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Court-Ordered Law Breaking

U.S. COURTS INCREASINGLY ORDER THE VIOLATION OF FOREIGN LAW

Geoffrey Sant[†]

INTRODUCTION

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.¹ Indeed, until fairly recently, it was virtually unheard of for a U.S. court to order the violation of foreign laws.² In 1987, a U.S. circuit court even stated, *per curiam*, that it was unsure “whether a court may ever order action in violation of foreign laws” and added “that it causes us 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.”³ Over the past decade, however, the phenomenon of court-ordered law breaking has increased at an exponential rate. Sixty percent of all instances of courts ordering the violation of foreign laws have occurred in the last five years.

The question of whether or not to order the violation of foreign law typically arises in the context of discovery disputes. In 2010, for example, plaintiffs demanded that a bank produce

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¹ Prior to the present article, I wrote an analysis of court-ordered foreign law breaking in the Second Circuit. See Geoffrey Sant, “Aerospatiale” *Factors on Discovery in Violation of Foreign Laws*, N.Y. L.J., Dec. 8, 2014, at 1, 1-4. When reviewing that article for publication, the editor of the *New York Law Journal* responded with some surprise, stating, “it isn’t every day that courts permit violations of any laws.” Email from Elaine Song, Legal Editor, *New York Law Journal*, to author (Oct. 27, 2014, 13:26 EST) (on file with author).

² See *infra* Section IV.A.

³ *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987).

financial records from Malaysia in violation of Malaysian laws protecting bank secrecy and financial privacy.⁴ In 2011, a litigant urged a court to order production of a company's trade secrets in violation of Swedish law prohibiting disclosure.⁵ In another recent case, a defendant sought the production of a confidential file from the Spanish government that included the results of a criminal investigation, production of which would violate Spanish criminal law.⁶ In each of these cases, the courts ordered the violation of foreign law, thereby declaring the supremacy of U.S. discovery over foreign law.

In its 1987 *Aérospatiale* decision, the Supreme Court created a five-factor test for courts to use when determining whether or not to order the violation of foreign law.⁷ Four of the five factors in this test require courts to make subjective judgments (for example, whether the information sought is "important"). But are U.S. courts actually able to carry out this analysis without being biased in favor of U.S. discovery? The five-justice majority and four-justice dissent in *Aérospatiale* sharply disagreed on this question, with the dissent warning that trial court decisions would be riddled with "pro-forum bias." This article is the first to conduct a statistical analysis of whether the pro-forum bias predicted by the four-justice *Aérospatiale* dissent and by numerous commentators has come true.⁸ The results are stark. Courts applying the *Aérospatiale* test have found each of the subjective factors to weigh in favor of U.S. discovery (that is, in favor of violating foreign law) by a ratio of at least four to one. Moreover, courts have concluded that two of the subjective factors favor violating foreign law by a ratio of at least ten to one. Such lopsided results seem to confirm the existence of "pro-forum bias."⁹

Often, U.S. courts make their pro-forum bias explicit, stating that they are ordering the violation of foreign laws because of "the United States' interests in vindicating the rights of American plaintiffs."¹⁰ This remarkable assertion contradicts the

⁴ *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639, at *2, *4 (S.D.N.Y. Mar. 8, 2010).

⁵ *AstraZeneca LP v. Breath Ltd.*, No. 08-1512 (RMB/AMD), 2011 WL 1421800, at *1 (D.N.J. Mar. 31, 2011).

⁶ *Reino de España v. Am. Bureau of Shipping*, No. 03 Civ. 3573 LTS/RLE, 2006 WL 2239641, at *1-2 (S.D.N.Y. Aug. 4, 2006).

⁷ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).

⁸ See *infra* notes 64-71 and accompanying text.

⁹ Part III will analyze the lopsided results of the *Aérospatiale* test.

¹⁰ *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992); *Coloplast A/S v. Generic Med. Devices, Inc.*, No. C10-227BHS, 2011 WL 6330064, at *4 (W.D. Wash. Dec. 19, 2011) (quoting this language); *In re Air Crash at*

widespread expectation that justice is blind to such things as the nationality of the parties. The focus by courts on the nationality of the parties—treating litigant nationality as a justification for ordering the violation of foreign laws—is both disturbing and disrespectful to foreign sovereigns.

Not only does there seem to be pro-forum bias in favor of U.S. discovery, but an analysis of all results in the United States suggests that courts might have an additional, deeper bias against non-Western nations. U.S. courts were over 50% more likely to find that any given factor weighed in favor of the laws of a Western nation as compared to a non-Western nation.¹¹

The harms caused by pro-forum bias do not halt at the decisions themselves. Just as striking as the pro-forum bias is the exponential growth in the number of litigants requesting that courts order foreign law breaking. There were 2,500% more cases seeking the production of documents in violation of foreign law in the past 10 years than in the first 10 years after the *Aérospatiale* ruling.¹² U.S. courts are largely responsible for the phenomenon of court-ordered foreign law breaking. Their willingness to order the production of documents in violation of foreign law seems to have greatly encouraged litigants to demand these documents. Litigants increasingly use court orders to trap opponents between conflicting laws, thereby forcing an unwarranted settlement. For example, litigants will demand unneeded documents that cannot be produced without violating foreign law. This litigation strategy traps the other party between violating the laws of its home nation and a U.S. court order. In this way, crafty litigants can force the other side to settle in order to avoid violating the laws of one nation. In addition to individual instances of litigation abuse, court-ordered violations of foreign law create international rancor and encourage foreign governments to retaliate by requiring the production of privileged or protected U.S. documents.¹³

In short, courts are increasingly ordering the violation of foreign laws. These court orders often occur in the context of discovery disputes, with parties seeking the production of documents from foreign nations that cannot be produced without violating those nations' laws. Courts generally apply the five-factor *Aérospatiale* test when determining whether or not to

Taipei, Taiwan on October 31, 2000, 211 F.R.D. 374, 379 (C.D. Cal. June 19, 2002) (partially quoting this language).

¹¹ See *infra* notes 258-266 and accompanying text. At this point in time, there is an insufficient number of cases to determine that this difference is statistically significant. The results, however, are suggestive. The harms caused by pro-forum bias are analyzed in Part IV.

¹² This extraordinary, exponential increase is presented in chart form in Part IV.

¹³ See *infra* Sections IV.B, IV.D.

order the production of documents in violation of foreign law. But the *Aérospatiale* test requires courts to make numerous subjective judgments, and the empirical analysis below demonstrates that courts are unable to apply the *Aérospatiale* test without pro-forum bias. Parts I and II of this article discuss the problematic history of *Aérospatiale* and its much-criticized five-factor test. Part III analyzes how courts have applied the five-factor *Aérospatiale* test. Part IV presents a statistical analysis of the application of this test in U.S. courts and concludes that there is overwhelming evidence of pro-forum bias. Finally, in Part V, the article suggests that the five-factor *Aérospatiale* test should be modified to ameliorate pro-forum bias, or in the alternative, U.S. courts should adopt a Hague Convention first approach, in order to stop the alarming trend of U.S. courts ordering the violation of foreign law.

I. THE SUPREME COURT'S *AÉROSPATIALE* RULING

“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.”¹⁴

Civil litigation in the United States permits broad discovery.¹⁵ Litigants generally must produce not only relevant and admissible evidence, but also any information that could *lead* to admissible evidence.¹⁶ This broad discovery contrasts sharply with other legal systems, such as those in continental Europe, where discovery is generally minimal and parties are expected to supply their own evidence.¹⁷ Civil law nations, like those in Europe, view evidence taking as a governmental function that should be performed by the judiciary.¹⁸ Attempts 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

¹⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, Reporter's Note 1 (AM. LAW INST. 1987).

¹⁵ See, e.g., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

¹⁶ See FED. R. CIV. P. 26(b)(1).

¹⁷ See Patricia Anne Kuhn, *Societe Nationale Industrielle Aerospatiale: The Supreme Court's Misguided Approach to the Hague Evidence Convention*, 69 B.U. L. REV. 1011, 1014 (1989); see also John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT'L L.J. 455, 462 (2012).

¹⁸ Gary B. Born, *The Hague Convention Revisited: Reflections on its Role in U.S. Civil Procedure*, 57 L. & CONTEMP. PROBS. 77, 83 (1994).

it if foreign nations set up their own prosecutors or police within the United States.¹⁹

In the mid-1900s, with foreign opposition to U.S. discovery hampering efforts at international litigation and damages collection, the United States pushed for an international treaty that would allow U.S. litigants to gather evidence from foreign nations.²⁰ The Hague Convention on Taking of Evidence Abroad created formal procedures by which litigants in the United States (and elsewhere) could obtain documents and testimony from foreign states.²¹ In order to ensure that the United States would respect and follow the Hague Convention procedures, many nations passed “blocking statutes.”²² Blocking statutes made it a crime to collect evidence (other than through the Hague Convention) within the foreign nation for use in litigation outside that nation.²³ Unilateral collection of evidence within foreign nations now not only offended those nations’ sovereignty, it also violated their laws.

When conducted outside the framework of the Hague Convention, U.S. discovery abroad could potentially violate not only blocking statutes, but also the substantive foreign laws that prohibit the release of certain specific kinds of sensitive information. For example, most nations have financial privacy and bank secrecy laws to protect sensitive personal and business information.²⁴ These substantive laws were created for independent public policy reasons and not merely to block U.S. discovery.

In the United States, the Restatement of Foreign Relations Law created a five-part test²⁵ for use in resolving

¹⁹ See, e.g., Hague Conference on Private International Law, *Draft Practical Handbook on the Operation of the Evidence Convention*, at 4 (Mar. 2014) [hereinafter *Draft Practical Handbook*]; Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. PA. L. REV. 1461, 1464-65 (1984) (citing Report of the United States Delegation to the Eleventh Session of Hague Conference on Private International Law, 8 INT’L LEGAL MATERIALS 785, 806 (1969)).

²⁰ CONVENTION ON TAKING OF EVIDENCE ABROAD, S. EXEC. DOC. NO. 92-25, at 3 (1972) (Statement of Carl F. Salans, Deputy Legal Adviser, Dept. of State); see *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 549 (1987) (5-4 decision) (Blackmun, J., concurring in part and dissenting in part) (noting this fact).

²¹ See, e.g., *Draft Practical Handbook*, *supra* note 19, at 4. In a nutshell, the Hague Convention established formal pathways by which a nation—such as the United States—could formally request that a central authority within a foreign nation gather and submit evidence for use in litigation.

²² Mark A. Cotter, *The Hague Convention: Selfish U.S. Interpretation Aggravates Foreign Signatories and Mandates Changes to Federal Discovery Rules*, 6 FLA. J. INT’L L. 233, 243 (1991).

²³ *Id.*

²⁴ See *supra* note 1 and accompanying text.

²⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (AM. LAW INST. 1987).

“conflicting mandates . . . , [where] the regulation of one state compels the person to violate the mandate of another state.”²⁶ Despite this test, the conflict between U.S. discovery and foreign laws reached the Supreme Court in 1987 in the case of *Societe Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*.²⁷ In *Aérospatiale*, the trial and appellate courts refused to require plaintiffs to obtain documents from France through the procedures outlined in the Hague Convention (which require sending formal requests to identified bodies within foreign governments seeking their assistance in obtaining evidence). Instead, the courts simply ordered the defendants to produce documents, even though such production would violate a French blocking statute. The Supreme Court decision in *Aérospatiale* focused primarily on whether lower courts were obligated to proceed through the Hague Convention when litigants seek documents held abroad. Due to the existence of the blocking statute, the decision also touched upon how courts should handle conflicts between U.S. discovery and foreign law.

It is ironic that many courts now speak of applying the “*Aérospatiale* test”²⁸ or the “*Aérospatiale* factors,”²⁹ considering the Supreme Court’s decision in *Aérospatiale* avoided providing such guidance to courts. The Supreme Court majority specifically stated that “[w]e do not articulate specific rules to guide this delicate task of adjudication,”³⁰ and commentators have universally—and repeatedly—lamented the majority’s “lack of guidance,”³¹ its “very little guidance,”³² and its “explicit refusal . . . to lay down explicit guidance.”³³ Summing up the views of many, one scholar wrote that “[c]learly, *Aérospatiale*’s failure to provide a framework for lower courts to utilize . . . is regrettable.”³⁴ The four-justice *Aérospatiale* dissent too lambasted the majority for having “missed its opportunity to provide predictable and

²⁶ *Id.* at pt. IV, Introductory Note.

²⁷ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987).

²⁸ *See, e.g., In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 48 (D.D.C. 2000); *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 355 (D. Conn. 1991) (calling it “the *Societe* . . . test”).

²⁹ *See, e.g., Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 401 (S.D.N.Y. 2014); *Coloplast A/S v. Generic Med. Devices, Inc.*, No. C10-227BHS, 2011 WL 6330064, at *4 (W.D. Wash. Dec. 19, 2011).

³⁰ *Aérospatiale*, 482 U.S. at 546.

³¹ Cotter, *supra* note 22, at 234, 239.

³² Patrick J. Borchers, *The Incredible Shrinking Hague Evidence Convention*, 38 TEX. INT’L L.J. 73, 81 (2003).

³³ James Chalmers, *The Hague Evidence Convention and Discovery Inter Partes: Trial Court Decisions Post-Aérospatiale*, 8 TUL. J. INT’L & COMP. L. 189, 203 (2000).

³⁴ *Id.* at 198.

effective procedures”³⁵ and its “failure to provide lower courts with any meaningful guidance.”³⁶

Nevertheless, lower courts attempting to apply the *Aérospatiale* ruling could not simply throw up their hands. Many courts developed a formal three-factor test³⁷ from the high court’s seemingly generic statement that trial courts should balance the “particular facts, sovereign interests, and [the] likelihood that resort to . . . [Hague Convention] procedures will prove effective.”³⁸ Other courts created a four-factor test, drawing on other language from *Aérospatiale*.³⁹ A greater number of lower courts, however, seized upon a footnote in the majority’s ruling, which stated that “[t]he nature of the concerns that guide a comity analysis is suggested by the Restatement of Foreign Relations Law of the United States.”⁴⁰ The footnote then proceeded to set out as “factors . . . relevant to any comity analysis” the same five factors that the Restatement identified for determining when to order discovery in violation of foreign law.⁴¹ These five factors are: (1) the importance of the discovery to the litigation; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of obtaining the information; and (5) the extent to which noncompliance with the request would undermine important U.S. interests or the interests of the state where the information is located.⁴² In some circuits, courts consider other factors in addition to these five.⁴³

³⁵ *Aérospatiale*, 482 U.S. at 568 (Blackmun, J., concurring in part and dissenting in part).

³⁶ *Id.* at 548.

³⁷ 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).

³⁸ *Aérospatiale*, 482 U.S. at 544.

³⁹ See, e.g., *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998); *Bodner v. Paribas*, 202 F.R.D. 370, 374-75 (E.D.N.Y. 2000) (each following a four-factor test 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”).

⁴⁰ *Aérospatiale*, 482 U.S. at 544 n.28. For examples of courts applying the five-factor test from the Restatement of Foreign Relations Law, see *infra* note 104.

⁴¹ *Aérospatiale*, 482 U.S. at 544 n.28; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (AM. LAW INST. 1987).

⁴² *Aérospatiale*, 482 U.S. at 544 n.28 (1987).

⁴³ See, e.g., *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) (identifying additional factors, including “the extent and the nature of the hardship that inconsistent enforcement would impose upon the person” and “the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state”); *Strauss v. Credit Lyonnais*, 249 F.R.D. 429, 454-56 (E.D.N.Y. 2008) (identifying as additional factors (1) the good faith of the party resisting discovery; and (2) the hardship of compliance on the party or witness from whom discovery is sought).

The *Aérospatiale* balancing test for ordering foreign law breaking was controversial and criticized from the get-go. The four-justice dissent, led by Justice Blackmun, believed it was grossly inappropriate (“an affront” to foreign nations⁴⁴) for U.S. trial courts to decide which foreign laws were worthy of being followed. The dissent’s “fear” was that trial courts would begin “issuing discovery orders . . . in a raw exercise of their jurisdictional power” and cause harm to international comity.⁴⁵ Commentators too “have almost uniformly condemned the opinion,”⁴⁶ with Russell Weintraub writing caustically of the opinion’s “xenophobia” and the “outrage” it provoked.⁴⁷ Patrick J. Borchers describes the “*Aérospatiale* case, and its subsequent history” as “monuments to . . . failure”⁴⁸ distinguished by “so unconvincing”⁴⁹ reasoning.

In addition to the general concern about international comity, however, the dissent, commentators, and even the *Aérospatiale* majority all expressed a more practical concern: namely, that trial “courts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own.”⁵⁰ U.S. trial courts, after all, have a “cognitive bias in favor of U.S. discovery.”⁵¹ Trial courts manage U.S. discovery on a day-to-day basis, and it is natural for them to highly value the importance of that discovery. The *Aérospatiale* dissent stated that “pro-forum bias is likely to creep into the supposedly neutral balancing process and courts not surprisingly often will turn to the more familiar procedures established by their local rules.”⁵² This natural bias in favor of U.S. discovery, combined with unfamiliarity with foreign laws, creates “a large risk” that the “case-by-case comity analysis . . . will be performed inadequately.”⁵³ The dissent concluded that “courts are not well designed”⁵⁴ to undertake the *Aérospatiale* comity analysis, especially because “relatively few judges are experienced in the area and the

⁴⁴ *Aérospatiale*, 482 U.S. at 547 (Blackmun, J., concurring in part and dissenting in part).

⁴⁵ *Id.* at 548.

⁴⁶ Russell J. Weintraub, *The Need for Awareness of International Standards When Construing Multilateral Conventions: The Arbitration, Evidence, and Service Conventions*, 28 TEX. INT’L L.J. 441, 460-61, 470 (1993).

⁴⁷ *Id.* at 460-61, 470-71.

⁴⁸ Borchers, *supra* note 32, at 74.

⁴⁹ *Id.* at 81.

⁵⁰ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 552 (1987) (Blackmun, J., concurring in part and dissenting in part).

⁵¹ See Sant, *supra* note 1, at 2.

⁵² *Aérospatiale*, 482 U.S. at 553 (Blackmun, J., concurring in part and dissenting in part) (citation omitted).

⁵³ *Id.* at 548.

⁵⁴ *Id.* at 551.

procedures of foreign legal systems are often poorly understood.”⁵⁵ Justice Blackmun pointed to recent U.S. trial court decisions as proof of courts’ “parochial views” and pro-forum bias.⁵⁶

The *Aérospatiale* majority recognized the danger of pro-forum bias but apparently believed that this danger could be avoided by simply exhorting trial courts to avoid bias and to treat “foreign litigants . . . [with] the most careful consideration.”⁵⁷ The majority repeatedly urged trial courts to take pains “to prevent discovery abuses,” to “prevent improper uses of discovery requests,” and to “demonstrate due respect” for “any sovereign interest” of a foreign state—a “delicate task.”⁵⁸ The majority called on courts to “supervise pretrial proceedings particularly closely,” and “exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.”⁵⁹

Did these exhortations succeed? Commentators have said no, criticizing *Aérospatiale*’s “confusing and unworkable standard” in which trial courts are expected to “balance” the interests of the United States and the foreign government.⁶⁰ Others have stated that the “supposed protection” of the case-by-case reasonableness approach “was largely illusory.”⁶¹ Patrick J. Borchers called trial court implementation of the ruling “disappointing”⁶² and “disturbing.”⁶³ It appears that pro-forum bias has proven too invidious for courts to avoid.

Despite the lack of a statistical analysis of court cases applying the *Aérospatiale* test, commentators have been highly skeptical of courts’ ability to avoid pro-forum bias. One writes that “[i]t is far from clear that domestic courts are suited for carrying out the balancing exercise required.”⁶⁴ Another condemns the “case-by-case comity analysis” as “subject to a great deal of abuse by local courts.”⁶⁵ The need has long existed for a statistical

⁵⁵ *Id.* at 552.

⁵⁶ *Id.* at 568.

⁵⁷ *Id.* at 546.

⁵⁸ *Id.*

⁵⁹ *Id.* For its part, the dissent stated that it was “encouraged by the extent to which the Court emphasizes the importance of foreign interests and by its admonition to lower courts to take special care to respect those interests.” *Id.* at 556 (Blackmun, J., concurring in part and dissenting in part).

⁶⁰ Abigail West, Comment, *A Meaningful Opportunity to Comply*, 63 U. KAN. L. REV. 189, 212, 215 (2014).

⁶¹ Borchers, *supra* note 32, at 79.

⁶² *Id.* at 82.

⁶³ *Id.* at 84. He adds that “[m]ost of the American commentary [discussing the standard] has been negative.” *Id.* at 79.

⁶⁴ Chalmers, *supra* note 33, at 207, 214.

⁶⁵ Steven R. Swanson, *Comity, International Dispute Resolution Agreements, and the Supreme Court*, 21 L. & POLY INT’L BUS. 333, 365 (1990).

analysis to determine whether or not pro-forum bias exists. Early commentators noted that Justice Blackmun's fear of "pro-forum bias" remained "of course speculative."⁶⁶ Some, including Adair Dyer, the First Secretary of the Permanent Bureau of the Hague Conference on Private International Law, called for an empirical analysis of the cases applying the *Aéropatiale* test.⁶⁷

Many commentators have claimed to discern pro-forum bias based on anecdotal evidence, but no commentator has attempted a statistical analysis. For example, one author remarked that U.S. courts "[b]alancing foreign sovereign interests against U.S. interests . . . invariably find that U.S. interests take precedence," but the author only cited to three cases.⁶⁸ Another author claimed that "prediction of a pro-forum bias . . . was borne out by lower court decisions," citing to five cases.⁶⁹ Another author reported anecdotally upon "a general trend in which courts demonstrate a pro-forum bias, often choosing to compel evidence disclosure under the Federal Rules even when doing so would violate foreign law."⁷⁰ This same author acknowledged, however, that her anecdotal reports "are not meant to be an exhaustive study."⁷¹ The fullest analysis to date was conducted in 2003 by an author who "review[ed] *Aéropatiale*'s progeny to determine whether the [*Aéropatiale*] test has proved to be . . . effective," concluding that "for the most part, it has not."⁷² This author's in-depth and helpful analysis discussed 11 "representative cases."⁷³ Nevertheless, the author chose not to attempt a statistical analysis of the results.⁷⁴

Putting aside the lack of statistical analysis, the overwhelming sense from observers and commentators is that U.S. courts have a "clear bias"⁷⁵ and an "inherent institutional

⁶⁶ George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the *Aéropatiale* Decision*, 63 TUL. L. REV. 525, 542 (1989).

⁶⁷ See Russell J. Weintraub, *The Need for Awareness of International Standards When Construing Multilateral Conventions: The Arbitration, Evidence, and Service Conventions*, 28 TEX. INT'L L.J. 441, 464 (1993) ("The practical results of the decision therefore can only be discerned through analysis of the subsequent cases applying the court's approach in *Aéropatiale*." (citing Adair Dyer, Permanent Bureau of the Hague Conference on Private International Law, *Checklist for the Discussions of the Special Commission of April 1989 on the Operation of the Hague Conventions on the Service of Process Abroad and on the Taking of Evidence Abroad*, Preliminary Document No. 1 (Mar. 1989))).

⁶⁸ Chalmers, *supra* note 33, at 206.

⁶⁹ Cotter, *supra* note 22, at 234, 240.

⁷⁰ West, *supra* note 60, at 207.

⁷¹ *Id.* at 211.

⁷² Borchers, *supra* note 32, at 74.

⁷³ *Id.* at 82-84.

⁷⁴ *Id.*

⁷⁵ Chalmers, *supra* note 33, at 203.

inability” to act as neutral arbiters of national interests.⁷⁶ Authors have also discerned a trend in which “courts in the United States have become more willing to impose severe sanctions for failure to comply with discovery orders generally.”⁷⁷ Others state that “the heavy preponderance of [cases] simply authorize[] discovery under local procedures,”⁷⁸ accusing “judicial systems of . . . customarily protect[ing] the interests of their own citizens in international disputes by resolving in their favor the procedural conflicts.”⁷⁹ The Supreme Court has noted the “tendency on the part of courts, perhaps unrecognized, to view a dispute from a local perspective,”⁸⁰ and one appellate court commented that “courts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests.”⁸¹

There has long been a need for an exhaustive empirical analysis of the *Aéropatiale* test’s statistical results to determine whether the predictions and anecdotal reports of pro-forum bias are correct. The remainder of this article analyzes attempts by U.S. courts to implement the five-factor test in the context of possibly ordering violations of foreign law. The evidence of pro-forum bias is clear.

II. THE *AÉROSPATIALE* TEST, TESTED: OVERWHELMING PRO-FORUM BIAS

For this article, I conducted an empirical analysis of every U.S. trial court to apply the *Aéropatiale* five-factor test. The results show that U.S. courts have been lopsided in finding that the factors favor violating foreign laws.

The five *Aéropatiale* factors consist of one objective factor and four subjective factors. The subjective factors—which require courts to decide such things as the degree of “importance” of certain desired discovery—have been overwhelmingly resolved in favor of violating foreign law. Courts have found each subjective factor to favor violating foreign law by a ratio of at least four to

⁷⁶ Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-Aéropatiale Applications of the Hague Evidence Convention*, 24 INT’L LAW. 393, 404 (1990).

⁷⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, reporter note 8 (AM. LAW INST. 1987); see also West, *supra* note 60, at 207 (discussing the “general trend”).

⁷⁸ Borchers, *supra* note 32, at 82.

⁷⁹ Swanson, *supra* note 65, at 333.

⁸⁰ *Société Nationale Industrielle Aéropatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 553 (1987).

⁸¹ *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 951 (D.C. Cir. 1984) (citation omitted).

one.⁸² For two of the subjective factors, courts found the factor to favor violating foreign laws by a ratio of at least ten to one.⁸³ These lopsided results call into question whether courts have weighed the factors correctly and whether U.S. courts are even capable of conducting the balancing test required by *Aérospatiale*.

But while both the *Aérospatiale* dissent and commentators recognized the likelihood of pro-forum bias, one poisonous side effect of pro-forum bias was unforeseen: the exponential increase in U.S. litigants' requests that courts order foreign law breaking. The willingness of courts to order foreign law breaking has created a snowball effect. As courts increasingly order foreign law breaking, litigants respond by requesting even more of these orders. By demanding documents that the other side cannot produce, litigants trap the other side between a U.S. court order and foreign law. Discovery becomes a weapon, and the trapped entity can be forced into an unwarranted settlement or evidentiary sanctions. By way of example, one nonparty bank that refused to violate foreign financial privacy laws was ordered by a U.S. court to pay \$10,000 every day it failed to comply with the order as a "coercive fine."⁸⁴ Eventually, the bank—a *nonparty to the original litigation*—agreed to pay a \$250,000 settlement to the plaintiffs.⁸⁵

The number of cases in which litigants use court-ordered violations of foreign law as a strategic weapon has grown exponentially. Between 2005 and 2014, there were 2,500% more cases in which litigants requested the violation of foreign law as compared to the first 10 years after the *Aérospatiale* ruling.⁸⁶ Such enormous growth strongly implies that a shift in litigation strategy has occurred; trial courts have thus unwittingly encouraged the "discovery abuses" that the *Aérospatiale* majority warned against.⁸⁷

Pro-forum bias is especially invidious. Bias cannot be easily corrected because "the limited appellate review of interlocutory discovery decisions . . . prevents any effective case-

⁸² See *infra* Sections III.B, III.E.

⁸³ See *infra* Sections III.B, III.C.

⁸⁴ Order, *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. May 28, 2010).

⁸⁵ Stipulation and Order of Settlement, *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS), 2010 WL 808639 (S.D.N.Y. June 21, 2010).

⁸⁶ See *infra* Section IV.A. These statistics are based on the number of cases during each time period that utilized the *Aérospatiale* five-factor test to determine whether or not to violate foreign law. In the first decade after the *Aérospatiale* ruling, only two cases applied the five-factor *Aérospatiale* test in the context of possibly ordering the violation of foreign law; in the past 10 years, there were 50 such cases. As discussed elsewhere in this article, not all courts applying *Aérospatiale* use the five-factor test.

⁸⁷ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987).

by-case correction of erroneous discovery decisions.”⁸⁸ Due to the U.S. system in which courts defer to precedent, courts cite to and repeat decisions tainted with pro-forum bias. One commentator discussed the problem of “widespread and self-reinforcing” court orders violating foreign law, in which “courts justify one *ipse dixit* with citation of another in seemingly endless chains.”⁸⁹ Courts’ natural tendency towards pro-forum bias, combined with few or no opportunities for appellate court correction, and compounded by U.S. deference to precedent, has caused not just a snowball effect, but an avalanche of bad law.

As court-ordered law breaking has become common, foreign governments have begun to express outrage. The Kingdom of Jordan recently filed its first-ever amicus brief⁹⁰ to a U.S. court, declaring that “it feels compelled to do [so] given the grave affront to its sovereignty”⁹¹ by a court order requiring the violation of its laws. In 2015, a court in the United Kingdom turned U.S. discovery abuse on its head, ordering the revelation of a sealed U.S. court document regarding an ongoing Department of Justice investigation.⁹² Although the U.K. court did not explicitly state that its decision was retaliation for abusive U.S. court orders, one suspects that U.S. violations of foreign sovereignty have made foreign courts less respectful of U.S. sovereignty.

Foreign governments and regulators who wish to take mercy on companies trapped between foreign law and U.S. court orders have unwittingly worsened the situation. Many foreign regulators have used their prosecutorial discretion by *not* punishing companies for having obeyed U.S. court orders that required foreign law breaking. Yet this lack of enforcement has emboldened courts to conclude that foreign governments do not take these laws seriously. One U.S. court recently asserted that “[i]f 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.”⁹³ This judge essentially demanded that foreign governments fine and imprison people for complying with U.S. court orders. “This method of reasoning appears to place banks [and companies] in a precarious position—

⁸⁸ *Id.* at 554 (Blackmun, J., concurring in part and dissenting in part).

⁸⁹ Chalmers, *supra* note 33, at 201.

⁹⁰ Motion for Leave to File Brief and Brief of Amicus Curiae the Hashemite Kingdom of Jordan at 1, Arab Bank, PLC v. Linde, 134 S. Ct. 2869 (2014) (No. 12-1485), 2013 WL 3830458, at *1.

⁹¹ *Id.* at 2.

⁹² Prop. All. Grp. Ltd. v. The Royal Bank of Scotland PLC [2015] EWHC 321 (Ch).

⁹³ Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397, 402 (S.D.N.Y. 2014).

the only way they can prove they will be sanctioned is if they are actually sanctioned first.”⁹⁴

Considering the many harms caused by pro-forum bias, it is deeply problematic that it is so ingrained in U.S. trial court practice. And as demonstrated below, pro-forum bias is evident from the lopsided margins by which courts find that each of the *Aérospatiale* test’s subjective factors weigh in favor of violating foreign laws.

III. CASES APPLYING THE *AÉROSPATIALE* FIVE-FACTOR TEST

The *Aérospatiale* five-factor test requires U.S. trial courts to weigh the need for U.S. discovery against deference to foreign law. Yet because the primary day-to-day role of U.S. courts is to manage discovery, the *Aérospatiale* test essentially requires courts to weigh the value of their own work against the value of foreign laws. Trial courts naturally have a cognitive bias in favor of U.S. discovery. One commentator notes that “balancing approaches almost always have an inherent bias favoring the forum state’s laws.”⁹⁵ As stated in one recent analysis, “[i]t is no surprise that U.S. courts usually find that U.S. discovery wins in this comparison—but it is surprising just how lopsided the results are.”⁹⁶ As it turns out, application of the *Aérospatiale* balancing test isn’t balanced at all.

To conduct the analysis for this article, I reviewed every U.S. decision to cite and apply the *Aérospatiale* five-factor test in the context of considering whether to order the production of information where that production was prohibited by foreign law. For each case that applied the *Aérospatiale* five-factor test, I analyzed and calculated the court’s conclusions as to each of the five factors. While this study therefore does not include every case citing to or applying an *Aérospatiale* “test,” it does consider every case to apply the full five-factor test in the context of possibly ordering violations of foreign law.

My analysis is limited in three ways. First, I restricted it to cases that analyzed whether or not to order the violation of foreign law. (I excluded many cases in which the *Aérospatiale* test was applied to other situations, such as whether or not to issue a letter rogatory.⁹⁷) Second, I limited my analysis to cases applying

⁹⁴ West, *supra* note 60, at 209-10.

⁹⁵ Swanson, *supra* note 65, at 362.

⁹⁶ See Sant, *supra* note 1, at 2.

⁹⁷ See, e.g., *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, No. C10-861RSM, 2014 WL 202102 (W.D. Wash. Jan. 17, 2014); *Seoul Semiconductor Co. Ltd. v. Nichia Corp.*, 590 F. Supp. 2d 832 (E.D. Tex. 2008). Both of these cases involved requests for a

the *Aérospatiale* five-factor test. (As noted above, some courts have applied a three-factor *Aérospatiale* test⁹⁸ or a four-factor test.⁹⁹ I did not include these cases, which involve different factors and different lines of interpretation from those in the five-factor test.) Third, I only analyzed cases that provided the results of all, or at least most, of the five factors. In a number of cases, the courts “simply . . . announce” the overall result of the *Aérospatiale* analysis, “with little further explanation.”¹⁰⁰ Because the calculations below rely on a comparison of the results for specific individual factors, I excluded cases that did not provide these results. Where courts provided results for some but not all factors, I included cases that analyzed at least four factors¹⁰¹ and excluded cases that analyzed fewer than a majority of factors.¹⁰²

In some instances, courts stated that they would treat a certain factor as neutral.¹⁰³ These cases were included in the analysis, but neutral factors were excluded when calculating the

letter rogatory. As a letter rogatory does not involve the violation of foreign law, these cases were excluded from the calculations.

⁹⁸ 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).

⁹⁹ *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998); *Bodner v. Paribas*, 202 F.R.D. 370, 374-75 (E.D.N.Y. 2000) (each following a four-factor test consisting of (1) 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).

¹⁰⁰ Borchers, *supra* note 32, at 84.

¹⁰¹ See, e.g., *In re Application of Chevron Corp.*, No. 11-24599-CV, 2012 WL 3636925 (S.D. Fla. June 12, 2012); *Doster v. Schenk A.G.*, 141 F.R.D. 50 (M.D.N.C. 1991). In *Chevron*, the court analyzed all factors but the first (importance), which the court seems to have skipped by accident. The court actually states at one point that it is addressing “the first two factors” of the *Aérospatiale* test, but the court only says that the information request “is fairly specific and relatively narrow in scope”—an analysis that addresses factor two (specificity) but not factor one (importance). *Chevron*, 2012 WL 3636925, at *12. The court’s wording implies that it found factor one (like factor two) to weigh in favor U.S. discovery, but the court is not explicit. *Id.* This article includes *Chevron*’s analysis of factors two through five in the calculations discussed below, but excludes factor one. See *id.* Similarly, in *Doster*, the court mentions the third *Aérospatiale* factor (whether the information originated in the United States) in passing but does not analyze it. *Doster*, 141 F.R.D. at 52. The other four *Aérospatiale* factors are analyzed and included in the calculations below.

¹⁰² For example, in *In re Baycol Products Litigation*, the court stated that the first two factors of the *Aérospatiale* test weighed in favor of U.S. discovery, but it did not analyze the other three factors. See *In re Baycol Products Litigation*, 348 F. Supp. 2d 1058, 1060 (D. Minn. 2004) (stating only that “the requested documents, purporting to relate to the withdrawal of Baycol from the worldwide market, are relevant and important to this litigation”). Because the court did not apply all five factors of the *Aérospatiale* test, the case was not included in these calculations. Other times, a case may mention the *Aérospatiale* test but not provide individualized analysis of the factors. See, e.g., *Rosales v. Fitflop USA, LLC*, No. 11cv973-W(KSC), 2013 WL 941729 (S.D. Cal. Mar. 11, 2013). These cases were excluded from the calculations.

¹⁰³ See, e.g., *SEC v. Stanford Int’l Bank*, 776 F. Supp. 2d. 323, 337 (N.D. Tex. 2011) (treating the fifth factor as neutral).

percentage of cases that weigh in favor of violating foreign law.¹⁰⁴ Some circuits have developed additional factors to be considered,¹⁰⁵ which are not discussed in this article. As the foregoing makes clear, the cases analyzed here do not represent every case to apply *Aérospatiale* in the context of potentially ordering the violation of foreign law. They are limited to cases applying the five-factor test and meeting the other requirements set forth above. In addition to these restrictions, my analysis focuses solely on how trial courts apply the *Aérospatiale* test. Geoffrey Miller points out that U.S. regulators frequently demand information that would violate foreign law if disclosed, but these cases are rarely litigated because the regulated company faces too much risk.¹⁰⁶ Thus, the problem of companies being forced to produce evidence by branches of the U.S. government is much more common than even indicated here.

Ultimately, I found 56 cases that applied *Aérospatiale* in determining whether or not to order the violation of foreign law and analyzed each or most of the individual factors.¹⁰⁷ Based on

¹⁰⁴ In other words, when calculating the percentage of cases that ordered the violation of foreign law, there are different denominators for some of the five factors.

¹⁰⁵ See *supra* notes 40-43 and accompanying text.

¹⁰⁶ I thank Geoffrey Miller for this insight. Email from Geoffrey Miller, Stuyvesant Comfort Professor of Law, NYU Law School, to author (June 13, 2015, 16:37 EST) (on file with author). A government regulator stated, at the Thirty-Third Cambridge Symposium on Economic Crime, “Don’t talk to me about bank secrecy laws. I don’t want to hear about them.” Personal communication to author (Sept. 9, 2015).

¹⁰⁷ The cases I identified as applying *Aérospatiale* to the context of weighing whether or not to order violations of foreign law (and which provide the results of the court’s analysis for a sufficient number of factors) are: *Linde v. Arab Bank, PLC*, 706 F.3d 92 (2d Cir. 2013); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992); *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-05944-SC, 2014 WL 6602711 (N.D. Cal. Nov. 11, 2014); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-05944-SC, 2014 WL 5462496 (N.D. Cal. Oct. 23, 2014); *BrightEdge Techs., Inc. v. Searchmetrics*, No. 14-cv-01009-WHO, 2014 WL 3965062 (N.D. Cal. Aug. 13, 2014); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C 07-5944 SC, 2014 WL 1247770 (N.D. Cal. Mar. 26, 2014); *Wultz v. Bank of China Ltd.*, 298 F.R.D. 91 (S.D.N.Y. 2014); *Eikenberry v. Celsteel Ltd.*, No. 13 Civ. 4661(AT), 2013 WL 5308028 (S.D.N.Y. Sept. 19, 2013); *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); *Pershing Pac. W., LLC v. Marinemax, Inc.*, No. 10-cv-1345-L(DHB), 2013 WL 941617 (S.D. Cal. Mar. 11, 2013); *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); *Chevron Corp. v. Donziger*, 296 F.R.D. 168 (S.D.N.Y. 2013); *Motorola Credit Corp. v. Uzan*, 293 F.R.D. 595 (S.D.N.Y. 2013); *Wultz v. Bank of China*, 942 F. Supp. 2d 452 (S.D.N.Y. 2013); *In re Application of Chevron Corp.*, No. 11-24599-CV, 2012 WL 3636925 (S.D. Fla. June 12, 2012); *Tiffany (NJ) LLC v. Forbse*, No. 11 Civ. 4976(NRB), 2012 WL 1918866 (S.D.N.Y. May 23, 2012); *TruePosition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012); *Lantheus Med. Imaging v. Zurich Am. Ins., Co.*, 841 F. Supp. 2d 769 (S.D.N.Y. 2012); *Coloplast A/S v. Generic Med. Devices, Inc.*, No. C10-227BHS, 2011 WL 6330064 (W.D. Wash. Dec. 19, 2011); *JP Morgan Chase Bank, N.A. v. PT Indah Kiat Pulp and Paper Corp.*, No. 02 C 6240, 2011 WL 5588764 (N.D. Ill. Nov. 16, 2011); *Tiffany (NJ) LLC v. Qi*, No. 10 Civ. 9471(WHP),

those results, I determined that (1) courts display a pro-forum bias; (2) there has been an exponential increase in litigants seeking court-ordered violations of foreign law; and (3) courts might have an additional bias against non-Western nations. The results of my statistical analysis for each individual factor are discussed below.

A. *Factor One: Importance*

The “importance” factor requires courts to subjectively weigh “the importance to the . . . litigation of the documents or other information requested.”¹⁰⁸ In a sign of possible pro-forum bias, U.S. courts have found that the factor of “importance” weighs in favor of violating foreign law by a ratio of ten to one. According to my study, 91% of courts (49 out of 54) applying the *Aérospatiale* five-factor test concluded that the information’s “importance” justified violating foreign law.

2011 WL 11562419 (S.D.N.Y. Nov. 14, 2011); *Stream Sicav v. RINO Int’l Corp.*, No. CV 10-08695-VBF (VBKx), 2011 WL 4978291 (C.D. Cal. Oct. 11, 2011); *Gucci Am., Inc. v. Li*, No. 10 Civ. 4974(RJS), 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011); *AstraZeneca LP v. Breath Ltd.*, No. 08-1512(RMB/AMD), 2011 WL 1421800 (D.N.J. Mar. 31, 2011); *Tiffany (NJ) LLC v. Qi*, 276 F.R.D. 143 (S.D.N.Y. 2011); *SEC v. Stanford Int’l Bank*, 776 F. Supp. 2d 323 (N.D. Tex. 2011); *Devon Robotics v. DeViedma*, No. 09-cv-3552, 2010 WL 3985877 (E.D. Pa. Oct. 8, 2010); *In re Payment Card Interchange Fee and Merch. Discount Antitrust Litig.*, No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010); *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); *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2010 WL 2976220 (E.D.N.Y. July 23, 2010); *In re Air Cargo Shipping Services Antitrust Litig.*, 278 F.R.D. 51 (E.D.N.Y. 2010); *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238 (S.D.N.Y. 2010); *Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV., 2009 WL 3823390 (S.D. Fla. Nov. 16, 2009); *Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd.*, No. 0308554 (DCP) (JCF), 2009 WL 1055673 (S.D.N.Y. Apr. 17, 2009); *Linde v. Arab Bank, PLC*, 262 F.R.D. 136 (E.D.N.Y. 2009); *In re Glob. Power Equip. Grp. Inc.*, 418 B.R. 833 (Bankr. D. Del. 2009); *Old Ladder Litig. Co., LLC v. Investcorp Bank, B.S.C.*, No. 08 Civ. 0876(RMB)(THK), 2008 WL 2224292 (S.D.N.Y. May 29, 2008); *Synthes (U.S.A.) v. G.M. dos Reis Jr. Ind. Com. De Equip. Medico*, No. 07-CV-309-L(AJB), 2008 WL 81111 (S.D. Cal. Jan. 8, 2008); *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429 (E.D.N.Y. 2008); *Abiola v. Abubakar*, No. 02 C 6093, 2007 WL 2875493 (N.D. Ill. Sept. 28, 2007); *Weiss v. Nat’l Westminster Bank*, 242 F.R.D. 33 (E.D.N.Y. 2007); *In re Rubber Chems. Antitrust Litig.*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007); *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310 (E.D.N.Y. 2006); *Reino de Espana v. Am. Bureau of Shipping*, No. 03CIV3573LTSRLE, 2005 WL 1813017 (S.D.N.Y. 2005); *In re Baycol Prods. Litig.*, MDL No. 1431 (MJD/JGL), 2003 WL 22023449 (D. Minn. Mar. 21, 2003); *Adams v. Unione Mediterranea Di Sicurta*, No. Civ.A. 94-1954, 2002 WL 472252 (E.D. La. Mar. 28, 2002); *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); *In re Air Crash at Taipei, Taiwan on October 31, 2000*, 211 F.R.D. 374 (C.D. Cal. 2000); *Doster v. Schenk A.G.*, 141 F.R.D. 50 (M.D.N.C. 1991); *In re Enron Corp.*, No. 01-16034 (AJG), 2007 WL 8317419 (Bankr. S.D.N.Y. July 18, 2007); *In re Activision Blizzard*, 86 A.3d 531 (Del. Ch. 2014); *Buttitta v. Allied Signal, Inc.*, No. L-9592-02, 2010 WL 1427273 (N.J. Sup. Ct. App. Div. Apr. 5, 2010); *Buttitta v. Asbestos Corp. Ltd.*, No. BER-L-9592-02, 2006 WL 2355200 (N.J. Super. Ct. App. Div. Aug. 16, 2006).

¹⁰⁸ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).

Courts have reached such lopsided results in part because they often (either intentionally or subconsciously) convert the first factor in the *Aérospatiale* test from “importance” to “relevance.”¹⁰⁹ Mere relevance is a remarkably low standard for ordering the violation of foreign law. It is also not the standard expressed in *Aérospatiale*. Yet courts frequently assert that the first factor weighs in favor of violating foreign law simply because “the documents in question fall within the scope of relevant discovery.”¹¹⁰ Courts have reached this conclusion even when the defendant points out that the documents sought are not “important” to the litigation.¹¹¹ In one case, the court declared that factor one favored violating foreign law because the documents requested were “likely to contain information that is of *some relevance* to this litigation.”¹¹² The court not only reduced “importance” to mere “relevance,” but it found that even a likelihood of “some relevance” outweighs foreign law.¹¹³ In another instance, a court stated that the factor weighed in favor of violating foreign law after determining that “hundreds of thousands of e-mails” would be “relevant” to issues of “damages, royalty, and willfulness.”¹¹⁴ It certainly seems unlikely that of hundreds of thousands of emails, each one would be “relevant,” much less “important.”

Even when courts have not explicitly lowered the standard from “importance” to “relevance,” courts often set a low bar for “importance.”¹¹⁵ In one instance, a court found that the factor of “importance” favored violating foreign law where the information sought would probably be of “significant value in helping Plaintiffs organize their case and may identify previously undiscovered

¹⁰⁹ See, e.g., *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C 07-05944SC, 2014 WL 124770, at *2 (N.D. Cal. Mar. 26, 2014) (“The Court finds the . . . [document sought] is relevant . . . This weighs for production.”); *Trueposition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012, at *5 (E.D. Pa. Mar. 6, 2012) (“The documents in question deal with jurisdictional discovery . . . and are relevant discovery.”); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 53 (E.D.N.Y. 2010); *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, No. 05-MD-1720(JG)(JO), 2010 WL 3420517, at *9 (E.D.N.Y. Aug. 27, 2010).

¹¹⁰ *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. at 53 (“Although the defendant disputes the plaintiffs’ characterization that the documents in question are ‘key’ to the litigation, Air France concedes that the documents in question fall within the scope of relevant discovery.”).

¹¹¹ *Id.*

¹¹² *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 2010 WL 3420517, at *9 (emphasis added).

¹¹³ *Id.*

¹¹⁴ *BrightEdge Techs., Inc. v. Searchmetrics*, No. 14-cv-01009, 2014 WL 3965062, at *3 (N.D. Cal. Aug. 13, 2014).

¹¹⁵ See, e.g., *infra* notes 115-22 and accompanying text.

competitor contacts.”¹¹⁶ Courts might not be taking the balancing test seriously when they find it “important” to help litigants “organize their case.”¹¹⁷

In addition to courts’ willingness to order the violation of foreign law, plaintiffs exacerbate the problem by frequently utilizing court-ordered law breaking to embark on fishing expeditions rather than to actually seek documents “important” to the litigation.¹¹⁸ Courts often approve fishing expeditions that sweep up financial records from banks even when the purpose of obtaining the documents is merely to identify potential targets for suit or identify who can pay damages.¹¹⁹ For example, one court found “importance” where the documents sought “could potentially reveal the identities” of additional defendants.¹²⁰ In another case, the information sought was an “attempt[] to identify unnamed . . . investors [who] are potentially liable.”¹²¹ In yet another instance, the court found “prime importance” where the plaintiffs’ lawyers sought financial records to “identify[] business relationships and transactions that may affect the parties’ ability to satisfy the judgment.”¹²² In each of these examples, courts decided that “trolling through people’s financial records to decide who has enough money to be sued is an ‘important’ reason to violate foreign law.”¹²³

In sum, courts find the first factor of the *Aérospatiale* test to weigh in favor of violating foreign law by the overwhelming ratio of ten to one. This extremely asymmetrical ratio is itself a strong indication of pro-forum bias. And courts regularly subvert this test by converting it from a question of “importance” to a question of mere relevance. Even when courts recognize that this factor focuses on “importance,” courts regularly find documents peripheral to the merits of a litigation (such as documents showing whether a defendant can pay a judgment) to be “important.”

¹¹⁶ *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2014 WL 6602711 (N.D. Cal. Nov. 20, 2014); *In re Cathode Ray Tube (CRT) Antitrust Litig.* No. C-07-05944-SC, 2014 WL 5462496, at *2 (N.D. Cal. Oct. 23, 2014).

¹¹⁷ *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2014 WL 6602711; *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2014 WL 5462496, at *2.

¹¹⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, reporter note 1 (AM. LAW INST. 1987); Swanson, *supra* note 65, at 335.

¹¹⁹ See *infra* notes 119-22 and accompanying text.

¹²⁰ *Tiffany LLC v. Qi*, 276 F.R.D. 143, 151 (S.D.N.Y. 2011).

¹²¹ *Old Ladder Litig. Co., LLC v. Investcorp Bank B.S.C.*, No. 08 Civ. 0876(RMB)(THK), 2008 WL 2224292, at *5 (S.D.N.Y. May 29, 2008).

¹²² *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, No. 03-08554, 2009 WL 1055673, at *3 (S.D.N.Y. Apr. 17, 2009).

¹²³ See Sant, *supra* note 1.

B. *Factor Two: Specificity*

The second factor of the *Aérospatiale* test requires courts to weigh “the degree of specificity of the request.” Courts have found this factor to weigh in favor of U.S. discovery in 93% of cases (52 out of 56), a ratio of thirteen to one. The results are even more extreme in the Second Circuit, where courts have found the specificity factor to weigh in favor of U.S. discovery in every single one of the 29 cases to consider the issue.¹²⁴ It seems unlikely that the Supreme Court intended for a balancing test to have such lopsided results.

In part, these extreme results are due to confusion over the meaning of the word “specificity.” While the Supreme Court apparently intended “specificity” to refer to the degree to which the request is “narrowly targeted” or “limited in scope,” courts often interpret this factor as asking whether or not the documents sought are clearly identified. One recent decision, for example, stated that “[t]he specificity of the request is also not seriously disputed since it identifies precisely the group of documents sought.”¹²⁵ Likewise, in another case, the document requests were said to be “sufficiently specific in identifying documents sought.”¹²⁶ These courts have interpreted factor two (“the degree of specificity”) not as asking whether the requests are narrowly tailored, but rather whether the documents sought are identified clearly. It would be remarkable if the Supreme Court really intended that foreign law should be violated in part because document requests are clearly written.

Presumably, the purpose behind including “specificity” in the five-factor test is to avoid ordering the violation of foreign law for the purpose of enabling a fishing expedition. Foreign governments have long protested U.S. fishing expeditions. As the Restatement of Foreign Relations Law notes, “[t]he objection to ‘fishing expeditions’ . . . [is] often heard in other states in response

¹²⁴ *Id.*; see also Joe Palazzolo, *U.S. Courts Order More Companies to Break Foreign Laws*, WALL ST. J. (Dec. 9, 2014, 4:37 PM), <http://blogs.wsj.com/law/2014/12/09/u-s-courts-order-more-companies-to-break-foreign-laws/> [<http://perma.cc/LTB4-9YWW>] (discussing generally the problem of courts overwhelmingly ordering the violation of foreign laws). Since the publication of my article on Second Circuit cases applying the *Aérospatiale* factors, one additional Second Circuit court applied the factors, and it too concluded that the document requests’ specificity favored violating foreign law. See *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 402 (S.D.N.Y. 2014).

¹²⁵ *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 53 (E.D.N.Y. 2010); see also *In re Air Cargo Shipping Servs. AntiTrust Litig.*, No. 06-MD-1775, 2010 WL 2976220, at *2 (E.D.N.Y. July 23, 2010) (noting that the requests seek “large volumes of data” but nevertheless finding that “the interrogatories are specific about the meetings and communications to which they are directed”).

¹²⁶ *Pershing Pac. W., LLC v. Marinemax, Inc.*, No. 10-cv-1345-L (DHB), 2013 WL 941617, at *7 (S.D. Cal. Mar. 11, 2013).

to United States document requests.”¹²⁷ Commentators too recognized that “while ‘fishing expeditions’ are all too common in the U.S., they are simply not tolerated in other countries.”¹²⁸ The Hague Convention reflects a compromise that would permit some U.S.-style discovery in exchange for halting untethered, offensive fishing expeditions within foreign sovereigns.¹²⁹ Yet courts have interpreted “specificity” so loosely that it has no impact on limiting these fishing expeditions.

One court found that the specificity factor applied even though the document request was exceedingly broad and vague. The defendant company Generic Medical Devices sought “any document[s] in [plaintiff’s] possession that are responsive to Generic’s Requests for Production.”¹³⁰ One might call this document request rather generic. As the plaintiff correctly pointed out, this document demand “failed to explicitly state what documents it requests [the plaintiff] produce.”¹³¹ Here, the document request was neither “narrowly tailored” nor “clear as to the documents sought.” Nevertheless, the court declared that “Generic’s request is sufficiently specific and this factor weighs in favor of production.”¹³²

Even when courts recognize that “specificity” means “narrowly targeted,” courts still find extremely broad requests to be “specific.” One court found specificity where the litigant demanded that the Spanish government turn over “all documents and things or copies of documents from or forming part of [Spain’s criminal investigation] file.”¹³³ Another court claimed that document requests for “hundreds of thousands of emails” were “specific” and were “not the type of ‘generalized searches for information’ which are discouraged.”¹³⁴ It is hard to understand how a request for hundreds of thousands of emails could ever *not* be a generalized search for information.

Even when courts recognize that a document is not sufficiently specific, courts will often not weigh this factor on the

¹²⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, reporter note 1 (AM. LAW INST. 1987); Swanson, *supra* note 65, at 335.

¹²⁸ Cotter, *supra* note 22, at 235.

¹²⁹ See, e.g., James A.R. Nafziger, *Another Look at the Hague Evidence Convention After Aérospatiale*, 38 TEXAS INT’L L. J. 103, 105 (2003).

¹³⁰ Coloplast A/S v. Generic Med. Devices, Inc., No. C10-227BHS, 2011 WL 6330064, at *4 (W.D. Wash. Dec. 19, 2011).

¹³¹ *Id.*

¹³² *Id.*

¹³³ See, e.g., Reino de Espana v. Am. Bureau of Shipping, ABS, No. 03CIV3573LTSRLE, 2005 WL 1813017, at *9 (S.D.N.Y. Aug. 1, 2005).

¹³⁴ BrightEdge Techs., Inc. v. Searchmetrics, No. 14-Civ-01009, 2014 WL 3965062, at *3 (N.D. Cal. Aug. 13, 2014) (quoting Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1475 (9th Cir. 1992)).

side of foreign law. Instead, the court will pare down the document request to make it palatable to the court. At first glance, it might seem reasonable for courts to pare down requests, but in actual practice, this is problematic. If courts simply narrow the scope of overly broad requests, then litigants feel no pressure to make narrowly tailored requests in the first place. On the contrary, litigants are incentivized to make a broad request that will either be accepted or else trimmed to whatever level the court will accept.¹³⁵

Another problem with courts paring down overly broad requests is that factor two (specificity) will nearly always weigh in favor of U.S. discovery. This has occurred in the Second Circuit, where every one of over two dozen cases applying the five-factor test concluded that the specificity factor favors violating foreign law. By way of example, one court recently declared that a request “was not specific enough”¹³⁶ but nevertheless declared that, “[b]ecause Plaintiff has to write a new notice of deposition in accordance with this order, that objection is moot.”¹³⁷ In another instance, the “requests . . . were decidedly less specific” but the court still found this factor to favor violating foreign law because the court itself “narrowed the scope of the requests considerably.”¹³⁸

One case in particular highlights both the problem of courts setting a low bar for finding specificity and the problematic nature of paring back document requests. In *Doster v. Schenk A.G.*, the defendant called the plaintiff’s discovery demands “abusive,” claiming that they “lack specificity, are not reasonably related to the allegations in the pleadings, and are not of great importance to the resolution of these disputes.”¹³⁹ The defendant “set out many of the interrogatories and requests” which it considered to be “overly broad,” and the court agreed that “[s]ome requests are overly expansive and premature.”¹⁴⁰ Yet the court still found that the factor of specificity favored violating foreign law because “these are precisely the types of requests which could be winnowed” to become “suitably limited.”¹⁴¹ Later in the five-factor analysis, the court proceeded to contradict itself. Discussing factor four (“the availability of alternative means of securing the

¹³⁵ When the court of its own volition pares back requests to the maximum extent it deems acceptable, the court is also essentially providing free legal advice to the requesting party. I thank Pamina Dexter for this helpful comment.

¹³⁶ *Eikenberry v. Celsteel Ltd.*, No. 13 Civ. 4661(AT), 2013 WL 5308028, at *6 (S.D.N.Y. Sept. 19, 2013).

¹³⁷ *Id.*

¹³⁸ *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 315 (E.D.N.Y. 2006).

¹³⁹ *Doster v. Schenk A.G.*, 141 F.R.D. 50, 53 (M.D.N.C. 1991).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

information”), the court stated that the documents could not be easily obtained through other means because “the documents are numerous,” and “[t]his is not a case where only a few, insubstantial documents are sought.”¹⁴² Thus, when discussing factor four, the documents sought were deemed overwhelmingly numerous, but when discussing factor two, the court found that the document requests were specific. The court therefore contradicted itself, and both times the court held that the factor favored violating foreign law. This would seem to be a strong indication of pro-forum bias.

Courts have thus concluded that factor two (specificity) weighs in favor of violating foreign laws by a ratio of thirteen to one, an extremely lopsided result that indicates pro-forum bias. Many courts have misinterpreted the “specificity” factor as asking whether the document request is clear, as opposed to whether it is narrowly tailored. Even when courts correctly interpret the word “specificity,” they claim to find “specificity” in vague requests and demands for hundreds of thousands of documents. Worse, by unilaterally paring down document requests, courts encourage abusively broad document requests.

C. *Factor Three: Origin of Information*

Of the five factors of the *Aérospatiale* test, the only entirely objective factor is the third one, which asks “whether the information originated in the United States.” Naturally, one should expect pro-forum bias (if it exists) to appear in courts’ analyses of the subjective factors. The objective factor thus acts as a kind of control group. Hence, it is possible to roughly determine the pervasiveness of pro-forum bias by comparing the results of the four subjective factors against the results of the objective factor.

The difference is stark. The sole objective factor (whether or not the information sought originated in the United States) was found to favor violating foreign law in a mere 6% of cases. By contrast, the four subjective factors were each found by courts to weigh in favor of violating foreign law in at least 80% of cases. This extreme dichotomy strongly suggests pro-forum bias. Moreover, there are indications of pro-forum bias even in courts’ treatment of the objective factor. A few courts acknowledged that the information sought originated outside the United States, and yet—in contradiction of the language in *Aérospatiale* (and the Restatement of Foreign Relations Law)—they still claimed that

¹⁴² *Id.* at 54.

this objective factor either weighed in favor of violating foreign law or else was neutral.

For example, in *Consejo de Defensa del Estado de la Republica de Chile v. Espirito Santo Bank*, the court acknowledged that “[c]learly here the information at issue originated in Chile.”¹⁴³ This should be the end of the matter; the third factor of the *Aéropatiale* test asks merely “whether the information originated in the United States,” and in *Espirito Santo Bank*, the answer was no.¹⁴⁴ Nevertheless, the court in *Espirito Santo Bank* made a series of logical twists to conclude that this fact weighed in favor of violating Chilean law. After acknowledging that the information originated in Chile, the court claimed that “the fact [that the documents originated in Chile] in the unique posture of this case actually cuts in . . . favor [of U.S. discovery],” supposedly because the information sought “is so uniquely available” to the foreign entity that production is even “more necessary.”¹⁴⁵ The court’s analysis turned this factor into a head’s-I-win, tails-you-lose scenario. If the documents originated in the United States, the factor would favor U.S. discovery, but because the documents originated in Chile, the court claimed that production was even “more necessary.”

In the case of *In re Global Power Equipment*, the court acknowledged that “[t]he documents were not created in the United States” but refused to recognize that this fact weighed against violating foreign law.¹⁴⁶ In *Global Power*, the requesting party wanted to depose witnesses who resided in France and wanted documents, some created in France,¹⁴⁷ even though French law prohibited this discovery.¹⁴⁸ These facts should be enough. But in a bit of logical sleight-of-hand, the court shifted the focus of factor three from the origin of the information to the topics of the testimony: the witnesses would be testifying about a “facility in the Netherlands” and a “dispute . . . between American and Dutch companies.”¹⁴⁹ These points are red herrings; the topic of the testimony is irrelevant. French sovereignty is implicated when French residents are forced to testify,¹⁵⁰ and the documents

¹⁴³ *Consejo de Defensa del Estado de la Republica de Chile v. Espirito Santo Bank*, No. 09-20613-CIV., 2010 WL 2162868, at *5 (S.D. Fla. May 26, 2010).

¹⁴⁴ *Société Nationale Industrielle Aéropatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).

¹⁴⁵ *Espirito Santo*, 2010 WL 2162868, at *5.

¹⁴⁶ *In re Glob. Power Equip. Grp., Inc.*, 418 B.R. 833, 848 (D. Del. 2009).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 839.

¹⁴⁹ *Id.* at 848.

¹⁵⁰ It has long been clear that the affront to sovereignty occurs when a resident of the country is forced to testify as a witness. *See, e.g., In re Anschuetz & Co.*, 754 F.2d. 602, 605 (5th Cir. 1985) (German government argued in amicus brief that depositions of German

from France are barred by French law regardless of their content.¹⁵¹ The court, however, implied that there was no problem with violating French law if the witnesses and documents discuss events that took place outside of France. Even the court appeared uncomfortable with its analysis; although the court implied that it was treating this factor as either neutral or as favoring the violation of foreign law, it does not say so explicitly.¹⁵²

A similar result occurred when Singapore Airlines was sued after one of its planes crashed in Taiwan.¹⁵³ Because its “principal place of business is Singapore,” the “majority of the information requested” was “located in Singapore” and “[n]one of the information requested was created or kept in the United States,”¹⁵⁴ analysis of factor three (the origin of information) should have been straightforward. The court insisted, however, that “whether the information originated in the United States” favored neither party.¹⁵⁵ The court reached this conclusion based on a non sequitur, namely that Singapore Airlines also “conducts regular flights to and from the United States” and has offices in the United States.¹⁵⁶ There is no logical reason why documents regarding events in Asia would have originated in the United States simply because Singapore Airlines also flies to the United States. If the documents originated in either Singapore or Taiwan, they did not “originate[] in the United States,” as required by the balancing test.¹⁵⁷ Nevertheless, the court claimed that “it is just as likely that responsive documents may be located in Taiwan, if not the United States” and from this concluded that the factor was neutral.¹⁵⁸

In the examples of the Singapore Airlines case, as well as *Global Power* and *Espirito Santo Bank*, the information sought originated outside the United States, but the court

witnesses would violate German sovereignty unless Hague Convention procedures were followed). Notably, the U.S. Department of Justice submitted an amicus brief agreeing with the German government that the Hague Convention should be used when requiring depositions of witnesses in a foreign country.

¹⁵¹ This point should be obvious. If this were not true, then classified documents “about” another nation would either be disclosed or not depending on the laws of the country discussed in the document.

¹⁵² *In re Glob. Power Equip. Grp. Inc.*, 418 B.R. 833, 848 (D. Del. 2009). The court never clearly states whether it considers this factor to be neutral, in favor, or against U.S. discovery. *Id.* For purposes of the calculations discussed in this article, this factor was treated as if the court had skipped it.

¹⁵³ *In re Air Crash at Taipei, Taiwan* on October 31, 2000, 211 F.R.D. 374, 374-78 (C.D. Cal. 2000).

¹⁵⁴ *Id.* (internal quotation marks omitted).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).

¹⁵⁸ *In re Air Crash at Taipei, Taiwan* on October 31, 2000, 211 F.R.D. 374, 378 (C.D. Cal. 2000).

refused to conclude that factor three weighed against violating foreign law. In other instances, courts have skipped over factor three, discussing only the subjective factors, all of which, courts conclude, favor violating foreign law.¹⁵⁹ The fact that some courts skip the one factor that weighs against violating foreign law might also indicate pro-forum bias.¹⁶⁰

In sum, the *Aérospatiale* five-factor test's sole objective factor—whether the information sought originated in the United States—weighs against violating foreign law in 94% of cases applying the test. The enormous divergence in results for the objective factor and the four subjective factors strongly implies pro-forum bias. Another indication of pro-forum bias is the fact that in some instances, courts have either skipped any discussion of the objective factor or else employed twisted reasoning to reach a desired result: that this factor is somehow either neutral or favors violating foreign law despite the information's foreign origins.

D. *Factor Four: Alternative Means*

Factor four of the *Aérospatiale* test asks courts to consider “the availability of alternative means of securing the information.”¹⁶¹ At first glance, this would appear to be an objective factor. In fact, considering that many countries are signatories to the Hague Convention and thus have an “alternative means of securing the information,” this factor should almost always weigh against violating foreign law. Many U.S. trial courts, however, have reinterpreted factor four to call for an evaluation of the merits of the alternative means of obtaining the information.¹⁶² These courts thus convert factor four into a subjective factor

¹⁵⁹ *Old Ladder Litig. Co., LLC v. Investcorp Bank*, B.S.C., No. 08-Civ-0876, 2008 WL 2224292 (S.D.N.Y. May 29, 2008); *Doster v. Schenk A.G.*, 141 F.R.D. 50 (M.D.N.C. 1991).

¹⁶⁰ Even when courts acknowledge that factor three weighs against violating foreign law, they often do so grudgingly. For example, one court acknowledged that “the vast majority of the discovery sought here . . . originated outside of the United States.” *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 315 (E.D.N.Y. 2006). This court stated, however, that factor three is the “only one of the factors that *arguably* favors recognition of the bank secrecy laws.” *Id.* (emphasis added). Why does the court use the qualifier “arguably” here? This is an objective factor, and there is nothing “arguable” about the fact that it weighs against the violation of foreign law.

¹⁶¹ *Aérospatiale*, 482 U.S. at 544 n.28.

¹⁶² See *supra* notes 153-159 and accompanying text; see also Megan C. Chang & Terry E. Chang, *Brand Name Replicas and Bank Secrecy: Exploring Attitudes and Anxieties Towards Chinese Banks in the Tiffany and Gucci Cases*, 7 BROOK. J. CORP. FIN. & COM. L. 425, 435 (2013) (commenting that one judge “seemed to read a likelihood of success qualification into factor four—that the ‘availability of alternative means’ needed to be alternative means that were actually . . . likely to succeed”).

rather than the objective factor it was apparently intended to be.¹⁶³ Not surprisingly, U.S. courts consistently find that simply ordering the violation of foreign law is the preferable means of obtaining information.¹⁶⁴ Accordingly, courts often conclude that factor four weighs in favor of violating foreign law despite such alternative options as a Hague Convention request, third-party subpoenas, or commencing a legal action in the foreign nation.

In one 2012 case, a plaintiff demanded that a not-for-profit European entity that sets standards for mobile telecommunications produce documents (in violation of French law) for the arguably weak purpose of determining whether or not a U.S. court had jurisdiction over the European entity in the first place.¹⁶⁵ The court decided that factor four (“the availability of alternative means of securing the information”) weighed in favor of violating French law, notwithstanding the availability of using a Hague Convention request to obtain the documents. The court reached this counterintuitive result because it unilaterally declared that “the procedures . . . [of] the Hague Evidence Convention are much more likely to be time-consuming.”¹⁶⁶

In another case, the court rejected a bank’s suggestion that plaintiffs lawfully seek the turnover of documents by filing actions in the foreign jurisdictions. The court rejected this option because it “would require hiring local counsel” and might lead to “significant costs and logistical concerns . . . with no clear likelihood of success.”¹⁶⁷ Concluding that the information would not be “easily obtained,” the court stated that “[t]his factor therefore supports disclosure.”¹⁶⁸ In both this example and in *TruePosition* (the 2012 case involving a not-for-profit European entity that set standards for mobile telecommunications), the courts rejected alternative means of obtaining information

¹⁶³ Factor four appears to be an objective factor because it merely refers to whether or not “alternative means of securing the information” are available, which is an objective fact (either alternative means are available or they are not). The language of factor four (“the availability of alternative means of securing the information”) gives no indication that a court is expected to subjectively weigh the various means of obtaining the information. *Aérospatiale*, 482 U.S. at 544 n.28.

¹⁶⁴ See *infra* notes 163-89 and accompanying text.

¹⁶⁵ The purpose is weak because the discovery would be about the meta-issue of whether or not the U.S. court has jurisdiction, as opposed to discovery relevant to the merits of the litigation. *Trueposition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012, at *5 (E.D. Pa. Mar. 6, 2012).

¹⁶⁶ *Id.* at *15.

¹⁶⁷ *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).

¹⁶⁸ *Id.*

because the options were not as fast and easy as the court simply ordering the violation of foreign law.

Speed and simplicity are common—though flawed—justifications for finding that alternative means are unsatisfactory. One court acknowledged that “alternative means are available” but declared that the Hague Convention was an unsatisfactory solution because it was a voluntary mechanism between foreign sovereigns.¹⁶⁹ As such, the court felt that the Hague Convention would be “highly unlikely” to provide the requesting party with “a response similar” to what the party would receive if the court simply ordered the violation of foreign law.¹⁷⁰

As demonstrated in these examples, courts often assert that the “alternative means” must be “similar” in speed, cost, and effectiveness to a U.S. court ordering the production of documents. There are at least two logical flaws with this assertion. First, as discussed above, the *Aérospatiale* test only asks whether alternative means exist. There is no indication that these alternative means must be evaluated and dismissed if they are more “time consuming.” Second, it is unclear what alternative could ever be considered “equal” to a court order in terms of speed, cost, and effectiveness from the perspective of the requesting party. After all, a court order requiring production of documents in violation of foreign law is immediate and requires no additional expense or effort by the requesting party.

Overall, 85% (46 out of 54) of cases to apply the *Aérospatiale* five-factor test have found factor four to favor violating foreign law. As noted above, factor four was apparently intended to be an objective factor, merely asking about the “availability” of alternative means of obtaining the information. Considering that the Hague Convention and other options are usually available, the problem is not that the results are lopsided, but rather that the lopsided results go in the wrong direction in favor of ordering the violation of foreign law.

Some decisions rejecting the Hague Convention as an “alternative means” display a marked disrespect for international comity. One U.S. bankruptcy court stated that the Hague Convention was unsatisfactory because it is “not compulsory[,] . . . can take upwards of six weeks to begin the process, and involve[s] the oversight of the French government.”¹⁷¹ The bankruptcy court contrasted this with the fact that “[a]n order

¹⁶⁹ *Coloplast A/S v. Generic Med. Devices, Inc.*, C10-227, 2011 WL 6330064, at *4 (W.D. Wash. Dec. 19, 2011).

¹⁷⁰ *Id.*

¹⁷¹ *In re Glob. Power Equip. Grp., Inc.*, 418 B.R. 833, 848 (D. Del. 2009).

of this Court under the Federal Rules of Civil Procedure can be enforced immediately,” and the bankruptcy court could “maintain[] direct supervisory authority over discovery.”¹⁷² According to the bankruptcy court’s reasoning, a delay of six weeks justified ordering a nonparty to break French law. Even more disturbing is the bankruptcy court’s assertion that the Hague Convention was unsatisfactory because it would put the French government in charge of gathering evidence in France. The court preferred to order the violation of foreign law so that the bankruptcy court could maintain “supervisory authority over discovery.”¹⁷³ The bankruptcy court took for granted that it—not France—should act as the “supervisory authority” in France regarding collection of French evidence.

The *Aérospatiale* dissent seemed to fear just this sort of scenario. It warned that “[o]ne of the ways that a pro-forum bias has manifested itself is in United States courts’ preoccupation with their own power to issue discovery orders.”¹⁷⁴ In *Global Power*, the bankruptcy court not only wanted to maintain “supervisory authority” over French discovery, but it rejected the Hague Convention process precisely to avoid letting France have authority over French discovery.¹⁷⁵ This dismissal of the Hague Convention is especially disconcerting considering that the United States proposed the Hague Convention in order to create a discovery process “that would be ‘tolerable’ to the State executing the request.”¹⁷⁶ As one commentator stated, “[t]he best evidence of what would be tolerable to the various parties is the mechanisms which they agreed to in the Convention.”¹⁷⁷ In effect, the bankruptcy court rejected the Hague Convention precisely because the Hague Convention respects international comity.¹⁷⁸

Both the bankruptcy court and other U.S. courts cite the purportedly slow speed of the Hague Convention as a justification

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 553 n.4 (1987) (Blackmun, J., concurring in part and dissenting in part).

¹⁷⁵ *In re Global Power Equip. Grp.*, 418 B.R. at 848.

¹⁷⁶ Roger C. Wilson, *The Hague Evidence Convention in U.S. Courts: Aérospatiale and the Path Not Taken*, *Societe Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, 107 S. Ct. 2542 (1987), 17 GA. J. INT’L & COMP. L. 591, 602 (1987); see Philip W. Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT’L L. 104, 105 (1973); *Aérospatiale*, 482 U.S. at 530 (stating that the Hague Convention’s purpose was to establish a “system for obtaining evidence located abroad that would be ‘tolerable’ to the State executing the request and would produce evidence ‘utilizable’ in the requesting state”).

¹⁷⁷ See Wilson, *supra* note 176, at 602.

¹⁷⁸ *In re Glob. Power Equip. Grp.*, 418 B.R. at 848.

for rejecting its use.¹⁷⁹ This justification seems unfair and perhaps disingenuous. For instance, although the bankruptcy court complained that the Hague Convention process may “take upwards of six weeks to begin the process,” in *Aérospatiale* itself, 15 months passed just between the Eighth Circuit’s ruling and the Supreme Court’s final decision—a decision that was limited to the meta-issue of whether or not the Hague Convention’s procedures were required.¹⁸⁰ Moreover, *Aérospatiale*’s underlying claim arose in 1980, meaning that seven years had passed between the underlying incident and the decision as to whether the Hague Convention would be used to collect evidence.¹⁸¹ As Justice Blackmun stated in dissent, “[c]ertainly discovery controlled by litigants under the Federal Rules of Civil Procedure is not known for placing a high premium on either speed or cost-effectiveness.”¹⁸² Given that the United States expects other nations to proceed through the Hague Convention when seeking evidence from the United States, it is hypocritical for the United States to reject the procedure it pushed to have established.¹⁸³

Not only do courts often reject the use of alternative methods of obtaining evidence from overseas, they also tend to absolve requesting litigants from having to make any effort to avoid violating laws when obtaining information. In one case, the plaintiffs sought a court order to violate foreign law even though the plaintiffs had made no effort to obtain the information legally.¹⁸⁴ The defendant complained that the plaintiffs never “formally or informally request[ed] any information from the Taiwanese government or the [relevant agency].”¹⁸⁵ The court,

¹⁷⁹ See, e.g., *Gucci Am., Inc. v. Li*, No. 10-Civ-4974, 2011 WL 6156936, at *8 (S.D.N.Y. Aug. 23, 2011) (rejecting it as “time-consuming”); *In re Glob. Power Equip. Grp.*, 418 B.R. at 833 (rejecting the Convention because it can “take upwards of six weeks to begin the process”).

¹⁸⁰ The Eighth Circuit ruled on January 22, 1986. See *In re Société Nationale Industrielle Aérospatiale*, 782 F.2d 120 (1986). The Supreme Court did not rule on the appeal until June 15, 1987, nearly 15 months later. *Aérospatiale*, 482 U.S. 522.

¹⁸¹ *In re Société Nationale Industrielle Aérospatiale*, 782 F.2d at 122.

¹⁸² *Aérospatiale*, 482 U.S. at 562 (Blackmun, J., concurring in part and dissenting in part).

¹⁸³ U.S. complaints that other nations are too slow to execute requests are hypocritical considering that the United States will take as long as two years to execute a request. Morris H. Deutsch, *Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C. § 1782, for Use in a Foreign or International Tribunal*, 5 B.C. INT’L & COMP. L. REV. 175, 176 n.7 (1982); see also Permanent Bureau, Hague Conference on Private Int’l Law, *Questionnaire of May 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad*, at 12, Prel. Doc. No. 1 (2008), <http://www.hcch.net/upload/wop/2008usa20.pdf> [<http://perma.cc/NL5A-FH9D>] (last visited Dec. 14, 2015).

¹⁸⁴ *In re Air Crash at Taipei, Taiwan* on October 31, 2000, 211 F.R.D. 374, 378 (C.D. Cal. 2000).

¹⁸⁵ *Id.*

however, concluded that plaintiffs did not need to attempt to obtain the information legally and found that this factor weighed in favor of violating foreign law *because* the plaintiffs did not need to proceed through any alternative means to get the information.¹⁸⁶ The court wrote, “[n]or must plaintiffs request information from Taiwan before seeking discovery from the defendant Therefore, this factor weighs in favor of plaintiffs.”¹⁸⁷ Absolving a litigant of making any effort to avoid violating foreign law is already problematic. Declaring that this factor weighs in favor of violating foreign law *because* the litigant need not take any steps to avoid violating foreign law is particularly extreme.

In fact, a number of courts have asserted that factor four (alternative means) favors violating foreign law *because* litigants have the right to choose which method they wish to use to obtain information.¹⁸⁸ Under this strange analysis, it is irrelevant whether or not alternative means of obtaining the information exist. If a party wishes to order the violation of foreign law, these courts assert, that is the party’s prerogative.

For example, a bank seeking to avoid violating foreign law “urged” the requesting party to “please go down to Ecuador. Use the letters rogatory process, which is available to you, and get an order from a court in Ecuador We will not object.”¹⁸⁹ There, the bank identified an “alternative means” of obtaining the information (letters rogatory) and even showed that the process would likely be successful. Yet the U.S. court, purportedly applying the fourth factor of the *Aérospatiale* test (“the availability of alternative means of securing the information”¹⁹⁰), expressed irritation that the bank identified alternative means of securing information:

Here, it appears that the bank wants to pick and [choose] the method and mechanism by which [the requesting party] obtains discovery. [The requesting party] may, of course, avail itself of the Letters Rogatory mechanism. However, the decision to do so [lies] exclusively with [the requesting party], not with [the bank]. The Court finds no authority that

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (internal citation omitted).

¹⁸⁸ See *supra* notes 174-176 and accompanying text. These courts never explain why a litigant would prefer obtaining information through a method that violates foreign law as opposed to a method that does not.

¹⁸⁹ *In re* Application of Chevron Corp., No. 11-24599-CV, 2012 WL 3636925, at *13 (S.D. Fla. June 12, 2012).

¹⁹⁰ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).

would require [the requesting party] to initiate the Letters Rogatory process¹⁹¹

By presupposing that the litigant has the right to select the means by which to obtain the information, the court has turned the *Aérospatiale* test into a nullity. The test's purpose is to determine whether foreign law should be violated, yet this court presupposed that a litigant gets to make that decision. The court also took the position that an entity potentially being ordered to violate foreign law has no right to propose alternative mechanisms of obtaining the information. This sort of reasoning encourages abusive discovery practices. Litigants will demand the violation of foreign laws, secure in the knowledge that courts will enforce these demands regardless of whether alternative methods exist.

E. Factor Five: Balancing National Interests

Factor five requires courts to weigh “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.”¹⁹² In other words, courts weigh the relative national interests of the United States and the foreign government. It is perhaps unsurprising then that U.S. courts overwhelmingly find that U.S. interests trump foreign state interests, even in questionable situations. U.S. courts have found the United States interest to outweigh the foreign interest in 81% of cases (42 out of 52).

U.S. courts fall into pro-forum bias when weighing national interests in part because those courts often do not even understand the foreign interests at stake. U.S. courts tend to underestimate the importance of financial privacy while overestimating the importance of their own work in overseeing litigation. Perversely, U.S. courts sometimes refuse to take foreign laws seriously unless those nations punish or imprison individuals for obeying U.S. court orders. And U.S. courts will even claim to know better than the foreign government what that nation's interest is.

¹⁹¹ *Chevron*, 2012 WL 3636925, at *13; *In re Société Nationale Industrielle Aérospatiale*, 782 F.2d 120, 122 (1986).

¹⁹² *Aérospatiale*, 482 U.S. at 544 n.28.

1. U.S. Courts Struggle to Understand Foreign Interests

The *Aérospatiale* dissent feared that pro-forum bias and unfamiliarity with foreign societies would cause U.S. trial courts to undervalue and overlook the foreign interests implicated in these disputes.¹⁹³ At the same time, U.S. trial courts will naturally overvalue the importance of U.S. discovery. Litigation and discovery, after all, is what U.S. trial courts do on a daily basis. U.S. trial courts cannot objectively weigh the importance of U.S. litigation and discovery against the importance of foreign law.¹⁹⁴ It is not reasonable to expect U.S. courts to fairly and impartially evaluate these interests. And as the *Aérospatiale* dissent noted, U.S. courts are particularly unfamiliar with the interests behind the foreign laws they are attempting to evaluate.¹⁹⁵

In fact, many U.S. courts attempting to apply the *Aérospatiale* test have confessed their unfamiliarity with the foreign laws they are supposedly weighing. One court noted that “Mexico apparently has an interest in restricting access to information about the ‘operations’ of its holding companies[, but t]he level of that interest is difficult to gauge.”¹⁹⁶ Another court acknowledged that many “foreign states have an interest in protecting privacy rights which is recognized as substantial,” and “[m]any countries’ laws contain significant penalties for violation[s] of the privacy laws—for example, in Uruguay violators face [a] potential prison sentence.”¹⁹⁷ Nevertheless, the court was “not clear [] in this particular case [whether] the foreign countries’ interests are significant.”¹⁹⁸ Yet another U.S. court expressed doubt as to whether the German constitutional principle of proportionality (protecting personal and business privacy) constituted “significant sovereign interests.”¹⁹⁹ As one commentator sarcastically stated, “a principle which a State has chosen to enumerate in its constitution would generally appear to indicate a significant sovereign interest in the matter at issue.”²⁰⁰

¹⁹³ *Id.* at 553 (Blackmun, J., concurring in part and dissenting in part).

¹⁹⁴ See Sant, *supra* note 1.

¹⁹⁵ *Aérospatiale*, 482 U.S. at 553 (Blackmun, J., concurring in part and dissenting in part).

¹⁹⁶ *British Int’l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, No. 90Civ.2370, 2000 WL 713057, at *10 (S.D.N.Y. June 2, 2000).

¹⁹⁷ *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 *10 (S.D.N.Y. Feb. 8, 2013).

¹⁹⁸ *Id.*

¹⁹⁹ *Doster v. Schenk*, 141 F.R.D. 50, 54 (M.D.N.C. 1991).

²⁰⁰ Chalmers, *supra* note 33, at 206.

Likewise, in two other cases, courts stated that “it is unclear whether any Italian interests would actually be undermined” (in reference to documents allegedly protected from disclosure by the Italian Personal Data Code)²⁰¹ and expressed uncertainty as to “any interest Sweden may maintain in protecting trade secrets,”²⁰² respectively. Another court noted that “the PRC’s State Secrecy Bureau has directly expressed an interest in the outcome of this case” but added that the “strength [of that interest] is unknown.”²⁰³

In each of these cases, the courts are explicit that they do not understand either the foreign interests or the strength of those interests. Yet despite these courts’ acknowledged lack of understanding, each of them still ordered the documents at issue to be produced in violation of foreign law. And trial courts are not alone in struggling to understand foreign interests. Even the Supreme Court has stated that it has “little competence in determining precisely when foreign nations will be offended by particular acts.”²⁰⁴

Supporting the view that U.S. courts are poorly equipped to balance U.S. and foreign interests is the fact that three cases in a 10-month period reached wildly divergent results as to whether or not U.S. or Chinese interests were greater, despite nearly identical underlying facts. All three cases dealt with plaintiffs demanding information from Chinese banks, in pursuit of money judgments against copyright infringers who held accounts at the banks.²⁰⁵ As pointed out by commentators, “each of the cases was decided in the Second Circuit and shared nearly identical facts,”²⁰⁶ and yet “the comity analysis . . . led to inconsistent outcomes despite similar circumstances and, in some instances, identical evidence.”²⁰⁷ Inconsistent outcomes based on the same facts demonstrate that the *Aérospatiale* test is amorphous, overly subjective, and prone to subconscious biases.

²⁰¹ *Devon Robotics v. DeViedma*, No. 09-cv-3552, 2010 WL 3985877, at *5 (E.D. Pa. Oct. 8, 2010).

²⁰² *AstraZeneca LP v. Breath Ltd.*, No. 08-1512(RMB/AMD), 2011 WL 1421800, at *15 (D.N.J. Mar. 31, 2011).

²⁰³ *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1476-77 (9th Cir. 1992).

²⁰⁴ *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983); see also *SEC v. Stanford Int’l Bank Ltd.*, 776 F. Supp. 2d 323, 336-37 (N.D. Tex. 2011) (stating that courts “generally are not the proper bodies to weigh which sovereign’s interests are more meritorious”).

²⁰⁵ *Chang & Chang*, *supra* note 162, at 425.

²⁰⁶ *Id.*

²⁰⁷ *West*, *supra* note 60, at 190-91.

More than one U.S. court has ordered the violation of a foreign nation's constitutionally enshrined rights.²⁰⁸ In one instance, the U.S. court ordered the violation of a foreign court order barring certain lawyers from producing documents in violation of the nation's constitution and its implementation of attorney-client privilege.²⁰⁹ The willingness of U.S. courts to violate foreign constitutions and foreign court orders shows remarkable dismissiveness towards foreign sovereigns and undermines the rule of law internationally.

2. U.S. Courts Undervalue the Foreign Interest in Financial Privacy

The most frequently implicated foreign interest in cases applying the *Aérospatiale* test is bank secrecy and financial privacy. One court recently noted that it is "frequent and common" for "a foreign litigant, particularly a bank," to be ordered to produce documents in violation of foreign laws.²¹⁰ Many of these cases involve attempts by U.S. litigants to force banks to turn over personal financial records held overseas. Nearly every foreign nation has laws protecting financial privacy, which indicates how important and accepted these laws are.²¹¹ Nevertheless, U.S. trial courts routinely underestimate how strongly a foreign nation will oppose "having its citizens' private financial information vacuumed up in discovery and passed around in a foreign country among private litigants, law firms, document review teams, discovery vendors, third-party translators, court personnel, assorted experts, and others."²¹² One commentator describes foreign nations as being "offended by what they perceive as . . . callous intrusions on their sovereignty."²¹³ Even the ABA has commented upon the trend of courts ordering the violation of foreign financial privacy and bank secrecy laws, stating that courts are overly focused on "any applicable exceptions to the foreign law and any ability of a

²⁰⁸ See, e.g., *Chevron Corp. v. Donziger*, 296 F.R.D. 168, 201 (S.D.N.Y. 2013) (Ecuadorian constitutional right); *Doster v. Schenk*, 141 F.R.D. 50, 54 (M.D.N.C. 1991) (German constitutional right).

²⁰⁹ *Chevron*, 296 F.R.D. at 201-02.

²¹⁰ Memorandum Opinion and Order at 18, *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639, at *8 (S.D.N.Y. Mar. 8, 2010).

²¹¹ See, e.g., *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) (identifying numerous nations with financial privacy laws); *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310 (E.D.N.Y. 2006) (same).

²¹² See *Sant*, *supra* note 1, at 2.

²¹³ *Swanson*, *supra* note 65, at 333.

banking customer to waive secrecy” to justify compelling broad violations of foreign law.²¹⁴

Banks are often caught between U.S. discovery requests and foreign laws protecting financial privacy and bank secrecy. Even the Restatement of Foreign Law is uncertain as to banks’ obligations in a conflict of laws scenario, noting that “[w]hether and to what extent” banks must take action “to avoid sanctions in the United States is not clear.”²¹⁵ The Restatement adds that “United States courts have disagreed on the obligations of non-party custodians, such as banks and brokers, with offices in the United States and foreign states.”²¹⁶ Considering the frequency of these conflicts between U.S. discovery and foreign financial privacy laws, it is troubling that there is so little clarity on the expectations for international banks and so little recognition in U.S. courts of the value and importance of financial privacy laws.

Many U.S. courts weighing the foreign interest in financial privacy laws overlook the fact that these banks are often nonparties that are not accused of any wrongdoing. Commentators have found it remarkable that courts require a bank “not actually a party to the litigation” to violate the law.²¹⁷ Commentators note that judges “seemed to project some culpability on the [nonparty]

²¹⁴ HOUSE OF DELEGATES, ABA, RESOLUTION 103, at 14 (Feb. 6, 2012), http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_103.doc [<http://perma.cc/UC9A-GQQ6>].

²¹⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(2)(c), 442 cmt. h (AM. LAW INST. 1987).

²¹⁶ *Id.* § 442, cmt. h (1987). In the years prior to *Aérospatiale*, courts took contradictory positions regarding banks trapped between U.S. discovery demands and foreign financial privacy and bank secrecy laws. The Supreme Court reversed the dismissal of one lawsuit when the plaintiff failed to produce records kept in a Swiss bank, declaring that “petitioner’s failure to satisfy fully the requirements of this production order was due to inability” as a result of circumstances outside its control. “It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.” *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958). A Second Circuit decision stated that “fundamental principles of international comity” required that the courts send letters rogatory rather than simply order the violation of Canadian law. *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960). The Seventh Circuit refused to enforce an IRS summons for the production of banking records from Athens that would have violated Greek financial privacy laws. *United States v. First Nat’l Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983). One year after *Aérospatiale*, the D.C. Circuit likewise agreed that a bank was not required to disclose records covered by foreign bank secrecy laws. *In re Sealed Case*, 825 F.2d 494, 498-99 (D.C. Cir. 1987). On the other hand, at least in the context of criminal grand jury proceedings, the Fifth Circuit and the Eleventh Circuit both required the production of financial records in violation of the bank secrecy laws of the Cayman Islands and the Bahamas. *United States v. Field*, 532 F.2d 404, 410 (5th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976); *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119, 1385-86 (1983). Considering the massive increase in demands for banks to produce documents in violation of foreign law, the severe and enduring split by U.S. circuit courts as to the obligations of international banks requires more guidance from the Supreme Court.

²¹⁷ *Chang & Chang*, *supra* note 162, at 435-36.

bank—as if it were partly to blame for the [defendants’ actions].”²¹⁸ The willingness of courts to order nonparties to violate the law in a home jurisdiction is striking considering that “the non-party status” of an entity has been described as the “principal argument . . . against allowing discovery” via court order.²¹⁹ Prior to the Supreme Court’s ruling in *Aérospatiale*, many lower courts specifically distinguished between how nonparties and parties to a litigation should be treated; courts generally recognized that nonparty entities have an especially strong claim to protection from court-ordered law breaking.²²⁰ In fact, the intermediate appellate court in *Aérospatiale* specifically distinguished between how parties and nonparties should be treated. In recent years, by contrast, courts have often ignored a bank’s nonparty status.

Aérospatiale emphasized that substantive rules of law (such as bank secrecy and financial privacy laws) are to be given greater deference by courts than blocking statutes.²²¹ Moreover, just as substantive laws require greater deference, “intrusive” discovery requests should be viewed with greater caution.²²² *Aérospatiale* noted that “[s]ome discovery procedures are much more ‘intrusive’ than others.”²²³ As examples of less intrusive discovery, the majority cited an interrogatory seeking the names of pilots and a request for an admission that the defendant advertised in a certain magazine.²²⁴ The court’s example of a more intrusive discovery request was a production demand for “design specifications, line drawings, and engineering plans.”²²⁵ Yet both the “less intrusive” and “much more intrusive” examples of discovery given by the majority pale in comparison to forcing banks to hand over people’s private financial records. Considering that financial privacy is a “substantive rule of law”²²⁶ that involves

²¹⁸ *Id.* at 439.

²¹⁹ Borchers, *supra* note 32, at 82.

²²⁰ Swanson, *supra* note 65, at 346-51. Prior to the *Aérospatiale* ruling, many of the circuit courts (including the immediate appellate court) had distinguished between parties and nonparties in regards to court-ordered violations of the law. *Id.* at 347. Under this analysis, nonparties were protected by the Hague Evidence Convention while parties were not under its protection. *See id.*

²²¹ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544-45 (1987).

²²² *Id.* at 545.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *See, e.g.,* Mark Brodeur, *Court Ordered Violation of Foreign Bank Secrecy and Blocking Laws: Solving the Extraterritorial Dilemma*, 1988 U. ILL. L. REV. 563, 565-66, 569 (1988); C. Todd Jones, *Compulsion Over Comity: The United States’ Assault on Foreign Bank Secrecy*, 12 NW. J. INT’L L. & BUS. 454, 454-55 (1992); G. Philip Rutledge, *Bank Secrecy Laws: An American Perspective*, 14 DICK. J. INT’L L. 601 (1996).

some of the most intrusive discovery possible, courts should be far more hesitant to order banks to violate financial privacy laws.

Among the highest-profile recent cases dealing with court-imposed law breaking is a series of lawsuits alleging that a variety of large banks supported international terrorism by permitting terrorists to misuse banking services.²²⁷ The allegations in these cases are salacious and emotional, if not necessarily backed by factual support. Many U.S. courts have found that the purported U.S. interest in fighting terrorism requires production of huge swaths of financial records in violation of the foreign state's financial privacy laws.²²⁸ Courts have been willing to find that these charges trump financial privacy even though the supposed "terrorism" interest is based on unproven allegations brought by a private litigant and despite the plaintiffs' demand for massive swaths of private financial information.²²⁹ The implication is that salacious allegations trump financial privacy.

Foreign nations' strong interest in their financial privacy laws is exemplified by a recent U.S. trial court decision ordering production of financial records held by a bank's branches in multiple nations.²³⁰ Each of these foreign nations prohibited production, and the U.S. court acknowledged that punishment for violations involved "significant penalties," including a potential prison sentence.²³¹ The fact that so many nations severely punish the release of financial records demonstrates that financial privacy is a strong national interest. Even so, the court concluded that the U.S. "interest in fully and fairly adjudicating the matters before its courts, including enforcing its judgments, outweighs the foreign countries' interest in protecting its banking customers' records."²³² Similarly, a separate court asserted that "the United States interest in fully and fairly adjudicating matters before its courts . . . outweighs Malaysia's interest in protecting the

²²⁷ See Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 534-35, 578-85 (2013). The targets of these suits include banks that even most plaintiff lawyers would admit are unlikely to actually support terrorism, such as National Westminster Bank, UBS, Credit Lyonnais, Royal Bank of Scotland, HSBC, Barclays, Bank of China, and American Express Bank.

²²⁸ See, e.g., *Linde v. Arab Bank, PLC*, 706 F.3d 92, 92-95, 105 (2d. Cir. 2013); *Strauss v. Credit Lyonnais*, 249 F.R.D. 429, 430, 456 (E.D.N.Y. 2008); *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 33 (E.D.N.Y. 2007).

²²⁹ See, e.g., *Linde*, 706 F.3d at 92-95; *Strauss* 249 F.R.D. at 430, 456; *Weiss*, 242 F.R.D. at 33.

²³⁰ *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 *1 (S.D.N.Y. Feb. 8, 2013).

²³¹ *Id.* at *10.

²³² *Id.* at *11.

confidentiality of its banking customers' records."²³³ In both instances, the U.S. courts found that merely initiating a lawsuit in the United States caused the U.S. interest in discovery procedures to outweigh foreign financial privacy laws.

These U.S. courts have subordinated foreign financial privacy laws to the "United States interest in fully and fairly adjudicating the matters before its courts."²³⁴ This analysis is "obviously problematic because any court undertaking the *Aérospatiale* five-factor balancing test is necessarily doing so as part of a litigation."²³⁵ If the existence of U.S. litigation outweighs the foreign nation's interest in its own laws, then U.S. litigation will always trump foreign laws, and there would be no need for an *Aérospatiale* test.²³⁶

3. U.S. Courts Overvalue the U.S. Interest in Overseeing Litigation

In 1992, the Ninth Circuit endorsed the statement that the United States has a "vital" interest "in vindicating the rights of American plaintiffs and in enforcing the judgments of its courts."²³⁷ Many courts have repeated this language or followed its logic, which has been described as the "United States interest in fully and fairly adjudicating the matters before its courts."²³⁸ This oft-repeated language is problematic. The Ninth Circuit's choice of language—"vindicating the rights of American plaintiffs"—carries a disturbingly jingoistic edge. The court appears to be stating that the nationality of litigants is relevant—that the United States has an interest in hearing the dispute because the plaintiffs are American. In these cases, the pro-forum bias of U.S. courts is explicit. A recent Florida decision is even more overt (the defendant was a U.S. entity):

²³³ *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639, at *7 (S.D.N.Y. Mar. 8, 2010).

²³⁴ See *supra* notes 227-28 and accompanying text.

²³⁵ See Sant, *supra* note 1 (emphasis added); see also Palazzolo, *supra* note 124.

²³⁶ If the Supreme Court in *Aérospatiale* had intended for courts to weigh the purported U.S. interest in "vindicating the rights of American plaintiffs" or in "fully and fairly adjudicating the matters before its courts," it seems that the Supreme Court would have said so. After all, this is an interest that would necessarily come up in each and every case to apply the *Aérospatiale* factors.

²³⁷ *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992).

²³⁸ See, e.g., *Linde v. Arab Bank, PLC*, 706 F.3d 92, 92-95 (2d. Cir. 2013); *Strauss v. Credit Lyonnais*, 249 F.R.D. 429, 430, 456 (E.D.N.Y. 2008); *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 33 (E.D.N.Y. 2007); *Coloplast A/S v. Generic Med. Devices, Inc.*, No. C10-227BHS, 2011 WL 6330064, at *3-4 (W.D. Wash. Dec. 19, 2011) (quoting the language in *Richmark*); *In re Air Crash at Taipei, Taiwan on October 31, 2000*, 211 F.R.D. 374, 379 (C.D. Cal. 2002) (partially quoting the language in *Richmark*).

In these circumstances, the relevant interests tilt in favor of the defendant's interests as a defendant in a United States court because, first, the United States undoubtedly has a substantial interest in fully and fairly adjudicating matters before its courts, which is only possible with complete discovery. And, second, this jurisdiction has an important interest in protecting its own nationals from unfair disadvantage when they are being sued²³⁹

According to the court, the "important interest" involved is America's interest in "protecting its own nationals."²⁴⁰ The choice of the phrase "its own nationals," as opposed to a more generalized phrase, such as "a litigant," indicates that the court views its duties as protecting *American* litigants. This is not merely pro-forum bias, it is pro-U.S. litigant bias.

Equally stark language appears in a district court's ruling that, although Spain had a "strong national interest" in preserving the confidentiality of a criminal investigation file, the file should nevertheless be produced.²⁴¹ The court asserted that the United States' interests were greater than Spain's interests, describing the U.S. interests as "America's interests in the fair adjudication of a billion dollar lawsuit brought against American defendants in an American court."²⁴² The triple repetition of the word "America(n)" within this single sentence demonstrates that the court might have improperly focused on the nationality of the litigants.

The supposed U.S. interest in "adjudicating the matters before its courts" is precisely the sort of thing U.S. courts would likely overvalue. Courts evaluating the importance of their own work will naturally have a cognitive bias. Nevertheless, many courts cite to the national interest in adjudication in justifying a finding that otherwise weak U.S. interests trump foreign law. For example, one court stated that "the underlying interest—collection of a judgment by a private party—is not so dramatic."²⁴³ Nevertheless, despite the "not so dramatic" issue at stake, the court decided that the mere existence of the litigation outweighed the foreign nation's interest in the integrity of its laws.²⁴⁴

Similarly, some U.S. courts use the purported U.S. interest in "adjudicating matters" to transform weak U.S. interests into supposedly "significant" interests. One example of this is

²³⁹ Consejo de Defensa del Estado de la Republica de Chile v. Espirito Santo Bank, No. 09-20613-CIV., 2010 WL 2162868, at *2 (S.D. Fla. May 26, 2010).

²⁴⁰ See *id.* at *2.

²⁴¹ Reino de Espana v. Am. Bureau of Shipping, No. 03 Civ. 3573LTS/RLE, 2006 WL 2239641, at *3 (S.D.N.Y. Aug. 4, 2006).

²⁴² *Id.*

²⁴³ Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238, 248 (S.D.N.Y. 2010).

²⁴⁴ *Id.* (asserting that "[U.S.] courts consistently recognize that the United States has a substantial interest in fully and fairly adjudicating matters before its courts" (quoting *Strauss*, 249 F.R.D. at 443) (internal quotation marks omitted)).

jurisdictional discovery (that is, discovery into a defendant's contacts with the United States to determine whether a U.S. court may proceed with adjudicating the litigation). By its nature, jurisdictional discovery is tangential to the underlying litigation. Nevertheless, one court claimed that jurisdictional discovery implicated the "interest in bringing these claims in a timely fashion before an American court" and that therefore the U.S. "interest in fully and fairly adjudicating such suits" constituted "significant national interests of the United States."²⁴⁵ Jurisdictional discovery, which is not even about the merits of a litigation, but rather is a complex, time-consuming analysis of whether or not a court has jurisdiction over a case in the first place, is a particularly weak "national interest." Regarding jurisdictional discovery, one scholar writes that she is "unaware of any other legal system that undertakes this type of labor-intensive, adverse proceeding before the jurisdiction of the court is even established."²⁴⁶ Considering that other nations do not even perform jurisdictional discovery, the supposed U.S. interest in jurisdictional discovery would seemingly be among the weakest possible "national interests." The fact that U.S. courts nevertheless do find that this interest outweighs foreign laws indicates that U.S. courts are incapable of impartially weighing U.S. and foreign interests.

4. U.S. Courts Demand Foreign Governments Punish Those Who Obey U.S. Court Orders

In a particularly perverse twist, the same courts that order foreign law breaking also demand that the foreign country punish those obeying the U.S. court order. The American Bar Association issued a resolution stating that any court order requiring the choice between violating foreign law and violating a U.S. court order "is inconsistent with promotion of rule of law, as it facilitates violation of law, either abroad or here."²⁴⁷ 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. Yet for U.S. courts, the failure to punish

²⁴⁵ Trueposition, Inc. v. LM Ericsson Tel. Co., No. 11-4574, 2012 WL 707012, at *5 (E.D. Pa. Mar. 6, 2012).

²⁴⁶ S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 494 (2010).

²⁴⁷ HOUSE OF DELEGATES, ABA, RESOLUTION 103, at 3 (Feb. 6, 2012), http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_103.doc [<http://perma.cc/UC9A-GQQ6>].

entities obeying U.S. court orders proves that foreign governments are not serious about their laws. In *Motorola Credit Corp. v. Uzan*, for example, the court stated that it would order production of documents in violation of the law in France, Jordan, and the United Arab Emirates because it believed that these nations traditionally had not punished those obeying U.S. court orders to violate the nations' laws.²⁴⁸ Discussing the financial privacy laws of these nations, the judge asked: "But is this [concern with financial privacy] 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."²⁴⁹ Not only was this judge ordering the violation of foreign law, he was stating that if these nations want their laws to be respected in the future, they must punish the entities that comply with the judge's order.

Another court noted that officials at financial institutions violating financial privacy laws could be punished by "one to five years imprisonment" by the foreign nation, but the court still ordered the laws to be violated because the laws "do not appear to be enforced."²⁵⁰ Decisions like these "place[] the banks in the position of having to be sanctioned in order to prove they will be sanctioned."²⁵¹ Further, and perversely, these U.S. court decisions require the foreign state to actually punish companies obeying U.S. court orders.

5. U.S. Courts Unilaterally Define Foreign States' Interests

From the perspective of foreign states, perhaps the most infuriating issue is that U.S. courts will often unilaterally decide that the foreign states' interests are something different from what the foreign states assert. In other words, the courts not only ignore or reject the foreign states' interests, but they even claim to know better than the foreign state what those interests are.²⁵² This occurred in a high-profile antiterrorism litigation in which a U.S. court ordered a bank to violate bank secrecy and financial privacy laws in three foreign nations.²⁵³ The judge acknowledged that "bank secrecy is an important interest of the foreign jurisdictions" and even noted that "indeed the United States has

²⁴⁸ *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).

²⁴⁹ *Id.* at 402.

²⁵⁰ *In re Application of Chevron Corp.*, No. 11-24599-CV, 2012 WL 3636925, at *13 (S.D. Fla. June 12, 2012).

²⁵¹ See West, *supra* note 60, at 223.

²⁵² As one British attorney sarcastically told me, "It's quite nice of you Americans to tell us what our interests are."

²⁵³ *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 310 (E.D.N.Y. 2006).

enacted similar bank secrecy protections.”²⁵⁴ The judge also noted that Jordan and Lebanon both ordered the international bank not to violate their bank secrecy laws.²⁵⁵

Nevertheless, the judge proceeded to make the extraordinary claim that Jordan and Lebanon had a different national interest than the one that they claimed to have.²⁵⁶ The magistrate judge seized upon Jordan’s and Lebanon’s publicly stated commitments to fighting terrorism to claim that “[b]oth Jordan and Lebanon[] have recognized the supremacy of [combating terrorism and compensating its victims] over bank secrecy.”²⁵⁷ Yet such a conclusion not only usurps Jordan’s and Lebanon’s rights to determine their own national interests, it also assumes that a private lawsuit is factually correct in its allegations. Apparently, in the court’s mind, any time a private litigant alleges a connection to terrorism, the seriousness of the allegations trump financial privacy protections. This is a particularly problematic position considering the recent flood of complaints making questionable terrorism-related allegations against banks.²⁵⁸

The bank, trapped between a U.S. court order and the laws of Lebanon and its home nation of Jordan, eventually chose to follow the orders of its home and regional regulators and not produce broad swaths of financial records in violation of Jordan’s laws. The U.S. court then imposed sanctions. The district court acknowledged that “[v]iolations of these [bank secrecy] laws may carry criminal penalties” but still required the violation of financial privacy laws for tens of thousands of private bank accounts belonging to individuals and businesses.²⁵⁹ On appeal, the Second Circuit noted that “[t]he District Court’s explication of the foreign states’ interests in enforcing the bank secrecy laws were, perhaps, spare.”²⁶⁰ Nevertheless, the Second Circuit too repeated the claim that “Jordan and Lebanon have expressed a strong interest in deterring the financial support of terrorism,” and “these interests have often outweighed the enforcement of

²⁵⁴ *Id.* at 315.

²⁵⁵ *Id.*; see also Motion for Leave to File Brief and Brief of Amicus Curiae the Hashemite Kingdom of Jordan at 4-5, *Arab Bank, PLC v. Linde*, 134 S. Ct. 2869 (2014) (No. 12-1485), 2013 WL 3830458, at *5 (noting in the introductory statement that the trial court’s sanctions order “severely punishes [the bank] for adhering to Jordan’s financial privacy laws during discovery” and stating that “Jordanian law barred Arab Bank from disclosing many of those records”).

²⁵⁶ *Linde*, 463 F. Supp. 2d at 315.

²⁵⁷ *Id.*

²⁵⁸ See Sant, *supra* note 227, at 534 (describing growth in number of lawsuits).

²⁵⁹ *Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 193 n.3 (E.D.N.Y. 2010).

²⁶⁰ *Linde v. Arab Bank, PLC*, 706 F.3d 92, 111 (2d Cir. 2013).

bank secrecy laws, even . . . in the foreign states.”²⁶¹ Each of these courts concluded that it knows better than foreign sovereigns what the nations’ interests should be.²⁶²

Unsurprisingly, many governments have found it presumptuous and offensive for trial courts to usurp the right to decide the foreign governments’ national interests. As a result of this “grave affront to its sovereignty,”²⁶³ the Kingdom of Jordan filed its first-ever amicus brief in a court in the United States—the U.S. Supreme Court.²⁶⁴ Moreover, the Prime Minister of Jordan wrote to the U.S. Secretary of State to protest the district court’s order.²⁶⁵ The United States, in an amicus brief to the Supreme Court, sided with Jordan and criticized the lower courts for giving “insufficient weight to the interests of foreign governments in enforcing their own laws within their own territories.”²⁶⁶ The United States also criticized the lower courts for misreading a memorandum of understanding in which governments like Jordan stated that antiterrorism efforts take precedence over bank secrecy. According to the United States amicus brief, “that memorandum of understanding pertains only to official state-to-state requests for mutual legal assistance. It does not suggest that member states have agreed to subordinate their interest in protecting certain banking information from public disclosure when private litigants seek documents.”²⁶⁷ Strikingly, the U.S. amicus brief agreed with Jordan and Lebanon’s expressions of their national interests, which means that the United States, Jordan, and Lebanon all agreed that their national interest was in favor of protecting financial privacy—but the U.S. trial and appellate courts unilaterally declared their interests to be something else.

The *Aérospatiale* balancing test requires “in every case[,] . . . a complex and problematic balancing of United States

²⁶¹ *Id.*

²⁶² U.S. courts seem to find it inconceivable that a nation could place financial privacy rights above allegations from private litigants regarding terrorism. Yet the United States also places certain forms of privacy above the fight against terrorism. For example, the United States will not breach the privilege between a suspected terrorist and his attorney. Likewise, U.S. courts will throw out evidence proving an individual was involved in terrorism if the evidence was obtained without a warrant. Considering these and other examples where privacy rights trump national antiterrorism efforts, it should not be surprising that foreign sovereigns believe the financial privacy of hundreds or thousands outweighs unsupported terrorism-related allegations made by a private litigant.

²⁶³ Motion for Leave to File Brief and Brief of Amicus Curiae the Hashemite Kingdom of Jordan at 2, *Arab Bank, PLC v. Linde*, 134 S. Ct. 2869 (2014) (No. 12-1485), 2013 WL 3830458, at *1.

²⁶⁴ *Id.* at *1.

²⁶⁵ *Id.* at *5.

²⁶⁶ Brief for the United States as Amicus Curiae, *Arab Bank, PLC v. Linde* at 16, No. 12-Civ-1485, 2013 WL 3830458, at *16 (U.S. July 24, 2013).

²⁶⁷ *Id.* at 17-18.

and foreign sovereign interests.”²⁶⁸ Yet as this section has demonstrated, and as commentators agree, “courts are a particularly inappropriate forum, both practically and constitutionally, for the amorphous political analysis necessary in such a balancing.”²⁶⁹ Courts continue to show a pro-forum bias in favor of U.S. national interests, and they frequently do not understand the interests behind foreign nations’ laws. Moreover, courts underestimate the importance of financial privacy laws. U.S. courts allow mere allegations to trump financial privacy, ignoring the fact that financial privacy laws are substantive and that financial discovery is highly intrusive. Further, U.S. courts reveal a cognitive bias in favor of discovery by overstating the U.S. interest in adjudicating disputes in its courts. Perversely, U.S. courts often refuse to take foreign laws seriously unless foreign governments punish companies and banks for complying with U.S. court orders to violate those laws. U.S. courts also usurp the role of foreign governments in identifying the national interests of foreign sovereigns. The extreme pro-forum bias of U.S. trial courts has had serious negative repercussions for nations, courts, companies, and individuals.

IV. NEGATIVE EFFECTS OF *AÉROSPATIALE* AND PRO-FORUM BIAS

The willingness of courts to order violations of foreign law has caused a snowball effect of increasing requests for these orders. There has been exponential growth in requests for courts to order law breaking abroad, and many of these requests appear to be improper. Specifically, litigants seek these court orders in part to put pressure on an opposing litigant to enter into an unwarranted settlement (so as to avoid having to either violate foreign laws or a U.S. court order). This abusive discovery may have caused foreign nations to retaliate by ordering production of confidential U.S. documents.

A. *Exponential Growth in Demand for Court-Ordered Law Breaking*

The number of litigants seeking court-ordered violations of foreign law has increased exponentially. In the first 10 years after *Aérospatiale*, only two cases applied the five-factor *Aérospatiale*

²⁶⁸ See Wilson, *supra* note 176, at 603 (citing, inter alia, *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-50 (D.C. Cir. 1984)).

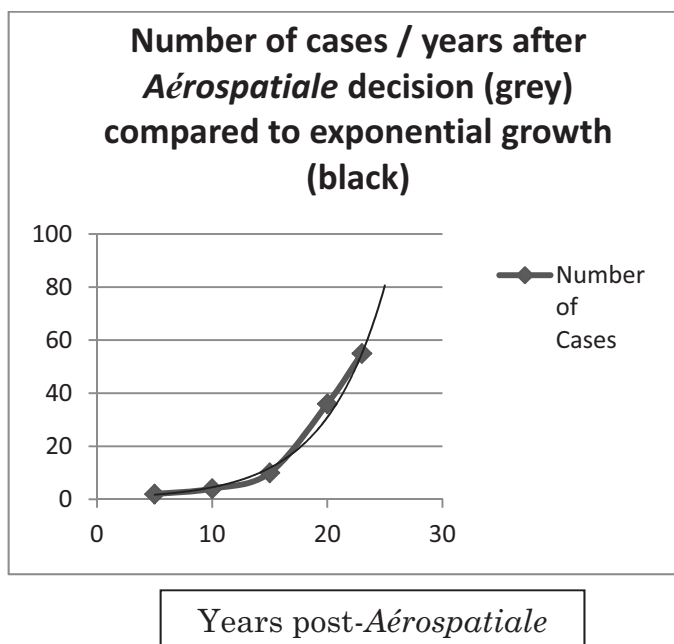
²⁶⁹ *Id.*

test to decide whether or not to order foreign law breaking.²⁷⁰ In the most recent decade, by contrast, there are 50 such cases. In fact, 60% of all cases applying *Aérospatiale* to the issue of foreign law breaking have occurred in just the last five years.

This enormous—and indeed, exponential—increase is represented in the chart below. The y-axis represents the total number of cases applying *Aérospatiale*'s five-factor test to determine whether or not to order foreign law breaking. The x-axis represents the number of years since the *Aérospatiale* decision, from 1987 to 2014. For purposes of comparison, a perfectly exponential rate of growth is overlaid on the chart. If the current exponential growth continues, the number of cases would surpass 200 by 2021.

Chart I: Exponential Growth in Requests for Courts to Order Foreign Law Breaking

Vertical Axis Represents Number of Cases; Horizontal Axis Represents Number of Years Post-*Aérospatiale*



²⁷⁰ As previously noted, this article is limited to cases that apply the five-factor *Aérospatiale* test and reveal the court's analysis of most of the five factors. The numbers discussed here do not include cases that applied the three-factor or four-factor *Aérospatiale* tests. See, e.g., *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998) (applying the four-factor test). The point here is not the absolute number of cases but rather the exponential growth in the number of these cases over time.

To be sure, the current exponential rate of increase cannot continue indefinitely, if for no other reason than that there is a natural upper boundary in terms of the number of cases that involve international discovery and potentially implicate foreign laws. Nevertheless, the exponential rate of growth in these cases is not explainable as the result of steady growth in international litigation. Rather, the exponential growth appears to result from a calculated change in litigation strategy. As litigants have come to realize that courts overwhelmingly approve these requests, litigants increasingly ask for documents that cannot be produced. The producing party must either break the law of its home jurisdiction or violate a U.S. court order—or perhaps enter into an unwarranted settlement.

B. Court-Ordered Law Breaking as Abusive Discovery

Two generations ago, it was held that a company doing business in the United States and abroad should have “protection from being caught between the jaws of [a U.S.] judgment and the operation of laws in foreign countries where it does its business.”²⁷¹ Unfortunately, this protection has evaporated. As shown below, litigants are increasingly misusing court-ordered law breaking as a litigation strategy. A company trapped between the choices of violating foreign law or violating a U.S. court order will sometimes agree to pay an unwarranted settlement.

A recent case involving United Overseas Bank provides a concrete example of this problem of seemingly abusive discovery and unwarranted settlement.²⁷² The plaintiff obtained a default judgment against alleged trademark infringers.²⁷³ These infringers never responded to the charges or paid any damages.²⁷⁴ United Overseas Bank, a nonparty, was not accused of any wrongdoing. Nevertheless, as part of the discovery into the infringers’ financial information, the plaintiff sought a U.S. court order that would require United Overseas Bank’s Malaysian subsidiary to turn over those financial records.²⁷⁵ The subsidiary, unable to gain permission from its Malaysian regulator, informed the court of the conflict with Malaysian law. (Malaysian law

²⁷¹ United States v. Gen. Elec. Co., 115 F. Supp. 835, 878 (D.N.J. 1953).

²⁷² Gucci Am., Inc. v. Curveal Fashion, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010).

²⁷³ Memorandum & Order at 2, Gucci Am., Inc. v. Curveal Fashion, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Apr. 4, 2010).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

punished the release of private financial records with up to three years in prison and a fine equal to \$900,000 USD.²⁷⁶) Nevertheless, applying the *Aérospatiale* five-factor analysis, the magistrate judge ruled that the bank had to produce the records within two weeks.²⁷⁷ The Malaysian regulator reaffirmed its refusal to permit United Overseas Bank's subsidiary to produce the records.²⁷⁸ The bank was now trapped between conflicting legal obligations, and the U.S. court began contempt proceedings.

In briefs to the U.S. court, United Overseas Bank asserted that it was “in a no-win situation whereby it either faces criminal punishment or civil penalties and fines in Malaysia, (personal to officers and directors) or the corporation faces fines and sanction in the United States.”²⁷⁹ The bank stated that it “has expended an exorbitant amount of time and money” in an attempt to win approval from Malaysian regulators to produce the information.²⁸⁰ The bank even offered the plaintiff law firm a creative solution, stating that United Overseas Bank could enter “into a confidentiality order with Plaintiff . . . to commence a proceeding in Malaysia” against [the] defendants.”²⁸¹ The bank would not contest these hearings, and “if the application is not opposed, the order will likely be obtained within 2 to 3 months.”²⁸² The plaintiff law firm rejected the offer.²⁸³

The court sanctioned United Overseas Bank for failing to produce financial records in violation of Malaysian law.²⁸⁴ On May 27, 2010, the U.S. court held the bank in contempt, imposing a \$10,000 per day coercive fine for noncompliance.²⁸⁵ One month later, the bank—a nonparty not accused of wrongdoing—settled with the plaintiff for \$250,000.²⁸⁶ The settlement did not provide the plaintiff with any financial records about the actual defendants.²⁸⁷ The plaintiff law firm later released a webcast

²⁷⁶ *Gucci Am.*, 2010 WL 808639, at *4, *6; see also Letter to Honorable Theodore H. Katz at 1, *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS) (THK), 2010 WL 808639 (S.D.N.Y. Apr. 12, 2010) (No. 23).

²⁷⁷ *Gucci Am.*, 2010 WL 808639, at *8.

²⁷⁸ Memorandum of Law of Nonparty United Overseas Bank Limited in Opposition to Request for Contempt at 7, *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. May 21, 2010) (No. 27).

²⁷⁹ *Id.* at 2.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 12.

²⁸² *Id.* at 9. The hearing was likely to be unopposed because the actual defendants were in default and had not appeared at any hearings.

²⁸³ *Id.* at 14.

²⁸⁴ Order, *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS) (THK), 2010 WL 808639 (S.D.N.Y. May 28, 2010).

²⁸⁵ *Id.*

²⁸⁶ Stipulation and Order of Settlement at 4-7, *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458 (RJS), 2010 WL 808639 (S.D.N.Y. June 21, 2010) (No. 32).

²⁸⁷ *Id.* at 4-5.

trumpeting their success in getting money from a third-party bank.²⁸⁸ United Overseas Bank was only one of multiple third-party banks featured as having been forced to pay damages in this way.²⁸⁹

The United Overseas Bank case and others like it demonstrate that ordering entities to violate foreign law can trap them between conflicting legal demands and lead to unwarranted settlements. Mystifyingly, the Supreme Court in *Aérospatiale* appears to have overlooked this negative consequence of court-ordered law breaking. The Supreme Court did recognize that abusive discovery demands could impose an “additional cost” and that this financial cost “may increase the danger that discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence.”²⁹⁰ While the Supreme Court recognized the problem of cost, it seems to have overlooked the danger of contempt charges against a noncompliant nonparty.

Moreover, even in terms of cost, the Supreme Court appears to have massively underestimated the costs imposed in U.S. discovery. The *Aérospatiale* majority thinks that a party might enter into an unwarranted settlement to avoid the “cost of transportation of documents or witnesses to or from foreign locations.”²⁹¹ Yet transportation and witness costs are dwarfed by the multimillion dollar expenses routinely incurred when running electronic discovery (especially in a country that does not have an e-discovery infrastructure).²⁹² Electronic discovery frequently requires massive battalions of U.S.-trained attorneys fluent in the local language to scan through endless emails and documents while coding for privilege and relevance.²⁹³ Thus, the *Aérospatiale* majority both greatly underestimated the cost of abusive

²⁸⁸ *Webcast: New Trends in Anti-Counterfeiting Litigation*, GIBSON DUNN (Nov. 25, 2010) <http://www.gibsondunn.com/publications/pages/Webcast-NewTrendsInAnti-CounterfeitingLitigation.aspx> [<http://perma.cc/HLB4-YMZK>]. The United Overseas Bank case is featured in one of multiple slides entitled “Failing to Comply with Court’s Orders Can Result in Serious Consequences for Third Parties.”

²⁸⁹ *Failing to Comply with Court’s Orders Can Result in Serious Consequences for Third Parties—United Overseas Bank (UOB)*, GIBSON DUNN, <http://www.gibsondunn.com/publications/Documents/WebcastSlides-NewTrendsInAnti-CounterfeitingLitigation.pdf> [<http://perma.cc/GA2M-MNAU>] (last visited Dec. 14, 2015).

²⁹⁰ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987).

²⁹¹ *Id.*

²⁹² David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 MINN. J.L. SCI. & TECH. 151 (2011). Degnan summarizes the special requirements and massive costs involved in sending attorneys overseas to conduct electronic discovery. *Id.* at 183-84. In particular, the author notes that counsel must overcome culture, language, and other communication issues. *Id.* at 184.

²⁹³ *See id.*

discovery and overlooked the real danger of conflicting legal obligations forcing entities into unwarranted settlements.

C. *Bias Against Non-Western Nations*

Abusive discovery, unwarranted settlements, and pro-forum bias are bad enough. Some commentators have made a further allegation of “unfairness” and bigotry in the way U.S. courts treat the laws of different nations.²⁹⁴ According to these commentators, U.S. courts are not only biased in favor of the United States, they also show bias in favor of Western nations and against non-Western nations.²⁹⁵ These commentators claim to discern differences in how courts evaluate cases with similar factual backgrounds but involve defendants from a Western foreign nation (such as Switzerland) and a non-Western foreign nation (such as China).²⁹⁶ One commentator called it “particularly problematic” that courts seemed to be “unduly influenced by attitudes” towards specific foreign countries.²⁹⁷ Others stated that it is “interesting” that such “disparate holdings resulted from the same five-factor comity analysis,”²⁹⁸ where the primary difference was the nationality of the laws being analyzed.

To analyze whether courts have demonstrated a bias against the laws of non-Western nations, I divided nations into the West (including Canada, Europe, and Israel) and the non-West (all others). At this point in time, the results discussed below are merely suggestive; there are not yet enough cases to find statistical significance. Nevertheless, results so far seem to confirm the anecdotal sense of “unfairness” expressed by commentators. To be sure, U.S. courts rarely find the *Aéropatiale* test’s subjective factors to weigh in favor of respecting *any* foreign nation’s laws. But when they do, courts were much more likely to respect the laws of a Western nation than a non-Western nation.

When dealing with Western nations, courts found the first factor (importance) weighed in favor of respecting foreign law 12.5% of the time (4 cases out of 32). With non-Western nations, the percentage was 8% (2 out of 25).²⁹⁹ Of course, both numbers are small. When compared to each other, however, the difference is noticeable. U.S. courts were 56% more likely to

²⁹⁴ Chang & Chang, *supra* note 162, at 437.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ West, *supra* note 60, at 208.

²⁹⁸ Chang & Chang, *supra* note 162, at 426.

²⁹⁹ One case dealt with both Western and non-Western nations and so is counted towards both totals.

find that factor one (importance) favored upholding a Western nation's laws as compared to a non-Western nation's laws.³⁰⁰

Results were similar for the other subjective factors. Courts found that factor two (specificity) weighed in favor of respecting Western nations' laws 12.5% of the time (4 out of 32), but not a single court found factor two to weigh in favor of non-Western nations. For factor four (availability of alternative means), U.S. courts found the factor weighed in favor of upholding Western nations' laws in 15.6% of cases (5 out of 32), but for non-Western nations, the result was 12% (3 out of 25).

Interestingly, the only subjective factor to show little distinction between Western and non-Western nations' laws was factor five, which involves weighing the interests of the United States and the foreign nation.³⁰¹ At first glance, it would seem that a factor focused directly upon weighing the United States against foreign countries would be especially likely to reveal subconscious biases against non-Western countries. It may be, however, that when courts weighed the United States interest against specific nations, the court was more conscious of the danger of bias and was therefore more careful to avoid it. At this point in time, the results for any given factor are merely suggestive of bias. More results are needed before it can be determined that there is indeed a statistical significance in the treatments of Western and non-Western nations.³⁰² The chart immediately below shows the results for each of the four subjective factors. (Factor three is excluded from the chart because it is an objective factor, and as such, its results would not be impacted by any biases of the courts.)

³⁰⁰ To put it another way, 12.5% is 156% of 8%.

³⁰¹ For factor five (balancing national interests), the percentage of courts finding that the factor weighed in favor of upholding foreign law was similar for Western nations (17.2% or 5.5 out of 32) and for non-Western nations (16% or 4 out of 25). See Chart II, *infra*. Note that one case dealt with two Western nations and found that factor five favored violating foreign law for one (France) but not the other (Switzerland). I have counted this split verdict as 0.5.

³⁰² When the results for all four subjective factors are added together, courts found a factor to weigh in favor of the laws of a Western nation 18.5 times out of a total of 128 possible occasions. By contrast, courts found a subjective factor to weigh in favor of the laws of a non-Western nation 9 times out of a total of 100 possible occasions. Therefore, a court was 61% more likely to find that any given subjective factor weighed in favor of a Western nation's laws as compared to a non-Western nation's laws. However, it is not yet possible to determine that this difference in results is statistically significant.

Chart II: Do U.S. Courts' Analyses of the Subjective Factors Display Pro-Western Bias?

Percentage of Cases Not Ordering Violations of Foreign Law

Subjective Factor	Western Nations	Non-Western Nations	Percentage Difference (Western Versus Non-Western Nations)
Factor One: Importance	12.5%	8%	56% greater
Factor Two: Specificity	12.9%	0%	Incalculably greater percentage
Factor Four: Alternative Means	15.6%	12%	30% greater
Factor Five: National Interests	17.2%	16%	7.5% greater
Overall Percentage of All Subjective Factors	14.5% (18.5/128) ³⁰³	9%(9/100)	61% greater

D. *Impact on U.S. Business and Foreign Respect for U.S. Laws*

The *Aérospatiale* five-factor test is problematic for many reasons. U.S. courts exhibit a pro-forum (and perhaps pro-Western) bias.³⁰⁴ There has been a snowball effect of more and more litigants demanding court-ordered law breaking.³⁰⁵ Courts have often forced parties and sometimes even nonparties “to make such a Hobson’s choice” between flouting the U.S. court order and the foreign law.³⁰⁶ A separate problem is the effect of court-ordered violations upon the U.S. business environment. These decisions “discourage . . . banks or other businesses from setting up in the United States out of fear that United States court orders would force them to violate either domestic or foreign law.”³⁰⁷

³⁰³ One case dealt with two Western nations and reached a split verdict, finding that factor five favored violating foreign law for France but not Switzerland. See *supra* note 300.

³⁰⁴ See *supra* Sections III.B, III.C, III.E, IV.C.

³⁰⁵ See *supra* Section IV.A.

³⁰⁶ West, *supra* note 60, at 222.

³⁰⁷ *Id.*

Particularly troubling is that foreign governments may turn U.S. court behavior against the United States and demand the production of documents and records in violation of U.S. law. The *Aérospatiale* dissent recognized that it did “not serve the country’s long-term interest to establish precedents that could allow foreign courts to compel production of the records of American corporations.”³⁰⁸ The dissent highlighted the danger that foreign governments and judiciaries may require American technological and military secrets to be turned over.³⁰⁹ Linked to this danger was the “price tag of accumulating resentment” as U.S. courts invaded the sovereignty and violated the laws of foreign nations.³¹⁰ Commentators warned that “[j]udicial insensitivity by United States courts has caused hostility abroad which may lead to . . . problems for American litigants in foreign tribunals.”³¹¹ Nevertheless, it has taken more than a decade for the “accumulating resentment” to reach a critical mass.

Foreign courts have recently begun to order document production in violation of U.S. law, perhaps in response to the ongoing disrespect by U.S. courts for foreign sovereignty. In early 2015, a court in the United Kingdom ordered the production of a document that had been filed under seal by a U.S. court.³¹² The document at issue would reveal “an ongoing investigation by the U.S. [Department of Justice],”³¹³ and its production would flout the clear mandate of both the U.S. court and the Department of Justice. The U.K. court’s strange logic and its dismissiveness towards U.S. law and U.S. concerns strongly resemble the attitudes of U.S. courts towards foreign law when applying the *Aérospatiale* test.

The document at issue in *Property Alliance Group* was a Deferred Prosecution Agreement between the Royal Bank of Scotland and the Department of Justice filed under seal by Judge Shea in the District of Connecticut.³¹⁴ The document itself stated that it was “the focus of an ongoing investigation,” that it “will be held in confidence by the parties to this agreement,” and that it “will not be made available to the public unless and until the Department of Justice, in its sole discretion, determines that such

³⁰⁸ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, at 552 n.3 (1987) (Blackmun, J., concurring in part and dissenting in part).

³⁰⁹ *Id.*

³¹⁰ *Id.* at 568.

³¹¹ See Wilson, *supra* note 176, at 604 (citation omitted).

³¹² *Prop. All. Grp. Ltd. v. The Royal Bank of Scotland PLC* [2015] EWHC 321 (Ch.).

³¹³ *Id.*

³¹⁴ *Id.*

information can and should be disclosed.”³¹⁵ The Royal Bank of Scotland informed the U.K. court that “the document is to be kept under seal” and that producing it would put the bank “at risk of criminal contempt proceedings.”³¹⁶ The Department of Justice confirmed to the U.K. court “the order of Judge Shea placing the document under seal” and also emphasized its ongoing “interest in maintaining the confidentiality of the information” in the document.³¹⁷

Despite the clear language of the court and the Department of Justice, the U.K. court required the document to be revealed to an opposing litigant.³¹⁸ In doing so, the U.K. court accepted a highly questionable assertion by a U.S. attorney claiming that when a U.S. court seals a document, it does not prohibit a party from distributing copies of that sealed document.³¹⁹ In language reminiscent of many court decisions applying the *Aérospatiale* five-factor test, the U.K. court claimed that the document’s supposed importance weighed in favor of its release. Much like U.S. courts that weigh national interests, evaluate foreign sovereigns’ interests in their own laws, and question whether foreign laws are really enforced, the U.K. court concluded that the U.S. court would not punish release of the document. The U.K. court also refused the Royal Bank of Scotland’s plea that the other party should be the one to inform the U.S. court that the sealed document was being revealed.³²⁰ And to top it all off, the U.K. court stated that, based on “the balance of factors,” it would “likely” release the sealed document to the general public.³²¹ This same U.K. court stated that its next step would be to consider possibly ordering the production of certain documents in violation of U.S. attorney-client privilege.³²²

It is perhaps easier to recognize the monstrosity of pro-forum bias and disrespect for foreign law when it is directed at one’s own nation. The example of this U.K. court’s disrespect for

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Prop. All. Grp. Ltd. v. The Royal Bank of Scotland PLC [2015] EWHC 321 (Ch.).

³¹⁹ *Id.* The U.S. attorney claimed that “the seal order prevents RBS from publicly disclosing the stamped filed copy . . . (i.e. the court record)” but that Royal Bank of Scotland is not prevented from disclosing “RBS’ own copy . . . , the one it obtained from the US Government prior to entry of the seal order.” This highly questionable assertion was made by Jonathan New of Baker & Hostetler. *Id.*

³²⁰ *Id.*

³²¹ *Id.* (“A year from now, when the case is approaching trial, . . . I regard it likely that the balance of factors when considering whether a document like [this] should be referred to in open court at trial is much more likely to come down in favour of publicity . . .”).

³²² *Id.*

U.S. sovereignty and court orders will hopefully cause U.S. courts to reflect upon their own willingness to order law breaking abroad. If not, the lack of comity displayed by U.S. courts will likely lead to more foreign courts ordering the violation of U.S. protective orders and attorney-client privilege and the release of sealed court documents. Such a result would have enormous ramifications for the U.S. legal system.

V. AN ALTERNATIVE REGIME

As this article demonstrates, courts have utterly failed to avoid pro-forum bias in applying the *Aérospatiale* test. So what should be done? There are two alternatives. The *Aérospatiale* test could be retained if U.S. trial courts correct their pro-forum excesses. I provide suggestions in this regard below. Alternatively, if courts are inherently unable to neutrally balance U.S. and foreign laws, then the *Aérospatiale* test should be rejected and replaced with a Hague Convention first approach.

A. *Reforming the Aérospatiale Test*

To retain the *Aérospatiale* test, it is necessary to reform the excesses inherent in courts' application of the test.

1. Factor Four Must Be an Objective Test

As discussed above, the fourth factor (availability of alternative means of obtaining the information) was apparently intended as an objective factor. This factor asks whether or not there exist alternative means by which the information sought can be obtained. U.S. trial courts have improperly converted this into a subjective factor, whereby the U.S. courts evaluate whether or not they deem the alternative means satisfactory. Factor four should be returned to the objective factor it was meant to be. Specifically, factor four should always weigh against the violation of foreign laws as long as there is an alternative means of obtaining the information (whether that is a Hague Convention request or another method).

2. "Specificity" Must Mean "Narrowly Tailored"

As previously discussed, many courts have interpreted the second factor (specificity) as asking whether the document requests are clear as to the documents sought. This is a misreading of the word "specificity." Court must recognize that

the “specificity” factor requires document requests to be narrowly tailored and targeted. Document requests are not tailored if they are made as part of a fishing expedition or if the requesting party is demanding huge quantities of documents.

3. Courts Must Reject—Not Pare Back—Overly Broad Requests

Courts have frequently taken up the task of narrowing overly broad document requests to a level the court deems acceptable. Courts that unilaterally narrow requests are effectively encouraging overly broad requests while also turning factor two (specificity) into a rubber stamp for violating foreign laws. An overly broad request must be deemed as weighing against the violation of foreign laws and rejected, not pared back.

4. When Weighing National Interests, the U.S. Interest in Adjudication Must Not Be a Consideration

Courts have vastly overvalued the supposed U.S. national interest in adjudication when applying factor five (weighing national interests). Considering that every court applying the *Aérospatiale* test is necessarily applying it in the midst of a litigation, the supposed U.S. national interest in adjudication would automatically be triggered every time. If the supposed interest in adjudication is so great that it outweighs foreign nations’ interests in their laws, then the fifth factor (comparing national interests) would always weigh in favor of violating foreign law. It would be a perverse result for a supposed balancing test if one of the factors came out the same way every time. Courts must cease treating the “U.S. interest in adjudication” as an interest to consider when weighing national interests. To the extent there is a U.S. interest in adjudication, this interest is already baked into the test and must not be considered as part of the fifth factor.

If courts implement these changes to the *Aérospatiale* test, then it may be possible to rescue the test from its current swamp of pro-forum bias.

B. *Replacing the Aérospatiale Test with a Hague Convention First Approach*

While the reforms outlined above could help eliminate pro-forum bias, one fears that that pro-forum bias would eventually creep back into the judicial process. The Supreme Court’s original

Aérospatiale opinion repetitively and vocally urged trial courts to avoid pro-forum bias, and yet pro-forum bias has not only appeared, it has neutered *Aérospatiale*'s supposed balancing test. U.S. courts are so infected with pro-forum bias that any attempt to reform the *Aérospatiale* test may end up reverting back to the current levels of bias.

An alternative system was proposed to the Supreme Court in the *Aérospatiale* litigation itself: a Hague Convention first approach. Under this approach, litigants would be required to at least attempt to obtain documents through the Hague Convention. Only if this attempt was unsuccessful (or if the foreign nation has not joined the Convention) could the litigant then seek a court order for the production of the documents in violation of foreign law. Under this approach, the *Aérospatiale* test would still be applied, but it would only come into play if the Hague Convention request fails (or if the foreign nation is not a signatory to the Hague Convention).

CONCLUSION

A review of all cases applying the five-factor *Aérospatiale* test reveals evidence of pro-forum bias. U.S. courts have found that each of the four subjective factors weigh in favor of violating foreign law by lopsided ratios as high as thirteen to one. These extreme results suggest that the warnings of pro-forum bias expressed by the *Aérospatiale* dissent and by commentators have proven correct. Moreover, results to date suggest that U.S. courts may have a further bias against non-Western nations.

The first *Aérospatiale* factor, "importance," is frequently converted by courts into a "relevance" test. Even courts that don't reduce "importance" to relevance still take an extremely broad view of importance. The second factor, "specificity," is often misunderstood by courts as referring to whether or not discovery requests are clearly written. Even when properly understood as asking whether requests are "narrowly tailored," courts regularly approve broad discovery requests as "specific." The sole objective factor is factor three, the national origin of the information sought. This objective factor can act as a control group by which to test the degree of pro-forum bias displayed by courts when analyzing the subjective factors. The difference in results between the objective factor (6% of cases favor violating foreign law) and the subjective factors (between 81% and 93% of cases favor violating foreign law) is extreme.

Factor four (whether alternative means are available) should be an objective factor. Instead, most courts convert this

factor into a subjective test, and courts consistently find court orders preferable to every alternative means of obtaining information. Factor five requires the weighing of U.S. and foreign interests. U.S. courts repeatedly confess that they do not understand the foreign interests at stake, underappreciating even interests enshrined in foreign constitutions. U.S. courts are particularly prone to underestimating the importance of financial privacy, which is a national interest across the globe. Courts are also prone to overvaluing their own role, with many declaring that a supposed U.S. interest in “adjudicating” court cases trumps foreign laws.

The overwhelming pro-forum bias of U.S. courts has encouraged litigants to demand documents in violation of foreign law. The result is abusive discovery that traps entities between conflicting legal requirements and sometimes forces unwarranted settlements. Requests for court-ordered foreign law breaking have skyrocketed, and the willingness of courts to order foreign law breaking has led to discovery abuse as litigation strategy.

Pro-forum bias, the lack of appellate correction, the trend towards using court-ordered law breaking as a litigation strategy, and U.S. deference to legal precedent have combined to create a terrible feedback loop. The once unheard-of scenario of courts ordering the violation of foreign law has grown exponentially in recent years. The willingness of U.S. courts to order foreign law breaking has damaged international comity, infuriated foreign sovereigns, and led to retaliatory actions. *Aérospatiale*'s experiment in letting trial courts “weigh” the importance of U.S. discovery against the importance of foreign law is a failure.

There are two potential solutions. Courts could rein in some of the abuses of the *Aérospatiale* test. A better solution, however, would be to require litigants to first attempt to obtain documents through the Hague Convention. The *Aérospatiale* test should come into play only when a Hague Convention request has been rejected or when the foreign nation is not a signatory to the Hague Convention.

The very idea of U.S. courts ordering entities to break the law should shock the conscience. And yet the *Aérospatiale* test has caused an enormous surge in court-ordered law breaking. The test must be either corrected or scrapped. After all, the first step in ending court-ordered law breaking is to stop ordering it.