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Recommended Citation

Markoski, Joseph P. (1981) "Telecommunications Regulations as Barriers to the Transborder Flow of Information," *Cornell International Law Journal*: Vol. 14: Iss. 2, Article 3.
Available at: <http://scholarship.law.cornell.edu/cilj/vol14/iss2/3>

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TELECOMMUNICATIONS REGULATIONS AS BARRIERS TO THE TRANSBORDER FLOW OF INFORMATION

Joseph P. Markoski†

Ever since the enactment of the Swedish Data Bank Statute in 1972,¹ the debate over transborder dataflow has focused on legislative initiatives aimed at the protection of personal privacy.² The attention given to such privacy protection measures has been understandable, particularly in light of the emphasis that these legislative efforts have placed on the use of novel administrative requirements such as data protection boards and mandatory licensing.³ Also understandable are the arguments that have arisen as to whether the goal of such legislation is the protection of personal privacy or the protection of domestic industry.⁴

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1. See Swedish Data Bank Statute of May 11, 1973, reprinted in U.S. DEPT OF COMMERCE, OFFICE OF TELECOMMUNICATIONS, SELECTED FOREIGN NATIONAL DATA PROTECTION LAWS AND BILLS 70 (C. Wilk ed. 1978).

2. See, e.g., Eger, *Emerging Restrictions on Transnational Data Flows: Privacy Protection or Non-tariff Trade Barriers?*, 10 L. & POL'Y INT'L BUS. 1055 (1978); Marks, *Crossborder Data Nets Become Targets of European Lawmakers*, DATA COMMUNICATIONS (1978); *Symposium—Transborder Data Flow*, 16 STAN. J. INT'L L. 1 (1980); Address by Richard L. Crandall, President, Comshare, Inc., Computer Law Association Program, in Washington, D.C. (Oct. 9, 1979) (on file at *Cornell International Law Journal*). For a discussion of European privacy protection laws in the context of the societal and economic goals of the Commission of the European Communities, see Ramsey, *Europe Responds to the Challenge of the New Information Technologies: A Teleinformatics Strategy for the 1980's*, 14 CORNELL INT'L L.J. 237, 243-45 (1981). For a similar discussion of the approach taken by the developing countries, see Bortnick, *International Information Flow: The Developing World Perspective*, 14 CORNELL INT'L L.J. 333, 333-43 (1981).

3. Enforcement mechanisms such as licensing, self-regulation, or national privacy commissions are considered among the most important dimensions of privacy protection legislation. See Turn, *Privacy Protection and Security in Transnational Data Processing Systems*, 16 STAN. J. INT'L L. 67 (1980). See also U.S. PRIVACY PROTECTION STUDY COMMISSION, REPORT, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 500, 502 (1977).

4. See Kirby, *Transborder Data Flows and the "Basic Rules" of Data Privacy*, 16 STAN. J. INT'L L. 27, 28 (1980); Eger, *supra* note 2, at 1095-1103.

What is somewhat surprising, however, is the relatively little attention that has been given to those barriers to the transborder flow of information that purposefully impede commerce.⁵ No pretense or effort has been made to cloak these barriers with the mantle of principle, such as respect for individual privacy or the preservation of cultural identity. Rather, the only apparent goal of these measures has been to restrict the flow of information across national boundaries. Although unlike more traditional customs-type barriers,⁶ these obstacles to trade have proven to be equally effective in impeding the free flow of information among nations.

This article will examine the use of such restrictions by several representative nations and will evaluate the reaction of the United States, particularly that of the Federal Communications Commission (Commission), to these non-tariff barriers to trade.⁷ Generally speaking, the Commission's response to these barriers has been less than effective. Although operating under an extremely flexible statutory charter, the Commission appears to have adopted a relatively narrow view of its responsibility and authority to secure the removal of dataflow restrictions. Other instrumentalities of the federal government, though more aggressive in their approach to

5. *But see* BUS. WEEK, Aug. 3, 1981, at 10.

6. As Alain M. Madec, Chairman of the French Commission on Transborder Data Flows, has recognized, information is generally not regulated or controlled by traditional mechanisms.

International exchanges of information concern an asset of universal value which can generate wealth or power for those who hold it. Oddly enough though, these flows are largely untouched by the traditional rules governing trade in products: they seldom appear in the accounts of those concerned and, where made between related bodies, are rarely invoiced at their "transfer price." Neither are they recorded by the customs, and their very volume often remains unknown to the authorities.

Madec, *Economic and Legal Aspects of Transborder Data Flows* ¶ 7, in OECD Doc. DST I/ICCP/80.26, at 33, 34 (1980).

7. This article is limited to those restrictions that directly affect two-way communications services and facilities, as opposed to one-way broadcast media that disseminate news and general entertainment programming. Generally speaking, two-way communications services have been traditionally classified as "common carriage" and are regulated by the Federal Communications Commission (Commission) pursuant to Title II of the Communications Act of 1934, 47 U.S.C. §§ 201-224 (Supp. III 1979). *See* Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 640-41 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976); *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960); *Home Ins. Co. v. Riddell*, 252 F.2d 1, 4 (5th Cir. 1958); *Ciaccio v. New Orleans Pub. Belt R.R.*, 285 F. Supp. 373, 375 (E.D. La. 1968). The Commission, however, is currently in the process of reevaluating its traditional classification and regulation of common carriers and their service offerings. *See* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 84 F.C.C.2d 445 (1980) (Further Notice of Proposed Rulemaking). The Commission regulates broadcasting services pursuant to Title III of the Communications Act of 1934. *See* 47 U.S.C. §§ 301-399 (1976).

dataflow barriers, have been unable to fill the void left by the Commission.

Efforts are now underway in Congress to remedy this situation. Proposals have been advanced to centralize responsibility for United States telecommunications and information policies and to encourage the Commission to pursue the removal of all restrictions on the use of telecommunications services and facilities that serve as barriers to trade and the free flow of information. Failing enactment of these measures and in the absence of new initiatives by the Executive, the status quo can be expected to continue.

I

THE PROVISION AND REGULATION OF TELECOMMUNICATIONS: THE UNITED STATES AND OVERSEAS MODELS

Essential to an understanding of the many ways in which foreign telecommunications regulations have been used as non-tariff barriers to American commerce is an appreciation of the differences in the way that telecommunications services are provided and regulated in the United States and abroad. Unlike the situation that prevails in most of the countries with which the United States trades, the private sector serves the telecommunications and associated equipment needs of users in the United States. Basic telephone service, as well as the more specialized voice and record communications services that American industry requires, are provided by hundreds of regulated and unregulated organizations that range in size from the very small to the very large.⁸

8. Over 1,500 firms provide "Plain Old Telephone Service," or "POTS" as it is colloquially known. UNITED STATES INDEPENDENT TELEPHONE ASS'N, PHONE FACTS '81 16 (1981). These companies range in size from the Athens Telephone Company, whose 1979 operating revenues were \$102,532, to the overwhelmingly dominant provider of such service, American Telephone and Telegraph Company (AT&T), whose 1980 revenues were \$51.6 billion. See Opposition to Petitions for Reconsideration of United States Independent Telephone Ass'n, F.C.C. Docket No. 20828, at 2 (filed Aug. 4, 1980); AT&T '80 26 (1981).

Enterprises such as GTE-Telenet Communications Corporation and Tymnet, Inc., both of which will soon be deregulated, offer sophisticated data communications services that enable computers to converse with other computers, terminals to converse with other terminals, and computers to converse with terminals. See notes 16-19 *infra* and accompanying text. These services, which employ such advanced technologies as packet switching, provide users with extremely accurate and cost-efficient data communications. In addition to their accuracy and efficiency, these service offerings enable disparate terminals and computers to communicate with each other, thereby providing users with greater flexibility in the equipment that they may utilize.

Domestic record services, such as telegraph, telex, and Mailgram service, are offered predominantly by Western Union Telegraph Company, although it is experiencing

In the international arena, voice communications services are provided almost exclusively by American Telephone and Telegraph Company (AT&T). Record communications services⁹ are generally provided by a group of much smaller carriers that, until recently, were confined to the provision of purely international service.¹⁰ The Commission, however, has proposed that the distinction between international voice and record traffic be eliminated and that all carriers be free to compete in the provision of both types of service.¹¹ The United States participates in the provision of international satellite communications through the Communications Satellite Corporation.¹²

In addition to providing transmission services, United States carriers also offer their subscribers a wide variety of communications

increasing competition. Hard copy facsimile services are provided by Graphnet Systems, Inc. and others. Facsimile offerings enable users to transmit documents such as truck permits when an exact duplicate of the original document is needed at a distant location.

In addition to these specialized services, a variety of satellite and terrestrial carriers provide private line services to users who require instant access to facilities dedicated to their exclusive use. Apart from uses in data and voice communications, private line service, particularly satellite service, is often used to transmit television signals to cable television operators.

The foregoing are but a few of the many services and organizations that satisfy the specialized communications needs of users in the United States. A more comprehensive enumeration of services, carriers, and other providers of service would be too voluminous for mention here. Such an enumeration would also be out-of-date shortly after publication.

9. Voice and record (telegraph/data/facsimile/non-voice) communications services have historically been offered by different carriers with different facilities, both within the United States and between the United States and overseas points. This dichotomy "initially arose from the acquisition of the patent rights to these two technologies by different entities, AT&T and Western Union." Overseas Communications Servs., 84 F.C.C.2d 622, 623 (1980) (Notice of Proposed Rulemaking).

10. The United States international record carriers (IRCs) include ITT World Communications Inc., RCA Global Communications Inc., TRT Telecommunications, Inc., Western Union International, Inc., FTC Communications, Inc., and United States-Liberia Radio Corporation. The FCC authorized these carriers to expand their international operations into the domestic market in early 1980. *See* International Record Carriers, 76 F.C.C.2d 115 (1979), *aff'd sub nom.* Western Union Tel. Co. v. FCC, No. 79-2494 (D.C. Cir. Sept. 3, 1981). As a result, Western Union is facing greater competition in the area of domestic record service. *See* BUS. WEEK, Dec. 22, 1980, at 62.

11. *See* Overseas Communications Servs., 84 F.C.C.2d 622 (1980) (Notice of Proposed Rulemaking). At present, AT&T's customers can transmit data, facsimile, or other record communications over AT&T's international voice circuits, but only on a secondary use basis. Similarly, customers of the international record carriers can use international record circuits for voice traffic, but only on a secondary use basis. The Commission's proposal would completely eliminate any restrictions on the services that either AT&T or the international record carriers may provide.

12. *See* Communications Satellite Act of 1962, 47 U.S.C. §§ 701-744 (1976). At present, Comsat does not serve the public directly. It functions as a "carrier's carrier" by providing satellite transmission channels to other carriers for resale to the public. The Commission is currently considering whether it should permit Comsat to deal directly with the public. *See* Aeronautical Radio, Inc., 77 F.C.C.2d 535 (1980) (Notice of Proposed Rulemaking).

equipment ranging in sophistication from the basic telephone handset to advanced network control equipment.¹³ A substantial number of equipment manufacturers that are not affiliated with common carriers also supply equipment to communications users.¹⁴ The Commission does not regulate these "interconnect" firms, as the suppliers of customer-premises equipment are often called.¹⁵

13. Until recently, the Commission regulated the offering of equipment by communications common carriers under Title II of the Communications Act. *See* 47 U.S.C. §§ 201-224 (Supp. III 1979); 47 C.F.R. § 64.702 (1980). In a proceeding popularly known as the *Second Computer Inquiry*, the Commission determined that the provision of terminal equipment by common carriers is not subject to Title II regulation and that such equipment should be offered separate and apart from transmission services. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 438-47, *on recon.*, 84 F.C.C.2d 50, 65-68, 98-105 (1980), *appeal docketed sub nom.* Computer & Communications Indus. Ass'n v. FCC, No. 80-1471 (D.C. Cir. May 5, 1980) *on further recon.*, F.C.C. 81-481 (released Oct. 30, 1981). As a result, any equipment not in service as of January 1, 1983, must be offered on a non-tariffed basis after that date. F.C.C. 81-481, ¶ 69. The Commission has deferred, until a later date, consideration of the regulatory treatment it will accord customer-premises equipment that is currently in place and offered pursuant to federal or state tariffs. *Id.* at ¶ 44.

14. For many years, telephone company tariffs contained blanket prohibitions against the interconnection of any customer-provided terminal equipment to the telephone network. This prohibition extended to telephone book covers, shoulder rests attached to the receiver, and locks on the dial of the telephone handset. *See* Economic Implications & Interrelationships Arising from Policies & Practices Relating to Customer Interconnection, Jurisdictional Separations & Rate Structures, 61 F.C.C.2d 766, 780 n.3 (1976). These restrictions were successfully challenged in *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956). There, the court held that AT&T could not prohibit the attachment of a Hush-A-Phone (a cup-like device that is attached to the telephone handset to obtain privacy in making telephone calls) to the network. In so doing, the court concluded that users have the right to use their telephones "in ways which are privately beneficial without being publicly detrimental." *Id.* at 269.

In *Use of the Carterfone Device in Message Toll Tel. Serv.*, 13 F.C.C.2d 420, *recon. denied*, 14 F.C.C.2d 571 (1968), the Commission invalidated an AT&T tariff provision that prohibited the interconnection of a Carterfone, a device that connects mobile radio systems to the interstate telephone network. After *Carterfone*, AT&T permitted the interconnection of customer-provided equipment, but required users of non-Bell equipment to utilize "connecting arrangements" or "network control signalling units" that the Bell System provided. The ostensible purpose of these devices was to protect the communications network from harm. Independent equipment manufacturers and their customers, however, found these devices to be expensive, poorly designed, and difficult to maintain. The Commission ultimately held that the tariff provisions requiring the use of these devices unjustifiably discriminated against users and suppliers of independent terminal equipment. To safeguard the network, the Commission adopted a registration program as a less restrictive alternative. *See* 47 C.F.R. § 68 (1980). Under this program, independently supplied terminal equipment may be connected to the network, if the equipment or its protective circuitry is registered with the Commission. *See* *Interstate and Foreign Message Toll Telephone*, 56 F.C.C.2d 593 (1975), *aff'd sub nom.* North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977). The Canadian Radio-Television and Telecommunications Commission has recently announced a similar program. The rules, though less liberal than those prevailing in the United States, permit the attachment of subscriber-provided terminal equipment to the Bell Canada network. *See* CRTC Decision No. 80-13 (Aug. 5, 1980).

15. The Commission has never regulated independent suppliers of terminal equipment under Title II of the Act. In the *Second Computer Inquiry*, however, the Commis-

Regulated common carriers and unregulated computer service firms also participate in another communications-related market—the provision of “enhanced services.”¹⁶ A regulatory term of art of relatively recent vintage, an “enhanced service” is a melange of communications and data processing services in which computer processing is used, *inter alia*, to “act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information.”¹⁷ Comprised of offerings that have traditionally been viewed as two distinct services—regulated communications and unregulated data processing—¹⁸ enhanced services have been found by the Commission to be beyond the scope of its common carrier jurisdiction.¹⁹ The creation of this vast unregulated market has dramatically increased the already large number of entities that serve the needs of the American public.

The Federal Communications Commission oversees the provision of interstate and foreign communications in the United States. An independent agency of the federal government, the Commission’s statutory mandate is “to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges”²⁰ Guided by an obligation to assure that its decisions serve the “public convenience, interest and necessity,”²¹ the Commission functions as a public interest manager

sion declined to rule whether customer-provided equipment supplied by non-common carriers is subject to its jurisdiction under Title I of the Act. *See Second Computer Inquiry*, 84 F.C.C.2d 50, 100 (1981).

16. *See generally* *Second Computer Inquiry*, 77 F.C.C.2d 384, 387, 417-35, 457-90 (1980).

17. *Id.* at 498; *see also id.* at 420-30.

18. *See id.* at 435.

19. *See Second Computer Inquiry*, 77 F.C.C.2d 384, 428, 430 (1980), *on recon.*, 84 F.C.C.2d 50, 89 (1981). The Commission made a factual determination that “enhanced services,” whether provided by communications common carriers or other entities, are not common carrier services. *See Second Computer Inquiry*, 77 F.C.C.2d at 430. Whereas the Commission generally asserted Title I jurisdiction over enhanced services, it qualified that claim with the statement that “we need not and should not resolve in the abstract questions of whether any enhanced services, while clearly not within our Title II jurisdiction, may be otherwise within our jurisdiction.” 84 F.C.C.2d at 92. The Commission continues to regulate basic transmission service, in which “a carrier essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information,” as Title II common carriage. 77 F.C.C.2d at 420. This may change, however, as a result of a rulemaking proceeding now underway. *See Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorization Therefor*, 84 F.C.C.2d 445 (1981) (Further Notice of Proposed Rulemaking).

20. 47 U.S.C. § 151 (1976). State regulatory commissions regulate purely intrastate communications services. *See id.* § 152(b).

21. *Id.* § 214(a).

of competing, commercially oriented communications interests.²² Significantly, the Commission does not itself provide communications services or equipment.

In addition to its domestic responsibilities, the Commission also participates in a "consultative process" with foreign telecommunications authorities.²³ Notwithstanding its traditional involvement in the consultative process, the Commission does not have any authority to engage in international negotiations.²⁴ Consequently, the Commission has never acted as the sole representative of the United States before such bodies as the International Telecommunications Union (ITU) or ITU's International Telegraph and Telephone Consultative Committee (CCITT).²⁵ Indeed, as an independent agency of the federal government, the Commission can speak only for itself, and then only in the areas reserved to it by the Communications Act of 1934.

The diverse market for telecommunications in the United States stands in marked contrast to the relative simplicity of telecommunications in most other countries of the world.²⁶ Elsewhere on the globe, the provision of communications services, and associated

22. The Commission, for example, assures that carriers furnish services at reasonable charges upon reasonable request, that the construction and use of communications facilities are consistent with the public interest, and that carriers do not discriminate among users either in their charges or practices. *See id.* §§ 201, 202, 214.

23. *See generally* Policies for Overseas Common Carrier Facilities, 73 F.C.C.2d 193 (1979). In October 1979, ITT World Communications Inc. (ITT) filed a petition for rulemaking with the Commission, in which it argued "that the Commission lacks authority to engage in discussions with foreign governments and telecommunications entities" ITT World Communications Inc., 77 F.C.C.2d 877, 878 (1980). The Commission disagreed, and explained that it does not engage in "negotiations" with foreign entities, only "informal conferences." *Id.* at 883. The Commission, however, conceded that international negotiations are the exclusive domain of the Department of State. *See id.* at 884 n.4; 22 U.S.C. § 2656 (1976).

ITT subsequently brought suit to enjoin the Commission's participation in the "consultative process" with foreign government instrumentalities. *See ITT World Communications Inc. v. FCC*, No. 80-0428 (D.D.C. Oct. 17, 1980), *appeal docketed*, No. 80-1721 (D.C. Cir. Aug. 11, 1980). The district court dismissed ITT's complaint, on standing and ripeness grounds. In dicta, however, the district court indicated that it had serious doubts that ITT could prove that the Commission's participation in the "consultative process" was "patently *ultra vires*." *Id.* at 4.

24. *See ITT World Communications Inc.*, 77 F.C.C.2d at 884 n.4.

25. *See notes 69-72 infra* and accompanying text.

26. In his classic work on the development of the Bell System in the United States, John Brooks noted the historical differences between the evolution of telecommunications in the United States and abroad:

Telephony had been making a shaky and erratic debut in other countries around the world. Almost everywhere, its early development contrasted sharply with that in the United States in two respects: That the telephones were owned or controlled to some extent by government rather than by private interests, and that telephone service was received with a marked lack of enthusiasm by the public.

J. BROOKS, TELEPHONE: THE FIRST HUNDRED YEARS 91-92 (1975). *But see* note 34 *infra*.

equipment is considered a government monopoly.²⁷ Generally speaking, either the postal ministry, a public corporation, or a private corporation controlled or partially owned by the government provides such services.²⁸ In some countries, such as Japan, the provision of domestic service is organizationally separated from the provision of international service, although both are subject to the postal authority.²⁹ Competition in the provision of communications services and equipment is, therefore, largely unknown in most countries.³⁰

Because of the absence of private sector involvement, a foreign telecommunications authority, or PTT as it is commonly known,³¹

27. The existence of state-owned telecommunications monopolies in Europe has not worked to the benefit of equipment users. Although European telecommunications authorities closely cooperate with respect to the provision of services, the equipment used in one country cannot be used elsewhere on the continent. *See* Commission of the European Communities, *New Information Technologies: First Commission Report*, Doc. COM (80) 513 final, at 2-3 (1980) (recommending the establishment of a uniform market for telecommunications technologies throughout the EEC). In the United States, however, continent-wide standards have emerged, even in the presence of competition among hundreds of suppliers of communications equipment. For a discussion of the problems presented by the lack of continent-wide standards in Europe, see Ramsey, *supra* note 2, at 245-57.

28. In West Germany, for example, the Bundespost directly operates the communications network. In the United Kingdom, telecommunications service was, until very recently, provided by the British Post Office. Now a public corporation, British Telecommunications Corporation, provides telecommunications service. In Japan, a private corporation provides international service. *See* note 29 *infra*.

29. Nippon Telegraph and Telephone Public Corporation is Japan's domestic carrier. It is also the largest supplier of computer services in that country. International service is provided by a private corporation, Kokusai Denshin Denwa Co., Ltd. The Ministry of Posts and Telecommunications oversees both of these organizations.

30. There are exceptions, however. In July 1980, the British government announced plans to end the telecommunications monopoly of the British Post Office. A new entity, British Telecommunications Corporation, has been established to manage telecommunications in the United Kingdom. Although the precise extent to which competition will emerge is not yet clear, it appears that the British government will permit users to connect at least some independently supplied equipment to the network. In addition, it is possible that some value-added services may be provided by independent companies. *See* Statement of Sir Keith Joseph, on Telecommunications, Before the House of Commons (London, July 21, 1980); DATAMATION, Oct. 1979, at 78; THE ECONOMIST, Dec. 6, 1980, at 64. The likely benefits of competition in the provision of communications services of competition were addressed in depth by a report prepared at the request of Britain's Department of Industry. *See* M. BEESLEY, LIBERALISATION OF THE USE OF BRITISH TELECOMMUNICATIONS NETWORK (1981).

The European Economic Community has also recently encouraged the relaxation of government procurement practices in an effort to promote the European Community as the leading supplier of European telecommunications needs. *See* Commission of European Communities, *New Information Technologies: First Commission Report*, Doc. COM (80) 513 final (1980); Ramsey, *supra* note 2, at 251, 256-57.

Canada has also attempted to promote competition in the telecommunications industry by authorizing the attachment of the Canadian National/Canadian Pacific network to Bell Canada's network. DATAMATION, *supra*, at 78.

31. An acronym for postal, telephone, and telegraph authority, the term PTT is generally used to describe all foreign telecommunications administrations.

acts not only as the regulator, but also as the regulated. As such, a PTT has the ability to formulate and enforce policies in furtherance of both its postal and telecommunications activities.³² As an oftentimes powerful and influential arm of the government,³³ a PTT can also implement other policies or goals that may not be consistent with the provision of economical and efficient telecommunications services. In this regard, a PTT is often free to structure technical standards, tariffs, and policies so as to achieve results consistent with its government's economic or political goals at home and abroad.³⁴ Moreover, as both the regulator and provider of communications service, a PTT can also effectively negotiate with foreign carriers and international communications organizations. PTTs are, therefore, well-situated to implement telecommunications policies and regulations that may be inconsistent with the free flow of information across national borders.

The implications of the above differences between the telecommunications infrastructure of the United States and that of most other nations are particularly significant in the area of transborder dataflow. Whereas a foreign PTT can adopt policies in furtherance of its own business needs or the goals of its government, the Commission lacks such freedom. Indeed, the Commission is powerless to

32. The French Ministry of Posts, Telecommunications et Telediffusion, a government organization which has its own government-funded research body, the Centre National d'Etudes des Telecommunications (CNET) overseas France's telephone network. In 1975, the French government placed high priority on the development and modernization of its telephone network and authorized the PTT to spend \$30 billion to achieve its goals. CNET has thus been able to engage in long-range planning in its research and development and has served as a catalyst for the French telecommunications industry. See generally Stratte-McClure, *French Telecommunications: Digital Technology and the Telematique Program*, SUPP. TO ELECTRONIC NEWS & SCIENTIFIC AMERICAN 13 (1980).

33. For a discussion of the economic and political power that many PTTs enjoy, see Ramsey, *supra* note 2, at 262-64.

34. Bureaucratic diffusion and lack of coordination have also been problems in the telecommunications infrastructures of other countries. The famous Nora & Minc Report, for example, discussed the problems presented by the structure of the telecommunications bureaucracy in France:

The administrative connection of telecommunications organizations fluctuates with the rhythm of governmental reorganizations. While the GTB [General Telecommunications Board] remains reverted to Postal Service and Telecommunications, TDF [Tele-Diffusion de France] has been joined to the Government's Press Office, and after the disappearance of this ministry, directly to the Prime Minister. For its part, the CNES [Center National d'Etudes Spatiales] depends on the Industrial Ministry.

This administrative dispersion makes a common policy difficult, even impossible. The divergences are kept quiet and remain in an obscurity which allows each organization to pursue its own policy. Arbitrations in the Prime Minister's cabinet, when they take place, become even easier as TDF depends directly on its guardianship.

S. Nora & A. Minc, Report on the Computerization of Society 54 (1978) (on file at *Cornell International Law Journal*).

act in any way that does not further its statutory mandate or that is inconsistent with its public interest responsibilities.³⁵ Further, a PTT can participate directly in international organizations such as CCITT, and defend and advance its domestic and international telecommunications policies. The Commission, however, cannot act so directly and must rely on the efforts of others to champion its policies.³⁶ Moreover, because a PTT itself provides communications services and deals directly with other administrations and carriers, it always operates on the basis of firsthand information. The Commission, on the other hand, must operate solely on the basis of information supplied by members of the private sector who provide service, construct facilities, and conduct business with foreign telecommunications administrations.

The limited scope of the Commission's statutory charter, as compared to that of a foreign PTT, has become increasingly apparent as the Commission has been called upon to take cognizance of, and to take action to eliminate, restrictions imposed on the transborder flow of data by foreign telecommunications administrations. When tested by determined resistance, the Commission has proven itself unable to achieve the speedy removal of such restrictions. The Commission's failures, however, are merely symptomatic of the larger inadequacies of the federal government.

When other agencies, such as the Department of State, the Department of Commerce, and the Office of the United States Trade Representative have become involved in transborder dataflow disputes, the results have been somewhat more favorable but the response time has been excessive. In large part, this is because the responsibility for national telecommunications and information policy is divided among many agencies,³⁷ no one of which has primary or exclusive jurisdiction. Consequently, when users of international communications services have demanded that the United States government take action to eliminate transborder dataflow restrictions—and that is the only time that the government has done so—the results have not been promising.³⁸

35. See 47 U.S.C. §§ 151, 214 (1976).

36. See note 23 *supra* and accompanying text.

37. In 1978, the President distributed responsibility for telecommunications functions among the Department of Commerce, the Office of Management and Budget, the Director of the Office of Science and Technology Policy, the Department of State, the General Services Administration, and the National Security Council. See Exec. Order No. 12,046, 43 Fed. Reg. 13,349 (1978); Eger, *The Global Phenomenon of Teleinformatics: An Introduction*, 14 CORNELL INT'L L.J. 203, 234-36 (1981).

38. The House of Representatives exhaustively studied the need for a comprehensive national approach to international information policy during the 96th Congress. See H.R. REP. NO. 1535, 96th Cong., 2d Sess. (1980). In an effort to remedy the "fragmented, uncoordinated, confused and conflicting structure within the executive branch for the

II

RESTRICTIONS IMPOSED ON THE USE OF
TELECOMMUNICATIONS FACILITIES
BY FOREIGN
ADMINISTRATIONS

The growth of international data communications traffic³⁹ and the increasing use of private leased channel networks⁴⁰ by American data processors and multinational organizations appear to have been the immediate impetus behind the first efforts of foreign PTTs to restrict and thereby gain control of information crossing national borders. Because leased channels are available at flat monthly rates,⁴¹ users with large communications needs have historically

development and implementation of international telecommunications and information policies," Congressman English introduced the International Communications Reorganization Act of 1981, H.R. 1957, 97th Cong., 1st Sess., 127 CONG. REC. H532 (1981).

39. The Eurodata Study documented the growth of international data communications. The initial results of this study, which was commissioned by a consortium of European PTTs, were presented at an *ad hoc* meeting of experts convened by the Working Party on Information, Computer and Communications Policy of the Directorate for Sciences, Technology and Industry of the OECD. The results were reported as follows:

- There are approximately 13 million data communications transactions each day in Western Europe. Of these approximately 10 per cent are international; this rather high share contrasts with voice traffic, where only 1 per cent of transactions are international.
- These transactions yield a total revenue to the PTTs of approximately U.S. \$2,000 million, of which international traffic accounts for a quarter. The average cost per transaction is approximately 6 cents per transaction overall and 15 cents per international transaction. With an average message size of 12,000 words (10,000 [*sic*] bits), this is significantly cheaper than telex.
- In fact, data communication now accounts for a greater total flow of traffic than does telex.
- The total volume of international data communications can be divided into two components: those transactions which, because they involve a message transmittal function, are international by necessity; and those transactions whose objective (for example, to access processing power) could be achieved locally. These are not hard and fast categories; but initial calculations suggest that 43 per cent of the total is international by necessity, 40 per cent could be carried out locally and 17 per cent could not be attributed to either category.
- Finally, the total number of data communications transactions in Western Europe is expected to increase at a compound annual rate of 25 per cent over the period 1979-1987, while the number of international data communications transactions will increase at an annual compound rate exceeding 30 per cent.

OECD, *Transborder Data Flows and Data Communications Policies*, in OECD Doc. DST I/ICCP/80.27, at 1-2 (1980).

40. A leased channel network is, generally speaking, a private communications or data processing network that the user of the network organizes, operates, and maintains. The user obtains the leased circuits and other communications facilities comprising the network from common carriers. Network control equipment, terminals, and other equipment may be owned by the user or leased from carriers or others. No communications traffic, other than that which the user properly authorizes, transmits the network.

41. See CCITT ORANGE BOOK, GENERAL TARIFF PRINCIPLES—LEASE OF CIRCUITS FOR PRIVATE SERVICE, Vol. II.1, Recommendation D.1, at 3-9 (1977) [hereinafter cited as CCITT ORANGE BOOK].

found such circuits much more economical than usage-sensitive services such as telex.⁴² Being transparent,⁴³ leased circuits also provide users with the flexibility to adapt these channels to their individual needs. This flexibility has enabled users to exploit advances in technology and to dramatically increase the amount of information that can be transmitted with added accuracy over these circuits. As new technology has increased the efficiency of these lines, the relative cost of individual transmissions has decreased. These savings, in turn, have encouraged greater use of leased circuits—all without the intervention of, and without any significant increase in revenues for, the PTTs and participating carriers.

A. PRELIMINARY INDICATIONS OF A POLICY SHIFT

1. *The SWIFT-CEPT Controversy*

The first major organized effort by foreign PTTs to curtail the use of private networks occurred in Europe. In 1973, the Society of Worldwide Interbank Financial Telecommunications (SWIFT) was incorporated as a cooperative non-profit society for the purpose of developing and operating an international communications network that would serve the needs of the world-wide banking community.⁴⁴ The SWIFT network was conceived as a leased channel network that would allow banks to achieve greater security and accuracy in their interbank transactions than was possible using telex or public telegram service.⁴⁵ The network was also intended to be substantially less expensive than existing public services.⁴⁶

Faced with the potential diversion of substantial amounts of traffic from their telex operations, European PTTs, acting through the Conference of European Post and Telecommunications Administrations (CEPT),⁴⁷ formed a study group to devise a means of

42. Unlike leased circuits, the price of overseas telex service is based on the length of individual messages, calculated by time. In certain instances, users are charged a fixed minimum, even if an individual message is shorter than the minimum. *See, e.g.*, Western Union Int'l, Inc., Tariff F.C.C. No. 5 ¶ 5; ITT World Communications Inc., Joint Tariff F.C.C. No. 12 § D; RCA Global Communications Inc., Tariff F.C.C. No. 90 ¶ 3. *See also* Western Union Telegraph Co., Tariff F.C.C. No. 240 ¶ 5.

43. A transparent circuit is one which does not interact in any way with the information or data being transmitted over the circuit. Every signal transiting the circuit, voice or data exits with exactly the same characteristics it had when it entered the circuit.

44. Nacamuli, *Swift: Objectives, Standardization, Availability, Auditability, Security, Privacy and Liability*, 3 TRANSNAT'L DATA REP. No. 6, at 7 (1980).

45. *Id.*

46. *Id.* at 9.

47. CEPT is a 26-member body of European postal and telecommunications authorities governed by a biennial plenary conference and two permanent commissions, one dealing with posts and the other with telecommunications.

recapturing revenues from SWIFT.⁴⁸ Two proposals emerged from the study. The first was to add a surcharge of not more than 150 percent of the cost of a basic leased circuit to the price of each leased circuit needed by SWIFT.⁴⁹ The second was to charge for leased circuits solely on the basis of the volume of information transmitted.⁵⁰ Neither proposal bore any relationship to the cost of providing the facilities SWIFT needed. After substantial confrontation, CEPT announced in May 1976 that the charges for SWIFT lines would be computed on the basis of both a flat rate and a per message element.⁵¹ The effect of the CEPT proposal was to increase the cost of using SWIFT by two to four hundred percent for communications among European banks and by one thousand percent for communications between European and North American banks.⁵² In short, the CEPT proposal threatened the economic viability of the SWIFT network even before it began operations.

2. *The Inauguration of Usage-Sensitive Data Services Between the United States and the United Kingdom*

SWIFT's difficulties with CEPT soon became a factor in a wholly unrelated proceeding before the Commission. In the fall of 1976, Western Union International, Inc. (WUI), a United States international record carrier (IRC), announced plans to inaugurate a data communications service priced on a usage-sensitive basis⁵³ between the United States and the United Kingdom.⁵⁴ Because WUI's usage-sensitive offering constituted a new service for which WUI required a certificate of public convenience and necessity from the Commission,⁵⁵ interested parties had an opportunity to comment on whether WUI's new offering would be consistent with the public

48. See CENTER FOR COMMUNICATIONS MANAGEMENT, INC., NEW TRENDS IN INTERNATIONAL TELECOMMUNICATIONS 35-41 (1976) [hereinafter cited as 1976 CCM REPORT].

49. Minutes of the Meeting of Conference of European Postal and Telecommunications Administrations (CEPT) Study Group "General Principles and Tariffs" (Florence, Italy Oct. 2-8, 1975), reprinted in 1976 CCM REPORT, *supra* note 48, app. B at 7.

50. *Id.* app. B, at 8.

51. *Id.* at 39.

52. *Id.* at 40. For a discussion of the legitimacy of CEPT's actions with respect to SWIFT under the Treaty of Rome, see Ramsey, *supra* note 2, at 279-81.

53. The charge for the new service was to be based on the number of characters transmitted, as well as the duration of the message. These usage-sensitive charges would be in addition to a fixed monthly charge.

54. See Application of Western Union Int'l, Inc., F.C.C. File No. I-T-C-2658 (filed Nov. 9, 1976). WUI's proposed service offered small users an equivalent to the sophisticated data communications services previously available only to users of large private leased channel networks.

55. See 47 U.S.C. § 214 (1976); Letter from W.R. Hinchman, Chief, Common Carrier Bureau, Federal Communications Commission, to Western Union Int'l, Inc. (Nov. 12, 1976) (on file at *Cornell International Law Journal*).

interest.⁵⁶

Two associations composed of users of international communications services petitioned the Commission to deny WUI a certificate of public convenience and necessity on the grounds that WUI's introduction of usage-sensitive service was part of a concerted effort, evidenced by the SWIFT-CEPT dispute, to eliminate or curtail the availability of flat-rate leased channel service.⁵⁷ In their filings, the Association of Data Processing Service Organizations, Inc. (ADAPSO)⁵⁸ and the Computer and Business Equipment Manufacturers Association (CBEMA)⁵⁹ urged the Commission to deny WUI's application for operating authority unless it was conditioned upon the continued availability of leased channel service.⁶⁰ In essence, the two groups sought the Commission's assurance that WUI's new service would complement, rather than replace, flat-rate, transparent private line service.⁶¹

Both ADAPSO and CBEMA stressed the importance of private line circuits in the provision of advanced computer processing services, and how the continued availability of such circuits serves the public convenience and necessity.⁶² Neither ADAPSO nor CBEMA, however, focused upon the fact that the elimination of private line service would constitute a barrier to the free flow of information. The petitioners were apparently reticent to advance what would have then been considered a novel construction of the Commission's

56. See 47 U.S.C. § 214 (1976); 47 C.F.R. § 63.52 (1980).

57. Petition to Deny Unless Conditioned, F.C.C. File No. I-T-C-2658, at 8-11 (filed Dec. 22, 1976) [hereinafter cited as ADAPSO Petition to Deny]; Response of Computer & Business Equip. Mfrs. Ass'n, F.C.C. File No. I-T-C-2658, at 9-10 (filed Dec. 22, 1976) [hereinafter cited as CBEMA Response] ("The minutes of a CEPT meeting with the IRC's . . . indicate that the European Administrations and the IRC's favor the introduction of enhanced, usage- or volume-sensitive services with rates *much higher* than present private line circuits whenever the volume-sensitive services can be introduced.").

58. ADAPSO is the principal trade association of the United States computer services industry. Its member companies provide the public with a broad range of computer services such as local batch processing, software design and support, timesharing, and other remote access data processing services.

59. CBEMA is a trade association of manufacturers of computer and business equipment and vendors of data processing services.

60. ADAPSO argued that "[i]n order to assure that the proposed DBS offering is not a step toward the reduction or curtailment of private line service, the Commission must condition the effectiveness of WUI's authorization upon an express commitment by WUI that it will not curtail the present use of private line service, and particularly that it will not curtail use in connection with data processing activities." ADAPSO Petition to Deny, *supra* note 57, at 11.

61. CBEMA Response, *supra* note 57, at 12.

62. ADAPSO and CBEMA argued that the availability of private line circuits has been an essential element in the development of remote access computer services. Private line circuits can be used for alternate voice/data use, can be customized by the user, and are easily susceptible to channel subdivision, high-speed transmission, and other techniques that allow the user to obtain maximum efficiency. See CBEMA Response, *supra* note 57, at 10; ADAPSO Petition to Deny, *supra* note 57, at 11.

public interest responsibilities. Consequently, they advanced more traditional arguments. For example, the two petitioners argued that no service, particularly leased channel service, could be eliminated or curtailed without an express Commission finding that the public interest would be served thereby.⁶³ Neither ADAPSO nor CBEMA, however, was able to establish to the Commission's satisfaction a direct and incontrovertible link between the introduction of WUI's proposed new service offering and CEPT's action with respect to SWIFT. Although the Commission was made aware that WUI participated in CEPT's efforts to restructure SWIFT's private line rates,⁶⁴ WUI itself had not filed any new tariff for its international private line service.⁶⁵ Similarly, there was nothing in its usage-sensitive service application that expressly pertained to private line service.

Although there was relatively little upon which the Commission could base an order conditioning its approval of WUI's application, there was also relatively little that militated against the imposition of the innocuous condition that ADAPSO and CBEMA had requested.⁶⁶ Perhaps unimpressed by the parties' arguments, perhaps mystified by their concern about an as yet unrealized threat to leased channel service, and most probably distracted by other issues, the Commission authorized WUI to offer its new data service.⁶⁷ The arguments of ADAPSO and CBEMA were relegated to a footnote:

CBEMA and ADAPSO also express concern that the introduction of the WUI service may be a step toward the relinquishment of overseas private line service offerings in favor of the usage-sensitive "shared" services described here. The Commission recognizes the technical and economical advantages to large volume users inherent in the use of overseas private line services. Such services cannot be curtailed without appropriate authorization from the Commission pursuant to Section 214.⁶⁸

Thus, in its first contact with transborder dataflow issues, the Commission viewed its obligations narrowly, perhaps awaiting a dispute more ripe for adjudication. The proceeding, however, was

63. CBEMA argued that WUI's proposal "should be considered a partial discontinuance of service" that requires a determination by the Commission that such a curtailment of service would serve the public interest. See CBEMA Response, *supra* note 57, at 11 n.1; 47 U.S.C. § 214 (1976). CBEMA also suggested that WUI's new service might be a ruse to offer service essentially equivalent to leased channel circuits at a higher price, an action that would violate the Commission's policy that the price of service must be based on the cost of providing that service. See CBEMA Response, *supra* note 57, at 12 n.2.

64. See ADAPSO Petition to Deny, *supra* note 57, at 9; Minutes of the Joint Meeting of CEPT Study Group "General Principles and Tariffs," reprinted in 1976 CCM REPORT, *supra* note 49, app. B, at 7-8. See notes 45-52 *supra* and accompanying text.

65. As far as the Commission was concerned, WUI had not taken any formal action with respect to its private line offerings that required agency intervention.

66. See notes 60-61 *supra* and accompanying text.

67. Graphnet Sys., Inc., 63 F.C.C.2d 402, 407-10 (1977).

68. *Id.* at 410 n.9.

nonetheless significant. The WUI dispute was the first time that a party had advanced the restrictive practices of foreign telecommunications authorities as a reason for the Commission to deny operating authority to a United States carrier.

B. THE INTERNATIONAL POLITICAL ARENA: CCITT STUDY GROUP III

CCITT is one of four permanent organs of the ITU.⁶⁹ Acting through various study groups,⁷⁰ CCITT conducts studies and issues Recommendations on a variety of technical and operational questions relating to telecommunications. These Recommendations have their genesis in proposals—or “Contributions”—of participating telecommunications administrations and recognized private operating agencies. Although many countries do not consider CCITT Recommendations to be binding, most administrations generally comply with them.⁷¹ The CCITT Recommendations are to be contrasted with the ITU’s Telephone, Telegraph and Radio Regulations, which are binding on the ITU member countries that signed them.⁷²

1. *The Contributions of the Italian Administration and of Cable and Wireless Ltd.*

In February 1977, with the SWIFT-CEPT dispute still unresolved, the Italian Administration objected to the continuation of flat-rate tariffs for international leased channel service. In a Con-

69. See International Telecommunications Convention, Oct. 25, 1973, art. 5, 28 U.S.T. 2497, T.I.A.S. No. 8572. The International Telecommunications Union (ITU) is the oldest of the specialized agencies of the United Nations. *Id.*, Annex 3. Its predecessor in interest, the International Telegraph Union, was established in 1865. The ITU currently operates under the provisions of the International Telecommunications Convention of 1973, which was drafted in Malaga-Torremolinos, Spain. See *id.* The purposes of the ITU are:

- a) to maintain and extend international cooperation for the improvement and rational use of telecommunications of all kinds;
- b) to promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunications services, increasingly their usefulness and making them, so far as possible, generally available to the public;
- c) to harmonize the actions of nations in the attainment of those ends.

Id. art. 4.

70. CCITT is subdivided into a series of organizations known as study groups, each of which is assigned a specific area of responsibility. Oftentimes, these study groups are broken down into working parties.

71. See ITT World Communications Inc., RCA Global Communications Inc., Western Union Int’l, Inc., F.C.C. File Nos. I-T-C-2664-11, I-T-C-2657-8, I-T-C-2678-1 (released Dec. 14, 1979) (Memorandum Opinion, Order, Authorization, and Certificate); DATAMATION, Feb. 1978, at 194.

72. See International Telecommunications Convention, *supra* note 69, arts. 42, 54 & 82.

tribution to CCITT Study Group III,⁷³ the Italian PTT urged the group to take affirmative action to discourage the creation of additional private line networks. The unabashed purpose of the Italian proposal was to "safeguard" PTT revenues.⁷⁴ Although the Contribution did not propose a specific solution, the Italian Administration urged the study group to investigate the possibility of replacing flat-rate charges with usage-sensitive tariffs.⁷⁵

The Italian Administration's call for a study received considerable support from a subsequent CCITT Contribution submitted by Cable and Wireless Ltd. (Cable and Wireless),⁷⁶ Hong Kong's recognized private operating agency. Although Cable and Wireless supported the continued availability of private line circuits,⁷⁷ it expressed a concern that such circuits were being used improperly.⁷⁸ The precise language of the Contribution reflected a belief that private line service should only be available to customers "using leased circuits for their own traffic."⁷⁹ The question whether United States remote access data processors were or should be considered to be using their leased channel networks for their own traffic was left unanswered.⁸⁰

73. CCITT Study Group III, Rates for Private Leased Circuits, Doc. COM III-No. 6-E (Feb. 1977) (Italian Administration).

74. *Id.*

75. *Id.*

76. CCITT Study Group III, Rates for Private Leased Circuits, Doc. COM III-No. 30-E (Dec. 1977) (Cable and Wireless Ltd.).

77. *Id.* ¶ 6.

78. The Cable and Wireless Contribution indicated:

We believe the major difficulty which has arisen in recent years with this method of charging has been the use of dedicated customer leased circuit facilities by users other than the customer. Naturally such use is becoming increasingly difficult to define and is a field where many different interpretations are possible, primarily because of the advent of present-day technology. In our opinion this is the area where some disquiet has arisen among Administrations/RPOAs and in consequence has led to the idea of volume sensitive tariffs being suggested. It has to be borne in mind that all Administrations/RPOAs have a duty to provide public service for all customers however small their traffic needs, and that they are naturally concerned if any erosion of their public traffic takes place because such action will reduce volumes on the public system and consequently increase the costs of the remaining traffic and thus make it more expensive for public customers. We consider study needs to be directed in particular to this area of concern.

Id. ¶ 4.

79. *Id.* ¶ 6.

80. Under now superseded rules, the Commission defined "remote access data processing service" as "an offering of data processing wherein communications facilities, linking a central computer to remote customer terminals, provide a vehicle for the transmission of data between such computer and customer terminals." 47 C.F.R. § 64.702(a)(4) (1979). Implicit in this definition was the conclusion that the communications traffic travelling between terminal and computer belonged to the remote access data processor. Otherwise, the data processor would be engaged in the business of selling communications.

2. *The United States Response.*

Notwithstanding the very real threat to private line service posed by the Contributions of the Italian Administration and Cable and Wireless, an immediate United States response was not forthcoming from the Commission, the Department of State, or from any other government agency. A response had to await the United States CCITT delegation.

The United States CCITT delegation soon found itself tested by the task of responding to the two Contributions. As the group met to formulate a response, it became painfully apparent that the interests of the United States IRCs, which provide services in conjunction with foreign administrations and RPOAs, were not identical to those of the United States users that pay for such services. Thus, the carriers' representatives on the delegation were willing to state that the United States "recognizes, and to some extent shares, the concerns shown by the Italian Administration."⁸¹ Users, however, particularly those involved in the provision of remote access data processing services, were unwilling to concede that a problem existed.⁸² Ultimately, a response acceptable to users and carriers alike was adopted and presented to CCITT Study Group III in early 1978.

In the first of a series of three Contributions, the United States delegation made it unmistakably clear that "[t]he continuation of leased circuits and networks for use in data processing systems and other customer activities is a matter of primary concern to the United States."⁸³ This theme was reinforced in a second Contribution that outlined "the United States of America's firm position that leased circuits charged on a flat monthly rental basis remain available to all users who require them."⁸⁴ In answer to the fears expressed both by Cable and Wireless and the Italian Administration concerning the misuse of leased circuits, a third Contribution offered documentation of the steps taken under United States law to assure that leased circuits are not and will not be used in contraven-

The rules now in effect do not define remote access data processing. Such services are considered part of the larger regulatory category of "enhanced services," which may contain elements of traditional communications and traditional data processing. *See* Second Computer Inquiry, 77 F.C.C.2d 384, 387 (1980). *See generally* notes 16-19 *supra* and accompanying text.

81. DATAMATION, Feb. 1978, at 195.

82. *Id.*

83. CCITT Study Group III, International Private Leased Telecommunications Circuits and Networks, Doc. COM III-No. 34-E, ¶ 8 (Feb. 1978) (United States).

84. CCITT Study Group III, Comments on a Proposed Study of Leased Circuit Pricing, Doc. COM III-No., 35-E, ¶ 5 (Feb. 1978) (United States).

tion of CCITT Recommendations.⁸⁵

C. THE HONG KONG DISPUTE

Between the introduction of the Italian Administration's Contribution in early 1977, and the submission of the Cable and Wireless Contribution later that year, the focus of debate shifted from the CCITT to the Commission's formal administrative processes. The event that sparked this shift was the refusal of Cable and Wireless to provide an American data processor with private line service either between the United States and Hong Kong or between Hong Kong and Singapore.⁸⁶ The timing of this refusal, as well as the context in which it was made, seemed to suggest the existence of a concerted effort to assure the demise of international leased channel service.

The problem arose when General Electric Company (GE), which operates a world-wide data processing network known as MARK III, attempted to expand its direct operations to include Hong Kong.⁸⁷ Towards this end, GE entered into negotiations with Cable and Wireless for the purpose of securing facilities to connect its network to Hong Kong. During this same period, Cable and Wireless was negotiating with the three major United States IRCs—RCA Global Communications, Inc. (RCA), ITT World Communications Inc. (ITT), and WUI—for the purpose of initiating a usage-sensitive public data service between the United States and Hong Kong.⁸⁸ The proposed service was similar to the one that WUI (and subsequently the other carriers) had previously initiated between the

85. See CCITT Study Group III, Uses of Private Leased Circuits, Doc. COM III-No. 38-E (Feb. 1978) (United States).

86. See Letter from L.A. Self, Cable and Wireless Ltd., to Robert F. Streight, General Electric Company (July 19, 1977) [hereinafter cited as Letter] (on file at *Cornell International Law Journal*); Petition to Deny of Ass'n of Data Processing Serv. Organizations, Inc., F.C.C. File Nos. I-T-C-2664-2, I-T-C-2657-3, I-T-C-2658-2 (filed Nov. 3, 1977) [hereinafter cited as ADAPSO Petition to Deny (Hong Kong)]; Reply to Oppositions to Petition to Deny of Ass'n of Data Processing Serv. Organizations, Inc., F.C.C. File Nos. I-T-C-2664-2, I-T-C-2657-3, I-T-C-2658-2 (filed Nov. 29, 1977) [hereinafter cited as ADAPSO Reply to Oppositions].

87. The GE MARK III system is a worldwide data processing network that combines advanced timesharing and batch computing technologies. MARK III is accessible by local telephone service in over 600 cities around the world. The system is designed to serve the information needs of business and industry. See GENERAL ELECTRIC INFORMATION SERVICES COMPANY, INTERNATIONAL ACCESS DIRECTORY, ACCESS AND SERVICE INFORMATION 2 (July 1979).

88. In response to an ADAPSO petition, Walter R. Hinchman, Chief of the Commission's Common Carrier Bureau, directed the three IRCs to disclose the reports of their negotiations with Cable and Wireless to ADAPSO. See Letter from Walter R. Hinchman, Chief, Common Carrier Bureau, Federal Communications Commission, to Herbert E. Marks (Jan. 16, 1978) (Reply No. 9140) (on file at *Cornell International Law Journal*); 47 C.F.R. §§ 0.460, 43.51, 43.52 (1980).

United Kingdom and the United States.⁸⁹

The IRCs' negotiations proved to be successful; GE's did not. In July 1977, Cable and Wireless announced the introduction of the IRCs' new data services and advised GE that these services "will satisfy your needs and the needs of others like yourself."⁹⁰ Cable and Wireless therefore concluded that, "[i]n view of the foregoing," it would not provide GE with any leased channel service.⁹¹

Denied private line service, GE was without recourse until September 1977, when the three United States IRCs petitioned the Commission for authority to initiate their public data services between the United States and Hong Kong.⁹² Had the carriers not been required to obtain such authorization, GE would have been without recourse and without service.⁹³ Indeed, even with such a requirement, the Commission would have been unaware of Cable and Wireless' action, unless GE had brought the situation to the Commission's attention.

Acting in response to GE's request, ADAPSO petitioned the Commission to deny the three carrier applications unless the Commission, as a condition of its approval, required each applicant carrier to continue to provide transparent leased channel service at flat monthly rates.⁹⁴ In support of its petition, ADAPSO urged the Commission to consider the record that had been developed since WUI first received authority to provide public data service between the United Kingdom and the United States.⁹⁵ ADAPSO cited the

89. See notes 53-68 *supra* and accompanying text.

90. See Letter, note 86 *supra*.

91. *Id.*

92. Application & Request for Special Temporary Authority of Western Union Int'l, Inc., F.C.C. File No. I-T-C-2758-2 (filed Oct. 17, 1977); Application of ITT World Communications Inc., F.C.C. File No. I-T-C-2664-2 (filed Sept. 28, 1977); Application for Authority of RCA Global Communications, Inc., F.C.C. File No. I-T-C-2657-3 (filed Oct. 11, 1977).

93. A similar situation that was not brought to the attention of the Commission was the refusal of the Spanish PTT to provide private line service to an American user. See DATAMATION, Feb. 1978, at 195. No opportunity to complain to the Commission arose, since the Spanish PTT was not involved in the provision of any service in conjunction with United States IRCs for which new or additional operating authority was required under section 214 of the Communications Act. See 47 U.S.C. § 214 (1976).

94. ADAPSO Petition to Deny (Hong Kong), *supra* note 86, at 17. ADAPSO also asked the Commission to condition any grant of operating authority upon the IRCs' agreement to provide each of their customers with written assurance of the continued availability of private line service. *Id.* CBEMA also filed a petition with the Commission challenging the IRCs' proposed service offerings. See Petition for Relief of Computer & Business Equip. Mfrs. Ass'n, F.C.C. File Nos. I-T-C-2664-2, I-T-C-2657-3, I-T-C-2658-2 (filed Nov. 10, 1977) [hereinafter cited as CBEMA Petition for Relief (Hong Kong)].

95. See notes 53-68 *supra* and accompanying text.

Italian Administration's proposal to CCITT,⁹⁶ the testimony elicited during then-recent hearings held by a House of Representatives Subcommittee concerning transborder dataflow barriers,⁹⁷ and the actual denial of service to GE which Cable and Wireless had inextricably linked to the introduction of the carriers' new data services.⁹⁸

ADAPSO advanced three major arguments. First, the Association argued that Cable and Wireless' refusal of service amounted to an unlawful discontinuation or curtailment of private line service that required prior Commission approval.⁹⁹ Second, ADAPSO argued that even if Cable and Wireless' action did not amount to a discontinuation of service, the leased channel service that was available was improperly subject to a condition not appearing in the carriers' published tariffs.¹⁰⁰ Finally, ADAPSO asserted that it would be against the public interest to allow the IRCs to take any action that would force users to abandon private line circuits in favor of public data services.¹⁰¹ ADAPSO also outlined the economic and technical advantages of private line circuits and their importance to American commerce. Specifically, ADAPSO argued that the elimination of private line service would result in an "unnecessary duplication of communications equipment and the costs attendant thereto . . . , unnecessary traffic over limited communications resources,"¹⁰² and a general decrease in the quality and efficiency of data processing services.¹⁰³

In their responses, the three applicant carriers disclaimed any responsibility for Cable and Wireless' actions. More important, the

96. CCITT Study Group III, Rates for Private Leased Circuits, Doc. COM III-No. 6-E (Feb. 1977) (Italian Administration). See notes 73-75 *supra* and accompanying text.

97. See *Transborder Data Flows Regulations: Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 26-49 (1977).

98. Although Cable and Wireless was not before the Commission as a party, ADAPSO argued that "[a]s one of the primary and necessary participants in the proposed database services, the institutional pronouncements of Cable and Wireless Ltd. must be deemed conclusive upon the three participating international record carriers currently before the Commission." ADAPSO Petition to Deny (Hong Kong), *supra* note 86, at 10-11.

99. *Id.* at 11. See 47 U.S.C. § 214 (1976); 47 C.F.R. § 63.01 (1980).

100. See ADAPSO Petition to Deny (Hong Kong), *supra* note 86, at 13; 47 U.S.C. § 203 (1976).

101. ADAPSO Petition to Deny (Hong Kong), *supra* note 86, at 14-16; CBEMA Petition for Relief (Hong Kong), *supra* note 94, at 8.

102. ADAPSO Petition to Deny (Hong Kong), *supra* note 86, at 16.

103. *Id.* at 14. A collateral issue not really pursued in this dispute was whether the three carriers had any statutory obligation to assist GE in its efforts to obtain the leased channel service described in their tariffs. In only a slightly different context, the Commission had found that ITT World Communications Inc. had an affirmative obligation "to make reasonable efforts to arrange for the necessary connecting facilities required locally and abroad." *Mocatta Metals Corp. v. ITT World Communications Inc.*, 54 F.C.C.2d 104, 116 (1975).

IRCs argued that the Commission was powerless to take any action in response to Cable and Wireless' denial of service.¹⁰⁴ In doing so, the carriers argued that the Commission's jurisdiction ended at the "theoretical mid-point" between Hong Kong and the United States to which they provided service. As to events beyond that theoretical mid-point, the carriers portrayed themselves as disinterested bystanders.¹⁰⁵ The IRCs also asserted that they had no intention of curtailing or eliminating leased channel service in the Pacific Basin.¹⁰⁶

Issue was thus clearly joined. Before the Commission could act, however, Cable and Wireless submitted its Contribution to CCITT Study Group III, in which it expressed support for the continued availability of flat-rate private line service.¹⁰⁷ Although the Contribution specifically questioned the propriety of the use many parties made of such circuits, it was not clear whether Cable and Wireless objected to the use made of such circuits by remote access data processors such as GE. It was also unclear whether this ambiguity was intentional or whether the Contribution was submitted in

104. See Opposition of RCA Global Communications, Inc. to Petition for Relief, F.C.C. File No. I-T-C-2657-3 (filed Nov. 23, 1977); Opposition of ITT World Communications Inc. to Petition for Relief, F.C.C. File No. I-T-C-2664-2 (filed Nov. 23, 1977); Opposition of Western Union Int'l, Inc. to Petition to Deny, F.C.C. File No. I-T-C-2658-2 (filed Nov. 17, 1977) [hereinafter cited as WUI Opposition (Hong Kong)]; Opposition of ITT World Communications Inc. to Petition to Deny, F.C.C. File No. I-T-C-2664-2 (filed Nov. 16, 1977) [hereinafter cited as ITT Opposition (Hong Kong)]; Opposition of RCA Global Communications, Inc. to Petition to Deny, F.C.C. File No. I-T-C-2657-3 (filed Nov. 17, 1977) [hereinafter cited as RCA Opposition (Hong Kong)].

In its opposition to ADAPSO's petition to deny, RCA emphasized:

if Cable and Wireless, or any other RCA Globcom overseas correspondent, decides at some future date to discontinue leased channel or any other service, there is little that can be done by RCA Globcom, ADAPSO, or the Commission itself to alter the correspondents' decision. . . . Cable and Wireless is a foreign entity over which neither the United States Government nor any of its citizens can exercise sovereign authority.

Id. at 7.

105. See RCA Opposition (Hong Kong), *supra* note 104, at 5 ("RCA Globcom can only be responsible for that portion of an interconnected overseas leased channel circuit over which it has control. Both as a theoretical and a practical matter, such control and responsibility end at the geographic midpoint between the United States and Hong Kong."); ITT Opposition (Hong Kong), *supra* note 104, at 7; WUI Opposition (Hong Kong), *supra* note 104, at 4-5.

106. See RCA Opposition (Hong Kong), *supra* note 104, at 8 ("RCA Globcom does and will continue to furnish leased channel service to Hong Kong and elsewhere in addition to the novel service which constitutes the subject of its challenged application."); ITT Opposition (Hong Kong), *supra* note 104, at 6; WUI Opposition (Hong Kong), *supra* note 104, at 4-5 ("WUI stands willing to provide private line service to any customer, including members of ADAPSO, from its gateway to mid-ocean However, the willingness or unwillingness of C & W to provide the necessary matching facilities to Hong Kong and the terms under which such service is provided is a matter to be resolved by C & W and the customer involved.").

107. See notes 76-80 *supra* and accompanying text.

response to the proceedings underway before the Commission. Even though the IRCs' proposed data services could not be provided without Cable and Wireless, the Hong Kong carrier chose not to appear before or become a named party in the proceedings. Its views, therefore, remained undisclosed.

Several months later, but before the Commission had ruled upon the carriers' applications, a Working Party of CCITT Study Group III met to consider the Contributions of the Italian Administration, Cable and Wireless, the United States, and others. In May 1978, the members of the Working Party unanimously concluded that "international private leased telecommunication[s] circuit[s] and network service should continue to be made available in its present form by Administrations and RPOAs."¹⁰⁸ Of equal significance was the group's conclusion that the Telegraph and Telephone Regulations affirmatively require the provision of leased channel service.¹⁰⁹ Any determination of a proper rate structure for such service, the working party suggested, would require further study.¹¹⁰ Another event which transpired prior to the Commission's consideration of

108. CCITT Study Group III, Report on the Meeting Held in Geneva From 1 to 3 May, 1978, Doc. COM III-No. 51-E, at 4 (July 1978) (Working Party III/1).

109. *Id.* ¶ 1.1.2. See Final Acts of the World Administrative Telegraph and Telephone Conference (Geneva 1973), 28 U.S.T. 3296, T.I.A.S. No. 8586; note 72 *supra* and accompanying text.

110. See CCITT Study Group III, *supra* note 108, at 10. The Working Party considered Contributions No. 6 (Italy), No. 30 (Cable and Wireless), No. 35 (United States), No. 38 (United States), No. 39 (IATA), No. 40 (IATA), No. 41 (Canada), and Delayed Contribution A (IPCT). The issue of the proper price structure for leased channel circuits will be studied until the next plenary session of the CCITT. During this period, European PTTs will gain experience with the utility of pricing mechanisms as a means of controlling the flow of data across their national borders. As recognized by Mario Benedetti, Chairman of the Eurodata Foundation:

When users have technically feasible alternatives, the major role in deciding the distribution of the market between them is played by tariffs; in calculating the price substitution elasticity between different networks, PTTs will be able in [the] future to figure the best structure and level of tariffs for the new data networks.

Benedetti, *A Million Europeans Use Data Transmission Every Weekday*, reprinted in 3 TRANSNAT'L DATA REP., No. 5 at 9, 11 1980. Through the experimental use of tariffs, the Italian Administration has encouraged Italian newspapers to use the telecommunications network to print, through the use of highspeed facsimile devices, simultaneous editions in different cities from originals produced at the head office. The Italian tariff allows the newspapers to lease circuits for only a few hours each night during off-peak times at a fraction of the cost of full time usage. *Id.*

Other mechanisms that will become increasingly popular include the use of communications rates based on the gold franc and requiring payment in local currency. See COMPUTERWORLD, Oct. 27, 1980, at 101. It can also be expected that efforts will be made to remove a major, if not the only, stumbling block to the introduction of private lines that are priced on a usage-sensitive basis. Currently, no equipment exists that can distinguish between administrative and control traffic that the PTT itself sends and mixes with a user's traffic. The development of equipment or software that can accurately count and levy a charge on the amount of data that a user transmits would allow pricing of private lines on a usage-sensitive basis.

ADAPSO's petition was Cable and Wireless' unexplained decision to provide the requested private line circuit to GE.

The record does not reflect whether any of these matters entered the Commission's decisionmaking process. Whether or not they did, the dispute had become moot. Events in the international arena indicated that private line service would not be eliminated, although it might be made subject to usage-sensitive pricing. In the face of these developments, the Commission issued a decision that authorized the three IRCs to initiate their data services between the United States and Hong Kong.¹¹¹

Rather than articulate an approach that either took cognizance of recent events or spoke with precision of the difficulties involved in regulating international communications, the Commission took an extremely restrictive view of its public interest responsibilities. Though ostensibly sharing ADAPSO's concerns with respect to the continued availability of private line service, the Commission inexplicably volunteered that it would not, and could not, compel foreign administrations to provide such service or any other service that the Commission requires United States carriers to provide.¹¹² Without any apparent reason, the Commission completely discounted the leverage it could exert over foreign correspondents by regulating the operations of the carriers subject to its jurisdiction.¹¹³ The Commission's reluctance to impose the conditions proposed by ADAPSO was even more surprising given its finding that the proposed conditions would not impose any significant burden on the carriers.¹¹⁴

The Commission's order also appeared to limit the application of section 214(c) of the Communications Act, which requires Commission approval before a carrier may reduce, impair, or discontinue

111. ITT World Communications Inc., Western Union Int'l, Inc., RCA Global Communications, Inc., F.C.C. File Nos. I-T-C-2664-2, I-T-C-2658-2, I-T-C-2657-3 (released July 12, 1978) (Memorandum Opinion, Order, and Authorization) [hereinafter cited as Hong Kong Order]. The Chief of the Commission's Common Carrier Bureau, acting upon delegated authority, issued the order. *Id.* at 13.

112. The Commission stated that it could not "force foreign correspondents to provide matching halves of particular circuits, or services which we require the U.S. carriers to provide now, or in the future." *Id.* at 11.

113. The Commission's reluctance to impose any burden on the three carriers appeared to be a departure from earlier decisions in which the Commission imposed burdens on United States carriers in order to enforce the provisions of the Communications Act. *See American Tel. & Tel. Co.*, 57 F.C.C.2d 1103, 1107 (1976) ("[W]e cannot as a matter of law accept the implicit assumption that our jurisdiction over a carrier's charges for international services is somehow dependent upon the agreement of its foreign correspondents."); *RCA Global Communications, Inc.*, 40 F.C.C.2d 616, 617 (1973) ("While we do not have jurisdiction over the foreign entities involved in this offering, we do have jurisdiction over the manner in which our carriers participate in it, just as we do with respect to any delivery practice or communications facility used to effectuate delivery."):

114. *See Hong Kong Order*, *supra* note 111, at 12.

service, to the unequivocal and unambiguous acts of carriers subject to its jurisdiction.¹¹⁵ In this regard, the Commission made it clear that it would not examine evidence that a foreign PTT had denied service, either with or without the encouragement or complicity of its United States correspondent. Apparently content to limit its review to the narrow facts before it, the Commission concluded that “[a] controversy between [Cable and Wireless] and a private entity over the provision of one private line circuit . . . does not . . . evidence any intent on the part of either the IRC or the foreign entities to discontinue generally flat rate, private line service.”¹¹⁶

D. JAPAN'S INTERNATIONAL CARRIER CONDITIONS SERVICE

While the Hong Kong dispute was still pending before the Commission, Kokusai Denshin Denwa Co., Ltd. (KDD), Japan's international carrier, was pursuing a course somewhat different than the one taken by Cable and Wireless. Since the beginning of 1976, two United States data processing companies, Control Data Corporation and Tymshare, Inc., had sought leased channel service from KDD between the United States and Japan. Rather than flatly refusing to provide service, as Cable and Wireless had done, KDD engaged in a process of red tape and delay.¹¹⁷ Only after a year and a half had transpired¹¹⁸ did KDD act upon the two companies' requests. When KDD did make the requested circuits available, however, the lines were subject to a number of restrictive conditions.

In the case of Tymshare, KDD insisted that the requested circuit be connected only to certain specified computer systems at one specific computer center in the United States.¹¹⁹ In addition, KDD demanded that the circuit not be connected to any public network in the United States, including that of Tymnet, Inc., an affiliate of Tym-

115. *Id.* at 11-12.

116. *Id.* at 12 n.7.

117. *See* notes 119-25 *infra* and accompanying text.

118. This delay was in marked contrast to the speed with which the Japanese government approved a joint venture between Tymshare and its Japanese affiliate. Misled by this swift action, Tymshare's affiliate hired staff, rented office space, and made long-term financial commitments. Virtually all of the affiliates start-up capital was gone by the time KDD acted on Tymshare's request for service.

During this year and a half period, several significant events took place. The Italian Administration introduced Contribution No. 6 to CCITT Study Group III; Cable and Wireless denied private line service to GE; and Cable and Wireless and the United States submitted their contributions to the CCITT Study Group III. *See generally* notes 71-85 & 86-91 *supra* and accompanying text.

119. *See* Petition to Deny of Ass'n of Data Processing Serv. Organizations, Inc., F.C.C. File Nos. I-T-C-2678-1, I-T-C-2657-8, I-T-C-2664-11, at 6 (filed April 11, 1979) [hereinafter cited as ADAPSO Petition to Deny (Japan)].

share.¹²⁰ Finally, KDD demanded that Tymshare's Japanese affiliate discuss the use of KDD's new public data communications service,¹²¹ when that service became available, in lieu of private line service.¹²² Confronted with the choice of acceding to KDD's demands or of not providing data processing services in Japan via the requested circuit, Tymshare and its Japanese affiliate agreed to KDD's conditions.¹²³

Control Data's experience with KDD was similar to that of Tymshare. KDD demanded that Control Data's leased circuit be connected to a single computer system in a single location within the United States.¹²⁴ In addition, KDD demanded that when its new data service became available, Control Data "respond to . . . [KDD's] consultation with a premise of transfer to this service."¹²⁵

These restrictions effectively prevented Tymshare and Control Data from marketing their full line of data processing services in Japan. To maintain as secure an environment as possible for their customers' data and to assure the continuous reliability of their services, Tymshare, Control Data, and most remote access data processors allocate responsibility for their data processing services among a number of computer centers in various geographic locations.¹²⁶ The data processing network moves data between customer terminals and various computer centers, depending on the application involved. Because primary processing capability for specific applications lies with specific processing centers, the only services that Tymshare and Control Data could offer in Japan were those that were processed on the systems connected to the ends of their transpacific circuits.¹²⁷

120. *See id.* The alleged purpose of these restrictions was to prevent message switching by Tymshare in violation of Japanese law. *See, e.g.,* Opposition of Western Union Int'l, Inc., F.C.C. File Nos. I-T-C-2678-1, I-T-C-2657-8, I-T-C-2664-1, at 14-18 (filed May 2, 1979). The U.S. National Telecommunications and Information Administration investigated the legitimacy of these restrictions under Japanese law. *See* Letter from Masaaki Kobayashi, Embassy of Japan, to Edward Greenberg, National Telecommunications and Information Administration (July 17, 1980).

121. This new service, International Computer Access Service (ICAS) was not yet available when KDD conditionally provided Tymshare the requested private line circuit. *See* note 132 *infra*.

122. *See* ADAPSO Petition to Deny (Japan), *supra* note 119, at 6.

123. *See id.* On March 22, 1978, 16 months after Tymshare had initially requested the circuit, service was inaugurated.

124. *See id.* at 8; note 120 *supra*.

125. *See* ADAPSO Petition to Deny (Japan), *supra* note 119, Appendix II, Attachment B, at 2 (Memorandum of Sept. 14, 1977).

126. *See id.* at 7, 8; Application for Review of the Ass'n of Data Processing Serv. Organizations, Inc., F.C.C. File Nos. I-T-C-2678-1, I-T-C-2657-8, I-T-C-2664-11, at 3 (filed Jan. 14, 1980) [hereinafter ADAPSO Application for Review].

127. ADAPSO Petition to Deny (Japan), *supra* note 119, at 7-9; ADAPSO Application for Review, *supra* note 126, at 3.

As was the case with the dispute that had arisen out of Cable and Wireless' action in Hong Kong, there was no effective mechanism to bring KDD's actions to the immediate attention of the Commission.¹²⁸ Lacking an effective administrative remedy, Tymshare and Control Data pursued relief in other quarters. Representatives of Tymshare and Control Data attempted to negotiate the removal of KDD's restrictive conditions with the Embassy of Japan, the Japanese delegation to CCITT, and the IRCs that provided private line service in conjunction with KDD. The two data processors also solicited the assistance of the United States-Japan Trade Facilitation Committee¹²⁹ and the United States Trade Representative.¹³⁰

None of these efforts, however, had produced any measurable level of success when RCA, ITT, WUI, and KDD were ready to inaugurate public data service between the United States and Japan. In applications essentially identical to those that the IRCs had presented to the Commission in the Hong Kong dispute,¹³¹ the three carriers requested section 214 operating authority for their usage-sensitive public data services.¹³² It was not until that time, after

128. See note 93 *supra*. The Communications Act of 1934 permits any person to file a complaint alleging a violation of the Act with either the Commission or a federal district court. See 47 U.S.C. §§ 206-209 (1976). For a description of the procedures used in filing such complaints with the Commission, see 47 C.F.R. §§ 1.722-.735 (1980). This complaint procedure, however, is limited to "any common carrier subject to the provisions of [the Communications] Act." See 47 U.S.C. §§ 207, 208 (1976). Therefore, a valid complaint cannot be filed directly against the foreign correspondent of a United States international record carrier. Although a complaint could be filed against a United States carrier in response to the unlawful conduct of its foreign correspondent, this would be largely ineffectual in deterring the complained-of conduct.

129. The Joint United States-Japan Trade Facilitation Committee was established in September 1977 to encourage increased Japanese imports through cooperation in trade development activities and in the resolution of market access problems. See 43 Fed. Reg. 23,628 (1978).

130. The United States Trade Representative is the chief representative of the United States for trade negotiations and reports directly to the President and to Congress. He is responsible for the administration of certain trade agreement programs and advises the President and Congress with respect to non-tariff barriers to international trade, international commodity agreements, and other matters related to trade agreement programs. See 19 U.S.C. § 2171 (Supp. III 1979); Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980), reprinted in 19 U.S.C. § 2171 (Supp. III 1979). The Trade Representative has prepared and continues to revise a list of selected impediments to trade in services. See, e.g., 4 TRANSNAT'L DATA REP., No. 5, at 49-55 (1981); 3 TRANSNAT'L DATA REP., No. 1, at 21-23 (1980).

The United States-Japan Trade Facilitation Committee and the United States Trade Representative were ultimately persuaded to use their influence to seek the removal of the KDD-imposed conditions. See note 144 *infra*.

131. See generally notes 86-116 *supra* and accompanying text.

132. See Application of RCA Global Communications, Inc., F.C.C. File No. I-T-C-2657-8 (filed Feb. 23, 1979); Application of ITT World Communications Inc., F.C.C. File No. I-T-C-2664-11 (filed Feb. 22, 1979); Application of Western Union Int'l, Inc., F.C.C. File No. I-T-C-2678-1 (filed Feb. 15, 1979). KDD labeled this new service ICAS. ICAS is an international data transmission service for on-line information retrieval and other

nearly a year of operation under KDD's restrictive conditions, and more than three years after they had first requested service, that Control Data and Tymshare had an opportunity to present their grievances to the Commission.

On April 11, 1979, Control Data and ADAPSO petitioned the Commission to deny the three carriers' applications.¹³³ In doing so, they squarely confronted the Commission, as it never had been before, with the issues whether it could: (1) approve, consistent with public interest, the inauguration of services that would assure the maintenance of non-tariff trade barriers against American data processors; (2) permit international and domestic telecommunications facilities to be used inefficiently; (3) sanction extraterritorial restrictions on the use of private leased circuits that completely conflicted with section 203 of the Communications Act and the United States' position before the CCITT; and (4) encourage the continued imposition of restrictions on American companies using facilities in the United States that the United States did not impose on Japanese citizens and companies using facilities in Japan.¹³⁴ The manner in which the petitioners framed the issues seemed to compel the Commission to decide whether the public interest standard embodied in section 214 of the Communications Act was broad enough to encompass concerns of international trade, international telecommunications policy, and international reciprocity.¹³⁵

purposes. It enables users to directly access host computers in foreign countries from their own data terminals.

133. See ADAPSO Petition to Deny (Japan), note 119 *supra*; Petition to Deny of Control Data Corp., F.C.C. File Nos. I-T-C-2678-1, I-T-C-2664-11, I-T-C-2657-8 (filed April 11, 1979). CBEMA filed comments in which it urged the Commission to condition its approval of the carriers' applications upon "the applicants' not discontinuing impairing or curtailing flat rate leased channel service between the United States and Japan." Comments of Computer & Business Equip. Mfrs. Ass'n, F.C.C. File Nos. I-T-C-2678-1, I-T-C-2664-11, I-T-C-2657-8, at 8 (filed April 11, 1979). In the alternative, CBEMA asked the Commission to deny the carrier applications until such time as it was satisfied that the grant of authority would not result in the discontinuance of leased channel service. See *id.* at 8-9.

134. See ADAPSO Application for Review, *supra* note 126 at 7.

135. Section 214's public interest standard is applicable to both domestic and international communications. See 47 U.S.C. § 151 (1976); Policy to be Followed in Future Licensing of Facilities for Overseas Communications, 62 F.C.C.2d 451, 452 (1976). Although the carriers disputed ADAPSO's interpretation of the public interest test, none of the carriers challenged the otherwise sweeping nature of "the public convenience and necessity" criterion. The importance of that criterion has been long-recognized:

The basic charter of the Commission is, of course, to act in the public interest. It grants or denied licenses as the public interest, convenience and necessity dictate. *Whatever factual elements make up that criterion in any given problem—and the problem may differ factually from case to case—must be considered. Such is not only the power but the duty of the Commission.*

Carroll Broadcasting Co. v. FCC, 258 F.2d 440, 443 (D.C. Cir. 1958) (emphasis added). See, e.g., Pocket Phone Broadcast Serv. Inc. v. FCC, 538 F.2d 447, 451 (D.C. Cir. 1976);

Notwithstanding the importance of the issues, the Commission's Common Carrier Bureau, acting on delegated authority,¹³⁶ issued a decision granting the carriers' applications¹³⁷ that managed to side-step every key issue. The order found "no persuasive evidence" that KDD's actions impaired private line service.¹³⁸ The Bureau also concluded that KDD's failure to observe CCITT Recommendations concerning the use of private lines was of no decisional significance, because the Recommendations "are not binding on the Commission, the IRC's, or other Administrations."¹³⁹ Unmentioned was the inconsistency of the KDD restrictions with the United States' free trade policy¹⁴⁰ and the position espoused by the United States before the CCITT.¹⁴¹ Also absent from the staff's decision was any reference to the principle of "international reciprocity" that had been recently affirmed by the Commission in another proceeding.¹⁴²

ADAPSO appealed the Bureau's order to the full Commission.¹⁴³ At that time, the Trade Facilitation Committee, the Department of Commerce, and the United States Trade Representative renewed their efforts to negotiate the removal of KDD restric-

Network Project v. FCC, 511 F.2d 786, 793 (D.C. Cir. 1975); Hawaiian Tel. Co. v. FCC, 498 F.2d 771, 776 (D.C. Cir. 1974).

136. See 47 C.F.R. § 0.291 (1979).

137. ITT World Communications Inc., RCA Global Communications, Inc., Western Union Int'l, Inc., F.C.C. File Nos. I-T-C-2664-11, I-T-C-2657-8, I-T-C-2678-1 (released Dec. 14, 1979) (Memorandum Opinion, Order, Authorization, and Certificate) [hereinafter cited as KDD Order].

138. *Id.* at 6. The order did not even discuss the significant limitations on the use of private line service that had been in effect for well over a year. It therefore did not reach the question whether the KDD-imposed restrictions constituted an impairment of service that required Commission approval. *Cf.* ITT World Communications Inc. v. New York Tel. Co., 381 F. Supp. 113 (S.D.N.Y. 1974) (change in the characteristics of service is an impairment requiring section 214 authorization by the Commission).

139. KDD Order, *supra* note 137, at 6.

140. See Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified in scattered sections of 19 U.S.C.); Address by D.P. Moynihan, U.S. Representative to United Nations, before U.N. General Assembly (Sept. 1, 1975, text prepared by Henry Kissinger), reprinted in 73 DEP'T OF STATE BULL. 425, 433-38 (1975).

Mr. Geza Feketekey, Assistant U.S. Trade Representative for Policy Development, recently stated in hearings before Congress that many times governments exert control over access to communications within their boundaries for commercial reasons, and frequently "these commercial reasons involve pure protectionism of a very old kind." *International Data Flow: Hearings Before the Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 489 (1980).

141. The United States CCITT delegation has consistently stressed the importance of the continued availability of private line circuits. See notes 81-85 *supra* and accompanying text.

142. See French Tel. Cable Co., 71 F.C.C.2d 393, 403-05 (1979). See also notes 159-71 *infra* and accompanying text.

143. ADAPSO Application for Review, note 126 *supra*; see 47 C.F.R. § 1.115 (1980).

tions.¹⁴⁴ Congress was also apprised, through testimony before concerned committees, of the effect of the restrictions on United States commerce, as well as of the inability of both government and industry to have the restrictions removed.¹⁴⁵ The Department of Commerce offered to brief the Commission on the wider trade implications of the KDD restrictions.¹⁴⁶ Although the Commission formally accepted this offer,¹⁴⁷ a briefing never took place. Despite the Department of Commerce's clear expression of interest in the dispute, the Commission apparently concluded that a briefing with the Department was either unnecessary or inappropriate, since it proceeded to schedule consideration of ADAPSO's appeal of the Bureau's decision.¹⁴⁸ Had the Commission awaited a briefing by the Department of Commerce, it would have learned that negotiations

144. In May 1980, the Office of the U.S. Trade Representative received notice that ADAPSO was prepared to invoke an elaborate statutory remedy aimed at ultimately removing the Japanese restrictions if negotiations proved unsuccessful. *See* Letter from Herbert E. Marks, Counsel to ADAPSO, to the Honorable Reubin O'D. Askew, U.S. Trade Representative (May 12, 1980) (on file at *Cornell International Law Journal*). The Trade Act of 1979 requires the Office of the U.S. Trade Representative to follow an extensive administrative process, culminating in review by the President, if a party files a formal complaint with respect to foreign trade restrictions. *See* 19 U.S.C.A. §§ 2411-2414 (West 1980). No party has ever used this procedure, however, to challenge a barrier to commerce in services.

145. *See International Data Flow: Hearings Before the Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 16-24, 61-64 (1980) (statements of Hugh P. Donaghue & Warren E. Burton); *Amendments to the Communications Act of 1934: Hearings on S. 611 and S. 622 Before the Subcomm. on Communications of the Senate Committee on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 1427 (1979) (statement of Stephen H. Beach).

146. *See* Letter from Abraham Katz, Assistant Secretary for International Economic Policy, U.S. Dep't of Commerce, and Henry Geller, Assistant Secretary for Telecommunications and Information, U.S. Dep't of Commerce, to Charles D. Ferris, Chairman, Federal Communications Commission (April 16, 1980) (on file at *Cornell International Law Journal*). Congress sharply criticized the belated involvement of the Department of Commerce:

Whatever the failings of the FCC, however, executive branch actions are equally open to criticism. One letter offering a briefing is a less than compelling intervention. Given the scope and complexity of the foreign policy and telecommunications policy questions involved, more substantial official communications by the executive agencies were in order. NTIA, for example, has filed voluminous comments in other FCC proceedings. The State Department's apparent caution was also unfortunate. While some delicate matters of foreign policy may have been involved, most of the issues and concerns were public and clearcut. Finally, in this essentially trade problem, where was the United States Trade Representative?

H.R. REP. NO. 1535, 96th Cong., 2d Sess. 48 (1980).

147. *See* Letter from Charles D. Ferris, Chairman, Federal Communications Commission, to Abraham Katz, Assistant Secretary for International Economic Policy, U.S. Dep't of Commerce, and Henry Geller, Assistant Secretary for Telecommunications and Information, U.S. Dep't of Commerce (May 12, 1980) (on file at *Cornell International Law Journal*); Letter from Richard A. Johnson, Associate General Counsel for International Trade, Dep't of Commerce, to Robert R. Bruce, General Counsel, Federal Communications Commission (July 3, 1980) (on file at *Cornell International Law Journal*).

148. *See* FCC Pub. Notice No. 28151 (Sept. 26, 1980).

between the United States and Japan were nearing fruition. Although it was abundantly clear from the outset that any Commission action would threaten the success of these negotiations, the matter was withdrawn from the Commission's agenda only at the last moment.¹⁴⁹

Three months after the Commission had scheduled action on the KDD appeal, Japan's Minister of Posts and Telecommunications "authorized" KDD to negotiate the removal of the restrictions that it had imposed on the use of leased lines.¹⁵⁰ Although the Commission subsequently made efforts not to disturb these negotiations,¹⁵¹ they proved to be only partially successful. As of this writing, KDD has refused to remove the last of the offending conditions. As with the Hong Kong dispute, events independent of the Commission led to removal of the barriers that had obstructed the free flow of information.

E. THE WEST GERMAN BUNDESPOST REGULATIONS

In December 1978, the German Federal Ministry for Posts and Telecommunications (Bundespost) promulgated regulations that dramatically circumscribed the use which could be made of international leased channel circuits by foreign remote access data processors wishing to do business in Germany.¹⁵² Specifically, the Bundespost regulations, which will become fully effective January 1, 1982, require all leased lines entering Germany to be "hardwired" to a single terminal device that is not connected to any other communications network in Germany, or to terminate in a computer in Germany that performs "true" data processing on the data transmitted.¹⁵³ If the latter condition is satisfied, the leased line may

149. See FCC Pub. Notice No. 00081 (Oct. 2, 1980).

150. See Telegram from U.S. Department of State, American Embassy, Tokyo, Japan, to Department of Commerce (Dec. 29, 1980) (on file at *Cornell International Law Journal*). "After rewriting their current contracts with KDD, American timesharing companies may begin offering their Japanese customers access to multiple computer processing centers located in the U.S. using international telecommunication access lines they lease from KDD." *Id.* See also *KDD Will Junk Rule on Int'l Data Service*, JAPAN ECON. J., Nov. 4, 1980 (Global Information Services, Inc. trans.); BUS. WEEK, Dec. 15, 1980, at 40.

151. See, e.g., ITT World Communications Inc., RCA Global Communications, Inc., Western Union Int'l, Inc., F.C.C. File Nos. I-T-C-2664-11, I-T-C-2657-8, I-T-C-2678-1 (released Oct. 21, 1981) (Order and Authorization).

152. See Telegram from American Embassy, Bonn, West Germany, to U.S. Secretary of State ¶ 3 (April 15, 1980) [hereinafter cited as Telegram] (on file at *Cornell International Law Journal*). The regulations were amended in April 1979. *Id.*

153. *Id.* The State Department offered its own unofficial translation of the regulations:

6.3 Indirect Access Via Computer Equipment

International leased lines, upon application by the lessees, may be permitted indirect access via data terminals to the main lines (main stations capable of direct dialing) of the Deutsche Bundespost—which may have neither direct nor

access the public networks operated by the Bundespost. As a result of these restrictions on the use of leased circuits, United States remote access data processors cannot do business in Germany unless they perform data processing there. This requirement that data processing be performed in Germany, however, would defeat many of the economic and technical advantages of operating a worldwide distributed data processing network.

In both purpose and effect, the Bundespost regulations are non-tariff barriers to trade. The regulations not only protect West Germany's data processing services industry (and the jobs that it provides), but they also assure that the Bundespost will derive higher revenues. Foreign data processors that are not prepared to locate some or all of their processing operations in Germany will be required to transfer their transatlantic and other international traffic to more expensive usage-sensitive services. Indeed, one of the *admitted* goals of the new regulations is to shift all data traffic to the Bundespost's usage-sensitive services—both domestic and international.¹⁵⁴

When the Bundespost regulations come into full effect, they will undoubtedly reduce the amount of unprocessed data that now transits the Atlantic Ocean. Their effect on United States data processors will thus be similar to the restrictions KDD imposed on the use of private lines.¹⁵⁵ The German Bundespost has itself recognized the dramatic impact that the new regulations will have on commerce. The Bundespost has conducted extensive discussions with affected

indirect access to the main telephone or data transmission lines (once again, main stations) insofar as these lines are part of a remote data processing system and it is assured that no unprocessed data can reach the public telecommunications network on the other side of the international leased line. However, only the main line (main station) of the lessee of the international leased line may be connected via digital leased lines for transmission speeds of more than two hundred bits per second and via the approved indirect access to the main lines (main station) network. After January 1, 1982, main lines will specifically only be permitted access to telephone or datex main lines (main stations, leased or foreign) as well as telephone, datex and telex main lines (main stations) of the Deutsche Bundespost via data processing equipment upon application of the lessee according to the above mentioned conditions. All indirect access of international leased lines via data concentrators (or other data equipment that does not process data) to such main lines of the public telephone network of the Deutsche Bundespost, which are already operating or will begin operating through 1981, can continue only until December 31, 1981.

Id.

154. *Id.* ¶ 6.

155. Like the KDD restrictions, the Bundespost regulations are extraterritorial in effect, since they limit the use which can be made of leased channel circuits both within and without Germany. The Bundespost regulations, however, at least purport to operate solely on the German terminus of a leased channel circuit. For a discussion of the legitimacy of the Bundespost regulations under the Treaty of Rome, see Ramsey, *supra* note 2, at 281-82.

companies and a variety of arrangements, including waivers, have been made to allow the companies to continue to operate in Germany, albeit on somewhat altered bases.¹⁵⁶

One probable effect of the Bundespost's efforts to negotiate the application of the new regulations to data processors will be to limit the incentive that users might otherwise have to lodge a formal complaint against Germany with the United States Trade Representative or, if the opportunity should present itself, with the Commission.¹⁵⁷ Absent some reason for the IRCs serving Germany to come before the Commission for additional authority to serve that country, the opportunities for effective regulatory relief are minimal.¹⁵⁸ Any invocation of the Commission's processes at the present time might be considered premature, however, since the Bundespost regulations will not take effect until 1982. Moreover, there is always the risk that the Commission might decline, as it has in the past, to take effective action to eliminate the restrictive effects of these regulations.

The same is true of the Office of the United States Trade Representative. Although the Trade Representative might initiate negotiations or lodge a complaint at the request of an individual data processor, such negotiations might be abandoned in return for trade concessions in non-telecommunications areas. Consequently, users would be generally disinclined to initiate a dispute that they could not ultimately control, particularly if such action might jeopardize a more favorable negotiated settlement with the Bundespost.

156. See Telegram, note 152 *supra*.

157. One commentator has suggested that users are generally reluctant to lodge complaints against a PTT

for fear of the impact which any reprisals by a PTT, or group of PTTs, would have on their business operations and on their revenues.

Of course, any director general of a PTT would be horrified at the suggestion that his or her organization might retaliate against a complainant—but if one knows the labyrinthine workings of a typical European PTT, one also knows that there are a multitude of subtle ways in which a major corporation's international telecommunication operations could be hindered, harassed or otherwise disrupted without any obvious or overt sign, of retaliation.

TELEPHONY, Jan. 26, 1981, at 73.

158. A similar situation was presented when two United States vendors of data bases were excluded from Euronet—a European communications network—because they used computers located outside of Europe. Neither vendor had any recourse under the existing provisions of the Communications Act. See *But US Data Base Vendors Excluded*, 4 TRANSNAT'L DATA REP., No. 3, at 6 (1981). For a discussion of Euronet's planned role in the development of a European information services market, see Ramsey, *supra* note 2, at 258-59.

III

INTERNATIONAL RECIPROCITY AND THE
PUBLIC INTEREST

For a brief period of time in 1979, while the KDD dispute was pending before the Commission's Common Carrier Bureau, it appeared as if the Commission was about to embark upon a course that would give users confidence that the Commission would not tolerate economic protectionism in international telecommunications. The occasion involved a request by French Telegraph Cable Company (FTCC), an international record carrier, for authority to establish and operate "gateway" offices in San Francisco, California and in Washington, D.C.¹⁵⁹ TRT Telecommunications Corporation (TRT), a competing IRC, opposed FTCC's application.¹⁶⁰ TRT urged the Commission to deny FTCC's application since FTCC was "a foreign corporation, owned and controlled by French nationals with apparently strong ties to the French government and its communications entity, the French PTT."¹⁶¹ TRT claimed that it would be unfair to accord FTCC additional operating privileges in the United States while the French PTT denied similar operating rights to TRT and to other American carriers.¹⁶²

In an unprecedented decision, the Commission denied FTCC's application. It did so on the basis of what the Commission described as a longstanding—though little known—reciprocity policy.¹⁶³ Noting that reciprocity was first enunciated by President Grant in 1869 and reaffirmed by Congress in the Submarine Cable Landing

159. See *French Tel. Cable Co.*, 71 F.C.C.2d 393 (1979). A "gateway" is a city that constitutes a point of entry into or exit from the continental United States, where the IRCs may pick up and deliver messages that either originate or terminate at a point outside the continental United States. The concept of a gateway, although today a product of section 222(a)(5) of the Communications Act, 47 U.S.C. § 222(a)(5) (1976), predates the passage of the Act. Before 1934, a gateway was the location of the IRCs' offices and the point at which they interconnected with domestic carriers. The locations of the initial gateway cities were determined by the physical termini of overseas transmission facilities and the fact that the IRCs had commercial operations in those cities. See *French Tel. Cable Co.*, 71 F.C.C.2d at 394.

160. See *French Tel. Cable Co.*, 71 F.C.C.2d at 394.

161. *Id.* at 397.

162. See *id.* at 397-98. New carriers have historically had difficulties obtaining operating agreements with foreign PTTs. See *Int'l Relay, Inc.*, 77 F.C.C.2d 819, 827 (1980). See also *Graphnet Sys., Inc.*, 63 F.C.C.2d 402 (1977), *recon. denied*, 67 F.C.C.2d 1020 (1978), *aff'd in part & remanded sub nom. ITT World Communications Inc. v. FCC*, 595 F.2d 897, 911 (2d Cir.), *on remand*, 71 F.C.C.2d 1066 (1979), *recon. granted*, Mimeo No. 25984 (released Feb. 4, 1980), *also* Mimeo No. 30890 (released April 3, 1980) (authorization of Graphnet to enter international market, despite lack of operating agreement, with resulting inability of Graphnet to commence operations).

163. See *French Tel. Cable Co.*, 71 F.C.C.2d at 403-05.

License Act of 1921,¹⁶⁴ the Commission made it clear that reciprocity was still a vital United States policy. Finding that no United States IRC had been allowed to maintain an office in France since 1958, the Commission concluded that a grant of authority to FTCC would conflict with this nation's policy of reciprocity and would, therefore, be inconsistent with the public interest, convenience, and necessity.¹⁶⁵ In a concurring statement, Commissioner Joseph Fogarty urged the Commission to take more drastic action to demonstrate the importance of the reciprocity policy. He proposed that the Commission schedule a hearing to consider the revocation of all of FTCC's extant operating authority.¹⁶⁶

Perhaps the most significant aspect of the Commission's decision was its expansive view of its public interest responsibilities. In weighing the public interest, the Commission took into consideration the executive and congressional policy of reciprocity—a policy not expressly articulated in the Communications Act. The implications of the Commission's analysis for its future treatment of non-tariff telecommunications barriers were enormous. Although there clearly would be limitations on the degree to which policies of reciprocity and free commerce in telecommunications would be controlling elements of the statutory public interest test,¹⁶⁷ the decision indicated that the Commission would use its discretion to weigh such policies in appropriate cases.

The Commission, however, began to back away from its statements in the FTCC case almost as soon as the decision was published. When FTCC petitioned the Commission for additional facilities to serve existing gateways, the Commission did not consider

164. President Grant had refused to issue a submarine cable landing license to French Cable until it "renounced its exclusive rights in France so that U.S. carriers could be accorded the privilege of landing cables on French soil." *Id.* at 401. See Submarine Cable Landing License Act of 1921, 47 U.S.C. §§ 34-39 (1976); Exec. Order No. 10,530 (1954) reprinted in 3 U.S.C. § 301 (1976). The Commission still grants cable landing licenses under the provisions of the Submarine Cable Landing License Act. See, e.g., *American Tel. & Tel. Co.*, 7 F.C.C.2d 957 (1967); *American Tel. & Tel. Co.*, 34 F.C.C.2d 132 (1972); *American Tel. & Tel. Co.*, 35 F.C.C.2d 803 (1972).

165. See *French Tel. Cable Co.*, 71 F.C.C.2d at 404-05.

166. *Id.* at 406. In another proceeding, Commissioner Fogarty joined the Commission in authorizing a seventh transatlantic cable (TAT), but emphasized the importance of reciprocity. Commissioner Fogarty argued that because the Commission has "deferred to the policies and expressed needs of the foreign governments, we should expect 'tit for TAT' from the Europeans in terms of *their* recognition of *our* competitive policies and *their* agreement to deal with *our* multiplicity of carriers." *Overseas Communications*, 71 F.C.C.2d 71, 99 (1979).

167. *Cf. FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953) (Commission's order vacated on grounds that, although "competition is a relevant factor in weighing the public interest," decision granting new transatlantic operating authority to international carrier could not be based solely on "national policy in favor of competition.").

reciprocity a bar.¹⁶⁸ When FTCC proposed to transfer its assets from the French government to United States corporations, only Commissioner Fogarty resisted.¹⁶⁹ In another case ripe for disposition on the grounds of reciprocity, the Commission declined to impose restrictions on the foreign ownership of cable television systems in the United States. The Commission concluded that it did not believe "a desire for reciprocity in international investment policies by itself provides an adequate basis for action on our part."¹⁷⁰ In short, the Commission found that questions of international trade were "more appropriately addressed to other branches of government."¹⁷¹ The Commission's apparent loss of interest in the principle of reciprocity was soon followed by an apparent lack of interest in the international ramifications of its own actions.

In the spring of 1980, the Commission issued a notice of rulemaking that proposed the adoption of a policy that would prohibit United States carriers from restricting the resale or shared use of international telecommunications services and facilities.¹⁷² The adoption of such a policy would place the United States in direct conflict with the policy reflected in the CCITT Recommendations that contain internationally accepted limitations on the use which may be made of international leased channel circuits.¹⁷³

Numerous parties commenting on the Commission's proposal argued that unilateral adoption of the proposed rule could result in a significant curtailment in the availability of flat-rate leased channel circuits by foreign administrations opposed to resale and shared

168. See *American Tel. & Tel. Co.*, 73 F.C.C.2d 248 (1979).

169. In Commissioner Fogarty's view, the French government would profit from the proposed transaction, the same as it would have if the Commission had granted FTCC's initial request for additional gateways. See *FTC Communications, Inc.* 75 F.C.C.2d 15, 29-30 (1980) (dissenting statement of Commissioner Joseph R. Fogarty).

170. *Foreign Ownership of CATV Systems*, 77 F.C.C.2d 73, 78-79 (1980).

171. *Id.* at 81.

172. See *Regulatory Policies Concerning Resale & Shared Use of Common Carrier Int'l Communications Servs.*, 77 F.C.C.2d 831 (1980) (Notice of Proposed Rulemaking).

173. Paragraph 1.7 of Recommendation D.1 provides:

Within the limits fixed by Administrations in each case, private leased circuits may be used only to exchange communications relating to the business of the customer. When the circuit is used to route communications from (to) one or more users other than the customer, these communications must be concerned exclusively with the activity for which the circuit is leased.

CCITT ORANGE BOOK, *supra* note 41, ¶ 1.7.

Paragraph 1.10 contains a more general limitation on the permissible uses of telecommunications facilities: "Administrations shall refuse to provide an international private leased circuit when the customer's proposed activity would be regarded as an infringement of the functions of an Administration in providing telecommunications services to others." *Id.* ¶ 1.10. See also Letter from Leon Burtz, Director of CCITT, to Arthur Freeman, Director, Office of Int'l Communications Policy, U.S. Dep't of State (June 20, 1980) (on file at *Cornell International Law Journal*).

use.¹⁷⁴ Were this to occur, a decade of work by the United States CCITT delegation would be quickly undone.¹⁷⁵ Moreover, adoption of the Commission's proposal would place the agency in conflict with the position historically espoused by the United States CCITT delegation.¹⁷⁶ Indeed, one of the delegation's most important Contributions to CCITT outlined the reasons why foreign administrations need not fear that leased channels would be improperly shared, resold, or used for message switching.¹⁷⁷

The Commission's proposal seemed particularly inappropriate for an agency that had previously articulated a need for international reciprocity.¹⁷⁸ Its apparent willingness to act in derogation of an internationally accepted regulation stirred a great deal of contro-

174. See Comments of Chase Manhattan Bank, N.A., F.C.C. Docket No. 80-176 (filed Aug. 14, 1980); Comments of Citicorp, F.C.C. Docket No. 80-176 (filed Aug. 15, 1980); Comments of Computer and Business Equip. Mfrs. Ass'n, F.C.C. Docket No. 80-176, at 6-8 (filed Aug. 15, 1980); Comments of Hawaiian Tel. Co., F.C.C. Docket No. 80-176, at 3 (filed Aug. 15, 1980); Comments of Int'l Communications Ass'n, F.C.C. Docket No. 80-176, at 17-18 (filed Aug. 7, 1980); Comments of ITT World Communications Inc., F.C.C. Docket No. 80-176, at 30 (filed Aug. 18, 1980); Comments of RCA Global Communications, Inc., F.C.C. Docket No. 80-176, at 3-4 (filed Aug. 15, 1980); Comments of TRT Telecommunications Corp., F.C.C. Docket No. 80-176, at 3-5 (filed Aug. 15, 1980); Comments of Western Union Int'l, Inc., F.C.C. Docket No. 80-176, at 1-4 (filed Aug. 15, 1980).

175. See notes 81-85 *supra* and accompanying text.

176. See, e.g., CCITT Study Group III, note 85 *supra*; see note 85 *supra* and accompanying text. The Chairman of the Commission attempted to explain the Commission's action in an address to European telecommunications administrations:

Before I close, I want to comment upon the reaction to our resale proposal within the CCITT. I need not reaffirm our commitment to CCITT: Our actions over the years leave no doubt about that. But we have legal obligations to examine our policies continuously and to adopt changes when it is in the public interest of U.S. citizens to do so. In this case, harmonizing a CCITT recommendation is not required *before* we first consider permitting resale of private lines. We recognize that it may be necessary *later* to take the question up in CCITT because it would do no practical good to authorize resale if none of our foreign correspondents is willing to concur in our decision.

Statement of the Hon. Charles D. Ferris, at 5 (Oct. 30, 1980) (Madrid, Spain) (meeting of representatives of United States, CEPT, and Teleglobe Canada) (on file at *Cornell International Law Journal*). The Chairman's remarks, however, were made after the Commission's proposal had received a great deal of criticism from within the CCITT and the United States. See notes 179-81 *infra* and accompanying text.

177. See CCITT Study Group III, note 85 *supra*.

178. See notes 159-66 *supra* and accompanying text. The Commission's proposal also seemed to mark a departure from its commitment to international cooperation with respect to international facilities planning. See *Overseas Communications*, 67 F.C.C.2d 358, 408-19 (1980); *Overseas Communications*, 62 F.C.C.2d 451, 457 (1976) ("We recognize, of course, that considerations of national sovereignty and international comity require that no nation have a final unilateral determination with respect to facility deployment and use."); *Overseas Communications*, 53 F.C.C.2d 121, 122 (1975) ("In carrying out our responsibilities regarding international communications we are keenly mindful of the fact that the United States is a party of interest in a broad community of many countries that also have concerns and responsibilities with regard to international communications systems . . ."); *American Tel. & Tel. Co.*, 35 F.C.C.2d 801, 818 (1972) ("We recognize international communications to be a mutual effort among telecommuni-

versy both at home and abroad.¹⁷⁹ Leon Burtz, Director of the CCITT, expressed a commonly held concern: "To implement at the international level provisions which are at variance with the CCITT Recommendations is tantamount to repudiating their validity and purpose and at the same time sapping the moral authority of the CCITT."¹⁸⁰ A score of foreign administrations also expressed their disapproval of the Commission's proposed rule.¹⁸¹

It is not surprising that a major theme that surfaced in the responses to the Commission's notice of proposed rulemaking was the need for a consistent and uniform United States telecommunications policy.¹⁸² Indeed, the fact that the Commission even released its proposal highlighted the potential for catastrophe inherent in the diffusion of responsibility for telecommunications and information

cations entities of several nations, and require, by their nature, the utmost effort by those concerned to cooperate in resolving differences of opinion and objections.")

179. See, e.g., Letter from Hon. Harley O. Staggers, U.S. House of Representatives, to Hon. Charles D. Ferris, Chairman, Federal Communications Commission (July 21, 1980); Letter from Hon. Richardson Preyer, U.S. House of Representatives, to Hon. Charles D. Ferris, Chairman, Federal Communications Commission (July 21, 1980); Letter from Hon. Harley O. Staggers, U.S. House of Representatives, to Matthew Nimitz, Department of State (July 21, 1980); Letter from Hon. Richardson Preyer, U.S. House of Representatives, to Matthew Nimitz, Department of State (July 21, 1980).

180. Letter from Leon Burtz to Arthur Freeman, *supra* note 173, at 3.

181. See Comments of ITT World Communications Inc., F.C.C. Docket No. 80-176 (filed Aug. 15, 1980). ITT stated:

Many [administrations] simply say they will continue to follow CCITT Recommendation D.1 (Chile, Columbia, Cyprus, India, Italy, Malaysia, Norway, Portugal, Sweden). Others say that they do not and will not permit shared-use or resale (Belgium, Brazil, Japan, South Africa, United Arab Emirates). Some express concern about degradation of quality of service from loss of control over the various network transitions and interface conditions (Austria, Switzerland, United Arab Emirates). Great Britain suggests that "any major changes . . . must necessarily be preceded by full discussions in ITU . . ." India and Singapore concur in the need to address the question within the CCITT forum.

Id. at 18-19.

182. In particular, there was strong sentiment that the Commission should first pursue the development of a uniform national policy within the federal government and then have appropriate representatives of the United States advance that policy—either bilaterally or in the context of CCITT. See Comments of Int'l Communications Ass'n, F.C.C. Docket No. 80-176, at 15-17 (filed Aug. 7, 1980); Comments of Association of Data Processing Serv. Organizations, Inc., F.C.C. Docket No. 80-176, at 10-11 (filed Aug. 15, 1980); Comments of Control Data Corp., F.C.C. Docket No. 80-176, at 4-5 (filed Aug. 15, 1980).

The comments of the International Communications Association, an association of large users of communications services, aptly summarized the perceived problem:

While the FCC clearly has expertise in telecommunications regulatory matters, there is some question as to whether it possesses sufficient statutory authority to negotiate on behalf of the United States or its carriers. The State Department, on the other hand, possesses authority and expertise in telecommunications. NTIA is charged with Executive telecommunications policy development and brings together expertise in the related fields of trade and information flow; however, like the FCC, it lacks specific authority to represent the United States in international telecommunications negotiations. Therefore, some legislative relief

policy within the United States government. The international resale and shared use proceeding, however, was merely one example of a problem that had previously arisen in other situations.¹⁸³

may be required to establish workable procedures for the development and coordination of United States telecommunications policy.

Comments of Int'l Communications Ass'n, F.C.C. Docket No. 80-176, at 17 (filed Aug. 7, 1980). See Exec. Order No. 12,046, 43 Fed. Reg. 13,349 (1978).

183. The KDD dispute serves as a prime example of the lack of coordination within the federal government. See notes 118-30 *supra* and accompanying text. A more direct conflict between the Commission and the United States CCITT delegation manifested itself at about the same time. In Contribution No. 38, the United States delegation to CCITT attempted to stave off efforts to eliminate or re-tariff private line service by stressing the restrictions that United States law placed on the use of such circuits. See notes 128-50 *supra* and accompanying text. The delegation argued that these restrictions, together with private enforcement, assured that private networks would not be used to divert traffic in an improper way from public networks.

In mid-1978, the Commission received complaints that Consortium Communications International, Inc. (CCI) was violating these restrictions. See Complaint, ITT World Communications, Inc. v. Consortium Communications Int'l, Inc., F.C.C. Docket No. 78-759 (June 12, 1978); Complaint, RCA Global Communications, Inc. v. Consortium Communications Int'l, Inc., F.C.C. File No. TS78-1945 (July 6, 1978). CCI offered an international service whereby users in the United States could use domestic telex or TWX to call CCI's offices. This traffic would be collected by a CCI computer in New York that directed the information to CCI's European office via a private line or the overseas voice telephone network. In Europe, the traffic was delivered to the addressee through the use of local telex services. CCI characterized its service offering as "information forwarding," "communications management," "data processing," and "hybrid data processing." See Special Appearance to Answer Complaint, ITT World Communications, Inc. v. Consortium Communications Int'l, Inc., F.C.C. File Nos. TS 9-78, TS 10-78, at 2, 13-18 (Aug. 15, 1978). The complainants and ultimately the Commission said CCI's operations constituted common carrier communications. The Commission, however, did not do so until February 12, 1980—a year and a half after the complaints had been filed. See ITT World Communications Inc. v. Consortium Communications Int'l, Inc., 76 F.C.C.2d 15 (1980).

In failing to act promptly on these complaints, the Commission seriously endangered the position and credibility of the United States delegation to CCITT. Having finally concluded that CCI was unlawfully engaged in the offering of communications common carriage, the Commission interposed a further obstacle to the resolution of the CCI dispute. In November 1980, before the initiation of the international resale and shared use proceeding, but after the release of a decision in the *Second Computer Inquiry*, the Commission unilaterally deferred action on CCI's then pending application for section 214 operating authority. The Commission stated that it was uncertain whether CCI's proposed service offering was basic, which required Commission approval, or merely an enhanced service, which did not. See Letter from William F. Adler, Chief, International Facilities Authorization & Licensing Division, Common Carrier Bureau, FCC, to Consortium Communications Int'l, Inc. (Nov. 14, 1980) (Ref. No. 61100). See also notes 16-19 *supra* and accompanying text.

IV

THE FUTURE ROLE OF THE COMMISSION IN
REMOVING BARRIERS TO THE
TRANSBORDER FLOW OF
INFORMATION

Over the course of the last several years, users of international communications services have witnessed the Commission at its extremes. In the Hong Kong and KDD disputes, the Commission demonstrated that it could remain oblivious to the most blatant restrictions on the transborder flow of information. The Commission's inaction with respect to the West German Bundespost regulations, although in a class by itself, also revealed a need for greater agency initiative. In the FTCC proceeding, however, the Commission displayed an institutional willingness to pursue its statutory public interest responsibilities aggressively. Whereas the KDD and international resale and shared use proceedings revealed a lack of coordination on the part of the Commission with other branches of federal government, the Commission's role in the FTCC case suggested otherwise.

Although informal efforts on the part of the agencies involved in transborder dataflow issues to consult with one another might alleviate some of the problems discussed above, the situation demands a more comprehensive solution.¹⁸⁴ Progress towards this end is being made on a number of fronts. In hearings that Congress has conducted over the last several years,¹⁸⁵ representatives of private industry reiterated their desire to see responsibility for telecommunications and information policy centralized within the federal government. These efforts have resulted in the introduction of a number of measures, two of which are now pending before Congress, that propose a structural solution to the current diffusion of responsibility within the federal bureaucracy.¹⁸⁶

In addition to these efforts to provide some focus and purpose to the development of national policy, other legislative initiatives have been advanced to remedy the problem of a Commission that is unwilling, or that views itself as unable, to secure the removal of

184. The agencies involved in telecommunications and information policy cannot ignore the various Executive orders and statutes responsible for the diffusion of responsibility among various agencies. *See, e.g.*, Exec. Order No. 12,046, 43 Fed. Reg. 13,349 (1978); 22 U.S.C. § 2656 (1976).

185. *See, e.g.*, *International Data Flow: Hearings Before the Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations*, 96th Cong., 2d Sess. (1980). *But see* H.R. REP. No. 100, pt. 2, 97th Cong., 1st Sess. (1981).

186. *See* H.R. 1957, 97th Cong., 1st Sess., 127 CONG. REC. H532 (1981); S. 821, 97th Cong., 1st Sess. (1981).

telecommunications barriers that restrict the transborder flow of information.¹⁸⁷ Although no legislative proposal has suggested that the Commission should have sole responsibility for developing telecommunications policy and obtaining the removal of such restrictions, the Commission has been recognized to be particularly well-situated to prevent the imposition and to secure the removal of protectionist measures that limit the use of international telecommunications facilities.¹⁸⁸

The Commission's past inability to deal effectively with transborder dataflow disputes has, in part, been attributable to its interpretation of section 214 of the Communications Act, which directs the Commission to weigh the public convenience and necessity in evaluating common carrier applications for authority to construct new facilities and to inaugurate new services between the United States and other countries.¹⁸⁹ Although the public interest standard is broad enough to require the Commission to consider the restrictions foreign telecommunications administrations have imposed on United States enterprises,¹⁹⁰ the Commission generally has not perceived its responsibilities so expansively. Even if the Commission were inclined to do so, section 214 provides, at best, a less-than-satisfactory means to pursue the removal of conditions that restrict the use which may be made of international telecommunications facilities by United States enterprises—common carrier or otherwise.¹⁹¹

187. See H.R. 4177, 97th Cong., 1st Sess. (1981); S. 898, 97th Cong., 1st Sess., 127 CONG. REC. S11443 (daily ed. Oct. 14, 1981). A similar provision surfaced during the last Congress as part of the ill-fated Telecommunications Act of 1980. See H.R. 6121, 96th Cong., 2d Sess. § 6, 126 CONG. REC. H7859 (1980). Bills such as H.R. 1957 and S. 821 specifically do not apply to the rulemaking and adjudicatory functions of the Commission. See, e.g., H.R. 1957, *supra* note 186, § 2(d).

Congressman Walgren recently introduced another measure implementing reciprocity, but only with respect to cable television. See H.R. 4225, 97th Cong., 1st Sess. (1981). This bill would require the Commission to impose restrictions (including complete exclusion) on foreign cable television systems and operators wishing to do business in the United States that would be identical to the restrictions the foreign country in question imposes on United States systems and operators.

188. In addition to requiring the Commission to assure reciprocity in international communications, S. 898 would also require "[e]very final significant rule or order of the Commission" to be accompanied by the Department of Commerce's analysis of the action's effect on "the ability of United States' industry to compete domestically and abroad." S. 898, 97th Cong., 1st Sess. § 406 (1981).

189. See 47 U.S.C. § 214 (1976).

190. See note 135 *supra*.

191. See note 93 *supra* and accompanying text. See also note 128 *supra*. The problem presented by the West German Bundespost regulations is a prime example. Section 214 simply would not come into play unless a United States carrier sought authority to undertake a new international offering in conjunction with the Bundespost. Absent some clear connection between the new offering and the restrictions on leased channel service, the Commission might not be inclined to take any action. This was the case in the Hong Kong and KDD disputes.

Absent an aggressive Commission, legislation appears to be the only sure means of remedying the situation. The proposals that Congress has favored to date would direct and empower the Commission to investigate and pursue the elimination of all transborder dataflow restrictions involving the use of telecommunications facilities.¹⁹² This would be done, without doing violence to international

192. Two examples of this approach include H.R. 4177, 97th Cong., 1st Sess. (1981) and S. 898, 97th Cong., 1st Sess. § 238 (1981). Of the two measures, H.R. 4177 is more comprehensive in its treatment of the principle of reciprocity. Even H.R. 4177, however, does not go as far as some parties would like. The Association of Data Processing Service Organizations, for example, has proposed that the Commission not only be directed to assure reciprocity generally, but that it be required to impose on foreign enterprises the same or similar conditions as are placed on United States enterprises doing business abroad. Since elements of the ADAPSO proposal appear in both S. 898 and H.R. 4177, ADAPSO's proposed addition to section 152 of the Communications Act is worth quoting in its entirety:

(c)(1) The Commission shall have authority, as provided herein, to assure that the terms and conditions pursuant to which a foreign enterprise is permitted, directly or in conjunction with a United States enterprise, to provide any telecommunications or telecommunications-related service or pursuant to which a foreign telecommunications or telecommunications-related service is permitted entry, directly or in conjunction with a United States telecommunications or telecommunications-related service, in any United States market are reciprocal with the terms and conditions pursuant to which United States enterprises and United States telecommunications and telecommunications-related services are permitted entry into—

(A) the foreign nation in which the operations of such foreign telecommunications or telecommunications-related service or such foreign enterprise are based; or

(B) the foreign nation under the laws of which such foreign telecommunications or telecommunications-related service or such foreign enterprise is established.

(2) In carrying out its responsibilities under paragraph (1), the Commission shall have the authority to inquire into any charge, practice, classification, requirement or provision of a service, facility, or product by any carrier in order to determine if such charge, practice, classification, requirement, or provision of a service, facility, or product is just and reasonable, promotes the public convenience and necessity, and ensures the equitable treatment and competitive position of United States enterprises in international markets.

(3) In carrying out its responsibilities under paragraphs (1) and (2), the Commission shall have the authority to adopt, by order or rule, regulations, policies, requirements, and procedures, and to restrict, condition, or prohibit the use of services, facilities, and instrumentalities subject to its jurisdiction under this Act, by a foreign telecommunications or telecommunications-related service, or by a foreign enterprise, as the Commission determines to be necessary or appropriate to carry out the provisions of this subsection; *provided, however*, that the Commission shall, to the extent possible, impose the same restrictions upon a foreign telecommunications or telecommunications-related service or foreign enterprise as are imposed upon similar United States telecommunications or telecommunications-related services or upon similarly situated United States enterprises by—

(A) the foreign nation in which the operations of such foreign telecommunications or telecommunications-related service or such foreign enterprise are based; or

(B) the foreign nation under the laws of which such foreign telecommunications or telecommunications-related service or such foreign enterprise is established.

comity or the prerogative of the Executive, by statutorily endorsing the principle of international reciprocity that the Commission once favored.¹⁹³ In short, these proposals would direct the Commission to assure that the terms and conditions pursuant to which foreign enterprises and foreign telecommunications and telecommunications-related services¹⁹⁴ are permitted to use United States telecommuni-

(4)(A) In conducting any inquiry under paragraph (1), and before taking action under paragraph (2), the Commission shall request and consider the views of the Secretary of State and the United States Trade Representative.

(B) The President may, not later than 45 days after any final determination of the Commission regarding the imposition of reciprocal restrictions upon a foreign enterprise or a foreign telecommunications or telecommunications-related service, veto such final determination if the President determines that such final determination will injure the foreign policy interests of the United States.

(C) If the President decides to take any action under this paragraph, he shall publish notice of his determination, including the reasons for the determination, in the Federal Register. Unless he determines that expeditious action is required, the President shall provide an opportunity for the presentation of views concerning the taking of such action.

(5) For purposes of this subsection:

(A) The term "foreign enterprise" means any common carrier, person or organization which is—

- (i) an alien or the representative of an alien;
- (ii) a foreign government or representative of a foreign government;
- (iii) a corporation, partnership, joint venture, or other legal entity organized or established under the laws of a foreign nation; or
- (iv) a corporation more than 20 percent of the capital stock of which is owned of record or voted by or on behalf of, directly or indirectly, an alien or the representative of an alien, a foreign government or representative of a foreign government, or a corporation, partnership, joint venture, or other legal entity organized or established under the laws of a foreign nation.

(B) The term "foreign telecommunications or telecommunications-related service" means any telecommunications service or service provided by or through the telecommunications facilities of a carrier, more than 20 percent of the revenues or profit of which service accrues (or would accrue if disbursements were made), directly or indirectly, to—

- (i) an alien or the representative of an alien;
- (ii) a foreign government or representative of a foreign government;
- (iii) a corporation, partnership, joint venture, or other legal entity organized or established under the laws of a foreign nation; or
- (iv) a corporation more than 20 percent of the capital stock of which is owned of record or voted by or on behalf of, directly or indirectly, an alien or the representative of an alien, a foreign government or representative of a foreign government, or a corporation, partnership, joint venture, or other legal entity organized or established under the laws of a foreign nation.

ADAPSO, *The Need for Reciprocity in International Telecommunications* (1981) (emphasis in original) (on file at *Cornell International Law Journal*).

193. S. 898 and H.R. 4177 both contemplate the involvement of the President and other executive agencies in the final determination of whether the imposition of reciprocal restrictions is appropriate. See H.R. 4177, note 187 *supra*; S. 898, *supra* note 187, § 238(d).

194. S. 898 speaks of "foreign carriers or foreign persons supplying telecommunication or information services, facilities, or equipment." S. 898, *supra* note 187, § 238(a).

cations facilities are no more favorable than those pursuant to which similarly situated United States enterprises and services are permitted to use foreign telecommunications facilities.

One advantage of such legislation is that the mere existence of unambiguous Commission authority to impose reciprocal restrictions might, in many cases, be adequate to discourage the use of telecommunications facilities by foreign administrations as non-tariff barriers to trade. Had such an unambiguous statement of congressional intent been in existence at the time that Cable and Wireless denied service or at the time that KDD restricted the use of leased channel circuits, it is questionable whether either foreign administration would have acted the way it did. Equally important, the Commission would have been equipped to take prompt action to protect the interests of United States users of international telecommunications facilities. Of particular value to the Commission in seeking a reversal of the KDD and Cable and Wireless actions would have been the power to impose identical or similar restrictions on users in Hong Kong and Japan that wished to communicate with the United States.¹⁹⁵

Another significant provision of the legislation that has been proposed involves a mandate to the Commission to investigate and take action on its own initiative to secure the removal of transborder dataflow restrictions. By permitting the Commission to act on its own initiative and eliminating the need for such action to be taken at the behest of an injured party, these legislative proposals will make restrictions such as those now imposed by the Bundespost subject to Commission scrutiny. The ability of the Commission to investigate dataflow barriers on its own may prove to be particularly valuable in cases where private parties, fearing retaliatory action by a foreign PTT,¹⁹⁶ might be reluctant to commence and actively participate in formal proceedings before the Commission.

Whether any of these measures will ever be enacted remains to be seen. In one sense, however, the proposals may already have had an impact. By expressing legislative displeasure with the manner in which the Commission and the executive branch have dealt with

H.R. 4177 addresses "foreign telecommunications services . . . or related service" and "foreign telecommunications carriers." H.R. 4177, note 187 *supra*.

195. In exercising its authority to impose reciprocal conditions or restrictions, the Commission will have to deal with the fact that some restrictions may be prompted solely by economic protectionism, some by a desire to protect personal privacy, and still others by a combination of the two. Recent appropriations legislation has demonstrated a recognition, in a much different context, that reciprocity cannot always be applied in a mechanical and inflexible fashion. See H.R. REP. No. 102, pt. 1, 97th Cong., 1st Sess. 29, 59 (1981).

196. See note 157 *supra*.

barriers to the transborder flow of information, the Congress may have spurred them to greater efforts.

CONCLUSION

The use of telecommunications regulations as barriers to the transborder flow of information is a growing phenomenon, particularly among industrialized nations. To date, the formal regulatory mechanisms of the United States have been ineffective in deterring, much less eliminating, restrictive foreign telecommunications regulations. When results favorable to the interests of users in the United States have been achieved, it has largely been through the efforts of agencies and individuals other than the Commission and its staff.

Although the Commission's statutory charter is currently flexible enough to enable the Commission to combat such restrictions, the Commission has not chosen to pursue its statutory mandate aggressively. Coupled with a lack of coordination with other branches of government and the United States CCITT delegation, the Commission's passive view of its role has exacerbated the problems created by the current diffusion of responsibility for national telecommunications and information policy within the federal government.

Congress has advanced several proposals to bring some order and direction to the formulation and implementation of United States policy. Whether any of these proposals will be enacted by Congress or whether the Executive will in some way take the initiative remains to be seen. Prompt and dramatic action, however, is needed to halt the erection of new transborder dataflow barriers and to deal effectively with all existing restrictions.

