

The *Aérospatiale* Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It

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“Blocking statutes” are foreign laws that prohibit the transfer of information to the United States for purposes of litigation. Though many countries have adopted blocking statutes in recent decades, these statutes have met an ignoble fate in the U.S. courts. Today, U.S. judges routinely order foreign litigants to produce discovery in violation of blocking statutes, thereby subjecting them to a Hobson’s choice: flout a U.S. court order and face sanctions, or violate foreign law and risk civil and criminal penalties. In the past decade, U.S. court-ordered blocking-statute violations have increased by 2,500 percent.

This Note presents an empirical analysis of the blocking-stature conflict and provides fresh guidance for foreign states. My study of fifty-six relevant cases reveals that, in determining whether to order litigants to violate blocking statutes, U.S. courts often consider whether foreign states actively enforce them. In at least twenty-three opinions, U.S. courts have found that, because the blocking statute lacked an “enforcement history,” the prospect of prosecution for violating the relevant statute was “slight and speculative.” In all twenty-three opinions, the courts went on to order violations of foreign law. By contrast, in the three opinions where courts found that foreign states actively enforced blocking statutes, courts refused to order their violation.

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U.S. courts have been sending a message: blocking statutes will not receive deference unless foreign states enforce them. Foreign states could respond by signaling renewed interest in their blocking statutes and penalizing parties that violate those statutes in response to U.S. court orders. If past decisions are any guide, just a few highly publicized prosecutions would have an appreciable effect on U.S. judges' reasoning. Blocking statutes might thereby be transformed, in short order, from "paper tigers" to blockbusters.

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INTRODUCTION

At the height of the telecom frenzy of the late 1990s, Motorola fell victim to one of the most costly financial frauds in its industry's history.¹ Eager to enter the emerging Turkish market, the company loaned more than \$2 billion to Telsim, a Turkish telecommunications company owned in large part by one family: the Uzans.² But within a few years, Motorola's relationship with Telsim began to sour—and by the early 2000s Telsim was in default.³ Motorola soon learned that the Uzans had siphoned off Telsim's assets and were planning to sell the company for scrap.⁴

Motorola sued and eventually won a \$3 billion judgment against the Uzans in the Southern District of New York.⁵ But by the time that judgment was rendered, several key members of the family had become international fugitives.⁶ Motorola's lawyers spent most of the next decade locked in a global paper chase with the Uzans, trying to cut their way through a maze of shell companies to reach the family's assets.⁷ In 2012, after nine years of failure, the

1. See Matthew Swibel, *Dial 'D' For Dummies*, FORBES (Mar. 18, 2002), <https://www.forbes.com/forbes/2002/0318/086.html> [<https://perma.cc/36BL-GZ9Z>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Motorola Credit Corp. v. Uzan*, 274 F. Supp. 2d 481 (S.D.N.Y. 2003), *vacated in part on other grounds*, 388 F.3d 39 (2d Cir. 2004).

6. *Motorola Credit Corp v. Uzan*, 73 F. Supp. 3d 397, 398 (S.D.N.Y. 2014).

7. *Id.*

Southern District permitted Motorola to serve ex parte discovery requests on several international banks in an attempt to gather information about the Uzans' assets and whereabouts.⁸

Three of the banks—located in France, the United Arab Emirates, and Jordan—resisted Motorola's discovery requests. Each argued that its country's bank secrecy laws prevented it from revealing information about the Uzans for purposes of U.S. litigation.⁹ Some could face both civil and criminal penalties were they to comply.¹⁰ The court rejected the banks' arguments and ordered production of the requested information under threat of sanction.¹¹ It did so in full recognition that the production it ordered violated the letter of French, Emirati, and Jordanian law, respectively.¹²

It is worth emphasizing just what happened in *Uzan*. The Southern District of New York ordered three banks—nonparties to the litigation before it—to *violate their own countries' laws*.¹³ Those banks faced a choice: refuse to comply with the court's order and face sanctions, or violate foreign law and risk criminal and civil penalties. Thirty years ago, the court's order in *Uzan* would have been truly extraordinary. In fact, until 1987, it was unclear whether U.S. courts could *ever* order violations of foreign law.¹⁴ But today, in the wake of the Supreme Court's decision in *Société Nationale Industrielle Aérospatiale v. U.S. District Court*,¹⁵ decisions like *Uzan* have become commonplace. In the past decade, U.S. courts have ordered foreign parties to break their own countries' laws with increasing frequency.¹⁶ These orders represent an unprecedented development in international law.¹⁷

Almost all of the U.S. court-ordered violations of foreign law contravene foreign 'blocking statutes.'¹⁸ Like the French, Emirati, and Jordanian bank

8. *Id.* at 398–99.

9. *See id.* at 401–02. As discussed below, the court allowed Motorola to serve a discovery request on a Swiss bank in addition to those listed here. Only the French, Emirati, and Jordanian banks are relevant for present purposes.

10. *Id.*

11. *Id.* at 405.

12. *Id.*

13. *Id.*

14. *See In re Sealed Case*, 825 F.2d 494, 497 (D.C. Cir. 1987) (“The federal courts have disagreed about whether a court may order a person to take specific actions on the soil of a foreign sovereign in violation of its laws and about what sanctions the court may levy against a person who refuses to comply with such an order.”).

15. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987).

16. *See* Geoffrey Sant, *Court-Ordered Law Breaking*, 81 BROOK. L. REV. 181, 181 (2015) (“Perhaps the strangest legal phenomenon of the past decade is the extraordinary surge of U.S. courts ordering individuals and companies to violate foreign law.”).

17. *Id.*

18. *Id.*; *see also* AM. BAR ASS'N, PROPOSED RESOLUTION AND REPORT #103, at 3 (2012), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_103.authcheckdam.doc [<https://perma.cc/3Z4E-FTEU>] (identifying blocking-statute conflicts as the primary source of court-ordered law breaking).

secrecy laws at issue in *Uzan*, blocking statutes prohibit the transmission of documents or other evidence located in the enacting country to other countries for purposes of foreign litigation.¹⁹ To date, U.S. courts have considered whether to order at least forty-two individual violations of foreign blocking statutes.²⁰ Courts ordered violations in thirty-seven of those instances.²¹ In each, the relevant blocking statute provided for both civil and criminal penalties.²²

“Court-ordered law breaking”²³ is an outgrowth of a well-documented problem: international conflict over the extension of the United States’ discovery regime beyond its borders. Over the course of the last century, the U.S. discovery regime has become notorious for its breadth and party-driven character.²⁴ The Federal Rules of Civil Procedure require parties to produce all materials that are “relevant to any party’s claim or defense and proportional to the needs of the case,” whether or not those materials are admissible in evidence.²⁵ This approach lies in stark contrast to that of most other countries, particularly civil-law jurisdictions, where discovery is comparatively minimal and the judiciary closely supervises evidence taking.²⁶ The disparity between the broad scope of discovery under the Federal Rules and the narrower scope in foreign legal systems has given rise to blocking statutes.²⁷ Most blocking statutes were passed between 1950 and 1990 in response to particular U.S. investigations or litigation that the international community perceived as overreaching.²⁸ And, in turn, the rise of foreign blocking statutes bred court-ordered law breaking.

The blocking-stature conflict has generated lively but one-sided literature. Most commentators have argued that court-ordered law breaking is bad law

19. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 972 (5th ed. 2011).

20. See *infra* endnote (i); discussion *infra* Part II (presenting the results of my own study of blocking-stature cases); see also Sant, *supra* note 16, at 194–97 (presenting results of author’s study of blocking-stature cases).

21. See *infra* endnote (ii).

22. See *id.*

23. The phrase “court-ordered law breaking” is Geoffrey Sant’s. I make use of it throughout this Note.

24. See Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 306–07 (2002) (comparing U.S. discovery to other common- and civil-law regimes and concluding “the number of discovery mechanisms available to the American lawyer as a matter of right, the degree of party control over discovery, the extent to which liberal discovery in the United States has become what almost looks like a constitutional right, and the massive use of discovery of all kinds in a substantial number of cases surely sets [the United States] apart”).

25. FED. R. CIV. P. 26(b)(1).

26. See Subrin, *supra* note 24, at 306.

27. See Mark A. Cotter, *The Hague Evidence Convention: Selfish U.S. Interpretation Aggravates Foreign Signatories and Mandates Changes to Federal Discovery Rules*, 6 FLA. J. INT’L L. 233, 243 (1991) (“This friction has led . . . to the enactment of ‘blocking’ statutes designed to counter U.S. efforts to require extraterritorial production of information.”).

28. See WALLACE, *infra* note 47 and accompanying text.

and bad policy and have derided the phenomenon as shortsighted.²⁹ Curiously, however, scholars' solutions to the blocking-statute conflict have largely focused on what U.S. actors should do in future cases—while at the same time acknowledging that the U.S. courts have shown little interest in reversing course.³⁰ That juxtaposition suggests that, though their proposals have been sensible, commentators have been engaged in a measure of wishful thinking. This Note takes a different tack. Rather than consider the blocking-statute conflict from the perspective of U.S. actors, it examines courses of action available to *foreign states*. It asks: At this stage in the blocking-statute conflict, what options do foreign states have?

This inquiry proceeds in three parts. Part I sets out necessary background, beginning with a brief history of the extraterritorial-discovery conflict and a description of the corpus of foreign blocking statutes as it stands today. It then introduces the test that U.S. courts apply when deciding whether to compel discovery in spite of applicable blocking statutes, derived from the Supreme Court's decision in *Aérospatiale*.³¹ Finally, using Geoffrey Sant's comprehensive study of blocking-statute cases in *Court-Ordered Law Breaking*, this Note shows that the U.S. courts' application of the *Aérospatiale* test has thus far been remarkably one-sided. In 88 percent of cases where U.S. courts applied *Aérospatiale* to blocking-statute conflicts, courts compelled at least one violation of foreign law.³²

Part II analyzes the blocking-statute cases from the perspective of a foreign state. It begins by showing that, in at least twenty-six instances, U.S. courts have considered the enforcement histories of blocking statutes in determining whether to order litigants to violate them. In twenty-three of those twenty-six instances, courts held that a foreign state's failure to enforce its blocking statute weighed in favor of ordering unlawful production. Those holdings have faced foreign sovereigns with what I call the "*Aérospatiale* Dilemma." If foreign sovereigns want to protect their citizens and companies from U.S. discovery orders, they must first prosecute their citizens and companies for complying with U.S. discovery orders. Part II concludes by arguing that, viewed properly, the *Aérospatiale* Dilemma is in fact an *opportunity* for foreign states. By engaging in active enforcement of their blocking statutes, foreign states could influence future applications of the *Aérospatiale* test in U.S. courts.

29. See, e.g., AM. BAR ASS'N, *supra* note 18, at 16; Daniel S. Alterbaum, Comment, Christopher X and CNIL: A Clarion Call to Revitalize the Hague Conventions, 38 YALE J. INT'L L. 217, 225 (2013); Patricia Anne Kuhn, Société Nationale Industrielle Aérospatiale: *The Supreme Court's Misguided Approach to the Hague Evidence Convention*, 69 B.U. L. REV. 1011, 1060–65 (1989); Sant, *supra* note 16, at 192.

30. See, e.g., Kuhn, *supra* note 29, at 360–65.

31. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522 (1987).

32. See *infra* endnote (ii) and accompanying text.

Part III explores that potential response to the *Aérospatiale* Dilemma. Using a series of U.S. cases, Part III analyzes which blocking-stature enforcement actions have the greatest potential to confront the *Aérospatiale* Dilemma. Were a foreign executive to pick a bellwether case, provide clear warning *ex ante* that it intended to enforce its blocking statute, and then *follow through* on that threat, that action would likely have an appreciable impact on the U.S. courts' future treatment of that statute. Foreign sovereigns might thereby reinvigorate their blocking statutes.

I.

AMERICAN-STYLE DISCOVERY AND ITS DISCONTENTS

Court-ordered law breaking is a big deal. In 1983, Rosenthal and Yale-Loehr remarked that “the most important problem in transnational litigation is the conflict faced by the multinational enterprise caught between U.S. laws compelling discovery and foreign laws prohibiting it.”³³ Nearly three decades later, the American Bar Association wrote that, in the year 2012, “[foreign] [l]itigants often face[d] a Hobson’s Choice: violate foreign law . . . or choose noncompliance with a U.S. discovery order.”³⁴ Though separated by many years, these two assessments show that the blocking-stature conflict has proven an enduring nuisance. And today, there is little sign of improvement.³⁵

The roots of the blocking-stature conflict lie in the extraterritorial application of U.S. substantive law. A century ago, it was a remarkable proposition that one country’s laws could be applied to acts that happened beyond its borders.³⁶ In 1909, the U.S. Supreme Court laid down the *American Banana* “universal rule”: whether an act was lawful “must be determined wholly by the law of the country where the act is done.”³⁷ The “territorial principle” constrained U.S. courts—the idea that “the power of American law end[ed] at the country’s boundaries” meant that where an act took place was the ultimate determinant of which country’s laws governed it.³⁸

Throughout the 20th century, however, U.S. courts eroded *American Banana*’s “universal rule.”³⁹ As the global economic system moved in fits and starts toward integration, the extraterritorial reach of U.S. laws expanded in areas like antitrust, securities, and even criminal law.⁴⁰ The extraterritorial

33. Douglas E. Rosenthal & Stephen W. Yale-Loehr, *Two Cheers for the ALI Restatement’s Provisions on Foreign Discovery*, 16 N.Y.U. J. INT’L L. & POL. 1075, 1075 (1984).

34. AM. BAR ASS’N, *supra* note 18, at 18.

35. See Sant, *supra* note 16, at 192 (presenting findings that from 2004–2014, U.S. courts ordered violations of foreign discovery-blocking laws with increasing frequency).

36. See Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT’L & COMP. L. REV. 297, 298 (1996).

37. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

38. Gibney, *supra* note 36, at 297.

39. *Id.* at 298–300, 303.

40. *Id.*

reach of U.S. substantive law grew so dramatically in the second half of the twentieth century that, by 1980, one commentator joked that America's greatest exports had become "rock music, blue jeans, and United States law."⁴¹

Of all the conflicts that extraterritorial applications of U.S. law have set in motion, none have been the source of more friction than court-ordered discovery.⁴² No country outside the United States permits the broad, party-directed discovery sanctioned by the Federal Rules of Civil Procedure.⁴³ As the reach of U.S. law has grown, the clash of discovery systems has been so stark that "[a]ttempts by U.S. litigants to gather evidence abroad for U.S. litigation have been viewed as usurping foreign sovereignty, similar to how the U.S. might view it if foreign nations set up their own prosecutors or police within the United States."⁴⁴

For decades, foreign states have fought against expansive U.S. extraterritorial discovery. At times, foreign officials have expressed their displeasure with U.S. practices in the media and through diplomatic notes.⁴⁵ Many have gone further to adopt blocking statutes. Blocking statutes limit the production of documents or other evidence located within the enacting state to a foreign state for purposes of foreign litigation.⁴⁶ Countries began to pass these statutes in the 1950s and have continued to do so in waves—usually in response to particular, controversial U.S. extraterritorial investigations—with the most recent wave in the late 1980s.⁴⁷

Today, at least fifteen countries have passed blocking statutes.⁴⁸ Some enacted blocking statutes for the express purpose of thwarting U.S. discovery.⁴⁹

41. V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L L. 257, 257 (1980).

42. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 rep.'s n.1 (AM. LAW INST. 1987) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.").

43. See Subrin, *supra* note 24 at 306–07.

44. See Sant, *supra* note 16, at 184–85.

45. See, e.g., *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1306 n.18 (D.C. Cir. 1980) (providing text of French diplomatic note that "expressed formal reservations regarding the application in France of the principle of pre-trial discovery of documents characteristic of common law countries"); M. D. Copithorne, *Canadian Practice in International Law During 1978 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 17 CAN. Y.B. INT'L L. 334, 337 (1979) ("The Government of Canada wishes to state its serious objection to the imposition of any sanction by the judicial branch of the United States Government for failure to produce documents or to disclose information located in Canada where such production would require a person or corporation in Canada to perform an act or omission . . . which is prohibited by [Canadian law].").

46. See BORN & RUTLEDGE, *supra* note 19, at 972 (defining "blocking statute" by reference to the statutes' effects).

47. See CYNTHIA DAY WALLACE, *THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION* 804–15 (2d ed. 2002) (providing detailed history of blocking statutes' emergence across the globe).

48. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 rep.'s n.1 (AM. LAW INST. 1987).

Others passed statutes that, while not directed expressly against U.S. discovery orders, operate to the same effect.⁵⁰ Most blocking statutes aim to prevent what enacting states viewed as U.S. infringements on their sovereignty.⁵¹ In some cases, distaste for substantive U.S. law also motivated foreign legislatures.⁵² And still other countries enacted blocking statutes to protect vital industries from the economic burdens of U.S. antitrust and securities laws.⁵³

Blocking statutes come in several forms. The global corpus of blocking statutes can be subdivided into three categories:⁵⁴

- 1) Content-based blocking statutes. These statutes prohibit disclosure of specified materials in response to foreign discovery orders unless first approved through designated government channels. One example is the French blocking statute.⁵⁵ Another is China's state-secrets law, which prohibits the transfer of data that might reveal "secrets concerning . . . [s]tate affairs . . . [or] national economic and social development."⁵⁶ Other prominent examples include data-privacy laws, of the sort that have recently proliferated across Europe.⁵⁷
- 2) Discretionary-prohibition blocking statutes. This type of statute grants government actors discretionary authority to forbid compliance with particular foreign discovery orders. The U.K. Protection of Trading Interests Act, for instance, authorizes officials to prohibit compliance with foreign discovery orders that would infringe upon the sovereignty or security of the United Kingdom.⁵⁸ Australia and Canada have adopted similar legislation.⁵⁹
- 3) Industry-specific blocking statutes. These types of statutes prohibit disclosure of information concerning particular industries. Examples include bank secrecy laws,⁶⁰ statutes prohibiting disclosure of information regarding the production

49. See WALLACE, *supra* note 47.

50. *Id.*

51. Cotter, *supra* note 27, at 243–45 (“Blocking statutes are interested primarily in preventing what the enacting state views as an infringement of its sovereignty.”).

52. *Id.* (discussing blocking statutes passed in England, Australia, Canada, France, and South Africa in response to U.S. investigation into worldwide uranium cartel in the 1970s).

53. See WALLACE, *supra* note 47 at 812–13 (describing German blocking statute enacted in response to FTC investigation of German shipping industry).

54. Born and Rutledge describe categories (1) through (3), as they appear here, in BORN & RUTLEDGE, *supra* note 19, at 974. Category (4) is my own addition.

55. See WALLACE, *supra* note 47, at 809 (quoting French Law No. 68-678 of 26 July 1968).

56. Lynn M. Marvin & Yohance Bowden, *Conducting U.S. Discovery in Asia: An Overview of E-Discovery and Asian Data Privacy Laws*, 21 RICH. J.L. & TECH. 1, 24 (2014).

57. See Council Directive 95/46, 1995 O.J. (L 281) 31–38 (EC).

58. See BORN & RUTLEDGE, *supra* note 19, at 974.

59. *Id.*

60. *Id.*

of uranium,⁶¹ and statutes forbidding disclosure related to shipping industries.⁶²

Blocking statutes prescribe both civil and criminal penalties for violators.⁶³ Thus, in at least fifteen countries, parties may be fined or sent to jail for producing evidence in response to U.S. investigations or litigation.

Thirty years ago, blocking statutes faced an uncertain fate in the U.S. courts, as the federal circuits found themselves divided over whether foreign entities could *ever* be forced to produce materials in violation of foreign laws.⁶⁴ As the D.C. Circuit wrote in 1987, “it cause[d] . . . considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question.”⁶⁵ With the circuits split, it appeared possible that blocking statutes might resolve the extraterritorial-discovery conflict in foreign states’ favor.

That changed when the U.S. Supreme Court decided *Société Nationale Industrielle Aérospatiale v. U.S. District Court*.⁶⁶ There, American plaintiffs brought suit against two French corporations following an airplane crash in the United States.⁶⁷ When the plaintiffs sought discovery, the defendants claimed that the French Blocking Statute forbid them from complying with the plaintiffs’ request and moved for a protective order.⁶⁸ Both the trial and appellate courts ordered the defendants to violate the French Blocking Statute and produce the requested documents.⁶⁹ In a 5-4 decision, the Supreme Court affirmed that U.S. litigants may initiate “any discovery pursuant to . . . the Federal Rules of Civil Procedure” against foreign counterparts, and that “[blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.”⁷⁰

The *Aérospatiale* majority expressly refused to “articulate specific rules to guide [the] delicate task of adjudicat[ing]” the conflict between motions to compel and applicable blocking statutes.⁷¹ Instead, it instructed lower courts to adjudicate conflicts based on “[their] knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies

61. *Id.*

62. *Id.*

63. George L. Blum, Annotation, *Effect of Intersection Between Discovery Rules and International Privacy Laws*, 1 A.L.R. 7th Art. 1 (2015).

64. *See In re Sealed Case*, 825 F.2d 494, 497 (D.C. Cir. 1987).

65. *Id.* at 498.

66. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987).

67. *Id.* at 524.

68. *Id.* at 526–27.

69. *Id.* at 546–47.

70. *Id.* at 541–42, 544 n.29.

71. *Id.* at 546.

they invoke.”⁷² In response, the dissent lamented the majority’s “failure to provide lower courts with any meaningful guidance” about how to resolve blocking-statute conflicts.⁷³ And indeed, in *Aérospatiale*’s wake, commentators have largely agreed that the majority’s opaque decision was “regrettable.”⁷⁴ Despite its vague guidance, *Aérospatiale* did mark one clear advance in the law. Today, if a case is properly before a U.S. court, the judge *can* order discovery in spite of a clearly applicable blocking statute.

Scholarly opprobrium notwithstanding, U.S. courts have applied *Aérospatiale* to the best of their ability. Part II, below, discusses the various ‘*Aérospatiale* tests’ that the lower courts have developed. But before considering those tests, it is useful to take a global view of blocking statutes’ fates in the U.S. courts thus far. Since *Aérospatiale* was decided in 1987, blocking statutes have ceased posing any serious obstacle to otherwise-justified U.S. discovery.⁷⁵ Geoffrey Sant proved that claim quantitatively in his article *Court-Ordered Law Breaking*.⁷⁶ In his study, Sant identified fifty-six opinions that referenced *Aérospatiale* in considering whether to order violations of foreign law.⁷⁷ He found “overwhelming evidence of pro-forum bias” in the lower courts’ applications of *Aérospatiale*.⁷⁸

Sant’s study confirmed that foreign states’ blocking-statute gambit has largely failed. In all but a small minority of cases, U.S. courts have rejected the foreign litigants’ blocking-statute defense—thereby rendering blocking statutes “paper tigers” in all but a few instances.⁷⁹ What is less clear, however, is the future of blocking statutes, and, by extension, the extraterritorial-discovery conflict more broadly. Are blocking statutes destined to gather dust?

72. *Id.*

73. *Id.* at 548.

74. See Sant, *supra* note 16, at 186 (summarizing negative scholarly reaction to *Aérospatiale*).

75. See Alterbaum, *supra* note 29, at 223 (“[U.S.] courts have rarely ruled in favor of foreign entities asserting their domiciles’ blocking statutes as a defense against complying with a subpoena.”); Marvin & Bowden, *supra* note 56, at 11 (“Since *Aérospatiale*, U.S. courts have overwhelmingly required production notwithstanding blocking statutes.”); John T. Yip, *Addressing the Costs and Comity Concerns of International E-Discovery*, 87 WASH. L. REV. 595, 598 (2012) (“American courts . . . often compel producing parties to hand over [discovery] even though doing so would violate foreign blocking statutes.”) (collecting cases).

76. See generally Sant, *supra* note 16.

77. See *id.* at 196 n.107.

78. *Id.* at 184.

79. See M.C. Seham, *Transnational Labor Relations: The First Steps Are Being Taken*, in 19 UNITED NATIONS LIBRARY ON TRANSNATIONAL CORPORATIONS, TRANSNATIONAL CORPORATIONS AND NATIONAL LAW 236, 220 (Seymour J. Rubin et al. eds., 1994); see also WALLACE, *supra* note 47, at 875 (detailing blocking statutes’ reception in U.S. courts).

II.

BLOCKING STATUTES IN THE U.S. COURTS

Now that foreign states' blocking-statute gambit has failed, what can they do about it? The answer emerges from a review of the cases in Sant's dataset and an analysis of the factors that motivated the courts in those decisions.⁸⁰

The U.S. courts' opinions in blocking-statute cases should guide future action. Recall that, as discussed above, the *Aérospatiale* opinion explicitly refused to "articulate specific rules" to guide the lower courts in resolving conflicts between blocking statutes and U.S. discovery requests.⁸¹ As a result, lower courts have developed and applied a variety of multi-factor balancing tests in the blocking-statute cases. A few courts have fashioned three-part⁸² or four-part⁸³ tests, gleaned from the language in *Aérospatiale*. Others have applied the five-factor test set out in the Restatement of Foreign Relations Law, which the *Aérospatiale* opinion cited as "relevant to any comity analysis."⁸⁴ Still others, following the Court's instruction to adjudicate conflicts based on their own "knowledge of the case," have applied the five-factor Restatement test plus other factors not considered in *Aérospatiale* itself.⁸⁵

These variations are deceiving. Regardless of how they have phrased their tests, lower courts have been cognizant of the Supreme Court's instruction to adjudicate blocking-statute conflicts based on *all* their knowledge of "claims and interests of the parties and the governments whose statutes and policies

80. As described above, Sant identified fifty-six cases in which courts applied *Aérospatiale* in determining whether to order violations of foreign laws. I replicated Sant's results by KeyCiting *Aérospatiale* on WestlawNext, and sorting through the 452 citing cases. I arrived at the same result: fifty-six cases where courts discussed *Aérospatiale* in considering conflicts between U.S. discovery orders and foreign law.

81. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 547 (1987).

82. See, e.g., *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344, 346 (D. Conn. 1997); *In re Aircrash Disaster Near Roselawn, Ind.*, October 31, 1994, 172 F.R.D. 295, 309 (N.D. Ill. 1997) (applying three-part test consisting of (1) the particular facts of the case at bar; (2) the sovereign interests at stake; and (3) the likelihood that resort to alternative discovery mechanisms will prove effective).

83. See, e.g., *Bodner v. Paribas*, 202 F.R.D. 370, 374–75 (E.D.N.Y. 2000) (applying four-factor tests consisting of "(1) the competing interests of the nations whose laws are in conflict; (2) the hardship of compliance . . . ; (3) the importance to the litigation of the information . . . ; and (4) the good faith of the party resisting discovery"); *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998).

84. *Aérospatiale*, 482 U.S. at 544 n.28. The five factors of the Restatement test are: (1) "the importance to the . . . litigation of the documents or other information requested;" (2) "the degree of specificity of the request;" (3) "whether the information originated in the United States;" (4) "the availability of alternative means of securing the information;" and (5) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (AM. LAW INST. 1987).

85. See, e.g., *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 552–53 (S.D.N.Y. 2012); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992).

they invoke.”⁸⁶ No court has explicitly refused to consider otherwise-relevant information on formalistic grounds.⁸⁷ Thus, for analytical purposes, foreign states should think of the *Aérospatiale* “test” expansively—in view of *all* the factors courts have considered.

All told, courts have considered the following seven factors in determining whether to order production in violation of foreign blocking statutes: (1) the importance of the documents or of information requests to the litigation; (2) the degree of specificity of the requests; (3) where the information originated; (4) the good faith of the party resisting discovery; (5) the availability of alternative means of securing the information; (6) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance would undermine important interests of the foreign state (“balancing national interests”); (7) the hardship of compliance on the party resisting discovery.

Blocking-stature opinions since *Aérospatiale* have methodically balanced some combination of these factors in reaching their decisions. The nature of multi-factor balancing tests makes it impossible to determine which factor or factors were most influential in the judge’s decision. But luckily, in considering the available options in the blocking-stature conflict, foreign states need not determine which factor was most influential in any given decision. Instead, considering the opinions from foreign states’ perspective will reveal what—if anything—those states can do to affect future applications of the *Aérospatiale* test in the U.S. courts.

Of the seven *Aérospatiale* factors listed above, four lie outside of foreign states’ control. In any particular extraterritorial-discovery dispute, the foreign state cannot affect (1) the importance of the documents to the litigation; (2) the degree of specificity of the request; (3) where the information originated,⁸⁸ or (4) the good faith of the party resisting discovery. Those factors inevitably vary with the facts of each case and with the whims of the parties.

In contrast, foreign states can affect future applications of the three other *Aérospatiale* factors: (5) the availability of alternative means of securing the information; (6) the extent to which compliance with the discovery request would undermine foreign states’ national interests (the “balancing national interests” factor); and (7) the hardship of compliance on the party resisting discovery. Foreign states seeking to enforce their blocking statutes should strategically focus on how U.S. courts treat these factors.

86. *Aérospatiale*, 482 U.S. at 546.

87. In reviewing the fifty-six cases in Sant’s dataset, I did not find one instance where a court refused to consider otherwise relevant information because it did not “fit” into one of that jurisdiction’s previously articulated factors.

88. Admittedly, a foreign state might affect this factor tangentially. For instance, the state might invest in massive server farms that would increase the digital storage space available to its citizens in their home country. But because this Note trains its focus on purely legal strategies available to foreign states, it does not engage that speculative prospect.

Subpart A discusses how foreign states might affect the availability of alternative means of securing requested information. It concludes that, because the U.S. courts have interpreted that factor restrictively, further development of “alternative means” is not a fruitful avenue for change. Subpart B then discusses how foreign states might affect U.S. courts’ applications of the “balancing national interests” and “hardship” factors. It concludes that U.S. courts have provided foreign states an opportunity to affect how they apply these factors in future cases.

A. *The “Alternative Means” Factor*

This factor asks courts to consider “the availability of alternative means of securing the information” that the requesting party is seeking from the party burdened by the blocking statute.⁸⁹ Foreign states can affect this factor by ensuring that viable alternatives to U.S. court-ordered production are available to litigants in the U.S. courts. The Hague Convention on Evidence Taking provides the most prominent alternative to U.S. court-ordered production.

The Hague Convention is an international evidence-gathering agreement.⁹⁰ It has fifty-eight signatories, including the United States, France, Switzerland, Great Britain, and China.⁹¹ Under the Convention, parties seeking extraterritorial discovery would first transmit ‘letters rogatory’ (i.e., letters requesting the transfer of evidence) to a designated Central Authority in the state where the evidence is located.⁹² That Authority then either approves or disapproves of the request and, where approved, manages the subsequent transfer of materials.⁹³ The Convention intended for these procedures to provide a uniform international procedure for evidence gathering that would ameliorate conflicts between international discovery regimes.⁹⁴ For litigants in the U.S. courts, the Hague Convention process is available any time the information sought is held within the borders of a Convention signatory. It would thus appear that, at least when all involved entities are Hague Convention signatories, the “alternative means” factor should always weigh against ordering violations of foreign law, because the Convention provides a means of gathering information less intrusive than the Federal Rules.

U.S. courts have not agreed with this proposition. In *Aérospatiale*, the Supreme Court held that the Hague Convention procedures were not a binding “first resort” for U.S. litigants.⁹⁵ Use of the Convention in the U.S. courts has

89. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c).

90. BORN & RUTLEDGE, *supra* note 19, at 1026–30.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 540 (1987).

been in continuous decline since.⁹⁶ Contemporary U.S. courts have interpreted the “alternative means” factor to call not for an examination of the *availability* of alternative means for evidence gathering—as is provided for in the *Restatement (Third) of Foreign Relations Law*—but rather “an evaluation of the *merits* of the alternative means of obtaining the information.”⁹⁷ Courts have routinely found that, because the Hague Convention process is time-consuming and provides a foreign veto, “simply ordering the violation of foreign law is the preferable means of obtaining information.”⁹⁸

By interpreting the “alternative means” factor as an evaluation of the merits of alternative discovery mechanisms, U.S. courts have effectively closed this avenue as a realistic means of foreign-state intervention in the blocking-statute conflict. U.S. courts have repeatedly held that acceptable “alternative means” must be “‘similar’ in speed, cost, and effectiveness to a U.S. court ordering the production of documents.”⁹⁹ Indeed, imagining an alternative discovery mechanism as speedy and cost-effective as a U.S. court order is difficult.¹⁰⁰ Any process that provides the opportunity for a foreign-state veto will be by definition slower, more costly, and less effective than the procedures outlined in the Federal Rules. Under the U.S. courts’ contemporary conception of the “alternative means” factor, providing another alternative discovery mechanism would likely be self-defeating.

B. The “Balancing National Interests” and “Hardship” Factors

The *Aérospatiale* test’s “balancing national interests” factor calls for courts to consider “the extent to which noncompliance with [a given discovery] request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.”¹⁰¹ The “hardship” factor calls for courts to evaluate “the hardship of compliance on the party from whom discovery is sought.”¹⁰² The remainder of this Part will show that, by initiating enforcement actions under their blocking statutes, foreign states could affect future applications of these two *Aérospatiale* factors in the U.S. courts.

Because several *Aérospatiale* factors are not susceptible to foreign-state influence, and because the U.S. courts have interpreted the alternative means factor so restrictively, the balancing national interests and hardship factors

96. See Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure*, 57 L. & CONTEMP. PROBS. 77, 90 (“Foreign states are also dissatisfied with the current *Aérospatiale* analysis . . . [and] their disappointment has increased as U.S. lower courts ignore the [Hague] Convention’s procedures with greater frequency.”).

97. Sant, *supra* note 16, at 206 (emphasis added).

98. *Id.* at 206–07.

99. *Id.* at 208.

100. *Id.*

101. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (AM. LAW INST. 1987).

102. *Bodner v. Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000)

represents foreign states' best remaining opportunities to affect future applications of *Aérospatiale* in the U.S. courts. I thus set out to determine how those factors have been applied in the opinions.

My most notable finding was that, in at least twenty-one instances, U.S. courts have held that foreign states' failure to enforce their blocking statutes (a) showed that no serious foreign state interest would be undermined by ordering violations of those statutes, or (b) undermined litigants' claims that compelling violation would constitute a hardship.¹⁰³ In other words, when foreign entities have raised the blocking-statute excuse, U.S. courts have often looked to the enforcement histories of the statutes, and, where the relevant statute had not been actively enforced, the courts held that the lack of enforcement weighed in favor of ordering their violation. These holdings have created what I call the '*Aérospatiale* Dilemma.' If foreign states are to protect their citizens and companies from U.S. discovery using blocking statutes, they must first use those statutes to prosecute and punish those very same entities.

Until now, no academic work has quantified the rise of the *Aérospatiale* Dilemma. As part of my effort to provide strategic advice to foreign states, I set out to measure the effect of the *Aérospatiale* Dilemma using the fifty-six opinions collected in Geoffrey Sant's "Court-Ordered Law Breaking." I began by narrowing the fifty-six cases compiled in Sant's article to match my inquiry. Because I wanted to investigate only those cases where U.S. federal judges considered whether to order violations of foreign blocking statutes, I excluded all state-court cases, and all cases where courts considered whether to violate foreign injunctions or court orders rather than foreign statutes. I then excluded cases where courts considered litigants' arguments that a discovery order would violate foreign law, but did not proceed with a full *Aérospatiale* analysis because they found that there was no actual conflict of laws.

Many of the remaining cases involved multiple foreign defendants or statutes, and courts often considered whether to order violations of multiple foreign laws in a single opinion. I thus further divided opinions in Sant's dataset to reflect the number of *individual* blocking-statutes violations that U.S. courts considered. I found that the federal courts have considered whether to order at least forty-two individual violations of foreign blocking statutes since *Aérospatiale*.ⁱ An analysis of those forty-two contemplated orders follows.

Courts compelled foreign parties to produce discovery in violation of foreign law in thirty-seven of those forty-two contemplated orders, and refused to order violations of foreign law in only five.ⁱⁱ Thus, when faced with conflict between motions to compel and foreign blocking statutes, U.S. federal courts ordered violations of foreign law 88 percent of the time.

Of the forty-two instances where federal courts considered the blocking-statute excuse, twenty-six explicitly considered the enforcement histories of the

103. See *infra* endnote (iii) and accompanying text.

foreign laws at issue.¹⁰⁴ In twenty-three of those twenty-six instances, courts found either (a) that there was evidence that the blocking statute had *not* been enforced in similar situations, or (b) that the objecting entity had offered no evidence as to the statute's enforcement history.ⁱⁱⁱ In all twenty-three of those instances, the courts went on to order production in violation of foreign law.¹⁰⁵ In contrast, of those twenty-six instances where courts considered the enforcement histories of foreign laws, those courts found evidence that the relevant statute *had* been actively enforced in only three.^{iv} In all three of those instances, the courts ultimately refused to order production.¹⁰⁶

These data provide three important insights. First, when courts have faced conflicts between motions to compel and blocking statutes, they have explicitly considered blocking statutes' enforcement histories in 63 percent of all instances. Second, in those instances where courts have considered blocking statutes' enforcement histories, the presence or absence of active enforcement has always been a bellwether for the ultimate disposition. When courts have explicitly found that a relevant blocking statute has not been enforced in similar cases, they have always ordered production. But in the very few cases where courts found that a relevant blocking statute *had* been enforced in cases like the one at bar, they have always refused to order production. The lesson is that, while courts have not considered enforcement history in every case, it has been an unailing indicator of the ultimate outcome in cases where they have.

Before moving to consider the strategic import of these findings, it is useful to breathe some life into the numbers with an illustrative case. The case discussed in this Note's Introduction—*Motorola Corp. v. Uzan*—brings the enforcement-history inquiry into focus.¹⁰⁷ As discussed above, blocking-stature conflicts arose in *Uzan* after Motorola filed *ex parte* discovery requests against banks in France, Jordan, the United Arab Emirates, and Switzerland.¹⁰⁸ Each bank raised its home-country blocking statute as an excuse to not produce the requested discovery.¹⁰⁹ In considering whether to order violations of the four blocking statutes, the court wrote:

[S]everal of the nations whose laws are here involved have enacted legislation prohibiting the release of . . . the information here sought, sometimes on pain of criminal prosecution, thereby suggesting a strong competing interest. But is this for real? If a given country truly values its national policy of, say, criminalizing compliance with a U.S. court subpoena, it will prosecute its citizens for so complying. . . .

104. See *infra* endnotes (iii) and (iv).

105. Compare the cases in endnote (iii) (cases discussing lack of enforcement history), with the cases in endnote (ii) (collecting cases where courts ordered violations of foreign law).

106. Compare the cases in endnote (iv) (cases noting active enforcement history), with the cases in endnote (ii) (collecting cases where courts refused to order violations of foreign law).

107. *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (2014).

108. *Id.* at 401.

109. *Id.*

[T]he extent to which the relevant country has actually enforced the prohibition is a strong indicator of the strength of the state interest.¹¹⁰

In light of that observation, the court then considered each of the relevant blocking statutes in turn. In considering the Jordanian and Emirati bank secrecy laws, it wrote that “the Court’s attention has now been focused on the total paucity of published prosecutions of banks or their officers in Jordan and the UAE for complying with discovery ordered by a foreign court.”¹¹¹ Similarly, in considering the French Blocking Statute, the court wrote “it appears that when a foreign court orders production of French documents even though the producing party has raised the ‘excuse’ of the French blocking statute, the French authorities do not, in fact, prosecute or otherwise punish the producing party.”¹¹² The court went on to order the Jordanian, Emirati, and French banks to produce discovery, notwithstanding their countries’ blocking statutes.

In contrast, the *Uzan* court quashed a motion to compel production of materials located in Switzerland. The court began by noting evidence that “[t]he Swiss Federal Office for Statistics reports 28 prosecutions [under the Swiss bank secrecy laws] between 1987 and 1996, and although that number has not been recently updated, anecdotal evidence presented to the Court indicates ongoing, vigorous, and serious enforcement.”¹¹³ The court was particularly impressed that, in 2013, the Swiss had imposed a three-year prison sentence on a Swiss banker after he turned over protected information while cooperating with German tax collectors.¹¹⁴ It concluded that the enforcement history of the Swiss blocking statute “strongly favor[ed] denying the release” of the information held by the Swiss bank, and quashed the motion to compel.

With *Uzan* as illustration, and the data presented above as proof, a comprehensive view of the *Aérospatiale* Dilemma emerges for the first time. My research confirms what commentators have suspected: U.S. courts have often responded to foreign entities’ blocking-statute excuses by demanding evidence of the statutes’ enforcement histories. As discussed above, those histories have proven dispositive.¹¹⁵

With those findings in view, the *Aérospatiale* Dilemma bespeaks its own solution. Foreign states could affect future applications of the *Aérospatiale* factors in the U.S. courts by establishing enforcement histories for their blocking statutes. It makes little difference that some courts—like the court in *Uzan*—have considered enforcement history as evidence of a foreign state’s national interests, while others have considered enforcement history as evidence of the objecting entity’s hardship of compliance. Regardless of the

110. *Id.* at 402.

111. *Id.* at 405.

112. *Id.* at 403.

113. *Id.* at 404.

114. *Id.*

115. *See infra* endnote (iii).

label, my research indicates that courts have consistently refused to order violations of foreign blocking statutes where there is evidence that they have been actively enforced. The U.S. courts have thus provided foreign states an opportunity. Foreign states can reinvigorate their blocking statutes by engaging in selective, strategic enforcement actions against those who violate them.

III.

CREATING ENFORCEMENT RISK

This Part illustrates how foreign states could seize the opportunity to establish enforcement histories for their blocking statutes. It uses a series of copyright-infringement cases to illustrate how the Chinese government recently just missed such an opportunity. The discussion that follows further illustrates the role that enforcement history plays in U.S. courts' applications of *Aérospatiale*, and suggests a path forward for foreign states.

In 2011, the clothier Gucci filed a lawsuit against several Chinese e-commerce companies, alleging that those companies had produced and sold knock-offs in violation of Gucci trademarks.¹¹⁶ At discovery, Gucci sought account records from several Chinese banks, including Bank of China, who had done business with the alleged infringers.¹¹⁷ Bank of China resisted the discovery requests, claiming that the Chinese Bank Secrecy Laws prohibited the transfer of the requested materials to the United States.¹¹⁸ In *Gucci America v. Li*, a magistrate judge ordered the Bank of China to comply with the plaintiff's discovery request notwithstanding applicable provisions of the Chinese Bank Secrecy Law.¹¹⁹ In applying the *Aérospatiale* factors, the judge noted that "the Bank has cited no specific instance in which a Chinese financial institution was punished for complying with a foreign court order directing the production of documents."¹²⁰

Shortly after the court rendered its decision in *Gucci*, the China Banking Regulatory Commission (CBRC) sent a letter directly to four Southern District of New York judges with similar copyright-infringement cases pending on their dockets.¹²¹ In that letter, the CBRC "assert[ed] that Chinese law prohibits the Bank[] from disclosing customer account information pursuant to a U.S. court order," and warned that the Bank would face penalties if it did so.¹²² After

116. *Gucci Am., Inc. v. Li*, No. 10 Civ. 4974(RJS), 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011), *vacated on other grounds*, 768 F.3d 122 (2d Cir. 2014).

117. *Id.* at *1.

118. *Id.*

119. *Id.* at *13.

120. *Id.* at *11.

121. *Tiffany (NJ) LLC v. Forbse*, No. 11 Civ. 4976(NRB), 2012 WL 1918866, at *6 (S.D.N.Y. May 23, 2012).

122. *Id.*

receiving the letter, the *Gucci* court did not amend its ruling.¹²³ The Bank of China thus produced the requested account information as ordered.¹²⁴

Nine months after *Gucci* was rendered, a nearly identical discovery dispute arose in the *Tiffany (NJ), LLC v. Forbse*.¹²⁵ Tiffany & Co.—the high-end jeweler—had sued several Chinese companies for copyright infringement, and sought account records from the Bank of China.¹²⁶ Again, the Bank claimed it was prohibited from complying with the request by the Chinese Bank Secrets Law.¹²⁷ But by the time *Forbse* arose, enough time had passed that the consequences of the magistrate judge’s ruling in *Gucci* had become apparent. The *Forbse* court noted that the Bank had complied with the production order issued in *Gucci*, and had “not actually been punished in any manner for complying” with the request, despite “the prospect of sanctions hinted at by the [Chinese Banking Regulatory Commission]” in its letter.¹²⁸

The *Forbse* court cited *Gucci*’s example in reaching its decision. It viewed the Chinese government’s failure to punish the Bank after *Gucci* as an indication that the law was not actively enforced, and thus held that the prospect that the Bank would be punished for complying with Tiffany’s request was “speculative at best.”¹²⁹ The court then ordered production notwithstanding the Chinese Bank Secrecy Law.¹³⁰ In a later opinion awarding damages to Tiffany’s, the court made no mention of any enforcement action carried out by the Chinese authorities against the Bank of China for producing account records in response to its earlier order.¹³¹ It thus appears that, even after this second violation, the Chinese authorities took no action.

These cases illustrate how the U.S. courts have tested foreign states’ seriousness about their blocking statutes and bring into focus the opportunity that the Chinese authorities missed. During the nine months that elapsed between *Gucci* and *Forbse*, the Bank of China produced customer account information in violation of the Chinese Bank Secrecy Law. The Chinese Banking Regulatory Commission asserted—in its letter to the U.S. judges—that such production would indeed violate the law. Yet Chinese authorities did not move to prosecute or punish the Bank of China. The court in *Forbse* took notice, and held that the Chinese authorities’ failure to punish the Bank after *Gucci* undermined the Bank’s blocking-statute excuse in *Forbse*.

123. *See id.* at *9.

124. *See id.*

125. *Id.* at *2.

126. *Id.*

127. *Id.*

128. *Id.* at *9.

129. *Id.*

130. *Id.* at *13.

131. *See Tiffany (NJ) LLC v. Forbse*, No. 11 Civ. 4976(NRB), 2015 WL 5638060, at *2 (S.D.N.Y. Sept. 22, 2015).

Cases like *Gucci* are opportunities for foreign states to build respect for their blocking statutes and change the course of U.S. courts' future applications of the *Aérospatiale* factors. In fact, *Gucci* is emblematic of the sort of case that foreign states should utilize to establish enforcement histories for their blocking statutes. That is for three reasons, all of which respond to foreign states' assumed goal: rendering their blocking statutes effective in future cases in the U.S. courts, while limiting negative domestic consequences of their enforcement actions.

First, the facts in *Gucci* were likely to be similar to future cases involving blocking-statute conflicts. Requests that banks produce customer account information give rise to more blocking-statute conflicts than any other type of discovery request.¹³² Thus, had the Chinese authorities punished the Bank of China for complying with the court's order in *Gucci*, the U.S. courts would have had little choice but to recognize similarities in precisely the sort of case most likely to arise again in the future. For that reason, enforcement actions in response to violations of bank secrets would provide foreign states the most "bang for their buck" in future blocking-statute cases.

Second, the Bank of China itself was—at least potentially—morally and legally culpable for doing business with obvious counterfeiters. The *Gucci* court suggested that the Bank of China had "actively assisted [the] Defendants in concealing illegally-obtained profits," though it could not confirm such a finding on the record before it.¹³³ Whether or not the Bank of China had actually engaged in any legal wrongdoing before *Gucci* was decided, its situation is suggestive of another attraction to cases like *Gucci* as vehicles for establishing enforcement history. Commentators have speculated that one reason foreign states have failed to enforce their blocking statutes is that they are hesitant to punish innocent parties who have been caught in an international catch-22.¹³⁴ The distastefulness of such enforcement—and the public relations risk that flows from it—is diminished where there is reason to believe that the burdened entity is not morally and legally blameless.

Third, the Chinese authorities could have punished the Bank of China without endangering the bank's long-term financial health. The Bank of China is part of the Global Fortune 500, with a market capitalization of \$141.3 billion.¹³⁵ By targeting financially buoyant institutions like the Bank of China

132. See *infra* endnote (i).

133. *Gucci Am., Inc. v. Li*, No. 10 Civ. 4974(RJS), 2011 WL 6156936, at *12 (S.D.N.Y. Aug. 23, 2011).

134. See Sant, *supra* note 16, at 221 ("Foreign governments, more respectful of this conflict than U.S. courts, have usually not punished companies that obey a U.S. court order and produce documents in violation of the law. Foreign regulators apparently recognize that companies facing a no-win situation should not be punished.")

135. See *Bank of China*, FORBES, <http://www.forbes.com/companies/bank-of-china> [<https://perma.cc/263P-9V7Q>].

in future enforcement efforts, foreign states could limit the economic damage caused by strategic enforcement.

Foreign states should take note of the opportunity that the Chinese authorities missed in *Gucci*. When an entity violates a blocking statute in response to a U.S. court order, in a situation (1) that is likely to be similar to future blocking-stature disputes, (2) where the burdened entity is otherwise morally or legally culpable, and (3) where civil penalties will not have an overlarge effect on the burdened entity's financial health, the state has an opportunity to create enforcement history at limited cost. The cases give us reason to believe that blocking statutes might thereby be transformed—from paper tigers to blockbusters.

CONCLUSION

The extraterritorial-discovery conflict has been a source of international conflict for decades. It has given rise to diplomatic protests, foreign retaliation, and—of course—blocking statutes. Today, the United States' infamous discovery regime appears to have triumphed over foreign attempts to thwart it. The blocking-stature cases, however, reveal an opportunity for foreign states. By responding to the *Aérospatiale* Dilemma with selective, strategic enforcement actions, foreign states could alter the balance of considerations that confront U.S. courts in blocking-stature cases. The opportunity is there, waiting for takers.

ENDNOTES

ⁱ French Blocking Statute

- 1) *TruePosition, Inc. v. LM Ericsson Tel. Co.*, Civil Action No. 11-4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012).
- 2) *Coloplast A/S v. Generic Med. Devices, Inc.*, No. C10-227BHS, 2011 WL 6330064 (W.D. Wash. Dec. 19, 2011).
- 3) *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51 (E.D.N.Y. 2010).
- 4) *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429 (E.D.N.Y. 2008).
- 5) *In re Enron Corp.*, No. 01-16034 (AJG), 2007 WL 8317419 (Bankr. S.D.N.Y. July 18, 2007).
- 6) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).
- 7) *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2014 WL 5462496 (N.D. Cal. Oct. 23, 2014).

German Federal Data Protection Act

- 8) *BrightEdge Techs., Inc. v. Searchmetrics, GmbH*, No. 14-cv-

01009-WHO (MEJ), 2014 WL 3965062 (N.D. Cal. Aug. 13, 2014).

9) *In re Baycol Prods. Litig.*, MDL No. 1431 (MJD/JGL), 2003 WL 22023449 (D. Minn. Mar. 21, 2003).

10) *Pershing Pac. W., LLC v. MarineMax, Inc.*, No. 10-cv-1345-L (DHB), 2013 WL 941617 (S.D. Cal. Mar. 11, 2013).

Chinese State Secrets Act

11) *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992).

12) *Wultz v. Bank of China Ltd.*, 942 F. Supp. 2d 452 (S.D.N.Y. 2013).

13) *Tiffany (NJ) LLC v. Qi*, 276 F.R.D. 143 (S.D.N.Y. 2011).

Chinese Tort Liability Law

14) *Stream Sicav v. RINO Int'l Corp.*, No. CV 10-08695-VBF (VBKx), 2011 WL 4978291 (C.D. Cal. Oct. 11, 2011).

Chinese Bank Secrets Law

15) *Tiffany (NJ) LLC v. Qi*, No. 10 Civ. 9471(WHP), 2011 WL 11562419 (S.D.N.Y. Nov. 14, 2011).

16) *Tiffany (NJ) LLC v. Forbse*, No. 11 Civ. 4976(NRB), 2012 WL 1918866 (S.D.N.Y. May 23, 2012).

17) *Tiffany (NJ) LLC v. Qi*, 276 F.R.D. 143 (S.D.N.Y. 2011).

18) *Gucci Am., Inc. v. Li*, No. 10 Civ. 4974(RJS), 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011).

19) *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238 (S.D.N.Y. 2010).

Swiss Banking Act

20) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).

21) *S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323 (N.D. Tex. 2011).

Swiss Penal Code

22) *S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323 (N.D. Tex. 2011).

Malaysian Bank Secrets Law

23) *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010).

Chilean Bank Secrets Law

24) *Consejo de Defensa del Estado de la Republica de Chile v. Espirito Santo Bank*, No. 09-20613-CIV, 2010 WL 2162868 (S.D. Fla. May 26, 2010).

South African Protection of Businesses Act

- 25) *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2010 WL 2976220 (E.D.N.Y. July 23, 2010).

Israeli Basic Laws relating to the Protection of Privacy

- 26) *Linde v. Arab Bank, PLC*, 262 F.R.D. 136 (E.D.N.Y. 2009).

Israeli Bank Secrecy Ordinance

- 27) *Linde v. Arab Bank, PLC*, 262 F.R.D. 136 (E.D.N.Y. 2009).
28) *Wultz v. Bank of China Ltd.*, 298 F.R.D. 91 (S.D.N.Y. 2014).

Israeli Prohibition on Money Laundering

- 29) *Linde v. Arab Bank, PLC*, 262 F.R.D. 136 (E.D.N.Y. 2009).

Israeli Prohibition on Terror Financing

- 30) *Linde v. Arab Bank, PLC*, 262 F.R.D. 136 (E.D.N.Y. 2009).

British Bank Secrecy Law

- 31) *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33 (E.D.N.Y. 2007).

Singapore Government Secrets Law

- 32) *In re* Air Crash at Taipei, Taiwan on October 31, 2000, 211 F.R.D. 374 (C.D. Cal. 2002).

Singapore Bank Secrecy Law

- 33) *CE Int'l Res. Holdings, LLC v. S.A. Minerals Ltd. P'ship*, No. 12-CV-08087(CM)(SN), 2013 WL 2661037 (S.D.N.Y. June 12, 2013).

United Arab Emirates Bank Secrecy Law

- 34) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).

Jordanian Bank Secrecy Law

- 35) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).
36) *Linde v. Arab Bank, PLC*, 706 F.3d 92 (2d Cir. 2013).

Lebanese Bank Secrecy Law

- 37) *Linde v. Arab Bank, PLC*, 706 F.3d 92 (2d Cir. 2013).

Ecuadorian Bank Secrecy Law

- 38) *In re* Chevron Corp., No. 11-24599-CV, 2012 WL 3636925 (S.D. Fla. June 12, 2012).

Ecuadorian Professional Disclosure Law

- 39) *Chevron Corp. v. Donziger*, 296 F.R.D. 168 (S.D.N.Y. 2013).

Uruguayan Bank Secrets Law

- 40) *NML Capital, Ltd. v. Republic of Argentina*, Nos. 03 Civ. 8845(TPG), 05 Civ. 2434(TPG), 06 Civ. 6466(TPG), 07 Civ. 1910(TPG), 07 Civ. 2690(TPG), 07 Civ. 6563(TPG), 08 Civ.

2541(TPG), 08 Civ. 3302(TPG), 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2013 WL 491522 (S.D.N.Y. Feb. 8, 2013).

Spanish Law of Civil Procedure

- 41) *Reino de Espana v. Am. Bureau of Shipping*, No. 03CIV3573LTSRLE, 2005 WL 1813017 (S.D.N.Y. Aug. 1, 2005).

Mexican Holding Company Nondisclosure Law

- 42) *British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, No. 90Civ.2370 (JFK)(FM), 2000 WL 713057 (S.D.N.Y. June 2, 2000).

ii Courts ordered violations of foreign law

- 1) *Linde v. Arab Bank, PLC*, 706 F.3d 92 (2d Cir. 2013) (ordering violation of Jordanian Bank Secrecy Law).
- 2) *Linde v. Arab Bank, PLC*, 706 F.3d 92 (2d Cir. 2013) (ordering violation of Lebanese Bank Secrecy Law).
- 3) *NML Capital, Ltd. v. Republic of Argentina*, Nos. 03 Civ. 8845(TPG), 05 Civ. 2434(TPG), 06 Civ. 6466(TPG), 07 Civ. 1910(TPG), 07 Civ. 2690(TPG), 07 Civ. 6563(TPG), 08 Civ. 2541(TPG), 08 Civ. 3302(TPG), 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2013 WL 491522 (S.D.N.Y. Feb. 8, 2013) (ordering violation of Uruguayan Bank Secrets Law).
- 4) *Pershing Pac. W., LLC v. MarineMax, Inc.*, No. 10-cv-1345-L (DHB), 2013 WL 941617 (S.D. Cal. Mar. 11, 2013) (ordering violation of German Federal Data Protection Act).
- 5) *Chevron Corp. v. Donziger*, 296 F.R.D. 168 (S.D.N.Y. 2013) (ordering violation of Ecuadorian Professional Disclosure Law).
- 6) *Wultz v. Bank of China Ltd.*, 298 F.R.D. 91 (S.D.N.Y. 2014) (ordering violation of Israeli Banking Ordinance).
- 7) *Linde v. Arab Bank, PLC*, 262 F.R.D. 136 (E.D.N.Y. 2009) (ordering violation of Israeli Basic Laws Relating to the Protection of Privacy).
- 8) *BrightEdge Techs., Inc. v. Searchmetrics, GmbH.*, No. 14-cv-01009-WHO (MEJ), 2014 WL 3965062 (N.D. Cal. Aug. 13, 2014) (ordering violation of German Data Protection Act).
- 9) *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992) (ordering violation of Chinese State Secrets Law).
- 10) *Wultz v. Bank of China Ltd.*, 942 F. Supp. 2d 452 (S.D.N.Y. 2013) (ordering violation of Chinese State Secrets Law).
- 11) *In re Chevron Corp.*, No. 11-24599-CV, 2012 WL 3636925 (S.D.

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- Fla. June 12, 2012) (ordering violation of Ecuadorian Bank Secrets Law).
- 12) Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976(NRB), 2012 WL 1918866 (S.D.N.Y. May 23, 2012) (ordering violations of Chinese Bank Secrets Law).
 - 13) TruePosition, Inc. v. LM Ericsson Tel. Co., No. 11-4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012) (ordering violation of French Blocking Statute).
 - 14) *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944-SC, 2014 WL 5462496 (N.D. Cal. Oct. 23, 2014) (ordering violation of French Blocking Statute).
 - 15) Coloplast A/S v. Generic Med. Devices, Inc., No. C10-227BHS, 2011 WL 6330064 (W.D. Wash. Dec. 19, 2011) (ordering violation of French Blocking Statute).
 - 16) Stream Sicav v. RINO Int'l Corp., No. CV 10-08695-VBF (VBKx), 2011 WL 4978291 (C.D. Cal. Oct. 11, 2011) (ordering violation of Chinese Tort Liability Law).
 - 17) Gucci Am., Inc. v. Li, No. 10 Civ. 4974(RJS), 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011) (ordering violation of Chinese Bank Secrecy Law).
 - 18) Consejo de Defensa del Estado de la Republica de Chile v. Espirito Santo Bank, No. 09-20613-CIV, 2010 WL 2162868 (S.D. Fla. May 26, 2010) (ordering violation of Chilean Secrecy Law).
 - 19) Gucci Am., Inc. v. Curveal Fashion, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) (ordering violation of Malaysian Bank Secrecy Law).
 - 20) *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2010 WL 2976220 (E.D.N.Y. July 23, 2010) (ordering violation of South African Protection of Businesses Act).
 - 21) *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51 (E.D.N.Y. 2010) (ordering violation of French Blocking Statute).
 - 22) Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238 (S.D.N.Y. 2010) (ordering violation of Chinese Commercial Banking Law).
 - 23) Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009) (ordering violation of Israeli Prohibition on Money Laundering).
 - 24) Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009) (ordering violation of Israeli Anti-Terrorism Financing Law).
 - 25) *In re* Glob. Power Equip. Grp. Inc., 418 B.R. 833 (Bankr. D. Del. 2009) (ordering violation of French Blocking Statute).
 - 26) Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429 (E.D.N.Y. 2008) (ordering violation of French Blocking Statute).

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- 27) *Weiss v. Nat'l Westminster Bank*, 242 F.R.D. 33 (E.D.N.Y. 2007) (ordering violation of British Bank Secrecy Law).
 - 28) *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310 (E.D.N.Y. 2006) (ordering violation of Jordanian Bank Secrecy Law).
 - 29) *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310 (E.D.N.Y. 2006) (ordering violation of Lebanese Bank Secrecy Law).
 - 30) *Reino de Espana v. Am. Bureau of Shipping*, No. 03CIV3573LTSRLE, 2005 WL 1813017 (S.D.N.Y. Aug 1, 2005) (ordering violation of Spanish Law of Civil Procedure).
 - 31) *British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, No. 90Civ.2370 (JFK)(FM), 2000 WL 713057 (S.D.N.Y. June 2, 2000) (ordering violation of Mexican Holding Company Nondisclosure Law).
 - 32) *In re Enron Corp.*, No. 01-16034 (AJG), 2007 WL 8317419 (Bankr. S.D.N.Y. July 18, 2007) (ordering violation of French Blocking Statute).
 - 33) *In re Air Crash at Taipei, Taiwan on October 31, 2000*, 211 F.R.D. 374 (C.D. Cal. 2000) (ordering violation of Singapore Government Secrets Law).
 - 34) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014) (ordering violation of French Blocking Statute).
 - 35) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014) (ordering violation of Emirati Bank Secrecy Law).
 - 36) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014) (ordering violation of Jordanian Bank Secrecy Law).
 - 37) *In re Baycol Prods. Litig.*, MDL No. 1431 (MJD/JGL), 2003 WL 22023449 (D. Minn. Mar. 21, 2003) (ordering violation of German Federal Data Privacy Act).

Courts refused to order violations of foreign law

- 1) *Tiffany (NJ) LLC v. Qi*, 276 F.R.D. 143 (S.D.N.Y. 2011) (refusing to order violations of Chinese banking laws; ordering parties to proceed through Hague Convention).
- 2) *Tiffany (NJ) LLC v. Forbse*, No. 11 Civ. 4976(NRB), 2012 WL 1918866 (S.D.N.Y. May 23, 2012) (refusing to order violation of Chinese Bank Secrets Law; ordering party to proceed through Hague Convention against one defendant).
- 3) *S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323 (N.D. Tex. 2011) (refusing to order violations of Swiss Banking Act; ordering parties to proceed through Hague Convention).
- 4) *In re Baycol Prods. Litig.*, MDL No. 1431 (MJD/JGL), 2003 WL 22023449 (D. Minn. Mar. 21, 2003) (refusing to order violation

of German Federal Data Protection Act; denied motion to compel discovery).

- 5) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014) (refusing to order violation of Swiss Banking Act).

iii No evidence that foreign blocking statute had been enforced

- 1) *Linde v. Arab Bank, PLC*, 706 F.3d 92, 114 (2d Cir. 2013) (“[T]he record . . . does not show ‘that defendant or its employees have been prosecuted for the Bank’s voluntary productions in other cases.’”).
- 2) *Linde v. Arab Bank, PLC*, 706 F.3d 92, 114 (2d Cir. 2013) (same with regard to Lebanese bank-secrecy law).
- 3) *NML Capital, Ltd. v. Republic of Argentina*, Nos. 03 Civ. 8845(TPG), 05 Civ. 2434(TPG), 06 Civ. 6466(TPG), 07 Civ. 1910(TPG), 07 Civ. 2690(TPG), 07 Civ. 6563(TPG), 08 Civ. 2541(TPG), 08 Civ. 3302(TPG), 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2013 WL 491522, at *11 (S.D.N.Y. Feb. 8, 2013) (“Since [the defendant] has not provided any cases where parties in its position have been fined or prosecuted for disclosing under similar circumstances, this factor weighs in favor of compliance.”).
- 4) *Chevron Corp. v. Donziger*, 296 F.R.D. 168, 207 (S.D.N.Y. 2013) (“[T]he record reveals that [the objecting entity] has provided . . . [similar] documents and materials throughout the history of this case when such materials were thought helpful to their position. Not once has he been prosecuted or subjected to any penalty. The absence of any such evidence weighs against a finding that a party faces hardship if it complies with a discovery request.”).
- 5) *Wultz v. Bank of China Ltd.*, 298 F.R.D. 91, 103 (S.D.N.Y. 2014) (“I find Hapoalim’s argument as to Israel’s interests not entirely persuasive. Hapoalim fails to cite even one example of a civil or criminal penalty that was ever actually enforced in connection with these laws.”).
- 6) *BrightEdge Techs., Inc. v. Searchmetrics, GmbH*, No. 14-cv-01009-WHO (MEJ), 2014 WL 3965062, at *5 (N.D. Cal. Aug. 13, 2014) (“Here, Searchmetrics has not provided any argument as to whether parties in its position have been fined or prosecuted for disclosing personal data under similar circumstances, this factor weighs in favor of compliance.”).
- 7) *Wultz v. Bank of China Ltd.*, 942 F. Supp. 2d 452, 468 (S.D.N.Y. 2013) (“With regard to hardship, it remains the case that BOC

has produced no evidence of a bank or its employees being meaningfully punished for disclosing confidential information to a U.S. court in contravention of Chinese law. As Dr. Peerenboom states: ‘the Chinese authorities have apparently not yet actually sanctioned a bank for disclosing confidential information to a foreign court under threat of sanctions in violation of Chinese law.’”).

- 8) *In re Chevron Corp.*, No. 11-24599-CV, 2012 WL 3636925, at *15 (S.D. Fla. June 12, 2012) (“It is also worth noting that de Alba’s research reveals no public record or history of violation and/or enforcement of the banking laws at issue[.] . . . Because of this, in her opinion, it is not likely that the bank’s employees or its officers would be subject to ‘adverse legal consequences such as the loss of their banking licenses or punishment, if they complied with such an order.’”).
- 9) *Tiffany (NJ) LLC v. Forbse*, No. 11 Civ. 4976(NRB), 2012 WL 1918866, at *9 (S.D.N.Y. May 23, 2012) (“In response, [the Plaintiff] notes that despite the prospect of sanctions hinted at by the [Chinese Authorities before an earlier production order], [the Defendant] has not actually been punished in any manner for complying with Judge Sullivan’s [earlier] order.”).
- 10) *TruePosition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012, at *6 (E.D. Pa. Mar. 6, 2012) (“Notably, as Trueposition points out, ETSI has presented no evidence that the French Blocking Statute has ever been enforced in the context of a federal suit, not even an antitrust case, filed in the United States regarding jurisdictional discovery.”).
- 11) *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2014 WL 5462496, at *7 (N.D. Cal. Oct. 23, 2014) (“[The Defendant] has pointed to no similar case, nor indeed any other case, in which the Blocking Statute was enforced against a French company. As such the Court finds the risk of prosecution in this case, if any, is minimal.”).
- 12) *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2010 WL 2976220, at *2 (E.D.N.Y. July 23, 2010) (“The possibility that SAA will suffer hardship in complying with a discovery order is speculative at best. Although the defendant cites the prospect of criminal sanctions if it violates the blocking statute, it has cited no instance in which such sanctions have ever been imposed.”).
- 13) *In re Air Cargo Shipping Services Antitrust Litig.*, 278 F.R.D. 51, 53–54 (E.D.N.Y. 2010) (quoting *Bodner v. Banque Paribas*, 202

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- F.R.D. 370, 375 (E.D.N.Y. 2000) (“As held by numerous courts, the French Blocking Statute does not subject defendants to a realistic risk of prosecution, and cannot be construed as a law intended to universally govern the conduct of litigation within the jurisdiction of a United States court.”).
- 14) *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 250 (S.D.N.Y. 2010) (quoting *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MDL-1775, 2010 WL 2976220, at *2 (E.D.N.Y. July 23, 2010) (“[T]he possibility that [the Bank] will suffer hardship in complying with the discovery order is speculative at best. Although the defendant cites the prospect of [] sanctions, . . . it has cited no instance in which such sanctions have been imposed.”)).
 - 15) *In re Glob. Power Equip. Grp. Inc.*, 418 B.R. 833, 850 (Bankr. D. Del. 2009) (“Maasvlakte has presented no evidence to suggest that ALE or Maasvlakte faces a significant risk of prosecution if it complies with the discovery requests pursuant to an order of this Court.”).
 - 16) *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 455 (E.D.N.Y. 2008) (“Moreover, considering that Credit Lyonnais has not faced any articulated harm following its previous disclosure of protected information in a press release, or following its *Strauss* production, Credit Lyonnais fails to explain why it continues to believe that such hardship is either imminent or inevitable.”).
 - 17) *Reino de Espana v. Am. Bureau of Shipping*, No. 03CIV3573LTSRLE, 2005 WL 1813017, at *8 (S.D.N.Y. Aug. 1, 2005) (noting that the Article’s “record of enforcement” indicated that it had “become a relic,” and going on to order production).
 - 18) *British Int’l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, No. 90Civ.2370 (JFK)(FM), 2000 WL 713057, at *10 (S.D.N.Y. June 2, 2000) (noting that company’s previous production of material in violation of relevant blocking statute indicated that “the terms of [the relevant statute] are not applied inflexibly, and that holding companies and their constituent companies retain the ability to ‘deal’ when faced with a discovery request that arguably violates Mexican law”).
 - 19) *In re Enron Corp.*, No. 01-16034 (AJG), 2007 WL 8317419, at *2 (Bankr. S.D.N.Y. July 18, 2007) (citing *Compagnie Francaise d’Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984) (“[P]laintiffs’ fears of criminal prosecution under the French Blocking Statute appear to

have no sound basis and . . . [t]here is little evidence that the statute has been or will be enforced.”) (internal quotation marks omitted).

- 20) *In re Air Crash at Taipei, Taiwan* on October 31, 2000, 211 F.R.D. 374, 379 (C.D. Cal. 2000) (“[D]efendant [has not] presented any evidence regarding the manner and extent to which Singapore enforces its secrecy laws.”).
- 21) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 405 (S.D.N.Y. 2014) (“[T]he Court’s attention has now been focused on the total paucity of published prosecutions of banks or their officers in Jordan . . . for complying with discovery ordered by a foreign court. Nor have the objecting banks identified any such prosecutions, published or otherwise.”).
- 22) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 403 (S.D.N.Y. 2014) (“In practice . . . it appears that when a foreign court orders production of French documents even though the producing party has raised the ‘excuse’ of the French blocking statute, the French authorities do not, in fact, prosecute or otherwise punish the producing party.”).

^{iv} **Evidence that foreign blocking statute had been enforced**

- 1) *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 404 (S.D.N.Y. 2014) (“The Swiss Federal Office for Statistics reports 28 prosecutions between 1987 and 1996, and although that number has not been recently updated, anecdotal evidence presented to the Court indicates ongoing, vigorous, and serious enforcement, as in a three-year prison sentence in 2013 for a former employee of Bank Julius Baer who aided German tax collectors. . . . In such circumstances, a balancing of interests strongly favors denying the release of the subpoenaed information from bank branches located in Switzerland, and the other *Aerospatiale* factors do not overcome this conclusion.”).
- 2) *Tiffany (NJ) LLC v. Qi*, 276 F.R.D. 143, 158–59 (S.D.N.Y. 2011) (“[T]he Banks here have cited Chinese cases in which a commercial bank was held liable to its customer after turning over the individual’s funds or information to a third party. . . . [These cases] demonstrate[] that Article 253(A) statute has been used to prosecute individuals and that violations can result in serious punishment.”).
- 3) *S.E.C. v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 339–40 (N.D. Tex. 2011) (“Swiss authorities have prosecuted individuals and entities for failing to heed laws designed to promote that

interest[.] . . . Accordingly, the Court finds that SG Suisse may face substantial hardship should the Court order it to comply with the Receiver's request. This factor weighs in SG Suisse's favor.”).

