COMSAT'S FIRST DECADE: DIFFICULTIES IN INTERPRETING THE COMMUNICATIONS SATELLITE ACT OF 1962

I. INTRODUCTION

The enactment of the Communications Satellite Act of 1962[1] (hereinafter referred to as the Act) marked the beginning of a new era in the field of communications for the United States. President Kennedy and the Congress felt an urgent need to stimulate all available talent and resources toward the development of a global communications satellite system, while maintaining private competition in the procurement of equipment and the providing of services to the public. The result was the creation of Comsat, a private[2] communications corporation intended to be a unique experiment in public and private ownership under close supervision by the federal government.

Comsat's goal is to provide a global communications satellite system "which will be responsive to public needs and national objectives, which will serve the communication needs of the United States and other countries, and which will contribute to world peace and understanding."[3] From the Act's inception, it was recognized that foreign cooperation would be essential if the global dimensions envisioned by the Act were to be achieved;[4] however, due to conflicts inherent within the structure of Comsat, both the development of the satellite system and the United States' dealings with the rest of the world were handicapped. This Note will trace the development of this global satellite system, pointing out the inherent conflicts within Comsat and indicating the effect they had on the accomplishment of the goals set out in the Act.[5]

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[1] 47 U.S.C. §§ 701-44 (1970).

[2] *Id.* § 701(c). Although the Act specifically refers to the corporation as "private," there is controversy surrounding a definition of the exact nature of the entity. One view suggests that the character of the corporation is that of a joint venture between the federal government and private industry. Levin, *Organization and Control of Communications Satellites*, 113 U. PA. L. REV. 315, 324-25 (1964-1965). [hereinafter cited as Levin]. Another commentator prefers to describe the corporation as quasi-public. Scrader, *The Communications Satellite Corporation: A New Experiment in Government and Business*, 53 KY. L.J. 732, 736 (1964-1965) [hereinafter cited as Schrader]. Yet another view, with the benefit of several years of operational perspective, suggests that "Comsat clearly evolved further toward becoming a purely private company than its creators intended." M. KINSLEY, OUTER SPACE AND INNER SANCTUMS 195 (1976) [hereinafter cited as KINSLEY].

[3] Act, 47 U.S.C. § 701(a) (1970).

[4] M. SCHWARTZ & J. GOLDSEN, FOREIGN PARTICIPATION IN COMMUNICATIONS SATELLITE ACT OF 1962 4 (Rand Memo No. 3484-RC, Feb. 1963) [hereinafter cited as Rand Memo].

[5] Among the Act's enumerated goals are: (1) the rapid development of a commercial global communications satellite system, (2) the extension of such services to economically less developed areas as well as well-developed areas, (3) efficient and economical use of the electromagnetic frequency spectrum, (4) reflection of the benefits of this system in both quality of services and charges for such services, (5) nondiscriminatory access to the system

II. BACKGROUND

A. *The Organization of Comsat*

Congress engaged in extensive debate regarding the advantages of private versus public ownership before the structure of Comsat was finalized.[6] Formerly, in 1960, it had appeared as if American Telephone and Telegraph Corporation (AT&T) would itself develop and control the satellite system.[7] In order to avoid the appearance of monopolization of the industry, AT&T joined with Western Union International Corporation, International Telephone and Telegraph, and RCA to propose to the Congress an exclusive consortium directed toward the development of space satellite communications.[8] President Kennedy countered with a plan providing for complete private ownership but limiting the interest of any individual or corporation to a maximum of 15-20 percent.[9] Numerous proposals were submitted by both private and governmental sectors, ranging from complete government ownership to total control by existing private international communication carriers.[10] Congress felt the need to strike a compromise, due to an impending threat of Soviet leadership in space communications and also in order to enhance the poor legislative record of the 78th Congress.[11] The result was the creation of a quasi-public entity,[12] with half its ownership available to the international common carriers and the other half open to the public.[13]

Although the concept of total government ownership of the satellite system was given little support, much could be said in its favor. A government owned arrangement could insure access by all interested parties

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by all authorized users, (6) the maintenance of maximum competition among private industry in the provision of equipment and services utilized by the system, (7) the continuation of competition in the provision of communications services to the public, and (8) adherence to Federal antitrust laws. The Congress did not intend to preclude the use of the communications satellite system for domestic communication services where consistent with the Act's provisions, nor to preclude the development of additional communications satellite systems, if required. 47 U.S.C. §§ 701(a)-(d) (1970).

[6] *See generally Hearings on Antitrust Problems of the Space Satellite Communications System Before the Antitrust and Monopoly Subcomm. of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962); *Hearings on Communications Satellites Before the House Comm. on Science and Astronautics*, 87th Cong., 1st Sess. (1961).

[7] D. SMITH, COMMUNICATIONS VIA SATELLITE 74 (1976) [hereinafter cited as SMITH].

[8] KINSLEY, *supra* note 2, at 4.

[9] *Id.* at 5.

[10] For a general discussion of the debate concerning the creation of Comsat, see SMITH, *supra* note 7, at 93-108.

[11] J. GALLOWAY, THE POLITICS AND TECHNOLOGY OF SATELLITE COMMUNICATIONS 71 (1972) [hereinafter cited as GALLOWAY].

[12] 47 U.S.C. §§ 731-35 (1970).

[13] "The passage of the Act culminated a process which had been characterized by bargaining and compromise but also by polemics and ideological involvement." GALLOWAY, *supra* note 11, at 69.

without discrimination. Moreover, such an arrangement would go towards the elimination of possible conflicts of interest resulting from private ownership of both ground stations and the system itself.[14] "Such ownership promised maximum coordination of civilian and military space programs and an end to reliance on ineffective regulation under conditions of natural monopoly."[15] The proponents of government ownership mounted a four pronged attack against private ownership: (1) conflict with antitrust laws could occur since the major carriers were also the largest equipment suppliers, (2) an early transfer of satellite operations to the private sector could result in a mediocre system, (3) since government funds developed the satellite technology, the benefits belonged to the public taxpayers, and (4) due to the corporation's direct dealings with foreign governments it would be placed in a position to establish foreign policy.[16] The passage of time did not allay the fears of those advocating government ownership.

B. *Internal Structure of Comsat*

The corporation created by the Communications Satellite Act of 1962 has been termed "quasi-public" due to "the various . . . controls . . . plus the presidential appointment of directors and obvious future interrelationship with other federal [*sic*] agencies . . . ."[17] Both internal and external controls were established in an effort to protect the public interest. Internal controls consisted of a broad base of ownership and the placement of government representatives on the board of directors.[18] Section 734 deals with the financing of the corporation and allows authorized communications common carriers to own up to 50 percent of the stock. Section 733 stipulates that the board of directors consist of 15 members: six chosen by the international carriers, six elected by the other stockholders, and the remaining three appointed by the President with the consent of the Sen-

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[14] Levin, *supra* note 2, at 334.

[15] *Id.* During Senate hearings, it was claimed that:

> Not only does the committee bill create a private monopoly, it would go even further and bestow on that single private monopoly the benefits of billions of dollars of the taxpayers' money. This legislation, if enacted, likely would constitute the biggest giveaway in the history of the United States.

S. REP. No. 1584, 87th Cong., 2d Sess. 51, *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 2269, 2309 (minority views). The report continued:

> Thus, in the interest of fostering competition and innovation in the communications satellite field, separate ownership of international communications carriers and the communications satellite system is not only advisable but essential. Private ownership and control of the space satellites would carry with it a built-in conflict of interest that would inevitably tend to slow down the most rapid development and maximum utilization of the best possible satellite system.

S. REP. No. 1584 at 52, [1962] U.S. CODE CONG. & AD. NEWS 2310-11.

[16] SMITH, *supra* note 7, at 106-07.

[17] Schrader, *supra* note 2, at 736.

[18] SMITH, *supra* note 7, at 108.

ate.[19] It was hoped that under such an arrangement, ultimate control of the corporation would be exercised by those possessing superior managerial ability rather than political influence.[20] As it turned out, the presidential appointees have been prominent private citizens easily susceptible to manipulation, and with little experience in communications.[21]

External control is manifested in several provisions of the Act, one of which prescribes seven functions that the President[22] directs to insure that the corporation operates according to the objectives of the United States in establishing a global communications satellite system which will contribute to "world peace and understanding."[23] The National Aeronautics and Space Administration (NASA) serves as technical consultant and furnishes launch facilities on a reimbursable basis.[24] The Federal Communications Commission (FCC) is given extensive regulatory power over the

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[19] Under the provisions of the original Act, the international carriers were allowed to choose six directors regardless of the percentage of stock they owned. Section 733 was amended in 1969, establishing a proportional system whereby the number of directors elected by the communications carriers is directly proportional to the percentage of carrier-owned stock. 47 U.S.C. § 733 (1962), *as amended* Pub. L. No. 91-3, 83 Stat. 4, 47 U.S.C. § 733 (1970).

[20] Schrader, *supra* note 2, at 734.

[21] KINSLEY, *supra* note 2, at 205-11. Kinsley points out that the presidential directors were ineffective due to their lack of expertise. *Id.* at 208. "Both the practicalities of life and the lessons of history lead to the conclusion that the appointment of government directors to a private board cannot effectively protect the public interest against private abuse." Schwartz, *Governmentally Appointed Directors in a Private Corporation - The Communications Satellite Act of 1962*, 79 HARV. L. REV. 350, 363 (1965-1966).

[22] 47 U.S.C. § 721(a) (1970). Specifically, the President shall:

> (1) aid in the planning and development and foster the execution of a national program for the establishment and operation, as expeditiously as possible, of a commercial communications satellite system;
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> (2) provide for continuous review of all phases of the development and operation of such a system, including the activities of a communications satellite corporation authorized under subchapter III of this chapter;
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> (3) coordinate the activities of governmental agencies with responsibilities in the field of telecommunication, so as to insure that there is full and effective compliance at all times with the policies set forth in this chapter;
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> (4) exercise such supervision over relationships of the corporation with foreign governments or entities or with international bodies as may be appropriate to assure that such relationships shall be consistent with the national interest and foreign policy of the United States;
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> (5) insure that timely arrangements are made under which there can be foreign participation in the establishment and use of a communications satellite system;
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> (6) take all necessary steps to insure the availability and appropriate utilization of the communications satellite system for general governmental purposes except where a separate communications satellite system is required to meet unique governmental needs, or is otherwise required in the national interest; and
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> (7) so exercise his authority as to help attain coordinated and efficient use of the electromagnetic spectrum and the technical compatibility of the system with existing communications facilities both in the United States and abroad.

[23] *Id.* § 701(a).

[24] *Id.* § 721(b).

activities of the corporation.[25] Additionally, upon entering into business negotiations with any international or foreign entity with respect to facilities, operations, or services, Comsat is required to notify the State Department of such negotiations.[26] The State Department then advises the corporation of relevant foreign policy considerations.[27] This elaborate system of checks and balances seems to have provided no obstacle with respect to the objectives of the major common carriers. An examination of the early years of Comsat's development demonstrates that the major carriers had little difficulty in attaining favorable rulings in areas where their other non-satellite private investments were at stake.[28]

III. CONFLICTS IN DEVELOPMENT

A great deal of concern was voiced over the sufficiency of the incentive given the international common carriers to develop a communications satellite system in direct competition with their existing cable facilities.[29] Proponents of the bill thought that close government supervision would guard against any hesitancy by the carriers to pursue a truly effective satellite system.[30] In actuality, the statutory monopoly created by the bill encouraged close cooperation among the participating carriers.[31] The fol-

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[25] *Id.* § 721(c). The Commission's ability to perform its regulatory functions will be discussed later in this Note.

[26] *Id.* § 742. Amendments to the original Administration bill drastically limited the role of the State Department.

[27] *Id.*

[28] A prime illustration is AT&T's continued insistence upon expanding its cable facilities despite the proven economy and efficiency of satellites. When satellite circuits first became available over the North Atlantic, AT&T agreed to use them until the route was served by approximately equal members of satellite and cable circuits. Following years of legal maneuvering, this 50-50 policy became the FCC's reasonable parity guideline. As a result, the enormous proliferation of satellite circuits has supported the carriers' arguments for new cables to maintain this reasonable parity, rather than reduce their need, which would be the logical conclusion. The FCC's TAT-5 cable decision is a perfect case where AT&T urged the need for a new cable solely on the basis of balance. *See* Applications for Authorization to Participate in the Construction and Operation of an Integrated Submarine Cable and Radio System Between the U.S. Mainland and Spain, Portugal, and Italy, 13 F.C.C. 2d 235 (May 22, 1968).

[29] "Congress . . . feared that common carriers with substantial investments in existing undersea cable and high frequency radio facilities would attempt to protect their investments by retarding new developments which threatened them with obsolescence." Note, *The Communications Satellite Corporation: Toward a Workable Telecommunications Policy*, 27 HASTINGS L.J. 721, 733 (1975-1976) [hereinafter cited as HASTINGS NOTE].

[30] "Its proponents also hoped that it would provide greater inducements to economic efficiency . . . ." Levin, *supra* note 2, at 335. *See* SMITH, *supra* note 7, at 106; Katzenbach, *Address on Communications Satellite Legislation*, 7 ANTITRUST BULL. 421, 424-25 (1962) [hereinafter cited as Katzenbach].

[31] HASTINGS NOTE, *supra* note 29, at 734. See Sen. Russell Long's (D. La.) attack on carrier participation in which he characterized the bill as being "as crooked as a barrel of snakes." 108 CONG. REC. 1511 (1962).

lowing FCC decisions, dealing with ambiguities in the Act, illustrate just how successful the carriers were in obtaining favorable rulings.

A. *Ownership of Earth Stations*

"The earth station problem dramatizes the difficulty of using an established regulated industry, with a heavy fixed investment in old equipment, to introduce a new technology."[32] In the first years of operation, Comsat owned and operated the three existing earth stations.[33] When a request was made to construct another needed station in West Virginia, the carriers protested vehemently. The result was a decision by the FCC in 1966[34] to grant the carriers half ownership in the earth stations, thereby reversing a ruling more favorable to Comsat issued only 19 months earlier.[35] The Commission gave to the Earth Station Ownership Consortium, in which ownership of the earth stations was split equally between Comsat and the carriers, responsibility for "formulating overall policy and deciding on major investments, types of major equipment and location of new stations, and the establishment of arrangements for the day-to-day operations of the station."[36] This arrangement included shared management of the stations and control of the "local loops."[37] Thus, the major carriers apparently utilized their influence and power to cause a complete reversal by the FCC of its earlier decision. They claimed that ownership of the stations was necessary for them to contribute to the development of the art, yet their building activities, both domestic and foreign, should have been sufficient to supply the needed incentive. Their argument that a Comsat monopoly would be against the spirit of the Act had little basis, since the Act explicitly permits an earth station monopoly as one of the FCC's alternatives.[38]

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[32] Schwartz, *Comsat, the Carriers, and the Earth Stations: Some Problems with "Melding Variegated Interests,"* 76 YALE L.J. 441, 444 (1966-1967) [hereinafter cited as Schwartz].

[33] "The earth station is a large, dish-shaped broadcasting and receiving antenna aimed at a satellite orbiting 22,300 miles above earth." A message is sent via the earth station to the satellite, which relays the signal to another earth station near the point of destination. It is then sent from the receiving station by a "local loop." KINSLEY, *supra* note 2, at 27.

[34] Amendment of Part 25 of the Commission's Rules and Regulations with Respect to Ownership and Operation of Initial Earth Stations in the United States for Use in Connection with the Proposed Global Commercial Communication-Satellite System, 5 F.C.C. 2d 812 (Dec. 7, 1966).

[35] Amendment of Part 25 of the Commission's Rules and Regulations with Respect to Ownership and Operation of Initial Earth Stations in the United States for Use in Connection with the Proposed Global Commercial Communication-Satellite System, 38 F.C.C. 1104 (May 12, 1965).

[36] 5 F.C.C. 2d at 820.

[37] The local loops are the connections between the earth station sites and the common carrier facilities. For an excellent discussion of the earth station controversy see KINSLEY, *supra* note 2, at 26-46.

[38] 47 U.S.C. § 721(c)(7). In pertinent part, the FCC shall:

> grant appropriate authorizations for the construction and operation of each satellite terminal station, either to the corporation or to one or more authorized carriers or

The carriers' real concern was a threat to their present and projected rate base raised by an independent satellite system.[39]

By denying Comsat complete ownership of the earth stations, the FCC destroyed any real chance for competition in the communications industry. Under the FCC ruling, the carriers are able to participate in more decision making at the earth station level, where they have a sure veto and are unaffected by conflicting fiduciary obligations.[40] Comsat's independent control of the stations would have provided vigorous competition so as not to require such close regulation.[41] Instead, the FCC chose to protect the interests of the existing industry.

B. *Authorized Users*

Another major ambiguity in the Act which required resolution by the FCC involved the question of which users would be allowed to lease satellite circuits directly from Comsat. Many large users other than the participating major carriers wanted to lease long-term circuits directly from Comsat. The international carriers insisted that the Act was intended to protect their investments by granting them exclusive buying and selling rights.[42] The policy argument advocated by the carriers claimed:

> that the carriers, prevented by the Satellite Act from establishing satellite facilities, had to depend on Comsat for satellite circuits, and it would be inequitable to allow Comsat to provide the profitable leased channels

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> to the corporation and one or more such carriers jointly, as will best serve the public interest, convenience, and necessity.

See also Schwartz, *supra* note 32, at 456.

[39] With full ownership of the earth stations and the local loops, Comsat would be able to offer service fully equivalent to that of the international carriers. KINSLEY, *supra* note 2, at 37. The "rate base" system is used by the FCC to determine the amount of profit allowed, based upon investments in equipment.

> It is clear that in a monopoly situation, locked into a predetermined maximum rate of profit, a firm will have little incentive to eliminate unnecessary expenses. In fact, it will usually have a *positive* incentive to try to get away with unnecessary investments, because these will add to its rate base.

Id. at 31-32. This tendency to invest unwisely and excessively to expand the rate base is known as the Averch-Johnson effect. J. Dingell quotes from the General Services Administration:

> It is time to abandon the thesis that regulation is the law's substitute for competition. Even where monopoly is benign, it is dangerous for monopoly to make the decisions. Both friends and foes of the regulatory process acknowledge its limits in affecting incentives, promotion of economy and developing efficiency and optimum cost of services. Regulation is essentially negative. It should utilize competition as a powerful supplement.

Dingell, *The Role of Spectrum Allocation in Monopoly or Competitition in Communications*, 13 ANTITRUST BULL. 937, 943 (1968).

[40] Schwartz, *supra* note 32, at 476.

[41] "But the structure they [FCC] did create is so full of potential conflicts and opportunities for insider self-preference that constant policing will be needed." *Id.* at 483.

[42] KINSLEY, *supra* note 2, at 50.

> directly to the large users and offer to the carriers only the less desirable services . . . Comsat would offer services to users and to carriers at substantially the same rate, and this would prevent the carriers from reselling satellite service to users on competitive terms.[43]

The FCC seemingly agreed with this "cream skimming" argument and resolved the issue in favor of the carriers.[44] Once again the FCC administered a serious blow to the possibility that Comsat might serve as a competitive alternative to the existing communications industry.[45]

The FCC also forbade Comsat from leasing circuits directly to the United States Government despite explicit language in the Act authorizing them to do so.[46] The Commission concluded that the reference to the government was reserved only for unique and exceptional situations.[47] The Government tested this ruling less than a year later when the Defense Department approached Comsat concerning the leasing of 30 satellite circuits from Hawaii to the Far East to monitor the Vietnam War. The Commission ruled that the Government had to purchase the circuits from the carriers at a "composite rate."[48] As a result, internationally leased circuit rates remained abnormally high, inhibiting the growth of Comsat and discouraging the aim of the Act to provide a global service at reasonable rates.[49]

Looking back over the reports on the earth station and authorized users decisions, one cannot help but be struck by Comsat's timid objections and questionable concessions. In its annual reports to the President, Comsat has consistently failed to utilize its avenue of recommendation granted to

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[43] Acheson, *Competition Problems in International Communications,* 13 ANTITRUST BULL. 963, 966 (1968) [hereinafter cited as Acheson].

[44] Authorized Entities and Authorized Users Under the Communications Satellite Act of 1962, 4 F.C.C. 2d 421 (July 20, 1966) [hereinafter cited as Authorized Users].

[45] "Clearly, if there were to be unrestricted dealings of Comsat with the public, it would mean that Comsat would be using its monopoly position to the detriment of the other carriers and, indeed, to deprive them of the opportunity to serve segments of the public under fair and equitable conditions." *Id.* at 428.

[46] "[T]he corporation is authorized to . . . contract with authorized users, including the United States Government, for the services of the communications satellite system . . . ." 47 U.S.C. § 735(b)(4) (1970).

[47] Authorized Users, *supra* note 44, at 435. The Commission noted that "loss of a substantial proportion of Government leased circuit revenues could have serious adverse effect upon the carriers. Instead of being able to reduce rates to reflect the lower costs of satellite circuits, they would probably have to seek substantial rate increases." *Id.* at 434. The Commission also noted that the Government provides over 70 percent of total leased circuit revenues.

[48] The carriers were to provide both satellite and cable circuits at a composite rate of $7,100. The cable rates at the time were approximately $11,000 per half circuit and Comsat had offered direct service for $4,000 per half circuit. The Commission ordered Comsat to sell the satellite circuits to the carriers for $3,800. Acheson, *supra* note 43, at 968. "The net of this is that, at the direction of the FCC, the carriers' revenues from satellite service they sell pay a substantial part of the costs of the cable system." *Id.*

[49] In 1967 the international carriers were buying half circuits from Comsat for $2,700 a month and selling them to users for $8,000. KINSLEY, *supra* note 2, at 63.

it by the Act.[50] These failures on the part of Comsat can only point towards the inherent conflicts and self-preferences imbedded within its structure. The influence exerted by the carriers through their participation in the management of Comsat is more than apparent from this line of decisions. The result has been an even greater concentration of power in the existing communications carriers and the inhibition of any possibility of realizing a truly competitive system. Attention will now be turned to the international realm in order to see what impact the organizational structure of Comsat has had on the development of a global satellite system.

IV. COMSAT'S DEALINGS ABROAD

The initial impetus for developing a global communications satellite system was a national challenge to be the forerunner in providing leadership in the peaceful use of outer space for the benefit of all mankind. "Here a successful program should pay dividends for us and other countries, not only in economic terms but also in terms of such important intangibles as the development of mutually helpful attitudes, institutions and relationships."[51] The Act expressly noted the need for foreign cooperation in the system[52] and consequently placed several controls on Comsat's ability to negotiate abroad.[53] This need for foreign cooperation resulted in numerous areas of conflict for Comsat during its formative years, in dealing with both the United States Government and foreign entities.[54]

V. THE EMERGENCE OF INTELSAT

The terms regarding participation in an international satellite system were not specified in the Act, in spite of the potential impact upon American foreign policy objectives. The need to formulate specific guidelines in order to insure effective negotiations with foreign nations was recognized

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[50] 47 U.S.C. § 744(b) (1970).

[51] Katzenbach, *supra* note 30, at 423.

[52] 47 U.S.C. § 701(a) (1970). *See* Rand Memo, *supra* note 4, at 17.

[53] Schwartz and Goldsen include the following: 47 U.S.C. §§ 721(a)(4), 721(a)(5), 721(c)(3), and 742. Rand Memo, *supra* note 4, at 18-19. 47 U.S.C. § 742 is the basic provision for control over Comsat's dealings abroad. 47 U.S.C. § 721(c)(3) states that the FCC should require the corporation to establish communications with a particular country where the Secretary of State advised that such communication was in the national interest.

[54] Through the authority of the President to oversee relations with foreign governments (47 U.S.C. § 721(a)(4)), the State Department would control foreign relations and Comsat would control business negotiations, but the relations between these two remain uncertain. GALLOWAY, *supra* note 11, at 73. "Once the State Department classifies a particular problem as one of 'foreign policy,' it will no doubt insist on fulfilling its statutory role, even though the Corporation might prefer to handle the problem as a purely business matter." Rand Memo, *supra* note 4, at 19. For a discussion of these conflicts in the creation of a global satellite system, *see* GALLOWAY, *supra* note 11, at 82; Underwood, *Problems of Participation in the Global Commercial Communications Satellite System*, 18 S.C.L. REV. 796, 799-807 [hereinafter cited as Underwood].

immediately.[55] No sooner had the new corporation come into existence than it objected to the State Department's interference with its international policy planning.[56] Comsat officials envisioned the establishment of a system based on a series of bilateral agreements (similar to their cable arrangements) with the result that the United States would be situated in the "center of the web."[57] As an alternative, they desired an American owned system that leased out the circuits.[58] The State Department opposed these proposals and advocated a multilateral arrangement allowing for more flexibility.[59] The dispute was resolved in favor of pursuing a multilateral arrangement which would encourage foreign nations to participate in the use and ownership of the system.[60] Relations between Comsat and the State Department improved considerably following these initial differences, but Comsat's dealings abroad were destined to be plagued by conflicts.

A plan for an international communications satellite association was first conceived in October of 1963, at a conference of the International Telecommunications Union (ITU).[61] By July 1964, the negotiating countries had managed to resolve their initial differences and had agreed to the Interim Arrangements for a Global Commercial Communications Satellite System.[62] A month later the group officially established the International Telecommunications Satellite Consortium (INTELSAT).[63] The United States was able to dominate the shaping and control of INTELSAT from the outset, due to its superior technological expertise and its major role in the operation of international message circuits.[64] Comsat emerged as the general manager of the system and received 61 percent of the voting power based upon the volume of American use in the system.[65] This insured

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[55] SMITH, *supra* note 7, at 130-31.

[56] *Id.* at 131. Philip Graham, publisher of the Washington Post, was elected the first chairman but due to illness he was replaced by Leo Welch after only three months. Mr. Welch also attacked the FCC for its invasion in Comsat's managerial functions.

[57] Chayes, *Unilateralism in United States Satellite Communications* in THE INTERNATIONAL LAW OF COMMUNICATIONS 42, 45 (E. McWhinner ed. 1970) [hereinafter cited as Chayes].

[58] *Id.*

[59] SMITH, *supra* note 7, at 131.

[60] *Id.* at 135. The State Department attempted to overcome the differences by convincing Comsat that the Europeans urged a multilateral agreement and that they were serving as the chosen instrument of American foreign policy and not as a private enterprise. GALLOWAY, *supra* note 11, at 82.

[61] HASTINGS NOTE, *supra* note 29, at 739.

[62] Aug. 20, 1964, [1964] 15 U.S.T. 1705, T.I.A.S. No. 5646, 514 U.N.T.S. 26 (effective for United States Aug. 20, 1964).

[63] GALLOWAY, *supra* note 11, at 99. *See* McWhinney, *The Antinomy of Policy and Function in the Institutionalization of International Telecommunications Broadcasting*, 13 COLUM. J. TRANSNAT'L L. 3, 9 (1974) [hereinafter cited as McWhinney].

[64] SMITH, *supra* note 7, at 140-41.

[65] *Id.* at 138.

Comsat virtually complete control over the system during its formative years.[66]

Despite smooth functioning of both the space and ground segments of the system, Comsat was unable to deal effectively with the other foreign members. Dr. Reinhold Steiner, the only non-American fulltime, permanent representative to INTELSAT, said, "If you consider the interest of the U.S. in improving relations with other countries, Comsat has failed. Of all the international carriers, Comsat has the worst reputation."[67] Comsat's management of the system was criticized because it "wore 'three hats' at the same time—as a U.S. internal, domestic, common carrier for profit; as the U.S. national representative to INTELSAT; and, finally, as the general managerial authority within INTELSAT itself."[68] Much of this criticism may be warranted when one views the manner in which procurement of equipment and the handling of contracts was conducted. Only 5 percent of over $380 million spent by INTELSAT through the middle of 1971 was spent outside the United States.[69] In light of these figures one can easily understand why Comsat, the only privately owned carrier in INTELSAT, came under such critical attack.[70]

Due to Comsat's inability to generate goodwill within INTELSAT, the United States found it difficult to retain much of the power it formerly enjoyed when the Interim Arrangement was renegotiated. At the European Space Telecommunications Conference of 1967, the European nations agreed "on the desirability of removing Comsat as the system manager, restricting its voting power and developing separate, regional systems."[71] Meanwhile, under pressure from the State Department and the FCC, Comsat agreed to internationalize some management functions while retaining technical and operational control. The same major issues of 1964, *i.e.*, ownership quotas, voting arrangements, and management, were the principal areas of controversy in the Definitive Arrangements negotiations.[72]

After more than two years of negotiation, the Definitive Arrangements

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[66] Chayes, *supra* note 57, at 46.

> But the Interim Arrangements did not provide the conditions for the growth of confidence in the consortium as an international instrument responsive to the international community. Intelsat became, for the most part, an arena in which Americans and Europeans battled out and traded out parochial interests without achieving a larger vision of international communications requirements.

[67] KINSLEY, *supra* note 2, at 115.

[68] McWhinney, *supra* note 63, at 11.

[69] KINSLEY, *supra* note 2, at 119. Comsat was also accused of manipulating its managerial role for private purposes in procuring contracts for INTELSAT IV satellites. *See id.* at 122-26.

[70] "As a private company, Comsat has been less successful than an experienced government agency might be in dealing with foreign representatives." *Id.* at 115.

[71] SMITH, *supra* note 7, at 144.

[72] GALLOWAY, *supra* note 11, at 158.

were finalized in August 1971, to become effective in February 1973.[73] The most important changes provided for a Director General to replace Comsat as the head executive over a 6 year transitional period. A Board of Governors was created to consist of approximately the top 20 investors. Comsat will continue to perform technical and operational services until 1979 under a management services contract.[74] Even after drastic reductions in Comsat's control, the other members further insured their control by requiring a two thirds majority vote by the Assembly of Parties (based on a one nation - one vote scheme) in order to decide substantive matters.[75] At this point, one can only speculate as to whether INTELSAT will continue to provide necessary services or if any future expansion in services will have to occur outside its framework.

VI. THE RESOLUTION OF AMBIGUITIES IN OUR FOREIGN OBJECTIVES

The developments over the past decade furnish one basis for determining whether the United States has been successful in establishing a global communications satellite system, as it had been originally envisioned. Due to the unique nature of the venture, there are several ambiguities in the Act which stem from foreign policy considerations. These include: (1) the urgency in establishing the system, (2) the meaning of "peace and understanding," (3) the nature of United States leadership, (4) the kind of participation by foreign countries, and (5) the relations between the Department of State and Comsat.[76]

The desire to establish a communications satellite system at the earliest possible time was primarily motivated by Russian success with Sputnik.[77] Since the technical knowledge necessary to develop a global satellite communications system was still several years away, the ownership issue should have been studied more carefully before enacting legislation which had the effect of circumventing the antitrust laws. The Act's goal, to stimulate all available talent and resources, was probably more hindered than aided by the grant of corporate control to the owners of an old technology with which the corporation was in direct competition. This hindrance did not appear to impede the establishment of an international consortium, since the United States government managed to manipulate the development of the consortium through its prescribed powers in the Act.[78] But as

[73] Agreement Relating to the International Telecommunications Satellite Organization "Intelsat," Aug. 20, 1971, [1972] 23 U.S.T. 3813, T.I.A.S. No. 7532 (effective Feb. 12, 1973).

[74] SMITH, *supra* note 7, at 151.

[75] *Id.* at 150.

[76] GALLOWAY, *supra* note 11, at 100.

[77] *Id.* at 47.

[78] One view states that the successful establishment of a global satellite system can be attributed to the government's approach of cooperation and participation toward Comsat. GALLOWAY, *supra* note 11, at 101-02. For example, the government achieved a cohesive and united position with Comsat in foreign negotiations. *Id.* at 103.

has been seen, the carriers did succeed in winning several decisions which resulted in keeping international circuit rates unnecessarily high.[79]

The Government's goal of achieving world peace and understanding has the appearance of failure in the early years of INTELSAT. Comsat's activities as manager of the international system were strongly criticized as being tainted by the carriers' private interests.[80] The decision to organize Comsat as Congress did, "meant from the outset that United States foreign policy objectives and perceptions in the field would be filtered through a private entity with divergent goals and perspectives."[81] The legislative history indicates that Congress failed to see the international ramifications of the Act. Speaking optimistically before the Senate Foreign Relations Committee, Secretary of State Dean Rusk said: "The fact that the corporation will be owned and the capital supplied by private companies and individuals will not impair the ability of the United States to cooperate successfully with other countries and international organizations in establishing a global communications system."[82] History now shows there was little difficulty in establishing the global system, but much controversy resulted from having a private corporation represent American foreign interests. Comsat's difficulties with the Government at home had an adverse effect upon its dealings abroad, where previously the international carriers had an excellent track record with telecommunications systems overseas.[83] As a result, the United States leadership role in the global system has been cut back substantially by the Definitive Arrangements revamping INTELSAT.

The current membership in INTELSAT indicates worldwide participation, with the exception of the Soviet bloc.[84] During the early years, the provision of services to the developing countries took place slowly, due to the immediate need to follow high volume routes in order to insure economic security. But today, almost worldwide services are available, and the smaller countries play a greater role under the new arrangements. On the other hand, participation by other nations in the manufacturing of components was severely limited in the early years, causing much discord among the members.[85] Hopefully, the improvement of technological capa-

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[79] Recall the earth station ownership decision, note 34 *supra*, and Authorized Users decision, note 44 *supra*.

[80] "Comsat's attitude has antagonized foreign governments and has been accused of slowing development of the international satellite system." KINSLEY, *supra* note 2, at 117.

[81] Chayes, *supra* note 57, at 44.

[82] *Hearings on the Communications Satellite Act of 1962 Before the Senate Comm. on Foreign Relations*, 87th Cong., 2d Sess. 173 (1962).

[83] HASTINGS NOTE, *supra* note 29, at 739.

[84] INTELSAT presently has 94 members and accounts for over 90 percent of the international communications traffic by satellite.

[85] SMITH, *supra* note 7, at 142. "In order to ensure that the U.S. aerospace industry remained the leader in technology development, the federal government placed controls on the exportation of technology likely to be applied to communications satellites." *Id.*

bilities among more countries, along with the change in INTELSAT's management, will remedy this problem.

The difficulties resulting from the ambiguous role of the State Department became immediately apparent. The State Department's concern over foreign policy implications was demonstrated by its avid support of the President's original bill, which would have allowed the State Department to conduct or supervise the foreign negotiations of the corporation.[86] Despite several alterations in the bill which resulted in changing the State Department's role to an advisory one,[87] history now shows that this limited control was used in conjunction with the President's powers under section 721(a)(4) to control most of the foreign policy developments. This control over foreign policy by the executive branch supports the contention of Secretary Rusk that the bill provided the United States Government with adequate authority to protect our foreign policy objectives; however, the use of a private corporation to implement American plans caused more problems than expected.

The early controversies between Comsat and the Government concerning ownership, treaty arrangements, and management of INTELSAT illustrate the uncertainties prompted by ambiguities in the Act.[88] The Government's role during the early operating years of INTELSAT was limited so that it would not appear as if the United States was using Comsat's managerial role to shape the direction of the entire international consortium. Yet the State Department did not hesitate to intervene during negotiation of the Definitive Arrangements so as to insure compatibility with our foreign objectives. As a result of all this confusion, "neither the United States itself nor foreign governments or communications entities can know entirely who is dealing with whom and with what authority."[89]

VII. CONCLUSION

The history of the development of the international communications satellite system casts some doubt on the propriety of the choice that the United States made in 1962.[90] In its haste to create a global satellite system, the 87th Congress created a structure "which contemplates numerous interlocking directorates; creates a backward and forward vertical joint

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[86] GALLOWAY, *supra* note 11, at 49. "From this, one can infer that the State Department foresaw the possibility that a private corporation controlling satellite communications might not always act in the best interests of the United States." *Id.*

[87] 47 U.S.C. § 742 (1970).

[88] GALLOWAY, *supra* note 11, at 82.

[89] Underwood, *supra* note 54, at 799.

[90] "The fact is that technological change in satellite communications brought a new order of complexity into communications policy. Technological change widened the area of choice and at the same time confused the old pattern of expectations. These consequences of technological innovation encouraged legislative decision-making and incrementalist rationality." GALLOWAY, *supra* note 11, at 104.

venture; and provides for substantial minority interests by companies which are simultaneously potential suppliers, customers, and competitors."[91] The potential for conflict which the Act created by granting control of the system to the existing major carriers soon became a reality during the resolution of several ambiguities inherent in this unique venture. The purpose of the Act, to reflect "the benefits of this new technology in both quality of services and charges for such services,"[92] was impeded by the carriers in their efforts to protect huge investments in undersea cables. Their successful lobbying efforts with the FCC resulted in the destruction of any possibility of Comsat serving as a potential competitor, thereby keeping internationally leased circuit rates unnecessarily high. Ambiguities in the Act concerning the various roles and objectives of the Government resulted in the existence of almost constant tension between Comsat and the State Department. This caused the United States to project a poor image in INTELSAT and appears to have achieved little in the way of world peace and understanding.

Despite all of these shortcomings which the first decade of operation has produced, the future years show hope for the development of a more productive global satellite system. The major carriers have now divested themselves of most of their ownership in Comsat, so there should be fewer inherent conflicts of interest within the organization.[93] Comsat should utilize its power to make recommendations to the President and Congress in order to stimulate greater legislative review. A reversal of some past FCC rulings could provide the incentive necessary for innovation by allowing Comsat to function as a true competitor. But so long as regulatory agencies such as the FCC are allowed to render decisions consolidating control of a new technology in the hands of the existing industry, there is little hope that the objectives such as those proposed in the Communications Satellite Act of 1962 will ever be realized.

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[91] Schwartz, *supra* note 32, at 464-65.

[92] 47 U.S.C. § 701(b) (1970).

[93] "The major carriers, with the exception of AT&T, have all divested themselves of their shareholdings with the result that only AT&T is now eligible to nominate and elect carrier directors and, in fact, there are currently only three carrier directors on the Comsat Board, all of whom represent AT&T. Establishment of Domestic Communications-Satellite Facilities by Nongovernmental Entities, 38 F.C.C. 2d 665, 680 (Dec. 22, 1972).