

# DIRECT BROADCASTING VIA SATELLITE AND A NEW INFORMATION ORDER

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## I. INTRODUCTION

In the context of a New Information Order (NIO)<sup>1</sup>, there seem to be two major problems of direct broadcasting via satellite

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1. The decolonization process, and the aftermath of the Second World War, gave birth to numerous "new" states. These states, having gained political independence, continued their efforts towards establishing their own socioeconomic and cultural identity. In the colonial period, the system that existed perpetrated one-way flow of information from the colonizer to the colonized, from the master to the servant, rather than an equal exchange between equals. The so-called "free flow of information" was nothing more than a "one-way flow" and detrimental to the interests of these newly independent states. They, along with Latin-American states in a similar condition, started expressing their opposition to the monopolization of international communications, mainly by the former colonizing states. Obviously, the appropriate international forum for the expression of such opposition was UNESCO. During the late 50's and 60's, various discussions took place in the UNESCO General Conferences with respect to the serious imbalances and inequalities in the field of international communications. At the 1970 General Conference, several delegations from the developing countries explicitly brought up the issue of unequal flow of information, asked for the adoption of new policies to give effect to a better-balanced flow of information, and asserted their right to cultural identity. It was stressed that:

[b]ecause of their impact, the media of communication—whose scope is considerably widened by the utilization of communication satellites—demand of those who use them an acute sense of their responsibilities . . . . If the dissemination of information is the monopoly of a few countries and if the international circulation of information is a one-way process only, the cultural values of most of the remaining countries may be seriously harmed.

INTERNATIONAL COMMISSION FOR THE STUDY OF COMMUNICATION PROBLEMS, MANY VOICES, ONE WORLD 40 (1980) (hereinafter cited as MacBride Commission Report). The 1970 General Conference clearly initiated serious efforts towards the establishment of what is known nowadays as New Information Order (also known as the "New World Information Order" and "New World Information and Communication Order"). The UNESCO General Conferences held in 1972, 1974 and 1976 and the Intergovernmental Conferences on Communication Policies held in 1975, 1977, 1979, and 1980 further clarified the aim and purposes of NIO as well as specific steps which should be taken towards its implementation. See MAC BRIDE COMMISSION REPORT, *supra* at 35-43, and Osolnik, *Aims and Approaches to a New International Communication Order*, International Commission for the Study of Communication Problems, Document No. 32, UNESCO, 1980. On the basis of the MacBride Commission Report, the 21st UNESCO General Conference held in Belgrade in 1980, adopted the "International Programme for the Development of Communication" (Resolution No. 4/21, Records of the General Conference, 21st Session, Belgrade, 23 September - 28 October 1980, Vol. 1). This resolution, in which the Programme was adopted, stressed that "this international programme, aiming to increase cooperation and assistance for the development of communication infrastructures and to reduce the gap between various countries in the communication field, must form part of the efforts for the establishment of a new, more just and more effective world information and communication order."

(DBS). The first problem relates to the question of access to natural resources, like the radio spectrum and the geostationary orbit; the second relates to the contents of international DBS. Keeping in view the wide scope of these problems, this paper concentrates mainly on the legal analysis of these two issues in order to establish what has already been settled and what still remains a controversy.

## II. A NEW INFORMATION ORDER

A call for a new order of things generally comes from those whose interests are adversely affected by the old; a new order is established to replace the old which no longer serves the interests of all the concerned participants.

In the field of radio communications, the first and perhaps the most important "new order" was established under the first International Radio Telegraph Convention of 1906, adopted to eliminate the monopoly of the British Marconi Wireless Company over international radio communications.<sup>2</sup>

It is universally accepted that there are serious imbalances and inequalities in the flow of information between the developed and the developing countries. The information flow at the international level is mainly "one-way" from developed countries to the developing ones.<sup>3</sup> The latter want to rectify this situation because it is against their national interests. The process of this rectification is the establishment of an NIO. A *laissez-faire* approach, if accepted in the case of international DBS, will enormously increase existing imbalances and inequalities.<sup>4</sup> It is, therefore, necessary to establish a legal framework within which international DBS can develop in a manner justifiable to all. The process for the establishment of such a legal framework is an important part of NIO.

The use of satellites for direct broadcasting promises the Third World great advantages in the rapid solution of its developmental problems.<sup>5</sup> Through the establishment of NIO, developing

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2. For details, see D. LEIVE, INTERNATIONAL TELECOMMUNICATIONS AND INTERNATIONAL LAW: THE REGULATION OF THE RADIO SPECTRUM 40-41 (1970).

3. MacBride Commission Report, *supra* note 1, 35-37. See also CENTURY FUND TASK FORCE ON THE INTERNATIONAL FLOW OF NEWS, A FREE AND BALANCED FLOW 4 (1978); Fowlie, *The New Information Order: Implications for the Third World*, SEARCH, Winter 1981, at 10.

4. It is rightly noted in the MacBride Commission Report, *supra* note 1 at 37, that the "dangers and fears created by the potentialities of direct satellite broadcasting stimulated the demand for a balanced flow of information."

5. See generally, Jasentuliyana, *Third World Perspectives of Space Technology*,

countries want to ensure their rightful place whenever they are able to initiate DBS. The NIO, therefore, is considered by them to be an essential step towards their efforts to establish a New International Economic Order.

### III. APPLICABLE INTERNATIONAL LEGAL PRINCIPLES

DBS is governed by the 1967 Outer Space Treaty,<sup>6</sup> the 1973 ITU Convention,<sup>7</sup> and the Radio Regulations. The Outer Space Treaty incorporates general and fundamental principles of international space law applicable to all outer space activities, including DBS. The ITU Convention and the Radio Regulations contain rules regulating all forms of international telecommunications.

The first two articles of the Outer Space Treaty are important with respect to the legal regime of outer space. They provide that:

The exploration and use of outer space . . . shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space . . . shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law.

Outer space . . . is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or any other means.<sup>7a</sup>

These articles declare two basic legal principles, generally known as the common interest principle and the freedom principle. The common interest principle implies that outer space must be explored and used in the common interest of all countries, while the freedom principle implies that all States are free to explore and use outer space.

It is important to note that freedom of action in the exploration and use of outer space is not absolute. It is subject to

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SPACE ACTIVITIES AND IMPLICATIONS: WHERE FROM AND WHERE TO AT THE THRESHOLD OF THE 80's 261-80 (1981).

6. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including The Moon and other Celestial Bodies, January 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 206.

7. *International Telecommunication Convention*, Malaga-Torremolinos, 1973, ITU, Geneva.

7a. See note 6 *supra*.

numerous limitations specified in the Outer Space Treaty. Article I, paragraph 2 of the Outer Space Treaty, which allows freedom of action, itself contains three important limitations. Outer space must be explored and used (1) "without discrimination of any kind," (2) "on a basis of equality" and (3) "in accordance with international law." Other important limitations are that outer space is not subject to "national appropriation"<sup>8</sup> and must be explored and used "for the benefit and in the interests of all countries,"<sup>9</sup> and with "due regard to the corresponding interests of all other States Parties to the Treaty."<sup>10</sup>

The principle of freedom of action has its origin in the traditional concept of national sovereignty. The fact that the Outer Space Treaty was adopted implies that unlimited sovereignty, as traditionally understood, was no longer acceptable in the exploration and use of outer space. The Treaty, as the French delegate to the UN stated, "clearly constituted an innovation from the standpoint of traditional international law based on the sovereignty of States."<sup>11</sup>

The Outer Space Treaty is an outcome of international cooperation and its objective, as expressed in its Preamble, is "to contribute to broad international cooperation in the scientific as well as the legal aspects of the exploration and use of outer space." This international cooperation has resulted in the imposition of limitations, as noted above, on the principle of freedom of action, so that outer space will be explored and used in the common interest of all countries. Therefore, it is apt to conclude that the contracting State Parties are under legal obligation while exercising their freedom of exploration and use of outer space, not to act outside the limits of the freedom principle itself, nor to infringe upon the common interest principle.

The Treaty does not contain specific prohibitions against the violation of the common interest principle. That does not, however, imply that such violation is envisaged. The Treaty was adopted as anticipatory law and must be understood as such. In other words, the Treaty was intended more to prevent legal disputes than to rectify them. That is why it does not contain any specific prohibitive rules. Above all, the Treaty is essentially, to

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8. See note 6 *supra*, at art. II.

9. *Id.*, art. I, para. 1.

10. *Id.*, art IX.

11. 21 U.N. GAOR 429, U.N. Doc. A/C. 1/SR (1968).

use Friedmann's term, a " 'cooperative' law of nations," in contrast to the "traditional system of international law [which] regulate[d] the rules of coexistence between sovereign States [and] is essentially a collection of 'don'ts' "<sup>12</sup> or prohibitions.

Some important legal rules with respect to the common interest principle and the freedom principle have been adopted by the international community through the International Telecommunication Union. These rules will now be examined.

#### IV. THE PROBLEM OF ACCESS

The principle of "first come, first served," if used to regulate access to the radio spectrum and geostationary orbital positions would naturally favor the interests of the developed countries. The developing countries expressed such fears during both the ITU's Extraordinary Administrative Radio Conference held in 1963 and the World Administrative Radio Conference for Space Telecommunications held in 1971. With the exception of a few important resolutions,<sup>13</sup> no specific rules were adopted at either of these conferences. To guarantee the access of the developing countries to both the radio spectrum and the geostationary orbit, the moral obligations contained in these resolutions were transformed into legal obligations by article 33 of the presently applicable (1973) ITU Convention. It provides that:

(2) In using frequency bands for space radio services, Members shall bear in mind that radio frequencies and the geostationary satellite orbit are limited natural resources, that they must 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.

A careful reading of this article shows that:

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12. Friedmann, *National Sovereignty, International Cooperation, and the Reality of International Law*, 10 U.C.L.A. L. REV. 739-47 (1963).

13. For example, Resolution Spa 2-1 adopted in 1971 provided:

That the registration with the ITU of frequency assignments for space radio-communication services and their use *should not provide any permanent priority* for individual country or group of countries and should not create an obstacle to the establishment of space systems by other countries. [emphasis added].

This resolution also imposed a duty on the first-comer countries that they "should take all practicable measures to realize the possibility of the use of new space systems of other countries." (Spa 2-1, para. 2).

(1) that both the radio frequencies and the geostationary satellite orbit are limited natural resources;

(2) a duty is imposed on the ITU members to use both these resources efficiently and economically;

(3) the efficient and economic use must be made so that not only ITU members but all countries or groups of countries may have equitable access to both these resources;

(4) equitable access is and will be guaranteed through provisions of the Radio Regulations based on the criteria of needs and the technical facilities at the disposal of the countries concerned.

The principle of equitable access established by article 33 is implemented by what is known as the 1977 Plan.<sup>14</sup> This Plan was adopted by the 1977 World Administrative Radio Conference (WARC) for Broadcasting Satellite Service, and has been incorporated in the Final Acts of 1979 WARC.<sup>15</sup> It is legally binding on all those countries which ratified the Final Acts.

The 1977 Plan eliminated the "first-come, first-served" principle in Regions 1 and 3 so far as broadcasting satellite service in the 12 GHz band was concerned. Countries in these regions (Asia, Africa, Europe and Oceania) have been allocated specific frequencies and geostationary orbital positions according to their requirements and needs. The Plan is an example of *a priori* guaranteed access to the spectrum/orbit resource in which the interests of all countries have been protected on an equitable basis. The 1977 WARC was guided by two important principles mentioned in the Preamble to its Final Acts: the best possible use of the radio-frequency spectrum and the geostationary satellite orbit, and the equal rights of all countries, large and small, even those countries which were not represented at the Conference.

The 1977 Conference did not adopt any plan for Region 2 (the Americas). A Region 2 Administrative Radio Conference will be convened in 1983 to draw up a detailed plan for broadcasting satellite service in the 12 GHz band, which:

shall provide for the detailed assignment of the orbital positions and frequency channels available, ensuring that the broadcasting

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14. *Final Acts of the World Administrative Radio Conference for the Planning of the Broadcasting-Satellite Service in Frequency Bands 11.7 - 12.2 GHz<sub>z</sub> (in Regions 2 and 3) and 11.7 - 12.5 GHz<sub>z</sub> (in Region 1)*, ITU 1977, Geneva.

15. *Final Acts of the World Administrative Radio Conference*, ITU Appendix 29A 1979.

satellite service requirements submitted by the various administrations are met in an equitable manner satisfactory to all the countries concerned. It should be laid down as a matter of principle that each administration in the Region should be guaranteed a minimum number of channels (4) for the operation of the broadcasting satellite service. Above the minimum, the special characteristics of the countries (size, time zones, language differences, etc.) shall be taken into account.<sup>16</sup>

Region 2 is expected to adopt a plan similar to the above, as it is learned that the U.S., which favors a "first come, first served" principle, is abandoning this approach since it is faced with a large majority of nations in this Region who favor a detailed plan for broadcasting satellite service.<sup>17</sup>

It must be noted that the 1977 Plan is rather limited in scope. It covers only the 12 GHz frequency band. The position in other frequency bands<sup>18</sup> for broadcasting satellite services did not change. The question of access to these frequency bands and appropriate geostationary orbital positions will come up for discussion at the 1985-87 WARC which will be convened "to guarantee in practice for all countries equitable access to the geostationary satellite orbit and the frequency bands allocated to space services."<sup>19</sup>

The 1977 Plan is undoubtedly a practical step in the implementation of the provisions of both the ITU Convention and the Outer Space Treaty and in the establishment of the New Information Order in the field of DBS. All countries in Regions 1 and 3 now have guaranteed access to the spectrum/orbit resource for their broadcasting satellites, and countries in Region 2 are expected to follow suit.

Before the issue of access is concluded, it is important to discuss a few other relevant questions. Is the geostationary orbit a limited natural resource? The answer is yes, both in law and in fact. The legal position is clear from article 33 of the ITU Convention. The geostationary orbit definitely is not unlimited. In the late sixties, Canada conducted three studies with respect to the establishment of a domestic satellite telecommunications system. They

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16. *Id.*, Resolution CH.

17. U.S. Abandons its "Evolutionary" Approach to Space Broadcasting, AVIATION WEEK AND SPACE TECHNOLOGY, May 5, 1980, p. 74.

18. *E.g.*, 2500-2655 MHz, 40.5 - 42.5 GHz, and 84 - 86 GHz in all three regions; and 22.5 - 22.55 GHz in Regions 2 and 3.

19. See note 15 *supra*, Resolution BP.

all showed grave concerns as to the limited availability of appropriate orbital positions and radio frequencies.<sup>20</sup> The Australian Government Task Force on National Communications Satellite System, in its 1978 Report, also showed similar concerns.<sup>21</sup> It has recently been reported that some American satellite communication systems may face problems because of the shortage of appropriate geostationary orbital positions mainly for the use of the 6/4 GHz frequency band.<sup>22</sup> Above all, the shortage of appropriate geostationary orbital positions could be serious over certain areas, e.g., over the Americas and Africa, because these positions are ideal for the satellites of numerous countries. This shortage of a resource necessitates special regulations to guarantee an equitable access to it by all countries.

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20. See (1) The Honourable C.M. Drury, White Paper on A Domestic Satellite Communications System for Canada, 28 March 1968, at pages 15 and 16:

The number of possible communication satellites which may be placed in such [geostationary] an orbit is limited. There is a natural limit imposed by the number of suitable frequencies that are available in the electro-magnetic spectrum, requiring satellite separation to avoid interference between satellite transmission beams.

(2) J. Chapman, P. Forsyth, P. Lapp, G. Patterson, Upper Atmosphere and Space Programs in Canada, Science Secretariat Privy Council Office, Ottawa, February 1967, at page 86:

The principal factor in this question [of ownership or control of Canadian satellites] is that the space 22,300 miles above the equator along a belt approximately of 18,000 miles long (20° either side of 95° W longitude) is available to any country for operation of a synchronous satellite for domestic TV transmission. . . .

The sky for location of Canada's satellites is valuable. If given over to the U.S. or any other country, this territory could be lost for ever.

(3) Science Council of Canada, A Space Program for Canada, July 1967, at page 28, stressed the fact that "there is only one orbit for geostationary satellites, and in due course it could become overcrowded."

21. It might be imagined that, with a synchronous satellite orbit lying 35,780 kilometres out in space, there would be ample room for all the synchronous satellites which might be required, by all countries. Such is not the case. . . . It is in Australia's interests to establish the orbital positions it will need for both Fixed Satellite Services and Broadcasting Satellite Services and to ensure that these positions are not lost to her by allocation to other countries. . . .

Commonwealth (Australia) Government Task Force, National Communications Satellite System, Report of July 1978, p. 84.

22. See Castledine, *Communication Channels Nearing Saturation Point*, AVIATION WEEK AND SPACE TECHNOLOGY, March 9, 1981, p. 101: "Success of commercial satellite communication may exhaust the frequencies currently in use and the orbital arc available for geosynchronous orbit by the end of this decade, according to the National Aeronautics and Space Administration." See also *FCC Approves Communications Satellites*, AVIATION WEEK AND SPACE TECHNOLOGY, January 5, 1981, at 46; *GTE Seeks FCC Slot Approval to Compete for Satcom Traffic*, AVIATION WEEK AND SPACE TECHNOLOGY, April 28, 1980, at 22; *Hughes Seeks C-Band Satcom Authority*, AVIATION WEEK AND SPACE TECHNOLOGY, December 17, 1979, at 62; THE ECONOMIST, February 28, 1981, at 83; Beakley, *Satellite Communications*, 14 TELECOMMUNICATIONS 19, 23 (1980).



Is the ITU an appropriate international organization to effect an equitable access to the geostationary orbit? The answer again is yes. The member countries of the ITU have been extending its jurisdiction periodically over new means of communications and related facilities. Since the beginning of space activities, the ITU has been allocating radio frequencies for space services. To avoid harmful interference in the operation of radio services, it is logical that the ITU have some sort of jurisdiction with respect to the location of radio stations. It may be noted that it has already started registering the locations of terrestrial radio stations. Articles 33 and 10 of the 1973 ITU Convention contain provisions with respect to the ITU's jurisdiction over the geostationary orbit. Though these provisions do not expressly and clearly authorize the ITU to regulate the use of the geostationary orbit as yet, the ITU seems to have assumed this power on the basis of the doctrine of "implied powers." According to Nicolas M. Matte, "[i]t would seem logical and desirable that the ITU should have regulatory powers [over the use of the geostationary orbit] since it is an international intergovernmental organization, having almost universal membership."<sup>23</sup>

The 1977 Plan, adopted under the aegis of the ITU, which effects an equitable access to the geostationary orbit, is in accordance with the ITU Convention. It was expressly declared to be so by various delegations (including those of the U.S. and Canada) to the 1977 WARC.<sup>24</sup> The 1977 Plan is not in conflict with the Outer Space Treaty. The allotment of orbital positions by the ITU does not amount to an appropriation of these "slots,"<sup>25</sup> but is instead a practical step towards the implementation of the common interest principle of the Outer Space Treaty.

Another question relates to the legal validity of the so-called 1976 Bogotá Declaration<sup>26</sup> under which some equatorial countries declared their sovereignty over the portions of the geostationary orbit above their respective territories. Such claims are in contradiction to the common interest principle of the Outer Space Treaty,

23. Matte, *Aerospace Law: Telecommunications Satellites*, 166 RECUEIL DES COURS, 121, 165 (1980).

24. See note 14 *supra*, Final Protocol nos. 10 and 74.

25. See Butler, *World Administrative Radio Conference for Planning Broadcasting Satellite Service*, 5 J. SPACE L. 93, 98. See also, Rankin, *Utilization of the Geostationary Orbit - A Need for Orbital Allocation*, 13 COLUM. J. TRANSNAT'L L., 101 (1974).

26. *Declaration of the First Meeting of Equatorial Countries, 1976*, reprinted in N. Jasentuliyana & R. Lee, 2 MANUAL ON SPACE LAW 383 (1979).

irrespective of whether or not there is a clear demarcation between airspace and outer space. One must not overlook the real purpose of this Declaration. Apprehension of the danger posed to their right to the utilization of the geostationary orbit prompted these equatorial countries to make this Declaration; their fears were legitimate.

### V. THE PROBLEM OF CONTENTS

Essentially, no international broadcasting via satellite is possible without prior consent of the receiving State.<sup>27</sup> This has been established by Radio Regulation No. 428A<sup>28</sup> and the 1977 Plan.<sup>29</sup>

The effects of the 1977 Plan have been summed up by ITU, in its Seventeenth Report to the U.N. Committee on Peaceful Uses of Outer Space (COPUOS), as follows:

In only a few cases and then only when agreement was specifically given at the [1977] Conference, does the Plan enable direct inter-country broadcasting on the same channels. Spillover has been reduced to a minimum consistent with No. 428A of the Radio Regulations; moreover, it is expected that the technical conditions which prevail in reception from broadcasting satellites (antennae in particular) are such that the possibility of reception of emissions, not intended in the Plan for the coverage of the area considered, will be more difficult than in the case of terrestrial broadcasting.<sup>30</sup>

These Radio Regulations, adopted by the ITU member countries, practically stop the one-way flow of information. Therefore,

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27. See *Elaboration of Principles Relating to Direct Television Broadcasting by Satellite: Working Paper Submitted by the United Kingdom [to the COPUOS]*, U.N. Doc. No. A/AC.105/196, Annex IV. See also J. Chapman & G. Warren, *Direct Broadcast Satellites: The ITU, UN and The Real World*, 4 ANNALS OF AIR AND SPACE LAW 413 (1979).

28. Radio Regulation no. 428A (now no. 6222), originally adopted at the 1971 WARC-ST, 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."

29. Under the 1977 Plan, to carry out "international" DBS, both the broadcasting and receiving states must share not only a common orbital position (provided in the Plan), but also a common "international beam" (provided in the Plan) which will cover the territories of both states. If they want to use their "national beams" (provided in the Plan) they have to make arrangements as to how to use these beams for broadcasting between themselves. Under this Plan, "international" DBS was permitted only in three cases (i.e. ARABSAT, NORDSAT, and the Vatican's coverage of the whole of Italy), see note 27 *supra*.

30. U.N. Doc. A/AC.105/213 6, 7 (1977).

to a large extent, they establish NIO in the field of international DBS. They have not, however, solved the whole problem. These regulations achieved an agreement on a technical basis on which DBS may eventually be carried out, but they do not presuppose an agreement on the commencement of international DBS activities and on the programmes that could be broadcast.

In the case of international radio and television via terrestrial means there is freedom of broadcasting, subject to various limitations.<sup>31</sup> The broadcasting state is not under an obligation to seek an agreement, with respect to the initiation of broadcasts or their contents, from the receiving state or states. But in the case of international DBS, a large majority of states, long before the actual start of any international DBS, indicated in UNCOPUOS that they will not acquiesce to any foreign DBS without prior consent.<sup>32</sup>

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31. Under customary international law, freedom of broadcasting via terrestrial radio and television has been continuously accepted. However, there are three important limitations on the freedom of broadcasting. Matte, note 23, *supra*, at 140-42. First, broadcasting must not incite war, revolution, armed revolt or other propaganda endangering internal security or order. These limitations are imposed by the International Convention Governing the Use of Broadcasting in the Cause of Peace, September 23, 1936, 186-187 L.N.T.S. 302. There are, at present, 68 states parties to this Convention. Propaganda of war has also been prohibited by Article 20 of the International Covenant on Civil and Political Rights (1966).

The second limitation is a prohibition of so-called "pirate" radio stations. This prohibition has been more specifically imposed by the European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories from January 20, 1965 Onwards, 4 INT'L LEGAL MAT'LS 115. Radio Regulation no. 422 (now 6214) may also be noted in this regard. This provides that "the establishment and use of broadcasting stations [sound broadcasting and television broadcasting stations] on board ships, aircraft or any other floating or airborne objects outside national territories is prohibited."

The third limitation is imposed by Radio Regulations adopted by various ITU Radio Conferences. These regulations provide for previously agreed upon radio frequencies which can be used for international (transborder) broadcasts via terrestrial radio and television. Radio frequencies not authorized to be used for international broadcasting cannot be legally used for such broadcasting. The member countries of the ITU have undertaken to ensure the conformity of their radio stations with the provisions of the ITU and Radio Regulations (See article 35 of the ITU Convention of 1973). Note also, in this respect, Radio Regulation no. 725 (now 5221) as revised by the 1979 WARC, which provides that "[n]o transmitting station may be established or operated by a private person or by any enterprise without a licence issued in an appropriate form and in conformity with the provisions of these regulations by the government of the country to which the station in question is subject."

32. As early as 1963, states started expressing their fears of the misuse of DBS and their desire to impose a ban on such misuse. (See the statements by the delegates of Hungary and Brazil made in the U.N. General Assembly during the discussion on international co-operation in the peaceful uses of outer space, 18 U.N. GAOR 169, 190, U.N. Doc. A/C. 1/SR. 1343 (1963). At the 1963 (ITU) Extraordinary Administrative Radio Conference similar fears were expressed and proposals were made to prohibit broadcasting via satellite unless prior consent of the receiving state is sought. See K. QUEENEY, DIRECT BROADCAST SATELLITES AND THE UNITED NATIONS 30 (1978). As discussed earlier, the ITU later adopted

The effect of this is that there does not exist freedom of broadcasting via satellites similar to the freedom for broadcasting via terrestrial radio and television. Therefore, an agreement on a political and legal basis is necessary to establish legal rights and obligations with respect to both the commencement and the contents of international DBS.

It is important to note that the freedom of broadcasting via terrestrial radio and television was accepted and is followed by States mainly because of their reciprocal transmitting capability.<sup>33</sup> Since most of the countries are (and will be in the near future) unable to afford international DBS, they have expressly declared their nonacceptance of the freedom of broadcasting with respect to international DBS.

There are two opposing positions on the question of the contents of international DBS. The first position advocates "prior consent" based on the principles of national sovereignty and non-interference with the affairs of a State. The second position advocates "free flow of information" based on article 19 of the Universal Declaration of Human Rights. It seems that both sides place rather undue emphasis on, and interpret rather narrowly, the legal basis of their arguments. Jean Bodin's concept of sovereignty has been eroded, to a good extent, by developments of international cooperation, increased international relations and indispensable interdependence. Nowadays no country can afford to live in absolute isolation. The needs of modern nations have changed significantly from the days of Jean Bodin. The affairs which used to be typically domestic or national are nowadays coordinated, and in some cases even regulated, internationally.

One must not forget, however, that states still jealously guard their rights since they have the duty to protect their national interests. For example, to protect the United States' interests in

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important Radio Regulations stipulating that no DBS take place without an agreement with the receiving state. In 1972, UNESCO's 17th General Conference adopted the Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange. Fifty-five states, which voted in favour of this Declaration, have expressed their intention not to acquiesce to any foreign broadcasting via satellite which might take place without their prior consent. See article IX of this Declaration. Since 1967, UNCOPUOS has been regularly discussing the Elaboration of Draft Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting. The records of these discussions clearly show that a large majority in COPUOS favours the "prior consent" principle. See U.N. Docs. A/AC.105/C.2/SR 303, 312.

33. See Matte, note 23 *supra*, at 140.

domestic telecommunication satellite systems, President Johnson, in his 1967 Communication Policy, stressed that in spite of its commitment to a single global system, the United States will not "give up [its] vital sovereignty over domestic communications."<sup>34</sup>

For international understanding and cooperation, wider exchange of information is highly important and desirable. To fulfill this goal, article 19 of the Universal Declaration of Human Rights, together with the international human rights conventions,<sup>35</sup> guarantees the individual's right to freedom of information. 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."

The right to receive and impart is always stressed, yet the right to *seek* information is generally omitted and forgotten. Individuals in one country may want to seek information about scientific and technological developments in another country in order to use the information in the developmental progress of their own country. Their right to seek information in such cases is denied, as most countries have laws to control this flow of information.<sup>36</sup>

It is argued that if one spends millions of dollars to develop information, one should have the right to control its flow in order to protect economic interests. However, this writer wonders how one denies the right of others to control the flow of information to and on their territories in order to protect their economic, social and cultural interests.

Above all, information is not only an economic but also a political power. No state, no matter how liberal it is, grants or can yet

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34. See *Communication Policy: Message from President Johnson to the Congress*, 57 U.S. DEPT OF STATE BULL., 296, 297 (1967). Recently, the Minister of Communications of Canada stipulated that "[w]e are concerned that our national sovereignty and identity not be eroded as a result of thoughtless application of technologies without regard for their implications for the economical social fabric of the country." An Address by the Honourable Francis Fox, Secretary of State and Minister of Communications to the Opening Session of the 1980 Annual Conference of the International Institute of Communications (IIC), September 8, 1980, *Communications and the North-South Dialogue: A Vital Link*, Government of Canada, Department of Communications, p. 3.

35. *E.g.*, International Covenant on Civil and Political Rights, art. 19; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10; and the American Convention of Human Rights, art. 13.

36. See, for example, the (U.S.) Export Administration Act, Pub. L. No. 91-184, 87 Stat. 841 (1969), the Export Administration Act, Pub. L. 96-72, 93 Stat. 503 (1979), and the Commodity Control List and Related Matters, 15 C.F.R. 399 (1981).

afford to grant a right of absolute freedom of information.<sup>37</sup> Article 29 of the Universal Declaration of Human Rights itself imposes limitations on such freedom. It seems that the world is not yet ready to accept an unconditional freedom of information. This fact is clear from the U.N.'s lingering inability to adopt a convention on the freedom of information.<sup>38</sup> A "free flow of information" which is a one-way flow is unacceptable to the international community. It has been unanimously declared by the member states of UNESCO that "free flow of information" must be "wider and better balanced."<sup>39</sup>

The solution to the problem of the contents of international DBS lies in the realization that the real purpose of article 19 is to establish a two-way flow (exchange) of information within the prescribed limits. In my view, the Canadian-Swedish proposal,<sup>40</sup> pre-

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37. Gotlieb, Dalfen, & Katz, *The Transborder Transfer of Information by Communications and Computer Systems: Issues and Approaches to Guiding Principles*, 68 AM. J. INT'L L. 229 (1974).

38. A Draft Declaration on Freedom of Information and Draft Convention on Freedom of Information have been on the U.N. General Assembly's agenda since 1959 and 1960 respectively. At present, there seems to be no possibility of adoption by the General Assembly of a Convention on Freedom of Information. See generally, U.N. Doc. A/34/168 (1979), U.N. Doc. A/34/149 (1979), U.N. Doc. A/34/484 Add. 2 (1979) and *Freedom of Information*, Note by the Secretary-General, U.N. Doc. No. A/34/195 (1979).

39. Article 1 of the Declaration on Fundamental Principles Governing the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War, art. 1, UNESCO (1978).

40. Since 1968, both Canada and Sweden have been promoting the adoption by COPUOS of guiding principles to govern DBS. It was on their proposal, U.N. Doc. A/AC.105/PV.55, 64-75 (1968), that the U.N. General Assembly established the Working Group on DBS in the COPUOS's Legal Subcommittee, G.A. Res. 2453 B, (1968). The Working Group met regularly, since 1969, to consider the different aspects of DBS. Both Canada and Sweden presented various proposals and working papers to the Working Group on the legal aspects of DBS. The latest of their working papers is called the "Clean Text," originally proposed to the 1979 session of the Working Group and discussed both at its 1979 as well as 1980 session, U.N. Doc. A/AC.105/C.2/L.117 (1979). The most relevant and important provisions of the "Clean Text" are the "Consultation and Agreements Between States" which provide:

1. A direct television broadcasting service by means of artificial earth satellites specifically directed at a foreign State, which shall be established only when it is not inconsistent with the provisions of the relevant instruments of the International Telecommunication Union, shall be based on appropriate agreements and/or arrangements between the broadcasting and receiving States or the broadcasting entities duly authorized by the respective States, in order to facilitate the freer and wider dissemination of information of all kinds and to encourage co-operation in the field of information and the exchange of information with other countries.
2. For that purpose a State which proposes to establish or authorize the establishment of a direct television broadcasting service by means of artificial earth

sented for adoption in UNCOPUOS, represents a good compromise, guaranteeing the protection of legitimate interests of receiving countries, as well as facilitating a better balanced flow of information. All the member states of UNCOPUOS should accept it. However, it is submitted that this proposal should also include a review clause like the one already incorporated in the 1979 Moon Treaty.<sup>41</sup> This will help to reassess the situation, perhaps every five or seven years, in the light of the technological, philosophical and political developments in the world.

## VI. CONCLUSION

In comparison to the existing mass media, international DBS is being developed and established in an international legal framework which, to a large extent, implements the NIO. The credit for the establishment of such a framework goes to the ITU - a functional intergovernmental organization having almost universal membership and working on the principle of equality of all states. To continue the progress already made toward guaranteeing an equitable access to geostationary orbital positions and frequency bands other than 12 GHz, the forthcoming 1985-87 Space WARC must further implement the NIO. With respect to the problem of the contents of international DBS, the ITU seems to have achieved what is possible under its constitution. The responsibility now lies with the U.N., and possibly UNESCO, to reach political agreement with respect to the commencement and contents of international DBS, and to facilitate a better-balanced exchange of information.

Imbalances and inequalities in the exchange of information between the developed and developing countries will be reduced when the latter become equally capable of broadcasting via satellite. Now that most of them have, and others will soon have, a guaranteed access to the spectrum/orbit resource, the "prior

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satellites specifically directed at a foreign State shall without delay notify that State of such intention and shall promptly enter into consultations with that State if the latter so requests.

3. No such agreements and/or arrangements shall be required with respect to the overspill of the radiation of the satellite signal within the limits established under the relevant instruments of the International Telecommunication Union.

Report of the Legal Subcommittee on the Work of its Nineteenth Session, U.N. Doc. A/AC.105/271, Annex I, 12 at 14-15 (1980).

41. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, art. XVIII, U.N. Doc. A/RES/34/68 (1979).

agreement" to the commencement of international DBS is necessary so that existing imbalances and inequalities in the exchange of information will not continue and increase with the growth of broadcasting via satellites. These achievements in the establishment of the NIO in the field of DBS are due to the fact that DBS involves the use of outer space, which must be explored and used "for the benefit and in the interests of all countries, irrespective of their degree of economic and scientific development." Such a legal restraint does not exist in the use of resources required in the field of existing mass media.