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PROBLEMS OF PARTICIPATION IN THE GLOBAL COMMERCIAL COMMUNICATIONS SATELLITE SYSTEM

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When the star rose from the mud of the earth
the gods laughed with secret mirth
at the latent defects of her birth.[1]

I. INTRODUCTION

The ancient astrologer constructed his own heavens from an anthropomorphic vision composed of superstitious myth, atavistic fears, religious belief and the half-light of dawning science. The diplomats who gathered in Washington in July and August, 1964, began to construct their own heaven in the form of a global communication satellite system in a far more enlightened fashion, but the wedding of modern science and diplomacy which took place there still showed traces of the astrologers' ancient components. It is the purpose of this article to identify those traces and determine whether they should grow more or less prominent.

In pursuing this purpose, we will consider the nature of the resource involved (the radio-telephone frequency spectrum) and an analysis of the Agreement Establishing Interim Arrangements for a Global Commercial Communication Satellite System, the Supplemental Agreement,[2] and the United States Communications Satellite Act.[3] This analysis will be largely concerned with a consideration of the participation structure created by the agreements and the act in order to assess the compatability of the system with the objectives announced by its creators. The analysis will be conducted in the context of both immediate and long range situations.

The radio-telephone frequency spectrum not only permits international sharing of its benefits, but also literally demands such

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1. "Satellite Satire," by James L. Underwood.

2. Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, and Special Agreement, August 19, 1964, T.I.A.S. No. 5646. (The first of the agreements will be referred to in text as the Interim Agreement and hereinafter cited as 1964 Interim Agreement, T.I.A.S. No. 5646.)

3. 76 Stat. 419 (1962), 47 U.S.C. § 701 (1964) (hereinafter cited by sections of the Act and the U.S. Statutes).

sharing.[4] It is not a resource that stops at national boundaries. It is not, like a river, a resourse around which national boundaries can be drawn. Its most important characteristic is that it is a limited resource. Like the soil, our capacity for utilizing it increases with the development of modern science, but it is not infinitely expandable. Not only is the spectrum a limited resource; it is somewhat uniformly distributed throughout the globe. It can not, like coal or iron or food stuffs, be mined or grown at the point of greatest supply and shipped to the point of greatest need. The limited nature of the spectrum, and its uniform distribution exercise a pervasive influence over the legal and political problems involved in creating a communications satellite system.

First to be examined are the announced objectives of the parties to the Interim Agreement in relation to the problems of participation. The preamble to the Interim Agreement states that the agreement is entered into "recalling the principles set forth in Resolution No. 1721 (XVI) of the General Assembly of the United Nations that communications by means of satellites be available to the nations of the world as soon as practicable on a global and non-discriminatory basis;" and "believing that satellite communications should be organized in such a way as to permit all states to have access to the global system and those states so wishing to invest in the system with consequent participation in the design, development, construction (including the provision of equipment), establishment, maintenance, operation and ownership of the system. . . ."[5] The United States Communications Satellite Act expresses its objectives in similar but more general terms. It speaks of providing services to underdeveloped as well as developed parts of the world.[6] It does not specifically enumerate areas of participation on the part of countries other than those provided with services; however, nothing inconsistent with participation by other nations in additional activities is included in the *opening* sections of the act.

In considering the compatibility of the scheme of participation devised by the agreements and the act with the objectives just mentioned, the problem of participation may be broken down

4. ITU, FROM SEMAPHORE TO SATELLITE 247 (1965).

5. 1964 Interim Agreement, T.I.A.S. No. 5646.

6. Communications Satellite Act, § 102(b), 76 Stat. 419 (1962), 47 U.S.C. § 701(b) (1964).

in the following manner: (1) *Who* should participate; (2) the *areas* in which the various participants should be active, and (3) the relative *degree* of participation of the various nations and entities involved.

II. WHO SHOULD PARTICIPATE

A. The United States' Representative: Too Many Voices

The problem of *who* should participate not only involves which nations should participate, but also involves the *nature* of the representative of a particular participant. The most important case in point is the United States. A violent, sometimes acrimonious, dispute arose as to whether the United States representative should be a private, public, or mixed entity.[7] In its refinements the dispute concerned whether a private entity, if chosen, should be a corporation whose stock is widely held or one whose stock and policy is controlled by the communications giants, such as the American Telephone and Telegraph Company (A.T.&T.).[8] If a public or a mixed entity were chosen, should it be a new extension of the President's traditional control over the nation's foreign policy or should it be considered an organizational means of utilizing a new development in communications or space technology? This involves the question of whether it is a fit subject for the traditional communications expertise of the Federal Communications Commission (FCC), an independent regulatory agency, or the newer expertise of the National Aeronautics and Space Administration (NASA), an agency under the direct control of the President. If the military aspects of the system were expected to be predominant, perhaps the executive should be given control through a defense agency.

These disputes were ostensibly settled by the passage of the Communications Satellite Corporation Act which created a so-called mixed public-private corporation to serve as the United States' agent in the establishment and operation of a global communication satellite system.[9] While apparently quelling the immediate conflict, the legislation increased the potential for conflict. The United States' representation was divided in a be-

7. See, *e.g.*, 108 CONG. REC. 15029 (1962) (remarks of Senator Morse).

8. For a discussion of public versus a private entity see Klein, Goldsen et al., *Communications Satellites and Public Policy: An Introductory Report*, Rand Corp. Memorandum, RM-2925 NASA (Dec. 1962).

9. Communications Satellite Act § 102(c), 76 Stat. 419 (1962), 47 U.S.C. § 701(c) (1964).

wildering fashion among the various contending groups discussed above. The resulting potential for conflict is somewhat similar to that created by a peace conference that divides a nation's territory into splinter elements: the necessity to reunite in order to create a viable entity can lead to a struggle for domination by the splinter units. The act raises serious questions as to who should be and who, in fact, is conducting the foreign policy of the United States in relation to communications satellites. At present neither the United States itself nor foreign governments or communications entities can know entirely who is dealing with whom and with what authority.

When the Communications Satellite Corporation is conducting "business negotiations" with foreign governments or communications entities, it is merely required by section 402 of the act to "notify" the State Department of the negotiations so that it can "advise the corporation of the relevant foreign policy considerations."[10] The corporation may request, but is not required to accept, the assistance of the State Department in conducting the negotiations.[11] So in foreign business negotiations, the State Department is either a mere observer or exercises a function secondary to that of the corporation. But it may be argued that this is no worse than the situation which occurs when other corporations conduct business negotiations with foreign governments or corporations. In fact, it is somewhat better than relations with some other corporations because of the statutory requirement that the State Department be kept informed. However, such arguments fail to consider that in the eyes of foreign governments or communications entities, any activities in the space development field by a corporation created by Congress must necessarily be an expression of United States governmental policy. The reasons for such an attitude are not hard to understand. The amazing surge of United States activity in space development since the 1957 Russian Sputnik launching has been entirely under careful governmental direction. Other countries may find it hard to believe that the United States government is relinquishing any portion of its control over space activities. This is particularly so in the light of the enormous national prestige attached to success in space activities.

10. 76 Stat. 426 (1962), 47 U.S.C. § 742 (1964).
11. 76 Stat. 426 (1962), 47 U.S.C. § 742 (1964).

The situation is drastically altered when one considers section 402 in relation to section 201(a)(4),[12] dealing with the powers and duties of the President of the United States under the act. The President's powers as described in the latter section are susceptible to interpretations which either completely abolish the corporation's powers to conduct foreign negotiations independently of the government or pose a direct conflict between the government's powers and those of the corporation. At the very least this situation poses very difficult problems of interpretation. Section 201(a)(4) states that the President shall "exercise such supervision over relationships of the corporation with foreign governments or entities or with international bodies as may be appropriate to assure that such relationships shall be consistent with the national interest and foreign policy of the United States." The act may be interpreted as creating two categories of activities by the corporation in relation to foreign governments or communications entities: those described as "business negotiations" and another category, referred to in section 201(a)(4), of indeterminate content consisting of all other international activities of the corporation. The term "business negotiations" is not defined. No standards of interpretation and no authoritative decision-makers have been designated by the act to determine which category contains a particular activity.

Another possible interpretation of the two sections is that two categories are not created at all, but that the President, under 201(a)(4) may, when he deems it desirable in the national interest, assume control of any activity of the corporation which relates to foreign entities or governments, including business negotiations. In view of this possible interpretation, foreign negotiators might hesitate to negotiate with Comsat in view of the possibility of discretionary presidential intervention. Similar hesitancy could be created by section 201(c)(3),[13] under which the Secretary of State may require the corporation to establish communications by satellites and ground station links with a particular foreign point when the Secretary of State considers it to be necessary in the "national interest." This provision could conceivably permit the Secretary to intervene in negotiations in which the corporation was attempting to determine which of several foreign localities should be linked with its facilities.

12. 76 Stat. 421 (1962), 47 U.S.C. § 721(a)(4) (1964).
13. 76 Stat. 422 (1962), 47 U.S.C. § 21(c)(3) (1964).

What is so far merely a picture of confusion and contradiction grows bizarre when we consider the above listed powers given to the national executive as they affect the Interim and Special Agreements dealing with the Global Communications Satellite System. Under those agreements the corporation is not merely the United States' representative in the system, but also the managing agent of the international consortium of nations sponsoring the Global Communications Satellite System.[14] In this capacity the corporation must be considered a somewhat internationalized body. It is not entirely compatable with this international nature of the corporation to permit even the latent existence of a power in the President to supervise the foreign relations activities of the corporation in order to make them consistent with United States' national interest and foreign policy. It should be recalled that the objective announced in the preamble to the Interim Agreement was not predominantly the service of the United States' national interest or foreign policy, but an orderly and non-discriminatory sharing of the radio-telephone frequency spectrum. The possible inconsistency of the act with the position of the corporation as managing agent of the international consortium is heightened by section 201(c)(3)[15] which gives the Secretary of State power to direct the corporation to establish communications by satellite and ground stations with particular foreign points when the Secretary deems it necessary.

Perhaps the most uncharacteristic role played by any of the participants designated by the act is that of the federal courts which could well find themselves decision-makers in the foreign relations field. Section 403 of the act provides that if the corporation by its conduct obstructs the realization of the purposes of the act, (which would include the multitude of foreign contacts necessary to establish global coverage), the Attorney General may seek equitable relief in the federal district court for the district wherein the corporation "resides." The act does not limit jurisdiction of the federal courts to provide such relief to predominantly domestic matters, such as non-discriminatory access by American communications common carriers to the system as users. The section could be interpreted as being the sole sanction that could be used by the President, under section 201, to supervise the activities of the corporation in order to maintain their consistency with American foreign policy and national in-

14. 1964 Interim Agreement art. VIII, T.I.A.S. 5646.
15. 76 Stat. 422 (1962), 47 U.S.C. § 721(c)(3) (1964).

terest.[16] If this is the exclusive sanction, the hands of the executive are severely tied in an area where rapid action may on occasion be necessary. Even if it is not the exclusive route, section 403 still may require federal courts to make delicate foreign policy decisions for which they have neither the experience nor the overall knowledge. A hypothetical situation will illustrate how this might occur. Suppose the State Department is negotiating a military alliance or trade agreement with country *A*. During the course of the negotiations, Comsat announces that it will cease awarding satellite equipment contracts to manufacturers in country *A* as their equipment is too costly and cannot meet the new technical standards adopted by the international consortium under the Interim Agreement. The President of the United States then informs the corporation that its policy is inconsistent with the foreign policy of the United States as it might upset the delicate negotiations with country *A*. The President directs the corporation to cease pursuing such a policy. The corporation replies that it is acting pursuant to directions of the international consortium, that the President has no authority to countermand these directions, that forcing the corporation to place such costly orders would constitute an unconstitutional taking of property by the President, and in sum, that the foreign policy interest of the United States are best served by permitting the corporation to follow the directions of the international consortium and by providing a technically better and more inexpensive system. The President then directs the Attorney General to go into the federal district court in Washington, D. C., and request equitable relief compelling the corporation to cease its announced policy Assuming that section 403 permits the court to reach the merits the court must determine not only the relative responsibility of the corporation to the international consortium and the President. and the unconstitutional taking issue but also the consistency of the corporations action with United States foreign policy.

To the already overcrowded collection of participants in the direction of United States interest in the Global Communications Satellite System must be added the FCC, a body which has not previously played an active role in foreign affairs. The FCC's powers in this field are given added weight by the fact that it is an independent agency not directly under the control of the

16. Communications Satellite Act § 201(a), 76 Stat. 421 (1962), 47 U.S.C. § 721(a) (1964); Communications Satellite Act § 403, 76 Stat. 426 (1962), 47 U.S.C. § 743(a) (1964).

President.[17] While many of the powers given the FCC under the act are in the same tradition as the powers it normally exercises over domestic common carriers, they take on unusual significance in light of the fact that the subject of these powers, Comsat, is not merely a domestic carrier, but also the managing agent of an international consortium. Most of the decisions the FCC makes under the act would have to be made by some group in the United States government. The question is, is it the most appropriate body to make them?

Let us consider some of the FCC's powers and how they might affect foreign relations. Under Article V of the Interim Agreement the international committee created by the agreement has the power to approve the technical standards for the satellite system and terminal stations.[18] The Communications Satellite Act (see section 201(c)(4)) gives this power to the FCC. This means that the FCC must be included in the majority of negotiations with foreign countries or communications entities. A glance at the FCC's Annual Report for 1964 indicates that it has been so included.[19] This sliver of power given to the FCC, an independent regulatory agency, means that theoretically at least the other members of the United States negotiating team might be willing to agree to one set of characteristics while the FCC could continue to insist on another. Since it has control over this area within the United States, the predominant power on the international committee, it follows that the FCC could completely block international agreement in this area. It is not likely to do so, but the possibility remains none the less. While the expertise of the FCC might be needed in making decisions in these areas, it seems more desirable that the FCC act in a purely advisory capacity to the State Department and the corporation. Perhaps NASA, an agency more susceptible to executive direction, should have the duty of evaluating the technical standards as far as the United States is concerned.

Many of the other powers held by the FCC in relation to communications satellite activities are concerned with its power over the access of domestic communications carriers to the system. One aspect of this power is its determination of whether American based ground stations shall be constructed and owned by

17. The President's lack of direct control over independent regulatory agencies is demonstrated by Humphrey's Executor v. United States, 295 U.S. 602 (1935).

18. 1964 Interim Agreement T.I.A.S. No. 5646.

19. 1964 F.C.C. ANN. REP. 41-50.

Comsat or by communications common carriers such as A.T.&T.[20] These decisions will determine whether Comsat or a communications common carrier will be most directly concerned with negotiating with foreign users of a particular ground station. In addition, the FCC has the power to allocate opportunities for owning Comsat stock among various common carriers in order to assure an equitable distribution of ownership.[21] While determination of these matters requires foreign policy judgment, adjudicative skills—such as those the FCC has traditionally been charged with using—are equally needed. However, an added international dimension must be added to the usual criteria of public and national interest in making decisions concerning Comsat because of its role as managing agent of the international consortium.

Much of the importance of the FCC activities in the communications satellite field can only be realized in light of the vast technical lead of the United States over the other members of the consortium. Because of this fact many of the decisions reached by the consortium must then clear the FCC as a second authoritative decision-maker. A recent case in point is the decision of the Interim Committee of the consortium to purchase four satellites. Since only United States corporations were capable of fulfilling the need, the approval of the purchase came squarely within the jurisdiction of the FCC under section 201(c)(9) of the Communication Satellite Act to approve or disapprove additions to the communications satellite system.[22] It would be better if this virtual veto power were exercised by a special agency or panel, more responsive to foreign policy determinations by the executive, rather than trying to pour these decisions concerning a delicate new area into the traditional role of the FCC.

The National Aeronautics and Space Administration is a participating United States agency that is growing in importance. Recently Comsat announced that the International Consortium had agreed to provide NASA with four communications satellites and three mobile ground stations for use in the Apollo moon shot program.[23] The same satellites and stations will be used to provide commercial service by the consortium throughout the Pacific

20. See Communications Satellite Act § 201(c)(7), 76 Stat. 422 (1962), 47 U.S.C. § 721(c)(7) (1964).

21. See Communications Satellite Act § 304(b)(2), (f), 76 Stat. 424-25 (1962), 47 U.S.C. § 734(b)(2), (f) (1964).

22. Communications Satellite Corp. News Release, p. 2, Oct. 25, 1965.

23. Wall St. J., Oct. 1, 1965, p. 8, col. 4.

area.[24] This could be looked at not only as Americanization of the commercial system, but also as an internationalization of the American manned-spacecraft program. Certainly NASA could have obtained the satellite and ground station services directly from United States sources without going through the international consortium; therefore, NASA's action can be interpreted as a deliberate inclusion of the international consortium as a participant in activities concerning a sharable resource. However, the action does raise some problems. The American manned-spacecraft program is looked upon in the eyes of world public opinion as partly a military project and partly as an element in the prestige race with the Soviet Union. A close link between the United States manned-spacecraft program and the global commercial satellite program partly deprives the latter of its image as a project designed to provide equal and peaceful use of the radio-telephone frequency spectrum by countries throughout the world. This change in character is less so in actuality than it may be made to appear by Soviet propaganda. This could be decisive in causing some of the so-called neutral or nonaligned countries not to participate in the system.

United States governmental participation in the global communications satellite system is, structurally at least, a confusing tangle of stray appendages of power. The internal power structure of the Communications Satellite Corporation also draws its participants from a variety of sources. The corporation has a board composed of fifteen United States citizens, three of whom are appointed by the President of the United States, six of whom are selected by the common carrier stockholders, and six whom are selected by all other stockholders.[25] Fifty per cent of the stock is reserved for purchase by common carriers authorized by the FCC.[26] The FCC is charged with effecting the widest possible distribution among common carriers.[27] No stock owner other than a common carrier can own more than ten per cent of the voting stock.[28] No more than twenty per cent of the voting stock

24. Communications Satellite Corp. News Release, p. 1, Nov. 2, 1965.

25. See Communications Satellite Act § 303(a), 76 Stat. 423-24 (1962), 47 U.S.C. § 733(a) (1964).

26. See Communications Satellite Act § 304(b)(2), 76 Stat. 424 (1962), 47 U.S.C. § 734(b)(2) (1964).

27. See Communications Satellite Act § 304(f), 76 Stat. 424 (1962), 47 U.S.C. § 734(f) (1964).

28. See Communications Satellite Act § 304(b)(3), 76 Stat. 424 (1962), 47 U.S.C. § 734(b)(3) (1964).

can be owned by non-United States citizens.[29] Several aspects of this distribution should be singled out for consideration. First of all, while foreign stock ownership is limited to twenty per cent, such holdings could be very powerful if concentrated in a few persons or groups. This power could be increased by combination with other categories of stockholders. This raises the specter of the United States' representative in the global communications satellite system receiving a large measure of direction from foreign sources. Foreign participation in the system should not begin at the level of United States representative but at the latter level of the international consortium. Not only is foreign participation inappropriate at the United States representative level because of its effect on the direction of United States foreign policy, but also because there are no provisions requiring any sort of equitable distribution of such foreign participation among citizens of a variety of foreign countries. Another aspect deserving note is that there is no specific limitation placed on the amount of stock that can be held by any one common carrier within the fifty per cent allocated to common carriers, but there is a limit of ten per cent on any one non-common carrier stockholder.[30] As to common carriers there is only a vague general direction to the FCC to achieve an equitable distribution.[31] This has left the United States open to the traditional Soviet criticism that its space efforts are merely projects of our large corporations. A typical Soviet comment is that of G. S. Stashevskug who, in regard to United States activity in the consortium, stated that:

> [A]n activity of the United States government in the field of communications in recent years, both within the country and in the international arena, has been devoted to the fulfillment of the order of big American monopolies and primarily the group of monopolies headed by the American Telephone and Telegraph Company which control the means of communication and the production of radio-electronic equipment.[32]

29. See Communications Satellite Act § 304(d), 76 Stat. 425 (1962), 47 U.S.C. § 734(d) (1964).

30. See Communications Satellite Act § 304(b)(2)(3), 76 Stat. 424 (1962), 47 U.S.C. § 734(b)(2)(3) (1964).

31. Communications Satellite Act § 304(f), 76 Stat. 424 (1962), 47 U.S.C. § 734(f) (1964).

32. Stashevskug, *Communications Satellites and International Law,* 12 SOVIETSKOYE GOSURDARSTUVE 56-66 (1964).

The distribution of decision-making power among a wide variety of poorly coordinated public and private bodies created a great potential for conflict among those bodies. Have any such conflicts actually occurred? The wide and confusing dispersal of the power to determine United States' policy concerning commercial communications satellites has already generated a bitter jurisdictional dispute. The dispute involves two issues: (1) Does the FCC have the power to determine from whom the Defense Department can obtain commercial communications satellite service? (2) Can Comsat provide such services directly to the Defense Department, or must it provide them through communications common carriers such as A.T.&T. or I.T.&T.? The FCC recently stated that the Defense Department could not obtain satellite services directly from Comsat but must lease services from common carriers.

The Defense Department decided to ignore the FCC decision and claimed that the FCC did not have the power to determine from whom it could obtain services. The common carriers protested the Defense Department decision since they did not welcome competition from Comsat, an organization which they helped create and in which they had large stockholdings.[33] This controversy could create the impression in the other member states of the international consortium that since the United States cannot determine its own policy it is not fit to exercise leadership in the consortium. However, the implications of the dispute go far beyond the communications satellite field and involve the principles underlying the allocation of power. When an attempt is made to accommodate so many interest groups by giving each a share of power, the result may be that no one group possesses sufficient power to make a firm decision. It is possible that a mixed public-private organizational structure will become the norm for new industries generated by scientific developments that have military and foreign policy overtones. If so, the experience in the communications satellite field indicates that built-in confusion results from the creation of too many autonomous sources of control.

B. The International Telecommunications Union

Having concluded our discussion of the multi-faceted United States representation in the global communication satellite sys-

33. See N.Y. Times, July 11, 1966, p. 41, col. 6; Wall St. J., July 8, 1966, p. 3, cols. 2 and 3; Wall St. J., July 7, 1966, p. 2, cols. 3-4.

tem, we should now consider other categories of participants, specifically, international organizations and other nation-states. One of the elder statesmen among existing international organizations is the International Telecommunications Union (ITU) which traces its history through predecessor organizations back to the most primitive attempts to communicate electronically across national boundaries.[34] In order to understand the role it does play now and could play in the future, reference should be made to the role it has played in the past. Its historical and current role may be analogized to that of a policeman assigned to a street intersection under a set of instructions which state that he may indicate to motorists the direction in which they must legally travel in order to avoid hitting one another, but that if they violate these legal requirements then all he can do is stand on the street corner and cry foul. Assume further that the role has been a useful one in the past because the traffic has been relatively light, the alternate routes many, and most motorists have had the good sense to know one could not successfully traverse the intersection without following the directions of the policemen. In concrete terms, the ITU's role has been to insure that the radio-telephone frequency spectrum is a shared resource.

International conferences, consisting of the entire membership of the union (which is roughly the same as that of the United Nations)[35] allocate frequencies among various categories of uses such as communications satellites, radio-astronomy, etc.[36] No frequency assignments are made to particular users; this is left to the individual country. Each new user must register his frequency and a description of his station with the ITU's International Frequency Registration Board (IFRB).[37] In case of interference by one station with another, the IFRB determines which user was the prior registered user.[38] The Union is of the opinion that both registration and priority are prerequisites for legal use.[39] This application is similar to the land law theories of squatters' rights and race-notice title registration. The union

34. ITU, FROM SEMAPHORE TO SATELLITE (1965).

35. Simsarian, *Interim Agreement Establishing a Commercial Communications Satellite System,* 59 AM. J. INT'L L. 344, 345 n. 7 (1965).

36. See International Telecommunications Union, *Final Acts of the Extraordinary Administrative Radio Conference to Allocate Frequency Bands for Space Radiocommunications Purpose* (Geneva 1963).

37. Telecommunications Convention and Final Protocol, Dec. 21, 1959, T.I.A.S. No. 4892.

38. ITU, FROM SEMAPHORE TO SATELLITE 250-54 (1965).

39. *Ibid.*

has no machinery for enforcing either the frequency allocations or IFRB decisions.

Historically, the Union has applied its regulatory functions to a particular new method of electronic communications only after the method has been in use for a number of years. But with the introduction of communications satellites as a method of international communications, the Union, for the first time, began to perform its regulatory functions prospectively, almost from the inception of the new system of communications. This greatly strengthens the possibilities of the Union as an international rule-making body. In 1963, shortly after the passage of the Communications Satellite Act by the United States, and shortly before the conference which organized the International Consortium for communications satellite development, the Union held an Extraordinary Administrative Radio Conference which resulted in the allocation of frequencies for communications satellite use; some frequencies exclusively, others on a shared basis with other uses.[40] Those attending the conference, including the United States delegation, apparently considered such an allocation a prerequisite to the operation of a global communications satellite system.[41] Before making certain proposals concerning the future role of the Union, one other feature of its organization should be mentioned: the arbitration provisions found in its charter. These provisions deal with the arbitration of disputes concerning the interference by one country with the telecommunications operations of another.[42] The provisions are of the most primitive sort, containing no machinery for compulsory submission of disputes to arbitration, but merely a method for selecting arbitrators. However, the provisions do represent a start.

Against this background the vague shapes of a significant new role for the Union are beginning to take on more definite dimensions. Three questions should now be discussed: (1) Should the global communications satellite system have been organized as a project of the Union; (2) should the system become a Union project in the future; (3) should the regulatory function of the Union increase in the future? The answer should probably be *no* to the first two questions and *yes* to the third.

40. International Telecommunications Union, *supra* note 36.

41. See remarks of Assistant Secretary of State Griffin Johnson quoted by Congressman Harris, 110 CONG. REC. 176 (1964).

42. See *Telecommunications Convention and Final Protocol,* Dec. 21, 1959, annex 4 T.I.A.S. No. 4892.

The Union has traditionally been, or at least has aspired to be, an international law-making and regulatory body. The global communications satellite system demands operation by an enterprisory organization. An enterprisory organization is designed to accomplish a specific purpose; as narrowly defined as possible.[43] It is composed only of parties definitely interested in the accomplishment of this project. The ITU on the other hand is a multi-purpose organization concerned with the entire range of problems relating to all forms of telecommunications. The ITU has not been accustomed to carrying on business operations itself but to umpiring business operations conducted by other organizations. In sum, there are three differences which distinguish the organizational needs of the global communications satellite system from the nature of the Union: purpose, method and membership. As to the last point, membership, it should be noted that at present less than half of the members of the ITU are members of the satellite system consortium although under the terms of the Interim Agreement of the consortium any member of the ITU is free to join.[44] If the consortium membership were initially as wide as that of the ITU, it might have been impossible to obtain from such a numerous and various membership the specificity of agreement necessary to begin the system. We at least have the beginnings of a system which, though it does not have a universal membership, at least has a widely international one. It should be noted once again that the membership of the ITU was able to agree on the allocation of frequencies among categories of use, and this is an important indication of its future role. It may be possible in the future to add real enforcement power to the frequency allocation and registration functions of the Union.

In many areas of activity, enforcement power in an international organization would probably be an unattainable goal of optimum world order rather than a necessity for minimum world order. For the immediate future this is probably true of the

43. MCDOUGAL, LASSWELL & VLASIC, LAW AND PUBLIC ORDER IN SPACE, ch. 8 (1963).

44. See 1964 Interim Agreement art. XII (a)(II), T.I.A.S. No. 5646. Simsarian in 59 AM. J. INT'L L. 344 nn. 4 & 5 (1965) states that the membership of the consortium includes Australia, Canada, Denmark, France, Italy, Japan, Netherlands, Spain, United Kingdom, United States, Vatican City, Algeria, Argentina, Austria, Belgium, Brazil, Ceylon, Chile, China, Columbia, Ethiopia, Federal Republic of Germany, Greece, India, Indonesia, Iraq, Ireland, Israel, Jordan, Kuwait, Lebanon, Libya, Monaco, New Zealand, Norway, Portugal, Saudi Arabia, South Africa, Sudan, Sweden, Switzerland, Syria, Tunisia, United Arab Republic, and Uruguay.

telecommunications field in general and the communications satellite field in particular. But unlike many areas of activity, the telecommunications field is concerned with a *finite* resource in an area of growing importance: international communications. The capabilities of using the spectrum have been increased recently by the development of communications satellites. So there will be no impetus of immediate necessity to add enforcement power, but the new technical developments could not increase the spectrum itself, and someday that necessity will arise. This necessity will mean that before anyone can use the spectrum beneficially, tight policing will be a must. When that time arrives arbitration in interference cases will have to become compulsory rather than permissive. In addition to merely registering frequencies selected by users themselves or their nation-states on a "first come first serve" basis within broad categories of allocation, the Union will have to establish, or at least recommend, a system of use priorities based on the importance of the use. This is not a prophesy of the millennium of world government of the utopian dreamer, but only a modest step in a very narrow, but important, field.

C. The United Nations

Specialized international bodies such as the ITU and the satellite consortium are able, to some extent, to compartmentalize areas of dispute and interaction between nations. In other words, in the context of such organizations, nations are able to address themselves to particular areas of dispute without bringing into play every dispute arising from every point of contact between those nations. Specialized international bodies can not completely isolate their own areas of concern and consider them in a sealed test tube, but some degree of compartmentalization is frequently possible. On the other hand, multi-purposed international bodies, which also have a broad membership base, sometimes tend to become a potpourri of international disputes involving the members. To some extent this is true of the United Nations, which, while it has a membership roughly the same as the ITU, unlike the ITU, has very broad objectives, *i.e.*, the peace, economic, medical and cultural well-being of the entire world. The broad objectives and broad membership of the United Nations determine the nature of its participation in the conception and operation of a global communications satellite system. Because of the nature of its objectives and membership, the United

Nations has played a uniquely limited but uniquely valuable role. To organize the communications satellite system directly under the control of the United Nations, would be to cause the system to fall heir to the difficulties the United Nations is having in other areas. For example periods of inactivity in the United Nations such as that which recently resulted from the non-payment of dues by some members could have caused serious delay in the organization and operation of the communications satellite system. On the other hand, the broad objectives and membership of the United Nations, have given it a prescriptive role on the highest constitutive level. This role takes the form of such pronouncements as General Assembly Resolutions 1721, 1802 and 1962, which respectively call for non-discriminatory access to the communications satellites and for state supervision of non-government agencies active in the communications satellite area.[45] This article will not enter the dispute as to whether or not the resolutions constitute international law. It is sufficient to say that the nations organizing the global communications satellite system reacted to the resolutions as if they were law, *i.e.*, to some extent they conformed their activities to the dictates of the resolutions. How much more needs to be done to comply further with the resolutions can be seen below in the discussions on *areas* and *degrees* of participation. At any rate, the Interim Agreement of the consortium and Communications Satellite Act did express in their initial paragraphs the sentiment of Resolution 1721 and did make some definite movements toward compliance. While state control of the Communications Satellite Corporation is at times tenuous and confused, Resolution 1962 is complied with in spirit in that no corporation will be permitted to exploit a technical lead as the Marconi Company attempted to do in the early days of the wireless.[46] The influence of the resolutions on the Interim Agreement of the consortium and the Communications Satellite Act may, in part, be attributable to the unusual clarity and unanimity with which they express world public opinion.

Not only does Resolution 1721 indicate participation by the United Nations as a prescriptive body but also as a user of the communications satellite system. The resolution states that the

45. Res. 1721 (XVI), U.N. GEN. ASS. OFF. REC. 16th Sess., Supp. No. 17 (Doc. A/5100) pp. 6-7 (1961); Res. 1802 (XVII), U.N. GEN. ASS. OFF. REC. 17th Sess., Supp. No. 17 (A/5217) p. 5 (1962); Res. 1962 (XVIII), U.N. GEN. ASS. OFF. REC. 18th Sess., Supp. No. 15 (A/5515) p. 15 (1963).

46. ITU, FROM SEMAPHORE TO SATELLITE 133 (1965).

"principle organs and specialized agencies" of the United Nations will find communications by satellite useful "for both operational and informational requirements."[47] The resolution does not spell out the details of such use, but a number of significant and perhaps even vital possibilities present themselves. In recent years the ability to disrupt peace by military attack has far outstripped the speed with which peacemaking mechanisms can act. A comprehensive communications satellite system could provide some degree of correction for this imbalance. Perhaps in the future when the United Nations dispatches a fact-finding group to a potential war area, evaluation by the United Nations of information the group collects need not await the return of the group and need not be based on uninformative telegraph messages. Coverage of the fact-finding mission by special television circuits leased by the United Nations could improve the quality and reliability of the information and speed its evaluation. An added result might be to widen participation in the fact-finding function beyond that of a mere committee. This may or may not be desirable.

We have considered the problem of *who* among the international organizations of the world and *who* among the agencies, public or private, of a particular nation-state, the United States, should participate in the global commercial communications satellite system. We should now consider the *nature* of the participation of the nation-states which are members of the international consortium.

III. THE COMPARATIVE POWER AND BENEFITS OF THE MEMBER STATES

The nature of the participation of the member-states will be discussed first as it concerns the *degree* of participation and then as it concerns the *areas* of participation. By *degree* of participation is meant the voting power of the participating state in the decision-making process of the consortium and the amount of satellite use or financial benefit received by the participant from the system. By *areas* of participation is meant the particular *issues* as to which the decision-making process of the consortium operates and the *fields* of activity from which a participant may expect to derive benefit.

Among the areas of participation are: (1) participation in the research, development and supply of equipment for the system;

47. Res. 1721 *supra* note 45.

(2) participation in the making of scientific, economic and political decisions such as (a) which ground stations should be permitted to utilize the space segment, and (b) rate determination for the space segment and for ground stations; (3) participation as the nation in which a ground station is located; and (4) participation as a mere user of the system by a nation which is a non-member of the consortium and which, therefore, does not take part in the decision-making process.

A common thread which determines the *degree* of participation in every *area* mentioned is the quota of each member state.[48] This quota is determined by the amount of financial contribution required from each member state by the agreement.[49] The initial quotas of the nineteen original signatories to the agreements are set forth in an annex to the agreements. In addition to the United States the original signatories were largely Western European nations.[50] The quotas of the original signatories are reduced with the admission of each new member who is assigned a quota. However, Article XII provides that under no circumstances can the combined totals of the members who were not original signatories exceed seventeen per cent. One of the results of this arrangement is that no matter how many additional states come in, the United States quota or voting power can never be lower than 50.63 per cent. Under the voting requirements system, the United States can block any action, but it can not alone cause passage of a particular proposal.[51] This is because any proposal which passes, must have the concurrence of representatives whose total votes exceeds the vote of the representative with the largest vote by either 12.5 or 8.5 per cent depending on the subject matter of the proposal.[52]

A power structure based solely on the amount of financial contribution presents several questions concerning the compatability of such a structure with the objective of non-discriminatory access announced in the preamble of the Interim Agreement. Among such questions are the following: (1) Is such a power structure necessary or desirable during the organizational and early operational stages of the system; (2) should such a power structure be changed when the system outgrows its infancy; (3) if a

48. 1964 Interim Agreement art. V T.I.A.S. No. 5646.
49. *Ibid.*
50. See Simsarian, *supra* note 44.
51. 1964 Interim Agreement art. V, T.I.A.S. No. 5646.
52. *Ibid.*

change is considered desirable, should the change provide for absolute equality of all member-states as to voting power, or should it provide for a shift in the location of the greatest power in the consortium according to some formula indicating the change in importance of the members?

The allocation of power according to the financial quota system is probably necessary in the earliest stages of the consortium, but it cannot remain so in the future and should not be the sole criterion utilized in the permanent agreement which must be considered no later than 1969.[53] A system of absolute equality in the voting power of all member countries probably should not be adopted within the foreseeable future. Rather, changes in the importance and ability of members should be reflected in the degree of voting power and the right to receive benefits.

To initially provide that member-states of a communications satellite system share equally in power and benefits would mean, in all probability, that there would be nothing to share. At the time of the organization of the consortium, the United States had an enormous lead in technical and financial capability to make such a system operational. The best way to make use of such capabilities for the benefit of the international community at large is to give the nation possessing such capabilities a strong enough voice that it can provide leadership in a definite direction and protect its financial investment. Such an arrangement is a reasonable classification and is compatible with a goal of nondiscriminatory access only if: The arrangement is merely temporary; it is not permitted to survive the conditions which made it necessary, and adequate protection against exploitation is placed in the hands of other participants. The Interim Agreement adequately meets these demands.

As conditions change, the power structure should also change. The time will come when other participating states will develop greater capabilities for making financial contributions. Their quotas should be changed accordingly. However, there are other changes, which may not occur simultaneously with a change in financial capabilities, but which should also be reflected in changes in voting power and the receipt of benefits. Such a change is the increase or decrease in the actual traffic utilization and the demand for such utilization by member-states. Clearly such a change should be reflected in the so-called satellite utilization quotas, *i.e.*, the amount of use of the satellite which a mem-

53. 1964 Interim Agreement art. IX, T.I.A.S. No. 5646.

ber may make through the ground station that services it. At present satellite utilization quotas are heavily influenced by the financial quotas.[54]

The changes in traffic should be reflected by power changes in other *areas* of activity in addition to satellite use. This is particularly true with regard to areas of activity which affect the ability of the system to meet new traffic demands. Such areas would include the determination of whether new ground stations should be permitted to utilize the system and the determination of rates for use of the space segment. Therefore, a new formula, which takes account of the necessity for change in both financial quotas and satellite utilization quotas, should be included when a permanent agreement is drafted. The power structure should not be in a constant state of flux, changing with every shift in strength no matter how slight, but should be periodically revised.

Does truly non-discriminatory participation require absolute equality of voting power, *i.e.*, a one member-one vote rule? While sovereign nation-states might be theoretically equal, in fact they are not. Rather than institutionally reflecting the theory of absolute equality and letting the actual inequality work in an under-the-table fashion, it is better to institutionally recognize the actual inequality and provide safeguards, in order that all can participate to some meaningful extent without exploitation by any.

This article has recommended provisions for changes in the consortium power structure partly because of the need to maintain internal consistency in the degree of participation with the consortium's objective of non-discriminatory access. One other possibility should be mentioned which, at this point, may largely be regarded as pure conjecture. This possibility arises from the fact that not only is non-discriminatory participation an announced goal of the consortium, but it is also the sentiment expressed in United Nations General Assembly Resolution 1721 mentioned earlier.[55] One could argue (and many would oppose the argument) that the resolution is international law, or is declaratory of international law, and that it constitutes a higher level of abstraction in international law than is contained in the Interim Agreement. Therefore, one might argue, that the developing principle of *jus congens* might require that the permanent

54. Article 8(b)(c), Special Agreement, T.I.A.S. No. 5646.
55. Res. 1721, Res. 1802, Res. 1962, *supra* note 45.

agreement reflect changes in the power structure by taking into account the greater contributions to and use of the communications satellite system by countries other than the dominant power. Such an argument is based on a series of assumptions each one of which is open to question.

Several *areas* of participation in the global communications satellite system present uniquely difficult problems which are not concerned primarily with the *degree* of participation but rather with some of the complexities which face consortium decision-makers because of the nature of the system. One of the most delicate areas in which decisions must be made is that of the selection of ground stations which will be permitted to utilize the space segment.[56] If for technical reasons only one ground station, from an area including several countries, will be permitted to use the space segment, the decision will have to be made as to which country will receive the station. The various countries contending for the honor of being the location of the site would consider their international prestige seriously affected by an adverse decision. In parts of the world where other means of telecommunications have received scant development, a decision in favor of one country as a ground site could well be a decision making that country the dominant power in the area in communications and perhaps in other matters as well. Because of the great potential for abuse of the position of being the site of the only ground station for several countries, a formal inspection committee should be created in order to insure that the ground station is providing non-discriminatory access to the system on the part of the other countries which are supposed to be served by the system. In order to prevent ground station site selection from being a political football, technical criteria should play as big a part as possible. To this end definite technical standards should be required by the permanent agreement and should be revised when necessary to take into account new technical developments. Under the present agreement no definite technical standards need be used in reaching a decision.[57]

IV. CONCLUSION

The consortium agreement is entitled: Agreement Establishing Interim Arrangements for a Global Commercial Communications

56. See 1964 Special Agreement, *supra* note 2 at art. 7 for the current selection system.

57. 1964 Special Agreement art. 7(a), T.I.A.S. No. 5646.

Satellite System. The key word in this tongue twisting title is *Interim*. If, as its name indicates, the arrangement is a mere way station, a necessary first stop along the road toward orderly international control of a new scientific means of utilizing a necessarily sharable resource, then the agreement represents genuine progress. If, on the other hand, the arrangement is frozen permanently in its present form, it represents only an illusion of progress that will cause widespread dissatisfaction among the member-nations benefitting the least. This could result in a desertion from the ranks of the consortium, and the factionalization of the global system into numerous small feudal arrangements. Such a chaotic situation would make the efficient use of the radio-telephone frequency spectrum impossible.