

NOTE

DOMESTICATING COMITY: TERRITORIAL U.S. DISCOVERY IN VIOLATION OF FOREIGN PRIVACY LAWS

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INTRODUCTION	550
I. GDPR'S EXTRATERRITORIAL PRIVACY REGULATIONS.....	553
A. GDPR's Extraterritorial Reach	554
B. GDPR's Substantive Protections and Penalties for Breach	556
II. FOREIGN-STATE COMPULSION AND U.S. DISCOVERY	558
A. Foreign-State Compulsion	558
B. Extraterritorial Discovery Under U.S. Law	560
III. TERRITORIAL DISCOVERY IN VIOLATION OF FOREIGN LAW: DOMESTICATING THE COMITY ANALYSIS	565
A. Lack of Consensus on Territorial Limits	565
B. Should Foreign-State Compulsion Be Territorially Limited?	568
1. <i>A Territorial Limit Based on Present Storage Location</i>	571
2. <i>A Territorial Limit Based on Site of Control</i> .	573
C. The Foreign-State Compulsion Defense Should Not Be Territorially Limited	573
IV. ACCOUNTING FOR THE PRESENT LOCATION OF DISCOVERABLE MATERIALS IN THE <i>AÉROSPATIALE</i> TEST .	576
A. Current Application of the <i>Aérospatiale</i> Comity- Balancing Test	576
B. Accounting for Present Location of Discoverable Materials in the <i>Aérospatiale</i> Test.....	582
1. <i>The Present Location of Discoverable Materials Should Be Accounted for in the Aérospatiale Test in Certain Circumstances.</i>	583

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2. *The Present Location of Discoverable
Materials Should Not Be an Independent*

Factor in the Comity-Balancing Test 584

CONCLUSION 587

INTRODUCTION

The European Union's (EU) recently enacted General Data Protection Regulation (GDPR) is being billed as "the most important change in data privacy regulation in 20 years."¹ The GDPR sets forth a stringent set of binding regulations that govern how data controllers and processors manage the private electronic data of EU citizens.² In an audacious effort to ensure comprehensive privacy protection for EU citizens in a globally connected digital landscape, EU regulators have made the GDPR apply extraterritorially.³ The regulation extends beyond the borders of the European Union, reaching any entity that stores or processes the personal data of EU citizens regardless of where that data is stored or processed.⁴

The GDPR's extraterritorial reach sets this groundbreaking regulation on a collision course with the equally far-reaching, party-driven discovery regime embraced by United States courts. The GDPR's rigorous protections—such as limits on transferability and a data subject's "[r]ight to erasure"⁵—may make it impossible for a party to comply with both the requirements of the GDPR and a United States-issued subpoena *duces tecum* for electronically stored information (ESI) protected by the GDPR. In facing this conflict, U.S. courts may soon be asked to decide whether to uphold the United States' preference for expansive civil discovery or yield to principles of international comity and fairness to parties caught between a "rock and a hard place."⁶

¹ *The GDPR*, EUGDPR.ORG, <https://eugdpr.org/> [<https://perma.cc/WZC2-DJFA>] (last visited Mar. 20, 2019).

² *GDPR Key Changes*, EUGDPR.ORG, <https://eugdpr.org/the-regulation/> [<https://perma.cc/KU3F-T26B>] (last visited Mar. 20, 2019).

³ *Id.*

⁴ See Commission Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, ¶ 22 (General Data Protection Regulation), 2016 O.J. (L119) 1 (EU) [hereinafter GDPR].

⁵ *Id.* art. 17.

⁶ See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 551 (E.D.N.Y. 2008) ("The defense of foreign sovereign compulsion . . . focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states. Rather than being concerned with the diplomatic implications of condemning another country's official acts, the foreign sovereign compulsion doctrine

In examining this issue, a number of practitioners and scholars have noted that the foreign-state compulsion defense may be available to a party caught between U.S. discovery obligations and the requirements of the GDPR.⁷ The foreign-state compulsion defense is a discretionary doctrine that allows a U.S. court to excuse or moderate sanctions for breaches of U.S. law when a party would violate foreign law by complying with U.S. law.⁸ While many of these commentators have written about the availability of the foreign-state compulsion defense for *extraterritorial* U.S. discovery (i.e., the discovery of evidence located abroad),⁹ very few have examined the application of the doctrine to *territorial* discovery (i.e., the discovery of evidence located within the territorial jurisdiction of the United States). This gap in the literature leaves a critical question unexamined and unanswered: Can a party invoke the doctrine of foreign-state compulsion to defend against a discovery request that would require the party to disclose GDPR-protected information when the information sought to be discovered is presently located in the United States?

This Note in no way answers the myriad questions surrounding the probable conflict between U.S. civil discovery and the GDPR, and this Note refrains from speculating as to how U.S. courts may ultimately treat discovery motions that would require a party to violate the GDPR.¹⁰ Rather, this Note aims to

recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's.”)

⁷ See *What to Do When You Can't Comply: Foreign Sovereign Compulsion as a Potential Defense to Conflicts Between U.S. Discovery Obligations and the GDPR*, ASS'N CORP. COUNSEL (July 24, 2018), <http://www2.acc.com/legalresources/quickcounsel/conflicts-between-us-discovery-and-gdpr.cfm?makepdf> [https://perma.cc/T65M-GQ4Z].

⁸ Don Wallace, Jr. & Joseph P. Griffin, *The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process*, 23 INT'L L. 593, 593–94 (1989).

⁹ See generally Melinda Levitt, *GDPR and U.S. eDiscovery—Who Will Win the Game of Chicken*, FOLEY & LARDNER LLP (June 20, 2018), <https://www.foley.com/en/insights/publications/2018/06/gdpr-and-us-ediscovery—who-will-win-the-game-of-c> [https://perma.cc/KUP2-Z5HP] (concluding that U.S. courts will likely continue to compel extraterritorial discovery even if it requires a party to violate the GDPR); David J. Kessler et al., *The Potential Impact of Article 48 of the General Data Protection Regulation on Cross Border Discovery from the United States*, 17 SEDONA CONF. J. 575 (2016) (assessing how U.S. courts may respond to Article 48 of the GDPR, which regulates data requests from a court, tribunal, or other administrative agency outside of the European Union).

¹⁰ See generally *Finjan, Inc. v. Zscaler, Inc.*, No. 17-cv-06946-JST, 2019 WL 618554, at *1–3 (N.D. Cal. Feb. 14, 2019) (applying the factors listed in *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) and ordering discovery of information potentially protected by the GDPR); *Corel Software, LLC v. Microsoft Corp.*, No. 2:15-cv-00528-JNP-PMW, 2018 WL

make two contributions. First, this Note addresses a series of threshold descriptive and normative questions that are mostly unaddressed by scholars, the Restatements of Foreign Relations Law, and the courts: Is the doctrine of foreign-state compulsion available to defend against a territorial discovery order or is the foreign-state compulsion defense limited to extraterritorial acts? How have courts applied the doctrine to territorial discovery, if at all? *Should* the foreign-state compulsion defense be territorially limited? Second, if the foreign-state compulsion defense is available to defend against a territorial discovery order, how do courts account for the fact that the information is presently located in the United States when applying the doctrine? *Should* courts account for the present location of ESI, and, if so, how much weight should the present location of data be given in a court's analysis?

In Part I, this Note begins by detailing the GDPR's extraterritorial reach, expansive privacy protections, and severe penalties for breach. Part II examines the foreign-state compulsion doctrine in the context of U.S. discovery. Part III asks whether a party can defend against a territorial discovery order by invoking the doctrine of foreign-state compulsion. In answering this question, this Note points out the lack of caselaw addressing this particular issue and addresses inconsistencies in the Fourth Restatement of Foreign Relations Law's discussion of possible territorial limits on the doctrine of foreign-state compulsion. This Note then argues that a party *should* be able to invoke the foreign-state compulsion doctrine to defend against a territorial discovery order because the principles underlying the doctrine—international comity and fairness to the parties—are implicated regardless of whether the violation of foreign law is said to take place in the United States or abroad. Ultimately, this Note concludes that, in the context of U.S. discovery, the foreign-state compulsion defense should be domesticated. That is, the defense should be available whenever an actual conflict exists between two sovereigns with legitimate claims to jurisdiction over the party to be compelled or the discoverable materials at issue, even if the discoverable materials are located in or controlled from the United States.

Part IV proceeds with the assumption that the foreign-state compulsion defense is available for territorial discovery. Under

4855268, at *1–3 (D. Utah Oct. 5, 2018) (denying Microsoft's petition for a protective order despite Microsoft's claim that the retention and production of GDPR-protected telemetry data would be unduly burdensome and disproportionate to the needs of the case).

the comity-balancing test articulated by the Supreme Court in *Aérospatiale*, U.S. courts are not explicitly directed to account for the present location of discoverable information when applying the doctrine of foreign-state compulsion.¹¹ Nonetheless, a number of courts have considered the present location of the discoverable materials at issue when deciding whether to compel discovery despite a contrary foreign law.¹² This Note concludes that, when it comes to GDPR-protected ESI stored in the United States, the present location of the discoverable data should *not* be independently considered in the courts' comity-balancing test. Rather, a court should account for the present location of data only if the present location is relevant to the court's assessment of an enumerated *Aérospatiale* factor—such as the availability of an adequate alternative mechanism for obtaining the information.

I

GDPR'S EXTRATERRITORIAL PRIVACY REGULATIONS

The GDPR is not the first privacy regulation promulgated by the European Union.¹³ In 1995, the EU enacted a privacy directive (1995 Directive) that prohibited the transfer of personal information to non-EU states if the non-EU state could not guarantee an “adequate level of [privacy] protection.”¹⁴ In response to the 1995 Directive, the United States and the EU negotiated the Safe Harbor agreement (Safe Harbor).¹⁵ Safe Harbor allowed U.S. entities to take certain measures to self-certify that they met the 1995 Directive's requirements for providing “adequate” privacy protection.¹⁶ The European Court of Justice, however, eventually struck down the Safe Harbor agreement after concluding that the self-certification process failed to provide an “adequate level of protection” substantially similar to the protection afforded in the EU.¹⁷ Safe Harbor was

¹¹ See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).

¹² See *SEC v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 333 (N.D. Tex. 2011).

¹³ See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, 50.

¹⁴ *Id.* at 45.

¹⁵ U.S. Dep't of Commerce Int'l Trade Admin., *U.S.-EU Safe Harbor Overview*, EXPORT.GOV, https://build.export.gov/main/safeharbor/eu/eg_main_018476 [<https://perma.cc/D7PF-HGUH>].

¹⁶ *Id.*

¹⁷ See Case C-362/14, *Maximillian Schrems v. Data Prot. Comm'r*, 2015 E.C.R. 650, ¶ 26.

subsequently replaced by Privacy Shield, a similar agreement that garnered stronger commitments from U.S. entities to safeguard data privacy and provided avenues of redress for EU citizens.¹⁸

The GDPR, which went into effect in May 2018, replaces the 1995 Directive on which Safe Harbor and Privacy Shield were based.¹⁹ While the GDPR is not the first iteration of data privacy regulation in the EU, the GDPR's extraterritorial reach, expansive privacy protections, and severe penalties for breach will fundamentally change the nature of data privacy regulation in the European Union.

A. GDPR's Extraterritorial Reach

In promulgating the GDPR, EU regulators sought to set a unified standard for data privacy protection across the EU.²⁰ The reason for this was twofold: a uniform standard better protects the privacy of data subjects by closing gaps and workarounds in the regulatory scheme, and it facilitates commerce by easing the costs of compliance.²¹ Further, the framers of the GDPR recognized that tying privacy regulations to territorial boundaries inadequately protects individuals who participate in global commerce and share personal information on the internet.²² Data often travels beyond borders, leading EU regulators to conclude that the GDPR must be extraterritorial as well.

¹⁸ See Press Release, European Commission, Restoring Trust in Transatlantic Data Flows Through Strong Safeguards: European Commission Presents EU-U.S. Privacy Shield (Feb. 29, 2016), http://europa.eu/rapid/press-release_IP-16-433_en.htm [<https://perma.cc/WF4K-CF8Z>].

¹⁹ See *Timeline of Events*, EUGDPR.ORG, <https://eugdpr.org/the-process/timeline-of-events/> [<https://perma.cc/VT5Z-7U7H>] (last visited Mar. 20, 2019).

²⁰ See Allison Callahan-Slaughter, *Lipstick on a Pig: The Future of Transnational Data Flow Between the EU and the United States*, 25 TUL. J. INT'L & COMP. L. 239, 251 (2016).

²¹ Press Release, European Commission, Agreement on Commission's EU Data Protection Reform Will Boost Digital Single Market (Dec. 15, 2015), https://europa.eu/rapid/press-release_IP-15-6321_en.htm [<https://perma.cc/68HL-VFM5>].

²² GDPR, *supra* note 4, ¶ 23 ("In order to ensure that natural persons are not deprived of the protection to which they are entitled under this Regulation, the processing of personal data of data subjects who are in the Union by a controller or a processor not established in the Union should be subject to this Regulation . . ."). In contrast, the 1995 Directive only applied to those controllers who processed an EU citizen's personal data in the EU. See Directive 95/46/EC, European Parliament and the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, 50.

Consequently, the GDPR extends to two distinct classes of data controllers and processors. First, the GDPR extends to “any processing of personal data”²³ by “a controller or processor in the [EU] . . . regardless of whether the processing itself takes place within the [EU].”²⁴ Thus, all EU-based controllers and processors are subject to the GDPR, even if the data processing takes place in the United States.

Second, the GDPR applies to controllers and processors “not established in the [EU]”²⁵ when the activities of these controllers and processors relate to: (1) “offering goods or services to [EU citizens] irrespective of whether connected to a payment” or (2) monitoring of data user behavior when that behavior takes place in the EU.²⁶ This means that U.S. companies that process EU citizens’ data as part of their commercial activities will be subject to the requirements of the GDPR—no matter the industry and irrespective of the scale of the EU-directed operations. Furthermore, because the GDPR applies to both controllers and processors, processing companies that operate data “clouds” will not be exempt from GDPR enforcement.

As it stands, the extraterritorial reach of the GDPR leaves U.S. companies with three options: (1) block EU users completely (an entirely unfeasible option for multinational entities); (2) suffer the penalties for breach (an impossible choice given the severity of sanctions); or (3) comply with the regulation.²⁷ When combined with the EU’s market power, the “extraterritorial application of EU data privacy law will have a huge impact on international data flow and will make the GDPR a de facto global standard.”²⁸

²³ The GDPR’s broad definition of “processing” would likely cover any transmission to or use by a U.S. court or other party. See GDPR, *supra* note 4, art. 4, ¶ 2 (“[P]rocessing’ means any operation . . . which is performed on personal data . . . such as collection, recording, organisation . . . [or] use, disclosure by transmission, dissemination, or otherwise making available . . .”).

²⁴ *Id.* ¶ 22.

²⁵ *Id.* ¶ 23.

²⁶ *GDPR Key Changes*, *supra* note 2.

²⁷ See *MarTech Today’s Guide to GDPR—The General Data Protection Regulation*, MARTECH TODAY, <https://martechtoday.com/guide/gdpr-the-general-data-protection-regulation> [<https://perma.cc/L98H-N8CM>] (last visited Mar. 20, 2019).

²⁸ Samantha Cutler, *The Face-Off Between Data Privacy and Discovery: Why U.S. Courts Should Respect EU Data Privacy Law When Considering the Production of Protected Information*, 59 B.C. L. REV. 1513, 1520 (2018); see also Callahan-Slaughter, *supra* note 20, at 240 (“By using its considerable market power as bargaining leverage, the EU has the capacity to facilitate change beyond its borders and strengthen other nations’ data protection safeguards.”).

B. GDPR's Substantive Protections and Penalties for Breach

In addition to its extraterritorial scope, the GDPR expands the type of data protected by EU privacy regulations.²⁹ By the terms of the GDPR, the regulation aims to protect all “personal data” of “data subjects.”³⁰ And the GDPR’s definition of “personal data” is expansive, encompassing “any information relating to an identified or identifiable natural person (‘data subject’).”³¹

The GDPR also sets forth an extensive set of privacy rights for EU citizens.³² The GDPR’s stringent protections are premised on the idea that “[t]he protection of natural persons in relation to the processing of personal data is a fundamental right.”³³ In safeguarding this right, the GDPR aims to give data subjects “broad rights of access and control over their own data.”³⁴ For example, the GDPR provides for a data subject’s right to consent, which requires a controller or processor to obtain each EU data subject’s affirmative consent for the controller or processor’s specific use of the subject’s personal data.³⁵ Thus, if a controller or processor were compelled to produce GDPR-protected information by a U.S. court, the controller or processor would need to reach out to each individual data subject to obtain affirmative consent before disclosing the data subject’s information in the manner prescribed by the order. The data subject would also retain the ability to withdraw his or her consent at any time.³⁶

Further, Article 17 of the GDPR gives data subjects a “[r]ight to erasure.”³⁷ The right to erasure allows data subjects to request, on a number of different grounds, that their personal data be permanently erased. If the grounds for erasure are interpreted broadly by EU regulatory authorities, a data subject could presumably retain the right to erasure even if their personal data has been disclosed to a third party; and this third party could very well be a U.S. court. This means that even if a party fully complies with the GDPR in producing information for U.S. litigation, there is still a risk that a data subject

29 Callahan-Slaughter, *supra* note 20, at 251.

30 GDPR, *supra* note 4, art. 4, ¶ 1.

31 *Id.*

32 See *GDPR Key Changes*, *supra* note 2.

33 GDPR, *supra* note 4, ¶ 1.

34 Callahan-Slaughter, *supra* note 20, at 251.

35 *Id.*

36 GDPR, *supra* note 4, art. 7, ¶ 3.

37 Callahan-Slaughter, *supra* note 20, at 251.

revokes their consent and requests that his or her data be erased.³⁸

Especially relevant to this Note, Article 48 of the GDPR regulates the flow of GDPR-protected information to non-EU courts. Specifically, Article 48 stipulates that controllers and processors may only comply with a production order from a foreign court if the party works through international agreements such as the Hague Convention on the Taking of Evidence (the “Hague Convention”).³⁹ This mandate runs counter to current U.S. practice, as U.S. courts are not obliged to use international judicial assistance treaties when ordering discovery that would require a party to violate foreign law.⁴⁰

Backing up these substantive protections is the possibility of massive monetary penalties for GDPR violations. The GDPR sets forth a sliding scale of penalties based on the severity of the violation, and severe violators may be subject to fines “up to 4% of annual global turnover or €20 Million (whichever is greater).”⁴¹ Although it is not clear how heavy-handed EU regulators will be in levying penalties under the GDPR, there is good reason to believe that the GDPR will be enforced with greater zeal than previous EU privacy regulations.⁴²

It is worth noting that the GDPR’s robust, uniform privacy regime stands in stark contrast to the United States’ self-regulatory, piecemeal approach to privacy regulation.⁴³ Far from embracing a broad-based privacy policy, “the United States relies on a fractured system comprised of various acts and statutes,” most of which were enacted in response to the needs of particular industries.⁴⁴ Further, U.S. privacy laws typically neglect to set forth specific regulatory requirements. Instead, the substantive regulatory requirements of U.S. privacy laws

³⁸ It is unclear how a U.S. court would respond to an EU citizen’s request for erasure if the data sought to be erased is already possessed by the parties or the court. Although outside the scope of this Note, this is a question worthy of further examination.

³⁹ See GDPR, *supra* note 4, art. 48.

⁴⁰ See *Soci t  Nationale Industrielle A rospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 (1987).

⁴¹ *GDPR Key Changes*, *supra* note 2.

⁴² See Natalia Drozdiak & Sam Schechner, *Europe Tightens Screws on U.S. Tech Amid Trans-Atlantic Tensions over Trade*, WALL ST. J. (Mar. 14, 2018, 12:20 PM), <https://www.wsj.com/articles/europe-tightens-screws-on-u-s-tech-amid-trans-atlantic-tensions-over-trade-1521044453> [<https://perma.cc/AG4D-9WR5>] (noting increased enforcement actions against U.S. tech companies by EU and European state regulators).

⁴³ See Bradyn Fairclough, *Privacy Piracy: The Shortcomings of the United States’ Data Privacy Regime and How to Fix It*, 42 J. CORP. L. 461, 463–64 (2016).

⁴⁴ *Id.* at 463.

are commonly populated by unwritten industry standards. As a result, the United States' self-regulatory model is rife with potential conflicts of interest,⁴⁵ and critics argue that the U.S. system fails to hold companies accountable for the mismanagement of personal data.⁴⁶

II

FOREIGN-STATE COMPULSION AND U.S. DISCOVERY

A. Foreign-State Compulsion

The foreign-state compulsion doctrine allows U.S. courts to exercise their discretion to “excuse violations of law, or moderate the sanctions imposed for such violations, on the ground that the violations are compelled by another state’s law.”⁴⁷ The defense arises when two states have “overlapping legitimate claims of prescriptive jurisdiction over persons, property, or conduct,”⁴⁸ and a party cannot comply with U.S. law without suffering severe criminal⁴⁹ or civil sanctions⁵⁰ under foreign law.⁵¹ To assert the defense, the actor in question must make a good faith effort to avoid the conflict of laws by seeking a release from foreign-state sanctions.⁵² Furthermore, U.S. courts will generally refuse to recognize the foreign-state compulsion defense if the exercise of prescriptive jurisdiction by the foreign

⁴⁵ See Carolyn Hoang, *In the Middle: Creating a Middle Road Between U.S. and EU Data Protection Policies*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 810, 848 (2012) (“On one hand, businesses are delegated the duty of protecting customer information. On the other hand, businesses need to make a profit, and selling information is very lucrative.”).

⁴⁶ Fairclough, *supra* note 43, at 464.

⁴⁷ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 442 (AM. LAW INST. 2017).

⁴⁸ *Id.* § 442 Reporters' Notes 1.

⁴⁹ See *Société Internationale v. Rogers*, 357 U.S. 197, 211 (1958) (“It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for non-production, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.”).

⁵⁰ See *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968) (“We would be reluctant to hold . . . that the mere absence of criminal sanctions abroad necessarily mandates obedience to a subpoena. . . . The vital national interests of a foreign nation, especially in matters relating to economic affairs, can be expressed in ways other than through the criminal law.”).

⁵¹ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 442 Reporters' Notes 2; see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (holding that a “conflict” between U.S. and foreign law does not exist for purposes of foreign-state compulsion if the party “subject to regulation by two states can comply with the laws of both”).

⁵² RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 442 cmt. c.

state is “unreasonable,”⁵³ so long as the United States’ exercise of jurisdiction is reasonable.⁵⁴

The Fourth Restatement of Foreign Relations Law rejects the idea of a “general defense” of foreign-state compulsion.⁵⁵ Rather, according to the Fourth Restatement, the availability and application of the doctrine “depend[] on the [underlying substantive] law in question.”⁵⁶ Because foreign-state compulsion is a doctrine of discretion, the availability and application of the doctrine depend on whether a U.S. court maintains the discretion to excuse or mitigate violations of U.S. law under the particular substantive law at issue. As a result, beyond the basic contours of the doctrine, courts have developed semispecialized articulations of the defense for specific areas of the law, such as discovery and antitrust.⁵⁷ In fact, the defense may be completely unavailable in regulatory regimes that restrict the courts’ role in implementing or developing the law.⁵⁸ It follows that the broad discretion afforded to U.S. courts in ordering and enforcing discovery under the Federal Rules of Civil Procedure gives courts “more room to recognize the [foreign-state compulsion] defense and to moderate the sanctions that otherwise might apply for noncompliance with federal law.”⁵⁹

There are two common justifications for the foreign-state compulsion defense. First, U.S. courts apply the foreign-state compulsion defense due to fairness concerns.⁶⁰ In this way, the doctrine serves to protect parties “from being caught between the jaws of [a U.S.] judgment and the operation of laws in foreign countries where it does its business.”⁶¹ Courts are prone to sympathize with parties who in good faith try to obtain a release from foreign-state laws, and yet remain torn between obligations pressed upon them by competing sovereigns. The

⁵³ See criteria for “reasonable” exercise of jurisdiction in RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2) (AM. LAW INST. 1987).

⁵⁴ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 442 cmt. e.

⁵⁵ *Id.* § 442 cmt. a.

⁵⁶ *Id.*

⁵⁷ See *id.* § 442 cmt. d. (noting that the foreign-state compulsion defense features prominently in antitrust law because antitrust statutes “assign to the judiciary a significant role in developing the law”).

⁵⁸ *Id.*

⁵⁹ *Id.*; see also *id.* cmt. a. (noting that courts have recognized the foreign-state compulsion defense “most often in cases seeking information”).

⁶⁰ Wallace & Griffin, *supra* note 8, at 596.

⁶¹ *United States v. General Electric Co.*, 115 F. Supp. 835, 878 (D.N.J. 1953).

foreign-state compulsion doctrine allows U.S. courts to exercise their discretion to rectify this situation.⁶²

The second justification for the foreign-state compulsion defense is the principle of comity. Comity is widely recognized as a guiding principle of American jurisprudence.⁶³ The Supreme Court has defined comity as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.”⁶⁴ While comity is not an obligation under international law, it is applied by U.S. courts “both as a principle of recognition and as a principle of restraint.”⁶⁵ Out of a concern for comity, U.S. courts apply the foreign-state compulsion doctrine to balance the competing interests of the United States and a foreign state when both nations assert jurisdiction over the actor or information at issue.

B. Extraterritorial Discovery Under U.S. Law

The foreign-state compulsion defense arises most often in the context of extraterritorial discovery.⁶⁶ In order to understand how the defense may be applied in *territorial* discovery, it is important to understand how the doctrine is applied to requests for information located abroad.

Generally, a U.S. court has three methods available to compel extraterritorial discovery. First, a court can request the cooperation or assistance of a foreign court to compel a party to produce information located within the foreign court’s jurisdiction.⁶⁷ Second, a U.S. court can require parties to acquire information through a judicial assistance treaty. The most prominent of these treaties is the Hague Convention.⁶⁸ Third, a court can unilaterally order extraterritorial discovery under the direct provisions of the Federal Rules of Civil Procedure.⁶⁹

⁶² See William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2073 (2015).

⁶³ For example, in *Aérospatiale*, the Court concluded that “in supervising pretrial proceedings, [courts] should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.” *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987).

⁶⁴ See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

⁶⁵ See Dodge, *supra* note 62, at 2078.

⁶⁶ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW §442, cmt. a (AM. LAW INST. 2017).

⁶⁷ The Federal Rules of Civil Procedure provide the mechanism through which a U.S. court can compel discovery. See FED. R. CIV. P. 26; FED. R. CIV. P. 45.

⁶⁸ See *Aérospatiale*, 482 U.S. at 539–40 (holding that the Hague Convention is not the exclusive mechanism for ordering extraterritorial discovery, as federal courts retain the power to order extraterritorial discovery under U.S. law).

⁶⁹ See *id.* at 540–41.

Under the Rules, a court with jurisdiction over a party⁷⁰ may order that party to produce documents or materials within the party's "possession, custody, or control"⁷¹ that are "relevant to any party's claim or defense and proportional to the needs of the case."⁷² Because the Rules do not set territorial limits on discovery, a U.S. court may order a party to produce discoverable information irrespective of where that information is located.⁷³ Due to the uncertainty and delay associated with working through foreign legal channels or treaty mechanisms, U.S. courts overwhelmingly choose to unilaterally order extraterritorial discovery under the Federal Rules of Civil Procedure.⁷⁴

Foreign states have long protested the expansive scope and extraterritorial reach of U.S. discovery, especially when U.S. courts exercise their unilateral authority to compel discovery abroad.⁷⁵ Many foreign states view U.S. extraterritorial discovery as an affront to the foreign state's sovereignty and judicial jurisdiction.⁷⁶ And in the eyes of many civil law nations, espe-

⁷⁰ Personal jurisdiction is the touchstone of a U.S. court's authority to order parties to produce discoverable materials. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 426 cmt. a.

⁷¹ FED. R. CIV. P. 34(a)(1). In addition, FED. R. CIV. P. 26(a) requires parties to make certain pretrial disclosures irrespective of a discovery request. Under this rule, parties are required to disclose copies or descriptions of "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment." *Id.* at 26(a)(1)(A)(ii).

⁷² *Id.* at 26(b)(1).

⁷³ See *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211–12 (1958) (discussing a U.S. court's ability to compel disclosure of banking records located in Switzerland).

⁷⁴ See Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure*, 57 L. & CONTEMP. PROBS. 77, 77 (1994) ("Under current law, U.S. courts typically do not employ the Convention's evidence-taking mechanisms when ordering discovery from either a litigant or a witness subject to the court's subpoena power.").

⁷⁵ Interestingly, the passage of the GDPR flips the traditional U.S. and European positions. The Europeans have now passed an extraterritorial statute that applies regardless of where the information or data controller is located, and the United States is now faced with a choice between deferring to the European's extraterritorial encroachment and holding fast to principles of expansive discovery under U.S. law.

⁷⁶ See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 976 (5th ed. 2011) (quoting Brief for the Federal Republic of Germany as Amicus Curiae at 6–7, *Anschuetz & Co. v. Miss. River Bridge Auth.*, 474 U.S. 812 (1985) ("The Federal Republic of Germany likewise considers it a violation of its sovereignty when a foreign court forces, under threat of sanctions, a person under the jurisdiction of German courts to remove documents located in Germany to the United States for the purpose of pretrial discovery, or orders a person, under the threat of sanctions The taking of evidence is a judicial function exclusively reserved to the courts of the Federal Republic of Germany."))

cially those with inquisitorial systems, extraterritorial U.S. discovery is said to violate the foreign court's exclusive authority to conduct investigations and collect evidence within its jurisdiction.⁷⁷

As a result, extraterritorial U.S. discovery efforts commonly provoke both diplomatic and legislative responses from foreign states.⁷⁸ Many foreign states have adopted "blocking statutes" designed to thwart American efforts to compel discovery abroad.⁷⁹ These blocking statutes prescribe civil or criminal sanctions for those who comply with foreign discovery orders.⁸⁰

and quoting Brief for the French-American Chamber of Commerce as Amicus Curiae at 13, *Am. Home Assurance Co. v. Société Commerciale Toutelectric*, 128 Cal. Rptr. 2d 430 (Cal. Ct. App. 2002) ("[Evidence collection] may violate the 'judicial sovereignty' of the host country, unless its authorities participate or give their consent.")).

⁷⁷ See Brief of Amicus Curiae the Republic of France in Support of Petitioners at 14–17, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987) (protesting unilateral U.S. discovery). In an inquisitorial system of adjudication, investigation and information-collection are controlled by the judge, not the litigants. See Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 701 (2014). In contrast, litigants in the U.S. "adversarial" system work through the bulk of pretrial information exchanges themselves with limited oversight or guidance from the court. See Born, *supra* note 74, at 83.

⁷⁸ See Born, *supra* note 74, at 89.

⁷⁹ For example, Article 1b of the French blocking statute makes it a crime for "any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of establishing evidence in view of foreign judicial or administrative procedures or in the context of such procedures." See *Loi 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères tel que modifié par Loi 80-538 du 16 juillet 1980* [Law no. 68-678 of July 26, 1968, relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents and Information to Foreign Individuals or Legal Entities, as modified by French Law no. 80-538 dated July 16, 1980], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 27, 1968, p. 7267, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000501326> [<https://perma.cc/5JFQ-VX8N>].

⁸⁰ See Born, *supra* note 74, at 967. For example, Articles 162 and 273 of the Swiss Criminal Code prescribe monetary and custodial penalties for "[a]ny person who betrays a manufacturing or trade secret that he is under a statutory or contractual duty contract not to reveal" and "[a]ny person who . . . make[s] a manufacturing or trade secret] available to an external official agency." See *SCHWEIZERISCHES STRAFGESETZBUCH* [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 311.0 (1938), *as amended by* Gesetz Oct. 4, 1991, AS 2465 (1992), arts. 162, 163, 273 (Switz.), <https://www.admin.ch/opc/en/classified-compilation/19370083/index.html> [<https://perma.cc/6U9S-52PS>]. Articles 162 and 273 were at issue in *Grupo Petrotelemex, S.A. De C.V. v. Polymetrix AG*, No. 16-cv-2401, 2019 WL 2241862, at *2 (D. Minn. May 24, 2019). In that case, Polymetrix argued that Articles 162 and 273 prevented it from "producing confidential third-party information in its possession." *Id.* at *2. The court determined that Article 162 would

Some foreign blocking statutes prohibit compliance with U.S. discovery orders outright unless the party works through foreign legal channels.⁸¹ Other blocking statutes prohibit parties from complying with discovery orders that touch upon certain industries,⁸² while others require that a foreign government agency screen discovery orders and prohibit compliance with those orders that implicate certain foreign-state interests.⁸³

Parties to U.S. litigation often find themselves caught between U.S. discovery obligations and foreign-state blocking statutes. This is where the doctrine of foreign-state compulsion comes into play. When determining whether to compel discovery that would require a party to violate a foreign blocking statute or privacy law, a U.S. court must decide if acquiring the protected information is worth forcing a blameless party to choose between U.S. discovery sanctions or the penalties imposed by foreign law.

In *Société Internationale v. Rogers*, the Supreme Court both affirmed the power of a U.S. court to unilaterally order extraterritorial discovery in violation of foreign law under the Federal Rules of Civil Procedure⁸⁴ and set forth a two-step framework for courts to apply when deciding whether to order or enforce extraterritorial discovery in violation of foreign law.⁸⁵ First, a

likely apply to at least some of the information within the scope of the discovery order, and accordingly applied *Aérospatiale* to determine whether the court would defer to the foreign blocking statute. *Id.* at *4–5. The court ultimately concluded that U.S. interests in compelling “timely compliance with discovery” of “information that goes to the heart of the matters at issue” outweighed Switzerland’s interests in applying its blocking statutes—in part because Polymatrix had failed to demonstrate Switzerland’s particularized interest in protecting the specific type of technical information sought to be disclosed. *Id.* at *7.

⁸¹ See *Bodner v. Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000) (noting that French blocking statute contains outright prohibition on disclosure).

⁸² See ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS* 152–53 (1996).

⁸³ See *id.* at 153–55 (discussing British blocking statutes that required review by a relevant minister).

⁸⁴ See *Société Internationale v. Rogers*, 357 U.S. 197, 204–05 (1958) (“[T]o hold broadly that petitioner’s failure to produce the [] records because of fear of punishment under the laws of its sovereign precludes a [U.S.] court from finding that petitioner had ‘control’ over them, and thereby from ordering their production [under the Federal Rules of Civil Procedure], would undermine congressional policies made explicit in the 1941 amendments, and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records.”).

⁸⁵ See *id.* at 204–07. In *Rogers*, the Court first held that, under the Federal Rules of Civil Procedure, a U.S. court can order discovery despite a contrary foreign law. *Id.* at 204–05. The Court then considered whether the District Court was correct in dismissing a party’s complaint under Rule 37(b) because the party failed to abide by a U.S. discovery order that would have required the party to violate Swiss law. *Id.* at 208, 211. On this second question, the court concluded

U.S. court should undertake a comity-balancing test to determine whether to order the production of discoverable materials under the direct provisions of the Rules.⁸⁶ Second, if discovery is ordered and a party is noncompliant, U.S. courts must then decide what sanctions are appropriate for the discovery violation in light of the party's perilous choice between violating either U.S. or foreign law.⁸⁷ *Rogers* settled the question of whether a U.S. court has the power to order extraterritorial discovery that would require a party to violate foreign law; now, the heart of the discovery debate revolves around the discretionary doctrines (i.e., foreign-state compulsion) that guide a court in deciding whether or not to exercise this power.

Under the first *Rogers* prong, a court must assess the importance of the information in resolving the dispute, and balance the interests of the United States in compelling discovery against the interests of the foreign state in protecting the information sought to be obtained.⁸⁸ In *Aérospatiale*, the Supreme Court expanded upon the *Rogers* framework by setting forth a case-by-case balancing test for courts to apply when deciding whether to compel discovery despite a contrary foreign law. Relying on the Restatement (Third) of Foreign Relation Law § 442, the Court prescribed a five-factor comity-balancing test in which courts consider:

- (1) the importance to the . . . litigation of the documents or other information requested;
- (2) the degree of specificity of the request;
- (3) whether the information originated in the United States;
- (4) the availability of alternative means of securing the information; and
- (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request

"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." *Id.* at 211. Accordingly, the Court ruled that outright dismissal of the action under Rule 37(b) was not a proper remedy for the discovery violation because the party had shown "extensive efforts at compliance" and the party's failure was not due "to willfulness, bad faith, or any fault of [that party]". *Id.* at 211-12.

⁸⁶ See *id.* at 204-05.

⁸⁷ See *id.* at 212-13 (holding that dismissal was inappropriate sanction for noncompliance with a discovery order "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner").

⁸⁸ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 543-44 (1987).

would undermine important interests of the state where the information is located.⁸⁹

In addition, courts applying the *Aérospatiale* comity-balancing test also consider the hardship of compliance (i.e., the likelihood and severity of the foreign penalty)⁹⁰ and the party's good faith efforts to comply with the discovery order.⁹¹ *Aérospatiale* continues to govern the implementation of the foreign-state compulsion defense in the context of U.S. civil discovery and has been incorporated into the most recent Restatement of Foreign Relations Law.⁹²

III

TERRITORIAL DISCOVERY IN VIOLATION OF FOREIGN LAW: DOMESTICATING THE COMITY ANALYSIS

As discussed above, U.S. courts employ a comity-balancing test when deciding whether to order extraterritorial discovery despite a contrary foreign law. But would a similar analysis apply when a court is deciding whether to compel the production of materials located in the United States if a party would violate foreign law by complying with the discovery order? The extraterritorial reach of the GDPR makes this situation likely to arise, and this scenario poses a set of threshold questions commonly overlooked in the scholarly literature. Is the foreign-state compulsion defense available to defend against a territorial discovery order, or is the doctrine limited to extraterritorial acts? Should the foreign-state compulsion defense be territoriality limited? If the location of information controls the application of the *Aérospatiale* test, how would a court determine where electronically stored information is "located"?

A. Lack of Consensus on Territorial Limits

Surprisingly few courts have decided whether *Aérospatiale* applies to territorial discovery. One case that does address this

⁸⁹ *Id.* at 544 n.28 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 (AM. LAW INST. 1987)) (ellipses in original).

⁹⁰ *See e.g.*, *United States v. First National Bank*, 396 F.2d 897, 904–05 (2d Cir. 1968) (upholding issuance of discovery order requiring a party to violate German law when the risk of civil damages under the German law was "slight and speculative").

⁹¹ *Weiss v. Nat'l Westminster Bank*, 242 F.R.D. 33, 42 n.8 (E.D.N.Y. 2007) (noting that the Second Circuit "applies a balancing test distilled from the Restatements of the Foreign Relations Law" (quoting *In re Grand Jury Subpoena* dated August 9, 2000, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002))).

⁹² *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 426 cmt. a (AM. LAW. INST. (2017)).

issue is *Strauss v. Credit Lyonnais*.⁹³ In *Strauss*, the plaintiffs sought to compel the production of documents presently located in the United States that were protected by French bank secrecy laws. In support of their motion to compel, the plaintiffs argued that *Aérospatiale* applied only to the discovery of evidence located abroad and that the court should refrain from undertaking a comity analysis when deciding whether to order the production of evidence located in the United States. The plaintiffs reasoned that “because the Court in *Aérospatiale* considered ‘the scope of the district court’s power to order *foreign discovery* in the face of objections by foreign states,’ documents located within the United States (even if they originate from foreign sources) are accorded less protection.”⁹⁴ Further, the plaintiffs argued that by the plain language of the Third Restatement on Foreign Relations Law § 442 (relied upon by the Court in *Aérospatiale*), the foreign-state compulsion comity-balancing test applies only to an “order directing production of information located abroad.”⁹⁵

Ultimately, the court in *Strauss* found the plaintiffs’ arguments unpersuasive and held that the *Aérospatiale* comity analysis applies even when the information sought to be disclosed is presently located in the United States.⁹⁶ While the court agreed with the plaintiffs that the Court in *Aérospatiale* and the Third Restatement of Foreign Relation Laws § 442 addressed only the applicability of the comity test as it relates to extraterritorial discovery, the court concluded that “this does not mean that documents, obtained involuntarily from, or without the consent of, a foreign bank or its customer, and now located in the United States, should be accorded any less protection based solely on the location of the documents.”⁹⁷ In reaching this conclusion, the court stressed that the documents originated in France and that a transnational bank-customer relationship existed despite the information’s storage in the United States.⁹⁸ The court concluded that there would be no reason to neglect the impact of a U.S. discovery order on France’s legitimate interests in regulating the bank-customer

⁹³ See *Strauss v. Credit Lyonnais*, 242 F.R.D. 199, 209 (E.D.N.Y. 2007) (Matsumoto, Mag. J.).

⁹⁴ *Id.* (citing *Aérospatiale*, 482 U.S. at 544 n.28) (emphasis in original).

⁹⁵ *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (AM. LAW INST. (1987))); see *Aérospatiale*, 482 U.S. at 544 n. 28 (noting that a U.S. court should account for the “important interests of the state where the information is located” (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442)).

⁹⁶ *Id.* at 209–11.

⁹⁷ *Id.* at 209.

⁹⁸ *Id.* at 209–10.

relationship simply because the information was located in the United States.

In light of the scarcity of caselaw concerning possible territorial limits on the foreign-state compulsion defense, it is not surprising that the Fourth Restatement of Foreign Relations Law fails to directly address this issue. But a close reading of the Fourth Restatement's reporters' notes and comments yields an even more unsatisfying conclusion. In articulating the state of the law regarding the foreign-state compulsion defense and U.S. civil discovery, the Fourth Restatement appears to reach contradictory conclusions concerning the relevance of information location to the availability of the foreign-state compulsion defense, at least as it relates to electronically stored information.

On the one hand, the Fourth Restatement concludes that “[t]o the extent that other states also have jurisdiction over the persons or information subject to a judicial production order *because of location*, the doctrine of foreign state compulsion found in § 442 may apply.”⁹⁹ This language appears to cabin the availability of the foreign-state compulsion defense to instances in which a foreign state asserts jurisdiction over discoverable materials “because of the [present] location” of the information (i.e., territorial jurisdiction).¹⁰⁰ If the foreign-state compulsion defense applies only when a foreign state asserts territorial jurisdiction over the materials at issue, the defense would likely be unavailable when the discoverable materials are located in the United States.

On the other hand, the Fourth Restatement's articulation of the foreign-state compulsion doctrine contains none of the territorially oriented language found in the Third Restatement. Unlike the Third Restatement, the Fourth Restatement does not present the doctrine as applicable to an “order directing production of information located abroad.”¹⁰¹ Instead, the Fourth Restatement simply recognizes that “[t]o the extent permitted by statute, regulation, or procedural rule, courts in the United States have discretion to excuse violations of law, or moderate the sanctions imposed for such violations, on the ground that the violations are compelled by another state's

⁹⁹ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 426, Reporters' Notes 1 (AM. LAW INST. 2017) (emphasis added).

¹⁰⁰ See *id.*

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

law.”¹⁰² The Fourth Restatement also emphasizes that the availability of the defense depends on the discretion afforded to U.S. courts in applying the law at issue, and the Fourth Restatement never suggests that this discretion is in some way more limited when a court is ruling on a request to compel territorial discovery.

Furthermore, the reporters’ notes of the Fourth Restatement state that:

In the contemporary world, where documents often exist mostly in virtual form and may be accessed from many locations, territorial location may become less relevant. The issue may be not the location of the server on which information is stored, but rather the location of persons who can obtain access to that information.¹⁰³

In this way, the Fourth Restatement recognizes that there may be some uncertainty as to how a court would identify a normatively significant “location” for electronically stored information, and that the relevant location for ESI may not always be defined by reference to the present storage location of the data.

These observations challenge the Fourth Restatement’s enigmatic suggestion that the foreign-state compulsion defense may be available only when a foreign state asserts jurisdiction “because of location.”¹⁰⁴ If the present location of data is “less relevant” for ESI—as the Fourth Restatement recognizes—why would the foreign-state compulsion defense be available only when a foreign state asserts jurisdiction because of the location of the information? That is, if the present location of data fails to capture the relevant “here” and “there” of a piece of information, why would the foreign-state compulsion defense be limited to instances where a foreign state asserts jurisdiction because the information is “there” and not “here?”¹⁰⁵

B. Should Foreign-State Compulsion Be Territorially Limited?

The lack of caselaw on this issue, coupled with the ambiguity and inconsistency of the Fourth Restatement, makes it diffi-

¹⁰² See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 442.

¹⁰³ *Id.* § 442 Reporters’ Note 7.

¹⁰⁴ *Id.* § 426 Reporters’ Note 1; see also *id.* § 426 Reporters’ Note 2 (noting that the Court in *Aéropatiale* cited the factors now set forth in Fourth Restatement § 426 cmt. a as “relevant to any comity analysis”).

¹⁰⁵ Jenifer Daskal, *The Un-Territoriality of Data*, 125 YALE L. J. 326, 326, 329 (2015) (noting that legal doctrines that account for the “territoriality” of information “depend[] on the ability to define the relevant ‘here’ and ‘there,’ and . . . presume[] that the ‘here’ and ‘there’ have normative significance.”).

cult to determine whether a court is likely to apply the foreign-state compulsion doctrine when deciding whether to order or enforce a territorial discovery order in violation of foreign law. Thus, this lack of consensus on the applicability of the doctrine necessitates a direct examination of the principal question itself: Should the foreign-state compulsion defense be available to defend against a territorial discovery order? This question should be answered with the driving principles of the foreign-state compulsion doctrine in mind—i.e., international comity and fairness to the parties.

If the location of ESI were to dictate the availability of the foreign-state compulsion defense, a court would first need to attach an “identifiable and stable location” to the discoverable materials.¹⁰⁶ As hinted at by the Fourth Restatement, there are a number of different ways to conceptualize the “location” of electronically stored materials. To illustrate these options, consider a scenario that might arise from the extraterritorial application of the GDPR: A French citizen, while on a trip to New York City, uploads a large set of documents to her personal cloud account. The third-party cloud operator, a U.S. company, then transfers the data to a storage facility in Ireland. The facility in Ireland retains a copy of the data and collects “meta-data” on the documents (e.g., when the documents were uploaded, the username of the uploader, etc.). Eventually, due to logistical concerns, the data controller transfers a portion of the data package to another storage facility in Colorado. Upon returning to France, the French citizen logs into her cloud account and accesses the full set of documents while working from a Parisian café.

What if the United States-based cloud operator is sued in a U.S. court and receives a request to disclose the French citizen’s documents? The cloud operator would likely be said to be “offering goods or services” to EU citizens and thus subject to the requirements of the GDPR.¹⁰⁷ In addition, the documents (and possibly the meta-data) would likely be protected by the GDPR because they contain identifying information about the French citizen. If the cloud operator points to the foreign-state compulsion doctrine to defend against the disclosure, where would a court say the document is located? Some of the data is

¹⁰⁶ *Id.* at 329.

¹⁰⁷ See GDPR, *supra* note 4, art. 1, ¶ 23; see also *GDPR Key Changes*, *supra* note 2 (“The GDPR . . . applies to the processing of personal data of data subjects in the EU by a controller or processor not established in the EU, where the activities relate to[] offering goods or services to EU citizens . . .”).

stored in Colorado, but what if the pertinent materials are stored on the server in Ireland? Maybe the data should be located by reference to where the data user accesses the information (France), or by reference to the location in which the data was uploaded (the United States)?¹⁰⁸

The Supreme Court came close to addressing a similar question in *United States v. Microsoft Corporation*.¹⁰⁹ In *Microsoft*, the U.S. government served a warrant on Microsoft that ordered the company to produce emails stored on a data server in Ireland.¹¹⁰ Microsoft refused to comply with the warrant and argued that the government lacked the authority to compel the disclosure of data stored on a server in another country.¹¹¹ In Microsoft's view, the present storage location of the data should have governed whether the warrant was extra-territorial (and therefore invalid). Conversely, the government argued that the warrant was territorial (and therefore valid) because Microsoft employees accessed and manipulated the data from offices in the United States. The government argued that the warrant required disclosure regardless of "where [the] documents are located, so long as [the materials] are subject to the recipient's custody or control."¹¹²

Ultimately, the *Microsoft* case was mooted by the passage of the CLOUD Act, which gives U.S. prosecutors the authority to compel United States-based service providers to produce data stored abroad.¹¹³ In passing the CLOUD Act, Congress effectively agreed with the government's argument in *Microsoft* concerning the relevant "location" of ESI. Under the Act, the location of the service provider (i.e., the party in "possession, custody, or control" of the information) governs whether a warrant is "territorial."¹¹⁴ In assessing the desirability of territorial limits on the doctrine of foreign-state compulsion, it is worth asking whether either of the approaches set forth in *Microsoft*—

¹⁰⁸ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 222, Reporters' Note 7 (AM. LAW INST. 2017).

¹⁰⁹ See *United States v. Microsoft Corporation*, 138 S. Ct. 1186 (2018).

¹¹⁰ *Id.* at 1187–88.

¹¹¹ *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197, 201 (2d Cir. 2016).

¹¹² *Id.*

¹¹³ Clarifying Lawful Overseas Use of Data Act (CLOUD Act), 18 U.S.C. § 2713 (2018).

¹¹⁴ *Id.*; see also Greg Nojeim, *Cloud Act Implementation Issues*, LAWFARE (July 10, 2018, 8:00 AM), <https://www.lawfareblog.com/cloud-act-implementation-issues> [<https://perma.cc/3YP2-TR84>] ("The [CLOUD Act] empowers the Justice Department to serve legal process authorized by the Electronic Communications Privacy Act (ECPA) on U.S. providers for data those companies control, no matter where the data is located.").

storage location or site of control—could provide a useful standard for setting territorial limits on the doctrine. How would this play out if these standards were applied to the hypothetical scenario described above?

1. *A Territorial Limit Based on Present Storage Location*

Storage location is seemingly easy to apply, but in practice, the present storage location of ESI is a poor barometer for determining the scope of the foreign-state compulsion defense. First, Professor Jennifer Daskal argues that data is fundamentally “un-territorial,” and that the present location of ESI has lesser normative significance than the present location of physical information.¹¹⁵ While the location of physical information is tangible and directly observable, nearly all electronic information is stored in the form of binary numerals.¹¹⁶ These sets of zeros and ones can be stored on servers, hard drives, or in “the cloud” and are often moved between storage locations “in circuitous and arbitrary ways, all at breakneck speed.”¹¹⁷ As evidenced by the hypothetical above, electronic data is highly mobile, manipulable, and easily copied. The mobility of data means that the storage location of data is often unstable and fleeting; while the manipulability, duplicability, and divisibility of data mean that data can be easily copied and partitioned across a number of storage locations in different jurisdictions.

In addition, data is often stored, processed, and controlled by third-party service providers, and the situs of data storage may be thousands of miles away from the location where a data user originally uploaded the information or where a data user accesses the data. For instance, in the hypothetical presented, the French citizen had no control over where her data was stored. As Professor Daskal argues,

[T]he fact of third-party control means [that the data owner (the person with the possessory interest in the data) often has no idea of the path by which his or her data travels from place to place or where it is being stored at any given moment—and thus has not made a conscious choice to bind him or herself to that jurisdiction’s rules].¹¹⁸

¹¹⁵ Daskal, *supra* note 105, at 326. (“[T]he rise of electronic data challenges territoriality at its core.”).

¹¹⁶ See RON WHITE, *HOW COMPUTERS WORK* 35 (1997).

¹¹⁷ Daskal, *supra* note 105, at 367.

¹¹⁸ Jenifer Daskal, *The Microsoft Warrant Case: The Policy Issues*, JUST SECURITY (Sept. 28, 2018), <https://www.justsecurity.org/25901/microsoft-warrant-case-policy-issues/> [https://perma.cc/R5SM-V65J].

Professor Daskal concludes that “[t]he ease and speed with which data travels across borders, the seemingly arbitrary paths it takes, and the physical disconnect between where data is stored and where it is accessed” should lessen the normative significance of data location in American jurisprudence.¹¹⁹ Professor Daskal’s argument as to the un-territoriality of data weighs against placing territorial limits on the foreign-state compulsion defense based on the storage location of data.

Second, and more importantly, territorial limits based on present storage location would not further the principles of comity and fairness that motivate the doctrine of foreign-state compulsion. In the hypothetical presented above, if the present storage location were to control the scope of the foreign-state compulsion doctrine, the *Aéropatiale* comity test would apply only for the production of the documents located in Ireland, not the documents located in Colorado. In terms of comity, this is an undesirable outcome. The mere fact that information is stored in the United States does not in itself eliminate a foreign state’s potential interests in regulating that information or the parties who control that information. To deny the foreign-state compulsion defense solely because the information at issue is presently stored in the United States is to deny that foreign states may have legitimate jurisdictional claims over persons or materials even when those materials are located in the United States.

Although it is beyond the scope of this Note to discuss whether U.S. courts will view the GDPR as a legitimate exercise of the EU’s prescriptive jurisdiction, it is enough to say that at least some applications of the GDPR would likely be seen as legitimate by U.S. courts, even if the ESI at issue is stored on servers in the United States. The GDPR could be seen as a legitimate exercise of active personality jurisdiction,¹²⁰ effects-based jurisdiction,¹²¹ or even territorial jurisdiction if the relevant conduct (i.e., uploading or accessing the documents) is

¹¹⁹ Daskal, *supra* note 105, at 326.

¹²⁰ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 410 (AM. LAW INST. 2017) (“International law recognizes a state’s jurisdiction to prescribe law with respect to the conduct, interests, status, and relations of its nationals outside its territory.”).

¹²¹ See *id.* § 409 (“International law recognizes a state’s jurisdiction to prescribe law with respect to conduct that has a substantial effect within its territory.”).

seen as occurring or beginning within the territory of an EU country.¹²²

Further, the present location of data does little to signal when fairness concerns are most serious. If storing information in the United States does not oust the jurisdiction of a foreign state in regulating the information, then the foreign state retains the power to enforce its regulations with severe sanctions even when the information at issue is located in the United States. Simply put, a party storing data in the United States may still be caught between a “rock and a hard place.”¹²³

2. A Territorial Limit Based on Site of Control

Defining the scope of the foreign-state compulsion defense by reference to where a service provider “controls” the relevant information is equally unsatisfactory. If this were the standard governing the hypothetical, the foreign-state compulsion defense would not apply at all because the cloud operator is “controlling” the data from the United States.¹²⁴ Relying wholly on the site of control entirely ignores any interests a foreign state may have in regulating information that is controlled by a U.S.-based company. And, like storage location, the site of control tells us nothing about the potential penalties that may be levied by a foreign state on a U.S.-based controller. For instance, under the GDPR, a controller or processor would face sanctions for breach regardless of where the controller or processor is located.¹²⁵ Thus, in order to fully account for the prescriptive interests of foreign states, along with concerns of fairness, the foreign-state compulsion defense should be available even when the information at issue is controlled from the United States.

C. The Foreign-State Compulsion Defense Should Not Be Territorially Limited

One could argue that the foreign-state compulsion doctrine should be territorially limited because other internationally oriented doctrines—such as the Act of State doctrine—are territo-

¹²² See *id.* § 408 cmt. c. (“According to the subjective territoriality principle, a state may exercise prescriptive jurisdiction over conduct that occurs or has begun within its territory, although the conduct has consequences in another state.”).

¹²³ *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 551 (E.D.N.Y. 2008).

¹²⁴ See Nojeim, *supra* note 114 (discussing the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), 18 U.S.C. § 2701 (2018)).

¹²⁵ GDPR, *supra* note 4, art. 1, ¶ 23.

rially limited. Under the Act of State doctrine, “courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property *within its own territory*, or from sitting in judgment on other acts of a governmental character done by a foreign state *within its own territory and applicable there*.”¹²⁶ Because the doctrine applies only to foreign-state acts on foreign territory, foreign state actions that extend beyond the territory of the foreign state remain subject to ordinary conflict of laws principles.¹²⁷

The Act of State doctrine could be seen as a comity-oriented doctrine of noninterference. However, the Supreme Court has stated that the rule is actually a quasi-constitutional separation of powers doctrine.¹²⁸ By preventing a court from passing judgment on foreign-state acts taken within the territory of a foreign state, the doctrine serves as a prophylactic rule of decision that prevents a conflict between U.S. and foreign law from developing. In this way, the rule ensures that the judiciary defers to the authority of the executive branch in controversies that fall squarely within the executive branch’s foreign affairs powers (i.e., controversies involving foreign-state acts on foreign-state territory). Thus, the territorial limits on the Act of State doctrine serve to confine the application of the doctrine to those instances when the potential for judicial infringement on the foreign affairs powers of the executive is most acute. Further, because the consequences of the doctrine are severe—as it requires a court to completely abstain from passing judgment on foreign state acts—territorial limits on the doctrine are necessary to restrain application of the doctrine. If the doctrine were not territorially limited, this would significantly erode the power of the judicial branch to pass judgment on international conflicts.

Unlike the territorial limits on the Act of State doctrine, territorial limits on the foreign-state compulsion defense would not cabin the doctrine to instances where the justifications for the rule are most acute. In contrast with the Act of State doctrine, the doctrine of foreign-state compulsion is a comity-oriented doctrine that comes into play when a direct conflict of laws *already exists*. Consequently, a territorial limitation on the doctrine of foreign-state compulsion would not prevent a

¹²⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443(1) (AM. LAW INST. 1987) (emphasis added).

¹²⁷ RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 241 cmt. e (AM. LAW INST. 2017).

¹²⁸ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

conflict from arising; rather, a territorial limit would require a court to blindly ignore an already existing conflict of laws simply because the persons or materials at issue are “located” in the United States. As demonstrated above, the principles underlying the foreign-state compulsion defense can be implicated no matter where the evidence is said to be located.

Additionally, unlike the Act of State doctrine, the foreign-state compulsion doctrine does not require a court to completely abstain from passing judgment on the acts of a foreign state. Instead, the foreign-state compulsion doctrine merely requires a court to give *some* consideration to the legitimate interests of a foreign state in regulating the parties or materials at issue. Because the doctrine is not a rigidly applied, outcome-determinative rule of decision—as is the Act of State doctrine—territorial limits are not necessary to constrain the application of the foreign-state compulsion defense.

Ultimately, the foreign-state compulsion defense should not be territorially limited because the principles underlying the doctrine—international comity and fairness to the parties—are implicated regardless of whether the violation of foreign law is said to take place in the United States or abroad. Instead, the comity-balancing test set forth in *Aéropatiale* should be “domesticated.” That is, the test should be brought to bear even when the information at issue is controlled from or stored here at home, within the territory of the United States.

If an actual conflict exists between two sovereigns with legitimate claims to jurisdiction over the party to be compelled or the discoverable materials at issue, and a party could not possibly comply with a U.S. discovery order without violating foreign law, the foreign-state compulsion doctrine should serve to guide U.S. courts in balancing the interests of the United States and the foreign state—even if the materials at issue are controlled from or located in the United States. This ensures that the *Aéropatiale* balancing test applies whenever concerns of comity and fairness to the parties arise. Even in extraterritorial discovery, the foreign state compulsion defense does not apply simply because the information is located abroad; rather, the doctrine applies because the foreign state has a legitimate claim to jurisdiction over the discoverable materials.

IV

ACCOUNTING FOR THE PRESENT LOCATION OF DISCOVERABLE
MATERIALS IN THE *AÉROSPATIALE* TEST

Aérospatiale does not expressly direct courts to consider the present location of the discoverable materials at issue when applying the Court's five-factor comity-balancing test. Rather, *Aérospatiale* only explicitly directs courts to assess "whether the information originated in the United States."¹²⁹ And as shown in Part III, the present location of ESI is a poor metric for governing the application of the *Aérospatiale* comity-balancing test because the present location of ESI does little to inform courts as to when considerations of comity and fairness to the parties are most acute. But does it necessarily follow that a U.S. court should completely ignore the present location of discoverable materials when applying the *Aérospatiale* comity-balancing test? That is, if *Aérospatiale* applies for territorial discovery, *should* a court account for the fact that the information at issue is presently located within the United States? If so, how much weight should a court give to present location when applying the comity-balancing test? In order to understand the role that present location could play in a court's comity-balancing inquiry, it is important to assess how courts currently apply the enumerated *Aérospatiale* factors.

A. Current Application of the *Aérospatiale* Comity-Balancing Test

When applying *Aérospatiale*'s comity-balancing test, courts consider each enumerated factor individually and decide whether that factor weighs for or against proceeding with discovery under the Federal Rules of Civil Procedure.¹³⁰ After assessing each factor individually, courts then weigh the balance of the factors and decide whether to compel discovery.

First, courts assess "the importance to the . . . litigation of the documents or other information requested."¹³¹ This inquiry requires a court to evaluate how important the requested information is to a party's ability to prove or disprove a claim or

¹²⁹ See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c)(3)).

¹³⁰ See, e.g., *Wultz v. Bank of China, Ltd.*, 910 F. Supp. 2d 548, 555–60 (S.D.N.Y. 2012) (analyzing each factor individually in separate subsections of the opinion).

¹³¹ *Aérospatiale*, 482 U.S. at 544 n.28 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c)(1)).

defense. Courts have developed different approaches for determining whether a piece of information is important enough to warrant its disclosure despite a contrary foreign law. Some courts require only that the information be “relevant” in the broad sense contemplated by the Federal Rules of Civil Procedure.¹³² Other courts demand a higher standard of relevance and will weigh this factor in favor of disclosure only when the information is “vital” or “crucial” to the litigation.¹³³

The second *Aérospatiale* factor requires courts to examine “the degree of specificity of the request.”¹³⁴ Under *Aérospatiale*, “[g]eneralized searches for information . . . are discouraged.”¹³⁵ In applying this factor, courts look to determine whether the request for information is sufficiently “tailored” to the claims and defenses at issue.¹³⁶ Furthermore, courts are less likely to weigh this factor in favor of discovery if the information sought is cumulative,¹³⁷ or if the parties have not cooperated in good faith to narrow the scope of discovery.¹³⁸

¹³² See, e.g., *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 440 (E.D.N.Y. 2008) (Matsumoto, Mag. J.) (quoting *Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 32 n.8 (S.D.N.Y. 1984) (“In ordering production of these documents, this Court does not need to find, nor can it find at this point, that the requested documents are ‘vital’ . . .”). A court may also impose a lower standard of relevance if the information is requested for the purpose of determining the court’s jurisdiction over the suit because “such limited jurisdictional discovery . . . is not nearly as intrusive as merits discovery.” *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 2012 U.S. Dist. LEXIS 29294, at *14 (E.D. Pa. Mar. 6, 2012).

¹³³ See *Strauss*, 249 F.R.D. at 440 (“Because the scope of civil discovery in the United States is broader than that of many foreign jurisdictions, some courts have applied a more stringent test of relevancy when applying the Federal Rules to foreign discovery.”); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) (“Where the outcome of litigation ‘does not stand or fall on the present discovery order,’ or where the evidence sought is cumulative of existing evidence, courts have generally been unwilling to override foreign secrecy laws.” (quoting *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977)); see also *Aérospatiale*, 482 U.S. at 542, 546 (allowing discovery through the Federal Rules when the requested documents were “vital” to the litigation).

¹³⁴ See *Aérospatiale*, 482 U.S. at 544 n.28 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c)(2)).

¹³⁵ *Richmark*, 959 F.2d at 1475.

¹³⁶ *Strauss*, 249 F.R.D. at 441 (“Here, the court finds that the requested discovery is relevant, vital and narrowly tailored . . . [to] the vital issues in the case . . .”).

¹³⁷ See *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2014 U.S. Dist. LEXIS 41275, at *70 (N.D. Cal. Mar. 26, 2014).

¹³⁸ See *Doster v. Schenk*, 141 F.R.D. 50, 53 (M.D.N.C. 1991) (“By failing to take advantage of the discovery conference procedure, defendant loses the right to urge use of the Hague Convention based on the nature or alleged burden of the discovery requests. . . . Defendant cannot at the same time frustrate attempts to simplify discovery and complain about it being burdensome.”).

The third *Aérospatiale* factor requires courts to consider whether the information “originated in the United States.”¹³⁹ Courts have applied this factor in a number of different ways, and there is no consensus on what it means for a piece of information to have “originated” in the United States. By the plain language of *Aérospatiale*,¹⁴⁰ this factor seems to direct courts to engage in an etiological assessment of the origins of the information. Some courts have applied the third factor in this way, and weigh this factor against disclosure only if a territorial nexus exists between the genesis of the information and the United States.¹⁴¹

But many courts applying this factor have looked beyond the etiological “origins” of the document and weigh this factor for or against disclosure based on the present location of the discoverable materials at issue.¹⁴² For example, in *Richmark*, the court reasoned that:

The fact that all the information to be disclosed (and the people who will be deposed or who will produce the documents) are located in a foreign country weighs against disclosure, since those people and documents are subject to the law of that country in the ordinary course of business.¹⁴³

Courts following the *Richmark* approach typically weigh this factor against disclosure whenever the information is presently located abroad.¹⁴⁴ It is unclear whether these same courts would weigh this factor in favor of disclosure if the information was located in the United States, or if these courts would sim-

¹³⁹ *Aérospatiale*, 482 U.S. at 544 n.28 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c)(3)).

¹⁴⁰ The Court’s use of the past tense “originated” suggests a backward-looking inquiry focused on the historical origins of the information.

¹⁴¹ See *Strauss v. Credit Lyonnais*, 242 F.R.D. 199, 209–10 (E.D.N.Y. 2007) (“Restatement § 442(1)(c) identifies as a factor whether the ‘information originated in the United States,’ not whether the information currently is located in the United States.”).

¹⁴² See *SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 333 (N.D. Tex. 2011) (quoting *Strauss*, 242 F.R.D. at 209).

¹⁴³ *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992).

¹⁴⁴ See *CE Intern. Res. Holdings, LLC v. S.A. Minerals Ltd. P’ship*, 2013 WL 2661037, at *10 (S.D.N.Y. June 12, 2013) (“The overseas location of this information weighs in favor of nonenforcement of the subpoena [duces tecum].”); *Salt River Project Agric. Improvement and Power Dist. v. Trench France*, 303 F. Supp. 3d 1004, 1008 (D. Ariz. 2018) (“If all of the information to be disclosed and the persons who will produce the information are located in the foreign country, this weighs in favor of utilizing Hague procedures because ‘those people and documents are subject to the law of that country in the ordinary course of business.’” (quoting *Richmark*, 959 F.2d at 1475)).

ply determine that this factor weighs neither for nor against disclosure if the information was located in the United States.

Further, other courts have assessed not only the present location of the discoverable materials, but also whether the party in possession of the information “avail[ed] itself of United States markets.”¹⁴⁵ For example, in *Finjan, Inc. v. Zscaler, Inc.*, the court weighed the third *Aérospatiale* factor in favor of discovery because the party to be compelled was “itself [] an American company, subject to American discovery law.”¹⁴⁶ The court reached this conclusion even though the relevant information was located abroad.

Fourth, a court applying *Aérospatiale* must determine the “availability of alternative means of securing the information.”¹⁴⁷ When scrutinizing alternative means, courts typically look at whether other sources of the information exist, whether other actors could disclose the information without violating foreign law, and whether alternative mechanisms for disclosure would allow a party to comply with discovery obligations without violating foreign law.¹⁴⁸ Simply put, “[i]f the information sought can easily be obtained elsewhere, there is little or no reason to require a party to violate foreign law.”¹⁴⁹

In applying the fourth factor, courts often assess the availability of the Hague Convention on the Taking of Evidence as an alternative means of disclosure. The Hague Convention allows a U.S. Court to “request the competent authority of another Contracting State . . . to obtain evidence” for use in U.S. litigation.¹⁵⁰ But even when the Hague Convention is available to the parties, an overwhelming majority of U.S. courts choose to weigh this factor in favor of compelling discovery under the Federal Rules because of concerns about the “efficiency, timeliness, and effectiveness of the [Hague] Evidence Convention.”¹⁵¹

¹⁴⁵ *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 2016 WL 3923873, at *16 (E.D. La. July 21, 2016).

¹⁴⁶ *Finjan, Inc. v. Zscaler, Inc.*, No. 17-cv-06946-JST, 2019 WL 618554, at *2 (N.D. Cal. Feb. 14, 2019) (“[Under the third *Aérospatiale* factor], the Court considers where the information is located, or the location of information and parties. Here, although [the subject of the discovery order] is located in the U.K., [the party resisting discovery] is an American company, subject to American discovery law. This factor weighs somewhat in favor of disclosure.” (citation omitted)).

¹⁴⁷ See *Aérospatiale*, 482 U.S. at 544 n.28 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c)(4) (AM. LAW INST. 1987)).

¹⁴⁸ See *Richmark*, 959 F.2d at 1475–76.

¹⁴⁹ *Id.* at 1475.

¹⁵⁰ See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

¹⁵¹ *In re Activision Blizzard*, 86 A.3d 531, 546 (Del. Ch. 2014); see also Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in*

In *Aérospatiale*, the Court quoted the Third Restatement of Foreign Relations Law § 442 to say that the fifth factor required a court to consider whether compelling discovery would “undermine important interests of the state *where the information is located*.”¹⁵² The Court’s reference to the Third Restatement’s territoriality-oriented language could suggest that *Aérospatiale* requires a court to consider the interests of a foreign state only if the information at issue is located in the foreign state. But, as noted by the court in *Strauss*, the Court in *Aérospatiale* only addressed the application of the foreign-state compulsion defense in the context of extraterritorial discovery.¹⁵³ Thus, the Court’s adoption of the Third Restatement’s territoriality-oriented language in a case concerning the discovery of information located abroad should not itself be taken to indicate the Court’s unwillingness to account for the prescriptive interests of a foreign state based on jurisdictional grounds other than territorial jurisdiction. Thus, stated more generally, the fifth—and most important—factor¹⁵⁴ in the *Aérospatiale* test requires a court to “tak[e] into account the extent to which the discovery sought serves important interests of the forum state versus the degree to which providing the discovery would undermine important interests of the foreign state.”¹⁵⁵

In applying this factor, courts often stress that it “is axiomatic that the United States has ‘a substantial interest in fully and fairly adjudicating matters before its courts.’”¹⁵⁶ But when weighing the interests of the United States, courts generally look beyond the United States’ general, adjudicatory interest in settling disputes to consider the specific interests of the United States in regulating the particular conduct, parties, or information at issue. In making this assessment, courts commonly consider the type of claim before the court.¹⁵⁷ For example, in

Transnational Discovery, 34 BERKELEY J. INT’L L. 157, 175–76 (2016) (collecting cases).

¹⁵² *Aérospatiale*, 482 U.S. at 544 n.28 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c)(5)) (emphasis added).

¹⁵³ *Strauss v. Credit Lyonnais*, 242 F.R.D. 199, 209 (E.D.N.Y. 2007); see *supra* subpart III.A.

¹⁵⁴ See *Wultz v. Bank of China, Ltd.*, 910 F. Supp. 2d 548, 558 (S.D.N.Y. 2012) (“This factor—the balancing of national interests—is the most important, as it directly addresses the relations between sovereign nations.” (quoting *Madanes v. Madanes*, 186 F.R.D. 279, 286 (S.D.N.Y. 1999))).

¹⁵⁵ *In re Activision Blizzard*, 86 A.3d at 547.

¹⁵⁶ *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 443 (E.D.N.Y. 2008) (quoting *Minpeco, S.A. v. ContiCommodity Services, Inc.*, 116 F.R.D. 517, 523–24 (S.D.N.Y. 1987)).

¹⁵⁷ See *Madanes v. Madanes*, 186 F.R.D. 279, 286 (S.D.N.Y. 1999) (reasoning that the United States’ interest in compelling discovery was stronger because

Strauss, the plaintiffs claimed that the defendants had violated U.S. antiterrorism laws.¹⁵⁸ The court ruled that the United States' specific substantive interest in combating terrorism outweighed the "competing interests of the foreign state" in enforcing its bank secrecy laws.¹⁵⁹

On the other side of the scale, a U.S. court must weigh the interests of the foreign state in regulating the conduct, parties, or information at issue. When applying *Aérospatiale*, a court is more likely to weigh the fifth factor against disclosure if the court finds that the foreign state has a particularized sovereign interest in protecting the information sought to be disclosed.¹⁶⁰ To determine whether a foreign state has a particularized sovereign interest, courts consider whether the foreign law regulating the information serves to protect a particular substantive interest of the foreign state.¹⁶¹ In addition, a court may also consider "expressions of interest by the foreign state, the significance of disclosure in the regulation . . . of the activity in question, and indications of the foreign state's concern for confidentiality prior to the controversy."¹⁶² If a court finds that the foreign law is "overly broad and vague," the law may not be given "the same deference as a substantive rule of law" because these blocking statutes do not signal that the foreign state has a particularized sovereign interest in protecting the specific type of information at issue.¹⁶³

"private enforcement of RICO claims . . . is infused with the public interest" (internal quotation marks and citation omitted); *Finjan, Inc. v. Zscaler, Inc.*, No. 17-cv-06946-JST, 2019 WL 618554, at *3 (N.D. Cal. Feb. 14, 2019) (noting that "[c]ourts have found that there is a strong American interest in protecting American patents" when considering U.S. interests in compelling discovery under the fifth *Aérospatiale* factor).

¹⁵⁸ See *Strauss*, 249 F.R.D. at 443.

¹⁵⁹ See *id.* at 443, 456.

¹⁶⁰ *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1476 (9th Cir. 1992) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 cmt. c. (AM. LAW INST. 1987)).

¹⁶¹ See *Aérospatiale*, 482 U.S. at 544 n.29 (holding that foreign law "is relevant to the court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material").

¹⁶² *Richmark*, 959 F.2d at 1476–77 (ellipses in original) (internal quotation marks omitted) ("Further, neither Beijing nor the PRC has identified any way in which disclosure of the information requested here will significantly affect the PRC's interests in confidentiality.").

¹⁶³ See *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988) (citing *Aérospatiale*, 482 U.S. at 544 n.29); see also *In re Activision Blizzard*, 86 A.3d 531, 549 (Del. Ch. 2014) ("As framed, the Blocking Statute is expansively broad. It purports to encompass any documents or information 'relating to economic, commercial, industrial, financial or technical' matters. It does not focus

The sixth and seventh factors of the comity-balancing inquiry were not explicitly set forth in the *Aérospatiale* decision, but a majority of courts have adopted these factors as part of their foreign-state compulsion analysis.¹⁶⁴ These factors focus on the fairness of compelling a party to comply with a U.S. discovery order that would require the party to violate foreign law. First, a court determines whether the litigant would endure severe hardship as a result of the disclosure.¹⁶⁵

In determining whether a litigant will endure hardship in complying with a discovery request, courts generally have looked to three elements: whether foreign law creates penalties for complying with discovery requests of U.S. origin, the likelihood that foreign authorities will enforce those laws, and the party/nonparty status of the litigant resisting discovery.¹⁶⁶

Second, courts consider whether the party has exercised good faith in attempting to comply with the discovery order. A court is more likely to find that a party exercised good faith if the party made a timely request that the discovery proceed under the Hague Convention or if the party contacted foreign-state officials to obtain guidance on how to comply with the U.S. discovery order without violating foreign law.¹⁶⁷ Conversely, a court may find that a party acted in bad faith if the party used “dilatory tactics” in an attempt to avoid the order.¹⁶⁸

B. Accounting for Present Location of Discoverable Materials in the *Aérospatiale* Test

The foregoing analysis shows that there is some ambiguity as to the role that present location currently plays in the courts’ application of the *Aérospatiale* comity-balancing in-

on a specific kind of material, nor does it identify a specific French sovereign interest.”).

¹⁶⁴ See, e.g., *United States v. First National Bank*, 396 F.2d 897, 904–05 (2d Cir. 1968) (upholding issuance of discovery order requiring party to violate German law when the risk of civil damages under German law was merely “slight and speculative”).

¹⁶⁵ See *SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 337 (N.D. Tex. 2011). It is not yet clear how EU courts and regulatory bodies will interpret and enforce the GDPR, a variable that could have a profound effect on whether U.S. courts will be willing to compel a party to violate the GDPR.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.* at 340–41; see also *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 456 (E.D.N.Y. 2008) (“In this case, Credit Lyonnais has made at least two efforts to contact CBSP for its consent for Credit Lyonnais to respond to plaintiffs’ discovery requests, and at least three efforts to contact the French Ministry of Justice for guidance.”).

¹⁶⁸ *Strauss*, 249 F.R.D. at 456.

quiry. This uncertainty is especially evident in the varying approaches courts have adopted in applying the third *Aérospatiale* factor. In applying this factor, some courts look only to whether the information “originated” in the United States,¹⁶⁹ while others weigh this factor against disclosure whenever the information is presently located abroad.¹⁷⁰ As with Part III’s discussion of possible territorial limits on the doctrine of foreign-state compulsion, the lack of consensus on the role of present location in the *Aérospatiale* test necessitates a normative evaluation of the principal question itself: Should courts account for the present location of discoverable materials when applying the doctrine of foreign-state compulsion? If so, how much weight should courts give to present location when applying the comity-balancing test? Should present location be incorporated as the eighth *Aérospatiale* factor? Again, these questions must be answered with the dual concerns of foreign-state compulsion—comity and fairness to the parties—in mind.

1. *The Present Location of Discoverable Materials Should Be Accounted for in the Aérospatiale Test in Certain Circumstances*

Ultimately, present location should, in certain circumstances, be accounted for in the *Aérospatiale* test because the present location of information can elucidate a court’s assessment of the enumerated *Aérospatiale* factors. First, a court must account for the present location of discoverable materials in order to assess the availability of adequate alternative mechanisms for disclosure. Notably, by the plain text of the Hague Convention, the Convention applies only when a court located within the territory of one party to the Convention requests information located in the territory of another party to the Convention. Thus, the Hague Convention would be unavailable to parties to U.S. litigation when the information is located in the United States.¹⁷¹ Because the availability of the often discussed, but ultimately oft-ignored, Hague Convention hinges

¹⁶⁹ See *Strauss v. Credit Lyonnais*, 242 F.R.D. 199, 209–10 (E.D.N.Y. 2007).

¹⁷⁰ See, e.g., *CE Intern. Resources Holdings, LLC v. S.A. Minerals Ltd. Partnership*, 2013 WL 2661037, at *10 (S.D.N.Y. 2013).

¹⁷¹ See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444, art. 1, Mar. 19, 1970 (“In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.”).

on the present location of the information at issue, courts should account for present location when applying the fourth *Aéropatiale* factor.

Second, the present location of discoverable materials can inform a court's assessment of a state's particular sovereign interest in regulating or protecting the information at issue.¹⁷² In certain instances—particularly when the information takes the form of physical documents—a state's jurisdictional claim may be strengthened solely because the information is currently located within the territorial jurisdiction of the state. For instance, in *Richmark*, the court ruled that the third *Aéropatiale* factor (i.e., whether the documents originated in the United States) weighed against compelling discovery because all of the requested documents were presently located in China.¹⁷³ The court reasoned that because the documents were located in China, the documents were “subject to the law of that country in the ordinary course of business.”¹⁷⁴

Likewise, a state's jurisdictional claim could be weaker if a piece of information is located outside of that state's territorial jurisdiction.¹⁷⁵ For example, many foreign states view U.S. extraterritorial discovery as overly intrusive and an affront to the foreign state's judicial jurisdiction. In certain circumstances then, it may be appropriate for a court to account for the present location of discoverable materials because this inquiry allows a U.S. court to more fully appreciate the comity concerns at play.

2. *The Present Location of Discoverable Materials Should Not Be an Independent Factor in the Comity-Balancing Test*

If present location should be accounted for, to some degree, in a court's application of the foreign-state compulsion defense, how much weight should courts give to present location when applying the comity-balancing test? Should present location be a factor all on its own? To answer these questions,

¹⁷² See *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1281 (7th Cir. 1990).

¹⁷³ See *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992).

¹⁷⁴ *Id.*

¹⁷⁵ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 408 cmt. c. (AM. LAW INST. 2017) (“According to the subjective territoriality principle, a state may exercise prescriptive jurisdiction over conduct that occurs or has begun within its territory, although the conduct has consequences in another state.”).

it is necessary to understand the purpose of the *Aérospatiale* test itself.

By the words of the Supreme Court, each *Aérospatiale* factor “is relevant to *any* comity analysis.”¹⁷⁶ That is, each enumerated factor serves to guide a court in determining when concerns of comity or fairness are most acute. For instance, the first two *Aérospatiale* factors are necessary to every inquiry because they ensure that the specific information sought to be disclosed is worth the costs of ordering a party to violate foreign law. Further, the fourth factor is necessary because utilizing alternative avenues of disclosure could avert the discovery controversy altogether. And of course, a court should always balance the interests of the United States and the foreign state under the fifth factor because this inquiry strikes at the heart of the comity concerns that underpin the doctrine of foreign-state compulsion.

But what about the third *Aérospatiale* factor? Why is the situs of origin *always* relevant to a court’s comity analysis? Assessing the purpose of the third *Aérospatiale* factor is more difficult because courts have inconsistently applied this factor.¹⁷⁷ And this inconsistency may itself reflect the courts’ uncertainty as to the purpose that the third factor serves within the comity-balancing test. Although not stated directly by the Court, the location of origin is relevant to a court’s comity analysis because a sovereign state has a legitimate prescriptive interest in regulating information that originated within its territory.¹⁷⁸ The Fourth Restatement on Foreign Relations Law § 408 comment c. asserts that a state has prescriptive jurisdiction over conduct “that occurs or *has begun* within its territory, although the conduct has consequences in another state.”¹⁷⁹ Thus, assessing the origin of the information is always necessary because it informs a court’s appraisal of the United States’ jurisdictional claims in compelling disclosure of the information at issue.

In light of this conclusion, if the location of origin is always relevant to a court’s assessment of the United States’ prescriptive jurisdiction, shouldn’t a court always account for the pre-

¹⁷⁶ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987) (emphasis added).

¹⁷⁷ See *supra* subpart IV.A.

¹⁷⁸ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 (AM. LAW INST. 1987); *In re Air Cargo Shipping Services Antitrust Litigation*, 278 F.R.D. 51, 52–53. (E.D.N.Y. 2010).

¹⁷⁹ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 408 cmt. c (emphasis added).

sent location of the information to assess the jurisdictional claims of both the United States and the foreign state? Some courts weigh the third *Aérospatiale* factor against disclosure whenever the information is presently located abroad,¹⁸⁰ but should a court weigh the third factor in favor of disclosure whenever the information is located in the United States?

As shown above, when the information takes the form of physical documents, the present location of the discoverable materials can inform a court's assessment of a state's particular sovereign interests in regulating or protecting the information at issue.¹⁸¹ But, as shown in Part III of this Note, the territorial location of electronically stored information warrants less normative weight because of the "un-territoriality" of data.¹⁸² Data is highly mobile, manipulable, divisible, duplicable, and often controlled by a third party; and because of these characteristics, the present location of electronically stored information tells us little about a state's jurisdictional claim to the digital information at issue. Unlike location of origin, the mere fact that information is presently located in the United States tells a court very little about the United States' interests in regulating the specific piece of information at issue. Thus, present location should not be an independent factor in the court's comity-balancing test because it does not *always* inform a court as to when comity or fairness concerns are most acute.¹⁸³ In fact, present location may be entirely irrelevant when the information at issue is ESI.

Moreover, even when present location is relevant, courts are wrong to consider the present location of the discoverable materials under the third *Aérospatiale* factor. The significance of the location of origin for a piece of information is separate and distinct from any importance that may attach to the information's present location because present location and the situs of origin support different justifications for prescriptive jurisdiction. In the interests of doctrinal clarity and deference to the Supreme Court's plain language in *Aérospatiale*, a court's assessment of present location, if at all relevant, should not overlap with the court's discussion of whether the information "originated in the United States." Rather, present location,

¹⁸⁰ See, e.g., *CE Intern. Resources Holdings, LLC v. S.A. Minerals Ltd. P'ship*, 2013 WL 2661037, at *10 (S.D.N.Y. 2013).

¹⁸¹ See *supra* section IV.B.1.

¹⁸² Daskal, *supra* note 105.

¹⁸³ See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987) (noting that the *Aérospatiale* factors are relevant to "any comity analysis").

if relevant, should be accounted for as part of the fifth *Aéropatiale* factor because it is only relevant if it informs a court's assessment of the jurisdictional claims of the parties. For instance, in *Richmark* the court discussed present location under the third *Aéropatiale* factor¹⁸⁴ and concluded that China maintained a strong jurisdictional relationship with the information at issue because the documents were located in China. The court was right to consider the present location of physical information located abroad, but the court should have discussed the location of the materials while weighing the foreign state's interest under the fifth *Aéropatiale* factor because the present location informed the court's assessment of the strength of China's sovereign interest in regulating the information at issue.

CONCLUSION

In the interest of comity, "both as a principle of recognition and as a principle of restraint,"¹⁸⁵ and out of a concern for fairness to the parties, the *Aéropatiale* comity balancing test should apply whenever an actual conflict exists between two sovereigns with legitimate claims to jurisdiction over the party to be compelled or the discoverable materials at issue. That is, at least in the context of U.S. discovery, the foreign-state compulsion defense should apply whenever a foreign state has a legitimate claim to jurisdiction over the discoverable materials at issue or the parties before the court—even when those materials are controlled from or located in the United States. This ensures that the *Aéropatiale* balancing test applies whenever concerns of comity and fairness to the parties arise.

Furthermore, when applying the *Aéropatiale* comity balancing test, courts should account for the present location of the discoverable materials at issue only if the present location of the information informs a court's assessment of the enumerated *Aéropatiale* factors. For instance, a court must account for the present location of discoverable materials in order to determine the availability of adequate alternative mechanisms for obtaining the information. And in the case of GDPR-protected information located in the United States, the unavailability of the Hague Convention would likely mean that the fourth *Aéropatiale* factor would weigh in favor of proceeding with discovery under the Federal Rules.

¹⁸⁴ See *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992).

¹⁸⁵ Dodge, *supra* note 62, at 2078.

In addition, a court should account for the present location of discoverable materials if the present location informs the court's assessment of either the United States' or the foreign state's particular sovereign interest in regulating the information at issue. But present location should not be incorporated as an independent factor in the courts' comity-balancing test because present location does not *always* signal when comity or fairness concerns are most acute. In fact, present location may be entirely irrelevant when the information at issue is ESI. Due to the un-territoriality of data, the present storage location of ESI often fails to inform a court as to the strength of a state's particular sovereign interest in regulating that piece of digital information. Thus, when it comes to GDPR-regulated ESI stored in the United States, the present location of the discoverable information should not be considered in the comity-balancing test, except to determine the availability of adequate alternative mechanisms for obtaining the information.