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Freedom of Information versus National Sovereignty: The Need for a New Global Forum for the Resolution of Transborder Data Flow Problems

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Abstract

This Note argues that the issues raised by transborder data flow restrictions must be dealt with on a global scale, not on a national basis. Part I of this Note discusses the international legal principles underlying the concept of freedom of information and the legal difficulties presented by the imposition of transborder data flow restrictions. Part II analyzes the perception among developing nations that sovereign rights are threatened by an unrestricted flow of information and discusses the measures developing nations are implementing to control this perceived threat. Part III analyzes several approaches suggested for dealing with the problems of transborder data flow restrictions and argues that a new international forum must be created to constructively address the legitimate concerns of the developing nations. This Note concludes that since the effective demise of Unesco, progress must be made toward creating a viable international forum to address the multilateral concerns over transborder data flow restrictions.

FREEDOM OF INFORMATION VERSUS NATIONAL SOVEREIGNTY: THE NEED FOR A NEW GLOBAL FORUM FOR THE RESOLUTION OF TRANSBORDER DATA FLOW PROBLEMS

INTRODUCTION

Both developed and developing nations accept the principle of freedom of information, that is, that governmental constraints on information are undesirable.¹ Yet the views and definitions of freedom of information are markedly different.² Developing nations fear that their stability and political independence may be eroded by an influx of information reflecting the foreign economic, political, and moral values of developed nations. Accordingly, many developing nations believe that

1. See Cleveland, *The Twilight of Hierarchy: Speculations on the Global Information Society*, 45 PUB. ADMIN. REV. 185, 194 (1985). Developed nations' concern over the control of information focuses on two primary areas: multinational corporations are vigorously opposed to information control of any kind due to the greatly increased production costs that will ensue, see generally McKeever, *Is it Best Not to Regulate Transborder Data Flow?*, INT'L BUS. LAW., Apr. 1984, at 159; Samiee, *Transnational Data Flow Constraints: A New Challenge for Multinational Corporations*, 1984 J. INT'L BUS. STUD. 141, and governmental organizations are concerned, or at least cloak their concern, with the belief that freedom of information is a basic human right. In 1946, the United Nations General Assembly acknowledged that "freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated." G.A. Res. 59(1), U.N. Doc. A/64, at 95 (65th plen. mtg.) (1946). Individual nations also acknowledge the principle of freedom of information. See, e.g., BURMA CONST. art. 157 ("Every citizen shall have freedom of speech, expression and publication . . .") reprinted in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 40 (A. Blaustein & G. Flanz eds. 1979) (hereinafter "Blaustein"); CUBA CONST. art. 52 ("Citizens have freedom of speech and of the press in keeping with the objectives of socialist society.") reprinted in 4 Blaustein, *supra*, at 21; EGYPT CONST. art. 48 ("Freedom of the press, printing, publication and mass media shall be guaranteed."), reprinted in 4 Blaustein, *supra*, at 22.

2. See 31 U.N. ESCOR Annex (Agenda Item 10, part II) at 9, U.N. Doc. E/3443 (1961) (statement of Dr. Hilding Eek, Report on Developments in the Field of Freedom of Information Since 1954).

All governments seem to agree that freedom of information is a fundamental right, that peoples should be made to avoid false or distorted reports or the dissemination of opinions inciting war or hatred between nations. As regards, however, the means of achieving a situation within nations and amongst them, characterized by a free and abundant flow of truthful information and by useful interchange of opinion, there is no general agreement. The concept of freedom of information as a legal concept is strongly controversial.

Id.

regulation of information by transborder data flow³ restrictions is essential to their existence as sovereign nations.⁴ Thus

3. Transborder data flow, also known as TDF or TBDF, was introduced into telecommunications language over ten years ago. See Rankin, *Business Secrets Across International Borders: One Aspect of the Transborder Data Flow Debate*, 10 CAN. BUS. L.J. 213, 213-15 (1985). It can be defined as "the transmission from one nation to another of units of information coded electronically for processing or storage by one or more digital computers." Feldman & Garcia, *National Regulation of Transborder Data Flows*, 7 N.C. J. INT'L L. & COM. REG. 1, 1 n.1 (1982). A broader definition relates transborder data flow to the concept of trade:

[T]oday we are entering into an era in which trade will consist largely of information exchanges. Even when trade involves non-information exchanges, it will nevertheless be totally dependent upon information exchange systems. These systems born of the computer coupled with the technology of communications create a relatively inexpensive means to transmit massive amounts of data rapidly and efficiently over great distances and across national borders. The transmission of such information is commonly known as "transborder data flow."

McGuire, *The Information Age: An Introduction to Transborder Data Flow*, 20 JURIMETRICS J. 1, 1-2 (1979).

Transborder data flow can include media products, news broadcasts, telephone conversations and telex services. See Rankin, *supra*, at 215. It allows processed data to be transmitted in a variety of forms, including physically, such as by an individual carrying a computer disk across a national border, or electronically, by a terrestrial line, submerged cable or satellite link. See Novotny, *Transborder Data Flow: Technical Issues of Legal Concern*, 3 COMPUTER L.J. 105, 106 (1981). Transborder data flow is created, however, through three primary activities: a) intra-corporate information transfers; b) international information transfers between governments; and c) transnational pursuit of information resources. See Rankin, *supra*, at 221.

Restrictions on transborder data flow can take many forms: direct regulation, such as licensing, registration, disclosure of information on data content, distribution and ownership, or indirect regulation, such as manipulating trade rules, tax incentives and tariff barriers. See Bach, *Law and Politics in Transborder Data Flow*, 14 LAW TECH. 1, 10-13 (1981). Nations can require registration and licensing of data banks, limits on the duration of permissible data retention, prior authorization for transborder transmission, rights of notice to data subjects, procedures to insure security and confidentiality and the imposition of sanctions for non-compliance. Dunn, *Advice to the U.S. Corporation Operating Abroad: The Costs of Transporting Information*, 9 ASILS I.L.J. 61, 68 (1985).

Since 1973, the following nations have adopted legislation restricting transborder data flow: Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, West Germany, Iceland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and Yugoslavia. 3 TRANSNAT'L DATA REP. No.2, at 15 (1980).

4. Sovereignty can be defined in several ways. Developing nations generally adopt a broad definition of exclusive domestic jurisdiction, while developed nations focus on the supreme law giving and law enforcing ability of a nation. Many developing nations divide sovereignty into economic sovereignty and cultural sovereignty. Economic sovereignty is threatened by controls placed upon segments of the economy by foreign corporations, international data networks or governments. See Groshan, *Transnational Data Flows: Is the Idea of an International Legal Regime Relevant in*

while both developed and developing nations speak of freedom of information and sovereignty, they clearly employ different definitions of the same terms. This problem is exacerbated by the recent demise of Unesco as a forum for resolving conflicts among nations regarding regulation of transborder data flow. A new international legal framework is needed to provide the necessary solutions.⁵

This Note argues that the issues raised by transborder data flow restrictions must be dealt with on a global scale, not on a national basis.⁶ Transborder data flow restrictions that differ from nation to nation make it difficult and expensive to conduct business or to provide complete information for governmental decision-making. Part I of this Note discusses the international legal principles underlying the concept of freedom of information and the legal difficulties presented by the imposition of transborder data flow restrictions. Part II analyzes the perception among developing nations that sovereign rights are threatened by an unrestricted flow of information and discusses the measures developing nations are implementing to control this perceived threat. Part III analyzes several approaches suggested for dealing with the problems of transborder data flow restrictions and argues that a new international forum must be created to constructively address the legitimate concerns of the developing nations. This Note con-

Establishing Multilateral Controls and Legal Norms?, 14 *LAW TECH.* 1, 12-13 (1981). Cultural sovereignty can be threatened by the influence the new technology may have on a nation's culture and people. Developing nations fear that transborder data flow may undermine cultural growth by forcing it into foreign patterns. *Id.* at 13. See *infra* notes 104-06 and accompanying text.

5. See *infra* notes 107-19 and accompanying text.

6. One expert estimates that by the end of the century, two-thirds of all the world's work will be "information" related work. See Cleveland, *supra* note 1, at 186. The dominance of information services during the present decade has been termed the "information age" or the "post-industrial information age." Parker, *Information Services and Economic Growth*, 1 *INFORMATION SOC'Y* 71 (1981). The information age is defined as "an age in which information activities dominate our economies and our societies." *Id.* The increasing domination of information has led to growth in a multitude of areas. Computers and telecommunication devices are replacing traditional items as dominant commodities and new industries and careers have developed around the accounting, information-processing and production efficiencies afforded by new devices like "computer-assisted design" and "robotics." See Lautsch, *Computers, Communications and the Wealth of Nations: Some Theoretical and Policy Considerations About an Information Economy*, 4 *COMPUTER L.J.* 101, 101-02 (1983).

cludes that since the effective demise of Unesco,⁷ progress must be made toward creating a viable international forum to address the multilateral concerns over transborder data flow restrictions.

I. INTERNATIONAL LAW AND TRANSBORDER DATA FLOW RESTRICTIONS

Transborder data flow is a relatively recent phenomenon⁸ that has broadened the possibilities of information transmission beyond the traditional channels of radio, television and newsprint to communication between computers located in distant parts of the globe.⁹ It is elusive, occurs almost instantaneously and physically frees data from national constraints.¹⁰ Data can now exist in many places at once, move rapidly from nation to nation and be controlled by those operating the data system.¹¹ The current technology that allows information to cross national borders gives nations the ability to control the transmission and reception of information through the use of transborder data flow restrictions.¹² Unfortunately, the inter-

7. See *infra* notes 59-61 and accompanying text.

8. The term itself came into usage only about a decade ago. See Rankin, *supra* note 3, at 213.

9. See Groshan, *supra* note 4, at 3-4. Transborder data flow can include media products, news broadcasts, telephone conversations, as well as more recently developed technology, such as electronic message services, electronic mail and electronic funds transfers. See Novotny, *Transborder Data Flows and International Law: A Framework for Policy-Oriented Inquiry*, 16 STAN. J. INT'L. L. 141, 143-44 (1980).

10. See Groshan, *supra* note 4, at 3.

11. *Id.*

12. The ability to regulate information across national boundaries translates into the exercise of power. See Bach, *Law and Politics in Transborder Data Flow*, 14 LAW TECH. 1, 3 (1981). As one commentator has stated: "Information is power and economic information is economic power. Information has an economic value and the ability to store and process certain types of data may well give one country political and technological advantage over other countries." H.R. REP. NO. 96-905, 96th Cong., 2d Sess. 20 (1980) (statement of Louis Joinet, former Secretary-General of the French Commission on Data Processing).

Brazil provides an example of direct regulation of transborder data flow in the developing world, and, in fact, has served as something of a model for other developing countries considering transborder data flow restrictions. See Rowan & Waite, *International Communications Law, Part I: Maitland Commission, Economic Development, and the United States*, 19 INT'L LAW. 1339, 1345 (1985). In 1979, the Brazilian government established the Special Informatics Agency (SEI) to regulate all transborder data flow. See M. Ripper & J. Wanderley, *The Brazilian Computer and Communications Regulatory Environment and Transborder Data Flow Policy 3* (June 1980) (unpublished paper presented to the International Bureau for Informatics World Confer-

national legal framework that presently governs this transmission of information has not been expanded to deal with recently developed types of information flow.¹³ The result is a legal system and legal analysis that has not kept pace with technological advances.¹⁴

Developing nations equate control of information with the

ence on Transborder Data Flow Policies) cited in Bortnick, *International Information Flow: The Developing World Perspective*, 14 CORNELL INT'L L.J. 333, 342 n.53 (1981).

SEI examines potential transborder data flow on a case by case basis and determines what impact the services will have on economic, privacy and national sovereignty concerns. Based on this analysis, the application to transmit TDF is accepted, rejected or conditionally accepted. See Bortnick, *supra*, at 342.

Canada provides another example of transborder data flow restrictions. Interestingly, Canada sees itself in a position identical to that of developing nations in the dispute over loss of sovereignty due to unrestricted transborder data flow. See generally CONSULTATIVE COMMITTEE REPORT ON THE IMPLICATIONS OF TELECOMMUNICATIONS FOR CANADIAN SOVEREIGNTY, CANADIAN DEP'T OF COMMUNICATIONS, TELECOMMUNICATIONS AND CANADA (1979) [hereinafter "Clyne Committee Report"]. Canada's minister of Communication said in 1980 that while Canada is "a sophisticated country in terms of new communications technologies and application . . . , [it] also share[s] with developing countries many concerns related to political, cultural and economic sovereignty . . . and identity.'" P. HAJNAL, GUIDE TO UNESCO 255 (1983) (quoting a statement on the MacBride Commission's report presented at the twenty-first session of Unesco's General Conference by G.I. Warren, Canadian representative). Canada has imposed various transborder data flow restrictions, such as those contained in the 1980 Banks and Banking Law Revision Act. See Banks and Banking Law Revision Act, 1980, Can. Stat. Ch. 40, Secs. 157 (4), (5), and (6). This Act requires that data produced by Canadian banks be processed in Canada, unless a special exemption is obtained. *Id.* In practice, this means that banks must rely on computers in Canada, not in the United States, and, on average, the cost of data processing in Canada is twenty to twenty-five percent more expensive than in the United States. See Hardy, *Transborder Data Flow: An Overview and Critique of Recent Concerns*, 9 RUTGERS COMPUTER & TECH. L.J. 247, 252 (1983).

13. See Ploman, *Transborder Data Flows: The International Legal Framework*, 3 COMPUTER L.J. 551, 556 (1982).

14. As one commentator states: "The adaption to changing circumstances is mainly patchwork . . . [n]either national legislation nor international rules provide for a coherent communications or information law. Such law as exists is pluralistic, uncoordinated and based on limited, functional objectives." *Id.* at 556. Another commentator states the conflict that transborder data flow restrictions present in international law:

[W]hen the source of the telecommunications is beyond the boundaries of the State, problems of control arise that have yet to find an adequate solution in terms of international law. It becomes necessary to distinguish between the right of a State to do what it pleases within its own territory, and the claim of the State to legally object to an activity originating beyond its borders but which has an internal effect.

D. SMITH, INTERNATIONAL TELECOMMUNICATION CONTROL 2 (1969). See generally Eger, *The Global Phenomenon of Teleinformatics: An Introduction*, 14 CORNELL INT'L L.J. 203, 231-34 (1981).

exercise of sovereignty¹⁵ while many developed nations consider such restriction of information as a denial of a fundamental human right.¹⁶ The meaning of freedom of information¹⁷ and a nation's legal right to control that information have been fervently debated.¹⁸

Although virtually all nations acknowledge the legal principle of freedom of information¹⁹, they interpret the word "freedom" in different ways. Western nations define "freedom" of information as the unrestricted transfer of information, while many developing nations define it as a balanced

15. The definition of sovereignty used by developing and developed nations differs. Developing nations seem to adopt a definition that emphasizes exclusive jurisdiction over a certain territory. A definition contained in Canada's Clyne Committee Report, *supra* note 12, is typical of that used by developing nations: sovereignty is "the ability of Canadians [both in government and in the private sector] to exercise control over the . . . direction of economic, social, cultural, and political change." *Id.* at 1 (quoting Dr. Peter Robinson).

Developed nations, on the other hand, seem to adopt a narrower definition, characterizing sovereignty as the "supreme legal authority of the nation to give and enforce the law within a nation and territory." Compare JESSUP, *MODERN LAW OF NATIONS* 40 (1968) with H. MORGANTHAU, *POLITICS AMONG NATIONS* 305 (rev. 5th ed. 1978).

The developing nations believe that their ability to exercise control over their nation and people is threatened by unrestricted transborder data flow; the developed nations, using their definition, counter that unrestricted transborder data flow enhances rather than threatens the ability to enforce the law. See generally Gross, *International Law Aspects of the Freedom of Information and the Right to Communicate* in *THE THIRD WORLD AND PRESS FREEDOM* 55 (P. Horton ed. 1978). See also Cleveland, *supra* note 1, at 195.

16. See *infra* notes 76-106 and accompanying text.

17. The definition of "freedom of information" varies with political persuasion. "Free" can be defined as information controlled by the market economy — so that what is profitable is transmitted; government neither controls nor monitors the information. The converse of "free" flow of information is "balanced" flow of information. This is information regulated by government, as to both content and quality, with the desired end being a "fair and just" presentation. See generally Masmoudi, *The New World Information Order*, 29 J. COMM. 172 (1979).

18. Unesco has been at the center of debate on the significance of freedom of information and sovereignty. The composition of Unesco, predominated by developing nations, makes it an ideal development ground for ideas in this field but, in turn, it gives its proclamations what many feel is a decidedly anti-Western bias. See generally Theberge, *U.N.E.S.C.O.'s "New World Information Order": Colliding with First Amendment Values*, 67 A.B.A. J. 714 (1981).

19. See statement of Dr. Hilding Eek, *supra* note 2. See also Note, *A New International Information Order: The Developing World and the Free Flow of Information Controversy*, 8 SYRACUSE J. INT'L L. & COM. 249, 249-50 (1980).

transfer.²⁰ A balanced transfer of information means information freed from developed world bias through government monitoring and control.²¹ The dispute over whether "free" means unrestricted or balanced transfer of information is not clarified by international agreements or the traditional legal principles on which they depend for their enforcement. In addition, the increasing politicization of Unesco has made it ineffectual as an international forum for the resolution of disputes over transborder data flow restrictions.

A. *Existing International Agreements*

The primary international agreements that refer to freedom of information are the Universal Declaration of Human Rights²² (Declaration) and the International Covenant on Civil

20. An interesting analogy to the developing nation viewpoint is taken by the Soviet Union. The following is an excerpt from a Soviet textbook:

For over a quarter of a century legal scholars have now been arguing as to whether there is a universally recognized principle of the freedom of information in international law. The main argument of those who claim that there is such a principle is the fact that some declarations and conventions on protecting human rights contain provisions concerning the right of everyone freely "to seek, receive and impart information and ideas through any media and regardless of frontiers."

These provisions, however, have a different meaning . . . human rights are not in the full sense of the word international. The rights of citizens are regulated by the legislation of every state on a sovereign basis and independently of any external authority.

INTERNATIONAL SPACE LAW 190 (A.S. Piradov ed. 1976), *quoted in* Gross, *supra*, note 15, at 60.

21. *See generally* Note, *supra* note 19, at 258-64.

22. G.A. Res. 217, U.N. Doc. 1/777, at 71 (1948) (hereinafter "U.D.H.R."). Forty-eight countries voted for this resolution, eight abstained; many developing nations were among the supporters including several that now have or are considering transborder data flow regulations, such as Brazil, India and Nigeria. Those countries abstaining included the USSR and South Africa.

The relevant provision of the Universal Declaration of Human Rights is Article 19, which resolves that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *Id.* at 74-5.

Another major international agreement that might be used to provide a framework in this area is the General Agreement on Tariffs and Trade. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, arts. 3, 7, 61 Stat. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (hereinafter GATT). The United States and other Western nations have suggested that GATT be extended to cover information sources. The response of the developing countries has been to rely on the "infant industry exception," arguing that they must protect and promote their industries

and Political Rights²³ (Covenant). Both the Declaration and the Covenant have so far proved ineffectual in providing the legal framework needed to resolve the international legal questions presented by transborder data flow restrictions. The Declaration was adopted in 1948 by forty-eight countries, including several nations that currently impose or are considering transborder data flow restrictions.²⁴ The Declaration is not generally considered a legally binding document; it is rather a resolution, made under the auspices of the United Nations General Assembly.²⁵ It is considered, however, by some jurists and scholars, to be part of the "fabric of international law"²⁶ and a tenet of customary international law.²⁷ If the Declaration is part of customary international law, then both the nations that voted for it and those that became sovereign nations after

that will be central to their future economic prosperity. See Feketekuty, *Restrictions on Trade in Communication Services*, 1984 MICH. Y.B. INT'L LEGAL STUD. 145, 153; see also W. KIRSCH, *TRANSBORDER DATA FLOWS: A CURRENT REVIEW* 67-69 (1983).

23. G.A. Res 2200, 21 U.N. GAOR, Supp. Annex (No. 16), at 49, U.N. Doc. A/6316 (1966) (hereinafter "Covenant"). Over sixty nations are signatories to this covenant, including the USSR.

Article 19(2) is the relevant provision: "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." *Id.*

24. See *supra* note 22 and accompanying text.

25. There are two schools of thought on the legal significance of General Assembly resolutions. The "traditional school" believes that resolutions can create international law, see, e.g., I L. GROSS, *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 214-20 (1984), while the other school, often referred to as the "progressive school", argues that resolutions may sometimes have legal significance. See, e.g., Onuf, *Professor Falk on the Quasi-Legislative Competence of the General Assembly*, 64 AM. J. INT'L L. 349 (1970). See generally Comment, *The New International Economic Order and General Assembly Resolutions: The Debate Over the Legal Effects of General Assembly Resolutions Revisited*, 15 CAL. W. INT'L L.J. 647, 665-74 (1985).

26. See, e.g., I. BROWNLE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 569-71 (3d ed. 1979); cf. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 408-14 (2d ed. 1968). See also Eger, *supra* note 14, at 207.

27. See N.Y. Times, March 20, 1977, at E16, col. 3. (statement of John P. Humphrey, Former Director of the Human Rights Division in the United Nations Secretariat) (the Universal Declaration of Human Rights has "now become . . . part of the customary law of nations and is therefore binding on all states, whether they voted for it or not."); see also N.Y. Times, April 1, 1977, at A28, col. 2. (statement of Eric Suy, Legal Counsel and Undersecretary of the United Nations) ("while it is clear that a General Assembly declaration does not have the force of law by the mere fact of its adoption, it is possible that in the course of time such a declaration, if it reflects the legal conviction of states, may acquire the force of customary international law through state practice.").

Two elements are generally considered for the creation of customary interna-

it was adopted are bound to uphold freedom of information as an international legal principle.²⁸

When the Universal Declaration of Human Rights was adopted in 1948, telecommunications possibilities were limited compared to today. The scope of communications envisaged by the United Nations was far narrower than what currently exists. Additionally, many of the developing nations that are most concerned about the threat posed by transborder data flow were not yet independent nations when the Declaration was adopted.²⁹ These three factors, the binding nature of the Declaration, the development of new technology and the emergence of many new nations, raise questions concerning the viability of this agreement.

The International Covenant on Civil and Political Rights, signed in 1966 by over sixty nations, is a more contemporary document.³⁰ It is a treaty, legally binding for its signatories, which include many developing nations.³¹ The Covenant does

tional law: usage, or State practice, and *opinio juris*. See Gross, *supra* note 15, at 55; Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662, 663-68 (1953).

Usage or State practice refers to the positive or negative actions of a particular State over a period of time. Kunz, *supra*, at 666. Practice alone, however, is not sufficient to create customary international law; it must be accompanied by *opinio juris*. *Opinio juris* is the belief that the State is legally obligated under international law to act in a particular manner. *Id.* at 667. The combination of the elements of usage and *opinio juris* is considered sufficient to demonstrate a State's consent to be legally bound. It is in this sense that many developed nations, particularly the United States, argue that freedom of information has achieved the status of customary international law so that restrictive transborder data flow regulations should be prohibited. See Gross, *supra* note 15, at 59-64 (discussion of customary international law and freedom of information).

There is no doubt that customary international law exists. In Article 38(1) of the Statute of the International Court of Justice, the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it," is directed to apply international conventions and "international custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice, art. 38(1), 59 Stat. 1055, 1060 (1945), T.S. 993, 3 Bevans 1153.

28. Unfortunately, we are now brought back to the issue of what exactly the term means. See *supra* notes 17-19 and accompanying text; see also Gross, *supra* note 20, at 59.

29. From 1947 through 1961, Third World nations increased from approximately 25% to 47% of the United Nations membership. African states alone increased from approximately 3% - 20% of the total membership.

30. The Covenant was signed eighteen years after the Declaration, which was signed in 1948. See *supra* note 22 and accompanying text.

31. The Covenant came into full force without the United States being a party. See N.Y. Times, March 20, 1977, at E16, col. 3.

not, in contrast to the Declaration, provide for absolute freedom of information.³² While Article 19 of the Covenant provides for the right of individuals to hold opinions without interference and the right to "freedom of expression" in any media and of any information or idea, Article 19(3) allows for restrictions on freedom of expression that may be necessary for the protection of "national security or of public order (*ordre public*), or of public health or morals."³³ Thus, developing nations may impose restrictions on information flow in the name of "sovereign rights," under Article 19(3).³⁴

Nations can look to the Declaration for a guarantee of absolute freedom of information but there are serious questions as to whether, since it is only a resolution, it is legally binding on those nations that voted in its favor. The Covenant is a treaty, as opposed to a resolution, and therefore it is legally binding on its signatories but also inadequate because it permits nations to restrict the flow of information if they can link the restrictions to the protection of sovereign rights.³⁵

B. *Unesco's Role In The Transborder Data Flow Debate*

The United Nations Education, Scientific and Cultural Organization (Unesco), was formed in 1945 under the auspices of the United Nations.³⁶ Unesco's members include both developed and developing nations. Recently, however, developing nations have gained a majority within Unesco and the organi-

32. Interestingly, this may reflect the differences in the world's composition and political climate between 1948 and 1966.

33. See Covenant, *supra* note 23, art. 19(3)(b). Article 19 states:

The exercise of the rights provided for in paragraph 2 [*supra* note 23] of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Id.

34. See *supra* notes 76-106 and accompanying text.

35. See *supra* note 33 and accompanying text.

36. UNESCO CONST. (adopted London, 16 November 1945). Unesco's purpose is to "advanc[e], through education, science and cultural relations of the peoples of the world, the objectives of international peace and . . . [the] common welfare of mankind." *Id.* preamble.

zation has been accused of having an anti-Western bias.³⁷ This development has resulted in the withdrawal of the United States and Great Britain from the organization during the last two years.³⁸ The withdrawal of two major developed nations may have major effects, such as reduced funding for Unesco programs, increased donations from other nations and, most importantly, diminished credibility of the organization itself. Unesco's membership is now weighted toward developing nations and Soviet bloc countries.³⁹ The preamble to the Unesco Constitution advocates "unrestricted pursuit of objective truth and . . . the free exchange of ideas and knowledge,"⁴⁰ but, due largely to the shift in Unesco membership, the definition of a "free exchange" has changed.⁴¹

37. The United Nations has also undergone a major shift in the nature of its member states. The disintegration of the various colonial empires in the years following World War II have led to a worldwide increase in newly independent states. See Comment, *supra* note 25, at 651. There were fifty-one original members in 1945 but by 1960 the number had increased to over eighty. *Id.* This influx of new member-states resulted in a gradual transformation of the composition of the United Nations, from a Western-dominated organization to a Third World dominated organization. See E. McWHINNEY, *THE WORLD COURT AND THE CONTEMPORARY LAW MAKING PROCESS* 132 (1979). It has been alleged that this new political majority coalition has a "keen awareness of the possibilities of using the General Assembly as a positive instrument for re-writing the 'old' or classical international law and substituting a 'new', postulated more progressive, Third World-oriented, international law in its place." *Id.*

38. See N.Y. Times, Dec. 20, 1984, Sec. 1, at p. 1, col. 6. (statement of Asst. Secy. of State Gregory J. Newell announcing the United States withdrawal from Unesco).

39. Out of over one hundred and sixty member nations of Unesco, less than 10% are Western nations. This imbalance in membership and its effect on voting patterns was partially responsible for the United States withdrawal in 1984. Critics of Unesco contended that the organization's approach to economic, freedom of press and human rights issues reflected a strong Soviet and Third World influence. See N.Y. Times, Dec. 20, 1984, § 1, at p. 1, col. 6.

40. UNESCO CONST. preamble (adopted in London, 16 November 1945).

41. For example, within the last decade at Unesco meetings, the Soviet Union has sought greater control over the press. In 1976, the Soviet Union introduced a draft Declaration on Mass Media which called for state control over the press. The draft was revised and presented at the 1978 General Assembly. The revised draft affirmed human rights but also asserted the need for a new, more just and effective information and communication order. The draft demands a free flow and a wider and better balanced dissemination of information. 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 Counteract Racism, Apartheid and Incitement to War, Res. 4/9.3/2 adopted by the General Conference. 1 Records of the Gen. Conf., 20th Sess., Paris, 24 Oct.-28 Nov. 1978 (Resolutions) 100-104 (UNESCO).

In the 1970s, Unesco became the birthplace of the demand for a "more balanced flow of information,"⁴² resulting in the call for a "new world information and communication order" (NWICO).⁴³ NWICO has been described as an "international exchange of information in which nations, which develop their cultural system in an autonomous way and with complete sovereign control of resources, fully and effectively participate as independent members of the international community."⁴⁴ Under NWICO, developing nations have demanded equal access to the world's information resources and control over foreign media coverage of their nations.⁴⁵

In 1980, the General Conference of Unesco adopted, by

42. For a brief account of Unesco's activities in the information area, see Naes-selund, *Unesco and the Press in The Third World*, in *THE THIRD WORLD AND PRESS FREEDOM* 210 (P. Horton ed. 1978). The demand continues today and is heard increasingly in the United Nations, Unesco, meetings of the Non-Aligned Movement, the International Telecommunications Union (ITU), the United Nations Conference on Science and Technology for Development (UNCTAD) and the World Administrative Radio Conference (WARC). See J. GUNTER, *THE UNITED STATES AND THE DEBATE ON THE WORLD "INFORMATION ORDER"* 6-7 (1979).

Developing nations' demands in the 1979 WARC are a good example of the concerns being voiced throughout the international agencies that deal with the regulation of information. In the Conference, developing nations pressed for a priori assignments of satellite orbital locations and associated frequencies in order to assure their possession of adequate spectrums, if and when they acquire the technology to use the resource. *Id.* at 39-42.

43. New World Information and Communication Order. Unesco Gen. Conf. Res. 21 4/19 (21st. session, Belgrade, Oct-Nov. 1980) (NWICO) (the initials "NWIO" are used interchangeably by some commentators with the initials "NWICO"). NWICO reflects the effort of the developing nations to "acquire equitable access to the world's information and communications resources. . . ." *INTERNATIONAL TELECOMMUNICATIONS AND INFORMATION POLICY: SELECTED ISSUES FOR THE 1980's: A REPORT*, Sept. 1983, US GPO at 31.

Proponents of NWICO advocate such goals as: control over the news media to strengthen national political control, control over information and communication to enhance national economic and social development, assistance in developing hardware, software and personnel infrastructures, obtaining revenue from licensing, tariffs and fees, and "balance" in the flow of information. See Primoff, *Introduction*, in *II COMMUNICATION IN A CHANGING WORLD* 3 (1983); see also Rowan & Waite, *supra* note 12, at 1344.

Unesco's plan for the NWICO should not be confused with the NIEO (New World Economic Order), G.A. Res. 3201/3202, U.N. Doc. A/9556 (1974), which seeks to distribute the world's wealth and resources more equally among all nations.

44. See Hamilink, *Informatics: Third World Call for a New Order*, 29 J. COMM. 144, 146 (1979).

45. See Bortnick, *supra* note 12, at 344. Mustapha Masmoudi, a key developing world proponent of NWICO, defines it in the following manner: "The new world information order founded on democratic principles seeks to establish relations of

consensus, an outline of the main elements of NWICO.⁴⁶ NWICO demanded the "elimination of the imbalances and inequalities which characterize the present situation,"⁴⁷ "removal of the internal and external obstacles to a free flow and wider and better balanced dissemination of information and ideas,"⁴⁸ and "freedom of press and information."⁴⁹ Representing primarily the voice of the developing nations,⁵⁰ Unesco demanded "freedom of information" by coupling the concept of freedom with the notion that information must also be "balanced."⁵¹

The establishment of NWICO has generated debate both within and outside of Unesco.⁵² The developed nations oppos-

equality in the communications field between developed and developing nations and aims at greater justice and greater balance." Masmoudi, *supra* note 17, at 178.

46. NWICO, *supra* note 43, at 4.

47. *Id.* para. i.

48. *Id.* para. iii.

49. *Id.* para. v. See *supra* notes 19-22 and accompanying text (discussion of definition of "freedom" of information).

50. This is even more the case now since both the United States and the United Kingdom have withdrawn from Unesco.

51. See Masmoudi, *supra* note 17, at 179-82. "[I]nformation in the modern world is characterized by true imbalances, reflecting the general imbalance that affects the international community." *Id.* at 172.

52. See Bortnick, *supra*, note 12, at 344-45; Hajal, *supra*, note 12, at 251. The General Conference of Unesco has, however, declined to initiate an international convention, as Venezuela proposed, nor have they defined NWICO. *Id.* at 250.

The debate over NWICO has polarized nations along the East-West axis and the North-South axis, but, interestingly, it has also led to new alliances. For example, Canada views itself as sharing many concerns similar to those of the developing nations. See generally Clyne Committee Report, *supra* note 12; *supra* note 12 and accompanying text.

Canada also views itself as dominated by developed world information, and fears a challenge to sovereignty unless control can be regained through transborder data flow restrictions. The Clyne Committee Report, *supra* note 12, stated:

Canadian sovereignty in the next generation will depend heavily on telecommunications. If we wish to have an independent culture, then we will have to continue to express it through radio and television. If we wish to control our economy then we will require a sophisticated telecommunications sector developed and owned in Canada to meet specific Canadian requirements. To maintain our Canadian identity and independence we must ensure an adequate measure of control over data banks, trans-border data flow, and the content of information services available in Canada.

Id. at 2.

The Clyne Committee Report stresses the danger to national sovereignty posed by a dependence on foreign nations with advanced telecommunications technology: "[I]nformatics is a word that is coming into general international use to describe computer-communications of all kinds. Of all the technologies that are developing

ing NWICO have expressed fear of governmental control of information and the press.⁵³ Developing nations contend that the developed nations retain an impermissive control of the information flow.⁵⁴ As an example, they cite to the control exercised by the four major Western news agencies, which are responsible for approximately nine tenths of the news transmitted in the world.⁵⁵ The developing nations' approach, set forth in the NWICO guidelines, is to exercise control of this information flow to achieve the desired balance of information from developed and developing nations.⁵⁶ A Unesco report summarized the concerns of the developing nations:

Operating on a world-wide scale, some information agencies — most of which have their headquarters in one of the industrialized countries — have, by reason of their equipment and capital, acquired a position of strength which probably enables them to offer better services but also leads them to convey one-way information reflecting the point of view of those countries, and which, above all, allows them to dominate the information market to an extent that borders on cultural aggression. . .⁵⁷

Western nations agree that the information flow is controlled by the West but their proposed solution to this problem focuses on the training of personnel from the developing nations and the initiation of news organizations in the develop-

so rapidly today, that of informatics poses possibly the most dangerous threat to Canadian sovereignty" *Id.* at 57.

The possibility of increased transborder data flow restrictions has also prompted the United States to examine its own vulnerability. George McGovern, as former Chairman of the Subcommittee on International Operations of the Senate Committee on Foreign Relations, stated that: "[o]ne way to 'attack' a nation such as the United States, which depends heavily on information and communications, is to restrain the flow of information — cutting off contact between the headquarters and the overseas branches of a multinational firm; taxing telecommunications crossing borders; building information walls around a nation." McGovern, *The Information Age*, N.Y. Times, June 9, 1977, at A21, col. 2.

53. See generally Theberge, *supra* note 18.

54. Hajnal, *supra* note 12, at 251 (comments of Frank Campbell, Information Minister of Guyana).

55. *Id.* at 251. The news agencies are Associated Press, United Press International, Reuters and Agence France-Presse. *Id.* at 349.

56. See generally Masmoudi, *supra* note 17.

57. UNESCO, MOVING TOWARDS CHANGE: SOME THOUGHTS ON THE NEW INFORMATION AND ECONOMIC ORDER 91 (1976).

ing world, not the control of existing news sources.⁵⁸

Existing international agreements and the efforts of Unesco have so far proved inadequate to handle the international legal problems that transborder data flow restrictions have created. As a result of the withdrawal of the United States and the United Kingdom from Unesco,⁵⁹ the development of multilateral international legislation to address the problems of transborder data flow restrictions will have limited usefulness. There is controversy as to whether the existing international agreements are binding.⁶⁰ Even if the agreements are considered binding, the definitions and interpretations given to the term "freedom of information" by the developed and developing nations are diametrically opposed⁶¹, making any agreement largely ineffectual.

II. *SOVEREIGN RIGHTS AND THE IMPACT OF TRANSBORDER DATA FLOW ON DEVELOPING NATIONS*

Many developing nations lack an information infrastructure⁶² that would provide them with the equipment and personnel needed to process data and to initiate their own information sources. Thus, these nations must export data for

58. *Id.* India followed the Western nations' suggestion and announced its intention to build a worldwide press organization around its national news service, Samachar. See Tatarian, *News Flow in the Third World: An Overview*, in *THE THIRD WORLD AND PRESS FREEDOM* 20 (P. Horton ed. 1978). Additionally, several developing nations organized the Non-Aligned News Agencies Pool (NANAP) the goal of which is "intended to achieve broad and free circulation . . . of news . . . about each other, and also provide objective and authentic information relative to non-aligned countries to the rest of the world." Specialized Ministerial Conference of Non-Aligned Countries: Ministerial Conference on the Press Agencies Pool, July 8-13, 1976, reprinted in O. JANKOWITSCH & K. SAUVANT, *THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES* 1563 (1978).

Another NWICO debate arising out of the fear of control surrounds the issue of journalistic licensing. Developing nations are trying to implement licensing by governmental or international organization in order to achieve what they consider journalistic protection. See Theberge, *supra* note 18, at 716.

59. See *supra* note 38 and accompanying text.

60. See *supra* notes 29-34 and accompanying text.

61. See *supra* notes 41-50 and accompanying text.

62. Information infrastructure describes a nation's institutions, organizations, resources and services which in combination accomplish the flow and delivery of information. India provides an excellent example of the development of an information infrastructure. In the 1960's, Prime Minister Indira Gandhi delivered an ultimatum to International Business Machines, Inc. (IBM) either to share equity in the In-

processing and import information for informed social, economic, and political decision-making as well as for entertainment purposes. This need to export data and import information is self-perpetuating. As long as it continues, domestic industries will not be created to enable the developing nation to process its own information.⁶³

One type of transborder data flow restriction that can solve this problem requires multinational corporations to develop local subsidiaries, personnel and facilities to process data within the developing nation.⁶⁴ For example, Brazil's informatics policy requires multinational corporations to use Brazilian computers, in Brazil, to accomplish their processing needs, if local computers can accomplish the necessary task.⁶⁵ In order to ensure that computers are available to meet this need, Brazil has centralized control of the purchase of computers by the national government and as far back as 1975 was buying computer equipment at the rate of US\$275,000,000 a year.⁶⁶ A policy such as Brazil's can have a positive effect socially and economically for the developing nation as it spurs domestic industries, providing jobs and increasing technical competence. Transborder data flow restrictions can also increase the host country's⁶⁷ leverage in economic decision making by requiring the decentralization of multinational corporations and demanding that equity be given locally.⁶⁸

Although transborder data flow restrictions may allow the developing nations some control over cultural erosion and economic vulnerability, the restrictions can be costly. Restriction-

dian subsidiaries or leave the country. IBM refused and because the nation lacked an information infrastructure, the government was forced to retreat.

Again, in 1970, Gandhi issued the same ultimatum. By this time, however, India had developed an infrastructure of information services to strengthen its bargaining position. During the previous decade India had been training programmers and developing a local microcomputer industry. India was able to stand firmly behind its ultimatum and IBM withdrew. See Grieco, *Between Dependency and Autonomy: India's Experience with the International Computer Industry*, 36 INT'L ORG. 609, 612-32 (1982).

63. See Sauvart, *Transborder Data Flows and the Developing Countries*, 37 INT'L ORG. 359, 366 (1983).

64. Brazil has implemented such a policy. See generally Bortnick, *supra* note 12, at 340-42; Hardy, *supra* note 12, at 254.

65. See Hardy, *supra* note 12, at 254.

66. *Id.*

67. Host country refers to the country where the subsidiary is located.

68. See Samiee, *supra* note 1, at 143.

tive legislation prevents local organizations from contracting data services abroad, resulting in lost revenue to the provider country and harm to the developing nation since it severely restricts the alternatives available for data services.⁶⁹ Transborder data flow restrictions may prohibit the import of foreign computer equipment, resulting in lost revenue to the provider nation and harm to the developing nation, which may lack equivalent technology.⁷⁰

Multinational corporations are strongly opposed to transborder data flow restrictions.⁷¹ They view restrictive legislation as prohibitively increasing the cost of doing business. Additionally, transborder data flow restrictions inhibit the development of technology.⁷² For example, the Brazilian transborder data flow regulations require multinational corporations to disclose information that may compromise proprietary rights,⁷³ and force the corporation to establish duplicate data processing facilities in Brazil, despite the much higher cost.⁷⁴ In order to avoid increases in cost and disclosure requirements, enterprises may choose less effective means of communication or may simply decide not to enter a particular market.⁷⁵

Governments of developed nations and multinational corporations share the concern about the potential of data flow restrictions for censoring ideas⁷⁶ and monitoring business.⁷⁷ Restrictive legislation invites government inspection and regulation of business data, providing a vehicle for monitoring and eventually controlling the flow of business data.⁷⁸

Despite these objections, many developing nations con-

69. See Note, *Transborder Data Flow: Problems with the Council of Europe Convention or Protecting States from Protectionism*, 4 *Nw. J. INT'L. L. & BUS.* 601, 614 (1982).

70. *Id.*

71. See generally McKeaver, *supra* note 1; Samiee, *How Transnational Data Flow Laws Affect Marketers*, *BUSINESS*, July-Sept. 1984, at 18.

72. Grossman, *Transborder Data Flow: Separating the Privacy Interests of Individuals and Corporations*, 4 *Nw. J. INT'L. L. & BUS.* 1, 5 (1982).

73. See Bortnick, *supra* note 12, at 342.

74. *Id.* at 343.

75. *Id.*

76. See generally Theberge, *supra* note 18.

77. See Rankin, *supra* note 3, at 227.

78. *Id.* Multinational corporations are also concerned that this type of extensive governmental monitoring raises the possibility of the theft of business secrets by governments and other industries. See generally Coombe, *Privacy, Data Protection, and*

tinue to restrict the flow of information. The challenge to sovereignty that prompts nations to impose transborder data flow restrictions has two principal components: (1) economic vulnerability and (2) cultural erosion.⁷⁹

A. Prevention of "Economic Vulnerability"

Developing nations view barriers to transborder data flow as necessary to prevent dependence on developed nations, which may result in economic vulnerability.⁸⁰ Economic vulnerability is associated with the loss of control over data when it is sent to a processing or storage country,⁸¹ or whenever a developing nation must depend exclusively on the developed nations for technological services or information sources.⁸²

Economic vulnerability is illustrated by the use of "remote earth sensing" satellites.⁸³ In developed nations, information collected by these satellites is used by both private enterprise

Transborder Data Flow: A Corporate Response to International Expectations, 39 BUS. LAW. 33 (1983).

79. These same concerns have motivated several Western nations to adopt extensive transborder data flow legislation. See, e.g., Organization for Economic Cooperation and Development: Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, Sept. 23, 1980, OECD Doc. c(80) 58 (Final) (Oct. 1980), reprinted in 20 I.L.M. 422 (1981); Council of Europe: Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Jan. 28, 1981, Europ. T.S. No. 108, reprinted in 20 I.L.M. 317 (1981). See generally Bing, *The Council of Europe Convention and OECD Guidelines on Data Protection*, 1984 MICH. Y.B. INT'L. L. STUD. 271; Feketekuty, *supra* note 22, at 150-56.

80. See *infra* notes 81-93 and accompanying text.

81. Canada's experience with transborder data flow is analogous to the experience of developing nations. See *supra* note 12 and accompanying text. The Clyne Committee Report, *supra* note 12, examined Canada's concern with economic vulnerability. The Report concluded that transborder data flow posed a serious threat to Canadian sovereignty. The Report recommended the adoption of protectionist measures, including strict transborder data flow legislation to protect Canadian sovereignty. *Id.* at 63-65; see also Eger, *supra* note 14, at 224-25.

Sweden provides another example of vulnerability when data is processed or stored outside of the country. The data processing service used by the Fire Department of Malmo, Sweden, stores architectural firefighting information in a data base located in Cleveland, Ohio. Burnham, *United States is Worried by World Efforts to Curtail Freedom of Information*, N.Y. Times, Feb. 26, 1978, at A1, col. 3. This example illustrates the importance foreign stored data bases may have on domestic stability.

82. See *infra* notes 83-86 and accompanying text.

83. "Remote earth sensing by satellite" (RES) is the collection by one nation of geographical, topographical, meteorological, military and other forms of data about another nation through observance by satellite. See Grosham, *Transnational Data Flows: Is the Idea of an International Legal Regime Relevant in Establishing Multilateral Controls and Legal Norms?*, 15 LAW TECH. 1, 1-2 (1982).

and governmental agencies in planning natural resource development.⁸⁴ Developing nations, in contrast, lack the information infrastructure⁸⁵ to process, store and analyze their own natural resource data. They must depend on foreign enterprises to collect and sort the data, and then buy back the information at a higher price, possibly without the full information the processing country gleaned from the data⁸⁶ Lack of complete information may result in economic vulnerability and may allow developers of non-renewable natural resources, usually Western multinational corporations, to enjoy greater economic advantages.⁸⁷

Governments of developing nations perceive Western multinational corporations as an increasing cause of economic vulnerability.⁸⁸ For a multinational corporation, transborder data flow is both a commercial good and a management tool.⁸⁹ The parent corporation uses the subsidiaries to access resources,⁹⁰ and subsidiaries are linked to the parent company through terminals which rely on transborder data flow to transmit information and conduct operations.⁹¹ With the locus of control in the parent company, the developing nation is virtually powerless to exercise control over, or have the ability to participate in, corporate policy decisions which may affect their nation.⁹² Multinational corporations use the inexpensive labor and resources of the developing nations to their advantage, making the developing nation economically vulnerable.⁹³

84. *Id.* at 2.

85. See *supra* note 62 and accompanying text.

86. See Bortnick, *supra* note 12, at 338-39, 347-48.

87. See Eger, *supra* note 14, at 231-32.

88. Interestingly, one commentator has suggested that the multinational corporation may be the most likely source of a "solution to the data flow crisis." Dunn, *supra*, note 3, at 86. The author reasons that the multinationals will be motivated by pragmatic concerns that will transcend nationalism, and additionally, they are not burdened by having to reconcile data flow with "parochial" national policy. *Id.* This may be a solution to the conflicts between the developed nations but may oversimplify the problems faced by the developing nations.

89. Sauvant, *supra* note 63, at 360.

90. See Samiee, *supra* note 1, at 142-43.

91. Sauvant, *supra* note 63, at 364.

92. The direct benefits from a multinational corporation to a host country occur generally at the processing and distribution stages, hence they normally will not accrue to the developing country. *Id.* at 366.

93. Even as a developing nation enters the information age, the multinational

B. Prevention of "Cultural Erosion"

Developing nations view their sovereignty as threatened by the cultural erosion they perceive occurs due to unrestricted transborder data flow. Commercial, economic and political planning information, if controlled by developed nations, may lead to cultural erosion within the developing nation.⁹⁴ Populations of developing nations generally have limited exposure to conflicting foreign values and high illiteracy rates, making the people particularly vulnerable to an influx of uncontrolled developed world information.⁹⁵ Developing nations fear that programming from developed nations may endanger the cultural heritage of their nations. Domestic information sources, such as local radio and television stations and news services, are usually extremely limited and developing nations are forced to rely on foreign controlled information sources and news services.⁹⁶ Therefore, developing nations are at the "mercy of the decisions of journalists, or the centres of information, which decide what to publish and what not to publish — it is their privilege."⁹⁷ Freedom of information becomes, in fact, "freedom of the informing agent."⁹⁸ Developing nations characterize this as a developed world attempt at "electronic colonialism" and "cultural imperialism."⁹⁹

As an example of this so-called "cultural imperialism", developing nations point to the negative image the developed world has fostered of developing nations by focusing news coverage on sensational disasters instead of developmental issues, representing their nations in what they consider to be an unsympathetic and biased light.¹⁰⁰ There is a tendency among

corporations are only allocating simple activities to their industries, leaving the more sophisticated processing in the developed countries. *Id.*

94. See *infra* notes 95-106 and accompanying text.

95. See Bortnick, *supra* note 12, at 339-40; see also *Nova: Global Village*, Transcript No. 1202, 12-14 (broadcast on WGBH-Boston, Mass., Jan. 22, 1985) (hereinafter "Nova Transcript").

96. See Bortnick, *supra* note 12, at 339-40; see also *Nova Transcript*, *supra* note 95 (discussion of the effect of India's satellite system and television usage); Feketekuty, *supra* note 22, at 151.

97. 18 U.N. Chronicle, June 1981 (remarks of Miguel Albornoz of Ecuador, the head of the United Nations Committee on Information).

98. See Masmoudi, *supra* note 17, at 175.

99. See Eger, *supra* note 14, at 209.

100. See N. Aggarwala, *Development Forum*, October 1978, reprinted in Masmoudi, *supra* note 17, at 180-81; Note, *The New World Information and Communication Order: Is*

developed world media, including news agencies, to direct the most attention to developing nations in times of disaster, crisis, and confrontation.¹⁰¹ Correspondents are brought into the developing nation to cover an emergency and then leave immediately thereafter. Coverage then returns to the status quo, which means, in many places, little if any coverage of political, social or cultural events.¹⁰² Developing nations' concern is twofold: they do not want developed nations imposing a cultural bias through external means, such as television, films or radio broadcasts, nor do they want the internal dealings of their country presented solely through the eyes of news organizations they perceive as hostile to their planning or political objectives.¹⁰³

Fear of cultural erosion extends beyond commercial programming to all forms of data flow that reflect the institutions and traditions of the processing or controlling country.¹⁰⁴ Each time a developing nation allows data to be stored abroad, cultural erosion may occur. The storage nation may impose its own value system on the customer nation by selectively releasing information.¹⁰⁵ The processing nations make administrative decisions based on the developing nations data, perhaps not even aware that they are imposing a cultural bias on the countries affected.¹⁰⁶

the International Programme for the Development of Communication the Answer?, 15 N.Y.U. J. INT'L L. & POL. 953 (1983); see also Theberge, *supra* note 18, at 715-16. An example of concern over media imbalance is Prime Minister Indira Gandhi's criticism of foreign news reporting: "India's achievements are ignored with a perverse consistency, while its shortcomings are presented with exaggerated glee." N.Y. Times, Sept. 20, 1981, § 1, at 4, cols. 4-5.

Mustapha Masmoudi, a member of Unesco's International Commission for the Study of Communications, called for a new world information order, proposing the "regulation of the right to information by preventing abusive uses of the right of access to information." Unesco Doc. 20C/31 at 6 (1978). The new world information order proposed also envisaged the establishment of a supranational organization to rectify false and biased news acts. *Id.* at 18.

101. See Tatarian, *supra* note 58, at 25-8.

102. *Id.*

103. See Masmoudi, *supra* note 17, at 180-82.

104. See Bortnick, *supra* note 12, at 339.

105. See Note, *supra* note 69, at 617. If the storage nation withholds information, either deliberately or accidentally, proper decisions can not be made in the developing nation. *Id.*; see also Groshen, *supra* note 4, at 13-14; Grossman, *supra* note 72, at 18.

106. See Grossman, *supra* note 72, at 18.

III. SUGGESTIONS FOR A VIABLE INTERNATIONAL FORUM

A number of organizations worldwide have been involved in the discussion and attempted resolution of transborder data flow problems,¹⁰⁷ but to date there has been very little progress on an international scale, largely because of the politicization of the issue. The politicization of communications issues, and the coordinate call for the development of NWICO and NIEO,¹⁰⁸ led to the withdrawal of the United States and the United Kingdom from Unesco. The effect of that withdrawal was to diminish Unesco's viability as an international forum for the resolution of transborder data flow problems. Until recently, Unesco had led the way in the discussion of communications issues, by providing a forum for both developing and developed nations to voice their concerns and grievances.¹⁰⁹ A new international forum must now be developed to deal with the myriad of conflicting national transborder data flow restrictions. As the world is brought closer by technology, the imposition of transborder data flow restrictions succeeds only in expanding the gap technology is trying to close.

A major hurdle to productive discussions is the definitional dispute. All nations embrace a concept of freedom of information, but define it differently. Some nations impose restrictions on information in the name of sovereignty while others consider such restrictions as fundamentally opposed to the principle of freedom of information. The result is conflict and stalemate and in turn this breeds the politicization that must be avoided if constructive and substantive dialogue is to take place.

An alternative to the development of an international fo-

107. Organizations involved in the discussion on transborder data flow include the United Nations, Unesco, the Non-Aligned Movement, the International Telecommunications Union, the United Nations Conference on Science and Technology for Development (UNCTAD) and the World Administrative Radio Conference (WARC). See J. GUNTER, *supra* note 42, at 8.

108. See *supra* notes 42-57 and accompanying text.

109. See Nanda, *The Communication Revolution and the Free Flow of Information in a Transnational Setting*, 30 AM. J. COMP. L. 411, 414 (Supp. 1982). Unesco's role in the international debate is evidenced by the development of NWICO, which has been evolving during the last decade at Unesco's biennial conferences. See Theberge, *supra* note 18, at 714.

rum for both developed and developing nations is to let the multinational corporations — those most affected economically by the restrictions — create the international standards of conduct.¹¹⁰ The tremendous variety and inconsistency of the transborder data flow regulatory schemes has created an extremely expensive administrative nightmare.¹¹¹ For a multinational to function efficiently in many developed as well as developing nations, it must adjust itself to each nation's requirements for information flow. Commentators argue that since the survival of the multinational corporation is dependent on its ability to pass information among its subsidiaries, and this ability is severely constrained by transborder data flow restrictions, the multinational may be the most likely source for a solution to the data flow crisis.¹¹² It is argued that the multinational corporation will be motivated by pragmatic concerns that can "transcend national boundaries", and will not have the burden of reconciling transborder data flow with national policy.¹¹³

As appealing as this proposal may sound, it does not adequately address the legitimate concerns of the developing nations. Whether such definitions of sovereignty or freedom of information are acceptable, it is clear that many are facing an information crisis caused by the lack of an information infrastructure. That problem will not be solved if the multinationals take control of policy. The multinationals may have "pragmatic" concerns but these concerns will be self-serving and are likely to ignore the developing world's problems of cultural and economic erosion. Additionally, multinationals are controlled by organizations based primarily in Western nations, a fact that is likely to cause considerable suspicion in the developing world.

The answer must lie in the creation of a viable international forum of developed and developing nations. Recently, a proposal was published that attempted to lay the groundwork for such a forum. The Maitland Commission¹¹⁴ was created by

110. See generally Dunn, *supra* note 3.

111. *Id.* at 86.

112. *Id.*

113. *Id.*

114. This Commission, headed by Sir Donald Maitland and composed of seventeen members from representative nations, was appointed in 1982 by the Interna-

the International Telecommunications Union¹¹⁵ in 1982. After several years of study, it proposed a new Center for Telecommunications Development whose purpose would be to provide planning and technical assistance to developing nations for the improvement of their telecommunications infrastructure. The proposed Center, staffed by "disinterested professionals", would focus on three major areas: 1) development planning, 2) preinvestment organization and planning and 3) operations support.¹¹⁶

Unfortunately, as needed as this type of assistance is, the proposal suffers from the same major problems that have plagued other international forums addressing this issue. Any United States cooperation in the venture is likely to be viewed with suspicion. For instance, United States government efforts to provide technical assistance to developing nations have been viewed as motivated at least partly by a desire to diffuse the campaign for the NWICO and the NIEO.¹¹⁷ Consequently, any perception that the United States or any other developed nation is using the Center to "buy-off" the developing nations will impede the usefulness of the Center or of any international forum.¹¹⁸

The politicization of transborder data flow means that any forum must be composed of both developing and developed nations and must draw its funding from sources that will preserve its multilateral nature. If the developed world is primarily responsible for the funding of the organization, suspicion will be immediately created among the developing nations. A

tional Telecommunications Union (ITU) Plenipotentiary Conference. The Commission's mandate was to recommend ways in which the worldwide telecommunications expansion could be stimulated. See Rowan & Waite, *supra* note 12, at 1341.

115. The ITU is a United Nations agency but predates the United Nations by over eighty years. Its role throughout its history has been to regulate the technical and administrative functioning of telephone, teletype and broadcast systems as they passed national boundaries. *Id.* at 1339 n.1. See generally G. CODDING, JR. & A. RUTKOWSKI, *THE INTERNATIONAL TELECOMMUNICATION UNION IN A CHANGING WORLD* (1982).

116. See Rowan & Waite, *supra* note 12, at 1342.

117. *Id.* at 1345. The Communications Counsel in the Bureau of Programs of the United States Information Agency stated it bluntly, "[i]t was a real *quid pro quo* policy: if you abandon the rhetoric, we will help you with communications development assistance." Read, *United States Government Involvement*, in *II COMMUNICATION IN A CHANGING WORLD* 60 (1983).

118. See Rowan & Waite, *supra* note 12, at 1345-46.

further source of conflict is the definitional problem. If the terms "freedom of information" and "sovereignty" are used by the participants and yet hold very different meanings for all, the forum will accomplish nothing.

For an international forum to be viable, it must include all nations involved in transborder data flow and have a source of funding not drawn primarily from the United States or major Western European nations. It must be pledged to examine and address the very real problems of the developing nations with respect to cultural and economic erosion. But most of all, the rhetoric of freedom of information must be abandoned and nations must work from the premise that control of information flowing across a nation's boundaries is a sovereign right. Without the latter, the developing nations will not give the forum the credibility it must have to reach an accord. The developing nations have definite concerns that must be addressed, but to start the discussion by concluding that what is being discussed is outside their sovereign rights will result in nothing being achieved. To make progress, the discussion must get past the political and rhetorical hurdles of freedom of information and sovereign rights. That is not what is crucial. The crucial issue is an increasingly interdependent world that is being progressively divided by national restrictions on the flow of information. The developed nations and their multinational corporations are being hurt by the imposition of further transborder data flow restrictions, the developing nations are being hurt because needed information is not reaching their nations. A viable international forum must be created.

CONCLUSION

By controlling information, nations may enhance their global and national positions. Both developed and developing nations are imposing transborder data flow restrictions in the name of privacy protection, national security and sovereignty. In reality, the motivation behind such restrictions is power over information.

The need for power is escalating the global race to impose transborder data flow restrictions. International organizations and agreements presently in existence are of limited assist-

ance.¹¹⁹ It is debatable if the agreements are binding, and even if they are, the disparity of definitions renders them practically non-binding.

Theoretically, transborder data flow should bring the world's people closer, eliminating geographic distances and making information access instantaneous, resulting in an interdependent global economy. In reality, transborder data flow is creating new barriers among the world's governments. New agreements and an effective international forum must be developed to prevent further erosion.

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119. See Dunn, *supra* note 3, at 86.

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