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## Bypassing Intelsat: Fair Competition or Violation of the Intelsat Agreement?

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## **Abstract**

The International Telecommunications Satellite Organization (INTELSAT), the 109-nation cooperative responsible for the vast majority of international satellite service, was recently presented with what may be its greatest challenge since its inception over twenty years ago. The consortium, hailed by many as a model among international organizations, faces possible competition from five American companies (Applicants) that have applied to the Federal Communications Commission (FCC) for permission to launch and operate satellites independent of the INTEL-SAT system. This Note begins with a brief look at the laws applicable to international satellite communications. The various interpretations given those laws will be set forth, along with policy and other reasons for approving or not approving the applications. Among the views considered are those of the Applicants, the President of the United States, the International Telecommunications Satellite Organization, the Communications Satellite Corporation (Comsat), and the FCC. An analysis of the conflicting views follows. From this analysis, it is concluded that the President's endorsement of limited competition is a reasonable stand, because it enables the United States to meet its international obligations, while furthering the national interest.

# BYPASSING INTELSAT: FAIR COMPETITION OR VIOLATION OF THE INTELSAT AGREEMENT?

## INTRODUCTION

The International Telecommunications Satellite Organization<sup>1</sup> (INTELSAT), the 109-nation cooperative responsible for the vast majority of international satellite service,<sup>2</sup> was recently presented with what may be its greatest challenge since its inception over twenty years ago. The consortium, hailed by many as a model among international organizations,<sup>3</sup> faces

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1. The International Telecommunications Satellite Organization (INTELSAT) was created pursuant to the Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, Aug. 20, 1964, 15 U.S.T. 1705, T.I.A.S. No. 5646, 514 U.N.T.S. 26 [hereinafter cited as Interim Arrangements Agreement]. This agreement was superseded by the Agreement Relating to the International Telecommunications Satellite Organization, Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532 [hereinafter cited as INTELSAT Agreement]; Operating Agreement Relating to the International Telecommunications Satellite Organization, Aug. 20, 1971, 23 U.S.T. 4091, T.I.A.S. No. 7532 [hereinafter cited as Operating Agreement].

INTELSAT is owned by its signatories. *See infra* note 39. Each signatory holds an investment share based on that country's current use of the system. The United States' investment share is approximately 24%. *Foreign Policy Considerations in International Communications Satellites* at 12, in *INTERNATIONAL SATELLITE POLICY* (Senior Inter-agency Group on International Communication & Information Policy ed. Jan. 18, 1984) [hereinafter cited as *Foreign Policy Considerations*].

2. INTELSAT provides two-thirds of the world's international telephone service, almost all international television transmission, most telex service, teleconferencing, and many kinds of data transmission. Colino, *The System Works, Don't Fix It*, N.Y. Times, Mar. 3, 1985, § 3, at 2, col. 3.

The following is a much-simplified description of how international satellite communications work: Assume that the New York branch of an international brokerage firm wants direct contact via a private line with its branch in London. The customer would contact an international record carrier (IRC), such as RCA or ITT, which would arrange to provide the service needed to transmit messages from New York to London. The IRC would have to obtain a local channel connecting the customer's office with the IRC's operating center, and a domestic channel connecting the IRC's operating center with a Comsat earth station in Etam, West Virginia, or Andover, Maine. Comsat would then provide the service from one of these earth stations to an INTELSAT satellite. This same arrangement would be made in reverse on the other side of the Atlantic, with British Telecommunications Public Limited Company serving as Comsat's counterpart. *See* Letter from Leonard J. Higgins, Administrator of Regulatory Affairs for RCA American Communications, to Julianne McKenna (Apr. 17, 1985) (copy on file at the offices of the *Fordham International Law Journal*). For a more detailed description of how satellite signal transmission operates, see Note, *Signal Piracy: The Theft of United States Satellite Signals*, 8 *FORDHAM INT'L L.J.* 62, 63 n.4 (1984).

3. *See generally* Lawson, *Impact of Competition on INTELSAT Studied*, 43 *CONG. Q.*

possible competition from five American companies (Applicants) that have applied to the Federal Communications Commission<sup>4</sup> (FCC) for permission to launch and operate satellites independent of the INTELSAT system.<sup>5</sup> The Applicants are

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362 (Feb. 23, 1985); Stuart, *INTELSAT: Time of Uncertainty*, N.Y. Times, Nov. 10, 1984, at 31, col. 3, at 38, col. 7.

4. The Federal Communications Commission (FCC) is "an independent United States government agency, responsible directly to Congress. Established by the Communications Act of 1934, [47 U.S.C. § 151 (1982)], it is charged with regulating interstate and international communications by radio, television, wire, satellite and cable." Federal Communications Commission, The FCC in Brief 1 (1983) (information bulletin).

5. The Applicants are Orion Satellite Corp. (Orion), International Satellite, Inc. (ISI), RCA American Communications, Inc. (RCA), Cygnus Satellite Corp. (Cygnus), and Pan American Satellite Corp. (PanAmSat).

Orion's proposed system would consist of two in-orbit satellites and one ground spare. Application of Orion Satellite Corp., CSS No. 83-002-P, at I-1 (FCC Mar. 11, 1983) (application for an international communications satellite system) [hereinafter cited as Orion Application]. Its signals would cover the eastern portion of North America and Western Europe. *Id.* The satellites would be designed to provide video, data, and audio services. *Id.* at I-5; *see In re Establishment of Satellite Systems Providing International Communications*, CC No. 84-1299, at 3-4 (FCC Jan. 4, 1985) (notice of inquiry and proposed rulemaking) [hereinafter cited as Notice of Inquiry].

ISI's proposed system would also consist of two in-orbit satellites and one ground spare. Application of International Satellite, Inc., CSS No. 83-004-P (LA), I-P-C No. 83-073, at ii (FCC Aug. 12, 1983) (application for an international communications satellite system) [hereinafter cited as ISI Application]. Its signals would cover the contiguous United States and Western Europe to the Adriatic Sea. *Id.* at 1. Video, audio, and data services would be offered. *Id.* at 1-2. ISI states that it would use a portion of its capacity to provide services on a tariffed, common carrier basis. *Id.* at 2; *see Notice of Inquiry, supra*, at 4.

RCA's proposed system would consist of six transponders on a previously authorized domestic satellite. Application of RCA American Communications, Inc., I-T-C No. 84-085, at 1 (FCC Feb. 13, 1984) (application for an international communications satellite system) [hereinafter cited as RCA Application]. The contiguous United States and portions of Europe and Africa would be covered. *Id.* The transponders would be used for video distribution, teleconferencing, private leased voice, and low-speed and medium-speed data communications. *Id.* at 2; *see Notice of Inquiry, supra*, at 5.

Cygnus' proposed system would also consist of two in-orbit satellites and one ground spare. Application of Cygnus Satellite Corp., CSS No. 84-002-P (LA) (FCC Mar. 7, 1984) (application for an international communications satellite system) [hereinafter cited as Cygnus Application]. Its signals would cover the contiguous United States and Western Europe, and, in addition, would have a spot beam so as to provide service to Puerto Rico, the United States Virgin Islands, the Caribbean Basin, and parts of Central America. Video, voice, and data services would be provided. *See Notice of Inquiry, supra*, at 4.

PanAmSat's system would consist of two satellites only, one in-orbit and one ground spare. Application of Pan American Satellite Corp., CSS No. 84-004-P (LA), at 2-3 (FCC May 31, 1984) (application for an international communications satellite system) [hereinafter cited as PanAmSat Application]. One-third of the satellites'

Orion Satellite Corporation (Orion), International Satellite, Inc. (ISI), RCA American Communications, Inc. (RCA), and Cygnus Satellite Corporation (Cygnus), which have proposed new transatlantic communications systems, and Pan American Satellite Corporation (PanAmSat), which seeks to establish a system between North and South America.

The filing of these applications with the FCC prompted action by the Executive Branch, which, under the Communications Satellite Act of 1962,<sup>6</sup> is responsible for determining whether additional international satellite systems are "required in the national interest."<sup>7</sup> The culmination of this activity was a memorandum from President Reagan to the Secretaries of State and Commerce indicating that additional international satellite systems are indeed required in the national interest, and directing that the United States consult with INTELSAT regarding the separate systems, as required under the treaty that created the organization.<sup>8</sup> Additionally, the Secretaries were instructed by the President to inform the FCC of criteria necessary "to ensure that the United States meets its international obligations and to further its telecommunications and foreign policy interests."<sup>9</sup> A joint letter from the Secretaries<sup>10</sup> setting forth those criteria is now before the FCC, which has invited public comment on the idea of private competition.<sup>11</sup> If the FCC approves the proposed systems, the United

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transponders would be used for international traffic between North and South America. *Id.* at 3. The remaining transponders would be used for domestic service in South America. *Id.* The satellites would be designed to provide audio and video distribution services. *Id.* at 2; see Notice of Inquiry, *supra*, at 5.

6. 47 U.S.C. § 701 (1982).

7. *Id.* § 721(a)(6). The President shall "take all necessary steps to insure the availability and appropriate utilization of the communications satellite system for general governmental purposes except where a separate communications satellite system is required to meet unique governmental needs, or is otherwise required in the national interest . . . ." *Id.*; see *id.* § 701(d).

8. Memorandum for the Secretary of State, the Secretary of Commerce, 20 WEEKLY COMP. PRES. DOC. 1853 (Dec. 3, 1984) [hereinafter cited as Presidential Determination].

9. *Id.*

10. Letter from George P. Shultz, Secretary of State, and Malcolm Baldrige, Secretary of Commerce, to Mark S. Fowler, Chairman of Federal Communications Commission (Nov. 28, 1984).

11. Notice of Inquiry, *supra* note 5, at 26. The deadlines for comments and reply comments were originally February 14, 1985, and March 7, 1985. *Id.* The deadlines were later extended to April 1, 1985, and June 5, 1985. In re Establishment of Satel-

States will then consult with INTELSAT regarding the coordination<sup>12</sup> of these systems with INTELSAT.<sup>13</sup> However, INTELSAT has made clear its opposition to the proposed systems,<sup>14</sup> making successful coordination unlikely.

This Note begins with a brief look at the laws applicable to international satellite communications.<sup>15</sup> The various interpretations given those laws will be set forth, along with policy and other reasons for approving or not approving the applications.<sup>16</sup> Among the views considered are those of the Applicants, the President, INTELSAT, the Communications Satellite Corporation<sup>17</sup> (Comsat), and the FCC. An analysis of the conflicting views follows.<sup>18</sup> From this analysis, it is concluded that the President's endorsement of limited competition is a reasonable stand, because it enables the United States to meet its international obligations, while furthering the national interest.

## I. *THE LAW RELATING TO SATELLITE SERVICE*

### A. *The Creation of Comsat: The Satellite Act*

The Communications Satellite Act of 1962<sup>19</sup> (Satellite Act) is the primary embodiment of United States policy on satellites.<sup>20</sup> It called for the creation of a commercial communica-

lite Systems Providing International Communications, CC No. 84-1299 (FCC Jan. 25, 1985) (order).

12. For the purposes of this Note, "coordination" means consultation with INTELSAT under the INTELSAT Agreement, *supra* note 1, arts. XIV(d)-(e).

13. See Presidential Determination, *supra* note 8, at 1853.

14. See *infra* notes 161-92 and accompanying text.

15. See *infra* notes 19-71 and accompanying text.

16. See *infra* notes 72-208 and accompanying text.

17. Comsat is the United States' signatory to the INTELSAT Agreement, *supra* note 1, created pursuant to the Communications Satellite Act, 47 U.S.C. § 701 (1982). It provides the connection between INTELSAT satellites and United States earth stations. Comsat World Services Marketing, International Communications Services (promotional brochure).

18. See *infra* notes 209-31 and accompanying text.

19. 47 U.S.C. § 701 (1982).

20. *Id.* Among the United States' international communications and information policy goals are the enhancement of the free flow of information and ideas among nations, the promotion of harmonious international relations, the development of services responsive to the requirements of trade and commerce, and the continuation of United States leadership in the communications, information, and aerospace fields. Senior Interagency Group on International Communication and Information Policy, A White Paper on New International Satellite Systems 5 (Feb. 1985).

tions satellite system that would serve the needs of the United States and other countries and "contribute to world peace and understanding."<sup>21</sup> United States participation in the system, now known as INTELSAT, was to be in the form of a private corporation subject to governmental regulation.<sup>22</sup>

Comsat is the corporation established as a result of the Satellite Act to be the United States' representative to INTELSAT.<sup>23</sup> Comsat is presently primarily engaged in providing international, domestic, and maritime satellite communications services.<sup>24</sup> Its function in the international arena is that of a carrier's carrier; it provides the connection between INTELSAT satellites and United States earth stations<sup>25</sup> for carriers such as American Telephone and Telegraph and RCA.<sup>26</sup>

Charged with authority for overseeing Comsat are the President of the United States, who ensures that the corporation operates according to the objectives of the United States in establishing a global system that contributes to world peace and understanding;<sup>27</sup> the National Aeronautics and Space Administration (NASA), which serves as a technical consultant and furnishes launch facilities;<sup>28</sup> the FCC, which is given exten-

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21. 47 U.S.C. § 701(a).

22. *Id.* §§ 731-44. Specifically, the Act called for the formation of "a communications satellite corporation for profit which will not be an agency or establishment of the United States Government. The corporation shall be subject to the provisions of this chapter . . ." *Id.* § 731.

23. See generally D. SMITH, COMMUNICATION VIA SATELLITE 93-120 (1976); Note, *The Communications Satellite Corporation: Toward a Workable Telecommunications Policy*, 27 HASTINGS L.J. 721 (1976) (both discussing the creation and development of Comsat).

24. Comsat, Comsat Guide to the INTELSAT and INMARSAT Satellite Systems 2 (promotional brochure). Comsat also performs specialized operational and technical functions such as training, maintenance, and research for INTELSAT, under special arrangements apart from the INTELSAT Agreements. *Id.*

25. An earth station has been defined as "an antenna, often saucer shaped, electronically equipped either to receive signals from satellites, to transmit signals back, or to do both." HOUSE COMM. ON SMALL BUSINESS, THE IMPACT OF CHANGES IN THE TELECOMMUNICATIONS INDUSTRY ON SMALL BUSINESS, H.R. REP. NO. 1171, 98th Cong., 2d Sess. 46 (1984).

26. Comsat World Systems Marketing, International Communications Services (promotional brochure). Recently, Comsat was given permission by the FCC to offer its services directly to end users, such as large corporations, via a subsidiary. Authorized User Policy, 90 F.C.C.2d 1934 (1982) (report and order). Carriers and end users cannot obtain services directly from INTELSAT; they must do so through Comsat. See Comsat World Systems Marketing, International Communications Services (promotional brochure).

27. 47 U.S.C. § 721(a).

28. *Id.* § 721(b).

sive regulatory control over the corporation's activities;<sup>29</sup> and the State Department, which advises the corporation on relevant foreign policy considerations.<sup>30</sup>

In its initial years, INTELSAT was dominated by Comsat, partly because the United States was so technically advanced in the satellite field.<sup>31</sup> This angered some states, and the Union of Soviet Socialist Republics (Soviet Union) used Comsat's dominance as an excuse for its refusal to join the organization.<sup>32</sup> The Soviet Union organized, instead, a rival system, known as Intersputnik, which consists almost exclusively of communist nations.<sup>33</sup>

### B. *The INTELSAT Agreements*

As a member of the INTELSAT organization, the United States is obliged to consult with INTELSAT regarding the technical and, possibly, economic effects of any proposed systems on the INTELSAT organization.<sup>34</sup> A brief description of the organization's governing structure is therefore necessary in order to gain an understanding of the way INTELSAT will address the issue of competing systems, should they be authorized by the FCC.

#### 1. INTELSAT'S Organizational Structure

INTELSAT is composed of four different bodies, ensuring adequate technical and political representation.<sup>35</sup> These units

29. *Id.* § 721(c).

30. *Id.* § 721(c)(3); see Act of Nov. 22, 1983, Pub. L. No. 98-164, § 35, 97 Stat. 1017, 1025-26 (1983) (codified at 22 U.S.C.A. § 2707 (West Supp. 1984)) (establishing the Office of the Coordinator for International Communications and Information Policy); *Dougan Describes New Telecommunications and Information Office at State Dept., Questions Ideas for Govt. Reorganization*, *Satellite Week*, June 6, 1983, at 6, 6-8.

31. See Note, *Comsat's First Decade: Difficulties in Interpreting the Communications Satellite Act of 1962*, 7 GA. J. INT'L & COMP. L. 678, 686-89 (1977); Note, *The Communications Satellite Corporation: Toward a Workable Telecommunications Policy*, 27 HASTINGS L.J. 721, 739-42 (1976).

32. See Shillinglaw, *The Soviet Union and International Satellite Telecommunications*, 5 STAN. J. INT'L STUD. 199, 203-07 (1970); Smith, *The Legal Ordering of Satellite Telecommunications: Problems and Alternatives*, 44 IND. L.J. 337, 349-50 (1969).

33. See Doyle, *An Analysis of the Socialist States' Proposal for Intersputnik: An International Communication Satellite System*, 15 VILL. L. REV. 83 (1969); Shillinglaw, *supra* note 32, at 199-226.

34. INTELSAT Agreement, *supra* note 1, arts. XIV(d)-(e).

35. *Id.* art. VI(a).



are known as the Assembly of Parties, the Meeting of Signatories, the Board of Governors, and the Executive Organ.

The Assembly of Parties is composed of representatives of the member countries of INTELSAT.<sup>36</sup> It meets every other year to discuss "those aspects of INTELSAT which are primarily of interest to the parties as sovereign states."<sup>37</sup> Each party is accorded one vote.<sup>38</sup>

The Meeting of the Signatories annually unites all signatories,<sup>39</sup> who are concerned primarily with the financial, technical, and operational aspects of the INTELSAT system.<sup>40</sup> Among the signatories' responsibilities are the establishment of general rules regarding the approval of earth stations for access to INTELSAT satellites, the allotment of satellite capacity, and the establishment and adjustment of the charges for the use of INTELSAT satellites.<sup>41</sup> As in the Assembly of Parties, each signatory is accorded one vote.<sup>42</sup>

The Board of Governors (Board) is the third of INTELSAT's four governing bodies. It is composed primarily of those signatories whose investment shares,<sup>43</sup> individually or in groups, are more than a specified amount.<sup>44</sup> The unit meets every twelve to fourteen weeks, and is responsible for making decisions regarding the design, development, establishment, operation, and maintenance of the space segment.<sup>45</sup> Decisions

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36. *Id.* art. VII(a); *see id.* art. I(f); INTELSAT, The Global Telecommunications Cooperative 7 (promotional brochure).

37. INTELSAT Agreement, *supra* note 1, arts. VII(b), VII(d).

38. *Id.* art. VII(f).

39. The signatories are either the member governments or their designated telecommunications entities. *Id.* arts. VII(a), VII(c). Comsat is the United States' signatory. *See supra* note 23.

40. INTELSAT Agreement, *supra* note 1, art. VIII(b).

41. *Id.* art. VIII(b)(v)(A)-(C).

42. *Id.* art. VIII(e).

43. "Investment shares" are based on the relative use of the INTELSAT system by member countries and are calculated in March of each year. Use is measured in terms of utilization charges, which are based on the nature and volume of service and the applicable rates. Operating Agreement, *supra* note 1, arts. 6, 8; *see* INTELSAT, The Global Telecommunications Cooperative 7 (promotional brochure); *see also* Mizrack, *The INTELSAT Definitive Arrangements*, 1 J. SPACE L. 129, 134-35 (1973) (regarding financial arrangements for the INTELSAT system).

44. INTELSAT Agreement, *supra* note 1, arts. IX(a)-(b).

45. *Id.* art. X(a). "'Space segment' means the telecommunications satellites, and the tracking, telemetry, command, control, monitoring and related facilities and equipment required to support the operation of these satellites." *Id.* art. I(h); *see*

are taken by weighted vote, with each governor casting a vote equal to the investment of those signatories he represents.<sup>46</sup>

The Executive Organ, with a staff of about 550,<sup>47</sup> is responsible for the day-to-day management of INTELSAT.<sup>48</sup> It is headed by the Director General, who reports to the Board of Governors.<sup>49</sup>

## 2. Key Provisions

INTELSAT is governed by two international agreements. The first, referred to as simply the "Agreement," sets forth the basic provisions, principles, and structure of the organization.<sup>50</sup> It was signed by the members through their foreign ministries.<sup>51</sup> The other document, referred to as the "Operating Agreement," sets forth more detailed financial and technical provisions.<sup>52</sup> It was signed by the members through their governments or their designated telecommunications entities, public or private.<sup>53</sup>

The goal of the INTELSAT organization is the creation of a "single global commercial telecommunications satellite system as part of an improved global telecommunications network which will provide expanded telecommunications serv-

INTELSAT, *The Global Telecommunications Cooperative 7* (promotional brochure).

46. INTELSAT Agreement, *supra* note 1, art. IX(f); *see also id.* art. IX(j).

47. INTELSAT, *The Global Telecommunications Cooperative 7* (promotional brochure).

48. INTELSAT Agreement, *supra* note 1, art. XI(b)(i); *see* INTELSAT, *The Global Telecommunications Cooperative 7* (promotional brochure).

49. INTELSAT Agreement, *supra* note 1, art. XI(b)(i).

Currently serving as Director General is, for the first time, an American citizen, Richard Colino. He works out of the consortium's recently built U.S.\$50 million headquarters in Washington, D.C. Stuart, *INTELSAT: Time of Uncertainty*, N.Y. Times, Nov. 10, 1984, at 31, col. 3. Prior to assuming the post of Director General of INTELSAT, Colino served as president and chief executive officer of a broadcasting and telecommunications consulting firm, held the same offices with a subscription television company, and was vice president of international operations with Comsat. He was the United States' representative to INTELSAT on several occasions, and at one point served as Chairman of the Board of Governors of INTELSAT. INTELSAT, Richard R. Colino Biographical Sketch and Curriculum Vitae.

50. INTELSAT Agreement, *supra* note 1.

51. *Id.* art. XIX(a). "This Agreement shall be open for signature . . . by the Government of any State party to the Interim Agreement . . . [or] by the Government of any other State member of the International Telecommunication Union." *Id.*

52. Operating Agreement, *supra* note 1.

53. *See* INTELSAT Agreement, *supra* note 1, art. 1(b).

ices to all areas of the world and which will contribute to world peace and understanding.”<sup>54</sup> This system is to “provide, for the benefit of all mankind, through the most advanced technology available, the most efficient and economic facilities possible consistent with the best and most equitable use of the radio frequency spectrum and of orbital space.”<sup>55</sup> While this language appears to make plain the parties’ intentions, there are conflicting views as to what is meant by a “single” system that is “part of an improved . . . network.”

Article I sets forth the definitions of terms used in the Agreement. “Public telecommunications services” are described as:

fixed or mobile telecommunications services which can be provided by satellite and which are available for use by the public, such as telephony, telegraphy, telex, facsimile, data transmission, transmission of radio and television programs between approved earth stations having access to the INTELSAT space segment for further transmission to the public, and leased circuits for any of these purposes; but excluding those mobile services of a type not provided under the Interim Agreement and the Special Agreement. . . .<sup>56</sup>

“Specialized telecommunications services” are described as “telecommunications services which can be provided by satellite, other than . . . [public telecommunications services], including, but not limited to, radio navigation services, broadcasting satellite services for reception by the general public, space research services, meteorological services, and earth resources services.”<sup>57</sup> There is some debate as to whether the services proposed by Orion should be classified as either “public telecommunications services” or “specialized telecommunications services.” The label given to the proposed services is important, because the extent of consultation<sup>58</sup> required by INTELSAT, and hence the difficulty of gaining INTELSAT approval, varies with the type of service.<sup>59</sup> Competing systems

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54. *Id.* preamble.

55. *Id.*

56. *Id.* art I(k).

57. *Id.* art. I(1).

58. “Consultation” refers to the furnishing of information and meetings required between the Assembly of Parties and one who intends to use space segment facilities separate from the INTELSAT space segment. *See id.* arts. XIV(c)-(e).

59. *Id.*

designed to meet "international public telecommunications services requirements" must be coordinated not only with respect to technical compatibility, but also with respect to the avoidance of "significant economic harm" to the INTELSAT system.<sup>60</sup> Competing systems designed to meet "specialized telecommunications service requirements, domestic or international" need only be coordinated with respect to technical compatibility.<sup>61</sup>

Article V(d) of the Agreement,<sup>62</sup> which deals with rates, is

60. *Id.* art. XIV(d). This article provides that:

To the extent that any Party or Signatory or person within the jurisdiction of a Party intends individually or jointly to establish, acquire or utilize space segment facilities separate from the INTELSAT space segment facilities to meet its international public telecommunications services requirements, such Party or Signatory, prior to the establishment, acquisition or utilization of such facilities, shall furnish all relevant information to and shall consult with the Assembly of Parties, through the Board of Governors, to ensure technical compatibility of such facilities and their operation with the use of the radio frequency spectrum and orbital space by the existing or planned INTELSAT space segment and to avoid significant economic harm to the global system of INTELSAT. Upon such consultation, the Assembly of Parties, taking into account the advice of the Board of Governors, shall express, in the form of recommendations, its findings regarding the considerations set out in this paragraph, and further regarding the assurance that the provision or utilization of such facilities shall not prejudice the establishment of direct telecommunication links through the INTELSAT space segment.

*Id.*

61. *Id.* art. XIV(e). This article provides that:

To the extent that any Party or Signatory or person within the jurisdiction of a party intends to establish, acquire or utilize space segment facilities separate from the INTELSAT space segment facilities to meet its specialized telecommunications services requirements, domestic or international, such Party or Signatory, prior to the establishment, acquisition or utilization of such facilities, shall furnish all relevant information to the Assembly of Parties, through the Board of Governors. The Assembly of Parties, taking into account the advice of the Board of Governors, shall express, in the form of recommendations, its findings regarding the technical compatibility of such facilities and their operation with the use of the radio frequency spectrum and orbital space by the existing or planned INTELSAT space segment.

*Id.*

62. *Id.* art. V(d). Article V(d) provides that:

All users of the INTELSAT space segment shall pay utilization charges determined in accordance with the provisions of this Agreement and the Operating Agreement. The rates of space segment utilization charge for each type of utilization shall be the same for all applicants for space segment capacity for that type of utilization.

*Id.*

also a subject of controversy. This section sets out the INTELSAT practice of averaging its costs worldwide.<sup>63</sup> Regardless of the origin or destination of a message, its sender is charged the same rate, depending on the type of service employed.<sup>64</sup> Revenues from high-volume routes, such as the North Atlantic, make it possible for INTELSAT to subsidize rates for service to and from developing nations.<sup>65</sup> Those favoring competition with INTELSAT have raised the possibility of amending the INTELSAT Agreement so as to effect a change in pricing, in order that INTELSAT may remain competitive if competition is allowed.<sup>66</sup>

Article XIV of the Agreement sets forth the rights and obligations of INTELSAT members.<sup>67</sup> It begins by instructing the parties and signatories that they are obliged to act in accordance with the principles set forth in the preamble and the rest of the Agreement.<sup>68</sup> Despite the requirement that a potential competitor merely consult with the Assembly of Parties,<sup>69</sup> an obligation to abide by the consortium's decision regarding the establishment of separate systems has been found indirectly in this prefatory language.<sup>70</sup> According to INTEL-

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63. See *id.*; Stuart, *Intelsat: Time of Uncertainty*, N.Y. Times, Nov. 10, 1984, at 31, col. 3, at 34, cols. 5-6.

64. Lowndes, *FCC Considers Policy Favoring Competition with INTELSAT*, Aviation Week & Space Tech., Jan. 7, 1985, at 24; Stuart, *Reagan Endorses Limited Intelsat Competition*, N.Y. Times, Nov. 29, 1984, at D7, cols. 1, 6.

65. Stuart, *Intelsat: Time of Uncertainty*, N.Y. Times, Nov. 10, 1984, at 31, col. 3, at 34, cols. 5-6.

66. Stuart, *Reagan Endorses Limited Intelsat Competition*, N.Y. Times, Nov. 28, 1984, at D7, cols. 1, 5.

67. INTELSAT Agreement, *supra* note 1, art. XIV. In sum, article XIV gives all parties and signatories the right to participate in all INTELSAT meetings and sets forth the procedure to be followed in the event that any party or signatory seeks to employ space segment facilities other than those of INTELSAT. *Id.*

68. *Id.* art. XIV(a).

69. *Id.* arts. XIV(c)-(e).

70. R. Colino, *Review of Certain Obligations of INTELSAT Members Under the INTELSAT Agreements, With Particular Reference to Article XIV(d), Attachment No. 1 to BG-60-62E*, at 6-8 (Aug. 15, 1984) (INTELSAT document) [hereinafter cited as *Review of Obligations*]. Note that the document indicates that it is neither a proposal nor a recommendation, but merely for the signatories' information. *Id.* at 1.

Article XVI sets forth the penalty for failure to comply with the terms of the Agreement or Operating Agreement: A breaching party may be deemed to have withdrawn from the organization. INTELSAT Agreement, *supra* note 1, art. XIV(b)(i). If the breach gives rise to a dispute between INTELSAT and the defaulting party or signatory, and a settlement is not reached within a reasonable time, under article XVIII, the dispute is submitted to arbitration. *Id.* art. XVIII(a)-(b). The

SAT's Director General, the authorization of a separate system in the face of a negative decision might constitute a breach of this vague provision.<sup>71</sup>

## II. *THE VIEWS ON COMPETITION*

### A. *The Applicants*

Orion, Cygnus, RCA, ISI, and PanAmSat assert that, as new entrants in the international satellite field, they will foster the development of new telecommunications services more accurately reflecting consumer demand.<sup>72</sup> They claim that INTELSAT does not currently offer, nor intend to offer, many of the services they seek to provide.<sup>73</sup>

According to the Applicants, increased competition in video, data, and private line voice services would be but a logical extension of prior decisions made by the FCC in the area of domestic communications.<sup>74</sup> This increased competition, the Applicants say, will make INTELSAT more responsive to the

arbitral tribunal consists of three members chosen in accordance with procedures set forth in a special annex to the Agreement. *Id.* annex C, art. 2. The tribunal's decision is binding. *Id.* annex C, art. 13(b).

71. Review of Obligations, *supra* note 70.

72. Orion Application, *supra* note 5, at I-2 through I-5; ISI Application, *supra* note 5, at 27-28; RCA Application, *supra* note 5, at 11-13; Cygnus Application, *supra* note 5, at 52; PanAmSat Application, *supra* note 5, at 32-33.

73. Cygnus Application, *supra* note 5, at 52; *see* PanAmSat Application, *supra* note 5, at 32; ISI Application, *supra* note 5, at 7-8; Orion Application, *supra* note 5, at I-1.

It has been alleged that some services recently introduced by INTELSAT were prompted, or at least hastened, by the Applicants' petitions to the FCC. RCA Application, *supra* note 5, at 13. Perhaps the main reason why INTELSAT is not meeting (at least, not economically meeting) the demands of particular users is because of constraints of its space segment engineering. Goldschmidt, *Space Privatization—Who Benefits?*, Development Forum, Feb./Mar., 1985, at 13, col. 1. The INTELSAT system was designed to maximize global connectivity for telephone and similar services. *Id.* In order to achieve this maximization, however, a satellite's beam must be dispersed. *Id.* As the beam is dispersed, the satellite's power decreases, requiring larger and more expensive ground stations, or less efficient use of the space segment. *Id.*

74. Cygnus Application, *supra* note 5, at 31-39; RCA Application, *supra* note 5, at 12-13; ISI Application, *supra* note 5, at 24-25; Orion Application, *supra* note 5, at I-3 through I-4.

Consider the following: While it currently costs at least U.S.\$2700 an hour to transmit television programming from New York to London via INTELSAT, its signatories, and the necessary domestic communications carriers, comparable domestic service over the same distance relying on domestic satellites costs only \$790. Markey, *New Entrants Would Lower Prices*, N.Y. Times, Mar. 3, 1985, § 3, at 2, cols. 3, 4-5.

needs of consumers and force it to respond more rapidly and efficiently to technological change. This will result in the best possible service, at the least possible cost.<sup>75</sup>

End-to-end rates<sup>76</sup> for international transmission services will be lower for customers of the proposed systems, the Applicants allege, because their proposals eliminate the need to use the facilities of multiple common carriers.<sup>77</sup> Those presently sending international messages must pay domestic transmission charges for the distance from their office to an international earth station in their country, and then they must pay the domestic telecommunications administration or entity for access to INTELSAT.<sup>78</sup> They also have to pay the foreign telecommunications administration or entity of the nation where the call is terminated for access to its foreign earth station.<sup>79</sup> Finally, they must pay the transmission charges associated with sending the message from the foreign earth station to the message's destination.<sup>80</sup> The proposed systems, however, provide for the "one-hop" transmission of messages, meaning that an earth station located on or near customer premises will be able to send signals directly to an INTELSAT satellite, thus avoiding the detour to the remotely located international earth station.<sup>81</sup> Comsat's inflated charges will, therefore, be avoided.<sup>82</sup>

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75. PanAmSat Application, *supra* note 5, at 26-27; Cygnus Application, *supra* note 5, at 31-39; RCA Application, *supra* note 5, at 11-13; ISI application, *supra* note 5, at 27-31.

76. "End-to-end rates" refers to the total cost associated with sending a message internationally, including payments to other carriers and/or telecommunications administrations for the use of their facilities. Letter from Leonard J. Higgins, Administrator of Regulatory Affairs for RCA American Communications, to Julianne McKenna (Apr. 17, 1985) (copy on file at the offices of the *Fordham International Law Journal*).

77. Cygnus Application, *supra* note 6, at 40-43; ISI Application, *supra* note 5, at 7.

78. Letter from Leonard J. Higgins, Administrator of Regulatory Affairs for RCA American Communications, to Julianne McKenna (Apr. 17, 1985) (copy on file at the offices of the *Fordham International Law Journal*).

79. *Id.*

80. *Id.*

81. See generally PanAmSat Application, *supra* note 5; Cygnus Application, *supra* note 5; RCA Application, *supra* note 5; ISI Application, *supra* note 5; Orion Application, *supra* note 5 (providing a description of the proposed systems).

82. Cygnus Application, *supra* note 5, at 43-44; ISI Application, *supra* note 5, 28-31.

Another advantage of competing systems, according to the Applicants, is that they will further the national objective of continuing United States leadership in the satellite communications arena.<sup>83</sup> The Applicants allege that failure to approve the proposed systems could result in the assignment of the desired orbital slots<sup>84</sup> to a foreign administration, meaning that satellite services between the United States and overseas points will be performed by a foreign entity.<sup>85</sup>

A final assertion made by the Applicants is that approval of their applications will strengthen the United States' defense communications capabilities.<sup>86</sup> Concentration of communications facilities in the hands of a single or only a few entities, they say, could potentially harm the national interest during times of national emergencies.<sup>87</sup> Approval of the applications will increase the number of possible communications routes that can be used by the Department of Defense, the single largest user of communications services in the world,<sup>88</sup> thus spreading the risk of total communications blackout in the event of a disaster.<sup>89</sup>

In addition to explaining why their proposals will enhance the public interest, the Applicants are careful to state why their proposals are consistent with domestic and international legal requirements.<sup>90</sup> The Applicants point out that, although the

83. PanAmSat Application, *supra* note 5, at 27-28; Cygnus Application, *supra* note 5, at 48. The United States' leadership in the satellite field is attributed by Cygnus to the FCC's commitment to competition and flexibility in regulating satellite carriers. Cygnus Application, *supra* note 5, at 48.

84. For a general discussion of orbital slot allocation, see Gold, *Direct Broadcast Satellites: Implications for Less-Developed Countries and for World Order*, 12 VA. J. INT'L L. 66, 82-83 (1971).

85. Cygnus Application, *supra* note 5, at 46-48; see also PanAmSat Application, *supra* note 5, at 33-35; ISI Application, *supra* note 5, at 37.

86. Cygnus Application, *supra* note 5, at 53-55; ISI Application, *supra* note 5, at 36-37.

87. Cygnus Application, *supra* note 5, at 53-55.

88. Petition for Rulemaking of the National Telecommunications and Information Administration 1 (FCC Feb. 21, 1985).

89. ISI Application, *supra* note 5, at 36-37; Cygnus Application, *supra* note 5, at 53-55. Moreover, according to Cygnus, use of its direct "one-hop" satellite facilities and their compatibility with transportable earth stations will make the Department of Defense less reliant on the communications facilities of foreign administrations. Cygnus Application, *supra* note 5, at 54; see ISI Application, *supra* note 5, at 36.

90. PanAmSat Application, *supra* note 5, at 46-53; Cygnus Application, *supra* note 5, at 58-74; RCA Application, *supra* note 5, at 13-16; ISI Application, *supra* note 5, at 40-65; Orion Application, *supra* note 5, at I-5 through I-6.



Satellite Act empowered Comsat to serve as the United States' representative to INTELSAT, nothing in the Satellite Act precludes the grant of other applications.<sup>91</sup> Moreover, that legislation "expressly contemplates the likely existence of additional [United States]-based international satellite carriers."<sup>92</sup> The Applicants cite to section 102(d) of the Satellite Act, which states that Congress did not intend to preclude the creation of additional communications satellite systems, "if required to meet unique governmental needs or if otherwise required in the national interest."<sup>93</sup> The meaning of these words is critical to the determination of whether the Applicants' proposals should be approved by the FCC.

According to the Applicants, the FCC's *Transborder Satellite Video Services*<sup>94</sup> decision and the legislative history of the term "national interest"<sup>95</sup> weigh in their favor.<sup>96</sup> *Transborder Services* authorized the use of domestic satellites for services between the United States and Canada, Central America, and the Caribbean, in cases in which such service would not cause INTELSAT significant economic harm.<sup>97</sup> The Applicants point out that, in *Transborder Services*, the FCC rejected Comsat's argument that it was granted exclusive authority under the Satellite Act to transmit all commercial satellite traffic between the United States and international points.<sup>98</sup>

The legislative history of the Satellite Act makes it clear that alternative systems, whether under private or public management, could be required in the national interest, if the sys-

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91. PanAmSat Application, *supra* note 5, at 1; Cygnus Application, *supra* note 5, at 58; RCA Application, *supra* note 5, at 14; ISI Application, *supra* note 5, at 43-44; Orion Application, *supra* note 5, at I-5 through I-6.

92. Cygnus Application, *supra* note 5, at 58.

93. 47 U.S.C. § 701(d) (1982); *see* PanAmSat Application, *supra* note 5, at 1; Cygnus Application, *supra* note 5, at 58; RCA Application, *supra* note 5, at 14; ISI Application, *supra* note 5, at 43-44; Orion Application, *supra* note 5, at I-5 through I-6.

94. 88 F.C.C.2d 258 (1981) (memorandum opinion, order, and authorization).

95. 47 U.S.C. § 701(d).

96. Cygnus Application, *supra* note 5, at 58-60; ISI Application, *supra* note 5, at 43-44; Orion Application, *supra* note 5, at I-5 through I-6; *see also* PanAraSat Application, *supra* note 5, at 37; RCA Application, *supra* note 5, at 14 (both citing *Transborder Services*, 88 F.C.C.2d 258 (1981) only).

97. 88 F.C.C.2d at 278.

98. PanAmSat Application, *supra* note 5, at 37; Cygnus Application, *supra* note 5, at 58-60; RCA Application, *supra* note 5, at 14; ISI Application, *supra* note 5, at 43-44; Orion Application, *supra* note 5, at I-5 through I-6.

tem established by the Satellite Act does not "serve the needs of our people" for any one of a number of reasons.<sup>99</sup> Possible reasons for allowing alternative systems are 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."<sup>100</sup>

Orion departs somewhat from the other Applicants in its interpretation of how the proposed services should be defined. Specifically, Orion argues that its proposed services are "specialized,"<sup>101</sup> and thus governed by paragraph (e) of article XIV of the Agreement,<sup>102</sup> which requires technical coordination, but does not impose the test of significant economic harm.<sup>103</sup> The essence of Orion's argument is that, because it will provide transmission capacity exclusively through the sale or long-term lease of its transponders,<sup>104</sup> its services are not "public" and should not be labelled as such.<sup>105</sup> The other Applicants do not press this argument; they agree that their proposed systems will provide "public telecommunications services" and thus submit to the test of significant economic harm.<sup>106</sup> Mindful that the FCC may not agree with its interpretation, Orion asserts that, even if it is subjected to the test of significant economic harm, it will meet it.<sup>107</sup>

The Applicants discuss at length why their proposals will

99. S. REP. No. 1873, 87th Cong., 2d Sess. 14, *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 2269, 2327 (supporting views of Senator Frank Church).

100. *Id.*

101. Orion Application, *supra* note 5, at I-7 through I-8. Orion argues first that its system will not be used to provide any "service," since Orion contemplates only the sale or lease of transponder capacity. *Id.* It is highly unlikely that the FCC or INTELSAT will agree. Orion only hesitatingly states that it may provide "specialized services." *Id.*

102. INTELSAT Agreement, *supra* note 1, art. XIV(e); *see supra* notes 57-61 and accompanying text.

103. *See* INTELSAT Agreement, *supra* note 1, art. XIV(e); *supra* note 61 (for the text of article XIV(e)); Orion Application, *supra* note 5, at I-7 through I-9.

104. A "transponder" is the satellite component that receives a signal from an earth station, shifts it in frequency, and retransmits it back to earth. HOUSE COMM. ON SMALL BUSINESS, THE IMPACT OF CHANGES IN THE TELECOMMUNICATIONS INDUSTRY ON SMALL BUSINESS, H.R. REP. NO. 1171, 98th Cong., 2d Sess. 54 (1984).

105. Orion Application, *supra* note 5, at I-7 through I-9.

106. PanAmSat Application, *supra* note 5, at 40-43; Cygnus Application, *supra* note 5, at 68-74; RCA Application, *supra* note 5, at 14-16; ISI Application, *supra* note 5, at 43-62.

107. Orion Application, *supra* note 5, at I-8 through I-9.

not cause the INTELSAT system significant economic harm.<sup>108</sup> They point to four occasions on which INTELSAT has approved separate satellite systems in the past.<sup>109</sup> In three of those cases, the INTELSAT Board of Governors found that significant economic harm would not be caused by the systems because it was unlikely that their projected traffic would have been carried by INTELSAT facilities.<sup>110</sup> In the fourth case, the Board did not anticipate significant economic harm to INTELSAT, even though its facilities could and did provide the same service.<sup>111</sup> Thus, there is some precedent for looking favorably upon the applications.

The Applicants assert that many of the customers likely to use their systems are entities that do not currently use the INTELSAT system, and are unlikely to use it in the near future, because of its limited service offerings, high prices, and reliance on multiple transmission networks.<sup>112</sup> The primary market for Cygnus' proposal, for example, is in the areas of advanced data communications applications, private voice services, and video programming,<sup>113</sup> which constitute a small percentage of INTELSAT's revenues.<sup>114</sup> In 1983, eighty-two percent of INTELSAT's revenues were derived from "full-time services," which consist primarily of phone services.<sup>115</sup> Revenues from transponder leases and television services, services

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108. PanAmSat Application, *supra* note 5, at 40-43; Cygnus Application, *supra* note 5, at 69-74; RCA Application, *supra* note 5, at 14-16; ISI Application, *supra* note 5, at 48-62; Orion Application, *supra* note 5, at I-8 through I-9.

109. Cygnus Application, *supra* note 5, at 69-70; RCA Application, *supra* note 5, at 15-16; ISI Application, *supra* note 5, at 50-51.

110. See Godwin, *The Proposed Orion and ISI Transatlantic Satellite Systems: A Challenge to the Status Quo*, 24 JURIMETRICS J. 297, 305 (1984). Those three systems are the Palapa-B system, serving Indonesia, Malaysia, the Philippines, Singapore, and Thailand; the Arab Communications Satellite System (Arabsat), serving several Near Eastern Countries; and the European Communication System (ECS), serving nations in western Europe. *Id.*

111. *Id.* The fourth proposal, presented by Algeria, involved the use of Intersputnik in communications between Algeria, the Soviet Union, Cuba, and several European nations. *See id.*

112. *See generally* PanAmSat Application, *supra* note 5; Cygnus Application, *supra* note 5; RCA Application, *supra* note 5; ISI Application, *supra* note 5; Orion Application, *supra* note 5 (mentioning these arguments throughout).

113. Cygnus Application, *supra* note 5, at 71.

114. *Id.*; see INTELSAT, 1983 ANNUAL REPORT 29 (1983).

115. Cygnus Application, *supra* note 5, at 70; see INTELSAT, 1983 ANNUAL REPORT 29 (1983).

to be emphasized by Cygnus,<sup>116</sup> accounted for about fourteen percent of INTELSAT's 1983 revenues.<sup>117</sup>

In conclusion, it is the Applicants' contention that, by providing new, innovative, "one-hop" services, they will attract a new market, a market currently unwilling or unable to use INTELSAT because of the prohibitively high costs inherent in providing data and video services through the global system. Because INTELSAT obtains the majority of its revenues from voice communications, it has not devoted to the data and video markets the attention desired by users of these specialized international services. For these reasons, the Applicants believe, their systems would serve the national interest and yet avoid significant economic harm to the INTELSAT system. An attorney for ISI summed up the Applicants' position: "We ask nothing of the U.S. government other than to be permitted to succeed or fail in the marketplace."<sup>118</sup>

#### B. *The Presidential Determination*

Upon the filing by Orion of the first application for a separate satellite system, the Departments of Commerce and State sent a joint letter to the FCC asking it to refrain from taking any final action on the application until an Executive Branch group undertook a review of the United States' satellite policy.<sup>119</sup> The group wanted to determine whether, and under what conditions, authorizing satellite systems and services in addition to INTELSAT would be consistent with United States law and treaty obligations, compatible with United States foreign policy and telecommunications policy goals, and required in the United States' national interest.<sup>120</sup>

This review was undertaken by the Senior Interagency Group on International Communication and Information Policy (SIG), which is composed of the State and Commerce De-

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116. Cygnus Application, *supra* note 5, at 70-71.

117. INTELSAT, 1983 ANNUAL REPORT 29 (1983).

118. Orion, *ISI Defend Plans for Private Satellite Systems Before Senate Panels*, *Satellite Week*, Nov. 7, 1983, at 5 (quoting William Fishman).

119. Letter from David J. Markey, Assistant Secretary-Designate for Communication and Information, Department of Commerce, and Diana Lady Dougan, Coordinator, International Communications and Information Policy, Department of State, to Mark S. Fowler, Chairman of the FCC (Apr. 6, 1983).

120. Senior Interagency Group on International Communication and Information Policy, *A White Paper on New International Satellite Systems 1* (Feb. 1985).

partments, as well as other governmental units.<sup>121</sup> Its conclusion was to favor new entry, subject to some limitations.<sup>122</sup> The Secretaries of State and Commerce subsequently forwarded their recommendations to President Reagan, who, on November 28, 1984, announced in a memorandum his determination that "separate international communications satellite systems are required in the national interest."<sup>123</sup> The memorandum instructed the Secretaries of State and Commerce to inform the FCC of criteria necessary to ensure that the United States both advances its telecommunications interests and meets its international obligations.<sup>124</sup> Additionally, the President directed the United States to consult with INTELSAT regarding those systems authorized by the FCC.<sup>125</sup>

A joint letter sent from the Secretaries to the FCC advised that two restrictions be imposed on any alternative system.<sup>126</sup> First, competing systems should be restricted to providing services through the sale or long-term lease of transponders or space segment capacity.<sup>127</sup> They should not be used to provide public switched message service, such as long-distance telephone service.<sup>128</sup> Second, one or more foreign authorities should authorize the use of each system and enter into consultation procedures with the United States and INTELSAT, pur-

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121. *Id.* In addition to representatives of the State and Commerce Departments, the SIG is composed of representatives of the Departments of Justice and Defense; the Offices of Management and Budget, Science and Technology Policy, Policy Development, and the United States Trade Representative; the National Security Council; the Central Intelligence Agency; the United States Information Agency (USIA); the Board for International Broadcasting; the Agency for International Development; and NASA. The SIG is co-chaired by the Departments of State and Commerce; the USIA serves as vice-chair. *Id.*

122. *Statement of Recommendations* at 1-7, in *INTERNATIONAL SATELLITE POLICY* (Senior Interagency Group on International Communication & Information Policy ed. Jan. 18, 1984) [hereinafter cited as *Statement of Recommendations*].

123. Presidential Determination, *supra* note 8, at 1853.

124. *Id.*

125. *Id.*

126. Letter from George P. Shultz, Secretary of State, and Malcolm Baldrige, Secretary of Commerce, to Mark S. Fowler, Chairman of the FCC (Nov. 28, 1984).

127. *Id.*

128. *Id.* This recommendation was made in order to discourage entry into the major markets of intercorporate communications and telephone calls between individuals. Markey, *New Entrants Would Lower Prices*, N.Y. Times, Mar. 3, 1985, § 3, at 2, col. 1.

suant to article XIV(d) of the INTELSAT Agreement,<sup>129</sup> to ensure technical compatibility and the avoidance of significant economic harm to INTELSAT.<sup>130</sup>

In a memorandum of law<sup>131</sup> sent to the FCC as an attachment to the joint letter, the State Department addressed the question of whether the Orion and ISI proposals were for "public telecommunications services,"<sup>132</sup> and thus subject to the significant economic harm test, or rather, for "specialized telecommunications services,"<sup>133</sup> requiring merely technical compatibility, as suggested by Orion.<sup>134</sup> It concluded that the "sounder view" is that the proposed services fall under the "public" heading.<sup>135</sup> A contrary interpretation "would permit any party to authorize a commercial non-INTELSAT system for international telecommunications services despite serious anticipated economic harm to INTELSAT."<sup>136</sup> The State Department concluded that such a contrary interpretation would undermine the basic purpose of INTELSAT, the maintenance of a single global commercial telecommunications satellite system.<sup>137</sup>

The memorandum focuses on the State Department's op-

129. INTELSAT Agreement, *supra* note 1, art. XIV(d); *see supra* note 60 (text of article XIV(d)).

130. Letter from George P. Shultz, Secretary of State, and Malcolm Baldrige, Secretary of Commerce, to Mark S. Fowler, Chairman of the FCC (Nov. 28, 1984). If the United States gives its approval to the Applicants, with or without a positive recommendation from INTELSAT, agreements still must be reached with foreign telecommunications administrations for the system to become operational. *See supra* note 2.

131. *Memorandum of Law* in INTERNATIONAL SATELLITE POLICY (Senior Inter-agency Group on International Communication & Information Policy ed. Jan. 18, 1984) [hereinafter cited as *State Department Memo*].

132. INTELSAT Agreement, *supra* note 1, art. I(k); *see supra* note 56 and accompanying text (text of article I(k)).

133. *Id.* art. I(1); *see supra* note 57 and accompanying text (text of article I(1)).

134. Orion Application, *supra* note 5, at I-8.

135. *State Department Memo*, *supra* note 131, at 1-2.

136. *Id.* at 2.

137. *Id.* The State Department's conclusions were based, in part, on an analysis of the negotiating history of the INTELSAT Agreements. According to the State Department's memorandum, article XIV "was a compromise between the desire of certain European countries, led by France, that the Agreement allow for possible 'regional' satellite systems, and the desire of the United States that other international satellite systems be precluded." *Id.* at 3. Several regional systems have been successfully coordinated with INTELSAT pursuant to the article XIV(d) tests of technical compatibility and avoidance of significant economic harm. *See supra* note 110; *see also* Transborder Satellite Video Services, 88 F.C.C.2d 258, 275-76 (1981) (memo-

position to the notion suggested by Orion that "public telecommunications services" are limited to services provided by common carriers, and that, because Orion is not a common carrier, its services necessarily fall within the alternative "specialized" category.<sup>138</sup> The State Department asserts that there is nothing in the text of the INTELSAT Agreement that limits the concept of "available to the public," a phrase used in the Agreement's definition of "public telecommunications services,"<sup>139</sup> to the concept of common carriage, "which is essentially a United States domestic regulatory concept."<sup>140</sup>

The memorandum also rebuts the argument made by Orion<sup>141</sup> that, because it will be selling or leasing transponder capacity on a long-term basis, the label "public telecommunications services" does not apply.<sup>142</sup> Orion argues that the general public cannot use capacity reserved for others by lease or sale.<sup>143</sup> The State Department refers Orion to article I of the Agreement, which expressly includes leased circuits in its definition of "public telecommunications services."<sup>144</sup>

The memorandum closes with a reference to the negotiat-

random opinion, order, and authorization); Lowndes, *Eutelsat Seeks Guarantee of Monopoly Inside Europe*, *Aviation Week & Space Tech.*, Oct. 1, 1984, at 139, 139-143.

It is interesting, considering the United States' original opposition to virtually all alternative systems, that it would later invoke a provision included only at the insistence of other nations. See *State Department Memo*, *supra* note 131, at 3. During the negotiations for the Interim Arrangements Agreement, *supra* note 1, the United States proposed addition of the following paragraph:

Each of the Parties to this Agreement agrees that it will not participate in any commercial communications satellite system other than the single global system which is the subject of this Agreement. Nothing in this Agreement shall preclude the creation of additional communications satellite systems if required to meet the unique governmental needs of any of the Parties to this Agreement.

Washington Plenipotentiary Conference to Establish Interim Agreements for a Global Communication System of Commercial Satellite Communications, Items 1 and 2, Doc. 5 (July 17, 1964), *quoted in* Colino, *INTELSAT: Doing Business in Outer Space*, 6 *COLUM. J. TRANSNAT'L L.* 17, 40 n.68 (1967).

138. *State Department Memo*, *supra* note 131, at 1-7; see Orion Application, *supra* note 5, at I-7 through I-8.

139. INTELSAT Agreement, *supra* note 1, art. I(k); see *supra* note 56 and accompanying text (text of article I(k)).

140. *State Department Memo*, *supra* note 131, at 4.

141. Orion Application, *supra* note 5, at I-8.

142. *State Department Memo*, *supra* note 131, at 3-5.

143. Orion Application, *supra* note 5, at I-8.

144. *State Department Memo*, *supra* note 131, at 4-5; see INTELSAT Agreement, *supra* note 1, art. I(k); *supra* note 56 and accompanying text (text of article I(k)).

ing history of the Agreement, which reveals that "specialized telecommunications services" were intended "to comprise principally those services, excluding generalized telecommunications, under the direct control of governments as a matter of special national policy . . . or services provided by governmental . . . entities incident to their functions."<sup>145</sup> As the proposed systems are in no way government related, they are necessarily public telecommunications services and therefore subject to the test of significant economic harm.<sup>146</sup>

The paper submitted by the SIG to the Secretaries of Commerce and State and used by the Secretaries in making their recommendations to the President sets forth additional considerations on the issue of competing satellite systems.<sup>147</sup> Among them is the possible impact of FCC approval of the applications on developing countries.<sup>148</sup> At recent INTELSAT meetings, many of these states have expressed the fear that, if significant traffic is diverted from INTELSAT's Atlantic Ocean region, the consortium would be forced to price its circuits<sup>149</sup> differently, in different regions of the world.<sup>150</sup> Revenues from the profitable North Atlantic route would no longer be able to subsidize less profitable routes to and from developing countries and prices would then have to reflect the true cost of providing a specific circuit.<sup>151</sup> The SIG points out that many of the statements made by the developing countries in opposition to the proposed systems are based on an interpretation of the phrase "single global . . . system"<sup>152</sup> as precluding the existence of virtually any independent system.<sup>153</sup> Such an interpre-

145. *State Department Memo*, *supra* note 131, at 8.

146. *Id.*; see *INTELSAT Agreement*, *supra* note 1, art. XIV(d); *supra* note 60 (text of article XIV(d)).

147. See generally *Foreign Policy Considerations*, *supra* note 1.

148. *Id.* at 5-7.

149. Although the word "circuits" implies the use of cables or the like, it is also used in the industry to refer to all communications paths, whether or not served by a physical connector such as a cable. Letter from Leonard J. Higgins, Administrator of Regulatory Affairs for RCA American Communications, to Julianne McKenna (Apr. 17, 1985) (copy on file at the offices of the *Fordham International Law Journal*).

150. *Foreign Policy Considerations*, *supra* note 1, at 6; see Lowndes, *FCC Considers Policy Favoring Competition with INTELSAT*, *Aviation Week & Space Tech.*, Jan. 7, 1985, at 24.

151. Lowndes, *FCC Considers Policy Favoring Competition with INTELSAT*, *Aviation Week & Space Tech.*, Jan. 7, 1985, at 24.

152. *INTELSAT Agreement*, *supra* note 1, preamble.

153. *Foreign Policy Considerations*, *supra* note 1, at 6.



tation, the SIG states, fails to appreciate that the INTELSAT Agreement envisioned "a single global . . . system as part of an improved global telecommunications network"<sup>154</sup> and that separate international systems already exist and have been successfully coordinated with INTELSAT.<sup>155</sup>

The SIG found that both the Satellite Act and the INTELSAT Agreement anticipated systems outside of INTELSAT,<sup>156</sup> and that, with certain restrictions,<sup>157</sup> the proposed systems should be accommodated by INTELSAT.<sup>158</sup> The issue, as the SIG saw it, was how to take advantage of opportunities brought about by new technology and yet, at the same time, retain the best of the existing INTELSAT system.<sup>159</sup> Despite the economic benefits to the lesser-developed countries of the status quo approach, the SIG concluded that United States "economic goals require recognition of the changing marketplace and encouragement of innovation."<sup>160</sup>

### C. INTELSAT

Opposition by INTELSAT to the applications before the FCC has been strong. The INTELSAT signatories have adopted a resolution questioning the propriety of United States approval of competition with INTELSAT, stating that

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154. INTELSAT Agreement, *supra* note 1, preamble.

155. *Foreign Policy Considerations*, *supra* note 1, at 6.

156. *Id.* at 12.

157. *Statement of Recommendations*, *supra* note 122, at 6-7.

158. See *Foreign Policy Considerations*, *supra* note 1, at 12.

159. *Id.*

160. *Id.* at 13. Another foreign policy concern of the SIG was that a substantial weakening of INTELSAT as the dominant global communications system could potentially enhance Soviet efforts to penetrate developing countries through Soviet communications satellite facilities. *Id.* at 9. The SIG noted a recent, more aggressive effort in commercial space exploration by the Soviets. *Id.* Melvin Laird, Secretary of Defense for the Nixon administration and now a director of Comsat, has expressed the same fear. Laird, *Should INTELSAT Have Competition?*, Wash. Post, Dec. 30, 1984, at C7, col. 5 (editorial). Most commentators seem to agree, however, that Soviet success in this area is unlikely. See, e.g., *Competitive Satellites*, Wash. Post, Dec. 30, 1984, at C6, cols. 1, 2 (editorial).

The fear expressed by some nations that United States endorsement of additional systems would constitute a signal that the United States no longer supported INTELSAT was dismissed by the SIG as unfounded. *Foreign Policy Considerations*, *supra* note 1, at 6. The SIG is correct in this regard. Such a fear ignores the fact that not all users of international satellite service are desirous of purchasing or making a long-term lease commitment to one of the Applicants for communications capacity.

the separate systems challenge the underlying purposes for which the INTELSAT system was formed.<sup>161</sup> INTELSAT's Director General has called the potential competition a "storm cloud."<sup>162</sup> The telecommunications agencies of at least twenty-three member nations have written to the State Department and forty-seven to the FCC expressing their concern about the proposals.<sup>163</sup>

In 1982, in anticipation of an increased number of requests for consultation and coordination of separate satellite systems under article XIV, the INTELSAT Board of Governors requested that the organization's Director General develop specific guidelines to streamline the process.<sup>164</sup> Up until that point, coordinations had been handled on a case-by-case basis,<sup>165</sup> making it unclear what standards had to be met. In September, 1984, the Director General submitted, in response, a procedure to be used in evaluating competing systems for economic harm.<sup>166</sup> The Reagan administration has opposed the proposal, claiming that it makes economic coordination with INTELSAT impossible.<sup>167</sup>

The Director General's proposal determines first whether or not the competing system would provide public international services.<sup>168</sup> If so, INTELSAT would be required to evaluate whether the proposed services could be provided by INTELSAT within the period of time proposed by the competi-

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161. See *INTELSAT Finds Threat in Transoceanic Diversion*, *Aviation Week & Space Tech.*, May 2, 1983, at 19.

162. See Stuart, *Intelsat: Time of Uncertainty*, *N.Y. Times*, Nov. 10, 1984, at 31, col. 3, at 34, col. 5.

163. *Id.* at 34, col. 6.

164. Lowndes, *Eutelsat Seeks Guarantee of Monopoly Inside Europe*, *Aviation Week & Space Tech.*, Oct. 1, 1984, at 139, 141.

165. *Id.*

166. R. Colino, *Policies, Criteria and Procedures for the Evaluation of Separate Systems Under Article XIV(d)*, BG-60-69E, W/9/84 (Aug. 22, 1984) (INTELSAT document) [hereinafter cited as BG-60-69E].

167. Lowndes, *FCC Considers Policy Favoring Competition With Intelsat*, *Aviation Week & Space Tech.*, Jan. 7, 1985, at 24.

168. R. Colino, *Tabulation of Questions to be Answered During the Non-Technical Coordination Process Under Article XIV(d) of the INTELSAT Agreement*, Attachment No. 1 to Addendum No. 1 to BG-60-69E, W/9/84, at 17-18 (Aug. 29, 1984) (INTELSAT document) [hereinafter cited as Attachment to Addendum to BG-60-69E].

tor.<sup>169</sup> If INTELSAT could provide the services within the proposed time frame, it would consider whether any of the traffic being coordinated would be carried by the INTELSAT system, if the separate system was not formed.<sup>170</sup> If some of the traffic could be carried by INTELSAT, the Board would determine an acceptable amount of traffic that the competitor could divert.<sup>171</sup> Next, INTELSAT would assess the cumulative harm a competitor could inflict over a ten-year period.<sup>172</sup> Systems still under consideration at this point would then be subjected to an evaluation of their potential effect on INTELSAT satellite loading in each region of operation.<sup>173</sup>

Finally, INTELSAT would consider whether the potential competitor might hinder INTELSAT's ability to establish a direct link between any two of its members. If INTELSAT could no longer provide certain satellites, or provide them only at higher costs and charges due to another system, there would be prejudice to the direct links.<sup>174</sup>

#### Reaction of the Board of Governors to the Director Gen-

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169. Attachment to Addendum to BG-60-69E, *supra* note 168; *see* BG-60-69E, *supra* note 166, at 18-19.

170. Attachment to Addendum to BG-60-69E, *supra* note 168; *see* BG-60-69E, *supra* note 166, at 30-33.

171. Attachment to Addendum to BG-60-69E, *supra* note 168; *see* BG-60-69E, *supra* note 166, at 23-24.

172. Attachment to Addendum to BG-60-69E, *supra* note 168; *see* BG-60-69E, *supra* note 166, at 24-27.

173. Attachment to Addendum to BG-60-69E, *supra* note 168; *see* BG-60-69E, *supra* note 166, at 28-30.

174. Attachment to Addendum to BG-60-69E, *supra* note 168; *see* BG-60-69E, *supra* note 166, at 19-22. Director General Colino has written:

[I]n assessing potential prejudice to direct telecommunications links INTELSAT should consider whether the proposed separate system would in any way affect the ability of any INTELSAT participant to access or be accessed through the INTELSAT system. Factors to be considered include whether any constraints on access to the INTELSAT system are explicit or implicit in operating arrangements for the separate system, whether the existence of the separate systems would make it necessary for INTELSAT to modify its operational plans in a manner which would require modification or expansion of any participant's ground facilities and whether any other aspect of the separate system would result in making it more expensive or more difficult for any INTELSAT participant to communicate via INTELSAT with another.

R. Colino, Intersystem Coordination Procedures: Proposed Procedures for Implementation of Article XIV(d) Requirements Concerning Prejudice to Direct Telecommunications Links, Attachment to BG-61-32E, W/12/84, at 3 (Nov. 7, 1984) (INTELSAT document).

eral's proposal has been split. Some governors are wary of conceding too much to INTELSAT.<sup>175</sup> The reaction of the Applicants to the Director General's suggestions has been cool. They argue that "[n]o sovereign state should permit INTELSAT to erect new, higher or differing consultation standards . . . particularly where the new standards are clearly an element of a concerted effort to preclude new regional systems."<sup>176</sup> They suggest that the United States oppose the proposal as a "blatant effort to rewrite the INTELSAT Agreement."<sup>177</sup>

Although the signatories are not legally bound to abide by INTELSAT's finding of significant economic harm,<sup>178</sup> the Director General has reminded the Board that INTELSAT members are subject to the article XIV(a) obligation to act, "within and outside of INTELSAT," in a manner that will contribute to the achievement of the organization's object and purpose.<sup>179</sup> Thus, the establishment of a separate international system, after a negative recommendation from INTELSAT, might detract from the organization's purpose and constitute a breach of the Agreement,<sup>180</sup> despite the apparently liberal language of article XIV(d),<sup>181</sup> which merely requires consultation with the Assembly of Parties.<sup>182</sup>

A key factor in determining whether the competing sys-

175. British Governor Geoffrey Hall has been quoted as expressing his government's belief that the INTELSAT agreements do not prohibit the establishment of separate systems. *INTELSAT's Colino Seeks to Defuse Criticism of Proposals to Board; Governors Divided on Coordination Criteria for Separate Systems*, *Satellite Week*, Sept. 17, 1984, at 1, 2. Another Governor stated: "Nobody expects a country to give up its sovereignty for an investment [in INTELSAT] of \$100 million." *Id.* (quoting Algerian Governor Abdelkader Bairi).

176. *INTELSAT's Colino Proposes Further Safeguard to INTELSAT System*, *Satellite Week*, Dec. 10, 1984 (quoting ISI comments to FCC).

177. *Id.* David Markey, Assistant Secretary of Commerce and head of the National Telecommunications and Information Administration, said of Colino's proposal that it was like "changing the rules in the middle of the game." *Senior U.S. Officials Work at Response to Proposals to Revamp INTELSAT Coordination Procedures*, *Communications Daily*, Sept. 11, 1984, at 1.

178. Article XIV(d) merely requires consultation with the Assembly of Parties. *See supra* notes 67-70 and accompanying text.

179. *Review of Obligations, supra* note 70, at 7.

180. *Id.*

181. INTELSAT Agreement, *supra* note 1, art. XIV(d); *see supra* note 60 (text of article XIV(d)).

182. *Review of Obligations, supra* note 70, at 7.

tems pose a threat of significant economic harm to INTELSAT is the percentage of switched traffic that INTELSAT transmits.<sup>183</sup> It is the nonswitched traffic that may be competed for by the Applicants, according to the State and Commerce Department's joint letter to the FCC (sent in response to President Reagan's directions).<sup>184</sup> The Reagan administration believes that eighty-five percent of INTELSAT's North Atlantic traffic is switched.<sup>185</sup> INTELSAT's Director General sets the figure at about seventy-five percent.<sup>186</sup>

Another source of disagreement between the Director General and the Administration is whether INTELSAT may adjust its rate structure to better compete with the Applicants, should their systems eventually become operative. According to the Director General and opponents of the new system, to upset the present pricing policy would be to shift the burden of cost for the global system to the nations that can least afford it.<sup>187</sup> The Director General is adamant that the Agreement does not allow for the flexible pricing of services and that, therefore, INTELSAT could not compete with the proposed separate systems unless the treaty were changed.<sup>188</sup>

Finally, the Director General denies claims that INTELSAT's present charges are too high.<sup>189</sup> He has pointed out that, adjusted for inflation, INTELSAT's 1985 telephone charge is about five percent of what it was twenty years ago.<sup>190</sup> A three-minute call between New York and Frankfurt, Germany, costs \$4.73, of which INTELSAT revenues are only

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183. See *supra* notes 126-28 and accompanying text.

184. Letter from George P. Shultz, Secretary of State, and Malcolm Baldrige, Secretary of Commerce, to Mark S. Fowler, Chairman of the FCC (Nov. 28, 1984).

185. Gwertzman, *U.S. Expected to Seek Competition to INTELSAT*, N.Y. Times, May 2, 1984, at D1, col. 1, at D23, col. 5.

186. *Id.*

187. See *INTELSAT Members Urge FCC to Reject Orion & ISI Applications*, Satellite Week, Mar. 26, 1984, at 4. According to Thomas McKnight, president of Orion, "INTELSAT is marching the poor in front of them so they can sustain an unsustainable monopoly in face of this American process." Stuart, *Intelsat: Time of Uncertainty*, N.Y. Times, Nov. 10, 1984, at 31, col. 3, at 34, col. 5.

188. Colino, *The System Works, Don't Fix It*, N.Y. Times, Mar. 3, 1985, § 3, at 2, col. 3; see *Commerce Dept. and Colino Differ on Whether INTELSAT Can Compete*, Satellite Week, Dec. 17, 1984, at 5.

189. Colino, *The System Works, Don't Fix It*, N.Y. Times, Mar. 3, 1985, § 3, at 2, cols. 3, 5.

190. *Id.* at col. 6.

about fifty cents, approximately ten percent of the total charge.<sup>191</sup> "If the problem is with the total cost of service to the user," the Director General has said, "why focus on INTELSAT's ten percent, rather than the remaining ninety percent of the charge that is controlled by the Federal Communications Commission?"<sup>192</sup>

#### D. *Comsat*

Like INTELSAT, Comsat has been adamant in its denunciation of its potential competitors' plans. It argues that, given the disproportionately high percentage of contracts that NASA and United States companies have been awarded by INTELSAT, United States industry will suffer if the FCC approves the applications and INTELSAT sustains significant economic harm.<sup>193</sup> There is also the possibility that FCC approval of the applications will result in a loss of United States prestige and influence, and that the Soviets may try to capitalize on this by recruiting for their Intersputnik system.<sup>194</sup>

It is interesting that both Comsat and the Applicants cite the *Transborder Satellite Video Services*<sup>195</sup> decision.<sup>196</sup> The Applicants use the case to support the proposition that the Satellite Act did not grant Comsat exclusive authority to transmit all satellite traffic between the United States and other nations.<sup>197</sup> Comsat, however, uses the case to assert that the proposal must be "exceptional"<sup>198</sup> insofar as it would be impossible, uneconomical, or impractical for INTELSAT to provide the planned services, before the FCC may approve them.<sup>199</sup> The burden of demonstrating such exceptional circumstances rests with the proponents of the planned systems.<sup>200</sup> Comsat claims that the Applicants have failed to demonstrate that their pro-

191. *Id.*

192. *Id.*

193. *Orion, ISI Defend Plans for Private Satellite Systems Before Senate Panel*, *Satellite Week*, Nov. 7, 1983, at 4 (quoting Joseph Charyk, president of Comsat).

194. *Id.*

195. 88 F.C.C.2d 258 (1981).

196. See Notice of Inquiry, *supra* note 5, at 8.

197. See *supra* notes 94-98 and accompanying text.

198. See *Transborder Services*, 88 F.C.C.2d at 272, 279-82.

199. Notice of Inquiry, *supra* note 5, at 8.

200. *Id.*

posals are in any way exceptional.<sup>201</sup>

### E. Federal Communications Commission

In late 1984, the FCC requested comments from the general public and industrial community on the Presidential Determination and other issues that have arisen in connection with the applications.<sup>202</sup> Because the FCC seeks replies to those comments, it will be over two years from the time of the first application before any decision is made.<sup>203</sup>

Given the FCC's demonstrated preference for expanded competition in the domestic telecommunications industry<sup>204</sup> and recent indications that its preference extends to the international arena,<sup>205</sup> it is likely that the FCC will authorize construction and operation of the proposed systems, although its recommendation may be qualified by some restrictions. The White House policy statement<sup>206</sup> will certainly serve as an impetus to the Commission to approve the applications.

It is clear, however, that the Commission must consider factors in addition to the Presidential Determination in assessing whether the national interest would be served by authorization of the additional systems.<sup>207</sup> Recommendations as to the factors that should be addressed by the Commission in making its determination are among the comments solicited by the Commission.<sup>208</sup>

## III. ANALYSIS

The United States was at one time so opposed to the exist-

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201. *Id.*

202. *Id.* at 26; see *supra* note 11 and accompanying text.

203. The first application was filed on March 11, 1983, by Orion. See Orion Application, *supra* note 5; Notice of Inquiry, *supra* note 5, at 1. INTELSAT has six months from the date of the commencement of consultation provided for in articles XIV(d) and (e) to make its recommendation. INTELSAT Agreement, *supra* note 1, art. XIV(f).

204. See, e.g., In re Establishment of Domestic Communications-Satellite Facilities by Non-governmental Entities, 34 F.C.C.2d 1 (memorandum opinion and order), adopted, 35 F.C.C.2d 844 (second report and order), *reconsidered*, 38 F.C.C.2d 665 (memorandum opinion and order 1972).

205. See Frieden, *International Telecommunications and the Federal Communications Commission*, 21 COLUM. J. TRANSNAT'L L. 423 (1983).

206. Presidential Determination, *supra* note 8.

207. See 47 U.S.C. § 721 (1982); Notice of Inquiry, *supra* note 5, at 9.

208. Notice of Inquiry, *supra* note 5, at 9.

ence of any separate international satellite system that it proposed the insertion of a paragraph in the INTELSAT Agreement barring them.<sup>209</sup> However, it now advocates just such a proposal in the form of the Presidential Determination.<sup>210</sup> While this change of stance may seem self-serving, vast changes have taken place in the telecommunications industry over the last twenty years that were not anticipated by scientists or politicians at the time the Agreement was drafted.<sup>211</sup> These changes must be taken into consideration in evaluating the proposals. Furthermore, despite the United States' change of stance, it is clearly acting within the bounds of the Agreement as it stands.

There have been many interpretations of the phrase "single global commercial telecommunications satellite system."<sup>212</sup> Some argue that a single global system allows for only one network of satellites that fulfills both domestic and international communications requirements.<sup>213</sup> Others argue that the phrase allows for the development of regional systems, provided there is only one global system.<sup>214</sup> Yet another interpretation of the phrase allows for a number of international satellite systems, INTELSAT among them, that are connected into a single global system.<sup>215</sup> If the emphasis is placed on the word "global," one might question, in light of INTELSAT approval of regional and transborder services,<sup>216</sup> whether the phrase now refers to intercontinental, transoceanic service, or something else altogether. The point is that the Agreement is

209. See *supra* note 135 for text of proposed paragraph.

210. See Presidential Determination, *supra* note 8, at 1853.

211. See generally D. SMITH, *supra* note 23, *passim* (describing technological developments); Frieden, *International Telecommunications and the Federal Communications Commission*, 21 *COLUM. J. TRANSNAT'L L.* 423 (1983) (discussing regulatory changes).

212. See Smith, *The Legal Ordering of Satellite Telecommunication: Problems and Alternatives*, 44 *IND. L.J.* 337, 350 (1969); Trooboff, *INTELSAT: Approaches to the Renegotiation*, 9 *HARV. INT'L L.J.* 1, 57-65 (1968).

213. See Trooboff, *supra* note 212, at 57. INTELSAT has approved several separate domestic satellite systems over the last few years, rendering this view untenable. See Colino, *International Cooperation Between Communications Satellite Systems: An Overview of Current Practices and Future Prospects*, 5 *J. SPACE L.* 65, 84-87 (1977); Dalfen, *The Telesat Canadian Domestic Satellite System*, 5 *STAN. J. INT'L STUD.* 84, 95-96 (1970).

214. See Smith, *supra* note 212, at 350.

215. *Id.*

216. See generally Godwin, *supra* note 110, at 304-06 (discussing INTELSAT approval of five regional and transborder services proposals).



ambiguous and that all sides can make and have made advantageous use of this ambiguity in their arguments.

In making their determinations, neither the FCC nor INTELSAT should be persuaded by the manipulation of case law or statutory or treaty language. They should bear in mind the present status of INTELSAT, the rapid evolution of the telecommunications industry, and consumer requirements today. INTELSAT is not a fragile, experimental organization; in 1982, it reported revenues of U.S.\$315 million.<sup>217</sup> Competition will serve as a spur to INTELSAT and Comsat to reduce prices and assure consumers that developing communications needs are met promptly.

The Reagan administration has not attempted to abdicate its responsibility to INTELSAT. In his determination, the President directed that the United States consult with INTELSAT and ordered the Secretaries of State and Commerce to devise and set forth the criteria necessary for the United States to meet its international obligations under the Agreements.<sup>218</sup> The memorandum issued by the Secretaries in response to the President's request expressly recognized article XIV(d) as the relevant provision of the Agreement, thus subjecting the proposed systems to the tests of technical compatibility and significant economic harm.<sup>219</sup> It is commendable that the Secretaries did not press the weak argument put forth by Orion that the proposed services be subject to only the test of technical compatibility.<sup>220</sup>

The language of the Satellite Act and the INTELSAT Agreement supports a procompetitive stance.<sup>221</sup> The legislative history behind the "national interest" language of the Satellite Act makes it clear that additional satellite systems could be launched if INTELSAT's services were too limited or too

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217. INTELSAT, 1982 ANNUAL REPORT 28 (1983).

218. See Presidential Determination, *supra* note 8, at 1853.

219. Letter from George P. Shultz, Secretary of State, and Malcolm Baldrige, Secretary of Commerce, to Mark S. Fowler, Chairman of Federal Communications Commission (Nov. 28, 1984).

220. Orion Application, *supra* note 5, at I-8; see *supra* notes 101-05 and accompanying text.

221. See Satellite Act, 47 U.S.C. § 701 (1982); INTELSAT Agreement, *supra* note 1, preamble, art. XIV(d).

costly.<sup>222</sup> Additionally, the existence of article XIV(d) of the INTELSAT Agreement evidences that separate systems were, in fact, contemplated by the Agreement's draftsmen. Furthermore, the Agreement's preamble describes the INTELSAT system as but a "part of an improved global telecommunications network."<sup>223</sup>

The Presidential Determination is a practical compromise because it leaves untouched public telephone service, the greatest source of INTELSAT revenues.<sup>224</sup> It allows competition for only customized services, services for the most part either not currently offered by INTELSAT, or only recently introduced by the consortium.<sup>225</sup>

The cumulative effect that alternative systems may have on INTELSAT is troubling. What would happen if the present applications are approved by the FCC and INTELSAT, revenues are lost by INTELSAT, and then yet another Applicant proposes an additional international system that would divert, for instance, two percent of INTELSAT's remaining revenues? Each alternative system, considered independently, would appear not to cause the INTELSAT system significant economic harm. However, the result could be a gradual deterioration of INTELSAT revenues, with INTELSAT serving only the least economical, least travelled routes.

Despite this possibility, the proposed systems should be approved. INTELSAT can prevent such a gradual deterioration by devising, as soon as possible, a clear and predictable test of significant economic harm that is fair to applicants. Moreover, the governments of the world's wealthier countries could replace the present hidden subsidies with open and direct support for INTELSAT.<sup>226</sup>

It is unclear whether INTELSAT's unresponsiveness to the needs of those desiring customized data and video services is the result of monopolistic indifference or an inability to economically provide the desired services. What is clear is that INTELSAT refuses to adopt a more flexible posture whereby

222. See S. REP. NO. 1873, 87th Cong., 2d Sess. 14, reprinted in 1962 U.S. CODE CONG. & AD. NEWS 2269, 2327; *supra* notes 99-100 and accompanying text.

223. INTELSAT Agreement, *supra* note 1, preamble.

224. See Presidential Determination, *supra* note 8, at 1853.

225. *Id.*

226. *Competitive Satellites*, Wash. Post, Dec. 30, 1984, at C6, cols. 1, 2 (editorial).

its services are complemented by those of other systems. Furthermore, if Comsat is inflating its prices, it is responsible for the high rates currently charged those who communicate internationally and for the consequent ability of the proposed alternative systems to compete with INTELSAT. To alleviate this problem, the FCC must seriously consider allowing the international record carriers equal access to INTELSAT, with the hope that competition for Comsat would encourage lower rates, at least at that leg of the system.<sup>227</sup>

The Director General's proposed procedures for determining whether an alternative system will cause significant economic harm to INTELSAT<sup>228</sup> is not the answer. It is unpredictable and makes coordination of separate public international satellite systems with INTELSAT virtually impossible. The Director General opposes a change in the INTELSAT price arrangements on the ground that it would require modification of the treaty,<sup>229</sup> but in proposing such a radical new coordination procedure, he is in effect modifying the treaty.

Assuming INTELSAT supports its conclusions with facts and figures, the United States should abide by any conclusions drawn by the consortium, despite the fact that a decision unfavorable to the Applicants is not binding on the United States.<sup>230</sup> To allow the launch and operation of separate satellite systems in the face of a negative decision by INTELSAT would be to politicize the organization, bringing about the very disharmony the INTELSAT Agreement sought to avoid.<sup>231</sup>

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227. See Petition for Rulemaking of the National Telecommunications and Information Administration (FCC Feb. 21, 1985).

228. See *supra* notes 164-74 and accompanying text.

229. Colino, *The System Works, Don't Fix It*, N.Y. Times, Mar. 3, 1985, § 3, at 2, cols. 3-4.

230. See INTELSAT Agreement, *supra* note 1, art. XIV(d); see *supra* notes 178-82 and accompanying text.

231. See Colino, *The System Works, Don't Fix It*, N.Y. Times, Mar. 3, 1985, § 3, at 2, cols. 3-5. Colino implies that the United States has already politicized the organization. *Id.*

This is not to say, however, that Colino is correct in interpreting article XIV(a) of the Agreement as possibly obligating the United States to abide in this case by a negative recommendation. Such a suggestion renders meaningless article XIV(d), which merely requires consultation with INTELSAT, and creates an obligation where none was made to exist by the Agreement's drafters.

*CONCLUSION*

INTELSAT faces what may be its most serious challenge to date as it awaits FCC evaluation of the applications of five companies to construct and operate alternative satellite systems. While some view approval of the separate satellite systems as signaling withdrawal of United States support for the consortium, others emphasize the very limited nature of the competition likely to be approved by the FCC. It is imperative that INTELSAT be flexible in its approach to the proposals. Specifically, it must consider ways in which it may adjust to meet the competition. A clearer, more predictable, and less restrictive test of significant economic harm than that proposed by the Director General should also be devised.

The Presidential Determination is reasonable because it adequately protects INTELSAT's essential services, while allowing desirable private communications initiatives to go forward. The FCC should adopt the same stance, and the United States enter into consultation proceedings with INTELSAT. INTELSAT must undertake its analysis with an open mind and in good faith, the United States must abide by any reasonable conclusions drawn by the consortium.

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