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# U.S. Discovery in a Transnational and Digital Age and the Increasing Need for Comparative Analysis

Vivian Grosswald Curran

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## U.S. DISCOVERY IN A TRANSNATIONAL AND DIGITAL AGE AND THE INCREASING NEED FOR COMPARATIVE ANALYSIS

Vivian Grosswald Curran\*

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### I. INTRODUCTION

Foreign blocking statutes are considered a thorn in the side of U.S. discovery in transnational cases. These laws forbid the disclosure of evidence sought under U.S. rules of federal procedure.<sup>1</sup> A further complication for discovery arises from the combination of two more recent phenomena in American law. The first is the presumption against extraterritoriality as expressed in *Morrison v. National Australia Bank*

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\* Distinguished Professor of Law, University of Pittsburgh. I thank the organizers of the symposium on discovery at the University of Akron Law School for inviting me to participate and to contribute my thoughts in written form, particularly Calleigh Olson and Danielle Schantz. Sincere thanks also to Manon Troin and Inès Soumhi for their able research assistance. Unless otherwise noted, translations are mine.

1. See, e.g., 3 Louis B. Kimmelman & Steven L. Smith, *Litigating International Disputes in Federal Courts* § 21:97 (4th ed. 2017).

*Ltd.*<sup>2</sup> (and as further elaborated by the U.S. Supreme Court in several subsequent cases),<sup>3</sup> in conjunction with the Supreme Court's growing attention to international comity in the same case law.<sup>4</sup> The second complication is the growth of transnational digital discovery.<sup>5</sup>

Judicial discovery tools function in terms of territoriality concepts because they depend on the territorially-defined jurisdictional powers of the courts.<sup>6</sup> Over many decades, the transnationalization of law has been a story of deterritorialization, but nowhere is this truer than where digital data is at issue: the cloud cannot be localized, but precedents oblige parties to argue in terms of the national territory in which data is localized, as though all data were tangible.<sup>7</sup> Most recently, the Supreme Court considered the case of *United States v. Microsoft Corp.*,<sup>8</sup> which might have enabled a ruling better adapted to digital data than we currently have. Congress enacted legislation intended to regulate the issue after the Court had granted certiorari,<sup>9</sup> and the Court then held the controversy moot.<sup>10</sup>

Legal transnationalization has resulted from increased mobility and encounter,<sup>11</sup> which at the judicial level in turn creates increased awareness both here and abroad of foreign legal conceptions and perceptions. The

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2. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

3. *E.g.*, *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

4. *See Kiobel*, 569 U.S. at 108. It has been pointed out that the modern presumption against extraterritoriality is itself partially based on international comity. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2079-80 (2015).

5. *See infra* Section IV.

6. *See* Hannah L. Buxbaum, *Territory, Territoriality and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631 (2009) (calling into question the validity of this basis in a globalized world).

7. One scholar argues that to think about "global law" one must stop thinking about legal norms in any traditional sense—namely, that the transnationalization of the global necessitates a more profound shift in our benchmarks. *See* Benoît Frydman, *Comment penser le droit global?*, Working Paper du Centre Perelman de Philosophie du Droit, [http://www.philodroit.be/IMG/pdf/comment\\_penser\\_le\\_droit\\_global\\_2011.pdf](http://www.philodroit.be/IMG/pdf/comment_penser_le_droit_global_2011.pdf) [<https://perma.cc/XSC6-RJRX>] (last visited May 23, 2018).

8. *U.S. v. Microsoft Corp.*, 138 S. Ct. 1186 (2018).

9. *See infra* Section IV for more on this legislation, known as the CLOUD Act, 115 Pub. L. No. 141, 132 Stat. 348 (2018). It was enacted on March 23, 2018 and signed into law as part of the Consolidated Appropriations Act 2018, 115 Pub. L. 141. This legislation provides, *inter alia*, an amendment to the Stored Communications Act, 18 U.S.C. § 2701 ("SCA"), the statute at issue in *Microsoft Corp.*

10. *Microsoft Corp.*, 138 S. Ct. at 1186.

11. *See* Benoît Frydman, *Les défis du droit global*, in LES DÉFIS DU DROIT GLOBAL 20 (Benoît Frydman & Caroline Bricteux eds., 2018); TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges et al. eds., 2004); JEAN-SYLVESTRE BERGÉ & GENEVIÈVE HELLERINGER, OPERATING LAW IN A GLOBAL CONTEXT: COMPARING, COMBINING AND PRIORITISING (2017); ZYGMUNT BAUMAN, GLOBALIZATION: THE HUMAN CONSEQUENCES (1998).

United States, however, unlike its European counterparts, retains a long and entrenched tradition of requiring judges to refrain from engaging in comparative legal analysis.<sup>12</sup> One of the most enlightened opinions in international discovery analysis, by Judge Friendly, resulted from ignoring that tradition.<sup>13</sup> The resistance to analyzing foreign law continues despite Judge Friendly's example, under the strong force of *stare decisis*, a fortiori since the U.S. Supreme Court reiterated the principle in *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>14</sup>

Foreign blocking statutes are also commonly raised as an objection where a foreign litigant or other interested person petitions a U.S. court for U.S.-style discovery in its jurisdiction under 28 U.S.C. § 1782.<sup>15</sup> The discussion below will analyze blocking statutes and § 1782 petitions as they interface with U.S. discovery. It then will address how concepts developed for tangible documents located in identifiable places are being applied to digitized data on the cloud. Cloud issues epitomize law's globalization or transnationalization, as they are the ultimate illustration of the deterritorialization with which law, a field defined by territory, is faced today.

## II. U.S. DISCOVERY AND THE FOREIGN BLOCKING STATUTE

### A. Background

The first U.S. Supreme Court case dealing with a foreign blocking statute was *Société Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers*.<sup>16</sup> The case involved two Swiss laws, including Switzerland's blocking statute concerning banking information. The Court deferred to the blocking statute, persuaded by evidence of the Swiss company's good-faith efforts to comply with U.S. discovery, its lack of collusion with the Swiss government to thwart discovery, as well as the severity of the criminal law penalties it risked incurring if it violated the banking secrecy statute by complying with U.S. discovery.<sup>17</sup>

*Rogers* set the standard for the criteria that U.S. courts have continued to follow in analyzing foreign blocking statutes' appropriate

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12. See, e.g., *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (drawing on an already long-established tradition in federal appellate courts).

13. *In re Letters Rogatory Issued by Director of Inspection of Government of India*, 385 F.2d 1017, 1020 (1967).

14. 542 U.S. at 243.

15. See *infra* Section III.

16. 357 U.S. 197 (1958).

17. *Id.* at 208, 211.

effect on discovery requests, although the Supreme Court later supplemented other factors to consider.<sup>18</sup> More specifically, U.S. courts deny discovery requests where the defense of a foreign blocking statute can persuade the court that the law will be enforced by the foreign state against the objecting party, and that the objecting party risks serious penalties, especially criminal, by violating it. Thus, in 2014, in *Motorola Credit Corp. v. Uzan*,<sup>19</sup> the Southern District of New York allowed discovery to proceed in the face of objections raised on the basis of French, Jordanian, and Emirati blocking statutes, which forbade the disclosure of the relevant evidence under criminal penalty of law, but, tellingly, not against the Swiss bank party. The court reasoned that, “[i]n contrast with the French situation, Switzerland’s bank secrecy regime constitutes, not just a seriously enforced national interest, but almost an element of that nation’s national identity.”<sup>20</sup>

*Rogers* was decided in 1958. At that time and for many years after, obtaining documents and other evidence beyond national boundaries was a notoriously slow and difficult process.<sup>21</sup> Consequently, an international treaty on evidence gathering in international civil and commercial matters was concluded in 1970 to facilitate and render the process more efficient and speedy.<sup>22</sup> This was the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*.<sup>23</sup> Such a treaty would no doubt have been infeasible had it permitted discovery in its U.S. form, since the latter is unique in the world in its breadth and level of intrusiveness.<sup>24</sup> An opt-out feature therefore was provided so that signatory states could decline to provide U.S.-style pretrial evidence. According to Article 23 of the Hague Convention, contracting states may make a declaration that they “will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries.”<sup>25</sup> While some of the 62 signatory states have only partially adopted this opt-out feature, generally by referring to pretrial “fishing expeditions” as

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

19. 73 F. Supp. 3d 397, 404 (S.D.N.Y. 2014).

20. *Id. Accord*, *S.E.C. v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 341 (N.D. Tex. 2011).

21. See Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure*, 57-SUM LAW & CONTEMP. PROBS. 77, 78 (1994); Vivian Grosswald Curran, *United States Discovery and Foreign Blocking Statutes*, 76 LA. L. REV. 1141, 1144 (2016).

22. See Curran, *supra* note 21; and *Aérospatiale*, 482 U.S. at 530-31 (explaining U.S. objectives in promoting the Hague Convention).

23. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 7, 1972, 23 U.S.T. 2555 [hereinafter Hague Convention].

24. This remains the case even after the reforms of 2015. See Curran, *supra* note 21, at 1147.

25. Hague Convention, *supra* note 23, at art. 23.

unacceptable, there are not many states that have not invoked Article 23 at all.<sup>26</sup>

Harkness and his co-authors have noted that “many contracting states operate on the assumption that the Hague Convention is the only means for securing [foreign] discovery” among contracting states.<sup>27</sup> What these authors call an “assumption” is a position many contracting states espouse, pursuant to which, as far as they are concerned, any discovery order emanating from a U.S. court that does not come via the Hague Convention is illegitimate, since the United States is a contracting state.<sup>28</sup> To be perfectly clear, it is not an “assumption” arising out of ignorance of U.S. law, but a legal position.<sup>29</sup> They knowingly reject the U.S. view dating from the Supreme Court holding in *Aérospatiale*.<sup>30</sup> In that case, the U.S. Supreme Court concluded as follows: the Hague Convention was neither exclusive nor even the preferred first method for obtaining evidence abroad, and litigants could initiate discovery using the Federal Rules of Civil Procedure.<sup>31</sup>

As the partial concurrence and dissent in *Aérospatiale* predicted, the majority’s holding presaged the end of the Hague Convention as the ordinary means for obtaining evidence abroad in civil and commercial litigation.<sup>32</sup> For the litigant, the Federal Rules provide the advantage of far broader discovery than the typical limitation that the Hague Convention Article 23 permits.<sup>33</sup> For the U.S. judge, as well as litigant, the Hague Convention has remained an unfamiliar text, while the Federal Rules have the advantage of being daily fare.<sup>34</sup> As Born and Rutledge

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26. See TIMOTHY P. HARKNESS, RAHIM MOLOO, PATRICK OH & CHARLINE YIM, *DISCOVERY IN INTERNATIONAL LITIGATION: A GUIDE FOR JUDGES* 16-17 (2015). For an updated list of those and all contracting states, see 20: *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82> [<https://perma.cc/RVK8-8G3L>] (last visited Mar. 6, 2018) (table reflecting applicability of arts. 15, 16, 17, 18 and 23 of the Hague Evidence Convention).

27. HARKNESS et al., *supra* note 26, at 11.

28. See Daniel Barlow, *Première application pénale de la loi de blocage de 1968, Note sous Cour de cassation (crim.) 12 décembre 2007*, 2008 *REVUE DES SOCIÉTÉS* 882, para. 13 (2008).

29. See, e.g., *Knight Capital Partners Corp. v. Henkel AG & Co.*, 290 F. Supp. 3d 681 (E.D. Mich. 2017).

30. *Societe Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 548 (1987).

31. *Id.*

32. *Id.* (“Experience to date indicates that there is a large risk that the case-by-case comity analysis now to be permitted by the Court will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently.”).

33. See, e.g., *Connex R.R. LLC v. AXA Corporate Solutions Assurance*, No. CV 16-02368-ODW (RAOX), 2017 WL 3433542, at \*14 (C.D. Cal. Feb. 22, 2017).

34. See *Aérospatiale*, 482 U.S. at 548.

have suggested, the net effect of *Aérospatiale* has been to place more decision-making power in this area in the hands of district court judges than in most areas of law involving international issues with foreign comity concerns because discovery objections tend to arise on motions *in limine* and generally are not subject to review at the interlocutory stage.<sup>35</sup> While these authors express a concern that the dearth of appellate review will lead to intercircuit lack of uniformity, another byproduct of that very paucity has been a greater tendency of courts dealing with blocking statutes to cite to other circuits as they look for applicable persuasive appellate authority due to the very absence of much overall authority, thus paradoxically increasing the likelihood of intercircuit uniformity,<sup>36</sup> despite some observable distinctions among circuits.<sup>37</sup>

### B. Recent Case Law Analyzing Blocking Statutes

As the *Motorola* court articulated in 2014, the courts have applied the standards the Supreme Court set forth in *Aérospatiale* since 1987. Since 2013, the courts also look to *Republic of Argentina v. NML Capital, Ltd.*,<sup>38</sup> a U.S. Supreme Court case that arose in the context of interpreting the Foreign Sovereign Immunities Act of 1976.<sup>39</sup> In that case, litigants were compelled to produce information in discovery despite applicable blocking laws from Spain, Brazil, Chile, Panama, Bolivia, Paraguay, Argentina, Uruguay, and the Cayman Islands.<sup>40</sup> Some of these blocking laws, invoked as defenses to discovery, were based on bank secrecy statutes and some even on foreign state constitutions (those of Panama and Paraguay).<sup>41</sup>

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35. See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1042 (2011).

36. See, e.g., *Republic Techs. (NA), LLC v. BBK Tobacco & Foods, LLP*, No. 16 C 3401, 2017 WL 4287205, at \*4 (N.D. Ill. Sept. 27, 2017) (Northern District for Illinois citing to Southern District of New York); *Connex R.R.*, 2017 WL 3433542, at \*14 (Central District of California citing to two Eastern District of New York cases and two other New York district courts); *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 226 (E.D.N.Y. 2007) (Eastern District of New York citing to the Seventh Circuit).

37. My research, for example, indicates the Second Circuit as being more likely to rule in favor of proceeding with Federal Rules discovery in the face of blocking statute defenses than the Seventh or Eleventh Circuits.

38. 134 S. Ct. 2250 (2014).

39. 28 U.S.C.S. §§ 1330, 1391(f), 1441(d), 1602-11 (LEXIS through Pub. L. No. 115-171).

40. For a discussion of the lower court defenses asserted by Argentina in *NML Capital*, see *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 400 (S.D.N.Y. 2014). In *NML Capital*, the Supreme Court alluded to the defendant's dilatory tactics with respect to discovery, noting that it had been ten years since the plaintiff had been trying to discover Argentina's assets. *NML Capital*, 134 S. Ct. at 2253.

41. *NML Capital*, 134 S. Ct. at 2253.

A student note published in 2018 tried to systematize the proportion of compelled discovery orders where each defense that had been raised of foreign blocking statutes had involved the potential for both criminal and civil penalties. The study concluded that the courts compelled Federal Rules discovery in 37 out of 42 cases.<sup>42</sup>

The Supreme Court derived the *Aérospatiale* standard it continues to apply from *Rogers* and what became § 442(1)(c) of the Restatement (Third) of the Foreign Relations Law of the United States.<sup>43</sup> Since then, the Restatement (Fourth) has been finalized. In the matters relevant to this discussion, the Restatement (Fourth) does not materially alter the previous one.<sup>44</sup> *Aérospatiale*'s factors, consistent with the Restatements (Third) and (Fourth) of Foreign Relations, consider how important the requested documents are to the litigation; how specific the discovery requests are; whether the evidence located abroad originated in the United States; if the party requesting the discovery has other means of obtaining the evidence; and if the court's deference to the foreign blocking statute would undermine U.S. "important interests" or, conversely, if, by compelling discovery, the court would undermine the foreign state's "important interests."<sup>45</sup>

The comity analysis courts have applied under *Aérospatiale*'s above-listed last criterion of interest balancing has been closely linked to studying whether the relevant foreign state actually enforces its blocking statute, a factor that had been underscored by the Supreme Court three decades earlier in *Rogers* when it deferred to Switzerland's bank secrecy law. By the time of *Aérospatiale*, when the Supreme Court was deciding this issue in terms of the French blocking statute, it could rely on the lower court's holding that France's law did not need to be taken seriously.<sup>46</sup> After *Aérospatiale*, the Supreme Court's finding that the French blocking statute's criminal penalty need not overcome a party's right to conduct discovery under the Federal Rules became the highest precedent for that proposition.<sup>47</sup>

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42. M.J. Hoda, *The Aérospatiale Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It*, 106 CAL. L. REV. 231, 234 (2018).

43. The Supreme Court referred in *Aérospatiale* to the Restatement (Third) § 437, the predecessor to later § 442.

44. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 222 (Tentative Draft No. 2, 2016).

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

46. *Id.* at 527.

47. See, e.g., *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 225 (E.D.N.Y. 2007) and sources cited therein.



For many years France's statute was not applied, and to date only four applications have been made.<sup>48</sup> French legislative history uncovered and quoted by a U.S. court even revealed the motive of thwarting U.S. discovery without the intent to apply the statute, if passed, against French nationals.<sup>49</sup> While this situation lasted for many years, the French Supreme Court eventually affirmed the application of its blocking statute.<sup>50</sup> Still, some U.S. courts under the sway of *stare decisis* continued to cite to U.S. precedents that predated France's application of its law, for the outdated proposition that France did not apply the blocking statute. One such case, decided in 2017, was *Republic Technologies (NA), LLC v. BBK Tobacco & Foods, LLP*,<sup>51</sup> in which the court cited to a 1984 case for the proposition that "[t]he Blocking Statute obviously is a manifestation of French displeasure with American pretrial procedures. . . . There is no evidence that France's interest in its blocking statute has changed or that France has become more vigorous in enforcing its blocking statute in recent years."<sup>52</sup> The *Republic Technologies* court also found, in keeping with precedent, that "the French blocking statute was not aimed at protecting [the] state, but at merely protecting [French] corporations from foreign discovery requests."<sup>53</sup> In contrast, it described as "vital" the U.S. interest in "providing a forum for the final resolution of disputes and for enforcing these judgments,"<sup>54</sup> concluding with no further analysis that U.S. interests "outweigh the sovereign interests (*if any*) that France has."<sup>55</sup>

*Republic Technologies* concerned information in France of the subsidiary of a U.S. company against whom a motion to compel discovery had been filed.<sup>56</sup> The court granted the motion, holding that the determinative factor in whether a parent company can be compelled to produce documents of a subsidiary is if the parent has the "legal right to obtain them."<sup>57</sup> Some recent cases acknowledge France's somewhat

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48. TGI Nanterre, 22 décembre 1993, JurisData n° 1993-050136; CA Versailles, 16 mai 2001, JCP E 2007, 2330, Cass. 2e civ., 20 novembre 2003, n° 01-15.633; T. com. Paris, Vac., 20 juillet 2005; Cass. crim., 12 décembre 2007, n° 07-83.228 (*Christopher X*).

49. *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911 (PNL), 82 Civ. 0375 (PNL), 1984 WL 423 (S.D.N.Y. May 30, 1984).

50. *Christopher X*, *supra* note 48.

51. *Republic Techs. (NA), LLC v. BBK Tobacco & Foods, LLP*, No. 16 C 3401, 2017 WL 4287205 (N.D. Ill. Sept. 27, 2017).

52. *Id.* at \*4 (quoting in part a 1984 case that predated the French Supreme Court's enforcement of its blocking statute, *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 508 (N.D. Ill. 1984)).

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

54. *Id.*

55. *Id.* at \*5 (emphasis added).

56. *Id.* at \*1.

57. *Id.* at \*2.

belated applications of its blocking statute under the pressure of copies of translated French decisions and other documents filed with U.S. district courts.<sup>58</sup> Yet, on the whole, while the non-enforcement of the statute figured heavily as a reason against deferring to it, the fact of its occasional enforcement does not mean that U.S. courts are deferring to it now.

Thus, in another 2017 case, *Connex Railroad LLC v. AXA Corporate Solutions Assurance*,<sup>59</sup> the French Ministry of Justice wrote a letter to signal the potential criminal liability France's blocking statute would subject the French defendant company.<sup>60</sup> The court accepted this as signifying that the statute applied to the defendant.<sup>61</sup> It also found that the documents that formed the object of the discovery probably originated in France, not the United States (one of the *Aérospatiale* factors militating against Federal Rules discovery).<sup>62</sup> Here, the court even found that the defendant's agreement to comply with the Hague Convention's expedited procedure seemed to make the latter a viable alternative means for plaintiff to obtain the documents,<sup>63</sup> but it reasoned that the Hague Convention's "effectiveness" had been questioned.<sup>64</sup> The court noted that the Hague Convention provides a narrower scope of discovery than the Federal Rules and that, therefore, it could not be said necessarily to constitute a truly viable alternative means to Federal Rules discovery.<sup>65</sup>

Finally, despite taking judicial note of the French Supreme Court (*Cour de cassation*) case applying the blocking statute, the court stated that this example, even when combined with the French Ministry of Justice's declaration of criminal vulnerability of the French defendant, was insufficient to persuade it that the defendant would run the risk of criminal prosecution in France if it were compelled to comply with Federal Rules discovery.<sup>66</sup> Citing to U.S. case law that *Aérospatiale* made famous concerning the French blocking statute, the California district

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58. See, e.g., *Connex R.R. LLC v. AXA Corporate Solutions Assurance*, CV 16-02368-ODW (RAOx), 2017 WL 3433542 (C.D. Cal. Feb. 22, 2017) (translation of French Supreme Court decision and letter from French Ministry of Justice); *S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 333, n.13 (N.D. Tex. 2011) (citing a law review article about the French enforcement of a blocking statute); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-MD-1720(JG)(JO), 2010 WL 3420517, at \*8 (E.D.N.Y. Aug. 27, 2010) (Eastern District of New York citing Northern District of California).

59. *Connex R.R.*, 2017 WL 3433542.

60. *Id.* at \*11.

61. *Id.*

62. *Id.* at \*13.

63. *Id.* at \*14.

64. *Id.*

65. *Id.* at \*14-15.

66. *Id.* at \*17.

court reasoned that “many [U.S.] courts have discounted that risk [of criminal prosecution] in the context of the French Blocking Statute, noting that the Blocking Statute does not subject defendants to a realistic risk of prosecution.”<sup>67</sup> It also (correctly) distinguished *Christopher X*, the French criminal law prosecution under France’s blocking statute that France’s Supreme Court upheld, because that case had nothing to do with a U.S. discovery request, but, rather, dealt with a French lawyer who had tried to get evidence from a French witness for use in a trial in the United States. It had not involved a dispute around the Hague Evidence Convention and the Federal Rules of Civil Procedure.

This is indeed an important distinction that diminishes the utility of the case to the discovery context.<sup>68</sup> Where it might continue to be seen as having some traction is that one can deduce from the *Christopher X* case the depth to which a core value of the French legal system had been undermined by a lawyer’s approaching a witness directly, where in France such actions are for judges alone to do. Similarly, U.S. pretrial discovery’s perceived prying and intrusiveness offend deep values in France of privacy,<sup>69</sup> just as U.S. evidence-taking conducted in France offends *l’ordre public* (fundamental values) inasmuch as only judges may do so in France.<sup>70</sup>

The latest French development with respect to its blocking statute has been to pass a new law, *la loi Sapin II*,<sup>71</sup> to apply the blocking statute more vigorously. In addition to *la loi Sapin II*’s strengthening the French blocking statute, the Executive Branch of the French government has created a new position to oversee the enforcement of the French blocking statute.<sup>72</sup> Meanwhile, the latest development in the United States is a case in which the federal district court did not compel U.S. discovery under the

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

68. The court did not require that plaintiff proceed under the Hague Convention. *Id.* at \*19.

69. See *infra* discussion of *Henry Zoch II v. Daimler, A.G.*, No. 4:17-CV-578, 2017 WL 5177959, nn.98-101 (E.D. Tex. Nov. 8, 2017) and surrounding text; Curran, *supra* note 21, at 1147.

70. See Curran, *supra* note 21.

71. Art. 2, Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, JORF n°0287 du 10 décembre 2016, available on Legifrance, French government site for legislation, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id> [<https://perma.cc/9XRX-B4JD>].

72. Décret n° 2016-66 du 29 janvier 2016 instituant un commissaire à l’information stratégique et à la sécurité économiques et portant création d’un service à compétence nationale dénommé « service de l’information stratégique et de la sécurité économiques », ORF n°0025 du 30 janvier 2016, available on Legifrance, at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031940456&categorieLien=id> [<https://perma.cc/4C87-D9MY>].

Federal Rules where the French defendant raised the French blocking statute as a defense.<sup>73</sup>

Although in no way referring to or at all recognizing the latest legislative and executive measures in French law to strengthen the blocking statute through heightened obligatory enforcement and oversight, and indeed, once again stating the time-honored principle that it was *not* inquiring into French law but simply accepting the statement concerning French law's penalties from the moving party because the latter had an experienced and credible French attorney who had spoken to the issue,<sup>74</sup> the Arizona district court in *Salt River Project Agricultural Improvement and Power District v. Trench France SAS* ruled that it would apply the Hague Evidence Convention.<sup>75</sup> In this novel case, the court concluded that the discovery requests were not necessarily "narrowly tailored"<sup>76</sup> to the case, further noting that the relevant documents of the French party were *located* in France. (The court did not speak to their place of origination, the criterion the Supreme Court had held to be the relevant factor in *Aérospatiale*.)<sup>77</sup>

The court also accepted the moving party's assertion over its opponent that the information sought was available through the Hague Convention, noting that the assertions to that effect were made by a French attorney experienced in Hague Convention practice.<sup>78</sup> Most interestingly, while most U.S. courts have found that France's sovereign interest in enforcing its blocking statute is outweighed by the U.S. national interest in protecting plaintiffs' rights and preserving broad-based discovery,<sup>79</sup> the Arizona court in *Salt River Project* held otherwise: "Unlike the U.S. interests, which are unlikely to be impaired if Hague procedures are used, this French interest [in enforcing its blocking statute] may be impaired if this Court simply orders discovery."<sup>80</sup> This decision may be an exception, or it may be a harbinger of increased deference to foreign blocking statutes under the sway, among other influences, of heightened attention to

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73. *Salt River Project Agric. Improvement and Power Dist. v. Trench France SAS*, No. CV-17-01468-PHX-DGC, 2018 WL 1382529 (D. Ariz. Mar. 19, 2018).

74. *Id.* at \*2 (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474, n.7 (9th Cir. 1992)).

75. *Id.*

76. *Id.* at \*3.

77. *Id.*

78. *Id.*

79. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987) and its vast progeny.

80. *Salt River Project*, 2018 WL 1382529, at \*4.

international comity and the presumption against extraterritoriality that have been gaining ground in recent years.<sup>81</sup>

As this case demonstrates, despite their reluctance to do so, it has been impossible for U.S. judges to avoid engaging in comparative law.<sup>82</sup> Thus, in *Securities and Exchange Commission v. Stanford International Bank, Ltd.*,<sup>83</sup> the district court in Texas stated that, “[a]lthough the Court is reluctant to interpret Swiss law, the Court finds the [Swiss] expert’s reading accurate.”<sup>84</sup> The courts must interpret and understand the foreign blocking statute if they are to draw the necessary conclusions regarding the following issues: whether the statute in fact would preclude the information requested through discovery, whether the laws of the foreign nation would lead to criminal sanctions, and whether the foreign legal system does or does not enforce its law.

In a 2017 case involving a German blocking statute concerning data protection, *Knight Capital Partners Corp. v. Henkel AG & Co.*,<sup>85</sup> the court once again engaged in some discussion of the foreign law at issue.<sup>86</sup> The court looked to Federal Rule of Civil Procedure 44.1 and to Ninth Circuit case law to indicate that, “in determining foreign law,”<sup>87</sup> it could “look to cases, regulations, treatises, scholarly articles, legislative history, treaties and other legal materials. . . .”<sup>88</sup> Moreover, in this case in which the court compelled discovery under the Federal Rules, the court rejected the idea that it should be guided by the German legal expert in determining the meaning of German law: “[T]he Court certainly has both the authority and the duty to construe the meaning of the statute in the first instance, informed by the ordinary principles of statutory construction and by reference to the plain language of the statute itself.”<sup>89</sup> Since legal experts in the United States, unlike in Germany and France, are party experts, not court experts, U.S. judges may be leery of their conclusions.<sup>90</sup> In this instance, however, where the court alluded to interpreting German law according to “ordinary principles of statutory construction,” those rules of

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81. See Kimmelman & Smith, *supra* note 1; Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247 (2010).

82. See, e.g., S.E.C. v. Stanford Int’l Bank, Ltd., 776 F. Supp. 2d 323 (N.D. Tex. 2011).

83. *Id.*

84. *Id.* at 333.

85. 290 F. Supp. 3d 681 (E.D. Mich. 2017).

86. *Id.* at \*3.

87. *Id.* at \*4.

88. *Id.*

89. *Id.*

90. On this issue and judicial frustration, see Easterbrook, J., in *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 628 (7th Cir. 2010).

construction no doubt refer to ordinary *U.S. rules of statutory construction*.

This was not a promising approach to understanding German law. Rules of statutory construction are different in Germany and France from those in the United States. Civil-law legal systems originally were built from the premise that textual, codified law contains all legal solutions and that judges may not create law.<sup>91</sup> As a consequence of being text-based, civil-law legal systems are far more developed in the area of statutory construction, especially in Germany where canons of construction have reached a level of exquisite organization.<sup>92</sup> The “meaning” of a law, as the court put it in *Knight*, may vary substantially as a function of rules of construction. Others, from the Supreme Court to scholars, have noted the very real risks of mistakes where judges do engage in foreign or comparative law analysis.<sup>93</sup> A risk of the policy against doing so is to increase the probability of error where, as is ever more the case in the globalized world, our courts must, and therefore do, engage in this process, but are less well prepared to do so than they otherwise might be if they engaged in comparative law fully and openly through adequate research and education and perhaps other innovations, such as court-appointed experts.<sup>94</sup>

The court in *Knight* rejected the German “expert’s opinion that discovery is permissible only when conducted on the basis of the Hague Convention [because it] is flatly contrary to the Supreme Court’s decision in the *Aérospatiale* case.”<sup>95</sup> The German expert whose opinion the court summarily dismissed as incorrect was reflecting Germany’s official legal perspective, which is the same as France’s.<sup>96</sup> *Aérospatiale* reflected the depth of U.S. law’s commitment to wide discovery as a fundamental right of litigants in American courts, albeit one that a U.S. court might have a duty to tailor more narrowly than ordinarily under the Federal Rules

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91. See, e.g., Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 93 (2001).

92. See, e.g., James R. Maxeiner, *Scalia & Garner’s Reading Law: A Civil Law for the Age of Statutes?*, 6 J. CIV. L. STUD. 1, 16-22 (2013).

93. *Intel Corp. v. Advanced Micro Devices, Inc.* 542 U.S. 241, 243 (2004); Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT’L L. & COM. 1, 9 (1998).

94. The United States stands virtually alone among western legal systems to reject comparative law today.

95. *Knight Capital Partners Corp. v. Henkel AG & Co.*, 290 F. Supp. 3d 681, 689 (E.D. Mich. 2017).

96. See *id.* (noting that many states take this position where information is sought by another Hague contracting state, rejecting *Aérospatiale*’s position as contrary to international law).

where comity concerns became a consideration.<sup>97</sup> In proceeding through the *Aérospatiale* factors, the *Knight* court noted that the German blocking statute's main objective was "to protect its citizens from [U.S.] discovery obligations."<sup>98</sup> It appeared to base this conclusion solely on a similar finding by the Eastern District of New York, which, in U.S. domestic parlance, also is "foreign law" to a Michigan court.

The *Knight* case can be contrasted with the Eastern District of Texas's 2017 *Henry Zoch II v. Daimler, A.G.* decision.<sup>99</sup> Though that court similarly granted the plaintiff's motion to compel discovery under the Federal Rules over a German defendant's objections, it did find that "Germany has a weighty national interest in protecting personal data. . . ."<sup>100</sup> The court was aware that Germany had not just enacted a statute but that the government had filed an amicus brief in a different case to declare the importance of privacy interests in Germany, and that the value of privacy is so fundamental to German law and society that it also is enshrined in Germany's constitution.<sup>101</sup> None of this ultimately persuaded the court to deny plaintiff's motion to compel discovery, where it found, under the *Aérospatiale* criteria, that (1) the requested information was important to the litigation; (2) the plaintiff had made specific, well-tailored requests for information, even though (3) the information did not originate in the United States, but where the court also found that (4) the plaintiff had no alternate means to acquire it, presumably precisely due to the privacy rights blocking law; and where (5) Germany's weighty interest in protecting its citizens' privacy interests was counterbalanced by the United States' "substantial interest in vindicating the rights of American plaintiffs and adjudicating matters before its courts."<sup>102</sup>

A different result has been obtained where objections to discovery arose on the part of the European Commission (EC) purely on the basis of comity, however, with no assertion of a formal blocking statute. Blocking statute cases at first blush would seem to have the stronger claim to success in defeating Federal Rules discovery, given that objections based on them are founded on the potential for criminal penalties by the party

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97. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 545-46 (1987).

98. *Knight*, 290 F. Supp. 3d at 691.

99. *Henry Zoch II v. Daimler, A.G.*, No. 4:17-CV-578, 2017 WL 5177959 (E.D. Tex. Nov. 8, 2017).

100. *Id.* at \*6.

101. *Id.* Privacy interests are perceived differently in both Germany and France from the United States. National memory of the Nazi years has been a strong influence on the protection of personal data in both European states.

102. *Zoch*, 2017 WL 5177959, at \*5-6 (internal quotation marks omitted).

raising a foreign blocking statute as a defense. Consequently, in those cases, courts inquire into the foreign state's habits of enforcement or, as a corollary mode of inquiry, into the defendant's motives: sincere attempts to comply with U.S. discovery or, on the contrary, an attempt to make use of the foreign national's blocking statute precisely to circumvent the discovery request.<sup>103</sup>

The pure comity cases have involved the EC where its own prior anti-competition litigation was concerned.<sup>104</sup> Courts have declined to compel Federal Rules discovery where the information sought was in a subsequent U.S. antitrust case.<sup>105</sup> This occurred in *Payment Interchange Fee*, where the defendant had submitted redacted documents the plaintiff had requested from EC litigation, and had asked the EC if it was permitted to reveal more in order to comply with the discovery requests.<sup>106</sup> The EC had refused, submitting its objections to the court.<sup>107</sup> The court noted how intimately linked to other litigation the requested information was and that the documents had originated in Europe, not the United States.<sup>108</sup> It found persuasive that the privacy rights the EC proceedings accorded to parties were of grave importance to the EC, notably in ensuring that future investigations were not held under the specter of the abrogation of parties' privacy by potential U.S. Federal Rules discovery if a U.S. case were to follow at a later date.<sup>109</sup>

The court held that the U.S. plaintiff's right to discovery was outweighed by the EC's "interest in confidentiality [because the latter] plays a significant role in assisting the effective enforcement of European antitrust law."<sup>110</sup> This case, as many others, heeded the Ninth Circuit assessment in *Richmark Corp. v. Timber Falling Consultants*,<sup>111</sup> that the *Aérospatiale* comity factor of balancing national interests is the weightiest. Both the Ninth and Tenth Circuits have also indicated that courts will deny motions to compel discovery if "the outcome of the [U.S.]

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103. See, e.g., *Société Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197 (1958).

104. See *In re Payment Interchange Fee*, No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D. N.Y. Aug. 27, 2010); *In re Rubber Chemicals*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007).

105. See *In re Payment*, 2010 WL 3420517.

106. See *id.* at \*3.

107. See *id.*

108. *Id.* at \*9.

109. See *id.*; *In re Rubber*, 486 F. Supp. 2d at 1080, n.1, 1083 (noting that participants in the EC's Leniency Program received leniency if they confessed to anti-competitive conduct and need to preserve privacy of participants for continued functioning of program).

110. *In re Payment*, 2010 WL 3420517, at \*9.

111. 959 F.2d 1468, 1475 (9th Cir. 1992).



litigation does not stand or fall on the present discovery order.”<sup>112</sup> The comity cases, which yield rulings against Federal Rules discovery even in the absence of blocking statutes, may signal a shift towards taking blocking statutes more seriously because of international comity concerns. Such a shift will have to overcome the long tradition of placing great weight on the U.S. courts’ vindicating the rights of parties to Federal Rules discovery.<sup>113</sup>

### III. SECTION 1782 PETITIONS

#### A. *Background*

U.S. courts’ preference for discovery under the Federal Rules reflects their deep respect for the plaintiff’s right to access discovery. Discovery has gained the stature of a constitutional or quasi-constitutional right.<sup>114</sup> A strong interest of the United States is the vindication of U.S. plaintiffs’ rights and providing a forum to adjudicate their claims. Under § 1782, U.S. courts have also in general shown a great inclination to honor the petitions for U.S.-style discovery, only here the petitioners are not U.S. parties, but foreign litigants, courts, and other interested persons, and the information they request is for use in foreign litigation occurring in another nation.

The section reads in relevant part as follows:

The district court of the district in which a person resides or is found may order him to give testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to . . . the application of any interested person [and] . . . [t]o the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.<sup>115</sup>

Section 1782 is designed to allow U.S. courts to provide assistance in foreign litigation.<sup>116</sup> In these cases, a U.S. court in its discretion is

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112. *Id.* (citing *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977)); accord *In re Rubber*, 486 F. Supp. 2d at 1078; *Fenerjian v. Nong Shim Co., Ltd.*, No. 13-cv-04115-WHO (DMR), 2016 WL 245263 (N.D. Cal. Jan. 21, 2016).

113. See Curran, *supra* note 21, at 1141, and sources cited therein.

114. *Id.*

115. 28 U.S.C. § 1782(a) (1964).

116. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 249 (2004) (citing *S. REP. NO. 1580*, at 7-8 (1964)); *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095 (2d Cir. 1995) (“We have . . . noted that Congress purposefully engineered section 1782 as a one-way street. It grants wide

agreeing to assist a foreigner in obtaining information that will be produced within the U.S. court's jurisdiction, and to do this despite the fact that the information sought would generally not be discoverable in the foreign forum in which the litigation is taking place.<sup>117</sup>

The only § 1782 case to have been adjudicated by the U.S. Supreme Court to date is *Intel*. The principal issue in that case was whether the executive branch of the European Union, the EC, could constitute a “tribunal” within the meaning of § 1782, despite the EC itself having argued to the contrary.<sup>118</sup> *Intel* set the standard for § 1782 petitions in several ways since it was decided in 2004. In particular, since *Intel*, even where the petitioner is an individual foreign litigant, a defense that the information sought is not discoverable in the foreign forum litigation is not a bar to discovery.<sup>119</sup> According to the Restatement (Fourth), § 1782 “is not limited to information the production of which the foreign or international tribunal *could* order, or that would be admissible in the foreign or international proceeding.”<sup>120</sup> Moreover, whereas at one time the location of the documents sought was a relevant criterion, “[i]n the contemporary world, where documents exist mostly in virtual form, and may be accessed from many locations, territorial location may become less relevant.”<sup>121</sup>

The Restatement (Fourth) departs from its last two predecessors in shifting the legal theory for decisions to enforce § 1782 discovery obligations from international law (as was the case in Restatement (Second) § 40 and Restatement (Third) §§ 441, 442) to principles of international comity: “Current state practice does not support the claim that the defense of foreign-state compulsion rests on international law. Rather, the defense reflects the practice of states in the interest of comity.”<sup>122</sup>

A seminal case in § 1782 law that dates from 1995<sup>123</sup> established several principles that have continued to characterize judicial rulings: (1) it may be reversible error to deny a § 1782 petition on the basis that the discovery requested would be unavailable to the foreign legal system in

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assistance to others, but demands nothing in return.”) (internal quotation marks omitted).

117. See *Intel*, 542 U.S. at 241.

118. The Court held it was a tribunal for purposes of § 1782. *Id.* at 242-43.

119. See *id.* at 243-44.

120. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 306 (Reporter's Note 3, 2016) (emphasis added).

121. *Id.*, Reporter's Note 7 (citing *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 15 F. Supp. 3d 466 (S.D.N.Y. 2014)).

122. *Id.*, Reporter's Note 9.

123. *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095 (2d Cir. 1995).

whose forum the litigation takes place;<sup>124</sup> (2) U.S. courts may not impose a “quasi-exhaustion” requirement on § 1782 petitioners, in the sense that a petition need not be preceded by the petitioner’s attempt to obtain the information in the forum jurisdiction;<sup>125</sup> and (3) U.S. judges should not attempt to understand the foreign law or legal system of the foreign forum.<sup>126</sup> At that time an intercircuit split divided jurisdictions’ perspectives on the relevance of foreign discoverability to § 1782 petitions.<sup>127</sup>

In 2004, however, the Supreme Court formally rejected the criterion of discoverability in the foreign forum as contrary to the statute: “While [concerns of] comity and parity [among litigants] may be important touchstones for a district court’s exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a).”<sup>128</sup> The Supreme Court also underscored a third criterion in *Intel*: “Section 1782 . . . does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist . . . Comparisons of that order can be fraught with danger.”<sup>129</sup> The Court added in a footnote that the “comparison of systems is slippery business.”<sup>130</sup>

Justice Ginsburg was quite right that the dangers of error are very real when comparing legal systems, yet comparison is necessary because it is inevitable. Thus, Justice Breyer dissented in *Intel* in part because of the majority’s denial of foreign law’s relevance.<sup>131</sup> One might wonder how international comity and parity among parties litigating in a foreign system can have any meaning, as the majority in *Intel* nevertheless suggested they might, if that system, its proceedings, and laws are not to play any role in the exercise of discretion by federal district courts in § 1782 cases.

Following in the footsteps of *Esmerian*, the Second Circuit in *In re Application for an Order Permitting Metallgesellschaft AG to take Discovery*, dealing this time with German rather than French pending

124. *Id.* at 1098.

125. *Id.*

126. *Id.* at 1099; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 243 (2004).

127. *See, e.g.*, Eleventh and First Circuits, with cases noted in the dissenting opinion of Justice Jacobs in *Esmerian*, 51 F.3d at 1103 (Jacobs, J., dissenting) (noting also that the majority in that case had taken the leap from permitting the district courts of the Second Circuit to allow discovery under § 1782 despite non-discoverability in the foreign jurisdiction, to *requiring* them to do so).

128. *Intel*, 542 U.S. at 243.

129. *Id.*

130. *Id.* at n.15.

131. *See id.* (Breyer, J., dissenting).

litigation, reversed a district court denial of a § 1782 petition.<sup>132</sup> The lower court relied on precedents for the proposition that foreign discoverability could be “a useful tool in the exercise of [the district court’s] discretion”<sup>133</sup> in § 1782 cases. According to the Second Circuit, however, “this language was not meant to authorize denial of discovery pursuant to § 1782 solely because such discovery is unavailable in the foreign court, but simply to allow consideration of foreign discoverability (along with many other factors) when it might otherwise be relevant to the § 1782 application.”<sup>134</sup> The court also made clear that if approving the application would create inequality by favoring the § 1782 applicant entitled to U.S.-style discovery, the remedy still would not be to deny the § 1782 petition, but, rather, to issue a discovery order that was narrower than it might otherwise be, and more “tailored” to the petitioner’s needs, in light of the disparity of means that would result from the respondent’s not having access to equivalent discovery in the ongoing foreign litigation.<sup>135</sup>

### B. *Comparative Legal Analysis*

The case against comparative legal analysis under § 1782 was made by one of the principal drafters of the section’s 1964 amendments, Hans Smit, a comparatist himself and former colleague of Justice Ginsburg at Columbia Law School:<sup>136</sup>

[T]he drafters realized that making the extension of American assistance dependent on foreign law would open a veritable Pandora’s box. They definitely did not want to have a request for cooperation turn into an unduly expensive and time-consuming fight about foreign law. That would be quite contrary to what was sought to be achieved. They also realized that, although civil law countries do not have discovery rules similar to those of common law countries, they often do have quite different procedures for discovering information that could not properly be evaluated without a rather broad understanding of the subtleties of the applicable foreign system. It would, they judged, be wholly inappropriate for an American district court to try to obtain this understanding for the purpose of honoring a simple request for assistance.<sup>137</sup>

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132. 121 F.3d 77 (2d Cir. 1997).

133. *Id.* at 79 (internal quotation marks omitted).

134. *Id.*

135. *Id.* at 80.

136. See Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, n.a1 (1965).

137. Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, 235

Yet even Professor Smit criticized the Second Circuit when it did not apply the Spanish law's understanding of privileges to § 1782(a)'s last sentence, shielding from production information subject to "any legally applicable privilege."<sup>138</sup> Instead, the court had applied the U.S. attorney-client privilege.<sup>139</sup> He argued that Spanish law should have been applied under a conflicts of law approach that the case called for.<sup>140</sup> In an early article written after the 1964 amendments to § 1782 had been drafted, Professor Smit explained as follows:

The reference in new Section 1782(a) to "any legally applicable privilege" is not restricted to the privilege against self-incrimination embodied in the fifth amendment. On the contrary, it embraces any and all privileges that the witness may invoke under the applicable law, including not only privileges recognized by American rules of evidence, but also privileges recognized by foreign law that, under the applicable American conflict of laws rule, the witness may properly invoke.<sup>141</sup>

Conflicts of law is one of many ways in which U.S. courts in foreign discovery and § 1782 cases need to explore foreign law.<sup>142</sup> Understanding that U.S. courts must increasingly engage with foreign legal analysis despite the risks and pitfalls that Smit correctly signaled, Judge Friendly looked to comparative legal scholarship in *In re Letters Rogatory* to make a subtle and apposite conclusion about French law.<sup>143</sup> He consulted legal scholarship on French law that appeared in the *American Journal of Comparative Law*.<sup>144</sup> The case exemplifies how U.S. courts might be able to embrace foreign legal analysis.

Once Judge Friendly studied the French legal institution at issue in his case and reached a conclusion about its effect on the discovery issue he was adjudicating, his finding about French law became incorporated into law by precedent, and was followed in a later case in the same

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(1994).

138. "A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." 28 U.S.C. § 1782(a) (1964).

139. The case was *Application of Sarrío, S.A.*, 119 F.3d 143 (2d Cir. 1997). Professor Smit's critique is in Smit, *supra* note 93, at 10-11, 14.

140. *Sarrío*, 119 F.3d at 143.

141. Smit, *supra* note 136, at 1033.

142. On the importance of comparative law to conflict of laws analysis, see Ralf Michaels & Christopher Whytock, *Internationalizing the New Conflict of Laws Restatement*, 27 DUKE J. COMP. & INT'L L. 349, 356-58 (2017).

143. See *In re Letters Rogatory Issued by Director of Inspection of Government of India*, 385 F.2d 1017 (1967).

144. *Id.* The case was criticized by Hans Smit for reasons other than Justice Friendly's account of French law or understanding of comparative legal analysis. See Smit, *supra* note 93, at 14.

jurisdiction which duly cited to *In re Letters Rogatory's* finding.<sup>145</sup> Judge Friendly's idea of consulting scholarship rather than party experts with respect to foreign law is fully supported by Federal Rule 44.1, allowing judges to gain their understanding of foreign law broadly: "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."<sup>146</sup> It is a rare court which initiates its own foray into comparative legal scholarship, however much courts may be skeptical of party experts' testimony concerning the proper interpretation of foreign law.<sup>147</sup> Judge Friendly's exploration of comparative law meant that he understood the determinative way in which the French *juge d'instruction* should not be deemed equivalent to a judge in the U.S. sense of the term, and how the French institution of "*instruction*" should satisfy § 1782's requirement of a "tribunal," despite apparent differences with the U.S. system which might have led to the opposite conclusion on the part of a U.S. lawyer or judge who was less well informed.<sup>148</sup>

The Seventh Circuit's more recent idea of replacing the paid party expert's testimony with the judge's reading foreign law in translation could yield just the sort of unfortunate slips and falls that Smit and Justice Ginsburg feared to the extent that courts might feel able to read translations independently of explanatory commentary and scholarship. These slips and falls, however, will be avoidable if the judge is apprised of the necessity of secondary literature, to which the Seventh Circuit referred:

French law, and the law of most other nations that engage in extensive international commerce, is widely available in English. Judges can use not only accepted (sometimes official) translations of statutes and decisions but also ample secondary literature, such as treatises and scholarly commentary. It is no more necessary to resort to expert declarations about the law of France than about the law of Louisiana, which had its origins in the French civil code, or the law of Puerto Rico, whose origins are in the Spanish civil code. No federal judge would admit "expert" declarations about the meaning of Louisiana law in a

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145. See *In re Letter of Request from the Gov't of France*, 139 F.R.D. 588, 590 (S.D.N.Y. 1991).

146. FED. R. CIV. P. 44.1.

147. For a court so skeptical that it suggested dispensing with experts in favor of reading the translated texts of foreign legislation, see *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624 (7th Cir. 2010).

148. See *In re Letters Rogatory*, 385 F.2d at 1017.

commercial case.<sup>149</sup>

Judge Friendly's comparative law initiative has not been followed, at least not openly, in light of the Supreme Court opinion in *Intel* that dealt with the issue of U.S. courts' interface with foreign law.<sup>150</sup> Yet the cases show that determinations of foreign law are made on a continuing and increasing basis. It is to be hoped that comity's increased presence in U.S. decision-making will also be a harbinger of comparative legal analysis and the willingness to examine foreign law openly and advisedly.

### C. Recent Case Law

#### 1. Document Location and Origin

In 2016, the Eleventh Circuit held that documents located outside the United States came within the purview of the court's § 1782 powers, pointing out in *Sergeeva v. Templeton International, Ltd.*<sup>151</sup> that under Federal Rule 45, those documents would be produced in the United States. The court thus held that this was a case of "domestic" discovery, rejecting the respondent's extraterritoriality argument. The court further held that control over the information requested was the "legal right to obtain" such information.<sup>152</sup> *Sergeeva* was a divorce case, an area in which § 1782 petitions arise frequently.<sup>153</sup>

Conversely, in *In re Application of RSM Prod. Corp. v. Noble Energy*, the court denied a § 1782 petition with respect to documents located outside of the United States for use in an Israeli court proceeding where granting the petition would have required the court to pierce the corporate veil of the foreign subsidiary.<sup>154</sup> The court reached this conclusion despite the apparently uncontested argument that Israel's courts are generally receptive to discovery from the United States.<sup>155</sup> The "body of caselaw suggest[s] that § 1782 is not properly used to seek documents held outside the United States" by foreign subsidiaries.<sup>156</sup> The Texas district court engaged in a comparative legal examination of Israel's discovery laws, concluding that the information sought would not be

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149. *Bodum*, 621 F.3d at 628-29.

150. *See Intel Corp. v. Advanced Micro Devices, Inc.* 542 U.S. 241, 243 (2004).

151. 834 F.3d 1194, 1200 (11th Cir. 2016).

152. *Id.* at 1201.

153. *See id.* at 1199, n.4.

154. *In re Application of RSM Prod. Corp. v. Noble Energy*, 195 F. Supp. 3d 899 (S.D. Tex. 2016)

155. *See id.* at 903-04.

156. *Id.* at 904.

discoverable there, and attributing some weight to that factor, linking it to the petitioner's attempt to profit from U.S. discovery.<sup>157</sup> The court did not go so far as to find that this amounted to trying to "circumvent" the law of the foreign country, one of the *Intel* factors.<sup>158</sup>

## 2. Proceedings Predating Complaints

In *Mees v. Buitter*,<sup>159</sup> the issue arose as to whether § 1782's requirement that the discovery be "for use" in a foreign proceeding was met where the party seeking it had not yet filed a complaint. The Second Circuit reversed the district court's decision that the petition could not be granted, holding that the statutory requirement is met so long as "the proceeding is within reasonable contemplation."<sup>160</sup> The Supreme Court previously had addressed this issue in *Intel*, where it had specifically stated that a foreign proceeding need not be either "pending" or even "imminent,"<sup>161</sup> for a U.S. court to grant a § 1782 petition. It also held that the applicant might win her § 1782 petition even if the discovery sought "was not necessary for her to succeed in the foreign proceeding."<sup>162</sup>

In keeping with *Mees*, the District Court for the Southern District of New York granted a § 1782 petition in 2017 to the plaintiff in *In re Kiobel*,<sup>163</sup> who intended to bring an action in the Netherlands similar to the one she had lost in the U.S. Supreme Court against Royal Dutch Shell, a Dutch company. Petitioner Kiobel sought documents and other materials from the law firm that had represented Shell in the U.S. case, *Cravath, Swaine & Moore, LLP*, for information relating to the U.S. case as well as to some related U.S. cases,<sup>164</sup> all of which had been brought under the Alien Tort Statute.<sup>165</sup> The U.S. *Kiobel* case had been dismissed in 2013 for failure to rebut the presumption against extraterritoriality and failure to demonstrate a sufficient nexus with the United States.<sup>166</sup>

The Southern District of New York signaled in its § 1782 decision that Kiobel's request was not premature because she had demonstrated her intent to bring an action concretely by:

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157. *Id.* at 906.

158. *See id.*

159. *Mees v. Buitter*, 793 F.3d 291 (2d Cir. 2015).

160. *Id.* at 295.

161. *Intel Corp. v. Advanced Micro Devices, Inc.* 542 U.S. 241, 259 (2004).

162. *Id.*

163. *In re Kiobel*, 16 Civ. 7992 (AKH), 2017 WL 354183 (S.D.N.Y. Jan. 24, 2017).

164. *See id.* at \*1-2.

165. 28 U.S.C. § 1350 (1948).

166. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).



(1) draft[ing] a writ of summons, which is the initiating summons in Dutch proceedings; (2) appl[ying] for and obtain[ing] legal aid on behalf of Kiobel from the Dutch Legal Aid Board, which required a show that meaningful legal steps had been taken to prepare for the action; and (3) sen[ding] “liability letters” to Shell, which had the effect of tolling the statute of limitations.<sup>167</sup>

The court also noted, in the inevitable foray into comparative law that § 1782 requires of U.S. courts, that Dutch law demands “a certain amount of evidence” at the outset, before litigation can begin.<sup>168</sup>

In *In re an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding*,<sup>169</sup> the District Court for the District of Columbia confirmed that the legal standard for a petitioner to meet § 1782’s “for use” in a foreign proceeding requirement is not exigent.<sup>170</sup> The petitioners in *Hulley*<sup>171</sup> represented Rosneft, the Russian state-owned company, in connection with a suit against the Russian Federation concerning an international arbitration award to Yukos, the Russian oil and gas company once run by Khodorkovsky before his imprisonment.<sup>172</sup> Subsequently, Yukos won the largest international arbitration award in history (\$50 billion).<sup>173</sup>

In this case, the court nevertheless denied the petition for Federal Rules discovery where it concluded that discovery would be of debatable relevance to the foreign proceeding and be likely to cause further litigation. It thus weighed the importance of the discovery to the case against the burdens such discovery would create and found that the burdens outweighed the relatively weak potential significance of the information sought.<sup>174</sup>

167. *Kiobel*, 2017 WL 354183, at \*2-3.

168. *Id.* at \*3.

169. *In re an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding*, Misc. Case No. 17-1466 (BAH), 2017 WL 3708028 (D.D.C. Aug. 18, 2017) (reconsideration denied).

170. *Id.* at \*10.

171. *Hulley Enters. v. Russian Fed’n*, 211 F. Supp. 3d 269, 272–73 (D.D.C. 2016) was the *In re an Order Pursuant* court’s Memorandum Opinion granting the same three petitioners’ motion for a stay of their related pending lawsuit to confirm the arbitration awards. *See In re an Order Pursuant*, 2017 WL 3708028 at \*1.

172. *See In re an Order Pursuant*, 2017 WL 3708028 at \*4-5; *Yukos shareholders \$50 billion win is largest arbitration award ever: GML director*, REUTER (July 28, 2014, 5:11 AM), <https://www.reuters.com/article/us-russia-yukos-gml/yukos-shareholders-50-billion-win-is-largest-arbitration-award-ever-gml-director-idUSKBN0FX00620140728> [<https://perma.cc/LH3C-UAXA>].

173. *In re an Order Pursuant*, 2017 WL 3708028, at \*4-5. While the respondent in *Hulley* represented Rosneft, apparently it previously had served as legal counsel for the Russian Federation. *Id.*

174. *Id.* at \*13.

Finally, in *Andover Healthcare, Inc. v. 3M Co.*,<sup>175</sup> the Eighth Circuit referred to the *Intel* criterion of party versus non-party petitioner, reasoning that where revealing trade secrets could have caused grave harm to the respondent, and the petitioner was a party to the litigation, the petitioner could seek authorization as a party to the action in the foreign proceeding for the discovery it sought.<sup>176</sup> In that case, the district court had concluded that “the highly sensitive nature of the requested discovery, and the lack of certainty that confidentiality [could] be maintained, weighed heavily against ordering discovery.”<sup>177</sup> This case is consistent with the recent tendency to evaluate the concerns of the foreign party and nation with increasing consideration.

#### IV. TRANSNATIONAL DIGITAL DATA DISCOVERY AND THE NEED FOR A NEW UNDERSTANDING OF EXTRATERRITORIALITY

A new dimension to discovery issues has entered with modern technology and in particular with the digital storage of data. This section explores the new challenge. Foreign blocking statutes figure in a new and often confusing manner in the area of U.S. discovery with respect to information stored in the cloud. Digital data cases are becoming more frequent and have injected new issues into traditional discovery inquiries. The difficulty they pose is in applying existing legal criteria that were developed over centuries on the basis that national law is territorial, to cases which epitomize the deterritorialization that the Internet creates wherever it reaches.

Under *stare decisis*, courts are bound by well-established laws of jurisdiction that are intertwined with discovery and blocking statute analysis and that all have as their point of departure two basic principles: (1) a court’s jurisdiction is bounded by geographical territory;<sup>178</sup> and (2) in international law each nation’s legal rights are limited to its national territory.<sup>179</sup> Superimposed on this is the U.S. presumption against the extraterritorial application of national law. This presumption, on the one hand, is part and parcel of international law.<sup>180</sup> On the other hand, it is part of a trend towards greater respect for international comity. The

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175. 817 F.3d 621 (8th Cir. 2016).

176. *Id.* at 623 (citing *Intel Corp. v. Advanced Micro Devices, Inc.* 542 U.S. 241, 264 (2004)).

177. *Id.* at 623-24.

178. See Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999).

179. IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 299 (7th ed. 2008).

180. See *id.* at 311-12.

presumption has been subject to varying interpretations in U.S. law at different times.<sup>181</sup>

In dealing with unexpected scientific developments, the law has always had to find its way, whatever the area. In 2018, revisions of the Uniform Parentage Act provided for the first time for the possibility of more than two parents per child because of the biomedical research that created surrogacy and new modes of fertility.<sup>182</sup> The Uniform Probate Code seems on the cusp of similar revisions.<sup>183</sup> Judicial perspectives developed a great deal from the days of the first surrogacy case of *Baby M*, when a New Jersey state court applied a brew of mainly contract law principles, along with adoption and constitutional law analysis, because of the dearth of available laws better suited to the novel issue which biomedical innovations of the time were causing it to adjudicate.<sup>184</sup>

Similarly, one possibility for cloud-stored data is to try to adapt ill-fitting laws of a bygone time that speak to site of location, while another is to create new laws. As this Article was being written, the U.S. Supreme Court decided *U.S. v. Microsoft Corp.*, a case that brought the cloud into confrontation with a foreign blocking statute,<sup>185</sup> while Congress had proposed a new law, now enacted, to regulate the matter, known as the CLOUD Act.<sup>186</sup> Courts traditionally have shown a preference for legislatures to act in their place where innovations in the law are called for. In this case, § 103(a)(1) of the CLOUD Act specifically includes, as part of a service provider's obligations under the Stored Communications Act (SCA), the disclosure of information "located within *or outside of the United States.*"<sup>187</sup> The issue of extraterritoriality had thus become moot. After the legislation was signed into law, the government obtained another warrant against Microsoft under the SCA.<sup>188</sup> The Supreme Court held that the case before it was moot and vacated the lower court holdings.<sup>189</sup>

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181. In the mid-twentieth century, the presumption against extraterritoriality had weakened so much that the Restatement (Third) of Foreign Relations Law no longer mentioned it. See William S. Dodge, *Understanding the Presumption against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 86. See also *id.* at 85-86 for relevant case law. Today the pendulum has swung back. See Kimmelman & Smith, *supra* note 1; *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

182. Uniform Parentage Act (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2017).

183. These revisions to the UPC are being undertaken by the Uniform Law Commission's Joint Editorial Board for Uniform Trust and Estate Acts. Email from Prof. Tom Gallanis, Subcomm. on U.P.C. Rev. to Vivian Grosswald Curran (Jan. 31, 2018) (on file with author).

184. *Matter of Baby M.*, 525 A.2d 1128 (N.J. Super. 1987).

185. *U.S. v. Microsoft Corp.*, 138 S. Ct. 1186 (2018).

186. See *id.*

187. *Id.* at 1888 (emphasis added).

188. *Id.*

189. *Id.*

What the legislation does not address is the non-localizable nature of data. It is this characteristic that case law also has not yet addressed, with the exception of the appellate court's concurrence in *Microsoft*.<sup>190</sup> *Microsoft*, like most of the digital data cases, involved both a foreign blocking statute and a U.S. statute, here the SCA.<sup>191</sup> The SCA authorizes searches and seizures of email accounts stored on the web.<sup>192</sup> Microsoft had been held in contempt of court when it refused to make disclosures in satisfaction of a government warrant issued under this law with respect to a client suspected of criminal conduct.<sup>193</sup> Microsoft disclosed information it said was stored in the United States, but refused to disclose other information requested, which it said was on a server based in Ireland.<sup>194</sup>

The majority defined a server as “a shared computer on a network that provides services to clients,”<sup>195</sup> and an Internet-connected server as a “common example of a server.”<sup>196</sup> The majority proceeded to explore the SCA's legislative history, concluding that its purpose was to extend Fourth Amendment privacy protections to, among others, email account holders.<sup>197</sup>

The next step for the majority was to invoke the presumption against extraterritoriality in U.S. statutes, a natural approach since the case arose under a statute and also since Microsoft had posed its objections to discovery in terms of the territoriality of the server (i.e., its location in Ireland) in keeping with digital data case precedents.<sup>198</sup> The court found that the statutory terms permitting searches and seizures, including amendments, were all limited to the national territory of the United States<sup>199</sup> and that the statute's principal purpose was to protect the privacy of users.<sup>200</sup> It concluded that the government had not rebutted the

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190. *Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation*, 829 F.3d 197, 222-32 (2d Cir. 2016) (Lynch, J., concurring), *vacated and remanded*, 138 S. Ct. 1186 (2018).

191. *Microsoft*, 138 S. Ct. at 1186.

192. *Id.*

193. *Id.* at 1187.

194. *Matter of Warrant*, 829 F.3d at 200.

195. *Id.*

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

197. *See id.* at 205.

198. *See id.* at 209 (citing *RJR Nabisco, Inc. v. Eur. Cmty.*, 179 S. Ct. 2090 (2016) and other U.S. Supreme Court and Second Circuit cases dealing with the presumption, and following the analytical approach in presumption against extraterritorial application cases outlined in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261-65 (2010)).

199. *Matter of Warrant*, 829 F.3d. at 213.

200. *Id.* at 219.

presumption against extraterritoriality. In the government's appeal to the Supreme Court, the issue of *whether there is territory* was not raised.

The Second Circuit's concurring opinion addressed the novel issues the majority had not discussed: "What searches are unreasonable is . . . a difficult question . . . when courts are assessing statutory authorizations of novel types of searches to deal with novel types of threats."<sup>201</sup> The concurring opinion sized up the problem as being not one primarily of privacy, but as the "[t]ricky [issue], in a world of transnational transactions *taking place in multiple jurisdictions at once, [of] deciding whether a proposed application of a statute is domestic or extraterritorial.*"<sup>202</sup>

In *Microsoft*, it would have been uncontested that the government's right to search and seize would not have permitted it to enter Ireland,<sup>203</sup> but, given the nature of the information sought in this case, the government argued that it had a right to the contested data to the extent that Microsoft had access to it.<sup>204</sup> The government's argument had a basis in the Restatement (Third) of Foreign Relations Law § 442(1)(a): "A court or agency in the United States, when authorized by statute or rule of court, may authorize a person subject to its jurisdiction to produce documents, objects or other information . . . even if the information or the person in possession of the information is outside the United States." Moreover, in this case, Microsoft could access the documents from the United States.

This analysis derives from the premise that the information was tangible, however. Judge Lynch articulated the current dilemma in applying a law of physically embodied information as follows:

Electronic "documents" . . . are different. Their location on a computer server in a foreign country is, in important ways, merely virtual . . . the very idea of online data being located in a physical 'place' is becoming rapidly outdated, because computer files can be fragmented and dispersed across many servers. Corporate employees in the United States can review these records, when responding to the "warrant" or subpoena or court order just as they can do in the ordinary course of business . . . without ever leaving their desks in the United States.<sup>205</sup>

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201. *Id.* at 225 (Lynch, J., concurring).

202. *Id.* at 226 (emphasis added).

203. *See id.* at 227.

204. *See id.*

205. *Id.* at 229 (quoting in part Orin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. PA. L. REV. 373, 408 (2014)).

The cloud thus casts a new light on the U.S. legal concept of extraterritoriality by virtue of making “location . . . virtual”<sup>206</sup> and by allowing data to be simultaneously accessed in many different places. Concepts of court jurisdiction and of transnational discovery arose before the advent of the Internet. The same is true for the statutes under which the digital data cases of the last years have been arising. Judge Lynch at least implicitly suggested in *Microsoft* that a relevant inquiry is if Congress, when enacting the SCA, “gave any thought at all to potential transnational applications of the statute.”<sup>207</sup>

In 2017, a year after the Second Circuit held that Microsoft could not be forced to disclose information under the SCA, the District Court for the Central District of California held that Google could be compelled to do so pursuant to the same statute.<sup>208</sup> Looking to five other cases involving Google, and distinguishing *Microsoft* on the facts, the court held that no invasion of privacy occurs before data is disclosed in the United States.<sup>209</sup> The court noted that Google transmitted data in an automated manner, based on algorithms and unrelated to any actions taken by account holders.<sup>210</sup>

Microsoft, on the other hand, stores its data according to country codes its account holders indicate.<sup>211</sup> The court noted another contrast in that, unlike Microsoft’s counterparts, Google’s automatic and frequent data transmissions take no account of the various blocking laws of the countries in which their data may, often fleetingly, be located at any given point.<sup>212</sup>

The court noted that the Second Circuit’s majority *Microsoft* opinion had been rejected by subsequent courts which had considered the issue, as well as by dissenting justices, particularly in its finding that the SCA would be applied extraterritorially were it to be applied, because the information requested was located in Ireland,<sup>213</sup> despite the fact that Microsoft could access the information from the United States.

In the view of this court, as well as of the Eastern District of Pennsylvania in *In re Search Warrant*,<sup>214</sup> “the fluid nature of the cloud

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206. *Id.*

207. *Id.* at 231.

208. *In re Search of Info. Assoc. with Accts.*, 268 F. Supp. 3d 1060 (C.D. Cal. 2017).

209. *Id.* at 1 (citing to the five Google precedents, at *id.* n.1).

210. *See id.*

211. *Id.* at 2.

212. *Id.*

213. *Id.* at 4-5.

214. *In re Search Warrant No. 16-960-M-01 to Google*, 232 F. Supp. 3d 708, 719 (E.D. Pa. 2017).

makes it uncertain whether a foreign state's sovereignty or which foreign state's sovereignty is implicated."<sup>215</sup> The court also evoked the Eastern District of Wisconsin in which the district court in *In re Information associated with one Yahoo*<sup>216</sup> held that the location of the service provider is the location of interest with respect to determining the court's jurisdiction, which then can compel disclosure of any information the service provider possesses or controls.<sup>217</sup> These and other cases, with the exception of *Microsoft*, all have held that the application of the SCA was domestic, not extraterritorial. In those cases, as the courts have noted, unlike in *Microsoft*, the account holders did not know where their data was stored.<sup>218</sup>

In ordering that Google be compelled to disclose the information the government sought pursuant to the SCA, the court held as follows:

No human hand in a foreign country is involved. No one goes to a foreign country to retrieve data. All of the actions Google described are within its authority under § 271(c)(1) and its user agreement. There is no "seizure" of data, as if from someone else in a location it does not control. Google has complete discretion to move data around the globe and does so on a regular basis, irrespective of foreign blocking statutes. It cannot seize data already within its possession, custody and control.<sup>219</sup>

This reasoning does not distinguish between the power of the Internet provider which through automated algorithms sends data on the cloud and the reach of an American domestic law statute. When speaking of the cloud, territorial terms may be inapposite, such that "everywhere" might be a less apt representation than "infinite." Should the SCA's reach become infinite by virtue substantially of the accessibility Google has to data stored on the cloud from its U.S. offices? If not, should the cloud provide criminals an escape route that will elude the SCA? Meanwhile, what does seem certain is that the courts will need to continue to grapple with how the concept of territoriality and data are to be understood together.<sup>220</sup>

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215. *In re Search of Info.*, 268 F. Supp. 3d at 6.

216. *In re Info. assoc. with one Yahoo email address that is stored at premises controlled by Yahoo*, Nos. 17-M-1234, 17-M-1235, 2017 WL 706307, at \*3 (E.D. Wis. Feb. 21, 2017).

217. *Id.*

218. *In re Search of Info.*, 268 F. Supp. 3d at 8.

219. *Id.*

220. For scholarship in this area, see Kerr, *supra* note 205; Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326 (2015).

## V. CONCLUSION

Edward Levi once described the process of the common law as society's needs impelling lawyers to knock at the doors of the courts to make an argument repeatedly unsuccessful until a dissenting opinion finally embraces that viewpoint contrary to prevailing legal authority, and, at an ulterior stage, fortified by the support of the respected dissenting justice, the same position eventually becomes the majority rule.<sup>221</sup> The need for open and fruitful comparative judicial legal engagement is one such societal need for law in the transnational era. Judge Friendly illuminated the path.

U.S. judges, like their colleagues across the world, necessarily must draw conclusions about foreign law at rates never seen before. It would be preferable for U.S. courts to do so with the tools of comparative legal scholarship in that area, and perhaps with court-appointed experts in foreign law, as the courts in European countries have been doing for many years.<sup>222</sup> While law's globalization demands comparative legal work, globalization itself also requires interdisciplinary work.<sup>223</sup> In particular, the digitalization of data requires legal concepts that are better adapted to the Internet's almost total deterritorialization of law, a field that already is experiencing deterritorialization through many factors in the modern age. But, after all, this story is the story of law itself, for, as one scholar has put it, "the history of law is no more than [that of] its transformations."<sup>224</sup>

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221. Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501 (1948).

222. Private conversations with judges on two of France's Supreme Courts and participation in many conferences in France have allowed the author to observe that foreign (at least French) courts operate with teams of comparative legal scholars to assist them in their work.

223. Or, as Frydman puts it, a "transdisciplinary approach." See Frydman, *supra* note 11, at 14.

224. *Id.* at 9.