl1_itso.cfm?location=dir_general99&id=322&link_src=HPL&lang=english> (noting that the price of supplying satellite transmission capacity dropped precipitously in the early 21st century due to "[t]he drop in demand for satellite capacity by major telecommunications carriers that are consolidating and reducing costs, the competition from transoceanic fiber optics cables, and the drop in demand for bandwidth as a consequence of digital compression").

190 *See Lockheed Martin Corporation, COMSAT Corporation, & COMSAT Digital Teleport, Inc., Assignors, & Intelsat, Ltd., Assignee, Order and Authorization*, 17 FCC Rcd. 27732, 27744 ¶ 19 (Int'l Bur. & Wireless Tel. Bur. 2002) (Intelsat Ltd.'s rates are regulated "as dominant on thin routes because [Intelsat Ltd.] possesses market power in this geographic market."); *Comsat Non-Dominant Order*, 13 FCC Rcd 14083, 14090-91 ¶ 9 (1998) (as a dominant carrier on its "thin routes," Intelsat Ltd. "require[e] detailed regulatory scrutiny" because its "market power" creates "incentive to charge rates or engage in practices that contravene the requirements of the Communications Act"). *But see* United States Government Accountability Office, *Intelsat Privatization and the Implementation of the ORBIT Act*, GAO-04-891, at 15-16 (Sept. 2004), <http://www.gao.gov/new.items/d04891.pdf> ("While Intelsat is the sole provider of satellite service into certain countries, . . . traffic into some countries is 'thin'—that is, there is not much traffic, and therefore there is little revenue potential. In such cases, global satellite companies other than Intelsat may not be interested in providing service to these countries.").

191 *See Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, 14 FCC Rcd 3065, 3073 ¶ 21 (1999) (noting "the small size of the [thin-route] markets. . . .").

carrier then served.[192] Moreover, only eight percent of U.S. revenue derived from INTELSAT services was then attributable to thin routes.[193] To date, these ratios appear to remain relatively unchanged.[194] In the future, as commercial communications satellites continue to proliferate and the number of thin routes decreases, Intelsat Ltd.'s obligation to serve lifeline customers can only grow less burdensome.[195] Thus,even if Intelsat Ltd.'s obligation to serve "lifeline" users at price-capped rates does impose a cost burden on Intelsat Ltd., this cost burden appears small in comparison with the company's overall operating revenues, and can only diminish over time. Accordingly, the lack of any explicit subsidy mechanism through which other carriers and users contribute payments toward the cost of serving "lifeline" users does not appear seriously to jeopardize Intelsat Ltd.'s financial viability or its ability to fulfill its public service obligation.[196]

4. Will global connectivity survive the possible retirement in 2013 of the residual treaty organization ITSO?

On July 18, 2001, the international treaty organization INTELSAT formally transferred its satellites to the new private company Intelsat Ltd., and simultaneously

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192 *Id.* at 3068 ¶ 9.

193 *Id.* at 3068 ¶ 8. In 1997-98, of $263 million derived from the provision of INTELSAT service on all U.S.-international routes, only $19 million was attributable to service provided on U.S.-international "thin routes." *Id*.

194 Since privatization, the FCC has not performed any new study of the revenues or circuit resources attributable to the Intelsat Ltd.'s "thin routes." However, during the privatization process, the FCC ruled that upon privatization, Intelsat Ltd. would be regulated as a "dominant carrier" on its "thin routes." In the regulatory proceedings that led to this decision, the FCC considered revising some of the specific regulations that had previously applied to the U.S. Signatory, COMSAT, prior to privatization. *See, e.g., In re Lockheed Martin Corp. & COMSAT Corp., Assignors, & Intelsat, Ltd, Assignee*, 17 FCC Rcd. 27732, 27744-47 ¶¶ 19-23 (Int'l Bur. & Wireless Telecom. Bur. 2002), *aff'd on recon.*, 18 FCC Rcd. 16605, 16607 ¶ 3 & nn.9-10 (Int'l Bur. & Wireless Telecom. Bur. 2003). The Commission ultimately declined to make any changes, however, because it concluded that the underlying market conditions had not changed in any significant respect. *See id.*

195 *See Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, 14 FCC Rcd 3065, 3079-80 ¶¶ 39-41 (1999) (assuming that current "thin routes" will gradually become competitive, and establishing a procedure for reclassifying them as "thick routes" when competition arises); *cf. In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, 11503-04 ¶ 3 (1998) ("[I]n general, continued growth in the information services industry will buttress, not hinder, universal service.").

196 Notably, Intelsat Ltd.'s obligation to serve to its "lifeline" users at price-capped rates did not deter a group of sophisticated private investors from paying $5 billion dollars to purchase Intelsat Ltd. on January 28, 2005. *See Intelsat Sale Completed*, WASH. POST, Jan. 29, 2005, at E2. *See also* **[note 109]**, *supra* (discussing the transaction).

transformed itself into the residual treaty organization ITSO.[197] When it transferred the satellites, however, the treaty organization retained "certain financial assets" to be used to fund ITSO's operating costs until 2013.[198] In 2013 or thereafter, when these funds run out, ITSO's member governments must decide whether to continue the residual treaty organization ITSO, or to retire it.[199] Should ITSO be retired, then "lifeline" users will no longer be able to enlist the treaty organization's aid in enforcing Intelsat Ltd.'s public service obligations.[200] Arguably, such a development could leave such users vulnerable to detrimental price increases or service reductions.[201]

For several reasons, however, such an outcome is unlikely. First, a decision to terminate the ITSO treaty organization would require the approval of two-thirds of ITSO's member governments.[202] Thus, if just 51 of ITSO's 150 member countries vote to continue the treaty organization beyond 2013, then the treaty organization will continue.[203] At present, however, at least 110 countries qualify for LCO protection under

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197 *See* page __, *supra*.

198 *See* ITSO Agreement Art. VII(a), done Nov. 17, 2000 ("ITSO will be financed for . . . twelve year[s] . . . by the retention of certain financial assets at the time of transfer of ITSO's space system to the Company.").

199 *See* ITSO Agreement Art. XXI, done Nov. 17, 2000 ("This Agreement shall be in effect for at least twelve years from the date of transfer of ITSO's space system to the Company. The Assembly of Parties may terminate this Agreement effective upon the twelfth anniversary of the date of transfer of ITSO's space system to the Company. . . .").

200 ITSO was originally created because some "lifeline" users and commentators were "reluctant to see INTELSAT's public service obligation secured through the vagaries of U.S. law as it now exists," and therefore preferred "to entrust the supervision of such matters to an international body." Francis Lyall, *Expanding Global Communications Services*, in PROCEEDINGS OF THE WORKSHOP ON SPACE LAW IN THE TWENTY-FIRST CENTURY: UNISPACE III TECHNICAL FORUM 63, 69 (2000). Notably, however, Intelsat Ltd.'s contractual obligations to "lifeline" users, including particularly the Lifeline Connectivity Obligations set forth in its "LCO Contracts," do *not* necessarily expire in 2013, even if the ITSO treaty organization should be retired. *See* pages __, *supra*.

201 *See* Francis Lyall, *On the Privatisation of INTELSAT*, 5 Sing. J. Int'l & Comp. L. 111, 131 (2001) (expressing "fear that, even with the . . . temporary securing of lifeline services for remote and under-developed areas [through the LCO Commitment], in fifteen years such services provided by the new INTELSAT structures on a subsidised basis will have disappeared on commercial grounds.").

202 *See* ITSO Agreement Art. XXI, done Nov. 17, 2000 ("The Assembly of Parties may terminate this Agreement . . . . by a vote pursuant to Article IX(f) of the Parties. Such decision shall be deemed to be a matter of substance."); *see also id.* Article IX(f) ("Decisions on matters of substance shall be taken by an affirmative vote cast by at least two-thirds of the Parties whose representatives are present and voting.").

203 See ITSO Member Countries Web Page, <http://216.119.123.56/dyn4000/dyn/docs/ITSO/tpl1_itso.cfm?location=&id=3&link_src=HPL&lang=english> (listing 150 member countries).

ITSO's various criteria, for at least some services or some routes.[204] If, in 2013, even half of these "lifeline" countries believe that ITSO's continuation would serve their national interests, such countries would control a sufficient number of votes to ensure that ITSO will continue.

Of course, any individual ITSO member country that favors retirement of the treaty organization in 2013 would be free to withdraw at that time, even if the organization continues in existence.[205] But individual ITSO member countries already have the right to withdraw today.[206] For non-lifeline ITSO member countries, the costs and benefits of maintaining membership in an ongoing ITSO would not change significantly in 2013. Indeed, should ITSO remain in existence after its initial twelve-year endowment is exhausted, the organization's modest operating costs would then be paid by Intelsat Ltd., and not by ITSO's member governments.[207] Thus, it is very likely that ITSO will remain in existence beyond 2013 if the "lifeline" countries consider its continuation to be beneficial.

Moreover, even if ITSO is retired in 2013, lifeline countries would not be left wholly unprotected. While it exists, ITSO provides assistance to "lifeline" users by monitoring Intelsat Ltd.'s performance in honoring its commitments to such users, and by assisting in resolving any disputes between Intelsat Ltd. and its "lifeline" users.[208] Even

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[204] *See* notes **[131-35]**, *supra* (discussing criteria for lifeline connectivity protection and counting numbers of countries that qualify). *See* also AP-25-3E FINAL W/11/00 Attachment No. 5, at 1-3 (Nov. 27, 2000) (listing 69 countries eligible for lifeline connectivity protection under "low income"/"low teledensity" criteria); AP-25-3E FINAL W/11/00 Attachment No. 6, at 1-2 (Nov. 27, 2000) (listing 41 additional countries or locations that do not meet "low income"/"low teledensity" criteria but nonetheless are eligible for lifeline connectivity protection on ground that no other carrier provides service).

[205] *See* ITSO Agreement Art. XIV(a)(i) ("Any Party may withdraw voluntarily from ITSO.").

[206] *Id.*

[207] *See* ITSO Agreement Art. VII(b), done Nov. 17, 2000 ("In the event ITSO continues beyond twelve years, ITSO shall obtain funding through the Public Services Agreement."); *see also id.* Art. I(j) ("'Public Services Agreement' means the legally binding instrument through which ITSO ensures that the Company [Intelsat Ltd.] honors the Core Principles"). The funds required would be modest: at present, ITSO has only four professional employees, and is based in office space that is located inside Intelsat Ltd.'s headquarters building. *See* ITSO Contact Information Web Page, <http://216.119.123.56/dyn4000/dyn/docs/ITSO/tpl1_itso.cfm?location=&id=17&link_src=HPL&lang=english>.

[208] *See* ITSO Agreement Art. X(f). To date, ITSO appears to have played an important behind-the-scenes role in performing these functions. *See* Welcoming Address by ITSO Director General Ahmed Toumi at the Opening Session of the 28th Assembly of Parties (June 29, 2004), <http://216.119.123.56/dyn4000/dyn/docs/ITSO/tpl1_itso.cfm?location=dir_general99&id=322&link_src=HPL&lang=english> ("July 2002 signaled the start of the active supervision of privatized Intelsat's performance. This phase has definitely had its share of problems. . . . [I]t has

(continued. . . . .)

if ITSO eventually is retired, however, Intelsat Ltd.'s Lifeline Connectivity Obligation contracts with its "lifeline" users would still remain in effect. If necessary, these LCO contracts could be enforced directly against Intelsat Ltd. in a court of competent jurisdiction in the United States.[209]

In sum, ITSO will continue beyond 2013 if the "lifeline" users collectively determine that the organization is still needed to protect their interests. Even if the organization is retired in 2013, lifeline users still enjoy the benefit of their LCO Protection and the legal means of enforcing this benefit. For these reasons, the possibility that ITSO might be retired in 2013 does not appear seriously to threaten the ability of "lifeline" users to receive service from Intelsat Ltd.

5. What will happen if Intelsat Ltd. goes bankrupt?

Before its satellites were privatized, the international treaty organization INTELSAT was not susceptible to financial failure. Instead, had INTELSAT's commercial revenues ever failed to cover the organization's costs, INTELSAT was authorized to make capital calls to its Signatories to make up the difference.[210] Moreover, for the first decade of its existence, INTELSAT also was protected by international law against competition from separate satellite systems that could cause "significant economic harm" to INTELSAT's operations.[211] Even after it waived this protection in 1984, INTELSAT remained capable of furnishing substantially all of its satellite transmission capacity at rates more than sufficient to cover all of the

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taken time to establish a relationship of mutual and solid trust between ITSO and Intelsat Ltd., and to develop effective work methods. . . . [I]n 2003 the focus was chiefly on . . . Intelsat [Ltd.]'s compliance with its lifeline connectivity obligations with countries benefiting from LCO protection. For customers in countries without any real power to negotiate price reductions with Intelsat, the LCO Pricing Index is a guarantee that, under certain conditions, they will enjoy market prices. After several months of painstaking discussions, we reached an acceptable solution for both the annual calculation of the current Index, and the principles that will govern [its future] revision. . . .").

209 *Cf. FCC Report to Congress as Required by Orbit Act*, 17 FCC Rcd. 11458, 11467 (2002) (Post-privatization, Intelsat Ltd. "do[es] not maintain an immune or privileged status.").

210 *See* INTELSAT Agreement Art. V(c) ("Each Signatory shall contribute to the capital requirements of INTELSAT, and shall receive capital repayment and compensation for use of capital. . . . "); *see also* INTELSAT Operating Agreement Art. 8(f) ("To the extent, if any, that the revenues earned by INTELSAT are insufficient to meet INTELSAT operating, maintenance and administrative costs, the Board of Governors may decide to meet the deficiency by using INTELSAT operating funds, by overdraft arrangements, by raising a loan, by requiring Signatories to make capital contributions in proportion to their respective investment shares or by any combination of such measures.").

211 *See* INTELSAT Agreement Art. XIV(d). In fact, INTELSAT never invoked this protection, which it permanently waived in 1984. *See* notes **[27-29]**, *supra*.

organization's costs.[212] Thus, prior to privatization, "lifeline" users enjoyed an extremely high level of assurance that financial difficulties would never force INTELSAT to go out of business.

Post-privatization, in contrast, Intelsat Ltd. is an ordinary commercial entity, subject to competition and operated according to ordinary business principles. Moreover, Intelsat Ltd.'s business operations take place in a market sector in which bankruptcies are far from unknown.[213] Arguably, therefore, the privatized Intelsat Ltd. could fail. If so, then the company's public service obligations to "lifeline" users seemingly might go unfulfilled.

In practice, however, even if Intelsat Ltd. does fail, the company's satellites—which are each worth hundreds of millions of dollars—would not likely go dark.[214] Rather, if Intelsat Ltd. should become insolvent and is forced into receivership, its insolvency would not excuse the company from fulfilling its public service obligations.[215] Indeed, even if Intelsat Ltd. ultimately were to be dissolved in bankruptcy, the company's satellites would then be transferred to a new owner. In the event that such a transfer takes place, U.S. law provides several safeguards that should prove adequate to protect the interests of "lifeline" users.

First, arguably Intelsat Ltd.'s LCO Contracts are best characterized as property instruments through which Intelsat Ltd.'s "lifeline users" have been vested with leasehold interests in Intelsat Ltd.'s satellite transmission capacity. If so, then the rights of "lifeline" users under the LCO Contracts are analogous to a tenant's leasehold interest in real property owned in fee simple by her landlord. Under U.S. bankruptcy law, however,

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212 *See Direct Access to the INTELSAT System*, 14 FCC Rcd. 15703, 15734-35 ¶ 74 (1999) (INTELSAT's utilization charges ("IUC") historically were set at rate levels sufficient to provide an 18% return on investment to INTELSAT); *see also* Francis Lyall, *On the Privatisation of INTELSAT*, 5 Sing. J. Int'l & Comp. L. 111, 117 (2001) ("At present INTELSAT finances are very healthy. It has not had to call on capital from its Signatories to finance new satellites series for many years.").

213 *See* Andy Pasztor, *After Debacles High and Low, Satellite Concerns Rise Again*, WALL ST. J., Nov. 4, 2003, at C3 (recounting bankruptcies of commercial satellite communications companies including New ICO, Globalstar, Iridium, Teledesic, and Loral Space & Communications Ltd. that occurred from 1996-2002).

214 *See id.* (describing the dispositions of the satellites that had belonged to bankrupt commercial satellite communications companies New ICO, Globalstar, Iridium, Teledesic, and Loral Space & Communications Ltd.; in all cases, satellites were transferred to new owners who continued to operate them).

215 *See, e.g., Final Analysis Communications Services Inc.*, 19 FCC Rcd. 4768, 4783 ¶ 36 & n.91 (Int'l Bur. 2004) (holding that "bankruptcy proceedings [are not] an excuse for failure to meet unrelated regulatory obligations where debt is not an issue," and noting that bankrupt satellite carriers have provided service to the public "before, during, and after [their] bankruptcy proceeding[s]") (citing *LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974)).

when a landlord becomes bankrupt, any post-petition disposition of the bankrupt landlord's property must "provide adequate protection" of the tenants' leasehold interest in the property.[216] To provide such protection, the transferee of a bankrupt debtor's property ordinarily must take such property subject to any preexisting third-party leasehold interests or encumbrances.[217]

Moreover, even if the LCO Contracts are better characterized as "executory contracts"—rather than as property instruments that vest "lifeline" users with leasehold interests in Intelsat Ltd.'s satellite transponder capacity—Intelsat Ltd.'s public service obligations to "lifeline" users would nonetheless survive any dissolution in bankruptcy. Under the U.S. Bankruptcy Code, an executory contract to which a bankrupt debtor is a party normally remains in effect so long as neither party defaults in its obligations under the contract.[218] Here, the LCO Contracts require Intelsat Ltd. to do no more than to furnish transmission capacity to "lifeline" users. Significantly, the LCO Contracts do not, under any circumstances, require Intelsat Ltd. to pay any money to anyone. Accordingly, Intelsat Ltd. would presumably remain capable of satisfying its obligations under the LCO Contracts even if the company were to become insolvent. Moreover, even if Intelsat Ltd. does fall into bankruptcy, "lifeline" users would have no incentive to seek termination or modification of the LCO Contracts. Accordingly, the Bankruptcy

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216 *See* 11 U.S.C. § 363(e) ("[O]n request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the [bankruptcy] trustee, the court . . . shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest."). In the present context, it is unnecessary to decide whether satellites in orbit are better characterized as real property or personal property, because this rule governs dispositions in bankruptcy of either type of property that is encumbered by a third-party interest *Id*

217 *See* 11 U.S.C. § 363(f) (property of a bankrupt debtor's estate ordinarily must be transferred subject to "any interest in such property of an entity other than the estate"). The U.S. Bankruptcy Code enumerates five exceptional situations in which the property of the bankrupt debtor *may* be transferred "free and clear of" any third-party interest in the property: where applicable nonbankruptcy law permits sale of the property free and clear of such interest, 11 U.S.C. § 363(f)(1); where the interested third-party entity consents to waive its interest in the property, *id.* § 363(f)(2); where such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property, *id.* § 363(f)(3); where such interest is in bona fide dispute, *id.* § 363(f)(4); or where the interested third-party entity could be compelled by law to accept a money satisfaction of such interest, *id.* § 363(f)(5). Should Intelsat Ltd. become bankrupt, none of those five statutory exceptions would appear to apply. Thus, even in bankruptcy, Intelsat Ltd.'s satellite assets could not be transferred "free and clear" of the company's LCO commitments to its "lifeline" users. *Cf.* 11 U.S.C. § 365(h) (restrictive covenants that are enforceable under applicable nonbankruptcy law survive lease rejection).

218 *See* 11 U.S.C. § 365(e)(1) ("[A]n executory contract or unexpired lease of the debtor may not be terminated or modified . . . at any time after the commencement of [a bankruptcy proceeding] solely because of [the debtor's bankruptcy]"). Where the bankrupt debtor has defaulted, or likely will default, its obligations under a contract, the other contracting party may seek to have the contract terminated or modified. *See* 11 U.S.C. §§ 365(a)-(c).

Code's general rule favoring nontermination of executory contracts would apply.[219] Under this rule, Intelsat Ltd.'s LCO Contracts with its lifeline users would not be extinguished in bankruptcy even if those Contracts are characterized as "executory contracts" rather than as property encumbrances.

Finally, if Intelsat Ltd. ever should be dissolved in bankruptcy, the Communications Act would provide an additional layer of protection to "lifeline" users, separate and apart from that provided by the Bankruptcy Code. Specifically, when the operator of an FCC-licensed communications facility becomes bankrupt, the bankrupt operator's existing FCC licenses can be assigned to a putative new owner only if the FCC determines that the proposed assignment would serve the public interest, convenience, and necessity.[220] To satisfy this statutory standard, the proposed transaction must comply with the Communications Act, the FCC's Rules, federal communications policy,[221] and other United States policies and objectives.[222] Generally, when a bankrupt operator's license is transferred, federal communications policy holds that the public interest is served by continuation of uninterrupted service to that operator's existing customers.[223] Moreover, in ratifying the ITSO Agreement, the United States adopted a specific federal policy and objective of maintaining the global connectivity and global coverage of the satellite system established by INTELSAT.[224] In particular, United States policy now holds that the satellite system should continue to serve its "lifeline" users for at least as

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219 *See* 11 U.S.C. § 365(e)(1).

220 *See, e.g.*, *In re Leap Wireless Int'l, Inc.*, 19 FCC Rcd. 14909, 14914 ¶ 10 (Wireless Telecom. Bur. 2004) (citing 47 U.S.C. § 310(d)).

221 *See, e.g.*, *id.* at 14915 ¶ 10 (citing cases).

222 *See Tender Offers and Proxy Contests*, 59 Rad. Reg. 2d (P&F) 1536, FCC 86-67, 1986 WL 291498, at ¶ 7 & n.20 (1986) ("While [the FCC's] primary mission is to implement the Communications Act, we believe that, in doing so, it is both necessary and appropriate for us to harmonize our actions with other federal policies and objectives."), *appeal dismissed sub nom.*, *Office of Communication of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C.Cir.1987) (citing *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985) & *LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974)); *cf. FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 304 (2003) (FCC must harmonize its implementation of the Communications Act with policies and objectives of Bankruptcy Code and other federal statutes).

223 *See, e.g., Applications of Verestar, Inc. for Assignment of Licenses to SES Americom, Inc.*, DA 04-3639, IB Docket No. 04-174, 2004 WL 2648124, at ¶ 14 (FCC Int'l Bur. & Wireless Telecom. Bur. Nov. 19, 2004) ("Allowing the assignment of these assets to SES Americom is critical to the uninterrupted provision of service to [bankrupt operator] Verestar's customers, which we find, in this instance, to be a specific benefit of the proposed assignments.").

224 *See* ITSO Agreement prmbl. ("The States Parties to this Agreement . . . [i]ntend[] that the Company will honor the Core Principles set forth in Article III of this Agreement and will provide, on a commercial basis, the space segment required for international public telecommunications services of high quality and reliability. . . ."); Art. III(b) ("The Core Principles are: (i) maintain global connectivity and global coverage; (ii) serve its lifeline connectivity customers; and (iii) provide non-discriminatory access to the Company's system.").

long as the ITSO Agreement remains in effect, regardless of whether the system remains in the hands of Intelsat Ltd. or is passed to subsequent successors-in-interest.[225] For both of these reasons, even if Intelsat Ltd. ultimately is ever dissolved in bankruptcy, the FCC should not approve the assignment of its operating authority to any entity that is not committed to honoring the LCO Commitments to serve Intelsat Ltd.'s "lifeline" users.

B. Political/Legal Threats to ITSO's "Public Service" Mission.

As a facilities-based international intergovernmental organization (IGO), the former INTELSAT treaty organization was immune from the operation of national laws and trade policies of its Member states.[226] As a Delaware corporation, a District of Columbia domiciliary, and a licensee of the United States Federal Communications Commission, in contrast, the privatized Intelsat Ltd. is now fully subject to U.S. law and FCC policy.[227] Accordingly, Intelsat Ltd. must now comply with a myriad of U.S. international trade statutes under which the President may invoke various trade sanctions or restrictions on foreign commerce as a means of achieving political or economic objectives of the United States.[228] Such trade sanctions or restrictions, if invoked, could

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225 *See id.*; *see also* ITSO Agreement Art. I(d) (defining "Company" to include both Intelsat Ltd. *and* its "successors-in-interest" to the satellite system).

226 *See* INTELSAT Agreement, done Aug. 20, 1971, 23 U.S.T. 3813, Art. XV(c) (requiring all INTELSAT Member nations to grant to INTELSAT and its officers and employees "immunity from legal process in respect of acts done or words written or spoken in the exercise of their functions and within the limits of their duties. . . ."). *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). In 1977, President Ford issued an Executive Order designating INTELSAT "as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by" the International Organizations Immunities Act of 1945 (IOIA), 22 U.S.C. § 288 *et seq.* *See* Exec. Order No. 11996, 42 Fed. Reg. 4331 (Jan. 19, 1977). President Ford's Executive Order superseded an earlier Executive Order in which President Nixon had similarly designated INTELSAT as an immune international organization under the IOIA. *See* Exec. Order No. 11718, 38 Fed. Reg. 12797 (May 14, 1973). *See also* Exec. Order No. 11277, 31 Fed. Reg. 6609 (Apr. 30, 1966) (designating an INTELSAT predecessor organization immune under IOIA); Exec. Order No. 11227, 30 Fed. Reg. 7369 (June 2, 1965) (same).

227 *See FCC Report to Congress as Required by Orbit Act*, 17 FCC Rcd. 11458, 11467 (2002) (Post-privatization, Intelsat Ltd. "do[es] not maintain an immune or privileged status," but instead is now "subject to U.S. or U.K. licensing authorities").

228 *See, e.g.*, Telecommunications Trade Act of 1988, 19 U.S.C. §§ 3101-11 (2000), Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (2000), International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701-07 (2000), National Emergencies Act, 50 U.S.C. §§ 1621-51 (2000), Trading With The Enemy Act of 1917, 50 U.S.C. app. §§ 1-44 (2000), Trade Sanctions and Export Enhancement Act of 2000, 22 U.S.C. §§ 7201-09 (2000).

potentially prohibit Intelsat Ltd. from "doing business" with certain foreign telecommunications carriers, even where such business relations are necessary for existing telecommunications links to be maintained.

For this reason, critics have charged that by rendering the ongoing operation of the INTELSAT satellite system subject to the control of U.S. law, the privatization of INTELSAT threatens the universal global connectivity of the world's telecommunications systems.[229] In particular, at the outset of the privatization process, one leading critic voiced the following specific concerns raised by rendering Intelsat Ltd. subject to regulation under U.S. law:

> [C]an it be expected that the [United States government] will always remain aloof and allow the provision of service to all customers? . . . [W]ill the US Congress refrain from seeking to direct how services are provided? Will contentions with Iran, Libya, Yugoslavia, or Iraq not impel the use of telecommunications as an economic weapon? . . . [T]he attitude to international law seen in recent US cases increases one's fears. The residual [treaty organization ITSO] may have little actual power to secure [Intelsat Ltd.'s] immunity from such pressures. Ultimately enforcement of any arbitral award would end up requiring the intervention of a normal judicial system. How would a [United States] court respond to an action to enforce an award under the Public Service Agreement if there is also either a governmental direction, or a Congressional statute on the point?[230]

Now that INTELSAT's privatization process has been completed, these concerns merit serious consideration. Post-privatization, does the global connectivity of the world's communications systems rest solely on the continued support of incumbent U.S. policymakers? Subpart IV.B.1 addresses whether any United States law or policy now in effect threatens Intelsat Ltd.'s continued ability to provide global connectivity. Subpart IV.B.2 then analyzes whether, as a matter of current U.S. law, the President and his Administration have authority to adopt policies that impact Intelsat Ltd.'s ability to maintain global connectivity. Subpart IV.B.3 assesses whether the United States

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[229] *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."); *accord* 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) (same); Francis Lyall, *Privatisation and International Telecommunications Organisations*, 38 Proc. Inst. Space L. 168, 168-74 (1995) (same).

[230] Francis Lyall, *On the Privatisation of INTELSAT*, 28 J. Space L. 101 (2000), *reprinted in* 5 Sing. J. Int'l & Comp. L. 111, 124-25 (2001) (footnotes omitted).

Congress has the power to violate the ITSO Agreement by enacting new laws or policies that threaten global connectivity, or, alternatively, whether such laws would violate the U.S. Constitution. Subpart IV.B.4 considers whether non-U.S. subsidiaries or affiliates of Intelsat Ltd. that serve non-U.S. locations via foreign-licensed satellites can be rendered subject to U.S. law. Finally, Subpart IV.B.5 considers whether global connectivity would continue if Intelsat Ltd. were rendered incapable of fulfilling its public service obligation.

1. Is Intelsat Ltd. violating current U.S. law by providing service to countries that are subject to U.S. trade sanctions?

The United States has been said to "lead[] the world in resorting to economic sanctions for foreign policy purposes."[231] Indeed, the United States currently maintains economic trade sanctions against Burma (Myanmar), Cuba, Iran, Iraq, Liberia, Libya, North Korea, Sudan, Syria, Zimbabwe, and several Balkan States.[232] Except for Burma (Myanmar) and Liberia, each of these countries is a Party to ITSO.[233] Moreover, three such countries—North Korea, Sudan, and Zimbabwe—have been designated by ITSO as "lifeline" users of Intelsat Ltd.'s services.[234] As "lifeline" users, these countries depend heavily on Intelsat Ltd. to keep them connected with the rest of the world. Accordingly, consistent with the former INTELSAT treaty organization's historic practice, Intelsat Ltd. has continued to serve every ITSO member country since privatization.[235] In so doing, however, has Intelsat Ltd. violated U.S. international trade law?

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[231] Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 Cal. L. Rev. 1162, 1169 (1987).

[232] *See* United States Department of the Treasury, Office of Foreign Assets Control, Sanctions Program and Country Summaries Web Page, <http://www.ustreas.gov/offices/enforcement/ofac/sanctions/> (listing economic sanctions in effect, and providing citations to Executive Orders and statutes implementing such sanctions); *see also* 50 U.S.C.A. § 1701 note (2000 & Supp. 2005) (setting forth text of various statutes that have enacted trade sanctions against specific countries pursuant to International Emergency Economic Powers Act).

[233] *See* ITSO Member Countries Web Site, <http://216.119.123.56/dyn4000/dyn/docs/ITSO/tpl1_itso.cfm?location=&id=3&link_src=HPL&lang=english>. With respect to the Baltic States, ITSO Members include Croatia, Bosnia & Herzegovina, and the "Federal Republic of Yugoslavia" (i.e. Serbia and Montenegro). *Id.*

[234] *See* ATTACHMENT NO. 5 TO AP-25-3E FINAL W/11/00 (identifying the Democratic People's Republic of (North) Korea as eligible for lifeline connectivity protection based on its low per capita income, and identifying both Sudan and Zimbabwe as eligible for lifeline connectivity protection based on both low per capita income and low teledensity). In addition, if they were ITSO Members, both Burma (Myanmar) and Liberia also would qualify for "lifeline connectivity" protection. *See id.*

[235] *See, e.g.*, *Media in Iraq*, BBC Monitoring Media, Jan. 24, 2005, 2005 WL 58346487 ("Vision of the Islamic Republic of Iran television in Arabic is based in Tehran and sponsored by the state-run Vision of the Islamic Republic of Iran. It broadcasts daily to Iraq on the Intelsat 902

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Historically, the United States Treasury Department has allowed U.S. telecommunications carriers to provide international telecommunications services to countries otherwise subject to U.S.-international trade sanctions—perhaps on the sound theory that communication must be possible in order for international disputes to be resolved. Accordingly, the Treasury Department has expressly excepted the provision of basic international telecommunications service from trade sanctions otherwise currently in effect against ITSO "lifeline" countries North Korea,[236] Sudan,[237] and Zimbabwe,[238]

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satellite at 62 degrees east, 10973 MHz, vertical polarization."). For a description of the programming transmitted by Vision of the Islamic Republic of Iran, *see* Steven Barraclough, *Satellite Television in Iran: Prohibition, Imitation and Reform*, Middle E. Stud., July 31, 2001, at 25, 2001 WLNR 4692654 ("As described by Ayatollah Khamene'i, the country's constitutional leader, Iranian broadcasting . . . is 'the mouthpiece of the Islamic system.' Its duty is to stand at the 'forefront' against 'a well-organised and obvious offensive (which) has been launched by (the) enemies of Islam against divine principles with an aim of promoting secularism, undisciplined behaviour and corruption among the people.' Since this onslaught is directed specifically against Islam and the Islamic Revolution, [the network] is required to promulgate 'religious thoughts and introduce the politics of the Islamic Republic in conformity with Islam and other parameters effective in the administration of the country.'") (footnotes omitted).

[236] *See* 31 C.F.R. § 500.571 ("All transactions of U.S. common carriers incident to the receipt or transmission of telecommunications involving North Korea are authorized.").

[237] *See* 31 C.F.R. § 538.512 ("All transactions with respect to the receipt and transmission of telecommunications involving Sudan are authorized. This section does not authorize the provision to the Government of Sudan or a person in Sudan of telecommunications equipment or technology."). For background, *see generally* Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497 § 6, 118 Stat. 4012 (2004) (implementing trade sanctions against Sudan "in support of peace in Darfur"); *see also* Sudan Peace Act, Pub. L. No. 107-245 § 6(b)(2), 116 Stat. 1507 (2002) (setting forth specific trade sanctions), *both codified at* 50 U.S.C. 1701 note (Supp. 2005).

[238] On March 6, 2003, President Bush issued an Executive Order prohibiting U.S. businesses from trading with "certain members of the Government of Zimbabwe and other persons [whose actions] . . . contribut[ed] to the deliberate breakdown in the rule of law in Zimbabwe, to politically motivated violence and intimidation in that country, and to political and economic instability in the southern African region. . . ." Exec. Order No. 13288 (March 6, 2003), 68 Fed. Reg. 11457 (Mar. 10, 2003). Subsequently, the Treasury Department promulgated regulations that prohibit trade only with certain named persons, while continuing generally to permit trade with the Zimbabwean government and other persons or companies located in Zimbabwe. *See generally Zimbabwe Sanctions Regulations*, 69 Fed. Reg. 45246-02 (July 29, 2004). Even with respect to the named Zimbabwean persons who are subject to U.S. sanctions, the provision of "postal, telegraphic, telephonic, or other personal communication that does not involve the transfer of anything of value" is expressly excepted from the sanctions. 31 C.F.R. § 541.206(a) (2005). However, the regulations did *not* "exempt from regulation or authorize transactions incident to . . . the provision, sale, or leasing of capacity on telecommunications transmission facilities (such as satellite or terrestrial network connectivity) for use in the transmission of any data." 31 C.F.R. § 541.206(b)(3). Rather, "[t]he exportation of such items or services and the provision, sale, or leasing of such capacity or facilities to a [named] person whose property or

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and also several "non-lifeline" countries currently subject to U.S.-international trade sanctions.[239] Similarly, in the special case of Cuba, the United States Congress has imposed seemingly permanent general trade sanctions, but has expressly exempted international telecommunications services from such trade sanctions.[240] At present, no existing U.S. law or trade policy purports to forbid the private, U.S.-licensed Intelsat Ltd. from providing basic international telecommunications service to any nation on earth.

2. Does the U.S. Administration have authority to promulgate new U.S.-international trade sanctions that might threaten Intelsat Ltd.'s ability to maintain global connectivity?

As discussed in Subpart IV.B.1, the United States Treasury Department, by administrative rule, has generally excepted the provision of international telecommunications services from the coverage of U.S. trade sanctions otherwise in effect against certain foreign countries. Arguably, however, any rules that have been promulgated by the Treasury Department might some day be repealed by that Department.[241] The question thus arises whether the patchwork of Treasury Department

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interests in property are blocked . . . are prohibited." *Id.* Thus, while existing U.S. trade sanctions do not interfere with Intelsat Ltd.'s provision of "lifeline" connectivity to Zimbabwe, apparently Intelsat Ltd. is prohibited from furnishing satellite transmission capacity directly to any of the individuals named in the Treasury Department regulations that implement limited trade sanctions against Zimbabwe.

239 *See, e.g.*, 31 C.F.R. § 550.510 (authorizing "[a]ll transactions of common carriers incident to the receipt or transmission of telecommunications . . . between the United States and Libya"); 31 C.F.R. § 560.508 (authorizing "[a]ll transactions of common carriers incident to the receipt or transmission of telecommunications . . . between the United States and Iran"); 31 C.F.R. § 515.542(b) (generally authorizing "all transactions incident to the use of cables, satellite channels, radio signals, or other means of telecommunications for the provision of telecommunications services between Cuba and the United States, including telephone, telegraph and similar services, and the transmission of radio and television broadcasts and news wire feeds between Cuba and the United States"); 31 C.F.R. § 515.418 (authorizing U.S. communications carriers to make settlement payments to Cuba to complete international calls).

240 The Cuban Democracy Act of 1992, as modified by the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6001-10 (2000), generally prohibits U.S. persons and business entities from engaging in virtually any commercial business transactions with Cuba. But the same Act specifically provides that international "[t]elecommunications services between the United States and Cuba *shall be permitted*." 22 U.S.C. § 6004(e)(1) (emphasis added); *see also* 22 U.S.C. § 6004(e)(2) ("Telecommunications facilities are authorized in such quantity and of such quality as may be necessary to provide efficient and adequate telecommunications services between the United States and Cuba."). For an accounting of payments made to Cuba by U.S. telecommunications carriers pursuant to this statute, *see Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1325 (S.D. Fla. 1999).

241 From a procedural standpoint, Treasury Department regulations that implement trade sanctions are particularly susceptible to hasty repeal, since the promulgation and repeal of such regulations need not comply with the transparent public notice-and-comment rulemaking procedures generally required by the Administrative Procedure Act. *See* 5 U.S.C. § 553(a)(1)

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regulations now in effect are subject to unilateral repeal by the Executive Branch of the U.S. government. If so, then these regulations may provide a very weak foundation upon which to entrust the continued global connectivity of world's telecommunications systems.

Ordinarily, administrative agencies enjoy considerable discretion to repeal regulations that they have promulgated.[242] Such discretion, however, is not unlimited. In particular, an agency may not take any action (*including* repeal of an existing regulation) that is "not in accordance with law" or that is "contrary to constitutional right, power, privilege, or immunity."[243] At present, several U.S. statutes would appear to require the maintenance of at least a limited exception from trade sanctions for international telecommunications services. In particular, the International Emergency Economic Powers Act of 1977,[244] under which most U.S.-international trade sanctions imposed since 1977 have been promulgated,[245] expressly disclaims vesting the Executive Branch with authority to "prohibit, directly or indirectly, any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value."[246] The same Act further disclaims providing "authority to regulate or prohibit . . . the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to . . . news wire feeds."[247] While not entirely free from ambiguity, these statutory reservations appear to contemplate that any trade sanctions imposed under the Act would provide exemptions that would allow at least some commercial operation of the communications facilities needed to transmit

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(excepting from public notice-and-comment requirements those rulemakings that concern "a military or foreign affairs function of the United States").

242 *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 658 (1997) (agency's rescission of a rule is reviewed under same deferential "arbitrary and capricious" standard by which promulgation of rule is reviewed).

243 Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(B). *See also* National Emergencies Act, 50 U.S.C. § 1631 (even "[w]hen the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act.").

244 50 U.S.C. §§ 1701-07.

245 *See* United States Department of the Treasury, Office of Foreign Assets Control, Sanctions Program and Country Summaries Web Page, <http://www.ustreas.gov/offices/enforcement/ofac/sanctions/> (listing economic sanctions in effect, and providing citations to Executive Orders and statutes implementing such sanctions).

246 50 U.S.C. § 1702(b)(1).

247 50 U.S.C. § 1702(b)(3); *accord* Trading With The Enemy Act of 1917 § 5(b)(4) (as amended in 1994), 50 U.S.C. app. § 5(b)(4) (same).

telegraph messages, telephone calls, and news wire feeds.[248] If so, then any future attempt by the U.S. Treasury Department to prohibit all commercial provision of international telecommunications service between the U.S. and another country would be subject to judicial reversal on the ground that it is "not in accordance with law."[249]

Similarly, the Telecommunications Trade Act of 1988 also vests the President with authority to impose trade sanctions under certain conditions.[250] At the same time, however, this Act cabins the scope of such authority by providing that the President shall *not* impose sanctions that are "inconsistent with the international obligations of the United States. . . ."[251] The current ITSO Agreement, like the INTELSAT Agreement before it, places the United States under an international obligation, even post-privatization, to "maintain [the] global connectivity and global coverage" of the satellite system formerly operated by INTELSAT.[252] Accordingly, the Telecommunications

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248 A similar implication can be derived from a provision of the Trading With The Enemy Act of 1917 that exempts from trade sanctions the transmission of "any telegram, cablegram, or wireless message, or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy," provided the communication is first submitted for censorship to the U.S. government. 50 U.S.C. app. § 3. Like the International Emergency Economic Powers Act of 1977, the Trading With The Enemy Act of 1917 appears to contemplate that commercial facilities used to transmit communications to and from hostile countries would remain operational during the period of hostilities.

249 Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

250 *See* Telecommunications Trade Act of 1988, 19 U.S.C. §§ 3101-11. This Act authorizes the imposition of trade sanctions primarily as a tool for assisting U.S. telecommunications providers to obtain access to foreign markets in which they seek to provide service. *See* 19 U.S.C. § 3101(b) (setting forth purposes of Act); *see also* 19 U.S.C. § 3105(b)(1) (setting forth specific trade sanctions authorized by Act). While the U.S. has never actually imposed trade sanctions under this Act, it has periodically threatened to do so. *See, e.g.*, J. Gregory Sidak, *Remedies and the Institutional Design of Regulation In Network Industries*, 2003 MICH. ST. DCL L. REV. 741, 752 (2003) (asserting that the Office of the United States Trade Representative (USTR) has implicitly threatened initiating trade sanctions against Japan, in order to pressure Japan into emulating US domestic regulatory policy on pricing of mandatory competitor access to the unbundled elements of the local network belonging to the operating companies of Nippon Telegraph and Telephone Corporation (NTT)); Jeffrey H. Rohlfs & J. Gregory Sidak, *Exporting Telecommunications Regulation: The U.S.-Japan Negotiations on Interconnection Pricing*, 43 Harv. Int'l L.J. 317, 318 (2002) (same); Luz Estella Ortiz Nagle, *Antitrust in the International Telecommunications Sector: The United States Challenges Mexico's Telmex Monopoly*, 33 U. MIAMI INTER-AM. L. REV. 183, 227 (2002) (in the 1990s, United States sought WTO sanctions and punitive actions against Mexico during trade dispute over access to Mexican telecommunications markets).

251 Telecommunications Trade Act of 1988 § 1382, 19 U.S.C. § 3111 (2000). *Accord* Tariff Act of 1930, 19 U.S.C. §§ 1677(4)(E)(v), 1677(9) (2000) (same); Agricultural Adjustment Act, 7 U.S.C. § 608e-1(c)(2) (2000) (same).

Trade Act cannot provide a basis for adopting any trade sanctions that would violate the ITSO Agreement by preventing Intelsat Ltd. from maintaining the global connectivity and global coverage of its satellite system.

Collectively, these statutes appear to bar the U.S. Executive Branch from unilaterally rescinding the regulatory exemptions that currently allow Intelsat Ltd. to serve every nation on earth. On the other hand, these statutes do not leave the U.S. Executive Branch powerless to slow the expansion of Intelsat service to U.S. rivals. To the contrary, early in the privatization process, the U.S. Executive Branch in 2001 did block the deployment of the planned U.S.-licensed Ku-band "Intelsat APR-3" satellite.[253] From its planned orbital location at 85° E.L., the "Intelsat APR-3" satellite would have offered "strategic landmass coverage of China, Russia, India and the Middle East."[254] For this reason, SINOSAT, an agency of the Chinese government, had pre-purchased the right to use six of the satellite's transponders for the entire orbital maneuver life of the satellite.[255] Launch services for the "Intelsat APR-3" satellite were to be provided by the China Great Wall Industry Corporation, another Chinese government agency.[256] While the proposed lease of "Intelsat APR-3" transponders to SINOSAT did not violate any U.S. law or policy, the U.S. State Department denied Intelsat Ltd.'s application for the export license that would have permitted China Great Wall Industry Corporation to obtain certain U.S. technology needed to perform the launch.[257] Rather than trying to

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[252] ITSO Agreement, Art. III(b)(i); *accord id.* Art IX(c)(i) (same). *See also id.* Art. XI(a) ("The Parties shall . . . meet their obligations under this Agreement in a manner fully consistent with and in furtherance of . . . the Core Principles in Article III and other provisions of this Agreement.").

[253] *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> (announcing plan to launch the "Intelsat APR-3" satellite). Under earlier plans that also were never implemented, the satellite to be located at 85° E.L. was variously called the INTELSAT "KTV satellite" or the New Skies Satellite "NSS-6 satellite." *See* Chris Bulloch, *Satellite Builders' Tough Times*, 57 INTERAVIA No. 661, at 43, 2002 WLNR 5140096 (Mar. 31, 2002) (reviewing history).

[254] 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.*

[255] *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>.

[256] *See id.*

[257] *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

(continued. . . . .)

launch the "Intelsat APR-3" satellite from a different country, Intelsat Ltd. instead terminated deployment of the satellite.[258] In this regard, the U.S. Executive Branch did hinder Intelsat Ltd.'s efforts to expand the capacity of its global network.[259] Under current U.S. law, however, the Executive Branch probably lacks the means to go any farther. Specifically, the U.S. Administration seemingly lacks a legal basis to unilaterally order Intelsat Ltd. to curtail the provision of any existing service.

3. Does the U.S. Congress have authority to enact new U.S.-international trade sanctions that might prevent Intelsat Ltd. from maintaining the global connectivity of the satellite fleet formerly operated by INTELSAT?

At present, several U.S. statutes appear to safeguard the patchwork of regulatory exemptions that currently protects Intelsat Ltd.'s ability to serve every nation on earth. Seemingly, however, nothing would bar the U.S. Congress from one day repealing the relevant statutory provisions in order to rescind such exemptions. In particular, the fact that an Act of Congress might cause the United States to breach its international obligations under the ITSO Agreement would not bar such an Act from taking effect.[260] Rather, under longstanding U.S. constitutional doctrine:

> By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to

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months of waiting was unable to obtain necessary presidential waiver that's provided after State Dept. recommendation.").

[258] *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.").

[259] After Intelsat Ltd. was unable to launch the "Intelsat APR-3" satellite into the 85° E.L. orbital location, a satellite launched in 1996 was relocated into that location. *See In re INTELSAT L.L.C.*, 18 FCC Rcd. 16414 (Sat. Div. 2003) (authorizing Intelsat Ltd. to relocate the "Intelsat 709" satellite from the 55.35° W.L. orbital location into the 85.15° E.L orbital location); *see also Comsat Corporation, Authority to Participate in the Launch of the INTELSAT 709*, 11 FCC Rcd. 12170 (Sat. Div. 1996) (authorizing original launch of "Intelsat 709" satellite)

[260] *See* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 Colum. J. Transnat'l L. 379, 381-82 (1997) ("[I]t is clear that Congress is free to enact legislation that violates the international legal obligations of the United States. This was made clear in the *Chinese Exclusion Case*, [130 U.S. 581, 599-601 (1889),] which upheld legislation requiring the United States to take action in violation of a treaty in the face of a challenge based squarely on the fact that the legislation conflicted with the treaty.") (footnotes omitted).

> construe them so as to give effect to both, if that can be done without violating the language of either; *but, if the two are inconsistent, the one last in date will control the other*. . . .[261]

Accordingly, should the U.S. Congress ever enact a statute that prohibits Intelsat Ltd. from fulfilling its contractual obligations to ITSO or to a foreign "lifeline customer," that statute would be "last in date" as compared with the ITSO Agreement, and would therefore "control" that Agreement. Under such circumstances, international law would not be sufficient to safeguard Intelsat Ltd.'s ability to preserve global connectivity and serve "lifeline" users.[262]

Nor would such a statute likely be held to violate the U.S. Constitution. Possibly, depending on its scope and effect, such a statute might unconstitutionally abridge the recognized First Amendment right of persons located inside the United States to receive information from foreign sources.[263] That First Amendment right, however, has not

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[261] *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (emphasis added). Although *Whitney* is more than a century old, throughout the twentieth century the Supreme Court consistently reaffirmed "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)) (ellipses in *Breard*); *accord* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1)(a) (1986) ("An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.").

[262] *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance."). The constitutional principle that U.S. courts may not fashion remedies to redress U.S. violations of international trade treaties is also reflected throughout the U.S. Code. *See, e.g.*, Trade Agreements Act of 1979, 19 U.S.C. § 2504(a) ("No provision of any trade agreement approved by the Congress . . . which is in conflict with any statute of the United States shall be given effect under the laws of the United States."); 19 U.S.C. § 3512 (same, concerning U.S. violations of World Trade Organization Uruguay Round Agreements); 19 U.S.C. § 3312 (same).

[263] *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 764-65 (1972) (recognizing First Amendment right of U.S. citizens to hear Belgian professor "explain and seek to defend his views," but sustaining professor's exclusion from United States based on his previous violations of visa restrictions); *Lamont v. Postmaster General of United States*, 381 U.S. 301, 305 (1965) (holding unconstitutional statute requiring destruction of unsealed mail from foreign countries determined to be "communist political propaganda" unless addressee returned reply card indicating desire to receive such mail). *Cf. Meese v. Keene*, 481 U.S. 465 (1987) (upholding statute requiring registration as "political propaganda" of certain expressive materials sponsored

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generally been construed to include any concomitant right of U.S. persons to expend or receive money in connection with the receipt of information from foreign sources,[264] and thus might not sufficiently safeguard Intelsat Ltd.'s ability to provide global connectivity on a commercial basis.[265] Alternatively, to the extent that the INTELSAT treaty organization's privatization was predicated in substantial part on its reliance on U.S. government assurances that privatization would not impair the satellite system's ability to provide global connectivity, the Due Process Clause of the Fifth Amendment arguably might be construed to prevent the government from later reneging on its assurances.[266] In practice, however, whatever assurances the U.S. government gave to INTELSAT (and INTELSAT's state Parties) would not likely satisfy the stringent standard of "unmistakabity" needed to bind the U.S. government to a promise under the Due Process Clause.[267]

4. If the U.S. Congress enacts new U.S.-international trade sanctions that hinder Intelsat Ltd.'s ability to maintain global connectivity,

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by foreign governments and intended to influence U.S. foreign policies, on ground that registration requirement did not suppress distribution of such materials in the United States).

[264] *See, e.g., Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs*, 459 F.2d 676 (3d Cir. 1972) (sustaining regulations prohibiting U.S. residents from paying money to booksellers located in North Vietnam, North Korea, or China, to obtain books); *Teague v. Regional Comm'r of Customs*, 404 F.2d 441 (2d Cir. 1968) (same), *cert. denied*, 394 U.S. 977 (1969).

[265] For arguments that judicial protection of the First Amendment right to receive information from foreign sources has generally been inadequate, *see* Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 Wm. & Mary L. Rev. 719 (1985); Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 Am. J. Int'l L. 840 (1989).

[266] *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 875-76 (1996) (holding that Fifth Amendment Due Process Clause prohibited U.S. government from reneging on promise to apply special accounting treatment to acquirers of failing thrifts; "[a]though the Contract Clause has no application to acts of the United States, it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights. The extent of that capacity, to be sure, remains somewhat obscure.") (internal citations omitted)

[267] *See Winstar Corp.*, 518 U.S. at 877 (reciting "unmistakability doctrine," which provides that "absent an 'unmistakable' provision to the contrary, contractual arrangements, including those to which a sovereign itself is a party, remain subject to subsequent legislation by the sovereign.") (internal quote marks and citations omitted); *accord id.* at 878 ("a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power."). *But see* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1665-66 (2002) (arguing that the strong presumption "barring legislative entrenchment should be discarded; legislatures should be allowed to bind their successors, subject to any independent constitutional limits in force.").

would Intelsat Ltd.'s non-U.S.-licensed satellites be required to comply with the sanctions?

Would the world's communications systems remain interconnected if, in the future, the U.S. Congress were to enact legislation prohibiting the provision of basic international telecommunications services to certain "rogue states"? Even in this "worst-case" scenario, Intelsat Ltd. arguably has some means of fulfilling its public service obligations to maintain global connectivity and serve "lifeline" users. This is because some non-U.S. users of the Intelsat satellite system now take service from non-U.S. affiliates and subsidiaries of Intelsat Ltd, via satellites that are operated pursuant to non-U.S. licenses and registrations. Specifically, since obtaining U.S. government licenses to operate the fleet of 17 in-orbit satellites previously operated by the INTELSAT treaty organization,[268] Intelsat Ltd. has diversified the regulatory jurisdiction to which its operations are subject. At the outset of its privatization process, Intelsat Ltd. announced its intention to license the operation of its planned future Ka-, BSS-, and V-band satellites in the United Kingdom, rather than the United States.[269] 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[270] and the People's Republic of China.[271] Since privatizing, Intelsat Ltd. has also

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[268] *See In re Intelsat L.L.C.*, 16 FCC Rcd. 12280, ¶¶ 8-9 (2001) (licensing a U.S. subsidiary of Intelsat Ltd. to operate the 17 C-band and Ku-band satellite space stations then in orbit, which formerly had been operated by the international treaty organization INTELSAT).

[269] *See id* at ¶ 8 n.22 (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."). As of 2005, Intelsat Ltd. has not yet launched any Ka-band, V-band, or and BSS-band satellites.

[270] 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. Aparna Achar, *Insat 2E Impacts Indian Communications*, TELECOMMUNICATIONS INTERNATIONAL, Volume 33, Issue 5, at 22, 1999 WL 12495481 (May 1, 1999). The "Insat 2E/ Intelsat APR-1" satellite is owned by the Indian Space Research Organization (ISRO), an agency of the Indian government. *Id.* The 83° E.L. orbital location is registered to India by the ITU. *Id.* 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. *Id.* 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."). For background on INTELSAT's involvement in the financing and launch of the "Insat 2E/ Intelsat APR-1" satellite, *see COMSAT Corp.*, DA 97-330, 1997 WL 54847 (Int'l Bur. Feb. 12, 1997) (authorizing INTELSAT's U.S. Signatory to lease eleven 36 MHz units of C-band capacity from the Indian National Satellite System on the INSAT-2E spacecraft, and to provide INTELSAT services via those facilities).

acquired an operational satellite licensed by the government of Papua New Guinea, an independent parliamentary democracy.[272] To the extent that Intelsat Ltd. (a Bermuda holding company)[273] uses Chinese-, Indian-, British-, or Papua New Guinean- licensed

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[271] 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>.

[272] *See* note **[99]**, *supra*, and surrounding text (describing Intelsat Ltd.'s purchase of the "EchoStar 9/Telstar 13" satellite from the insolvent Loral Space & Communications Corporation). The "EchoStar 9/Telstar 13," satellite, originally a joint venture of Echostar and Loral, was launched into the 121º W.L. orbital location on August 7, 2003. *See* Boeing News Release, Sea Launch Successfully Launches EchoStar IX/Telstar 13 Satellite into Orbit (Aug. 7, 2003), <http://www.boeing.com/news/releases/2003/q3/nr_030807s.html> (reporting launch). At that time, the satellite's C-Band transponders, which serve the North American continent, were designated as the "Telstar 13" satellite, owned by Loral SpaceCom Corp., and operated under license from the government of Papua New Guinea. *EchoStar Satellite Corp.*, 18 FCC Rcd. 15862, ¶ 6 (Int'l Bur. Aug. 1, 2003), *modified*, *EchoStar Satellite Corp.*, 18 FCC Rcd. 15875 (Sat. Div. Aug. 1, 2003). The Ka-band and Ku-band transponders on board the same satellite were designated the "EchoStar 9" satellite, owned by Echostar, and operated under U.S. license and registration. *Id.* at ¶¶ 5, 15 (authorizing operation of EchoStar 9 satellite). When ownership of the C-band transponders aboard the "Telstar 13" satellite was transferred from Loral to Intelsat Ltd. in March 2004, those transponders retained their Papua New Guinean licensure. *See In re Visionstar Inc.*, 19 FCC Rcd. 14820, ¶ 13 n.36 (Int'l Bur. 2004) ("The C-band payload aboard the EchoStar 9 satellite is operated pursuant to an authorization from Papua New Guinea under the name 'Telstar 13.' Although Loral SpaceCom Corp. was the original operator of the Telstar 13 payload, its interest in the payload was recently transferred to Intelsat North America LLC (Intelsat).") (citing *Loral Satellite, Inc.*, 19 FCC Rcd. 2404 ¶ 10 (Int'l Bur. 2004) and *Loral SpaceCom Corp.*, 18 FCC Rcd. 16374 (Int'l Bur. 2003)). The Ka-band and Ku-band transponders on board the same satellite continue to be owned by Echostar and operated as the "EchoStar 9" satellite, which remains licensed in the United States.

[273] *See* Intelsat Ltd. Annual Report for 2003 (stating that Bermuda is Intelsat Ltd.'s "Jurisdiction of Incorporation or Organization" and its "Address of Principal Executive Offices"), *filed with* U.S. Securities & Exchange Commission, Form 20-F (filed March 15, 2004), <http://www.sec.gov/Archives/edgar/data/1156871/000095013304000891/w95010e20vf.htm>. Because Intelsat Ltd. is a Bermuda holding company, disputes concerning Intelsat Ltd.'s internal governance generally must be resolved under Bermuda law. *See Atherton v. FDIC*, 519 U.S. 213, 224 (1997) (under the "internal affairs doctrine" in conflict of laws, courts "normally look to the State of a business' incorporation for the law that provides the relevant corporate governance general standard of care.") (citing Restatement (Second) Conflict of Laws § 309 (1971)).

satellites to provide communications services on international routes that do not begin, end, or pass through the United States, the attenuation of such services from the regulatory jurisdiction of the United States arguably might provide Intelsat Ltd. with a measure of insulation against U.S. national laws and trade policies.

Intelsat Ltd.'s use of non-U.S.-licensed satellites, however, is unlikely to fully insulate the company's operations against adverse U.S. legislation. Rather, in a handful of previous instances, the U.S. Congress has enacted statutes purporting to prohibit non-U.S. entities located outside the United States from engaging in certain business transactions with third party "rogue states."[274] As of 2005, the U.S. government has never actually enforced any of these statutes against a non-U.S. entity. Nor have any of these statutes purported to restrict the provision of basic international telecommunications service, even to "rogue states."[275] Nonetheless, these statutes illustrate Congress's occasional predilection to legislate extraterritorially. Accordingly, enactment of a statute purporting to prohibit Intelsat Ltd. from using its non-U.S.-licensed satelites to serve certain "rogue states" would not be wholly unprecedented.

Nor would such a statute be unenforceable against Intelsat Ltd.'s non-U.S. subsidiaries or affiliates. Rather, U.S. courts have generally sustained the extraterritorial application of U.S. substantive law, subject only to the ability of those courts to exercise personal jurisdiction over non-U.S. defendants.[276] Here, should Intelsat Ltd. ever be sued or prosecuted in connection with its use of non-U.S.-licensed satellites, the Washington DC-based company would almost certainly be subject to personal

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274 *See, e.g.*, Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172 §§ 5-6, 110 Stat. 1541, 1543-45 (1996) (imposing sanctions against any *non-U.S.* company or person who directly and significantly enhances Iran's or Libya's ability to develop their petroleum resources, or enhances Libya's aviation, military, or paramilitary capabilities), *amended by*, Pub. L. No. 107-24, §§ 2(a), 3 to 5, 115 Stat. 199, 200 (2001), *codified as amended at* 50 U.S.C. § 1701 note (Supp. 2005); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, ("Helms-Burton Act"), Pub. L. No. 104-114 § 102(a)(2), 110 Stat. 785, 792 (1996), *codified at* 22 U.S.C. § 6032(a)(2) ("urg[ing] the President to take immediate steps to apply . . . sanctions . . . against countries assisting Cuba."). For a thorough analysis of these statutes, *see* Harry L. Clark, *Dealing With U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. Pa. J. Int'l Bus. L. 61 (1999). For a European perspective, *see* KINKA GERKE, UNILATERAL STRAINS ON TRANSATLANTIC RELATIONS : US SANCTIONS AGAINST THOSE WHO TRADE WITH CUBA, IRAN, AND LIBYA, AND THEIR EFFECTS ON THE WORLD TRADE REGIME (1997).

275 *See* note **[n-1]**, *supra* (discussing scope of foreign business activities restricted by Iran and Libya Sanctions Act and Helms-Burton Act); *see also* Subpart IV.B.1, *supra* (discussing history of exempting basic international telecommunications service from scope of U.S.-international trade sanctions).

276 The constitutionality of the Helms-Burton Act was sustained in a case brought by a domestic public interest organization. *See Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996). *See also* Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 Colum. J. Transnat'l L. 379 (1997) (arguing that the Due Process Clause of the Fifth Amendment imposes *no* territorial limits on the legislative power of Congress).

jurisdiction in U.S. courts—*even* if the suit or prosecution concerned only the use by a non-U.S. subsidiary or affiliate of Intelsat Ltd. of non-U.S.-licensed satellites to serve countries or territories located outside the United States.[277]

In addition, separate and apart from any threat of suit or prosecution, Intelsat Ltd.'s operations remain subject to regulatory control by the U.S. FCC, whose arsenal of tools is substantial. Most directly, should Intelsat Ltd.'s non-U.S. subsidiaries or affiliates fail to honor any U.S. trade sanctions imposed by Congress, the FCC could revoke (or threaten to revoke) Intelsat Ltd.'s existing U.S. licenses.[278] Were its U.S. licenses to be revoked, Intelsat Ltd. would be unable to operate the majority of its satellites. In addition, the FCC could also revoke (or threaten to revoke) Intelsat Ltd.'s existing authority to use at least one of its non-U.S. licensed satellites, the Papua New Guinea-licensed "Telstar 13," to serve users located in the United States.[279] Finally, the

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[277] *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 & n.9 (1984) (U.S. courts will exercise "general jurisdiction" over a nonresident defendant that has "continuous and systematic" contact with the forum, regardless of whether the controversy at issue arises out of any such contacts). Because most of Intelsat Ltd.'s employees are located in the United States and much of its service is provided to users located in the United States, Intelsat Ltd. would clearly satisfy the "continuous and systematic" contact standard. For criticism of the application of "general jurisdiction" in international litigation involving foreign defendants who do business in the United States, *see* Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 San Diego L. Rev. 1035, 1037-38 & nn.8-9 (2004). For a general defense, *see* Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141.

[278] Should Intelsat Ltd. violate any FCC rules or policies, the FCC could revoke or suspend the satellite space station licenses currently held by Intelsat Ltd.'s U.S. subsidiary. *See Policy Regarding Character Qualifications In Broadcast Licensing*, 102 F.C.C.2d 1179, ¶¶ 7, 21 (1986) (FCC licensees must "comply with the Communications Act and [FCC] rules and policies" in order to obtain and retain their licenses,), *recon. denied*, 1 FCC Rcd. 421 (1986). In this regard, it is significant that in certain circumstances, an FCC licensee can be held responsible for violations of FCC rules and policies committed by its corporate parent or subsidiary, whether or not the licensee is directly involved in the parent's or subsidiary's misconduct. *See id.* at ¶¶ 79, 82. Thus, Intelsat Ltd.'s U.S. subsidiary licensee could possibly be held responsible if Intelsat Ltd. or an affiliate were to use Intelsat Ltd.'s non-U.S.-licensed satellites as a means of circumventing U.S. law or FCC policy. Moreover, although the FCC has very rarely revoked licenses from existing licensees, few licensees would risk revocation by continuing to engage in conduct of which the FCC has expressed disapproval. *See* Lars Noah, *Administrative Arm-Twisting In The Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873 (1997) (arguing that "administrative arm-twisting"—*i.e.*, "a threat by an agency to impose a sanction or withhold a benefit in hopes of encouraging 'voluntary' compliance with a request that the agency could not impose directly on a regulated entity"—represents a broad and important category of informal agency activity).

[279] *See Loral SpaceCom Corp., Petition for Declaratory Ruling to Add Telstar 13 to the Permitted Space Station List*, 18 FCC Rcd. 16374 (Sat. Div. 2003) (authorizing the Papua New Guinea-licensed "Telstar 13" satellite located at the 121° W.L. orbit location to communicate routinely, without additional FCC action, with earth stations located in the United States); *see*

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FCC probably could exercise additional leverage over Intelsat Ltd. by prohibiting (or threatening to prohibit) Intelsat Ltd.'s U.S.-licensed telecommunications customers from communicating with Intelsat Ltd.'s satellites.[280]

Finally, in addition to the power that the U.S. government wields in its sovereign capacity as a regulatory authority, it also yields additional power in its commercial capacity as a consumer of satellite services. At present, the United States government purchases up to ten percent of all satellite capacity available commercially in the U.S. market.[281] At least half of this capacity is used to fulfill U.S. military requirements.[282]

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also FCC International Bureau, Permitted Space Station List Web Page, <http://www.fcc.gov/ib/sd/se/permitted.html> (listing the "Telstar 13" satellite as a foreign-licensed "permitted space station," authorized to communicate with earth stations located inside the United States). As of 2005, Intelsat Ltd. has never sought to add any non-U.S.-licensed satellite space station other than the "Telstar 13" to the FCC's "permitted space station list." Neither the Indian-licensed "Insat 2E/ Intelsat APR-1" satellite nor the Chinese-licensed "Sinosat-1/ Intelsat APR-2" satellite is located in an orbital location from which it is possible to serve the United States. *See* notes **[270-71]**, *supra* (discussing these satellites).

[280] In *International Settlement Rates*, 12 FCC Rcd. 19806 (1997), *aff'd*, *Cable & Wireless PLC v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999), the FCC essentially dictated to every foreign telecommunications carrier on earth the maximum "settlement rates" receivable by those foreign carriers to complete an international phone call originating in the United States. Although it lacked direct authority to regulate non-U.S. carriers, the FCC accomplished its objective by prohibiting U.S. carriers from paying to foreign carriers any "settlement rates" in excess of the FCC-prescribed caps. *See Cable & Wireless PLC*, 166 F.3d at 1229-32 (describing, and sustaining, FCC's indirect strategy for imposing settlement rate caps on foreign carriers). *See also* Rob Frieden, *Regulatory Opportunism In Telecommunications: The Unlevel Competitive Playing Field*, 10 CommLaw Conspectus 81, 92 (2001) (noting that the FCC's "Settlement Rates" Order was affirmed notwithstanding that FCC efforts "to affect the behavior and the financial performance of [foreign] carriers has generated vocal opposition, at home and abroad, that the Commission failed to appreciate international comity and national sovereignty.") (footnotes omitted). Here, by analogy, in the event that Intelsat Ltd.'s non-U.S.-licensed satellites were ever used in ways inconsistent with U.S. policy, the FCC would likely have authority to prohibit U.S.-licensed carriers and users from communicating with those satellites.

[281] UNITED STATES GENERAL ACCOUNTING OFFICE, CRITICAL INFRASTRUCTURE PROTECTION: COMMERCIAL SATELLITE SECURITY SHOULD BE MORE FULLY ADDRESSED, GAO Rep. No. GAO-02-781, at 6 (Oct. 3, 2002), <http://www.gao.gov/new.items/d02781.pdf>. Historically, federal agencies spent an estimated $400 million annually to secure capacity from commercial satellites. Andy Pasztor, *U.S. Contracts Bring Windfall For French Firm*, WALL ST. J., March 28, 2003, at A11, 2003 WL-WSJ 3963189.

[282] Andy Pasztor, *U.S. Contracts Bring Windfall For French Firm*, WALL ST. J., March 28, 2003, at A11, 2003 WL-WSJ 3963189. For example, commercial communications satellites carried 45 percent of all military communications between the United States and the Persian Gulf region during Operation Desert Shield/Desert Storm in 1991. UNITED STATES GENERAL ACCOUNTING OFFICE, CRITICAL INFRASTRUCTURE PROTECTION: COMMERCIAL SATELLITE SECURITY SHOULD BE MORE FULLY ADDRESSED, GAO Rep. No. GAO-02-781, at 7 (Oct. 3, 2002), <http://www.gao.gov/new.items/d02781.pdf>. As of 2002, nearly 60 percent of the

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By potentially threatening to take its substantial business elsewhere, the U.S. government has an additional means of pressuring Intelsat Ltd. to comply with U.S. laws and policies. For all of these reasons, if the U.S. Congress should ever enact a statute purporting to prohibit Intelsat Ltd. from providing international telecommunications services to "rogue states," even Intelsat Ltd.'s non-U.S.-licensed satellites would almost certainly be compelled to comply with such a statute.

5. Does the United States now have the ability to disrupt the universal global connectivity of the world's communications systems, or to remove individual countries from the world's communications infrastructure?

The United States Congress, working in conjunction with the President, probably now does possess power to disrupt Intelsat Ltd.'s ability to maintain global connectivity.[283] For proponents of the principle of global connectivity, the *de facto* devolution to the U.S. government of legal authority to disrupt Intelsat Ltd.'s ability to serve every nation on earth is a cause for concern. By the same token, however, the impact of INTELSAT's privatization on the urgency of that concern should not be overstated. Even before privatization, the United States government exercised tremendous influence on INTELSAT's decision-making and conduct.[284] Nonetheless, the United States never sought to use that influence to advocate the exclusion or expulsion from INTELSAT of any country or territory. Nor, since privatization, has the United States sought to prevent the privatized Intelsat Ltd. from providing service to any country. Indeed, by ratifying the ITSO Agreement in 2000, the United States formally reaffirmed its commitment to preserving universal global connectivity.[285] Since 2000, no U.S. elected official has publicly called for reconsideration of that commitment.[286]

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satellite capacity purchased commercially by the Department of Defense was supplied by Intelsat Ltd. Renae Merle, *U.S. Probes Military's Use of Commercial Satellites*, WASH. POST, Dec. 6, 2002, at E5, 2002 WL 103574491.

[283] *See* Subpart IV.B.4, *supra*.

[284] As the largest user of the INTELSAT system, the United States exercised substantial influence within INTELSAT through its participation in INTELSAT governance. *See* INTELSAT Agreement Art. IX(f) (allocating certain voting rights within INTELSAT based on each member country's investment share, where investment share reflected each country's utilization of INTELSAT satellite transmission capacity). *See also COMSAT Study*, 77 FCC 2d 564, ¶¶ 436-42 (1980) (discussing the mechanism by which the U.S. Government formerly participated in INTELSAT's governance through its "instructional process"). On occasion, the United States also influenced INTELSAT by threatening to withdraw from the organization if it did not have its way. *See, e.g.* Subpart III.A, *supra* (describing the U.S. government's role in influencing INTELSAT's decision to privatize in 1999-2000).

[285] *See* ITSO Agreement Arts. III(b)(i), IX(c)(i) (providing that State Parties to ITSO, including the United States, must ensure that the satellite system formerly operated by INTELSAT maintains "global connectivity and global coverage" post-privatization, including

(continued. . . . .)

Moreover, while privatization undoubtedly has enhanced the ability of the United States to control access to the INTELSAT satellite system, it bears remembering that, prior to privatization, the same gatekeeping role formerly was performed by the INTELSAT treaty organization itself. Recognizing that some form of gatekeeping is inevitable, some commentators have reasonably opined that universal global connectivity would be better safeguarded by internationalizing that gatekeeping function (as was done by INTELSAT prior to privatization), rather than by vesting such power in a single national government.[287] However, it must be noted that intergovernmental treaty organizations do not necessarily prioritize the principle of universal global communications connectivity above other political concerns. The Charter of the recently formed African Union, for example, expressly contemplates the disruption of international telecommunications links as a permissible political sanction against intransigent member nations.[288] In this regard, the African Union has followed the lead of the United Nations, whose Charter has long authorized the interruption of international

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"non-discriminatory access to the . . . system" and continued service to "lifeline connectivity customers").

[286] During the same time period, in contrast, the United States formally "unsigned" the Rome Statute establishing the International Criminal Court. *See* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to U.N. Secretary-General Kofi Annan (May 6, 2002), <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> ("unsigning" treaty). Also during the same time period, various "U.S. officials and their political supporters urged the unsigning of a number of important treaties that the United States has signed but not yet ratified—such as the Kyoto Protocol, the Biodiversity Treaty, the Comprehensive Test Ban Treaty, the Convention on the Rights of the Child, and the ILO Convention on Race Discrimination in Employment." Edward T. Swaine, *Unsigning*, 55 Stan. L. Rev. 2061, 2064 & n.15 (2003) (citing news accounts and press releases).

[287] *See*, *e.g.*, Francis Lyall, *On the Privatisation of INTELSAT*, 28 J. Space L. 101 (2000), *reprinted in* 5 Sing. J. Int'l & Comp. L. 111, 128-29 (2001) (arguing that "the FCC as custodian of the US interest is likely to listen to comments and argument made by US nationals, and the very nature of these proceedings is culturally alien to most of the world and therefore their outcomes can be difficult to accept. . . . [I]n licensing the FCC takes account of US interests. While it is true that it is supposed to have some regard to more general interests, it would be preferable to have INTELSAT's licensing done with regard to the world as a whole, and to leave national interests aside.") (footnotes omitted).

[288] See Constitutive Act of the African Union, Organization of African Unity, done July 11, 2000, entered into force May 26, 2001, Art. 23, ¶ 2 (African Union Member States that fail to comply with the decisions and policies of the African Union will be subject to sanctions, including "the denial of transport *and communications links* with other Member States, and other measures of a political and economic nature to be determined by the Assembly.") (emphasis added), *discussed in* Nsongurua J. Udombana, *The Unfinished Business: Conflicts, the African Union and the New Partnership for Africa's Development*, 35 GEO. WASH. INT'L L. REV. 55, 68 & n.81 (2003).

telecommunications links as an acceptable form of political sanction against international aggressors.[289]

Of course, the INTELSAT treaty organization—unlike the African Union, the United Nations, or the United States—was never empowered to impose political sanctions against individual INTELSAT member countries.[290] INTELSAT *was*, however, empowered to expel individual countries from membership in the organization.[291] While INTELSAT never exercised this power, it does appear that the Peoples' Republic of China successfully exercised its influence within the INTELSAT treaty organization to prevent the Republic of China (Taiwan) from ever obtaining INTELSAT membership.[292] Accordingly, by removing China from the gatekeeping process, INTELSAT's privatization, in fact, has greatly enhanced the ability of at least one territory, Taiwan, to obtain service from INTELSAT's former satellite system.[293] Conversely, while undeniably raising some concerns, to date the introduction of a U.S. gatekeeping role has not actually impaired the ability of any country or territory on earth to obtain service from the satellite system now operated by Intelsat Ltd.

Moreover, certain developments since privatization have further reduced the likelihood that the United States might seek to bar Intelsat Ltd. from maintaining universal global connectivity. Specifically, in addition to providing some services via non-U.S.-licensed satellite space stations,[294] Intelsat Ltd. has also recently begun to do

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289 *See* U.N. Charter Art. 41, 59 Stat. 1031 (1945) (In response to a threat to the peace, breach of the peace, or act of aggression, "[t]he Security Council may . . . call upon the Members of the United Nations to apply . . . measures . . . include[ing] complete or partial interruption of economic relations and of rail, sea, air, postal, *telegraphic, radio, and other means of communication*, and the severance of diplomatic relations.") (emphasis added).

290 *See* INTELSAT Agreement Art. III ("INTELSAT shall have as its prime objective the provision, on a commercial basis, of the 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.").

291 *See* INTELSAT Agreement Art. XVI(b)(i), (k) (setting forth procedure for "involuntary withdrawal" from INTELSAT of state Parties that "failed to comply with any obligation under this Agreement"). This "involuntary withdrawal" procedure was never invoked.

292 Author's Interview with Prof. Yu-Li Liu, Department of Radio and Television, National Chengchi University, College of Communication, Taipei, Taiwan (Sept. 29, 2002). The Republic of China (Taiwan) was never admitted to membership in INTELSAT or ITSO. *See* ITSO Member Countries Web Page, <http://216.119.123.56/dyn4000/dyn/docs/ITSO/tpl1_itso.cfm?location=&id=3&link_src=HPL&lang=english>. Similarly, the Republic of China (Taiwan) also has never been admitted to membership in the United Nations. *See* United Nations List of Member States Web Page, <http://www.un.org/Overview/unmember.html>.

293 Author's Interview with Prof. Yu-Li Liu, Department of Radio and Television, National Chengchi University, College of Communication, Taipei, Taiwan (Sept. 29, 2002).

294 *See* Subpart IV.B.4, *supra*.

the reverse: to sell individual transponders located on board its own U.S.-licensed satellites to foreign government users. Thus, under an agreement negotiated in 2000, a telecommunications operator controlled by the Norwegian government ("Telenor A.S.")[295] purchased the permanent right to use one quarter of the transmission capacity of the U.S.-licensed Intelsat Ltd. "10-02" satellite, which became operational in August 2004.[296] The "10-02" satellite is located at 359°E, with spot beams that cover all of Europe and the Middle East and much of Central Asia and North Africa.[297] Moreover, Telenor uses its transmission capacity on the "10-02" satellite to serve not just Norway, but also other territories throughout Europe and the Middle East.[298] Similarly, in 2001 a telecommunications agency of the Chinese government ("SINOSAT") acquired the rights to use two C-band transponders on a planned Intelsat satellite then scheduled for launch into the 178° E.L. orbital location.[299] In 2004, Portugal's government broadcasting

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[295] 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, retained 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*, 17 FCC Rcd. 14030, 14032 ¶ 3 (2002).

[296] 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 Ltd. 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 is U.S.-licensed, was launched into orbit at 359° E.L. (1° W.L.) in June 2004, and became operational in August 2004. Intelsat Ltd. Press Release, *Intelsat's IS-10-02 Satellite Launch Successful: Satellite to Provide High-Power Coverage of Europe, Africa, South America and the Middle East* (June 17, 2004), <http://www.intelsat.com/aboutus/press/release_details.aspx?year=2004&art=20040617_01_EN.xml&lang=en&footer=65>. At the time the satellite became operational, approximately 50 percent of its 36 Ku-band transponders were owned by Telenor. *Id.* (In addition to these 36 Ku-band transponders, the "10-02" satellite also carries 70 operational C-band transponders). *Id.*

[297] *See* Intelsat Ltd. Press Release, *Intelsat's IS-10-02 Satellite Launch Successful: Satellite to Provide High-Power Coverage of Europe, Africa, South America and the Middle East* (June 17, 2004); *see also* Coverage Maps: Intelsat 10-02 @ 359°E Web Page, <http://www.intelsat.com/satellites/covmaps/10-02@359.asp> (illustrating the coverage of the satellite's spot beams in Europe, Central Asia, the Middle East, and North Africa).

[298] *See* Intelsat Ltd. Press Release, *Intelsat's IS-10-02 Satellite Launch Successful: Satellite to Provide High-Power Coverage of Europe, Africa, South America and the Middle East* (June 17, 2004).

agency entered into leases to purchase transmission capacity on three separate U.S.-licensed Intelsat Ltd. satellites from 2005-2007.[300]

Selling or leasing transponders to foreign government users cannot immunize Intelsat Ltd. from having to comply with U.S. laws. Such activity can, however, interject diplomatic ramifications into any decision by the U.S. Congress to enact legislation that would hinder Intelsat Ltd.'s ability to fulfill its public service obligations. Undoubtedly, some U.S. Congress Members might favor prohibiting U.S. commercial communications carriers (including Intelsat Ltd.) from serving "rogue states" such as Iran or North Korea. The same Members, however, might pause before enacting legislation that would dictate to the governments of Norway, Portugal, or China, new limitations on the permissible uses of satellite transponders that those governments have already purchased from a U.S. company. In response to Congress's enactment of such legislation, those foreign governments, at a minimum, might raise a meritorious claim against the United States through ITSO's dispute resolution process.[301] At a maximum, those governments might lodge complaints with the World Trade Organization, or might retaliate by enacting corresponding sanctions affecting U.S.-international trade. Alternatively, those governments might simply ignore any resale restrictions imposed by U.S. legislation, leaving the U.S. government to face difficult choices about whether and how to pursue enforcement. Because of these considerations, Intelsat Ltd.'s practice of selling transponders on some of its U.S.-licensed satellites to foreign government users may constitute a political safeguard that contributes to protecting Intelsat Ltd.'s continued ability to maintain global connectivity.

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299 *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>. *See also* Paul Dykewicz, *Further Consolidation Among Operators Is Ahead*, SATELLITE NEWS, Aug. 23, 2004, 2004 WLNR 839039 (reporting that "Sinosat acquired rights to use two C-band transponders on . . . [an] Intelsat satellite at 178 degrees E."). Although Intelsat Ltd. to date has not carried out its plan to launch a *new* satellite into the 178° E.L. orbital location, in April 2005 it migrated its existing "Intelsat 605" satellite into that location. *See Actions Taken*, Public Notice, 19 FCC Rcd. 20950, 20950 (Int'l Bur. Oct. 22, 2004) (authorizing Intelsat Ltd. "to immediately begin drifting the INTELSAT 605 satellite from its current location at 32.9° E.L. to 178.0° E.L."); *see also Satellite Space Applications Accepted for Filing*, Public Notice, NO. SAT-00251, 2004 WL 2376094 (FCC Satellite Policy Branch Oct. 22, 2004) (noting that the "INTELSAT 605 [satellite] is expected to be at the 178.0° E.L. location in March/April 2005.").

300 *See* INTELSAT Press Release, *Intelsat to Provide International Distribution for Radio e Televisao de Portugal* (Sept. 10, 2004), <http://www.intelsat.com/aboutus/press/release_details.aspx?year=2004&art=20040910_01_EN.xml>.

301 *See* ITSO Agreement Art. XVI(a) ("All legal disputes arising in connection with the rights and obligations under this Agreement between Parties with respect to each other, or between ITSO and one or more Parties, if not otherwise settled within a reasonable time, shall be submitted to arbitration in accordance with the provisions of Annex A to this Agreement.").

Finally, it must be noted that even if the U.S. Congress should enact legislation that effectively prevents Intelsat Ltd. and other U.S.-international carriers from providing service to users located in certain foreign countries, at this late date such legislation would not likely cause any country to be disconnected from the global communications grid. In 2005, nearly 250 commercial communications satellites operate from locations in geostationary orbit above the earth.[302] Correspondingly, almost every populated land-mass on earth falls within the "footprint" of at least six of these 250 satellites.[303] Only 30 of these 250 operational commercial communications satellites, however, belong to Intelsat Ltd.[304] Other satellites, in contrast, are operated by the governments of Russia,[305] France, [306] China,[307] India,[308] and the Arab States,[309] none of which would be bound to

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[302] *See* Commercial Communications Satellites in Geosynchronous Orbit Web Page, Boeing Corp. (updated Dec. 30, 2004), <http://www.boeing.com/defense-space/space/bss/launch/980031_001.pdf> (showing 247 commercial communications satellites currently in geostationary orbit).

[303] *See id.*; *see also COMSAT Non-Dominant Order*, 13 FCC Rcd. 14083, 14117 ¶ 64 (1998) ("A number of non-U.S. regional satellite providers can be used to provide international video services. These systems and their regions include Arabsat (Middle East), Eutelsat (Europe), Astra (Europe), AsiaSat and APStar (Asia),and Palapa (Southeast Asia). . . . Also, a number of countries are served by domestic satellite systems. These countries include Argentina, Australia, Brazil, Canada, China, France, Germany, India, Italy, Japan, Malaysia, Mexico, Russia, South Korea, Spain, Thailand, Turkey and the United States. Argentina, Brazil, Malaysia, Mexico and Thailand also obtain regional services on their domestic satellites.") (footnotes omitted).

[304] *Compare* Commercial Communications Satellites in Geosynchronous Orbit Web Page, Boeing Corp. (updated Dec. 30, 2004), <http://www.boeing.com/defense-space/space/bss/launch/980031_001.pdf> (showing 247 commercial communications satellites currently in geostationary orbit) *with* Intelsat Ltd. Satellite Coverage Maps Web Page, <http://www.intelsat.com/resources/coveragemaps.aspx> (showing 30 Intelsat satellites currently in geostationary orbit).

[305] Russia holds ITU registrations for three satellites that are owned and operated by the Intersputnik International Organization of Space Communities, an ongoing public international intergovernmental organization originally established in 1971 by the former Soviet Union. *See* Agreement on the Establishment of the Intersputnik International System and Organization of Space Communications**,** 862 U.N.T.S. 3 (entered into force July 12, 1972) (establishing Intersputnik treaty organization); *see also* Intersputnik Organization Web Page, <http://www.intersputnik.com/company.shtml>. Today, Intersputnik's 25 member governments include Afghanistan, Azerbaijan, Belarus, Bulgaria, Cuba, Czech Republic, Federal Republic of Germany, Georgia, Hungary, India, Kazakhstan, Democratic People's Republic of Korea (North Korea), Kyrgyzstan, Laos, Mongolia, Nicaragua, Poland, Romania, Russia, Syria, Tajikistan, Turkmenistan, Ukraine, Vietnam, Yemen, and Республика Никарагуа. *See* Intersputnik Members Web Page, <http://www.intersputnik.com/countries.htm>. 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).

[306] Among the many commercial communications satellites licensed in France are those belonging to Eutelsat S.A., the private commercial successor entity of the former European

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implement trade sanctions undertaken by the United States for political purposes.[310] Moreover, many regions of the earth now receive international telecommunications

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Telecommunications Satellite Organisation "EUTELSAT." Originally formed in 1977 by the governments of Western Europe, the EUTELSAT treaty organization 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.* From its fleet of 23 satellites (18 owned and 5 leased), Eutelsat S.A. is technically capable of serving up to 90 percent of the world's population. Eutelsat Web Page, <http://www.eutelsat.com/about/1_1_1.html>.

307 *See* note **[271]**, *supra* (discussing the Chinese-licensed "Sinosat-1/ Intelsat APR-2" satellite located in orbit at 110.5° E.L). In 2005, without Intelsat Ltd.'s involvement, the Chinese government launched its second satellite, the Ku-band "Sinosat-2" satellite located above China at 134°E.L. Sinosat-2 Satellite Web Page, <http://www.sinosatcom.com/english/satellite/wx_2.htm>.

308 *See* note **[270]**, *supra* (discussing the Indian-licensed "Insat 2E/ Intelsat APR-1" satellite located in orbit at 83° E.L.). In addition to the "Insat 2E/ Intelsat APR-1" satellite, the Indian government also operates nine other commercial communications satellites currently located in fixed geostationary orbit. *See* Indian Space Research Organisation, Indian National Satellite System (INSAT) Programmes Web Page, <http://www.isro.org/programmes.htm> (setting forth launch dates and orbital locations of the Indian government's Insat-1D, Insat-2A, Insat-2B, Insat-2C, Insat-2DT, "Insat 2E/ Intelsat APR-1," Insat-3A, Insat-3B, Insat-3C, and Insat-3E satellites).

309 The Arab Satellite Communication Organization (ARABSAT) is a regional intergovernmental treaty organization established on April 14, 1976 by the member states of the League of Arab States. Arabsat Web Page, <http://www.arabsat.com/about_us/index.asp>; *see also* note **[29]**, *supra* (discussing ARABSAT's first satellite launch in 1980). "ARABSAT is dedicated to enabling the Arab World with a range of satellite-based communications services." *Id.* ARABSAT operates three satellites currently in geostationary orbit above the Middle East: the "ARABSAT-2B" satellite located in orbit at 30.5º E.L., and the "ARABSAT-2A" and "ARABSAT-3A" satellites collocated at 26º E.L. *See* ARABSAT Satellite Features Service Brochure, *online at* <http://www.arabsat.com/downloads/pdf/brochures/SATELLITE_Features.pdf> At present, ARABSAT's Member states include Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen. ARABSAT Member Countries Web Site, <http://www.arabsat.com/about_us/about.asp?code=member>. Notably, four ARABSAT member countries—Iraq, Libya, Sudan, and Syria—are currently subject to various U.S.-international trade sanctions. *See* **[note 232]**, *supra*. Should these sanctions ever be expanded to prohibit Intelsat Ltd. from serving any ARABSAT member country, such a country would still be able to remain connected with the world via ARABSAT.

310 Indeed, the Russian-led Intersputnik treaty organization was originally founded in 1971 precisely in order to provide an alternative to INTELSAT. Today, Intersputnik continues to hold itself out as "an open intergovernmental organization that can be joined by any state." Intersputnik Web Page, <http://www.intersputnik.com/>. Notably, Intersputnik's 25 member

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service via transoceanic submarine fiber optic cable, which can provide many of the same services as satellites.[311] Finally, if necessary to preserve global connectivity or to protect "lifeline" users, Intelsat Ltd. potentially could dispose of its interests in its Indian-[312] and Chinese-licensed[313] satellites, leaving the governments of India and China free to operate those satellites unencumbered by adverse U.S. legislation.

CONCLUSION

The transformation of INTELSAT into a profit-seeking commercial entity inevitably has raised concerns about whether the privatized successor entity will continue to be willing—and financially able—to serve high-cost, low-volume "lifeline" users around the world. These concerns are not without force. Particularly with respect to "lower-middle-income" nations that do not qualify for "lifeline connectivity" protection, privatization may not provide as strong a guarantee of affordable service as was formerly provided by INTELSAT's uniform pricing policy. Nonetheless, the safeguards discussed in this Article collectively ensure that the privatization of INTELSAT should not deprive qualified "lifeline" users of basic international telecommunications service at affordable rates. Under the LCO Commitments that Intelsat Ltd. has executed with "lifeline" users, service to such users cannot be reduced or curtailed. Moreover, under FCC regulatory rules that now apply to Intelsat Ltd., the rates charged to "lifeline" users must decline by no less than four percent annually. While explicit subsidies have not been introduced, Intelsat Ltd.'s business model appears viable and capable of supporting the company's public service obligations. And if the company should fail, any successor who obtained control of the satellites would continue to be bound by Intelsat Ltd.'s public interest obligation. For these reasons, in theory and in practice, these safeguards substantially ensure that no individual user's economic ability to obtain such service has been diminished by the privatization. Moreover, the market competition on many international routes that privatization has facilitated—and will likely continue to facilitate—is likely to produce costs savings and other economic benefits for users worldwide.

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countries include three—Cuba, North Korea, and Syria—that are currently (and perennially) subject to various U.S.-international trade sanctions. Compare **[note 305]**, *supra* (listing Intersputnik member countries) with **[note 232]**, *supra* (listing countries currently subject to U.S.-international trade sanctions). Should U.S. -international trade sanctions ever be expanded to prohibit Intelsat Ltd. from serving Cuba, North Korea, or Syria, those countries would still be able to remain connected with the world via Intersputnik.

311 *See* notes **[37-42],** *supra*

312 *See* note **[270],** *supra* (discussing the Indian-licensed "Insat 2E/ Intelsat APR-1" satellite located at 83° E.L., which is a joint venture of Intelsat Ltd. and the Indian Space Research Organization (ISRO), an agency of the Indian government).

313 *See* note **[271],** *supra* (discussing the Chinese-licensed "Sinosat-1/ Intelsat APR-2" satellite located at 110.5° E.L, which is a joint venture of Intelsat Ltd. and the government of the Peoples' Republic of China).

The transformation of INTELSAT into an ordinary U.S.-licensed satellite system, subject to the laws and policies of the United States, has also given rise to reasonable concern that the U.S. government might someday seek to restrain the privatized Intelsat Ltd. from continuing to serve certain geopolitical rivals of the United States, or certain U.S.-defined "rogue states." At present, existing U.S. statutes and treaty obligations appear to foreclose such an eventuality. These statutes and treaty obligations deny the U.S. President and his Administration the legal authority to unilaterally impose sanctions that might threaten global connectivity. Unlike the President, however, the U.S. Congress has authority to repeal existing statutes and to breach or abrogate existing U.S. treaty obligations. Moreover, U.S. courts would likely uphold Congress's authority to regulate Intelsat Ltd.'s provision of service to customers located outside the United States, via non-U.S.-licensed satellites. Thus, as a matter of law, Intelsat Ltd.'s ability to serve every nation on earth is not entirely secure. As a practical and political matter, however, because several of Intelsat Ltd.'s satellites are operated as joint ventures with foreign governments, the U.S. government could not implement trade sanctions threatening Intelsat Ltd.'s ability to serve "rogue states" without potentially creating diplomatic difficulties with U.S. allies or trading partners. Moreover, even if the U.S. should adopt such sanctions, the redundancies in coverage that are now provided by several non-U.S. satellite systems ensure that no country need ever find themselves wholly unable to obtain international telecommunications service in the wake of INTELSAT's privatization.