FOREIGN DATA: IS IT SAFE IN UNITED STATES DATA BANKS?

Recently, several nations including Canada, France and Sweden have expressed concern that certain forms of information exchanges between countries pose a serious threat.[1] The threat is based on the age-old concern over power. In 1977 the French Minister of Justice, Louis Joinet, addressed this new threat when he stated "information is power, and economic information is economic power."[2] If one country is able to devise methods to gather and store more economic information than other countries, it then has the potential to acquire a greater share of this power.[3]

The vast majority of data bases and data records are currently located in the United States.[4] In 1979, 259 million data bases and 94 million records were in the United States.[5] In that same year only 269 million data bases and 55 million records were found in developed market economies.[6] As a result of the United States leading position many countries find themselves either relying on United States data base information or depositing their valuable information in data memory banks located within the United States.[7] These

1. Kesler, *Regulation of Transnational Data: A Statement of the Issue*, 10 INT'L BUS. L. 193 (1982); *see also* Durka, *Legal Issues of Transborder Data Transmission*, 74 AM. SOC'Y INT'L L. PROC. 177 (1980).

2. Kesler, *supra* note 1, at 193. This statement was made by the French Minister of Justice at the Organization for Economic Cooperation and Development Symposium on Transborder Data Flow. This Symposium was held in Vienna, Austria in 1977. McGuire, *The Information Age: An Introduction to Transborder Data Flow*, 20 JURIMETRICS J. 1, 6 (1979).

3. McGuire, *supra* note 2, at 3.

4. Fishman, *Introduction to Transborder Data Flow*, 16 STAN. J. INT'L L. 1, 8 (1980). The term "data base" in a broad sense refers to the total category of goods and services which make up the information retrieval industry. The term "record" refers to the total information which has been compiled in each category of goods and services. Because of the newness of the data industry, confusion arises as to what goods and services should be included in estimating the size of the data industry. Further, there is a lack of reporting on revenues "specifically attributable to data base services." U.N. Centre on Transnational Corporations, Transborder Data Flows: Access to the International on Line Data Base Market, at 24, U.N. Doc. ST/CTC 41 U.N. (1983) [hereinafter cited as Transborder Data Flows].

5. Transborder Data Flows, *supra* note 4, at 24.

6. *Id.*

7. Note, *The Development of Canadian Law on Transborder Data Flows*, 13 GA. J. INT'L & COMP. L. 825, 852 (1983). Most of Canadian transborder data flow "originates on terminals in the United States." *Id.* This is contrasted with countries like Brazil which have placed bans on products and data processing importation if they cannot be handled domestically. *Id.* at

countries fear that because of the United States dominant position, and their corresponding dependence on data information or data storage facilities in the United States, they are in a uniquely vulnerable position.[8] The United States could feasibly confiscate this information, exploit it in some way, and thus take unfair advantage of them.[9]

This concern was pointedly brought to light by the following incident. The fire department in Malmoe, Sweden had devised a computer program which showed where the closest fire hydrants, emergency vehicles and hospitals were located with respect to any particular fire being reported.[10] The program operated from a data memory bank located in Cleveland, Ohio.[11] For several days this data was not transmitted to the fire department in Sweden, because of a severe blizzard in Cleveland.[12] When this situation was brought to the attention of the Swedish government, it was justifiably alarmed.[13] The Swedish government recognized that this was not a situation where the United States was refusing to transmit the needed data. However, the incident raised the following concern: what would happen if the United States ever cut off computer communication in the event of a diplomatic breakdown between the two countries?[14]

This Comment will focus on the concerns inherent in transborder data flow,[15] in light of the United States dominant technologi-

850. France has a regulatory agent which requires licensing for any transborder data flow activity. This agency may halt the transborder data flow activity when it appears warranted. *Id.* at 843.

8. Fishman, *supra* note 4, at 8; *see also* Kesler, *supra* note 1, at 193.

9. Kesler, *supra* note 1, at 193. The legal consequences resulting from United States confiscation of another country's computer data stored locally, has never been addressed. It is only a hypothetical question. The United States has never attempted to withhold another country's computer data. A number of authorities have raised this question, however: What would happen, if the United States withheld data information belonging to a foreign country? None of these authorities have attempted to answer that question. *See*, Durka, *supra* note 1, at 177. *See also* Donoghue, *Some Policy and Legal Issues in Transborder Data Flow*, 74 AM. SOC'Y INT'L L. PROC. 187 (1980). This authority raises the security issue in light of a country storing its five year econometric model in the United States; *see also* Novotny, *Transborder Data Flows and International Law: A Framework for Policy-Oriented Inquiry*, 16 STAN. J. INT'L L. 141, 161 (1980). If there is a denial or interruption of transborder data flow, there is a national security risk; *see also* Fishman, *supra* note 4, at 8-9. Both France and Canada have documented their fear of America's dominance of informational resources.

10. *See* Kesler, *supra* note 1, at 193; *see also* Durka, *supra* note 1, at 175.

11. Durka, *supra* note 1, at 175.

12. *Id.*

13. *See* Kesler, *supra* note 1, at 193.

14. *Id.*

15. Novotny, *supra* note 9, at 143-44. The term transborder data flow [hereinafter cited as

cal and storage capability. Three possible methods the United States might use to legally confiscate another country's data, will be examined. They are expropriation, economic sanctions, and the International Emergency Economic Powers Act. Utilizing any one of these courses of action, the United States could retain data which is either being stored in the United States or transmitted from a central data bank located within the United States. The other country's legal right to compensation or return of the confiscated data varies depending upon which course of action is chosen. These differences will be analyzed individually.

The analysis of these differences will show that a country's interest in its data information is not sufficiently protected from legal confiscation by the United States under existing international law. Once these insufficiencies are identified a discussion of the prospects of using a friendship treaty to resolve these problems will follow. The United States friendship treaty with the Republic of Korea will be used as an example because it contains several provisions which could be useful in the protection of foreign data. Finally, this Comment will propose a list of essential elements that must be included in any treaty or international agreement to help safeguard foreign data while it is being transmitted or stored in a central data bank in the United States. In the event of a diplomatic breakdown between the two countries this treaty would then address the relative legal rights and responsibilities of the parties.

I. HISTORY

Currently, there are enormous informational exchanges which are occurring between countries every day. This ability to exchange information internationally has developed primarily through technological advancements made in telecommunications.[16] When these telecommunications advancements were combined with developing computer technology, a capacity to share significantly greater amounts of information on a global level was created.[17] The result has been a worldwide information explosion.[18]

Prior to World War II, electronic communication between

TBDF] refers to units of information which have been coded electronically for processing, by one or more digital computers, which transfer or process the information to more than one State. *Id.*

16. Fishman, *supra* note 4, at 7.

17. *Id.*

18. *Id.* at 8. Currently the combination of telecommunications and computers has resulted in "thousands of messages and billions of bits of data" being used on a daily basis. The

countries was infrequent.[19] The first major advancements occurred in the mid-1950's, when an undersea telephone cable was constructed which linked the United States with Europe.[20] During the same period, experiments with satellites were also taking place.[21] Technological advances in satellites lead to communications services on an even more global level. Satellite telecommunication had the additional advantage of sharply reducing the cost of worldwide communications.[22]

Meanwhile, during that same period, equally significant advancements were made in the use of computers.[23] Prior to 1960 most information and recordkeeping was accomplished manually.[24] With the advent of computers, recordkeeping quickly became automated.[25] Information was no longer stored primarily in files. It was also being stored in computers and central data banks.[26] This new computer technology resulted in several advances that were not possible when records were being kept manually.[27]

First, the computer was able to process and accumulate data at a tremendous speed.[28] Second, the computers and central data banks had the capacity to store significantly greater amounts of information than had been possible when data was gathered manually.[29]

The final major step occurred when computer technology was combined with telecommunications technology. This allowed vast amounts of information to be transmitted and exchanged on a worldwide scale.[30] This new global availability of information has created an information intensive society; however, it has also given rise to a significant number of new problems.

Some of these problems are of a local nature, while others are of

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subject matter ranges from "international finance, news gathering, diplomacy, trade, transportation, [and] scientific research [to] intergovernmental cooperation." *Id.*

19. *Id.* at 7. The transmission of messages prior to World War II occurred via the telegraph, telephone and radio. E. MCWHINNEY, THE INTERNATIONAL LAW OF COMMUNICATIONS 51 (1971).

20. Fishman, *supra* note 4, at 7. There are six undersea cables which connect the major trade countries and a seventh one is currently under construction. Today undersea cables connect the majority of the world's trading countries. *Id.*

21. *Id.*

22. *Id.*

23. A. WESTIN & M. BAKER, DATABANKS IN A FREE SOCIETY 3 (1972).

24. *Id.*

25. *Id.*

26. *Id.* at 229.

27. *Id.* at 4.

28. *Id.*

29. *Id.*

30. *See* Fishman, *supra* note 4, at 7.

an international variety.[31] One major local problem revolves around creating the computer data banks, in which newly acquired information can be stored.[32] Once this data is centrally located a decision has to be made whether to share it with different organizations within the country or to expand its use and share it with other countries.[33]

States may in fact decide to confine data information solely within their own borders.[34] There are several reasons, however, why most countries choose not to do so. Principally, the transmission of such information furthers domestic and international commerce.[35] Secondly, the establishment of computer-communication systems is facilitated because these systems provide transnational corporations with a quick method to disseminate information to their branch offices.[36] As a result of this quickened information exchange, the economic activity among such corporations is enhanced.[37]

The exchange of economic information among countries is steadily increasing. As a result of these increases, there will be a greater international use of computerized information systems.[38] This increase will in turn require more central data banks and storage facilities to meet the rising demand of storing and transmitting information.[39] Many countries are not in a financial or technological

31. *See* Novotny, *supra* note 9, at 143.

32. MCWHINNEY, *supra* note 19, at 51. The term central data banks has not been consistently defined. In general, it is used to refer to any compilation of data about people or things. *Id.*

33. *See* Novotny, *supra* note 9, at 144.

34. *See* MCWHINNEY, *supra* note 19, at 51.

35. *Id.*

36. Sauvant, *Transborder Data Flow and the Developing Countries*, 37 INT'L ORG. 359, 362 (1983); *see also* Kesler, *supra* note 1, at 157. In addition to the commercial benefits to be derived, political relations may also be facilitated by regular communication of information. *See* MCWHINNEY, *supra* note 19, at 51.

37. Sauvant, *supra* note 36, at 362.

38. *See* Transborder Data Flows, *supra* note 4, at 20-22. Computer service industries since the mid-1960's have been able to offer a number of on-line data base services such as: (1) powerful time sharing computers which allow a large number of users to have access to the same information at the same time, though located far from the central computer; (2) "rapid access storage devices" which have large storage capabilities; and (3) telecommunications networks that provide local access for dialing into a remote computer at far less cost than dialing long distance. *Id.* at 24.

This on-line data base market is supported by the national and international computer market. In 1970, the industry in the United States had revenues of $2 billion. Eight years later the revenue had increased to $9 billion compared to the computer service industry in Western Europe which in 1978 had revenues of only $5 billion. *Id.*

39. *Id.* at 24. As an example of the growing demand, in 1975 the United States had 177 million data bases. In 1979 United States data bases increased to 259 million. *Id.*

position to build their own central data bank facilities and, as a result, it will be necessary for them to use facilities located in other countries.[40] When they use these foreign facilities they become dependent upon that other country for that information.

Naturally, they want assurances that this dependency will not place them in an unacceptably disadvantageous position.[41] For example, if all of their economic information is in a storage base located within the United States, what would happen if the United States chose to stop transmission of this data?[42] The economy of such a country could be seriously jeopardized if this information were withheld.[43] These countries are validly concerned that their rights to their economic data information remain unprotected.[44] The means which might be used to withhold this information will now be examined.

II. LEGAL THEORIES AVAILABLE TO WITHHOLD DATA INFORMATION

A. Expropriation: First Legal Bases for Data Confiscation

The legal right of a country to expropriate resources found within its territory, even though belonging to another, is unquestioned in the international community.[45] The power of expropriation arises from the State's right of sovereignty over its own economic

40. *See* McGuire, *supra* note 2, at 4. France has been a strong advocate in the reduction of reliance upon basic data supplies and avoidance of United States data banks, for both itself and other European countries. *Id.*

41. *Id.* at 3.

42. Donaghue, *supra* note 9, at 187.

43. *See* Novotny, *supra* note 9, at 160.

44. Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition*, VAND. L. REV. 1022, 1043 (1983).

45. This principle was specifically stated in several important U.N. resolutions including Permanent Sovereignty over Natural Resources, G.A. Res. 3171, 28 U.N. GAOR, Supp. (No. 32) at 52, U.N. Doc. A/9030 (1973), *reprinted in*, 13 INT'L LEGAL MATERIALS 238 (1974); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, Sixth Special Sess., U.N. GAOR, Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974), *reprinted in* 68 AM. J. INT'L L. 798 (1974); Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974), *reprinted in* 14 INT'L LEGAL MATERIALS 251 (1975). It was also affirmed in Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources. G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) at 17, U.N. Doc. A/5217 (1962), *reprinted in*, 2 INT'L LEGAL MATERIALS 223 (1962).

All States have a right to expropriate. This right originates from a "State's sovereignty over its natural resources and economic activity." The only issue concerns the rights of the foreign investor who has had his property expropriated. *See also* Note, *Creating a Framework for the Re-Introduction of International Law to Controversies over Compensation for Expropriation of Foreign Investments*, 9 SYRACUSE J. INT'L L. & COM. 163 (1982).

activities.[46]

Expropriation occurs when a country takes "possession of personal, individually held assets and rights of foreigners which are located in that country."[47] In the United States, several elements have been established which must be met for a valid expropriation. These elements were best explained in the landmark case of *Banco Nacional de Cuba v. Chase Manhattan Bank*, where Cuba had expropriated assets belonging to United States firms.[48]

From *Banco Nacional*, it is clear that to legally expropriate data belonging to another country two elements must be satisfied. The first requirement is that the item expropriated must fall within the classification of a natural resource, or natural wealth.[49] The second requirement is that the assets must be foreign owned.[50]

There is confusion as to how to classify data information.[51] Currently, there are two major views as to how data information should be labeled. Many countries have argued that transborder data information should be viewed as a commodity flow.[52] If one thinks of data in terms of commodities, data would be seen as a physical asset like sugar, coffee or wheat. Data would then fall within the

46. Note, *supra* note 45, at 163.

47. R. RIBEIRO, NATIONALIZATION OF FOREIGN PROPERTY IN INTERNATIONAL LAW 1 (Brazilian Embassy, Washington, D.C. 1977). Expropriation is based upon a narrow concept of service and social interest. When a State expropriates, it is usually taking "personal, individually held assets, and rights of foreigners." Nationalization, by contrast, is a much broader concept. This concept refers to a State's attempts to have the entire "ownership of wealth and natural resources, as well as the means of production." Regardless of whether the country is confiscating data through nationalization or expropriation the legal rights would be essentially the same. *Id.*

48. Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981). On July 6, 1960, following a serious break in diplomatic relations with the United States, Cuba enacted Law No. 851. *Id.* at 878. This law effectively expropriated all assets and firms "owned by national or legal persons of United States citizenship." *Id.* at 879. Several American concerns were affected by the enactment of this law. Chase, Citibank and First Boston all had assets located in Cuba. *Id.* at 878. Through the use of Resolution No. 2, Banco Nacional was established to serve as the instrumentality which obtained all of the assets of these three firms. Further, under Law No. 891, Banco Nacional was placed in control of all other remaining assets which belonged to other private banks owned by United States nationals. *Id.*

49. *See* RIBEIRO, *supra* note 47, at 1.

50. *Id.*

51. *International Data Flow: Hearing Before a Subcommittee of the Committee on Government Operations*, 96th Cong., 2d Sess. 267 (1980) [hereinafter cited as *International Data Flow: Hearing Before a Subcommittee*]. (Statement of Mathew Nimetz, Undersecretary for Security Assistance, Science and Technology, Department of State); *see also* Kesler, *supra* note 1, at 194; *see also* Sauvant, *supra* note 36, at 360.

52. *See* Kesler, *supra* note 1, at 194; *see also* Sauvant, *supra* note 36, at 360.

definition of a product. Thus it would be an economic resource.[53] This being the case, it would satisfy the first element required for expropriation. Others have argued data information is more like a service than a product.[54]

There are several reasons why many countries adopt the view that data information more closely resembles a service than a product. First, it is maintained that data information is simply units of information which have been coded electronically.[55] This coded information is transmitted from a central data bank to another country. The information itself does not really leave the central storage bank because the foreign country is only receiving a copy of the data in the form of digital units.[56] In this view, data banks and storage facilities in the United States are only providing the foreign user with the service of receiving the data. As a service, it cannot be viewed as a natural resource.

Since the test for expropriation set out in *Banco Nacional* requires the existence of a natural resource, viewed as a service, data would fail to satisfy this test.[57] However data is defined, either as a natural resource or a service, will ultimately determine whether the first element of the test for expropriation has been satisfied. In either case, there remains a second requirement which must be satisfied.

The second requirement concerns foreign ownership of the asset.[58] It is questionable whether a foreign country can be said to have legal ownership of data information.[59]

Whether data information can be legally owned is uncertain.[60] Information has traditionally been viewed as something to which no

53. *See* Sauvant, *supra* note 36, at 360.

54. *International Data Flow: Hearing Before a Subcommittee*, *supra* note 51, at 267. Nimetz, expressed the notion that TBDF and similar services have not been seen as a product. Therefore, they have not been covered by the General Agreement on Tariffs and Trade [GATT]. This Treaty traditionally was an instrument drafted to cover products, not services. Since the United States advocates classifying TBDF as a natural resource, it would fall within the definition of a product. Then GATT could be used to cover TBDF issues. *Id.*

55. Note, *supra* note 7, at 825.

56. *See* Branscomb, *supra* note 43, at 1026.

57. *See* RIBEIRO, *supra* note 47, at 1.

58. *Id.*

59. Fishman, *Legal Issues of Transborder Data Transmission*, 74 AM. SOC'Y INT'L L. PROC. 185 (1980). "Traditionally, ownership rights in printed, recorded or broadcast words have been protected by copyright law. Copyright issues yet to be resolved regarding computerized information include the scope of information eligible for copyright protection and clarification of the extent of protection. *Id.* In *Banco Nacional*, the banks whose assets were expropriated had legal title to the assets. *See Banco Nacional*, 658 F.2d at 875.

60. *See* Fishman, *supra* note 59, at 185.

one can claim ownership. United States patent laws express this concept by being "committed to the notion that a mere idea or intellectual process cannot be patented."[61] If these coded electronic units only consist of information, and if information itself cannot be owned, it logically follows that a country will not be able to claim absolute ownership. If data information cannot be legally owned, it will not satisfy the second requirement of expropriation: foreign ownership.[62] Consequently, the United States could not use expropriation to legally confiscate foreign data.

If data information is classified as a commodity, and the necessary ownership rights are present, data information could then be legally expropriated from the foreign country. In such a scenario, the foreign country would have the following legal rights.

Initially, the country which has had its natural resources expropriated would not have a legal right to its return.[63] The only possible right that the foreign country has, is the right to sue for compensation. Whether that country will receive adequate redress in monetary compensation is uncertain because there is a lack of international agreement as to what constitutes appropriate compensation.[64]

The general rule of compensation in expropriation cases was stated in UN General Assembly Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources.[65] Under this resolution, the owner of the commodity will be paid appropriate compensation, "in accordance with the rules in force in the State, taking such measures, in the exercise of its sovereignty and in accordance with international law."[66] This standard of appropriate compensation is viewed differently depending upon which country has done the expropriating and which country is seeking the compensation.[67] Further, some developing countries and socialist countries have rejected the need for appropriate compensation.[68] There are even some underdeveloped and socialist countries that contend no compensation is

61. D. BRANDON, DATA PROCESSING CONTRACTS 56 (1976); *see also* Honduis, *Data Law in Europe*, 16 STAN. J. INT'L L. 87, 88 (1980).

62. *See* Fishman, *supra* note 59, at 185.

63. *See* Note, *supra* note 45, at 163.

64. *Id.*

65. G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) at 17, U.N. Doc. A/5217 (1962), *reprinted in*, 2 INT'L LEGAL MATERIALS 223 (1962).

66. *Id.* at art. I, § 4.

67. *See Banco Nacional*, 658 F.2d 875 (1981).

68. *Id.* at 888. The constitutions of some socialist countries state that full value for expropriated assets is not required. B. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 96 (1977).

required.[69]

The United States has, on the other hand, argued that expropriation must be followed by prompt, adequate and effective compensation.[70] Moreover, "this duty to justly compensate is constitutionally mandated in the United States."[71]

Some difficult problems in determining what is adequate compensation could be expected to arise in attempting to assign a value to data information.[72] First, the foreign user's legal rights to compensation would be dependent on the present state of the United States economy.[73] The United States courts would assess the worth of the data information at the time of expropriation.[74] Second, the problem of valuation is further complicated by the fact that there is no current method whereby the worth of data information may be conclusively determined.[75] Therefore, if data information is looked upon as a commodity, it is imperative that a foreign party be able to assign a value for its actual worth. Furthermore, to ensure that the foreign user's legal rights are protected, there should be an agreement to full compensation for that assigned value, regardless of the state of the economy.

Expropriation, of course, is only one means by which the United States could legally confiscate data information. Another course of action which would permit the legal confiscation of data would be through the use of economic sanctions.

B. UN Security Council Sanctions Against the Storage Country: A Second Basis for Data Confiscation

Through the mechanism of economic sanctions, the United States could legally withhold another country's foreign data. This

69. *See Banco Nacional*, 658 F.2d at 875.

70. *Id.*

71. *See* Note, *supra* note 45, at 165. The United States Constitution states "[Nor] shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

In *Banco Nacional*, this view of compensation was followed. Banco Nacional sought to recover funds owed by Chase Manhattan and Chase sought to set off the amount expropriated from its branch banks located in Cuba. The Court of Appeals evaluated each of these claims and determined that in light of the Cuban economy Chase had received full compensation. *Banco Nacional*, 658 F.2d at 877-79. While *Banco Nacional* indicates that the United States does not always give complete compensation, it will give compensation which is adequate and fair in light of the present American economy. *Id.*

72. *See* Fishman, *supra* note, 59, at 185.

73. *See Banco Nacional*, 658 F.2d at 877-79.

74. *Id.*

75. *See* Fishman, *supra* note 59, at 185; *see also* Branscomb, *supra* note 43, at 1025.

could occur in two different ways. First, the UN could request assistance from the United States in placing economic sanctions on another country. The second alternative is that the United States could decide on its own to place economic sanctions on another country. In each instance, there would be different legal remedies available for the return of the withheld data.

1. The Use of Economic Sanctions by the UN

The use of international sanctions was first recognized in the 1919 League of Nations Covenant.[76] The League's use of sanctions was not considered to have been effective.[77] The UN, as heir to the League, has made substantial improvements in their use of economic sanctions.[78]

The UN may request that countries impose economic sanctions against other countries by invoking Articles 39 and 41 of Chapter VII of the UN Charter.[79] Article 39 provides: "The Security Council shall determine the existence of any breach of the peace or act of aggression and shall make recommendations . . . ."[80] Article 41 states:

> The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call on Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of . . . telegraphic . . . and other means of communication and the severance of diplomatic relations.[81]

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76. Note, *Economic Sanctions: An Effective Alternative to Military Coercion?*, 6 BROOKLYN J. INT'L L. 289, 291 (1980).

77. *Id.* at 292-93. Article 16 of the League of Nations Covenant provided that should a member State resort to war against any other member State, an economic boycott by all other member States could result. Procedurally there was no provision for enforcement of the boycott. The covenant only provided that the member States themselves should police against breaches to the international peace. This made the use of boycotts ineffective. Neff, *The Law of Economic Coercion: Lesson from the Past and Indications of the Future*, 20 J. TRANSNAT'L L. 431 (1981).

78. *See* Note, *supra* note 76, at 293. The reason the U.N. has improved in its use of economic sanctions stems from the new procedures being used. It is no longer the individual member States who are charged with the duty to guard the international community. Now these member States are only obliged "to serve the cause of peace if called upon by the Security Council to do so." Neff, *supra* note 77, at 431.

79. *See* Note, *supra* note 76, at 293; *see also* U.N. CHARTER arts. 39, 41.

80. U.N. CHARTER art. 39. Article 39 does not define what type of threat needs to exist before the U.N. may become involved. This has been intentionally omitted, in order to provide the flexibility needed to encompass a broad range of factual situations which may occur in the international community. *See* Note, *supra* note 76, at 293-94.

81. U.N. CHARTER art. 41. Article 41 gives the U.N. the authority to render economic

In the past, the UN has requested that the United States join in economic sanctions against other countries. For example, in 1966 the Security Council requested that member States of the UN stop importing certain Rhodesian commodities, and discontinue selling or shipping military supplies to Rhodesia.[82] In 1967 pursuant to the United Nations Participation Act, the United States joined in imposing sanctions against Rhodesia.[83]

The United States, following a request from the UN Security Council, could be requested to discontinue exporting or importing data information. A refusal to comply with such a UN request would violate the United States legal obligation as a member of the UN and the Security Council.[84] If a country threatened a breach of peace in the international community, any nation which belonged to the UN could be requested to render economic sanctions against that foreign country.[85] While this type of "information sanction" has never been placed upon any country, it appears from the wording of Article 41 that it could be done.

Article 41 states that the UN may request an interruption of "telegraphic" and "other means of communication."[86] In the event that data information were classified as a service, this section could be employed to place economic sanctions on a State and stop the transmission of data service.[87] Since the process of providing data

sanctions. *See* Note, *supra* note 76, at 296-300. The Security Council has requested member States to participate in economic sanctions on several occasions. First there was an attempt to sanction the Franco government in Spain. No sanctions were imposed because the committee investigating the issue found that no threat to international peace existed. In 1950 economic sanctions were placed upon North Korea as a result of the North Korean invasion of South Korea. This measure proved ineffective because Western nations had imposed economic sanctions on their own, without waiting for a request from the Security Council. The Soviet Union and other Eastern European countries refused to cooperate in an embargo against Portugal. This embargo was passed reluctantly by the Security Council. The last embargo that the Security Council imposed was against Rhodesia in 1966. *Id.*

82. Comment, *Economic Sanctions: The Lifting of Sanctions Against Zimbabwe-Rhodesia by the United States*, 21 HARV. INT'L L.J. 253 (1980). Britain imposed sanctions upon Rhodesia in 1965. The British claimed that Rhodesia, a British colony, made an unauthorized declaration of independence. The Security Council in 1966 passed a resolution to have member States participate in these economic sanctions against Rhodesia. *Id.* at 253-54.

83. *Id.* at 254. The United States, "pursuant to the United Nations Participation Act of 1945, also imposed sanctions against Rhodesia." *Id.* In 1968 the sanctions intensified and, along with the other prior imposed sanctions, prohibited the shipping of any commodity other than certain humanitarian and educational products. These sanctions continued for twelve years. *Id.* at 253.

84. *Id.* at 259.

85. *Id.* at 254.

86. U.N. CHARTER art. 41.

87. *Id.*

service to someone in a foreign country requires transmission of data through telecommunication or satellite channels it would fall within the scope of Article 41.[88]

If data information is designated as a commodity it would likewise fall within the purview of Article 41. This section further states that the UN Security Council may employ "complete or partial interruption of economic relations."[89] Data information, as an economic resource, would then be covered under the term "economic relations." This request by the UN would require that the United States cease all economic relations with the designated country. This would appear to include the transmission of data information.

Should such sanctions be placed upon a country, in an attempt by the Security Council to bring about international peace, the remedies available to the foreign country would be minimal.

Certainly if they are also a member of the UN, they may seek peaceful resolutions. Article 33 of the UN Charter states that parties to a dispute which may, "endanger the maintenance of international peace and security, shall first of all seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, [and] judicial settlement."[90] The thrust of this Article's application is that if the United States was withholding data information pursuant to a request of the UN, Article 33 would provide a remedy to recover the data information.[91]

While the foreign country's rights to the return of the confiscated data appear minimal, this is not as serious as it might first appear. Past use of UN imposed sanctions have been mostly unsuccessful.[92] Further, there has been considerable hesitation by the Security Council to employ such sanctions.[93] Consequently, it is more likely that the United States would decide on its own to place sanctions on the country.

2. *United States Use of Economic Sanctions*

The United States has in the past placed a variety of economic sanctions on other countries.[94] If a country did pose a threat to the

88. *Id.*

89. *See* U.N. CHARTER art. 41.

90. U.N. CHARTER art. 33.

91. *Id.*

92. *See* Note, *supra* note 76, at 293.

93. *Id.* at 298.

94. R. STEELE, THE IRAN CRISIS AND INTERNATIONAL LAW, PROCEEDINGS OF THE JOHN BASSETT MOORE SOCIETY OF INTERNATIONAL LAW: SYMPOSIUM ON IRAN 51 (1981).

United States, one method of countering that threat would be to impose economic sanctions. Additionally, the United States might place economic sanctions on a country to assist a third country that had been threatened in some way. In either case, the United States could decide to withhold data information from a country by placing economic sanctions on that country.

The legal rights of the sanctioned country would consist of the following. First, the country could invoke Article 33.[95] This would be similar to the remedy available to them if the UN had requested the sanction against the targeted country. However, in this instance, the targeted country might have a greater chance of success under Article 33. Under these circumstances, the UN would be a neutral party, thus more likely to be successful in directing the disputing parties toward a peaceful solution.

Should the use of Article 33's peaceful resolution provisions fail, or be ineffective, the target country might attempt to resort to the use of force. This may be possible because the resort to force may be legal under the UN Charter.[96]

Some authorities argue that the use of force by a country which is being economically sanctioned, is never permitted under the Charter.[97] Others assert that it depends on the severity of the economic sanctions.[98] The confusion revolves around two articles of the UN Charter.[99]

Article 51 reads:

> Nothing in the present Chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.[100]

For some this Article appears to imply that a State could never use force in the absence of an armed attack upon the country.[101] The retention of data information would not be considered an armed attack; although some argue that the words "armed attack" should not

95. *See* U.N. CHARTER art. 33.

96. Zedalis, *Some Thoughts on the United Nations Charter and the Use of Military Force Against Economic Coercion*, 17 TULSA L.J. 487, 488-89 (1982).

97. *Id.* at 489.

98. *Id.*

99. *Id.* at 491.

100. U.N. CHARTER art. 51.

101. *See* Note, *supra* note 76, at 493.

be interpreted as meaning only a military confrontation.[102] They argue that an armed attack should refer to any extreme economic coercion used by one State against another.[103] If the United States retained all vital economic data belonging to a State, this might fall within the confines of extreme economic coercion. Those who advocate this liberal definition would then argue that withholding data is a form of extreme economic coercion and should be viewed as an armed attack.

Article 51, however, only provides for the right of self defense against armed attacks. In order to use this right, it must be shown that an infraction of the Charter has been committed.[104] It is possible that the withholding of data information could be viewed as an infraction of Article 2, paragraph 4 of the UN Charter.

Article 2, paragraph 4 states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[105]

If the United States withholding of data was deemed to be a violation of this portion of the Charter, this would give rise to the right to employ Article 51 to defend against this unauthorized use of extreme economic force.[106] The argument that would be made to justify the use of force would take the following course.

First, the withholding of a foreign State's data violates Article 2 of the UN Charter. Under a broad interpretation this extreme economic coercion could be considered an armed attack. Consequently, the targeted country could employ Article 51 and defend itself against this unjustifiable attack. Through self defense, the country could then attempt to use force to recover the confiscated data.[107]

Since the use of economic sanctions has only been employed in limited circumstances it appears more likely that the United States, faced with some perceived threat from another country, will use other available legal remedies. The United States would likely at-

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102. *See* Zedalis, *supra* note 96, at 491.

103. *Id.* at 492.

104. *Id.* at 491.

105. U.N. CHARTER art. 2, para. 4.

106. *Id.*

107. *See* Note, *supra* note 76, at 298, 300. Of the few economic sanctions that have been employed by the U.N., none have been analyzed as extreme economic coercion, which would allow the sanctioned State to resort to force. The 14 year sanctions against Rhodesia would be a good example of intense economic coercion. However, it has been expressed that to attempt this type of analysis is complex, and perhaps even futile. *See* Zedalis, *supra* note 96, at 489.

tempt to retain that country's data by invoking the International Emergency Economic Powers Act (IEEPA).

C. *International Emergency Economic Powers Act: A Third Means of Blocking Data Information Flow*

The third means by which the United States could legally block the flow of data information belonging to foreign parties is the International Emergency Economic Powers Act (IEEPA).[108] A reading of sections 1701 and 1702 of Title 50 provides the essence of the Act's powers.

Section 1702 states that:

> [T]he President may under such regulation as he may prescribe . . . prohibit any acquisition, holding . . . importation or exportation . . . with respect to or transactions involving, any property in which any foreign country or a national has any interest . . . [that is] subject to the jurisdiction of the United States.[109]

Section 1701 states:

> [Section 1702] may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or in substantial part outside the United States, the national security, foreign policy, or economy of the United States if the President declares a national emergency with respect to such threat.[110]

The purpose of IEEPA is to allow the government to temporarily block assets belonging to another country during a *declared emergency*. In contrast to expropriation, under IEEPA, the government cannot permanently keep the assets. At some point, the assets must be returned.[111]

IEEPA has only been used once for a declared emergency; it was employed by President Carter to block Iranian funds following the 1979 seizure of the United States embassy in Teheran.[112] The

108. STEELE, *supra* note 94, at 51. The International Emergency Economic Powers Act [hereinafter cited as IEEPA] was enacted by Congress in 1977. It actually dates back to 1917. At that time, it was called The Trading with the Enemy Act. The difference, relevant to this Comment, is that The Trading with the Enemy Act could only be employed during a time of war; whereas IEEPA can be used during any national emergency. If IEEPA could only be used during a time of war, its employment to confiscate data information could only occur during declared wars. *Id.* at 51-53.

109. 50 U.S.C. § 1702 (1979).

110. 50 U.S.C. § 1701 (1979).

111. *See* STEELE, *supra* note 94, at 51.

112. IEEPA was employed by President Carter, pursuant to Executive Order No. 12,170, 44 Fed. Reg. 65,729 (1979) to block Iranian funds. *Id.* at 51. All of the assets were not returned with the hostage release. After much negotiation, it was determined that the remaining "non-bank claims against Iran and by Iran against the United States, would be resolved

UN failed to use sections 39 and 41 of the UN Charter to sanction Iran[113] but the United States used IEEPA to place its own embargo on exports and imports from Iran.[114]

In order to invoke the principles of IEEPA and withhold information, the threat to the United States must be *unusual* or *extraordinary*.[115] The statute, however, does not provide any time constraints as to how long the data information can be legally retained.[116] Thus, it is important to see what legal remedies exist for the affected State.

The legal remedies to an invocation of IEEPA are unclear.[117] A look at how Iran secured the return of their blocked assets after the United States employed IEEPA, may shed some light on the remedies available. Because fifty-one of the fifty-three Americans held were United States embassy personnel they had a privileged status under the Vienna Convention and Iran was obligated to allow them to depart.[118] The fact that Iran did not allow them to leave meant that Iran had violated fundamental tenets of conventional customary international law.[119] For this reason, Iran was not able to rely on international law or assistance from the UN.[120] Another act or aggression by a foreign State against the United States may result in a similar limit of legal remedies. If the State has not violated international law, then it could seek UN assistance in retrieving the withheld data.[121]

The first legal remedy became available to Iran with the recovery of certain bank funds that took place simultaneously with the return of the hostages.[122] The second legal remedy occurred through the help of the Popular Republic of Algeria, which acted as intermediary for negotiations between Iran and the United States.[123] Both countries agreed to set up an International Arbitral Tribunal which was to decide the remaining claims of Iran against the United States

through international arbitration." Amin, *The Settlement of Iran-United States Disputes*, 1982 J. BUS. L. 248.

113. *See supra* notes 76-81 and accompanying text.

114. *See* STEELE, *supra* note 94, at 53.

115. *Id.* at 90.

116. 50 U.S.C. § 1702 (1979).

117. *Id.*

118. Williams, *International Law and the American Hostages in Iran*, 1980 ARMY LAWYER (Dep't of the Army Pamphlet 27-50-86) 30-32.

119. *Id.* at 31.

120. *Id.* at 32.

121. *Id.*

122. Amin, *supra* note 112, at 248.

123. *Id.* at 249.

as well as the claims of nationals of the United States against Iran.[124]

The remedies available to Iran existed primarily because of the superior bargaining position it occupied based upon the American lives at stake. The Iranian example may be contrasted to a hypothetical situation, where the IEEPA is used to justify data confiscation. In this situation, the following points may be raised. First, the legal remedies available depend upon the nature of the threat. In the Iranian crisis, the bulk of the Iranian assets were exchanged when the Americans were freed and the remainder of the assets were settled later.[125] Clearly, without American lives at stake, the incentive to return the foreign data in whole or in part might never occur. The less powerful country then may have more to lose because it has less to offer at the bargaining table.

Second, the fact that Iran was supplying oil to the United States gave an added incentive to arbitrate and return any remaining Iranian funds more promptly than might have occurred otherwise.[126] In a data retention situation, the incentive to arbitrate will probably be strongest where significant economic ties exist between the foreign country and the United States. In comparison, if the nation is underdeveloped or one with which the United States does not have strong economic ties, the United States could conceivably be much slower in returning the confiscated data information.

Another factor which would influence the speed with which the United States returns confiscated data is whether a treaty exists with that particular country. In many of the treaties that the United States has signed, there are provisions which require fair treatment of the other nation. It would be a breach of the foreign State's legal rights if the United States refused to accord equitable treatment to any given signatory. The United States has signed a number of bilateral friendship treaties that seem particularly conducive to protecting a party's legal rights in the event of data confiscation by the United States.[127]

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124. *Id.*

125. *See* Amin, *supra* note 112, at 249. Iran received $2.4 billion in assets returned from the Federal Reserve in addition to $500 million from overseas deposits. *Id.*

126. *See* STEELE, *supra* note 94, at 51.

127. The United States has signed friendship treaties with a number of countries, for example, *see* Memorandum of Understanding Concerning Consultations on Matters of Mutual Interest, Feb. 21, 1976, United States-Brazil, 27 U.S.T. 1034, T.I.A.S. No. 8240; Principles of Relations and Cooperation, June 14, 1974, United States-Egypt, 25 U.S.T. 2359, T.I.A.S. No. 7913; and Treaty of General Relations, July 4, 1946, United States-Philippines, 61 Stat. 1174, T.I.A.S. No. 1568, 11 Bevans 3. For a more complete listing of the variety of friendship treaties see 5 P. ROHN, WORLD TREATY INDEX 318-21 (2d ed. 1983).

III. TREATIES OF FRIENDSHIP, COMMERCE AND NAVIGATION

The treaties of friendship, commerce and navigation are bilateral treaties between the United States and any of a number of other countries. These treaties consist of general provisions which are guidelines of fairness with respect to treatment of property.[128] They prohibit "unreasonable or discriminatory measures that would impair legally acquired rights or interests within the respective territories."[129] The goal of the friendship treaties is to establish a "framework within which mutually beneficial economic relations can take place."[130] One such friendship treaty was signed by the United States and the Republic of Korea at Seoul on November 28, 1956.[131] This treaty includes several provisions which could be adapted in formulating a treaty between the United States and another country storing data information in a United States central storage facility.[132]

Article I is a general provision which sets the stage for equitable economic relations between the two countries.[133] It states that "each party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other party." By use of the term "equitable," customary international law could be used to show that a particular State has overstepped the boundary of equitable treatment.[134]

This important provision raises the question of what the customary international law is with respect to another country's assets located within a host country. Customary law protects foreign assets which are located within a host country.[135] Without these protections, it is doubtful that there would be any foreign ownership. As it is, citizens of many nations own assets located in other countries.[136] This occurs because governments have not made it a habit to unjustifiably confiscate foreign owned assets.[137]

Article 1 of the Treaty between the United States and Korea provides that "equitable treatment should be accorded to the [for-

128. *See International Data Flow: Hearing Before a Subcommittee, supra* note 54, at 268.

129. *Id.*

130. *Id.*

131. Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States—Republic of Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947, 301 U.N.T.S. 304 [hereinafter cited as Treaty of Friendship].

132. *See International Data Flow: Hearing Before a Subcommittee, supra* note 54, at 268.

133. *See* Treaty of Friendship, *supra* note 131, at art. I.

134. G. SCHWARZENBERGER, THE DYNAMICS OF INTERNATIONAL LAW 7 (1976).

135. *Id.* at 1.

136. *See* Sauvant, *supra* note 36, at 362.

137. G. UNKIN, THEORY OF INTERNATIONAL LAW 114 (1974).

eign] persons, property, . . . and other interests of nationals and companies of the other Party."[138] The Treaty does not define what the parties mean by equitable treatment, but a resort to customary law seems most appropriate.[139] Therefore, under customary law, the data information if it were being afforded equitable treatment, could not be unjustifiably confiscated.[140]

Article VI addresses what would happen if the United States attempted to expropriate the data information. It states:

> Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effective realizable form and shall represent the full equivalent of the property taken.[141]

This provision establishes that the amount of compensation to be paid for expropriated property should be "equivalent value of the property taken." By international standards this is a very high rate.

Article VI goes on to state that this value is to be established either at the time the property is expropriated, or prior to that time. With data information it will be difficult to establish a value; countries might easily disagree as to the data's actual worth.[142] Therefore, the value, or method for deciding the value, should be agreed upon prior to the signing of any agreement or treaty. This will avoid later confusion and misunderstanding.

Article V discusses what action can be taken if a dispute between the two countries occurs. It states "either party shall be accorded national treatment and most favored treatment with respect to the courts of justice . . . in pursuit and defense of their rights."[143] The fact that a country might be concerned about being forced to settle its dispute in an American court is understandable.[144] Therefore, Article V may be able to relieve that fear because it permits resort to arbitration to be included as part of the contract.[145] Further the Article states that the arbitration provision "shall not be deemed

138. *See* Treaty of Friendship, *supra* note 131, at art. I.

139. *See* SCHWARZENBERGER, *supra* note 134, at 7.

140. *See supra* notes 48-83 and accompanying text for a discussion of expropriation. Expropriation is the legal means for a country to take another country's property.

141. *See* Treaty of Friendship, *supra* note 131, at art. VI, para. 4.

142. *See* Fishman, *supra* note 59, at 185.

143. *See* Treaty of Friendship, *supra* note 131, at art. V, para. 1.

144. *See supra* note 9. Countries fearing United States dominance over the data information issue will not be likely to want American courts to resolve the dispute.

145. *See* Treaty of Friendship, *supra* note 131, at art. V, para. 2.

unenforceable within the territories of such other party, merely on the grounds that the place designated for the arbitration proceedings is outside such territories."[146]

In the event that the country is worried about the application of United States law, the treaty should provide a place for arbitration. If this is done, and if that country has signed a friendship treaty similar to this one, then it would have the assurance that the place of arbitration designated would have to be honored.[147]

Article VI could also be helpful in assuring equitable treatment among all the countries who are storing data information in a United States storage base. This section states that "products of either party shall be accorded, within the territories of the other party, national treatment and most-favored-nation treatment in all matters affecting storage and use."[148] This section would very easily be applicable to the use of central data base storage facilities. Thus, if data information is classified as a product, as some would advocate, then under this Article it would receive most favored nation treatment.[149] It should be noted, however, that despite the fact that the term "most favored nation" treatment gives the impression of priority treatment, in reality, it means that a party to this treaty will merely be treated "upon terms no less favorable than the treatment accorded . . . any third country."[150] Therefore, it is only a guarantee of equality of treatment, not a guarantee against retaining data information, or giving it any special protections.

The only Article that may create a problem is Article VII.[151] This Article states that "each party reserves the right to limit the extent to which aliens may establish, acquire interest in, or carry on enterprises engaged within its territories in transport communication."[152] This Article does not provide a definition of what is to be included within the term "transport communication."[153] One question then is whether it could apply to the communication of data from the United States to the foreign country. If it is applicable to data information, then there are two possible meanings. On the one hand, transport limits of data information must be expressed prior to

146. *Id.*
147. *Id.*
148. *See* Treaty of Friendship, *supra* note 131, at art. VI, para. 5.
149. *See* Kesler, *supra* note 1, at 194; *see also* Sauvant, *supra* note 36, at 360.
150. *See* Treaty of Friendship, *supra* note 131, at art. XXII, para. 2.
151. *See International Data Flow: Hearing Before a Subcommittee*, *supra* note 54, at 268.
152. *See* Treaty of Friendship, *supra* note 131, at art. VII, para. 2.
153. *Id.*

the foreign country's initial use of the central data banks.[154] In the alternative, it might imply that at any time it so chooses the United States can and will regulate data transportation.[155] If the latter interpretation is used, this would mean that a foreign country could expect an interruption of data information communication, without any limits. However, if the former interpretation is used, it would mean that the potential limits must be addressed prior to or in the initial agreement between the foreign country and the United States. This is clearly the preferential position. Because computer data transportation is of recent origin, it would be advisable to have a clear understanding by the parties, as to the actual interpretation to be given to Article VII.

The Treaty between South Korea and the United States appears to cover some of the areas of concern that a country will have in order to be satisfied that their data information will be secure within the United States. There are, however, other areas that the Treaty does not resolve, for example, the worth of data and whether data should be classified as a service or a commodity. Further, it is not enough that data information be safe within the United States, but it must be safe anywhere in the international community.

IV. PROPOSAL

Two factors suggest that the United States should play a more active role in ensuring that data information is safe anywhere in the international community. First, a recent report showed that half of the United States labor force and gross national product is information based.[156] Further, the vast bulk of automated data bases are housed in the United States.[157] The United States has a large economic investment in the data information explosion. It is important that this investment be adequately protected, and it can only be protected if all parties have a clear understanding of their rights and liabilities.[158]

In light of the dominant position of the United States, it is interesting to note that the United States is behind other countries in attempting to regulate and solve the problems created by this new

154. *Id.*

155. *Id.*

156. *See* Fishman, *supra* note 4, at 2. This figure is based on U.S. Commerce Department statistics and qualified in the sense that it refers to "the broadest generic category of goods and services, and not to narrow, specific bits of informational data." *Id.*

157. *Id.*

158. *See supra* notes 47-83, 96-109, 119-30, 131-48 and accompanying text.

information explosion.[159] Many European nations have State controlled communication monopolies which set up policies for international data flow concerns.[160] Their laws provide for data inspection boards which have power to control what information can leave the country.[161] In contrast, the United States has no central policy-making body, nor has Congress any current plans to enact one.[162]

The United States Congress should be thoroughly appraised of data information issues, and be actively enacting laws which are applicable in this area. There are several reasons why Congress has failed to enact any strong policy in the data information area.

First, there is a strong lack of perception of the problems in this area. In a 1977 press conference, Henry Geller, Assistant Secretary of Commerce for Communications and Information, stated that European laws were basically only concerned with privacy issues of data information.[163] This view is an over-simplification of what is actually occurring in the various countries. Many countries including Brazil, Canada, France, Japan, and Sweden are drafting policies which go beyond the privacy issue.[164] Further, Belgium, the Netherlands, and Spain have bills pending which concern the regulation of data banks.[165]

If the United States intends to retain a dominant position in the data information area, it might be jeopardized by these new laws. If a country adopts controls which benefit only itself and which place undue restrictions on the United States ability to transmit or store their data information, it could prove economically disastrous.[166]

A second reason why the United States is reluctant to set policy in this area stems from its common law background of addressing legal concerns.[167] The United States is adverse to drafting legislation, "until there is a proven need for statutory rules."[168] Therefore, it is natural for it to delay as long as possible, until a major concern

159. *See* Sauvant, *supra* note 36, at 370. A few countries have begun to design policies to deal with data issues that concern more than protection of an individual's personal privacy rights. The United States is not among these countries. *Id.*

160. *See* Kesler, *supra* note 1, at 193.

161. *Id.*

162. *Id.*

163. Bigelow, *Transborder Data Flow Barriers*, 20 JURIMETRICS J. 12-13 (1979).

164. *See* McGuire, *supra* note 41, at 370.

165. *See* Bigelow, *supra* note 163, at 9.

166. *Id.*

167. Poloman, *Transborder Data Flows: The International Legal Framework*, 3 COMPUTER L.J. 551, 552 (1981-1982).

168. *Id.* at 553.

arises.[169]

The civil law countries, by contrast, take the position that laws should be enacted to anticipate a possible legal concern before it arises.[170] They do not wait to solve the problems after the legal issue has arisen in a court of law. They view the United States lack of legislation as procrastination, or worse, as an attempt on the part of the United States to hide sinister political motives.[171] In light of this different reaction to enacting laws, the United States Congress needs to actively seek out the possible problems, which are developing among the countries and make proposals to the countries involved. Otherwise, this lack of Congressional problem solving could force other countries to assume a lack of commitment by the United States to protect the respective country's data, which is being stored in or transmitted from central data banks within the United States. If this perception occurs, a country might decide that its data is not safe, and refuse to become involved with the United States.

One step the United States has taken to combat what appears to be a lack of concern on its part is to propose certain guidelines on the data information issue, to the Organization for Economic Cooperation and Development (OECD).[172] This twenty-four member organization is well suited to deal with international data information concerns.[173] This is clearly not sufficient involvement because the issues are extremely complex and require much greater participation.

One way to ensure that the United States will take a much more active role is to have an Assistant Secretary of State for Information and Telecommunications Policy.[174] This office could set out to study what subject area is included in the new information explosion, and then make proposals to establish coherent international information and communication laws.[175] If this were done, unresolved issues such as the value that should be placed upon data,[176] how data should be classified,[177] the legal rights of the countries relying on transmission and storage from United States central data banks,[178]

169. *Id.*
170. *Id.* at 552.
171. *Id.* at 553.
172. *See* Fishman, *supra* note 59, at 183.
173. *Id.* The guidelines proposed to OECD are mainly concerned with privacy issues. There is a need to focus on the economic issues of TBDF. *Id.*
174. *Id.* at 189.
175. *Id.*
176. *See* Note, *supra* note 45, at 185.
177. *See supra* notes 58-62 and accompanying text.
178. *See supra* notes 47-83, 96-109, 131-48 and accompanying text.

and other important concerns resulting from the information explosion could be addressed in a timely manner.

One action that the United States could easily implement in the interim (to immediately demonstrate to other countries its concern) would be to get more involved in a number of organizations which are actively pursuing answers to the data information issues.[179] There are a number of such organizations, including the Intergovernmental Bureau for Information,[180] the Council of Europe[181] and the Organization of Economic Cooperation and Development.[182]

It is imperative that major efforts be made to research the legal issues involved in the complex area of data base information. Only through a united international effort can this complex area of data information be fully explored.[183] Without a joint effort, controls instituted independently by each country could reverse the process of increasing information exchanges between countries and put us back in history to the limited informational exchanges of previous eras.

CONCLUSION

The legal problems which have arisen as a result of the information explosion will, by necessity, have to be addressed on an international level. The fact that in a split-second data can travel from the United States to another country, so that intervening distances are irrelevant, makes it evident that the concerns involved are not local. Thus, careful international planning is necessary to avoid the chaos that would result from haphazard enactment of local laws concerned with protecting local interest only.

This Comment has discussed three courses of action which the United States could legally use to confiscate or temporarily retain

179. *See* Novotny, *supra* note 9, at 153.

180. *See* Branscomb, *supra* note 43, at 1040. The Intergovernmental Bureau for Information consists of 37 member nations. This organization is active in formulating policies which will increase the information flowing between developed and developing nations.

181. *See* Bigelow, *supra* note 163, at 11. The Council of Europe is attempting to draft a treaty which would "dispense with controls in information transfers between signatories." The treaty would have a common core, but would allow for signatories to accept or reject certain provisions. This would allow for signatory flexibility.

182. *See* Fishman, *supra* note 59, at 180. The Organization of Economic Cooperation and Development has been involved in an international effort to raise the issues involved in TBDF. This organization held an international TBDF Conference in Vienna (1977). The meeting was attended by 300 individuals, from government, private individual and intergovernmental organizations. *See* Bigelow, *supra* note 163, at 11.

183. *See* Novotny, *supra* note 9, at 153.

data information from a foreign country: expropriation,[184] economic sanctions[185] and employment of IEEPA.[186] This led to the conclusion that the legal rights of the foreign country are often lacking impact. This is because there is no clear definition of how data information is to be classified. If it is property similar to a commodity, one set of legal rights would apply. On the other hand, if it is a service, a different set of legal rights would be applicable. Further, the issue of what value should be placed upon data information is unresolved, making compensation for loss difficult at best and more often impossible.

This led to a determination that there is a gap in international law, which needs to be addressed in order to ensure that data information belonging to a foreign country is protected in the host country. While the United States has friendship treaties with many countries, these treaties are only a starting point to bridging some of those legal gaps.[187] First, it will be necessary to have a clear understanding of what the term data information comprises, in order to know which parts of the treaty are applicable. Also, it is important to recognize that data information is an international concern, not something that two countries can effectively control between themselves. Therefore it is important to extend the friendship treaties to a multilateral treaty where a majority of the countries can participate.

Since the United States is in a lead position in the data information revolution it is imperative to protect that interest by taking a much more active part in resolving the legal issues. Currently the United States has not elected to do so. While it is understandable that the issues are complex, and no simple solutions exist, this should not persuade it against a greater attempt to assist the international community in seeking solutions.

There are presently many international organizations which are studying the problem. While guidelines have been established, they are ineffective because countries are not committed to guidelines. Even if today's answers may be obsolete in a few years, it is necessary to set up multilateral treaties that will work to solve current

184. *See supra* notes 48-83 and accompanying text.
185. *See supra* notes 84-111 and accompanying text.
186. *See supra* notes 112-29 and accompanying text.
187. *See supra* notes 131-48 and accompanying text.

problems with the understanding that, as issues change, amendments will be adopted to fit those new concerns.

Sherry M. Horgan