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THE OVER FRIENDLY SKIES OF ASEAN? - A LEGAL FRAMEWORK

By Austin I. Pulle

Introduction

When the video recording made by the former Deputy Prime Minister of Malaysia, Anwar Ibrahim, made prior to his arrest by the Malaysian authorities was broadcast on international television networks, a furious Prime Minister Mahathir made some sarcastic comments to journalists in response to the broadcast.1 He invited the foreign media to continue spreading their "lies" and said that Malaysia, as a small country, was powerless to prevent false reporting by the international broadcast media. This acknowledgement, while perhaps symptomatic of the current disarray among the Association of South East Asian Nations ("ASEAN"), also points to a neglect among the ASEAN states to address the issue of direct satellite television broadcasts as a regional issue.

The ASEAN community includes a significant geographical area of Asia. From the Western part of Myanmar to the eastern tip of Irian Jaya in Indonesia, the community also includes two of the largest archipelagic states, Indonesia and the Philippines. A diverse group of countries with a rich cultural heritage make up the ASEAN community. The United States and the European Union have controls in place that regulate the type of direct satellite television broadcasts that can be undertaken by broadcasters subject to their jurisdiction. And yet, ASEAN, the Latin American countries, and the rest of Asia do not have a comparable regime of regulation.

At present, two of the ASEAN states, Singapore and Malaysia, specifically address the issue of direct satellite television broadcasts. Both of these countries prohibit persons within their territory from installing or maintaining antenna capable of receiving direct satellite television...
broadcasts. Indonesia, Thailand and the Philippines do not prohibit the installation of satellite dishes and other forms of reception devices capable to receiving direct television broadcasting signals. Arguably, the fragmented approach to regulation does not advance the long-term interests of ASEAN as a community. First, rapidly advancing technology, especially in the capacity of the Internet to relay high-resolution television images, may make restrictions on receipt of direct satellite television difficult to sustain. Second, given the capacity of television to influence events and populations, unrest in parts of ASEAN such as Indonesia or the Philippines, can detrimentally affect states that do regulate direct satellite television broadcasts. Finally, the skies will be the infrastructure of the information age and regulating terrestrial receivers may be as effective as the legendary King Canute who ordered the waves to stop forming!

The present heralds the start of a post-industrial era to be known as the Information Age. As we approach the new millennium, the Soviet Empire has disintegrated, the free market has been embraced by most nations, some of which have been scorched by the embrace, and the information age has heralded the victory of markets and technology over governments and frontiers. The currency crisis has battered the once flourishing economies of Asia. New viceroys and East India Companies appear poised to re-colonize the East, this time not with gunboats and armies, but with the more potent weapons of the Information Age. The new viceroys are the owners of information and media, the Gateses and the Murdochs, and the weapons they wield are knowledge based or media products created and supported by dazzling technology. What do

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1 See generally, The Straits Times 1 (September 25, 1998).
2 See, Toshio Kosuge, Satellite Communications Systems and Legal Issues in the Asia-Pacific Region, in The Uses of Airspace and Outer Space for All Mankind in the 21st Century 57, at 63 (Chia-Jui Cheng, ed. 1995). Kosuge also observes that unlike in Europe, “there are no such common rules and standards in the Asia-Pacific Region, where the movement to create them is rather slow. However, with the increasing number of satellites that will be available”) * * * we must ensure that we evolve new common rules for trans-border TV broadcasting between the countries of the region.” Id. At 66.
these developments portend for the countries of ASEAN? What choices are available to ASEAN governments? Should ASEAN generate a policy of direct satellite television broadcasting or should it be content to continue with the existing arrangements of addressing these issues through national controls? Can ASEAN do something or is negotiating the terms of surrender the only alternative? Should it attempt to generate a policy in time for UNISPACE III in 1998 even though its economies experience a downturn, or should it wait for a later time when it might perhaps be too late? This paper will attempt to address the above and related questions.

No definite solutions are possible given the fact that emerging technologies rapidly render old norms obsolete. Detailed rules cannot be enunciated in such an environment, only a broad set of principles. However, these principles must enshrine the respective interests of the major actors. Without compromise, the debate will degenerate into shrill claim and counterclaim.

The Interests of the ASEAN States

Perhaps, the primordial interest of the receiving states, whether in ASEAN or elsewhere, is the interest in maintaining public order. Home to rich cultures and diverse nationalities and ethnic and religious groups, Asia has had its share of problems arising precisely from these problems. Asian countries have grappled to keep the lid on ethnic and racial tensions with varying degrees of success. An ancient Chinese saying observed that “a picture is worth a thousand words”. Indubitably, a television image with live commentary is worth several million words. Television images have the power to move and to inflame. It is the latter that should concern Asian countries. For example, in Sri Lanka where armed Tamil groups are fighting for an independent state, it is not unusual for such groups to inflict acts of horrifying terror in Sri Lanka’s capital, Colombo, by means of suicide bombers. The Sri Lanka media regulations prevent the

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3 Mr. Murdoch informed the shareholders of his company in 1996: “We intend to *** use sports as a battering ram and a lead offering in all our pay-television operations.” Quoted in “Not Just a Game”, The Economist Magazine – A Survey of Sports 14 (6 June 1998).
publication of graphic pictures of the victims. The reason for this prohibition is because the authorities fear a backlash by the majority Sinhalese community against Tamils living in areas populated by the Sinhalese majority. Given the incidence of violent racial and religious upheaval in South Asia, few would begrudge such censorship undertaken for the peace and stability of a community.

A more controversial instance is where foreign owned media provide a platform for dissidents and rebels to articulate viewpoints that would be considered seditious in the receiving countries but fall short of being considered subversive under international law. The mere presence of the dissident on an international TV channel could provide a boost to the supporters of the dissident. If the dissident calls for an uprising, or worse, an armed uprising, the government of the receiving state would have to deal with such adverse propaganda. The recent broadcast of the video recording by Mr. Anwar Ibrahim is a good example of the facility provided by direct satellite television broadcasts.

In the Information Age, the legitimacy of a government would rest largely on the probity of its officials. Allegations of fraud, mismanagement, criminal activities especially if made in the credible format of an investigative reporter documentary format could have devastating impacts on the government concerned. To illustrate this point, the recent CNN treatment of the story it broadcast on the use of a lethal nerve gas by the American military on deserters in Laos is instructive, the so-called “Operation Tailwind”. As those familiar with the incident will recall, the story was first broadcast by CNN with the narration by Peter Arnett, a correspondent who became famous for the coverage of the Gulf War. Time Magazine also repeated this allegation.

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However, when this allegation was challenged by other journalists in the American media, CNN made a public retraction of the story. Ted Turner, the founder of CNN, regarded the broadcast as one of the worst things that had happened to him and apologized profusely for the broadcast. The retraction was accompanied by the dismissals of two of the segment's producers, Jack Smith and April Oliver (who stood by their story) although Peter Arnett managed to retain his job. One of the board members of CNN is reported to have said, "This has damaged U.S. foreign policy around the world, because some people will always now believe that poison gas was used." Change the country context, and the broadcaster's response would also change. Let us assume that CNN chooses to broadcast a supposed investigative account of some heinous activity such as a government trafficking in human organs that later turned out to be baseless. It would be fanciful to assume that CNN would retract the story with the same fanfare given to the nerve gas allegation. Lacking meaningful controls over the broadcaster, the government of the receiving state would be helpless to counter such allegations effectively.

Advertising by media outside national borders could also erode legitimate governments interests in regulating advertising and other forms of marketing. At one time, Indonesia severely restricted consumer advertising on television because in many peasant communities, the citizens responded to the call to go and buy as advice from the government and would go out next day and buy the product. If the highly developed marketing and advertising skills are deployed on Asian populations, many citizens could make mindless consumer decisions that would not be in their best interests. Those familiar with the infant food formula controversy would recall that the largely peasant societies of Asia are gullible and could make purchases that they could either ill afford or which are bad for them. Another impact of this would be that local-advertising entities, which usually attract a country's artistic and creative talent, would be unable to compete with

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6 Supra note 1 at 32.
their more sophisticated rivals with deep pockets. Although tobacco advertising is on the wane, it is unrealistic to expect its complete demise. As smoking becomes less popular in the West, the tobacco companies have begun to target Asian populations. Singapore, alive to the dangers of smoking to the health of its population, has for several years taken various steps to reduce tobacco consumption. In other countries, tobacco consumption is on the increase and could lead to hefty social and health costs. In other words, using the powerful medium of television, advertising could stimulate unrealistic or harmful consumer desires that could undermine the stability of receiving countries.

Millions of viewers watched the recently concluded soccer World Cup in Paris and the Commonwealth Games in Malaysia. If, to paraphrase Marx, television has replaced religion as the opium of the people, sports extravaganzas, soap opera serials, and films can stupefy whole populations. Some countries in Asia would welcome this development. It serves to distract populations from the problems of such countries. They welcome such electronic bread and circuses. Governments of other countries may resent such developments. The work ethic that has been responsible for the success of many Asian countries could be shattered if there is frequent resort to the distractions and rich diversities of overseas television media.

Finally, the messages that governments wish to convey to their own populations may be drowned in the clutter of competing direct satellite television programs broadcast by persons with little interest in the cultural integrity of the region. Religious programs, programs advocating loyalty, hard work, and courtesy, and programs for the whole family could be relegated to the category of least watched programs. Programs with a high domestic cultural content could also be swept aside by competing programs compiled with superior special effects. As the French resistance to Hollywood based cultural products shows, this is not a
concern confined to Asian countries. One of the benefits of television is to provide national populations a sense of their rich cultural heritage. Such educational benefits would be reduced if programs have to compete with the glitzy, and sometimes hyper-violent, products from Hollywood.

Media Conglomerates and Their Patron States

It is no accident that the West is the home to the major television conglomerates. Political freedoms of expression guaranteed by constitutions and treaties, a strong tradition of news gathering, access to technology and funds, and reputable schools of journalism combine to create a synergy that ensures that the West will dominate transborder flows of information including satellite television broadcasting.

Several factors combine to make the home states of media organizations, such as the United States wary of any attempts to regulate the content of satellite broadcasts. First, the constitutional history of the U.S. revolving around the First Amendment to the American constitution is adamantly inconsistent with ideas of censorship and prior restraint on publication. A common theme that runs through the debates in the Federalist Papers, the Watergate controversy, and the present troubles of President Clinton is that the American people have a right to know how their government and its officials operate regardless of the national security interests that may be jeopardized by such publication. From this perspective, it is not difficult to jump to another conclusion that is what is good for the United States is good for the rest of the world. Western news media, non-governmental organizations, and others frequently point to the highly restrictive censorship that prevails in most Asian countries. They regard such censorship as a tool whereby the governments cover up their misdeeds and subjugate a population into compliance. The cold war debate also fuels such a perception. During that debate, the freedom
According to a media was favorably contrasted with the outrageously compliant media of the former Soviet Union and its eastern bloc allies. The U.S. withdrawal from membership of the United Nations Educational and Scientific Organization ("UNESCO") was largely caused by the belief that UNESCO was endorsing a system of news censorship. Accordingly, charges of censorship summon images of an assault of basic freedoms. These images are potent and will galvanize opposition not only from American lawmakers and officials but also from the American elite.

Riding piggyback on these images are the western media organizations. These media organizations wield an enormous amount of power in western countries. It will be a foolish politician who will deliberately set out to antagonize such groups which by nuanced and selective reporting could destroy a politician’s career. Powerful lobbyists, lawyers, and foundations advocate the interests of these groups before legislatures, regulatory institutions, and international conferences. It is therefore easy for these groups to attach the label “censorship” to any move to regulate content, and thus consign such proposals to defeat.

These groups also serve the political agenda of western powers. During the Gulf War, for example, the breathtaking accuracy of cruise missiles was illustrated by footage showing these missiles honing into and destroying military targets. What was not shown were the failures of such missiles and the impact of missiles that went astray. The political viewpoint of western states explaining actions that they took in the international field will be well articulated. Any response from others will usually be a token response, and probably, selectively edited to show an unpersuasive point of view. During a particularly dangerous period of the Asian meltdown when currencies have been battered and populations have been driven to poverty levels, globalization and the free market systems have come under scathing attack by some
governments. In order to re-start the momentum of globalization and keep intact the various market opening mechanisms achieved by the Uruguay Round, western media could be a very useful ally of western governments that want to keep open the world trading system. They could do this is several effective ways. By reporting negatively on countries that have bucked the free market trend and interviewing economists who advocate a particular viewpoint, the ideas and opinions of Asian populations can be thus shaped by foreign media groups.

Finally, a host of intangible benefits accrues to countries in which large media organizations are based. First, the cultural stamp of the next decades would be western. Western values, fashions, eating styles, and entertainment would be disseminated worldwide by means of western media. The latest fashions from the catwalks of Paris to the special effects rooted films will become the staple fare of the global cultural audience. Second, a necessary accompaniment of such a cultural stamp is to inculcate a fondness for western commodities and an aversion to local products and services. The growth of fast food outlets, western franchises, brand name jeans, and a host of other products attest to a growing westernisation of Asia. Third, the monetary benefits would be reaped in the home countries of these sellers. Royalties, license fees, dividends that enlarge the tax base of the home countries are really tantamount to a transfer of capital from Asian countries to western countries. Finally, and perhaps most importantly, important synergies are created in the western countries. The coming decades will witness an explosion of knowledge based products. The stimulation, the funds, the critical mass necessary for such creative activity will be largely in the west. The west will produce and Asia and the rest of the developing world will consume. The new East India companies would have arrived.

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The International Law of Space as Context

The foundations of the international law of space find their origins in the middle of the cold war. Remarkably, despite the tensions, the space powers and the other members of the United Nations were able to generate several treaties that constitute the base of the current international law of space. The successful orbit of Sputnik in October 1957 captured the imaginations of millions and provided the stimulus necessary to discuss what was once an esoteric topic. In the twenty years following Sputnik, the Outer Space Committee of the United Nations managed to shepherd five space treaties into force. These are: (a) Treaty on Principles Governing the Activities in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, (b) Convention on International Liability for Damage Caused by Space Objects (the "Liability Convention"), (c) Convention on Registration of Objects Launched into Outer Space, (d) Agreement Governing the Activities of States on the Moon and other Celestial Bodies, and (e) Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.

Article I of the Outer Space Treaty declares that outer space "shall be free for exploration and use by all States without discrimination of any kind, on the basis of equality and in accordance with international law." This principle codifies a principle that had been affirmed time and again in the UN General Assembly. The Outer Space Treaty imposes limitations on the freedom of use doctrine. One such limitation, contained in Article I itself, is that the use of outer space should be "in accordance with international law". Under international law, television broadcasts

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that would openly incite revolt in particular countries will be regarded as a subversive act and illegal. It is difficult however to characterize programs that taken together may have the effect of inciting a population to revolt as subversive. Some developing country theorists have argued that Article I of the Outer Space Treaty embodies the "common heritage of mankind" concept that is found in the law of sea treaties. Under this view, the benefits derived from the use of outer space must be shared with all countries.\(^\text{15}\) Prevailing state practice contradicts the validity of such an assertion. The better view is that Article I merely reflects the general concepts of res communis where the resource can be shared by all and is subject to appropriation by no one state or group of states. In the context of direct television satellite broadcasts the Outer Space Treaty appears to require states, and persons under their jurisdiction, not to use outer space to incite revolt or revolution in other states but goes not further. The Liability Convention, likewise, does not provide assistance with regard to direct satellite television broadcasts. Article I of this convention defines injury as "loss of life, personal injury or other impairment to health, or loss or damage to property". The context of the convention and the preparatory material make it clear that the convention was meant to cover physical damage caused by space objects. The use of a space object like a broadcast satellite to inflict health damage by injurious advertising would not fall within the scope of the convention.\(^\text{16}\) The existing treaties do not specifically address the issue of direct satellite television broadcasts. Nevertheless, they provide a foundation on which a special regime could be built. The high seas for example were regarded as res communis for centuries. However, this did not prevent the international community from building on this concept to safeguard common interests such as fish stocks and the prevention of pollution by dumping. A law of the skies relating to direct satellite television broadcasts that accommodates


\(^{15}\) See generally, Space Activities and Emerging International Law (N.M. Matte ed. 1984).

the enlightened interests of the international community is a desirable goal given the dramatic reduction of ideological strife among nations in this post-cold war era.

In 1961, a UN General Assembly Resolution declared that "communications by means of satellites should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis." In 1968, the General Assembly established a working group within the UN Committee on the Peaceful Uses of Outer Space ("COPUOS") to consider the issues relating to direct television broadcast satellites. COPUOS had hitherto proceeded by means of consensus. However, that consensus was badly fractured when it came to developing a body of principles to govern direct television satellite broadcasts. There was broad agreement among states on many areas. For example, the states agreed that direct television broadcasting should be conducted in accordance with international law, that every state has the right to conduct direct television satellite broadcasts, and that international cooperation in the field should be encouraged. What proved to be insurmountable stumbling blocks were three principles. These principles related to Consent and Participation, Program Content, and Unlawful/Inadmissible Broadcasts. Of these, the issue of prior consent was the most controversial, and although some breakthrough compromises were suggested, they were not followed. In 1982, the UN General Assembly passed Resolution 37/92 entitled "Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting" (the "DBS Principles Declaration"). All of the present ASEAN states voted in favor of this resolution. The countries that voted against this resolution included the space resources states such as the United States, Japan, Germany, the U.K., Denmark, Italy, and the Netherlands. The DBS Principles

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17 GA Res. 1721, UN Doc A/5100 (1961).
18 GA Res. 2453, UN Doc A/7218 (1968).
Declaration applied to broadcasting by states. When the U.N. passed this resolution, the last and
decisive phases of the cold war had been reached. President Reagan was in the White House and
with his famous "Evil Empire" speech had thrown down the gauntlet to confront the USSR on
every front. Given the context in which the DBS Principles Declaration evolved, it is arguable
that the declaration should be junked, and a new set of principles should be enacted. Given the
fact that the resistance to the DBS Principles Declaration revolved around three issues deemed
critical to the space resources states over which there could be compromise by the states who
voted in favor of the Declaration, these set of principles could provide a basis for further
elaboration. As Gorove observed: "As foreign DTBS develops, states and broadcasting entities
will probably also reach agreement – most likely on a bilateral, and only occasionally on a
multilateral basis – whenever a mutual interest or friendly relations make such agreements easy
to achieve and when the contracting states do not expect political or regulatory problems to
arise."21 Due to the fact that space law tends to develop incrementally, it would be useful to
extract certain principles from the declaration and examine their potential for development.

Article 1 of the declaration attempts to reconcile two principles that may conflict: First, the
television broadcasting must be carried out "in a manner compatible with the sovereign rights of
States, including the principle of non-intervention". Second, the "right of everyone to seek,
receive and impart information and ideas" is recognized.

Article 2 allows satellite television broadcasters to "provide recreation with due respect to the
political and cultural integrity of States."

21 Supra note 18 at 75.
Article 5 states in part that "[e]very State has an equal right to conduct activities in the field of international direct television broadcasting by satellite and to authorize such activities by persons and entities under its jurisdiction." (Emphasis supplied.)

Article 6 in part states that activities "in the field of international direct television broadcasting by satellite should be based upon and encourage international co-operation."

Article 8 states that "States shall bear international responsibility for activities in the field of international direct television broadcasting by satellite carried out by them or under their jurisdiction and for conformity of any such activities with the principles set forth in this document."

Article 13: "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."

Article 14: "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 agreements and/or arrangements in conformity with the relevant instruments of the International Telecommunication Union and in accordance with these principles."

From the above principles, it appears that the DBS Principles Declaration was overly focussed on prior consent and in its attempt to saddle space resources states with international responsibility for the liability of its broadcaster nations, did not provide a viable regime for the
space resources states. On the other hand, its insistence that outer space being *res communis* did not necessarily make it the Wild West where anything goes is a principle that has a potential to be enlarged into detailed rules.

**DBS Principles Declaration II?**

The prior consent controversy that split the international community in 1982 was the product of a political environment that no longer exists. Virulent strains of nationalism, ethnic hatred, and religious fundamentalism threaten to unravel important benefits in the post-cold war era. The international community as a whole has an interest in addressing these problems as they may manifest through direct broadcast satellite television. It is submitted that the following principles could secure widespread consensus should the UN General Assembly, taking into account the existing realities, wish to replace the DBS Principles Declaration. A new set of principles on the following lines could be explored:

First, all direct television satellite broadcasts should refrain from inciting ethnic, religious, and class hatreds. Given the international community’s experience with the effects of hate radio in the Tutsi-Hutu genocides in Rwanda and Burundi, the generation of such a principle should not be controversial. In addition, television broadcasters should refrain from showing graphic images of violence, atrocities, and disturbances that would, having regard to the audience, tend to inflame such audience to violence.

Second, all direct television satellite broadcasts must be mindful of the interests of minors and apply the same standards of protection available to minors in the United States and Europe. In particular, broadcasts should not direct violent television or harmful advertising such as alcohol consumption or unhealthy consumption practices towards minors.
Third, advertising of certain injurious products should be banned. These would include tobacco
products, some types of alcohol, and medicines that have not been approved for non-prescription
use.

Finally, standards of decency and promotion of entertainment for the entire family should be
encouraged. This would require direct television satellite broadcasters to avoid pornographic and
violent material in their material.

A replacement declaration should also encourage a plurilateral forum consisting of space
resource states, receiving states, private direct satellite broadcasters, local media organizations,
and relevant non-governmental organizations such as those devoted to the welfare of women
and children, the reduction of armed conflict, and the preservation of the environment to meet at
regular intervals in order to share views on appropriate television content and coverage. Such a
dialogue will be useful so that there could be a frank exchange of views among the various
participants.

The European Convention on Transfrontier Television

The European Convention on Transfrontier Television (the "European Convention") and the
Directive of the European Union on Transfrontier Television Broadcasting Activities offer
standards on program content that could be usefully adapted for use by ASEAN states. These
instruments are useful to the ASEAN community because they set forth generally acceptable
standards with regard to programming content. Media conglomerates would be hard pressed to
argue that while they are willing to comply with the standards of the European Convention, the
ASEAN community should only expect lower standards. Moreover, if the ASEAN states are
able to develop their own standards on critical issues such as advertising, protection of minors,

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22 Done at Strasbourg, May 5, 1998 (Reproduced in 28 Int'l Legal Materials 857), came into force
and the regulation of hate speech, these with the standards set forth in the European Convention
could promote universally accepted norms of direct satellite television broadcasting.

However, before the standards are analyzed, it should be noted that the European Convention is
based on the assumption that the member states that are parties to the Convention can exercise
jurisdiction over the broadcasters. For example, Article 3 declares that the Convention applies
"to any programme service transmitted or retransmitted by entities or by technical means within
the jurisdiction of a Party, whether by cable, terrestrial transmitter or satellite, and which can be
received, directly or indirectly, in one of more other Parties. (Emphasis supplied.) How would
ASEAN exercise jurisdiction over media giants such as CNN and Sky News that are
incorporated in western countries and do not have their headquarters in ASEAN countries?

It is submitted that although the ASEAN states may not have the same degree of jurisdiction
enjoyed by the European states, it could through a choice of measures induce western media
conglomerates to enter into a dialogue with a view to agreement on a set of principles. It is
reported that Rupert Murdoch dropped BBC television broadcasts to China in order not to
offend the Chinese authorities. The *quid pro quo* that ASEAN states could offer is to forego
some current options available to them. Some of these options are as follows: (a) Advertisers
who use satellite television services could be deemed to be doing business in the ASEAN
countries and taxes could be levied against their agents in ASEAN on a deemed income basis;
(b) TRIPS mandates intellectual property protection for satellite television programs. Such
intellectual property protection can be extended on the condition that the broadcasts satisfy
certain public policy standards of the ASEAN states. So long as these standards relate to
generally acceptable standards and do not infringe freedom of information concerns, measures
of this nature would probably survive a complaint to the WTO; (c) work permits and other
licenses necessary for the journalists from the western media organizations could be given on condition that the media groups agree to mutually acceptable standards; and (d) The ASEAN states could push for a satellite broadcasting code in the context of GATS and bring the issue of unregulated satellite television broadcasting in Asia as an issue on the agenda of WTO.

Chapters II and III of the European Convention, respectively entitled, "Programming Matters" and "Advertising" offer useful criteria to the ASEAN community.

Article 7 of the European Convention requires the broadcaster to respect the dignity of the human being and the fundamental rights of others with regard to both presentation and content of program services. In particular the programs must not be indecent or give undue prominence to violence or be likely to incite racial hatred. With regard to programs that may impair the physical, mental or moral development of children and adolescents, the programmers are required to schedule their broadcasts at times when children will not be likely to watch them. Broadcasters are also under a duty to ensure that the news fairly presents facts and events. The more detailed European Council directive elaborates on these themes. Article 22 of the directive requires that broadcasts do not incite minors' to hatred on grounds of race, sex, religion or nationality.

Article 8 permits both natural and legal persons the right to reply or to seek comparable legal or administrative remedies relating to programs that have been transmitted.

Article 10 entitled "Cultural Objects" reads as follows in pertinent part: "Each * * * Party shall ensure for European works a majority proportion of their transmission time, excluding the time appointed to news, sports, events, games, advertising and teletext services." Article 2(e) defines
"European audiovisual works" as "creative works, the production or co-production of which is controlled by European natural or legal persons".

The European Convention's regulates advertising by establishing criteria of fairness and consumer welfare. For example, Article 11 requires that all advertisements be fair and honest and not mislead nor prejudice the interests of consumers. Advertisers are not allowed to exercise editorial influence. Article 13 prohibits subliminal advertisements as well as surreptitious advertisements which means the presentation of products or services in programs when they serve advertising purposes. This article also forbids the use of persons who regularly present news or current affairs programs from appearing in advertisements as endorsers or otherwise.

For example, Article 12 of the directive requires that television advertising not prejudice respect for human dignity, include discrimination on the basis of race, sex or nationality, be offensive to religious or political beliefs, encourage behaviour prejudicial to health or safety, or encourage behaviour prejudicial to the protection of the environment.

Article 15 deals with the advertising of specific products. The Convention prohibits tobacco advertising. It regulates the conditions under which alcohol may be advertised. First, alcohol advertisements must not be directed at minors nor should minors figure in those advertisements. Second, the advertisements must not link alcohol with physical performance or driving. No claims should be made for alcohol as a stimulant, sedative, or a means of solving personal problems. Abstinence from alcohol should not be portrayed in a negative light nor should the immoderate consumption of alcohol be promoted. Finally, with regard to medicines, the advertisement of medicines available only be prescription is prohibited. Other non-prescription drugs may be advertised provided they are "honest, truthful and subject to verification and shall comply with the requirement of protection of the individual from harm."
A DIRECT SATELLITE TELEVISION CODE FOR ASEAN SKIES?

The ASEAN states and commercial broadcasters could attempt to establish a broadcasting code that would satisfy the critical interests of both groups. In formulating the content of such a code, key principles contained in European Convention could be modified to take into account the level of integration in the region. There are several ways in which such a code could be structured. One way is to have three lists, an open list, a negative list, and a list for prior consultation. Under the open lists, broadcasters would have the right to transmit without the prior consent of the ASEAN states. In the negative list, the broadcasters would refrain from such broadcasts. Finally, under the prior consultation list, broadcasters would consult with a representative of the ASEAN states on the proposed broadcast.

What could be the contents of the negative list? A certain category would not be controversial. For example, pornography or images designed to excite purient emotions would be excluded. Other categories could be images that would or tend to excite racial or religious hatred or be found deeply offensive by persons of a particular religion should be on the negative list. Explicit pictures of victims of disasters, accidents, and terrorist actions should also be placed on the list. A final, and perhaps controversial category, would be speeches, interviews, or statements by persons advocating violence, the violent overthrow of governments, and criminal conduct. These would be considered subversive broadcasts that arguably are prohibited by the current state of international law.

The open list could embrace categories such as sports events, educational television, films that could be watched by the whole family, coverage of religious events, and news broadcasts.
The prior consultation list could include religious proselytizing and subjects relating to the protection of minors.

Should there be a local content element in such a proposed code? The European Union, wary of Hollywood generated products, has provided for a local content provision in its regulation on transfrontier television broadcasting. The purpose behind that regulation was to preserve an European cultural identity. The countries of Asia may have similar concerns but at the same time there could factors that support a neutral and homogeneous American approach as an alternative to specific ethnic related programs. Like their counterparts in European countries, Asian policymakers may decry a television broadcasting system that constantly feeds its population with a steady diet of American game shows, soap operas, and serials. A drastic alteration of cultural values in urban Asian centers may be expected. Several ASEAN countries have made the case for a system of values generically referred to as "Asian Values". The components of this set of values consist of respect for elders, a willingness to put the interests ahead of particular individual interests, hard work and loyalty to employers, and thrift. Few would doubt that these values would suffer serious injuries if the American television values of rugged individuality, an independence of thought and action, and celebrity cultures are allowed to rule the Asian television channels. However, serious obstacles present themselves to copying the European model of program content. First, the Asian countries have not successfully transcended their history of rivalries as have the European countries. If broadcasters aim at a particular Asian audience, it will be a Chinese audience because of the sheer size of this audience. However, Malaysia and Indonesia discourage too enthusiastic an identification with Chinese culture by the overseas Chinese living in their territories. The United States has
challenged the European regulation as violative of the Uruguay Round agreements. Given the weak bargaining position of ASEAN where some of its members are in political and economic turmoil, it is doubtful that a strong U.S. counterattack can be successfully resisted. A way out of the impasse may be to discard an "Asian content" requirement but at the same time insist only upon quality American programs such as educational programs, nature and wildlife programs, Public Broadcasting Systems' fare such as "Masterpiece Theatre" and reduce the fare with a high content of violence. Programs that have a heavy American content will at least have one useful side effect. The knowledge of English that has become the global lingua franca will become more widespread in Asia.

The regulation of advertising would be addressed in a code of conduct. Standards of advertising would exclude prohibited practices such as subliminal advertising. What is unclear is whether a code can address issues such as not using a "hard sell" on vulnerable audiences such as the illiterate, promote practices that are injurious to the health of the population such as the consumption of alcohol and soda beverages, or promote products that have not been properly tested. Here, the European Convention rules on advertising could provide a basis for agreement. The broadcasting interests would have to secure agreement from their advertisers that they would submit to a consumer best practices code. Consumer safeguards would include the right to a refund for defective products, a right to return an item during a cooling off period, adequate warranties on parts and labor, and an agreement to submit product liability disputes to binding arbitration in an ASEAN location. For the ASEAN countries, the seller of products to ASEAN nationals could also collect any goods and services tax that may be applicable.

How would such a code address the vexatious issue of defamation? Different legal systems have different traditions of protecting reputation. The most media friendly regime is perhaps found in the United States. In the seminal case of *New York Times v Sullivan*, the United States Supreme court held that where public figures sued for defamation, the plaintiffs would have to also show an element of malice in order to succeed. The policy behind this decision was that a modern democracy must not chill free speech and criticism of officials who are accountable to their citizens. In contrast, the English law of defamation which applies is the commonwealth countries within ASEAN makes no such distinction and accords public officials the same rights of protecting their reputation accorded to private individuals. The media conglomerates would naturally wish to be protected under the broad American regime. At the same time, it should be noted that the print media has accepted the proposition that when they distribute newspapers in individual countries, they must abide by the defamation laws of those countries. In Singapore, for example, the International Herald Tribune has acknowledged liability under the defamation law applicable in Singapore in actions instituted against it in the Singapore courts. Unlike the print media, the broadcasting media would feel immune from such actions as they cannot be sued within ASEAN and if they are sued in their home countries such as the United States, the courts would find that there was no defamation absent a showing of actual malice. In order to persuade media conglomerates to participate in a broadcasting code, the ASEAN states may have to provide incentives. A proposal worth considering would be as follows: The satellite television media and the ASEAN states agree to a code containing the principles of defamation. These principles may reject the license to defame provided by *New York Times v Sullivan* but at the same time broaden the scope of defences such as fair comment and qualified privilege. The code should provide that if a plaintiff in an ASEAN state believes that he has been defamed, the defendant media organization will attempt to settle the dispute with him amicably and will

explore opportunities of a suitably prominent retraction and monetary damages. In the event that no amicable solution is possible, the dispute will be referred to arbitration of three arbitrators, one chosen by each party, and the chairman chosen by the other two arbitrators. This tribunal will then consider the plaintiff's complaint and will have the right to render a final award. The tribunal will also have power to make a summary award and avoid the costs of a protracted litigation. The award making power must include the right to award damages as well as order a range of conduct such as retraction statements and apologies. The rules applicable to the arbitration could be devised taking into account the interests of the parties and the appointing authority could be the chairman of the permanent court of arbitration.

Although intangible, direct broadcasting of satellite television can arguably be considered a taxable activity by the government of the receiving state. It is true that a radio broadcast that is received in a particular ASEAN state would not be activity justifying taxation. It is submitted that satellite television broadcasting is different. First, the activity is directed at a particular country. For example, some of the MTV broadcasts from Singapore are directed at India. Indian viewers are encouraged to call, the video jockey is a person of Indian descent, the MTV logo uses the Indian tricolor, and the whole format of the program makes it clear that it is directed largely at an Indian audience. If MTV were physically located in India, it would probably qualify as a permanent establishment within the meaning of India's taxes laws and tax treaties. Should the result be any different because MTV is located offshore? Under international law, a state is considered to have jurisdiction if the effects of a particular activity operate within its territory. In the above example, the effects are not accidental. They are deliberate. Second, the broadcaster gains a commercial advantage through the activity. Commercial broadcasting is not undertaken for charity. Giant media companies bid hundreds of millions of dollars for telecast

rights of major sporting events. They obviously intend to recoup those fees and handsome profits from advertisers. In turn, the advertisers look to the sales to the consumers of the recipient country. It is thus fair that the government of the recipient state looks to the income of the broadcaster as a taxable fund. Broadcasting companies would resist such a move. The response could be twofold. First, ASEAN states could tax the manufacturers of the products advertised who would then bargain for lower advertising costs with the broadcasting entity. Alternatively, ASEAN states could amend various double tax treaties with the home country of the broadcasters whereby the home country would concede that these broadcasters have a permanent establishment in the ASEAN states which renders them liable to taxation. It should be conceded that the latter is an unlikely scenario because of the greater leverage that the satellite broadcaster will have over its own government. A possible compromise would be for the broadcasting companies to agree to contribute a percentage of their revenues to an ASEAN fund devoted to media education in the ASEAN region. They could also agree to provide training to ASEAN nationals at their home offices, and where appropriate provide technical assistance to terrestrial based stations in ASEAN on various aspects of media production.

**CONCLUSIONS**

In the coming decades, direct satellite broadcasting to Asian countries including ASEAN would increase significantly. The size of the Asian populations, the growth of the middle class, and the market for media products such as films, music, and sports events will fuel the expansion of direct satellite broadcasts. Indeed, Hollywood based products consciously target non-English speaking Asian audiences by reducing English dialogue and increasing special effects and violent images. With the exception of city-states such as Singapore, most Asian countries will be unable to resist the expansion. Technological breakthroughs and citizen demand would make

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27 Supra note 3.
any government's ability to restrict access to such direct television broadcasting difficult. At present, the ASEAN states have the option of prohibiting installation of antennas and receiving dishes within their respective territories from receiving direct satellite broadcasts. However, they have no control over the type and content of the programs that could be broadcast to their territories especially when the broadcasts originate from media conglomerates. If the ASEAN states continue to address the problems associated with unregulated direct satellite broadcasts exclusively by regulating terrestrial based receivers, a time would come when the direct satellite television broadcasters would become entrenched. Although the bargaining powers of ASEAN states have been reduced by the economic downturn and the political disturbances in some of their members, it is advisable for ASEAN to forge a common position and require this problem to be addressed in the forthcoming UNISPACE III Conference in 1999. The current international law regards outer space as res communis. Direct satellite broadcasters and the states of which they are nationals are not obligated to ensure compliance with standards regarding content except arguably a duty not to broadcast subversive and hostile propaganda. An unregulated direct satellite-broadcasting regime for ASEAN could result in a disfiguration of its cultures and a transformation of its societies in undesirable ways. The leverage of ASEAN over direct satellite broadcasters who are not nationals of its member states is limited. On the other hand, the home states of direct satellite broadcasters have powerful incentives to continue with the existing unregulated regime. ASEAN could derive some principles from the European experience in preserving its cultural integrity. The European Convention on Transfrontier Television and the related European Commission directives offer principles that could be modified to suit the ASEAN context. Such principles regarding the protection of minors, regulation of advertising and consumer protection, protection against defamation and the right of reply, and the right to information could be integrated into a code of broadcasting that could be jointly administered by ASEAN states and a union of direct satellite television broadcasters.
Such a code would also provide for an ombudsman who would attempt to settle disputes relating to satellite television broadcasts, and if such settlements are not possible, a system for binding arbitration among the disputants. Finally, there would also be provision for a taxation of satellite broadcast revenues which will fund media training institutions in ASEAN.

The disarray and turbulence in several ASEAN states poses a challenge to forging a common position. Different political ideologies, levels of economic development, and different sizes of countries make the forging of a common position difficult. However, if such unity cannot be achieved, it would be at a significant cultural and economic cost to the region as the new viceroyys of the information age prepare to don the mantle of their predecessors in Asia.