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## China and the Prior Consent Requirement: A Decade of Invasion and Counter-Invasion by Transfrontier Satellite Television

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# **China and the Prior Consent Requirement: A Decade of Invasion and Counter-Invasion by Transfrontier Satellite Television**

*by*  
MEI NING YAN\*

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## Introduction

Having the largest television audience in the world, the People's Republic of China (China or PRC) is naturally a prime target for international television broadcasters.<sup>1</sup> Satellite television channels, from the United States (U.S.) and Taiwan in particular, are eager to penetrate the Chinese market. Indeed, China has experienced a growing "siege" by satellites beaming endless television programs into its territory since the early 1990s.

Nonetheless, the majority of China's television viewers to date only have access to domestic television. This is despite the fact that the first pan-Asia direct broadcasting by satellite (DBS) service, Satellite Television Asia Region (STAR), was fully launched in October 1991 and is now a decade old.<sup>2</sup> Throughout the past decade, the efforts of international satellite television broadcasters to enter the China market freely have been frustrated. Moreover, many

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1. It is a common practice for the Chinese authorities to cite the country's television penetration rate but not the actual size of the national television audience. According to the China Statistical Yearbook 2001 (in Chinese) compiled by China's National Bureau of Statistics, the country's television penetration rate stood at 93.65% in 2000. Unofficial figures said there were 335 million television households in China with a total population of 1.195 billion in mid-2001. *China - Satellite Boosts Television Viewing*, China Online (Nov. 27, 2001) (available in LEXIS). Meanwhile, in *An Outline of The Development Plan of Radio, Film and Television Business: 2001-2010*, SARFT Doc. 46 (2001) (reprinted in China Radio and Television Yearbook 2001 (in Chinese), at 25-29), SARFT disclosed that China's total television audience amounted to 1 billion in early 2001. All of these figures exclude those of Hong Kong, Macau and Taiwan. SARFT (State Administration of Radio, Film and Television) is currently the government department under China's State Council responsible for broadcasting regulation. It was formed in 1998 upon the restructuring of the State Council, replacing the Ministry of Radio, Film and Television (MRFT). In China, the ultimate control of media policy lies with the Publicity Department (formerly known as Propaganda Department) of the Central Committee of the Chinese Communist Party (CCP). SARFT and its predecessor, MRFT, used to treat all of its documents on broadcasting policy and regulation as internal but they were widely available in the industry. Some documents would eventually be published in the China Radio and Television Yearbook (in Chinese), which is an SARFT/MRFT official publication. From time to time, the MRFT also produced in-house booklets collecting many of these documents. Similar collections by the MRFT/SARFT have become available in bookshops in recent years, and the Handbook on Regulation of Radio and Television Industry (rev. ed.) (2001) (in Chinese) is very comprehensive and handy. In the last couple of years, SARFT has also made some documents available on its official website <<http://www.sarft.gov.cn>>. All these documents are in Chinese; the English titles are translations by the author of this article. The latest figures published by China's biggest media research company, CVSC-TNS, in September 2003, indicate that China has 306 million TV households with viewers totaling 1.07 billion. See the company's website (in Chinese) at <<http://www.cvsc-tns.com>> (accessed Oct. 1, 2003).

2. In early 2001, Satellite Television Asia Region, formerly known as STAR TV, adopted a new brand name, STAR.

international broadcasters have in recent years readily submitted to Chinese national broadcasting rules, including making annual applications to the authorities for approval to reach a very limited audience composed mainly of foreign visitors and expatriates. In essence, the Chinese government has for the past ten years minimized the impact of transfrontier satellite television on its nationals by applying the country's own laws and policies.

Such an outcome is quite contrary to predictions made in the early 1990s. Press reports and academic researchers then recorded a rapid spread of satellite dishes and illicit reception and retransmission of transfrontier satellite television in China, leading to optimistic predictions that any control by the Chinese government would soon become ineffective.

Through a comprehensive survey of China's legal enactments, ministerial directives and policy speeches of high-ranking officials, this paper gives a historical account of how the Chinese government has successfully maintained its broadcasting sovereignty in face of the advent of DBS, which respects no national borders. In the course of this account, China's insistence on the prior consent requirement will be highlighted.

The prior consent requirement, in its original sense, imposes a duty on the originating country to seek consent from the receiving country before transmitting transfrontier satellite television signals. It thus enables the receiving country to exercise control over access and content of the incoming satellite television. This would mean the making of agreements between nation states, which would become part of international law regulating transfrontier satellite television. China, like the former Soviet Union and many developing countries, initially insisted on the introduction of an international regulatory regime on DBS implementing the prior consent requirement. However, without an international regulatory mechanism in place, the ruling Chinese Communist Party (CCP) throughout the 1990s devised numerous national broadcasting rules to give effect to the prior consent requirement. In devising these rules, the Chinese government had more in mind than just the transfrontier satellite television broadcasters. Much effort was spent, especially in the latter 1990s, on strengthening central government's control over domestic television, especially at the local level. This proved to be crucial in preventing infiltration by transfrontier satellite television. In an attempt to perpetuate the prior consent requirement, China channeled much of its effort in the later 1990s into building a highly controlled environment – "a single satellite in the sky, a single

network on the ground” (*tian shang yi ke xing, di shang yi zhang wang*)<sup>3</sup> – by combining the Malaysian and Singaporean practices for controlling transfrontier satellite television. Many international satellite television broadcasters, hanging their hopes on China shifting its emphasis from banning access to vetting program content, have shown great willingness to cooperate with the Chinese authorities in exchange for access. Their efforts finally bore fruit in late 2001, exactly a decade after DBS was introduced in the region. The Chinese authorities, for the first time, granted cable access to three transfrontier satellite television operators. One of the three — China Entertainment Television (CETV) — is owned by AOL-Time Warner, the world’s biggest media conglomerate, based in the U.S. The other two — STAR and Phoenix Satellite Television Co. (Phoenix) — are both investments of media mogul Rupert Murdoch. While international satellite television operators described this development as groundbreaking, this paper examines the move in the light of China’s continued insistence on the prior consent requirement. Finally, the paper argues that China’s unilateral insistence on the prior consent requirement has demonstrated that neither technology nor the market mechanism alone can guarantee media freedom and the free flow of information.

### **I. China and the Prior Consent Requirement**

The prior consent requirement was hotly debated when the international regulation of DBS was discussed at the United Nations (U.N.) and United Nations Educational, Scientific, and Cultural Organization (UNESCO) from the late 1960s to the early 1980s.<sup>4</sup>

The U.N. Committee on the Peaceful Uses of Outer Space (COPUOS) formed a working group in 1968 to study the technical feasibility of DBS and its implications. Some group delegates expressed their fear that DBS technology would bring serious adverse effects, including interference in internal affairs of other States. They suggested “a prohibition on broadcasts beamed from satellites by one

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3. See China Radio and Television Yearbook 1997 at 70 (in Chinese). The phrase is a translation by the author of this article. The *pinyin* of the Chinese words is put in parentheses for reference.

4. The details of debates on the prior consent requirement in particular and regulation of direct broadcasting by satellite are discussed in various articles. See generally Kathryn M. Queeney, *Direct Broadcast Satellites and The United Nations* (1978); Kaarle Nordenstreng & Herbert Schiller (eds.), *National Sovereignty and International Communication* (1979); and Jon T. Powell, *International Broadcasting By Satellite - Issues Of Regulation, Barriers To Communications* (1985).

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State to others without the explicit prior consent of the Government concerned through bilateral or multilateral agreements.”<sup>5</sup>

The former Soviet Union, supported by the vast majority of developing countries, earnestly pursued the prior consent requirement. While the Soviet Union’s main fear of DBS focused on the spread of political propaganda, the developing countries were more concerned with the adverse impact on their economic development and cultural heritage. They nonetheless shared the same goal to preserve the traditional sovereign right of a state to regulate its national broadcasting system and to prevent intrusion of transfrontier television. Arguments over DBS were closely linked to debates on the free flow of information and agitation for the “New World Information and Communication Order.” The U.S., the biggest exporter of television programs, fiercely opposed the prior consent requirement, arguing it would become a barrier to the free flow of information. Canada and Sweden tried to mediate the divergent views, but the positions on the principle of prior consent were so different that no binding international treaty on the regulation of DBS resulted despite debates extending over a decade. Instead, the U.N. General Assembly passed Resolution 37/92 in 1982 entitled “Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting.”<sup>6</sup> Articles 13 and 14 of the resolution framed the requirement of prior consultation and agreement in a mandatory manner, though the explicit principle of requiring “prior consent” of the receiving countries was abandoned.<sup>7</sup>

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5. United Nations General Assembly, Committee on the Peaceful Uses of Outer Space, Working Group on Direct Broadcast Satellites, *Report of the Second Session of the Working Group*, Aug. 12, 1969, at 7, A/7621/Add.1 (Supplement No. 21A).

6. The resolution was adopted on Dec. 10, 1982. One hundred and seven countries voted for the resolution, 13 voted against and 13 abstained. The full text can be located at United Nations, General Assembly <<http://www.un.org/documents/ga/res/37/a37r092.htm>> (Nov. 16, 1982).

7. Section J of the Resolution concerns “Consultations and Agreements between States.” Art. 13 reads: “A State which intends to establish or authorize the establishment of an international direct television broadcasting satellite service shall without delay notify the proposed receiving State or States of such intention and shall promptly enter into consultation with any of those States which so requests.” Art. 14 reads: “An international direct television broadcasting satellite service shall only be established after the conditions set forth in paragraph 13 above have been met and on the basis of agreement or agreements in conformity with the relevant instruments of International Telecommunication Union and in accordance with these principles.” *Id.*

### A. China's Position in the 1980s

China did not participate in the free flow of information debate at UNESCO.<sup>8</sup> Nor was she actively involved in the drafting of DBS regulation at the U.N. In 1982, China voted in favor of Resolution 37/92 at the U.N. General Assembly, but chose not to explain its vote on that occasion. China's delegation nonetheless had detailed its position on the issue of DBS regulation when China was admitted to COPUOS as a full member in 1981:

We consider that international direct television broadcasting should be carried out on the basis of respect for State sovereignty and non-interference in States' internal affairs, the established principle of international law. Only thus can understanding and friendship among the peoples of various countries be properly promoted and the cause of maintaining international peace and security be served.<sup>9</sup>

It was apparent that China leaned towards the model of prior consent and program censorship which the Soviet Union had proposed to the U.N.:

[W]e consider that consultations and agreement between the broadcasting and the receiving States should contain not only the technical arrangement in accordance with the relevant documents of the International Telecommunication Union, but also a non-technical arrangement concerning important interests of the receiving State. This point should be adequately embodied in this principle. As for the question of co-operation on the program content, this is also an important issue, but it is not mentioned in the proposal of the 12 countries. We hope some appropriate proposals will be made on this after consultations.<sup>10</sup>

The issue of state responsibility was also highlighted:

[China's] delegation supported the formulation in the text of the draft principles that States should bear international responsibility for activities in the field of international direct television broadcasting by satellite carried out by them or under their

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8. The delegation of the PRC replaced the delegation from the Republic of China (i.e. Taiwan) at the U.N. in 1971.

9. Ms. Wu Dalan, Speech, *Committee on the Peaceful Uses of Outer Space*, (United Nations, General Assembly, Jun. 26, 1981) in *Verbatim Record of the 223rd Meeting*, U.N. Doc. A/AC.105/PV.223, 18 (1981).

10. *Id.*, in a discussion of a proposal submitted by Argentina, Brazil, Canada and other countries.

jurisdiction.<sup>11</sup>

China reiterated its position at a COPUOS meeting in 1982, rejecting the argument of free flow of information and advocating the need for prior agreement:

We have always believed that international direct television broadcasting should be based on the universally recognised principle of international law of respect for national sovereignty. When the sovereignty of another State is at issue, one-sided emphasis of the free dissemination of information, without calling for full respect for the rights and interests of the receiving State and without, at the same time, stressing the necessity of reaching prior agreement with the receiving State, will not facilitate the search for solutions and agreement.<sup>12</sup>

From the above statements, it is clear that China insisted upon a prior consent requirement that would involve control over program content by the receiving country and state responsibility on the part of the originating country. She may be considered as a faithful supporter of the requirement. It is plain why China adopted such a position. The ruling CCP has prevented Chinese nationals from enjoying Western-style media freedom since 1949. No private ownership is allowed in the media sector. Nor is there any freedom of access to information from outside China. Though tuning into foreign short-wave radio broadcasting or watching foreign satellite television are seldom subject to severe punishment these days, long sentences of imprisonment can still be incurred by those who dare to operate their own media. To allow foreign satellite television to have an unfettered access to the Chinese audience would mean: (1) foreign television stations could circumvent Chinese laws and policies on broadcasting ownership and operation, and (2) Chinese nationals could have uncontrolled access to foreign information. Such developments would result in the CCP losing its traditional control over media ownership and the flow of information, controls which the Party has always regarded as vital to its survival.

11. Mr. Huang Hua, Speech, *Special Political Committee*, (United Nations, General Assembly, Oct. 29, 1981) in *Summary Record of the 17th Meeting*, U.N. Doc.A/SPC/36/SR.17, 8 (1981).

12. Mr. Liu Du, Speech, *Committee on the Peaceful Uses of Outer Space*, (United Nations, General Assembly, Mar. 26, 1982) in *Verbatim Record of the 237th Meeting*, U.N. Doc. A/AC.105/PV.237, 7 (1982).

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**B. China: The Leading Defender of Prior Consent in the 1990s**

China remained a firm supporter of the prior consent requirement throughout the 1990s, despite the fact that international debates on the principle had subsided. Indeed, the issue of international regulation of DBS has not been on the agenda of the COPUOS since 1982.

DBS was widespread in western Europe by the late 1980s and became available in Asia in 1991 when STAR was launched. In China, the ruling CCP regards the increasing volume of transfrontier satellite television made possible by DBS as a severe threat to its power. It perceives that Western powers, since the fall of the Soviet Union, have shifted their infiltration efforts to Asia, especially China, with satellite television being the best vehicle.<sup>13</sup> A Chinese official in charge of satellite television regulation maintained:

To permit 'outside border' satellite television programs to radiate and transmit freely into a state's territorial space equates to a sovereign state allowing foreign countries to establish at will television stations or other news organizations in its territory.<sup>14</sup>

The Chinese authorities, nonetheless, are aware that restrictive measures on reception can only be temporary and may soon be circumvented by technological advances. They maintain satellite television regulation would best be tackled on a global basis with the introduction of a "New World Information and Communication Order," or regional regulation comprising of the prior consent requirement, agreed program standards, the right of reply, and the establishment of organizations overseeing regulation of international satellite television.<sup>15</sup>

China expressed its wishes to work with Asian broadcasting organizations to counter infiltrations of Western culture and to promote Oriental culture.<sup>16</sup> Though the Asia-Pacific Broadcasting Union (ABU) endorsed "Guidelines for Transnational Satellite Broadcasters in the Asia-Pacific Region" in 1994, the document fell short of what China had wanted.<sup>17</sup> The guidelines treated satellite television in Asia as *fait accompli* and avoided the issue of prior

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13. China Radio and Television Yearbook 1997, *supra* n. 3, at 29, 41.

14. See Li Kehan, *Posture and Impact of World Satellite Television Development and Our Attitude*, 4(5) China Radio and Television Academic Journal 9 (1996) (in Chinese).

15. *Id.* at 10.

16. See China Radio and Television Yearbook 1994 at 42 (in Chinese).

17. 25(2) Asian Mass Communication Bulletin 8 (1995).

consent. Moreover, the western European model of “Television Without Frontiers” was regarded as impracticable “due to the political discrepancies and the cultural heterogeneity in the Asian region.”<sup>18</sup>

With no international or regional agreement on the prior consent requirement in sight, China cannot rely on the cooperation of transmitting countries and instead in the 1990s has tried to unilaterally create the *effect* of prior consent. China’s efforts to give effect to the prior consent requirement can roughly be divided into two periods: those before the mid-1990s and those since. In the first half of the 1990s, the Chinese authorities built from scratch a body of laws and policies dealing specifically with transfrontier satellite television regulation. In the latter half of the 1990s, emphases shifted to the effective implementation of these laws and regulations.

## **II. Giving Effect to the Prior Consent Requirement: Laws and Policies Before the mid-1990s**

To prevent transfrontier satellite television that was not approved by the Chinese authorities from reaching ordinary Chinese viewers, regulations were devised in the early 1990s not only restricting direct reception by satellite dishes, but also banning retransmission by terrestrial or cable television. It was hoped that such regulations could both supersede satellite transmission technology and prevent foreign satellite television operators from establishing a satellite-cable transmission mode of reception in China.<sup>19</sup>

### **A. Restricting Direct Reception of Satellite Television**

Direct reception of satellite television in China was somewhat different from that of developed countries. Satellite dishes were mainly installed by *danwei* (meaning entities or units), as opposed to individuals, on the pretext of business necessities. Such *danwei* can be companies, schools and universities, factories, social organizations, government departments, etc. Many *danwei* are of a very large scale, having their own compounds that contain not only offices but also staff quarters. Once dishes are installed, signals are often transmitted to the quarters as a kind of fringe benefit to staff. Employees and

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18. See Woo-Hyun Won, *The Changing Environments Surrounding Satellite Broadcasting in Asia Region and the Proper Responses to Them*, 30th General Assembly Asia-Pacific Broadcasting Union 107, 112 (1993).

19. China Radio and Television Yearbook 1994, *supra* n. 16, at 252.

their families may therefore watch satellite television for leisure and entertainment.

The Chinese government has employed satellite technology since 1985 to improve domestic television transmission. By 1987, the Chinese government was alarmed by the fact that more than 3000 earth stations had been established all over the country, with some rebroadcasting foreign television programs live.<sup>20</sup> The authorities began drafting regulations on direct reception in that year.<sup>21</sup>

1. *Joint Decree No. 1*

In the wake of the 1989 democratic movement in China and the fall of the Berlin Wall, the department then known as the Ministry of Radio, Film, and Television (MRFT),<sup>22</sup> the Ministry of Public Security, and the Ministry of State Security jointly promulgated in May 1990 China's first comprehensive piece of regulation on the reception of foreign satellite television. It was entitled, "Regulatory Measures on the Use of Satellite Ground Receiving Equipment for Receiving Television Programs Transmitted from Foreign Satellites" (Joint Decree No. 1).<sup>23</sup> This was one month after Asiasat 1, the first privately-owned satellite offering DBS services in Asia, was launched, and seventeen months before STAR came into operation.

Joint Decree No. 1 introduced a permit system restricting reception of television programs from foreign satellites to qualified *danwei*, compounds, and hotels with real business needs. Watching for entertainment purposes was ruled out. No recording was permitted as a general rule. Retransmission, whether via terrestrial/cable television or in video booths, was strictly forbidden.

Joint Decree No. 1 had several inherent weaknesses. It only regulated reception of programs, not ownership or use of satellite ground receiving equipment. All *danwei* were free to install such equipment, but only those intending to receive television programs from foreign satellites were required to apply for a permit. Neither the meaning of "satellite ground receiving equipment" nor that of

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20. See MRFT, *A Selection of Radio, Film and Television Working Documents - Part I* (1994) at 30 (in Chinese).

21. See MRFT, *A Collection of Administrative Regulations and Departmental Rules on Radio, Film and Television 1988-1993* (1995) at 533 (in Chinese).

22. For descriptions about MRFT, see *supra* n. 1.

23. Joint Decree No. 1 is a short form used by the author. It is officially called *Decree No. 1 of MRFT, Ministry of Public Security and Ministry of State Security* (reprinted in *Handbook on Regulation of Radio and Television Industry* (rev. ed.) (2001) at 360 (in Chinese)). See *infra* n. 39 for legal status of decrees made by ministries.

“foreign satellites” was defined.

The three ministries issued further rules four months later.<sup>24</sup> Permits had to be renewed annually. Qualified applicants had to submit production contracts or purchasing details of their satellite ground receiving equipment. Shops could only sell equipment manufactured by designated factories. Advertising of unauthorized products was banned and no importation was allowed without permission. Stricter rules were imposed on qualified hotels as well.

The above regulations failed to deal with specific problems arising from Asiasat 1, and the MRFT had to devise further rules in June 1991.<sup>25</sup> At the time, Asiasat 1 carried not only foreign television channels, but also those of China’s national broadcaster, China Central Television (CCTV), and two other provincial stations. To step up monitoring, *danwei* receiving these Chinese channels from Asiasat 1, according to the new rules, had to apply for permits under Joint Decree No. 1. It led to confusion as to whether the decree also applied to the reception of domestic television. Moreover, Asiasat 1, a joint venture with Chinese funding, arguably did not fall within the remit of Joint Decree No. 1 which supposedly only dealt with foreign satellites.<sup>26</sup> Further problems arose when STAR, also transmitting from Asiasat 1, was fully launched. Based in and uplinked from Hong Kong, STAR was arguably not a foreign television station.<sup>27</sup> Neither Joint Decree No. 1 nor related notices contained any provisions regulating the reception of STAR.

Indeed, none of these direct reception regulations had much impact on STAR. Its Chinese Channel, and MTV (Music Television) channel to a lesser extent, became very popular in China during the first two years of their launch. Satellite dishes sprang up all over the

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24. MRFT, *Notice on Certain Questions Regarding Full Implementation of “Regulatory Measures on The Use of Satellite Ground Equipment for Receiving Television Programmes Transmitted from Foreign Satellites,”* MRFT Doc. 650 (1990) (reprinted in *Handbook on Regulation of Radio and Television Industry* (1997) at 318 (in Chinese)). See *infra* n. 39 for legal status of such notices made by MRFT.

25. MRFT, *Notice on Strengthening the Regulation of Receiving Equipment of Asiasat 1*, MRFT Doc. No. 467 (1991) (reprinted in *China Radio and Television Yearbook 1992-93* at 292 (in Chinese)).

26. Asiasat 1 was owned at the time by Asia Satellite Telecommunications Co. Ltd., a joint venture between Hong Kong businessman Li Ka Shing’s Hutchison Telecommunications, Cable and Wireless of the United Kingdom, and the Chinese government’s investment company, the Chinese International Trust and Investment Corporation.

27. Hong Kong was still under British rule in 1990. Yet the PRC had always claimed its sovereignty over the colony and never considered it as foreign. See also *infra* nn. 44-45 and associated text, on the concept of “outside border.”

country to receive STAR.<sup>28</sup> Several reasons contributed to their rapid spread. First, before STAR was launched, transfrontier satellite television programs receivable in China were in foreign languages without any dubbing or subtitles. Broadcast in Mandarin, STAR's Chinese Channel became a real alternative to state-run television channels. Second, top Chinese leader Deng Xiaoping conducted a tour of southern China in February 1992, urging further economic reform and opening-up. Deng's initiative brought a relaxed atmosphere to all spheres, including the media industry. STAR took advantage of this and proliferated rapidly in China. Third, STAR was owned at the time by Li Ka Shing, a Hong Kong tycoon with very good relations with the Chinese authorities.

Surveys commissioned by STAR claimed that its viewers across the Asian region leapfrogged from 3.75 million households in 1992 to 11.3 million in 1993, and to 42.7 million in late 1993.<sup>29</sup> The survey in late 1993 also indicated China alone made up 70 percent of STAR's total viewers.<sup>30</sup> Even the head of CCTV admitted that many Chinese were watching STAR and CNN International (CNNI).<sup>31</sup>

## 2. *State Council Decree No. 129*

A tightening up of policy began in late 1993. The authorities justified tougher regulation by citing the rapid growth of satellite dishes and shops selling this equipment.<sup>32</sup> However, Western observers maintained that the threat posed by Rupert Murdoch was a major reason.<sup>33</sup> In July 1993, Murdoch's News Corporation bought 63.6 percent of STAR's shares.<sup>34</sup> About a month later, Murdoch made the famous remark in London:

Advances in the technology of telecommunications have proved an unambiguous threat to totalitarian regimes everywhere . . . satellite broadcasting makes it possible for information-hungry residents of

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28. Based on first-hand observation by the author in the southern Province of Guangdong and the southwestern city of Chengdu. See also *Peking Censors Dished by Satellite TV*, *The Independent* (London) 16 (Oct. 12, 1993), for the situation in Beijing.

29. Peter Lovelock and Susan Schoenfeld, *The Broadcast Media Markets In Asia*, in *Telecommunications in Asia - Policy, Planning and Development* 160-161 (John Ure ed. 1995).

30. *Id.*

31. Yang Weiguang, *Introduction*, in *On Television Dramas, Series on Television* (Chen Hanyuan ed. 1993) at 4 (in Chinese). Yang was the head of CCTV at the time.

32. China Radio and Television Yearbook 1994, *supra* n. 16, at 228.

33. See e.g. *Wrinkle, Wrangle Eastern Star*, *Financial Times* 11 (Mar. 5, 1994).

34. *News Corp. in \$525 M Deal for Hong Kong TV Group*, *Financial Times* 1 (Jul. 27, 1993).

many closed societies to bypass state-controlled television channels.<sup>35</sup>

The then MRFT minister noted that new regulations were urgently needed to control the reception of STAR, stressing that Americans had a hand in the running of the station.<sup>36</sup> However, the Chinese authorities had more than Murdoch in mind. China was by then within the reach of over ten broadcasting satellites, and senior MRFT officials regarded this as dangerous. Riot incitement, and cultural and ideological infiltration, were highlighted as possible adverse results of foreign satellite television.<sup>37</sup>

The Chinese authorities had for some time wanted to amend Joint Decree No. 1. To them, the decree did not provide adequate regulation of private reception of foreign satellite television by individuals or families, or of the production, sale, and importation of satellite dishes.<sup>38</sup> In October 1993, the State Council promulgated the "Provisions Governing Satellite Television Broadcasting Ground Receiving Equipment" (State Council Decree No. 129).<sup>39</sup> A set of further implementation rules was announced in February 1994.<sup>40</sup>

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35. A speech made by Murdoch when launching BSkyB's multichannel services; see *The Times* (London) 5 (Sept 2, 1993).

36. CCTV, *CCTV Anniversary Supplement: 1958-1993*, Television Research, at 25 (1993) (in Chinese). Television Research is an in-house publication of CCTV.

37. China Radio and Television Yearbook 1994, *supra* n. 16, at 23.

38. Law Yearbook of China 1994 at 79 (in Chinese).

39. It was not until the 1980s that China began to put more emphasis on law making. China's broadcasting laws are still very primitive. They suffer from lack of clarity, consistency and transparency. These enactments can be classified according to their ranking within the legal hierarchy. Generally speaking, there are four tiers. The National People's Congress (NPC), China's legislature, has yet to enact a Broadcasting Law, which will be the law in the highest tier and will serve as the basic law for all other broadcasting laws and regulations. The second tier consists of administrative regulations on broadcasting enacted by the State Council. They are considered as laws, but of a lower ranking than laws enacted by the NPC. State Council Decree No. 129 was the first piece of legislation promulgated by the State Council in this area. The third tier consists of departmental rules made by SARFT (formerly by MRFT) and approved by the State Council. Departmental rules made by SARFT form the fourth tier. Most of the current legal enactments on broadcasting come from the third and fourth tiers. Moreover, SARFT issues from time to time notices of all kinds on broadcasting regulation. The legal effect of these documents is far from clear. Yet, since all broadcasting media in China are state-controlled, notices issued by SARFT serve as direct instructions to broadcasters and, if implemented fully and vigorously, their effects are often no less than laws.

40. MRFT, *Implementation Rules for "Provisions Governing Satellite Television Broadcasting Ground Receiving Equipment,"* MRFT Decree No. 11 (reprinted in *Handbook on Regulation of Radio and Television Industry* (rev. ed.) (2001) at 364 (in Chinese)). MRFT Decrees are in the third tier of China's broadcasting legal enactments, see also *supra* n. 39.

These regulations created a much more rigid regime for ownership and use of satellite dishes in China.

To begin with, the permit system was no longer confined to reception of satellite television. Different permits were required for production, import, sale, installation and use of satellite television ground receiving equipment.<sup>41</sup> Moreover it was specified that private individuals were not allowed to install, use, sell or import such receiving equipment.<sup>42</sup> But provision was made for individuals with real needs, such as those unable to receive television signals by other means. A comprehensive definition of ground receiving equipment for satellite television broadcasting was also given.<sup>43</sup>

Another major change was that the reception of all satellite television programs, whether originating from “within border” (*jingnei*) or “outside border” (*jingwai*), would be subject to regulation.<sup>44</sup> No definition was given to “within border” and “outside border” television programs, yet it is apparent that “outside border” television programs refer to programs from foreign countries, or from Taiwan, Hong Kong and Macau.<sup>45</sup> China has always claimed sovereignty over the latter three places but had so far regarded them as under separate jurisdictions.<sup>46</sup> The replacement of the general terms of “domestic” and “foreign” with the specific terms “within border” and “outside border” reflected both the complexities in transfrontier television regulation and China’s sophistication in law drafting.

Under State Council Decree No. 129 and its implementation

41. State Council Decree No. 129, Art. 3, and MRFT Decree No. 11, Chapters 2-4.

42. State Council Decree No. 129, Art. 9.

43. *Id.* Art. 2.

44. MRFT Decree No. 11, Art. 5. “Outside border” and “inside border” are translations by the author of this article. *Pinyin* of these Chinese words are put in parentheses for reference.

45. Neither the State Council Decree No. 129 nor the MRFT Decree No. 11 defined the terms “outside border” and “inside border.” Yet the MRFT Decree No. 10, promulgated on the same day as Decree No. 11 and entitled “Provisions Governing the Import and Broadcast of ‘Outside Border’ Television Programs,” contains a definition of “outside border” programs. Art. 3 of the decree defined “outside border” programs as programs for broadcast purpose by television stations coming from foreign countries, Taiwan, Hong Kong and Macau. Decree No. 10 is reprinted in Handbook on Regulation of Radio and Television Industry (rev. ed.) (2001), at 238 (in Chinese).

46. There are border controls on the flow of goods and personnel between China and the three places, despite the return of Hong Kong and Macau to Chinese sovereignty. This is largely because of the CCP’s promise to keep the capitalist system of the two places intact for fifty years. An MRFT official told the author of this article in 1996 that Hong Kong and Macau would still be considered as “outside border” upon their return to China. Programs of STAR, coming from Hong Kong, belong to the “outside border” category.

rules, any *danwei* may apply for installation of satellite ground receiving equipment to receive “within border” television programs.<sup>47</sup> But the *danwei* eligible for receiving “outside border” satellite television programs are far more restricted than before.<sup>48</sup> They have to be *danwei* of higher ranking and bigger scale with real business needs. Also allowed are qualified hotels (Grade 2 of national level, or three star or above receiving foreign visitors), and compounds designated as offices or residences for foreigners and people from Hong Kong, Macau and Taiwan. Reception and transmission of “reactionary” and “pornographic” satellite television programs are forbidden.<sup>49</sup> Display of “outside border” satellite television programs is not allowed in public places such as bus terminals, piers, airports, shops, cinemas and dance halls.<sup>50</sup> All broadcasting and relay stations, e.g., terrestrial and cable television stations, and MATVs (master antenna television), are prohibited from retransmitting “outside border” satellite television programs.<sup>51</sup>

### 3. *Effectiveness of the Measures*

Decree No. 129 and its implementation rules, taken together, have allowed only expatriates, foreign visitors, and very few Chinese to watch transfrontier satellite television. Average Chinese viewers are barred from doing so and can only watch domestic television. The regulations were seen as high profile gestures made by the Chinese authorities to tighten control in this area: much publicity was received both at home and abroad. For a while, these new regulations succeeded in putting a halt to the rapid growth in the number of satellite dishes.<sup>52</sup> Shops on the high street selling satellite dishes without permits virtually disappeared.<sup>53</sup> Yet illegal sale of satellite dishes has not been stamped out completely.<sup>54</sup> The number of illegal

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47. MRFT Decree No. 11, Art. 4.

48. *Id.*

49. MRFT Decree No. 11, Art. 11.

50. *Id.*

51. *Id.*

52. The actual number of satellite dishes in China is far from clear. When Decree No. 129 was promulgated, the official figure was 40,000. Teresa Poole, *Peking censors dished by satellite TV*, *The Independent* (London) 16 (Oct. 12, 1993). Unofficial estimates at the time went as high as 500,000. See Patrick E. Tyler, *Beijing Journal; CNN and MTV Hanging by a 'Heavenly Thread'*, *N.Y. Times* A4 (Nov. 22, 1993). While the MRFT certainly grossly understated the number of illegal dishes, any unofficial estimation has to be regarded with caution, given the country's vast size and huge regional variations.

53. *Murdoch's Star has Trouble Rising in the East*, *The Independent* (London) 14 (Mar. 6, 1994).

54. Susan Schoenfeld, *Cable Television: A Back Door to China's Telecommunication*

satellite dishes was reported to have multiplied in 1996 in Shanghai because of poor law enforcement and high profits.<sup>55</sup> Meanwhile, a clamp-down on illegal satellite dishes has become a kind of annual operation conducted by local SARFT branches. The last massive campaign nationwide was conducted in the spring of 1999, in anticipation of the 10th anniversary of the Tiananmen Massacre and the PRC's 50th anniversary. The effectiveness of these operations was doubtful. According to official figures, the early phase of the 1999 action led to the closing down of some 60 shops and factories and the demolition of less than 2,000 satellite dishes.<sup>56</sup> The authorities estimated there were some 17,000 illegal satellite dishes at the time.<sup>57</sup>

It is harder for the authorities to drive out illegal direct reception for several reasons. First, any *danwei* may apply to receive "within border" programs. Second, the ban on private ownership of satellite dishes is not absolute. Because 70 percent of China is mountainous, satellites have become the major mode of television reception in rural areas. Once installed, it is difficult for SARFT officials to ascertain which channels such equipment is receiving. Moreover, many *danwei* have powerful backing from other ministries, or their compounds are just too big for SARFT officials to conduct successful raids. It is an open secret that most *danwei* with satellite dishes legally installed for reception of "within border" programs will also illegally receive STAR's Chinese Channel (replaced by Phoenix Chinese channel, which is free-to-air, since March 1996).<sup>58</sup> Taiwanese satellite television programs have also become increasingly popular in eastern China in recent years.<sup>59</sup>

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*Market*, Intermedia 19 (June/July 1995).

55. *Domestic News: In brief*, China Economic Review 4 (Sep. 1996). This article reported that dish installation services were available in Shanghai for about U.S. \$360, and that the number of users there was estimated to be nearly 10,000, 80 percent of them individuals, with about 100 new viewers coming on stream every month. The author of this article went to Shanghai in October that year and found the situation largely as described.

56. SARFT, *Circular on Putting into Order "Outside Border" Satellite Television Ground Receiving Equipment*, SAFRT Doc. 422 (1999) (reprinted in Handbook on Regulation of Radio and Television Industry (rev. ed.) (2001) at 373 (in Chinese)).

57. SARFT, *Notice on Further Strengthening the Work on Regulating "Outside Border" Satellite Television Ground Receiving Equipment*, SAFRT Doc. 455 (1999) (reprinted in Handbook on Regulation of Radio and Television Industry (rev. ed.) (2001) at 377 (in Chinese)).

58. In a 1996 trip, the author found that a pub immediately outside Shanghai's Fudan University was receiving Phoenix Chinese Channel. While in Beijing, the author found that staff quarters of the People's Daily was receiving STAR's Movie Channel.

59. During a trip to Shanghai in the summer of 2000, the author observed illegal reception of Taiwan satellite television, despite such illegal reception being a major aim of the 1999 clampdown. Reception of Taiwanese television has become even more popular

## B. Ban on Cable Retransmission

As mentioned earlier, both Joint Decree No. 1 and the implementation rules of State Council Decree No. 129 carried a retransmission ban.<sup>60</sup> Terrestrial television stations were subject to further regulations governing the import of foreign programs, which allowed no retransmission of foreign satellite programs.<sup>61</sup> The regulation on cable television also forbade retransmission of “outside border” television programs transmitted by satellites.<sup>62</sup>

Throughout the 1990s, efforts to prevent television stations, especially cable stations, from broadcasting foreign satellite television programs were a major preoccupation for MRFT and its successor, SARFT. Television stations in China face a chronic problem of filling their airtime due to low production capacity.<sup>63</sup> The problem was aggravated by a rapid growth in number of stations and channels in the 1980s when the central government, in a bid to improve television penetration, adopted a policy of encouraging local governments to set up stations using local resources.<sup>64</sup>

Comparatively speaking, the retransmission ban on terrestrial television is more effective because these stations have always been

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since then.

60. MRFT Decree No. 11, Art. 11, *supra* n. 49.

61. *Provisional Provisions Governing the Import of Overseas Television Programs*, MRFT Doc. 817 (1990). The enactment prohibited overseas television programs include those from foreign countries and Hong Kong, Macau and Taiwan received through a satellite ground receiving equipment. Meanwhile, Art. 10 of the *Provisions Governing the Import and Broadcast of “Outside Border” Television Programs*, MRFT Decree No. 10, lists the types of programs prohibited, amongst which are “television programs from foreign countries, Taiwan, Hong Kong and Macau received directly through satellite ground receiving equipment.”

62. *Provisions Governing Cable Television*, MRFT Decree No. 12, promulgated in early 1994 (reprinted in Handbook on Regulation of Radio and Television Industry (rev. ed.) (2001) at 167 (in Chinese)); *Provisional Provisions Governing Television Programs of Cable Television Stations and Centres*, MRFT Doc. 250 (1992) (reprinted in China Radio and Television Yearbook 1992-93 at 298 (similar provision) (in Chinese)).

63. CCTV, the national broadcaster, in the early 1990s could only produce one third of the programs aired. The production ratio dropped to 1:6 for stations at the provincial level and 1:9 at lower levels. Liu Jiliang, *On the Current Situation and Duties of Television Propaganda*, 6 Television Research 6 (1993) (in Chinese). Liu was the MRFT minister in the mid-1990s.

64. There was a total of only 32 terrestrial television stations in China in 1978. The Chinese authorities then only allowed stations to be set up only at the central government level, provincial level and in some major cities. The Chinese authorities called it a broadcasting policy of 2-tier operation. In the early 1980s, local stations were allowed to be set up at city and county levels. This meant a four-tier operation, a major change of broadcasting policy. The number of terrestrial television stations increased to 422 in 1988. There were around 1,000 terrestrial television stations by the mid-1990s.

under tight control. Moreover, it is impossible for terrestrial channels to retransmit the entire content of “outside border” satellite television channels, since this would mean replacing their own channels. Problems lie mainly with cable stations. The growth of cable television in China has surpassed that of terrestrial television both in number of stations and channels.<sup>65</sup> By late 1995, there were some 1,285 MRFT-approved cable television stations.<sup>66</sup> Unofficial estimates of illegal or yet-to-be approved stations ranged from 2,000 to 10,000.<sup>67</sup> While terrestrial television stations in China then normally only broadcast two channels, cable television stations at the time broadcast eight to twenty channels. Before STAR launched its Chinese Mandarin Channel in October 1991, most cable television stations resorted to pirated video tapes, the majority of which were smuggled into China, to fill some 90 percent of their programming.<sup>68</sup> It became a common practice in 1992 for cable television stations all over China to retransmit the whole of STAR’s Chinese Mandarin Channel and, to a lesser extent, MTV and STAR Sports.<sup>69</sup>

When Joint Decree No. 1 first imposed a retransmission ban in 1990, most cable stations simply ignored it. The State Council Decree No. 129 was a watershed. The MRFT reported in 1994 and 1995 that most cable television stations had replaced retransmission of STAR with CCTV-4.<sup>70</sup> This was closely related to the ministry’s efforts in

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65. Cable television has developed rapidly in China since the mid-1980s. In the 1990s, cable television became the main transmission mode in major cities and urban areas. By 2001, SARFT figures showed that cable subscribers amounted to 90 million. See *China Tops 90 Million Cable Household Mark*, China Online (Mar. 27, 2001). The latest figures published by China’s biggest media research company, CVSC-TNS, in September 2003 indicate that China has 1.15 million cable TV households. CVSC-TNS <<http://www.cvsc-tns.com/>> (accessed Oct. 1, 2003).

66. Li Kehan, *On the Current Situation and Future Development of Satellite and Cable Television*, a speech given at the China Cable and Satellite Television Summit (1996). Li was an MRFT official then in charge of satellite and cable television regulation.

67. Chang Ximing, *Television Industry, Competition in the Air Getting Keener*, in *Current Situations and Future Trends of China’s Development 1996-1997* (Weng Jiming et al eds., 1997) at 309 (in Chinese); see also Rowan Simons, *Chinese Cable TV*, *Television Asia Supplement* 11 (Mar. 1996).

68. Sun Zhonrui, *How to Smoothen the Regulatory Mechanism of Television*, 5 *Radio and Television Decision References* 27 (1992) (in Chinese). Sun was then a MRFT official.

69. Liu Yu-li, *The Growth of Cable Television in China - Tensions between Local and Central Government*, 18(3) *Telecommunications Policy* 224 (1994). Liu’s paper cited stations in Foshan of Guangdong Province, Chengdu of Sichuan Province and Jinzhou of Liaoning Province retransmitting STAR’s Chinese Mandarin Channel. The author of this article traveled widely in the Pearl River Delta in 1992 and 1993 and found many local cable television stations were retransmitting the three STAR channels mentioned.

70. *China Radio and Television Yearbook 1995* at 10 and 38 (in Chinese). Interviews and observations by the author of this article in late 1996 confirmed that the majority of

tidying up the television industry, particularly cable television.

Nonetheless, even the ministry admits that illegal cable retransmission of STAR has not been stamped out completely. The ministry in Beijing makes law and policies, but relies on its local branches for implementation. Local MRFT officials, involved in the day-to-day operation of stations, attach more importance to profits than to strict implementation of regulations. Indeed, many local cable stations are neither approved by the ministry nor under its control. This reflects not only the inherent conflicts between central and local government, but also the challenges to the ministry's broadcasting monopoly from other departments.<sup>71</sup> Furthermore, big *danwei* have a tradition of operating their own cable systems. Another problem comes from numerous MATV systems that exist all over China. The ministry simply does not have the necessary resources to monitor all of these cable and MATV systems.

Indeed, major regulations in place by the mid-1990s restricting both direct reception and retransmission of transfrontier satellite television have been widely disregarded. Joseph Chan categorized the situation in the early 1990s as "suppressive openness."<sup>72</sup> Thus, the Chinese government shared with those governments practicing "virtual suppression" the intent to fend off foreign television, but lacked the necessary effective control. Chan projected optimistically that China would move from a state of "suppressive openness" into one of "illegal openness." Under "illegal openness," reception and retransmission of foreign television would still be against the law but the government would give up attempting to suppress it when the audience size was beyond effective policing. This was the situation in Taiwan then, though the evolutionary path would be interrupted by occasional crackdowns. Lee and Wang also observed that the efforts of many Asian nations to ban the reception of satellite television had

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cable television stations in coastal provinces and major cities have stopped retransmitting STAR.

71. MRFT, *A Report on Radio and Television Inspection*, China Radio and Television Yearbook 1996 at 121 (in Chinese). Since all broadcasting stations in China are state-owned and state-controlled, most SARFT/MRFT officials have the dual role of regulator and operator. Nonetheless, local SARFT/MRFT officials, who are from local government, would often attach more importance to their role as operator than that of regulator since their stations are funded locally. This is especially so when regulatory policies devised by the central government are in conflict with local interests.

72. Chan categorized the initial responses of Asian governments towards STAR into four different types: (1) virtual suppression (as in Malaysia and Singapore); (2) regulated openness (as in Hong Kong and the Philippines); (3) illegal openness (as in India and Taiwan); and (4) suppressive openness (as in China). Joseph Chan, *National Responses and Accessibility to STAR TV in Asia*, 44(3) *Journal Of Communication* 112 (1994).

been futile and many had been forced to relax their restrictions.<sup>73</sup> They noted that the proliferation of satellite dishes in China might have come to a point where any control had become ineffective. Lee and Wang predicted that the trend towards further deregulation and greater openness was without doubt among Asian nations.

### **III. Strengthening Control Over Local Television: Laws and Policies Since the Mid-1990s**

Such optimistic projections have yet to materialize in China: the majority of China's television audience at the beginning of the 21st century still have access to domestic television only. Indeed, press reports and academic researchers have portrayed a different scenario since the mid-1990s. Leonard and Harrison, in their survey of satellite broadcasting in the Asian market, remarked that Asian governments had proven to be adept and resilient in dealing with transfrontier satellite television. They also observed that "national sovereignty remains essentially the victor in any battle between the nation state and the global village," and "the satellite service market remains a market developing within boundaries set by state controls."<sup>74</sup> In his study of China's strategies to regulate satellite broadcasting, Hao concluded that a national government may not be helpless in face of foreign satellite broadcasting.<sup>75</sup> He maintained that through careful planning, a national government may regulate satellite broadcasters as effectively as domestic broadcasters.

As early as 1996, Atkins highlighted a key development among Asian states in forming links with accommodating media corporations.<sup>76</sup> He maintained that commercial access for television networks was being granted on the basis of political compliance, and entertainment and business news predominated to the detriment of political news and discourse. Clarke also noted that in the latter part of the 1990s, international satellite television broadcasters in their Asian ventures had become allies of national governments and local broadcasters. International satellite television broadcasters were no

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73. Paul Lee and Georgette Wang, *Satellite TV in Asia*, 19(2) Telecommunications Policy 140 (1995).

74. Peter Leonard and Kate Harrison, *Satellite Broadcasting: The Asian Market*, a paper presented to the International Bar Association Conference held in New Delhi, India, on Nov. 2-7, 1997.

75. Hao Xiaoming, *Party Dominance vs. Cultural Imperialism: China's Strategies to Regulate Satellite Broadcasting*, 5 Communication Law and Policy 155 (2000).

76. William Atkins, *Satellite TV Transforming Broadcasting*, Nieman Reports 55, Harvard University (1996).

longer regarded as threats, but such changes occurred at the expense of critical news coverage of the countries concerned.<sup>77</sup>

Though illicit reception and retransmission of transfrontier satellite television has continued to grow in China over the last few years, this article argues that the Chinese authorities at the turn of the new century have strengthened their position in relation to enforcement of the prior consent requirement. This was achieved by strict implementation of the regulations devised in the first half of the 1990s. A two-pronged approach of tightening control on domestic television and working towards the goal of “one single satellite in the sky, one single network on the ground” was adopted.

In 1997, the State Council issued “Regulations Governing the Administration of Radio and Television” (State Council Decree No. 228), which was by far the most comprehensive broadcasting legislation since 1949.<sup>78</sup> It reaffirmed traditional regulatory measures. With the exception of educational television, no government departments other than the MRFT could establish or operate television stations.<sup>79</sup> No private ownership of stations was allowed.<sup>80</sup> Joint ventures with “outside border” individuals or organizations were prohibited.<sup>81</sup> Leasing or transfer of time slots was forbidden.<sup>82</sup>

More rules have been devised since the mid-1990s to strengthen central government control on broadcasting and discourage local development. Annual review and inspection of television stations was introduced.<sup>83</sup> No new stations and channels are allowed.<sup>84</sup> Only stations at the national, provincial, and city level may continue to operate. Television stations at county level, whether terrestrial or

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77. Judith Clarke, *International Satellite Television in Southeast and East Asia 1990-1999: From Threat to Authority to Ally of Governments and Local Broadcasting Industries*, 1(2) *Revista del CEID* 68 (1999).

78. The State Council Decree No. 228 was the second piece of legislation on broadcasting enacted by the State Council. The Chinese government began to draft the Radio and Television Law, a basic law for broadcasting, in 1987, yet the drafting work has been much delayed. The Chinese authorities eventually decided in 1995 that the time was not ripe to enact such a basic law. The State Council instead enacted the decree in 1997. The full text of the decree is reprinted in *Handbook on Regulation of Radio and Television Industry* (rev. ed., 2001) at 105 (in Chinese).

79. State Council Decree No. 228, Art. 11 (China).

80. *Id.* Art. 10.

81. *Id.*

82. State Council Decree No. 228, Art. 13.

83. *Provisions Governing Annual Inspection of Radio and Television Stations*, MRFT Doc. (1996) 436 (reprinted in *Handbook on Regulation of Radio and Television Industry* (rev. ed., 2001) at 184 (in Chinese)).

84. See *China Radio and Television Yearbook 1996*, at 8 (in Chinese).

cable, have been phased out by combining them with radio stations.<sup>85</sup> These revamped local stations are largely confined to retransmission of programs from stations of higher levels. By curbing their broadcasting function, the ministry hopes that illegal practices at the local level, including retransmission of transfrontier satellite television channels, can be stopped. As a result, by early 2001, the total number of television stations nationwide, including terrestrial, cable, and educational, had been greatly reduced to 651.<sup>86</sup>

The ministry has also tightened control of cable television. Cable systems at every locality, large or small, including those operated by *danwei*, must be integrated into a single network and put under the unified control of local MRFT branches.<sup>87</sup> These cable networks are to be further integrated into a nationwide network for efficient control by the ministry. The most recent move has been the forced merger of cable, education and terrestrial television stations at provincial and city levels.<sup>88</sup> Every province and city in China, from July 2001 onwards may have one television station at most, with former cable television channels grouped under it. The authorities hope that through the integration of cable networks and the phasing out of cable stations, management problems posed by cable television can be eliminated. By August 2001, the total number of television stations in China had been further reduced to 429.<sup>89</sup>

#### **IV. Working Towards “A Single Satellite in the Sky, A Single Network on the Ground”**

The CCP has always insisted on media monopoly by the Party. To guard this monopoly against the invasion of transfrontier satellite television, China borrowed much from the experience of Singapore

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85. See *Opinions on Merging of Broadcasting Organizations at County Level*, MRFT Doc. 458 (1997) (reprinted in *Handbook on Regulation of Radio and Television Industry* (rev. ed.) (2001) at 188 (in Chinese)). This meant that the broadcasting policy of four-tier operation came to an end.

86. *An Outline of the Development Plan of Radio, Film and Television Business: 2001-2010*, SARFT Doc. 46 (2001) (reprinted in *China Radio and Television Yearbook 2001* at 25-29 (in Chinese)). The document did not give a breakdown for the 2001 figures.

87. *China Radio and Television Yearbook 1996*, *supra* n. 84, at 9.

88. *Approval of Opinions Jointly Prepared by the Ministry of Information Industry and State Administration of Radio, Film and Television on Strengthening the Management of Cable Television Network Construction*, State Council Document No. 82 (1999) (reprinted in *Handbook on Regulation of Radio and Television Industry* (rev. ed. 2001) at 130 (in Chinese)).

89. See SARFT <<http://www.sarft.gov.cn/page/sygg/gk/htm/>> (accessed Jun. 22, 2002).

and Malaysia in giving effect to the prior consent requirement.<sup>90</sup> In Singapore, the initial ban on direct reception of foreign satellite television was later supplemented by retransmission of approved channels with program-by-program censorship by Cablevision, a government-controlled cable network.<sup>91</sup> The Chinese authorities have shown much interest in the Singaporean practice and hoped that a nationwide unified cable network, i.e. “a single network on the ground,” can perform a gatekeeping function and filter out unwanted transfrontier satellite television programs.<sup>92</sup>

#### **A. Building a Strictly Domestic Satellite-Cable Network**

The Chinese model of controlled retransmission of transfrontier satellite television has gone beyond that of Singapore, which allows cable retransmission of approved foreign satellite channels in entirety. Cable subscribers in Singapore can watch CNNI and HBO regularly, so long these channels do not offend the government. In China, the CCP has established a strictly domestic satellite-cable network in the past few years. Until policy changes made in October 2001, all television stations in China could only retransmit domestic satellite television, comprised of encrypted CCTV channels and provincial satellite channels.<sup>93</sup> CCTV expanded its channels from four to eight in 1996 in an effort to “struggle against Western satellite television.”<sup>94</sup> It was hoped that the new channels, devoted to sports, movies, children, science and technology, and the military, would help local stations to fill their airtime. The provinces are another source of domestic satellite television. By the end of 1999, all provinces and four major cities, Beijing, Shanghai, Tianjin and Zhongqing, launched their own satellite television channels. Ordinary cable television subscribers in China only have access to local channels, most of the CCTV channels, and a selection of provincial satellite television channels.

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90. China Radio and Television Yearbook 1994, *supra* n. 16, at 228.

91. See Eddie Kuo and Peng Hwa Ang, *Singapore*, in Handbook of the Media in Asia (Shelton A. Gunaratne ed. 2000) and William Atkins, *The Politics of Southeast Asia's New Media* (2002), for details of transfrontier satellite television regulation in Singapore.

92. See Ai Zhisheng, *A Speech Given at the National Symposium on Radio, Film and Television Propaganda Work* (reprinted in China Radio and Television Yearbook 1994 at 253-257). Ai was the MRFT minister at the time.

93. For recent policy changes, see part VII, *infra*.

94. See Yang Weiguang, *Certain Questions of Encrypted Satellite Television*. 4 Television Research 4 (1996) (Yang was the head of CCTV at the time. The total number of CCTV channels has since increased to thirteen, the latest being a 24-hour news channel launched in July 2003).

Transfrontier satellite television, as a rule, reaches most Chinese viewers as programs offered by domestic television channels, mostly edited and repackaged, in very limited quantities. Since 1995, television stations at specified levels have been allowed to apply to downlink programs from “outside border” satellite television channels in the sports, travel, science, cartoon, children, education and music genres.<sup>95</sup> Still forbidden are news, current affairs, drama and entertainment. Moreover, programs must be recorded for editing and censorship purposes before broadcasting to Chinese viewers. No cable retransmission of “outside border” satellite television channels in their entirety is allowed. Another MRFT notice issued in 1996 also specified that import of “outside border” satellite television programs is limited to approved satellite channels and program topics.<sup>96</sup> The actual number of programs downlinked has been small because stations have to follow strict conditions in their import of “outside border” television programs, via satellites or otherwise.<sup>97</sup> A few “outside border” satellite television channels have made progress since the mid-1990s in getting Chinese television stations to fill individual program slots by satellite feeds. The most successful of these channels has been ESPN.<sup>98</sup> Indeed, ESPN’s live sports events are the only “outside border” television programs not subject to further editing before being broadcast on Chinese television. Two other American channels, MTV and Discovery, had made deals with major cable television stations to air some of their programs.<sup>99</sup> NBC

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95. MRFT, *Notice on Issues Relating to Regulation of “Outside Border” Satellite Television Programme Reception*, MRFT Doc. 757 (1995) (reprinted in *Handbook on Regulation of Radio and Television Industry* (rev. ed. 2001) at 411 (in Chinese)).

96. MRFT, *Notice on Reviewing and Rectifying Some Television Stations and Cable Television Stations’ Signing of Contracts without Authorization with Foreign Merchandisers in Importing “Outside Border” Satellite Television Programs*, MRFT Doc. 148 (1996) (reprinted in *Handbook on Regulation of Radio and Television Industry* (rev. ed. 2001) at 415 (in Chinese)).

97. MRFT, *Regulations on Import and Broadcast of “Outside Border” Television Programs*, MRFT Decree No. 10 (reprinted in *Handbook on Regulation of Radio and Television Industry* (rev. ed. 2001) at 238 (in Chinese)).

98. In early 2001, ESPN stated that some 30 cable television stations in China with an audience of about 20 million broadcast the channel’s live games, see Mark O’Neill, *CCTV Queries Rights of ESPN to Show Soccer*, *South China Morning Post* (Hong Kong), *Business Post*, at 4 (Mar. 27, 2001).

99. According to China Online (Mar. 30, 2001), MTV is seen in 54 million households via 37 cable systems. Yet SARFT’s director Xu Guangchun in an interview had scoffed at Viacom’s own estimates of 40 million mainland audience for its MTV channel as untrue. See *China TV Takes on Western Flavour*, *Financial Times* (Survey-China) 4 (Oct. 8, 2001). Another report from China Online (Dec. 11, 2000) says that Discovery provides two hours of programming to 23 Chinese cable TV stations every day.

Asia and CNBC in 1996 made a deal with Guangzhou Cable Television to air most of their programs, dubbed and edited, but the venture only lasted for about a year.<sup>100</sup>

### **B. Placing All Television Channels onto a Single Satellite**

To the Chinese authorities, a seamless control of transfrontier satellite television can only be possible when “a single network on the ground” is supplemented by “a single satellite in the sky.” The ministry repeatedly stressed the need to place all domestic satellite television channels onto one or two satellites for better regulation.<sup>101</sup> This is especially so given the rapid development of domestic satellite television in recent years. Indeed, Beijing initially banned provinces from launching their own satellite television channels fearing the spread of unapproved news items and programs.<sup>102</sup> The restriction was eventually lifted because of pressure exerted by provinces on the one hand and the central government’s urgent desire to improve television penetration of remote areas on the other. The ruling CCP is particularly worried about the influence of transfrontier broadcasting in Tibet, Xinjiang and inner Mongolia, fearing such broadcasting would intensify separatist activities among national minorities, while considering satellite television the most efficient vehicle for delivering the party’s messages to these areas.<sup>103</sup> In 1999, the SARFT began to deploy direct-to-home (DTH) broadcasting, on a trial basis, in implementing its project of “Bringing Television to Every Village.”<sup>104</sup> All domestic satellite television channels were required to lease transponders from a domestic satellite, Sinosat 1, and were offered to the public as CBTv, a non-commercial DTH package.<sup>105</sup> Meanwhile, the ministry has provided small subsidies to some remote villages to install satellite dishes designed to receive

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100. Based on interviews with NBC Asia staff in 1996 and 1997. *See also Yin, Yang and You: Tapping into the Asian Entertainment Market is Not Simple*, Forbes (Mar. 10, 1997).

101. China Radio and Television Yearbook 1994, *supra* n. 16, at 34; China Radio and Television Yearbook 1995, *supra* n. 70, at 25; China Radio and Television Yearbook 1996, *supra* n. 84, at 8.

102. China Radio and Television Yearbook 1995, *supra* n. 70, at 25; China Radio and Television Yearbook 1996, *supra* n. 84, at 321.

103. China Radio and Television Yearbook 1994, *supra* n. 16, at 254; China Radio and Television Yearbook 2000 at 11; *2001 Radio, Film and Television Work Emphases*, SARFT Doc. 47 (2001) (reprinted in China Radio and Television Yearbook 2001 at 22-24 (in Chinese)).

104. *China - Satellite TV Launch Delayed*, China Online (Apr. 24, 2002).

105. Details of Sinosat 1, launched in mid-1998, can be located at <<http://www.sinosatcom.com>> (accessed Aug. 2003).

only CBTv channels.

A senior SARFT official disclosed in mid-2001 that the ministry would soon require approved “outside border” satellite television channels to lease transponders from a China-owned satellite too.<sup>106</sup> In recent years, the Chinese authorities have annually approved which “outside border” satellite television channels may be directly received by hotels, *danwei* and compounds with permits.<sup>107</sup> The approval scheme, though it has little impact on free-to-air channels, exercises direct control over “outside border” encrypted channels because only decoders of the approved channels are allowed to be imported and sold. The SARFT has been very cautious about two types of incoming satellite television: news channels, and those from Taiwan. Though channels from Taiwan have applied since 1997, the ministry has so far not approved any of them. For several years in a row, CNN was the only news channel approved. The BBC was included for the first time in 2001. This was hailed by the BBC as “a major thaw” in its relationship with China.<sup>108</sup> In 2001, there were five free-to-air and 22 encrypted channels approved, mostly entertainment and sports channels like HBO, Cinemax, MTV and ESPN.<sup>109</sup>

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106. Mr. Du Baichuan, deputy chief engineer at SARFT, disclosed this intention at a conference on digitization of broadcasting in China held in Hong Kong in mid-2001. The author of this article attended the conference. See also *China Mulls Control for Satellite TV – Plan to Redistribute Foreign Channels Could Hit International Broadcasters*, *Asian Wall Street Journal* 1 (Aug. 1, 2001).

107. The Chinese authorities have not publicized any document revealing when this approval system was instituted. Sources in the industry said this approval system dated back to 1997.

108. John Gittings, *Deal Clinched as BBC and China Make Up*, *The Guardian* 18 (Jan. 10, 2001); but see *infra* nn. 160-161 (describing China’s recent suspension of BBC broadcasts).

109. The five free-to-air channels approved in 2001 were Phoenix Chinese Channel, Star’s Channel V and Sports, and NHK 1 and 2. *Notice on Questions concerning the Strengthening in Approval and Management of “Outside Border” Satellite Television Programs*, SARFT Doc. 151 (2001) (available at SARFT’s website). The 22 encrypted channels in 2001 were CNNI, HBO Asia, Cinemax Asia, CNBC, ESPN Asia, MTV Asia, National Geographic Asia, Star Movie, Sony Entertainment, Discovery Asia, NHK Culture and Entertainment Channel, Hallmark Entertainment Channel, Jet TV, Phoenix Movie, TVB8, TVB Galaxy, Network of the World (NOW), Macau Satellite TV Travel Channel, BBC World, Sun Television, Macau Five Stars Satellite TV and Macau Asia Satellite TV. See “*Outside Border*” *Satellite Television Channels Approved for Application of Reception Permit in 2001 by Hotels of Three Stars or National Grade 2 or above Receiving Foreigners*, SARFT Docs. 653 (2000) and 751 (2000) (available at SARFT’s website, accessed Jun. 23, 2002) for the above list. TV5 was added to the list in March 2002. See SARFT website <<http://www.sarft.gov.cn>> (accessed Jun. 23, 2002) (in Chinese). For the year 2003, the number of “outside border” satellite television channels approved for direct reception by hotels, *danwei* and compounds with permits have increased to 30. They are: CNNI, HBO, Cinemax, CNBC Asia Pacific, MTV Mandarin,

These approved channels can transmit their signals into China via a satellite of their own choice. The Chinese authorities, if dismayed by any of these channels, can either remove it from the approved list or exert pressure on it to make changes.<sup>110</sup> Moreover, hotels, *danwei* and compounds with permits are instructed to block some channels, mostly CNN and Phoenix Chinese Channel, during sensitive times like the anniversaries of the Tiananmen Massacre.<sup>111</sup> The Chinese authorities have for a long time wanted to devise more efficient and centralized control over these channels. By requiring them to be transmitted from a China-owned satellite, the ministry can vet “outside border” programs and further encrypt them before transmission. Once a centralized satellite platform is adopted, only dishes designed for reception of signals from the designated satellite will be allowed. Existing dishes are to be outlawed and demolished.

These arrangements are similar to those in Malaysia. The Malaysian government replaced its dish ban in 1996 by a measure allowing only the installation of satellite dishes specially designed for receiving the country’s DTH service. The DTH service retransmits delayed, vetted foreign satellite television broadcasts.<sup>112</sup> The Chinese version is even stricter. In the foreseeable future, only *danwei*, hotels and compounds with permits, very limited in number, will be allowed to receive the approved “outside border” television channels from the China-controlled satellite platform via DTH.<sup>113</sup> The great majority of viewers in China will still be confined to watching domestic satellite channels. Moreover, the Chinese authorities hope that the new digital DTH service equipped with advanced encryption technology will also

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National Geographic Channel Asia, Star Movie International, ESPN, Channel V, Star Sports, AXN, Discovery, Hallmark, BBC World, NHK World Premium, JetTV, Phoenix Movie, Phoenix Chinese Channel, TVB8, TVB Galaxy, Sun Television, NOW, Macau Satellite TV Travel Channel, Macau Asia Satellite TV, Macau Five Stars Satellite TV, TV5, Phoenix Infonews Channel, Bloomberg, Xing Kong Wei Shi, and Eurosportsnews. See <<http://www.sarft.gov.cn/page/zhglxx/wxpd.htm>> (accessed Oct. 1, 2003).

110. TNT Cartoon Network was removed from the 2001 list soon after approval. *Market News: Television: Cartoon channel banned*, China Economic Review (Mar. 13, 2001); see also *infra* nn. 160-161 and associated text (describing China’s recent suspension of BBC broadcasts).

111. *China Tightens Hold on Info before Tiananmen Anniversary*, The Associated Press (May 27, 1999).

112. See Atkins, *supra* n. 91 (describing arrangements of transfrontier satellite television regulation in Malaysia).

113. The Chinese authorities as a practice do not publish figures on the number of television viewers allowed to receive these approved channels. For estimations, see *China Mulls Control for Satellite TV – Plan to Redistribute Foreign Channels Could Hit International Broadcasters*, Asian Wall Street Journal 1 (Aug. 1, 2001) and Ming Pao B4 (Jul. 26, 2001) (in Chinese).

wipe out the longstanding problem of illegal direct reception of “outside border” channels, free-to-air ones in particular. Since mid-2001, the ministry has been negotiating with transfrontier satellite television operators concerned about the use of a centralized satellite platform. Massive campaigns have been launched in many parts of China to remove illegal satellite dishes.<sup>114</sup>

### C. Effectiveness of the New Measures

The success of the “single satellite in the sky” policy very much hinges on wiping out black markets for satellite dishes and decoders. However, since the size of DTH dishes is getting smaller, the Chinese authorities may find it harder to conduct successful raids.

Meanwhile, Beijing has encountered difficulties in achieving its goal of “a single network on the ground” because stations with local support and funding are reluctant to give up their editorial and business autonomy. Some local stations, especially those along the coast, defy the cable retransmission ban from time to time in order to boost subscriptions and advertising revenues. Retransmission of the Phoenix Chinese Channel has become even more widespread than before.<sup>115</sup> Moreover, many local stations have repeatedly ignored the “must-carry” rule and have refused to retransmit CCTV-1 programs.<sup>116</sup> Nevertheless, the measures adopted since the mid-1990s have prevented, at least for the past couple of years, the projected complete conquest of the China market by transfrontier satellite television. Ten years after DBS was introduced in the region, the Chinese authorities are still able to give effect to the prior consent

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114. By early July of 2002, most of the approved “outside border” satellite channels had joined the centralized satellite platform provided by Sinosat 1. See Sinosat, *Channel Guide* <[http://www.sinosat.com.cn/english/company/index\\_pdz.htm](http://www.sinosat.com.cn/english/company/index_pdz.htm)> (accessed Jul. 1, 2002). For recent crackdowns, see Hui Yuk-min and Loretta Leung, *Beijing Tightens Satellite-TV Grip*, South China Morning Post B4 (Nov. 2, 2001); *Guangdong Clamps Down on Illegal Reception of Satellite Television*, Ming Pao B16 (Oct. 31, 2001) (in Chinese). SARFT issued repeated notices in late 2001 and early 2002, demanding that local SARFT branches wipe out illegal dishes. One such notice was issued jointly in March 2002 by six ministries and departments (SARFT, Ministry of Public Security, Ministry of Information Industry, Ministry of Foreign Trade and Economic Cooperation, General Administration of Customs and State Administration for Industry and Commerce). See SARFT <[www.sarft.gov.cn/](http://www.sarft.gov.cn/)> (accessed Jun. 23, 2002).

115. See also descriptions in the next section.

116. It has become an annual practice for SARFT to issue a notice reminding local stations of their obligation to retransmit CCTV-1 programs. See Propaganda Department of CCP’s Central Committee and MRFT, *Notice on Mandatory Retransmission in Full of Programs of Central People’s Radio and CCTV by Local Radio Stations and Television Stations*, MRFT Document 836 (1993) (reprinted in Handbook On Regulation of Radio and Television Industry at 313 (rev. ed., 2001) (in Chinese)).

requirement.

## V. Impact of the Prior Consent Requirement

The impact of China's *de facto* prior consent requirement has been significant. For the past decade, the authorities have been able to prevent most viewers from watching transfrontier satellite television programs and to shield the Chinese television industry from foreign competition.

### A. Impact on "Outside Border" Satellite Television Channels

So far, transfrontier satellite television operators have not benefited much from DBS technology in penetration of the China market. In an attempt to secure a foothold, some tried to appease or collude with the Chinese authorities. A high-ranking MRFT official highlighted tactics employed by transfrontier satellite television operators. These tactics included avoiding sensitive issues, consulting the Chinese authorities on the editorial line, allowing Chinese television stations to censor and revamp their programs, and even assisting in devising more advanced censoring mechanisms.<sup>117</sup> Such measures, very much in line with collusive practices adopted by foreign television broadcasters in other Asian states, have gone beyond normal trade practices and have sacrificed the editorial independence cherished in the western world.<sup>118</sup>

Yet this appeasement has achieved little. The only exception has been the Phoenix Chinese Channel, which is widely regarded in China as one of "our" channels. The channel, replacing STAR's Chinese Channel, was launched in 1996 by Phoenix Satellite Television Co. (Phoenix), in which News Corporation initially had a holding of 45 percent.<sup>119</sup> Officially, the remaining shares were held by Hong Kong companies, yet rumored connections ranged from CCTV to the People's Liberation Army.<sup>120</sup> The chairman of Phoenix, Liu Changle, and some senior executives were formerly with China's

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117. China Radio and Television Yearbook 1995, *supra* n. 70, at 58. The author of this article talked to executives in the industry and found that such thinking and practices are widespread. See also *Murdoch Offers "Censor" to China*, *The Independent* (London) 1 (Dec. 29, 1994).

118. See Atkins, *supra* n. 76; Clarke, *supra* n. 77.

119. The holding was reduced to about 38 percent upon listing. The STAR's Chinese Channel is still available in the Taiwan market.

120. See, e.g., *Murdoch, Mainland Military in STAR Deal*, *South China Morning Post* 1 (Mar. 13, 1996); *Phoenix Says Connections Will Help Stave Off Rivals*, *Financial Times* 28 (Nov. 1, 2001); *infra* n. 121. The author also came across similar remarks in several interviews.

national and provincial broadcasters.<sup>121</sup> The channel, very much tolerated by the Chinese authorities, has been retransmitted in its entirety by some cable stations in the Guangdong Province, neighboring Hong Kong, since June 1997.<sup>122</sup> Several other channels have since been added to the Phoenix brand name and the company became listed in Hong Kong in late 2000. The success of Phoenix in China has been widely attributed to its strong backing, good connections, and cautious editorial policy.<sup>123</sup>

The Phoenix venture had helped Murdoch outdo other “outside border” satellite television operators in their entry to the China market. It achieved this by injecting a strong Chinese influence. Indeed, Murdoch, for the past decade, has been the keenest among “outside border” satellite television operators in building good relationships with the Chinese authorities.<sup>124</sup> STAR had made it clear

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121. *Phoenix Rising: A Former Propaganda Chief is Changing the Face of Chinese TV*, Asiaweek 1 (Mar. 9, 2001).

122. According to Phoenix’s *Prospectus* <[http://www.hkgem.com/newlistings/prospectus/e\\_8002\\_pro\\_20000621chap008.pdf](http://www.hkgem.com/newlistings/prospectus/e_8002_pro_20000621chap008.pdf)> (2000) at 28, the approval, not in written form, was granted informally by MRFT’s Guangdong branch and endorsed by the ministry in Beijing. Since the arrangement is informal, Phoenix admits that the ministry can stop retransmission at will at any time. The arrangement is similar to the province’s cable retransmission of Hong Kong terrestrial television. The law does not allow cable retransmission of “outside border” television, terrestrial or satellite. Yet, in an effort to discourage viewers in Guangdong from erecting antennas to receive terrestrial television across the border from Hong Kong, the ministry has informally allowed cable retransmission of Hong Kong television in the province. Serving as gatekeeper, Guangdong cable television filters out unwelcome news items from Hong Kong on a daily basis. News items on Taiwan, Tibet and those criticizing Chinese leaders and policies are generally banned. Since the outlawing of Falun Gong in China, news items on the group coming from “outside border” are also banned. *See also infra* n. 161 (concerning the suspension of BBC’s transmissions in mid-2002 for broadcasting a news item on Falun Gong).

123. Liu Changle noted people at Phoenix had been extremely careful about what content they would bring into mainland China. *China’s Law Put Media Firms in Limbo*, *The Wall Street Journal* A18 (Jun. 22, 2000); *see also Phoenix Rising: A Former Propaganda Chief is Changing the Face of Chinese TV*, *supra* n. 121.

124. In April 1994, STAR dropped BBC World, whose documentaries on Mao Zedong and Chinese labor camps had very much antagonized Beijing, off its northern beam. Tony Walker, *BBC Feels Chill From China*, *Financial Times* 4 (May 23, 1994). Other friendly gestures of Rupert Murdoch included publication of a biography of Deng Xiaoping written by one of his daughters, scrapping the deal with the last Governor of Hong Kong, Chris Patten, to publish his memoirs, setting up a production house in Tianjin, and assisting People’s Daily in developing electronic publishing and data retrieval. *Murdoch Dreams of a Chinese Empire*, *The Independent* (London) 10 (Jan. 10, 1997); *Patten Sues over Scrapped Book Deal*, *BBC News Online: UK* (Feb. 27, 1998); *Star TV Losses are Just a Beginning*, *South China Morning Post* 4 (May 12, 1996); and Tony Walker, *Murdoch’s China Ambitions Boosted by News Corp Deal*, *Financial Times* 1 (Jun. 14, 1995).

that its philosophy was accommodation, not confrontation, and that it would present programming popular with governments in its footprint.<sup>125</sup> Murdoch's son, James, who has become chairman and chief executive of STAR, emphasized the need for foreign companies to adopt a cautious approach and be sensitive to the local political environment.<sup>126</sup>

#### **B. Impact on Chinese Viewers**

On a positive note, transfrontier satellite television has resulted in a wider and more stratified flow of information in China. The privilege of access to information is no longer confined to the Party elite. Several tiers of television viewers, enjoying different degrees of access, have emerged. The first tier is composed of those who enjoy direct reception of transfrontier satellite television programs legally. These include Chinese working in foreign enterprises, designated hotels, qualified government departments and enterprises, or major media organizations. As of 2001, they can receive a total of 27 approved "outside border" satellite television channels, including CNNI and BBC. This tier of audience is privileged among Chinese nationals. Its size has grown considerably over the years because of China's further opening up and its continued growth in foreign trade and business.

The second tier consists of friends, family members, relatives, and colleagues from other departments of the first tier audience. They enjoy a similar degree of access to "outside border" satellite channels, either because their offices or living quarters are situated in the same compound or simply because they pay frequent visits. This tier is much bigger than the first tier.

The third tier is made up of those who have access to "outside border" channels for other reasons. Satellite dishes, installed legally or not, are used illegally to receive the Phoenix Chinese Channel or Taiwanese channels. The majority of this tier knows very little foreign language or none at all. The mode of reception is mainly collective, in residential compounds of cities or in remote villages. Also in this tier are viewers in some parts of Guangdong Province who have been

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125. See *Star Wars*, Cable World 52-53 (Nov. 29, 1993).

126. *Foreign Media Must Not Offend*, Hong Kong iMail B4 (May 11, 2001). James Murdoch, on another occasion, stirred a row by openly agreeing with the Chinese government's branding of Falun Gong as a "dangerous and apocalyptic" cult and attacking the Hong Kong and western media for their negative portrayal of China. *Murdoch Heir Slams Falun Gong, HK, Western Media Hit in Broadside*, Hong Kong iMail A2 (Mar. 24, 2001).

able to watch Phoenix Chinese Channel via cable television since mid-1997. This tier is again much larger than the first two tiers. In 2001, those with access to Phoenix Chinese Channel had a wide choice of programs including CBS's "60 Minutes" and live coverage of the September 11 terrorist attacks on the U.S.

The rest of the viewers in China make up the bottom tier, with access to domestic satellite-cable television only. Some may have the opportunity to watch programs from ESPN, MTV, or Discovery, if their cable television stations have deals with the channels.

No accurate means are available to measure the actual size of each tier of viewers. Phoenix Chinese Channel claimed to have an audience of 42 million households in 1999, with some 147 million viewers.<sup>127</sup> This only represents some 13.1 percent of China's total audience. In other words, the Chinese authorities are still able to prevent the remaining 86.9 percent, the bottom tier, from watching "outside border" satellite television channels. Their access to information outside China, particularly uncensored news items, has been severely restricted as a result. Beijing journalist Gao Yu gave a vivid account of how frustrated she was with the city's television on the evening of September 11, 2001.<sup>128</sup> She complained bitterly that China's tight control and censorship of television made fools of its 1.3 billion nationals.

### C. Impact on China's Television Industry

Competition from "outside border" satellite channels has effectively been fended off in the past decade. During the period, China's domestic satellite television has grown rapidly. Yet this growth has been in terms of quantity, not quality. The Chinese authorities have repeatedly called for production of quality domestic

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127. Phoenix Prospectus, *supra* n. 122, at 28 and 69. A summary of the survey results can also be located at Phoenix's website.

128. Gao Yu, *Making a Fool of 1.3 Billion Chinese*, Open Magazine at 34-5 (Oct. 2001) (in Chinese). When Gao learnt of the terrorist attacks on the U.S. at around 10 p.m. (Beijing time), upon receiving a phone call from her brother who was watching Phoenix Chinese Channel, she searched some fifty available channels, all domestic, and found none of them was covering the attacks. According to Gao, it was not until after 11 p.m. that Shanghai Satellite Television, which apparently did not follow the standard practice, began to broadcast some pictures of the attacks and it remained the only channel to do so that evening. Later that night, Beijing Satellite Television broke the news by carrying a report from *Xinhua*, China's official news agency: some 70 words in total without any images. Gao noted that many people in Beijing did not learn of the attacks until the next day and some even thought the attacks had occurred in the morning of twelfth. Gao, a journalist from Beijing, was imprisoned twice by the Chinese authorities, for her participation in the 1989 Democratic Movement and for allegedly leaking state secrets.

television programs, especially dramas and cartoons, as the ultimate solution to infiltration by western television. Yet little has been achieved in this respect. The broadcasting media, though much more sophisticated and diversified than a decade ago, cannot shed their major role as the Party's mouthpiece and propaganda machinery, and have so far remained under the tight control of CCP. CCTV has always enjoyed a monopolistic position in China, and there is still only one national television network for the entire country. All other provincial and city television stations, until very recently, were forbidden to form conglomerates, not to mention building other national networks. The director of SARFT, Xu Guangchun, confessed Chinese television stations are far behind the American television channels in terms of size and competitiveness.<sup>129</sup>

### **VI. Recent Changes: Liberalizing Control in the Near Future?**

Though China has succeeded in giving effect to the prior consent requirement throughout the past decade, its officials in charge of broadcasting policies, as mentioned earlier, have expressed worries about the effectiveness of restrictive measures in the long run. Indeed, technological advances have further weakened China's media Great Wall, the most obvious example being delivery of video via the Internet. Beijing has announced rules over the past few years banning unauthorized ventures in this area and regulating the Internet.<sup>130</sup> The other major worry repeatedly mentioned by SARFT is the impact of China's entry into the World Trade Organization (WTO) on the country's television industry. The ministry stressed that broadcasting, unlike telecommunications, is under no obligation to be opened up to foreign investors, yet it was alarmed by the huge size of the international media conglomerates and their determination to enter

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129. Xu Guangchun, *A Report Presented to the National Working Meeting on Radio, Film and Television* (reprinted in *China Radio and Television Yearbook* at 5-12 (2001) (in Chinese)).

130. SARFT, *On Strengthening the Regulation of Radio, Film and Television Programs Transmitted to the Public via Information Networks* (SARFT Decree No. 1), promulgated in October 1999. The Chinese authorities have stepped up content regulation and security surveillance of Internet services in 2000 and 2001 by promulgating a number of legal enactments. For an account of these legal enactments and their impact, see Amnesty International, *State Control of the Internet in China*, AI Index: ASA 17/007/2002 <<http://web.amnesty.org/library/Index/engasa170072002?OpenDocument&of=COUNTRIES\CHINA?OpenDocument&of=COUNTRIES\CHINA>> (Nov. 26, 2002). The Chinese text of these legal enactments can be located at China Internet Network Information Center <<http://www.cnnic.net.cn/policy/http://www.cnnic.net.cn/policy/>> (accessed Sep. 30, 2003).

the Chinese market.<sup>131</sup> Indeed, the opening up of telecommunications in the age of convergence may have a far-reaching impact on China's broadcasting operations.

Against this background, SARFT has apparently made significant modifications to its transfrontier satellite television policy in late 2001 by opening up cable access to "outside border" satellite television channels, albeit in a very limited way. It struck several deals with "outside border" satellite television operators in the autumn of 2001, which have attracted much publicity abroad. In mid-October, Xu Guangchun, director of SARFT, announced that the ministry would officially allow Phoenix's Chinese channel and movie channel to be retransmitted over cable networks in the Pearl River Delta area of Guangdong Province.<sup>132</sup> Phoenix has thus become the first "outside border" satellite television operator gaining official approval for cable retransmission in China. A few days later AOL Time Warner was given official approval to have its CETV retransmitted under an arrangement similar to Phoenix's two channels.<sup>133</sup> As Xu noted, this was the first time a foreign television organization had been granted cable television carriage rights in mainland China.<sup>134</sup> The president of Hong Kong-based Turner Broadcasting System Asia Pacific, Steve Marcopoto, who had negotiated the deal, described the venture as "groundbreaking."<sup>135</sup> Less than a week later, in early November, CCTV formed a joint venture in Hong Kong with the territory's leading broadcaster, TVB (Television Broadcasts Ltd.). The most

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131. For the ministry's expression of alarm, see SARFT, *An Outline of the Development Plan of Radio, Film and Television Business: 2001-2010*, SARFT Doc. 46 (2001) (reprinted in *China Radio and Television Yearbook* at 25-29 (2001) (in Chinese)). Broadcasting services are being differentiated from telecommunications services in the WTO arrangements. See 2(b) of the Annex on Telecommunications to the 1994 General Agreement on Trade in Services, which says the annex "shall not apply to measures affecting the cable or broadcast distribution of radio or television programming."

132. *Phoenix TV Given Go-ahead to Broadcast in Southern Guangdong*, China Online (Oct. 19, 2001) (available 2001 WL 14483130). As of September 2003, only the Phoenix Chinese Channel has been allowed cable retransmission in Guangdong. The retransmission of Movie Channel has yet to be approved. Meanwhile, MTV has been allowed cable re-transmission in Guangdong since April 26, 2003. *MTV officially Landing in Guangdong*, SinoCast China Business Daily News (May 12, 2003) (available in LEXIS, News library / Most Recent Two Years (English, full text) database).

133. James Kynge, *AOL Time to Broadcast in China*, Financial Times 38 (Oct. 23, 2001).

134. Since AOL Time Warner is from the U.S., it is both "foreign" and "outside border." Phoenix TV is from Hong Kong, so it is only "outside border" not "foreign." See supra n. 45 (meaning of "outside border").

135. Steve Donahue, *AOL Time Warner Net Gains Access to China*, Multichannel News at 3 (Oct. 29, 2001).

prominent feature of the deal was that the joint venture would launch a new satellite television channel in 2002. This will be the first time that CCTV has owned and operated a satellite television channel jointly with an “outside border” organization. In December 2001, Murdoch’s STAR was given permission for cable retransmission in Guangdong, for a new entertainment channel specially designed for Chinese viewers.<sup>136</sup> As STAR put it, this was the first time China had granted an entirely new channel cable carriage in the country.<sup>137</sup>

Yet a closer look would reveal these deals are not that “groundbreaking.” As noted earlier, Phoenix Chinese Channel has already been allowed cable access in some parts of Guangdong since mid-1997. AOL Time Warner bought the financially-troubled CETV recently. The channel in the past claimed that it maintained a good relationship with the Chinese authorities and was able to secure retransmission by some cable stations.<sup>138</sup> The deals therefore merely legalized the longstanding practice.<sup>139</sup> Moreover, Marcopoto of Turner made it clear that AOL Time Warner wanted to offer Chinese viewers a channel that would not offend their cultural or political sensibilities, and that CETV would continue to steer clear of news.<sup>140</sup>

It was China who got what it most wanted from the deals, not the transfrontier satellite television operators. AOL Time Warner agreed, as a reciprocal arrangement, to carry CCTV-9, an English channel targeting overseas audiences, on its New York, Los Angeles and Houston cable systems.<sup>141</sup> CCTV-9 will also be carried on the News Corp.’s Fox Cable Network in the U.S. in return for STAR’s

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136. Yasmin Chahremani, *Rupe’s Star Gets OK for Mandarin Cabler*, 385 No. 6, *Variety*, at 18 (Dec. 24, 2001). The new channel, named *Xing Kong Wei Shi* (or Starry Sky) was launched on March 28, 2002. See Wendy Kan, *Rupe’s Starry Sky Covers China*, 386 No. 8 *Variety* at 28 (Apr. 8, 2002). As of September 2003, television viewers in Guangdong can receive via cable four “outside border” satellite television channels: *Xing Kong Wei Shi*, MTV, CETV, and the Phoenix Chinese Channel.

137. *STAR Granted Landing Rights for a New Channel in China*, STAR press release (Dec. 19, 2001).

138. Dan Boylan, *CETV’s Formula for Success: No Sex, No Violence, No News*, *Asia Cable And Satellite World* 12 (Oct. 1997).

139. As mentioned earlier, MRFT rules devised before mid-1990s explicitly forbade cable retransmission of “outside border” satellite television channels. Yet State Council Decree No. 228, enacted in 1997, paved the way for legalizing cable retransmission. Art. 41 of the Decree says: “Radio stations, television stations which import or retransmit ‘outside border’ radio or television programs via satellite, must obtain approval from State Council’s ministry responsible for radio and television.” (in Chinese)

140. Mark Landler, *AOL Gains Cable Rights in China by Omitting News, Sex and Violence*, *N.Y. Times* C11 (Oct. 29, 2001).

141. Joe McDonald, *AOL Time Warner Inks Landmark Deal*, *The Associated Press*, BC cycle (Oct. 22, 2001).

cable deal in Guangdong.<sup>142</sup> As for Phoenix, it has formed a joint venture with CCTV to bring CCTV-4, a Mandarin channel targeting overseas Chinese, on mainstream U.S. satellite television platforms and to produce programs for Chinese-speaking viewers worldwide.<sup>143</sup> In the deal with TVB, the new satellite television channel would be categorized as “outside border” because the joint venture is to be set up in Hong Kong. In relation to the prior consent requirement, these deals demonstrate China’s ability to require transfrontier satellite television operators, in lieu of transmitting countries, to agree and submit to the country’s consent on both access control and program censorship.

Meanwhile, some mainland Chinese newspapers projected possible further opening up of the Chinese television market to international broadcasters. *The New Express*, a newspaper belonging to CCP’s Guangdong committee, reported that the central authorities would soon allow over 30 “outside border” television channels to be retransmitted in parts of Guangdong, making the region a “special media zone” for transfrontier television.<sup>144</sup> In the same report, a communication studies professor from Beijing remarked that the proposed zone could serve as a buffer before China inevitably opens up to foreign media. Such an arrangement would allow Chinese media opportunities to learn from foreign media and at the same time alleviate the impact of Western culture. If the zone were to be implemented, it would join the other measures adopted by SARFT in response to the challenges posed by technological advances and general opening up of China’s markets due to its entry into WTO.<sup>145</sup> Yet the report did not specify the time frame and no confirmation or denial has so far been made by Beijing. Another press report has said sources in the industry are speculating that SARFT would soon allow all the approved “outside border” satellite television channels to reach the mass Chinese audience in the form of pay television.<sup>146</sup>

It is far from clear how likely these projections are to materialize in the near future. The Chinese authorities may prefer to wait for a

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142. Ghahremani, *Rupe’s Star Gets OK for Mandarin Cabler*, *supra* n. 136.

143. *Phoenix-CCTV Venture to Export Chinese Programming*, China Online (Oct. 31, 2001).

144. See *Guangdong Plans to Build Media Special Zone*, Ming Pao B14 (Oct. 30, 2001) (in Chinese), and *Guangdong in Foreign TV Boom*, Hong Kong iMail A5 (Oct. 31, 2001).

145. The most prominent proactive measure has been SARFT’s instruction for provinces and big cities to consolidate their resources by forming media conglomerates.

146. *Pay TV Coming Soon, Foreign Media Watching Out for Business Opportunities*, Yangzi Wan Bao (Jun. 7, 2002) (in Chinese).

while and see how Phoenix, AOL Time Warner's CETV and STAR's new channel perform. Indeed, some other important gestures and moves of the Chinese authorities during the same period should be highlighted if a more accurate scenario is to be portrayed. Around the same time, CCP and SARFT jointly issued an important reminder about media reform, stressing that "under no circumstances can the role of news media as the mouthpiece of CCP and the people be changed," and that the regulation of satellite television ground receiving equipment and downlinking of "outside border" satellite television programs must be strengthened.<sup>147</sup> Additionally, SARFT promulgated in December 2001 an important legal enactment on the regulation of "outside border" satellite television. The combined effect of these two actions indicated that China is still trying very hard to implement its prior consent requirement on "outside border" satellite television.

The legal enactment is entitled "Provisional Measures on Approving and Managing the Landing of 'Outside Border' Satellite Television Channels" (SARFT Decree No. 8).<sup>148</sup> This is the first time that the Chinese authorities have produced legislation with detailed rules that "outside border" satellite television channels have to follow if they are to get approval for downlinking their signals in China. Article 2 says that this Decree applies to satellite television channels established outside mainland China, and has thus indirectly defined what is "outside border." Additionally, an annual application has to be made.<sup>149</sup> Upon approval, landing can take place in hotels of three stars or above receiving foreigners, compounds designated as offices or residences for "outside border" personnel, and other specified areas.<sup>150</sup> The term "other specified areas" marks a departure from the previous policy which only allowed *danwei* with real business needs to receive these television signals, and paves the way

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147. This reminder, entitled *Some Opinions on Deepening the Reform of News, Publishing, Radio and Television Industry*, was jointly issued by the Publicity Department of the CCP's Central Committee, SARFT and the State Press and Publication Administration. This reminder covered nearly all recent issues and policies about China's media. This was an internal document, but its content was widely reported in the press in early 2002. See *News Media State Operates, Chinese Officials Detailing Media Industry Reform* China News Service, Jan. 16, 2002 (online version in Chinese), and *China Continues Ban on Foreign, Private Funding of News Media*, China Online (Jan. 16, 2002).

148. The text of the Decree, effective Feb. 2002, can be located on SARFT's official website.

149. See SARFT Decree No. 8, Art. 3 and 9.

150. *Id.* Art. 4.

for possible liberalization in the future.<sup>151</sup> Yet “outside border” channels are subject to strict conditions. To qualify for application, the channel concerned has to be a major broadcaster in the originating country/region and among the top three in television audience ratings.<sup>152</sup> Moreover, the channel has to promise to actively assist Chinese television programs to be downlinked overseas.<sup>153</sup> On top of these, the channel has to be friendly to China and actively promote broadcasting exchanges and co-operation.<sup>154</sup> Moreover, programs broadcast by the channel cannot violate Chinese laws.<sup>155</sup> Another condition is to allow SARFT’s authorized dealer to have the sole right of distribution of the channel in China and agree not to employ any other means of downlinking.<sup>156</sup> In principle, only one channel from one broadcasting organization will be allowed.<sup>157</sup> No transfrontier news channels will be allowed at all in China.<sup>158</sup> Also excluded are those “outside border” channels set up by the SARFT and related parties.<sup>159</sup> Yet there is a proviso to these two categories of prohibitions, allowing approval in special circumstances.<sup>160</sup> Permission for landing will be revoked if the channel is found broadcasting any content violating Chinese laws three times in a year.<sup>161</sup> Once

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151. The Chinese authorities at the same time promulgated another legal enactment entitled *Provisional Measures Governing the Management of Cable Television Systems in Urban Communities* (SARFT Decree No. 7). This decree, the full text of which can be located at the SARFT website, applies only to residential compounds and staff quarters of *danwei* for mainland Chinese (i.e., it is not applicable to compounds designated for “outside border” personnel). These communities are required to be connected to a SARFT-controlled cable network. They are not allowed to set up “outside border” satellite television ground receiving equipment, or to receive and transmit “outside border” television programs.

152. SARFT Decree No. 8, Art. 5(2).

153. *Id.* Art. 5(3).

154. *Id.* Art. 5(4).

155. *Id.* Art. 5(1).

156. *Id.* Art. 5(5).

157. *Id.* Art. 11.

158. *Id.*; see also remarks at *infra* nn. 160-161.

159. *Id.* Currently there is no such channel. Yet the new channel to be jointly set up by TVB and CCTV in Hong Kong will be considered as “outside border” and will fall into this category. There are two possible reasons for such a prohibition. First, Chinese authorities might have foreseen that such channels, in order to compete in markets elsewhere, would contain programs not allowed in mainland China. Alternatively, Chinese authorities might simply try to prevent domestic television channels from circumventing censorship rules at home by setting up new channels “outside border.”

160. *Id.* This proviso shows how flexible, or indeed uncertain, laws in China can be. Whether news channels like CNNI or BBC World can have landing rights in China depends very much upon the discretion of the Chinese authorities.

161. SARFT Decree No. 8, Art. 15. The BBC has become the first “outside border” satellite channel to have its landing right suspended because of content violations under

disqualified, no fresh application will be allowed for three years.<sup>162</sup>

Judging from rules stipulated in this decree, it is very clear that “outside border” channels applying for landing approval have virtually no bargaining power over access or program content, and the only immediate benefit is “to be there” in the promising China market. Indeed, this enactment together with the proposed compulsory centralized satellite platform indicated that the Chinese authorities are still clinging hard to the goal of “a single satellite in the sky, a single network on the ground” and can in the near future exercise tighter control over transfrontier satellite television. It is likely that China will try to maintain its insistence on prior consent unless there are major changes in policies or Chinese leadership. International television operators’ success in the China market in the foreseeable future will still very much depend upon their collusion with the authorities and their submission to censorship. As a *Financial Times* editorial comment put it, the new prospects surrounding recent cable retransmission approvals demonstrate that the *kowtow* still works.<sup>163</sup>

## VII. Conclusion

The impact of the Chinese authorities’ insistence upon the prior consent requirement on the freedom of information and the free flow of information has been significant. For the past decade, the combined effect of DBS technology and China’s further opening up to a market economy has only benefited a very small sector of China’s population. The majority of Chinese viewers have been confined to watching domestic television only. The prior consent requirement was achieved, not by reaching agreements with transmitting countries, but through unilateral application of China’s own national broadcasting laws and policies and the co-operation and

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the new centralized satellite platform arrangements. Transmission of the BBC from Sinosat 1 was switched off by the Chinese authorities in early July of 2002. A foreign ministry spokesman maintained that the BBC had repeatedly violated an agreement with the China International Television Corporation, and noted that China was willing to allow the broadcaster to resume limited broadcasting rights within China as long as it takes measures to resolve broadcast violations. The BBC had repeatedly run on its hourly news bulletin a story about the banned Falun Gong over June 30 and July 1, 2002, as part of its coverage of the fifth anniversary of Hong Kong’s return to Chinese sovereignty. *China to Allow BBC to Resume Broadcasting When It Fixes “Violations”*, AFX News (Jul. 12, 2002) (available in LEXIS). Meanwhile, a BBC spokeswoman confirmed that other satellites are continuing to bring the BBC into China. *China Axes BBC after Falun Gong Item*, Associated Press (Jul. 5, 2002).

162. *Id.*

163. *Tune Into China*, *Financial Times* 16 (Sept. 5, 2001).

submissiveness of international satellite television operators.

There have been predictions in the 1980s that the advent of DBS would make any prior consent requirement superfluous: “[N]either national frontiers nor the political wills of the governments affected will . . . be able to prevent distribution of satellite-broadcast programs.”<sup>164</sup> Similar arguments could be found in Asia in the early 1990s, especially with regard to the role of STAR TV: “STAR TV has set an Asian precedent that potentially defies the ‘prior consent’ principle. . . . If the virtually mute response to STAR TV on the international level continues, it will serve as a tacit recognition of the breakdown of the prior consent principle.”<sup>165</sup>

Such predictions turned out to be half-true. DBS has definitely enhanced the ability of television broadcasts to flow freely across national borders. In practice, however, it has not led to an unrestricted free flow of transfrontier television in the 1990s. China, and several other countries like Singapore and Malaysia, have successfully devised national measures to prevent or restrict transfrontier satellite television from reaching their nationals.

It is hard to predict when and under what circumstances the prior consent principle will eventually collapse, whether it be from technological advances, consequences of China’s entry into the WTO, changes in China’s policies and leadership, or an interaction of some or all these factors. It is even harder to predict how well Chinese viewers would fare then: would media monopoly by the authoritarian regime be replaced by the dominance of international media conglomerates?

Even if the prior consent principle collapsed, regulatory issues relating to transfrontier satellite television would not disappear altogether. In the era of increasing transfrontier satellite television, broadcasting sovereignty of nation-states is definitely shrinking. At the same time, developed and developing countries alike are faced with the growing problems of media concentration and private monopoly, and of ensuring that the incoming television broadcasts observe certain program standards. These issues, together with the protection and promotion of media freedom, contain a strong international dimension. Yet chances of reaching any international treaty in the foreseeable future on either protection of the free flow

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164. Wolfgang Hoffmann-Riem, *International Regulation of Direct Satellite Broadcasting: Illusions and Alternatives*, 3 *European Journal of Communication* 247 (1988).

165. Chan, *supra* n. 72, at 128.

of information or regulation of transfrontier satellite television are very slim. Nonetheless, "Television Without Frontiers" as implemented in western Europe in the past decade may be worth exploring as a model for regional cooperation.