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LAW-MAKING FOR INTERNATIONAL INFORMATION FLOWS

ROLAND STEVENS HOMET, JR.*

PREFACE

Senior executives of major United States computer and semiconductor firms met recently in Florida.¹ They were there to explore the possibility of pooling their research and development budgets into a high-technology collective, as an imitative counterthrust to the trade practices of the Japanese Ministry of Trade and Industry. William Norris, organizer of the meeting and chairman of Control Data Corporation, recognized that such an arrangement would have to surmount the hurdles of United States antitrust law;² but in his view such action was necessary because the Japanese practices had caused "massive distortion of the world competitive scene which can only be dealt with by extraordinary action."³

Taking at full value the evident merits of this complaint, it is worth noticing that they concern essentially just two parties: producers of electronic equipment in Japan, and producers of similar equipment in the United States. If—fairly or unfairly—Japanese equipment were to take over the American market, consumers and users of such equipment would not be fundamentally disadvantaged. Where there is unfairness, moreover, the producing industries in each country have ready access to their governments for complaint and defense. That is why Japanese-United States trade negotiations have been at the top of each country's agenda for some years. And the laws to which the two parties may have recourse are well-identified: industrial-organization (including antitrust) and trade laws nationally, and the General Agree-

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1. Wall St. J., Mar. 1, 1982, at 6, col. 2. "Sixteen major U.S. electronics companies, apparently convinced they have less to fear from one another than from their Japanese competitors, are exploring a joint research and development venture of unprecedented size and breadth." *Id.*

2. *Id.* Subsequently the joint research venture, Microelectronic and Computer Technology Corp. (MCC) was granted a limited antitrust clearance by the Department of Justice.

3. Wall St. J., Mar. 1, 1982, at 6 col. 2.

ment on Tariffs and Trade (GATT) internationally.

These threatening vexations of trade distortion, therefore, even when they become "extraordinary," at least take place within a clearly understood legal and policy context. Such is not the case for the equally threatening and potentially just as vexatious regulatory curtailments to international information flow.

THE PROBLEM

Let us suppose a state of regulatory or tariff curtailment such that European-source banking information could reach New York only by mail or by personal travel, and further that this constraint did not apply to information movements within Europe. We would quickly discover how much of modern banking *is* information flow. Chase Manhattan Bank—a multinational corporation whose worldwide operations are critically dependent on the rapid, reliable and inexpensive movement of large volumes of information—would be immediately affected by the curtailment. Its European competitors, such as Hambros or Barclay's, could react instantly to banking opportunities in Europe while Chase (New York) could not. How would Chase redispense its headquarters? With what loss of operational grasp? And suppose further that like barriers to financial data movement were to spread—to Canada, Japan, the Middle East, Africa and Latin America. Could Chase or any other bank remain a multinational corporation? What would be the cost of adjustment, not just in terms of money, but in terms of management? Would we not then have a truly "massive distortion of the world competitive scene which can only be dealt with by extraordinary action"?

This quotation suggests the similarity between the electronic-equipment and information-flow cases. It stems from the potentially calamitous effects of internationalizing the currently sporadic and piecemeal regulatory restrictions on information flow. The threat may not appear as urgent, or vexatious, as the one that drew the electronic equipment producers to Florida. But, it is unmistakably present. It is also larger and broader in its implications, and under current conditions it is far less manageable. This becomes clear when one considers the dimensions of the *difference* between the two cases.

To begin with, the industry ramifications in the information-flow case are multidimensional; they extend well beyond banks. Control Data and other United States-based information processing firms would have to give up international operations. The Society for World-

wide Interbank Financial Telecommunications (SWIFT)⁴ would have to be abandoned. United States international airlines could not compete for ticket sales in Rome or Rawalpindi. International oil operations would be disrupted. American manufacturing, sales, services and other information-dependent industries would all be adversely affected. Methods of adjustment could be found, but at what costs and with what effects on long-established patterns of business conduct? Everywhere the *national* and *regional* firms would gain precedence, not because of increased efficiency or improved customer relations, but because of political fiat. It would be as if the most radical architects of the New International Economic Order had suddenly been handed an open season to write their prescriptions into practice—all by the simple expedient of manipulating information transactions.

Such an occasion would surely unify all affected United States industries and propel them into action. That should be a source of considerable group strength, if it happened in time. But the group would have to confront not just one nation, like Japan; it would have to deal with a wide number of governments and intergovernmental bodies that are engaged in the regulation of data flows. Today there are the Canadian Banking Act, the French data tax and valuation proposals, Brazilian and Japanese restrictions on external processing circuits, and German requirements of in-country processing. The list is growing in length and variety. Regulatory claims have been further staked out by the Organisation for Economic Co-operation and Development (OECD),⁵ the Intergovernmental Bureau for Informatics (IBI)⁶ and the United Nations Centre on Transnational Corporations. There is significant potential for this trend to spread—to the United Nations Educational, Scientific and Cultural Organization (UNESCO), to the United Nations Committee on Information (UNCI), to the United Nations Conference on Trade and Development (UNCTAD) and to others.

All of these measures, present and prospective, are steps beyond

4. Nacumuli, *SWIFT: Objectives, Standardization, Availability, Auditability, Security, Privacy and Liability*, 3 *Transnat'l Data Rep.* 1 (No. 6, 1980). SWIFT is the Society for Worldwide Interbank Financial Tele-Communications, formed in 1973 to develop and operate an international communication network to serve the worldwide banking community. *Id.* at 7.

5. The OECD was established in September 1961, by the Convention on the Organization for Economic Co-operation and Development. It is the successor body to the Organization for European Economic Co-operation (OEEC). The OECD's aim is to promote economic and social welfare by assisting its member governments in the formulation and coordination of policies designed to this end. See *Organisation for Economic Cooperation and Development (OECD)*, 19 *Y.B. INT'L ORG.* C3023 (1981).

6. The IBI was established December 1974, in Paris, by a United Nations General Assembly resolution.

the protection of personal privacy. That original impulse has largely played itself out, and although there remain particular sticking points, the international community has managed fairly well to contain the privacy issue. What has happened beyond that is a discovery that data flows impinge not just on privacy and other individual liberties but on larger concerns of a political, economic, social and cultural nature. At stake in the perception of many other governments is the permeability or integrity of their own separate societies—something awkwardly summed up in the phrase “information sovereignty.”⁷ This is the amorphous policy challenge that today poses the broadest and gravest threat to the operations of United States information-intensive multinational enterprises. By its very nature, the claim of information sovereignty cannot yield to the application or elaboration of any single set of countermeasures.

Here is another major distinction from the trade-practice complaint. Privacy protection is reasonably well-understood and can be dealt with. The same may be said of trade promotion and restriction. There is a shared Western tradition of safeguarding individual liberties; there is the GATT. Information sovereignty, however, is an impulse, not a tradition; an aspiration, not a code.

Perhaps the greatest danger lies in the absence of any body of law to which to refer or by which to contain this aspiration. On the one hand, articulation of broadly acceptable legal principles could become a means of legitimizing what are now still isolated incidents of national restriction. That is what was attempted with press censorship in the 1974-78 Mass Media Declaration at UNESCO.⁸ On the other hand, with no GATT-like instruments of restraint, the spreading pattern of national regulations could harden into customary international law with equally restrictive effect.

RESPONSES

Whatever United States preferences in the matter might be, there are already serious efforts underway in international bodies to develop legal principles for information flow.

The OECD has authorized two inquiries, one economic and one legal, into the practice of moving business information across national

7. For an elaboration of this concept, see the appendix.

8. Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War; UNESCO RES. 4/9.3/2, 20 UNESCO GEN. CONF. RES., UNESCO Doc. 20C/Resolutions at 100-04 (1978).

frontiers.⁹ The purpose of the legal study is to determine what gaps should be filled by public international law—perhaps in the form of an OECD-sponsored code of conduct.

The IBI, whose stated purpose is to promote research, education and utilization of informatics at the government level,¹⁰ has tabled a set of ten legal principles, which the United States government (a non-member) has labeled “premature.” The IBI has a major heads-of-state conference scheduled in Havana in 1984, and the legal report is aimed for that conference.

The United Nations Center on Transnational Corporations has issued a lengthy report describing the international regime for data flows as a “legal vacuum.” While the author of that report has disclaimed any present intention of developing a legal regime, he concedes that the political dynamics are not in his control.¹¹

With all this activity going on, and more quite probably in the offing, the question for United States policy and preparations is not whether it should be taking place but how to influence it in a constructive direction.

There is considerable confusion and a dissipation of effort at present in determining what body of law to appeal to. There are elements of trade, taxation, commerce, telecommunications, human rights and state sovereignty to consider. None of these areas alone can span the field. Perhaps it would be useful to retreat to the generic spawning ground of “information sovereignty,” and then to split the response into separate elements of private and public ordering.

The first question to address would be how far private ordering—the systems of law that govern business relations among private parties—can contribute to a reduction of “information sovereignty” tensions. One would wish to look here at commercial laws, insurance arrangements, enlightened business practices and other such matters to determine what elaborations (or simple publicizing) may be in the common interest.

Second, one would examine the prospects for improved *harmonization* of commercial laws and practices, and/or agreement on applica-

9. See PRELIMINARY INTERPRETATION OF OECD/BIAC SURVEY, DSTI/ICCP/83.19 (May 17, 1983); LIABILITY ISSUES RELATED TO TRANSBORDER DATA FLOWS, DSTI/ICCP/83.16 (May 31, 1983). See also U.S. DEPARTMENT OF STATE, OFFICE OF INVESTMENT AFFAIRS, CURRENT STATUS REPORT: SELECTED INTERNATIONAL ORGANIZATION ACTIVITIES RELATING TO TRANSNATIONAL ENTERPRISES 34 (August, 1983).

10. Intergovernmental Bureau for Informatics (IBI), 19 Y.B. INT'L ORG. C1645g (1981).

11. See K. SAUVANT, TRANSNATIONAL CORPORATIONS AND TRANSBORDER DATA FLOWS: A TECHNICAL PAPER (1982).

ble private international law (choice of laws). Might the Uniform Commercial Code provide something of a model for international information transactions, perhaps through the good offices of a UNIDROIT?¹²

Third, one would consider what, if anything, remains that requires resolution under public international law—the law that operates among nation states. It may develop that trade and taxation, telecommunications and intellectual property need more attentive application of their respective international charters and nothing more. On the other hand, some new charter may be called for. Here one would want to weigh very carefully all the factors that impinge on regularity of business transactions, such as choice of forum, displacement of existing laws, and pace of introduction.

Fourth, one would address the *form* of any new legal regime—code, convention, declaration, or anything else—with equal attention to effects on international commercial transactions.

Fifth and finally, although in some respects it might be taken up first, one would have to develop a scrupulously analyzed and re-analyzed timing sequence from the first announcement of the inquiry through the warding off of premature regulatory initiatives to the final introduction of specific and seasoned proposals for action. Plainly, this would have to be done in the United States in close consultation with all affected segments of the United States information industries as well as with the Department of State.

As this last point demonstrates, an effective plan for countering “information sovereignty” would need to combine research and strategy, study and action. That is my submission.

FORECAST

Nothing of this nature or dimension is currently in prospect. The State Department does not wish to get drawn into any exploration of legal regimes for fear of counterproposals. United States multinational corporations accept that judgment because they perceive no imminent crisis.

Does it matter if they are wrong? If believe so. I suspect that the vector of political forces now at work in the world is pointing in the direction of an International Law of Information Conference and an

12. The International Institute for the Unification of Private Law (UNIDROIT) was established in April 1926, by an agreement between the Italian Government and the League of Nations. The aim of the organization is to study and propose methods to harmonize private law between states or groups of states. See International Institute for the Unification of Private Law (UNIDROIT), 19 Y.B. INT'L ORG. C2136g (1981).

OPEC-like cartelization of spectrum, both within ten years. Each of these prospects holds the potential for vast and disastrous impact. We could avoid them but we are not doing so. That cannot last. Unless we in the United States exert ourselves to redirect the swirl of "sovereignty" forces along more constructive paths, we face a potentially calamitous disintegration of information resources and relationships that will benefit neither United States interests nor the international community. The time for strategic thinking is now.

APPENDIX

TRANSBORDER DATA FLOWS AND THE CLAIMS OF OFFENDED SOVEREIGNTY*

Computer communications across national boundaries can be restricted in a number of ways, of which overt data regulation is only one and—as the recent OECD experience suggests—perhaps the one that is the most amenable to adjustment. Other available instruments of control include refusal of private lines, imposition of usage- or distance-sensitive pricing, and assertion of local-carrier monopolies over the terms of service. Whatever the method chosen, the motivations are likely to constitute a complex mixture of impulses and concerns.

Those that relate to protection of personal privacy touch on widely shared values and accordingly lend themselves to at least some measure of harmonization. Those that can be attributed to strict economic rivalry—the desire to protect and encourage home-grown as opposed to foreign industries—can (at least in theory) be drawn to account in the framework of the GATT. But there are other motivations, loosely bound up in the preservation of “sovereignty,” that escape such easy classification. It is desirable, if possible, to reduce them to their constituent parts for analysis and appreciation.

The French have probably been the most vocal on the subject of sovereignty. At a September 1977 Vienna, Austria symposium organized by the OECD, Louis Joinet of the French Justice Ministry proclaimed that: “Information is an instrument of power, of policies, of culture.”¹ The following year at the SPIN Conference organized by UNESCO and the Intergovernmental Bureau for Informatics, the French delegation proposed a resolution that passed by consensus:

...
Considering the threat of evasion of national laws posed by these (international data) flows, particularly for countries which have passed legislation on informatics and freedoms,

Considering present disequilibria in the direction of these flows which could place certain national sovereignties in jeopardy if the confidential nature of certain data relating to the

* This appendix is a verbatim reproduction of a paper delivered by the author to a State Department task force in 1979. The task force disbanded before the paper was discussed.

1. See generally ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TRANSBORDER DATA FLOWS AND THE PROTECTION OF PRIVACY (1979).

States and business enterprises as well as of information regarding the private lives of individuals, were not respected as a result of such dislocalization of data,

. . .

Recommends:

. . .

3. Considering the political, economic, social, and legal dimensions of the problem of data flows without seeking to reduce them in a single international instrument, to only one of such aspects. . . ."²

We may ourselves look at each of the relevant aspects of national sovereignty in turn.

1. National Security

Obviously if vital or sensitive information relating to the national defense or national economic planning is processed abroad, a country may feel itself excessively dependent upon data banks and communications circuits that are not within its exclusive control. Since it is government agencies that choose where and how to process this data, and whether to maintain duplicate data and/or processing locally, the remedy for this concern would seem to lie in the government's own hands.

A broader concern, which may have been magnified by the OPEC oil boycott, is the general undesirability of depending for strategic resources on unreliable foreign suppliers. Information is coming increasingly to be recognized as a strategic resource, and the United States holds a dominant position in the capacity for and sophistication of information processing. The Canadians have publicly voiced their concern that information in United States data banks might be peremptorily withheld for security or other reasons, court injunctions, or a change in United States law. A response to this apprehension should cite not only the ideological commitment of the United States to the free flow of information but also the competitive realities in data processing (*vis à vis* Japan and others) that preclude arbitrary monopolistic practices.

2. Economic Sovereignty

Computer communications, whether internal or external, may have a number of destabilizing effects on a country's economic structure and performance. They may threaten (as they have in the United

2. SPIN Conference—Intergovernmental Conference on Strategies and Policies for Informatics, 28 Aug.—6 Sept. 1978, Torremolinos, Spain.

States) established patterns of monopoly control over telecommunications, designed to assure reliability and accountability, which in most countries is seen as a proper sovereign prerogative. Employment effects of electronic automation may also cause concerns; fear of major unemployment from computerization is reflected in a recent British poll. The Nora Report in France, while painting an optimistic economic future with "informatisation," warned of near-term increases in unemployment.³

As indicated, such effects would occur whether data processing were carried on internally or externally. The sovereign concern with this aspect of trans-border data flows is associated with a loss of control—the inability to dictate the pace at which electronic processing will be introduced, and to relate that pace to the fashioning of necessary economic adjustments such as retraining and relocation of displaced workers. This may be only a transitional concern, but one that is keenly felt and that cannot be dismissed as simple economic rivalry.

In the Third World, the question of economic sovereignty is likely to arise in a different form, as electronic data communications are linked to the "excessive power" and "unaccountability" of the multinational corporation. The MNC, it may be said, scoops up raw materials for fabrication and sale elsewhere, and it similarly sends locally generated data out for processing and use in other quarters—all without the supervisory control or participation of the host government. Further, LDC governments may fasten on the international communications of the MNC as an indispensable attribute of its economic functioning, and seek to "squeeze" those communications as a way of bringing the MNC to terms. So long at least as Third World countries have no stake of their own in regional or international data communications, they are unlikely to attach any countervailing value to freedom of information flow. This part of the debate may therefore tend in the direction of the Economic and Social Council and be taken up as part of the rights and responsibilities of multinational corporations.

3. Social Sovereignty

Anyone who has had a billing dispute with a credit card company or a health insurance firm knows the frustrations of dealing with a computer. Others may fear that turning people into machine-readable data entails a form of dehumanization that is damaging to society. Of course these results can occur wherever the processing takes place, but again trans-border data flows involve a further alienation and loss of control.

3. S. NORA & A. MINC, *THE COMPUTERIZATION OF SOCIETY: A REPORT TO THE PRESIDENT OF FRANCE* 33-34 (1980).

The Nora Report speaks of a "crise de civilisation"—a conflict between traditional values and modernization.⁴ In the long term, computerization presents a choice (drawing on Brzezinski, *Between Two Eras* (1970)) between an elitist and a democratic society, one controlled by a few technocrats or one open to widened individual participation. This choice, by fair implication, must be subject to the control of the affected society.

Computer communications and their broadened access to information may, in the judgment of the Nora Report,⁵ introduce positive economic and social values, such as the decentralization of public administration and the improved competitiveness of small and medium-sized firms. But these opportunities will have to contend against the strong French traditions of centralization, rigid administrative hierarchies, and the domination of big business.⁶ There is a need to avoid the sequence "rigidity-explosion" that is all too familiar to France. Only a deliberate policy of social change, managed by the French government, can in this view accommodate the conflicting forces and foster a positive evolution towards a new and more open society.

In summary, sovereign control and regulation are seen as necessary to equalize matters and to prevent the alien forces symbolized (for Nora) by IBM from precipitating France in a direction that requires social guidance.⁷ Similar views may well be held, though less explicitly, by other European countries.

4. Cultural Sovereignty

At a New York Data Regulation Conference in December, 1978, Mr. Bernasconi of the IBI said that countries must fear falling victim to "cultural homogenization."⁸ The form of information storage affects both language and knowledge, says Nora; given the present dominance of the United States as a locus for storage, "unspoken criteria originating from the American cultural model will prevail."⁹ It is blue jeans and Coca-Cola and popular songs all over again.

But the argument is more subtle and more penetrating. To permit Americans or anyone else to control the world's data banks is to allow the ways of perceiving reality to be modeled by a single society. The

4. *Id.* at 1.

5. *Id.* at 5.

6. *Id.* at 6.

7. *Id.* at 6-8.

8. *See id.* at 131.

9. *Id.* at 131.

categories of software incorporate choices of context and connection that reflect a particular informational and logical perspective. To be bound to someone else's perspective on these matters is to accept a species of "cultural alienation."¹⁰ So says the Nora Report, adding that the installation of data banks is for this reason an imperative of sovereignty.¹¹

Lest this be thought extreme, the Chinese under Mao refused to import computers because the *hardware* was thought to embody alien culture.¹² What the French are saying, more moderately, is that the dictionaries and grammars of the future should not all be edited in the same country.

5. Conclusion

This has been a summary of genuine sovereign concerns that have nothing to do with the protection of personal privacy or with straight economic rivalry. The fact that they are genuine does not, however, mean that they should prevail. The "free flow of information" principle is an answer to sovereignty; it resists Balkanization no matter how well motivated. Yet understanding the apprehensions of others about social, economic and cultural effects of trans-border data flows may help us consult with them about devising positive rather than restrictive remedies—about building up their own data processing and communication capabilities rather than cutting back those already in existence. For what it is worth, the French at the 1978 UNESCO General Conference co-sponsored a U.S. resolution (which was adopted) calling for "the provision to developing countries of technological and other means for promoting a free flow and a wider and better balanced exchange of information *of all kinds*."¹³ (Emphasis added). That was in response to claims of sovereignty.

10. *Id.* at 80.

11. *Id.*

12. Aspen Institute Conference on Communications Policy Making, Toronto, Canada, March 1977 (comments of the national librarian, a Chinese national).

13. UNESCO RES. 4/9. 3/2, 20 UNESCO GEN. CONF. RES., UNESCO Doc. 20C/Resolutions at 100-04 (1978).