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## 2001: A Space Legislation Odyssey - A Proposed Model for Reforming the Intergovernmental Satellite Organizations

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# 2001: A Space Legislation Odyssey - A Proposed Model for Reforming the Intergovernmental Satellite Organizations

## **Keywords**

Communications Satellite Competition and Privatization Act of 1998, Intergovernmental Satellite Organizations (“ISOs”)

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## COMMENT

# 2001: A SPACE LEGISLATION ODYSSEY—A PROPOSED MODEL FOR REFORMING THE INTERGOVERNMENTAL SATELLITE ORGANIZATIONS

HENRY WONG\*

*“[TO] COMBINE THE BEST OF ARTHUR C. CLARKE WITH ADAM SMITH.”*<sup>1</sup>

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\* J.D./M.B.A. Candidate May 1999, *American University, Washington College of Law/Kogod Graduate School of Business*; B.A., 1996, *University of Washington School of Business*. The author would like to thank his mother, father, and sister for their unconditional love and support. At the time this Comment went to print, the 105th Congress concluded without acting on the Bills discussed herein. Nonetheless, a new Bill, S. 376, entitled “Open Market Reorganization for Better International Telecommunications” (“ORBIT”), was re-introduced by Sen. Conrad Burns in the 106th Congress and contains basically the same provisions as the Bills discussed herein. *See Burns Floats Draft Bill on Intelsat Privatization*, TELECOMMS. REP. INT’L, Jan. 29, 1999, at 1 (discussing the introduction of the proposed Satellite Services Competition and Privatization Act of 1999); *see also ‘ORBIT’ Bills Falls Short of Compromise on Intelsat*, TELECOMMS. REP. INT’L, Feb. 12, 1999, at 1 (discussing the introduction of ORBIT in the 106th Congress).

1. *See The Communications Satellite Competition and Privatization Act of 1997: Legislative Hearing on H.R. 1872 Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Commerce Comm.*, 105th Cong. 61, at 22 (1997) [hereinafter *Satellite Comp. Hearings*] (testimony of Jack Gleason, Associate Administrator for International Affairs, National Telecommunications and Information Administration) (describing the delicate goal of striking a balance between technological innovation and economic efficiency); *see also* GENERAL ACCOUNTING OFFICE, TELECOMMUNICATIONS: COMPETITION ISSUES IN INTERNATIONAL SATELLITE COMMUNICATIONS ((GAO/RCED-97-1) Oct. 11, 1996) [hereinafter GAO REPORT ‘97] (“The world famous physicist and science fiction author Arthur C. Clarke is credited with conceptualizing, in 1945, plans that showed how three objects orbiting the earth at different locations 22,300 miles above the equator could distribute radio signals that could reach anywhere on earth.”); Robert A. Nelson, *The Art of Communication via Satellite*, VIA SATELLITE, July 1998, at 16 (“In 1945 Arthur C. Clarke wrote an article entitled ‘The Future of World Communications’ for the magazine *Wireless World*. This article, which the editors renamed ‘Extra-Terrestrial Relays,’ was published in the October issue. In it, Clarke described the properties of the geostationary orbit, a circular orbit in the equatorial plane of the earth such that a satellite appears to hover over a fixed point on the equator.”); ADAM SMITH, AN INQUIRY

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INTRODUCTION

Few Americans know that satellite service is only possible through the auspices of an internationally sanctioned monopoly. During the 105th Congress, important legislation was introduced which could have changed this. Congressmen Thomas Bliley<sup>2</sup> and Edward Markey<sup>3</sup> introduced H.R. 1872 (the “Bliley Bill”), entitled the

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INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776) (discussing free market and laissez-faire economics).

2. Representative Thomas Bliley represents Virginia's Seventh District and is the Chairman of the House Commerce Committee. *See* JOINT COMMITTEE ON PRINTING UNITED STATES CONGRESS, 1997-1998 OFFICIAL CONGRESSIONAL DIRECTORY, 105TH CONGRESS 415 (1998) [hereinafter CONGRESSIONAL DIRECTORY].

3. Representative Edward Markey is a Democrat from Massachusetts and is also a member of the House Subcommittee on Telecommunications, Trade and Consumer Protection. *See id.*

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“Communications Satellite Competition and Privatization Act of 1998” (the “Act”), which could have dramatically affected the provision of international satellite telecommunications services around the world. The Bliley Bill sought to amend the Communications Satellite Act of 1962<sup>4</sup> by calling for the privatization of all treaty-established Intergovernmental Satellite Organizations (“ISOs”) beginning in the Year 2001.<sup>5</sup> At the cornerstone of the debate was the future role of the three ISOs: COMSAT, INTELSAT, and Inmarsat.

For the past three decades, these ISOs have provided global nondiscriminatory service, including everything from a direct communications link, the “Hot Line,” between the President and Moscow during the Cold War to worldwide coverage of the Summer Olympics. However, as worldwide privatization of state-owned telecommunications companies continues,<sup>6</sup> the value of a monopolistic global satellite system has diminished. On the horizon, numerous private satellite companies stand ready to compete in this marketplace.<sup>7</sup> These companies argue that they can provide the same non-discriminatory service to consumers around the world at lower prices.<sup>8</sup>

Not surprisingly, these calls for privatization have not been left unanswered. While Washington agrees that the old system hinders

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at 415.

4. See *infra* Part I.A (discussing the legislative history behind the Communications Satellite Act of 1962).

5. See H.R. 1872, 105th Cong. (1998).

6. See John H. Harwood II et al., *Competition in International Telecommunications Services*, 97 COLUM. L. REV. 874, 904 n.37 (1997). The European Union adopted a directive, Commission Directive 96/19, 1996 O.J. (L 74) 14, to begin privatizing many of Europe’s dominant carriers. See *id.*, at 904. In Japan, Nippon Telegraph and Telephone was allowed to compete with the former international service monopoly, Kokusai Denshin Denwa for the first time. See *id.* Moreover, Singapore intends to end Singapore Telecom’s monopoly by mid-2000 and Australia was scheduled to be deregulated last year. See *id.* In the Americas, Canada, Chile, and several Latin American countries have privatized their telecommunications operators. See *id.*

7. See Chris Forrester, *LEO, GEOs and MEOs, Will They All Fly?*, VIA SATELLITE, Oct. 1997, at 18 (discussing the various satellite systems proposing to offer their satellite communications services beginning in 1998); see also Timothy J. Logue, *Opening Doors Around the World*, SATELLITE TELECOMMS., Aug. 1996, at 31. The satellite industry is in its most dynamic growth stage ever. See *id.* In developed countries, Global Positioning System technology coupled with direct broadcast satellite services are reaching more people than ever. See *id.* In developing countries, the demand for satellites is growing at an exponential rate because of the lack of terrestrial infrastructure costs. See *id.* The next generation of satellites, low and medium earth orbiting, will bring internet access to businesses and consumers alike. See *id.*

8. See *Satellite Comp. Hearings*, *supra* note 1, at 43 (testimony of Gerald B. Helman, Vice President, Mobile Communications Holding, Inc.). “Technology is making possible a broad array of services by satellite, capable of reaching and benefiting everyone.” *Id.* U.S. based companies are prepared to offer nondiscriminatory service to the entire world. See *id.* “The bottom line of a competitive marketplace is that more people around the world will be served by a growing array of [services] at lower prices.” *Id.*

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competition, ongoing debate still exists as to the future role of the ISOs.<sup>9</sup> This, however, did not prevent the proposed legislation from garnering significant bi-partisan support from both the House of Representatives and the Senate in its initial stages.<sup>10</sup> The Bliley Bill passed overwhelmingly in the House of Representatives and was forwarded to the Senate for review.<sup>11</sup> Meanwhile, Senator Conrad Burns<sup>12</sup> recently introduced in the Senate the “International Satellite Communications Reform Act of 1998,”<sup>13</sup> with similar aims to privatize the ISOs. The Clinton Administration has also joined the restructuring efforts by establishing a working group to facilitate the restructuring of the ISOs.<sup>14</sup> Consequently, change is inevitable; the question now is whether the Act provides the best vehicle for that change.

This Comment reviews the U.S. Government’s efforts to create a competitive satellite industry in the United States through the restructuring of the ISOs. Part I provides a historical and legal background of the ISOs in question. Part II explains why these ISOs frustrate competition in the modern-day telecommunications market. Part III reviews the current efforts toward competition and restructuring of the ISOs. Part IV looks specifically at the Act and describes the obstacles to be overcome to achieve success. Finally, Part V proposes a working model for legislation to ensure that the Act’s goals of global competition are met.

## I. A HISTORICAL AND LEGAL OVERVIEW OF ISOs

### A. *The Communications Satellite Act of 1962*

Some Americans can still recall the 1950s when the Russian launch of Sputnik threatened America’s proclaimed “technological superiority.”<sup>15</sup> The success of Sputnik at the peak of the Cold War

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9. See discussion *infra* Part IV (discussing the ongoing debate over the ISO restructuring).

10. See discussion *infra* Parts IV.A, .D, .G, and .E (discussing the various pieces of legislation introduced in Congress aimed at restructuring the ISOs).

11. See 144 CONG. REC. H2859 (daily ed. May 6, 1998) (recording passage of H.R. 1872 by a 403 to 16 vote); see also Mike Mills, *New Competition for COMSAT?*, WASH. POST, May 7, 1998, at E5 (discussing the passing of H.R. 1872 and possible consequences if enacted).

12. Senator Conrad Burns is a Republican from Montana and Chairman of the Senate Commerce, Science, and Transportation Subcommittee on Communications. See CONGRESSIONAL DIRECTORY, *supra* note 2, at 377.

13. S. 2365, 105th Cong. (1998) (stating that its goals are to promote competition in a global satellite market by privatizing intergovernmental satellite organizations).

14. See discussion *infra* Parts III.C.2, .3 (discussing the current efforts by the Administration to facilitate ISO restructuring).

15. See ANN HENRY, THE SATELLITE SERVICES INDUSTRY 3-4 (Oct. 8, 1997) (Robertson Stephens Telecoms Research Report) (discussing the launch of Sputnik as igniting a global ‘space race’).

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sparked a legacy of insecurity with the American People about space technology.<sup>16</sup> Many Americans believed that the “race to space” would determine the outcome of the Cold War.<sup>17</sup> Based on this public insecurity, Congress responded with a flurry of space legislation directed at easing the national conscience.<sup>18</sup>

One such initiative was the enactment of the Communications Satellite Act of 1962 (“CS Act”),<sup>19</sup> which sought to establish a global communications system operated by a United States company. Some pundits suggested that a U.S.-driven proposal for global satellite services was the only way to keep the Russian space program at bay until the United States caught up.<sup>20</sup> Others believed that an international cooperative was the only viable economic model for the provision of global satellite services.<sup>21</sup> Either way, the CS Act represented the first international attempt at commercial space activity.

The CS Act’s primary goal was to develop a commercial communications satellite system for worldwide telephone connectivity.<sup>22</sup> The CS Act mandated the application of military defense space technology in developing the global system.<sup>23</sup> Under extensive governmental oversight,<sup>24</sup> the CS Act created the

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16. *See Satellite Comp. Hearings, supra* note 1, at 4 (opening statement by the Honorable W.J. “Billy” Tauzin, Chairman, Subcommittee on Telecommunications, Trade, and Consumer Protection) (“Americans believed that capitalism was the engine behind unending economic growth. Sputnik spooked us.”).

17. *See* PBS ONLINE NEWSHOUR FORUM, THE DAWN OF THE SPACE AGE (visited Nov. 24, 1998) <[http://www.pbs.org/newshour/forum/october97/sputnik\\_10-13.html](http://www.pbs.org/newshour/forum/october97/sputnik_10-13.html)> (on file with the *American University Law Review*) (“The fact that a nuclear bomb could have been substituted for the satellite was quickly pointed out.”).

18. *See* HENRY, *supra* note 15, at 6.

19. 47 U.S.C. § 701 (1997) (reporting under § 701(a) that the policy of Congress under this Act was to establish a commercial communications satellite system, in conjunction with other countries, to incorporate “public needs and national objectives, which will serve the communication needs of the United States and other countries, which will contribute to world peace and understanding”).

20. *See Satellite Comp. Hearings, supra* note 1, at 4 (opening statement by the Honorable W.J. “Billy” Tauzin, Chairman, Subcommittee on Telecommunications, Trade, and Consumer Protection); *see also* G.A. CODDING, JR., THE FUTURE OF SATELLITE COMMUNICATIONS 38 (1990). Responding to the challenge created by U.S. support of INTELSAT, the Soviet Union created Intersputnik in 1968. *See id.* Today Intersputnik offers telecommunications services to users in seventy different countries, including the United States. *See id.*

21. *See Satellite Comp. Hearings, supra* note 1, at 13 (testimony of Regina M. Keeney, Chief, International Bureau, FCC).

22. *SEE* GENERAL ACCOUNTING OFFICE, TELECOMMUNICATIONS: COMPETITIVE IMPACT OF RESTRUCTURING THE INTERNATIONAL SATELLITE ORGANIZATIONS I ((GAO/RCED-96-204) July 8, 1996) [hereinafter GAO REPORT ‘96].

23. *See* GAO REPORT ‘97, *supra* note 1, at 14 (reporting that the military launched its first satellite, Explorer I, on January 31, 1958); *see also* Robert Wold, *Nasa at 40, The Early Years Pay Off*, VIA SATELLITE, Oct. 1998, at 32 (stating that the roots for communications satellites are in rocket science developed for intercontinental ballistic missiles).

24. *See Satellite Comp. Hearings, supra* note 1, at 18 (testimony of Regina M. Keeney, Chief,

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Communications Satellite Corporation (“COMSAT”)<sup>25</sup> to develop and coordinate the system. At the time it was passed, no one could have guessed the tremendous impact and success the CS Act would eventually have on world communication.

When Apollo 11 landed on the moon in 1969,<sup>26</sup> the images of the event were carried live via satellite to millions of people worldwide.<sup>27</sup> As a result of a global commercial satellite system, it was the most widely viewed event in broadcast history.<sup>28</sup> As astronaut Neil Armstrong announced that he had taken “one small step for man, one giant leap for mankind,” Americans at last were able to shed their insecurity over Sputnik. Congress’ repeated attempts to ease the national conscience had finally manifested itself through the legacy of the CS Act.

From that point forward, America would regain the lead in the space race. More importantly, however, these satellite images marked the beginning of a period that would change forever conventional views of the universe and the world’s relationship to the cosmos.

#### *B. COMSAT’s Catalyst Role in the Satellite Telecommunications Industry*

Congress established COMSAT as a publicly traded private corporation in 1962.<sup>29</sup> Initially, the CS Act mandated that COMSAT develop, alone or in conjunction with foreign governments, a commercial communications satellite system.<sup>30</sup> Many believed that the best way to achieve this goal was to structure COMSAT as a commercial for-profit entity which would then invest in the system.<sup>31</sup> After numerous hearings on the matter, Congress eventually called for COMSAT to work with countries around the world to create the International Telecommunications Satellite Organization (“INTELSAT”).<sup>32</sup> Today COMSAT remains the largest owner and

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International Bureau, FCC); *see also* 47 U.S.C. § 721(a)(4) (1997) (stating that COMSAT is subject to extensive supervision “to assure that COMSAT’s relations with foreign governments and international organizations are consistent with the national interests and foreign policy of the United States”).

25. *See* GAO REPORT ‘97, *supra* note 1, at 3. On June 1, 1993, the Communications Satellite Corporation changed its name to COMSAT Corporation. *See id.* at 20 n.1.

26. *See* EDGAR M. CARTRIGHT, APOLLO EXPEDITIONS TO THE MOON 203 (giving a detailed discussion on the events leading up to, and during, the Apollo 11 landing).

27. *See* GAO REPORT ‘97, *supra* note 1, at 14 (explaining that the satellite broadcast was viewed by 500 million people).

28. *See id.*

29. *See id.* at 20.

30. *See Satellite Comp. Hearings, supra* note 1, at 18 (testimony of Regina M. Keeney, Chief, International Bureau, FCC).

31. *See id.*

32. *See* GAO REPORT ‘97, *supra* note 1, at 21 (stating that INTELSAT was created first through an interim agreement in 1964, with its present structure finalized in 1973 through an

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user of the INTELSAT system in the United States.<sup>33</sup> In 1979, Congress expanded COMSAT's role, making it a signatory to the International Maritime Satellite Organization ("Inmarsat") as well.<sup>34</sup> As a result of its 'legal monopoly,' COMSAT became the sole United States access provider to the Inmarsat and INTELSAT systems.

The benefits of COMSAT's status as the only U.S. access provider to the global systems are significant. Today COMSAT is traded on three U.S. exchanges by 48,000,000 shareholders.<sup>35</sup> Its 1996 revenues topped the 500 million dollar mark and its net income was just under nine million.<sup>36</sup> As a legal monopoly, COMSAT is regulated as a dominant carrier by the Federal Communications Commission ("FCC").<sup>37</sup> Accordingly, COMSAT must seek approval from the FCC each year to raise equity or incur debt.<sup>38</sup> In addition, these same regulations prohibit any investor from owning more than ten percent of its shares.<sup>39</sup> As a result of these restrictions, however, COMSAT also enjoys special privileges not afforded other satellite providers—most notably, its immunity against U.S. antitrust laws.<sup>40</sup>

### C. INTELSAT and Inmarsat

INTELSAT was established via international treaty by the United States and eighteen other countries in 1964<sup>41</sup> to provide voice, data, and video communications. Although established by international

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intergovernmental agreement with other countries).

33. *See id.* at 23. "Three U.S. agencies—the State and Commerce departments and the Federal Communications Commission—have primary responsibility for overseeing U.S. membership in the [ISOs] and for instructing the U.S. signatory in its representational role." *Id.* at 3.

34. *See id.* at 23.

35. *See* COMSAT CORP., SEC 10-K FILING (Mar. 24, 1997), available in LEXIS, COMPNY Library, SEC File.

36. *See* COMSAT CORP., 1997 ANNUAL REPORT 19 (1997).

37. *See International Satellite Reform: Is Technology Outpacing Regulation?: Hearing Before the Subcomm. on Comm. of the Senate Commerce, Science and Transportation Comm.*, 105th Cong. (1998) available at <<http://www.senate.gov/~commerce/hearings/hearin98.htm>> [hereinafter *Satellite Reform Hearings*] (testimony of Betty Alewine, President and CEO, COMSAT Corporation).

38. *See id.*

39. *See id.*

40. *See* discussion *infra* Part II (describing recent litigation where COMSAT was deemed to be immune from U.S. antitrust laws).

41. *See* Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT", Aug. 20, 1971, 23 U.S.T. 3813, 3819, T.I.A.S. No. 7532 (effective Feb. 12, 1973) [hereinafter *INTELSAT Agreement*]; *see also* Johannes P. Pfeifenberger & Hendrik S. Houthakker, *Does INTELSAT Face Effective Competition in the Provision of its Services?* (July 1996) <<http://www.citi.columbia.edu/history/conferen.htm>> (presented during the INTELSAT Restructure and Satellite Competition Conference at the Columbia Institute for Tele-Information, New York, April 26, 1996) (concluding that INTELSAT faces effective competition from alternative providers of telecommunications transmission capacity) (*Competition Report*). Although established in 1964, INTELSAT was converted into its present day structure as an international treaty organization in 1973. *See id.*

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treaty, INTELSAT is a commercial venture intended to produce a minimum fourteen percent return each year for its shareholders.<sup>42</sup> In order to facilitate the commercial framework, agreements were drafted, allowing participation in ownership of the satellite capability. Thus, countries could invest in the amount of delivery they desired by purchasing an interest in INTELSAT. Today INTELSAT has over 140 signatories possessing ownership in the INTELSAT system. The United States owns the largest share, at 17.96%.<sup>43</sup> A minimum level of participation is available to smaller countries like Uruguay, which owns .05% of the system.<sup>44</sup> Accordingly, no one country can control delivery because maximum shares are based on total participation by all countries. As a result, each country shares a varying ownership interest in INTELSAT, depending upon its use of INTELSAT services.

Today, INTELSAT provides global connectivity to over 200 countries and operates a global system of twenty-seven geostationary satellites.<sup>45</sup> Its 1997 revenues were approximately \$900 million, and its assets were worth over three billion dollars.<sup>46</sup> Through the INTELSAT system, millions of Americans and people worldwide have been able to witness spectacular events, including live global coverage of news-breaking events.

As a system owned by countries around the world, INTELSAT is immune to the laws of any one country.<sup>47</sup> Accordingly, INTELSAT is immune from national taxes and cannot be sued unless it expressly waives its immunity.<sup>48</sup> In addition, INTELSAT enjoys special privileges to lucrative geostationary satellite orbital slots which are not afforded other operators.<sup>49</sup> Finally, INTELSAT is the dominant world provider of satellite services because it has special access to its shareholders' markets around the world.<sup>50</sup>

Like INTELSAT, the International Maritime Satellite Organization

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42. See GLENN H. REYNOLDS & ROBERT P. MERGES, OUTER SPACE: PROBLEMS OF LAW AND POLICY 202-04 (1989); see also Michael A. Einhorn, *INTELSAT, A Reform Proposal* (July 15, 1996), available at <<http://www.citi.columbia.edu/history/einhorn.htm>> (presented during the INTELSAT Restructure and Satellite Competition Conference at Columbia Institute for Tele-Information, New York, April 26, 1996) (reporting that today INTELSAT's target rate of return is 20%, while its actual rate of return is 17%).

43. See *id.*

44. See *id.*

45. See INTELSAT, 1997 ANNUAL REPORT (1997).

46. See *id.*

47. See INTELSAT Agreement, *supra* note 41, at art. XV (stating that INTELSAT is governed by international treaty).

48. See *id.*

49. See discussion *infra* Part II.B (discussing the competitive advantages enjoyed by INTELSAT).

50. See discussion *infra* Part II.B (discussing INTELSAT's dominance in its members' markets).

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“Inmarsat”) <sup>51</sup> was formed by an international treaty in 1979 <sup>52</sup> pursuant to the Maritime Satellite Act. <sup>53</sup> Its initial purpose was to improve maritime communications. <sup>54</sup> Through its operations, Inmarsat has acted as a life-line to many seafarers by carrying distress communications from ailing vessels at sea. <sup>55</sup> Although Inmarsat was established to provide global maritime communications, its services were expanded in 1985 to include the aeronautical sector as well. <sup>56</sup> More recent amendments in 1989 allow Inmarsat to compete in the mobile satellite service markets. <sup>57</sup> Today, Inmarsat operates a global system of eight satellites—four operational and four spares. <sup>58</sup> Like its sister INTELSAT, Inmarsat enjoys immunity from all national laws and taxation. <sup>59</sup> Currently, Inmarsat is headquartered in London and has seventy-nine member countries. <sup>60</sup>

#### D. *The Legal Structure of the ISOs*

As treaty organizations, INTELSAT and Inmarsat are made up of ‘parties’ and ‘signatories.’ <sup>61</sup> Parties are the national governments which have signed the international treaty. They meet biannually at the Assembly of Parties to consider issues of general policy and long-term objectives. <sup>62</sup> Signatories, on the other hand, are the actual owners and operators of the satellite systems. <sup>63</sup> They are typically owned by national governments or government sanctioned monopolistic private companies. <sup>64</sup> Some countries act as both

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51. See GAO REPORT ‘97, *supra* note 1, at 2 (explaining that the International Maritime Satellite Organization was renamed the International Mobile Satellite Organization in 1993).

52. See Convention of the International Maritime Satellite Organization (“Inmarsat”), Sept. 3, 1976, 31 U.S.T. 1, 4, 1143 U.N.T.S. 105, 107 (effective July 16, 1979) [hereinafter *Inmarsat Convention*].

53. Pub. L. No. 87-624, Title V, § 501, 92 Stat. 2392 (1978).

54. See *Satellite Comp. Hearings*, *supra* note 1, at 15 (testimony of Regina M. Keeney, Chief, International Bureau, FCC).

55. See *id.*

56. See GAO REPORT ‘96, *supra* note 22, at 3.

57. See *Inmarsat Convention*, *supra* note 52, at art. III(1) (referencing “aeronautical communications” and “air traffic services”). See generally GENERAL ACCOUNTING OFFICE TELECOMMUNICATIONS: COMPETITION IN THE MOBILE COMMUNICATIONS INDUSTRY (GAO/RCED-96-20) (Oct. 12, 1995) (describing the competition and market potential of the mobile communications industry).

58. See GAO REPORT ‘96, *supra* note 22, at 3.

59. See INTELSAT Agreement, *supra* note 41, at art. XV.

60. See GAO REPORT ‘97, *supra* note 1, at 23-24.

61. See Einhorn, *supra* note 42.

62. See *id.* (reporting that the Assembly of Parties meet to decide “competitive rulemaking, tariff-setting, capacity additions, technology overhauls, and the ways to maintain global connectivity”).

63. See *Satellite Comp. Hearings*, *supra* note 1, at 15 (testimony of Regina M. Keeney, Chief, International Bureau, FCC).

64. See GAO REPORT ‘96, *supra* note 22, at 3.

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signatories and parties to the international treaty.

The signatories are responsible for financing INTELSAT and Inmarsat.<sup>65</sup> Their level of contribution depends on the level of capacity the signatory desires from the system.<sup>66</sup> The largest investors of the system sit on the Board of Governors and participate in major decisions affecting the organization.<sup>67</sup> These decisions include the design, development, establishment, operation, and maintenance of the satellite system.<sup>68</sup> Although each country gets one vote at the Assembly of Parties, voting on the Board of Governors is dependent upon each signatory's investment share.<sup>69</sup> COMSAT is the U.S. signatory to both INTELSAT and Inmarsat, and also sits on the Board of Governors.<sup>70</sup>

Countries will generally appoint only one agent as their signatory to buy and resell capacity on the INTELSAT and Inmarsat systems.<sup>71</sup> INTELSAT's profits are distributed to the signatories on the basis of their investment share in the system.<sup>72</sup> Because the signatories pay for all operational expenses of the ISOs, they recover this cost by selling their invested capacity to local long-distance companies, private network operators, broadcasters, and other organizations.<sup>73</sup> In effect, these signatories act as the marketing and selling arms of the ISOs. The mark-ups charged by the signatories depend upon the country in which they are providing service.<sup>74</sup> In most cases, the signatory is able to charge high rates because it is usually the sole direct access provider to the INTELSAT and Inmarsat systems.<sup>75</sup>

## II. THE STRUCTURE OF THE ISOs IMPEDES COMPETITION

### A. *Market Advantages*

To provide satellite service in any country, the operator must gain

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65. *See id.* at 3.

66. *See Satellite Comp. Hearings, supra* note 1, at 15 (testimony of Regina M. Keeney, Chief, International Bureau, FCC).

67. *See id.*

68. *See* GAO REPORT '97, *supra* note 1, at 22.

69. *See id.*

70. *See* Anthony Velocci, Jr., *Lockheed-Martin Angling for Comsat Acquisition*, AVIATION WK. & SPACE TECHNOLOGY, Sept. 28, 1998, available at 1998 WL 19818215 (reporting that COMSAT owns 18% of INTELSAT and 22% of Inmarsat).

71. *See* Einhorn, *supra* note 42 (explaining that pending formal ratification, INTELSAT's Board of Governors will permit several signatories).

72. *See* GAO REPORT '97, *supra* note 1, at 22.

73. *See* Pfeifenberger & Houthakker, *supra* note 41 (describing extensively the different customers of international satellite services—including CBS, HBO, Reuters, and the BBC).

74. *See* GAO REPORT '96, *supra* note 22, at 7.

75. *See* discussion *infra* Part II (describing how the structure of the ISOs impedes competition).

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permission from domestic licensing authorities.<sup>76</sup> In the United States, operators must submit requests to the FCC.<sup>77</sup> In many other countries, however, the licensing authorities are also signatories to the ISOs.<sup>78</sup> Signatories benefit significantly from this arrangement because they have a vested interest in their investment in the ISOs and charge large mark-ups on ISO services.<sup>79</sup> Subsequently, these licensing authorities favor INTELSAT and Inmarsat over other foreign operators who desire to do business in their country.<sup>80</sup>

Some governments restrict access to foreign competitors altogether and utilize the ISOs as their sole service providers.<sup>81</sup> Others place heavy restrictions upon operations, effectively closing markets to other competitors.<sup>82</sup> These barriers include: (1) authorizing earth stations only if they serve INTELSAT's satellites; (2) assessing prohibitively high tariffs on smaller earth stations used by private satellite operators; (3) prohibiting alternative systems' interconnectivity with the local telephone network (which, of course, is also owned by the signatory/regulatory agency); and (4) denying or restricting access to necessary radio spectrum for the transmission of satellite signals.<sup>83</sup> In the United States, however, end users and long distance carriers are allowed to bypass COMSAT and purchase capacity from other satellite providers.<sup>84</sup> Nonetheless, the ISOs possess strong market power over potential competitors in a significant portion of the rest of the world.

### *B. Competitive Advantages*

The ISOs also enjoy special advantages over the competition. The ISOs now control the most lucrative geostationary orbital slots that

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76. See GAO REPORT '96, *supra* note 22, at 17 (stating that operators must gain the right to use the necessary spectrum, such as radio frequencies, to establish the necessary ground stations to receive satellite signals, and permission to interconnect on the ground with the domestic telephone service).

77. See *id.* INTELSAT, headquartered in the United States, also coordinates access to fixed orbital locations and spectrum through the FCC. See *id.* However, submissions by INTELSAT to the FCC are forwarded automatically to the International Telecommunications Union for evaluation rather than being submitted to the FCC for approval. See *id.*

78. See GAO REPORT '97, *supra* note 1, at 30 (explaining that the FCC has reported that 71% of the signatories to the ISOs are also the regulatory authorities which decide on licensing, spectrum allocation, and market access).

79. See *id.*

80. See *id.*

81. See Einhorn, *supra* note 42.

82. See GAO REPORT '97, *supra* note 1, at 29 (outlining concerns about competition in the international communications market).

83. See *id.* at 30.

84. See Einhorn, *supra* note 42 (explaining that competition is more apparent in the United States, where other telecommunications companies are allowed to purchase capacity in other satellite systems besides INTELSAT).

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link the major traffic routes around the world.<sup>85</sup> As ISOs, INTELSAT and Inmarsat enjoy faster access to these orbital slots because their applications are not subject to national review.<sup>86</sup> Other private operators must first file with the appropriate national authority for evaluation before their application is forwarded to the International Telecommunications Union (“ITU”) for coordination.<sup>87</sup> Although the ISOs also submit their requests to their host country, these submissions are mere formalities.<sup>88</sup> The applications take only one to two days to process because they are forwarded automatically to the ITU without national review.<sup>89</sup> The licensing process for private U.S. operators, however, includes on average, a five-year FCC review for the provision of international service and eighteen months for domestic service.<sup>90</sup>

Furthermore, since orbital slots are awarded on a “first come, first served” basis, this practice complicates new competitors’ access to the slots.<sup>91</sup> Latter applicants must coordinate with prior applicants in order to hedge against technical interference.<sup>92</sup> This is very important for private operators because they must divulge sensitive and proprietary business information to the ISOs when coordinating with their systems.<sup>93</sup> Not surprisingly, INTELSAT commonly registers more slots than it needs because of this streamlined registration

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85. See Siegfried Wiessner, *The Public Order of the Geostationary Orbit: Blueprints for the Future*, 9 YALE J. WORLD. PUB. ORD. 217, 218-20 (1983) (reporting that the geostationary orbit lies directly above the equator at an altitude of 22,300 (35,776 km) in the sky); see also Sharon L. Fjordbak, *The International Direct Broadcast Satellite Controversy*, 55 J. AIR L. & COM. 903, 905 (1990) (explaining why traditional communications satellites broadcast from a geostationary orbit). A satellite positioned in geostationary orbit provides the most desirable means of relaying telecommunications signals because the satellite travels at the same speed of the rotation of the earth. See *id.* Thus, its fixed position in the sky eliminates the need for a land-based transmitter to track constantly its location. See *id.* Three satellites operating in relay can provide worldwide coverage. See *id.* See generally Martin A. Rothblatt, *The Impact of International Satellite Communications Law upon Access to the Geostationary Orbit and the Electromagnetic Spectrum*, 16 TEX. INT’L L.J. 207, 209-10 (1980) (discussing the development of geostationary spectrum).

86. See discussion *supra* Part I.C (stating that ISOs may bypass national regulatory authorities in gaining rights to geostationary orbital slots).

87. See discussion *supra* Part II.A (illustrating as a market advantage the ISOs enjoy through speedy licensing).

88. See GAO REPORT ‘97, *supra* note 1, at 30 (discussing various governmental controls over telecommunications). INTELSAT submits its requests to the United States while Inmarsat submits its requests to the United Kingdom. See *id.*

89. See *id.* (noting the short timeframe for processing government submissions).

90. See *id.* (pointing out the significant amount of time taken by the FCC to process private company licenses).

91. See Henry Wong, Comment, *The Paper “Satellite” Chase: The ITU Prepares for its Final Exam in Resolution 18*, 63 J. AIR L. & COM. 850-51 (1998) (discussing the ITU’s orbital slot registration process).

92. See *id.*; see also discussion *supra* Part II.A (discussing the ISOs’ orbital slot registration process).

93. See GAO REPORT ‘97, *supra* note 1, at 31-32 (noting that various companies have complained of being competitively harmed from having to provide sensitive information).

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process.<sup>94</sup> This “hoarding” of orbital slots has resulted in many disputes with private operators over the ISOs’ “paper satellites.”<sup>95</sup> As a result, the ISOs effectively prevent competitors from obtaining orbital slots<sup>96</sup> or spectrums necessary to operate their systems.<sup>97</sup>

The ISOs’ sheer size and dominance also provide competitive advantages. Operating over twenty satellites, INTELSAT can allocate a significant portion of its abundant capacity to new services and developing markets.<sup>98</sup> The organization is considerably larger, in both capacity and volume of services, than any other geostationary satellite system throughout the world.<sup>99</sup> Although Inmarsat is not quite so large, it is the only provider of global maritime satellite services.<sup>100</sup> This dominance provides the ISOs with capital to expand into developing markets since they may look to its signatories as well as the capital markets for financing.<sup>101</sup> In addition, commercial investors view these ISOs as favorable risks because of the signatories’ ties to their governments in most countries.<sup>102</sup> In fact, the Alliance for Competitive International Satellite Services<sup>103</sup> (“ACISS”) has reported that private operators have trouble finding financing for their prospective systems if those systems will compete with the ISOs.<sup>104</sup>

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94. See Notes of Scott Blake Harris, Chief, International Bureau, FCC, from his speech delivered at the INTELSAT Restructure and Satellite Competition Conference, Columbia Institute for Tele-information, New York (Apr. 26, 1996), available at <<http://www.citi.columbia.edu/speechsbh.html>>.

95. See Wong, *supra* note 91. The paper satellite problem refers to the gigantic number of applications filed with the ITU Radiocommunications Bureau to operate satellite systems at specific locations in geostationary orbit. See *id.* at 850-51. Abuse of the ITU’s “first come, first serve” reservations process has caused congestion in the orbital arc by satellite system projects that exist on paper, but not in reality. See *id.* at 851. INTELSAT maintains its own inventory of paper satellites in order to hedge against satellite failure. See *id.* Many private operators, however, accuse INTELSAT of hoarding slots for only speculative purposes. See *id.* at 851 n.19 (reserving slots for future multimedia uses).

96. See *Satellite Failure Highlights INTELSAT’s Need for Operational Flexibility*, SATELLITE WK., Sept. 22, 1997, at 1997 WL 7891911 (discussing INTELSAT’s asserted need to retain paper satellites to hedge against the risk of satellite failure).

97. See GAO REPORT ‘96, *supra* note 22, at 15.

98. See GAO REPORT ‘97, *supra* note 1, at 21.

99. See *id.*; see also *Global Countdown: Satellite Operators Are Rushing to Establish Networks to Deliver Services Worldwide*, UPLINK, Winter 1996-1997, available at <<http://www.spaceway.com/uplink/archive/up964/global964.html>> [hereinafter *Global Countdown*] (discussing PanAmSat’s merger with Galaxy to create a comparable system of 21 geostationary satellites).

100. See GAO REPORT ‘97, *supra* note 1, at 44 (discussing Inmarsat’s public interest role as a communications link to ailing vessels at sea). But see Forrester, *supra* note 7, at 18 (discussing new satellite systems which will provide mobile satellite services in the near future).

101. See GAO REPORT ‘97, *supra* note 1, at 44 (noting competitors’ concerns about Inmarsat’s market dominance).

102. See *id.* (discussing advantages held by Inmarsat from the perspective of investors).

103. See *id.* at 18 (reporting that ACISS is composed of Columbia Communications Corp., Motorola Inc., Odyssey Worldwide Services, Orbital Communications Corporation, Orion Network Systems, PanAmSat Corporation, and TRW Inc.).

104. See *id.*

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Moreover, when these private companies can secure financing, they must pay considerably higher interest rates.<sup>105</sup>

### *C. Regulatory Advantages*

The ISOs also benefit from distinct regulations over their competition. The organizations' treaty status provides certain privileges and immunities.<sup>106</sup> Not only are the ISOs' earnings exempt from national taxation, but they are also immune from antitrust and liability prosecution.<sup>107</sup>

In 1989, PanAmSat,<sup>108</sup> a private U.S. satellite operator, brought suit against COMSAT alleging a variety of anti-competitive activities.<sup>109</sup> The U.S. District Court for the Southern District of New York dismissed the complaint on the grounds that signatories are "representatives of the parties," and that the immunity clause of the international treaties applied to signatories like COMSAT as well.<sup>110</sup> After several years of litigation, the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of PanAmSat's lawsuit in 1997, holding that PanAmSat failed to present sufficient evidence to support its charges that COMSAT had violated antitrust laws and engaged in predatory pricing.<sup>111</sup> As a result, the ISOs may act in the market in ways their competitors cannot because they are immune from U.S. antitrust laws.

Also, the treaties require that firms that wish to compete with INTELSAT must coordinate with INTELSAT to ensure they do not cause the ISOs any significant economic harm or technical interference.<sup>112</sup> These consultations with the ISOs usually require divulgence of proprietary business information.<sup>113</sup> In fact, an FCC

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105. *See id.*

106. *See* Einhorn, *supra* note 42.

107. *See* GAO REPORT '96, *supra* note 22, at 12.

108. *See* PANAMSAT, THE COMPANY, *available at* <<http://www.panamsat.com/company.htm>> (visited Nov. 24, 1998) (giving a broad overview of company).

109. *See* Alpha Lyracom Space Communications, Inc. v. COMSAT Corp., Opinion and Order, 89 Civ. 5021 (S.D.N.Y. 1990), 59 USLW 2209, *rev'd in part*, 946 F.2d 168 (1991) (reporting that plaintiff's claimed that COMSAT participated in anticompetitive conduct to squash plaintiff's ability to enter into the domestic and international markets successfully).

110. *See id.*

111. *See* Alpha Lyracom Space Communications, Inc. v. COMSAT Corp., 113 F.3d 372 (2d Cir. 1997) (explaining that COMSAT's activities were immune to legal proceedings and could not be deemed as evidence to support PanAmSat's antitrust claims); *see also* PANAMSAT, PRESS RELEASE, PANAMSAT CALLS FOR LEGISLATIVE ACTION TO END COMSAT'S PRIVILEGES AND IMMUNITIES (May 19, 1997), *available at* <<http://www.panamsat.com/news/p051997.htm>> (discussing the U.S. Court of Appeals' dismissal of PanAmSat's antitrust lawsuit against COMSAT).

112. *See* GAO REPORT '96, *supra* note 22, at 12.

113. *See* GAO REPORT '97, *supra* note 1, at 31-32.

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approval to operate a system in the United States must first be predicated by a determination from the ISOs that the prospective operator will not cause the organization any technical interference or economic injury.<sup>114</sup>

Not surprisingly, several disputes between private operators and the ISOs have arisen. In one instance, INTELSAT's consideration of possible *financial* impacts of Columbia Communications Corporation's system ("Columbia")<sup>115</sup> was a factor in determining that its satellites would cause INTELSAT unacceptable technical interference as well.<sup>116</sup> Concerned with the possibility that Columbia would be forced from the market, thus harming competition, the FCC granted Columbia a continuation of service until a mutually acceptable solution could be reached.<sup>117</sup> One past FCC official poignantly described the situation when he asked: "Imagine the result in the 1970s if MCI had to get permission to compete from the AT&T Board of Directors?"<sup>118</sup> Although the FCC intervened in the matter, they could not order INTELSAT to concede any of its claims because of its international immunity.<sup>119</sup> Recently, though, INTELSAT and Columbia reached an amicable resolution in the matter.<sup>120</sup>

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114. *See id.*

115. *See* COLUMBIA COMMUNICATIONS CORPORATION, CORPORATE PROFILE (visited Dec. 11, 1998) <<http://www.tdrss.com/profile.html>> (providing a broad overview of the company).

116. *See* Application for Special Temporary Authority to Remove Conditions on its Existing Authorization to Operate C-Band Transponder Capacity on the National Aeronautics and Space Administration Tracking and Data Relay Satellite System ("TDRSS") Space Station at forty-one Degrees West Longitude, Order and Authorization, DA 96-703, 11 FCC Rcd. 13710 (May 6, 1996). When Columbia's leased satellites were extended, the company applied to the FCC for permission to continue operating. *See id.* at 13711. INTELSAT subsequently found that Columbia's satellites would create unacceptable interference with its own satellites. *See id.* at 13714. After INTELSAT's finding, Columbia filed a new application with the FCC for special temporary authority to continue service. *See id.* at 13715. Concerned that INTELSAT had placed its commercial interests in front of its public interest obligations, the FCC granted the special temporary authority. *See id.* at 13719. The FCC ordered Columbia to negotiate with INTELSAT to reach a mutually agreeable resolution under the ITU's provisions and apply for permanent authority to operate. *See id.*

117. *See id.*

118. Harris, *supra* note 94. Harris explained that:

The Columbia incident demonstrates the current *moral bankruptcy* of an organization [INTELSAT] that had been designed, in perhaps a more innocent time, to act in the best interests of all the citizens of the world . . . . INTELSAT also games the technical coordination process. My staff can attest to the countless hours negotiating technical coordination with INTELSAT on behalf of competing systems—occasionally only to be able to achieve an acceptable result after high level U.S. government intervention.

*Id.*

119. *See* INTELSAT Agreement, *supra* note 41, at art. XV.

120. *See* *INTELSAT and Columbia End Battle Over Disputed Slot*, SATELLITE NEWS, Dec. 22, 1997, available in 1997 WL 7890511. Under an agreement reached by INTELSAT and Columbia, the latter will shift its traffic from the NASA TDRSS 4 satellite it currently leases to an aging INTELSAT satellite that both companies will share. *See id.* Columbia will stop using

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#### D. *Alternative Competition*

Although the ISOs have commanding market, competitive, and regulatory advantages, it does not necessarily follow that there is a lack of competition in the marketplace. The growth of alternative satellite systems and fiber optic cables is cited by COMSAT as evidence that INTELSAT no longer enjoys market dominance.<sup>121</sup> In fact, INTELSAT's market shares have decreased since the late 1980s for all types of services and major geographic routes.<sup>122</sup> Declining market shares alone, however, are not a clear indicator of competitive pricing because many fiber-optic cables are owned by the same entities that are signatories to INTELSAT.<sup>123</sup> Regardless of which view is accepted, though, it is clear that the United States and the rest of the world are on a gliding path towards a more competitive satellite environment.

### III. A REVIEW OF THE TREND TOWARD COMPETITION

#### A. *The Reagan Years*

Whereas U.S. policies in the 1960s and 1970s focused on protection and promotion of the ISOs, competition was at its peak during the 1980s.<sup>124</sup> The domestic telecommunications market was the first target of this new pro-competitive agenda.<sup>125</sup> In the mid-1980s, after years of monopoly status, AT&T was effectively ordered to spin off its regional assets.<sup>126</sup> The birth of the "baby bells" provided local telecommunications services, while new companies entered the long-distance and international phone markets.<sup>127</sup> Meanwhile, these national events had an eventual ripple effect in the international satellite telecommunications realm.

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TDRS by May 15, 1998, and will assume ownership of INTELSAT 515, which will be renamed Columbia 515, and will be the first spacecraft owned by Columbia. *See id.* Columbia will also move the satellite to 37.5 degrees West and will lease an unspecified number of transponders to INTELSAT at no charge. *See id.*; *see also* *INTELSAT, Columbia Settle Fight over Orbital Slots*, TELECOMMS. REP., Dec. 22, 1997, at 7 (remarking that Columbia 515 will be able to provide coverage to North and South America, Europe, and Africa at its new location).

121. *See* Pfeifenberger & Houthakker, *supra* note 41 (arguing that INTELSAT faces effective competition in the marketplace).

122. *See id.*

123. *See* GAO REPORT '97, *supra* note 1, at 38.

124. *See infra* notes 132-33 and accompanying text.

125. *See* BRUCE WASSERSTEIN, *BIG DEAL: THE BATTLE FOR CONTROL OF AMERICA'S LEADING CORPORATIONS* 293 (1998) (describing the evolution of competition in the domestic telecommunications market).

126. *See id.* at 301 (describing the breakup of AT&T and the birth of 22 local operating companies).

127. *See id.* at 301-02 (describing the early success of the "baby bells" in providing local telephone services).

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In 1981, the FCC authorized the use of domestic satellites for transborder communications between the United States, Canada, and Mexico.<sup>128</sup> In 1983, several U.S. companies filed applications with the FCC to establish satellite systems to compete with INTELSAT.<sup>129</sup> The next year, President Ronald Reagan issued Presidential Determination No. 85-2, which authorized the entrance of these new competitors into the satellite telecommunications market.<sup>130</sup> This Presidential Determination claimed that such competition was, under the Communications Satellite Act of 1962, in the national interest of the United States.<sup>131</sup>

At the same time, the FCC sought to increase competition in the international telecommunications sector by ending long-standing policies protecting the dominance of the ISOs. Some of these policies required U.S. telecommunications carriers to place a certain amount of traffic over the INTELSAT system<sup>132</sup> and an intensive regulatory review of alternative cable applications.<sup>133</sup> Bending from U.S. pressure, INTELSAT began making a series of determinations that separate satellite systems would not cause it significant economic harm.<sup>134</sup> In response to those changes, the FCC lifted the remaining restrictions on the types of international satellite services competitors may provide in 1997.

### *B. The WTO Basic Agreement on Telecommunications*

Like the domestic policies which drove the liberalization of international telecommunications policies in the 1980s, it appears that history is repeating itself in the 1990s. Ironically, the same policies which were credited with the breakup of AT&T in the 1980s were overturned with the enactment of the Telecommunications Act of 1996.<sup>135</sup> The liberalization of key domestic telecommunications markets, however, did not result in competition in the international

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128. *See id.* at 25.

129. *See id.* at 25-26.

130. *See Satellite Comp. Hearings, supra* note, at 16 (testimony of Regina M. Keeney, Chief, International Bureau, FCC).

131. *See id.*

132. *See* GAO REPORT '97, *supra* note 1, at 26-27. In 1971, the FCC issued guidelines which required reasonable parity in the use of cables and satellites by AT&T on its transatlantic routes. *See id.* This policy was eliminated in 1988 partly because INTELSAT no longer needed a guaranteed level of use of its satellites. *See id.*

133. *See Harris, supra* note 94 (discussing past FCC policies designed to protect the ISOs' market presence).

134. *See* GAO REPORT '97, *supra* note 1, at 32.

135. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.); *see also* H.R. CONF. REP. NO. 104-458, at 1 (1996) (the Telecommunications Act of 1996 was aimed at ultimately opening all domestic telecommunications markets to competition).

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arena. Benefits from U.S. pro-competitive policies were not reciprocated by foreign markets and their governments.<sup>136</sup> As a result, U.S. telecommunications policy also began to focus on liberalizing international markets.

After several important multilateral trade agreements in the international arena, telecommunications services were finally included in the General Agreement of Tariffs and Trade (“GATT”).<sup>137</sup> The newly created World Trade Organization (“WTO”)<sup>138</sup> was given the role of brokering future trade agreements to open up global telecommunications markets.<sup>139</sup> Specifically, the goal of the WTO was to get countries to agree to open their telecommunications markets to competition by: (i) allowing foreign operators to purchase ownership stakes in domestic telecommunications services; and (ii) establishing a set of common rules for fair competition in the telecommunications sector.<sup>140</sup> The stakes and arguments for competition were compelling: a deal could reduce the average cost of international telephone calls by eighty percent and save consumers \$1 billion over three years.<sup>141</sup>

After some last minute negotiating, a deal was finally brokered on February 15, 1997.<sup>142</sup> Under the WTO Basic Telecommunications Agreement, sixty-eight countries accounting for more than ninety percent of the world’s telecommunications revenues pledged to begin opening their markets to foreign competition.<sup>143</sup> Most of the world’s biggest markets, including the United States, European Union, and Japan, began liberalizing their telecommunications

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136. See Harwood, *supra* note 6, at 875-77 (discussing how the benefits of U.S. pro-competition policies were offset by the disadvantages of unilateral liberalization).

137. See General Agreement of Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

138. See WORLD TRADE ORGANIZATION, ABOUT THE WTO (visited Dec. 11, 1998) <<http://www.wto.org/about/agmnts5.htm>> (discussing the WTO’s role in overseeing the operation of the General Agreement on Trade in Services).

139. See *id.*

140. See WTO PRESS RELEASE, COMMITMENTS IN BASIC TELECOMMUNICATIONS (Apr. 30, 1996), available at <<http://www.wto.org/press/aprdec-e.htm>> (detailing the resolution adopted by the Council for Trade in Services regarding the Decision on Commitments to Basic Telecommunications Agreement).

141. See Alan Cane, *Getting Through: Why These Talks Matter*, FIN. TIMES, Feb. 14, 1997, at 6; see also WTO PRESS RELEASE, RUGGIERO CONGRATULATES GOVERNMENTS ON LANDMARK TELECOMMUNICATIONS AGREEMENT (Feb. 17, 1997), available at <<http://www.wto.org/wto/archives/press67.htm>> (“Telecommunications liberalization could mean global income gains of some one trillion dollars over the next decade or so. This represents about 4% of world GDP at today’s prices.”).

142. See Frances Williams & Alan Cane, *World Telecoms Pact Set to Slash Costs of Calls*, FIN. TIMES, Feb. 17, 1997, at 1; see also WTO, PRESS RELEASE, THE WTO NEGOTIATIONS ON BASIC TELECOMMUNICATIONS (Feb. 15, 1997), available at <<http://www.wto.org/press/summary.htm>> (discussing the negotiation history of the Basic Telecommunications Agreement).

143. See Williams & Cane, *supra* note 142.

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markets on January 1, 1998, when the pact went into effect.<sup>144</sup> All forms of basic telecommunications service are covered, including voice telephony, data and fax transmissions, and satellite and radio communications.<sup>145</sup>

There are two major developments in this agreement which affect the provision of satellite services around the world. First, forty-eight countries signed an agreement to open up their markets for satellite service.<sup>146</sup> These countries represent eighty percent of the total market for satellite service revenues.<sup>147</sup> Of the forty-eight countries opening up their satellite markets, twenty-two agreed to open up their markets by January 1, 1998.<sup>148</sup> The rest of the commitments will take effect in 1999.<sup>149</sup> Second, sixty-five countries signed the Reference Paper on Pro-Competitive Regulatory Principles.<sup>150</sup> This is the most significant development because it means that key satellite markets have committed themselves to a separation of the country's telecommunications regulator from its national telecommunications provider.<sup>151</sup>

### *C. Current Restructuring Efforts*

#### *1. FCC policy*

Leveraging three years of goodwill and momentum amassed by the WTO negotiations, recent U.S. policy has focused on restructuring the ISOs. In May 1996, the FCC issued a notice of proposed rulemaking known as the Domestic International Satellite

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144. *See id.*

145. *See id.*

146. *See Satellites & The Telecommunications Act, Hearing Before the Subcommittee on Communications of the Senate Commerce, Science and Transportation Comm.*, 104<sup>th</sup> Congress (1997) [hereinafter *Satellites & Telecoms Act Hearing*] (testimony of Steven W. Lett, Deputy U.S. Coordinator International Communications and Information Policy, U.S. Department of State); *see also* Bill Pietrucha, *FCC Opens U.S. Markets to Foreign Satellite Operators*, NEWSBYTES NEWS NETWORK, July 18, 1997, available in 1997 WL 12352190 (discussing how foreign satellite operators can bypass the FCC policies that require them to show that their home countries have already opened up markets to U.S. satellite operators). *But see FCC Opens U.S. Telecom. and Satellite Markets to Foreign Competition*, MOBILE COMM. REP., Dec. 1, 1997, available in 1997 WL 13198282 (discussing how the FCC's policies could still apply to non-WTO countries or ISO affiliates like New Skies).

147. *See Satellites & Telecoms Act Hearing, supra* note 146 (testimony by Steven W. Lett, Deputy U.S. Coordinator International Communications and Information Policy, U.S. Department of State).

148. *See id.*

149. *See id.*

150. *See Satellite Comp. Hearings, supra* note 1, at 16 (testimony of Regina M. Keeney, Chief, International Bureau, FCC).

151. *See id.* (mentioning the significance of the large numbers of countries agreeing to foster more competitive telecommunications environments).

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Consolidation Order (“*DISCO I*”),<sup>152</sup> which established criteria to permit foreign-based operators to offer service in the United States.<sup>153</sup>

*DISCO I* proposed a test in which the granting of a license to a foreign operator to provide services in the United States would be contingent upon a showing that U.S.-based satellites have effective competition opportunities (“ECO-SAT test”) in: (i) the home market where the foreign operator is licensed; and (ii) all “route markets” that the foreign satellite intends to service from earth stations in the United States.<sup>154</sup> In light of the recent WTO agreement, however, *DISCO I* was reconsidered because the WTO agreement allows nondiscriminatory access to markets without consideration of where a foreign operator is licensed.<sup>155</sup>

With the adoption of the International Satellite Service Order (“*DISCO II*”),<sup>156</sup> non-U.S. satellite operators from WTO member countries<sup>157</sup> will receive a presumption in favor of access to the U.S. market for the provision of fixed and mobile services.<sup>158</sup> The FCC adopted this approach for three reasons. First, the general obligations created by the WTO Basic Telecoms Agreement provide

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152. See In the matter of Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, 11 F.C.C.R. 18178 (proposed May 14, 1996) [hereinafter *Disco I*].

153. See Harwood, *supra* note 6, at 895 (discussing the Equal Competitive Opportunities (“ECO”) Test prescribed by *DISCO I*).

154. See *DISCO I*, 11 F.C.C.R. at 18187; Cf. Market Entry and Regulation of Foreign-affiliated Entities, 11 F.C.C.R. 3873 (1995) [hereinafter *Foreign Carrier Entry Order*]. The ECO-SAT test was adapted from the original ECO test set forth in the *Foreign Carrier Entry Order* in 1995. See *Disco I*, 11 F.C.C.R. at 18182. Under the original ECO test, the FCC looked at:

(1) whether U.S. carriers are permitted by law to offer international facilities-based services in the foreign country; (2) whether there exist reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier’s domestic facilities for the termination and origination of international services, and whether there are sufficient means to monitor and enforce those conditions; (3) whether competitive safeguards exist in the foreign country to protect against anti-competitive practices; and (4) whether there is an effective regulatory framework in the destination country to develop, implement and enforce legal requirements, interconnection arrangements, and other competitive safeguards.

*Foreign Carrier Entry Order*, 11 F.C.C.R. at 3890.

155. See Alan Cane, *A Ringing Endorsement*, FIN. TIMES, Feb. 18, 1997, at 19 (quoting Mr. Neil McMillan, a British civil servant who led the WTO negotiations, as stating, “[t]he developed countries will get the lion’s share of this market”).

156. Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Report and Order, 12 F.C.C.R. 24094 (1997) [hereinafter *DISCO II*].

157. See *id.* at 24118. A space station operator will have a WTO member designation if the space station operator is based in a WTO country or relies on a WTO member administration that grants the license or is responsible for coordinating the system internationally. See *id.* Although a satellite system may have a majority investment from a non-WTO country, other relevant factors, including the operator’s place of business, will play important roles in determining whether the operator is from a WTO Member country. See *id.*

158. See *id.* at 24099 (adopting an open entry standard for applicants from WTO member countries).

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insulation against discriminatory conduct.<sup>159</sup> Moreover, all WTO members are governed by the GATT and must comply with its provisions dealing with transparency and national treatment.<sup>160</sup> Second, the increased competitive environment for telecommunications services, coupled with the regulatory mechanisms available through the WTO dispute settlement process, will provide additional protection against harm to U.S. competition.<sup>161</sup> Third, classifying WTO members based on their market access commitments may discourage open entry policies for other countries intending to implement liberalization policies, as well as negatively affect trading relations with international partners.<sup>162</sup>

Pursuant to *DISCO II*, the FCC will not apply an ECO-SAT test to WTO member route markets served by non-U.S. satellites licensed by non-WTO countries.<sup>163</sup> This is consistent with the FCC's rationale that sufficient protection in the GATT, coupled with regulatory licensing safeguards, is enough to ensure a competitive U.S. satellite market.<sup>164</sup> An ECO-SAT test will be applied, however, to all non-WTO route markets served by non-U.S. satellites licensed by non-WTO countries.<sup>165</sup> Because global satellite system operators must obtain authorizations from all countries to which they seek to provide service, it is possible that non-WTO countries will prohibit access by U.S. satellites, while allowing access by other foreign satellites.<sup>166</sup> This scenario could provide another competitor with a competitive advantage over the U.S. satellite operator due to its extended coverage area.<sup>167</sup> Thus, the home market of non-U.S. satellites is crucial to the FCC's ECO-SAT analysis.

*DISCO II* also provides that, in order for COMSAT to provide U.S. domestic service via the INTELSAT and Inmarsat systems, COMSAT must waive any immunities that it derives from its majority ownership of the systems, as well as show that use of those systems will enhance

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159. *See id.* at 24114 ("WTO member that did not make a market access commitment for satellite services must nonetheless afford no less favorable treatment to a U.S. services than it does to a system licensed in any other country if the WTO member decides to open its market.").

160. *See id.* (stating that WTO members who open their markets are obligated by GATs to provide equal treatment to U.S. satellite providers).

161. *See id.*

162. *See id.* (stating that excluding WTO members who did not make market access commitments could raise an "Most Favored Nation" issue).

163. *See id.* at 24131-32.

164. *See id.*

165. *See id.* at 24132.

166. *See id.*

167. *See id.*

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competition in the U.S. market.<sup>168</sup> This measure was taken in response to U.S. courts which have determined that COMSAT, while acting in its capacity as U.S. signatory to INTELSAT and Inmarsat, has immunity from liability under U.S. antitrust laws.<sup>169</sup> The FCC has concluded that this creates an unfair advantage for COMSAT that must be remedied before COMSAT may serve the U.S. market.<sup>170</sup> The FCC will also treat ISO affiliates the same as other WTO member licensed systems, but will apply the ECO-SAT test to ISO affiliates from non-WTO countries.<sup>171</sup>

## 2. *Inmarsat and ICO Global Communications*

Current U.S. satellite policy is further complicated by the uncertainty created by the restructuring of the ISOs. In 1994, as an effort to expand into new markets, Inmarsat established an affiliate, ICO Global Communications (“ICO”).<sup>172</sup> This effort was the first example of how a treaty organization could restructure by forming an affiliate partly financed by Inmarsat and its existing signatories.<sup>173</sup> Initially, the United States opposed the formation of ICO because of concerns about the close relationship between Inmarsat, its invested signatories, and ICO.<sup>174</sup>

The United States eventually agreed to the formation of ICO on the condition that several principles of structural separation between the parent, its owners, and the affiliate be met to promote effective competitive opportunities.<sup>175</sup> These principles included: (i) nondiscriminatory access to countries’ domestic markets for all mobile satellite communications networks; (ii) a prohibition on the

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168. *See id.* at 24149 (stating that COMSAT is required to make an appropriate waiver of immunity from any suit as part of its application to provide domestic services via INTELSAT or Inmarsat).

169. *See id.* at 24148-49; *see also supra* notes 108-11 and accompanying text (discussing COMSAT’s immunity from an antitrust suit filed by PanAmSat).

170. *See id.* (expressing concern that COMSAT’s immunity may harm the U.S. market).

171. *See id.* at 24155.

172. *See Inmarsat Creates Affiliate, Gains U.S. Support*, MOBILE SATELLITE NEWS, Dec. 15, 1994, available in 1994 WL 11221763, at 4-5 (citing COMSAT Mobile Vice President, Ron Mario, as remarking, “[w]e believe [establishing the Inmarsat affiliate is] the most effective way to compete against giants such as Motorola. Inmarsat would be too slow to compete [in the market]”).

173. *See* GAO REPORT ‘96, *supra* note 22, at 11. The Initial Public Offering of ICO’s shares raised \$1.4 billion. *See id.* Inmarsat had a total investment of 10.6% of the voting shares, while nearly 60% of Inmarsat’s seventy-nine signatories invested directly in ICO. *See id.* These signatories hold an overwhelming 70% of ICO’s voting shares. *See id.*

174. *See id.* (stating that these concerns included: (i) the likelihood that Inmarsat’s signatories would have an obvious incentive to aid ICO, (ii) this close relationship would give preferential market access to ICO because many of its owners were licensing authorities in their respective countries as well, and (iii) advantages to accessing capital because of its implicit government backing).

175. *See id.* at 12-13.

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transfer of spectrum or orbital slots from Inmarsat to ICO; (iii) a ban on cross-subsidization<sup>176</sup> from Inmarsat; and (iv) a restriction on the transfer of treaty-based immunities and privileges to ICO.<sup>177</sup> To date, however, ICO has yet to procure a license to operate its system in the United States.<sup>178</sup>

Following the relative success of ICO, Inmarsat is considering several proposals to restructure its own organization.<sup>179</sup> In fact, current efforts include finalizing a privatization plan of Inmarsat sometime next year.<sup>180</sup> Under this restructuring, part or all of Inmarsat's existing satellites would be transferred to the private entity, while a residual organization overseeing Inmarsat's public interest goals would also be established.<sup>181</sup>

Among the United States' most serious concerns regarding the current restructuring efforts, is the relationship the newly created ICO will have with a private Inmarsat.<sup>182</sup> In response to this threat, the United States issued a position paper describing two fundamental goals to be met in order to gain the support of the United States: (1) the restructuring must guarantee the provision of global maritime distress communications services consistent with Inmarsat's original mission, and (2) competition enhancement by allowing fair and equitable market access to all competitors.<sup>183</sup>

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176. *See id.* (reporting that a cross-subsidy occurs if the costs of producing one service are paid for by consumers of a different service).

177. *See id.* at 13 (discussing how the owners of ICO voted at its annual meeting on May 28, 1996 to approve and amend ICO's Articles of Incorporation to accept fully the U.S. conditions).

178. *See* Theresa Foley, *ICO Faces Uphill Struggle for U.S. License*, COMM. WK. INT'L, May 4, 1998 (visited Dec. 16, 1998) <<http://www.totaltele.com/cwi/204/204news19.html>> (citing the reluctance of the FCC to license immediately the ICO system despite international pressure to do so).

179. *See Inmarsat Assembly Approves Privatization Proposal*, TELECOMMS. REP. INT'L, May 1, 1998, at 1. The Inmarsat Assembly in Parties approved amendments to develop a privatization model in April 1998, a significant step for Inmarsat to become fully privatized by the end of 1999. *See id.* at 2. The new Inmarsat structure will be composed of two entities: a public company and an intergovernmental structure to ensure that Inmarsat's public service obligations are met. *See id.*; *see also Inmarsat Chief Optimistic on Privatization Plans*, COMM. TODAY, Mar. 18, 1998, at 8, 9 (stating that privatization is expected to occur by January 1, 1999). *But see Delay Said Likely in Inmarsat Privatization*, COMM. TODAY, Mar. 26, 1998, at 9 (stating that plans to privatize Inmarsat by early 1999 may be overly optimistic).

180. *See Satellite Comp. Hearings*, *supra* note 1, at 13 (providing testimony of Regina M. Keeney, Chief, International Bureau, FCC).

181. *See* GAO REPORT '97, *supra* note 1, at 47-49. Fully privatizing the organization would relieve many of the competitive issues currently in controversy with the existing structure of the ISOs. *See id.* The benefits of creating a private company, however, are offset by the fact that a future merger with ICO, which is also owned by its signatories, would impede competitors' access to foreign markets. *See id.*

182. *See* GAO REPORT '96, *supra* note 22, at 13. Inmarsat is on record as being interested in a future merger with ICO and a private Inmarsat. *See id.* This relationship would present an obvious strain on free competition because the owners of these organizations could easily restrict market access to other competitors. *See id.*

183. *See* GAO REPORT '97, *supra* note 1, at 52-53. According to FCC and Commerce

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### 3. *INTELSAT and New Skies Satellites*

Amid the ongoing negotiations of Inmarsat, INTELSAT is also seeking to restructure itself. The United States and COMSAT have proposed to spin off part of INTELSAT's 'non-core mission' services, such as video broadcast, to an affiliate, News Skies Satellites NV ("New Skies").<sup>184</sup> According to the proposal, the current INTELSAT would be reduced to roughly half of its current size and would focus solely on providing basic telecommunications services.<sup>185</sup> After a period of two to three years, New Skies would be relatively independent because it would consist of eighty percent external investment.<sup>186</sup>

The initial proposal further required: (1) that New Skies not have any priorities or immunities previously enjoyed by INTELSAT; (2) 'arms length' dealings between the two entities; and (3) no special access to lucrative orbital slots.<sup>187</sup> This proposal is designed to reduce the financial incentive of INTELSAT's signatories and to give New Skies preferential market access by limiting the signatories' investment to a maximum of twenty percent.<sup>188</sup> Under more recent negotiations, however, this binding external ownership requirement failed when strong international opposition argued successfully against it.<sup>189</sup> Nonetheless, New Skies would presumably act in compliance with the antitrust laws of any given country because it would not retain any of INTELSAT's immunities.<sup>190</sup>

It is still unclear, however, whether these concerns will ultimately be resolved to everyone's satisfaction. When Irv Goldstein, Director General and Chief Executive Officer of INTELSAT, announced INTELSAT's intention to turn over six of its communications

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Department officials, however, Inmarsat owners are uninterested in the U.S. position paper. *See id.* In fact, its owners would like to see greater government ownership in a restructured Inmarsat and less external investment. *See id.* at 53. COMSAT has added that ICO's incorporation of the United States' accepted conditions in its Articles of Incorporation are adequate insurance in ensuring competition in mobile satellite services. *See id.* The ACISS, however, has pointed out that these provisions are not binding on ICO's individual signatory owners who are ultimately the gate keepers for their countries. *See id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.* at 50.

188. *See id.* at 49-50 (reporting that according to U.S. officials, the United States is facing strong opposition to the proposed 20% limit on signatory investments).

189. *See Administration Supports Bliley's Call for Satellite Privatization, Answers Queries on Procurement*, TELECOMMS. REP., Feb. 9, 1998, at 5 (noting that there was "simply... no international support" for the National Telecommunications and Information Administration's ("NTIA") position).

190. *See* GAO REPORT '97, *supra* note 1, at 49-50.

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satellites to New Skies,<sup>191</sup> opponents of the move claimed that this action had violated earlier concessions that INTELSAT would not provide New Skies with any preferential market advantages.<sup>192</sup> In fact, supporters of the Bliley Bill immediately denounced the plan and called for strengthened support of H.R. 1872.<sup>193</sup> They argued that New Skies would gain unfair market access because it would receive a transfer of assets valued at over \$700 million, debt free, while existing satellite competitors were forced to fund their projects by themselves.<sup>194</sup> Consequently, INTELSAT's creation of New Skies far from settled the current debate. In fact, Congress now appears even *more* likely to enact legislation, on its own terms, to guarantee a fully competitive satellite marketplace.

#### 4. COMSAT

With Inmarsat and INTELSAT's restructuring efforts as a backdrop, COMSAT is also lobbying the FCC to classify it as a non-dominant carrier. In April 1997, COMSAT filed a petition requesting a broad overhaul of FCC regulation over COMSAT services provided over INTELSAT.<sup>195</sup> COMSAT requested the elimination of rate of return regulation, including rate of return prescription, and other existing structural separation requirements.<sup>196</sup>

At a recent Senate hearing on satellite reform, COMSAT argued that it simply does not dominate the marketplace anymore—citing the growth of undersea fiber optic cables and alternative satellite systems as evidence of competition.<sup>197</sup> COMSAT further advocated

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191. See *INTELSAT Spinoff Strikes Sparks in Satellite Industry*, AEROSPACE DAILY, available in 1998 WL 9025841, Feb. 19, 1998 (describing the angst of the satellite communications industry when INTELSAT announced its plan to form New Skies at the "Satellite 98" conference); Mike Mills, *INTELSAT to Form Separate Company, Critics Say Consortium's Competitive Advantage Will Remain*, WASH. POST, Apr. 1, 1998, at C11 (quoting Irv Goldstein as asserting, "New Skies 'is the first step in the ultimate commercialization of INTELSAT'").

192. See Mills, *supra* note 191, at C11 (explaining that competitors believed that INTELSAT's transferring of five of its satellites, providing the start-up with an immediate annual revenue stream of \$200 million, and transfer of other assets valued at additional \$700 million, free of debt, would create an unfair market advantage for New Skies); see also *Markey Attacks INTELSAT Spin-Off Plan as 'Charade'*, TELECOMMS. REP., May 4, 1998, at 15 [hereinafter *Markey Attacks*] (noting that INTELSAT plans to give a sixty million dollar loan to New Skies as a start up gift while many other operators are still paying for their satellite investments). See generally *INTELSAT's 'Inc.' Plan Takes Heat in U.S.*, TELECOMMS. REP. INT'L, Mar. 13, 1998, at 15 (giving general insight on the congressional backlash to the proposed INTELSAT spin-off).

193. See *Markey Attacks*, *supra* note 192, at 15 (announcing the Alliance for Competitive International Satellite Services' support of H.R. 1872).

194. See Mills, *supra* note 191, at C11 (describing other companies' satellite investment obligations).

195. See *In the Matter of COMSAT Petition for Partial Relief From the Current Regulatory Treatment of COMSAT World Systems Video and Audio Services*, 12 F.C.C.R. 12059 (1997).

196. See *id.*

197. See *Satellite Reform Hearings*, *supra* note 37 (testimony of Betty Alewine, President and

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that its outdated capital structure guidelines, which limit investors from owning more than ten percent of the company, should also be eliminated.<sup>198</sup> In addition, COMSAT supports the privatization of INTELSAT, but insists that multilateral negotiations with other signatories should be carried out, rather than unilateral U.S. legislative action.<sup>199</sup>

The FCC finally agreed with COMSAT and granted its petition to be deregulated and reclassified as a non-dominant carrier one year later, in April 1998.<sup>200</sup> COMSAT was able to convince the FCC that it faced significant competition from other satellite providers, foreign satellite operators, and undersea fiber optic cables.<sup>201</sup> Based on these circumstances, the FCC ruled that COMSAT had no monopoly power, and that regulation of COMSAT as a dominant carrier was unnecessary and anti-competitive.<sup>202</sup> Approximately eighty-five to ninety percent of COMSAT's satellite provision service was deregulated by this historic FCC order.<sup>203</sup>

Other restrictions remain, however, which could have a negative impact on the restructuring of COMSAT. The CS Act allows only authorized carriers to invest in COMSAT.<sup>204</sup> Authorized carriers are specifically designated as communications common carriers by the FCC upon a finding that their ownership in COMSAT would be consistent with the public interest.<sup>205</sup> Once deemed an authorized carrier, such carrier is not allowed to own more than fifty percent of COMSAT's voting stock.<sup>206</sup> All other investors which are not deemed authorized carriers by the Commission face even stricter ownership limits, requiring ownership of COMSAT's voting stock to not exceed ten percent.<sup>207</sup>

On September 19, 1998, Lockheed Martin ("Lockheed")

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CEO, COMSAT Corporation) ("Competing with the likes of Hughes, PanAmSat, Loral, Lockheed Martin, AT&T, British Telecom, MCI, and many, many others, COMSAT is just one of many players, and at \$500 million a year in annual revenues, a relatively small one at that.").

198. *See id.* ("We must get approval from the FCC every single year in order to borrow money or raise equity. No other telecommunications company is subject to this kind of oversight and regulation . . . this is simply no way to run a commercial company in today's competitive environment.").

199. *See id.* (asserting that full privatization of INTELSAT should be supported but that COMSAT or the United States can achieve this reform on its own).

200. *See* In the Matter of COMSAT Corporation, F.C.C. Order 98-78, 63 Fed. Reg. 25811 (Apr. 28, 1998).

201. *See id.*

202. *See id.*

203. *See id.*

204. *See* 47 U.S.C. § 734(b)(1) (1997).

205. *See id.*

206. *See id.* § 734(b)(2).

207. *See id.* § 734(b)(3).

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announced its plan to acquire COMSAT for \$2.7 billion in a two step transaction intended to comply with the CS Act's ownership restrictions.<sup>208</sup> The deal calls for Lockheed to merge COMSAT into its telecommunications subsidiary, Lockheed Global Telecommunications ("LGT"), and eventually file for a public offering.<sup>209</sup> In the first step, Lockheed will purchase up to forty-nine percent of COMSAT at \$45.50 per share.<sup>210</sup> Under this first phase, the Commission must grant approval to the merger of COMSAT's common carrier unit into LGT, then designate the combined entity an "authorized carrier" under the CS Act.<sup>211</sup> By being first designated an "authorized carrier," Lockheed could purchase up to forty-nine percent of COMSAT without running afoul of the CS Act's provisions.<sup>212</sup>

The next step calls for Lockheed to acquire the remaining shares (fifty-one percent) of COMSAT in a stock swap.<sup>213</sup> One share of Lockheed stock would be worth two COMSAT shares.<sup>214</sup> Under this second phase, the CS Act would have to be amended to allow Lockheed to purchase more than ten percent of COMSAT's voting stock.<sup>215</sup> As noted earlier, the CS Act forbids more than ten percent ownership of COMSAT's voting stock by any stockholder.<sup>216</sup>

Although it is likely that the Commission will grant the requisite approval for the merger, changing the CS Act to allow for more than ten percent ownership may prove more problematic.<sup>217</sup> Recent legislation passed by the House indicates that the merger would receive support in changing the ten percent ownership cap on COMSAT.<sup>218</sup> Under the Bliley Bill, the Commission would have been ordered to treat COMSAT as a non-dominant carrier for the

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208. See *Lockheed Martin-COMSAT Deal Must Clear 5 Hurdles*, SATELLITE WK., Sept. 28, 1998, available in 1998 WL 10711113 [hereinafter *Lockheed/COMSAT Deal*] (discussing the Lockheed/COMSAT merger).

209. See *id.* (detailing the five hurdles that Lockheed must overcome to acquire COMSAT).

210. See *Lockheed Martin's Planned Buyout of COMSAT Will Build Satellite Services*, SATELLITE NEWS, Sept. 28, 1998, available in 1998 WL 6614639 [hereinafter *COMSAT Buyout*] (discussing Lockheed's two step merger transaction attempt to acquire COMSAT).

211. See *id.*

212. See *id.*

213. See *id.*

214. See *id.*

215. See *id.* (noting that "the second phase requires government regulators to relax existing restrictions that limit any organization from buying more than 10% of COMSAT's voting stock").

216. See *supra* notes 204-07 and accompanying text (setting out the requirements of the CS Act).

217. See *COMSAT Buyout*, *supra* note 210 (recognizing that Senate approval of the merger remains doubtful in light of the necessity of relaxing existing government restrictions).

218. See *id.* (recalling that the House overwhelmingly passed a bill to privatize COMSAT).

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Commission's regulations,<sup>219</sup> as well as allow COMSAT's competitors direct access to the INTELSAT and Inmarsat systems.<sup>220</sup> These "direct access" provisions imply that COMSAT's ownership cap would be lifted.<sup>221</sup>

Other obstacles this merger must face include obtaining shareholder approval by COMSAT shareholders, as well as satisfy any antitrust concerns.<sup>222</sup> It is likely that the Federal Trade Commission ("FTC") will have peripheral involvement in handling review of this merger because of the FTC's expertise in dealing with aerospace antitrust issues.<sup>223</sup> In large part, this deal would not raise antitrust concerns because the businesses being merged have little overlap.<sup>224</sup> Lockheed, a traditional defense and aerospace manufacturing giant, is attempting to access the very profitable satellite communications industry.<sup>225</sup> Because this merger does not involve an aggregation of a specific market, it is likely that the merger will pass antitrust concerns.<sup>226</sup>

#### IV. THE NEED FOR LEGISLATIVE REFORM

##### A. *H.R. 1872—The Bliley Bill*

The recent restructuring efforts have also set the stage for Congress to review the ISOs' role in the new telecommunications environment. In June 1997, Representative Thomas Bliley (R-Va.), Chairman of the U.S. House Commerce Committee, introduced H.R. 1872, the "Communications Satellite Competition and Privatization Act of

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219. The FCC granted COMSAT's petition for non-dominant status on April 28, 1998, independent of H.R. 1872. *See supra* notes 200-03 and accompanying text (discussing the negotiations underlying this agreement).

220. *See* H.R. 1872, 105th Cong. § 641 (1998) (outlining the deregulation of COMSAT as a nondominant carrier).

221. *See id.* § 641. Although H.R. 1872 recently died with the recess of Congress, it passed overwhelmingly in the House and is expected to be reintroduced when Congress reconvenes. *See supra* note 11 and accompanying text. *But see Congress Asks FCC to Freeze Merger*, TELECOMMS REP. INT'L, Jan. 29, 1999, at 3 (stating that some members of Congress would like the FCC to delay approval of LGT as an "authorized common carrier" until Congress addresses the broader question of comprehensive satellite reform legislation).

222. *See Lockheed/COMSAT Deal*, *supra* note 208 (stating that one of the hurdles Lockheed must clear in order to merge with COMSAT is obtaining clearance under Hart-Scott-Rodino provisions of the antitrust laws).

223. *See id.*

224. *See* Frederic M. Biddle & John Simons, *Lockheed Martin Hopes COMSAT Will Fuel Bottom Line*, WALL ST. J., Sept. 22, 1998, at B4 (discussing the relatively low antitrust concerns posed by this merger).

225. *See id.*

226. *See id.* One analyst commented on the merger, "[i]n the case of COMSAT and Lockheed Martin, it doesn't create an issue of market aggregation and doesn't put Lockheed Martin into a substantial position that would be an antitrust issue." *Id.*

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1997,” which sought to amend the Communications Satellite Act of 1962.<sup>227</sup> Co-sponsored by Rep. Edward Markey (D-Mass.), the Bliley Bill sought to make dramatic changes in the U.S. regulation of the ISOs.<sup>228</sup> The Bliley Bill received tremendous support from the satellite industry upon its initial introduction.<sup>229</sup> Meanwhile, the Senate Subcommittee on Communications initiated its own investigations into the matter.<sup>230</sup> If the restructuring efforts by the ISOs are perceived by Capitol Hill to be detrimental to U.S. competitive interests abroad, then it is likely that legislative mandates will follow. Based on strong congressional support during 105th Congress, the Bliley Bill could well be the catalyst for such legislation in the future.

Specifically, the Bliley Bill would have required the FCC to limit or revoke authority from the ISOs to provide non-core services to, from, or within the United States unless the ISOs, and their successor entities, have been privatized in a manner which does not harm competition in U.S. telecommunications markets.<sup>231</sup> The Bliley Bill called for the privatization of Inmarsat by January 1, 2001, and INTELSAT by January 1, 2002.<sup>232</sup> During its restructuring, the Bliley

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227. See *Bipartisan Effort Led by Chairman Bliley to Set Pro-Competitive Framework for INTELSAT Privatization*, BUS. WIRE, June 12, 1997, available in WL 6/12/97 Bus. Wire 18:52:00 (discussing PanAmSat’s approval of Chairman Bliley’s introduction of H.R. 1872).

228. See *Satellite Act Would Privatize INTELSAT/Inmarsat*, COMM. TODAY, June 16, 1997, available in 1997 WL 10863992 (quoting Rep. Bliley stating, “[t]his legislation is designed to fully privatize INTELSAT and Inmarsat on a model based on free and fair competition”).

229. See *IXCs Release Report Backing Satellite Reform Legislation*, TELECOMMS. REP., Mar. 9, 1998, at 25 (discussing the support by U.S. interexchange telephone carriers for the Bliley Bill because it will have a total cost savings in the industry of about one billion dollars over ten years and total consumer benefits, including lower prices, of about \$1.5 billion over the same period); *Satellite Circuit*, SATELLITE NEWS, June 16, 1997, available in 1997 WL 7890288 (quoting Russell Daggat, President of Teledasic Corp. as saying, “Teledasic strongly supports Chairman Bliley’s and Rep. Markey’s continuing efforts to further encourage competition in the international satellite industry”); see also *PanAmSat Applauds U.S. Moves to Privatize INTELSAT*, EXCHANGE TELECOMMS. NEWSL., June 20, 1997, available in 1997 WL 10406788 (explaining how PanAmSat “commends chairman Bliley for his tireless efforts to ensure an equal playing field for satellite service providers, which ultimately will translate into better and more varied services for consumers in the United States and around the world”); *Satellite Bill*, TELECOMMS. REP. INT’L, Nov. 21, 1997, at 8 (discussing industry support for the Bliley Bill); *Bliley Repeats Call for Satellite Reform Cites Letters from FCC, COMSAT*, TELECOMMS. REP. INT’L, Jan. 16, 1998, at 10 (citing letters from the FCC and COMSAT which indicate that “satellite reform . . . is urgently needed”).

230. See UNITED STATES SENATE, PRESS RELEASE, BURNS ANNOUNCES SATELLITE HEARING (June 10, 1997), available at <<http://www.senate.gov/~burns/p970610a.htm>>. Montana Senator Conrad Burns, Chairman of the Senate Commerce, Science, and Transportation Subcommittee on Communications, announced his intentions to hold hearings on the topic, “International Satellite Reform: Is Technology Outpacing Regulation?” See *id.* The main themes of the hearings were: (1) competitive neutrality of proposed regulations; (2) ensuring universal service to consumers worldwide; (3) privatization of the ISOs; and (4) promotion of market access to foreign competitors. See *id.*

231. See H.R. 1872, 105th Cong. (1998).

232. See *id.* § 602 (asserting that the “President shall oppose, and the Commission shall not

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Bill would have limited the ISOs' expansion of services into new markets until full privatization was completed, unless the FCC determined that there was "continued progress" toward a pro-competitive environment.<sup>233</sup> In addition, the Bliley Bill prohibits the FCC from assisting in the registration of new orbital slots for INTELSAT and Inmarsat until the ISOs are fully privatized.<sup>234</sup> Next, the Bliley Bill directs the President and the FCC to initiate multilateral negotiations with the ISOs' current signatories to establish a pro-competitive privatization of the ISOs.<sup>235</sup> Finally, the Bliley Bill would strip the immunities and privileges of COMSAT and allow other companies direct access to the INTELSAT and Inmarsat systems.<sup>236</sup>

### *B. A Unilateral Approach*

The current undertaking by Congress represents a unilateral approach to restructuring the ISOs. In effect, the Bliley Bill promotes the use of the lucrative U.S. telecommunications market as a 'carrot' to induce other signatories to comply with U.S. goals. The FCC has jurisdiction over the licensing of foreign satellite operators' access to U.S. markets through its authority to approve the establishment of earth stations that service the foreign satellite systems.<sup>237</sup> The Bliley Bill would force the FCC to refuse licensing to the ISOs if certain conditions were not met.<sup>238</sup> Because of the ISOs' desire to do business in the U.S. market, it is argued that the Bliley Bill would ensure compliance with U.S. competition policies.

With regard to any successor entities to the ISOs, the Bliley Bill proposes that an initial public offering of its shares should be held

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assist," any requests for new orbital slots from INTELSAT after January 1, 2002, and Inmarsat after January 1, 2001).

233. See *id.* § 603 (citing to the additional services authorized during continued progress); see also *House Panel Amends Satellite Privatization Bill; Industry Gloats, Prepares for Next Skirmishes*, TELECOMMS. REP., Mar. 23, 1998, at 8 [hereinafter *Industry Gloats*] (describing the compromise reached between supporters of COMSAT and the Bliley staff to allow flexibility for "stand still" provisions in the Bliley Bill).

234. See H.R. 1872, 105th Cong. § 601(c) (1998).

235. See *id.* § 661 (1998). The Bliley Bill calls for the multilateral negotiations to meet the specified criteria: (1) successor and separated entities are national, stock corporations independent of signatories and control access to telecommunications markets and of any intergovernmental organizations; (2) preferential treatment is terminated; (3) expansions into new markets are prohibited; (4) successor entities must apply for national licensing and orbital and spectrum assignments; (5) such entities are domiciled in countries parties to the WTO Basic Telecom. Agreement; (6) any unused orbital slots be returned to the ITU; and (7) the ISOs assets are audited before transfer. See *id.*

236. See *id.* § 621.

237. See GAO REPORT '97, *supra* note 1, at 25-26.

238. See *supra* notes 160-70 and accompanying text (discussing the FCC's application of the ECO-SAT test to ISOs if certain competitive conditions were not met).

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within one year after any decision to create any separate entity.<sup>239</sup> All privileges and immunities would be waived regarding transactions between INTELSAT and New Skies, and none of its officers, directors, or employees would be shared.<sup>240</sup> The Bliley Bill calls for the United States to assess whether the number of competitors, including private operators and ISO spin-offs, would be sufficient to create a fully competitive market.<sup>241</sup> The FCC would be granted exclusive authority to determine whether the outcome of the restructuring talks would harm competition in the U.S. market.

Furthermore, the Bliley Bill seeks to stop the expansion of the ISOs into new markets like the Internet, hand-held satellite phones, and direct to home (“DTH”) or direct broadcast satellite (“DBS”) video services.<sup>242</sup> In doing so, these ISOs would be prevented from using any of their current competitive advantages to monopolize these new markets. For example, INTELSAT recently registered ten orbital slots in the Ka-band to pursue possible opportunities in multimedia markets.<sup>243</sup> The Bliley Bill would not only prohibit INTELSAT from entering this market, but also from transferring these orbital slots to New Skies. Under the Bliley Bill, COMSAT would additionally be included in these “standstill provisions,” and its services would be limited or even eliminated in some areas. But as noted earlier, later amendments to the Bliley Bill allowed the ISOs to enter these new markets if the FCC determined there was “continued progress” toward a pro-competitive privatization of the ISOs.<sup>244</sup> Otherwise, these “standstill provisions” would prevent an ISO from using its privileges and immunities to enter the market for newer, non-core services for it or its successor entities if privatization was not

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239. See H.R. 1872, 105th Cong. (1998).

240. The Bliley Bill omitted any discussion regarding ICO because it had already spun off from Inmarsat.

241. See H.R. 1872, 105th Cong. §§ 622(1), 624(3) (1998) (providing the criteria for determining the proper number of competitors for INTELSAT and Inmarsat).

242. See *id.* § 681(13) (describing other services as high speed data transfer and Ka-band services).

243. See *Harris, supra* note 94; see also *House Testimony Favors ISO Privatization; COMSAT Attacks Bliley-Markey Legislation*, TELECOMMS. REP., Oct. 6, 1997, at 4 [hereinafter *House Testimony*] (describing how INTELSAT has retained three-degree spacing between its satellites, although the United States has since gone to two degree spacing, in an effort to hog orbital spaces for future uses); Henry Wong, *The Emerging Satellite Services Sector: New Opportunities for Investment*, J. OF PRIVATE EQUITY, Fall 1998, at 9. Proposed Ka-Band satellite communications makes available a higher band width two-way broadcasting frequency than exists in traditional Ku-Band communications. See *id.* at 9. These high speed Ka-band systems will enable the transmission of voice, video, and data at 500 times the speed of today’s terrestrial networks. See *id.*

244. See H.R. 1872, 105th Cong. (1997); see also *Industry Gloats, supra* note 233, at 8 (noting that progress would be examined at annual milestones leading to complete INTELSAT privatization by Jan. 1, 2002 and full Inmarsat privatization by Jan. 1, 2001).

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completed in a competitive manner.

### *C. Opposition to H.R. 1872*

While it was apparent from testimony before the U.S. House of Representatives that there was consensus favoring privatization of INTELSAT and Inmarsat,<sup>245</sup> representatives and supporters of the ISOs spoke strongly against any unilateral U.S. action.<sup>246</sup> Opposition to the Bliley Bill brought forth several issues which must be settled before H.R. 1872 will be enacted. In particular, these parties believe that unilateral action by the United States may be viewed in an unfavorable manner by the international community. Although Congress believed the United States should lead the way in developing a competitive satellite market, the Bliley Bill threatens months and months of restructuring talks facilitated by the Administration.<sup>247</sup> Meanwhile, INTELSAT has continually reaffirmed its mission and place in the evolving satellite industry and suggested that such unilateral action would result in a loss of established goodwill with other countries.<sup>248</sup>

At the heart of this debate are the rigid timetables for privatization contained in the Bliley Bill. The Bliley Bill would require Inmarsat to fully privatize by 2001, and INTELSAT to privatize by 2002.<sup>249</sup> Opponents question whether the Bliley Bill's timetables are realistic since consensus by all the parties is required before privatization is

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245. See *U.S. Industry, Officials Favor Privatization*, TELECOMMS. REP. INT'L, Oct. 10, 1997, at 4. There was "a remarkable amount of agreement among representatives of Congress, the Administration, and the satellite industry that INTELSAT and Inmarsat should be privatized." *Id.* at 4. COMSAT, on the other hand, strongly opposed the unilateral approach, and some Democrats on the Commerce Committee feared that such unilateral legislation could lead to an international backlash, thereby harming U.S. industry. See *id.*; see also *Administration Supports Bliley's Call for Satellite Privatization, Answers Queries on Procurement*, TELECOMMS. REP., Feb. 9, 1998 (referring to the Administration's support for the Bliley Bill); *NTIA Supports Bliley's Call for Privatization*, TELECOMMS. REP. INT'L, Feb. 13, 1998, at 17 (discussing the NTIA's support of the Bliley Bill amid the intensive negotiations ongoing with other INTELSAT parties to spin off New Skies).

246. See Timothy Shea, *Why INTELSAT Privatization will Backfire*, COMM. WK. INT'L, Apr. 1, 1998, available in 1998 WL10361202 (reporting the weaknesses of the Bliley Bill and offering support for the ISOs); *Group Voice Worries About Restructuring Bill*, TELECOMMS. REP., Mar. 2, 1998, at 14 (citing letters by the shipping industry which express concern over the possible elimination of Inmarsat's global maritime distress and safety services if privatization is not completed in a pro-competitive manner).

247. See *id.*

248. See *Satellite Reform Hearings*, *supra* note 37, (testimony of Irving Goldstein, Director General of INTELSAT); see also *Administration, Industry Grapple over Steering Wheel in Senate's Cruise to Satellite Restructuring*, TELECOMMS. REP., Aug. 4, 1997, at 3 (noting that the greatest impediment to reforming the ISOs is fear that private operators would not provide nondiscriminatory service to all countries).

249. See *In Satellite Restructuring Bill, Bliley calls for Privatizing INTELSAT, Inmarsat*, TELECOMMS. REP., June 16, 1997, at 1 [hereinafter *Satellite Restructuring Bill*] (describing the details of the Bliley Bill).

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initiated. Moreover, these same parties have rejected several U.S. covenants already in its restructuring talks.<sup>250</sup> Some members of the House Commerce Committee urged caution regarding the legislation's effects on U.S. foreign policy.<sup>251</sup> In fact, panelists at a recent House hearing warned that the Bliley Bill may be seen as a thinly veiled attempt to eliminate the ISOs and to allow U.S.-based private companies to dominate international markets.<sup>252</sup> Such a perception would outrage and further complicate restructuring efforts undertaken by the Administration.<sup>253</sup>

This fear of international backlash culminated when the Bliley Bill was amended to offer some flexibility into the initial rigid timetables.<sup>254</sup> Under the amended Bliley Bill, the FCC will begin a "phase-in" privatization review of INTELSAT, effective immediately until full privatization is completed by 2002.<sup>255</sup> Under this new language, INTELSAT may offer additional services if:

- (1) By June 1, 1999, COMSAT must submit a proposed "resolution" calling for the privatization to the INTELSAT Board of Governors, and the U.S. government must submit the same resolution to an Assembly of Parties;<sup>256</sup>
- (2) By Jan. 1, 2000, INTELSAT must create a working party to consider the resolution;<sup>257</sup>
- (3) By Jan. 1, 2001, the resolution would have to be approved by an INTELSAT Assembly of Parties;<sup>258</sup> and
- (4) By Jan. 1, 2002, the "pro-competitive privatization" would have to be completed.<sup>259</sup>

Bliley Bill supporters believe these annual milestones will guarantee the full privatization of INTELSAT in a pro-competitive

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250. See GAO REPORT '97, *supra* note 1, at 52-53 (stating that Inmarsat members have been generally uninterested in U.S. views).

251. See *House Testimony*, *supra* note 243 (quoting committee member Albert Wynn (D-Md.) as stating, "[w]e are proposing to dismantle two satellite systems that have served the world well. Before we take this step, I believe it's crucial that the members . . . understand what the consequences will be").

252. See *Satellite Restructuring Bill*, *supra* note 249 (reporting that an industry source stated, "[r]equiring the FCC and the Executive Branch to dictate the privatization of two international organizations is unlikely to provoke a cooperative response among other parties").

253. See *Satellite Bill Gets Ticket for House Floor; INTELSAT Debates Spin-off in Brazil Meetings*, TELCOMMS. REP., Mar. 30, 1998, at 4 (explaining how some INTELSAT parties have suggested that the U.S. "dissociate" itself from current negotiations involving the spin-off of New Skies because of the unilateral action contemplated in Congress).

254. See *Industry Gloats*, *supra* note 233, at 8 (discussing the amendments to the Bliley Bill).

255. See H.R. 1872, 105th Cong. § 603(b) (1998).

256. See *id.* § 603(b)(2).

257. See *id.* § 603(b)(3).

258. See *id.* § 603(b)(4).

259. See *id.* § 603(b)(5).

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Instilling flexibility into the privatization timetables, however, is not enough to guarantee the Bliley Bill's success. COMSAT vehemently opposed the "standstill provisions" included in the Bliley Bill which would prohibit it from entering new markets until after 2001.<sup>260</sup> Furthermore, the new language will also implement a "fresh look" provision which offers existing COMSAT customers to renegotiate their contracts during the privatization process of INTELSAT and Inmarsat.<sup>261</sup> At a recent Senate hearing, COMSAT argued that implementation of these principles would affect current negotiations with customers for the provision of these services, and this in return would result in a tremendous economic loss to both its shareholders and customers.<sup>262</sup> However, PanAmSat disputed this position by claiming that any existing contracts could be 'grandfathered' into the privatization process.<sup>263</sup> Despite these restrictions, COMSAT would receive its long coveted status as a 'non-dominant' carrier. As noted earlier, COMSAT has already been deemed a 'non-dominant' carrier by the FCC, irrespective of the Bliley Bill.<sup>264</sup>

Besides questioning the current restructuring efforts, the Administration has raised additional issues regarding the Bliley Bill. The Commerce Department, representing the Administration, has stated it does not 'fully concur' with the part of the Bliley Bill that would give the FCC "exclusive authority to determine the suitability or competitiveness of the outcome" of restructuring negotiations.<sup>265</sup> The Administration feels that determination should be a shared

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260. See *Satellite Reform Hearings*, supra note 37 (testimony of Betty Alewine, President and CEO, COMSAT Corporation); see also *Congress Told of Need to Restructure ISOs*, TELECOMMS. REP. INT'L, Aug. 15, 1997, at 9 (describing COMSAT's views of the standstill provisions as being "harsh, punitive, and confiscatory").

261. See H.R. 1872, 105th Cong. § 642 (1998).

262. See *Satellite Reform Hearings*, supra note 37 (testimony of Betty Alewine, President and CEO, COMSAT Corporation); *House Panel Clears INTELSAT Privatization Measure*, COMM. TODAY, Mar. 26, 1998, available in 1998 WL 5265254 (reporting that the "fresh look" provisions would allow customers to cancel \$523 million in contracts beginning in 2000); see also *Bill to Privatize INTELSAT Cleared by House Panel*, COMM. TODAY, Mar. 19, 1998, available in 1998 WL 5265173 (explaining that the "fresh look" provisions may also cause COMSAT to sue the U.S. government for potential damages if COMSAT cannot deliver the services it has already contracted since May 12, 1997).

263. See *Satellite Reform Hearings*, supra note 37 (testimony by James Cuminale, Senior Vice President and General Counsel of PanAmSat).

264. See *COMSAT General Counsel Calls for 'Pro-Competitive' Legislation; Tells Lawmakers H.R. 1872 Will Raise Prices, Close Markets and Restrict Consumer Satellite Choice*, PR NEWSWIRE, Sept. 30, 1997, available at WL 9/30/97 PR Newswire 09:41:00 (citing COMSAT's desire for the FCC to consider its petition for non-dominant status on its merits alone and not be incorporated into the provisions of this Bliley Bill).

265. See *Satellite Comp. Hearings*, supra note 1, at 22 (testimony of Jack Gleason, Associate Administrator of International Affairs at the National Telecommunications and Information Administration).

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undertaking by both the Executive Branch and the FCC due to the ongoing restructuring talks of the ISOs.<sup>266</sup> Even if both the Administration and the FCC shared in the duty to determine competitiveness, language in the Bliley Bill assessing the amount of competition in the U.S. marketplace remains vague, and therefore potentially problematic.<sup>267</sup>

The Administration also pointed out constitutional concerns regarding the Bliley Bill based on its instruction to the President to negotiate within a specified criteria.<sup>268</sup> These provisions could interfere with the President's foreign policy prerogatives and his constitutional right to conduct diplomatic exchanges in the manner he sees fit.<sup>269</sup> Consequently, any pro-competitive satellite legislation must overcome these issues before success can be achieved.

#### *D. S. 2365--The Burns Bill*

The Bliley Bill passed in the House of Representatives by a 403-16 vote, and is currently under review by the Senate.<sup>270</sup> The Senate, too, has joined the restructuring efforts by proposing a similar version to the Bliley Bill. This version, entitled the "International Satellite Communications Reform Act of 1998" (the "Burns Bill"),<sup>271</sup> was introduced by Senator Conrad Burns on July 28, 1998 and is also aimed at restructuring the ISOs, albeit in a less aggressive fashion.<sup>272</sup> Unlike the Bliley Bill, the flexible Burns Bill calls for the sale of both INTELSAT and Inmarsat by 2003, and lacks some of the tougher threats of the Bliley Bill, including the ability to terminate access to

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266. *See id.*

267. *See Satellite Restructuring Bill, supra* note 249 (pointing out one industry source who stated that if he were drafting the Bliley Bill, he would "sharpen his pencil" to make pro-competitive provisions more specific).

268. *See Satellite Comp. Hearings, supra* note 1, at 22 (testimony of Jack Gleason, Associate Administrator of International Affairs at the National Telecommunications and Information Administration) (citing specifically constitutional concerns about § 648 of H.R. 1872 which required the Executive office to consult with Congress prior to each meeting with INTELSAT or Inmarsat Assembly of Parties, INTELSAT Board of Governors, and the Inmarsat Council and § 661 which mandated that the President secure the "pro-competitive privatizations in a manner that meets the [FCC Licensing] criteria").

269. *See id.*

270. *See Mills, supra* note 11, at E5 (reporting that supporters successfully promoted the Bill "as benefiting U.S. consumers by allowing more competition in the growing world-wide satellite market").

271. *See* S. 2365, 105th Cong. (1998) (describing the objective of the Bill as "[t]o amend the Communications Satellite Act of 1962 to promote competition and privatization in satellite competition").

272. *See* Bill Piertruchd, *Burns Bill Looks to Privatize Satellite Industry*, NEWSBYTES NEWS NETWORK, July 29, 1998, available in 1998 WL 11724733 (explaining that the Burns Bill's provisions are not as tough as the Bliley Bill's).

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the lucrative U.S. market.<sup>273</sup> Another significant difference between the bills is that the Bliley Bill allows companies to renegotiate existing contracts with COMSAT beginning in 2000, while the Burns Bill does not require such a “fresh look” provision.<sup>274</sup> As noted earlier, COMSAT does not favor “fresh look” provisions because it gives existing customers the ability to cancel their contracts, forcing COMSAT to essentially renegotiate the contract on less favorable terms.<sup>275</sup>

#### *E. The Breaux Bill*

A related draft bill (“Breaux Bill”) proposed by Senator John Breaux also attempts to force a pro-competitive privatization of the ISOs.<sup>276</sup> Similar to the Burns Bill, the Breaux Bill does not include “fresh look” provisions.<sup>277</sup> In contrast, though, the Breaux Bill would effectively codify into law certain provisions which required the FCC to verify the independence of ISO affiliates like New Skies and ICO before granting a license.<sup>278</sup> These provisions are the same provisions first set forth in the FCC’s *DISCO II* Order.<sup>279</sup>

Because of the differing approaches that each bill takes, it is likely that any final piece of legislation will be a compromise between the Bliley, Burns, and Breaux Bills. How and to what extent the ISOs move forth with privatization will undoubtedly determine whether a more harsh approach is used or a more flexible one.

#### V. A PROPOSAL FOR A REVISED WORKING MODEL OF H.R. 1872

While there are many advantages to unilateral U.S. legislative action, H.R. 1872, in its present form, fails to take into account many of the aforementioned issues, including the rigid timetables for privatization. This Comment focuses on three major areas of the Bliley Bill; advocating to affirm one, but proposing to compromise and amend two others. First, as advised by the Bliley Bill, the lucrative U.S. market should be used as a market incentive for the ISOs to comply with competitive standards. Second, the flexibility inherent in the Burns Bill was essential to providing a final

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<sup>273.</sup> *See id.*

<sup>274.</sup> *See id.*

<sup>275.</sup> *See id.*

<sup>276.</sup> *See Satellite Competitors Criticize Burns Bill*, SATELLITE WK., Aug. 3, 1998, available in 1998 WL 10711035.

<sup>277.</sup> *See id.*

<sup>278.</sup> *See id.*

<sup>279.</sup> *See id.*; see also *supra* notes 156-67 and accompanying text (discussing *DISCO II*'s ECO-SAT test).

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framework for ISO restructuring. Finally, this flexibility was particularly important when establishing timetables for privatization and facilitating cooperation between the Administration and Congress. Accordingly, this Comment provides a working model towards these three stated goals.

#### A. *Market Incentives*

Given the emerging telecommunications environment,<sup>280</sup> signatories to the ISOs must be induced through market incentives in order to favor pro-competitive policies. The heart of H.R. 1872 accomplishes this by forcing the signatories to consider the lucrative U.S. market when contemplating the restructure of the ISOs. Signatories from less developed countries must also be convinced that a free market will provide nondiscriminatory satellite service to its people as well. Given the number of global satellite systems scheduled to launch in the next few years,<sup>281</sup> continued liberalization of worldwide regulations will make it easier for these companies to invest in foreign markets.<sup>282</sup> In particular, these companies will likely look to the lucrative U.S. marketplace for service opportunities. Therefore, the market incentives already contemplated in the Bliley Bill should be retained in any revised version of H.R. 1872.

#### B. *Preventing International Backlash*

Despite the inclusion of market incentives, other issues need to be resolved in order to prevent international backlash and unfair treatment of the ISOs. There is a concern by many that sections 621(1)(A) and (B) of the Bliley Bill impose too harsh a timetable for the ISOs to privatize<sup>283</sup> by requiring Inmarsat to be privatized by 2001 and INTELSAT the following year. Although the new amendments seek to “phase in” privatization of the ISOs, it is doubtful that this alone will garner international support.

These concerns stem from developing countries’ doubts that

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280. See discussion *supra* Part I (addressing the history of ISOs).

281. See *Via Satellite’s Global Satellite Survey 1997* (visited Nov. 24, 1998) <<http://www.phillips.com/satellite/survey/new1.htm>>. Geostationary Communications Satellite launches are projected to reach 250 launches by Year 2000. See *id.* In the 1980s, a mere sixty-nine satellites were launched. See *id.*; see also *Via Satellite’s Satellite Industry Trends and Statistics 1997* (visited Sept. 22, 1998) <<http://www.phillips.com/satellite/survey/new12.htm>>. North American satellites contribute to 24% of the world’s total market. See *id.* The United States dominates the satellite market in more than 42 countries. See *id.*

282. See discussion *supra* Part I.A (describing market advantages).

283. See *Competition Report*, *supra* note 43 (discussing INTELSAT’s declining market share due to the entrance of alternative providers of telecommunications services at prices comparable to those charged by INTELSAT). See discussion *supra* Part IV.A.

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private operators could offer the same nondiscriminatory services to their countries by 2001. Based on current technology and an increase in demand, however, private actors could arguably meet the ISOs' current levels of service and price. Although private operators will likely be able to meet this demand by 2001,<sup>284</sup> a more flexible deadline should still be included in the Bliley Bill.

In order to hedge against this risk, a revised H.R. 1872 should include provisions for granting possible extensions to the ISOs. To accomplish this, Section 601 should be amended to include Section 601(e):

(e) GRANTING OF EXTENSION FOR COMPETITION TEST CONSIDERATION.

(1) PETITION FOR EXTENSION—INTELSAT or Inmarsat, or any successor entities, may petition the Commission to grant temporary relief from the licensing criteria in sections 621, 622, and 624 for an additional six (6) months, after the passing of the privatization dates outlined in this Section.

(A) INTELSAT must file for petition for temporary relief at least six (6) months before the privatization date indicated in Sec. 621(1)(A) of this Act, or at least six (6) months before any other deadline established by the Commission after the passing of the initial privatization date.

(B) Inmarsat must file for petition for temporary relief at least six (6) months before the privatization date indicated in Sec. 621(1)(B) of this Act, or at least six (6) months before any other deadline established by the Commission after the passing of the initial privatization date.

(C) Petitions for extension filed with the Commission shall be subject to notice and comment.

(2) CRITERIA FOR DETERMINING EXTENSION:

(A) Upon petition by INTELSAT or Inmarsat, or any successor entities, for temporary relief, it must show in its petition:

(i) reasons why it has failed to privatize in a competitive manner that does not harm competition in the telecommunications markets of the United States;

(ii) an outline of the restructuring plan it intends to undertake in the next six months so it does not harm competition in the telecommunications markets of the United States;

(iii) a date in which it believes restructuring may be completed so it

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284. See *supra* note 7 (describing the numerous entrants into the satellite marketplace in the next few years).

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does not harm competition in the telecommunications markets of the United States; and

(iv) any other factors or reasons it feels the Commission should consider in the determination of its petition.

(B) The Commission shall consider the following as relevant factors in its determination to grant or not grant an extension:

(i) Whether INTELSAT or Inmarsat, or any successor entities, have restructured in good faith so it does not harm competition in the telecommunications markets of the United States;

(ii) Whether INTELSAT or Inmarsat, or any successor entity, is likely to succeed in restructuring so it does not harm competition in the telecommunications markets of the United States;

(iii) Whether a granting of an extension is likely to facilitate a restructuring of INTELSAT or Inmarsat, or any successor entities, in a manner that does not harm competition in the telecommunications markets of the United States.

(3) GRANTING OF EXTENSION.

(A) Upon granting of any extension by the Commission, the temporary relief shall be afforded INTELSAT or Inmarsat, or any successor entities, for up to one (1) additional year, but not less than six (6) months.

(B) Upon the granting of any extension by the Commission, INTELSAT or Inmarsat, or any successor entities, may file for additional extensions if needed.

The addition of these provisions provides several advantages. First, section 601(e) would protect the United States from international backlash by allowing the ISOs more time if they are not fully privatized by the Bliley Bill's deadlines.<sup>285</sup> This measure fosters a level of goodwill between the United States and foreign countries because it ensures that multilateral negotiations will be given due deference before any unilateral decision is made.<sup>286</sup> Second, the Bliley Bill would clearly outline the requirements of an extension and the considerations which the Commission will take into affect in granting an extension. Once again, this gives ISOs the required flexibility they may need to protect against last minute hedging by other countries.<sup>287</sup>

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285. See *House Testimony*, *supra* note 243 (citing John Dingell (D-Mich.) warning that the Bliley Bill could provoke international backlash by dictating privatization and then imposing sanctions on the ISOs if the deadlines were not met).

286. See *id.* (stating that the Commerce Department noted that most parties to the ISOs "see U.S. efforts at privatization as a thinly veiled American conspiracy to promote market dominance by U.S. companies").

287. See *id.* (reporting that Regina M. Keeney, Chief of the FCC International Bureau, stated that the somewhat rigid privatization terms could be given more flexibility to reach goals in

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Third, these provisions allow continued involvement by the FCC in determining if the United States will shut its markets to the ISOs. This allows the U.S. delegation to leverage this ‘wild card’ during restructuring negotiations until pro-competitive policies are met.<sup>288</sup> Fourth, this process will be subject to public notice and comment. This guarantees that the satellite industry will have a voice in whether or not to grant an extension.

Finally, this measure is a fair compromise between the Burns and Bliley Bills. The Burns Bill would ease privatization requirements until 2003. The proposed amendments would accomplish both the Bliley Bill’s stated goals of privatization by 2002, but allow flexibility for the Burns Bill’s 2003 deadline. As a result, these provisions may be incorporated into a revised H.R. 1872 to circumvent concerns regarding the rigidity of the current timetables.

### *C. Fostering Cooperation Between the FCC and the Administration*

The Administration is on record that it does not “fully concur” with provisions in section 601 that provide the FCC with sole authority to determine the competitiveness of the outcome of restructuring talks.<sup>289</sup> The FCC, as the chief regulator of telecommunications in the United States, should retain the right to revoke licensing if U.S. competition goals are not met. However, in order to protect U.S. negotiation tactics during the restructuring talks, the Administration must be allowed to participate in the determination of competition with the FCC. Otherwise, multilateral negotiations by the Administration may be jeopardized if other countries believe the FCC is intent on denying it access to the U.S. markets.

Accordingly, section 601(a)(1) should be revised to read:

(1) COMPETITION TEST.—The Commission may not issue a license or construction permit to any separated entity, or renew or permit the assignment or use of any such license or permit, or authorize the use by any entity subject to United States jurisdiction of any space segment owned or operated by any separated entity, unless both the Commission and the State Department determines that such issuance, renewal, assignment, or use will not harm competition in the telecommunications market of the United States. If the Commission or State Department does not make such

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tandem with other countries).

288. See *supra* note 227 (describing how James Cuminale of PanAmSat stated that the attractiveness of the U.S. market can be used as a lever to induce other countries to adopt market access reforms).

289. See discussion *supra* Part IV.C (discussing the Administration’s opposition to the unilateral legislative action).

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a determination, it shall deny or revoke authority to use space segment owned or operated by the separated entity to provide services to, from, or within the United States.<sup>290</sup>

This approach will ensure that U.S. multilateral negotiating positions are not forfeited, while also resting ultimate authority to revoke licenses with the FCC. As discussed earlier, the Administration is involved with ongoing negotiations with INTELSAT/Inmarsat parties to fully privatize these entities. The Administration's cooperation is critical because the privatization of the ISOs will require a global consensus. As a result, relying solely on unilateral FCC authority to revoke licenses may cause upheaval in the negotiation processes.

The proposed provisions provide a joint incentive for both the FCC and the State Department to cooperate in the restructuring talks. By acting together, the FCC and State Department can develop a strategy to best meet the U.S. pro-competition goals. For example, the FCC and State Department can try a "good cop, bad cop" approach to get signatories to give in to its terms. While the State Department plays the lead role in negotiating, the FCC can threaten rejection if certain provisions are not met. Finally, constitutional concerns would be eliminated because both the Administration and the FCC would share in the outcome of the talks. Although the FCC would relinquish some control in the matter, a shared and well planned effort would be more suitable to U.S. interests abroad. Alternatively, INTELSAT parties will be less reluctant to nullify the Administration's positions on the basis that they do not have superseding authority over the FCC to revoke foreign operator's licenses.

#### CONCLUSION

While many countries subscribe to the futuristic views of Arthur Clarke, there are others who remain apprehensive of Adam Smith's *invisible hand*. The goal of any legislation should be directed at

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290. Presently, § 601(a)(1) states:

(1) COMPETITION TEST—The Commission may not issue a license or construction permit to any separated entity, or renew or permit the assignment or use of any such license or permit, or authorize the use by any entity subject to United States jurisdiction of any space segment owned, leased, or operated by any separated entity, unless the Commission determines that such issuance, renewal, assignment, or use will not harm competition in the telecommunications market of the United States. If the Commission does not make such a determination, it shall deny or revoke authority to use space segment owned, leased, or operated by the separated entity to provide services to, from, or within the United States.

H.R. 1872, 105th Cong. § 601(a)(1) (1998).

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striking a balance between both perspectives—ensuring technological innovation to all countries while rewarding entrepreneurial spirit. The Bliley, Burns, and Breaux Bills aimed to deliver in both regards. Waving the United States' lucrative telecommunications market in the face of other countries, Capitol Hill is attempting to accelerate liberalization policies already sweeping the entire world.

As more private operators begin matching the services previously only available through the ISOs, the need for a regulated satellite monopoly is marginalized. Recent successes in the WTO Agreement on Basic Telecommunications Services have evidenced the rest of the world's acknowledgment of this inevitable conclusion. With more and more foreign private operators clamoring for entry into the U.S. telecommunications market, the draw of the U.S. market will be a compelling reason for these operators to pressure their countries to reform the ISOs in a competitive manner. Accordingly, market incentives should be retained as the cornerstone to any future legislation in this area.

Besides economic incentives, incremental changes must also be added to the revised Bliley Bill. Crafting legislation that promotes international diplomacy and fosters a cooperative effort between the FCC and the Administration are important stepping stones when developing a working model towards global success. Accordingly, providing flexibility in the Bliley Bill's current timetables and allowing a shared undertaking in the matter are fundamental to restructuring the ISOs in a pro-competitive fashion. Consequently, these improvements will increase the likelihood of other countries accepting Adam Smith's *invisible hand* in lieu of Uncle Sam's *strong arm*.