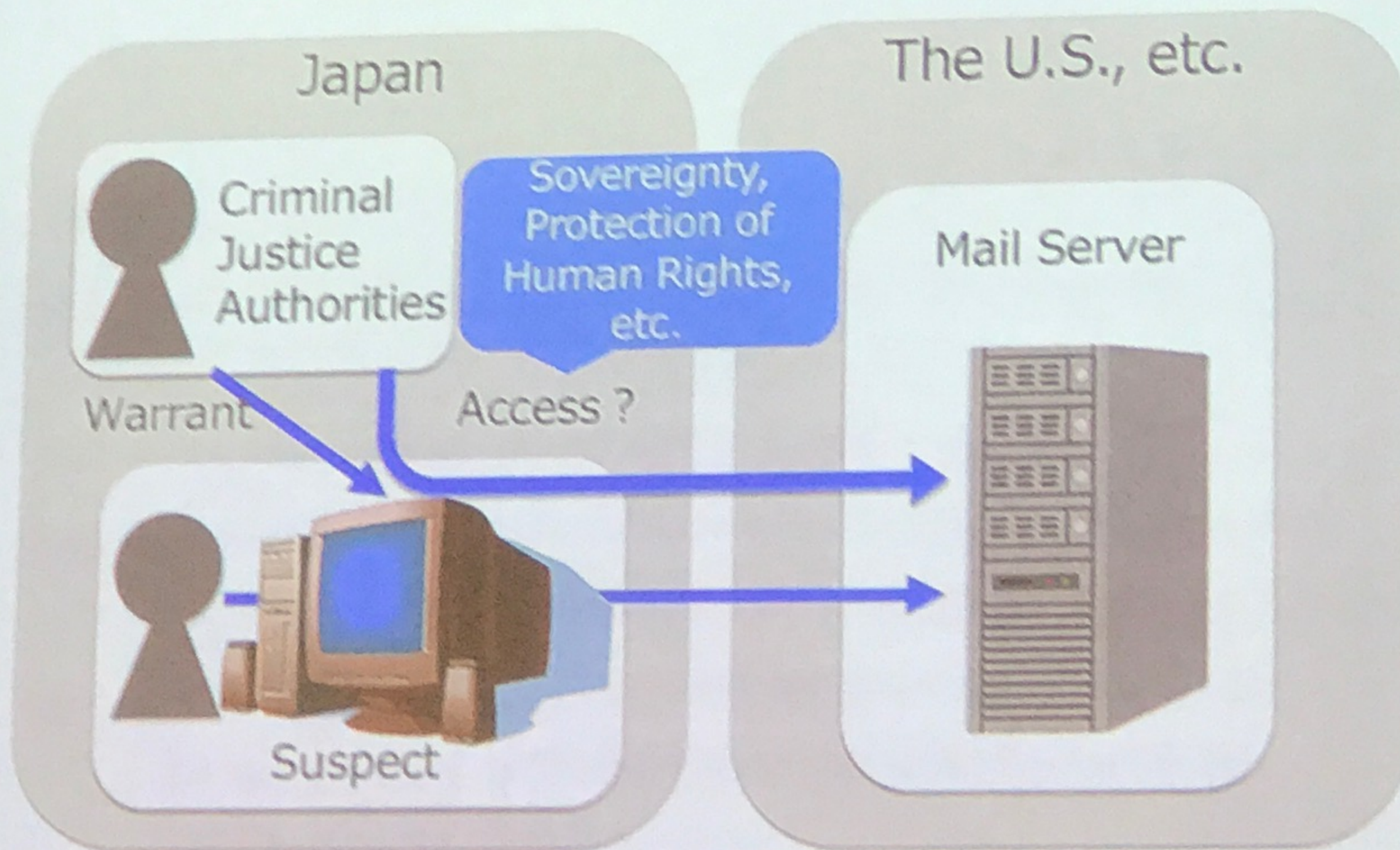


September 20, 2018
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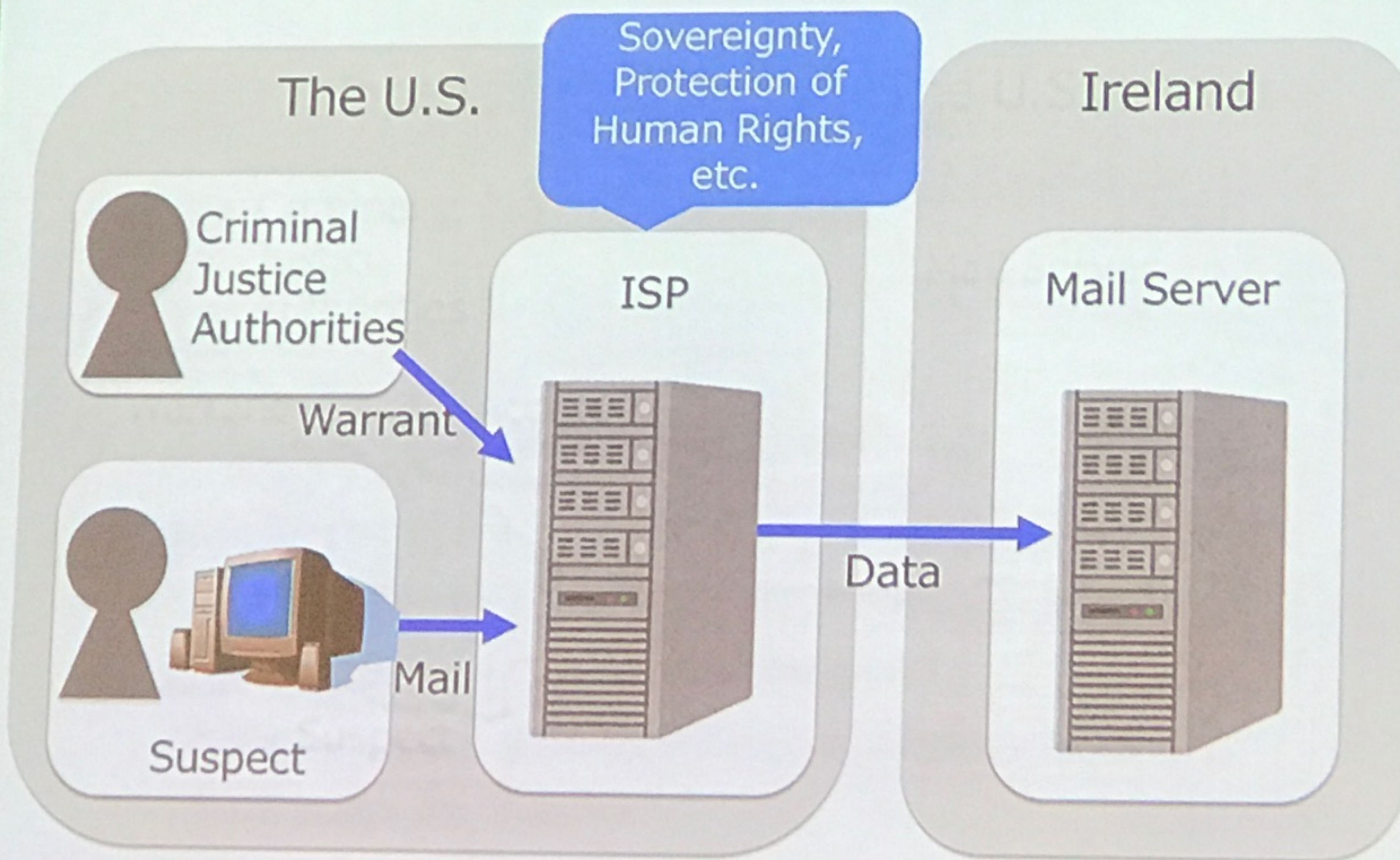
1. Criminal Investigation
 - 1-1. Necessity for Overseas Search
 - 1-2. Yokohama Case in Japan
 - 1-3. Microsoft Case in the U.S.
2. The CLOUD Act
 - 2-1. Provisions
 - 2-2. Impact of the Act
 - 2-3. Opinions of the CLOUD Act
3. Discussion
 - 3-1. Sovereignty
 - 3-2. Problems in Each Scenario
 - 3-3. Conclusion

1-2. Yokohama Case in Japan



Tokyo High Court, December 7, 2016

1-3. Microsoft Case in the U.S.



Microsoft Corp. v. United States, 829 F.3d 197 (2016)
In re: Search Warrant 232 F.Supp.3d 708 (2017)

2-1. Provisions

- Microsoft case made a defect in legal system clear
- March 23, 2018: Congress passes the Clarifying Lawful Overseas Use of Data Act (CLOUD Act)

Section	Rule
§2713 Required Preservation and Disclosure of Communications and Records	SCA provisions apply to <u>data located within or outside of the U. S.</u> Thus, the U.S. LEA can require preservation and disclosure of data outside the United States based on the SCA warrant.
§2703(h) Comity Analysis and Disclosure of Information Regarding Legal Process Seeking Contents of Wire or Electronic Communication	If providers (even in the U.S.) receive an SCA warrant on data located in a country under an executive agreement that <u>may violate that country's law</u> , they have 14 days to <u>petition a court to modify or quash the warrant.</u>

2-2. Impact of the Act

1. American criminal justice authorities can compel providers in the United States or in foreign countries to preserve and disclose overseas data.
2. Foreign criminal justice authorities, under an executive agreement, can access data stored inside the United States more quickly than before.

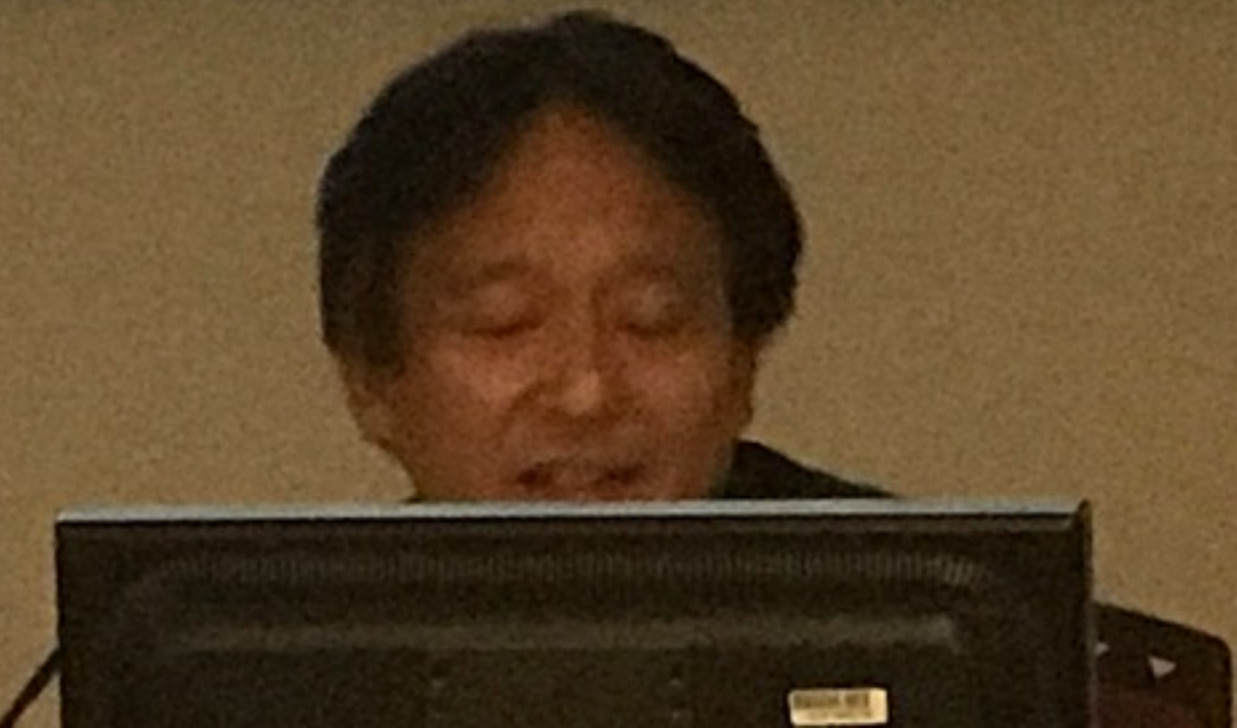
Providers \ Data	In the U.S.		In Foreign Countries	
	Before	After	Before	After
In the U.S.	○	○	X	○
In Foreign Countries	X	○	X	○

2-3. Opinions on the CLOUD Act

Organization	Opinion	Comment
Microsoft	Agree	The CLOUD Act gives cloud service providers added and direct legal rights to protect privacy under international agreements.
Electronic Privacy Information Center, EPIC	Disagree	The United States police could obtain Americans' data without complying with the Fourth Amendment.
The American Civil Liberties Union Foundation, ACLU	Disagree	Congress can object to the agreement, but need not formally approve the agreement. The agreement is also not subject to review by any court.
The Electronic Frontier Foundation, EFF	Disagree	The CLOUD Act allows foreign governments to obtain information that could pertain to individuals in the U.S. without meeting constitutional standards.

3-1. Sovereignty

- "Independence in regard to a portion of the globe" giving "the right to exercise therein, to the exclusion of any other State, the function of a State." (United Nations, Island of Palmas arbitral award (1928), 838)
- When the human rights of people or entities in a given State's territory are infringed by another State, the independence of the former State is also often infringed.



Article 32 of the Cybercrime Convention

- In part, this was due to a lack of concrete experience with such situations to date; and, in part, this was due to an understanding that the proper solution often turned on the precise circumstances of the individual case, thereby making it difficult to formulate general rules.
- They agreed not to regulate other situations until such time as further experience has been gathered and further discussions may be held in light thereof. In this regard, Article 39, paragraph 3 provides that **other situations are neither authorized, nor precluded.**

Council of Europe (2001), Convention on Cybercrime - Explanatory Report - [2001] COETSER 8.

3-2. Problems in Each Scenario

Interests to be Protected Type of Investigation	Sovereignty	Rights of Data Subject	Rights of Data Controller
Compulsory Investigations of Data Subjects	Infringement of target state's sovereignty	Search or seizure without due process of law	No infringement of any interest
Compulsory Investigations of Data Controllers	Infringement of target state's sovereignty	Search or seizure without due process of law	Search or seizure without due process of law
Request for Cooperation to Data Controllers	Controversial	Invasion of privacy and data protection	No infringement of any interest



3-3. Conclusion

1. Investigations on data subjects:

- Authorities should be allowed to investigate with statutory procedures in their own territory without any specific allocation of authority under international law.

2. Investigations on data controllers:

- Authorities should not be allowed to investigate without the consent of the State where the data are stored or a new and specific allocation of authority under international law.
- The allocation should include the requirement for, at least, ex-post notification to the sovereign State where the data are located.