THE COMMERCIALIZATION OF SPACE—TWENTY YEARS OF EXPERIENCE: SOME LESSONS LEARNED—

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On July 20, 1984, the White House announced a "National Policy on the Commercial Use of Space."[1] The policy prescribes four general categories of initiatives to be undertaken by the Government: economic initiatives; legal and regulatory initiatives; research and development initiatives; and initiatives to implement the National Policy on the Commercial Use of Space. The latter is described as intended to provide to entrepreneurs assurances of consistent government actions and policies over extended periods of time. Such assurances of "clear policy defining government's role in encouraging private sector space - based activities" are stated to be the key to industrial research and manufacturing in space. A reading of these goals and initiatives gives a sense of *déjà vu* at least with respect to what has to-date been the singularly most important and successful area of space commercialization—international commercial satellite communications.

On August 31, 1962, President Kennedy signed into law the Communications Satellite Act of 1962 following months of extensive legislative hearings and debate.[2] The Satellite Act, which represented a compromise between commercialization of communications satellites and government ownership and operation, states as 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 communications needs of the United States and other countries, and which will contribute to world peace and understanding."[3]

The Act further declared as a matter of policy that the United States' participation in the global system would be in the form of a private corporation subject to appropriate government regulation, as a means to provide the widest form of private enterprise

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[1] *National Policy on the Commercial Use of Space,* The White House (July 20, 1984). On August 15, 1984, the President approved a National Space Strategy which, *inter alia,* reaffirms the earlier commercial policy, and was designed to implement the National Space Policy. *See Aviation Week and Space Technology* 14 (Aug. 27, 1984).

[2] Communications Satellite Act of 1962, 76 Stat. 419 (codified as amended at 47 U.S.C. §701-757 (1976) [hereinafter cited as Satellite Act]. The major congressional committee reports on the Satellite Act are REPORT OF THE SENATE COMMITTEE ON AERONAUTICAL AND SPACE SCIENCES, S. REP. NO. 1319, 87th Cong., 2d Sess. (1962); REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS, S. REP. NO. 1873, 87th Cong., 2d Sess. (1962); REPORT OF THE SENATE COMMITTEE ON COMMERCE, S. REP. NO. 1584, 87th Cong., 2d Sess. (1962); REPORT OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, H.R. REP. NO. 1636, 87th Cong., 2d Sess. (1962). Senate Reports 1584 and 1873 are reprinted in 1962 U.S. CODE CONG. & AD. NEWS 2269-2329.

[3] Satellite Act §102(a) (codified at 47 U.S.C. §701(a) (1976)).

participation.[4] Six months later, the Communications Satellite Corporation was incorporated under the laws of the District of Columbia pursuant to the Satellite Act. Two years following the enactment of the Satellite Act, interim international arrangements were concluded among the United States and ten other countries for the establishment of the International Telecommunications Satellite Consortium (INTELSAT).[5] Thus was born the global system—an institutional concept conceived by President Kennedy in 1961[6] as the first step in the commercialization of space.

Measured by any standard, INTELSAT has been an enormous success, both technically and as an instrument of United States foreign policy.[7] From its first satellite—Early Bird—launched in April 1965 with the capacity to carry 240 simultaneous telephone conversations or one television channel across the North Atlantic between earth stations located in the United States, Canada, France, the Federal Republic of Germany and the United Kingdom, INTELSAT has grown to a system covering the entire globe and presently utilizing operational satellites each capable of transmitting simultaneously 12,000 telephone conversations plus 2 television broadcasts among more than 170 countries and territories. More than two-thirds of all intercontinental telephone calls and all intercontinental television are transmitted "via satellite". The system, for example, made it possible for more than an estimated two billion people to watch the 1984 Summer Olympics—a truly global audience. The INTELSAT organization, now established under definitive arrangements[8] has a membership of 109 countries, with most other countries of the world utilizing the system to some degree although they are not members of INTELSAT.[9]

Although the global system has met with great success and its international arrangements have been widely accepted and adhered to, the implementation within the United States of this first national policy for the commercialization of space has continued to engender considerable policy and legal debate. This article briefly examines certain of these debates and their possible significance as to the emerging commercial space

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[4]Satellite Act §102(c) (codified at 47 U.S.C. §701(c) (1976)).

[5]Agreement Establishing Interim Arrangements for Global Commercial Communications Satellite System, with Special Agreement, August 20, 1964, T.I.A.S. No. 5646. For discussion on the establishment of INTELSAT, *see e.g.*, Colino, *INTELSAT: Doing Business in Outer Space*, 6 Col. J. Transn. L. 17 (1967).

[6]1962 U.S. CODE CONG. & AD. NEWS 2287-88.

[7]See *Statement of Under Secretary of State William Schneider, Jr. Before the Subcomm. on Telecommunications, Consumer Protection and Finance, of the House Comm. on Commerce and Energy*, 98th Cong., 1st Sess. (July 25, 1984). "I would like to preface my remarks by commenting that the global system of international communications satellites is a magnificent achievement of U.S. policy based on the Communications Satellite Act of 1962." *Id.*

[8]Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" and Operating Agreement, February 12, 1973, 23 U.S.T. 4091, T.I.A.S. 7532 [hereinafter cited as INTELSAT Agreement and Operating Agreement]. For informative insights on the definitive arrangements negotiations, *see* Colino, *The INTELSAT Definitive Arrangements: Ushering in a New Era in Satellite Telecommunications*, European Broadcasting Union Legal and Administrative Series, Monograph No. 9 (1973); Mizrach, *The INTELSAT Definitive Arrangements*, *1* J. Space L. 129 (1973); Washburn, *The International Telecommunications Satellite Organization, International Cooperation in Outer Space: A Symposium*, Doc. No. 57, 92nd Cong., 1st Sess. 437 (1971).

[9]Any state which is a member of the International Telecommunication Union can accede to the INTELSAT Agreement and either sign or designate an entity to sign the Operating Agreement, thereby becoming a Signatory to INTELSAT. INTELSAT Agreement, Art. XXIX, *supra* note 8. In the case of a non-member state, access to and utilization of the INTELSAT space segment is obtained through application by the duly authorized telecommunications entity of that state. Operating Agreement, Art. 14, 15, *supra* note 8.

activities and concludes that while the approach adopted with the Satellite Act as to the form of United States participation in the global system was necessary and appropriate for the development of commercial satellite communications, it may not be a particularly useful or appropriate model for future space commercialization activities.

1. *The Comsat Model*

A. *International Communications Facilities In the Early 1960's—The Setting*

At the time of the debate and passage of the Satellite Act, international communications consisted essentially of limited telephony, telegraphy and telex services. Communications across the North Atlantic were transmitted either through underseas cable or by high frequency radio. Cables were expensive and, although they provided reasonable quality, communications were limited by the number of telephone circuits in the cable and by the fact that the cables were essentially point-to-point facilities. High frequency radio afforded service of sporadic reliability and low quality, since it was affected by such natural phenomona as weather and sunspot activity. Nevertheless, the growing post-war international economy created a demand for international communications, and telephone calls often had to be booked in advance. The market conditions were, therefore, appropriate for the introduction of a new technology which would not only provide greater capacity and higher reliability and quality, but would also afford the means by which to route calls to many points, not just primarily between the countries at the opposite ends of the cable.

Within the United States, international communications services were furnished by private companies operating as communications common carriers subject to government regulation. Long distance telephone service was the *de facto* monopoly of the American Telephone and Telegraph Company (AT&T) and international telegraph, telex and leased line services were provided by essentially four international record carriers (IRC's)[10]. The furnishing of international communications service was regulated by the Federal Communications Commission (FCC) and provided pursuant to tariffs filed with the FCC[11]. The rates of return (i.e. profits) which the carriers were permitted to earn were established by the FCC. AT&T was a fifty percent owner of the trans-Atlantic submarine cable facilities—the remainder owned by foreign interests[12]. AT&T's investment in the cable was included as part of its overall rate base against which it was allowed to earn an FCC regulated rate of return. Competition, to the extent it existed, was confined essentially to the record carrier services (e.g. telegraph and telex), although their rates were largely identical between the same two points.

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[10]ITT World Communications, Inc.; RCA Global Communications, Inc.; Western Union International, Inc. (*not* part of Western Union Telegraph Company, the U.S. domestic telegraphy and telex carrier); and Tropical Radio and Telegraph Co. (now TRT Telecommunications Corp.) Tropical also provided telephony service between the United States and Latin America. U.S. international communications carriers are generally referred to as international service carriers (ISC's). WUI is now part of the MCI Corporation.

[11]See generally, Title II of the Communications Act of 1934, 48 Stat. 1064 (codified as amended at 47 U.S.C. §201-224 (1976)) (Title II) [hereinafter cited as Communications Act].

[12]In both cable and satellite transmission facilities, governments maintain joint ownership in international facilities thereby extending their respective jurisdictions to what is described as the theoretical mid-point of the circuit. Hence, the concept of a half circuit which is a two way channel extending to the theoretical midpoint of the transmission facility and back.

Overseas, communications services were furnished (and for the most part still are today) by government-owned monopolies which in many cases were outgrowths of the government-owned postal systems. As a result, communications services were viewed in these countries as another service furnished by the government and competition was limited essentially to the provision of equipment (e.g. telephones) to the government—not to the individual consumers of communications. International standards and protocols for exchanging communications traffic were (and are today) set by recommendations of consultative committee (CCI's) of the International Telecommunication Union (ITU)[13] in which the government monopolies generally represented their respective governments. The FCC represented the United States but relied considerably on the technical and operational expertise of the carriers such as AT&T.

In order to facilitate international communications between two countries, its communications entities entered into operating arrangements which established the financial and operational terms pursuant to which they would exchange international communications traffic in accordance with the ITU recommendations. These arrangements, which could be as informal as the exchange of letters or telexes, specified the mode of transmission i.e. the facilities to be used and the number of circuits to be established. Except for the desirability of having diverse traffic routes (i.e. some circuits through cable and some through other modes so as to better ensure reliability of service), the tendency was to use those international facilities in which the particular parties had the greatest investment. Hence, a preference for cables.

As a result, the international communications environment existing in the early 1960's was highly structured and regulated. The introduction of the communications satellite into this environment not only revolutionized international communications from the consumers' standpoint but significantly altered the institutional arrangements and policies concerning the furnishing of such communications. In the United States, the catalyst for change was the creation by national policy of a company dedicated to one mode of transmission—satellites—and granted a lawful monopoly by Congress as the sole provider of channels of communications into and out of the United States through a system of communications satellites, which materialized as the INTELSAT global system. While industry ably responded in providing the necessary technology to implement the global system concept, its acceptance placed considerable strain on the regulatory and policy making apparatus of government, resulting in compromises and artificial constraints which, while satisfactory in the short run in enabling satellite communications to gain a necessary foothold, failed to provide satisfactory long term solutions in a rapidly expanding market for international communications services[14].

B. The Creation of Comsat—Its Structure

Comsat, the United States participant in INTELSAT, is a publicly traded, for-profit corporation with currently more than 60,000 shareholders, assets exceeding $1 billion and shareholder equity in excess of $500 million. Its form was largely the result of legislative compromise between establishing an entity owned and controlled solely by the Government and one owned and controlled by AT&T and the other international carriers. Initially,

[13]International Telecommunication Convention, Article 11, October 25, 1973, T.I.A.S. 8572.

[14]For a discussion of the Government relationships with Comsat, *see* Gantt, *U.S. Government-Industry Relations and the Space-Based Technologies: The Comsat Example, in* INTERNATIONAL SECURITY DIMENSIONS OF SPACE 196 (Ra'anan and Pfaltzgraft, Jr., eds. 1984).

fifty percent of the stock was set aside for and subscribed to by communications common carriers[15]. (AT&T owned approximately 29 percent). The other fifty percent was quickly subscribed to by the public in what was then the largest initial public stock offering in a start-up venture. This arrangement sought to give the carriers an investment opportunity in the new technology, but not control, so as to afford the new entity the benefit of their expertise. Subsequently the international carriers, including AT&T, all sold their stock holdings in Comsat.[16]

The board of directors initially consisted of six directors elected by the carriers, six by the public shareholders and three appointed by the President of the United States and confirmed by the Senate. However, ever since the ISC's sold their stock, all twelve shareholder directors have been elected at large by all the shareholders[17]. Furthermore, no one shareholder or affiliated group of shareholders (other than carriers authorized by the FCC) can by law own more than 10 percent of the stock of Comsat—an effective measure against a merger or hostile takeover.[18]

As for government regulation, and in order to achieve the objectives of the Satellite Act, the FCC was given powers in addition to those which it already possessed under the Communications Act of 1934, as amended.[19] The Satellite Act mandated that Comsat would be a communications common carrier regulated by the FCC.[20] Among the powers accorded the FCC was the power to:

> grant appropriate authorizations for the construction and operation of each satellite terminal station [i.e. earth station], either to the corporation [Comsat] or to one or more authorized carriers or to the corporation [Comsat] and one or more such carriers jointly, as will best serve the public interest, convenience, and necessity . . . . [And] without preference to either [Comsat or such carriers].[21]

The President likewise was given certain authority with respect to Comsat, including the requirement to:

> "exercise such supervision over relationships of [Comsat] with foreign governments or entities or with international bodies as may be appropriate to assure that such relationships shall be consistent with the national interest and foreign policy of the United States."[22]

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[15]Satellite Act §304(b) (codified as amended at 47 U.S.C. §734(b) Supp. XIII 1984)).

[16]As the result of restrictions placed upon AT&T in the Domestic Satellite Proceedings, AT&T disposed of its ownership interest in Comsat in 1973. Memorandum, Opinion and Order, 38 (F.C.C. 2d 665, (1972). The other major carriers had previously sold their holdings.

[17]Satellite Act §303(a) (codified as amended at 47 U.S.C. §733(a) (Supp. XIII 1984)).

[18]Satellite Act §304(b)(3) (codified at 47 U.S.C. §734(b)(3) (1976)). Pursuant to Article 502(c) of the Comsat Articles of Incorporation, this percentage has been further reduced to five (5) percent.

[19]47 U.S.C. §§701-757 (1976). In the event application of provisions of the Satellite Act are inconsistent with application of provisions of the Communications Act, the provisions of the Satellite Act control. Satellite Act §401 (codified at 47 U.S.C. §741 (1976)).

[20]Satellite Act §401 (codified at 47 U.S.C. §741 (1976)).

[21]Satellite Act §201(c)(7) (codified at 47 U.S.C. §721(c)(7) (1976)). Thus, only communications common carriers may own and operate U.S. earth stations that access the INTELSAT global system.

[22]Satellite Act §201(a)(4) (codified at 47 U.S.C. §721(a)(4) (1976)). The form of this supervision with respect to meetings of the governing body of INTELSAT (Board of Governors) on which Comsat sits as the United

In addition to owning the United States interest in the satellites comprising the global system and owning and operating earth stations as determined by the FCC, Comsat is authorized by the Satellite Act to furnish channels of communication

> "to [the] United States communications common carriers and to other authorized entities, foreign and domestic."[23]

and

> "to contract with authorized users, including the United States Government, for the services of the . . . [global] system."[24]

At the same time that Congress conferred on Comsat the broad mandate with respect to what was to become the INTELSAT global system, it also placed a potential limit on the extent of Comsat's exclusivity by the following language in its Declaration of Policy and Purpose:

> It is not the intent of Congress by this Act to preclude the use of the [global] communications satellite system for domestic communication services where consistent with the provisions of this chapter *nor to preclude the creation of additional communications satellite systems,* if required to meet unique governmental needs or *if otherwise required in the national interest.*[25] [Emphasis added.]

States representative has been the subject of much discussion and criticism. The process involves three Government agencies—the Department of State, the National Telecommunications and Information Agency and the FCC—which review the Board agenda and proposed Comsat positions in advance of the meeting and issue instructions to Comsat as regards the foreign policy implications for the United States. Comsat regards these instructions as binding and keeps in close contact with the Department of State as to developments during the Board meetings and debriefs the agencies following the meeting. The critics seek greater participation in the process of formulating these instructions and continue to urge that the Government place an "observer" in the meetings as part of the Comsat delegation to see the instructions are faithfully carried out. The opponents cite the need to maintain secrecy in the development of the U.S. positions and the concern that a Government representative present in the Board meeting would be solicited for support by other delegations and detract from Comsat's statutory role as U.S. participant in INTELSAT. *See generally,* Comsat Study, 77 F.C.C.2d 564 (1980).

[23]Satellite Act §305(a)(2) (codified at 47 U.S.C. §735(a)(2) (1976)).

[24]Satellite Act §305(b)(4) (codified at 47 U.S.C. §735(b)(4) (1976)).

[25]Satellite Act §102(d) (codified at 47 U.S.C. §701(d) (1976)). While the underscored language establishes a potential limit to Comsat's exclusivity, the language with respect to domestic communications services was relied on by the FCC in authorizing Comsat to enter the U.S. domestic communications satellite business through the establishment of a separate system, COMSTAR, leased to AT&T, and as a minority participant in a multipurpose domestic satellite system which eventually became Satellite Business Systems. *See,* Establishment of Domestic Communications Satellite Facilities by Non-Governmental Entities, Report and Order, 22 F.C.C.2d 86 (1970) (Annex C); Satellite Business Systems, Memorandum, Opinion and Order, 62 F.C.C.2d 997, *recon. denied,* 64 F.C.C.2d 872 (1977), *aff'd en banc* 652 F.2d 72 (D.C. Cir. 1980).

Thus, what emerged from the enactment of the Satellite Act was

- a private, for profit, corporation,
- with a limited exclusive mandate and accompanying "franchise",
- to establish, own and operate in conjunction with foreign governments or entities a global system of commercial communications satellites,
- to construct and operate, itself or jointly with other U.S. carriers, as authorized by the FCC, satellite earth stations within United States,
- through which to furnish, as a common carrier, communications services to authorized U.S. communications common carriers and other authorized users, including the U.S. Government,
- pursuant to regulation by the FCC and foreign policy supervision by the President,
- in furtherance of national policies and purposes enunciated in the Satellite Act.

Previously the U.S. communications carriers had been able to establish and utilize, by mutual agreement with their foreign correspondents, international transmission facilities through which to furnish international communications services to their U.S. customers, subject only to applicable economic and technical regulation by the FCC. They were now required in the case of this new technology to obtain the necessary communications capacity by which to furnish such services to their customers from a government imposed "middleman", Comsat—a carriers' carrier.[26] In order to ensure that the carriers would fairly utilize this new transmission medium and not by-pass it in their own economic self-interest by relying disproportionately on submarine cables, particularly on high density traffic routes such as the North Atlantic, the FCC imposed various artificial constraints. One of these allowed the carriers in setting their rates between given points to average their transmission facilities costs between those points, thus eliminating any cost advantages that satellites possessed over cables.[27] Another required that new satellites and cable circuits

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[26]As a carriers' carrier, Comsat provides under tariff satellite capacity to international service carriers which, in turn, utilize this capacity in furnishing communications services, such as telephone, telex and leased circuits, to consumers of those services. The extent to which Comsat, as a matter of law and policy, can provide its services directly to those consumers, i.e. to authorized users, in competition with the carriers has been the subject of extensive FCC proceedings and is discussed later in this article.

[27]*Authorized Entities and User,* 4 F.C.C.2d 421 (1966), *recon. granted in part,* 6 F.C.C.2d 593 (1967). The FCC removed the requirement for composite rates in Modification of Authorized User Policy Report and Order, 90 F.C.C.2d 1394 (1982), *rev'd on other grounds,* 725 F.2d 732 (D.C. Cir. 1984) (Authorized User II).

be activated in ratios specified by the FCC.[28] These policies—which all but eliminated intermodal competition between cables and satellites—were viewed as essential to ensure viability and growth of the new satellite system.

C. *The Comsat Model—Issues of Implementation*

While the obvious benefits offered by satellite communications—e.g., multiple access, high quality, high reliability, instantaneous communications, including for the first time the capability to furnish broadband communications services such as television and high speed data—made it desirable for the carriers to utilize this new technology to meet their customer demands, it also led to institutional tensions. The carriers, certain large users and, to a lesser extent, Comsat were motivated to seek broader interpretations of their respective institutional roles in the furnishing of satellite communications. This, for the most part, took the form of demands on the Government to modify the role of COMSAT, through legislative, regulatory or policy changes, primarily in response to advances in technology, changes in the marketplace and increased governmental emphasis on deregulation of communications services.

Under traditional public principles, an entity such as an electric power company or a local telephone company, in exchange for the grant of an exclusive geographic service area franchise from the responsible government body, undertakes to provide service within that area to all customers on a non-discriminatory basis pursuant to reasonable terms and conditions of service. These terms and conditions are subject to regulation by the government and designed to earn for the utility a reasonable rate of return on its investment. In many respects the global system operations of Comsat fit this general mold of a public utility, the major difference being that Comsat historically has acted as a wholesaler or "carrier's carrier" of satellite communications capacity to the international communications carriers, which, in turn, serve the end users.

What are these channels of communications and how are they utilized in, for example, the transmission of international telephone calls from New York City to London? An overly simplified description would be to imagine a two-way voice grade telephone circuit from New York City to the nearest general purpose U.S. earth station in Roaring Creek, Pennsylvania. This terrestrial circuit is established, for example, by AT&T Communications, an international service carrier, with appropriate interface in New York City to the local circuits of the New York Telephone Company. At the earth station the terrestrial circuit is electronically connected to a similar two-way voice grade half circuit which Comsat has established between the earth station and an appropriate Atlantic Ocean Region Intelsat satellite. In the satellite it is electronically interfaced with a similar half circuit established between the satellite and the earth station in England and from there to London by the British telephone company (British Telecom), the UK participant in INTELSAT.

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[28] *See e.g.*, Overseas Communications, 67 F.C.C.2d 358 (1977) (balanced loading of available facilities); ITT Cable & Radio Inc.-Puerto Rico, 5 F.C.C.2d 823 (1966), 7 F.C.C.2d 957 (1967) (prescribed use formula requiring carriers to activate equal numbers of circuits in the new cable and through the new earth station). *See* Authorized User II, 90 F.C.C.2d at §§75-99, for a discussion of the FCC's reasons for deciding to gradually phase out the fill requirements and for making permissive the compositing of rates.

From an economic standpoint, Comsat, as the U.S. Signatory[29] to INTELSAT, makes capital investments in INTELSAT in proportion to its ownership share of INTELSAT—presently approximately 23 percent. INTELSAT uses the capital to acquire and launch the INTELSAT space segment.[30] It recoups its investment plus a 14 percent return on investment for its investors by "selling" allotments of communications capacity in the satellite. The basic unit of allotment is a "half circuit" which is that amount of bandwidth capacity necessary to establish a one-way voice grade channel from the earth station to the satellite and back to the earth station,—hence a two-way voice circuit on the U.S. "side" of the satellite. Under the INTELSAT arrangements, allotments of capacity can only be made, in the case of a member state such as the United States, to the Signatory of that state.[31] Thus, in the foregoing example of a telephone circuit from New York City to London, Comsat establishes the two-way communications circuit between the U.S. earth station and the satellite by purchasing a half circuit allotment from INTELSAT at the current rate of $390 per month. (British Telecom makes a similar purchase of a half circuit on its side of the satellite.) The $390 rate per half circuit allotment is designed to recoup for INTELSAT its proportionate share of the INTELSAT operating costs and investment amortization costs and contribute towards the 14 percent return target.[32] To the extent Comsat's proportionate use of the INTELSAT satellite equals its percentage investment, the transaction over time becomes a wash except for operating cost and the time value of money. To recover these elements Comsat must include them, along with its other operating and amortization costs, together with its FCC-allowed rate of return on its rate base investment, in determining its revenue requirement and, hence, the rate to its customers for the satellite half circuit. Currently Comsat's rate for its leased voice grade channel service—for both earth station and the space segment—is $1060 per month.[33]

1. Scope of Comsat's Role in International Satellite Communications—

A reading of the Satellite Act, its history and the resulting INTELSAT agreements suggests that Comsat's role in international satellite communications can be described as encompassing (1) the ownership, operation and management of the U.S. share of a "communications satellite system"—to use the language of the Satellite Act[34]—, (2) when

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[29]Signatory is the term used in the INTELSAT arrangements to denote the government agency or private entity designated by the government of a member state to be that state's investor or "shareholder" in INTELSAT and to sign the Operating Agreement and assume the rights and obligations of a Signatory. INTELSAT Agreement, Art I(g), *supra* note 8.

[30]The INTELSAT space segment consists of the satellites and associated ground telemetry, control and command (TT&C) equipment. It does not include the communications earth stations which, instead, are owned separate from INTELSAT by the individual member states' governments or private communications entities. *Id.*, Art. I(h).

[31]Operating Agreement, Art. 15, *supra* note 8.

[32]*Id.*, Art. 8. The 14 percent return is realized by the signatory only if, and to the extent, its investment exceeds its use, in which case it is earning 14 percent on that part of its investment representing the capacity utilized by another signatory or designated non-member user.

[33]Comsat Tariff FCC No. 101, 6th Revised Page 19, Effective July 30, 1984.

[34]Satellite Act §305(a)(1) (codified at 47 U.S.C. §735(a)(1) (1976)).

authorized by the FCC, the ownership and management of U.S. earth stations, (3) the sale of communications capacity derived from the system to authorized U.S. communications common carriers and other authorized users, and (4) the representation of the United States in the INTELSAT Board of Governors and Meeting of Signatories.[35] As will be discussed below, if the FCC follows through on its previous proposals in the remand of the *Authorized User II* proceeding currently before it, Comsat will have a potentially broader, albeit non-exclusive, customer base for its services including large government and corporate users. Furthermore, if Comsat so chooses, it may enter the retail end-to-end international communications services business (e.g., high speed data). In one sense, *Authorized User II,* in opening the policy door for Comsat to enter the end services business, may prove pivotal to Comsat's future viability given the other developments in this field. Even the FCC, in *Authorized User II,* reminded Comsat that it may no longer have the luxury of remaining just a carriers' carrier.[36]

a. As Defined by the FCC's Authorized User Policy

The Satellite Act authorized Comsat to furnish channels of communications to "United States communications common carriers and to other authorized entities" and "to contract with authorized users, including the United States Government" for the services of the global system.[37] When Comsat filed its first tariff in May 1965, which offered services only to communications common carriers, it informed the FCC that it stood ready to provide service to any other entities which the FCC authorized to receive service from Comsat. While the Satellite Act specifies[38] that the term "communications common carrier" shall have the same meaning as the term "common carrier" in the Communications Act of 1934, as amended,[39] nowhere is the term "authorized entities" or "authorized users" defined. The task was left to the FCC which has sought to define the concept of an "authorized user" more on policy than strictly legal grounds.

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[35]The Board of Governors is the governing body of INTELSAT meeting at least four times a year and responsible for the establishment and operation of the space segment. Its composition is for the most part determined on the basis of investment, and decisions on substantive matters are taken by weighted voting based on investment unless all the Governors, less no more than four, are in favor of a decision in which case the decision carries without weighted voting. INTELSAT Agreement, Art. IX, X, *supra* note 8. The Meeting of Signatories, meets once a year and can be compared to an annual stockholders meeting of a corporation with limited powers. *Id.,* Art. VIII.

[36]90 F.C.C.2d 1394, 1422 (1982). "74. We also observe that Comsat, in stating that it is unlikely to enter the switched-services market and that any benefit from its entry would be "minimal," is departing from a position which it has advocated in the past. At the time of our 1966 *Authorized User* proceeding, Comsat attached a great deal of importance to the ability to market its innovations to potential users. Moreover, Comsat has on a number of occasions eagerly sought precisely the broadened authority in which it now disavows interest. Comsat's reluctance in this proceeding may arise from a desire not to upset existing institutional arrangements, including a comfortable monopoly as supplier of satellite facilities with a guaranteed share of overseas circuits, for the vagaries of the competitive market. We expect that, as a result of our earlier decisions and those taken today, Comsat increasingly will be subjected to market pressures. In this changing environment where Comsat's monopoly position is less firm, it may become more interested in providing new services in competitive markets."

[37]Satellite Act §305 (codified at 47 U.S.C. §735 (1976)).

[38]Satellite Act §103(7) (codified at 47 U.S.C. §702(7) (1976)).

[39]47 U.S.C. §153(h) (1976).

As can be seen, in view of the fact that Comsat wholesales capacity to the international service carriers which then retail it to the end users, to the extent Comsat can sell its capacity to a broader market and thereby by-pass the carriers, it is competing with them. Comsat is required by the Satellite Act to sell its capacity on a non-discriminatory basis under tariff, at the same rate to all buyers for the same service.[40] Any difference in rates must be cost-justified. But most importantly, even if Comsat could sell service directly to the end users, it would be selling them only a part of the service (i.e. a circuit between the earth station and the satellite). The end usser would have to make its own arrangements to get to the earth station and for the foreign circuits. As a consequence, Comsat would not as a practical matter be competing with the carriers except, perhaps, as regards the largest users. These large customers (e.g. ARINC, the Federal Government), which could arrange for their own terrestrial communications links to the earth station and for foreign circuits, could therefore buy large amounts of capacity "wholesale" from Comsat at the same rate Comsat charges the ISC's, thereby avoiding having to pay the ISC markup.

The international record carriers, however, successfully took the position originally that Comsat's sale of leased private line satellite circuits to large users would severely undercut the carriers' business, which was heavily dependent on revenues from leased circuits, and thereby jeopardize the growth of the telex services and other non-leased services. To avoid this result, the FCC, in 1966, determined that while, as a matter of law, Comsat was not barred from providing its services directly to non-carrier entities, such could only be done as a matter of policy in "unique or exceptional circumstances."[41] Although, in general, this decision remains in effect today;[42] the FCC has under active consideration in its *Authorized User II* proceeding a revision of the policy to (1) require Comsat to furnish services to entities other than common carriers directly at the earth stations and (2) permit it to provide end-to-end services to such entities through a fully separated subsidiary.[43]

b. As Defined by the FCC's Direct Access Proceeding

Since the implementation of this new *Authorized User II* policy would place Comsat in competition of sorts with the ISC's in furnishing international communications services, the FCC on the date that it announced *Authorized User II,* and as part of a general re-

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[40]Satellite Act §201(c)(2), 401 (codified at 47 U.S.C. §721(c)(2), 741 (1976)).

[41]Authorized Entities and Users, 4 F.C.C.2d 421 (1966), *reconsid. granted in part,* 6 F.C.C.2d 593 (1967). (Authorized User I).

[42]In 1978, upon application by the Spanish International Network (SIN) for authorized user status in connection with its Spanish language telecasts, the FCC rather than grant an exception to *Authorized User I,* waived that policy and designated SIN an authorized user, Spanish International Network, 70 F.C.C.2d 2127 (1978) (SIN I), and in 1980 permitted Comsat to provide service at its earth stations directly to SIN and other television networks, Communications Satellite Corporation 76 F.C.C.2d 5 (1980) (SIN II), and to revise its tariff to include the offering of the new service. Communications Satellite Corporation 79 F.C.C.2d 562 (1980) (SIN III). All three decisions were subsequently affirmed *sub nom,* ITT World Communications, Inc. v. FCC, 725 F2d 732 (D.C. Cir. 1984).

[43]Authorized User II, 90 F.C.C.2d 1394 (1982), *vacated and remanded sub nom,* ITT World Communications, Inc. v. FCC, *supra* note 42. The court in considering *Authorized User II* and after holding that the Satellite Act gives the FCC broad discretion to designate non-carriers as authorized users, found that the FCC had abused its discretion by failing to consider adequately certain relevant factors prior to implementing *Authorized User II.* Accordingly, the court vacated and remanded *Authorized User II* to the FCC for further proceedings. The decision of the FCC on remand is presently pending.

examination of its policies concerning Comsat, initiated a Notice of Inquiry (NOI) looking towards some form of direct economic involvement by the ISC's in the ownership of satellite capacity.[44] This it was believed would readjust the "playing field" to a level state by permitting the ISC's to gain access to the INTELSAT capacity, albeit through Comsat, on an equivalent economic basis with Comsat. Specifically, the FCC asked for comments whether the existing tariff arrangements under which the ISC's acquired capacity on a non-capitalized lease basis should be modified to permit acquisition on a capitalized lease basis or as an investment, such as an indefeasible right of use[45], in Comsat's share of the INTELSAT satellite capacity.

After considering the comments, filed in response to the *Direct Access NOI,* the FCC decided not to implement its proposals. It concluded that the benefits did not substantially outweight the adverse results which the FCC found were likely to attend the adoption and implementation of direct access.[46] The Commission found that any form of direct economic access would likely not reduce the space segment costs significantly but, instead, the most likely outcome would be a dividing of costs between Comsat and the ISC's with very little to be gained by way of increased efficiency. Moreover, the FCC expressed concern that AT&T's economic participation in INTELSAT investment decisions would adversely impact intermodal competition between satellite and cable given the fact of AT&T's large investment in cable facilities and large use of the satellite system.

Although the ISC's had not gained direct economic access to INTELSAT satellite capacity on the same economic conditions as Comsat, the FCC did propose in the companion Earth Station Ownership Notice of Proposed Rule Making Proceeding[47] that Comsat unbundle its service and offer its customers a space segment-only tariff for satellite capacity which the customer could then derive through a non-Comsat earth station.[48] This unbundling of the Comsat service coupled with the advances made in earth station technology opened the way for a proliferation of smaller earth stations offering more unique forms of service to customers at various locations than had been traditionally offered through the large general purpose earth stations. Even so, Comsat retained its economic exclusivity with respect to the space segment for international satellite communicsations—or so it appeared.

c. As Defined by the FCC's Earth Station Ownership Policy

The Satellite Act empowers Comsat to "own and operate satellite terminal stations [i.e. earth stations] when licensed by the [FCC]".[49] The FCC, as one of its specific responsibilities under the Satellite Act is required to grant authorizations and licenses

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[44]INTELSAT Satellite Facilities, Notice of Inquiry, 90 F.C.C.2d 1446 (1982) (Direct Access NOI).

[45]An indefeasible right of use is a capital investment interest in a transmission facility in which the holder does not obtain rights in management or control of the facility. *Id.*, at §18 n. 28. The holder, however, is permitted to place this investment in its rate base and earn a return on it, thus providing it with an economic interest in the facility. The concept was invented by the FCC to permit the IRC's to have an investment interest in the Transatlantic TAT-4 cable facilities.

[46]Report and Order, INTELSAT Satellite Facilities, 97 FCC 2d 296 (1984). (Direct Access Decision)

[47]Notice of Proposed Rule Making, Ownership and Operations of Earth Stations, 97 FCC 2d 444 (1984).

[48]Satellite Act §305(a)(3) (codified at 47 U.S.C. §735(a)(3) (1976)).

[49]Satellite Act §201(c)(7) (codified at 47 U.S.C. §721(c)(7) (1976)).

for the construction and operation of earth stations to Comsat, or to one or more authorized carriers or to Comsat and one or more such carriers, jointly.[50] The initial U.S. earth station was constructed by AT&T at Andover, Maine, prior to the creation of INTELSAT for use with its experimental TELSTAR satellite. Comsat subsequently acquired the use of this facility to operate with the first INTELSAT satellite, Early Bird. In 1966, the FCC established its first earth station ownership policy pursuant to which the U.S. earth stations working with the INTELSAT satellites were owned jointly by Comsat and the ISC's.[51] In April 1982, the FCC initiated a Notice of Inquiry (NOI)[52] to determine whether this 1966 policy continued to serve the public interest and suggested a possible distinction between the general purpose earth station with which all ISC's interconnect to provide international switched and private line services to the public and specialized stations designed to meet the private line needs of a dedicated user or group of users, the latter being of a type that customarily would be located on or near the dedicated user(s) premises.

Comments were received from various interested parties, including a proposal by Comsat to restructure the existing ownership and operating arrangements by dissolving the ESOC arrangement and converting the ESOC stations into "wholesale/retail combination stations", in which Comsat's wholesale operations would be located in the same facility with the carriers retail operations. In June 1983, INTELSAT announced the introduction of a major new service, INTELSAT Business Services (IBS), which would enable the authorized carriers to establish for their customers dedicated international communications networks employing customer premised earth stations to furnish all types of digital communications services such as video conferencing, facsimile and high speed data. Comsat, subsequently obtained from the FCC authority to furnish the new service to its U.S. carrier customers and to construct and operate special earth station facilities.[53] Other carriers also obtained authority to construct similar specialized stations through which to offer the IBS service.[54]

These significant developments reflected the major advances that had been made in earth station technology and the customer demand for more flexible satellite service offerings to meet their rapidly expanding communications requirements. The FCC took note of these developments and tentatively concluded that significant benefits would flow from a liberalization of its earth station ownership policy. This policy, having served its purpose as a conservative policy imposing stability during the infancy of INTELSAT, had outlived its usefulness now that INTELSAT had evolved into a mature and financially viable organization. A new policy which stressed the benefit to users while continuing to recognize the U.S. commitment to a mature INTELSAT was now required.

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[50]Ownership and Operation of Earth Stations, 5 F.C.C.2d 812 (1966). The ownership is manifested by an agreement establishing separate consortia for earth stations in the continential United States, Hawaii and Guam with Comsat owning 50 percent and the ISC's owning the remaining 50 percent in approximate proportion to their respective use as projected in 1966. An Earth Station Ownership Committee created by the Agreement oversees the operation of these stations which are made available to Comsat to enable it to furnish its communications channels under tariff to the authorized carriers and users. Comsat, in turn pays a rental to the carriers for its use of their share of the investment in the stations. *See,* Notice of Proposed Rule Making, Ownership and Operation of Earth Stations, 97 FCC 2d 444 (1984).

[51]90 F.C.C.2d 1458 (1982).

[52]Notice of Proposed Rule Making, *supra* note 51.

[53]Communications Satellite Corporation, FCC 84-124, 126 (April 11, 1984).

[54]*E.g.,* International Relay, Inc., FCC 84-125 (April 11, 1984).

Accordingly, the FCC proposed a policy which (1) would permit—but not require—existing earth stations to continue to be jointly owned and (2) would allow new earth stations to be individually owned by Comsat or by authorized carriers including new entrants.[55] In order to implement this policy of independent ownership, the FCC required Comsat to unbundle its service offering and file a cost-based tariff solely for space segment capacity which the independent earth stations owner could purchase for use in providing its customers service through its station.[56] This tentative policy was designed to promote within the United States intra-modal competition for international communications satellite services in much the same vein as the FCC's *Authorized User II* policy was designed to promote intermodal competition between satellites and cables. Instead of the various institutional classifications of earth stations proposed in the earlier NOI, the FCC decided to employ a more practical classification scheme based upon prevalent technology (i.e. IBS, television and multi-purpose earth stations) as the basis for evaluating future earth station applications under a list of criteria which were set out in the NPRM for further public comment.[57] Thus, the FCC tentatively concluded after 18 years of a conservative earth station ownership policy designed primarily to facilitate the orderly maturing of INTELSAT—and, which, had concomittantly provided security for Comsat—that the future viability of INTELSAT and the interests of the users in competitive international communications services could be mutually achieved through a greatly liberalized earth station ownership policy.

d. As defined by the FCC's Transborder Services Decision

With the advent of Canadian and U.S. domestic communication satellites, the growth of the cable TV industry and the reduction in cost and size of television receive-only (TVRO) earth stations, it was not long before various applications were submitted to the FCC to (1) receive TV signals from Canadian satellites,[59] (2) transmit communications to Canada via U.S. domestic satellites[60] (3) and transmit television signals to Caribbean and Central American countries using U.S. domestic satellites.[57.3] The applicants argued that in the case of television programming, they were not creating additional programming but would merely be furnishing to additional points the programming that was *already* on the satellite either for distribution to Canadian or U.S. television or cable stations. To put the same programs through INTELSAT for transborder distribution, they argued, would be inefficient and costly, assuming they could get capacity on INTELSAT satellites. Further, as to U.S.-Canada traffic, they contended that INTELSAT had never provided services between the two countries—instead expensive and inefficient terrestrial means were used theretofor. Comsat opposed most of the applications asserting, as a major basis,

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[55]Notice of Proposed Rulemaking, *supra* note 50, at §27.

[56]*Ibid.*

[57]*Id.*, at §32.

[58]*E.g.*, 220 Television, Inc. (File No. 318 DSE-ML-78) to permit the reception by a television station licensee in St. Louis, Mo. of television station signals from TELESAT Canada's ANIK I and II satellites.

[59]*E.g.*, RCA Americom Communications, Inc. (File No. W-P-C-1719) to add various new receive points in Canada for signals transmitted through its SATCOM U.S. domestic satellites.

[60]*E.g.*, Southern Satellite Systems, Inc. (File No. I-P-C-44) to extend its domestic television programming services to the Cayman Islands, BWI via a U.S. domestic satellite.

its exclusivity under the Satellite Act and the United States commitment to the single global system for international public telecommunications services.

After obtaining guidance from the Executive Branch as to foreign policy and national interest considerations[61], the FCC found that the public interest would be served by a grant of the applications subject to certain conditions which included prior coordination with INTELSAT under Article XIV of the INTELSAT Agreement.[62] In a seminal decision, the FCC decided that the use of domestic satellite facilities for the limited purpose of furnishing international public telecommunications services of the type sought in the applications did not contravene the Satellite Act, the INTELSAT Agreement or U.S. international telecommunications policies.

> "On balance, the operational difficulties, increased costs of facilities and services, and spectrum inefficiencies make use of the global system impractical when compared to the alternative utilization of domestic satellite facilities. We find that in particular cases such as these where the United States has discharged its treaty obligations to INTELSAT, and has obtained the concurrence of the appropriate foreign governmental authorities, the Commission may permit receive-only earth station operators to receive the authorized signals of non-U.S. domestic satellite facilities, and may authorize United States [domestic satellite] carriers to provide service to transborder locations."[63]

Although ostensibly confined to use of domestic satellite facilities, this decision served as a major prelude for a frontal attack on the concept of the single global system and Comsat's exclusivity under the Satellite Act.

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[61]Letter dated July 23, 1981, from Undersecretary of State James L. Buckley to FCC Chairman Mark Fowler [the Buckley Letter]. Copy appears as Appendix A to FCC's *Transborder Services* decision, footnote 62, *infra.* After reciting that the "foundation of our international communications satellite policy includes the concept of a global system to which all nations can have non-discriminatory access", Secretary Buckley noted that the INTELSAT Agreement recognizes that members may choose to rely on separate satellite systems to meet there international public telecommunications service requirements under certain conditions.

> Certain exceptional circumstances may exist where it would be in the interest of the United States to use domestic satellites for public international telecommunications with nearby countries. One such case would be where the global system could not provide the service required. Another case would be where the service planned would be clearly uneconomical or impractical using the INTELSAT system. In such cases, the United States commitment to the global system would not preclude reliance on domestic satellite facilities. [Buckley letter, p. 2]

The letter suggested certain consultation and coordination procedures in the event the FCC decided to authorize the applications, but cautioned that service would not be inaugurated unless:

> "(a) the proposal not to utilize the INTELSAT space segment receives a favorable recommendation in the INTELSAT Assembly (for these purposes a favorable recommendation requires a two-thirds favorable vote); or
> (b) such proposal is supported by the U.S. Government and both the U.S. and the foreign governmental authorities concerned, in the absence of a favorable recommendation by the Assembly, consider in good faith that the obligations under Article XIV have been met. [Buckley letter, p. 3]

[62]Transborder Satellite Video Services, 88 F.C.C.2d 258 (1981) (Transborder Services).

[63]*Id.*, at §52.

2. *The Extent of Comsat's Exclusivity in International Satellite Communications*

As change through technological and regulatory means was being imposed on the role of Comsat domestically in international satellite communications through the INTELSAT global system, a challenge was mounted within the private sector to the concept of INTELSAT remaining the single global system. In 1983, an application was filed with the FCC by Orion Satellite Corporation for authority to establish and operate a private satellite system over the Atlantic to serve customers on the high density North Atlantic corridor.[64] The applicant proposed to sell or lease the satellite transponders to high volume users which would use them as part of their respective worldwide company networks. Orion contended that the types of communications services these customers desired were not being offered through the INTELSAT system and, therefore, their system would serve the national interest by meeting these demands and should be authorized under the "additional systems" exception of Section 102(d) of the Satellite Act. Furthermore, Orion maintained that as a private system it would not be offering "public telecommunications services" as defined under the INTELSAT Agreement and, therefore, only technical coordination would be required with INTELSAT under Article XIV and not economic coordination.[65]

Orion's application was followed by four others[66] and a fifth which was subsequently withdrawn.[67] These applications,—because, with one exception,[68] they seek to compete with INTELSAT, on its major and most lucrative traffic route, the North Atlantic route,—have presented the U.S. Government with the most serious international communications legal and policy issues since the enactment of the Satellite Act. On the one hand, the United States as the principal architect of INTELSAT—one of the major triumphs in United States' foreign policy of the past twenty years—is being unanimously urged by the other member states of INTELSAT not to take any action which would injure the organization. The smaller countries have especially benefited from the services of INTELSAT which has interconnected them to the world community at the same price per circuit as paid

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[64]Application of Orion Satellite Corp., File No. CSS-83-002-P (filed Mar. 11, 1983).

[65]*Id.*, at I-7. See INTELSAT Agreement, Art. XIV, *supra* note 8. If a person within the jurisdiction of a Party to the INTELSAT Agreement proposes to establish, acquire or utilize space segment facilities separate from the INTELSAT space segment they must undertake a technical coordination of those facilities with INTELSAT. Furthermore, under Article XIV(d), if the separate facilities are for the purposes of meeting "international public telecommunications services" requirement then there must also be an economic coordination with INTELSAT including finding and recommendations by INTELSAT's Assembly of Parties as to whether the use of the separate facilities to meet such requirements will cause "significant economic harm" to INTELSAT and "prejudice the establishment of direct communications links through the INTELSAT space segment among all the participants." Orion maintains that since its service will not be available to the public it is not offering an international public telecommunications service and, therefore, no economic coordination is required. *Id.*

[66]Application of International Satellite, Inc., File No. CSS-83-004-P(LA) (filed August 12, 1983); Application of RCA Americom for modification of authority, File No. 909-DSS-MP-84 (filed Feb. 13, 1984); Application of Cygnus Satellite Corp., File No. CSS-84-002-P(LA) (filed Mar. 7, 1984); Application of Pan American Satellite Corp., File No. CSG-84-004-P/L (filed June 4, 1984).

[67]Application of Systematics General Corp., File No. CSS-84-005-P(LA) (filed June 12, 1984).

[68]Pan American Satellite Corp. (PANAMSAT) propose to provide both video and audio services between the U.S. and Latin America as well as domestic transmission service in the Caribbean Basin and South America—a Western Hemisphere Satellite system. See Application of Pan American Satellite Corp., *supra* note 66.

by the major developed nations.[69] The United States has enjoyed a position of respect in its leadership role in the organization. U.S. industry has benefited substantially in the several billions of dollars of contracts awarded by INTELSAT.[70] While there do exist several regional systems outside of INTELSAT, these generally were envisioned at the time the INTELSAT agreements were negotiated and were taken into account in INTELSAT planning. Furthermore, they have been coordinated with INTELSAT under Article XIV(d) and found not to threaten "significant economic harm" to INTELSAT.

Opposing this argument for a sustained committment to the concept of a single global system, is the current United States policy favoring deregulation and reliance on competitive marketplace forces in the provision of telecommunications facilities and services. Extensive deregulation having occurred in the U.S. domestic satellite services market,[71] the proponents of deregulation and competition, both in government and industry, were prepared to pursue similar goals internationally.

From all signs, however, little serious consideration or planning was given to the fact that although the technology existed, politically the United States cannot accomplish these goals without the agreement and assistance of the foreign governments involved.[72] Historically, the international submarine cable facilities have been jointly owned by the countries using those facilities, regardless of whether that ownership was public or private. This concept was recognized early on as essential to the successful development of the global satellite system.[73] Foreign governments were offered ownership in the satellite facilities. In fact, with its investment-equals-use principle, INTELSAT resembles an international cooperative association among the governments involved to establish and operate the central "relay" facility (i.e. the satellites). This "relay" facility is essential for communicating transoceanically in the high quality, microwave frequency bands, since signals at these higher frequencies travel in a straight line and do not reflect off the ionosphere as do ordinary radio broadcast signals.

Many, if not most of the members of INTELSAT appear to view international communications as a means of facilitating economic growth and commerce rather than an end in itself. Therefore, the amount of opposition that has been leveled against these proposed separate systems should come as no surprise.

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[69]INTELSAT averages its cost of service since, pursuant to Article V(d) of the INTELSAT Agreement, it may not discriminate among users in the charges for the same type of service. Thus, the half circuit charge of $390 per month applies equally to use with Atlantic Ocean, Pacific Ocean and Indian Ocean region satellites. *See* INTELSAT Agreement, Art. V, *supra* note 8.

[70]Intelsat has procured six major series of satellites during its 20 years. The prime contractor of each of these has been a U.S. contractor although a portion of the subcontract work in most cases has been performed internationally, primarily by European or Canadian companies.

[71]*See e.g.,* Fifth Report and Order, Competitive Common Carriers, Dkt 79-252 (August 9, 1984).

[72]One recent study is helpful in focusing the issues and suggesting that a less confrontational approach would be to negotiate first with the foreign governments concerning separate satellite systems and then license U.S. entities on the basis of the outcome of those negotiations. Rein *et al,* Implementation of a U.S. "Free Entry" Initiative for Transatlantic Satellite Facilities; Problems, Pitfalls and Possibilities (July 3, 1983). See also, Gantt, *International Satellite Communications—Some Current Issues,* American Bar Association, Forum Committee on Air and Space Law, Second Annual Forum, November 1, 1984.

[73]For example, the Satellite Act contemplated ownership of the "communications satellite system" in conjunction with "foreign governments or business entities". Satellite Act §305(a)(1) (codified at 47 U.S.C. §735(a)(1) (1976)).

The Government must now decide whether (1) to adhere to the concept of a single global system, or (2) to permit the establishment of facilities parallel to INTELSAT along its most lucrative traffic route. If it decides in favor of the latter, it will have further reversed the policies of the past twenty years with respect to the role of Comsat whose exclusivity in international satellite communications is tied to the INTELSAT global system. The ISC's would then have means involving, perhaps, greater economic participation on their part by which to furnish communications services via satellite without having to deal with Comsat.

The applicants for separate systems rely principally on two major arguments to distinguish their proposed services from those constituting what they contend to be the limits of Comsat's exclusivity. First, they contend that their systems by providing services which they believe INTELSAT does not and/or cannot reasonably offer, will be meeting a "national interest" requirement, and therefore, should come within the Sectin 102(d) exception of the Satellite Act, for additional systems required in the national interest.[74] Second, the assertion is made that by offering to sell or lease on long term bases satellite transponders to private users for their internal communications purposes, they are not furnishing "public telecommunications services" and, therefore, are not in economic competition with INTELSAT within the terms of Article XIV(d) of the INTELSAT Agreement.

a. *Section 102(d) of the Satellite Act as a Limit on Comsat's Exclusivity*

Although the applicants for separate systems all point to the Section 102(d) "additional systems" language, that subsection must be read in the context of the entire Section 102 in which Congress declared the United States policy with respect to international satellite communications. Read in that context, subsection (d) appears as no more than a narrow exception to the otherwise broad policy endorsement of a global satellite system, so as not to preclude the creation of additional systems should they be required in the national interest. Several important factors and issues emerge from such a reading of the language.

First, the language imposes the broader "national interest" test rather than the standard FCC criteria of the "public interest, convenience and necessity".[75] Second, a successful applicant would have to demonstrate not only that the grant of its application would *serve* the national interest, but that it was *required* by the national interest—a more stringent requirement. Thus, for example, a court might reasonably conclude that the creation of competitive conditions which may serve to further a national policy of promoting competition would not, standing alone, be a sufficient showing in support of an additional system under Section 102(d). The primary purpose of the Satellite Act is not to maintain and strengthen competition; rather, the Act was intended to establish and operate an efficient global communications system for the benefit of the general public."[76]

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[74]Satellite Act §102(d) (codified at 47 U.S.C. §701(d) (1976)).

[75]Communications Act §309 (codified at 47 U.S.C. §309 (1976)).

[76]ITT World Communications, Inc. v. FCC, 725 F.2d 732, 747 n. 33 (D.C. Cir. 1984). ("The primary purpose of the Satellite Act is not to maintain and strengthen competition; rather, the Act was intended to establish and operate an efficient global communications system for the benefit of the general public.")

Third, since the same term "communications satellite system" is used in Section 102(d) as elsewhere in the Satellite Act, an applicant for a separate system should be required to demonstrate that its system fits the definition of this term as contained in Section 103(1) of the Satellite Act: The term 'communications satellite system' refers to a system of communications satellites in space whose purpose is to relay telecommunications information between satellite terminal stations, ..."[77]

The term "satellite terminal station" is itself defined in Section 103(3) as a complex of communications equipment located on the earth's surface and "operationally connected with one or more terrestrial communications systems."[78] The term—terrestrial communications systems—however, is not defined in the Satellite Act, thus leaving open the question of whether an "additional communications satellite system" to provide international private network services through customer premised earth stations would come within the language of the term "satellite terminal station."[79] If it does, the inquiry continues. On the other hand, if it does not, then a limit would appear to have been established as to Comsat's exclusivity; namely, service through a satellite system interconnected by means of satellite terminal stations to the terrestrial *public* network.

Fourth, who is empowered to authorize an additional system? The Congress? The FCC? The President? How do the policy objectives set forth in the Satellite Act and the special provisions with respect to the President in Section 201(a) and the FCC in Section 201(c) apply or relate, if at all, to an additional system? These and other questions are not answered in the Satellite Act.[80] However, their importance and the magnitude of the foreign policy issues involved suggest the need for congressional legislation to reformulate U.S. policy and to make consequent changes in U.S. institutional structures if, indeed, there is to be a change in the United States policy towards a single global system. Specifically, any such legislation should declare the new policy (assuming there is to be a change), the relationship of additional systems with the present global system and the role of Comsat. The Satellite Act merely states that in limited circumstances there could be additional systems. It does not state who is to authorize these systems—only that they must be required in the national interest. Elsewhere, in Section 301 of the Satellite Act Congress expressly reserved to itself the right to appeal, alter, or amend the Satellite Act

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[77]Satellite Act §103(1) (codified at 47 U.S.C. §702(3) (1976)).

[78]Satellite Act §103(3) (codified at 47 U.S.C. §702(3) (1976)).

[79]Specifically, can customer premised earth stations be considered operationally connected to terrestrial communications systems? The proponents of additional satellite systems would presumably argue that they are not, but instead are interconnected with private company networks, for example, the intra-premises PBX, which are different from the telephone companys' terrestrial systems used to furnish common carrier service to the public at large. The opponents of additional systems might argue that the Satellite Act must be construed as a living document and, therefore, the definition of satellite terminal station must be viewed in the context of industry developments. Customer-premised earth stations connecting via satellite multinational companies' private communications networks to local premises PBXs was probably not envisiaged in 1962. Nevertheless, the growth in communications technology, it can be argued, has made this intra-office PBX as much a terrestrial communications system as the large microwave and cable systems operated by telephone companies.

[80]For example, should the President supervise the negotiations of an "additional system" operator with foreign governments and international bodies in respect to matters of foreign policy? Likewise, should an "additional system" operator by required to extend service to foreign points other than those it wishes to serve? In other words, is the "additional system" operator to be free of the regulatory restraints imposed by the Satellite Act on Comsat and, hence on the services available to U.S. customers through the INTELSAT system? Such a dichotomy of regulation could undermine the viability of the global system—a result, it is submitted—*not in the national interest.*

at any time.[81] In fact, the Satellite Act bill (HR 11040) in the version passed by the House of Representatives on May 3, 1962, reserved *to the Congress,* in Section 102(d), the right to provide for additional systems if required in the national interest. The reservation language was added by amendment to the bill during the floor debate on May 2, 1962, by Representative Harris who explained that his amendment, which had been suggested by the Speaker of the House, was intended to state in a positive manner the intent of Congress ("The Congress reserves . . . ") rather than in a negative fashion ("It is not the intent of Congress by this Act . . . to preclude . . . . ")[82]

When HR 11040 was introduced in the Senate the language of the entire House-passed version of the Satellite Act was stricken and the Senate version (S 2814) substituted.[83] Although the Senate does not appear to have specifically addressed the Harris amendment, Senator Church commented directly, in a Committee report, as to the purpose behind Section 102(d);

> "The wisdom of this last clause 'or if otherwise required in the national interest' is perfectly apparent. *We* cannot now foretell how well the corporate instrumentality established by this act will serve the needs of our people. If it should develop that the rates charged are too high, or the service too limited, so that the system is failing to extend to the American people the maximum benefits of the new technology, or if the Government's use of the system for, say, Voice of America broadcasts to certain other parts of the world proves excessively expensive for our taxpayers, then certainly this enabling legislation should not preclude the establishment of alternative systems, whether under private or public management. And just as certainly is that gateway meant to be kept open, in case *we* should ever need to use it, by the language [of Section 102(d)]."[84] [Emphasis added].

In the legislative scheme, Congress had determined to proceed with a global system on the basis of the United States' participant being a private entity. Unable, however, to predict the future success or conduct of this entity, Senator Church believed it prudent for Congress to reserve the right to alter this legislative scheme to accommodate additional systems where required in the national interest. Given the totality of the circumstances, a good case is made that Congress should address the issues certainly as a matter of national policy if not as a matter reserved to it exclusively by law.

b. The Scope of INTELSAT "Public Telecommunications Services" As a Limit on Comsat's Exclusivity

An analysis as to the scope of Comsat's exclusivity with respect to international satellite communications services must consider the scope of the global system's undertaking. The INTELSAT Agreement states as the prime objective" of INTELSAT, "the provision, on

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[81]Satellite Act §301 (codified at 47 U.S.C. §731 (1976)).

[82]108 Cong. Rec. 7523-24 (1962).

[83]*Id.*, at 10649.

[84]S. REP. No. 1873, *supra,* note 2, reprinted in 1962 U.S. CODE CONG. & AD. NEWS 2327.

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."[85]

The term "public telecommunications services", defined in the INTELSAT Agreement:

> means 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, fascimile, data transmissions, transmission of radio and television programs between approved earth stations having access to the INTELSAT space segment for further transmission to the public, and leased circuits for any of these purposes; . . . [86]

All other forms of service are categorized as "specialized telecommunications services."[87]

Applicants for separate systems argue that to the extent their systems are private systems they do not provide "public telecommunications services" and are, therefore, not encroaching on either INTELSAT's or Comsat's exclusive mandate. They direct their argument to the language—"and which are available for use by the public"—and contend that their services will not be available for *use* by the public but only by their private customers for internal communications under individual contracts—as opposed to common carrier tariffs offering non-discriminatory service.[88] Comsat defends by arguing that "available to the public" is not a condition but is language intended merely to exemplify that it is the type of use—not the identity or class of customer—which is the controlling factor.[89]

The description of the services offered by INTELSAT is for the purpose of identifying the *types* of services and not the customer.[90] Given its nature as the provider of a transmission path to facilitate the exchange of international communications traffic by national telecommunications administrations and entities, there is no reasonable way in which INTELSAT could regulate its services by customer class (i.e. public or private). INTELSAT does not serve the end users. Articles III and I(k) and (l) establish the priority of transmission of traffic on the system. The owners did not want their investment used to establish specialized telecommunication services such as those listed in Article I(l), nor did they wish for purely domestic public telecommunications services (Article III(c)) to have the same priority as international public telecommunications services. Thus, there was a need for a series of definitions keyed to *types* of service—not class of customer—to facilitate the operation of the system. The public/private dichotomy further breaks down in view of the fact that leased circuits are mentioned specifically as a type of public telecommunications service.[91] Such circuits are by their nature used, for example, by the

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[85]INTELSAT Agreement, Art. III, *supra* note 8.

[86]*Id.*, Art. I(k).

[87]*Id.*, Art. I(l).

[88]*See e.g.*, Application of Orion Satellite Corp., *supra* note 58 at I-8.

[89]Comsat Petition to Deny Application of Orion Satellite Corp., File No. CSS-83-002-P.

[90]*See*, Legal Opinion on the Scope of INTELSAT's "Public Telecommunications Services" (January 13, 1984) placed in FCC file in Application of International Satellite, Inc., File No. CSS-83-004-P(LA).

[91]INTELSAT Agreement, Art. I(k), *supra* note 8.

customer-lessee on a full-time, as opposed to a per message, basis for private internal communications of the customer.

The difficulty with the INTELSAT definition can be traced to two major factors and should be instructive in defining the scope of future collaborative space endeavors. First, the rapid growth in technology and services has brought about uses and concepts—such as the sale of satellite transponders—that were not readily foreseen during the negotiations of the INTELSAT definitive arrangements. Second, the term "public telecommunications services" was left until the end of the negotiations for final definition—although the term had been used throughout the negotiations in formulating other articles. As a result, the language of the definition was extensively negotiated and redrafted in a final attempt by some delegations to place boundaries on the organization's primary objective in furtherance of their own political objectives. This resulted in a somewhat less than precise final definition.

3. *Government Regulations and Supervision of Comsat's Role in International Satellite Communications*

a. Regulation

Comsat is subject to extensive regulations by the FCC under both the Communications Act and the Satellite Act.[92] In addition to the proceedings described previously in this paper which pertained to Comsat's role in international communications services, the FCC has conducted a series of major proceedings concerning Comsat's organizational structure to determine whether and to what extent Comsat should be permitted to engage in non-INTELSAT/INMARSAT (i.e. competitive) lines of business and, if so, the financial and procedural safeguards necessary to ensure that Comsat does not take unfair advantage of its statutory role in financing and conducting its competitive business activities[93] In its *Comsat Study* the FCC concluded that Comsat should not

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[92]Comsat is regulated both as a common carrier under Title II and as a licensee of the frequency spectrum under Title III of the Communications Act. Regulation under the Satellite Act is pursuant to Section 201(c).

[93]The series of FCC proceedings relating to the Corporate Structure of Comsat were an outgrowth of a statutory requirement enacted in 1978 that the FCC conduct a study of the corporate structure and operating activities of Comsat and report to Congress by May 1980 with a view towards determining whether any changes were required to ensure that Comsat would affectively fulfill its obligations and carry out its functions under the Satellite Act and the Communications Act. Satellite Act §505 (codified as amended at 47 U.S.C. §754 Supp. VIII 1984)). The study requirement was part of an amendment to the Satellite Act which designated Comsat as the United States participant in a proposed International Maritime Satellite Organization (INMARSAT) patterned along the lines of INTELSAT and with the mission of establishing a global system of maritime communications satellites to serve the maritime commercial and safety needs of the United States and foreign countries. In May 1980, the FCC issued its report in which it concluded that while Comsat could, as a legal matter, engage in activities in addition to its INTELSAT and INMARSAT businesses, as a matter of policy Comsat's authority to engage in such additional competitive businesses would be conditioned on changes being made in Comsat's corporate structure, its accounting systems, its information distributions systems and the current arrangements for Government oversight of Comsat's activities. Communications Satellite Corporation, 77 FCC2d 564 (1980) [hereinafter cited as Comsat Study]. Of particular concern to the FCC were the potentials for cross-subsidization between the INTELSAT/INMARSAT and competitive activities and for unfair use of information in its competitive business derived from its INTELSAT/INMARSAT roles. Comsat, thereafter filed a plan with the FCC as to how it proposed to remedy these concerns of the FCC through changes in its structure and operations, and this plan was put out for comment in October 1980 in the form of a Notice of Proposal Rule Making (NPRM). *See* 81 FCC2d 287 (1980). Following receipt of comments, the FCC issued its First Comsat Structure Order reaffirming its earlier legal and policy conclusions but finding Comsat's proposed cost allocation plans inadequate and deficient. *See* 90 F.C.C.2d 1159 (1982), *recon. denied*, 93 F.C.C.2d 701 (1983), *appeal dkted.*

be precluded from applying its corporate technology and expertise in new areas of satellite application. As a legal matter Comsat should engage in activities outside of its *INTELSAT* and *INMARSAT* lines of business to the extent these activities were not inconsistent with the purpose and objectives of the Satellite Act.[94]

As a matter of policy, however, the FCC concluded that certain structural, accounting and information distribution aspects of Comsat's business raised significant issues that required changes in Comsat's structure, its accounting practices and the arrangement for Government oversight of Comsat's activities. What followed—and is still in progress—was an in-depth look on the public record at Comsat's activities and practices.[95]

b. *Supervision*

Pursuant to the Satellite Act the Government exercises a degree of supervision over Comsat's activities as they may impact on foreign policy, which it does not exercise with respect to a normal multinational private corporation. First, and by far the least controversial of these is the requirement that Comsat notify the Department of State of business negotiations with any international or foreign entity.[96] As a consequence, the Department is to advise Comsat of any relevant foreign policy considerations. In practice, this requirement appears to have worked well and to the mutual benefit of both parties. In

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sub nom., RCA Global Communications, Inc. v. FCC, No. 83-1662 (D.C. Cir. 1983) (Corporate Structure I). Comsat thereafter submitted a report to the FCC proposing certain further changes in its cost allocation practices relating to R&D expenses and G&A expenses and made further modifications in these practices. Comments were filed by interested parties after which the FCC issued its Second Comsat Structure Order on March 30, 1984. Communications Satellite Corporation, 97 FCC 2d 145 (1984) [hereinafter cited as Corporate Structure II]. In the text of its *Corporate Structure II* decision, the FCC reviewed the role of Comsat under the Satellite Act. It concluded that while during the infancy of INTELSAT it had viewed Comsat's mission broadly, circumstances had now changed, particularly the fact that INTELSAT had matured and its staff now carried out the management and operation of the global system. Because of this, Comsat's mission had narrowed and its cost allocation practices, including its treatment of the Comsat Laboratories, a significant portion of which appeared in the Comsat rate base, had to reflect this change. The practical effect of the FCC's decision was to remove portions of Comsat's assets from its rate base and require Comsat to revise its tariff filings accordingly, resulting in lower rates to its customers. Comsat's petition for reconsideration of Corporate Structure II is awaiting further FCC action.

[94]77 F.C.C.2d 564 (1980). Subsequently, the U.S. Court of Appeals for the District of Columbia, in a separate case involving, *inter alia,* the authority of Comsat to engage in the furnishing of direct broadcast services (DBS) adopted a "consistent with" test for the scope of Comsat's authority using as the benchmark the purposes of the Satellite Act.

> "In holding that Comsat may engage in certain non-INTELSAT or INMARSAT activities even when those activities are not ancillary to its INTELSAT/INMARSAT responsibilities, we do not suggest that Comsat can engage in any business ventures it desires; despite the colorful drafting of NAB's arguments, we need not decide today whether the FCC intends or is authorized to allow Comsat to participate in venture's involving 'department stores, dairy farms, football, or fountain pens.' We hold only that, *at least* when Comsat's activities are directed to the purposes for which it was created—the development of satellite communications technology, *see* 47 U.S.C. §701,—Comsat's activities are 'consistent with' the purposes of the 1962 Act within the meaning of section 201(c)(8). Participation in DBS meets this standard."

National Assoc. of Broadcasters v. FCC, 740 F.2d. 1190, 1218 (D.C. Cir. 1984).

[95]*E.g., Corporate Structure II, supra* note 93.

[96]Satellite Act §402 (codified at 47 U.S.C. §742 (1976)).

conducting foreign business negotiations it is useful for a U.S. company to be knowledeable of its government's relations with the relevant foreign government or international organization.

The second type of supervision concerns Comsat's role as the U.S. participant in INTELSAT and INMARSAT and as the U.S. representative in the substantive decision-making bodies of those organizations in which the investors are represented.[97] Criticism has been leveled at the so-called "instructional process'—Comsat preferred the term "guidance".[98] While some criticism has been valid—and changes have been made in the process to accommodate a greater public awareness of the process, the matters dealt with relate to U.S. foreign policy and, under the circumstances, may not readily lend themselves to public debate if the process is to be effective. For example, before each meeting of the INTELSAT Board of Governors, the Government representatives—Department of State, FCC, National Telecommunications and Information Administration—review the proposed agenda and proposed Comsat positions and provide foreign policy guidance as well as instructions where appropriate. Comsat, alone, attends the INTELSAT and INMARSAT Board of Governors, Meeting of Signatories and Council meetings, but keeps in close communications with the Department of State to advise as to developments and receive any updated guidance and instructions.

Is this an effective form of supervision? On balance, the answer is probably yes. On the positive side, it affords the government visibility as to what is occuring in the organization and allows the Government to inquire as to the Comsat positions on various items. In addition, under recently implemented procedures[99] there is afforded an opportunity for public input—i.e. input from U.S. carriers, end users and manufacturers as to what the instructions should be, but not as to what the Government actually proposes to instruct. But then how often does the State Department seek public comment on foreign policy matters, generally? The U.S. companies are free, of course, to make their views known to Comsat as well. However, the latter is viewed by some as a competitor in light of its competitive business activities in areas such as manufacturing. Various solutions have been proposed such as placing a government "observer" in the Board of Governors and Council meetings to ensure that instructions are properly followed and implemented. This, however, could diminish Comsat's role and stature within these organizations and provide foreign delegations, which for the most part are more closely aligned with their respective governments, additional leverage against Comsat—and, in effect, against the United States—when a controversial matter comes before the organization for decision.

An alternative to such an institutional solution, would be to permit a broader range of input from industry and government through a mechanism similar to a private sector advisory committee. Whatever mechanism is used, the important factor is that given Comsat's diversification into competitive lines of business, the Government's supervisory role must of necessity expand beyond purely foreign policy matters to include making sure that Comsat by virtue of its statutory monopoly does not gain an unfair advantage

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[97]In INTELSAT, this is the Board of Governors and the Meeting of Signatories. In INMARSAT, it is the Council.

[98]*Comsat Study, supra* note 93 at §440. A thorough discussion of the process appears in the *Comsat Study, supra* note 93, beginning at §431.

[99]Beginning with the 60th Board of Governors meeting, September 1984, copies of most BG documents are placed in the public reading room at the FCC as soon as possible after receipt by Comsat. This accords some opportunity for interested parties to transmit their concerns to the Government for consideration in the instructional process—but does not afford a direct opportunity to comment on the instructions, themselves.

either through advance information or by securing action within INTELSAT or INMARSAT uniquely favorable to its competitive lines of business. This supervision can redound to Comsat's benefit should claims of unfair trade practices be asserted. The burden is on Comsat, in the first instance, to propose a satisfactory solution that properly takes into account and balances the legitimate concerns of government and industry as to decisions taken by INTELSAT and INMARSAT, the "public trust" placed on Comsat and Comsat legitimate business interests *(i.e.* preservation of its INTELSAT and INMARSAT investments). If Comsat does not fulfill this burden, then either the FCC or Congress must.

4. *The Comsat Model—Is It Appropriate For Other U.S. Space Commercialization Activities?*

The concept of a global system of communications satellites—when viewed generally in the context of the "half-circuit" international communications arrangements—suggests that any successful system of communications satellites would have to be jointly owned or controlled by the participating states, as an extension of their national sovereignty over communications into and from their respective territories. The decision by Congress not to permit U.S. participation to be through one or more of the U.S. international carriers meant that the operating companies, which had traditionally owned the U.S. portion of international communications facilities, would not own a direct interest in this new mode—satellites. However, they would continue to be the U.S. correspondents of the foreign PTT's for all communications whether transmitted through the satellites or via other modes. The concept of a designated U.S. entity—Comsat—worked particularly well in the early development stages of this new mode of communications. The entity was dedicated solely to the satellite mode, and its foreign INTELSAT partners were, like Comsat, also lawful monopolies. This dictotomy between Comsat and the ISC's, however, as the system matured led to considerable regulatory tension within the United States and, more recently, internationally.

If we consider other forms of commercialization of space e.g. remote sensing and materials processing, the need for—or, indeed, the appropriateness of—a U.S. designated entity is not readily apparent. Remote sensing can be carried out by a sensing state without any active participation required on behalf of the sensed state. Manufacturing in space is—or promises to be—an extension of earth-bound businesses, which traditionally have been operated on competitive bases. While, conceivably, there could be formed an international organization with the responsibility for establishing, owning and operating remote sensing satellites and distributing the unenhanced sensed data, there is no global infrastructure for data gathering, processing and dissemination similar to the telecommunications infrastructure from which to rationalize the need for a designated U.S. participant in such an organization.

Thus, given the difficulties inherent in the designated entity concept—e.g. a monopoly, the need for a regulatory scheme and the likely future desire to diversify into affiliated competitive businesses—a substantial justification should be required before the concept is utilized in other space commercialization activities. Moreover, if utilized, the enabling legislation should set forth a scheme by which over time the designated entity's exclusivity could be replaced with competitive marketplace conditions.

5. Postscript

Subsequent to the preparation of this article, the President, on November 28, 1984, determined pursuant to Sections 102(d) and 201(a) of the Satellite Act[100] that "separate international communication satellite systems are required in the national interest." He further announced that the United States would consult with INTELSAT regarding such systems as are authorized by the FCC in order to meet the obligations of the United States under the INTELSAT Agreement.[101]

Pursuant to the President's direction, the Secretaries of State and Commerce notified[102] the Chairman of the FCC of the President's determination and of the criteria necessary to ensure that the United States meets its international obligations and to further its telecommunications and foreign policy interest. These criteria, which must be satisfied as part of any final FCC authorization of a separate system, require that:

(1) each system is to be restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks (except for emergency restoration services); and

(2) one or more foreign authorities are to authorize use of each system and enter into consultation procedures with the United States Party [to the INTELSAT Agreement, i.e., the U.S. Government] under Article XIV(d) of the INTELSAT Agreement to ensure technical compatibility and to avoid significant economic harm.

Furthermore the letter premised the President's determination, its conditions and these criteria on the Executive Branch's review of the applications now before the FCC and cautioned that any forthcoming proposals that were "substantially different" may require further Executive Branch review. Finally, the letter suggested that the FCC should afford the interested parties an opportunity to comment on the pending applications in view of the recommendations of the Executive Branch.

Accompanying the letter was a memorandum of law[103] from the Legal Adviser of the Department of State on the issue as to whether the proposed use of the satellite system of Orion Satellite Corporation and International Satellite, Inc. would constitute international "public telecommunications services" requiring coordination with INTELSAT as to both technical compatibility *and* the avoidance of significant economic harm. The memorandum concluded that, although the issue "is not free from doubt, the sounder view appears to be "that the systems would provide public telecommunications services within the meaning of the INTELSAT Agreement, and thereby require both technical and economic coordination under Article XIV(d) of the INTELSAT Agreement.

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[100]Satellite § 102(d) (codified at 47 USC § 701(d) (1976); Satellite Act § 201(a) (codified at 47 USC § 721(a) (1976)).

[101]Presidential Determination No. 85-2, November 28, 1984, 49 Fed. REg. 46987 (1984).

[102]Letter, dated November 28, 1984, from George Schultz, Secretary of State, and Malcolm Baldridge, Secretary of Commerce, to the Honorable Mark Fowler.

[103]Memorandum of Law, *The Orion Satellite Corporation and International Satellite, Inc. Applications for International Satellite Communication Facilities*, Legal Adviser, U.S. Department of State, (November 21, 1983).

Also of significant further interest is a concurrent release from the National Telecommunications and Information Administration (NTIA) of the Department of Commerce to the effect that both Commerce and State have been instructed to address two related issues that are "important to ensure the efficient development of international satellite systems." The first issue deals with whether INTELSAT under its Agreement may vary its prices to meet actual or potential competition. The second issue and one of more direct impact to COMSAT, it would appear, concerns the matter of direct access to INTELSAT space segment capacity:

> Commerce and State are expected to recommend to the FCC that INTELSAT be allowed to deal directly with other U.S. carriers with respect to competitive communications services. Affording companies in addition to COMSAT [which the release refers to as essentially the 'exclusive U.S. marketing agent for INTELSAT'] the option of dealing directly with INTELSAT for competitive services is a necessary step to ensure additional facilities are constructed only where economically or technically justified.[104]

The focus of attention now returns to the FCC which is expected to conduct some further inquiries permitting additional public comment. In addition, there may also be congressional hearings as significant interest has been shown by several committees.[105]

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[104]NTIA, Technical Information Advisory, *International Satellite Determination* (November 28, 1984).

[105]See, e.g., Letter dated October 9, 1984, from Senator Packwood, Chairman of the Senate Committee on Commerce, Science, and Transportation, and Congressman Dingell, Chairman of the House Committee on Energy and Commerce, to Chairman Fowler; Letter, dated November 9, 1984, from Senator Pell, Ranking Minority Member on the Senate Committee on Foreign Relations, to the President.