

COMMENTS

THE EXTRATERRITORIAL ASSERTION OF LONG-ARM JURISDICTION AND THE IMPACT ON THE INTERNATIONAL COMMERCIAL COMMUNITY: A COMMENT AND SUGGESTED APPROACH

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1. INTRODUCTION

The Supreme Court's decision in *International Shoe Co. v. Washington*¹ heralded the demise of the strictly territorial locus of in personam jurisdiction.² The *International Shoe* Court held that jurisdiction³ could constitutionally be maintained over a foreign⁴ defendant if "minimum contacts"⁵ existed between the defendant and the forum, and if maintenance of the suit in the forum did not "offend 'traditional notions of fair play and substantial justice.'"⁶ For the twelve years immediately following *International Shoe*, the Supreme Court significantly expanded the reach of the minimum contacts test.⁷ Following

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¹ 326 U.S. 310 (1945).

² In *Pennoyer v. Neff*, 95 U.S. 714 (1878), the Court had stated that "no state can exercise direct jurisdiction and authority over persons or property without its territory." *Id.* at 722.

³ Unless otherwise indicated, the term "jurisdiction" describes in personam jurisdiction.

⁴ The term "foreign," as used herein and as applied to corporations, describes parties incorporated by a state within the United States other than the forum state. The term "alien" describes parties who, due to incorporation or nationality, are subjects of a foreign country.

⁵ See Cohen, *In Personam Jurisdiction in Federal Courts over Foreign Corporations: The Need for a Federal Long Arm Statute*, 14 DEN. J. INT'L L. & POL'Y 59 (1985); Jay, "Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. REV. 429 (1981); Comment, *In Personam Jurisdiction over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1965).

⁶ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁷ Louis, *The Grasp of the Long-Arm Finally Exceeds its Reach: A Comment on "World-Wide Volkswagen v. Woodson" and "Rush v. Savchuk,"* 58 N.C.L. REV. 407, 407-08 (1980).

this lead, the state courts aggressively began to enact and extend the reach of their long-arm statutes.⁸ The Supreme Court made only one attempt⁹ to curb this trend until *World-Wide Volkswagen Corp. v. Woodson*¹⁰ was decided in 1980.

Many factors undergird the *Volkswagen* decision,¹¹ but the Supreme Court appeared particularly concerned that the aggressive application of state long-arm statutes over foreign defendants threatened the very essence of federalism: the Court stated that one of the purposes of the minimum contacts test was to "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."¹² Having articulated the particular and limited position of each state within the national community, the Supreme Court recently had the opportunity to articulate a similarly limited position for the United States within the international community. In *Asahi Metal Industries Co. v. Superior Court*,¹³ the Court failed to make the most of its opportunity.¹⁴

The California Supreme Court's disposition of the *Asahi* case¹⁵ strongly suggests that state courts in this country are not adequately considering the commercial interests of the international community.¹⁶ This disregard comes at a particularly unfortunate time. World trade, now worth approximately two trillion dollars annually, grew sevenfold between 1970 and 1984.¹⁷ National boundaries no longer shelter do-

⁸ See generally Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970) (discussing the history of long-arm jurisdiction and the weakening of due process requirements for the assertion of in personam jurisdiction); Comment, *supra* note 5, at 1028 (In "order to provide a more convenient forum for their citizens, many state legislatures have enacted 'long-arm' statutes enabling suit to be brought in the state where the plaintiff resides."); Recent Developments, 14 VAND. J. TRANSNAT'L L. 585, 589 (1981) ("In response to the fresh enunciation of due process standards in *International Shoe* and its progeny, state legislatures enacted broad jurisdictional long-arm statutes.").

⁹ In *Hanson v. Denckla*, 357 U.S. 235 (1958), the Court cautioned that the post-*International Shoe* trend, which aggressively extended the reach of long-arm statutes, did not herald "the eventual demise of all restrictions on the personal jurisdiction of state courts." *Id.* at 251.

¹⁰ 444 U.S. 286 (1980).

¹¹ See *infra* notes 42-45, 74-83 and accompanying text.

¹² 444 U.S. at 292.

¹³ 107 S. Ct. 1026 (1987), *rev'g* 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985).

¹⁴ The Court's holding and the positions of the Justices as to each issue are discussed *infra* notes 51-65 and accompanying text.

¹⁵ 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985). The jurisdictional grounds upon which the California Supreme Court decided this case are discussed *infra* Section 2.

¹⁶ See *infra* notes 138-49 and accompanying text.

¹⁷ *Global Competition: The New Reality*, WILSON Q., Summer 1985, at 42 (reviewing 2 PRESIDENT'S COMM'N ON INDUS. COMPETITIVENESS, GLOBAL COMPETI-

mestic industry: seventy percent of all goods made in the United States, whether sold here or abroad, face alien competition in the marketplace.¹⁸ The transformation has been particularly acute with respect to the phenomenal economic growth of Japan and other Pacific countries. In 1977, the volume of United States trade across the Pacific exceeded United States trade across the Atlantic for the first time.¹⁹ Pacific trade now accounts for approximately one-quarter of all United States exports and one-third of all imports.²⁰ Within this context of rapidly expanding international trade, the *Asahi* Court's mild appeal that state courts heed the advice of *Volkswagen* and "consider the . . . policies of other nations whose interests are affected by the assertion of jurisdiction"²¹ simply does not go far enough.

This Comment will first discuss the *Asahi* case and the jurisdictional grounds upon which it was settled.²² Next, several factors inadequately analyzed by the *Asahi* court — the ability of the defendant to structure its conduct to avoid suit in a particular jurisdiction,²³ the introduction of the United States' product liability law into the international commercial arena,²⁴ and principles of international comity²⁵ — will be discussed. Finally, this Comment will argue that the United States, through its assertions of jurisdiction, should make a minimal encroachment on the paramount interests of the international commercial community.²⁶ A test which links the reasonableness of an assertion of international jurisdiction to a particular alien manufacturer's position in the production/distribution chain will then be proposed.²⁷

2. *Asahi* AND THE JURISDICTIONAL GROUNDS UPON WHICH IT WAS SETTLED

In 1978, Gary Zurcher was severely injured and his wife was killed when his motorcycle collided with another vehicle.²⁸ The accident was allegedly caused by a sudden loss of air and explosion in the rear tire of the motorcycle. Zurcher and his wife were California residents

TION: THE NEW REALITY (1985)).

¹⁸ *Id.*

¹⁹ 2 GOLDEN STATE REP., May, 1986, at 10.

²⁰ *Id.*

²¹ *Asahi Metal Indus. Co. v. Superior Ct.*, 107 S. Ct. 1026, 1034 (1987).

²² See *infra* Section 2.

²³ See *infra* Section 3.1.

²⁴ See *infra* Section 3.2.

²⁵ See *infra* Section 3.3.

²⁶ See *infra* Section 4.1.

²⁷ See *infra* Section 4.2.

²⁸ *Asahi*, 39 Cal. 3d 35, 40-41, 702 P.2d 543, 544, 216 Cal. Rptr. 385, 387 (1985).

and the accident occurred in California.²⁹

Zurcher filed a product liability suit in California. He alleged that the tire, tube, and sealant were defective. Cheng Shin Rubber Industrial Company, the Taiwanese corporation that manufactured the tube, was among the defendants named in the complaint. Cheng Shin filed a cross-complaint for indemnity against various co-defendants and against Asahi Metal Industries Co., Ltd.³⁰

Zurcher eventually settled all his claims against the defendants, leaving only Cheng Shin's indemnity action against Asahi.³¹ Asahi is a Japanese corporation. It is a major producer of valve assemblies and had manufactured the assembly of the allegedly defective tube.³² Asahi maintained no offices, property or agents in California. It solicited no business and made no sales there.³³ Between 1978 and 1982, Asahi sold approximately 1,350,000 valve stem assemblies to Cheng Shin. Proceeds from these sales accounted for 1.24% and 0.44% of Asahi's total income in 1981 and 1982, respectively.³⁴ All of these sales took place in Taiwan and all of the shipments were sent from Japan to Taiwan.³⁵ The tubes sold in California were marketed by Cheng Shin through a related company that was incorporated in California. Approximately twenty percent of Cheng Shin's total sales in the United States were allegedly to California.³⁶

Asahi moved to quash service on the ground that California's exercise of jurisdiction over it would violate the restrictions placed upon state jurisdiction by the Due Process Clause of the Fourteenth Amendment.³⁷ Writing for the Supreme Court of California, Chief Justice Bird held that the exercise of jurisdiction was proper. The court relied primarily on the Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson* to reach its conclusion.

In *Volkswagen*, respondents had purchased an Audi automobile from petitioner Seaway Volkswagen, Inc. (Seaway).³⁸ While driving this car through Oklahoma the following year, respondents were involved in a collision with another vehicle. The injured respondents

²⁹ *Id.*

³⁰ *Id.*

³¹ 107 S. Ct. 1026, 1030 (1987).

³² *Id.* at 1029-30.

³³ *Id.* at 1031.

³⁴ *Id.* at 1030.

³⁵ *Id.*

³⁶ *Id.*

³⁷ California's long-arm statute authorizes the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973).

³⁸ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

brought a product liability suit in which they alleged that their injuries resulted from defective design and placement of the car's fuel system.³⁹ Respondents joined the following defendants: the primary manufacturer, Audi NSU; the importer, Volkswagen of America; petitioner World-Wide Volkswagen, distributor of Audis to retail dealers in New York, New Jersey, and Connecticut; and petitioner Seaway, the retail dealer who had sold respondents their car in New York.⁴⁰ Neither the primary manufacturer nor the importer contested jurisdiction in the Supreme Court of Oklahoma,⁴¹ but the petitioners maintained that Oklahoma's assertion of jurisdiction over them was unconstitutional. The Supreme Court agreed with the petitioners and, in broad dicta, fashioned the test by which any particular member of the production/distribution chain could be subjected to the jurisdiction of another forum. The Court focused on whether each member of the chain, through its "conduct and connection with the forum," could have reasonably foreseen "being haled into court there."⁴² The Court stated that the assertion of jurisdiction was proper where "a corporation . . . delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."⁴³ Applying these principles, the Supreme Court found that the presence of the Audi in Oklahoma was, from petitioners' point of view, a "fortuitous circumstance": they had not availed themselves of the "privileges and benefits of Oklahoma law,"⁴⁴ but had instead restricted the scope of their sales to the New York tri-state area.⁴⁵

In *Asahi*, the California Supreme Court distinguished *Volkswagen* by stating that, while the presence of the Audi in Oklahoma was fortuitous, "Asahi's valve assembly . . . was sold in [California] as part of a finished product [and] reached California in the stream of commerce."⁴⁶ The court found that, although Asahi "did not design or control the system of distribution that carried its valve assemblies into California,"⁴⁷ it knew⁴⁸ that some of the assemblies sold to Cheng Shin would

³⁹ *Id.*

⁴⁰ *Id.* at 288-89.

⁴¹ *Id.* at 288 n.3.

⁴² *Id.* at 297.

⁴³ *Id.* at 298; *cf.* *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) (jurisdiction properly asserted where a corporation "purposefully direct[s]" its products at a state in a fashion that is not "random, isolated, or fortuitous").

⁴⁴ *World-Wide Volkswagen*, 444 U.S. at 295.

⁴⁵ *Id.* at 289.

⁴⁶ *Asahi Metal Indus. Co. v. Superior Ct.*, 39 Cal. 3d 35, 47, 702 P.2d 543, 549, 216 Cal. Rptr. 385, 391 (1985).

⁴⁷ *Id.* at 49, 702 P.2d at 550, 216 Cal. Rptr. at 392.

⁴⁸ One of Cheng Shin's managers stated in an affidavit that "I am informed and believe that Asahi was fully aware that valve stem assemblies sold to [Cheng Shin] and

be incorporated into tubes and sold in California.⁴⁹ The court held that "the minimum contact requirement is satisfied where, as here, the manufacturer is aware that a substantial number of its products will be sold in the forum state."⁵⁰

The Supreme Court reversed. The Court acknowledged that the "'constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established "minimum contacts" in the forum state.'"⁵¹ The Court was, however, unable to base its holding on a minimum contacts analysis. Writing for herself and only three other Justices,⁵² Justice O'Connor stated that the requisite minimum contacts existed only where "an action of the defendant [was] purposefully directed toward the forum State."⁵³ The plurality did not believe that, within this context, Asahi's "mere act of placing the product into the stream [of commerce]" was an act purposefully directed toward California.⁵⁴ Purporting to rely on *Volkswagen*, the plurality stated that a defendant's subjective knowledge of the ultimate destination of its product was not germane to the due process analysis.⁵⁵ Asahi's subjective awareness that some of the products containing its valves were being sold in California did not, therefore, convert the "mere act" of placing its valves in the stream of commerce into an act "purposefully directed" toward California.⁵⁶

to others would end up throughout the United States and in California." *Id.* at 48 n.4, 702 P.2d at 549 n.4, 216 Cal. Rptr. at 392 n.4.

⁴⁹ *Id.* at 48, 702 P.2d at 549, 216 Cal. Rptr. at 392.

⁵⁰ *Id.* at 51-52, 702 P.2d at 552, 216 Cal. Rptr. at 394.

⁵¹ *Asahi Metal Indus. Co. v. Superior Ct.*, 107 S. Ct. 1026, 1031 (1987) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

⁵² Justices Powell and Scalia, and Chief Justice Rehnquist agreed with Justice O'Connor's interpretation of the stream of commerce doctrine and with her application of the minimum contacts test.

⁵³ 107 S. Ct. at 1033.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1032-33 (citing *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 299 (3d Cir. 1985)). In the domestic setting, it is far from certain whether a manufacturer's subjective awareness that its product will be swept by the stream of commerce into the forum state is relevant to the due process analysis. See *infra* notes 83, 107 (last paragraph), & 162-64.

⁵⁶ *Asahi*, 107 S. Ct. at 1032-33. In *Asahi* itself, Justice Brennan, joined by Justices White, Marshall, and Blackmun, disagreed with the plurality's construction of the stream of commerce doctrine and stated that jurisdiction may properly be asserted over a defendant who is "[subjectively] aware that the final product is being marketed in the forum State." *Id.* at 1035 (Brennan, J., concurring in part and in the judgment). Justice Brennan saw "no need" for an additional showing that the defendant had purposefully directed its activity toward the forum state. *Id.* Nevertheless, he did concede that "this is one of those rare cases" where jurisdiction could be denied on "fairness grounds despite the existence of minimum contacts." *Id.* Justice Stevens, joined by Justices White and Blackmun stated that it was not necessary to reach the question of minimum

With the Court divided as to whether minimum contacts existed between Asahi and California, the reversal was based instead on the "reasonableness" prong⁵⁷ of *International Shoe*: eight Justices⁵⁸ agreed that California's assertion of jurisdiction over Asahi would "offend traditional notions of fair play and substantial justice."⁵⁹ The Court stated that whether an assertion of jurisdiction was "reasonable" depended in each instance on an evaluation of several factors.⁶⁰ These factors included the relative burdens to the plaintiff and defendant, the

contacts where, as here, the assertion of jurisdiction did not meet minimum requirements inherent in the concept of "fair play and substantial justice." *Id.* at 1038 (Stevens, J., concurring in part and in the judgment). Justice Stevens then added: "I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment . . .'" *Id.* at 1038. It appears, however, that Justice Stevens's conclusion is based on an incorrect statement of the facts. *See id.* at 1030 & *supra* note 36 and accompanying text (noting that Cheng Shin installed 100,000 Asahi valves into its tubes, although in 1981 and 1982, only 20% of Cheng Shin's United States sales were in California).

⁵⁷ Initially, the requirement that the assertion of jurisdiction be "reasonable" was inextricably linked with the minimum contacts requirement. *See International Shoe v. Washington*, 326 U.S. 310, 320 (1945) ("It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant incurred there."); *see also* J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 125 n.9 (1985) ("The language of the *International Shoe* opinion sets out the 'fair play and substantial justice' formulation as the standard against which the sufficiency of the minimum contacts test is to be measured, thus tying the two standards together."). Subsequent decisions appeared to split the standard into a two-prong test: the *Volkswagen* Court characterized the minimum contacts inquiry as a threshold question, and deemed unnecessary further inquiry into "reasonableness" if minimum contacts between the defendant and the forum did not exist. 444 U.S. at 294; *see* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra*; *see also* *Hendrickson v. Reg O Co.*, 657 F.2d 9, 14 (3d Cir. 1981) ("[T]he Court made it clear that the first consideration must be the defendant's contacts with the forum."). Recent Supreme Court cases recognizing the distinction between "general" and "specific" jurisdiction appear to focus the due process analysis entirely on the minimum contacts question. *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984) (requiring that contacts be "continuous and systematic" where plaintiff's cause of action is unrelated to defendant's activity within the forum) (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)). The "reasonableness" prong was recently revitalized as an independent jurisdictional consideration in *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" (quoting *International Shoe*, 326 U.S. at 320). For a general discussion of *Burger King*, *see* Perschbecher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in Burger King Corp. v. Rudzewicz*, 1986 ARIZ. ST. L.J. 585.

⁵⁸ Justice Scalia was the only member of the Court who refused to join this part of the opinion.

⁵⁹ *Asahi Metal Indus. Co. v. Superior Ct.*, 107 S. Ct. 1026, 1033 (1987) (quoting *International Shoe*, 326 U.S. at 316).

⁶⁰ 107 S. Ct. at 1033.

interests of the forum state, the interstate interest in efficient dispute resolution, and, in the international setting, the interest in "furthering the fundamental substantive policies of other nations."⁶¹ Applying these factors to the facts of the case, the Court held that the assertion of jurisdiction was unreasonable: the Japanese defendant was forced to litigate in a distant forum governed by an unfamiliar legal system,⁶² while California had a "slight" interest in resolving the indemnification dispute between two alien litigants.⁶³ The Court disapproved of the California Supreme Court's failure to include the interests of alien nations in its due process analysis:⁶⁴ the Court cautioned that state courts should be "unwilling to find the serious burdens on an alien defendant outweighed by the minimal interests . . . of the plaintiff or the forum State."⁶⁵

3. FACTORS INADEQUATELY ANALYZED: INEQUITIES AND ADVERSE EFFECTS EMANATING FROM THE *Asahi* DECISION

As noted above,⁶⁶ the California Supreme Court based its jurisdictional analysis on factors that had been developed and applied in the domestic setting.⁶⁷ The United States Supreme Court considered only briefly the interests of alien nations when it reached the opposite conclusion.⁶⁸ Neither decision included an analysis of certain factors which should always be considered when issues of international dimension are

⁶¹ *Id.* at 1034.

⁶² See *infra* note 169 and accompanying text.

⁶³ It will be proposed that even where a domestic plaintiff remains a party to a product liability dispute against an alien component manufacturer, the interest of the plaintiff's forum will almost always be outweighed by the interest of the United States in preserving international commercial stability. See *infra* notes 138-39 and accompanying text.

⁶⁴ See *supra* note 21 and accompanying text.

⁶⁵ 107 S. Ct. at 1035. The *Asahi* decision thus places the lower courts in a confusing position. Determining whether the requisite minimum contacts exist between the defendant and the forum has always been the primary component of the Supreme Court's jurisdictional analysis. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957); see Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 86-116 (1983) ("chant[ing] the litany" of Supreme Court jurisdiction cases from *Pennoyer* to *Volkswagen*); *supra* note 57. But the division of the *Asahi* Court on the minimum contacts issue and the grounds upon which the decision was ultimately based suggest that the minimum contacts test is no longer the "constitutional touchstone" of the due process analysis. To base every jurisdictional question on an unstructured "reasonableness" inquiry would derogate the special need to infuse the international commercial system with stability and predictability. See generally *infra* Section 4.

⁶⁶ See *supra* notes 46-50 and accompanying text.

⁶⁷ See *infra* note 137 and accompanying text for the factors specifically discussed by the California Supreme Court.

⁶⁸ See *supra* notes 21 & 65 and accompanying text.

at stake. These factors include the ability of a particular member of the production/distribution chain to structure its conduct to avoid jurisdiction in a particular United States forum,⁶⁹ the effect that aggressive extraterritorial application of domestic long-arm statutes might have on international trade and product liability insurance,⁷⁰ and considerations of international comity.⁷¹

3.1. *The "Stream of Commerce" and the Diminished Capacity of Secondary Manufacturers to Avoid Suit in a Particular Forum*

In several respects, the stream of commerce doctrine⁷² reflects modern economic reality. The *Volkswagen* Court⁷³ was well aware that the relaxation of the restrictions imposed by the due process clause on state assertions of jurisdiction resulted from a "fundamental transformation in the American economy."⁷⁴ Although the *Volkswagen* Court specifically addressed the transformation in the national economy,⁷⁵ the change in the international economic structure has been no less striking.⁷⁶ The stream of commerce doctrine also acknowledges that alien manufacturers in the modern business world rarely deliver their products directly to United States consumers. These manufacturers instead rely on extended chains of distribution to disseminate their products

⁶⁹ See *infra* notes 89-94 and accompanying text.

⁷⁰ See *infra* notes 95-108 and accompanying text.

⁷¹ See *infra* notes 109-33 and accompanying text.

⁷² For a general discussion of the stream of commerce doctrine and the economic realities that support its adoption by the courts, see Comment, *Personal Jurisdiction in the Post-World-Wide Volkswagen Era — Using Market Analysis to Determine the Reach of Jurisdiction*, 60 WASH. L. REV. 155 (1984); Note, *Civil Procedure — North Carolina Adopts the Stream of Commerce Theory of Jurisdiction: A Step In the Right Direction — Bush v. BASF Wyandotte Corp.*, 20 WAKE FOREST L. REV. 737 (1984).

⁷³ Because a majority of the *Asahi* Court could not agree on the parameters and application of the stream of commerce doctrine as it had been fashioned in *Volkswagen*, the latter opinion is referred to directly. Cf. *Texas v. Brown*, 460 U.S. 730, 737 (1983) (noting that plurality opinions are not binding but "should obviously be the point of reference for further discussion of the issue").

⁷⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

⁷⁵ Quoting from *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957), the Court observed:

[t]oday many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

444 U.S. at 293.

⁷⁶ See *supra* notes 17-20 and accompanying text.

throughout the country.⁷⁷ By "increasing the distribution of its products through indirect sales within the forum, a [primary] manufacturer benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents."⁷⁸ The doctrine is thus grounded in fundamental notions of fairness and quid pro quo: a manufacturer should not be able to profit from the sale of its finished product within a particular state while insulating itself from the reach of the state's long-arm jurisdiction.⁷⁹ To allow an alien manufacturer to shield itself from both jurisdiction and liability for damages simply by employing a complex distribution scheme would "permit a legal technicality to subvert justice and economic reality."⁸⁰ As it is understood by the *Asahi* plurality,⁸¹ the stream of commerce doctrine thus focuses on whether each participant in the production/distribution chain "purposefully avail[ed] itself of the privilege of conducting activities with the forum state, thus invoking the benefits and protections of its laws."⁸² Presumably, a participant who

⁷⁷ *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 200 (5th Cir. 1980); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 442, 176 N.E.2d 761, 766 (1961); *Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 479, 508 A.2d 1127, 1137 (1986); Note, *The Long-Arm Reach of the Courts Under the Effects Test After Kulko v. Superior Court*, 65 VA. L. REV. 175, 178-79 (1979).

⁷⁸ *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir.), cert. denied, 454 U.S. 1085 (1981); cf. *Gray*, 22 Ill. 2d at 442, 176 N.E.2d at 766 ("The fact that the benefit [which the manufacturer] derives from [the forum state's] laws is an indirect one . . . does not make it any the less essential to the conduct of his business."); *McCombs v. Cerro Rentals*, 622 S.W.2d 822, 827 (Tenn. Ct. App. 1981) (The manufacturer "indirectly availed itself of the laws of Tennessee by injecting its products into the stream of national commerce."); Note, *supra* note 77, at 179; Comment, *supra* note 72, at 171.

⁷⁹ *DeJames*, 654 F.2d at 285; *Poyner v. Erma Werke GmbH*, 618 F.2d 1186, 1190 (6th Cir.), cert. denied, 449 U.S. 841 (1980); *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 553 F. Supp. 328, 334 (E.D. Pa. 1982); *Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 552.

⁸⁰ *Gendler*, 102 N.J. at 479, 508 A.2d at 1137 (quoting *Certismo v. Heidelberg Co.*, 122 N.J. Super. 1, 12, 298 A.2d 298, 304 (N.J. Super. Ct. Law Div. 1972)); cf. *Honeywell, Inc. v. Metz Apparaturwerke*, 509 F.2d 1137, 1144 (7th Cir. 1975) ("We look to the economic and commercial realities of the case, and . . . it is not within . . . the concepts of fairness [to allow the primary manufacturer] to insulate himself . . . by using an intermediary or professing ignorance of the ultimate destination of his products."); *Gray*, 22 Ill. 2d at 443, 176 N.E.2d at 766 ("Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts . . . lose their relations to reality, and injustice . . . is promoted."); *Currie, supra* note 79.

⁸¹ See *supra* notes 51-56 and accompanying text.

⁸² *Asahi Metal Indus. Co. v. Superior Ct.*, 107 S. Ct. 1026, 1031 (1987) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Additionally, the *Volkswagen* Court pointed out that collateral financial benefit accruing to a manufacturer would not by itself support jurisdiction. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 299 (1980).

has done so could reasonably foresee being haled into court in that state.⁸³

The stream of commerce doctrine is, therefore, designed to permit each participant in the production/distribution chain to decide whether the benefits derived from doing business in a particular forum are outweighed by the concomitant burdens of litigating there. Those who have purposefully availed themselves of the benefits of state laws are on "clear notice" that they are subject to that state's jurisdictional reach; thus alerted, they may "structure their primary conduct" to avoid suit in that state.⁸⁴

Various courts have seized upon the language quoted above and have carefully scrutinized whether manufacturers have structured their conduct to avoid suit in a particular forum. In *Oswalt v. Scripto, Inc.*,⁸⁵ the defendant, a Japanese manufacturer of cigarette lighters, delivered several million lighters each year to its exclusive United States distributor. The distributor, also a Japanese corporation, placed the lighters in the stream of commerce for sale to the United States. The Texas plaintiff was injured by one of the lighters. Defendant maintained no office, place of business, servant, employee, or director in any part of the United States. The Fifth Circuit Court of Appeals, however, concluded that jurisdiction over the defendant was properly exercised. The court noted that the defendant intended through its marketing scheme to serve the entire United States, and that defendant did not "in any way [attempt] to limit the states in which the lighters could be sold."⁸⁶ The facts of *Oswalt* can be easily distinguished from those of *Volkswagen*: the "distribution system [of the Japanese lighter manufacturer] was not structured to gain some 'minimum assurance'. . . that the lighters would not be sold in Texas,"⁸⁷ while the commercial ties of the New York retailer in *Volkswagen* were limited to several east coast states.⁸⁸

⁸³ *Asahi*, 107 S. Ct. at 1032 (quoting *Volkswagen*, 444 U.S. at 297); see *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); Ripple & Murphy, *World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead*, 56 NOTRE DAME LAW. 65, 68 (1980) (foreseeability discussed by the *Volkswagen* Court depends upon the manufacturer's purposeful availment of the privilege of conducting activities in the forum); Comment, *supra* note 72, at 167.

⁸⁴ *Volkswagen*, 444 U.S. at 297.

⁸⁵ 616 F.2d 191 (5th Cir. 1980).

⁸⁶ *Id.* at 199-200.

⁸⁷ *Id.* at 200.

⁸⁸ For other examples of the scrutiny applied to the conduct of the party challenging jurisdiction, see *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 299-300 (3d Cir. 1985) (collecting stream of commerce cases in which manufacturers had sold product to distributor which served forum); *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1271 (5th Cir. 1983) (New York manufacturer of spray paint, having little direct contact with forum in which plaintiff is injured by its product, but having shipped its

The means by which a primary manufacturer may avoid suit in a particular state are not, however, available to the alien component manufacturer.⁸⁹ Component parts are usually sold by component manufacturers to primary manufacturers pursuant to a discrete contract.⁹⁰

products into the forum state, failed to "structure[] its primary conduct to avoid contact with the forum state"); *Plant Food Co-op v. Wolfkill Food & Fertilizer*, 633 F.2d 155, 159 (9th Cir. 1980) (Canadian fertilizer dealer, knowing its product was bound for Montana, "could have objected or made other arrangements if it found exposure to Montana's long-arm jurisdiction unacceptable"); *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 553 F. Supp. 328, 333 (E.D. Pa. 1982) (French manufacturer of ball bearings "did not in any way attempt to restrict its market or limit the states in which its bearings could be sold"); *Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 481, 508 A.2d 1127, 1138 (1986) (manufacturer can avoid jurisdiction by "attempting to preclude the distribution and sale of its products in the forum state"); *Martinez v. American Standard*, 91 A.D.2d 652, 457 N.Y.S.2d 97 (App. Div. 1982) (jurisdiction not properly exercised over foreign component manufacturer where there was no evidence that this manufacturer made "a discernible effort to serve, directly or indirectly, a market in the forum state").

⁸⁹ The Supreme Court has never specifically determined the extent to which the stream of commerce doctrine applies to component manufacturers. Much of the confusion stems from the citation made by the *Volkswagen* Court to *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). *Volkswagen*, 444 U.S. at 298. *Gray* held that jurisdiction could properly be asserted over a foreign component manufacturer which delivered its products into the stream of commerce with the expectation that they would be purchased by consumers in the forum state.

It is not clear whether the *Volkswagen* Court cited *Gray* to affirm that decision, see, e.g., *Asahi Metal Indus. Co. v. Superior Ct.*, 107 S. Ct. 1026, 1037 (1987) (Brennan, J., concurring and dissenting); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 201-02 (5th Cir. 1980), or merely to acknowledge it as the leading source of the stream of commerce doctrine. See, e.g., *Humble v. Toyota Motor Co.*, 727 F.2d 709, 711 (8th Cir. 1984) (Japanese car seat manufacturer who sold seats to Japanese car manufacturer did not place allegedly defective seats in "stream of American commerce" for sale to injured Iowa plaintiff). Prior to *Asahi*, the Supreme Court hinted at the latter position. *Eschmann Bros. & Walsh, Ltd. v. Mueller & Co.*, 444 U.S. 1063 (1980). In *Eschmann*, an English manufacturer sold allegedly defective components to an Illinois manufacturer, who incorporated the components into medical instruments. The instruments were then sold throughout the United States and injured the Colorado plaintiff. The Supreme Court vacated the judgment rendered against the alien component manufacturer and remanded the case for reconsideration in light of *Volkswagen*. Petitioner's Brief at 20, *Asahi*, 107 S. Ct. 1026 (1987) (No. 85-693). *Asahi* itself did nothing to resolve the question: three justices agreed with Justice Brennan, who, as noted above, seemed to believe that *Volkswagen* affirmed the stream of commerce doctrine outlined in *Gray*; three other justices, on the other hand, agreed with Justice O'Connor, who did not explicitly mention *Volkswagen's* reference to *Gray*. For a discussion of the conflicting interpretations of *Volkswagen*, see *Asahi*, 107 S. Ct. at 1032-33. See also Comment, *supra* note 72, at 160-61.

⁹⁰ In this respect, it is difficult to see how the stream of commerce doctrine applies at all to the component manufacturer. The component manufacturer derives its economic benefits from its contract with the primary manufacturer; and, while it would be unrealistic for a component manufacturer to assume that its parts will not eventually be incorporated into finished products and sold to consumers in various states, the sale of parts to a primary manufacturer does not constitute "purposeful avail[ment] . . . of the . . . benefits and protections of [the forum state's] laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); see *Asahi*, 107 S. Ct. at 1033 (plurality adopting similar position).

Usually, component manufacturers do not control the marketing and distribution scheme of the finished product;⁹¹ nor, judging from the emphasis placed by the courts on the conduct of the primary manufacturers, are they expected to do so.⁹² This limited ability to control the marketing and distribution decisions has raised concern that component manufacturers are far more likely than primary manufacturers to be victimized by aggressive assertion of long-arm jurisdiction. The reasons for this concern are evident. It may be assumed that a state would be deterred from excessive application of its long-arm statute by the possibility that a primary manufacturer would, "if the risks [became] too great, sever its connection with the State."⁹³ But the component manufacturer exerts no such deterrent effect on a state: because the component manufacturer usually has less control over the ultimate destination of its products than the primary manufacturer, "the State is not adequately restrained by the possibility that the [manufacturer] will withdraw from its markets."⁹⁴ Because they have a limited — if not non-existent — capacity to structure their conduct to avoid suit in a particular state, component manufacturers should not be subjected to the same standards of conduct applied to primary manufacturers.

3.2. *The Potential Chilling Effect of the United States' Product Liability/Insurance Crisis on International Trade*

The efforts exerted by alien manufacturers to resist United States'

Profits reaped by the component manufacturer from the ultimate sale of the finished product need not change this conclusion: the *Volkswagen* Court stated that mere "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction . . ." 444 U.S. at 299.

⁹¹ In several cases, courts have deemed relevant to the jurisdictional analysis the fact that the component manufacturers did not control the marketing or distribution of finished products. *Asahi*, 107 S. Ct. at 1033; *Humble v. Toyota Motor Co.*, 727 F.2d 709, 710 (8th Cir. 1984); *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1085 (5th Cir. 1984) (upholding jurisdiction); *cf. Stavro, Riding the Tiger*, *FORBES*, Oct. 8, 1984, at 181 (discussing the limited decision-making capacity of a subassembly contractor to IBM). One court has, however, upheld jurisdiction partly because the component part was uniquely designed for consumers in the forum. *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 553 F. Supp. 328, 330 (E.D. Pa. 1982), *cited with approval in Asahi*, 107 S. Ct. at 1033. Other cases in which component manufacturers have actively participated in decisions regarding finished products are cited *infra* note 159.

⁹² See cases cited *supra* note 88.

⁹³ *World-Wide Volkswagen v. Woodson*, 444 U.S. at 286, 297 (1980), *quoted with approval in Asahi*, 107 S. Ct. at 1032.

⁹⁴ *Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 96. *But see Lilly, supra* note 65, at 125 (stating that "the alien defendant will often be indifferent to whether the suit against him is filed in State A or State B").

assertions of jurisdiction can best be explained by the fear with which alien tribunals regard the "fabulous damages" routinely awarded in United States' product liability cases.⁹⁵ The wording of many long-arm statutes suggests that it might not be possible to decide the jurisdictional issue without also deciding the outcome of the underlying dispute.⁹⁶

To suggest that an alien component manufacturer faced with the prospect of large adverse damage awards can "simply . . . purchase liability insurance to defray expenses incurred in litigating abroad"⁹⁷ is somewhat cavalier in light of the liability insurance crisis currently afflicting domestic manufacturers.⁹⁸ Testifying in 1978 before the House Subcommittee on Capital, Investment, and Business Opportunities, one New York Congressman, speaking for a panel of five Congressmen, noted that manufacturers who responded to a questionnaire were paying more than 300% more for their insurance premiums in 1976 than they were in 1974.⁹⁹ These findings were not uncommon.¹⁰⁰ The rapid price increases have particularly harmed the small manufacturer.¹⁰¹

⁹⁵ *Smith Kline & French Laboratories Ltd. v. Bloch*, [1983] 2 All E.R. 72, 74 (C.A.) (Denning, J.). See *Castanho v. Brown & Root Ltd.*, [1981] 1 All E.R. 143, 143 (H.L.) (American lawyers persuaded plaintiff to enforce claim in America "where the damages would probably be much greater"); Gornall & Wharton, *Briefing the Foreign Client on Starting a Business in the United States*, 6 N.C.J. INT'L L. & COM. REG. 235, 256-57 (1980).

⁹⁶ Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 246 (1967); see, e.g., 42 PA. CONS. STAT. ANN. § 5322(a)(4) (Purdon 1980) (providing that "[c]lausing harm or tortious injury [in the state] by an act or omission" outside the state may serve as a basis upon which jurisdiction may be asserted) (emphasis added). For a discussion of the issues that may arise when a court must consider the merits in order to resolve the jurisdictional question, see *Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1284-85, 1285-86 n.2 (9th Cir. 1977).

⁹⁷ Note, *Civil Procedure — Long-Arm Statutes — Jurisdiction Over Alien Manufacturers in Product Liability Actions*, 18 WAYNE L. REV. 1585, 1592 (1972).

⁹⁸ The concern about the product liability and insurance crisis is not limited to the United States. See generally Orban, *Product Liability: A Comparative Legal Restatement — Foreign National Law and the E.E.C. Directive*, 8 GA. J. INT'L & COMP. L. 342 (1978); Comment, *Federal Product Liability Reform: A Comparison of S.2670 and the System in the United Kingdom*, 9 U. PA. J. INT'L BUS. LAW 265 (1987).

⁹⁹ SUBCOMM. ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES OF THE HOUSE COMM. ON SMALL BUSINESS, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 997, 95th Cong., 2d Sess. 9 (1978) (hereinafter REPORT) (presentation of Hon. E. Pattison).

¹⁰⁰ *Id.* Conversely, it has been stated that "product liability insurance costs have never exceeded 1 percent of gross sales in the vast majority of industries." Hollings, *Preserving the Vitality of Tort Law*, TRIAL, Feb. 1984, at 104.

¹⁰¹ See REPORT, *supra* note 99; *Special Report: Liability Insurance Is Top Issue at White House Conference*, J. ACCTR., Oct. 1986, at 27 (Liability insurance is a "crisis (which) has . . . become a life and death sentence to many small businesses." (quoting *The State of Small Business: A Report of the President — Transmitted to the Congress 1986, Together With the Annual Report on Small Business and Competition of the U.S. Small Business Administration*, cited in 22 WEEKLY COMP. PRES. DOC. 1155

Responding to a survey conducted by the House Subcommittee, the Hartford Group stated that “[t]he size of the insured company is an important consideration If there is a chance of a catastrophic loss, the larger insured company will very likely generate a premium commensurate with the risk, but a small company will not.”¹⁰² Furthermore, the small manufacturer may be unable to renegotiate exorbitant rates once they are quoted: the volume of business done by the small manufacturer is frequently too small to let it demand that its rates be set at a level fairly related to its individual loss experience.¹⁰³ The result is that “small business . . . people are devastated by the high cost of liability insurance, if they can get it.”¹⁰⁴

Notwithstanding the inhibiting effect that large damage awards have on small domestic manufacturers,¹⁰⁵ it is entirely conceivable that many small alien manufacturers, leery of large damage awards and unable to purchase the necessary insurance, will simply sever all contact with the United States. For example, commercial manufacturers in the United Kingdom reacted with harsh language to a proposed United States/United Kingdom draft convention by which judgments rendered in this country against British manufacturers would be enforced in the United Kingdom:

In most relevant cases, this [enforcement] w[ould] result in what amounts to an abrogation of our legal system in favour of one containing so many features that are totally abhorrent to us The commercial and economic effects on those manufacturers who export to the United States cannot be overestimated and it seems likely that this could lead to many manufacturers withdrawing altogether from the American market.¹⁰⁶

To the extent it deters alien manufacturers from trading with this country, the extraterritorial application of state long-arm statutes may constitute a violation of the Commerce Clause of the United States

(Sept. 15, 1986)).

¹⁰² Report, *supra* note 99, at 39.

¹⁰³ *Id.* at 40.

¹⁰⁴ Collins, *Spotlight Continues to Shine on Liability Issue*, J. ACCT., May 1986, at 48.

¹⁰⁵ See generally SUBCOMM. ON ANTITRUST, CONSUMERS AND EMPLOYMENT OF THE HOUSE COMMITTEE ON SMALL BUSINESS, UNDERUTILIZATION OF SMALL BUSINESS IN THE NATION'S EFFORTS TO ENCOURAGE INDUSTRIAL INNOVATION, H.R. REP. NO. 1829, 95th Cong., 2d Sess. (1978).

¹⁰⁶ Payne, POLICY, July 1977, at 572, quoted in North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 Nw. J. INT'L L. & BUS. 219, 229 (1979).

Constitution.¹⁰⁷ More generally, the *Asahi* Court failed to discuss or condemn the adverse effect that the California Supreme Court's decision might have had on the free flow of international commerce.¹⁰⁸ This failure suggests that if principles of international comity have not been completely forgotten, they have at least been demeaned.

3.3. Principles of Comity and the Enforcement Abroad of Judgments Rendered in the United States

Principles of international comity will likely be denigrated where, as in *Asahi*, a United States court focuses its analysis primarily on domestically-developed tests for asserting adjudicatory jurisdiction. In the domestic setting, the Full Faith and Credit Clause of the Constitution¹⁰⁹ blurs the line that conceptually separates jurisdiction to adjudicate¹¹⁰ from the duty to enforce judgments:¹¹¹ if valid jurisdiction exists

¹⁰⁷ U.S. CONST. art. I, § 8. The commerce clause provides that "Congress shall have the power . . . [t]o regulate Commerce with foreign nations," and it has occasionally been invoked to restrain assertions of jurisdiction by the state courts which place undue burdens upon interstate commerce. *Id.*; see *Davis v. Farmers Co-Operative Equity Co.*, 262 U.S. 312 (1923) (statute compelling all foreign interstate carriers to submit to forum's unlimited jurisdiction as precondition of maintaining a soliciting agent there violates commerce clause). In a famous hypothetical, Judge Sobeloff warned of

the hesitancy a California dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit for . . . heavy damages in case of [an] accident attributed to a defect in the tires. It is difficult to conceive of a more serious threat and deterrent to the free flow of commerce between the states.

Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir. 1956). It appears plausible that where concern about the jurisdictional reach of United States' courts deters alien manufacturers from trading with this country, the state in question has arguably interfered with the federal congressional power to "regulate commerce with the foreign nations." See Note, *supra* note 97, at 1592.

It is worth noting that *Erlanger* was cited favorably by the *Volkswagen* Court as an example of the unintended harm which would afflict national commerce if a manufacturer's actual knowledge were adopted as the type of "foreseeability" germane to the due process analysis. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980); see *infra* notes 162-65, and accompanying text; *supra* note 83 and accompanying text.

¹⁰⁸ For an argument that the primacy of the concerns of the international commercial community should be asserted, see *infra* notes 138-39 and accompanying text.

¹⁰⁹ U.S. CONST. art. IV, § 1.

¹¹⁰ "Jurisdiction to adjudicate" is the authority of the state to make its laws applicable to persons or activities. See RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 [441] (Tent. Draft No. 6, 1985).

¹¹¹ "Jurisdiction to enforce" is the authority of the state to use its resources of government to induce or compel compliance with its laws. *Id.* § 431; see also von Mehren & Trautman, *Jurisdiction to Adjudicate*, 79 HARV. L. REV. 1121, 1126 (1966) (Issues of adjudicatory and enforcement jurisdiction are "separate, though interrelated.").

in the rendering state court, the judgment must be recognized and enforced in other states.¹¹² In the international setting, however, the Supreme Court has observed that

[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory . . . shall be allowed to operate within the dominion of another nation, depends upon . . . “the comity of nations.”¹¹³

A core notion of international comity¹¹⁴ is that the judgments of alien courts should, whenever possible, be enforced by domestic courts:¹¹⁵

[Enforcement] fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through the satisfaction of mutual expectations. The interests of both forums are advanced: the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened.¹¹⁶

It is a mistake, however, to conclude that nations will grant indiscriminate credit to alien judgments and will disregard their own minimum standards of justice.¹¹⁷ Japan may be especially reluctant to do so. Contrary to the United States policy of protracted trials and large damage awards in product liability suits, Japan has established a type of no-fault, government-administered insurance. Under this program, persons injured by defective products are automatically awarded modest compensation;¹¹⁸ it is unlikely that large damage awards rendered

¹¹² von Mehren & Trautman, *supra* note 111, at 1126.

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

¹¹⁴ “Comity” has been defined as

the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton, 159 U.S. at 163-64; *see also* *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). For a discussion of the judicial concerns over comity in a different context, see Comment, *The SEC and Foreign Blocking Statutes: Need for a Balanced Approach*, 9 U. PA. J. INT’L BUS. L. 551 (1987).

¹¹⁵ *Laker Airways*, 731 F.2d at 937.

¹¹⁶ *Id.*

¹¹⁷ *Cf. Hilton*, 159 U.S. at 164-65 (citing J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 28 (1834)).

¹¹⁸ Shōhi Seikatsu Yō Seihin Anzen Hō (Consumer Products Safety Act), Law Published by Penn Law: Legal Scholarship Repository, 2014

abroad would be unhesitatingly enforced.¹¹⁹ European countries are similarly wary. The Netherlands simply refuses to enforce any judgment rendered abroad.¹²⁰ France claims exclusive jurisdiction over lawsuits to which her citizens are parties and will not recognize the judgment of an alien court against a French citizen.¹²¹ West Germany determines whether alien judgments will be enforced by extrapolating from the bases on which adjudicatory jurisdiction is assumed:¹²² a judgment rendered against a German defendant who has assets in the rendering nation¹²³ or who has appeared and been served in the rendering forum¹²⁴ will be enforced in Germany. England also will enforce alien judgments if an "acceptable" base of adjudicatory jurisdiction, which includes either personal service on the English defendant within the forum or the defendant's voluntary appearance, was asserted in the original proceeding.¹²⁵

The reluctance to enforce alien judgments can best be explained by the enforcing country's concern that its citizen was not treated fairly by the alien tribunal. This concern is well founded. Within the domestic setting, it has been observed that "the countervailing policies which favor restraint [in the extraterritorial assertion of long-arm jurisdiction]

No. 31, art. 63 (Japan 1973). For a general discussion of this Act, see 7 *DOING BUSINESS IN JAPAN* § 4.08[2] (Z. Kitagawa ed. 1983). Amici Brief of California Manufacturers' Association at A-7, *Asahi Metal Indus. Co. v. Superior Ct.*, 107 S. Ct. 1026 (1987) (No. 85-693).

¹¹⁹ More generally, the Japanese legal system is imbued with the core elements of the Confucian order. This order discourages even Japanese citizens from litigating their claims. Because "it was the duty of the faithful commoner not to disturb the lord's peace by becoming too involved in a lawsuit," the Japanese courts impose upon potential plaintiffs stiff litigation taxes and long calendar delays. *The Role of the Law and Lawyers in Japan and the United States*, WILSON Q., Autumn 1984, at 46; see also Chira, *To Be Sorely Tried, Try Filing a Lawsuit in Japan*, N.Y. Times, Sept. 1, 1987, at A4, col. 3 (noting that there exists in Japan "a cultural taboo against resorting to the courts").

¹²⁰ *WETBOEK VAN BURGERLIJKE RECHTSVORDERING [Rv.]* art. 431, § 1 (Neth.); see von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1602 (1968).

¹²¹ *CODE CIVIL [C. CIV.]* art. 2123 (Fr.); von Mehren & Trautman, *supra* note 120, at 1613; H. BATIFOL, *DROIT INTERNATIONAL PRIVÉ* § 718 (4th ed. 1967).

¹²² *ZIVILPROZESSORDNUNG [ZPO]* § 328 (W. Ger.). The judgment of an alien nation will not be enforced "if the courts of the state to which the foreign court belongs do[] not have jurisdiction under German law." von Mehren & Trautman, *supra* note 120, at 1611, n.23.

¹²³ West German law provides that "[a]ctions pertaining to property against a person having no domicile in the interior may be brought before a court in whose district property of the defendant is situated." ZPO § 23, translated in de Vries & Lowenfeld, *Jurisdiction in Personal Actions — A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 332 (1959).

¹²⁴ ZPO § 23; see von Mehren & Trautman, *supra* note 120, at 1611 n.23.

¹²⁵ Foreign Judgments (Reciprocal Enforcement) Act, 1933, 15 & 16 Geo. 5, ch. 47, § 4; von Mehren & Trautman, *supra* note 120, at 1614.

will have no political outlet in the forum state . . . Long-arm legislation applies only to those who are not constituents, and usually favors those who are."¹²⁶ The same problem exists in the international setting, and it is particularly acute with respect to the civil law countries. In these countries, the rules for international litigation were promulgated at a time when international cooperation in that field was unknown; the resulting bases upon which jurisdiction may be asserted are notoriously chauvinistic.¹²⁷ By forcing the plaintiff to sue the defendant in a forum in which the defendant has voluntarily appeared, the traditional rules of recognition attempt to provide at least a minimum assurance that the defendant will not be treated unfairly.¹²⁸ But long-arm statutes permit the plaintiff to "call the defendant to him" and their increased use has heightened concern that the alien defendant might not be treated fairly. Consequently, it has been observed that, "when the plaintiff in the original proceeding is seeking to derive advantage from a judgment in his favor, recognition . . . becomes correspondingly more problematical."¹²⁹

Although the assertion of jurisdiction over alien manufacturers obviously cannot depend on the attitude of the enforcing nation, the assertion should at least show a respectful regard for the more conservative views of other nations. Domestic courts would do well to recognize that assertions of jurisdiction based on comparatively intangible concepts, such as "minimum contacts" or "purposeful availment," are, from the outset, likely to be regarded with suspicion by nations requiring either personal presence and service, or the presence of assets.¹³⁰ The aggressive assertion of such domestic jurisdictional bases is likely to have serious repercussions: von Mehren and Trautman have warned that "a legal system cannot confine its analysis solely to its own ideas of what is just, appropriate, and convenient . . . Conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal, and economic reprisals."¹³¹

¹²⁶ Carrington & Martin, *supra* note 96, at 237.

¹²⁷ De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L.Q. 706, 706-08 (1968).

¹²⁸ von Mehren & Trautman, *supra* note 120, at 1616. For a discussion of the principle of recognition, see *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); G. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 537-38 (7th ed. 1965).

¹²⁹ von Mehren & Trautman, *supra* note 120, at 1616.

¹³⁰ See *supra* notes 123-25 and accompanying text.

¹³¹ von Mehren & Trautman, *supra* note 111, at 1127; see also North, *supra* note 106, at 236 (noting fierce opposition to the jurisdictional provision by which judgments rendered in the United States against British manufacturers would be enforced in the United Kingdom); Amici Brief of the American Chamber of Commerce in the

4. TOWARDS AN INTERNATIONAL JURISDICTION

4.1. "Reasonableness" and the Needs of the International Commercial Community

From the previous section, it may be concluded that the assertion of jurisdiction by a plaintiff in one country over a defendant in another must be "reasonable" in an international sense. Comity notwithstanding, the international legal system is consensual: nations are not bound to enforce judgments rendered by other nations, and reasonableness, within this context, is a prerequisite to the extraterritorial assertion of jurisdiction.¹³² Within the domestic setting, the assertion of jurisdiction over a foreign defendant is said to be reasonable if the defendant has certain "minimum contacts" with the forum.¹³³ Within the international setting, however, this test is inadequate in several respects. Leaving aside the unjustified hardships that such a test works against the domestic plaintiff,¹³⁴ domestically-developed jurisdictional tests will necessarily apply domestic notions of "fair play and substantial jus-

United Kingdom and the Confederation of British Industry at 11 n.6, *Asahi Metal Indus. Co. v. Superior Ct.*, 107 S. Ct. 1026 (1987) (No. 85-693) (noting that negotiations on the draft convention were broken off in part because of British manufacturers' concerns that the jurisdictional provision would subject them to excessive product liability damages).

¹³² These principles are recognized by the RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 2, 1981). Section 403(1) provides that even if a country acquires prescriptive jurisdiction through § 402, "a state may not apply law to the conduct, relations, status or things having connection with another state . . . when the exercise of such jurisdiction is unreasonable." *Id.* § 403(1). Section 403(2) lists various factors which the court should consider to determine whether the exercise of jurisdiction is reasonable.

The reasonableness test set forth in § 403(2) may, however, be circumvented. Although § 403 requires reasonableness to be assessed in light of the § 403(2) factors, § 415(2) provides that where the "principal purpose" of the defendant's contact with the forum is to "affect" United States commerce, no specific § 403(2) examination is required. See *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d at 909 n.152 (D.C. Cir. 1984).

¹³³ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¹³⁴ Professor Lilly argues that the minimum contacts test is premised on the tacit assumption that in the domestic setting, at least two fora are available to the domestic plaintiff: if jurisdiction fails in the plaintiff's own state for want of minimum contacts, it can be invoked in the state in which the defendant is incorporated. In the international setting, however, the strict requirement that the alien corporation have minimum contacts with the plaintiff's particular state will often lead to the complete failure of jurisdiction within this country. Lilly, *supra* note 65, at 124. Lilly goes on to state that because "[t]here is no apparent basis in *International Shoe* and its offspring for permitting a state to extend its *in personam* jurisdiction beyond the generally applicable constitutional limits simply on the ground that the defendant is an alien," this problem cannot be remedied by aggregating the alien defendant's contacts with the entire nation. *Id.* at 127; see *Superior Coal Co. v. Ruhrkohle A.G.*, 83 F.R.D. 414, 419 (E.D. Pa. 1979) (listing cases which require that the alien defendant have sufficient contact with the plaintiff's particular state).

tice":¹³⁵ considerations of international comity will be either omitted from the analysis or relegated to positions of secondary importance. More important, the domestic minimum contacts test focuses the assessment of reasonableness solely upon the competing interests of the actual litigants.¹³⁶ Reasonableness, in the international commercial setting, must be assessed in light of the paramount interest of the United States in maintaining a reciprocally fair system for transnational interaction.¹³⁷ Professor Maier has, therefore, stated that international assessments of reasonableness must be made "with special reference to the importance of maintaining jurisdictional rules that will support, ease and encourage international economic and social intercourse."¹³⁸

The Supreme Court has, in other areas of the law, consistently asserted the primacy of international commercial considerations. In *The Bremen v. Zapata Off-Shore Co.*,¹³⁹ the Court enforced a forum-selection clause in a contract between German and American merchants. The clause specified that any disputes arising under the contract were to be resolved in the United Kingdom. The Court noted that forum-selection clauses had generally been disfavored by United States courts: such clauses were usually held to be "contrary to public policy" and were not enforced.¹⁴⁰ The Court, however, was more concerned with the realities of international commerce than with providing the United States plaintiff with the most convenient forum:

For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States The expansion . . . will hardly be encouraged if, notwithstanding solemn contracts, we insist

¹³⁵ *International Shoe*, 326 U.S. at 316. The Supreme Court has specifically warned that "[t]o determine that 'American standards of fairness' . . . must nonetheless govern [a] controversy [involving extremely attenuated contact between a German corporation and the United States] demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries." Scherk v. Alberto-Culver, 417 U.S. 506, 517 n.11 (1974).

¹³⁶ See, e.g., *Omstead v. Brader Heaters, Inc.*, 5 Wash. App. 258, 270-71, 487 P.2d 234, 242 (1971). Similarly, the California Supreme Court focused its inquiry on California's "strong interest" in protecting its resident consumers, administering its laws in an orderly fashion, and reducing the likelihood of inconsistent verdicts. *Asahi Metal Indus. Co. v. Superior Ct.*, 39 Cal. 3d 35, 53, 702 P.2d 543, 553, 216 Cal. Rptr. 385, 395 (1985); see also *Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355, 1359 (9th Cir. 1983); *Buckeye Boiler Co. v. Superior Ct.*, 71 Cal. 2d 893, 899, 458 P.2d 57, 62, 80 Cal. Rptr. 113, 118 (1969).

¹³⁷ Maier, *Extraterritorial Jurisdiction at a Crossroads: An Interaction Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 301 (1982).

¹³⁸ *Id.* at 303.

¹³⁹ 407 U.S. 1 (1971).

¹⁴⁰ *Id.* at 8; see, e.g., *Carbon Black Export, Inc. v. The SS Monrosa*, 254 F.2d 297, 300-01 (5th Cir. 1958).

on a parochial concept that all disputes must be resolved under our laws and in our courts We cannot have trade and commerce in world markets and international waters [resolved] exclusively on our [own] terms.¹⁴¹

The Court concluded that "present-day commercial realities" and "expanding international trade" mandated the enforcement of choice-of-forum provisions.¹⁴²

The Court itself has indicated that controversies carrying international commercial implications must be governed by special considerations. In *Scherk v. Alberto-Culver Co.*,¹⁴³ the Court upheld an arbitration clause providing that the International Chamber of Commerce in Paris would resolve all disputes arising under a contract for the sale of three German corporations by Scherk to Alberto-Culver, a United States corporation. Alberto-Culver alleged that Scherk had falsely stated that the trademarks owned by the corporations were unencumbered. Alberto-Culver alleged that this violated the Securities Exchange Act of 1934¹⁴⁴ and Rule 10b-5.¹⁴⁵ To avoid the arbitration clause, Alberto-Culver relied on *Wilko v. Swan*.¹⁴⁶ In that case, the Court, dealing with two domestic corporations, found that arbitration and choice-of-law provisions were the sorts of "stipulation[s] [that could not] be waived under . . . the Securities Exchange Act."¹⁴⁷ The Court in *Scherk*, however, refused to let the policies embodied in the Securities Exchange Act override the special need to infuse stability and predictability into the international commercial system:

A contractual provision specifying in advance the forum in which disputes shall be litigated . . . is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction

. . . [T]he dicey atmosphere [which results from a system in which such provisions are not enforced] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter

¹⁴¹ *The Bremen*, 407 U.S. at 8-9.

¹⁴² *Id.* at 15. The Court noted that such a clause would not be enforced if there were a "strong showing that it should be set aside." *Id.*; see also Maier, *supra* note 137, at 312-13.

¹⁴³ 417 U.S. 506 (1974).

¹⁴⁴ 15 U.S.C. §§ 78a-78hh (1980).

¹⁴⁵ 17 C.F.R. § 240.10b-5 (1986).

¹⁴⁶ 346 U.S. 427 (1953).

¹⁴⁷ *Id.* at 434-35.

into international commercial agreements.¹⁴⁸

4.2. *Serving the Needs of the International Commercial Community*

4.2.1. *Presumption of Unreasonableness*

Several conclusions follow from the previous section. First, the primacy of the needs of the international commercial community must be asserted: only in this way will stability and predictability be infused into the international system.¹⁴⁹ For the same reason, the jurisdictional test governing situations similar to *Asahi* should be easy to apply and, to some extent, outcome-determinative.¹⁵⁰ Finally, no state should assert jurisdiction over any manufacturer which could not structure its conduct to avoid suit there:¹⁵¹ fundamental principles of fairness¹⁵² will be denigrated if this is not the case. The principal inquiry should, therefore, relate to the particular position each manufacturer occupies in the production/distribution chain; assertions of jurisdiction over manufacturers occupying secondary positions in the chain will be presumptively unreasonable.¹⁵³

The presumption set forth above is satisfactory for several reasons. First, the inquiry into the particular position each alien manufacturer occupies in the production/distribution chain constitutes the logical extension of present inquiries: lower courts have already distinguished between primary and secondary manufacturers, and have constrained the scope of jurisdiction to which the latter can be exposed.¹⁵⁴ Second, the

¹⁴⁸ *Scherk v. Alberto-Culver*, 417 U.S. 506, 516-17 (1974). For a general discussion of the comity interests raised by extraterritorial assertions of jurisdiction by the Securities and Exchange Commission, see Comment, *supra* note 114.

Professor Maier notes that the Supreme Court has in other areas of the law evinced a similar desire to infuse the international commercial system with stability. See Maier, *supra* note 137, at 304-12.

¹⁴⁹ See *supra* notes 137-38 and accompanying text.

¹⁵⁰ The quest for an outcome-determinative test is not unique to the international setting. Domestically, it has been noted that there have been efforts — principally through focusing attention on the activity of the defendant — to “build the minimum contacts test into a rigid test, good for all occasions.” Carrington & Martin, *supra* note 96, at 239-40.

¹⁵¹ See *supra* notes 89-94 and accompanying text.

¹⁵² For a general discussion concerning the role of “fairness” in assertions of jurisdiction, see Case Comment, *World-Wide Volkswagen Corp. v. Woodson*, 11 CUMB. L. REV. 481 (1980); Case Comment, *World-Wide Volkswagen Corp. v. Woodson*, 32 U. FLA. L. REV. 795 (1980).

¹⁵³ For a discussion of the manner in which this presumption may be rebutted, see *infra* Section 4.2.2.

¹⁵⁴ See *Nelson v. Park Indus.*, 717 F.2d 1120, 1125 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984); *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 533 F. Supp. 328, 332 (E.D. Pa. 1982); Charles Gendler & Co. v. Telecom Equip. Corp., 102 N.J. 460, 478, 508 A.2d 1127, 1136 (1986). This concept

inquiry is fair: primary manufacturers and those closest to them on the production chain are best able to structure the distribution scheme to avoid suit in a particular, distant forum.¹⁵⁵ Third, the results of the presumption will accord with the reasonable expectations of the parties. Because they derive their profits from the sale of finished products, primary manufacturers usually establish broad distribution schemes that serve the largest possible markets.¹⁵⁶ A primary manufacturer cannot in good faith argue that it is not amenable to suit in a forum within the market it chose to exploit. The secondary manufacturer, however, derives its greatest economic benefit from its contract with the primary manufacturer, and only collateral benefit from the eventual sale of the finished product. The secondary manufacturer would not, therefore, reasonably expect the minor benefit derived from the sale of the product to a distant forum to carry with it the concomitant burden of defending a product liability suit there. Finally, because it will usually force only primary manufacturers to litigate in American courts, the presumption ensures that the United States will make the smallest possible intrusion into the international commercial system.¹⁵⁷

is merely extended one step further when the scope of jurisdiction to which a component manufacturer can be exposed is similarly constrained. The component manufacturer is, functionally, a secondary manufacturer: like local retailers who avail themselves primarily of the benefits of particular, local markets, component manufacturers avail themselves primarily of the benefits of the contract formed with the primary manufacturer. See *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 303 (3d Cir. 1985) (Sloviter, J., dissenting) (noting that "the benefit derived by *manufacturers* who place their products in the stream of commerce is far different from the mere derivative benefit received by distributors and *analogous defendants* . . .") (second emphasis added).

¹⁵⁵ See *supra* notes 89-94 and accompanying text. Evidence that a secondary manufacturer in some way controlled or actively participated in the distribution scheme may rebut the presumption that the assertion of jurisdiction over it is unreasonable. See *infra* Section 4.2.2.

¹⁵⁶ *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *Gendler*, 102 N.J. at 478, 508 A.2d at 1136-37; see also Note, *The Long Arm Reach of the Courts Under the Effects Test After Kulko v. Superior Court*, 65 VA. L. REV. 175, 179 (1979) (discussing the reasonable expectations of corporations marketing their goods in interstate commerce).

¹⁵⁷ See *supra* Section 4.1. This result does not significantly compromise the rights of an injured plaintiff: because the primary manufacturer usually has the "deepest pocket," the domestic plaintiff should be adequately compensated without joining every participant in the production chain. Cf. *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) (stating that one reason for introducing strict liability into the product liability area was that the primary manufacturer was in the best position to insure against the risk of injury and distribute to the public the costs incurred therein).

4.2.2. *Rebutting the Presumption: Participation in the Distribution Scheme and Factors of Secondary Importance*

The presumption outlined above is based partly on the assumption that alien component manufacturers do not control the scheme by which the finished product is distributed.¹⁵⁸ Consequently, the basis of the presumption is undermined when an alien component manufacturer helps to decide where the finished product is to be distributed.¹⁵⁹ The component manufacturer in that case cannot complain that it could not prevent its components from being swept into a distant forum. Where an alien component manufacturer plays an active role in distribution decisions, the court should determine whether jurisdiction may properly be asserted by balancing the needs of the international commercial community¹⁶⁰ against the secondary factors set forth below. Although the factors may individually be of limited importance, they may collectively rebut the presumption which ordinarily arises.

Subjective Knowledge. An inquiry into whether each defendant manufacturer was subjectively aware of the ultimate destination of the finished product should be of minor importance.¹⁶¹ Such an inquiry will, first, require the judiciary to expend additional resources ascertaining each defendant's subjective awareness.¹⁶² The problem is exac-

¹⁵⁸ See *supra* note 91 and accompanying text.

¹⁵⁹ See, e.g., *Hendrickson v. Reg O Co.*, 657 F.2d 9, 15 (3d Cir. 1981) (component part manufacturer has "not only placed its products in the stream of commerce" but has "actively worked to retain its forum customers' good will and future patronage by selling repair parts, additional goods, and furnishing technical advice and assistance"); *Allen Organ Co. v. Kawai Musical Instruments Mfg.*, 593 F. Supp. 107, 111 (E.D. Pa. 1984) (Japanese manufacturer and American distributor are, for practical purposes, the same company); *Rockwell Int'l Corp. v. Construzioni Aeronautiche Giovanni Agusta, S.p.A.*, 553 F. Supp. at 328, 329-30 (E.D. Pa. 1982) (French ball bearing manufacturer "[w]orks closely" with primary manufacturer and has exclusive agreement with California corporation to promote or sell finished product); see also *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 299 (3d Cir. 1985) (collecting cases in which "the [secondary] manufacturers involved . . . made deliberate decisions to market their products in the forum state"); *Metrix Warehouse, Inc. v. Daimler-Benz Akteingesellschaft*, 716 F.2d 245 (4th Cir. 1983) (component manufacturer attempts to affect policy regarding distribution of its products).

¹⁶⁰ See *supra* Section 4.1.

¹⁶¹ Recent opinions, unfortunately, make this factor the focus of analysis. See, e.g., *Asahi Metal Indus. Co. v. Superior Ct.*, 107 S. Ct. 1026, 1035 (1987) (Brennan, J., concurring and dissenting) (arguing that "the stream of commerce refers . . . to the regular and anticipated flow of products from manufacture to distribution to retail"); *Nelson v. Park Indus.*, 717 F.2d 1120, 1125-26, (7th Cir. 1983) ("[I]n determining whether it is reasonable to hale [defendants] into court . . . a critical fact is whether these defendants are aware of the distribution system.").

¹⁶² Carrington and Martin have observed that jurisdictional issues which depend on specific questions of fact for their resolution "may become so intolerably complex that our judicial operations will become overburdened, or top-heavy, with preliminary issues." Carrington & Martin, *supra* note 96, at 246-47; see, e.g., *United States v.*

erbat if constructive awareness is imputed to manufacturers.¹⁶³ The imposition of jurisdictional burdens on defendant manufacturers who "knew or should have known" the ultimate destination of the product may significantly increase the costs of each transaction: secondary manufacturers will have to invest considerable costs to ascertain this destination, determine whether they are willing to assume the risks of litigating there, and, perhaps, negotiate with the primary manufacturer concerning a restricted scope of distribution.¹⁶⁴

Interest of Plaintiff's State. The interest of the plaintiff's state in providing resident consumers with a convenient forum in which to litigate¹⁶⁵ is also of reduced importance. As noted above, the Supreme Court has in other areas of the law stressed that the interests of the particular parties to a lawsuit and their respective countries must defer to the paramount interest of the United States in maintaining a "reciprocally fair system for transnational interaction."¹⁶⁶ Where both parties to a lawsuit implicating international commerce are aliens, a state should be extremely reluctant to exercise jurisdiction. Notwithstanding the fact that a state in such circumstances would have no interest in providing its residents with a convenient forum, the application of United States law to a dispute that involves only alien parties would have a disruptive effect on the international system.¹⁶⁷ The alien parties would also be forced to litigate in an unfamiliar legal system, and it is unlikely that this confusion would be greatly dispelled by the application of alien law in the United States court.¹⁶⁸ The absence of a domestic litigant also suggests that the case would be more properly litigated abroad,¹⁶⁹ a result that would be welcomed by overburdened domestic

Montreal Trust Co., 35 F.R.D. 216 (S.D.N.Y. 1964) (full and separate hearing to decide jurisdictional facts).

¹⁶³ See, e.g., *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir.), cert. denied, 454 U.S. 1085 (1981); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 197 n.8 (5th Cir. 1980).

¹⁶⁴ See generally Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570 (1984) (describing costs of doing business within the United States legal framework).

¹⁶⁵ See, e.g., *Asahi Metal Indus. Co. v. Superior Ct.*, 39 Cal. 3d 35, 53, 702 P.2d 543, 553, 216 Cal. Rptr. 385, 395 (1985).

¹⁶⁶ Maier, *supra* note 137, at 306.

¹⁶⁷ See, e.g., *Benz v. Compania Naviera Hildago*, 353 U.S. 138 (1956) (application of NLRA).

¹⁶⁸ Even if alien law were applied in a United States court, the trial would necessarily involve domestic procedures confusing to the litigants. Amici Brief of the American Chamber of Commerce in the United Kingdom and the Confederation of British Industry at 14, n.9, *Asahi Metal Indus. Co. v. Superior Ct.*, 107 S. Ct. 1026 (1987) (No. 85-693).

¹⁶⁹ See generally Comment, *Restoring Justice to the Doctrine of Forum Non Con-*

courts.¹⁷⁰

Place of Injury. The forum in which a particular plaintiff was injured by an alleged defect is also of limited importance. In *Romero v. International Terminal Operating Co.*,¹⁷¹ the Supreme Court indicated that the place where a plaintiff was injured was not a relevant consideration in international transactions. The Court observed that adopting the place-of-injury rule as the dispositive factor in a Jones Act case would be “disruptive of international commerce” because the rule “[did] not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations.”¹⁷² While a forum may well have a legitimate interest in providing its plaintiff with a convenient forum,¹⁷³ this interest will nearly always be outweighed by the interests of the international commercial community. This factor should, accordingly, be given very little weight in determining whether or not to assert jurisdiction over a particular manufacturer.

5. CONCLUSION

Domestically developed and aggressively applied jurisdictional principles have no place in the international commercial setting. This is particularly true with respect to secondary manufacturers who cannot structure the scheme of distribution in order to avoid the jurisdiction of a particular forum. The spectre of liability under United States product liability laws may be sufficient to deter small alien manufacturers from dealing with this country. By subjecting only those manufacturers who occupy primary positions on the production/distribution chain to litigate in distant fora, the United States promotes a predictable, minimally-intrusive base of jurisdiction. In this manner, international comity will be fostered, and a reciprocally fair system for international interaction will be maintained.

veniens, 8 J. COMP. BUS. & CAP. MARKET L. 169, 177-81 (1986); Note, *Forum Non-Conveniens and the Foreign Plaintiffs in Federal Courts*, 69 GEO. L.J. 1257, 1264-68 (1981).

¹⁷⁰ The dissenters in the California Supreme Court's decision of *Asahi* noted that the adjudication in this country of a dispute between two aliens constituted a mismanagement of judicial resources: “[California's] overburdened courts should be concerned with disputes that more directly involve California.” 39 Cal. 3d at 56, 702 P.2d at 555, 216 Cal. Rptr. at 397.

¹⁷¹ 358 U.S. 354 (1959).

¹⁷² *Id.* at 384.

¹⁷³ See *supra* note 137.