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This conference is entitled "The Management of Transborder Data Flows: U.S.-Canada and Beyond." I guess I'm the beyond. The conference raises the issue of whether bilateralism makes sense. I will argue that it does make sense; in fact, it's probably the only sensible way to go.

Transborder data flow restrictions are based on a variety of factors. One of them is privacy. It is very difficult to argue with the protection of privacy, since it is one of those motherhood issues. But if one looks at the countries from which the greatest charges for the protection of privacy comes, one cannot help but notice that these are not particularly known for their ardent championship of civil liberties. The first governmental entity that passed a privacy protection act was the German state of Hesse in 1970. At the time, Germany was involved in a major manhunt for the Baader-Meinhof group, two or three dozen terrorists, which led to the setting up of a national system of border checks, road blocks, and various other forms of control which cannot be described other than as being of chilling efficiency, and which are largely still on the books. I think the concerned party in TBDF issues is largely a government, not the citizenry.

Now why is that so? There are a number of partial explanations. I will not venture to go into them. Each one has some validity, but altogether I don't think they're particularly persuasive. What I will argue instead is that the whole issue of TBDF restrictions is largely used, with all its legitimate concerns, as a lever in a bigger game. It's often been said that that bigger game is trade protectionism. But one should go beyond that. Privacy and sovereignty are not an excuse for protectionism. Instead, both protectionism and privacy are used for the same purpose, to support the otherwise crumbling position of what one should call the postal-industrial complex.

What is the postal-industrial complex? It is a coalition of interest groups centered around the domestic telecommunications monopolies. These PTTs have surrounded themselves with support organizations; in economic terms, they let others share in the monopoly rent. First are the equipment suppliers. Most of these countries have a small and tight group of equipment suppliers closely linked and allied with the PTTs. Frequently the PTT is the coordinator, even setting the market shares of suppliers. Then there are the labor unions, which also share in the monopoly rent through work conditions and salaries that probably are higher than they would be otherwise. They wish to protect the system that exists: and with that monopoly under challenge now, they have reacted quite sharply. The American experience with the airline industry and now in the telecommunications industry, where deregulation has led to layoffs and wage rollbacks, has been noted. Similarly, the political Left, which for ideological reasons often advocates government ownership, has argued that it is important for the infrastructure to be in governmental hands rather than privately owned, and this view is shared by moderates as well.

The efforts of the PTTs and of governments to insert TBDF restrictions can therefore be seen as an attempt to bring into this grand coalition other players that are still not quite in it. Those are those new high-tech computer office equipment manufacturers that have increasingly come into the orbit of PTTs.

The arguments which are used in European telecommunications debates are frequently quite similar to the ones that we have heard in the United States in the context of policy toward AT&T, for instance. First is the cross-subsidy argument, i.e., that only through a government monopoly could one protect the economically weak. That argument essentially collapses to the one that if those subsidies were in the open through the normal taxation and allocation mechanism that is employed in most other forms of redistribution, these same subsidies would not flow. They are therefore not a true indication of what a transparent political process would yield.

An economically more persuasive argument centers on economies of scale and scope. If some services or customers are leaving the general public network, they impose costs on the rest. Current evidence, especially in the United States, does not necessarily lend great empirical weight to this point, however.

An argument that is increasingly made abroad is that of industrial policy. If a country like France or Germany wants to stay in the big league of technology it has to support its high-tech industry, and what better way to do that than through the telecommunications sector, a leading edge in technological development and one over which the government, through PTTs, has a direct control. The problem with infant industry protectionism is that the image implies that there is a certain growth plateau that humankind reaches. But one cannot necessarily expect this in the telecommunications and computer industry, which will keep growing and developing for a long time. There is a fast track and some countries may have opted out of it through protectionism. The fast track may simply consist of North America and Japan.

In addition to the industrial policy argument, sovereignty and privacy are being added to the panoply of arguments made by the participants of the postal-industrial complex. Because essentially it is very difficult to control and to enforce restrictive rules directly, it is much simpler to have controls of the conduit. If you have different conduits, then the maintenance of TBDF restrictions becomes practically impossible unless one establishes some form of censorship, monitoring, or other controls. It is easier to have a grasp over the communications conduit itself. And this is an additional argument for the maintenance of a PTT monopoly.

It is necessary for the monopolies to advance these protective arguments because their monopoly situation, the relatively cozy arrangement of many decades, is being challenged. Private networks, leased-line networks, value-added networks, newfangled attachments--all these threaten to reduce revenue and control, and raise the possibility of resale of telecommunications services and other unacceptable practices. Beyond that and in the longer run, it raises for PTTs the specter of international, largely American, integrated telecommunications companies that provide communications, data processing, data bases, marketing, and links with other data bases. Those companies presumably would be aggressive, customer-oriented, innovative, and flexible--in short, everything that the PTTs are not. Furthermore, they would be unencumbered by the social policy obligations that the PTTs have to incur.

I think this context is important because it probably would be too confining to talk only about restrictions in communications, as if the problem is one of crossing a border. That's an additional complication. But many of the PTTs don't like domestic free flow, either. It's not the international aspect that bothers them necessarily, it's simply the control over data flows in general, and over technology, services, and uses.

Normal trade issues can be frequently resolved through the imposition of tariffs. In the case of data and information, this becomes a very difficult issue. It becomes difficult conceptually. What exactly is information? What kind of information? It becomes an issue of principle. Does a free society restrict trade in information? It becomes an issue of constitutionality. Where does the First Amendment come in? And it becomes a practical problem. How do you set a tariff? What is the value of information? Whom do you impose a tariff on if information is broadcast from a satellite? How do you identify who shares in the information? It is something that economically speaking can still be maintained by the owner and can be used by an additional one or a thousand persons. What is the volume of information? When does information cross a border? Those issues will become very difficult. I certainly would not want to be the one who has to draft tariff regulations on information.

Therefore, because a tariff policy is difficult, nontariff barriers become important, and the control over the channel by a governmental entity becomes essential.

I will give you some illustrations that at least should alert us to the more principled issues that go far beyond trade. In Brazil, on-line data bases must be located within Brazil. To the extent that that is not done by the data suppliers, for reasons of cost or other factors, some negotiation has to take place with the Brazilian government, or rather with its telecommunication carriers, which may refuse. It is not clear who is helped and who is hurt, since the denial of information access may be to Brazil's disadvantage in the long run.

Another problem is illustrated by Amnesty International, an organization that collects data on political prisoners. In France, where it also collects such information, French data protection law now prohibit the collection of data such as political or racial information, or information on convictions, which are after all the essence of Amnesty International's activity. Nor can the organization transmit that information abroad, although its modus operandi is to mobilize world opinion. Is it not ironic that it is now easier for Amnesty International to operate in countries without privacy protection than in France? This conceivably could be solved by the government excepting certain approved humanitarian organizations, but this also means that other humanitarian organizations may not be approved.

The European countries are ultimately hurting themselves. It is no coincidence that this week's Newsweek cover is entitled "The Decline of

Europe." The United States and Japan are in the midst of an extremely rapid technological development. In the four years between 1978 and 1982, the ratio of European data terminals to U.S. data terminals has fallen, from 62% to 52%. That is to say, the United States alone has twice as many data terminals as Europe.

It is in that context that bilateralism has a greater chance of success than multilateralism. Global multilateralism is not particularly practical today. Even within the OECD, communications policy is shaped through the needs of the postal-industrial sector to protect its dominance, and in that context TBDF is only one issue. It is hard to believe that one could go beyond some kind of papering over of fundamental disagreements.

Three smokescreens are frequently raised on TBDF issues. One is that the issues are so interrelated that some international "harmonization" is necessary. Essentially, this is a call for a policy cartel to shore up tottering defenses. A second smokescreen is to make the technical aspects of the issues so complicated that one relegates them from the domestic political sphere into the transnational sphere of engineers. And last, it is claimed that legal implications are so complicated that again one needs some international agreement. Clearly, the transborder data flow issues raise new and complex legal issues, but there has been international trade in goods, services, and commmodities for centuries, and the parties on either end were quite able to structure the deals in an effective way. And the courts have been able, when new situations arose, to handle them. A year or two ago, a question arose in the Evra case about who was liable for the mistransmission of some essential piece of information that cost the person who didn't get the information $15 million. The matter was before Judge Richard Posner, formerly of the University of Chicago, and a noted conservative Law and Economics scholar. Posner essentially extended the well-known doctrine of Hadley v. Baxendale of foreseeable damages to this situation. As novel legal issues arise they can be handled in such a fashion by courts, private agreements, and arbitration without requiring intergovernmental agreement.

In summary, given the basic divergence of telecommunications policy--the United States having essentially undergone its main policy discussions, and Europe being to some extent locked in them now--there is very little hope that one can come to an agreement encompassing OECD nations. Therefore, the initiative of a bilateral agreement between the United States and Canada seems a sensible one.