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The Legal Commitment of the United States to the INTELSAT System

Bert W. Rein* and Carl R. Frank**

I. Introduction

In 1961 President John F. Kennedy offered U.S. leadership in providing satellite communications to the entire world.¹ This initiative was incorporated in the Communications Satellite Act of 1962 (Satellite Act), in which Congress authorized the United States to sponsor a global satellite consortium to provide nondiscriminatory service to all nations.² This policy was solidified in a 1964 Interim Agreement,³ which was replaced in 1971 by a Final Agreement that established the International Telecommunications Satellite Organization (INTELSAT).⁴ Today, INTELSAT has 114 member nations, and services still more.⁵

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¹ The United States originally proposed the creation of a global satellite system "in the interest of world peace and closer brotherhood among people throughout the world." W. McDougall, *THE HEAVENS AND THE EARTH* 354 (1986) (quoting Policy Statement of President John F. Kennedy (July 24, 1961)).

² Communications Satellite Act of 1962, § 102, 47 U.S.C. § 701 (1982).

The legislative debate that proceeded passage of this act was controversial but beyond the scope of this Article. For an illustration of those controversies, see W. McDougall, *supra* note 1, at 356. For an excellent discussion of the legal background of the Communications Satellite Act of 1962, see Glassie, *Analysis of the Legal Authority for Establishment of Private International Communications Satellite Systems*, 18 *GEO. WASH. J. INT'L L. & ECON.* 355, 361-68 (1984). See also Rosenblum, *Regulation in Orbit: Administrative Aspects of the Communications Satellite Act of 1962*, 58 *Nw. U.L. REV.* 216, 216-19 (1963) (discussing the background of the Act in general). See generally Levin, *Organization and Control of Communications Satellites*, 113 *U. PA. L. REV.* 315 (1965) (comprehensively discussing the original version of the Act); Note, *The Communications Satellite Act of 1962*, 76 *HARV. L. REV.* 388 (1962) (providing an excellent overview of the original version of the Act).

³ Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, *opened for signature* Aug. 20, 1964, 15 *U.S.T.* 1705, T.I.A.S. No. 5646 [hereinafter Interim Agreement].

⁴ Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT," *opened for signature* Aug. 20, 1971, 23 *U.S.T.* 3813, T.I.A.S. No. 7532 [hereinafter INTELSAT Agreement]. For a discussion of the international negotiations that led to the creation of INTELSAT, see COLINO, *THE INTELSAT DEFINITIVE ARRANGEMENTS: USHERING IN A NEW ERA IN SATELLITE TELECOMMUNICATIONS* 3-6 (1973).

⁵ INTELSAT, 1987-88 INTELSAT REPORT 1 (1988).

For twenty years following the negotiation of the interim arrangements for the INTELSAT system, the U.S. Government exercised comprehensive regulatory controls over U.S. international communications services. This ensured a prominent role for INTELSAT on U.S. international telecommunications routes and effectively guaranteed the success of INTELSAT's single global system. These comprehensive regulatory controls included: (1) supervision by the Federal Communication Commission (FCC or Commission) and executive branch over the total circuit capacity on all U.S. international routes, regardless of whether such capacity was generated by satellites, undersea cables, or landline facilities;⁶ (2) allocation by the FCC of transoceanic traffic between all available facilities under "balanced loading" principles;⁷ and (3) endorsement by the FCC of tariff levels for the U.S. affiliate to INTELSAT, the Communication Satellite Corporation (COMSAT), permitting recovery of the fully allocated costs of INTELSAT operations.⁸

Recently, however, the United States changed its regulatory policy in an effort to allow market forces to shape the development and use of facilities of U.S. international telecommunications routes. Such a change in policy has caused the withdrawal of all applicable U.S. Government controls, and the FCC and executive branch have clearly indicated that they will not restrict private investors from laying any number of fiber-optic, undersea cables on major U.S. routes.⁹ Nor will the Government restrict private industry in the launching of satellites on routes offering long-term leased international capacity not interconnected with the public switched system.¹⁰ Moreover, the United States has significantly loosened restrictions on common carrier investment in fiber-optic transoceanic cables,¹¹

⁶ The FCC did so through several facilities planning dockets by determining estimates of circuit demand and supply in each ocean region for multiyear periods, but used a more rigorous process for the North Atlantic region. See Rein, McDonald, Adams, Frank, & Nielson, *Implementation of a U.S. "Free Entry" Initiative for Transatlantic Satellite Facilities: Problems, Pitfalls, and Possibilities*, 18 GEO. WASH. J. INT'L L. & ECON. 459, 476-80 (1985) (providing a general description of this process) [hereinafter Rein].

⁷ The concept of balanced loading pertains to an FCC requirement that U.S.-based international carriers, principally American Telephone & Telegraph Company (AT&T), must activate one international satellite circuit for each cable circuit they wish to use. See *In re American Telephone & Telegraph Co.*, 13 F.C.C.2d 235, 237 (1968); *In re Proposed TAT-5 Project*, 11 F.C.C.2d 957, 957-58 (1968) (advisory letter from the FCC to AT&T).

⁸ *Communications Satellite Corp.*, 38 F.C.C. 1286, 1295-96 (1965), *modified in Communications Satellite Corp.*, 27 F.C.C.2d 927, 930-31 (1971).

⁹ See *Tel-Optik, Ltd.*, 100 F.C.C.2d 1033, 1040-42 (1985); *Pacific Telecom Cable, Inc.*, 2 F.C.C. Rcd. 2686, 2687-90 (1987).

¹⁰ See *International Communications*, 101 F.C.C.2d 1047 (1985). For discussions of this proceeding, see Rein, *supra* note 6, at 461-70; Godwin, *The Proposed Orion and ISI Satellite Systems: A Challenge to the Status Quo*, 24 JURIMETRICS J. 297, 325-28 (1984).

¹¹ See *American Telephone & Telegraph Co.*, 98 F.C.C.2d 440 (1984) (approving North Atlantic cable with capacity far exceeding predicted demand); *American Telephone & Telegraph Co.*, Mimeo No. 1794 (Jan. 7, 1986) (approving Pacific cable with a capacity far exceeding predicted demand); *American Telephone & Telegraph Co. of Puerto Rico*,

and has taken a "hands-off" position on INTELSAT's own investments that provide additional capacity.¹² The FCC has also abolished its previous "balanced loading" requirement and withdrawn from the mandatory allocation of traffic to INTELSAT or any other facility.¹³ Finally, the FCC has stated that the pricing of INTELSAT circuits by COMSAT are to be established by market forces generated by competing facilities.¹⁴

The U.S. withdrawal of comprehensive controls over the development and use of international telecommunications facilities subjects INTELSAT and other facilities investors to the risks associated with bad managerial decisions and adverse market conditions, which could consequently lead to severe economic hardship or even enterprise failure. Such risks are necessary by-products of competitive markets and concomitant to profit opportunities in the unregulated communications markets of the future. Exposing INTELSAT's global system to these risks, however, raises difficult issues of policy and law.

Much attention has focused on the wisdom of a policy that would permit the INTELSAT system to be curtailed or withered by competition at the inevitable cost of adversely affecting U.S. relations with smaller INTELSAT members or major powers who are equally dependent on INTELSAT.¹⁵ This Article deals with several related, but distinguishable, questions including: (1) whether the U.S. Government has a legal obligation to safeguard INTELSAT from these risks under its own domestic law or under the international obligations it accepted in the INTELSAT Agreement; (2) if so, what degree of security the U.S. Government is obligated to provide to INTELSAT; and (3) what mechanisms are available for the enforcement of such legal obligations.

II. United States Safeguard Obligations

A. Domestic Law Safeguards

The Communications Satellite Act of 1962 established domestic rules for the licensing of satellites to provide service on U.S. international routes. Under the Satellite Act of 1962, Congress committed

Inc., 3 F.C.C. Rcd. 5917 (1988) (approving Caribbean cable with capacity far exceeding predicted demand).

¹² Cf. Communications Satellite Corp., F.C.C. 86-173 (Apr. 17, 1986).

¹³ International Carrier Circuits, 3 F.C.C. Rcd. 2156 (1988).

¹⁴ *Id.* at 2158-60. See also Communications Satellite Corp., 2 F.C.C. Rcd. 2420 (1987).

¹⁵ See *In re Establishment of Satellite Systems Providing International Communications*, 101 F.C.C.2d 1046, 1064-87; SENIOR INTERAGENCY GROUP ON INTERNATIONAL COMMUNICATION AND INFORMATION POLICY, A WHITE PAPER ON NEW INTERNATIONAL SATELLITE SYSTEMS 17 (1985) [hereinafter WHITE PAPER]; Rein, *supra* note 6, at 501-11; Potamitis, *Competition in International Satellite Telecommunications Services*, 44 U. TORONTO FAC. L. REV. 34, 44-54 (1986).

the United States "to establish, in conjunction with other countries, . . . a commercial communications satellite system, as part of an improved global communications network . . ." ¹⁶ To that end, Congress provided for a unique U.S. corporate participant in the proposed international venture, the Communications Satellite Corporation. Congress also established ownership, control, and regulatory parameters to ensure that COMSAT acted in the national interest and did not disrupt competition between pre-existing U.S. entities that provided international communications services directly to users. ¹⁷ Section 102(d) of the Satellite Act made clear that the FCC was precluded from licensing any other international satellite system to provide service on U.S. routes absent a prior determination that such systems were "required to meet unique governmental needs, or . . . otherwise *required in the national interest*." ¹⁸ Thus, regulation of an exclusive satellite service provider, rather than competition, was the anticipated U.S. method of ensuring that the full benefits of satellite technology were passed on to communications users. Such regulation would be accomplished through government supervision of COMSAT's role in the international system and FCC regulation of COMSAT's service offerings to other U.S. carriers.

The exclusive status accorded to the proposed international system under the 1962 Act was a cornerstone of the U.S. position in the negotiations leading up to the INTELSAT Interim Agreement in 1964 and the definitive INTELSAT Agreements in 1971. ¹⁹ The United States insisted on, and essentially achieved, an undertaking from all members of the interim INTELSAT organization that no competing satellite systems would be authorized. ²⁰ Though the United States was less successful in foreclosing the potential for competing systems under the actual INTELSAT Agreements, it did secure commitments that such systems would not be allowed to cause technical harm or "significant economic harm" to the INTELSAT organization. ²¹

The U.S. authority to negotiate the interim and definitive Agreements arose directly from the 1962 Satellite Act. The contemporaneous understanding of that Act was that so long as INTELSAT was accorded sufficient scope and resources to meet U.S. international satellite communications needs, the United States was prepared to

¹⁶ Communications Satellite Act of 1962, § 102(a), 47 U.S.C. § 701(a) (1982).

¹⁷ See Glassie, *supra* note 2, at 361-68 (describing history of legislation and fundamental disagreements over the proposed organization of COMSAT).

¹⁸ Communications Satellite Act of 1962, § 102(d), 47 U.S.C. § 701(d) (1982).

¹⁹ The Communications Satellite Act of 1962 authorized the executive branch to call a plenipotentiary conference with other nations interested in forming a satellite cooperative. See *id.* § 201(a), 47 U.S.C. § 721(a) (1982).

²⁰ See COLINO, *supra* note 4, at 6.

²¹ INTELSAT Agreement, *supra* note 4, art. XIV, 23 U.S.T. at 3854. See also COLINO, *supra* note 4, at 91-92.

forego the "national interest" licensing authority in the 1962 Act whereby the FCC could approve alternate international systems. Although not requiring that INTELSAT be safeguarded from all commercial satellite competition on U.S. routes, the Satellite Act was interpreted to *permit* the United States to foreclose such competition entirely by international agreement or to agree to substantive limitations on such competition in order to ensure the welfare of INTELSAT.

Such foreclosures or limitations on competition in the definitive INTELSAT Agreements are clearly consistent with the 1962 Satellite Act. They are incorporated in U.S. law by the INTELSAT Agreements, which are given treaty-equivalent status as executive agreements undertaken pursuant to an express prior congressional mandate.²² As a result, INTELSAT is safeguarded from the introduction of commercial satellite competition under U.S. domestic law both by the the Satellite Act's requirement that the competition be in the "national interest," and by those additional entry limitations accepted by the United States in the INTELSAT Agreement.

1. *The "National Interest" Limit On Injurious Competitive Entry*

a. *Transborder Satellites*

Initial domestic law consideration of "national interest" limitations on the entry of competing international satellites came about somewhat indirectly through U.S. authorization of domestic satellite systems whose footprints extended to Canada, Mexico, and nearby Caribbean countries.²³ Operators of these satellites sought to provide international services between those points and the United States on a peripheral and incidental basis.²⁴ The FCC accepted the argument that the primarily domestic orientation of these systems eliminated the need for a formal "national interest" determination under the 1962 Act as a precondition of so-called "transborder" in-

²² Although not formally a treaty, because congressional approval preceded formation of the agreement, the INTELSAT agreement is a Congressional-Executive agreement, which normally is considered to have the full force of a treaty. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 comment e (1986) ("[The] prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.") [hereinafter RESTATEMENT (THIRD)]; B. Altman & Co. v. United States, 224 U.S. 583, 598-602 (1912) (stating that a Congressional-Executive agreement is a "treaty" under statute conferring appellate jurisdiction).

²³ See Domestic Communications-Satellite Facilities, 22 F.C.C.2d 86 (1970), 35 F.C.C.2d 844 (1972), *recon.* 38 F.C.C.2d 665 (1972). Hughes Aircraft Co., 43 F.C.C.2d 1141 (1973); Western Union Telegraph Co., 38 F.C.C.2d 1197 (1973) (authority to construct domestic satellites).

²⁴ Such services would permit an existing network user to communicate with offices in nearby Canada and Mexico without arranging for alternative communications facilities.

ternational service.²⁵ Nevertheless, the FCC sought executive branch guidance to determine whether such services could be authorized consistent with the 1962 Act and the INTELSAT Agreements.²⁶

The executive branch furnished its views in a July 23, 1981 letter from Undersecretary of State James L. Buckley to FCC Chairman Mark Fowler (Buckley Letter).²⁷ The Buckley Letter noted that international services via satellite systems other than INTELSAT on U.S. routes was not precluded by the 1962 Act or by the definitive INTELSAT Agreements. Nevertheless, the Buckley Letter stated that "[t]he integrity of the INTELSAT system is important to achieving the goals established in the Communications Satellite Act of 1962."²⁸ The letter concluded that alternative capacity could be authorized to serve internationally only where INTELSAT (1) "could not provide the service required," or (2) where the "service planned would be clearly uneconomical or impractical using the INTELSAT system."²⁹

These limitations, though overtly regulatory in nature,³⁰ had no express relation to the "significant economic harm" limitation of the INTELSAT Agreement.³¹ The Buckley Letter focused on the procedural coordination obligations imposed on the United States under the INTELSAT Agreements and on establishing a "national interest" test which the FCC could apply without regard to whether it paralleled the "significant economic harm" standard in the INTELSAT Agreement.³²

The Buckley Letter clearly viewed the "national interest" requirement of the 1962 Satellite Act as limiting entry to alternative systems that *supplemented* rather than competed with INTELSAT services. Under either prong of the Buckley test, an alternative service

²⁵ Indeed, no entity argued that a determination was required under § 102(d) of the Communications Satellite Act of 1962.

²⁶ See *Transborder Satellite Video Services*, 88 F.C.C.2d 258, 271 (1981) ("[W]e have hesitated to act up to now . . . until we received official guidance from the Department of State in its capacity as foreign policy advisor and spokesman for the Executive Branch.").

²⁷ Letter from James L. Buckley, Undersecretary of State, to Mark S. Fowler, FCC Chairman (July 23, 1981) (containing an interagency task force's conclusions with respect to whether the "transborder policy" was compatible with the United States' obligations under INTELSAT), *reprinted in* *Transborder Satellite Video Services*, 88 F.C.C.2d at 287-89 [hereinafter Buckley Letter].

²⁸ *Id.* at 287.

²⁹ *Id.* at 288.

³⁰ In other words, providing service to adjacent international points using Domsats (domestic satellites) required special Department of State consideration and FCC authorization, and could not be merely undertaken in accordance with the dictates of the marketplace.

³¹ INTELSAT Agreement, *supra* note 4, art. XIV(d), 23 U.S.T. at 3854.

³² The FCC might have taken the position that Domsat traffic which is uneconomic or impractical on INTELSAT would not harm the global system. However, in the eight years that the FCC has been applying its policy it has never taken such a position.

would be foreclosed unless its proponents showed that *but for the proposed alternative service, no satellite communications of the contemplated type would flow*.³³ The Buckley test effectively foreclosed the diversion of INTELSAT's existing or potential traffic to a commercial satellite alternative and eliminated price competition between INTELSAT and such a system since it entitled INTELSAT to the traffic flow unless INTELSAT carriage was "uneconomical or impractical."

In 1988 the Buckley test was reviewed by the Circuit Court of Appeals for the District of Columbia in an appeal of a later grant of a transborder license to a domestic satellite corporation, Teleport International.³⁴ In the *Teleport* case, the court found a "protectionist policy in favor of INTELSAT embodied in applicable law and treaties" including a "purpose . . . to shield INTELSAT from price competition."³⁵ It recognized the Buckley Letter as an "attempt to give content to the statutory [national interest] provision" and endorsed FCC reliance on the principles of section 102(d) of the 1962 Satellite Act in evaluating international service proposals by domestic satellite operators.³⁶

As a result, the court set aside an FCC authorization of transborder U.S.-Jamaica service that was based on the finding that INTELSAT service was "uneconomical" solely because INTELSAT was more expensive than the domestic alternative.³⁷ The court stated that it was "hard pressed to understand how such an outcome is compatible with the Buckley Letter, not to mention the Communications Satellite Act and the Intelsat Treaty."³⁸ It held that an "uneconomic" finding must be based on a *qualitative* (system configuration) difference between INTELSAT service and the domestic alternative, rather than a mere quantitative price difference.³⁹ Thus, the court concurred with the Buckley Letter that the "national interest" requirement under the 1962 Act did not include a national interest in price competition.

b. Separate Satellites

The Buckley Letter approach is generally deferential to INTELSAT and appears to be based on the policy goals of global cooperation expressed and implied in the 1962 Satellite Act. This approach was not used, however, when the executive branch re-evaluated and

³³ The Buckley Letter required that Domsat applicants carry the burden of proof. See Buckley Letter, *supra* note 27, at 288.

³⁴ *Communications Satellite Corp. v. FCC*, 836 F.2d 623 (D.C. Cir. 1988) [hereinafter *Teleport*].

³⁵ *Id.* at 625, 632.

³⁶ *Id.* at 626, 630.

³⁷ See *In re Teleport International Ltd. and American Satellite Co.*, 1 F.C.C. Rcd. 101, 103 (1986).

³⁸ *Teleport*, 836 F.2d at 633.

³⁹ See *id.* at 633.

substantially modified its policy towards competing satellite systems in 1984.

The shift came with the applications of several entities to construct new satellites poised over ocean regions and designed to carry traffic between the United States and points in Europe or Asia.⁴⁰ These entities did not propose incidental international services; rather, their systems were to be designed and constructed solely to compete with INTELSAT for transoceanic traffic.⁴¹ These, then, were entirely "separate" systems rather than merely domestic satellites broadcasting internationally.

The FCC stayed its hand on the separate systems applications pending executive branch evaluation of their foreign policy implications. In late 1984, acting under Presidential Determination No. 85-2, the Reagan Administration found separate satellite systems to be in the national interest so long as their capacity was offered on a capacity sale or long-term basis and was not interconnected with the public switched network.⁴² The Administration's separate systems position emphasized the advantages of competition in stimulating the use of satellite facilities in private communications systems, developing innovative satellite offerings, and reducing consumer costs.⁴³

In support of the Determination, an Executive Branch Task Force released a "White Paper" in 1985 on the separate satellites policy.⁴⁴ While the White Paper was somewhat critical of INTELSAT's service offerings to potential private system customers, it did not attempt to show that separate systems were a required *supplement* to the INTELSAT system or that the traffic they would carry would otherwise not be carried by INTELSAT. On the contrary, the White Paper focused almost exclusively on the benefits that competition in international satellite services would bring U.S. users.⁴⁵

Because of the difference between such separate systems and the previous transborder policy, the executive branch was required to face squarely the "significant economic harm" limitation contained in the INTELSAT Agreement.⁴⁶ The United States did so through

⁴⁰ For an overview of the applications, see generally Colino, *A Chronicle of Policy and Procedure: The Formulation of the Reagan Administration Policy on International Satellite Telecommunications*, 13 J. SPACE L. 103 (1985).

⁴¹ E.g., Application of Orion Satellite Corp., FCC File No. CSS-83-002-P (LA) (filed Mar. 11, 1983); Application of Pan American Satellite Corp., FCC File No. CSS-84-004-P (LA) at 2, 16 (filed June 4, 1984).

⁴² Presidential Determination No. 85-2, 49 Fed. Reg. 46,987 (Nov. 30, 1984).

⁴³ See Letter from George P. Shultz, Secretary of State, and Malcolm Baldrige, Secretary of Commerce, to Mark S. Fowler, FCC Chairman (Nov. 28, 1984), reprinted in *Establishment of Satellite Systems Providing International Communications*, 100 F.C.C.2d 290, 315-16 (1988).

⁴⁴ See *supra* note 15 (citing WHITE PAPER).

⁴⁵ WHITE PAPER, *supra* note 15, at 11-14.

⁴⁶ INTELSAT Agreement, *supra* note 4, art. XIV(d), 23 U.S.T. at 3854.

service limitations imposed on separate systems, limiting them to nonswitched traffic not interconnected with the public network.⁴⁷ The White Paper concluded that the restrictions would shield ninety percent of INTELSAT's revenue from direct competition and therefore create only a limited challenge to the INTELSAT system.⁴⁸ Although the analytical "national interest" focus of the Satellite Act was centered on a *need* to justify additional capacity, the White Paper simply assumed such capacity was a necessary element of fostering competition, and moved to a more general inquiry of whether the type of competition and traffic diversion being authorized would unduly impair the INTELSAT system.

The FCC enthusiastically endorsed the new executive branch criteria in its 1985 Separate Systems decision.⁴⁹ It concluded independently that the competition provided by separate systems was in the national interest⁵⁰ and that the executive branch limitations were sufficient to ensure the viability of INTELSAT.⁵¹ The FCC made clear that its threshold for concern over "significant economic harm" to the INTELSAT system was relatively high and would not be reached absent a showing that "INTELSAT's very existence" at a minimal service level was at least at reasonable risk.⁵²

Unlike the transborder policy, the separate satellite decisions of the executive branch and the FCC have not been reviewed by the courts to determine their consistency with the Satellite Act and the INTELSAT Agreement. Nevertheless, the analysis in the *Teleport* decision strongly suggests that a "national interest" authorization premised only on the virtues of competition could not withstand a judicial challenge under the Satellite Act. Indeed, because the "competition" promised by separate satellites is based on price competition with INTELSAT, the *Teleport* evaluation would also call into question the underlying Presidential Determination.⁵³

A new element was added to the legal framework for competition with INTELSAT with the 1985 passage of section 146 of the Foreign Relations Authorization Act of 1986.⁵⁴ Section 146 reiterates the policy support for INTELSAT found in the 1962 Satellite

⁴⁷ WHITE PAPER, *supra* note 15, at 31 ("Limiting new entrants to customized services reduces any likelihood of significant adverse economic impact on INTELSAT.")

⁴⁸ *Id.* at 34.

⁴⁹ *In re* Establishment of Satellite Systems Providing International Communications, 101 F.C.C.2d 1046 (1985).

⁵⁰ *Id.* at 1177-79.

⁵¹ *See id.* at 1115-47.

⁵² *Id.* at 1129.

⁵³ The Presidential Determination purported to operate within the Communications Satellite Act of 1962. *See* Presidential Determination No. 85-2, 49 Fed. Reg. 46,987 (Nov. 30, 1984) (stating that action is under authority given to the President by § 102(d) and § 201(a) of the Communication Satellite Act of 1962). If so, it would be required to be consistent with the approach taken in that statute, including its protection of INTELSAT.

⁵⁴ Pub. L. No. 99-93, § 146, 99 Stat. 405, 425 (1985). *See also infra* note 58 and accom-

Act, but also expresses congressional support for competitive separate satellite systems in compliance with the "executive branch conditions established pursuant to the Presidential Determination No. 85-2."⁵⁵ Thus, it may be argued that the intent and effect of section 146 was to supplant the "national interest" finding requirement of the 1962 Act through an absolute bar on separate systems outside Determination 85-2 conditions, and a wholly permissive licensing regime for satellites operating within those limitations.

Although the above construction of section 146 of the Foreign Relations Authorization Act is tenable, it is not necessarily persuasive for three reasons. First, section 146 itself states that the United States should avoid licensing actions that cause technical or economic harm to the INTELSAT system and reaffirms the U.S. commitment to INTELSAT.⁵⁶ As Congress clearly showed no intent to override international commitments to INTELSAT, section 146 is properly read as dealing only with domestic law-originated limitations on separate system authorizations while leaving undisturbed limitations arising from U.S. international obligations.

Second, section 146 does not expressly delete or amend section 102(d) of the 1962 Satellite Act and thus leaves in place the general rule that separate satellites be "required in the national interest."⁵⁷ While section 146 evidences general congressional support for competition in noninterconnected services, there may be some circumstances where separate satellite authorizations are not "required" to provide such competition. For example, where substantial private cable capacity is present on particular routes, competition with INTELSAT may be sufficiently intense and therefore not require additional satellite capacity. Indeed, section 146 might be read simply to require Presidential Determination 85-2 limitations in situations where the pre-existing "national interest" test of section 102(d) of the Satellite Act is otherwise satisfied.

Third, there is some question as to whether section 146 is incorporated into organic law or has expired with the 1986-87 appropriation to which it was attached. The compiler of the U.S. Code has not codified section 146 into the Communications Satellite Act but merely lists it as a note to section 102 of the Satellite Act.⁵⁸ Nevertheless, section 146 was drafted as organic legislation with no visible tie to 1986-87 events,⁵⁹ and was treated as an Act with continuing

panying text noting that § 146 has not been officially codified as a statute per se in the United States Code.

⁵⁵ *Id.* § 146(b)(1), 99 Stat. at 425. *See also infra* note 58 and accompanying text.

⁵⁶ *Id.* § 146(a)(2)(B). *See also infra* note 58 and accompanying text.

⁵⁷ 47 U.S.C. § 701(d) (1982).

⁵⁸ *See* 47 U.S.C. § 701 (Supp. III 1985).

⁵⁹ Other provisions contained in the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 were codified into positive law. *See, e.g.*, 22 U.S.C. § 4314 (Supp. III

validity by the D.C. Circuit in the *Teleport* decision.⁶⁰ Thus, it seems probable that section 146 must be read together with section 102(d) of the Satellite Act in assessing separate satellite entry limitations under U.S. domestic law.

In sum, the legal safeguards against competitive injury to INTELSAT from new satellite entry under U.S. domestic law seem to include both the section 102(d) and section 146 licensing restrictions as well as applicable international commitments under the INTELSAT Agreements. The proper interpretation of the licensing limitations is somewhat murky and depends on the extent to which section 146 of the Foreign Relations Authorization Act modifies the "national interest" limitations enunciated in *Teleport*. The proper interpretation of the INTELSAT Agreement's limitations is discussed later in this Article.

2. *Other Domestic Law Safeguards Against Undue Diversion of INTELSAT Traffic Potential*

Consideration of domestic law safeguards against undue diversion of INTELSAT's traffic potential to undersea cable has long been an element of the U.S. legal regime. This is because undersea cable facilities predated the INTELSAT system⁶¹ and have remained a viable technical alternative for virtually all INTELSAT services.⁶² As in the case of separate satellite facilities, undue diversion has been considered in FCC licensing decisions on cable investment proposals.⁶³ Moreover, even after decisions have been made to authorize cable construction, U.S. regulators have allocated traffic between cable and satellite systems in order to enhance the INTELSAT system.⁶⁴

The allocation of international traffic between competing systems is anathema to the deregulatory philosophy of the current FCC,⁶⁵ and the Commission has now totally withdrawn from that ac-

1985) (codifying § 126 of the Act, which authorizes protective services for foreign missions).

⁶⁰ The *Teleport* case was decided *after* expiration of the periods covered by the Foreign Relations Authorization Act of 1986. Both the majority and the concurring opinions cited and discussed the provision as if it were controlling law. See *Teleport*, *supra* note 34, at 627 ("Congress undertook to write [the separate systems policy] into law as part of the 1986-87 Foreign Relations Authorization Act.').

⁶¹ See Rein, *supra* note 6, at 476.

⁶² Undersea cables between the United States, Europe, Asia, and the Caribbean interconnect with the public network at those overseas points and can connect with virtually any accessible location. The technical advantages of satellites are limited principally to remote locations and "point-to-multipoint" services.

⁶³ See generally *In re* Policy to be Followed in Future Licensing of Facilities for Overseas Communications, 67 F.C.C.2d 358 (1977) (rejecting the initial TAT-7 proposal).

⁶⁴ See *American Telephone and Telegraph Co.*, 13 F.C.C.2d 235, 250 (1968).

⁶⁵ Since the early 1970s, the Commission has implemented deregulatory philosophies designed to maximize competition and reliance on the marketplace. See generally *In re* Allocations of Frequencies in the Bands Above 890 Mc., 29 F.C.C. 825 (1960) (permitting private microwave systems); *In re* Establishment of Policies and Procedures for Consideration

tivity.⁶⁶ Nevertheless, U.S. practice has established that the FCC has the power to allocate traffic in order to safeguard the INTELSAT system against undue traffic diversion from any source. Thus, should the international obligations of the United States require it to take action to increase INTELSAT carriage on U.S. routes, U.S. domestic law provides a proven and effective vehicle to meet those obligations.

B. *International Law Safeguards*

Article XIV(a) of the INTELSAT Agreement specifically obligates all government parties to "exercise their rights and meet their obligations under this Agreement in a manner fully consistent with and in furtherance of the principles stated in the Preamble and other provisions of this Agreement."⁶⁷ This broad statement reflects the customary international law principle of *pacta sunt servanda*, which is codified in Article 26 of the Vienna Convention on the law of treaties⁶⁸ and acknowledged in section 321 of the latest Restatement of U.S. Foreign Relations law.⁶⁹ The essence of *pacta sunt servanda* is that a state may not act inconsistently with the object and purpose of a treaty to which it is party.

As set forth in its Preamble and recognized by the D.C. Circuit in *Teleport*, the core objective of the INTELSAT Agreement is the successful establishment and operation of "a single global commercial telecommunications satellite system" that "will provide expanded telecommunications services to all areas of the world" and will make those services available "consistent with the best and most equitable use of the radio frequency spectrum and of orbital space."⁷⁰ The Agreement requires that the foregoing be accom-

of Application to Provide Specialized Common Carriers in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, 29 F.C.C.2d 870 (1971) (authorizing specialized common carriers), *aff'd sub nom.* Washington Util. & Transportation Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *In re* Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C.2d 261 (1976), *recon.* 62 F.C.C.2d 588 (1977) (permitting resale of private lines), *aff'd sub nom.* American Telephone and Telegraph Co. v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); *In re* Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 F.C.C.2d 167 (1980) (permitting resale of long-distance services), *recon. denied*, 439 U.S. 875 (1978); *In re* Regulation of Domestic Receive-only Satellite Earth Stations, 74 F.C.C.2d 205 (1980) (permitting competition in long-distance services).

⁶⁶ *In re* Policy for the Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period, 3 F.C.C. Rcd. 2156, 2160 (1988).

⁶⁷ INTELSAT Agreement, *supra* note 4, art. XIV(a), 23 U.S.T. at 3853.

⁶⁸ Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 339 [hereinafter Vienna Convention]. The Vienna Convention has not been ratified by the United States but is nonetheless accepted as a codification of the customary law of treaty interpretation. See RESTATEMENT (THIRD), *supra* note 22, §§ 313, 314 comment b.

⁶⁹ RESTATEMENT (THIRD), *supra* note 22, § 321 comment a.

⁷⁰ INTELSAT Agreement, *supra* note 4, preamble, 23 U.S.T. at 3814.

plished under rates for all parties which "shall be the same . . . for that type of utilization."⁷¹ Thus, the objects and purposes of INTELSAT include global coverage, economically sustainable operations, nondiscriminatory rates, rate levels which will allow expanded service to all areas of the world, and maximum utilization ("fill") of INTELSAT satellites to extract maximum benefit from the frequencies and orbital positions INTELSAT occupies.

By entering into the INTELSAT Agreement, the United States and other parties agreed to refrain from actions that would defeat these objectives. This obligation applies whether actions are direct limitations on INTELSAT operations (such as prohibitions or limitations on soliciting business from national carriers or local users),⁷² or limitations on INTELSAT's ability to secure the resources it needs for successful operations (such as discriminatory restrictions on the availability of launch services).⁷³ The obligation also applies to such actions as the authorization of competing circuit capacity, which affects INTELSAT's economic viability and its efficient use of frequency and orbital space, and the introduction of rate competition, which affects INTELSAT's ability to maintain a traffic-expanding nondiscriminatory rate structure. Thus, as the United States has traditionally recognized through its integrated regulation of the construction of transoceanic cable and satellite capacity and its "balance loading" supervision of all transoceanic circuit use, compliance with *pacta sunt servanda* and Article XIV(a) must be assessed against the full range of national actions that significantly affect INTELSAT's operations.

At the time the INTELSAT Agreements were negotiated, it was assumed that governments would strike a balance between the construction of cable and satellite capacity and that all governments, including the United States, would affirmatively allocate traffic among facilities.⁷⁴ The protective thrust of specific international agreement was therefore largely directed at the possible diversion of satellite traffic to alternative satellite systems. The foreclosure of alternative systems under the Interim Agreement resolved that concern until 1971, but the alternative system issue was hotly contested and differently resolved in the definitive Agreements.⁷⁵

⁷¹ *Id.*, art. V(d), 23 U.S.T. at 3823.

⁷² The signatories of INTELSAT, and not INTELSAT itself, actually offer satellite services in each nation. *See id.*, art. III(a), 23 U.S.C. at 3819.

⁷³ In fact, for years the United States exclusively launched INTELSAT satellites because it was the only INTELSAT member who possessed the capability. Especially after the Challenger disaster, however, INTELSAT has increasingly relied upon Ariane, the European space consortium, for satellite launches.

⁷⁴ When the INTELSAT agreements were negotiated, the United States' reliance on competition had not yet begun. As a result, international facilities were little more than shared bridges between monopolists on either side of the circuit.

⁷⁵ *See COLINO, supra* note 4, at 6.

Largely at the insistence of European governments who demanded the right to create a European-controlled regional satellite system to replace landline connections in Europe, the INTELSAT parties agreed not to foreclose commercial satellite alternatives to the global system.⁷⁶ Nevertheless, recognizing the sensitivity of decisions to launch and use such systems under Article XIV(a) and *pacta sunt servanda*, a special procedure was created to assist a party proposing to use a separate system in evaluating its Agreement obligations. This procedure, contained in Article XIV(d), specifies that a proposing party shall "ensure technical compatibility of [proposed] facilities and their operation with the use of the radio frequency spectrum and orbital space by the . . . INTELSAT space segment and . . . avoid significant economic harm to the global system of INTELSAT."⁷⁷ To that end, the proposing party is required to furnish all relevant information to the INTELSAT Assembly of Parties and to receive advice from the Assembly in the form of findings concerning technological and economic harm issues.⁷⁸

Article XIV(d) findings are not binding on the proposing party but are required to be given good faith consideration before the party makes its final decision under Article XIV(a).⁷⁹ The significant weight that the United States believes should be accorded the collective view of INTELSAT parties expressed under Article XIV(d) is explicitly affirmed by section 146 of the Foreign Relations Authorization Act, which establishes special congressional review procedures in the event a U.S. proposal is the subject of an adverse Article XIV(d) finding.⁸⁰ Although INTELSAT has never disapproved a requested Article XIV(d) coordination,⁸¹ the United States nevertheless appears to be moving toward an era where its marketplace philosophy is at odds with the goals of the organization.

It is doubtful that any departure from the concept of a global cooperative in favor of a freely competitive system is warranted by the principle of "changed circumstances," also known as *rebus sic stantibus*. This principle, which also is codified in the Vienna Conven-

⁷⁶ See *id.* at 91-92.

⁷⁷ INTELSAT Agreement, *supra* note 4, art. XIV(d), 23 U.S.T. at 3854.

⁷⁸ *Id.* ("[S]uch Party . . . shall furnish all relevant information to and shall consult with the Assembly of Parties.")

⁷⁹ See WHITE PAPER, *supra* note 15, at 18 ("Such recommendations are not binding on the United States, although the U.S. will carefully consider all recommendations."); Note, *Bypassing INTELSAT: Fair Competition or Violation of the INTELSAT Agreement*, 8 FORDHAM INT'L L. J. 479, 509 (1985).

⁸⁰ See Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 146(d), 99 Stat. 405, 426 (1985); see also *supra* note 58 and accompanying text (noting that section 146 has not been officially codified as a statute per se in the U.S. Code).

⁸¹ Indeed, INTELSAT approved the Teleport International coordination that was later struck by the United States Court of Appeals for the District of Columbia. See INTELSAT Assembly of Parties Record of Decision, AP-11-4E (April 1-2, 1987).

tion and acknowledged in the Restatement of Foreign Relations law, permits termination of treaty obligations when the facts and conditions upon which they were founded have substantially and fundamentally changed.⁸² The United States rarely invokes this principle, chiefly because of fears that its allies would claim the benefit of the doctrine with regard to obligations flowing to the United States.⁸³ It is also far from clear that a trend toward a marketplace approach to telecommunications facilities could be considered fundamental enough to warrant alteration of the legal commitments of INTELSAT parties.⁸⁴

Even if the doctrine of changed circumstances applied, it would not justify a renunciation of specific INTELSAT obligations. *Rebus sic stantibus* merely permits a party to withdraw or denounce a treaty as a whole; it is not a principle of interpretation permitting a lesser commitment under a continuing treaty.⁸⁵ Because the INTELSAT agreement itself contains a withdrawal provision in Article XVI,⁸⁶ the changed circumstances doctrine adds little to the parties' pre-existing rights to exit the INTELSAT organization.

In sum, the INTELSAT Agreement, considered as a whole and in the context of customary international law and the Vienna Convention, provides significant technical and economic safeguards against harm to INTELSAT. These safeguards are also recognized in U.S. domestic law through the treaty-equivalent status of the INTELSAT Agreements.⁸⁷ The fact that the INTELSAT parties provided a special advisory procedure for evaluating those safeguards only in the case of alternative satellite facilities is easily understandable in light of the historical context of negotiation and the specialized satellite expertise of the INTELSAT organization. Neither the limited scope of that procedure, nor its advisory character, however, can be deemed to override or narrow Article XVI(a) or *pacta sunt servanda*, or to make procedural compliance with Article XVI(d) alone a substitute for adherence to INTELSAT's purposes and objectives.

III. Required Safeguard Levels

Assuming that the United States now has the domestic legal power under section 146 of the Foreign Relations Authorization Act

⁸² Vienna Convention, *supra* note 88, art. 62(1), 1155 U.N.T.S. 352; RESTATEMENT (THIRD), *supra* note 22, § 336.

⁸³ See Haraszti, *Treaties and Fundamental Change of Circumstances*, 146 RECUEIL DES COURS, 1, 22 (1975).

⁸⁴ See RESTATEMENT (THIRD), *supra* note 22, § 336 (listing requirement to invoke the doctrine); Fisheries Jurisdiction Case (United Kingdom v. Iceland), 1973 I.C.J. Rep. 3, 20-21 (circumstances of fishing technology insufficiently altered to permit termination of clause granting International Court of Justice jurisdiction over fishing rights dispute).

⁸⁵ RESTATEMENT (THIRD), *supra* note 22, § 336.

⁸⁶ INTELSAT Agreement, *supra* note 4, art. XVI, 23 U.S.T. at 3857.

⁸⁷ See Teleport, *supra* note 34, at 624.

to authorize competing satellite systems and undersea cable capacity on INTELSAT routes so long as that capacity does not impair the objects and purposes of INTELSAT, two additional issues arise in determining how U.S. domestic and international law obligations limit competitive flexibility. The first issue concerns how extensive an INTELSAT system is required to achieve INTELSAT's purposes and is therefore entitled to be safeguarded. The second concerns what degree of capacity or price competition between INTELSAT and other facilities should be deemed to cause significant economic harm to INTELSAT and therefore require U.S. Government intervention.

The INTELSAT system has grown substantially since its inception and now makes capacity available for a multitude of international services and domestic uses not inconsistent with the international prime mission.⁸⁸ This raises the question of the identity and scope of the INTELSAT system that is the beneficiary of the Article XIV(d) protection. It is possible and not altogether unreasonable to argue that a smaller INTELSAT system could meet the purposes of the Preamble and competition that forces INTELSAT to retrench neither causes INTELSAT "significant" economic harm nor defeats the objects of the Agreement.

Given its current actions, however, the United States does not appear able to assert a position that requires a retrenchment in the concept of the INTELSAT system. Decisions on the size and operational capacity of the INTELSAT satellite system are made through the clearly delineated processes of INTELSAT's management organs. The key planning organ, the Board of Governors,⁸⁹ is subject to weighted voting by investment share and its largest member is COMSAT.⁹⁰ Under the 1962 Satellite Act and the Communications Act of 1934,⁹¹ the United States has plenary power to instruct COMSAT with respect to INTELSAT system planning decisions.⁹² Thus, the United States has had ample opportunity to raise questions within INTELSAT as to whether the current or planned system unwisely goes beyond "the space segment *required* for international public telecommunications services of high quality and reliability to be available on a nondiscriminatory basis to all areas of the world."⁹³

Nevertheless, there is no record of system construction over

⁸⁸ INTELSAT, *INTELSAT: THE GLOBAL TELECOMMUNICATIONS COOPERATIVE* 5-7 (1987).

⁸⁹ INTELSAT Agreement, *supra* note 4, art. X, 23 U.S.T. at 3840.

⁹⁰ In 1988 COMSAT held a 26.42% interest in the INTELSAT organization. *INTELSAT, 1987-88 INTELSAT REPORT* 44 (1988).

⁹¹ Pub. L. No. 73-416, ch. 652, 48 Stat. 1064 (codified as amended at 18 U.S.C. §§ 1304, 1464 (1982); 47 U.S.C. §§ 151-609 (1982)).

⁹² *See* 47 U.S.C. § 721(c) (1982).

⁹³ INTELSAT Agreement, *supra* note 4, art. III(a), 23 U.S.T. at 3819 (emphasis added).

U.S. objection. Having not made such a protest, the United States has implicitly ratified decisions of the organization designing and expanding its offerings. Thus, the actual INTELSAT system as operated and planned by INTELSAT seems to be the only legally acceptable foundation for analyzing the issue of technical harm or significant economic harm.

Determining the extent and "significance" of harm, particularly economic harm, to this system is a far more complex and fact-specific predictive task. The objectives and purposes of INTELSAT as set forth in the Agreement, however, provide helpful touchstones for this process. First, and most important, if INTELSAT is to succeed as a "commercial" enterprise,⁹⁴ it must generate sufficient total revenue to cover its fully allocated costs as specified in the INTELSAT Operating Agreement.⁹⁵ Any government action that defeats such recovery must be considered to cause "significant economic harm."

Second, if INTELSAT is to be a "global" system,⁹⁶ any government action that forecloses use within a member nation clearly produces "significant economic harm." Third, if INTELSAT is to provide "expanded telecommunications services to all areas of the world,"⁹⁷ it cannot be required to meet its cost recovery objectives by increasing rates to cover for revenues lost through diverted circuits without suffering "significant economic harm." Fourth, if INTELSAT is to maintain nondiscriminatory rates both in the legal and practical sense,⁹⁸ it cannot be subjected to intense price competition on high density routes (with concomitant readjustment of relative cost recoveries) without sustaining "significant economic harm."⁹⁹ Fifth, if INTELSAT is to use radio frequency and orbital resources with maximum efficiency¹⁰⁰ it cannot be subjected to substantial traffic diversion and reduced fill without sustaining "significant economic harm."

The analysis of significant economic harm may eventually be performed in a U.S. domestic legal forum, within the INTELSAT advisory procedure, or in an international forum reviewing U.S. com-

⁹⁴ See *id.*, preamble, 23 U.S.T. at 3814 ("[The] aim of [the INTELSAT organization is] achieving a single global commercial telecommunications satellite system.").

⁹⁵ Operating Agreement Relating to the International Telecommunications Satellite Organization, *opened for signature* Aug. 20, 1971, 23 U.S.T. 4094, T.I.A.S. No. 7532.

⁹⁶ INTELSAT Agreement, *supra* note 4, preamble, 23 U.S.T. at 3814.

⁹⁷ *Id.*

⁹⁸ *Id.*, art. V(d), 23 U.S.T. at 3823.

⁹⁹ A similar situation in the United States arose when MCI Telecommunications Corporation, a newly authorized long distance carrier, was permitted to compete on "thick" routes with American Telephone & Telegraph which averaged its rates throughout the nation. See generally *In re MCI Telecommunications Corp.*, 60 F.C.C.2d 25 (1976) (forbidding MCI to engage in such "cream-skimming"), *rev'd sub nom.* 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

¹⁰⁰ INTELSAT Agreement, *supra* note 4, preamble, 23 U.S.T. at 3814.

pliance with international treaty obligations.¹⁰¹ Whatever the forum, however, the analysis must take account of the amount of alternative capacity being authorized or freed from pre-existing restrictions, the imposition or continuation of any restrictions on use or pricing of the alternative capacity that limit its impact on INTELSAT, and the existence of any government policies that would shield INTELSAT from such impacts before diversion became a severe problem. If the totality of remaining controls fails to safeguard INTELSAT against a serious risk of impairment of its objects and purposes through "significant economic harm," the United States is obligated to adjust one or more of these parameters to increase INTELSAT's security as a matter of both domestic and international law.

IV. Available Safeguard Forums

An effort to prevent the United States from jeopardizing the objects and purposes of the INTELSAT Agreement or an attempt to require the United States to restrict pre-existing satellite or cable authorizations in order to ameliorate recognized significant harm to INTELSAT could be commenced in a number of forums. Using domestic law, including its incorporation of the INTELSAT Agreements, COMSAT (or a consumer of INTELSAT service) could challenge an FCC licensing or rulemaking decision on competitive flexibility and pursue that challenge through the U.S. courts as was done in *Teleport*.¹⁰² In addition, COMSAT or a consumer could pursue an effort to condition pre-existing licenses or to modify existing rules to enhance INTELSAT's security.¹⁰³

In any such challenge the court would make its own determination of the impact on INTELSAT objectives of the proposed action or failure to restrain. While under traditional administrative law principles a court would generally accord substantial weight to FCC findings on the impact issue,¹⁰⁴ a more difficult situation would be presented where the FCC determination was at odds with a "significant economic harm" finding by the INTELSAT Assembly of Parties.¹⁰⁵

An even more intriguing opportunity for review could be presented under Article XVIII(a) of the INTELSAT Agreement.¹⁰⁶ That article provides for mandatory arbitration of "all legal dis-

¹⁰¹ See *infra* notes 102-108 and accompanying text.

¹⁰² See 47 U.S.C. §§ 401, 402 (1982) (containing penalties, enforcement provisions and procedures for challenging FCC orders).

¹⁰³ *Id.*

¹⁰⁴ See *Chevron USA, Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

¹⁰⁵ It is arguable that INTELSAT's determination under its own Article XIV(d) standard should be accorded the deference due an administrative agency's interpretation of its own enabling act.

¹⁰⁶ INTELSAT Agreement, *supra* note 4, art. XVIII(a), 23 U.S.T. at 3865.

putes" between INTELSAT parties (or between INTELSAT and any party) with respect to "rights and obligations" under the INTELSAT Agreement.¹⁰⁷ Elaborate procedures for the conduct of such arbitrations are established in Annex C of INTELSAT Agreement and state that "[t]he decision of the tribunal . . . shall be binding on all disputants and shall be carried out by them in good faith."¹⁰⁸

Given this facility, a government that believes that the United States has violated its Article XIV(a) obligations by authorizing excessive competing capacity or overstimulating competitive behavior could commence arbitration seeking to require the United States to take steps to come into compliance with Article XIV(a) and/or to compensate INTELSAT for its actual "significant economic harm." The arbitral tribunal would have authority to construe the objects of the Agreement and the impact of the challenged U.S. conduct. Notwithstanding the right of the United States to make its own initial determination on Article XIV(a) obligations, including those subject to Article XIV(d) advisory procedure, the tribunal does not appear constrained to defer to a party's good faith decision or even to accord it presumptive weight. Thus, the first significant evaluation of Article XIV(a) and *pacta sunt servanda* obligations could arise from binding international arbitration brought against the United States by another INTELSAT party.

V. Conclusion

The legal obligation of the United States to safeguard INTELSAT against competitive injury transcends merely abstract principles. In fact, the duty is enforceable under U.S. law, as the *Teleport* decision reveals. In addition, violation of those obligations creates serious risks for the United States in international arbitration pursuant to the INTELSAT Agreement.

The United States could eliminate this duty by withdrawal from INTELSAT.¹⁰⁹ Short of that drastic action, however, the United States cannot merely continue to assert domestic deregulatory policy goals as providing an excuse for its actions. Rather, the decisionmakers must give meaningful weight to the legal safeguard obligations discussed in this Article and ensure that reliance on marketplace forces remains consistent with these responsibilities.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*, Annex C, art. 13(b), 23 U.S.T. at 3889.

¹⁰⁹ *Id.*, art. XVI, 23 U.S.T. at 3857.

