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# ASAHI METAL INDUSTRY CO. V. SUPERIOR COURT: EFFECT OF STATE COURT JURISDICTION ON INTERNATIONAL TRADE

Emily B. Randall\*

## INTRODUCTION

The application of traditional principles of in personam jurisdiction to alien<sup>1</sup> corporate defendants often conflicts with international trade policy objectives. State court jurisdiction over alien corporations involves two competing interests: the interest of the state in administering justice within its territorial boundaries, and the interest of the state in promoting national foreign trade goals.<sup>2</sup> In deciding whether to exercise in personam jurisdiction over alien corporations, state courts apply the minimum contacts test.<sup>3</sup>

The minimum contacts analysis for personal jurisdiction evolved in response to problems concerning nonresident *domestic* defendants.<sup>4</sup> In that context, the minimum contacts approach assisted state courts in examining whether a defendant's relationship to the forum state justified imposition of local judicial power.<sup>5</sup> Different concerns arise, how-

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1. For purposes of this Comment, "alien" refers to an individual or corporation of a foreign country.

2. See Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 257 (1986) (outlining competing state interests in the international commercial arbitration context).

3. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980); Kulko v. Superior Court, 436 U.S. 84, 92 (1978); Shaffer v. Heitner, 433 U.S. 186, 212 (1977); Hanson v. Denckla, 357 U.S. 235, 251 (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

4. See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that the assertion of in personam jurisdiction over a Delaware defendant with sufficient contacts in Washington did not offend traditional notions of fair play and substantial justice).

5. See *id.* (creating the defendant-oriented minimum contacts test); see also Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 79 (analyzing the nature of the contacts of a defendant with the forum state in terms of its relation to the controversy); Jay, "Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. REV. 429, 432-35 (1981) (presenting an overview of the Supreme Court decisions involving the minimum contacts test and criticizing the defendant-oriented approach); Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 488 (1984) (presenting the Supreme Court cases that

ever, when courts apply to alien defendants the jurisdictional test constructed for nonresident, domestic defendants.<sup>6</sup> In particular, the traditional analysis fails to account for international trade policy considerations.

In 1982, the Supreme Court in *Asahi Metal Industry Co. v. Superior Court*,<sup>7</sup> applied the traditional in personam jurisdictional analysis and concluded that a California court could not assert jurisdiction over a Japanese component parts manufacturer. Although the Court applied the traditional analysis, it intimated that international comity concerns mandated a need for judicial restraint.<sup>8</sup> In weighing these concerns, this Case-Comment argues that state courts should also take into account the potential adverse impact on international trade when they attempt to assert jurisdiction over alien corporations.<sup>9</sup> Ultimately, courts should disfavor asserting jurisdiction when a probable restraint on international commerce may result.<sup>10</sup>

This Case-Comment analyzes the Supreme Court decision in *Asahi Metal Industry Co. v. Superior Court*<sup>11</sup> and explores analogous international cases that provide a framework within which courts can assess the impact of state court jurisdiction on international trade. Part I explores the theories that underlie the traditional framework courts use to determine when they may assert in personam jurisdiction and analyzes the limits of these theories as applied to alien defendants. This section also evaluates assertions of jurisdiction when a defendant's contacts with the state are indirect or unsubstantial. Part II analyzes the lower court and the Supreme Court decisions in *Asahi Metal Industry*. Part III presents the international trade policy issues addressed in both the note case and related international cases. Part IV of this Case-Com-

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have shaped the development of a theory of state jurisdiction over nonresident defendants). One commentator also argues by analogy that courts should use a substantive causation approach to jurisdiction. Brilmayer, *supra*, at 105.

6. See Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 116-17 (1983) (comparing the application of the minimum contacts test in the domestic setting to its application in the transnational setting); Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758, 772-73 (1984) (suggesting using a reasonableness test as the benchmark for determining jurisdiction over alien defendants).

7. See *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1034-35 (1987) (failing to find that the plaintiff had sufficient minimum contacts with a foreign state to satisfy due process considerations).

8. See *id.* (suggesting that the court analyze individually each case involving an alien defendant).

9. See *infra* notes 231-63 and accompanying text (interpreting the international trade policy concern).

10. See *infra* notes 236-41 (highlighting some of the adverse effects that extraterritorial jurisdiction places upon international commerce).

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

ment concludes that courts should incorporate an international trade policy analysis into their determination of when they may exercise in personam jurisdiction over alien corporation defendants.

## I. JUDICIAL THEORIES OF IN PERSONAM JURISDICTION

### A. THEORETICAL CONSIDERATIONS: ALTERNATIVE FORUM AND STATE SOVEREIGNTY CONCERNS

Courts examine the connection of the defendant with the forum state when determining whether a court should assert jurisdiction over an alien defendant.<sup>12</sup> The Supreme Court established this minimum contacts test in *International Shoe Co. v. Washington*.<sup>13</sup> The test is a quantitative measure of the nexus between the activity of the defendant and the forum state.<sup>14</sup>

Although the Supreme Court has refined the analysis since *International Shoe*, the minimum contacts test is an adequate framework for deciding whether to exercise jurisdiction over alien defendants. The problem arises, in part, because the theoretical assumptions that operate in the domestic context do not apply in the alien defendant context. The assumptions of the traditional approach are as follows: 1) the absolute availability of a domestic forum, 2) the overriding importance of state sovereignty concerns, 3) the enforceability of judgments under the full faith and credit clause of the United States Constitution, and 4) the United States constitutional protections that prevent states from taking retaliatory action against other states.<sup>15</sup> In the alien corporate defendant context, there are flaws with each of these assumptions.

First, a court that employs the minimum contacts test assumes that a domestic forum is available in which a United States plaintiff can bring a claim.<sup>16</sup> Under the traditional approach, the injured party in a domestic context may bring suit in the domiciliary state of the defendant.<sup>17</sup> When the defendant is a United States corporation, the plaintiff

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12. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (establishing the minimum contacts test for in personam jurisdiction over nonresident domestic defendants).

13. *Id.*

14. *Id.*

15. See Lilly, *supra* note 6, at 116-17 (discussing the policy differences between exercising jurisdiction over nonresident and alien defendants).

16. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (reviewing historical bases of in personam jurisdiction).

17. See *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1877) (borrowing principles of territorial sovereignty from international law to limit jurisdiction to state boundaries). The Court in *International Shoe* extended the principles that the Court established in *Pennoyer* to allow state courts to reach beyond their boundaries when a defendant has

may also bring suit in the state where the corporation maintains its principal place of business.<sup>18</sup>

These assumptions are inapplicable, however, when the defendant is an alien corporation. A plaintiff may be unable to sue in a United States court because the alien defendant lacks sufficient contacts with any of the fifty states.<sup>19</sup> The plaintiff would have to seek recovery in a foreign country.<sup>20</sup> The inconvenience and expense of litigating abroad may, alone, prevent the plaintiff from suing in a foreign forum.<sup>21</sup> Moreover, depending on the choice of law rules of the forum,<sup>22</sup> the applicable substantive law may provide an inadequate remedy.<sup>23</sup> In addition,

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sufficient contacts with the state. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

18. See, e.g., ILL. ANN. STAT. ch. 110, § 2-209 (1983) (permitting jurisdiction over any person who transacts business within the state); N.Y. CIV. PRAC. L. & R. 302 (1972) (permitting jurisdiction over any nondomiciliary who regularly does business within the state); N.C. GEN. STAT. § 1-75.4 (1983) (circumscribing jurisdiction over a party who is engaged in substantial activity within the state). The extent of state court jurisdiction depends upon the state's long arm statute. The most inclusive long arm statutes extend jurisdiction up to the limits of federal constitutional due process. See R.I. GEN. LAWS § 9-5-33 (1985) (construing jurisdiction over foreign corporations as equivalent to due process construction that Rhode Island or United States courts give).

19. *Cyromedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287, 289 (D. Conn. 1975) (discussing a motion to dismiss a claim against an alien defendant that conducted its business in the United States and employed United States distributors due to insufficient contact with the forum state).

20. See *Lilly*, *supra* note 6, at 124 (noting that the requirement of minimum contacts with a particular state can entirely frustrate domestic jurisdiction).

21. See *id.* at 127-28 (discussing the possible futility of a plaintiff suing a defendant in a foreign judicial system); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980) (discussing the burden on the defendant of litigating in a distant or inconvenient forum).

22. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 comment a.3 (1971) (defining choice of law as the rules each state court must apply to determine whether the court shall apply local law).

23. See Hollenshead & Conway, *An Overview: International Products Liability*, 16 TRIAL 50, 50 (1980) (pointing out the increased possibility of product liability actions against alien defendants and the need for lawyers in the United States to have greater familiarity with foreign laws). The European Community has submitted a proposal that imposes a strict product liability standard on manufacturers whose products injure consumers in Common Market countries. *Id.* at 52-53. Unlike United States courts, European courts impose monetary ceilings on punitive damage awards. *Id.* at 52. Article 1 of the proposal imposes liability on the manufacturer for its defective products when the defect was unknown and undetectable at the time of distribution. *Id.* at 53. West Germany provides a no-fault standard of liability in the pharmaceutical industry. *Id.* Japanese law generally adheres to a negligence standard in product liability actions. *Id.* at 54. Problems of proof associated with negligence claims, however, limit liability in Japanese claims. *Id.* New Zealand operates an insurance program under which tort claims are unnecessary because victims receive compensation from a general fund that employers, self-employed persons, and automobile owners finance. *Id.* at 53-54; see also AMERICAN TEXTILE MACHINERY ASS'N, INTERNATIONAL STUDY OF PRODUCT LIABILITY COSTS AND SYSTEMS FOR FIVE DOMESTIC MACHINERY INDUSTRIES 182-308 [hereinafter INTERNATIONAL STUDY OF PRODUCT LIABILITY COSTS] (prepared for the Inter-

the procedural laws of the forum may prove inhospitable to suits of plaintiffs from the United States.<sup>24</sup>

A second theoretical difficulty with applying the minimum contacts approach to aliens involves judicial concern with state sovereignty.<sup>25</sup> The United States legal system promotes the status of states as coequal sovereigns functioning within a national framework.<sup>26</sup> When a plaintiff of one state sues a defendant in another state, the state courts represent sovereign entities of equal power and authority.<sup>27</sup> The United States Constitution and state constitutions serve to limit states from overreaching their boundaries. When a United States citizen sues an alien corporation, however, the focus shifts to the competing interests between an individual state of the United States and a foreign country.<sup>28</sup> Clearly, a state in the United States and a foreign country are not coequal sovereigns.<sup>29</sup> Therefore, the concern about respecting individual states' sovereignty within the federal system, is not germane to the jurisdictional analysis for alien corporate defendants.

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national Trade Administration, U.S. Dep't of Commerce) (1984) (comparing the product liability laws of various countries and the possible economic impact on United States manufacturers).

24. See Toran, *supra* note 6, at 788 (discussing the problems of litigating in a foreign country that applies unfavorable laws).

25. *Id.* at 772 (analyzing the inapplicability of state sovereignty concerns to alien defendants).

26. See U.S. CONST. art. IV, § 1, cl. 4 (providing for full faith and credit among the states and federal protection of the states).

27. See *id.* (requiring each state to give full faith and credit to the judicial proceedings of every other state).

28. See Toran, *supra* note 6, at 772 (discussing the difference between an analysis of competing state interests and the interests of a state versus the interests of a foreign country); see also Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133, 135 (1971) [hereinafter Maier, *Bases and Range of Federal Common Law*] (noting the ramifications of de facto foreign policy decisions state courts make when deciding traditional state law questions).

29. See U.S. CONST. art. I, § 8 (providing Congress—the national government—with the authority to regulate commerce with foreign nations); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (holding that power over external affairs rests exclusively in the national government).

Some state courts have held that a higher sovereignty barrier for asserting personal jurisdiction exists when the defendant is an alien resident. *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985); *Rocke v. Canadian Auto. Sports Club*, 660 F.2d 395, 399 (9th Cir. 1981). A nonresident United States defendant may ultimately seek redress for unfair judicial practices through the political process of the state. Brilmayer, *supra* note 5, at 85. Although an alien may appeal a judgment against it in the state court or remove it to the federal court system, the alien has little opportunity to affect the political process of the state. *Id.* at 85-87. Some lower courts merely have transferred interstate sovereignty concerns to the international setting, disregarding the inapplicability of the sovereignty issue. See *Donahue v. Far E. Air Transp. Corp.*, 652 F.2d 1032, 1038 (D.C. Cir. 1981) (stating that foreign sovereignty is as significant as that of a sister state).

A third concern arises because a United States citizen who obtains a judgment in a state court may enforce that judgment in the courts of any other state under the full faith and credit clause of the United States Constitution.<sup>30</sup> The full faith and credit clause requires each state to enforce the judgment of another state, regardless of the nature of the conflict or the parties.<sup>31</sup> The constitutional protection, however, does not apply to a judgment enforceable in a foreign country.<sup>32</sup> If the exercise of jurisdiction in the United States appears excessive or offends the public policy standards of a foreign country, the offended country frequently will not enforce the judgment.<sup>33</sup> Thus, in a case involving an alien defendant, a plaintiff that is successful in a United States court may be unable to enforce its judgment in the alien's country.

The fourth assumption rests on the reliance of a state on United States constitutional protections to prevent a sister state from taking

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30. U.S. CONST. art. IV, § 1; see 28 U.S.C. § 1738 (requiring federal courts to give full faith and credit to state decisions).

31. *Id.*

32. See *Hilton v. Guyot*, 159 U.S. 113, 227 (1895) (declining to give effect to a French judgment because French courts did not enforce United States judgments).

33. See De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L.Q. 706, 711 (1968) (discussing efforts of the United States and the United Kingdom to balance assertions of extraterritorial jurisdiction and enforcement of foreign court judgments).

The German Civil Procedure Code provides for in personam jurisdiction over nonresident defendants who merely own assets in Germany. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1204 (1984). The French Civil Code provides for suit in French courts for any injured French plaintiff, regardless of the defendant's contacts with France. *Id.* The French Code also states that French defendants can be sued only in France. *Id.* In 1968, the European Community enacted the Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (Brussels Convention) to curtail the exorbitant jurisdictional ramifications of the code provisions of Germany and France, and to provide some uniformity to jurisdictional approaches in Common Market countries. Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, Sept. 27, 1968, reprinted in 15 O.J. EUR. COMM. (No. L 299) 32 (1972) (entered into force Feb. 1, 1973); Juenger, *supra*, at 1205-06. The Brussels Convention prohibits applying the jurisdictional provisions of the French and German Codes against Common Market domiciliaries. *Id.* at 1206. It also provides a jurisdictional scheme in which the defendant individual can be sued in his or her domiciliary court or where, in the case of a corporation, the defendant maintains its principal place of business. *Id.* Limited personal jurisdiction applies to contract and tort actions. *Id.* at 1207.

The Brussels Convention does not, however, accord protection to citizens of countries outside the Common Market system. *Id.* at 1211. The French and German code provisions, therefore, retain their bite in regard to non-Common Market parties. *Id.* The drafters of the Brussels Convention declined to incorporate the *forum non conveniens* doctrine into their judicial process, viewing it as too burdensome for the plaintiff. *Id.*

retaliatory action.<sup>34</sup> Although the full faith and credit clause of the Constitution requires each state to honor legal judgments of other states,<sup>35</sup> it does not govern the conduct and judicial activity of foreign countries.<sup>36</sup> Therefore, it does not assist plaintiffs who are unable to enforce a United States court's judgment in foreign countries.<sup>37</sup>

In the past, attempts of United States courts to extend the extraterritorial reach of their jurisdiction caused foreign governments to respond with retaliatory legislation.<sup>38</sup> Several countries have enacted blocking statutes prohibiting the disclosure, copying, and inspection of documents, and preventing the removal of documents from the country to thwart extraterritorial proceedings in the United States.<sup>39</sup> Such actions discourage the achievement of international uniformity in the enforcement of judgments and provide further evidence of the inadequacy of the traditional minimum contacts approach for determining when United States courts should exercise in personam jurisdiction over alien defendants.

United States courts are not unaware of these problems. State and federal courts have attempted to resolve the dilemma involved in asserting jurisdiction over alien defendant corporations.<sup>40</sup> Many courts have embraced the stream of commerce doctrine<sup>41</sup> to determine whether a court may assert jurisdiction over an alien corporation. This approach focuses on whether the alien anticipated the possibility of defending a suit in the courts of the United States.<sup>42</sup>

Another approach, unique to federal courts but germane to the jurisdictional dilemma, is the national contacts theory.<sup>43</sup> Under this theory, a federal court may assert jurisdiction over an alien corporation whose contacts with the nation as a whole satisfy the minimum contacts test.<sup>44</sup>

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34. See U.S. CONST. art. IV, § 1, cl. 2 (providing the full faith and credit clause of the United States Constitution).

35. *Id.*

36. *Id.*

37. *Id.*

38. See *infra* notes 258-59 and accompanying text (presenting United States and British discord regarding enforceability of judgments).

39. *Id.*

40. See *infra* notes 42-97 and accompanying text (discussing stream of commerce and national contacts approaches to jurisdiction over aliens).

41. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (establishing the stream of commerce doctrine).

42. *Id.*

43. See *infra* notes 71-97 and accompanying text (providing an analysis of the national contacts theory).

44. See *Cyromedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287, 290 (D. Conn. 1975) (deciding that a court may determine whether it has jurisdiction over an alien defendant, in a suit arising under federal law, on the basis of aggregated contacts within the



The next section of this Case-Comment discusses the stream of commerce and national contacts theories, and evaluates their capacity to provide adequate solutions to the problem of jurisdiction over an alien defendant.

## B. JUDICIAL APPROACHES TO JURISDICTION OVER ALIENS

### 1. *Stream of Commerce Theory*

State and federal courts apply the stream of commerce theory that the Supreme Court articulated in *World-Wide Volkswagen Corp. v. Woodson*.<sup>45</sup> This doctrine allows courts to adjudicate cases in which a nonresident corporation injects the product into a distribution network. Implicit in the distribution is the corporation's expectation that consumers in the forum state will use its products.<sup>46</sup> If the product causes injury to a state resident, the corporation's reasonable expectation of use in that state serves as the prerequisite for personal jurisdiction.<sup>47</sup>

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entire United States).

45. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980); see *Hedrick v. Daiko Shoji Co., Ltd.*, 715 F.2d 1355, 1358 (9th Cir. 1983) (finding that the court reasonably could exercise jurisdiction over a Japanese wire splicer serving worldwide ports because the defendants knew that the ship that caused the injury served United States ports); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 199 (5th Cir. 1980) (basing jurisdiction over a Japanese cigarette lighter manufacturer on the state's strong interest in litigating suits involving inherently dangerous products); *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231, 234-35 (9th Cir. 1969) (upholding jurisdiction over a British motor coach manufacturer because the design of the vehicles included specific modifications for use in the forum state); *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 553 F. Supp. 328, 331-32 (E.D. Pa. 1982) (asserting jurisdiction over a French manufacturer of ball bearing assemblies that specifically designed the product for ultimate use in the United States market, despite an extensive chain of distribution); *Bryant v. Ceat S.p.A.*, 406 So. 2d 376, 379 (Ala. 1981) (holding that the court could exercise jurisdiction over an Italian tire manufacturer where the defendant derived indirect economic benefit from the sales in the United States of its subsidiary distributor), *cert. denied*, 456 U.S. 944 (1982). *But see* *DeJames v. Magnificence Carriers*, 654 F.2d 280, 285 (3d Cir.) (denying jurisdiction where a Japanese ship converter did not participate in an indirect marketing scheme despite the attenuated benefit to the Japanese automobile industry), *cert. denied*, 454 U.S. 1085 (1981); *Hutson v. Fehr Bros., Inc.*, 584 F.2d 833, 837 (8th Cir.) (holding that the court could not assert jurisdiction over an Italian chain packager because the presence in the forum state of the manufacturer was merely the result of the decision of the distributor to market in the United States), *cert. denied*, 439 U.S. 983 (1978); *Samuels v. BMW of N. Amer., Inc.*, 554 F. Supp. 1191, 1194 (E.D. Tex. 1983) (declining to exercise jurisdiction where the wholly owned, autonomous subsidiary of the defendant in the United States conducted the activities within the state, and was financially capable of providing relief for the plaintiff); *cf. Omstead v. Brader Heaters, Inc.*, 5 Wash. App. 258, 266, 487 P.2d 234, 242-43 (1971) (basing the exercise of jurisdiction on a strong state interest in protecting consumers from defective products).

46. *Id.*

47. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980)

The Supreme Court relied upon an Illinois state court case, *Gray v. American Radiator & Standard Sanitary Corp.*,<sup>48</sup> to formulate the stream of commerce analysis.<sup>49</sup> A strong public policy interest in consumer protection underlies the stream of commerce doctrine.<sup>50</sup> Concerns about consumer protection continue to guide state courts toward both an expanded interpretation of state long arm statutes<sup>51</sup> and greater accountability for defendant component parts manufacturers.<sup>52</sup>

The stream of commerce analysis also involves the concept of purposeful availment.<sup>53</sup> To assert jurisdiction over a nonresident defendant, a court must determine that the defendant acted with sufficient deliberation to reflect its anticipation of accountability in the forum state.<sup>54</sup> The mere fortuitous presence of a product in the state does not warrant an inference that the product has entered the stream of commerce.<sup>55</sup>

The Court of Appeals for the Third Circuit in *DeJames v. Magnificence Carriers, Inc.*,<sup>56</sup> interpreting *World-Wide Volkswagen*, reversed

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(applying the stream of commerce analysis developed in *Gray v. American Radiator & Standard Sanitary Corp.*); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 200 (5th Cir. 1980) (basing jurisdiction on the formulation of the stream of commerce conditions present in *Gray v. American Radiator & Standard Sanitary Corp.*); *Poyner v. Erma Werke GmbH*, 618 F.2d 1186, 1192 (6th Cir.) (identifying the interest of the state in protecting its citizens from dangerous imports), *cert. denied*, 449 U.S. 841 (1980).

48. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

49. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

50. See *Greenman v. Yuba Power Prods.*, 27 Cal. Rptr. 697, 701, 59 Cal. 2d 57, 61, 377 P.2d 897, 901 (1962) (discussing the current trend in products liability actions including the public policy considerations).

51. See J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* § 3.12 (1985) (defining a state long arm statute as predicated jurisdiction over an alien upon an analysis of the alien's contacts with the forum).

Some authors have provided an economic analysis of expanded jurisdiction over non-resident defendant manufacturers. Brilmayer, *supra* note 5, at 95-96. Where the defendant has no control over the location of product sales, however, the state should not expand its jurisdiction. *Id.* The author notes that a state always has the incentive to assert jurisdiction over the nonresident defendant so it can transfer the costs of the plaintiff's injuries to the defendant. *Id.* Logically, if these costs are too high, the defendant may choose to withdraw from the market. *Id.* If a defendant corporation cannot structure its economic activity so as to be immune from suit in a particular forum, however, the court cannot assume that the corporation consented to jurisdiction, or that it was willing to take the risks because of sufficient profits. *Id.* The state court exercise of jurisdiction, therefore, would be inconsistent with due process notions of fairness and justice if the state no longer must confront the potential withdrawal of the corporation. *Id.*

52. See *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 553 F. Supp. 328, 334 (E.D. Pa. 1982) (noting that a manufacturer should not profit while insulating itself through a multifaceted chain of distribution).

53. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

54. *Id.*

55. *Id.* at 297.

56. *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285-86 (3d Cir.), *cert.*

the lower court's exercise of in personam jurisdiction. In its reversal, the Third Circuit Court of Appeals established a workable formulation of the stream of commerce doctrine that accounts for the due process concerns of alien defendants.<sup>57</sup> The court specified that a manufacturer cannot create a complex distribution scheme or allege ignorance of the final destination of the product to insulate itself from liability.<sup>58</sup> State territorial restrictions would operate, however, to limit jurisdiction when the manufacturer, particularly the small business owner, reasonably does not expect to penetrate the United States market.<sup>59</sup>

The Supreme Court, in *McGee v. International Life Insurance Co.*,<sup>60</sup> recognized that the nationalization of markets and global distribution networks diminished the burden of defense in a foreign country. The Court stated that because growth in interstate transportation and communications has increased, courts needed to use an expanded approach regarding jurisdiction to protect residents injured within the territorial boundaries of a state.<sup>61</sup> Economic and technological changes also allowed the Court of Appeals for the Sixth Circuit in *Poyner v. Erma Werke GmbH*<sup>62</sup> to justify its exercise of jurisdiction over a German corporation. Although economic policy concerns led at least one court<sup>63</sup> to refrain from asserting jurisdiction over an alien corporation, other courts consider the hardship of litigation in a foreign forum a corollary of international trade.<sup>64</sup>

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*denied*, 454 U.S. 1085 (1981).

57. *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285-86 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981). The court underscored the foreseeability standards set forth in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980), particularly noting that the presence of the product alone is not a substitute for service of process. *Id.* at 286.

58. *Id.* at 285.

59. *Id.* at 286. The dissenting opinion in *DeJames* provides an interesting counterpoint to the majority determination that the defendant did not expect to enter the United States market. The dissent argued that the Japanese ship converter did indeed benefit from economic activity in the United States because the ships transported Japanese automobiles there. *Id.* at 291-92 (Gibson, J., dissenting). The ship conversion business, therefore, represented a pivotal link in the distribution of Japanese cars, a very profitable industry. *Id.*

60. *McGee v. International Life Ins. Co.*, 355 U.S. 200, 223 (1957).

61. *Id.* Residents frequently could not afford the cost of bringing an action in a foreign forum. *Id.* Without expanded jurisdiction, the high costs could effectively insulate companies against adverse judgments. *Id.*

62. *Poyner v. Erma Werke GmbH*, 618 F.2d 1186, 1191-92 (6th Cir.) (identifying the dramatic shift in the balance of trade occurring in the 1970s), *cert. denied*, 449 U.S. 841 (1980).

63. *See Samuels v. BMW of N. Amer.*, 554 F. Supp. 1191, 1194 (E.D. Tex. 1983) (focusing on the economic impact of jurisdiction).

64. *Bryant v. Ceat S.p.A.*, 406 So. 2d 376, 379 (Ala. 1981) (recognizing the hardship of defense in a foreign forum, but stating that this is a consequence of participa-

In addition to the stream of commerce approaches, the Court of Appeals for the Ninth Circuit developed a seven-factor balancing test to deal with the special problems of jurisdiction over alien defendants.<sup>65</sup> The test explores the reasonableness of jurisdiction within due process

tion in international trade), *cert. denied*, 456 U.S. 944 (1982). The court stated that it is not an excessive burden of foreign trade to hold a defendant accountable in the state in which the corporation has injected its products, directly or indirectly, through channels of international trade. *Id.*; see also *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231, 235 (9th Cir. 1969) (stating that when the acts of the defendant satisfy foreseeability requirements, the fact that it involves an international rather than interstate context is irrelevant). The court held that the burden of defense in a distant forum is one attribute of foreign trade. *Id.* at 235. Other attributes of international trade disputes may involve the problem of enforcing a judgment in a foreign country. *Id.* at 236. The court minimized these concerns, but the dissent observed that excessive exercises of jurisdiction might have an adverse effect on international trade and international relations. *Id.* at 239. But see *Hutson v. Fehr Bros., Inc.*, 584 F.2d 833, 837 (8th Cir.) (holding against the exercise of jurisdiction on the basis that it would place undue burden on the defendant to litigate a suit in the United States), *cert. denied*, 439 U.S. 983 (1978). The court noted that because defending a suit is expensive, the defendant is likely to settle out of court, despite its denial of liability. *Id.* This possibility suggests that the exercise of jurisdiction may thwart the interests of the judiciary in the administration of justice. *Id.* One factor underlying the decision of the court not to assert jurisdiction over the defendant was the availability of jurisdiction over other parties who might have provided the plaintiff with adequate relief. *Id.*

When the question of exercising jurisdiction involves alien defendants, courts generally rely on the doctrine of *forum non conveniens* to prevent overburdening the defendant with litigation in a foreign forum. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509-12 (1947) (dismissing the suit of a Virginia plaintiff in the federal district court of New York against a Pennsylvania corporation). The Court set forth various private and public interests for a court to consider in rendering a *forum non conveniens* decision. *Id.* at 508-09. The Court mentioned four private interests: the relative ease of access to sources of proof, the availability of compulsory process for witnesses, the location of the injury, and the enforceability of potential judgment. *Id.* The Court mentioned four public interests: the burden on the judicial system, the relationship of the jury to the litigation, the determination of local interests in local courts, and the potential for application of foreign law. *Id.*; see *infra* note 164 (discussing the treatment of the *forum non conveniens* issue in *Asahi Metal Industry*); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981) (holding that the application of less favorable law is not a relevant factor to the *forum non conveniens* analysis).

65. *Insurance Co. of N. Amer. v. Marina Salina Cruz*, 649 F.2d 1266 (9th Cir. 1981). The seven factors relevant to an examination of asserted jurisdiction include: 1) the extent of the purposeful interjection of the defendant into the forum state; 2) the burden of defending a suit in the forum state; 3) the extent of possible conflict with the sovereignty of defendant's state; 4) the forum state's interest in adjudicating the dispute; 5) the most efficient judicial resolution of the controversy; 6) the importance of the forum to plaintiff's interest in convenient and effective relief; and 7) the existence of an alternative forum. *Id.* at 1270; see also *Hedrick v. Daiko Shoji Co., Ltd.*, 715 F.2d 1355, 1359 (9th Cir. 1983) (applying the seven-part balancing test to find jurisdiction reasonable). With respect to the seventh factor of the test, the court noted that although a Japanese forum might be available, it did not provide a practical solution for an injured longshoreman. *Id.* at 1359. The fourth factor, the interest of the forum state in regulating manufacturers who expose Oregonian workers to hazardous conditions as a result of defective products, is a compelling justification for the assertion of jurisdiction. *Id.*

constraints.<sup>66</sup> In addition, this test specifically requires courts to weigh conflicting sovereigns' interests.<sup>67</sup> This requirement addresses whether exercising jurisdiction would result in potential friction with the defendant's home country.<sup>68</sup>

Despite the apparent flexibility of the stream of commerce theory for recognizing the unique characteristics of jurisdiction over alien corporate defendants, this approach fails to address the problem adequately. In practice, lower courts apply different criteria to measure purposeful activity.<sup>69</sup> One court concentrated on whether the manufacturer sold its product into a distribution chain without restricting the ultimate destination of the product.<sup>70</sup> Other courts examine whether the defendant specially designed the product for use in the United States.<sup>71</sup>

The stream of commerce approach involves an overly technical set of rules incapable of providing consistency or precedential value. To mold factual settings into the rules, the courts in most decisions imputed an economic benefit to the defendant.<sup>72</sup> The courts' analysis varies, creat-

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66. *Hedrick v. Daiko Shoji Co., Ltd.*, 715 F.2d 1355, 1359 (9th Cir. 1983); *Insurance Co. of N. Amer. v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981).

67. *Insurance Co. of N. Amer. v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981). The court noted that the Mexican ambassador had invoked the doctrine of sovereign immunity in his objection to United States jurisdiction. *Id.* at 1273. The ambassador relied on the fact that a Mexican Navy shipyard had performed the modifications allegedly causing damage to the ship. *Id.* According to the reasoning of the court, the ambassador's action suggested the potential for lack of enforcement of a judgment rendered in the Alaskan court. *Id.*

68. *See id.* at 1273 (stating that courts should consider sovereignty conflicts in assessing whether to exercise jurisdiction because a potential friction with the country of the defendant could deter an effective and judicially efficient resolution of the dispute).

69. *See Oswalt v. Scripto, Inc.*, 616 F.2d 191, 199-200 (5th Cir. 1980) (noting that the defendant did not attempt to limit the sale of its products in Texas, but rather accepted the national marketing plan of the distributor); *Bryant v. Ceat S.p.A.*, 406 So. 2d 376, 379 (Ala. 1981) (holding that the exercise of jurisdiction of the Alabama state court did not offend due process because the Italian tire manufacturer sold its product without restriction to United States wholesalers), *cert. denied*, 456 U.S. 944 (1982).

70. *Bryant v. Ceat S.p.A.*, 406 So. 2d 376, 379 (Ala. 1981), *cert. denied*, 456 U.S. 944 (1982).

71. *See Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231, 234 (9th Cir. 1969) (stating that the defendant designed and manufactured coach bodies with specific modifications necessary for tourism in Hawaii); *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 553 F. Supp. 328, 331-32 (E.D. Pa. 1982) (noting that although the acts of the defendant were once or twice removed from the final sale in the forum state, the defendant participated in design decisions with the assembling corporation's engineers to meet the standards the United States required for imported helicopters).

72. *See Hay, Judicial Jurisdiction over Foreign Country Corporate Defendants — Comments on Recent Case Law*, 63 OR. L. REV. 431, 435-44 (1984) (analyzing recent cases involving the stream of commerce approach to personal jurisdiction and discussing economic benefit as a factor in the courts' analysis).

ing uncertainty concerning how the test will be applied.<sup>73</sup> As a result, alien businesses engaging in business activities in the United States cannot predict with certainty when their activities will expose them to the jurisdiction of a United States court.

*Asahi Metal Industry Co. v. Superior Court*<sup>74</sup> illustrates the current dissension and confusion in the Supreme Court over the application of the stream of commerce doctrine in the context of the alien corporation. Before examining *Asahi Metal Industry*, this Case-Comment discusses the national contacts theory developed within the federal court system.<sup>75</sup> Although courts disfavor the national contacts theory, the theory remains important from a historical perspective. The theory reflects judicial recognition that the traditional minimum contacts approach is insufficient and represents the continuing struggle to create an adequate alternative.

## 2. National Contacts Theory

The national contacts theory involves a traditional due process analysis to cases with alien corporate defendants.<sup>76</sup> Some federal courts applying the national contacts test focus on the relationship of the defendant to the United States as a whole rather than to any one state.<sup>77</sup> In *First Flight Co. v. National Carloading Corp.*,<sup>78</sup> the court provided a theoretical basis for the application of the doctrine within the federal court system. The court examined the contacts of the defendant with the entire United States<sup>79</sup> and declined to limit its authority to acts

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73. See Special Project, *Obtaining Personal Jurisdiction over Alien Corporations — A Survey of U.S. Practice*, 9 VAND. J. TRANSNAT'L L. 345 (1976) (presenting a comprehensive review of case law interpreting the long arm statutes of each state as they affect alien corporate defendants).

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

75. See *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730, 736-37 (E.D. Tenn. 1962) (employing the national contacts test to exercise federal jurisdiction over the defendant).

76. See *infra* notes 83-87 and accompanying text (describing the national contacts theory).

77. *Cryomedics, Inc. v. Spemply, Ltd.*, 397 F. Supp. 287, 290 (D. Conn. 1975); *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 726 (D. Utah 1973); see Note, *The Outer Limits of In Personam Jurisdiction over Alien Corporations: The National Contacts Theory*, 16 GEO. WASH. J. INT'L L. & ECON. 637 (1982) [hereinafter Note, *Outer Limits*] (providing an analysis of the theory and its potential impact upon alien corporations).

78. *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730, 738 (E.D. Tenn. 1962); see also Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961) (drawing an analogy between state jurisdictional analysis under the fourteenth amendment to federal jurisdiction under the fifth amendment).

79. *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730, 738 (E.D.

occurring within the physical territory of the district.<sup>80</sup> In so doing, the court in *First Flight* suggested that the national contacts theory effectively exchanges state sovereignty<sup>81</sup> for national sovereignty in situations with international ramifications.<sup>82</sup>

The national contacts theory prevents a corporation from insulating itself unfairly from liability by amplifying the points of contacts to include the entire nation.<sup>83</sup> For example, an alien corporation that transacts business in the United States marketplace through small branch offices or intermediaries without sufficient connection to any one state would be unable to avoid the personal jurisdiction of a United States court.<sup>84</sup> United States courts, therefore, have a broader jurisdictional reach under this theory.

The national contacts theory also serves four policy goals: 1) providing effective and convenient relief for the plaintiff,<sup>85</sup> 2) protecting federal court authority to hear important controversies affecting the welfare of United States citizens,<sup>86</sup> 3) applying the national contacts test not only to facilitate evolution of the law to reflect social and economic changes, but also to provide a uniform standard to guide state courts, and 4) examining the potential effect of jurisdiction on international relations.<sup>87</sup>

The fourth policy factor is germane to the dilemma the Court alludes to in *Asahi Metal Industry*. The fourth policy goal addresses the problem that arises when a court of one country exerts a broad jurisdictional reach that offends the laws of another country,<sup>88</sup> thereby provok-

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Tenn. 1962).

80. *Id.*

81. See Toran, *supra* note 6, at 772 (discussing the extension of state sovereignty concerns to the international arena).

82. *Id.* Because the case concerned a material constitutional inquiry, the court measured contacts with the whole sovereign nation of which the court hearing the case is an arm rather than with the physical territory of the district court. *Id.*; see also *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 729 (D. Utah 1973) (holding that the court may properly consider the aggregate presence of the defendant's apparatus in the United States as a whole).

83. *Cryomedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287, 291 (D. Conn. 1975); see also *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 728 (D. Utah 1973) (stating that the defendant should not be immune from suit in the United States merely because each state's fractional share of the nationwide market cannot satisfy minimum contacts).

84. See Note, *Outer Limits*, *supra* note 77, at 652-57 (outlining four policy objectives, and emphasizing international interests).

85. *Id.*

86. *Id.*

87. See *infra* notes 298-301 and accompanying text (providing the definition and development of the comity doctrine).

88. *Id.*

ing governmental retaliatory action or the refusal of the other country to enforce a judgment.<sup>89</sup> For example, in *Engineered Sports Products v. Brunswick Corp.*,<sup>90</sup> the district court acknowledged the need to respect the sovereignty of other nations and even voiced support for a stricter standard of jurisdiction in the international context. The court held, however, that defendants with the requisite contacts with the United States should not be immune from suit.<sup>91</sup>

Aggregating the contacts of an alien corporate defendant in the United States also may enable plaintiffs to bring claims under federal law.<sup>92</sup> For example, alien courts may have difficulty applying United States patent laws.<sup>93</sup> Therefore, when a domestic corporation charges an alien corporation with patent infringement and no state alone can exercise personal jurisdiction over the defendant, the national contacts theory allows the federal courts to hear the case.<sup>94</sup>

Despite important policy and practical reasons for extending the use of the theory, the Court of Appeals for the Ninth Circuit in *Wells Fargo & Co. v. Wells Fargo Express Co.*<sup>95</sup> rejected the national contacts test as statutorily insufficient. Neither state long arm statutes<sup>96</sup> nor the Federal Rules of Civil Procedure<sup>97</sup> enable a federal court to serve alien defendants outside the territorial boundaries of the United States. The court, therefore, held that Congress must act to pass legislation providing for worldwide service of process before the national contacts theory can achieve a prominent position in alien jurisdictional analysis.<sup>98</sup> The need for an adequate approach to state court jurisdiction over alien corporate defendants continues to plague state courts.

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89. See *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 729 (D. Utah 1973) (discussing the absence of an analogue in international law to the full faith and credit clause).

90. *Id.* at 728-29.

91. *Id.* at 729.

92. See *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975) (involving a suit against an alien corporation for patent infringement); *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722 (D. Utah 1973) (involving a patent infringement suit against a European boot manufacturer).

93. *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 727 (D. Utah 1973) (describing the application of United States patent laws).

94. *Id.* at 728-29.

95. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 417-18 (9th Cir. 1977).

96. See *supra* note 18 (discussing selected state jurisdictional statutes).

97. See Fed. R. Civ. P. 4 (providing statutory authority for service of process).

98. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 417-18 (9th Cir. 1977).



II. *ASAHI METAL INDUSTRY CO. V. SUPERIOR COURT*

The Supreme Court applied a traditional stream of commerce analysis<sup>99</sup> in its most recent attempt to define due process constraints for cases involving jurisdiction over alien corporations. In *Asahi Metal Industry*,<sup>100</sup> the Supreme Court granted certiorari to examine the scope of state court authority.<sup>101</sup> The case involved an indemnity suit in which the original state resident had obtained adequate relief, but the cross-claim of the alien defendant against another alien corporation remained in state court.<sup>102</sup> The *Asahi Metal Industry* case resulted in a plurality decision with two concurring opinions, which reflects the difficulty the Court encounters when working with the traditional tests and the need for a broader standard.

## A. FACTUAL HISTORY

The controversy in *Asahi Metal Industry*<sup>103</sup> arose from a product liability suit alleging that a defective tire, tube, and sealant injured the plaintiff, a California resident.<sup>104</sup> In 1978, Gary Zurcher, after losing control of his motorcycle, collided with a tractor causing him to suffer severe injuries.<sup>105</sup> His wife, a passenger on the motorcycle, died.<sup>106</sup> Zurcher alleged that the accident resulted from a sudden loss of air and explosion in the rear tire.<sup>107</sup> He filed a product liability action in the Superior Court of California for Solano County, the county where the injury occurred.<sup>108</sup>

The defendants included Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tire tube.<sup>109</sup> Cheng Shin filed a cross-complaint seeking indemnification from the other co-defendants and from Asahi Metal Industry Co., Ltd. (Asahi), the Japanese manufacturer of the valve assembly of the tube.<sup>110</sup> The supe-

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99. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1032-33 (1987).

100. *Asahi Metal Indus. Co. v. Superior Court*, 106 S. Ct. 1258 (1986).

101. *Id.*; see also *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1035 (1987) (reporting that the Court granted certiorari because the state court interpretation of the minimum contacts test was inconsistent with notions of fair play and substantial justice).

102. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1029-30 (1987).

103. *Id.*

104. *Id.* at 1029.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1031.

109. *Id.*

110. *Id.*

rior court settled and dismissed the claims against Cheng Shin and the other defendants named in the original action.<sup>111</sup> Cheng Shin's indemnity action against Asahi, however, remained and formed the basis of the state court personal jurisdiction issue.<sup>112</sup>

The court exercised jurisdictional authority according to the California long arm statute,<sup>113</sup> which provides for jurisdiction subject to due process restrictions under both the state constitution and the United States Constitution.<sup>114</sup> Asahi contested the state court exercise of in personam jurisdiction.<sup>115</sup> Asahi argued that the assertion of jurisdiction of the California court over the corporation violated fourteenth amendment due process guarantees in the United States Constitution.<sup>116</sup>

As proof, Asahi stated that it was a Japanese corporation that has neither offices, property, nor agents in the state of California.<sup>117</sup> The company manufactures tire valve assemblies in Japan and sells its products to Cheng Shin and other tire manufacturers.<sup>118</sup> Asahi sold products to Cheng Shin in Taiwan and shipped products directly from Japan to Taiwan.<sup>119</sup> Cheng Shin asserted that it incorporated 150,000 of the Asahi assemblies in 1978; 500,000 in 1979; 500,000 in 1980; 100,000 in 1981; and 100,000 in 1982.<sup>120</sup> Asahi indicated, however, that its sales to Cheng Shin amounted to only 1.24% of Asahi's total income in 1981, and .44% in 1982.<sup>121</sup>

Cheng Shin purchases assemblies from several manufacturers and sells its tubes throughout the world.<sup>122</sup> Cheng Shin markets tubes in California, where sales amount to approximately twenty percent of its total United States sales.<sup>123</sup> Cheng Shin Tire USA, the California corporation involved, distributed Cheng Shin tubes in California.<sup>124</sup>

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111. *Id.*

112. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 52-54, 702 P.2d 543, 552-53, 216 Cal. Rptr. 385, 394-96 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

113. CAL. CIV. PROC. CODE § 410.10 (West 1973).

114. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 43, 702 P.2d 543, 545, 216 Cal. Rptr. 385, 387 (1985).

115. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1032 (1987).

116. *See id.* at 1030 (discussing Asahi's due process concerns that it would be subject to the court's jurisdiction despite its limited sales to Cheng Shin). The due process clause of the fourteenth amendment prohibits the state from depriving any person of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1.

117. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1030 (1987).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

An attorney for Cheng Shin examined the inventory of a retail motorcycle store in Solano County to determine informally the quantitative relationship of Asahi valve assemblies to Cheng Shin tire tubes sold in California.<sup>125</sup> Of the one hundred and fifteen tubes sold, ninety-seven were Japanese or Taiwanese in origin; and twenty-one of the ninety-seven incorporated Asahi valve assemblies.<sup>126</sup> Cheng Shin, therefore, manufactured twelve of the tubes with Asahi valve assemblies.<sup>127</sup> A Cheng Shin spokesperson stated that Asahi was aware that Cheng Shin distributed its assemblies in the United States and specifically in California.<sup>128</sup> The president of Asahi, however, denied having an understanding that its small percentage of sales to Cheng Shin would subject it to litigation in California.<sup>129</sup>

## B. PROCEDURAL HISTORY

### 1. *California Court of Appeals*

When the Superior Court of California asserted jurisdiction, Asahi appealed to the California Court of Appeals.<sup>130</sup> The court of appeals reversed the decision of the superior court, finding that Asahi had insufficient contacts with California to subject it to personal jurisdiction.<sup>131</sup> The appellate court recognized that the globalization of commercial transactions provided a rationale for the trial court's assertion that jurisdiction over an alien component parts manufacturer exists.<sup>132</sup>

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125. *Id.*

126. *Id.*

127. *Id.*

128. Brief of Petitioner at C-10 app., n.4, *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (No. 85-693); *see also* *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 48 n.4, 702 P.2d 543, 549 n.4, 216 Cal. Rptr. 385, 392 n.4 (1985) (en banc) (applying the stream of commerce theory because of the implications that Asahi knew the product would be marketed in the United States), *rev'd*, 107 S. Ct. 1026 (1987).

129. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 48 n.4, 702 P.2d 543, 549 n.4, 216 Cal. Rptr. 385, 392 n.4 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

130. *Zurcher v. Dunlop Tire & Rubber Co.*, No. 76180 (Super. Ct., Solano County, Cal., Apr. 20, 1983) (order denying motion to quash summons). The superior court held that because Asahi conducts business on an international level, Asahi should respond to a product liability suit on an international level. *Id.*

131. *Asahi Metal Indus. Co. v. Superior Court*, 149 Cal. App. 3d 30, 31, 194 Cal. Rptr. 741, 742 (Ct. App. 1983), *aff'd*, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

132. *Id.*; *cf.* *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 903, 458 P.2d 57, 64, 80 Cal. Rptr. 113, 120 (1969) (holding that a manufacturer that passes its products through intermediaries cannot disclaim responsibility for being only one part of the overall distribution network).

The court of appeals, however, added that the quality and nature of the acts of the component parts manufacturer must reflect deliberate and foreseeable activity to warrant jurisdiction.<sup>133</sup>

The court concluded that Asahi did not conduct business activity directly with the state of California and did not perform any economic acts indirectly serving the tire market of the state.<sup>134</sup> Asahi sold its components to Cheng Shin, who foreseeably would sell the finished product in California.<sup>135</sup> The court focused its evaluation on Asahi's business conduct only with respect to California.<sup>136</sup>

Because the case involved a nonresident manufacturer whose defective product arrived in the forum state and caused injury to state residents, the court considered whether to apply the stream of commerce theory. The stream of commerce theory supports jurisdiction where the component parts manufacturer has only indirect sales through importers or independent distributors.<sup>137</sup> Asahi's remoteness from the final destination of the product and consequent injury alone did not insulate the corporation from suit in California.<sup>138</sup> Manufacturers do not escape legal liability through the use of intermediaries<sup>139</sup> or a professed lack of knowledge as to the destination of finished products.<sup>140</sup>

For a defendant to be amenable to suit in a foreign forum the defendant must foresee that its conduct and connection with the state

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133. See *Secrest Machine Corp. v. Superior Court*, 33 Cal. 3d 664, 668-70, 660 P.2d 399, 403-04, 190 Cal. Rptr. 175, 179 (1983) (holding that the manufacturer designed all of its acts connected with the sale of the product to complete the business transaction and yield profit from final sales in California).

134. *Asahi Metal Indus. Co. v. Superior Court*, 149 Cal. App. 3d 30, 33, 194 Cal. Rptr. 741, 744 (Ct. App. 1983), *aff'd*, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

135. *Id.* at 743.

136. *Id.*; see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (validating the stream of commerce analysis); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (formulating the stream of commerce theory).

137. See *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1083-85 (5th Cir. 1984) (exploring the previous decision that used the stream of commerce theory); *Hedrick v. Daiko Shoji Co., Ltd.*, 715 F.2d 1355, 1358 (9th Cir. 1983) (stating that a forum state, consistent with due process, can exercise long arm jurisdiction over a manufacturer or supplier of a defective product who knew or should have known that a product would enter the stream of foreign commerce). The court added that a victim can sue the manufacturer or supplier in the forum where the injury occurred. *Id.*

138. *Asahi Metal Indus. Co. v. Superior Court*, 149 Cal. App. 3d 30, 33, 194 Cal. Rptr. 741, 744 (Ct. App. 1983), *aff'd*, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

139. *DeJames v. Magnificence Carriers*, 654 F.2d 280, 285 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

140. *Asahi Metal Indus. Co. v. Superior Court*, 149 Cal. App. 3d 30, 33, 194 Cal. Rptr. 741, 744 (Ct. App. 1983), *aff'd*, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

represent its anticipation of liability there.<sup>141</sup> The court relied on the foreseeability analysis of the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*.<sup>142</sup> The court concluded that the mere possibility that Asahi's valve assemblies might be distributed in California as the result of the independent transactions and decisions of its buyers did not satisfy the stream of commerce standard for jurisdiction.<sup>143</sup>

The court of appeals restated the two primary functions of the minimum contacts approach.<sup>144</sup> First, the minimum contacts approach protects the defendant against the burdens of litigation in a distant forum.<sup>145</sup> Second, the approach ensures that the state does not overreach the limits of the federal system.<sup>146</sup> Because California sought to impose its sovereignty beyond the federal system, the court had to balance the interests among litigants and the forum.<sup>147</sup> On this basis, the court concluded that it was unreasonable to require Asahi to respond to Cheng Shin's suit in California.<sup>148</sup> The court therefore held in favor of Asahi, refusing to exercise jurisdiction over the Japanese corporation.<sup>149</sup>

## 2. *Supreme Court of California*

The Supreme Court of California reversed the state court of appeals and affirmed the trial court's exercise of in personam jurisdiction over Asahi.<sup>150</sup> Because Asahi introduced its valve assemblies into the stream of commerce with an expectation of eventual sales in the forum state, the court determined that Asahi satisfied the minimum contacts test.<sup>151</sup> Given the interest of the forum state in the litigation, as well as Cheng Shin's interest in avoiding inconsistent judgments, the Supreme Court found the trial court's assertion of jurisdiction over Asahi reasonable and fair in light of due process standards.<sup>152</sup>

The court began with a historical review of the development and application of the minimum contacts approach to state court jurisdiction.<sup>153</sup> The court noted that economic and technological advances pre-

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

151. *Id.* at 54-55, 702 P.2d at 553, 216 Cal. Rptr. at 396.

152. *Id.* at 55, 702 P.2d at 553, 216 Cal. Rptr. at 396.

153. *Id.* at 42-47, 702 P.2d at 545-49, 216 Cal. Rptr. at 388-91; *see World-Wide*

precipitated the liberation of the minimum contacts standard.<sup>154</sup> Moreover, increased interstate and international transactions made it less burdensome for a nonresident manufacturer to defend itself in the forum to which the manufacturer directed business activity.<sup>155</sup> Despite the territorial restrictions on the jurisdictional reach of a court, a manufacturer that deliberately avails itself of the benefits and protections of state laws shows the knowledge requisite to be held legally accountable for injuries related to product sales in the forum state.<sup>156</sup>

Interpreting the purposeful availment issue, in which the manufacturer's contacts with the state hinge on activity occurring at the beginning of an extensive chain of distribution, the court found Asahi's contacts with California sufficient to indicate purposeful availment.<sup>157</sup> The court then applied the stream of commerce theory.<sup>158</sup> An exercise of jurisdiction is reasonable, the court held, when the manufacturer indirectly serves the forum market and derives legal and economic benefit from ultimate purchase of its product there.<sup>159</sup>

Despite Asahi's argument that the presence of its valve assemblies in California was merely fortuitous and insufficient under *World-Wide*

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Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (requiring a reasonableness standard to analyze the relationship of the defendant with the forum state); Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (underscoring that the focus of courts should be on the relationship among the defendant, the forum, and the litigation); International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (stating that the minimum contacts test depends upon the quality and nature of the activities of the defendant with the forum state).

154. Asahi Metal Indus. Co. v. Superior Court, 39 Cal. 3d 35, 43, 702 P.2d 543, 546, 216 Cal. Rptr. 385, 388 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987); see McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957) (discussing transformation of the national economy in terms of technology, transportation, and communications exchanges across state lines).

155. Asahi Metal Indus. Co. v. Superior Court, 39 Cal. 3d 35, 43, 702 P.2d 543, 546, 216 Cal. Rptr. 385, 388 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987). The Court in *World-Wide Volkswagen* noted that economic transformation has accelerated across international boundaries, thereby reducing the burden of defense in a foreign forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

156. Asahi Metal Indus. Co. v. Superior Court, 39 Cal. 3d 35, 43, 702 P.2d 543, 546, 216 Cal. Rptr. 385, 388 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987); see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (applying the purposeful availment standard to a products liability action); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (formulating the concept of purposeful availment).

157. Asahi Metal Indus. Co. v. Superior Court, 39 Cal. 3d 35, 51-52, 702 P.2d 543, 552, 216 Cal. Rptr. 385, 394 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

158. *Id.* at 45-46, 702 P.2d at 547-48, 216 Cal. Rptr. at 390. Another court identified the broader range of foreseeability for manufacturers and primary distributors at the beginning of the national distribution network. *Nelson by Carson v. Park Indus., Inc.*, 717 F.2d 1120, 1125-26 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984).

159. Asahi Metal Indus. Co. v. Superior Court, 39 Cal. 3d 35, 45-46, 702 P.2d 543, 547-48, 216 Cal. Rptr. 385, 390 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

Volkswagen to establish jurisdiction, the court distinguished *World-Wide Volkswagen*.<sup>160</sup> Whereas the plaintiff in *World-Wide Volkswagen* merely *used* the automobile in the state,<sup>161</sup> in *Asahi Metal Industry* the injured party *purchased* the finished product that incorporated the manufacturer's valve assembly in the state of California.<sup>162</sup> The commercial nature of the transaction in the forum state buttresses the assertion that Asahi indirectly received economic benefits from California law.<sup>163</sup> Although Asahi did not control the distribution system or directly exploit the California market, Asahi's awareness of the distribution system yielding sales in the state provided adequate support for the stream of commerce analysis the court used.<sup>164</sup>

After determining that Asahi's relationship with the state satisfied the minimum contacts test, the court considered whether a court could reasonably assert jurisdiction.<sup>165</sup> Asahi argued that California could have no interest in an indemnity suit between two alien manufacturers, especially because the original plaintiff did not even name Asahi as a defendant.<sup>166</sup> The court disagreed, holding that the alien nature of the

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160. *Id.* at 48-51, 702 P.2d at 549-51, 216 Cal. Rptr. at 391-93.

161. *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (denying the exercise of jurisdiction where the consumer purchased the car in New York and merely drove it to the forum state).

162. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 48, 702 P.2d 543, 549, 216 Cal. Rptr. 385, 391 & n.3 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

163. *Id.* at 48-49, 702 P.2d at 550, 216 Cal. Rptr. at 392. One court held that the affirmative conduct of a defendant in delivering its product into the forum state was voluntary and financially beneficial. *Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155, 159-60 (9th Cir. 1980). Another court determined that because the manufacturer of the product was aware of the national retail market into which its product flowed, the manufacturer derived economic benefit from that market. *Nelson by Carson v. Park Indus., Inc.*, 717 F.2d 1120, 1126 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984).

164. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 49, 702 P.2d 543, 550, 216 Cal. Rptr. 385, 392 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987). Asahi argued that it made no active attempt to exploit the forum market, neither creating a special marketing scheme nor designing its products to satisfy American standards. *Id.* at 49, 702 P.2d at 550, 216 Cal. Rptr. at 393. Although Asahi tried to establish that Cheng Shin's transactions with California merely represented unilateral activity and protected Asahi from jurisdiction, the court invoked the stream of commerce theory to reject Asahi's argument. *Id.* at 50 n.7, P.2d at 551 n.7, 216 Cal. Rptr. at 393 n.7.

165. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 52, 702 P.2d 543, 552, 216 Cal. Rptr. 385, 394 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987). In another California case, a court required a determination that asserting jurisdiction would be fair and reasonable, weighing the interests of the plaintiff, the defendant, and the state. *Secrest Mach. Corp. v. Superior Court*, 33 Cal. 3d 664, 672, 660 P.2d 399, 404-05, 190 Cal. Rptr. 175, 180-81 (1983).

166. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 52-53, 702 P.2d 543, 552-53, 216 Cal. Rptr. 385, 394-95 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

indemnity suit did not justify immunity from state court jurisdiction.<sup>167</sup> Moreover, California does have a substantial interest in the protection of its consumers, a protection that requires the state to enforce state safety standards.<sup>168</sup> The additional interests of the state in the orderly administration of its laws and of Cheng Shin in avoiding inconsistent adjudications outweighed Asahi's possible inconvenience in defending itself in California.<sup>169</sup> The Supreme Court of California, therefore, held that the exercise of jurisdiction of the trial court over Asahi was both reasonable and fair.<sup>170</sup>

### C. UNITED STATES SUPREME COURT DECISION

In *Asahi Metal Industry Co. v. Superior Court*,<sup>171</sup> the United States Supreme Court, in a plurality decision, reversed the Supreme Court of California, holding that the court's exercise of jurisdiction over Asahi was not consistent with the due process clause of the fourteenth amendment.<sup>172</sup> Employing the reasonableness test, the Court concluded that exercising jurisdiction over Asahi in this case would offend notions of fair play and substantial justice.<sup>173</sup> Four Justices disagreed with the

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167. *Id.* One court has concluded that even where the original defendant in a products liability suit settles with the plaintiff and then seeks indemnity against the manufacturers, the original defendant would not be immune from the assertion of jurisdiction. *Volkswagenwerk, A.G. v. Klippan, GmbH*, 611 P.2d 498, 502 n.7 (Ala.), *cert. denied*, 449 U.S. 974 (1980). Similarly, an Ohio court held that due process concerns justify state court exercise of jurisdiction in foreign party indemnity actions. *Ross v. Spiegel Inc.*, 53 Ohio App. 2d 297, 300, 373 N.E.2d 1288, 1292 (Ohio Ct. App. 1977).

168. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 53, 702 P.2d 543, 552, 216 Cal. Rptr. 385, 395 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

169. *Id.* at 53, 702 P.2d at 553, 216 Cal. Rptr. at 395.

170. *Id.* The dissent argues, however, that Asahi did not show the requisite intent to serve the California market. *Id.* at 54, 702 P.2d at 554, 216 Cal. Rptr. at 396 (Lucas, J., dissenting). Even if Asahi foresaw that California consumers ultimately might purchase Asahi valves, Asahi took no steps toward this goal beyond its sales to Cheng Shin. *Id.* The dissent maintains, moreover, that despite the finding that Asahi had minimum contacts with the forum state, the interest of California in the injured plaintiff diminished after the plaintiff obtained his relief. *Id.* at 55, 702 P.2d at 555, 216 Cal. Rptr. at 397 (Lucas, J., dissenting). Given the alien party nature of the indemnity action, the dissent alludes to the possibility of suit in an alternative forum in Japan or Taiwan where the parties entered the sales contract. *Id.*

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

172. *Id.* at 1034; see U.S. CONST. amend. XIV, § 1 (prohibiting states from depriving persons of life, liberty, or property without due process of law).

173. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1034-35 (1987).

The Supreme Court in *Asahi Metal Industry*, after determining that the California court could not exercise jurisdiction over Asahi, did not address the forum non conveniens issue. *Id.* at 1035. The Court, however, alluded to the underlying policies of the doctrine, discussing the serious burden on the Japanese defendant of having to defend itself in the United States under California law. *Id.* at 1034. Because the plaintiff was not a United States citizen, the Court did not have to address the policy of providing



plurality's interpretation of the stream of commerce theory and conclusion regarding Asahi's purposeful availment of California law.<sup>174</sup>

### 1. Reasonableness Test

The analysis of the Supreme Court decision in *Asahi Metal Industry Co. v. Superior Court* focuses on the reasonableness of the assertion of jurisdiction.<sup>175</sup> The Court confirmed its policy that an assertion of jurisdiction may not offend notions of fair play and substantial justice.<sup>176</sup> A reasonable exercise of jurisdiction, the Court held, depends upon the balancing of factors identified in *World-Wide Volkswagen*: 1) the burden on the defendant, 2) the interests of the state, 3) the interest of the plaintiff in adequate relief, 4) the interest of the federal judiciary in efficient resolution of controversies, and 5) the shared interests of the several states in furthering fundamental substantive social policies.<sup>177</sup>

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United States injured citizens with access to United States courts. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). In addition, because the parties initiated and completed the transaction outside the United States, the Court questioned whether Japanese or Taiwanese law should apply. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1034 (1987).

Product liability laws in Japan are far more restrictive than in the United States. See Ottley & Ottley, *Product Liability Law in Japan: An Introduction to a Developing Area of Law*, 14 GA. J. INT'L & COMP. L. 29, 42-55 (1984) (discussing Japanese attitudes toward dispute resolution, and tort and warranty theories of recovery). Japanese law provides recovery for injuries resulting from unforeseen latent defects in a product, but limits damages to the reliance or expectancy interest of the buyer. *Id.* at 44. An injured plaintiff may seek recovery under a negligence theory if he or she can show (1) the intent or negligence of the defendant, (2) an infringement on the rights of the plaintiff, (3) the legal capacity of the defendant, and (4) damages. *Id.* at 47. On the other hand, Japanese law does not provide for strict liability actions. *Id.* at 55-56; see also Cohen & Martin, *Western Ideology, Japanese Product Safety Regulation and International Trade*, 19 U. BRIT. COLUM. L. REV. 315, 324-40 (1985) (presenting a discussion of Japanese products liability law).

A Far Eastern forum would be a more appropriate forum for judicial resolution of the dispute because both parties reside there and have better access to the evidence related to the commercial transaction. *Id.* The Court recognized the nature of the suit as an indemnity action between two alien corporations. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1030 (1987).

The Court held that California is not a reasonable forum in which to adjudicate the dispute because the indemnity issue did not involve a United States party. *Id.* at 1034-35. The decision further operates to promote the reasonable regulation of international trade because it refers dispute resolution to the forum in which the commercial transaction took place and to the forum under whose laws the parties signed the contract.

174. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1035 (1987) (Brennan, J., concurring in part).

175. *Id.* at 1033-34.

176. *Id.* at 1033; see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (establishing the due process rationale for the minimum contacts test).

177. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1034 (1987). The Court in *World-Wide Volkswagen* originally announced the factors. *World-Wide Volk-*

Weighing these factors, the Court concluded that the assertion of jurisdiction would be unreasonable and unfair.<sup>178</sup> Distance, expense, and vulnerability to a foreign judicial system place a severe burden on the alien defendant forced to litigate in California.<sup>179</sup> The Court underscored the need to place extra weight on the burden side of the equation when jurisdiction requires the long arm statute of the state to reach outside the United States.<sup>180</sup>

The Court also ruled that the interests of the plaintiff and of the state were slight, compared with Asahi's burden of defense in a foreign country.<sup>181</sup> Moreover, the action was primarily an indemnity claim,<sup>182</sup> with a Taiwanese corporation seeking indemnity from a Japanese corporation in a California court.<sup>183</sup> The contractual events took place in Taiwan.<sup>184</sup>

The interest of the state diminished when Cheng Shin settled with the originally injured plaintiff.<sup>185</sup> The issue thus changed from a product liability question to an indemnification issue.<sup>186</sup> According to the plurality, although the state retains its interest in ensuring that foreign manufacturers comply with state safety standards, this interest does not apply to an indemnity action.<sup>187</sup> Also, it is unclear whether California state law should govern this suit.<sup>188</sup> If Taiwanese or Japanese law were more appropriate, asserting jurisdiction over Asahi would hardly

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swagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

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

179. *Id.*

180. *Id.*

181. *Id.*

182. *See id.* (stating that the only interest of the plaintiff, Cheng Shin, and the forum in the California court assertion of jurisdiction over Asahi is a claim for indemnification).

183. *Id.*

184. *Id.* The Court suggested that if Cheng Shin had persuaded the Court that it was more convenient to litigate in California than the Far East, then the Court might have placed greater weight on Cheng Shin's interest in relief. *Id.* Instead, the Court focused its analysis on Asahi's burden in a California trial.

185. *Id.* at 1030.

186. *Id.*

187. *Id.* at 1033. *But see* Asahi Metal Indus. Co. v. Superior Court, 39 Cal. 3d 35, 52, 702 P.2d 543, 553, 216 Cal. Rptr. 385, 395 (1985) (en banc) (discussing the state's interest in consumer protection), *rev'd*, 107 S. Ct. 1026 (1987).

188. *See* Phillips Petroleum v. Shutts, 472 U.S. 797, 821-22 (1985) (holding that because the forum state lacked interest in claims unrelated to the state, applying the law of the forum would be arbitrary and unfair). The Court in *Phillips Petroleum* noted that the preference of the plaintiff for forum law is not controlling. *Id.* at 820; *see also* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (recognizing that the presence of the defendant in the forum state gave that state an interest in regulating the insurance obligations of the company toward state residents). The dissent in *All State Ins. Co.* argued that allowing the plaintiff to choose applicable substantive rules would result in "forum shopping." *Id.* at 337 (Powell, J., dissenting).

serve state safety objectives.<sup>189</sup> The Court noted that as long as the state can hold the manufacturer of the final product liable, in this case Cheng Shin, that manufacturer will be responsible for quality control over its component parts suppliers.<sup>190</sup>

Two additional factors comprise the reasonableness inquiry: first, the interests of the states in efficient judicial resolution, and second, the enhancement of substantive social policies.<sup>191</sup> In this portion of its analysis, the Court emphasized the significance of the international nature of this case.<sup>192</sup> In examining the interests of the several states, the Court noted that it must consider the policies and procedures of foreign nations<sup>193</sup> as well as the impact of an exercise of jurisdiction on the foreign policy goals of the federal government.<sup>194</sup> Given the magnitude of these questions, the Court recommended using restraint when conducting the reasonableness analysis within the international context<sup>195</sup> and concluded that because the burden on the defendant was significant, exercising jurisdiction over Asahi would be unreasonable.<sup>196</sup>

The Supreme Court applied the traditional jurisdictional tests to the alien corporation in the *Asahi* case. The Justices arrived at three different conclusions concerning the question of purposeful availment. Despite their unanimity as to the reasonableness of jurisdiction over a remote Japanese component parts manufacturer, the strong dissenting opinions reflect the inadequacy of the traditional tests in the context of international commerce.

## 2. Purposeful Availment — Stream of Commerce Test

The plurality decision examined the pivotal test of due process: whether the defendant had minimum contacts with the forum state.<sup>197</sup> The plurality restated the purposeful availment test, which allows the forum state to maintain jurisdiction over a defendant who has acted

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

190. *Id.*

191. *Id.*; see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (presenting the factors applied in a reasonableness inquiry).

192. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1034-35 (1987).

193. *Id.* at 1034.

194. *Id.* at 1035.

195. *Id.*; see *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting) (recommending that courts exercise great care when extending United States notions of personal jurisdiction over both foreign property in the United States and property in foreign countries).

196. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1035 (1987).

197. *Id.* at 1031-35; see also *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (defining the minimum contacts test); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (interpreting the minimum contacts formulation).

with intent to accept the benefits or protection of that state.<sup>198</sup> When the defendant acts with such intent, the act itself operates as the requisite connection to justify the court's jurisdiction.<sup>199</sup>

As a prelude to its inquiry into the question of purposeful availment, the plurality reviewed the holding of the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*.<sup>200</sup> The plurality first differentiated two types of foreseeable activity: 1) the attenuated foreseeability that a product might be transported after sale to the forum state, and 2) the foreseeability of the sale of the product in the state as part of the overall stream of commerce.<sup>201</sup> The plurality noted that lower courts have reached contradictory conclusions when using a stream of commerce analysis to evaluate a defendant's awareness of final sales in the state.<sup>202</sup>

Some courts hold that placement of a product in the stream of commerce is sufficiently purposeful,<sup>203</sup> other courts require an additional showing of intent.<sup>204</sup> The Supreme Court of California employed the former analysis, holding that Asahi's awareness of the ultimate sales in California provided a constitutional basis for jurisdiction.<sup>205</sup> Contrary to the state court holding, the Supreme Court plurality determined that due process requires more than mere awareness of the destination of

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198. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1030 (1987); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) (providing a rationale for jurisdiction when a defendant benefits from state laws).

199. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1031 (1987).

200. *Id.* The Court in *World-Wide Volkswagen* denied the assertion of jurisdiction because mere foreseeability without reasonable expectation was insufficient. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980). The Court also rejected the state court exercise of jurisdiction because the attenuated foreseeability that the product might be transported to the forum state was not sufficient to establish the jurisdiction of the court. *Id.* at 299. If the manufacturer anticipates sales in the forum state, however, foreseeability satisfies the due process analysis. *Id.* at 297.

201. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1031 (1987).

202. *Id.* at 1032.

203. See *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1084-85 (5th Cir. 1984) (finding that the manufacturer had an interest in reaching as broad a market as possible and that it made no attempt to limit the states to which the distributor ultimately would sell the finished cylinders); *Hedrick v. Daiko Shoji Co., Inc.*, 715 F.2d 1355, 1358 (9th Cir. 1983) (concluding that the manufacturer had performed a forum-related act in producing a part for an ocean vessel that the manufacturer knew served world ports).

204. See *Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984) (per curiam) (finding that because the Japanese automobile seat manufacturer does not conduct any business in the United States, requiring it to defend itself in a foreign country would be unjust).

205. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 47-52, 702 P.2d 543, 549-52, 216 Cal. Rptr. 385, 391-94 (1985) (en banc), *rev'd*, 107 S. Ct. 1026 (1987).

the product.<sup>206</sup> Rather, a state court must find that a manufacturer intentionally directs an act toward the state.<sup>207</sup>

The plurality enumerated conduct that would satisfy the intent requirement: 1) designing the product for the state market, 2) advertising in the state, 3) establishing channels to provide regular advice to customers, or 4) marketing through a distributor who acts as the manufacturer's sales agent in the state.<sup>208</sup> Because Asahi neither maintains offices, property, agents, or representatives in California, nor conducts advertising or solicitation of orders there, the plurality found that the California court exceeded the limits due process imposes.<sup>209</sup>

The minority concurrence disagreed with the determination of the plurality that injecting a product into the stream of commerce with an awareness of its destination does not satisfy the purposeful availment standard.<sup>210</sup> The minority defined the stream of commerce as a continuous and anticipated flow of goods through the chain of distribution.<sup>211</sup> The stream of commerce, the concurrence of the minority stated, is not an unpredictable and haphazard movement of goods to the forum state, rather it is a directed process whose very nature removes the element of surprise when litigation arises in the state.<sup>212</sup>

The minority recognized that the burden of defense logically corresponds to the benefits received.<sup>213</sup> Asahi derived financial reward from retail sales in California, and indirectly received a benefit from the California regulatory process, which increased commercial activity.<sup>214</sup> The minority, therefore, would have held that Asahi did not need to take additional acts to be subject to the jurisdiction of the California court.<sup>215</sup>

The minority criticized the decision of the plurality as inconsistent

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

207. *Id.* The Court in *Burger King* required a substantial connection between the defendant and the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). The Court in *Keeton*, however, stated that the regular sales in the forum state of thousands of magazines the respondent published were neither random nor fortuitous. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

208. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1033 (1987).

209. *Id.*

210. *Id.* at 1035 (Brennan, J., concurring in part).

211. *Id.*

212. *Id.* at 1036 n.1 (Brennan, J., concurring in part). See generally Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L. FORUM 533, 546-60 (1963) (providing the development of the stream of commerce theory).

213. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1035-36 (1987) (Brennan, J., concurring in part).

214. *Id.*

215. *Id.*

with *World-Wide Volkswagen Corp. v. Woodson*.<sup>216</sup> The Court in *World-Wide Volkswagen* held that when a manufacturer anticipates suit in a forum state because it maintains regular sales of goods there, it can use several methods to protect itself.<sup>217</sup> The minority opinion noted that a manufacturer may purchase insurance against liability costs, pass on additional costs to the consumer, or specifically restrict sales in that state.<sup>218</sup> An assertion of jurisdiction, therefore, was valid because Asahi foresaw regular and extensive sales of its component parts in California.<sup>219</sup> Asahi's conduct represented a substantial connection to the forum state that satisfied the minimum contacts test.<sup>220</sup>

Three Justices agreed with the judgment reversing the Supreme Court of California, but also joined the minority concurrence in its application of the stream of commerce theory.<sup>221</sup> These Justices took a different approach from the minority, maintaining that once the Court finds that exercising jurisdiction would be unreasonable,<sup>222</sup> there is no need to perform a minimum contacts test.<sup>223</sup> In addition, these Justices asserted that a defendant's mere awareness that its products would reach California through the stream of commerce is not the same as purposeful availment.<sup>224</sup> The factors determining whether Asahi met the purposeful availment standard were the volume, value, and hazardous character of the products.<sup>225</sup> Assessing these factors, the three Justices found Asahi's regular course of dealing in California to be sufficiently substantial to constitute purposeful availment.<sup>226</sup>

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216. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 297 (1980).

217. *See id.* at 297 (1980) (discussing the reasonableness inquiry for determining jurisdiction).

218. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1037 (1987) (Brennan, J., concurring in part).

219. *Id.*

220. *Id.* at 1035.

221. *Id.* at 1038 (Stevens, J., concurring in part and in the judgment).

222. *Id.*

223. *Id.* The Court in *Burger King* determined that it may evaluate other factors to establish the reasonableness of jurisdiction despite an inadequate showing of minimum contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985).

224. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1038 (1987) (Stevens, J., concurring in part and in the judgment).

225. *Id.* The concurrence specifically pointed to the fact that over 100,000 Asahi valve assemblies annually ended up in California. *Id.*

226. *Id.*

### III. LEGAL ANALYSIS: INTERNATIONAL TRADE POLICY CONCERN

#### A. ADVERSE EFFECT ON INTERNATIONAL COMMERCE

The decision of the Court in *Asahi Metal Industry Co. v. Superior Court* is predictable. It is firmly rooted in traditional and long-established concepts of in personam jurisdiction.<sup>227</sup> The plurality opinion does not deviate from these concepts; rather, it serves to underscore the continued commitment of the Court to the application of the traditional approach.<sup>228</sup>

The plurality correctly used the stream of commerce doctrine to conclude that Asahi did not intend to serve the California market.<sup>229</sup> Because Asahi did not direct its business activity toward that specific market,<sup>230</sup> Asahi clearly did not anticipate a possible lawsuit in California. Although Asahi ultimately serves a worldwide market, the Court interpreted the stream of commerce theory narrowly, thereby limiting the extent to which a component parts manufacturer is liable for end product use anywhere in the world.

The concurring opinions reflect the difficulty the Supreme Court experiences when rendering jurisdictional decisions within an international commercial setting.<sup>231</sup> The reasonableness inquiry is a satisfactory method for evaluating assertions of jurisdiction in the international context, but its circumvention of the heart of the problem provides inadequate guidance to the lower courts. The Court must evaluate the extent to which jurisdiction over an alien corporation may adversely affect international trade.

The ruling in *Asahi Metal Industry* provides a basis for courts to begin evaluating the impact that their jurisdictional reach will have on international commerce. The Court focused its examination on the shared interest of the several states in furthering substantive social policies. The Court considered procedural and substantive policies of other nations in conducting its jurisdictional analysis.<sup>232</sup> Although each case presents different substantive social interests for review, the federal in-

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227. See *supra* notes 45-73 and accompanying text (discussing the stream of commerce jurisdictional theory).

228. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1033 (1987).

229. See *supra* notes 173-80 and accompanying text (discussing the finding of the Court that Asahi's contacts with California were insufficient for an exercise of jurisdiction).

230. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1033 (1987).

231. See *supra* notes 210-20 and accompanying text (explaining the minority position).

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

terest in foreign relations should be a dominant consideration in the analysis of whether to assert jurisdiction in an international context.<sup>233</sup>

The Court, however, did not outline the specific nature of the foreign policy concern, or the type of analysis involved in considering the trade policies of the United States with other nations.<sup>234</sup> If the Court recommends a case-by-case determination, it should provide guidance for lower courts. The need for guidelines is particularly acute in the state court systems, where decisions are widely divergent and have a serious impact on foreign commerce in the United States.<sup>235</sup>

The following discussion provides an analytical framework for judicial consideration of the impact of jurisdiction on international trade. Whether state court jurisdiction adversely affects international trade may depend upon the foreign governmental or corporate response to the assertion of jurisdiction. For example, the foreign response ultimately may injure the United States economy.<sup>236</sup>

The concern about a case's impact on international trade most frequently arises in product liability suits against alien corporations. The growth in international trade and the increasingly global nature of the world economy has led to a rise in international product liability suits.<sup>237</sup> Because tort recovery in other countries is vastly different from that available in the United States, tort suits in the United States provoke much criticism abroad.<sup>238</sup> United States law in this area is more liberal than most foreign systems,<sup>239</sup> providing consumers with the po-

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233. *Id.* at 1035.

234. *See id.* at 1034-35 (noting that courts should consider only procedural and substantive policies of other nations that the exercise of jurisdiction affects).

235. *But see* *Container Corp. of Amer. v. Franchise Tax Bd.*, 463 U.S. 159, 181 (1983) (arguing against the Court's determination of which particular acts will offend foreign nations). The Court discussed its lack of competence to decide how to balance a risk of retaliation against the state action. *Id.* The Court in *Container Corp.* suggested that developing objective standards to reflect general observations regarding international trade imperatives would be useful. *Id.*

236. *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966) (criticizing national conduct with respect to jurisdiction as solely self-interested and, therefore, likely to disturb the international order and cause reprisals).

237. *See* Siegmund, *Current Developments in Product Liability Affecting International Commerce*, 4 J. PRODUCT LIABILITY L. 109, 109 (1981) (noting the rate of change toward stricter standards of liability and the special legal problems arising when defective goods cross international boundaries); Hollenshead & Conway, *supra* note 23, at 52-54 (providing a summary of product liability law on a country-by-country basis).

238. *See* von Mehren, *Transnational Litigation in American Courts: An Overview of Problems and Issues*, 3 DICK. J. INT'L L. 43, 62-63 (1984) (stating that foreign countries dislike the excessive civil damages United States courts award).

239. *See* Orban, *Product Liability: A Comparative Legal Restatement — Foreign National Law and the EEC Directive*, 8 GA. J. INT'L & COMP. L. 342, 393 (1978)



tential for huge damage awards.<sup>240</sup> Foreign manufacturers, therefore, suggest that the system in the United States operates as a nontariff trade barrier discouraging competitors from entering the United States marketplace.<sup>241</sup> They maintain that their fear of liability not only affects direct sales here, but also may discourage some foreign investors from acquiring United States companies or opening plants that would benefit the United States labor force.<sup>242</sup>

In response to these accusations, United States manufacturers claim that the product liability system in the United States provides foreign competitors with a significant trade advantage.<sup>243</sup> They argue that foreign corporations are able to maintain a competitive edge because they do not carry heavy insurance burdens at home and they forego insurance protection here because the insurance costs related to United States sales are overwhelming.<sup>244</sup> In light of these existing tensions, courts should examine the impact of jurisdiction on international trade when adjudicating a product liability suit involving an alien corporation.

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Supreme Court examined the possible impact of state court jurisdiction on the United States economy.<sup>245</sup> The case involved jurisdiction over an alien

(noting the availability in the United States of accident information, and higher consumer awareness); Brody, *When Products Turn Into Liabilities*, FORTUNE, Mar. 3, 1986, at 20 (discussing the explosion in product liability suits and the costs of insuring against them). The crisis in the availability of business insurance has encouraged congressional efforts toward reform. *Id.* at 24. Senators Christopher Dodd and Slade Gorton proposed a no-fault claims program for injured persons as an alternative to litigation. Senator John Danforth grafted the compensation plan onto a legal reform measure to create a federal code dealing with product liability. *Id.* at 24.

240. See Siegmund, *supra* note 237, at 141 (stating that product liability damage awards are much higher in the United States than in other countries).

241. See INTERNATIONAL STUDY OF PRODUCT LIABILITY COSTS, *supra* note 23, at 306 (discussing differences among American, European, and Japanese product liability systems, and the resulting higher costs of insurance to United States manufacturers). Companies include these costs as part of the overhead in determining the unit price of United States machinery. *Id.* at 397. In addition to the high cost of liability insurance, United States manufacturers experience costs related to deductible sums under the insurance policy, awards above the policy limits, time and costs of company personnel for accident investigations, document assembly and production, interrogatories, damage to corporate reputation and the resulting loss of sales, and product recall expenses. *Id.* These costs, exclusive of insurance costs, may range from \$5,000 to \$80,000 per year. *Id.* at 300.

242. *Id.* at 306. Sixty to seventy percent of French companies do not insure for product liability. *Id.*

243. *Id.*

244. *Id.* at 307. Foreign corporations interpret the extraterritorial application of United States product liability laws as an imposition of our socioeconomic value system on them. *Id.* at 306.

245. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

defendant whose only contact with the forum state consisted of the purchase of helicopters and participation in training and other service programs that were part of the contractual agreement.<sup>246</sup> Implicit in the Court's decision is a concern about the effects the exercise of jurisdiction would have on United States export sales.<sup>247</sup> Although not expressly reflected in the opinion in *Helicopteros Nacionales*, the Court incorporated the economic arguments that the United States Solicitor General<sup>248</sup> made in his amicus brief delivered in support of the alien corporation.<sup>249</sup>

The Solicitor General argued that the assertion of jurisdiction would reduce global sales of products of United States export firms.<sup>250</sup> If foreign buyers consequently risk liability in the United States merely on the basis of their purchases, these buyers arguably will seek alternative sources of supply to meet their needs.<sup>251</sup> The Solicitor General noted the critical importance of foreign trade to the United States economy.<sup>252</sup> The Solicitor General also argued that jurisdiction would damage congressional and executive efforts to promote the export of United States products and to remove foreign trade barriers.<sup>253</sup> Assertions of

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246. Brief for the United States as Amicus Curiae at 9-14, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (No. 82-1127). The United States has an interest in assuring that jurisdictional obstacles to free trade do not thwart its efforts to remove barriers to foreign trade. *Id.* at 13.

247. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984).

248. See L. CAPLAN, *THE TENTH JUSTICE* 3-7, 196-99 (1987) (defining the role of the Solicitor General and the nature of amicus briefs he or she files with the Supreme Court).

249. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984); Brief for the United States as Amicus Curiae at 10, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (No. 82-1127). In 1981, the United States Trade Representative, Ambassador William E. Brock, advised Congress that the services provided as part of a transfer of high technology equipment or manufacturing goods are a necessary component of the sales package. Opening Statement of Ambassador William E. Brock, United States Trade Representative, Before a Joint Oversight Hearing of the Senate Committee on Finance and the Senate Committee on Banking and Housing, and Urban Affairs on U.S. Trade Policy 6 (July 8, 1981).

250. Brief for the United States as Amicus Curiae at 11-12, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (No. 82-1127).

251. *Id.* at 12. The aerospace industry is vital to the United States balance of trade. Over the past five years, 67% of civil transport aircraft sales were for export. *U.S. Trade Policy, Phase I: Administration and Other Public Agencies: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 5-43 (1981) (statement of W. Stephen Piper, Office of the United States Trade Representative).

252. Brief for United States as Amicus Curiae at 13, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (No. 82-1127). The risk of business loss is especially acute in the aerospace arena because foreign suppliers of aerospace products often receive large government subsidies that result in a favorable price differential to them in the world market. *Id.*

253. *Id.* at 12-13. Congress intended the Export Trading Company Act of 1982 to

jurisdiction can undermine United States trade policy initiatives.

The controversy presented in *Asahi Metal Industry* could affect both international trade and the United States economy.<sup>254</sup> Unlike the Court in *Helicopteros Nacionales*, the Court in *Asahi Metal Industry* did not confront the problem of loss of sales to a threatened export industry.<sup>255</sup> In *Asahi Metal Industry*, the Court confronted a jurisdictional issue related to government trade policy questions.<sup>256</sup> For example, Cheng Shin argued that it was reasonable to subject a Japanese manufacturer to the same jurisdictional liability as domestic manufacturers.<sup>257</sup> Moreover, Cheng Shin argued that denial of jurisdiction gave a competitive advantage to foreign manufacturers that already enjoy the advantages of their home country's less restrictive national environmental regula-

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promote the export of United States products. See Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233, 1234 (1982) (codified at 15 U.S.C. §§ 4001-4021 (1982)) (amending the Foreign Corrupt Practices Act of 1977).

254. See generally R. BARNET & R. MULLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* (1974) (providing an analysis of the globalization of the world economy).

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

256. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1034-35 (1987). In February 1987, the Reagan Administration identified the key components of its new trade policy initiative. *Reagan Administration Sends Massive Package of Competitiveness Legislation to Capitol Hill*, 4 Int'l Trade Rep. (BNA) No. 8, at 280 (Feb. 25, 1987) (identifying the key components of the new trade policy initiative of the administration). The package includes the following: (1) a worker adjustment program for dislocated workers; (2) increased government support for science and research; (3) new protection for the intellectual property rights of American products and technology; (4) relaxed export controls for non-national security concerns; (5) new product liability reforms to reduce costs for American business in general; (6) a new GATT round of multilateral trade negotiations; (7) domestic import relief under section 201 of the trade laws; (8) consideration of reciprocity under section 301 with respect to retaliation against closed foreign markets, while preserving presidential negotiating flexibility; (9) improved efficiency of antidumping and countervailing duty laws; and (10) clarification of the Foreign Corrupt Practices Act to benefit American exports. *Id.*

In Congress, Senate Finance Chairman Lloyd Bentsen (D-Tex.) introduced a trade bill in 1987. *This Trade Bill Just May Fly*, *Bus. Wk.*, Feb. 16, 1987, at 31. It provides for the following:

- 1) the acceleration of trade relief for companies and industries which draw up plans to improve productivity and increase competitiveness. The plans also would require presidential retaliation against unfair trading practices, if negotiated agreements failed;
- (2) expanded retraining for American workers displaced by foreign competition with funding to come from a new 1 percent across-the-board customs surcharge;
- (3) presidential authority to negotiate a solution to Third World debt problems and to urge exporting countries to revalue their exchange rates;
- (4) the extension for 10 years for presidential authority to negotiate multilateral trade agreements, if he reports to Congress more frequently and fully on trade policy.

*Id.*

257. Brief for Respondent at 27-28, *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (No. 85-693).

tions and lower labor and marketing costs.<sup>258</sup> If the Court protects foreign manufacturers from jurisdiction in product liability cases, it will further harm domestic industries suffering from overwhelming foreign competition.<sup>259</sup> Domestic companies will bear the cost of defective foreign component parts, rather than the foreign manufacturer.<sup>260</sup>

The California Manufacturers Association (CMA) filed an amicus brief in favor of the Respondent in *Asahi Metal Industry*.<sup>261</sup> In a lengthy appendix CMA compared the United States and Japanese balance of trade situations.<sup>262</sup> The CMA stated that the center of economic gravity has moved to the Pacific Basin region.<sup>263</sup> For example, the Japanese, Korean, and Taiwanese trade surpluses with the United States equal one-third of the United States trade deficit.<sup>264</sup> The Japanese defense budget totals one percent of the Japanese gross national product (GNP), whereas the United States defense budget equals seven percent of its GNP.<sup>265</sup> The fact that two-thirds of United States exports to Japan consist of raw materials or semi-finished products, CMA argued, reveals a trade picture similar to that between a developing and developed nation.<sup>266</sup> CMA implied that the Court should consider the United States-Japan trade imbalance and assert jurisdiction over Asahi to protect United States manufacturing interests.<sup>267</sup>

Asserting jurisdiction over alien manufacturers, however, can have an adverse impact on international commerce and ultimately may harm United States economic interests.<sup>268</sup> Foreign commerce suffers, for ex-

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258. *Id.*

259. *Id.*

260. *Id.*

261. Brief of California Manufacturers Ass'n in Support of Respondent at A-1 app., *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (No. 85-693).

262. *Id.*

263. *Id.* at A-3 app. By the end of this century the Pacific region will contribute half of the total world Gross National Product (GNP). *Id.* at A-4; see also *Global Competition: The New Reality*, 9 WILSON Q. 42, 42-43 (Summer 1985) (discussing the position of the United States in terms of industrial competitiveness).

264. Brief of California Manufacturers Ass'n in Support of Respondent at A-3 app., *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (No. 85-693). The CMA states that national boundaries do not protect domestic industries and that 70% of United States goods compete against foreign manufactured items. *Id.*

265. *Id.* at A-8 app.

266. *Id.* at A-11 app. Despite the increasing use of joint venture projects between firms in Japan and United States firms in the United States, automation threatens the continued employment of United States workers. *Id.* at A-12 app.

267. See *id.* at A-3 app. (arguing that the Court should exercise jurisdiction over the Japanese defendant in light of the increasing number of foreign goods sold in the United States market).

268. See *Samuels v. BMW of N. Am., Inc.*, 554 F. Supp. 1191, 1195 (E.D. Tex. 1983) (examining the effect of jurisdiction on trade). The shared interest of the states in furthering trade policies that promote the development of international trade, ulti-

ample, when a corporation decides against penetrating a new market because it faces uncertainty and unpredictability in the forum courts. Moreover, exercises of jurisdiction may cause the country of an aggrieved party to retaliate.<sup>269</sup> Such reprisals may consist of economic, political, or legal measures designed to offset the effects of judicial encroachment over national boundaries.<sup>270</sup> The far-reaching effects that the exercise of state court jurisdiction causes in these cases calls for judicial restraint.

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mately benefits United States citizens. *Id.* at 1194. The court held that the encouragement of trade and the economic well-being of individuals in the United States outweighed a policy requiring manufacturer responsibility. *Id.* To assert jurisdiction would have the effect of increasing export costs to the United States, a result that ultimately would harm the United States economy. *Id.* at 1195; *cf.* *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 729 (D. Utah 1973) (considering whether the judgment of a United States court would impair international trade). *But see* *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231, 235 (9th Cir. 1969) (holding that the hardship of defending a defective product in the forum state is an attribute of foreign trade). The dissent in *Duple*, however, argued that exercising jurisdiction will have an adverse effect on United States international relations, a field controlled by the Congress and the President. *Id.* at 239. The question of whether to assert jurisdiction in this case, therefore, should be a national policy decision. *Id.*

269. *See, e.g.*, Protection of Trading Interests Act, 1980, C.11, § 4 (Great Britain) (stating that a court in the United Kingdom will not give effect to a request from a foreign court if it infringes on the jurisdiction of the United Kingdom); Law No. 80-538 of July 16, 1980 [1980] J.O. 1799, *superseding* Law No. 68-678 of July 26, 1968 [1968] J.O. 7267 (France); Protection of Businesses Act, Act 99 of 1978, *as amended* by the Protection of Businesses (Amendment) Act, Act 114 of 1980 (South Africa); *see* Grossfield & Rogers, *A Shared Values Approach to Jurisdictional Conflicts in International Economic Law*, 32 INT'L & COMP. L.Q. 931, 934 n.17 (1983) (discussing the effects of excessive jurisdictional policies, especially the disruptive impact on the political and legal interests of the international community). These blocking statutes prohibit such actions as disclosure, copying, and inspection or removal of documents located within the territory of the state against whom the foreign plaintiff ultimately seeks recovery. *Id.* at 934. The authors suggest that the United States should take foreign interests more seriously at the beginning of the jurisdictional inquiry. *Id.* at 935.

270. *See* von Mehren, *supra* note 238, at 61 (discussing foreign hostilities to United States judgments). The United States and the United Kingdom failed to establish a bilateral convention on foreign judgments, designed to regularize recognition and enforcement practices. *Id.* at 57-58; *see also* United Kingdom-United States: Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, *initiated* Oct. 26, 1976, *reprinted in* 16 I.L.M. 71 (1977) (providing the proposed Convention). The negotiation efforts were unsuccessful because the British objected to the huge damage awards available in United States courts. von Mehren, *supra* note 238, at 58.

Many foreign nations criticize the excessive damage awards civil judgments in the United States provide. *See* Smith, Kline, & French Laboratories v. Bloch, 1 W.L.R. 730 (Q.B. 1983) (denigrating the contingency fee system in the United States, which encourages settlement without providing a deterrence to rising legal costs).

## B. JUDICIAL RESTRAINT IN INTERNATIONAL CASES

The Supreme Court draws a distinction between domestic and international controversies and recognizes that judicial restraint is often an appropriate response in the latter context.<sup>271</sup> An analysis of international cases reveals the concern of the Court with the impact of its decisions on foreign trade and commerce.<sup>272</sup> This section discusses how the Supreme Court in *Asahi Metal Industry* could have approached the trade policy considerations.

International contract law principles provide legal support for the proposition that jurisdiction over alien manufacturers may adversely affect international trade and commerce. In *Bremen v. Zapata Off-Shore Co.*,<sup>273</sup> the Supreme Court upheld a forum selection clause that designated the London Court of Justice to hear any disputes arising out of the transaction between the United States and German corporations. The Court analyzed the effect of enforcing the clause on national commercial policy.<sup>274</sup> Because United States policy aims to encourage the expansion of United States business and industry, international commercial disputes involving United States parties cannot be subject exclusively to United States court jurisdiction and United States law.<sup>275</sup> The enhancement of international trade requires certainty of law and foresight in negotiation.<sup>276</sup> Parties to an international contract must be able to assess freely the financial risks of a venture, including the risk of defending a suit in a particular forum.<sup>277</sup>

Although it was not a party to a forum selection clause, Asahi was a

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271. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.11 (1974) (discussing the judicial response to situations dealing with foreign contacts); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (noting the restraint placed on United States business if United States courts always assume jurisdiction).

272. Brief of Petitioner at 25, *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (No. 85-693) (considering the additional criteria of fair play and substantial justice requirements).

273. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972) (discussing the neutral selection of a forum by contract).

274. *Id.*

275. *Id.* at 17-18 (discussing forum selection in an international commercial transaction); see also *Gilbert v. Burnstine*, 255 N.Y. 348, 354-55, 174 N.E. 706, 707 (1931) (stating that courts should enforce contracts and that unless parties defy the law or public morality, they should have the right to freedom of contract). The court held that unless contractual provisions would entangle national or state affairs, forum selection clauses are strictly private business. *Id.*

276. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972) (discussing the importance of upholding a forum selection clause to provide certainty and predictability in international transactions); see also Farguharson, *Choice of Forum Clauses — A Brief Survey of Anglo-American Law*, 8 INT'L LAW. 83 (1974) (providing a comparative analysis of British and United States law).

277. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972).

party to a typical international contract.<sup>278</sup> Asahi, a Japanese component parts manufacturer, contracted with a Taiwanese tire maker to sell parts for incorporation into a final product.<sup>279</sup> Contract performance, including shipping, occurred outside the United States.<sup>280</sup> Exercising state court jurisdiction over a Japanese manufacturer that did not conduct business in the United States or direct any marketing efforts toward the United States would be unduly burdensome and unfair.<sup>281</sup> Finding jurisdiction in every *de minimis* case would thwart the free flow of goods and services between nations and interfere with a primary objective of United States trade policy.<sup>282</sup>

The Supreme Court recognizes the significant difference between international agreements and domestic contracts.<sup>283</sup> In *Scherk v. Al-*

278. Brief of Petitioner at 25, *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (No. 85-693). The Petitioner argued that the nature, obligation, and interpretation of a contract remain subject to the law of the place where the parties sign the agreement. *Id.*

279. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1027 (1987).

280. *Id.*

281. *Id.* at 1035. Even if the California state court were able to hear the case and in fact ruled against Asahi, it is questionable whether Japan would enforce the judgment. See Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV. 555, 579-85 (1985) (presenting an overview of the problems pertaining to United States service of process in Japan as well as issues of enforceability). A foreign judgment must satisfy the Japanese Civil Procedure Code (CCP) article 200 which requires:

(1) [t]hat the jurisdiction of the foreign court is not denied in laws and regulations or a treaty;

(2) [t]hat the defeated defendant, being Japanese, has received service of summons or any other necessary orders to commence procedure by a method other than public notice or has entered an appearance in the case without receiving service thereof;

(3) [t]hat the judgment of the foreign court is not contrary to the public order or good morals of Japan; [and]

(4) [t]hat there exists reciprocity [also translated as "mutual guarantee"].

Japanese Civil Procedure Code (CCP) article 200 (11 EHS trans. 1972).

A Japanese court refused to enforce a Washington state judgment against a Japanese manufacturer in a products liability action because enforcement would violate the public order. *Marubeni-American v. Kansai Iron Works*, 361 HANTA 127 (Osaka Chino Saibansho, 1977). The Japanese Supreme Court interprets "reciprocity," in CCP art. 200(4), to mean that the recognition rules of the rendering jurisdiction are not materially different from the Japanese rules. Peterson, *supra*, at 584.

282. See *supra* note 256 (discussing the proposals for a new national trade policy); see E. MCGOVERN, *INTERNATIONAL TRADE REGULATION* 12-13 (1982) (discussing the principles of the General Agreement of Tariffs and Trade (GATT) law). All GATT contracting parties should enter into reciprocal and mutually advantageous arrangements directed toward the reduction of tariff and nontariff barriers and the elimination of discriminatory treatment in international commerce to achieve economic objectives. *Id.* at 12.

283. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-16 (1974) (stating that international agreements have a unique character and different considerations than exclusively domestic contracts).

*berto-Culver Co.*,<sup>284</sup> the Court upheld a contract clause that provided for arbitration in Paris, despite United States federal laws that preclude the arbitration of securities disputes. The Court demonstrated sensitivity to the unique characteristics of international trade by recognizing the possibility that foreign businesses might avoid transacting with United States investors if, despite their otherwise mutually agreed upon contract provisions, they risk liability under United States securities laws.<sup>285</sup> When United States courts impose United States standards upon international commercial transactions, they exalt United States law over the law of other countries and consequently damage United States relations with other nations.<sup>286</sup>

State court jurisdiction may involve a possible invocation of the commerce clause.<sup>287</sup> The commerce clause gives Congress the power to regulate commerce with foreign nations.<sup>288</sup> The clause requires courts to use a stringent analysis when a case involves foreign rather than interstate commerce issues.<sup>289</sup>

In *Japan Line, Ltd. v. County of Los Angeles*, the Court examined a state tax on a foreign entity for a possible violation of the commerce clause.<sup>290</sup> The Court struck down the tax, holding that the state had encroached on the exclusive power of the federal government over for-

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284. *Id.* at 508. In allowing arbitration in Paris, the Court overruled its decision in *Wilko v. Swan*, 346 U.S. 427, 434-35 (1953), where it ruled that an arbitration agreement cannot deprive a securities purchaser of his or her judicial remedy under section 22(a) of the Securities Act of 1933. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515 (1974). The Court stated that the crucial difference between the decisions in *Wilko* and *Scherk* was the truly international character of the contract. *Id.*

285. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974).

286. *Id.* at 516-17. The dissent expressed concern over the invocation of the "international contract talisman" which operates to override the protection of United States investors under federal securities laws. *Id.* at 533. Removal of these guarantees requires legislative enactment, not judicial determination. *Id.*; see also Note, *From Schoenbaum to Scherk: The Continuing Question of Subject Matter Jurisdiction in an International Securities Transaction*, 12 Hous. L. Rev. 924, 942 n.144 (1975) (identifying two empirical factors to indicate whether United States court jurisdiction is detrimental to the economic relations of the United States: (1) evidence that foreign governments register official protests, and (2) lower levels of foreign business investment in the United States).

287. *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 770-71 (1945) (stating that under the commerce clause, the states may not regulate phases of local commerce that have national impact and demand uniform regulations); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193, 196-200 (1824) (holding that congressional authority to regulate foreign commerce is exclusive and plenary).

288. U.S. CONST. art. I, § 8, cl. 3; see THE FEDERALIST No. 22, at 143-45 (A. Hamilton) (C. Rossiter ed. 1961) (providing an historical perspective on the development of the commerce clause).

289. *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979).

290. *Id.*



eign policy.<sup>291</sup> The state may not prevent the government from "speaking with one voice" when regulating commercial relations with foreign governments.<sup>292</sup> Because the United States economy could experience serious repercussions from commercial retaliation, no state can act to create national foreign policy nor appear to dictate national policy to a foreign country.<sup>293</sup> The Supreme Court recognized that the state could make *de facto* foreign policy decisions even when addressing issues under the traditional authority of the state.<sup>294</sup>

The facts in *Asahi Metal Industry* are analogous to those in *Japan*

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291. *Id.* at 448. Other courts have upheld the federal government's exclusive power over foreign affairs. See *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (striking down a state statute as intrusive into foreign affairs, a field under the control of the President and Congress); *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933) (stating that with respect to foreign intercourse and trade, the people of the United States act through a single government). The Court in *Zschernig* identified three types of unacceptable state regulations: (1) state law that has an adverse effect upon international relations; (2) state law that interferes with the efforts of the national government in carrying out the existing foreign policy; and (3) state regulations in areas that only the national government can, through uniform laws, effectively regulate. *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); cf. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319-22 (1851) (holding that the Court may curtail state impingements on foreign commerce even though Congress does not regulate the specific matter in question).

292. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449-51 (1979); see *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 278-79 (1976) (examining whether a state import tax is unconstitutional under the import-export clause); *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 555-56 (1959) (Frankfurter, J., dissenting) (articulating the one voice doctrine as an instrument of foreign trade). The Court in *Michelin* stated that the federal government must speak with one voice when regulating commercial relations with foreign governments. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976). The Supreme Court in *Japan Line, Ltd.* identified the connection between issues arising from the commerce clause and the import-export clause, noting that both clauses address the right of the federal government to be free from state interference when regulating foreign commerce. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 n.14 (1979).

The Court was concerned with the risk that Japan would retaliate in response to a state imposed tax that was inconsistent with national policy to allow exemptions. *Id.* at 453. West German retaliation would follow because the relevant West German tax statute provides for only reciprocal foreign exemptions. *Id.* at 453 n.18. The European Community (EC) communicated its intention to initiate similar measures. *Id.*

293. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1976). But cf. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (holding that the state tax did not implicate foreign policy issues or prevent the federal government from speaking with one voice). The Court recognized its limitations in determining when a foreign nation would take offense at a particular state act and its limitations in balancing the risk of foreign retaliation against the authority of the state to tax. *Id.*

294. *United States v. Belmont*, 301 U.S. 324, 330 (1937). Some commentators focus on the foreign policy issues found in tort, contract, and domestic relations cases that come before state courts. See Maier, *Bases and Range of Federal Common Law*, *supra* note 28 (listing a variety of issues decided in state courts that affect foreign policy, particularly tort, contract, and domestic relations laws).

*Lines, Ltd.* in that California sought to assert jurisdiction over a remote Japanese manufacturer.<sup>295</sup> Although the case does not involve imposition of a state tax or even the extraterritorial application of a state regulation, the assertion of jurisdiction arguably brings the "one voice" doctrine to the forefront. The United States continues to conduct delicate negotiations with Japan on trade policy.<sup>296</sup> If an individual state exercises jurisdiction over a product liability action beyond a reasonable scope, the state could damage trade negotiations and bilateral agreements.

The question of whether jurisdiction has a deleterious impact on international trade also relates to the issue of comity.<sup>297</sup> Comity concerns the degree of respect that a domestic forum accords the law of a foreign government that is not otherwise binding on the forum.<sup>298</sup> Comity is a natural outgrowth of an interdependent economic world composed of autonomous political units.<sup>299</sup> When a nation attempts to impose extraterritorially its laws on the residents or instrumentalities of another sovereign, its action may be unlawful and intrusive.<sup>300</sup>

The extraterritorial application of domestic law causes international

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295. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1030 (1987).

296. See Kumagai, *The Outlook for International Trade Relations*, BUS. ECON. JAN., 1987, at 18-19 (discussing protectionist versus free trade policies). As a result of successful negotiations in 1986, Japan unilaterally reduced or abolished tariffs on 1,850 items in the beginning of 1987. *Id.* at 20. Japan liberated the field of telecommunications services in April 1986 as part of its commitment to improve access to the Japanese market. *Id.* In the financial sector, the Tokyo Stock Exchange now permits foreign investment firms to join the Exchange. *Id.* But cf. Baldrige, *Secretary Baldrige Urges Japan to Lower Trade Barriers*, BUS. AM., Aug. 4, 1986, at 2 (emphasizing to Japanese business and trade representatives the fragile status of the United States-Japan trade relationship). Since 1980, Japanese imports have fallen by 7%, from \$140 billion to \$130 billion, while exports rose by 35%. *Id.* at 3. Japanese imports of manufactured goods equalled 2.7% of the Japanese GNP in 1985. Based on this 1985 figure, proportionately the United States imported 2.5 times as much as the Japanese. *Id.* at 5.

297. See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (providing a judicial interpretation of the comity concept); see also Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 581 (1983) (arguing for diplomatic exchange, rather than judicial determination to resolve conflicting claims of authority regarding the extraterritorial application of laws). Court decisions that claim to recognize foreign governmental interests, but instead reveal a parochial attitude toward conflict resolution ultimately injure the international system. *Id.* at 594-95.

298. *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).

299. *Id.* The court recognized that the movement of people and goods across national borders leads to attempted regulation of national interests beyond sovereign boundaries, yet this requires much international cooperation. *Id.*

300. See E. NEREP, *EXTRATERRITORIAL CONTROL OF COMPETITION UNDER INTERNATIONAL LAW* 551-55 (1983) (describing principles that serve to protect national sovereignty); see also A. LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* 3 (2d ed. 1983) (discussing international trade regulations as having political as well as economic objectives).

tensions and retaliatory action and increases the risks and, therefore, the costs of international trade and investment as well.<sup>301</sup> Foreign corporations assessing the risks and benefits associated with United States business activity expect a reasonable degree of certainty and predictability. Multinational corporations operating in a multitude of national markets are subject to the regulations of diverse legal systems.<sup>302</sup>

Excessive jurisdiction increases stress in the international commercial system when corporations find themselves subject to conflicting directives with respect to potential liability. Reduced participation in international trade and increased protectionist legislation are possible consequences. Protectionist legislation restricts the beneficial movement of goods, capital, and technology.<sup>303</sup> Because jurisdiction questions can potentially affect international trade, United States courts must consider whether jurisdiction operates in the interest of the international community and not only in the interest of state residents.

### CONCLUSION

American state court assertions of jurisdiction over alien manufacturers can have an adverse impact on international commerce. Courts

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301. Note, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. PA. L. REV. 355, 367 (1984); see also Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151, 154 (1980) (analyzing the deleterious effect on relations between Britain and the United States that has resulted from the application of United States antitrust laws).

302. *Id.* at 368.

303. See Weidenbaum, *The High Cost of Protectionism*, 49 VITAL SPEECHES OF THE DAY 761, 762 (1983) (arguing that open trade lowers inflationary pressures because the supply of goods and services increases; and arguing that open trade improves the efficiency of resource allocation to yield higher growth, increased employment, and improved living standards). Protectionism shifts costs to nonprotected companies, which are costs the consumer ultimately bears, in the form of higher prices. *Id.* Protectionism is a hidden consumer tax. In 1980, this hidden tax amounted to over \$58 billion or \$255 per United States consumer. *Id.*; see also Kumagai, *supra* note 296, at 19 (noting that protectionism may foster a worldwide recession).

The House of Representatives overwhelmingly passed an omnibus trade bill (H.R. 4800) on May 28, 1986 and reintroduced it on January 6, 1987 as H.R. 3. *Rep. Wright Announces Bipartisan Conference on Trade Legislation, Measure Reintroduced*, 4 INT'L TRADE REP. (BNA) No. 1, at 20 (Jan. 7, 1987). The House bill would reduce the President's discretion with respect to trade remedies, would link negotiating authority to pre-announced positions on trade matters, and would apply American labor standards to foreign countries. *House Approves Omnibus Trade Bill by Wide Margin Despite Threat of Presidential Veto*, 3 INT'L TRADE REP. (BNA) No. 22, at 706-07 (May 28, 1986). The administration has attacked several H.R. 3 provisions as violative of international law and suggested therefore that they would more appropriately be handled under the GATT. Baker, *Yeutter Pledge Cooperation on Bill, but Hit H.R. 3, Promote Administration Plan*, 4 INT'L TRADE REP. (BNA) No. 7, at 217-18 (Feb. 18, 1987). The administration contended that the bill would lead to foreign retaliation and harm United States interests. *Id.*

should, therefore, incorporate an international trade policy analysis into the jurisdictional analysis to facilitate trade with other nations and to avoid retaliatory action as a result of excessive jurisdictional schemes. In formulating a structure within which the court may evaluate the impact of jurisdiction on international trade, it is helpful to use analogies from policy concerns available in related areas of the law. Selected international contract, tax, and arbitration cases provide support for the proposition that in the international context, courts should exercise restraint in extending United States legal precepts beyond national boundaries.

The Supreme Court in *Asahi Metal Industry* confronted the issue of whether assertions of jurisdiction can cause deleterious effects on international trade. The Court decided against the exercise of jurisdiction. It did not, however, expressly address the international trade policy concern. This Case-Comment concludes that in future cases, courts should incorporate international trade concerns into the traditional jurisdiction analysis.