Current and Future Legal Uses of Direct Broadcast Satellites in International Law

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COMMENTS

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Introduction

When the 1979 session of the Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space ended, thirteen "Principles Governing the Use by States of Artificial Earth Satellites for [International] Direct Television Broadcast" had been accepted, but consensus on the free flow of information and the rights of States to send and receive information was not achieved. As a result, the polarization of positions regarding the right of a state to prevent direct television broadcasts into its territory unless it grants prior consent continues, with the extreme positions occupied by the United States and the Soviet Union.

The issue of the right of a State to broadcast television signals directly into another without the consent of the target State is a major international problem of continuing importance. Further, the inexorable advance of satellite broadcasting technology will continue to increase the likelihood of political and cultural disruption as direct broadcast satellite systems become a world-wide possibility in the next few years.

While several treaties exist which may be construed to prevent direct broadcasting into a neighboring State from an orbiting satellite, these treaties are not universally accepted and it is unclear whether they represent customary international law. Thus, it is necessary to determine the rules of customary international law with regard to direct broadcasts from satellites in the event States withdraw from existing treaties or these non-universal treaties are found not to be customary international law. If these treaties are not customary international law, then States which are not parties to the treaties may serve as bases from which other States could vicariously circumvent the treaties to which they are bound without actually breaching those treaties or violating customary international law.

Although most of the space powers are parties to several treaties, the possibility arises that unless customary international law prevents direct television broadcasts, a State which is not party to any space

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2. Id.
treaty could find a lucrative source of income by serving as the official base from which parties who are treaty signatories could circumvent those treaties by selling a satellite to State X and letting that State proceed to make its legal, and possibly extremely disruptive, broadcasts into the target country. However, if customary international law prohibits such activity, then current space treaties need not be considered the sole source of law (nor could parties commence broadcasting twelve months after announcing intent to withdraw from the treaties), and no new treaties or amendments to existing treaties are necessary to prevent direct television broadcasts.

To determine the current legal state of and likely future legal state of direct television broadcasts from space, this Comment will examine the effects of existing international agreements on direct broadcasting satellites (DBS), the validity of the current legal positions of States regarding DBS, the possibility of the development of a multinational treaty on DBS, and whether a multinational treaty is needed.

The Problem of Direct Television Broadcasts

"Direct satellite broadcasting refers to the transmission of messages from the satellite directly to community receivers or to individual home television sets without the need of local stations to receive and rebroadcast." The possibility of direct home reception is of major international concern since community reception is subject to government control.

It is essential to establish the seriousness with which the international community regards the possibility of direct home reception of foreign broadcasts. Since "[d]irect satellite broadcasting makes possible the same capability for television broadcasting by satellite that has existed until now [only] for powerful shortwave radio transmitters," the stronger psychological impact of television has increased the concerns of many States. In fact, the high illiteracy rate and lack of other modern forms of entertainment will certainly result in an even greater impact in underdeveloped States where "[s]evere psychological addiction is a likelihood." Indeed, until recently in Brazil from noon until late at night television viewing rates have been seventy-five percent higher than in the U.S.

3. In a sense, this would be analogous to current shipping practice in which some States allow oil companies to register their tankers under that State's flag for a small fee, thereby permitting the oil companies to avoid the stricter safety and liability laws of other States.
5. See infra text accompanying notes 89-125.
6. K. Queeney, supra note 4, at 7.
8. Id.
Obviously, the major concern of any country is loss of control over program content available to its population.

Because DBS have been operating in various forms since the United States launched the Applications Technology Satellite in 1974,9 and because over 100 countries now participate in INTELSAT10 which uses DBS, it appears certain that State practice has sanctioned the use of DBS. The troublesome question concerns how those DBS are used.

Current International Treaties on Outer Space Activities

Of the five U.N. space treaties, only the Outer Space Treaty (OST)11 appears applicable to DBS. The Moon Treaty12 deals exclusively with activities on celestial bodies and is clearly inapplicable. Similarly, the Rescue and Return Treaty13 is inapplicable. While the Treaty on the Registration of Objects Launched into Outer Space14 determines in which country a DBS is considered registered, it has little relevance in terms of the legality of unrestricted direct broadcasts from satellites. Article II of the Convention on the International Liability for Damage Caused by Space Objects15 indicates that the liability of a launching State is limited to the damage caused by the object itself, not by emanations from it.16 The article states "[a] launching State [is liable] . . . for damage caused by its space object on the surface of the earth or to aircraft in flight."17 It is significant that the treaty does not use the language "damage caused by activities of its space object." It seems clear that the occurrence contemplated by the treaty is collision, rather

9. K. Queeney, supra note 4, at 1.
16. Obviously, this restriction does not include "emanations" (such as nuclear radiation) more appropriately considered in light of the OST’s prohibition against weapons of mass destruction.
than operation,¹⁸ and therefore, the Liability Treaty is inapplicable to the question of DBS.

Therefore, the only applicable U.N. treaty is the 1967 Outer Space Treaty (OST), currently ratified by eighty-four States.¹⁹ Despite the fact that the issue of foreign propaganda broadcasts from satellites had been raised at the U.N. as early as 1962 and 1963,²⁰ and that in 1966 at the beginning of discussion on the OST widespread anxiety persisted over possible direct broadcast of television signals without the prior consent of the receiving State,²¹ no explicit mention of direct broadcast satellites appears in the OST. While it is true that the OST is quite general in its treatment of legal principles applicable to outer space, the lack of specific mention of DBS indicates that the States parties to the treaty could not come to a basic agreement on DBS. However, the preamble to the treaty does refer to UN General Assembly Resolution 110(II) "which condemned propaganda designed or likely to provoke or encourage any threat to the peace."²² Though the preamble is not considered a binding element of a treaty, Article 31 of the Vienna Convention on the Law of Treaties states that the preamble of a treaty is to be considered in any attempt to divine the intent of the signatories as expressed in the body of the treaty.²³

Article I of the OST states that the use of outer space must be carried out "for the benefit and in the interests of all countries."²⁴ In light of the general nature of this language, the use of DBS must be considered, in a general sense, to be beneficial to all countries.²⁵ Clearly then, according to Article I the problem of DBS is not in their existence or operation, but the specific uses of DBS by States party to the treaty.

Article II of the treaty states that outer space is not susceptible of national appropriation.²⁶ In terms of DBS, the portion of outer space which may be argued to be "appropriated" is the geosynchronous orbit.²⁷

¹⁹. C. Christol, supra note 1, at 912.
²¹. K. Queeney, supra note 4, at 13.
²². Outer Space Treaty, supra note 11.
²⁴. Outer Space Treaty, supra note 11, art. I.
²⁶. Outer Space Treaty, art. II, supra note 11.
²⁷. The geosynchronous orbit is an orbit 22,300 miles out from the equator which allows a satellite, such as a DBS, to remain in the same position relative to a point on
However, neither scholars nor the United Nations Committee on the Peaceful Uses of Outer Space have regarded Article II as a ban on the use of natural resources. In fact, the policy of “first come, first served” regarding outer space had been followed since the beginning of space exploration, and the OST did not appear to alter this practice. Yet, while the legitimacy of placing DBS in geosynchronous orbit has been established, the limits of use of those satellites under the OST have not.

As mentioned earlier, proper interpretation of the OST would prevent the broadcast of propaganda designed or likely to disrupt the peace. U.N. General Assembly (UNGA) Resolution 110 (II) of 3 November 1947, to which the OST preamble refers, sought to prevent threats to the peace of the international community. An analysis of this section of the OST also requires a determination of what constitutes propaganda. Since the information delivered by a DBS would often have the effect of disrupting the domestic order of receiving States, accurate classification of such information as propaganda or not is essential. Given the difficulty of defining “propaganda” and the indication that UNGA Resolution 110 (II) refers to threats to peace in the international community, it does not appear likely that the preamble to the OST effectively condemns the use of DBS for broadcasting into another State. Further, the specific provisions of the treaty do not lend themselves to an interpretation that would prohibit direct broadcasting of television signals into another country.

Article I of the OST proclaims that outer space shall be free for use by all States without discrimination of any kind, but the context of this paragraph indicates that equality of access is its subject.

Article III may contain a prohibition against direct satellite broadcasts which have an adverse impact on States, since that article requires States to carry out activities in outer space “in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.” However, since it can be argued that even politically oriented broadcasts promote understanding, Article III does not appear to pose much of an obstacle to the use of DBS.

the Earth’s surface throughout its orbit, eliminating the need for using a number of satellites for DBS.

28. Gorove, supra note 25, at 323.
29. Id. at 325.
30. See supra text accompanying notes 22-23.
32. Outer Space Treaty, art. III, supra note 11.
In any event, the sweeping language and broad scope of Articles I and III have been seen as merely stating generalities of such breadth that until specific operative principles are established, any peaceful use of outer space is acceptable. This conclusion, of course, prompts the question of what constitutes "peaceful" use. As mentioned earlier, peace between nations in the sense of international conflict appears to be the only realistic interpretation of this concept. Thus, it appears that while the Outer Space Treaty does prohibit use of DBS designed to or likely to result in a breach of international peace, the treaty is not specific enough to be applicable in situations where direct broadcasts are designed or likely to cause domestic unrest in the receiving country. Even if the treaty were interpreted as prohibiting broadcasts of this nature, the lack of specificity of the treaty on this matter prevents reading the treaty as a complete ban on direct broadcasts, and, as a result, determining whether a broadcast violates the treaty would be an enormously difficult, if not impossible, task.

Since the Outer Space Treaty is not self-executing, does not provide sufficient guidance in determining the legality of direct television broadcasts into another State without its prior consent, and can be withdrawn from upon twelve months' notice, other sources must be consulted to determine the international legal status of direct television broadcasts without prior consent of the target State.

The International Telecommunications Union (ITU)

The ITU is the "principle international institution for achieving agreement among nations on the use of telecommunications." The 1973 ITU Convention has been ratified by every country on Earth and binds them with treaty force. In addition to the general principles laid out in the Convention, communications satellites are regulated by the ITU Radio Regulations. Though these regulations are not applicable to the purely domestic telecommunications of a member State, they are applicable when domestic services interfere with those of neighboring States.
unless a separate agreement has been reached by those States.41

Generally, the ITU provides for the technical coordination of communications systems, the allocation of frequencies, allocations of orbital positions, what portion of the radio spectrum States use to broadcast programs, and the integration of future direct broadcast systems.42 Though the previous method of regulation was protection of existing frequency assignments upon proper notification and registration of a station, the recent trend has been toward planned spectrum use for DBS.43

Changes in and additions to ITU regulations are made at World Administrative Radio Conferences (WARCs).44 At the 1977 WARC for Broadcast Satellites (WARC-BS), plans for ITU Regions 1 and 3 (essentially the entire world but the Americas)45 were proposed and eventually adopted which had a significant impact on DBS. These plans were "designed to permit individual reception, using antennae under one meter in diameter, such as could readily be installed in individual homes."46 While some sources feel that the plan's technical limitations on broadcast frequencies eliminate the fear of undesired direct broadcasting into foreign States,47 those same sources admit that the new regulations merely make such broadcasting far more difficult.48 This admission and the fact that the Soviet Union and Third World countries continue to push for a binding multi-lateral agreement prohibiting direct broadcasting without prior consent of the receiving country49 strongly indicate that the fear that technological advances would allow direct broadcasting is neither illusory nor remedied by WARC 1977. Of course, the main reasons for desiring a specific treaty on DBS is that ITU regulations are more easily changed and their abrogation is less politically damaging than withdrawal from a treaty.

Hence, a determination of the status of DBS under customary international law is important since neither the regulations of the ITU

41. Id.
42. K. Queeney, supra note 4, at 18.
43. Rice, supra note 37, at 815-16.
44. Id. at 814.
45. Region 1 consists of Africa, Europe, the Middle East, all of the U.S.S.R., Turkey, and Mongolia; Region 2 consists of Greenland, North and South America, the Caribbean, and Hawaii; Region 3 consists of Asia (except for those areas in Region 1), Australia, and most of the Pacific islands. See Pal, Space, Man, and Interaction in Centre for Research of Air & Space Law, Earth-Oriented Space Activities and Their Legal Implications 2 (1983) [hereinafter cited as Space Activities].
46. Rice, supra note 37 at 818.
47. K. Queeney, supra note 4 at 212.
48. "Mr. Butler, representative of the ITU, stated that . . . 'the reception of programs from neighboring countries at the present state of art will be far less easy in the case of the broadcasting satellites services than in the case of terrestrial broadcasting.'" Id. (emphasis added) (footnote omitted).
49. See infra text accompanying notes 89-97.
nor the OST satisfactorily cover the issue. In fact, despite the existence of the ITU and the several U.N. treaties concerning outer space, it appears there is no widely accepted, codified space law applicable to all countries.\footnote{Dula, supra note 35, at 38.}

One of the major reasons certain States desire a binding prohibition of direct broadcasts without prior consent of the target State is the problem created by broadcast “spillover.” Since a DBS placed in geosynchronous orbit would illuminate an area of one million square miles\footnote{C. Christol, supra note 1, at 606.} (approximately the area of India, and slightly less than one-third the area of the continental United States\footnote{The Hammond Whole Earth Atlas 4 (new census ed. 1984).}), the problem of a signal meant for domestic consumption spilling over into a neighboring country is great. Naturally, the existence and severity of spillover depends on the size, shape, and location of the State, as well as the diameter of the satellite beam, degree of signal strength fall-off, and maintenance of the satellite’s position.\footnote{K. Queeney, supra note 4, at 88.} The ITU attempted to diminish this problem with WARC Provision Number 428A which declared that "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 reached with such other countries."\footnote{Final Acts of the World Administrative Radio Conference—1971, Prov. No. 428A, reprinted in id. at 89 [hereinafter cited as WARC 428A].} The degree of compliance with this provision would be determined by officials of the International Frequency Registration Board.\footnote{Id.} This provision would prevent "international spillover," and has formed the basis of some States’ claim that the provision established the concept of "prior consent" in international law.\footnote{Id. at 152.} Other States argued that the provision merely set technical goals for DBS operation and was devoid of legal implication.\footnote{Id. at 171.} Given the language that the broadcasting State must reduce spillover "to the maximum extent practicable"\footnote{WARC 428A, reprinted in id. at 89.} this writer believes that the ITU Provision simply indicates a general technical guideline and does not absolutely prohibit spillover. Rather than read into the provision a broad principle of international law which has yet to be settled by the United Nations,\footnote{Ploman, Satellite Broadcasting, National Sovereignty, and Free Flow of Information, in National Sovereignty and International Communication 160 (K. Nordenstreng ed. 1979).} a more restrained interpretation of the ITU Provision seems appropriate.
Have the UN Treaties and the ITU Resulted in the Creation of a Rule of Customary International Law?

Excluding the Moon Treaty (which has been ratified by only three countries and bears little chance of entering into force), as of 1982 only twenty-two countries were bound by all four of the remaining U.N. treaties and the ITU convention. When a short span of time is involved, the formation of a rule of customary international law requires extensive and virtually uniform State practice. In the case of the OST, eighty-four States out of 154 have ratified the treaty—quite possibly an insufficient number to be considered extensive State practice in a matter of world-wide concern. If one accepts that the legal treatment of outer space is of significant concern to every State on Earth, it must be conceded that the OST constitutes neither a codification of customary international law for DBS nor has it developed into customary international law after it entered into force in 1967. As far as the ITU Convention is concerned, while every State is a party to it and its provisions have the force of a treaty, since the Convention itself is primarily a regulatory agency, it is probable that neither the ITU nor its regulations are considered as embodying customary international law by those states party to it. As a result, the ITU Convention does not even have the concept of opinio juris operating in favor of the creation of customary international law. Thus, while customary international law can develop from a treaty it does not appear to have developed from any of the treaties concerning activities in outer space.

The Positions of States on Direct Broadcast Satellites

Although the existing treaties do not establish universally accepted legal rules for activity in outer space, this is not to say that no customary international law exists regarding those activities. In fact, space is and has been subject to customary international rules of law. However, to decide what, if any, of those rules apply to DBS, an examination of the positions of States on certain matters closely related to direct television broadcast without prior consent is necessary.

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60. C. Christol, supra note 1, at 912.
61. Id. at 913.
63. See, for example, the discussion of the dispute over whether WARC Provision 428A embodies customary international law, supra text accompanying notes 54-59.
64. North Sea Cases, 1969 I.C.J. at 44.
65. Id. at 41.
The Geosynchronous Orbit

An essential element of DBS is the placement of the satellite in geosynchronous orbit. The geosynchronous orbit is located 22,300 miles from the Earth's surface, on the equatorial plane. Satellites placed in this orbital position remain in the same place in space in relation to the Earth's surface, hence the term "geosynchronous."

The geosynchronous orbit actually has "a dual 'orbit/spectrum' nature because its value can only be realized through the simultaneous exploitation of both the geostationary orbit and the electromagnetic bands." Since it is one of "the world's most important reservoirs of value," it has quite naturally been subject to competing claims. While most of the world recognizes the geosynchronous orbit to be subject to the OST (i.e., it can be used by anyone, but appropriated by no one), many equatorial States claim the geosynchronous orbit as their sovereign resource by virtue of their equatorial location. Fearing that the geostationary orbit would be completely occupied before their governments could enjoy any direct benefits, several equatorial States asserted their claims to the geostationary orbit above their respective countries in the Bogota Declaration in December of 1976. These States based their claim on the scientifically erroneous notion that "the existence of the orbit depended exclusively on its relation to the gravitational phenomena generated by the Earth." (Achieving a geostationary orbit is actually dependent on the velocity and position of the satellite as well as gravitational attraction which is, of course, created by the total mass of the object being orbited.) Hence, the infirmities of the scientific basis of the Bogota Declaration and the fact that the geostationary orbit is located too far out in space (22,300 miles) to be realistically considered connected with equatorial states has robbed the Declaration of any validity. These facts and the likelihood that the Bogota Declaration was made too late to preempt a rule of customary international law permitting free access and use of the geosynchronous orbit strongly indicate that the Declaration places no restriction on DBS.

68. Id. at 56.
70. C. Christol, supra note 1, at 455.
71. Id. at 455.
72. Gorove, supra note 25, at 326.
73. The first satellite to achieve geosynchronous orbit was the United States satellite Syncom 2 in 1963. Thus, the equatorial States waited over 13 years to assert their claim, a strong indication of acquiescence on their part.
Positions of States at the UN on the Free Flow of Information

A second point of contention regarding DBS which is not so easily dispatched is the concept of the free flow of information across national borders. Universal acceptance of this concept would virtually eliminate opposition to direct television broadcasting without prior consent; however, nothing close to general acceptance of this idea exists or is likely to exist in the near future. The subject of freedom of information and the right to communicate has been so hotly debated that when the International Institute of Communications of London met in Cologne in 1975, its efforts were directed merely at a description of the right to communicate rather than a legal definition.74 Although other international studies have been made and have concluded that the jus communicationis and the right to information are fundamental rights essential to contemporary human society,75 the continuing controversy in the U.N. has shown that these concepts are far from attaining world-wide acceptance.76

Fear of television broadcasts without prior consent was raised in U.N. resolution 1962 (XVIII) as early as 1963.77 The U.N. has since provided three major avenues for negotiation of this issue: (1) the ITU, (2) UNESCO, and (3) the Committee on the Peaceful Uses of Outer Space.78 The present status of DBS with regard to the ITU is that the technical regulations for DBS make direct broadcast very difficult and have sharply reduced the possibility of intentional spillover of signals.79 It should be reiterated that since ITU regulations are not treaties, the States which fear direct broadcasting are still strongly advocating a treaty which would prevent direct broadcasting without prior consent of the target State.80

As the result of several years of debate, UNESCO issued a declaration on the use of satellite broadcasting to increase the free flow of information in 1972.81 Despite speaking only in terms of "prior agreements," the substance of the declaration embodied the prior consent principle82 and passed on a vote of 55 in favor, 7 against, and 22 abstentions.83 However, since the declaration does not have the binding

74. Williams, Teleinformatics, the Protection of Privacy and the Law, 7 Annals Air & Space L. 447, 448 (1982).
75. Id. at 449.
76. Id. at 450.
78. K. Queeney, supra note 4, at 198.
79. See supra text accompanying notes 51-59.
80. See infra text accompanying notes 85-97.
81. Rice, supra note 37, at 820.
82. Id.
83. K. Queeney, supra note 4, at 133.
effect of a treaty, and since a large number of States failed to assent to it, the legal significance of the declaration is questionable.

The major work at the U.N. was accomplished by the Committee on the Peaceful Uses of Outer Space (COPUOS), which as the only international, intergovernmental body exclusively concerned with outer space, occupies a strong position in the network of organizations which handle outer space matters. In COPUOS debates on DBS, a polarization developed with some States arguing for no control whatsoever while others argued for strict regulation (i.e., prior consent).

Three factors motivated those against regulation:

(1) Technical and economic considerations were not favorable to the appearance of the direct broadcast satellite in the near future; (2) Imposing regulations on a technology which had not even appeared and about which little was actually known might hamper its development; (3) The free flow of information and ideas across the world . . . [should not] be obstructed. . . . [because] the "right to give and impart information," as recognized in the Universal Declaration of Human Rights, meant that at least as much importance should be given to the free flow of information as to the respect for national sovereignty.

Three factors also motivated those urging regulation: "(1) the need for domestic control and approval of program content; (2) the belief that operational systems were imminent; and (3) the realization that only a few States were technically and financially able to implement such a satellite."

The specific positions of individual States, or groups of States, are noteworthy in order to gauge the firmness of their positions. The Soviet Union favors strict control of DBS and is followed by many underdeveloped countries—but for different reasons. While the Soviet Union's main fear is of Western propaganda, the underdeveloped countries fear loss of cultural identity and loss of political control over their own populations. This fear of loss of cultural identity has been strongly expressed by many nations (not all underdeveloped), with some States limiting or even denying access by their populations to the currently existing television services of certain super-powers. Aside from the

84. Rice, supra note 37, at 820.
85. K. Queeney, supra note 4, at 18.
86. Id. at 79-80.
87. Id. at 37.
88. Id. at 36.
89. Id. at 79.
90. Id. at 48.
91. Comment, supra note 7, at 75.
possibility of mind control and cross-cultural shock, DBS could actually result in a loss of a sense of political separateness, since the heads of State of the superpowers could address the population of an underdeveloped country while that State's own leader could not.

The United States' position, supported only by the United Kingdom and, to a limited extent, Japan and Belgium, advocates complete freedom of the flow of ideas and information without any regulation, based on the notion that these concepts are so fundamental to individuals that no restrictions could be tolerated.

A middle ground has been established by Canada and Sweden who advocate the establishment of a broad framework of principles, supplemented by specific regional agreements, rather than a global treaty applicable to all.

While some agreements have been reached, there has been little progress in resolving the question of prior consent. In fact, in 1981 the COPUOS Working Group submitted a report on DBS, but the text of the Draft Principles presented by the Group contained so many square brackets (indicating a lack of agreement) that a "consensus regarding the vital issues is certainly not in sight." In 1982 negotiations came to a "complete standstill."

Summary

Free access and use of the geosynchronous orbit resource, though disputed, has been accepted by the vast majority of States and appears to be customary international law. However, specific uses of DBS have not proved susceptible of international agreement. And while the ITU has managed to reduce the fears of many States by setting technical regulations which make direct broadcasting to unaugmented receivers very difficult, UNESCO's efforts to draft an acceptable resolution have failed, as have similar efforts by COPUOS. Thus, the future development of international law applicable to DBS seems likely to be restricted to customary international law and not international agreements.

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92. K. Queeney, supra note 4, at 49.
93. Id. at 49.
94. Id. at 79.
95. Id. at 80.
96. Teleinformatics, supra note 74, at 450.
97. Id. at 450.
98. See supra note 54.
99. C. Christol, supra note 1, at 613.
100. Logsdon, Direct Broadcast Satellites: International Policy Issues, in Space Activities, supra note 45, at 43, 47.
Is There Any Customary International Law of Outer Space?

Current International Law and the Placement of DBS in Space

"Influence on the development of economically rewarding applications of space technology such as DBS . . . may have passed the UN by, with delegates from the space capable states in COPUOS conducting a delaying action until application systems are in place and operating [,then international legal principles may be fitted to economic realities."

Given the current state of affairs, the preceding passage also appears applicable to the other international efforts to agree on DBS. In fact, since slightly over half of the nations of the world have ratified the Outer Space Treaty "and successively less have ratified or acceded to the other United Nations agreements and conventions,"\textsuperscript{102} it can be said that there is no widely accepted, codified law of space applicable to all countries.\textsuperscript{103} In fact, the International Court of Justice has stated that a limited number of states ratifying a treaty is evidence that the treaty in question did not codify international custom.\textsuperscript{104} However, the lack of generally agreed upon codification does not mean that there is no international law of outer space applicable to all countries, for customary international law of outer space exists apart from the treaties.\textsuperscript{105} Indeed, the process of the development of international law for outer space activities is "precisely the same as is maintained for [the] . . . earth, including ocean and air space, activities"\textsuperscript{106} (i.e., through "explicit agreement and the implicit communications of customary behavior [, with] . . . implicit communications . . . [playing] a much more important role than agreement or other deliberate formulation\textsuperscript{107}).

Since explicit agreement efforts arguably have failed to produce an adequate, reliable body of international space law, implicit communications of customary behavior must be examined. In doing so, it appears that the existence \textit{per se} of DBS has been sanctioned by State practice, since over 100 Western nations currently avail themselves of INTELSAT\textsuperscript{108}

\textsuperscript{101} Id. at 49.
\textsuperscript{102} Dula, supra note 35, at 38.
\textsuperscript{103} Id. at 32. It should also be noted that no generally accepted principles exist for copyright protection, the rights of neighboring countries, or the protection of broadcasts. K. Queeney, supra note 4, at 52.
\textsuperscript{104} Colombian-Peruvian Asylum Case (Colombia v. Peru) 1950 I.C.J. 266, 277.
\textsuperscript{105} McDougal, supra note 66, at 618.
\textsuperscript{106} Id. at 623.
\textsuperscript{107} Id. at 625.
\textsuperscript{108} Canby, supra note 10, at 290.
(an international network of DBS) and the Soviet bloc uses INTERSPUTNIK\textsuperscript{109} for parallel purposes. Additional weight in favor of international acceptance of the legality of DBS is found in the lack of objection by States to the use of space for DBS providing purely domestic service to a State.\textsuperscript{110}

Terrestrial Precedent for the Use of DBS Without Prior Consent of the Target State

Once the placement of DBS in outer space is found acceptable in international law, the question of what uses of DBS are permissible logically arises. As mentioned earlier,\textsuperscript{111} the unrestricted broadcast of propaganda and information is the major concern in this area. Using terrestrial precedent as a means of determining the legality of direct television broadcast of information and/or propaganda is difficult because the issue is extraordinarily complex and, to a certain degree, the accepted legal principles are in direct conflict. This confusing state of affairs results from the inherent conflict between the sovereign rights of cultural independence and self-determination, and the concept of freedom of information which springs from the amorphous concept of Human Rights. The use of terrestrial precedent is further complicated by the fact that, on Earth, only radio has been used to broadcast propaganda and news information because of the limited range of earth-based television signals. As a result, it may be illogical to expect the international rules which developed around radio broadcasts to be applicable to the psychologically more powerful television broadcasts.\textsuperscript{112}

Nevertheless, assuming the applicability of terrestrial precedent, the international legal status of propaganda may provide a basis for determining the legality of information broadcasts.

While state practice and explicit declarations of positions have sanctioned certain uses of propaganda,\textsuperscript{113} some forms of propaganda are prohibited by customary international law.\textsuperscript{114} Unfortunately, categorizing

\begin{footnotes}
\footnote{109. Parry, Spaced Out—Satellite Remote Sensing—The Costs and Benefits, in Space Activities supra note 45, at 68, 95.}
\footnote{110. While the equatorial states object over the issue of uncompensated access to the geostationary orbit, none has expressed an objection to the placement of DBS in geosynchronous orbit if the orbit resource is resolved in their favor.}
\footnote{111. See supra text accompanying notes 76-97.}
\footnote{112. See supra text accompanying note 92.}
\footnote{113. Whitton, Hostile International Propaganda and International Law, in National Sovereignty and International Communication 217 (1979) [hereinafter cited as International Communication].}
\footnote{114. Id. at 221.}
\end{footnotes}
such broadcasts is exceedingly difficult. For example, the Soviet Union favors rules against war propaganda, but not if the conflict in question is one of "liberation" or "anti-colonialism." Despite the difficulty in defining or recognizing propaganda, the illegality of subversive propaganda is borne out by several sources. In addition to the arguments that subversive propaganda violates the fundamental principle of the right of a State to exist, abrogates the right of a State to be free from foreign coercion, and constitutes internationally prohibited aggression, it must be noted that although nations accused of using such propaganda deny their guilt, no country has denied the existence of the prohibition against such broadcasts. Defamatory propaganda directed against a State or its rulers is also considered illegal, and war propaganda is, or is quickly becoming, internationally prohibited. The possibility of privately instigated propaganda should not pose a great problem, since most States would be able to control private individuals so that the State itself would not incur liability for their actions. The Constitution's mandate of free speech probably would not prevent government control in this area, since the rationale of national security would likely override the First Amendment.

Nevertheless, the problem of loss of cultural integrity due to direct television broadcasts is a difficult one to solve even without the problems posed by propaganda. For example, while Article I of UNESCO's unanimously adopted Declaration of the Principles of International Cooperation states that "each culture has a dignity and value which must be respected and preserved . . . [and] every people has the right . . . to develop its culture," Article IV states that "the aims of international

115. Id. at 217.
116. Id. at 220.
117. Id. at 221.
118. Id. at 222.
119. Id. at 224-26; see also U.N. Resolution 110(II), Yearbook 1947-1948, at 91-93.
120. Whitton, supra note 113, at 228.
121. An extended analysis of this issue is beyond the scope of this paper, but government restriction of speech contrary to national security has been sanctioned by the Supreme Court. See, e.g., Schenk v. United States, 249 U.S. 47, 39 S. Ct. 247 (1919); Abrams v. United States, 250 U.S. 616, 40 S. Ct. 17 (1919); Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857 (1951). See also Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193 (1944) in which the racially discriminatory internment of American citizens of Japanese descent was allowed on the grounds of national security. Evidently, then, if privately instigated propaganda broadcasts posed a sufficient threat to national security, the Supreme Court would sanction government restriction of such broadcasts.
cultural cooperation . . . shall be to spread knowledge . . . [and] enable everyone to have access to knowledge." The tension between the goals of preserving cultural identity and the goal of spreading knowledge to "everyone" is obvious. While one might argue that such statements merely stand for the notion of the free flow of information between governments who would then be responsible for disseminating it to their people, the counter-argument is that this interpretation would actually inhibit the free flow of information and therefore run contrary to the UNESCO Declaration. Thus, even if virtually all forms of propaganda are considered prohibited, the broadcast of carefully selected, though factually accurate, news items could have exactly the same negative effect on the receiving States. In fact, the U.S. position is that factually accurate news broadcasts are even more politically effective than propaganda.

Not even the firmly established principle of national sovereignty adequately relieves the tension between freedom of information and preservation of cultural integrity because matters which were previously thought to be of purely domestic concern have become the subjects of increasingly greater international concern; for example, the protection of basic human rights irrespective of national borders has become customary international law. In light of what has been said throughout this Comment, the process of "internationalization" of certain formerly domestic issues seems to have already occurred with regard to the free flow of information, though the issue is far from being settled.

One interesting and internationally legal method available for States wishing to prevent foreign broadcasts from entering their country is to claim economic protection for that State's own developing television industry. Since States currently engage in economic protectionism for other fledgling industries, this justification would also seem to be legally viable for seeking to halt foreign broadcasts which constitute unfair competition with domestic stations. Of course, in bringing such a claim to an international body, the target State would bear a significant burden of proof which in most cases would probably be far more difficult to sustain than in the typical case of industrial protection, since the target State would have to prove it was sincerely attempting to start a television industry.

123. Id. at art. IV.
125. De Sola Pool, Direct Broadcast Satellites and the Integrity of National Culture, in International Communications, supra note 113, at 120, 152.
Summary

Though the placement of DBS in orbit is sanctioned by State practice, the uses of DBS once in orbit are not, and determining the legal status of those uses is extremely difficult because so few States are financially capable of beginning direct television broadcasts to unaugmented home television sets. With so few States involved for such a short period of time, and the major participants in direct opposition on the issue, a determination of an established, positive rule of customary international law is impossible, and quite probably inappropriate, particularly since the international law of space is developing in the absence of previously existing international law.

Furthermore, terrestrial precedents of radio broadcasting of news or propaganda are of little help (even if one ignores the conceptual problem of comparing psychologically more powerful television programs to radio programs) because of the inherent difficulty in deciding both what constitutes propaganda and whether the free flow of information from a news broadcast is culturally destructive. Thus, even if we can apply terrestrial prohibitions against certain types of propaganda, success in defining these prohibitions will continue to be elusive. As far as preserving a State's cultural identity is concerned, it must be recognized as a fact of modern international life that every State experiences some loss of cultural identity with every contact it makes with another State, and deciding what broadcasts constitute a threat to a State's cultural integrity would be even more difficult than determining what constitutes propaganda. Given the nebulous state of international law with regard to the uses of DBS, the law of outer space appears increasingly likely to evolve slowly, with legal principles developing out of implicit communications of customary behavior rather than explicit agreements on what the law is.

The Immediate Future of Direct Broadcast Satellites

In 1979 the World Administrative Radio Conference recommended to the ITU Administrative Council that a conference should be convened entitled "World Administrative Radio Conference on the Use of the Geostationary Satellite Orbit and the Planning of Space Services Utilizing It." Currently, two WARC conferences are scheduled to discuss this topic, one in July of 1985 and the other in September of 1987. The history of international debate on the subject of DBS, as this Comment has recounted, does not present an optimistic picture for these conferences. As one author aptly described the situation, "it is rare that men

126. For discussion on the U.S./U.S.S.R. polarization see supra text accompanying notes 89-94.
have been able in advance to agree on the rules which should govern any new and important innovation, and there is little evidence in the historical record to think that the situation will be any different for DBS."\footnote{129}

In addition to the dim future of negotiations, recent studies indicate that some basic assumptions regarding DBS have been undercut by technological advance. The expected problem of crowding in the geostationary orbit, possibly to the exclusion of late-developing States, has been alleviated to a great degree by the prospect of spacing the satellites closer together, albeit at an increased cost to ground stations.\footnote{130} Further, constant technological development indicates that the frequency spectrum is not as limited as was once thought.\footnote{131} "Thus, the outlook appears to be gaining ground that, through the efficient and economical use of both high and low frequencies, the needs of both the advanced States and the [less developed countries] . . . can be satisfied."\footnote{132} In fact, it has been argued that resource \textit{engineering}, which is more efficient than resource planning, would not only solve most of the problems raised by underdeveloped countries with regard to the economic benefit of DBS, but that taking advantage of new, more efficient technology for such engineering is mandated by international law.\footnote{133} Thus, it appears that continuous technological developments will continue to complicate outer space activities far faster than negotiations can address the issues raised.

Additionally, economic developments will continue to complicate matters. For example, the economic attractiveness of severing satellite ownership is increasing, and "'[a]s satellite ownership becomes increasingly fragmented, it [will become] correspondingly difficult to associate particular treaty and statutory obligations (e.g., coordination, tariffs, and permissible business practices) with specific entities.'\footnote{134} In other words, these developments indicate that space is becoming more and more like Earth.

Contrary to what one would expect, this is \textit{bad} for international negotiations and makes international agreement less likely because, unlike terrestrial situations, the regulation of space is not subject to any single, all-encompassing authority the way terrestrial developments are always subject to absolute regulation by central governments. In all likelihood,
the more space takes on the characteristics of Earth, the more likely negotiations regarding space will resemble the ultimately unsuccessful efforts to work out a comprehensive means of regulating the world's oceans: too many complex issues and too many special domestic interests of the States involved to allow creation of a negotiated regime.

Conclusion

The major fear raised by direct television broadcasts without prior consent is the loss of cultural integrity. However, loss of cultural integrity is a natural result of the interaction of nations and is occurring at a greater rate every day. Thus, in a world of nations which are increasingly accessible to more people and are increasingly intertwined in countless ways, the problem presented by direct television broadcasts is better stated as the possibility of rapid loss of cultural identity. Since deciding when such violations of cultural integrity occur or deciding what constitutes a violation will almost certainly prove impossible, perhaps the only method to prevent cultural shock is to prohibit absolutely any direct television broadcast without prior consent.

However, since existing treaties do not offer a basis for this prohibition, and the prospects of a future agreement on this principle are exceedingly remote, the only remaining source for developing of such a principle of international law is that of implicit communication by behavior. Since such a large number of States oppose such a ban, development of a prohibition against direct television broadcasts without prior consent of the receiving State is unlikely to arise from this source either.

Yet, while direct television broadcasts would not violate international law, those States fearing cultural destruction may already have the protection they require in the ITU technical regulations which make such broadcasts so difficult. Since the real fear of these States is rapid infusion of foreign ideas into their cultures, the ITU regulations should be sufficient to prevent this. Of course, the technical regulations could be changed, and technological advances could permit direct broadcasts despite current regulations. In that event, without a treaty, little legal protection would remain.

Considering the complexity of the issues involved, the extreme ideological and technological differences between the nations of the world, and the poor history of laws which have attempted a priori regulation of rapidly advancing social and technological developments, the possibility of international consensus on direct broadcast satellites will likely remain light years away.

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135. It is important to reemphasize that although Canada and Sweden favor some controls, they are not in favor of a complete prohibition on the use of DBS.