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I. THE INTERESTS AT STAKE

The growth of the modern "information society" is a phenomenon transcending national borders, characterized by tremendous progress in both telecommunications and computer technology — a technology called collectively "telematics." Telematics have not only become the vital nervous system of our domestic economies and begun to play an increasing role in our private lifestyles,[1] but have grown to link the nations of the world in constant, instantaneous, and complex ways. These communications and the data conveyed through them (whether their raw material is written text, tables, numbers, pictures, or voices), due to their importance, are in many respects a matter of concern for governments, and thus the object of national and/or international regulation.

The much-heralded "information society" and its service-oriented economy amount, at some level, simply to the buying, selling, and managing of information. The regulation of information as it travels (as "data") will impact the economy as directly as did control of commodities in the past. This regulation, both national and international, creates an increasing challenge to the law and the lawyer. The issues raised are highly complex and the law may provide no ready answers — even to the most important questions.

To evaluate and clarify the legal problems involved in the modern "information society," we must first analyze the interests at stake. For the purposes of this analysis, I shall divide the interests at stake into three categories: interests in the free flow of data (free flow interests), interests in controlling data flows (control interests), and more general interests which may work both ways.

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1. *Transnational Corporation and Transborder Data Flows: A Technical Paper*, UNCTC, U.N. Doc. ST/CTC/23, U.N. Sales No. E.82.II.A.4 (1982); *Transborder Data Flows: Access to the International On-line Data-base Market*, UNCTC, U.N. Doc. ST/CTC/41 U.N., Sales No. E. 83.II.A.1, (1983); INTERNATIONAL INFORMATION FLOWS: A PLAN FOR ACTION (Business Roundtable 1985); K.P. SAUVANT, TRADE AND FOREIGN DIRECT INVESTMENT IN DATA SERVICES 29-91 (1986); Richardson, *International Trade Aspects of Telecommunication Services*, 23 COMMON MKT. L. REV. 385 (1986); Grewlich, *Die Transnationale Dimension der sich entwickelnden Informationswirtschaft*, 1987 EUROPA-ARCHIV 615.

The free flow interests are by no means uniform. Within this category there are three main subcategories: interests in access to information, in access to markets, and in access to services. Interests in access to information are protected by rules providing for "freedom of information." This is a human rights issue to the extent that the information is in the hands of governments or is otherwise generally available. Where the information is proprietary in nature, access becomes simply a business interest.

The need of enterprises offering telecommunication and information services to sell these services defines the access to market interest. Related is the interest of computer and telecommunications enterprises in selling equipment needed for such services. This interests is that of the sellers of information, technology and related services. This business concern is often styled as an interest in free flow of information, but it can be called a "freedom" interest only to the extent that the freedom of trade, or rather the freedom to trade, is considered a fundamental economic freedom — as in the law of the European Community, where the free movement of goods is considered to be one of the fundamental freedoms of the Common Market. That freedom to provide services also becomes a human rights issue where the service itself is information. Freedom of the press issues may arise in this context.

Those who want to use certain telecommunication and information services may possess an interest in access to these services. That means an interest in an efficient telecommunications infrastructure, in availability, and in reliability of such services. This interest is only partly identical to the access to information issue. It may rather be a business interest in the availability, preferably at low cost, of telecommunication and data processing services for business purposes. This interest is that of the buyers of information and related services.

The control interest most debated by lawyers is that of privacy or data protection. There are, however, many others. A great issue between the United States and her Western European Allies, and also between East and West, is that of national security interests. There may also be interest in protecting certain national industries. The best known example of this is the Brazilian Informatics Law.[2] In other countries, there might also be an interest in assuring that the requirements of information and telecommunication services are not entirely fulfilled by import. This may be due to considerations of industrial

2. *See generally* TRANSBORDER DATA FLOWS AND BRAZIL (UNCTC 1983); Bahadian, *Trade in Services: The Case of Transborder Data Flows*, 79 PROC. AM. SOC'Y INT'L L. 246, 257 (1985).

policy (location of high tech industry), labor market policy, vulnerability (the interest not to be dependent for essential services on foreign data processing), and also to a certain extent cultural policies. Finally, national telecommunications policies may also induce some restrictions on the importation or exportation of telecommunication and information services.

The group I call "general interests" may overlap with some of the other interests, as with the last few examples given under "control interests." For example, a developing country may see its development interests better served where there is free flow of data, or it may for various reasons have an interest in restricting the import or export of data. The same holds true for policies of industrial countries to foster technological development. National security may find interest in both restricting and opening transborder data flows: among the Western countries, there is a concern of keeping advanced technology used for military purposes out of the reach of the potential adversary; yet this may be counterbalanced by a wish to foster the development of such technology by international scientific exchanges. On the side of the socialist States, interest in access to advanced technology, for both military and general economic reasons, has probably motivated any propagation of free flow of information.

The examples given so far may suffice to show that the interests of various countries or types of countries may differ widely, and that, even for a single country there will, as a rule, be no clear-cut "national" position. Various parts of the national societies will benefit from one or the other position in different ways. With this reservation, it is nevertheless useful to identify five groups of countries with different overall positions.

The first "group" is made up of the United States alone. Its position as home-country of a massive information and computer industry is unique, creating its fundamental interest in the export of services and equipment. The essential interests of other States, in turn, include access to information which is stored on data banks in the United States. In the field of telecommunications, the United States has traditionally preferred provision of service by private but highly regulated enterprises, the common carriers. Telecommunication law during the last years in the U.S. has, however, moved toward deregulation of these industries, which has also determined the interest position of the United States in the international area.

The other Western industrialized States make up the second interest group. They have a significantly weaker position as producers of

information and telecommunication services as well as hardware. They depend to a significant extent on imports from the United States.

The third group is the socialist States. These states have to face a serious technological gap in the field of information and computer industries. They have a strong interest in access to information and technology, partly but not only for military reasons,[3] a consideration which prompts Western countries, especially the United States, to deny that very access.

The so called threshold countries or newly industrialized countries comprise a fourth interest group. The states of this group are perhaps the most loosely allied, taking sometimes divergent positions in the field of transborder data flows. The restrictive Brazilian position, for example, designed to foster the development of the country's own computer and information industry, is well known. Other countries of this group have decided to develop into services trading centers by opening their borders.

Most of the fifth group, the developing countries, do not possess a computer and information industry of their own. It is a serious development policy question whether and to what extent they should acquire the technology necessary to be included in transborder data flows. There is a real danger that these countries would become the object of information rather than benefiting from it. The practice of remote sensing by satellite and storage of data thus acquired proves the point. Information gathering is in the hands of industrialized countries, and the developing countries are not the masters of information concerning their national resources.

Keeping these interest groups in mind, the rest of this article will explore the above-identified access to information, access to markets, and access to services interests.

II. Legal Issues — Access to Information

The problem of access to information is first of all a human rights issue. Article 19 of the United Nations Covenant on Civil and Political Rights provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in the foregoing paragraphs

3. Müller, *Sicherheitspolitische Aspekte der Ost-West-Wirtschaftsbeziehungen*, in Grünbuch zu den Folgewirkungen der KSZE 273-283 (1977).

> carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary, (1) for the respect of the rights or reputation of others, (2) for the protection of national security or of public order (*ordre public*), or of public health or morals.

This provision would guarantee access to information stored in a data bank in a foreign country as a right to receive information regardless of frontiers, through any media of one's choice. There are, however, two problems involved in that provision. The first is its applicability in the relationship between the United States and the rest of the world, as the United States has not ratified the Covenant. The question thus arises whether this provision forms part of customary international law. Article 19 is certainly not a controversial issue between the United States and the Western industrialized countries, and it is in my view not doubtful that the basic principles of the Covenant on Civil and Political Rights form part of customary international law.[4] I would include in these basic principles the right to receive information regardless of frontiers. The really difficult question thus is that of the precise content and limitations of the right to information. The possibilities of limitation are formulated in a broad way in Article 19 paragraph 3, covering restrictions based on security considerations — such as those which are being imposed or at least considered as desirable by some circles in the United States.[5]

There are two limitations on the extent to which these restrictions may derogate from the principles of the Covenant. The first one is that these restrictions have to be based on law. Thus, restrictions based on the U.S. Export Administration Act will be covered. Thus, when the export of certain data from the United States to a foreign country is prohibited according to the Export Administration Act — a possibility which so far was used once in the famous Dresser case in order to enforce a pipeline embargo against the USSR[6] — that kind of restriction is "provided by law" within the meaning of Article 19 of the Covenant. On the other hand, restrictions based merely on some

4. Carillo Salcedo, *Human Rights, Universal Declaration (1948)*, 8 ENCYC. PUB. INT'L L. 303, 307 (1985); Frowein, *Das Problem des grenzüberschreitenden Informationsflusses und des "domaine reserve"*, 19 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 1, 26-32 (1979).

5. *See U.S. Seeking to Limit Access of Soviets to Computer Data*, Wash. Post, May 27, 1986, at A1, col. 1; *U.S. Limits Access to Information Related to National Security*, Wash. Post, Nov. 13, 1986, at A1, col. 1.

6. A comprehensive discussion of the legal questions of that case are beyond the scope of this study. For more information, *see Extraterritorial Application of U.S. Export Controls — The Siberian Pipeline*, 77 PROC. AM. SOC'Y INT'L L. 241 (1983).

kind of security policy which has no statutory basis, would be a violation of the Covenant or the corresponding customary rule.

The second consideration is that no limitation of fundamental rights is unlimited. Generally speaking, restrictions are legitimate to the extent necessary to preserve a competing value, but may not prevail at all costs over the human rights interest. This balancing of interests is well recognized in the constitutional law of many States, and the international guarantees cannot be different. In the international sphere, however, it is very difficult to define the limits on restrictions in the absence of a judicial body competent to do so. It is thus highly desirable that the States concerned agree on some more precise rules relating to restrictions of access to information, in particular those based on security considerations. The COCOM-list consultations may serve as a pattern as they exist for similar reasons.[7]

It has also been pointed out that to the extent that the information at stake is of a proprietary nature, the issue becomes really not one of freedom of information, but rather one of the protection of acquired rights. Here again, we are in difficult waters for two reasons. First, the application of international customary law rules concerning the protection of private property to this kind of industrial or intellectual property is by no means certain. Second, the customary rules on the protection of private property are themselves hotly debated.[8] Such rights would, however, be protected by most modern investment protection treaties. In the light of the uncertainties described, it seems necessary and desirable that the States concerned get together and develop rules to that effect.

There remains the question of an appropriate forum for the development of these rules. By far the biggest portion of international data flows occurs among Western industrialized countries. The organization which has developed into being a kind of think tank of these countries, the Organization for Economic Cooperation and Development ("OECD"), would probably be an adequate framework. The form of the instrument could be a code of conduct, providing also for dispute settlement procedures. This form has successfully been used by OECD in a number of instances.[9]

The problem of access to information certainly needs to be solved.

7. *See generally* Berman & Garson, *United States Export Controls — Past, Present and Future*, 67 COLUM. L. REV. 791 (1967) (on the COCOM procedure). A more recent study can be found in Leben, *Les contre-mesures inter-étatiques et les réactions a l'illicite dans la société internationale*, 1982 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 1.

8. Dolzer, *Expropriation and Nationalization*, 8 ENCYC. PUB. INT'L. L. 214, 217-20 (1985).

9. The best-known example is the OECD Code of conduct for transnational corporations, 15 I.L.M. 967 (1976).

The less secure access to United States data banks appears to be, the more non-U.S. users will develop competing information facilities. If we are to avoid needless duplication in these costly systems, there is a mutual interest in finding a solution to this problem.

III. Legal Issues — Access to Markets

The transborder provision of telecommunication, information and data processing services generally is not subject to customs duties. The barriers these services have to face are rather so called non-tariff barriers, i.e. certain regulations which make the provision of these services impossible, difficult, or at least more costly. The main problems in this respect are the scope of national (*e.g.* PTT) or international (*e.g.* INTELSAT) telecommunication monopolies (the monopoly being a classical non-tariff trade barrier), and certain restrictive conditions concerning the use of basic telecommunication facilities. The main problems of the latter kind are the conditions and the cost of the use of leased lines. In addition, other regulations concern specific services such as banking and insurance.

These questions of non-tariff barriers are well known to the international trade lawyer. The question of whether rules similar to those concerning trade in commodities apply to or should be created for non-tariff barriers to trade in services remains very current. While the GATT and certain bilateral treaties are designed to ensure the free movement of goods by establishing certain rules for trade (*e.g.* the Most Favoured Nation clause, tariff concessions, the principle of non-discrimination, and others), there is no general rule of freedom of trade in services, nor is there any particular regime to that effect for information, data-processing and telecommunications services. The ITU Convention, and regulations adopted thereunder, do not establish such a principle (although they have a definite impact on transborder services of the kind described). We are thus, to a great extent, in the field of *lex ferenda*. The issues are being treated in the framework of the so called Uruguay-Round of the GATT[10] and also in certain bilateral relations. The first positive regulation of these questions can be found in the United States-Canada Free Trade Agreement.[11]

Non-tariff technical barriers to trade are regulations which as a rule are designed to protect specific values. They may or may not be of a protectionist nature, but their impact on trade is felt in various

10. *See* Richardson, *supra* note 1.

11. Communication from the President of the United States, Free Trade Agreement Between Canada and the United States, H.R. Doc. No. 100-216, 100th Cong., 2d Sess., Ch. 19: Services (1988).

ways. There are rules concerning certain goods where the restrictive effect on trade results from the fact that they differ from one country to the other. In such a case, harmonization of the rules eliminates the restrictive effect on trade. There are other rules which increase transaction costs by their complexity alone, even if they are international or equal from one country to the other. In such a case, even harmonization does not solve the problem. This is why certain ITU regulations are sometimes considered trade barriers,[12] restricting international trade in telecommunication services.[13]

Before we go into the details of reducing or eliminating barriers to free trade in services, one fundamental principle underlying such rules has to be explained, namely the principle of proportionality. As already said, nontariff barriers to trade are accepted because they are necessary to protect certain values. This is clearly demonstrated by Article XX of the GATT concerning general exceptions, which mentions a number of public and private interests which legitimize measures restricting international trade. Measures not so legitimized are "unnecessary" trade barriers within the meaning of the GATT Code on Non Tariff Barriers. One can thus formulate the general principle that tariff barriers to trade are only legitimate where they are "necessary and proper," where they constitute an appropriate, reasonable means to protect valid interests. This principle clearly underlies the jurisprudence of the Court of Justice of the European Communities concerning both the free movement of goods and the free circulation of services.[14] But in the absence of a judicial determination of the border line, the distinction between appropriate and inappropriate barriers to trade is hard to draw. Additional and more precise rules are thus needed. Some proposals to that effect are already on the negotiating table for the Uruguay Round.

The first problem one encounters in the field of access to markets in telecommunication services is that of monopolies. In many, if not most countries of the world, telecommunication services or at least certain services of this kind are the subject of a monopoly. Recent developments, in particular the tremendous progress of telematics, have brought these traditional monopolies under attack in many countries. Thus the fundamental problem posed at the international level is

12. This is true for CC-ITT Recommendations, and it was the reason for objections voiced against certain drafts of the new telecommunications regulations, which were submitted to the ITU Administrative Conference in 1988.

13. This is the position of the Commission on Computing, Telecommunications and Information Policies of the International Chamber of Commerce in particular.

14. The fundamental case on these questions is the so-called *Cassis de Dijon* judgment, 1979 E. Comm. Ct. J. Rep. 647.

the following: is the monopoly, the classic and far reaching barrier to trade in services, to be maintained? If so, how is the dividing line between the sphere of the monopoly and that of free competition to be drawn? This is a difficult problem both from the substantive and the formal point of view, formal in the sense of the drafting of a definition. This problem is analogous to that faced in the United States when the question of the dividing line between regulated communication services and unregulated data-processing services arose. The US-Canadian Free Trade Agreement solves the definition problem by referring to the respective national definitions, made possible by the fact that the Canadian regulatory authority adopted standards similar to that of the US-FCC.[15]

The second major problem is that of accessibility and cost of "basic" telecommunication services, in many cases monopoly services. To put it in a somewhat simplified way, the interest of providers of information, data-processing and telecommunication services is to use cheap leased lines and enjoy at the same time a great liberty of routing any traffic through these lines, which includes subleasing. This is in many respects opposed to the financial interest of postal administrations which want to subsidize more costly services out of revenue derived from less costly leased lines. Their strategy is rooted in the basic concept that telecommunication services offered by the postal administration should be considered as a whole, that there is a social welfare function involved when these services are provided at low cost to economically weaker persons and regions. There is thus a legitimate state interest which justifies this kind of regulation which makes certain services more costly.

Another classic regulatory rule to avoid and reduce non tariff barriers is the principle of non-discrimination. It is closely related to the fundamental GATT principle of Most Favoured Nation treatment. It requires equal treatment of service providers of similar categories. Here, as in other fields where non-discrimination is an issue, certain interests of the state may justify distinctions. May a postal administration, having concluded an interconnection agreement with two foreign service providers, refuse to admit a third one because it is of the opin-

15. Free Trade Agreement between Canada and the United States of America, *supra* note 11, Annex 1404, Sectoral Annexes, C. Computer Services and Telecommunications - Network - Based Enhanced Services, Art. 7. The relevant decisions referred to are, in particular, the Computer I and Computer II decisions of the FCC, 28 F.C.C. 2d 267 (1971) and 77 F.C.C. 2d 384 (1980) and, for Canada, the Telecom Decision CRTC 84-18. On this question, see R. BRUCE, J. CUNARD, & M. DIRECTOR, FROM TELECOMMUNICATIONS TO ELECTRONIC SERVICES 5, 197, 306 (1986).

ion that two is a reasonable number to provide the type and amount of traffic expected?

A third classic principle of reducing the restrictive effect of regulations is that of transparency. Part of the restrictive effect that national regulations may have on a foreign entity's access to the market resides in the fact that these regulations are not well known, or that their drafting is a matter of secrecy. The GATT Code on Non Tariff Barriers thus enshrines the principle of transparency of national rule-making. This is certainly a principle which deserves to be transposed to the services field.

IV. Legal Issues — Access to Services

It is the interest of users of telecommunication, information and data-processing services that the kind of service needed is available, reliable, and inexpensive. This involves a series of aspects and problems. The first is the availability of "basic" telecommunication services at the international level. This is guaranteed by the cooperation of postal administrations and common carriers. The ITU provides a general framework for that cooperation, but the necessary details are worked out by bilateral or regional arrangements between administration and carriers. While there is a general agreement that there is to be some public responsibility for the functioning of international telecommunications, there is today no uniform view as to how far that State or public responsibility goes, or, in other words, how far the availability of services can be assured by market forces. It is a fundamental issue for current attempts to regulate international telecommunication services comprehensively within the framework of ITU. One of the questions which is discussed, for instance, is whether there should be a list of telecommunication services included in the regulations or whether the definition of telecommunication services should be left open for private initiative. An exhaustive list of services included in the regulations would severely hamper innovation in this rapidly changing field of telecommunication services. On the other hand, a list might serve legitimate standardization interests and thus, might help both consumers and economically weaker services providers. The development of the new Integrated Services Digital Network ("ISDN") will probably abolish any technical need of standardizing services.

Similar considerations apply to another important user interest, namely compatibility. A user will be interested in being able to reach as many other users as possible. This requires that the equipment of the users on either end of the line be compatible or made compatible

by some kind of intermediate operation. There are several ways to insure such compatibility. It may be done through governmental regulation, i.e. within the framework of ITU; it may be done through the industries' own standard setting processes, that is ISO at the international level; or it may be left to market forces, where compatibility is insured either by a leading product which is accepted by a great segment of the market, or by other market mechanisms.

Similar questions arise as to what could be called the legal infrastructure of transborder data flows. A number of legal instruments have the function of bringing about an adequate settlement between the interest of various actors involved and thus of contributing to a satisfactory functioning of the transactions at stake. One of the major issues which may be raised in this respect is an adequate distribution of the risks involved in a malfunctioning of transborder data flows. This includes the question of responsibility which may be regulated by applicable national law, but which may also be regulated by contracts between the user and the service provider. It has to be analyzed more closely whether existing national legal systems and contract practice provide an adequate balance of interest. If not, some kind of international regulation might be necessary.

Another issue is the protection of transborder data flows against illegal interference by private parties. One may well leave this problem to the ingenuity of hardware and software producers which have invented and may further invent devices which exclude or render very difficult outside interference by technical regulations or by deterring it through criminal law protection. But some governmental coordination of these efforts, with assurances of adequate criminal sanctions for some acts of interference, may be desirable as well.

Finally, specific rules are required for specific transactions and also for certain general problems involved in transactions performed through transborder data flows. For instance, traditional rules concerning declarations purporting to produce legal effects may no longer be applicable where such declarations are made through data transmission. Again, the solution of these problems can be left to the ingenuity and contract practice of the relevant actors. But it may as well be necessary that such problems are dealt with by national legislators and international public regulation.

V. Conclusion

When Western policymakers discuss transborder data flows, some mean freedom, and some mean business. But whose freedom and whose business? It must be understood that different actors within the

various countries and the governments of various countries, even countries of the Western alliance, have different kinds of interests in international telecommunication services and transborder data flows. These different interests have to be accommodated. This requires a clear recognition and understanding of the interests and values at stake, coupled with sophisticated regulatory skills for so complex and rapidly changing a subject matter. Only if this regulatory challenge is faced with clear insight into the demands of the subject matter, and clear identification of the competing values at stake, will good international law result. To put it in the words of William Bishop: "One of the best ways in which to approach international law, is to ask what it is used for, and by whom."[16]

16. Bishop, *General Course of Public International Law*, 115 RECUEIL DES COURS 147, 151 (1965).