

TELECOMMUNICATIONS, OUTER SPACE, AND THE NEW INTERNATIONAL INFORMATION ORDER (NIIO)

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I. INTRODUCTION

One of my experienced colleagues frequently reminds me that we live in a world of sovereign states in which there is a pervasive sense of egalitarianism resulting from claims to legal equality. Admittedly, national sovereignty is a hardy crustacean. It possesses a certain mysterious majesty of its own. Its mythology is constantly and unhesitatingly being promoted by world figures. But it has its critics, if not its detractors. They remind us, as Judge Phillip C. Jessup once noted: "Sovereignty is a quicksand. If one tries to build upon it, the entire legal structure sinks and perishes. Sovereignty in the sense of the unregulated will of States to do as they please is absolutely incompatible with the international rule of law."¹

As an international legal principle, there is a need to secure the application of sovereignty in the service of all mankind. Narrow nationalist perceptions of national well-being must be judged these days from a world community perspective. Only through a global approach can the true national well-being of states be advanced. This frequently shared value orientation has particular application to the world-wide dissemination of data, information, and ideas. Such an outlook also has direct application to policies affecting the distribution of extra-territorial and "invisible" resources.² In the process of applying the principle of sovereignty to the resolution of such matters, international negotiations will be the preferred format. In such deliberations, participants will seek accommodation based on values assigned to such factors as cultural integrity, unhindered opportunities to communicate, the formation of a world culture, economic interests, and concerns respecting national security.

Taking these considerations as a starting point, the need then emerges to deal with specifics in a pragmatic way. In applying in-

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1. Jessup, *On the World Community*, 1965 INTERNATIONAL CONVOCATION ON THE REQUIREMENTS OF PEACE, 12.

2. H. LEVIN, *THE INVISIBLE RESOURCES: USE AND REGULATION OF THE RADIO SPECTRUM* 15 (1971).

telligence to facts in the formulation of policy, it is important to begin by searching for the facts. Realizing this, it can be readily acknowledged that ultimate facts are more hypothetical than real. Even the most "concrete" facts are frequently quite slippery and have the capacity of transforming themselves under scrutiny. This, in the best sense, is the product of the ongoing research of our scientific and technology-oriented colleagues. One must also be aware that honest research appraisals are frequently demeaned on the grounds that they are incomplete or are biased as a consequence of the economic, social, or political orientations of their proponents. Nonetheless, the policy process produces the soundest results when put into action following an initial search for all of the objectively ascertainable facts. For example, until now much of the debate of the United Nation's Committee on the Peaceful Uses of Outer Space (COPUOS), and at the World Administrative Radio Conferences (WARCs) of the International Telecommunication Union (ITU) has been based on the assumption that Direct Broadcast Satellites (DBS) will be available for successful commercial operation in the not too distant future.

As I make this observation respecting the formation of world policy, I am reminded of an experience I once had discussing the process of international negotiations with a highly placed Finnish official. Upon being advised by him that he had found it easy to carry on high-level negotiations with a Soviet counterpart, I expressed surprise. I was reassured, if not entirely satisfied, by the following distinction. The Finn pointed out that there were objective facts and subjective facts. Once the negotiators were able to concentrate their attention on the subjective facts, I was told, the negotiations could be brought to an ascertainable conclusion.

This brief recapitulation is relevant to an assessment of the sharing of resources, finite or infinite, when one accepts the proposition that states, like individuals, possess acquisitive impulses. When the details of sharing are being considered there are many practical considerations to be taken into account; the "true" facts are not always the most weighty. This is not to say that the advanced states do not have a major responsibility to bring their research facts and conclusions to the attention of their less well informed counterparts from the other parts of the world. Indeed, they do.

Additionally, it is perfectly obvious that the ideological differences among states and regions will have a heavy impact upon

the policy equation of the international agreement process. It is generally accepted, for instance, that the countries of the West, under the influence of freedom-oriented traditions flowing from the Age of Enlightenment and before, have a bias in the area of human rights. These countries are the proponents of civil and political rights and liberties. Countries of the socialist bloc follow the beat of a different drummer. They prefer to espouse economic, social, and cultural rights. This has been translated by them into a concern for needs, as opposed to the Western orientation toward rights.

In an assessment of the respective rights and duties of states in any area of competition, conflict, cooperation, or reconciliation it is necessary to take into account a decisional process that is measurably, but not totally, influenced by facts as well as by preferred policy considerations. A blending of the relevant ingredients is to be expected. Thus, when an assessment is made of the use of geostationary orbital positions for electronic transmissions throughout the world, as well as the availability to states of facilities for domestic broadcasts, some bargaining must be expected. This is especially true at a time when there has been an explosive increase of states, which in turn has had such consequences as demands for a New International Economic Order (NIEO) and for a New International Information Order (NIIO).

II. THE STRUCTURAL SETTING

National concerns relating to the dissemination of "information," in the broadest sense of the term, have found expression in a number of international organizations. Among the most prominent of these have been the United Nations, the International Telecommunication Union (ITU), and the United Nations Economic, Social and Cultural Organization (UNESCO). At the United Nations, principal efforts have been undertaken by the General Assembly's 53 member Council on the Peaceful Uses of Outer Space (COPUOS), Economic and Social Council (ECOSOC), and by the United Nations Development Program (UNDP). The United Nations also employed the conference process to inquire into specific issues. For example, in 1979 it convened a Conference on Science and Technology for Development. At present a plan is being developed for the Second U.N. Conference on the Exploration and Peaceful Uses of Outer Space. At the ITU, decisions have been made in periodic general conferences of the Union, at either

general or special WARCs, or at regional radio conferences. UNESCO, through the drafting of formal agreements and the adoption of resolutions, as well as through the preparation of a series of research reports and studies, has been identified with mass communications since 1948.

The comparative utility of the three forums mentioned above, the UN, the ITU, and UNESCO will be examined subsequently. Each has had a different orientation respecting the identification of law and policy related to world-wide mass communications. Each has addressed itself somewhat differently to issues over time. It is clear that each has had a role to play. Of course, the special outlooks that have been raised in one forum have also been heard in the other forums, although possibly in a muted or less specific fashion.

Several important differences exist between these organizations. Of the three, UNESCO has been the most heavily politicized forum in which outer space communications have been considered. It is the institution where the United States' commitment to article 19 of the Universal Declaration of Human Rights has taken the severest battering. It is the only one of the three institutions in which withdrawal has been given reluctant thought. Until the present at least, COPUOS, with its fairly small membership, and despite its responsibilities in the political-legal arena, as well as involvement in scientific and technical areas, has not been severely affected by either East-West or North-South tensions. To the extent that substantial differences have arisen respecting the issue of prior consent on the part of a receiving state for a foreign broadcast, the debates have generally been among the supporters of civil and political rights and liberties. Canada and Sweden have been on one side and on the other has been principally the United States. Recent shifts have resulted in a reduction among the proponents of prior consent.

The ITU, as a specialized agency of the United Nations composed of over 150 states and operating on a one-state one-vote basis, has the responsibility for assuring that the radio spectrum be used to advance community interests. Although originally conceived to bear only technical responsibilities, it has become increasingly clear that fulfillment of ITU duties cannot be separated from political-legal security considerations. The union meets its responsibilities through periodic ITU conferences and through its world-wide and regional World Administrative Radio Con-

ferences. In recent years it has been engaged in essentially non-stop legislative conferences. The 1971 WARC on space telecommunications and the 1977 WARC on broadcasting satellite services demonstrated that technically based decisions can be reached in the face of real but muted political claims. The same held true of the 1979 WARC, although the issues before it were potentially explosive from a political perspective.

III. ASSESSMENT OF ROLES OF THE FOREGOING INSTITUTIONS

Before analyzing the respective roles of these three international organizations in the area of mass communications, reference must be made to the principle of national sovereignty. In applying the principle of sovereignty to mass communications emanating from space objects, it is necessary to be aware of either the irrelevance of sovereignty or at least its essential neutrality. The foregoing statement needs to be placed in the context of possible future broadcasts from the space object of one state into receivers located in another state, and in particular, direct or indirect broadcasts into home or community receivers. Relying only on the principle of sovereignty, and in the absence of limitations imposed either by formal international law and by its constant companion, namely customary international law, it is submitted that it would be perfectly lawful for a state to engage in such broadcasts and to authorize its nationals to do so. By the same token, of course, it would also be within the sovereign rights of the receiving state to prevent the reception of such broadcasts. The situation can be described as one of clashing, co-equal sovereignties rather than one of higher sovereignty being accorded to either the sending or receiving state. A similar observation may be made in reference to remote sensing through the utilization of space objects.

The foregoing conclusion is supported by the most relevant formal international agreement in this area, the 1967 COPUOS Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.³ In article 1 of the COPUOS Treaty, provision

3. More than eighty states are bound by the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, done January 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (entered into force for United States on October 10, 1967).

was made for the free and equal access to, and exploration, use, and exploration of the space environment. In establishing national rights and obligations the Treaty neither prohibited nor authorized broadcasts from space objects. Since it is accepted that the scope of international agreements is generally restrictive, it may be concluded that, in the absence of specific prohibitions, receiving and sending states cannot legitimately claim violation of national sovereignty.

In the early 1970s the practical prospects for the mass communication of data, information, and ideas by way of Direct Broadcast Satellites (DBS) were becoming more apparent. All three of the international organizations examined here have dealt with the subject. In doing so they have become intensely involved in the following: the varying interests, values, wants, and needs of their respective decisional processes, with COPUOS arriving at decisions via consensus; the sizes of the different institutions; the ideological preferences of the members; the perceptions held within the several institutions of their prerogatives; and their experiences in dealing with scientific and technical matters as opposed to more wide-ranging political and philosophical issues. Despite these considerations, or perhaps because of them, the general interest in both the method and subject matter of communications has been so wide-ranging that it has not been possible to confine consideration of the subject to one institution. From the UN's interest in direct television broadcasts beginning in 1968, UNESCO's concern for the freedom of information dating back to the Universal Declaration of Human Rights in 1948, to the ITU's involvement in the use of radio frequencies by space objects dating back to 1971, there were many forces at work leading to the present interest in a NIO.

IV. THE ROLE OF UNESCO

In addition to the interests previously identified it is necessary to call attention to other national preferences that will certainly affect the form and substance of the proposed NIO. At UNESCO, as early as 1948, a resolution was adopted upon the initiative of the United States, recommending that members "recognize the right of citizens to listen freely to broadcasts from other countries."⁴ This was followed by United States support for a 1969

4. UNESCO, Records of the General Conference, 3d Sess., vol. 2, UNESCO Doc. 3 C/Resolution 7.2221 (1959).

UNESCO Resolution 4.14, dealing with the promotion of the use of space communications to further UNESCO's aims. Among that Resolution's provisions was an authorization to the Secretary-General "to collect and disseminate information and to promote studies and research on the use of space communication for the free flow of information, the rapid spread of education and greater cultural exchange." This seemed quite in keeping with the American tradition of the free communication of data, information, and ideas.

In 1972, UNESCO, with its mission of eliminating human ignorance, adopted a "Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange."⁵ This Declaration recognized the fact that DBS constituted a new dimension in international communications. The United States, however, expressed opposition to the terms and content of the Declaration. Among the reasons advanced for the opposition was the absence of a useful definition of terms. It was also suggested that the Declaration did not adequately deal with numerous issues, and that its general approach toward direct broadcasting was negative. Finally, there was opposition to the principle that would have required prior consent to such broadcasts by a receiving state. The Declaration was considered to constitute a hazard to the free flow of facts, information, and ideas, and as such, stood in conflict with the basic goals of UNESCO.

By the early 1970s, lesser developed countries (LDCs) were becoming aware of the potential of space-based communications. Through membership and participation in UNESCO, the UN, and the ITU, they came to realize that the extent of a state's development could partly be gauged by its communication capabilities. In the process of modernization they have endeavored to move into the era of mass communications. They perceive mass communications as a two-way street in which governments can reach their populations, and the people can express their wishes to the government. In endeavoring to identify the structures best suited to meet the need for the distribution of data, information, and ideas, certain domestic tensions have surfaced. In response, governments have sought to clarify the impact of government on media practitioners. Practitioners have been treated as a part of

5. UNESCO, Records of the General Conference, 17th Sess., vol. 1, UNESCO Doc. 17 C/Resolution 4.111 (1972).

the total paraphernalia of the state. The extent to which public controls have been imposed has, of course, varied from country to country.

Supported by the lesser developed countries, but led by Eastern European nations, the 1976 agenda of the UNESCO General Conference included consideration of a "Draft Universal Declaration on Fundamental Principles Governing the Use of the Mass Media in Strengthening Peace and International Understanding and in Combatting War Propaganda, Racism and Apartheid."⁶ In assessing the terms of the draft Declaration, the representative of the United States pointed out that it posed a conflict between ideologies with respect to mass media, a conflict which was essentially political. He characterized its terms as reflecting "the views of some nations that regard the mass media as a political arm of the State. It reflects the view that information media is to be used as a tool or an implement to further the aims and objectives of the State."⁷ Thus, on political and constitutional grounds it was asserted that further negotiations were in order. Although support for the Declaration has grown, the United States has maintained its original opposition.

The recent effort at UNESCO to formulate a NIIO has been a cause for concern in the United States.⁸ This stems from the definition accorded to the NIIO in a recent UNESCO study. There it was defined as the "international exchange of information in which States, which develop their cultural systems in an autonomous way and with complete sovereign control of resources, fully and effectively participate as independent members of the international community."⁹ One cannot help but be impressed with the aggressive assertion of national sovereignty as opposed to loyalty to the general interests of the world community reflected in the quoted definition.

UNESCO's role in the formulation of a NIIO appears to be at

6. UNESCO Doc. 19 C/Resolution 91 (1976).

7. UNESCO, Records of the General Conference, 17th Sess., vol. 2, pt. 2 (36th mtg.) 435, 458 (1976).

8. UNESCO Meeting Adopts Compromise Declaration of Mass Media Question, 15 U.N. MONTHLY CHRONICLE, No. 11, p. 54 (1978).

9. Hamelink, *The New International Economic Order and the New International Information Order* (UNESCO International Commission for the Study of Communication Problems), Rep. No. 34, p. 8; M. MASMOUDI, *THE NEW WORLD INFORMATION ORDER* (UNESCO International Commission for the Study of Communication Problems), Rep. No. 31, 1978; *MANY VOICES, ONE WORLD* (UNESCO International Commission for the Study of Communication Problems) (S. MacBride ed. 1980).

odds with article 19 of the Universal Declaration of Human Rights. Article 19 provides that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."¹⁰ The NIIO, as defined, would constrain the rights of the individual as set out in article 19.

V. *THE ROLE OF COPUOS*

In the early 1960s, COPUOS, assisted by the UN Secretariat, began to display an interest in direct communications. In its April 1967 meeting, COPUOS examined the matter with some care. Following action by the General Assembly, a Working Group met in February 1969 to consider technical and economic problems associated with DBS. It was able to consider a joint working paper presented by Canada and Sweden, another from the United States, and an ITU statement.

Subsequently the Soviet Union obtained the support of its allies, many of the lesser developed countries, and France for a COPUOS statement of principles based on the 1972 UNESCO Declaration. These states favored the view that it would be necessary for a broadcasting state to receive the permission of a receiving state prior to engaging in or authorizing a broadcast.

Beginning in 1970, Canada and Sweden have put forward a series of proposals which, although periodically modified, have favored a principle of prior consent by a receiving state. Most recently these states have called for advance agreement on broadcasts from satellites without reference to the content of such transmissions. The United States has not accepted their joint proposals, since such a concession to the control of the dissemination of information by this technical means could have an adverse impact on the free and unhindered dissemination of information throughout the world. From a practical perspective, any such restriction on the free flow of information might cause the U.S. Senate to reject an agreement containing those constraints. Even if the COPUOS-based proposal were to take the form of a Statement of Principles, rather than a formal agreement, it would be difficult for the United States to accept it in the light of its historic support for the freest possible dissemination of data, information, and ideas.

10. Universal Declaration of Human Rights, U.N. Doc. A/811 (December 10, 1948).

The United States has opposed the inclusion of a provision requiring prior consent in the COPUOS-sponsored principles. In support of its position the United States has made several arguments. First, it has asserted that until adequate practical experience has been gained in the use of DBS, no international political limitations on use should be imposed. Second, it has contended that unnecessary political restraints would reduce the use of satellites and thus inhibit the growth of space technology. Third, it has argued that existing ITU regulations are adequate to deal with present problems. Specifically, it has pointed out that article 7, section 428A of the 1971 Radio Regulations provides that, "[i]n devising the characteristics of a space station in the broadcasting-satellite service, all technical means available shall be used to reduce, to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries."¹¹

The provision relied on by the United States was restated without change as rule 6222 at the 1979 WARC. The rule constitutes a formal restraint on the means available to broadcasting states in their domestic broadcasts to the extent that such broadcasts may have international consequences. Rule 6222 can be treated as a limitation on the guarantee of article 1 of the Principles Treaty that signatories have freedom in the exploration, use, and exploitation of the space environment. The United States has subscribed to the rule on the grounds that its function is to protect the effective use of the broadcast spectrum. Concerns exist, however, that a requirement for technical coordination might constitute a form of prior consent and thereby raise constitutional issues.¹²

The issue of prior consent has posed seemingly insuperable difficulties for the United States. Regretably, the issue has produced clashes among co-supporters of human rights and fundamental freedoms, including members of COPUOS whose unremitting commitments to free and robust expression of ideas correspond with those of the United States. In 1975, in an effort to avoid the issue of prior consent, the United States urged at the UN that any system of DBS should include a plan for full consultations

11. Partial Revision of the Radio Regulations, done July 17, 1971, 23 U.S.T. 1527, 1648, T.I.A.S. No. 7435.

12. For an assessment of United States constitutional problems, see, Note, *Toward the Free Flow of Information: Direct Television Broadcasting via Satellite*, 13 J. INT'L L. ECON. 329, 350-56 (1979).

among the concerned states. The United States proposal reads:

We are proposing that before direct television broadcasting is undertaken, States within the reception area should be notified of the intention to broadcast. Those who broadcast should be prepared, on a reciprocal basis, to assume an obligation to give formal notification to States within the likely broadcast area. In addition, those who broadcast should agree to consult fully with the governments of the States in the intended reception area if the latter so request, with the intention of making good faith efforts to reconcile problems which may be raised.

We believe that this approach would offer protection for any State which has legitimate concerns about direct television broadcasting into its territory, without establishing an international scheme based on prior consent. We do not envisage establishment through these procedures of a right of any State to prohibit others from undertaking broadcasting. We do envisage that such notification and consultation requirements would go substantially beyond the technical consultations now provided for within the ITU.¹³

Adherence to the foregoing approach, it was hoped, would facilitate consultations so that differences would be quickly and easily reconciled. In particular, potential receivers would be provided with a full opportunity to resolve foreseeable problems. It was also noted that consultations would be incumbent on broadcasters because of their unwillingness to alienate prospective audiences. While maintaining the same approach in 1979, the United States observed that a sending state would not be accorded a wholly unrestricted broadcast opportunity. In its 1979 submission, the United States indicated that a broadcasting state would be obliged to "take into account and give due regard to the interests and concerns of the foreign State in regard to the proposed service . . ."¹⁴

In an attempt to overcome the existing deadlock, there have

13. This was consistent with Secretary Kissinger's 1975 statement relating to broadcasting satellites. He indicated that the United States was committed to greater communication and the wider exchange of ideas. But, he said, "we recognize that there must be full consultation among the countries concerned." *International Law, World Order, and Human Progress*, 73 DEPT. STATE BULL. 353, 359 (1975).

14. U.N. Doc. A/AC.105/C.2/L.118 (March 22, 1979); U.N. Doc. A/AC.105/240, Annex 4, p. 5 (April 10, 1979). For an excellent analysis of the contributions of Canada and Sweden, see Chapman and Warren, *Direct Broadcast Satellites: The ITU, UN and the Real World*, 4 ANNALS OF AIR & SPACE L. 413 (1979).

been suggestions that it might be possible for negotiators to settle for content guidelines or parameters of conduct. These, presumably, would be fashioned in such a manner as to protect fragile cultures from inroads and influences emanating from states possessing advanced capabilities for information dissemination. Such proposals appear to have little chance of success. Past history has indicated a myriad of responses to efforts to define or to isolate the substantive content, for example, of propaganda, war-mongering, racism, and bigotry. Efforts to define and to control acceptable cultural patterns have also failed. It may well be that we are edging toward a world culture and that the principle of a free flow of information will inevitably prevail over concerns for a formally prescribed morality, a localized cultural integrity, and even narrow views of national sovereignty. However, in the world community, as in smaller and more discrete associations, good manners have substantial value. With the free flow of information it will always be possible to lodge suitable protests against breaches of propriety however interpreted by unwilling recipients.

VI. THE ROLE OF THE ITU

If, as appears to be the case, COPUOS in its rational and low-keyed approach toward creating a consensus respecting formal limitations on DBS has not been able to reach agreement, is there any greater likelihood that formal or informal rules can be achieved in other fora? What is the situation at the ITU and in its worldwide and regional WARC's? In these settings the negotiators have been charged, pursuant to article 33 of the 1973 ITU Convention with arranging the disposition of frequency bands for space radio services and geostationary orbital positions so that these resources will "be used efficiently and economically so that countries or groups of countries may have equitable access to both in conformity with the provisions of the Radio Regulations according to their needs and the technical facilities at their disposal."¹⁵

Unlike the focus at COPUOS on "prior consent," the members of the ITU have sought to regulate access to and the use of radio frequencies so as to avoid interferences in the broadcasting of messages through the multiple and uncoordinated uses of a given

15. International Telecommunication Convention, done October 25, 1973, 28 U.S.T. 2495, 2529, T.I.A.S. No. 8572 (Entered into force for the United States on April 7, 1976).

wavelength. The ITU has built a practice around such concepts as "assignments," "allocations," and new proposals relating to "allotments." These words have important technical meanings as they relate to the use of the broadcast spectrum. The ITU allocates frequencies by services, such as the broadcast satellite service, to three geographical regions. States make assignments of specific wavelengths to broadcasters who operate within the indicated state. States record these nationally-identified assignments with the International Frequency Registration Board (IFRB) of the ITU. The term "allotment" has recently entered the vocabulary of the ITU because of the efforts of various countries, particularly the LDCs, to obtain *a priori* distributions of indicated wavelengths.

At the present time a state or its nationals can begin to use a wavelength through the publication by the state of a national assignment. This is followed by national notification to the IFRB that the country wishes the assignment to be entered on the registry of the Board. As a result of this practice the expression "first-come, first-served" has come into vogue as the purported basis for the distribution of frequency uses. Although such uses do not create proprietary rights in the radio spectrum, less developed countries, having entered the arena after many frequencies have been allocated, have had to engineer their systems around the earlier ones.¹⁶

The LDCs have been fearful that radio frequencies and geostationary orbital positions have been preempted by the existing activities and practices of the space-resource states. In response, they have sought priorities respecting spectra and, possibly, orbital positions. At the 1979 WARC, they urged that they should receive "allotments" now, even though they may not have demonstrated a present capability to use and exploit such resources. The concept of "allotments," then, can be likened to that of "assignments," the difference being that "assignments" are the product of national action, whereas "allotments" would be the product of an international decision by a WARC.

The role of planning as a means for effecting distributions of frequencies, including possible future allotments on an *a priori*

16. Jackson, *Allocation of the Radio Spectrum*, 242 SCIENTIFIC AM. 34, 38-39 (1980); see generally White and Holmes, *The Future of Commercial Satellite Telecommunications*, 2 QUEST 46 (1978).

basis to the lesser developed countries, has come under some criticism. As a spokesman for advanced states, the United States has been opposed to such "warehousing" of frequencies. It has urged that allocations be made only when there is a need to use the frequency. In assessing the 1979 WARC, Professor G.O. Robinson, Chairman of the United States Delegation stated:

The Third World fears of being preempted by earlier developed country exploitation actually were belied by experience, because no one could show that there had been any such preemption, despite considerable satellite activity by both developing and developed countries. The argument that preemption will not happen failed at WARC, and it probably will fail at the future planning conference because it cannot be proved that no country will ever be denied reasonable access to the spectrum or orbit. Such proofs are in the realm of religion, not engineering, and the protagonists do not share the same faith.¹⁷

Nonetheless, it was agreed that upon proof of actual need, less developed countries might achieve future guaranteed options to certain orbital positions or allotments, strictly limited to a few frequencies and positions.¹⁸

If "allotments" were to be used, with specific distributions of frequencies to states being made by a WARC, the existing practice of the ITU in accepting registration of national assignments after the frequency had been put into use would have to be substantially modified. Legally, it is doubtful that such prospective allotments by the ITU could be sustained under article 2 of the Principles Treaty, since the article prohibits acquisition of national sovereignty over any part of the space environment by any means. This prohibition applies to the acts of states and international organizations.

During the 1979 WARC, advanced states vigorously opposed the *a priori* (e.g. allotments prior to need of space resources) proposals of the lesser developed countries. The advanced states indicated that establishment of such a practice would conflict with the criteria established in article 33 of the ITU Convention. They also sought to convince the lesser developed countries that suitable frequencies would be available at such time as those lesser

17. Robinson, *Regulating International Airwaves: The 1979 WARC*, 21 VA. J. INT'L L. 45 (1980).

18. *Id.* at 46.

developed countries could demonstrate actual capacity to make use of them. Concurrently, the advanced states acknowledged the present or potential need on the part of the lesser developed countries. As has often been the case in international negotiations when agreement cannot be reached, it was decided to postpone further consideration of the matter. The matter will be considered at a forthcoming conference.

These circumstances have a direct impact on the underlying premise of the NIO. The lesser developed countries, through management of their own communications, seek to receive and impart data, information, and ideas most favorable to them. It is their opinion that nationalistic goals could be promoted through ownership and operation of national space objects. National culture could be protected against the intrusion of the outside world. In addition, these nations believe, transmitting capabilities would enable them to design and broadcast the materials deemed most needed by or useful to their citizens. This could relate, for example, to agricultural, health, sanitation, and general educational needs. In fact, this was the preference indicated by India in 1973, when plans were being made for the 1975 joint venture between the United States and India known as the Satellite Instructional Television Experiment (SITE).¹⁹

The United States is obliged, pursuant to section 102 (b) of the Communications Satellite Act of 1962, to make telecommunications services available to developing countries.²⁰ According to this statute, the United States must promote the efficient and economical use of the electromagnetic frequency spectrum so that its benefits become available to all mankind. To obtain such goals, a system of worldwide communications open to all nations, and based on international cooperation has become operational. Although it accepts the value of international telecommunications, the United States also recognizes that great benefits and enormous financial savings can result from domestic communications systems. Recognition has been given to the special requirements of the LDCs, in particular their need to minimize costs for

19. Christol, *Space Joint Ventures: The United States and Developing Nations*, 8 U. AKRON L. REV. 404 (1974); see also Jasentuliyana, *Third World Perspectives of Space Technology*, in *SPACE ACTIVITIES AND IMPLICATIONS: WHERE FROM AND WHERE TO AT THE THRESHOLD OF THE '80s* 261 (1981).

20. Communications Satellite Act of 1962, 47 U.S.C. § 701(b) (1976).

materials and labor in the installation of such systems. States with large expanses of territory will be the principal beneficiaries of such recognition.

It should be noted that a very considerable change of emphasis in this area has taken place in the past five years. In the mid-1970s there were extensive joint efforts by the LDCs and the advanced states aimed at providing more and better communications. While this practice has continued, and has been of major benefit, at the present time the lesser developed countries' emphasis has turned to national television and satellite systems for communications purposes. If such national systems are to be successful and do service to a NIIO, it will be necessary for the lesser developed countries to be assured of access to orbital positions and the use of identifiable broadcast spectra. These demands are being voiced with a certain urgency because the lesser developed countries recognize that the advanced states are continuing to put operating communications satellites into geostationary orbital positions. Moreover, the lesser developed countries have a certain distrust of the often-stated position of the states currently able to exploit space resources that the "first-come, first-served" formula does not confer any property or proprietary rights on existing users.

Since WARC's operate on a one-state one-vote basis, there was concern prior to and even during the 1979 WARC that the conference would become politicized along the lines of the NIIO dialogue. That prognosis was not realized. This can be attributed, in part, to the fact that the participants were essentially technical specialists. Nonetheless, indicative of the potential for politicization was the view heard at the Conference that the advanced states should develop broadcasts and the reception of impulses on single sideband receivers for the benefit of the lesser developed countries, as well as provide "the technology, and the capital investment to use it, free without patents, trade marks or license fees."²¹

The specialists participating in the WARC's realize better than most, that the intangible resources of the space environment are both exceedingly valuable and not infinite. They also realize that science and technology are constantly evolving and that over time more efficient and creative ways to exploit present resources

21. Raghavan, 7 DEVELOPMENT FORUM 10 (1979).

will be developed, requiring only the application of suitable management procedures.

Major attention has focused on the free exploitation or a *post-iori* approach and favored by advanced states, and the highly planned specific allotment, or a *a priori* model, supported by LDCs. As a further alternative, speculations have been raised concerning the allocation of orbits and spectra by way of a market formula. One commentator, in supporting such a means to effect distributions, has stated that although this might seem unfair to the poorer states "relative wealth is not the only determinant of resource distribution: relative utility and intensity of demand are equally important."²² Such an approach could render obsolete the allocation process, particularly if it were agreed that states holding allotments could transfer such allotments to other users. The argument is that an allotment plan is *per se* inefficient, and that a need exists to maintain the mandate of equitable use. If limited transfers of allotments among different countries by way of a market in radio frequencies were allowed, the result would be a system "enormously more responsive to efficiency interests while remaining reasonably faithful to equity considerations."²³

VII. ROLE FOR EQUITY

In the distribution of intangible and tangible resources of the world there is increasing authority to support the application of principles of equity. In this connection it is appropriate to recall that:

It has been perceived that all human beings are members of the human race no matter whether they live in the "North" or the "South," whether their loyalties are given to technologically advanced or disadvantaged States, and whether their ideologies support the cause of freedom or statism. Many of the advanced States, for example, have cooperated to ameliorate the pressing burdens of poverty in the LDCs, through what is known as development assistance. This has its foundations in moral concerns, since the history of mankind has been based on the proposition that the rich and powerful possess a moral obligation to aid those less favorably endowed. The sense of sharing has come to be considered as a precursor of a global fairness revolution.²⁴

22. Robinson, *supra* note 17, at 49.

23. *Id.* at 51.

24. Christol, *The Common Heritage of Mankind Provision in the 1979 Agreement*

Such considerations have induced states to enter into formal agreements whereby they have determined that principles of equity should be applicable to the distribution of benefits derived from exploitative endeavors.

The willingness of the world community to equitably distribute benefits derived from *res communis* areas can be amply illustrated. In regard to the use of radio frequencies and the geostationary orbital position, attention has already been called to article 33 of the 1973 ITU Convention. Article 11, para. 7(d) of the 1979 Moon Treaty prescribes equitable sharing by the parties in benefits derived from the moon and its natural resources. The Moon Treaty also provides that in effecting such a sharing, special consideration is to be given to "the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon."²⁵ Equitable principles must also be considered in determining the compensation paid by a launching state should it incur liability to pay damages pursuant to article 12 of the 1972 International Liability for Damages Caused by Space Objects Convention.²⁶ The principle of equity has recently been incorporated in several of the articles of the current draft Convention on the Law of the Sea.²⁷ For example, article 69, para. 1 provides that landlocked states shall have the right to equitable participation in the exploitation of certain living resources, while account is taken of relevant economic and geographical circumstances of all the concerned states. Article 140, para. 2, of the same draft agreement, in delineating the manner in which activities are to be carried on in a sea area, imposes a duty to provide for the equitable sharing of financial and other economic benefits derived from any activities.

The foregoing examples are reflected in several portions of the current COPUOS draft "Principles Governing the Use by States of Artificial Earth Satellites for [International] Direct Television Broadcasting."²⁸ In the draft's preamble attention is called to the

Governing the Activities of States on the Moon and Other Celestial Bodies, 14 INT'L L. 429, 452-53 (1980).

25. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, U.N. Doc. A/34/664 (1979); 18 INT'L LEGAL MAT'LS 1434 (1979).

26. Convention on International Liability for Damage Caused by Space Objects, March 29, 1972, 24 U.S.T. 2389, 2397, T.I.A.S. No. 7762.

27. U.N. Doc. A/CONF.62/WP.10/Rev. 3/Add. 1 (1980); 19 INT'L LEGAL MAT'LS 1129 (1980).

28. U.N. Doc. A/AC.105/271, Annex, p. 6 (1980).

desire "to safeguard the legitimate rights and interests of all States and to encourage orderly development on an equitable basis of this new and promising means of television broadcasting."²⁹ Also, in the proposed principle on the applicability of international law, reference is made to the 1973 ITU Convention as having application to direct television broadcasting by means of artificial earth satellites, invoking by inference the equitable provision of article 33 of the agreement.

The fact that article 2 of the 1967 Outer Space Principles Treaty provides that the space environment is not subject to national appropriation, did not prevent representatives of eight equatorial states from reaching agreement on the 1976 Bogata Declaration. In that Declaration, they asserted that international space law allowed them to assert national sovereignty at geostationary orbital heights, a distance of 22,300 miles above the surface of the earth. Several of the equatorial states have made use of the COPUOS and WARC forums in order to restate their claims. They have been unable to gather additional support.³⁰ Undoubtedly, these claims were more designed to augment the economic positions of the participating states than to influence the formation of a NIIO. Nonetheless, they do demonstrate that states are fully cognizant of the values associated with monopolistic controls over geostationary orbital positions and the radio spectrum. Such claims highlight the differences between monopolistic controls and distributions based on the sharing of uses. Up to the present, the claims of the equatorial states have not served to unduly politicize either the UN or the ITU.

VIII. CONCLUSION

The continued advances in science and technology during the present era have heightened awareness of the value of the invisible resources of the space environment. Through the use and exploitation of radio frequencies and geostationary orbital positions vast benefits can accrue to all mankind. The manner of

29. U.N. Doc., *supra* note 27.

30. Christol, *The Geostationary Orbital Position as a Natural Resource of the Space Environment*, 26 NETHERLANDS INT'L L. REV. 5 (1979); Christol, *International Space Law and the Use of Natural Resources: Solar Energy*, 15 REV. BELGE DE DROIT INT'L 28 (1980).

distributing and the distribution of such resources, as well as the benefits derived or to be derived from their exploitation, have posed important scientific, technological, political, legal, and security questions. Through such international institutions as the UN, ITU, and UNESCO demands have been made for a sharing of such resources, with the expectation that users and exploiters may do so in a manner best suited to their interests. In determining what the several interests are, much deference will be accorded to the prerogative of national choice. Such choice must, of necessity, be conditioned by suitable concerns for the well-being of the entire world community.

In determining the substance of community well-being it is clear that the content of the data, information, and ideas that are broadcast via electronic means can be freely disseminated as allowed by article 19 of the Universal Declaration of Human Rights. It is equally clear that information ideas and their dissemination within a given state, may be seen by that state as an element of its national policy. Hence, in recent years a restrictive focus has been accorded to mass communications by states composing the Eastern bloc and some of the lesser developed countries. This approach, limiting the free dissemination of ideas, has been opposed by the United States along with other countries. The impetus toward restrictions on free dissemination of data, information, and ideas has been identified with the NIIO. Paradoxically, the movement has been promoted as a means to advance mass communications.

Many states seek wider participation in deciding on the distribution of radio frequencies and geostationary orbital positions. Many of these states support the restrictions identified with the NIIO. Unlike the United States, which possesses deep-seated convictions that prior restraints on the freedom of expression are harmful to the interests and values of its citizens, some of the states most energetic in their defense of a NIIO are either actually or potentially the most repressive regarding human rights and fundamental freedoms. Thus, it is possible to imagine that an allotment to such a state of a radio frequency allowing space telecommunications, either for domestic or international broadcasts, might result in broadcasts of materials possessing a highly propagandistic content.

Under such circumstances what should be the response of states committed to a more open society? Presumably members of

an open society have little to fear, even though the idea of controlling the substantive content of communications is repulsive to them. If they are convinced that the free dissemination of ideas is the first principle of their societies, they would be expected to contend that their way of life, as explained and understood by them, would in any event prevail. Unlike states possessing fragile cultures and unable to respond effectively against outside influences, the members of the free world would argue that a world culture is constantly evolving. Democratic states, taking a long view of the future, would urge that this evolution will ultimately result in a blending of their emphasis on civil and political rights and liberties with the concerns over human needs deemed important by states possessing different socio-economic organizations. Under such circumstances the proposals for a NIIO will be treated as another aspect of the ongoing ideological conflict, entitled to the same treatment as any other maneuver in that continuing dialogue.

It may be more relevant to concentrate discussion on another subject, namely the distribution of the invisible resources between states presently possessing space resources and lesser developed countries. Undoubtedly, much hard bargaining lies ahead on this subject, with the ITU probably being the focal point for such negotiations. As suggested, it will be helpful to approach the problem of sharing of space resources by reference to equitable principles. Such principles do not require an equal sharing of resources and their benefits. The fact that states are equal in the sense of possessing national sovereignty does not mean that they thereby are automatically entitled to equal shares in areas of the universe and to the natural resources appertaining to that universe.

While it may be appropriate and desirable to effect distributions so as to provide special consideration for the lesser developed countries, each decision permitting such benefits should take into account numerous factors. Several formulas were identified. Until a better one presents itself it will be possible to use the provision contained in article 11, para. 7(d) of the 1979 Moon Treaty, which demands that there shall be: "An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon, shall

be given special consideration." Such a formulation would allow for bargaining where decisions would be based on both needs and contributions. This is consistent with article 33 of the 1973 ITU Convention. That article identified efficiency and economy, along with equity, as considerations when dealing with radio frequencies and geostationary orbital positions. These criteria do not demand that states be treated as equals in the sharing of resources and benefits when they make different scientific and technological contributions, are widely disparate in size, in populations, and differ in other economic and social conditions. An approach focusing on equitable considerations would allow for the continuation of bargaining on the basis of demonstrable interests, values, wants, and needs. These have always been the hallmark of states torn between seeking to serve their own narrowly defined national interests while at the same time confronting the needs of the larger interests of the entire world community.