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The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants

by
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and MARY KAY KANE**

It is trite but true to observe that disputes between United States nationals and people from other lands have been increasing steadily and doubtless will continue to do so. More and more, our commercial fates are intertwined. Accordingly, the phenomenon of litigation in the courts of the United States against people, both natural and corporate, from other countries will be more common in the future than it has been in the past. Such a trend should cause us to pause to reconsider whether what we have developed as practice in the past ought to be applied unthinkingly to the future as well.

As in all civil litigation, courts confronted with suits against alien defendants must determine two preliminary questions in order to ensure

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1. In suits brought in federal courts a third question must be asked: Does the court have subject matter jurisdiction over the particular controversy involved? See generally C. WRIGHT, LAW OF FEDERAL COURTS § 7 (4th ed. 1983). That particular inquiry is not part of our concern. The federalism principles that underlie restrictions on federal court power over particular controversies may be capable of different interpretations or they may be subject to special statutory regulation when aliens are parties to litigation. See, e.g., 28 U.S.C. § 1330
that whatever judgment is reached comports with due process and thus is enforceable. These questions are (1) can personal jurisdiction to properly be asserted over the alien defendant, and (2) has adequate notice of the suit been given to the defendant? The applicability of these two requirements to suits against alien defendants cannot be doubted since the courts long have recognized that our due process guarantees are available to "persons" whether or not they are citizens of the United States. Some serious questions, however, can and should be raised as to whether these prerequisites should be treated differently when alien defendants are involved and, if so, how? It is these issues that motivate this Article.

Two events of legal significance, one immediately past and the other imminent, make an exploration of this topic particularly important now, lest our failure to rethink these questions allows us to lapse into unthought practice as if by default. First, the Supreme Court recently has acknowledged that cases involving alien defendants may require some specialized attention when testing the constitutionality of a state court's assertion of jurisdiction. Although the Court seemed almost intentionally to forgo an excellent opportunity to address the question in its 1984 decision in Helicopteros Nacionales de Colombia, S.A. v. Hall, the need for special treatment was made explicit in the Court's 1987 decision in Asahi Metal Industry Co. v. Superior Court. Unfortunately, the Court failed adequately to come to grips with what special consideration ought to be given, and instead limited itself to the mere recognition that courts should be aware of the special burdens imposed on aliens defending here when assessing the fairness of asserting jurisdiction over them. A clearer, more carefully articulated consideration of what special concerns are involved, and what constitutional constraints exist, is necessary for future guidance.

2. The term personal jurisdiction as used here embraces actions in which jurisdiction is asserted premised on service of process (in personam), as well those based on the attachment of some property owned by the defendant (quasi in rem or in rem).
3. Due process rights are guaranteed for all "persons," which necessarily includes aliens. Galvan v. Press, 347 U.S. 522, 530 (1954); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886).
4. See infra text accompanying notes 34-45.
7. Id. at 1034-35.
The second feature event that makes our inquiry most timely is the publication of the American Law Institute's new Restatement of the Law, Foreign Relations Law of the United States (Revised). Although that document speaks to future practice and undoubtedly will be very influential on this topic, it fails to provide the necessary guidance. On jurisdictional issues it calmly accepts the notion that the criteria for exercising jurisdiction should be "basically the same" as in interstate cases and never examines why this is so or how they may differ. Although criticism for not moving into uncharted waters may be unfair, if the Institute's role is limited merely to restating, there is danger that this bland assumption as well as the statement of black letter categories of proper and improper jurisdiction settings will solidify the law before we ever have the opportunity to reconsider. So before echoes of our past have become unsuited regulators of our future, some exploration is required.

Our approach will be twofold. As the title suggests, we will begin by examining the problems surrounding the question of whether to exercise jurisdiction over an alien defendant. Although it is true that in some instances a failure of notice deprives the court of jurisdiction, and that the failure either to have a proper jurisdictional nexus with the forum or to provide constitutional notice will mean that the ensuing judgment can be collaterally attacked as an invalid exercise of the court's jurisdiction, it is important to keep in mind that the two concepts are distinct constraints on the courts. Thus, in this Article we will treat issues of judicial power and notice separately. We will look first at the current law concerning when jurisdiction can be asserted constitutionally, exploring why and where that law should be rethought and suggesting a model.

8. "Although nearly all of the leading cases in the United States involved interstate transactions or claims brought by one resident and citizen of the United States against another, the criteria for exercise of judicial jurisdiction are basically the same as for claims arising out of international transactions or involving a non-resident alien as a party." Restatement of the Law, Foreign Relations Law of the United States (Revised) § 421, reporter's note 1 (Tent. Final Draft, July 1985) [hereinafter Restatement].

9. Id. § 421(2).

10. E.g., McDonald v. Mabee, 243 U.S. 90, 92 (1917); see also Restatement (Second) Conflict of Laws § 25 (1971).


12. The Supreme Court itself has recognized the importance of keeping the issues of judicial power separate from notice. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

13. Keeping jurisdiction and notice questions separate also comports with the way those matters are treated in most civil law countries in which notice is tested typically only when there is a default. See deVries & Lowenfeld, Jurisdiction in Personal Actions—A Comparison of Civil Law Views, 44 Iowa L. Rev. 306 (1959).
approach to be followed. Then we will turn to an exploration of the notice question, examining the various rules, statutes, conventions, and treaties that control when service of process is made on alien defendants. In addition to providing a framework for accomplishing notice in this setting, we hope to answer along the way some of the difficult problems that have surfaced in applying the existing criteria.

The final matter that will be addressed is the one that every lawyer should consider when deciding where to file suit. That question is whether a judgment obtained against an alien defendant using our model approach could be enforced abroad if necessary. Although a worldwide answer to that question cannot be offered with certainty, some general indications can be found by looking at practices in some of the major commercial nations. In addition, by contrasting our notions of when it is proper to assert jurisdiction over a defendant with those of other countries, we can assess whether the adoption of our proposed scheme would be perceived as an exercise of "exorbitant" jurisdiction, which might cause international strife rather than cooperation.

I. Standards for Exercising Jurisdiction Over Alien Defendants

The propriety of asserting jurisdiction over an alien defendant depends upon finding an appropriate long-arm statute (or attachment statute if property is found in the relevant jurisdiction) and then determining whether the exercise of jurisdiction under that statutory scheme is constitutional. There are some specialized federal long-arm statutes dealing with the assertion of jurisdiction over defendants outside United States' borders in certain kinds of actions and a special federal provision for suits against foreign governments. For the most part, however, jurisdic-
tion over alien defendants will be asserted under the generally applicable state long-arm statutes and no peculiar problems of statutory interpretation exist as a result of the international or alien character of the defendant.

It is the question of what constitutional criteria are appropriate for testing the assertion of jurisdiction over nonresident alien defendants that poses a problem. A good vehicle for portraying the issue is *World-Wide Volkswagen Corp. v. Woodson*, decided by the United States Supreme Court in 1980. Four defendants were sued in an Oklahoma state court for injuries arising out of alleged deficiencies of an Audi automobile. They were Seeway, the New York retail dealer that sold the car to the plaintiffs; World-Wide, the regional distributor for a three state area; Volkswagen of America, the importer; and Audi, the German manufacturer. Audi made no objection to the jurisdiction of the Oklahoma state court. The other three did and, upon losing, Seeway and World-Wide pursued their objections through the Supreme Court of Oklahoma to the Supreme Court of the United States.

The outcome should be familiar and needs only a brief statement here: applying and refining principles announced in *International Shoe Co. v. Washington*, the Supreme Court ruled that the persistent defendants had inadequate contacts with Oklahoma to support jurisdiction. As to the other two, the case did not speak at all because Volkswagen of America gave up early, and Audi raised no objection even at the trial level. It is the hypothetical outcome and reasoning as to the German

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19. State long-arm statutes apply not only in state courts, but also in the federal courts by virtue of *Fed. R. Civ. P. 4(e).*

20. There should be little doubt that jurisdiction over resident aliens should be subject to the same constitutional standards as those applied in cases against United States citizens. For example, if a Vietnamese national is now permanently residing in California, suit should be possible in California state or federal courts. Similar conclusions apply for corporations whose only claim to alien status is that they incorporated in the Bahamas, for example. See infra note 33. The question whether special treatment is required arises in suits against nonresident aliens and is limited to whether jurisdictional assertions over them necessitate or allow the development of standards different from those used to control state court assertions over individuals and corporations not resident within the forum state.


22. 326 U.S. 310 (1945).

23. In dictum, the Court suggested that jurisdiction over the international manufacturer and national importer might have been proper. It commented that if the defendant purpose-
manufacturer that this Article addresses. Would it be correct to say that, if it had objected, the German manufacturer should be governed by the same principles as those applied to Seeway and World-Wide? If not, then what should control?

A. The Judicial Approach to Date

A brief review of some of the lower court decisions that have confronted challenges to jurisdiction made by alien defendants reveals no clear answer. In some cases the courts and the parties seem not even to have recognized that the nonresident defendant's status as an alien might suggest that a different inquiry would be appropriate. Rather, they have treated the review of jurisdiction as a straightforward issue of whether the International Shoe criteria were met: that is, whether the defendant had sufficient minimum contacts with the forum state such that the assertion of jurisdiction would not offend notions of fair play and substantial justice.

Those courts that have recognized the question have responded in one of two ways. The first is represented by those that have seemed to fully catered to a national market by distributing its product there, it might be sued in any state where the product malfunctioned. World-Wide Volkswagen, 444 U.S. at 297-98. Although the validity of this stream-of-commerce position may be questioned in light of the Court's more recent decision in Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026 (1987), see infra note 49, that need not concern us here. The distinction in World-Wide Volkswagen did not rest on the fact that the manufacturer was an alien corporation, whereas the protesting defendants were within the United States, but rather on the type of activity in which the various defendants engaged.


25. Despite the grandiose company name of International Shoe, there was nothing international about that company, which was a Missouri manufacturing corporation. The principles developed in that case thus pertained to the assertion of jurisdiction over defendants residing in states other than the forum.

give heightened scrutiny to the fairness of asserting jurisdiction when a nonresident alien defendant was involved, although they have not agreed on how this standard differed or was to operate.\textsuperscript{27} The second approach has been to adjust the way in which minimum contacts may be satisfied, allowing consideration of the defendant’s contacts with the nation as a whole,\textsuperscript{28} rather than simply those with the forum.\textsuperscript{29} The premise under-

\textsuperscript{27} Some courts, while acknowledging that the presence of an alien defendant may suggest that fifth, rather than fourteenth, amendment considerations control, nevertheless have asserted that the International Shoe criteria apply. \textit{See, e.g.,} American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V., 710 F.2d 1449, 1452 n.1 (10th Cir. 1983). They then may adjust the fairness inquiry to take account of the special burdens that might be involved.

The Ninth Circuit has issued several opinions expressing the notion that the reasonableness criteria must be applied with caution in the international context, suggesting that factors of particular importance are: the potential travel burden on the alien defendant, the burden on the plaintiff if the alternative forum is in another country, and the notion that the sovereignty barrier may be higher when a foreign national is defending (although it never has explained how that factor operates). \textit{E.g.,} Pacific Atl. Trading Co. v. M/V Main Express, 758 F.2d 1325, 1330-31 (9th Cir. 1985); Paccar Int’l, Inc. v. Commercial Bank of Kuwait, S.A.K., 757 F.2d 1058, 1065 (9th Cir. 1985); Olsen v. Government of Mexico, 729 F.2d 641, 649-50 (9th Cir.), \textit{cert. denied,} 469 U.S. 917 (1984); Hedrick v. Daiko Shoji Co., 715 F.2d 1355, 1358-59 (9th Cir. 1983); Raffaele v. Compagnie Generale Maritime, S.A., 707 F.2d 395, 398 (9th Cir. 1983); Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270-73 (9th Cir. 1981); \textit{see also} Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 319 (D. Md. 1983) (adopting the Ninth Circuit approach).


The Texas Supreme Court in \textit{Hall v. Helicopteros Nacionales de Colombia,} S.A., 638 S.W.2d 870, 875 (1982), \textit{rev’d,} 466 U.S. 468 (1984), approached the jurisdiction question by balancing the conveniences for the American plaintiffs who would have to sue in a foreign country against the large international business, and finding a special state interest in providing a forum under such circumstances.

Finally, other courts simply have acknowledged that when applying the \textit{Shoe} criteria to foreign commerce, caution must be exercised. \textit{See Deutsch v. West Coast Mach. Co.,} 80 Wash. 2d 707, 717, 497 P.2d 1311, 1317, \textit{cert. denied,} 409 U.S. 1009 (1972). In contrast, one district court suggested that when alien defendants are involved there is no reason based on fairness to prefer one forum over another. \textit{See Cryomedics, Inc. v. Spembly, Ltd.,} 397 F. Supp. 287, 292 (D. Conn. 1975).


lying those decisions is that because the action is in federal court and based on some federal law, fifth amendment rather than fourteenth amendment due process controls, thus allowing for a national contacts approach. But even this last approach has not been without controversy, and several cases have limited its utility to situations in which a


Many cases taking a national contacts approach also suggest that specialized fairness concerns are applicable to alien defendants. E.g., Texas Trading & Milling, 647 F.2d at 315-16 n.37; Engineered Sports Prods., 362 F. Supp. at 729.

Various commentators have explored the use and propriety of the national contacts approach in the federal courts. Articles focussing on its use under special federal statutes generally have urged the adoption of that approach. See, e.g., Hovenkamp, Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis, 67 IOWA L. REV. 485, 498-505 (1982); Kane, supra note 18, at 405. Reactions have been more mixed over the question whether the federal courts generally could adopt a nationwide contacts approach under the fifth amendment. See, e.g., Fullerton, Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts, 79 NW. U.L. REV. 1, 56-60 (1984) (use of nationwide contacts rejected as unconstitutional); Hay, Judicial Jurisdiction Over Foreign-Country Corporate Defendants—Comments on Recent Case Law, 63 OR. L. REV. 431, 453-54 (1984) (national contacts should be used in cases against foreign defendants); Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 VA. L. REV. 85, 116-17 (1983) (national contacts of alien defendants cannot be used without congressional expansion of statutory authority); Note, Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction, 61 B.U.L. REV. 403, 417 (1981) (fifth amendment allows use of nationwide contacts); Note, National Contacts As a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits, 70 CALIF. L. REV. 686, 687 n.12, 698-99 (1982) (nationwide contacts can be used only in federal question suits and only if Congress enacts a statute or rule 4 is amended)[hereinafter Note, National Contacts]; Note, Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard, 95 HARV. L. REV. 470, 481-86 (1981) (aggregate nationwide contacts should be used in all federal question suits and should be implemented by Congress).

The controversy is exemplified by the majority and dissenting opinions in the en banc decision of the Fifth Circuit in Point Landing, Inc. v. Omni Capital Int'l, Ltd., 795 F.2d 415 (5th Cir. 1986), aff'd sub nom. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 108 S. Ct. 404 (1987). The majority held that since the Commodity Exchange Act contains no service provisions, the federal courts' jurisdictional reach is governed by rule 4 and the application of the Louisiana long-arm statute, limited by an assessment of state contacts. Id. at 422-27. Judge Wisdom, writing for the dissent, disagreed.

Statutes and rules should be construed so as not to reach an irrational result. Here there is a bizarre hiatus in the Rules. . . . When there is a hiatus in the Federal Rules the district court may establish its own ad hoc rule, provided that it is fair and reasonable and not inconsistent with any of the express rules. In a federal question action, aggregating a defendant's national contacts is analogous to aggregating state contacts in a diversity case. Aggregation of national contacts is a fair and reasonable ad hoc solution to the problem.

Id. at 428. The Supreme Court affirmed, holding that federal courts have no authority to
specific federal long-arm statute is involved. Further, its restriction to federal courts has led to unequal treatment depending on the forum in which the plaintiff to files suit.

The Supreme Court has been slow to address this question. Its first review of a jurisdictional challenge by an alien defendant came in 1984, when it decided Helicopteros Nacionales de Colombia, S.A. v. Hall. The Court created a federal rule for service. 108 S. Ct. at 413. Thus, since there was no federal long-arm, the Louisiana statute controlled. The Court never reached the constitutional question, id. at 409 n.5, because it found that the state statute did not permit jurisdiction on the facts presented. Id. at 411.


33. It might be said that the Supreme Court had an earlier opportunity to confront the special status of alien defendants in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). The case presented the problem of whether Ohio had to decline jurisdiction over a Philippine corporation on a cause of action unrelated to Ohio. The Supreme Court answered “no,” without particular reference to the fact that an alien corporation was defending. The Court, however, should not be criticized for dodging the issue. In fact, as recognized in an earlier California opinion involving the same underlying dispute, the actual contest was a marital property dispute between two Americans. The Benguet Mining Company became involved only when the American wife sought to attach some of her husband’s stock in the corporation and sought damages because of the company’s failure to issue the stock in her name. See Perkins v. Benguet Consol. Mining Co., 55 Cal. App. 2d 720, 727-32, 132 P.2d 70, 76-80 (1942). Additionally, the defendant, although organized in the Philippines, no longer was doing business there because its operations had been interrupted by the Japanese occupation during World War II. Its headquarters had been moved to Ohio, which became the center of its administrative activity. Thus, the Court was not confronted with a truly alien corporation, organized and carrying on its principal activities outside the United States. It is this latter type of corporation that is of interest here. Corporations who merely are incorporated in countries other than the United States, but whose principal activities and headquarters remain in the United States do not present a case for special treatment. To rule otherwise would be to ignore the territorial interests of our country and to allow parties to avoid those interests (or at least remove themselves from the ordinary application of our jurisdictional standards) merely by incorporating elsewhere. The concern raised in this Article is whether corporations that are truly alien, as well as individuals who are nonresidents and noncitizens of the United States, should require some special treatment for jurisdictional purposes.

case was a wrongful death action brought in the Texas state courts against a Colombian corporation (Helicol) and others for an accident occurring in Peru when one of the defendant's helicopters crashed. Helicol was in the business of transporting persons by helicopter for various companies working in South America. The crash occurred while Helicol was performing one of these transportation arrangements—an agreement that had been negotiated in Texas. The Court declared that "Helicol's contacts with the State of Texas were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment." Its analysis rested on a finding that the minimum contacts threshold for asserting jurisdiction had not been crossed because none of Helicol's contacts with the state of Texas were sufficient to establish general jurisdiction in Texas. No recognition was given to the fact that Helicol was an alien defendant; it was treated as though it were an Oklahoma foreign corporation involved in the same controversy.

The Court's silence on this point cannot be explained adequately, particularly in light of the concurring opinion by Justice Campbell in the Texas Supreme Court. He raised several of the international questions that begged to be answered. First, he suggested that the Texas court did not have the same problem facing it as had the United States Supreme Court in the World-Wide Volkswagen case. "We do not have a dispute

35. Id. at 418-19.
36. Four contacts were identified: (1) defendant's chief executive officer had flown to Texas to negotiate the transportation contract that ultimately led to the tragic flight; (2) defendant had purchased most of its helicopters from a Fort Worth company over the years; (3) defendant had sent prospective pilots and management personnel for training in Texas; and (4) the checks paying for its transportation services were drawn on a Texas bank and paid into a New York account. Id. at 416-17.
37. When the case came from the Texas Supreme Court, it was characterized as one in which the cause of action neither arose out of nor was related to defendant's activities in Texas so that general jurisdiction rather than specific jurisdiction was needed, thereby requiring a greater showing of contacts. Id. at 413-16. This characterization of the case was challenged by the dissent. See id. at 420-24 (Brennan, J., dissenting). There was, however, no suggestion by either the majority or the dissent that anything other than a traditional fourteenth amendment analysis was in order.
39. Professor Weinberg has pointed out that both Helicol in its brief in the Supreme Court and the Justice Department, which filed an amicus brief, had argued that there would be unfavorable repercussions for the balance of payments if jurisdiction were assumed and a judgment entered in accordance with American law. Id. at 929.
41. In fact, other lower courts also have noted that the World-Wide Volkswagen sovereignty concerns may be different from the sovereignty concerns raised in international cases. E.g., Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1272 (9th Cir. 1981); Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty., Ltd., 647 F.2d 200, 203 n.4
over jurisdiction between coequal sovereigns in a federal system. We are deciding jurisdiction between countries; as to citizens of the United States and a resident of Colombia. Therefore, 'due process' in this case must be universal in its application." He then went on to conclude that jurisdiction was proper noting, among other things, that it would be "unreasonable to require the widows and children seeking relief here to go to a foreign country to prosecute their action." According to Justice Campbell, this concern gave the Texas court a special interest in assured plaintiffs a forum "at least when that interest is not adequately protected by the plaintiff's power to choose the forum country." Despite this clear language in the lower court, the Supreme Court refused to address those concerns, applying a straightforward minimum contacts analysis and never seeming to acknowledge whether defendant's alien status might present some special considerations.

Three years later the Court apparently decided to confront the question whether special concerns properly are considered when determining the propriety of jurisdiction over alien defendants. The case, Asahi Metal Industry Co. v. Superior Court, arose out of a motorcycle accident in California. The plaintiff sued the Taiwanese manufacturer of the motorcycle tires (Cheng Shin) in California state court, claiming that the accident was caused by defects in its product. The defendant cross-claimed against Asahi, the Japanese manufacturer of the valve stem, seeking indemnification. Asahi sought to quash the summons arguing that jurisdiction over it was unconstitutional. As the record revealed, Asahi made no direct sales to California; its sale of the allegedly defective valve stem took place in Taiwan where it shipped its product to Cheng Shin. Asahi was aware that its product was incorporated into tires that were being shipped around the world, including the United States, but an affidavit of the president of the company declared that it did not foresee that

(D.C. Cir. 1981). Although others specifically have equated the two. E.g., Paccar Int'l, Inc. v. Commercial Bank of Kuwait, S.A.K., 757 F.2d 1058, 1065 (9th Cir. 1985).

42. Helicopteros, 638 S.W.2d at 875.
43. Id.
44. Id.
45. The Helicopteros Court did refer to Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). 466 U.S. at 414-15. But, as noted earlier, supra note 33, that case, though involving a Philippine corporation, never addressed the question whether that characteristic required special consideration.
47. Jurisdiction had been obtained under California's long-arm statute, which authorizes jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973). Thus, Asahi's argument was that California's assertion of jurisdiction was inconsistent with the fourteenth amendment due process clause. Asahi, 107 S. Ct. at 1030.
its sales in Taiwan would subject it to suit in California. Jurisdiction ultimately was sustained by the California Supreme Court on the theory that Asahi knew that some of its valve stems were being distributed in the state and benefited indirectly from the sale of tires by Cheng Shin in California. Its intentional act of placing its product in the international stream of commerce was sufficient to provide the basis for state court jurisdiction.\textsuperscript{48}

The Supreme Court reversed, finding jurisdiction to be unconstitutionally asserted. Although the Court divided on the question whether the minimum contacts requirement could be satisfied by the stream of commerce theory used by the California Supreme Court,\textsuperscript{49} eight members of the Court agreed that the assertion of jurisdiction over Asahi violated notions of fair play and substantial justice—the second prong of the\textit{International Shoe} standard—and reached that conclusion in large measure because of the special burdens placed on the alien defendant.\textsuperscript{50}

The Court, in an opinion by Justice O'Connor, addressed the four traditional factors that have been used to analyze the fair play standard: the burden on the defendant; the interest of the forum state; the plaintiff's interest in obtaining relief; and the interest of the interstate judicial system in efficient justice and in furthering fundamental substantive social policies. Each of these factors as applied to the facts of the case, with its special international character, was found to suggest that jurisdiction should not be asserted. The burden on Asahi was particularly severe because of the distance between Japan and California and because it required the defendant to submit to a foreign nation's legal system. Justice O'Connor concluded: "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."\textsuperscript{51}

Further, since the original California plaintiff had settled his case and only the Taiwanese manufacturer with


\textsuperscript{49} Four justices, in an opinion by Justice O'Connor, ruled that placing a product in the stream of commerce without some evidence that defendant purposefully directed it toward the forum state was insufficient to support jurisdiction. 107 S. Ct. at 1031-33. Four other justices, in a concurring opinion by Justice Brennan, held that due process was satisfied if the defendant was aware that the product was marketed in the forum state. \textit{Id.} at 1035-38. Justice Stevens, in an opinion joined by Justices White and Blackmun, stated that it was unnecessary to reach the minimum contacts issue since the finding that jurisdiction was unfair and unreasonable disposed of the case. \textit{Id.} at 1038.

\textsuperscript{50} \textit{Id.} at 1033-35. Justice Scalia did not join in this ruling and did not file a concurring opinion explaining why.

\textsuperscript{51} \textit{Id.} at 1034.
its indemnity claim against the Japanese defendant remained, the interests of the alien cross-claim plaintiff, as well as the forum, were slight.  

Finally, the Court noted that the procedural and substantive policies of other nations whose interests might be affected by this litigation counselled against the assertion of jurisdiction. Although recognizing that those interests would not always require dismissal, Justice O'Connor commented that those interests, as well as the Federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.

So what does all this mean? First, we clearly are told that some specialized treatment of jurisdiction is appropriate when a nonresident alien is defending. No longer should the international character of the defendant simply be ignored. Second, the Court suggests that this special consideration is pertinent when determining fairness under the fourteenth amendment. But exactly what these special fairness concerns are, or how they operate, remain somewhat in question. In fact, the case does little to clarify existing law, other than to underscore that the problem of how to treat alien defendants is a real one.

One reason that the Asahi Court’s analysis provides little guidance is that on the facts of the case, the decision was easy—all factors pointed toward dismissal. The Court had before it a foreign plaintiff and defendant litigating a transaction (the rights under the indemnity agreement) entered into outside the country. But how should the lower courts balance the fairness concerns if a local plaintiff is present—if, for example, the injured plaintiff originally had sued Asahi? There is no guidance from the Supreme Court, other than to say that a great deal of weight should be given to the burdens imposed on the foreign defendant. Further, if Asahi had shown additional contacts with California, would those have been sufficient to overcome the fairness concerns exposed by the Court? We only can speculate as to the answer.

So in large measure Asahi is not a much more helpful guide for future jurisdiction inquiries than other lower court decisions that had rec-
ognized the unique problems inherent in the international character of alien defendants, but had not formulated a coherent response to those concerns. In fact, the case does not even answer the question whether a national contacts approach might be used. Rather, the Court limited itself to addressing the case in the framework presented below. Since that approach focussed on California contacts and the stream of commerce theory, no statement concerning the propriety of a broader view of the relevant contacts was made. It might be argued that the Court espoused a general philosophy suggesting the need for extra protection for alien defendants and that itself is inherently inconsistent with an expanded contacts approach. It is just as easy, however, to understand the approach taken by the Court as one that relies on the fairness peg of the International Shoe standard to counterbalance whatever contacts approach is used.

A more serious criticism can be made of Asahi than simply the argument that it leaves too many unanswered questions. The problem with the approach of the Asahi Court—and the parties who presented the case—is that their underlying thesis is quite wrong. The due process clause of the fourteenth amendment as applied to assertions of personal jurisdiction has no bearing at all on what American courts can do to foreigners. It regulates only what the courts of one American state can do to persons who are in another American state. Thus the World-Wide Volkswagen Court said "even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." In Asahi, Justice O'Connor simply transformed this interest of the "several States" into the interests of nations. Yet, it seems quite obvious to us, that an "instrument of interstate federalism" very properly may regulate what Oklahoma can do to an Ameri-

54. See supra note 27.
55. In a footnote in the portion of her opinion dealing with contacts and with which three other justices agreed, Justice O'Connor specifically noted that they were not ruling on the question of whether Congress constitutionally could provide a statutory scheme for suits against aliens that relied on a national contacts approach. 107 S. Ct. at 1033 n.*.
57. Asahi, 107 S. Ct. at 1034. Prior to Asahi, some lower federal courts also had made the same mistake. E.g., Paccer Int'l, Inc. v. Commercial Bank of Kuwait, S.A.K., 757 F.2d 1058, 1065 (9th Cir. 1985); Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1272 (9th Cir. 1981). But see Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co., 743 F.2d 956, 959 (1st Cir. 1984).
can car dealer located in New York, but may have no bearing at all on what an Oklahoma state court can do to a German automobile manufacturer, or a California state court can do to a Japanese parts manufacturer.\textsuperscript{58}

In the international order, there is no such thing as Oklahoma. Oklahoma is an address, not a state. It is a fabled land in musical comedy, where the corn grows as high as an elephant's eye and wind goes sweeping across the plain. But it is just as mythical as Ruritania. It fields no army, sails no navy, prints no stamps and coins no money. Most important of all, it has no diplomatic relations and can conclude no treaties. In short, it lacks every single attribute of a "state" for international purposes.\textsuperscript{59}

Yet Oklahoma, even if not a state in the international sense, does have courts. It is true that some are federal and some are state, and their respective spheres are sharply defined. But in a world order of things, those are simply American courts.\textsuperscript{60} How we choose to distribute our judicial business by either geography or by subject matter is our own business and, further, is a matter as to which Germany and Japan are profoundly disinterested. If the Japanese courts ever are asked to enforce a judgment against Asahi, their question would be: "Is this a valid American judgment?", not whether it would be valid internally within the United States.\textsuperscript{61}

To reach this conclusion is not to say that Asahi or Audi are not "persons" within the meaning of either the fourteenth or fifth amendment.\textsuperscript{62} Due process is guaranteed by our assurances that no decision will be reached without according those defendants notice and an opportunity to be heard.\textsuperscript{63} But the fourteenth amendment as it has evolved in the jurisdiction context provides protections in addition to and quite apart from these procedural fairness guarantees to persons. Specifically, it protects the concerns of sister states of this Union from transgressions

\textsuperscript{58} See Stein, Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction, 65 Tex. L. Rev. 689, 739 n.220 (1987); Toran, supra note 24, at 772 n.70.
\textsuperscript{59} See Restatement, supra note 8, § 201 comment g.
\textsuperscript{60} International law "does not concern itself with the allocation of jurisdiction among domestic courts." Restatement, supra note 8, § 421 comment f, at 435-36; see R.H. Graveson, Conflict of Laws: Private International Law 619 (7th ed. 1974).
\textsuperscript{61} See Brenscheidt, The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany, 11 Int'l L. & Pol'y 261, 264 (1977); see also infra text accompanying notes 227-78 (discussion of foreign judgment enforcement). To the extent that state boundaries are used to limit the enforceability in the United States of an American judgment against an alien, we thus may be unnecessarily restricting its potential enforcement abroad.
\textsuperscript{62} See supra note 3.
\textsuperscript{63} See infra text accompanying notes 165-226.
by each other. This has been a consistent theme from Pennoyer v. Neff through World-Wide Volkswagen. Quite obviously neither Germany nor Germans can claim any benefits that are accorded to the State of New York or to persons because they are in or are from New York. The due process clause is not a privileges and immunities clause. Further, the fact that aliens are guaranteed equal protection under the laws does not preclude reasonable distinctions between aliens and citizens in applying their due process safeguards.

To say that the minimum contacts approach of International Shoe does not curtail the jurisdiction of American courts over alien defendants does not mean that jurisdiction is unbounded. To find the proper point of departure, we simply go back to an ancient landmark, Pennoyer v. Neff, decided by the Supreme Court 110 years ago and ruling that as a principle of international law, Oregon process could not run into Califor-

64. See Note, Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard, 95 Harv. L. Rev. 470, 484 (1981) ("the practice of considering only contacts within the state—is dictated not by fairness, but by limits of the state's power"). The due process guarantees in interstate cases are tied to the full faith and credit clause. U.S. Const. art. IV, § 1. As recognized in Pennoyer v. Neff itself, that clause requires sister states to enforce each other's judgments only when they have been entered in accordance with due process. 95 U.S. 714, 732-33 (1877). Professor Weinberg has argued that concerns about state interests are not really a legitimate part of the jurisdiction inquiry; that states really do not care whether jurisdiction is asserted over one of their own residents, as long as some forum is provided. Further, she suggests that jurisdictional assertions in international cases pose no real threat to the sovereignty of other nations; convenience alone matters. Weinberg, supra note 38, at 924. Her arguments, however, ignore the fact that jurisdictional questions are inevitably tied to judgments; the reason we strive so hard to assure the correctness of jurisdiction is in order to obtain a judgment that will be enforceable anywhere. In the United States, full faith and credit ensures that states will honor each other's decrees. If jurisdiction is lacking in the original forum, then full faith and credit does not require another state to ignore its own sovereign interests and enforce the judgment; indeed, it legitimately will assert its interest to ignore the judgment. In the international realm, there is no full faith and credit guarantee to compel enforcement; comity notions stemming from respect between nations (or sovereigns) alone urge enforcement. See A. Ehrenzweig, Conflict of Laws § 46 (1959). Thus, there are sovereignty concerns in international cases, but of a different order.

65. 95 U.S. 714 (1877).

66. See Stein, supra note 58, at 689. It is true that in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982), the Court clarified the reference in the World-Wide Volkswagen case to interstate federalism, noting that the restriction was a result of the individual liberty interest of the defendant, rather than some independent state interest. The Court, however, then characterized the due process concern expressed in International Shoe as one of balancing that interest against the question of state power. Id. at 712. In the international setting, it is one of national power, as restrained by due process. This difference was noted in Asahi, see supra text at note 51, although its ramifications were not fully appreciated there.

67. Aliens cannot claim the protection of the privileges and immunities clause for it is limited to "citizens." U.S. Const. amend. XIV, § 1.

68. See Restatement, supra note 8, § 722(2).
nia to commence a civil action. Notions of sovereignty and territoriality form the basis for limiting extraterritorial jurisdiction in the international realm. Further, those notions seem naturally to suggest that in the international context, the jurisdiction that matters is American jurisdiction, and not the more specific California jurisdiction. There are, however, some constraints in international understanding. For example, we have denounced somewhat the Helicopteros and Asahi Courts for resting their decisions on the due process clause of the fourteenth amendment. Do we therefore imply that those rulings are wrong in result? Certainly not intentionally. It is just that nobody can tell whether they are right or wrong because they asked the wrong question. “Contacts” has meaning internationally as well as domestically, but the contacts that matter for the former are not limited to those with Texas or California. Had the question been put as “What contacts does Helicopteros have with the United States?,” we well might have found much greater involvement than was shown in the case. So too with Asahi. Substantial contacts might have justified jurisdiction by some American court.

It is true that in a country as large as the United States, it may matter which American court can act, and that determination embraces some important notions of fairness. But this is a quite familiar problem. We call it venue, not jurisdiction, and deal with it as a matter of place of trial.

It also is certainly the rule that venue statutes as such typically give short shrift to aliens. Most, like the federal rule, simply declare that an

69. Pennoyer, 95 U.S. at 722. Some commentators have criticized the Pennoyer Court’s use of international law concepts on the ground that they are not appropriate in the interstate context. See Gottlieb, In Search of the Link Between Due Process and Jurisdiction, 60 WASH. U.L.Q. 1291, 1294-95 (1983); Hazard, A General Theory of State-Court Jurisdiction, 1965 SUP. CT. REV. 241, 263-65; Jay, “Minimum Contacts” as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. REV. 429, 452-54 (1981); Redish, Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation, 75 NW. U.L. REV. 1112, 1115-16 (1981). Right or wrong, these criticisms do not undercut the validity of the Court’s statements regarding the sovereignty basis for jurisdiction in the international order. Rather, they suggest the impropriety of viewing the interstate and international cases through the same looking glass.

70. As explained by Justice Field in Pennoyer, there are two well-established principles of public law governing jurisdictional assertions between independent states. First, “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.” 95 U.S. at 722. Second, “no State can exercise direct jurisdiction and authority over persons or property without its territory.” Id.

71. See infra note 79.

72. See RESTATEMENT, supra note 8, § 421, reporter’s note 6, at 441 (“There is no international law impediment, however, to aggregating a foreign defendant’s contacts with the United States as a whole . . . .”).
alien can be sued anywhere. All that means, however, is simply that an action can be filed anywhere. Whether fairness and convenience concerns demand that it be dismissed, we consider under the doctrine of forum non conveniens. Ironically, even the Supreme Court recognized this fact in another personal jurisdiction case not involving an alien, Burger King Corp. v. Rudzewicz, in which Justice Brennan commented that if the defendant’s contacts with the forum are purposeful and sufficient to cross the minimum contacts threshold, then most often other considerations that would render jurisdiction unreasonable “may be accommodated through means short of finding jurisdiction unconstitutional.” Therefore, fairness concerns involving where suit takes place need not be abandoned if the jurisdictional inquiry in suits against alien defendants properly is focused solely on what contacts the defendant has had with the nation as a whole. The burdens imposed by defending abroad rightly may be considered on a forum non conveniens inquiry.

B. A Model Approach

To criticize the Supreme Court for failing to provide a satisfactory approach to the problem of when it is proper to assert jurisdiction over a nonresident alien without examining the alternative would itself be unfair. So, with all the temerity that is due, we now will advance and explore our proposed model approach.

Our approach consists of three parts. First, the question whether personal jurisdiction properly may be asserted over an alien defendant should be answered by a single inquiry into the kind and nature of jurisdiction.

74. In the federal courts, the question more often is whether the case should be transferred, rather than dismissed. See id. § 1404(a).
76. Id. at 477. Justice Brennan specifically suggested that clashes in law could be accommodated through choice of law rules and inconvenience by a change of venue.
78. Other commentators also have suggested that a single inquiry be used to test jurisdiction over aliens, but their inquiry relies on an assessment of the reasonableness of asserting jurisdiction given the inconveniences involved. See Toran. supra note 24, at 784-85; Weinberg, supra note 38, at 924. This approach can be criticized on two grounds. First, it lacks a theoretical foundation by failing to give appropriate recognition to the role of foreign state sovereignty interests in jurisdiction. Second, it relies on a balancing standard to answer a question of power and in so doing injects uncertainty in the international realm where certainty and predictability are so important. Of course, reasonableness and inconvenience must be considered, but they should remain discretionary, nonconstitutional considerations. See infra text at notes 92-93; see also Stafford v. Briggs, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting).
contacts the defendant has had with the United States as a whole.\textsuperscript{79} This is true regardless of whether the court addressing the question is state or federal or whether the case is premised on an alleged violation of state or federal law.\textsuperscript{80} The concern with the personal jurisdiction inquiry is territorial and the court deciding the issue is sitting in a very real sense as a court of the nation, not as a court of the state. Thus, international constraints require only that there be substantial contacts with the country as a whole; if there are, we may demand a foreign national to submit to our courts.\textsuperscript{81}

In addition, the propriety of asserting jurisdiction premised on national contacts should not depend on whether jurisdiction is being asserted under a federal or state long-arm statute.\textsuperscript{82} Of course, there must be statutory authorization to assert jurisdiction outside the borders of the forum and thus a long-arm statute must exist and, depending on the categories authorized, this may have the effect of restricting jurisdiction from

\textsuperscript{79} The use of contacts, rather than relying solely on presence—the sole basis for jurisdiction at the time of \textit{Pennoyer v. Neff}—remains consistent with the approach recognized in the international context, and reflects the understanding that in modern times a defendant may be within the sovereign control of a jurisdiction by the nature of its activities, as well as by its physical presence. \textit{See Restatement, supra} note 8, ch. 2, introductory note at 431-32.

\textsuperscript{80} Notions of the source of governing law should be kept separate from the question whether jurisdiction is proper. The Supreme Court long has asserted this proposition with reference to questions of interstate jurisdiction. \textit{See Shaffer v. Heitner, 433 U.S. 186, 215 (1977)}; \textit{Hanson v. Denckla, 357 U.S. 235, 253 (1958)}. The propriety of this separation has been questioned by some commentators. \textit{See Martin, Personal Jurisdiction and Choice of Law, 78 Mich. L. Rev. 872 (1980)}; Sedler, \textit{Judicial Jurisdiction and Choice of Law: The Consequences of \textit{Shaffer v. Heitner}, 63 Iowa L. Rev. 1031, 1038 (1978)}. Nonetheless, the need to keep jurisdiction and choice of law questions separate is even clearer in the context discussed in text because the determination of whether federal or state law controls rests not on territorial concerns, but on federalism constraints that are immaterial in the international context.

\textsuperscript{81} \textit{See infra} text accompanying notes 249-57.

\textsuperscript{82} The determination whether a given long-arm statute may be used requires an inquiry into both whether the governmental authority that issued the statute intended it to cover the particular defendant involved and whether, if it did, the Constitution will allow the assertion. Although the constitutional issue obviously is intertwined, it is important to keep separate these two inquiries. Statutory limitations may prevent jurisdiction from being asserted, even if it would be constitutional to do so, and this also may be true when an alien is defending. The reason for tolerating these nonuniform results is because each governmental unit is allowed to decide for itself whether and when its courts may assert jurisdiction. If there is a strong need for uniformity, Congress always can enact a federal long-arm, making it exclusive. \textit{See, e.g., 28 U.S.C. \S 1605 (1982) (Foreign Sovereign Immunities Act)}. In the absence of such action, however, the fact that a state long-arm statute is utilized should not necessitate a different constitutional analysis than when a federal statute is invoked. Both governmental units should be under the same restraints (or lack of restraint). \textit{See DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 292-93 (3d Cir.) (Gibbons, J., dissenting), cert. denied, 454 U.S. 1085 (1981)}. The failure to keep separate these two questions has contributed to the confusion in the lower courts that have confronted the issue of whether a national contacts approach might be used. \textit{See supra} notes 28-32.
its full territorial reach. That anomaly always has existed and simply reflects the deference given to each court system to decide for itself how far it wants to extend its reach. The key is to recognize that if there is a statutory basis for asserting jurisdiction, the constitutional question remains the same regardless of the statutory source. Constitutional authority is premised on sovereign territorial power over the defendant through his contacts with the nation.

The second part of our approach recognizes that due process in the international setting is satisfied by an inquiry into the sufficiency of the notice involved. The parameters of this independent requirement are discussed later. The third and final step simply acknowledges that insofar as fairness concerns tied to convenience should play a role in the decision to hear the case—and they should—they can be accommodated through the application of *forum non conveniens*, as defined by the Supreme Court most recently in *Piper Aircraft Co. v. Reyno.*

The virtues of this three-part analysis would be many. As already noted, it is doctrinally sound and, as will be shown, it is consistent with international notions of the allocation of jurisdiction between sovereign nations. Additionally, such an approach avoids many of the problems of predictability inherent in the balancing standard of minimum contacts versus fair play and substantial justice. The value and desire for predictability in the international setting is particularly acute. Further, on a practical level, the inquiry into national contacts is more realistic, and should be one judges easily can apply given their long experience with the evaluation of state contacts.

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84. See infra text accompanying notes 165-226.

85. Some commentators who have balked at the use of a national contacts approach in the absence of congressional action, nonetheless, have urged that if such a statute were enacted, convenience concerns could be handled adequately through *forum non conveniens* and transfer. *E.g.*, Note, National Contacts, supra note 30, at 701-03.

86. 454 U.S. 235 (1981), reh'g denied, 455 U.S. 928 (1982). The *Piper* case specifically articulated the proper concerns on *forum non* only for the federal courts. *Id.* at 248 n.13. State courts generally have been left free to develop their own standards in this area. See Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1217 n.3 (11th Cir.), cert. denied, 106 S. Ct. 347 (1985). However, as stated in the text, when the state court asserts jurisdiction over an alien defendant it is sitting as a “court of the nation,” and as such, properly should follow the Supreme Court’s lead. See Note, Civil Procedure—Long Arm Statutes—Jurisdiction Over Alien Manufacturers in Product Liability Actions, 18 WAYNE L. REV. 1585, 1597-98 (1972); infra text accompanying notes 150-52.

87. See supra text accompanying notes 58-72.

88. See infra text accompanying notes 227-78.

89. See supra note 78.
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Adjusting for fairness by use of forum non conveniens also has important practical advantages. First, the Supreme Court has had occasion recently to refine its standards for forum non conveniens in the international setting so there exists well-developed doctrine allowing for easy application. Second, it places convenience concerns in their proper perspective, keeping separate questions of sovereign power from those of whether, in light of all the circumstances presented, jurisdiction should be declined and the parties remitted to some other forum to settle their dispute. Third, forum non offers the added possibility that the court can adjust for potential inequities between the parties by using conditional dismissals—a device not available under the “black-or-white” approach to jurisdiction.

Some commentators have urged that relying on forum non and transfer to cure the problem of the inconvenient forum is insufficient because it leaves too much to court discretion; instead, the inconvenience issue should be treated as a question of constitutional right. Their conclusions, however, fail to take account of the confusion that necessarily results from utilizing a balancing standard resting on more than one foundation. Moreover, in applying the International Shoe standard itself, the finding of sufficient contacts as a practical matter seldom is overborne by convenience concerns. The problem and prevailing question is how to balance the two. If determinations of inconvenience (as well as considerations of the forum’s and foreign state’s relative interests in the controversy) need not be weighed against the finding of contacts, but, instead, suggest that dismissal may be appropriate as a matter of discretion, a clearer understanding of the standard may be achieved.

A closer look at how the national contacts approach and forum non restraints would operate best may illustrate their advantages, as well as answer some lurking questions. The remainder of this section will do just that.

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90. See infra text accompanying notes 117-28.
91. See infra text accompanying notes 136-42.
92. See Fullerton, supra note 30, at 35-36; Redish, supra note 69, at 1137-38.
93. See FTC v. Jim Walter Corp., 651 F.2d 251, 257 (5th Cir. 1981). One argument made against such a discretionary determination is that it prevents collateral attacks on grounds of convenience and thus may deprive a defendant of his full right to challenge the truly inconvenient forum. See Fullerton, supra note 30, at 37. Our failure to be persuaded by this argument rests in part on the conviction that it is not unreasonable in and of itself (and certainly not constitutionally) to require the defendant to raise his convenience objection in the original forum. Further, to make the determination discretionary does not mean that the forum is unlikely to consider it seriously. If anything, keeping convenience as a separate concern may better focus the courts’ attention on what actually is at stake.
(1) Territoriality and National Contacts: The Power Question

The assessment of an alien defendant's past contacts with the nation as a whole so as to establish jurisdiction in any United States court should proceed much as it has in those courts that have used a national contacts approach when a nationwide service of process statute was involved. Indeed, it is not very different from that developed in the state jurisdiction context—we simply cast the net further. This means that the court should evaluate the number and nature of the defendant's contacts to determine whether they were sufficiently purposeful so as to support jurisdiction. Most important, the court in assessing the contacts should consider their aggregate strength; a series of indirect contacts may suffice to indicate that the defendant knowingly submitted itself to the jurisdiction of the American courts.

Thus, in evaluating whether sufficient contacts exist, the court still may find a useful guide in the distinction between general and specific jurisdiction: recognizing that a single indirect contact may be sufficient if the cause of action arose out of that contact, but more must be shown if the cause of action is unrelated. Illustratively, if a New York plaintiff purchases a car while in Germany and has an accident there, the jurisdiction determination in a later suit in New York against the manufacturer will depend upon what contacts the German manufacturer has had in the United States as a whole—more than one contact is required. It will not matter for constitutional purposes, however, if no contacts are shown in New York, if many exist in other states. But if the car is purchased from a local manufacturer in New York and an accident then occurs in Oklahoma, specific jurisdiction is available in Oklahoma without reference to whether other autos are distributed in that state or elsewhere in the country. This would be true under the traditional state contacts approach as well. In effect, then, the adoption of a national contacts approach may make it easier to establish general jurisdiction, but should have little impact on specific jurisdiction.

In a similar vein, if defendant's contacts can be demonstrated by the

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94. See cases cited supra note 28.
95. See generally J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 3.11 (1985).
98. Delagi v. Volkswagenwerk AG of Wolfsburg, Germany, 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972). The lack of any direct contacts with the forum may mean that the state long-arm statute cannot be used, however, and thus jurisdiction would be impermissible on statutory grounds. E.g., Gorso v. Bell Equip. Corp., 476 F.2d 1216, 1222-23 (3d Cir. 1973).
stream of commerce approach\textsuperscript{99} in the international setting, the focus should be whether the alien directed its products toward the United States markets generally.\textsuperscript{100} If so, it is not necessary to show that it sought specifically to enter the forum state's markets or to benefit from commerce there in order to find proper jurisdiction in that state.\textsuperscript{101}

Despite these advantages, the use of a national contacts approach to jurisdiction over aliens still leaves open some very knotty problems. For example, there is considerable debate concerning the question of how to treat parent and subsidiary corporations for jurisdiction purposes. Can the contacts of one company be imputed to another alien corporation because of the relationship between the two?\textsuperscript{102} The problem remains even if a national contacts approach is followed because it is necessary to

\textsuperscript{99.} The \textit{Asahi} Court divided on the question of whether the stream of commerce theory was appropriate. \textit{See supra} note 49. The main difference between the justices, however, was over whether there had to be evidence that defendant purposefully directed its product toward the forum or whether it merely had to be aware the product was marketed there. In other words, what indirect activity would be deemed a "contact?" It is not necessary for us to resolve that issue here. Whichever view predominates, the focus should be on the stream of commerce into the United States' market, not that of any particular state. \textit{See, e.g.}, \textit{Hall} v. \textit{Zambelli}, 669 F. Supp. 753, 757 (S.D. W. Va. 1987) (direct stream of commerce into Pennsylvania used to substantiate jurisdiction in West Virginia).

\textsuperscript{100.} Consider, for example, \textit{Le Manufacture Francaise des Pneumatiques Michelin} v. District Court, 620 P.2d 1040 (Colo. 1980). Plaintiffs sought damages for injuries arising from a one-car accident in Colorado when one of defendant's tires allegedly failed. The tire was not part of the normal chain of distribution but was purchased by an American serviceman when in Germany who later shipped the auto to the United States and traded it to a Colorado dealer who then sold it to plaintiffs. Plaintiffs had no evidence of the sale of defendant's tires in Colorado. \textit{Id.} at 1045. They did, however, show wide distribution in the United States. Because the court applied a state contacts approach, it was necessary for it to draw an inference from national sales that Michelin "indirectly seeks to serve a nationwide market, including Colorado." \textit{Id.} Further, because the particular tire was purchased outside the normal stream of commerce, the Colorado Supreme Court felt obliged to try to find a tenuous connection "relating" the sale of that tire to other inferred Colorado tire sales to support jurisdiction. \textit{Id.} at 1047. While the result reached by the court cannot be criticized, the tortuous path required to get there can. A national contacts approach would make such adventures unnecessary.

\textsuperscript{101.} \textit{See} \textit{Hay}, \textit{supra} note 30, at 435-44. In fact the use of the stream of commerce theory and nationwide contacts perspective combined may make it much easier to find general jurisdiction, with the effect that it will become less important to try to fit a case into the specific jurisdictional category, thereby avoiding one more preliminary issue and argument over whether the cause of action was or was not related to defendant's conduct.

determine what is a relevant contact. In situations in which the alien corporation has no direct contacts with the United States, the only viable way in which to assert jurisdiction over it would be to impute contacts of a closely related company to it.

Additionally, there is the question of how attachment jurisdiction should operate in the international setting. Until the Supreme Court’s 1977 decision in Shaffer v. Heitner, it was well settled law that jurisdiction could be asserted over nonresident defendants if they owned property within the territorial power of the forum state and that property was seized prior to filing suit. These principles were derived, once again, from Pennoyer v. Neff. But the Shaffer Court ruled that jurisdiction should be determined under a uniform standard and that future assertions of attachment jurisdiction should be tested against the International Shoe minimum contacts criteria. Thus, the question may be asked as to whether or how these developments should affect the use of attachment jurisdiction when property is held by alien defendants.

We must begin from the same departure point as that in in personam cases. Shaffer, just as International Shoe, is limited to establishing principles for the assertion of jurisdiction between states and consequently does not necessarily control in the international arena. The Shaffer Court’s preference for a uniform standard for jurisdiction is not inconsistent with that conclusion. It was premised on the notion that, as between the states, it made no sense to be concerned about the fairness of asserting jurisdiction over a nonresident when a long-arm statute was used, and to ignore totally fairness concerns by relying solely on territorial power because of the fortuity that the defendant owned some property in the state. But, as demonstrated earlier, there is a justification for developing a different standard to govern assertions of jurisdiction over alien defendants, and the basis for that standard historically and

103. The practical need for resorting to attachment jurisdiction would be reduced if the ability to obtain jurisdiction premised on national contacts and stream of commerce notions is accepted. See, e.g., Papendick v. Bosch, 410 A.2d 148, 153-54 (Del. 1979), cert. denied, 446 U.S. 909 (1980).
105. For a discussion of attachment jurisdiction before and after the Shaffer decision, see J. Friedenthal, M. Kane & A. Miller, supra note 95, §§ 3.8-.9, 3.14-.16.
106. 95 U.S. 714 (1877).
107. Shaffer, 433 U.S. at 207.
108. Id. at 207-12.
109. See supra text accompanying notes 56-77.
110. In his concurring opinion in Shaffer, Justice Stevens noted that there might be some reasons to reach a different conclusion on jurisdiction in the international context. 433 U.S. at 218-19. He did not, however, explore what exact differences might be appropriate.
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Internationally is territoriality. Further, in the international arena, the availability of attachment jurisdiction premised solely on the presence of property may be justified because such jurisdiction may be the only means of suing in the United States. The Shaffer Court specifically did not rule on the question whether the attachment of property alone was sufficient to provide jurisdiction if no other forum were available. Rather, its conclusions implicitly rested on the notion that it was not necessary to rely on territorial principles because the defendants properly might be sued in some state in which they had minimum contacts and any judgment reached there could be enforced through the full faith and credit clause. That reasoning, although compelling in interstate cases, may be inapposite in international ones.

In summary, then, under our proposed approach, international sovereignty interests are satisfied by the contacts of the defendant or its agents with the nation as a whole or by the attachment of existing property. Concerns of fairness, in either case, will be addressed through the application of forum non conveniens. Finally, insofar as there is concern that attachment jurisdiction over aliens would be perceived as excessive, causing problems internationally, Congress always has the power

111. Some post-Shaffer cases have relied on this reasoning in upholding attachment jurisdiction. See Riesenfeld, Shaffer v. Heitner: Holding, Implications, Forebodings, 30 Hastings L.J. 1183, 1197 (1979). In one case, a shipper asserted quasi in rem jurisdiction over funds in a broker's account that were credited to a foreign defendant. The Second Circuit distinguished Shaffer as a domestic case involving defendants who might have been sued elsewhere, whereas the issue at bar was whether defendant could be sued in the United States at all, creating elements of "jurisdiction by necessity." Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 654-55 (2d Cir. 1979). To the same effect, see Louring v. Kuwait Boulder Shipping Co., 455 F. Supp. 630, 633 (D. Conn. 1977). See also Biel v. Boehm, 94 Misc. 2d 946, 950-51, 406 N.Y.S.2d 231, 234-35 (1978).

112. Shaffer, 433 U.S. at 211 n.37.

113. The natural consequence of this territorial argument also would support in personam jurisdiction premised solely on a defendant being personally served with process when in the United States, so called "tag jurisdiction." The viability of this form of jurisdiction in interstate cases remains unclear after Shaffer v. Heitner. See Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 268, 270-71 (5th Cir. 1985); R. Casad, supra note 24, ¶ 2.04[2][c]. Typically, arguments against it are premised on the inherent unfairness of requiring a defendant to defend in a particular forum based on the fortuitous fact that service was accomplished there, as well as the need to apply International Shoe to all forms of interstate jurisdiction. Of course, forum non or transfer should operate to provide protection against egregious results. See, e.g., Opert v. Smid, 535 F. Supp. 591, 594 (S.D. N.Y. 1982). But cf. Restatement, supra note 8, § 421 comment e ("'Tag jurisdiction'... is not generally acceptable under international law."). Its unacceptability, however, results from its potential for inherent unfairness, which will be considered on forum non under our approach.

114. The Revised Foreign Relations Restatement limits the use of attachment jurisdiction to those cases in which "the thing is owned, possessed, or used in the state, but only in respect of that thing or a claim reasonably connected with that thing." Restatement, supra note 8, § 421(2)(k). These limitations are premised on the applicability of Shaffer v. Heitner, and
to provide by statute that jurisdiction is to be limited to in personam cases. Indeed, that is exactly what was done for suits against foreign governments.115

(2) Forum Non Conveniens: The Prudential Concerns

Any examination of how forum non may be used to protect notions of fairness as they relate to convenience116 must begin with a closer look at Piper Aircraft Co. v. Reyno.117 The question presented was whether a Pennsylvania federal district court118 could dismiss a wrongful death action arising out of a Scottish aircrash on grounds of forum non conveniens. The case was brought by a nominal California plaintiff on behalf of the estates of five Scottish passengers killed in the crash against the Ohio manufacturer of the propeller and the Pennsylvania manufacturer of the plane engine. The Scottish pilot and British owners were not joined as defendants. The Supreme Court ultimately ruled that dismissal was appropriate. Although the named defendants were Americans, the principles enunciated in Piper are particularly apt in cases involving alien defendants because the Court confronted major issues normally arising in those cases. These issues include how the doctrine is to be applied when the alternative forum is a foreign tribunal and the foreign law appears much less favorable than American law, as well as what weight to give to provisions in the European Convention on Jurisdiction and the Enforcement of Judgments, declaring general jurisdiction based solely on the presence of property “exorbitant.” Id. comment i.

As already shown in text, Shaffer does not control the question. As to the European Convention, two responses are appropriate. First, finding such jurisdiction exorbitant simply means that any judgment based on that form of jurisdiction will not be recognized outside the rendering state. That limitation on the scope of the judgment inheres in our own law, which limits quasi in rem judgments to the value of the attached property. See Freeman v. Alderson, 119 U.S. 185, 187-88 (1886). See generally J. Friedenthal, M. Kane & A. Miller, supra note 95, § 3.8. Second, if there remains concern about the inherent fairness of such jurisdiction and a desire not to appear internationally insensitive to claims that we are “overreaching,” such concerns appropriately may be considered on a case by case basis during the forum non conveniens inquiry.


116. Several courts have suggested that fairness/convenience concerns best may be handled not by jurisdictional inquiries but through forum non. E.g., Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co., 743 F.2d 956, 959 (1st Cir. 1984); FTC v. Jim Walter Corp., 651 F.2d 251, 257 (5th Cir. 1981). But see Stein, Forum Non Conveniens and the Redundancy of Court Access Doctrine, 133 U. Pa. L. Rev. 781, 843 (1985) (reliance on a discretionary standard is not appropriate when considering fairness); Stewart, Forum Non Conveniens: A Doctrine in Search of a Role, 74 Calif. L. Rev. 1259, 1263 (1986) (the concerns considered in forum non better can be handled under the personal or prescriptive jurisdiction inquiry).


118. The case actually was begun in the California state courts, removed to federal court and then transferred to Pennsylvania. Id. at 239-40.
the fact that an alien plaintiff is involved when balancing fairness considerations.

Justice Marshall, writing for the Court,\(^\text{119}\) began his analysis by reaffirming the *forum non* standard enunciated by the Court in 1947 in *Gulf Oil Corp. v. Gilbert*.\(^\text{120}\) Under *Gilbert* the presumption is to honor plaintiff’s forum choice, allowing dismissal only when an alternative forum is available and when both the private interests tied to the litigants’ convenience and the public interests affecting the forum court’s convenience suggest that dismissal is appropriate.\(^\text{121}\)

Applying that standard to the case at bar, the Court made several specific rulings of particular interest in actions against alien defendants.

First, dismissal may not be barred solely because of an unfavorable change in the law.\(^\text{122}\)

Conversely, because convenience is at the heart of *forum non*, dismissal may be appropriate if it is shown that the plaintiff chose a particular forum not because it was convenient, but to take advantage of favorable law.\(^\text{123}\)

Thus, when American or foreign plaintiffs sue alien defendants in United States courts, they cannot rest assured that their forum choice will be honored simply because it is apparent that to dismiss will subject them to the less favorable substantive law of another country. In this way, the alien defendant is protected from a potentially unfair advantage being given to the plaintiff.\(^\text{124}\)

Second, Justice Marshall acknowledged that although a strong pre-

\(^{119}\). *Piper* was decided by only seven justices. All seven agreed with the first portion of Justice Marshall’s opinion holding that dismissal was not barred by an unfavorable change in the law. Three justices dissented from the remainder of the opinion applying the *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), standard because they felt it unnecessary to reach that question.


\(^{121}\). *Id. at 246.*

\(^{122}\). Id. at 249.

\(^{123}\). Id. at 249 n.15.

\(^{124}\). The plaintiff’s interests are protected by the Court’s recognition that a dismissal would not be in the interests of justice if the “remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.” *Id.* at 254. Under those circumstances, there effectively is no alternative forum. The presumption, however, is that the foreign courts are fair. See *Note, Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. Chi. L. REV. 373, 385-86 (1980). Mere differences in procedure do not overcome that presumption. *E.g.*, Ahmed v. Boeing Co., 720 F.2d 224, 226 (1st Cir. 1983); ACLI Int’l Commodity Servs., Inc. v. Banque Populaire Suisse, 652 F. Supp. 1289, 1295-96 (S.D.N.Y. 1987); Shields v. Mi Ryung Constr. Co., 508 F. Supp. 891, 895-96 (S.D.N.Y. 1981); Panama Processes, S.A. v. Cities Serv. Co., 500 F. Supp. 787, 800 (S.D.N.Y. 1980), aff’d, 650 F.2d 408 (2d Cir. 1981). And the fact of smaller awards or the unavailability of certain theories of recovery does not establish that there is “no remedy at all.” *Piper*, 454 U.S. at 254-55. Typically, a finding that no viable alternative forum exists requires a showing of a complete failure of procedure or remedy. *E.g.*, Filartiga v. Pena-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984); Lake v. Richardson-Merrell, Inc., 538 F. Supp. 262, 267-70 (N.D. Ohio 1982); Phoenix
sumption normally favors plaintiff’s forum choice, that presumption has less force when the plaintiff is an alien, because it is less reasonable to assume that the forum was chosen because of convenience. In a case such as Asahi, then, had the trial court confronted a forum non motion when suit first was filed, the presence of the American plaintiff would invoke the presumption against dismissal. But if the issue were addressed when only the cross-claiming alien defendants remained, less deference need be given to the plaintiff’s choice of a California forum.

The third portion of Justice Marshall’s opinion outlined how both the private and public interest factors supported dismissal. Of particular interest is the Court’s acknowledgement that the district court correctly took into account the difficulty for the defendants resulting from their inability to implead potential alien third party defendants and that the limited review allowed the appellate court did not permit reversal. Further, the Court noted that the need to apply foreign law to the claims was a legitimate public interest factor pointing toward dismissal.

Applying the Piper criteria to the Asahi facts clearly supports dismissal of the cross-claim for forum non conveniens. At the point at which the Asahi Court considered dismissal, only alien parties remained, invoking no presumption for the California forum and requiring the application of foreign law to the indemnity claim. A more difficult question is

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125. Piper, 454 U.S. at 255.

126. This assumes that the forum non motion was addressed to the entire case. If dismissal had been sought only as to the cross-claim, a closer question is presented. See infra text accompanying notes 130-34.

One commentator has argued that the American citizenship of the plaintiff can establish a presumption of convenience only if citizenship correlates with residency. See Note, supra note 124, at 381.

127. Piper, 454 U.S. at 259-60.

128. Id. at 260.

whether dismissal of the cross-claim would have been appropriate if the American plaintiff remained in the case.

The policy underlying the device of impleader or cross-claims is to encourage defendants to bring in others who may have a duty to indemnify or contribute to the payment of any claims proven by the plaintiff. In this way not only is judicial economy achieved by avoiding multiple suits (a policy somewhat inapposite if we acknowledge that the alternative forum is a foreign tribunal), but also the original defendant is protected from the delay and need of dual litigation. The importance of this policy in assuring fairness to the defendant was underscored in Piper itself. Thus, in answer to our more difficult question, the convenience of the Taiwanese defendant clearly would be served by retaining its cross-claim against Asahi, and the presumption against dismissal usually operating in forum non determinations seems rightly applicable, despite the alien character of the claimant.

The issue then becomes whether that presumption is overcome by those public interest factors indicating that the preferred forum is a foreign tribunal—namely, that the governing law will be foreign, and that the transaction to which it is applied (the contract between the parties) was entered into outside the United States so that there is little American interest, but high foreign state interest in the dispute. The balancing of these competing interests presents a close question and, realistically, that means that the trial judge’s determination most likely will be final because it is unlikely that it will be reversed as an abuse of discretion. It also suggests that in such cases the trial judge might be wise to postpone ruling on the forum non motion until it becomes clear whether the American plaintiff will remain in the suit or, as in Asahi, will settle, leaving only the “foreign” claim. Depending on the stage of the litigation when this occurs and the investment already made in preparing to litigate the

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131. Piper, 454 U.S. at 259-60.
134. Whether the court can postpone such a determination may be open to question. See infra text accompanying notes 155-64.
cross-claim, the *forum non* considerations, as elaborated in *Piper*, would dictate a reasonably clear result.

It also must be borne in mind that the court, when assessing the fairness of the alternative forum and the hardship that may be imposed on the plaintiff if suit proceeds there, has the power to condition its dismissal so as to avoid some of the potential burdens that otherwise might exist. This flexibility is unique to *forum non* and is an additional factor supporting the preference for this device over using a jurisdictional determination to assess convenience and fairness.

The *Piper* Court recognized that procedural differences between foreign tribunals and American courts often make the American judicial system more attractive. Specifically, it pointed to differences in substantive law, the ability of plaintiffs in American courts to shop for favorable choice of law rules, the American jury trial system, the American rule allowing contingent attorney fees and resisting fee-shifting to the losing party and, finally, the more extensive discovery usually available in American courts. Although the Court found that those differences were insufficient to establish that dismissal would be unfair, it later noted that unfairness might be tempered by the ability to condition dismissal to adjust the inequities.

The most common conditions stipulated on *forum non* dismissals are that the defendant agrees to waive any objections to jurisdiction and the statute of limitations in the foreign court. But *Piper* suggested other conditions, such as requiring the defendant to agree to produce records relevant to the plaintiff's claims that would not be available under the more restrictive discovery regime of the foreign court.

The power to impose conditions is not unlimited. It must be carefully exercised to avoid creating an unfair preference for the plaintiffs. Further, the object is not to impose American notions of procedure on foreign litigation. Identical procedure is not necessary to create a fair forum. Thus, although several courts have conditioned dismissal on

136. *Id.* at 257 n.25.
139. *See* cases cited *supra* note 124.
the defendant's agreement to make necessary documents or witnesses available in the foreign tribunal,\textsuperscript{140} the Second Circuit recently reversed a district court order that conditioned dismissal on the defendants' agreement to be bound by American discovery rules in an Indian tribunal, even though discovery from the plaintiffs was to be governed by more restrictive Indian law.\textsuperscript{141} As the court noted:

\begin{quote}
We recognize that under some circumstances, such as when a moving defendant unconditionally consents thereto or no undiscovered evidence of consequence is believed to be under the control of a plaintiff or co-defendant, it may be appropriate to condition a forum non conveniens dismissal on the moving defendant's submission to discovery under the Federal Rules without requiring reciprocal discovery by it of the plaintiff. . . . Basic justice dictates that both sides be treated equally, with each having equal access to the evidence in the possession or under the control of the other.\textsuperscript{142}
\end{quote}

Thus, the trial court was limited to conditioning dismissal on the rights of both sides to utilize Federal Rules discovery, if allowed by the Indian authorities, or to remitting both sides to the Indian discovery system.

As the preceding discussion should have made clear, the adoption of a two-step jurisdiction-forum non conveniens approach in cases like \textit{Asahi} or \textit{Helicopteros} would have little impact on the outcome, but would provide a much better methodology for handling those cases. The factors the Court discussed in \textit{Asahi}\textsuperscript{143} as pertinent to a fairness inquiry for jurisdiction purposes embrace most of the same things relevant to forum non conveniens and, consequently, the same conclusions as to fairness or unfairness would be likely.\textsuperscript{144} Under our model, however, it would not be necessary

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\textsuperscript{141} In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 809 F.2d 195 (2d Cir. 1987).

\textsuperscript{142} \textit{Id.} at 205 (citations omitted).

\textsuperscript{143} \textit{See supra} notes 51-54 and accompanying text.

\textsuperscript{144} Professor Weinberg has argued that a foreign tribunal always will present serious disadvantages to an American plaintiff so that it would be "unthinkable" that such a case could be dismissed for forum non conveniens if jurisdiction were proper. Weinberg, \textit{supra} note 38, at 934. Apparently, not all courts agree. \textit{See, e.g.,} J. F. Pritchard & Co. v. Dow Chem. of Canada, Ltd., 462 F.2d 998, 999-1000 (8th Cir. 1972); ACLI Int'l Commodity Servs., Inc. v. Banque Populaire Suisse, 652 F. Supp. 1289, 1295 (S.D.N.Y. 1987); Munsell v. La Basserie Molson Du Quebec Limitee, 623 F. Supp. 100, 102 (E.D.N.Y. 1985); Shepard Niles Crane & Hoist Corp. v. Fiat, S.P.A., 84 F.R.D. 299, 306 (W.D.N.Y. 1979). Furthermore, at least part of Professor Weinberg's conclusion is premised on the fact that a fairness determination already has been made for jurisdiction purposes, suggesting the need to demonstrate greater unfairness to overcome that ruling. This problem would not occur under our model because forum non would
to worry about how to balance those concerns against the defendant's contacts with the forum, providing important clarification as to what actually is at issue. Further, the recognition that fairness properly is part of the *forum non* determination also makes clear that a discretionary decision is involved, making it subject to narrower review. This result seems more in keeping with the realities of what is at issue—a careful balancing of potentially competing private and public interests. Our model approach also would not be likely to affect the result in *Helicopteros*. In that case, it should be remembered, the Court rested its conclusion not on fairness or convenience, but on the notion that the contacts were insufficient to support jurisdiction. Consequently, unless we assume that there were additional national contacts such that general jurisdiction could have been asserted, the *forum non conveniens* determination never would be reached.

There are, however, two potential difficulties inherent in relying on *forum non* to protect fairness that should be addressed. The first is the question whether, given the need for uniform treatment and predictability, state courts should be allowed to apply their own notions of the doctrine in determining whether to dismiss. This question has important ramifications. For example, some states adhere to the practice that *forum non* dismissals cannot be granted whenever a resident plaintiff is involved; the *Piper* standard does not set forth any automatic rules of thumb, and if all other factors suggest that the foreign tribunal would be the preferred one, then *Piper* would suggest that dismissal should follow.

Even more directly, California courts have ruled that the California standard for considering the impact of a change in the law is much more liberal than the *Piper* standard and that an alien plaintiff's choice of a
California forum is entitled to substantial deference.¹⁴⁹

Historically, when the Supreme Court has set forth *forum non* principles it has been for the federal courts alone, and state courts have been free to accept or reject them.¹⁵⁰ Nonetheless, a strong argument can be made that the state tribunal, sitting as a national court in a suit against an alien, should be governed by federal principles suggesting when in the exercise of its discretion it should decline jurisdiction. The need for the dominance of federal standards in the international context is quite compelling.¹⁵¹ The power to assert jurisdiction on a nationwide basis must be constrained by principles derived from national interests or concerns. As a practical matter, *forum non* decisions in these international cases serve as a curb on jurisdictional assertions that might have foreign relations implications.¹⁵²

Although the above answer seems quite clear, a secondary governing law issue also lurks, and is not as easily answered. It arises because of procedural differences between many states and the federal courts concerning how and when to raise preliminary issues, such as *forum non conveniens*. In most systems, issues going to defendant's convenience must be raised at the outset of the litigation or they are waived.¹⁵³ Additionally, in some states governed by strict procedural codes, the defendant would not be able to join the two preliminary questions whether jurisdiction was proper and whether, even if it was, *forum non* concerns suggest that the court should dismiss. To do so would be deemed making a general appearance and constitute a waiver of the jurisdiction objection.¹⁵⁴ Since under our model, the *forum non* inquiry effec-


¹⁵⁰ It generally is agreed that federal diversity courts need not be bound by state *forum non* rules as they involve primarily matters of court administration. See In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1159 (5th Cir. 1987); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3828, at 293-95 (1986). The Supreme Court, however, never has decided whether federal *forum non* principles may be applied in a diversity case or are restricted to federal question cases. See Piper, 454 U.S. at 248 n.13. The adoption of federal *forum non* principles in suits against aliens necessarily would apply in diversity cases, as well as provide a rule applicable in the state courts.


¹⁵² See Stein, supra note 58, at 739 n.220.

¹⁵³ See J. Friedenthal, M. Kane & A. Miller, supra note 95, at 84-85.

¹⁵⁴ See id. § 3.26.
tively substitutes for the consideration of fairness factors that are part of the normal fourteenth amendment due process inquiry in other state court jurisdiction cases, it is essential that these issues not be subjected to a risk of forfeiture because of a procedural trap.

In a case like *Asahi* an additional wrinkle is presented. Remember that at the time suit was filed an injured California plaintiff sued the Taiwanese manufacturer who brought in Asahi on a cross-complaint. Had the Japanese defendant moved initially to dismiss for *forum non* (recognizing that under a national contacts approach coupled with a stream of commerce theory, objections to jurisdiction would be futile), the court could have refused to dismiss because at that point California represented the best forum in which to litigate the matter between all the parties.\(^{155}\) Certainly, given the California plaintiff and accident, the main suit would not have been dismissed. Further, to allow the Taiwanese defendant the ability to protect itself and avoid the delay of separate actions,\(^{156}\) it could be deemed appropriate (fair) to keep the Japanese defendant in the California forum. Indeed, these very facts might suggest to the attorneys for the Japanese defendant that a *forum non* motion should not be filed because its chances of success would be so slim. The inquiry, however, differs once the plaintiff has settled his claims and the sole issue remaining involves the indemnity question. If the court has not invested much time or energy in the action, all *forum non* factors would suggest that dismissal would be appropriate. Yet, technically, the defense no longer would be available because it was not raised at the outset.

That result, which is to be abhorred, could be avoided if we adjusted the procedural rules to recognize that *forum non*, although a waivable defense, must be raised as soon as the facts realistically reveal that it is a legitimate objection.\(^{157}\) A defendant who raised it at the first available opportunity would not be subject to the risk of waiver. This flexible approach would be in keeping with the fluid and discretionary character of

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155. *See supra* text accompanying notes 131-34. For additional examples of cases in which a motion for *forum non* was denied when an American plaintiff sued an alien defendant and the alternative forum was foreign, see Hatzlachh Supply Inc. v. Tradewind Airways Ltd., 659 F. Supp. 112 (S.D.N.Y. 1987); Teleco Oilfield Servs., Inc. v. Skandia Ins. Co., 656 F. Supp. 753, 759 (D. Conn. 1987); Intel Corp. v. Malaysian Airline Sys., 652 F. Supp. 1101 (N.D. Cal. 1987).

When an American plaintiff is suing a foreign government under the Foreign Sovereign Immunities Act, the presumption favoring plaintiff's forum choice may be even greater. *See* Kane, *supra* note 18, at 411-12.

156. *See supra* text accompanying note 130.

157. This appears to be the prevailing rule in the federal courts. *See* C. Wright, A. Miller & E. Cooper, *supra* note 150, § 3828, at 291.
Indeed, a strong analogy can be drawn to transfer motions in the federal court system that are limited only by considerations of general timeliness, not strict procedural rules. Such flexibility very well might be inconsistent with that utilized in the forum state, and on matters so procedural the states generally have had authority to follow their own law. The only argument against this conclusion would be the rather extreme one that as international matters are federal, and the forfeiture of objections by alien defendants because of procedural technicalities would create a poor image internationally, the states in those cases should follow a federal approach that would be more flexible. But that argument seems weak, at least in the absence of federal legislation and against the long historical backdrop of state procedure governing in state courts, so it probably would not prevail. This means that we simply have to accept the fact that in some cases, despite all desires to provide a reasoned inquiry, the alien defendant in a state court may not have a truly viable opportunity to have his fairness objections seriously considered. But the fact that a few cases will have poor results does not undercut the conclusion that the advantages of our approach far outweigh the disadvantages that might occur in those few cases. We must leave it to the state courts to recognize the importance

158. It is important to recognize that *forum non* is not simply a venue motion in the international context. It acts much more like transfer motions in the federal courts, so that there should not be a specific time barrier preventing its consideration.

159. See C. Wright, A. Miller & E. Cooper, supra note 150, § 3844, at 334-37.

160. See J. Friedenthal, M. Kane & A. Miller, supra note 95, at 233-34.

161. There should be no doubt that if Congress passed specific legislation regulating such matters, it would be binding on the states. See generally Note, Procedural Protection for Federal Rights in State Courts, 30 U. CIN. L. REV. 184 (1961).

162. In those cases in which state courts have been required to adhere to federal procedure, the Supreme Court typically has been able to conclude that such a ruling would not be too disruptive of or intrusive on the state court system. See Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 361 (1952) (right to jury trial); Brown v. Western Ry. of Alabama, 338 U.S. 294, 296 (1949) (rule of construction for pleadings). If the imposition of a federal standard would be disruptive and the state's procedure is nondiscriminatory, then federal law may not be applied. See Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916) (unanimous verdict rule). Although there obviously are arguments on both sides, our view is that to require state courts as a matter of federal common law to ignore their own timing restraints, which are designed to achieve early dispositions of preliminary issues and avoid wasted trials, would be inappropriate without congressional authorization.

163. Perhaps this conclusion might be ameliorated if defendant raised *forum non* at the outset so as to preserve the objection and then was able to renew the challenge after a change in circumstances. Although this approach involves a potentially wasteful (perhaps even frivolous?) initial *forum non* motion, it would be more consistent with those states that demand early motions to avoid waiver.

164. The alien defendant also may not be completely at the mercy of the state procedural system if it can remove the suit to federal court. See 28 U.S.C. § 1441 (1982).
of developing special or flexible rules to accommodate the problem.

We conclude where we began. The question of whether a court may exercise jurisdiction over an alien defendant should be determined as a matter of power solely by inquiring into what, if any, contacts the defendant has had with the nation as a whole. If such contacts exist, then the issue of the fairness of exerting jurisdiction properly may be addressed under the discretionary standard of forum non conveniens, as just elaborated. Additional due process concerns are present in the problem of how to provide adequate notice. Thus, we now will turn to the notice question to explore how it may be satisfied in the international setting.

II. Notice and Service of Process

Once it is determined that jurisdiction properly may be asserted over an alien defendant, it is necessary to consider whether adequate notice of the suit has been or can be given. A failure of notice means a failure of due process and may subject the suit to dismissal, or, if judgment is reached, may prevent the judgment from being enforced abroad. The traditional method of assuring notice is service of process. Recent developments within the United States have denigrated the functions once accomplished by service and sometimes have equated notice with mere knowledge. Within the United States, so be it. But when process is served outside our borders, and primarily upon non-Americans, the liberation we enjoy at home has not yet arrived. Failure to meet technical requirements can be fatal. Thus, questions of notice necessitate a serious inquiry into whether the requirements for service have been followed, as well as whether the notice given meets constitutional demands.

The due process requirements surrounding service can be stated

166. See infra text accompanying notes 231-32. Compare Bank of Montreal v. Kough, 430 F. Supp. 1243, 1248 (N.D. Cal. 1977), aff’d, 612 F.2d 467 (9th Cir. 1980) (Canadian judgment against California defendant will be enforced only if the defendant received actual notice and an opportunity to defend).
167. See generally J. FRIEDENTHAL, M. KANE & A. MILLER, supra note 95, § 3.20. In cases based on attachment jurisdiction, attachment statutes, rather than service of process statutes, control. For comparative purposes, an interesting survey of the prejudgment attachment procedures of ten European countries is found in INT’L FIN. L. REV. 29 (Oct. 1983).
168. See generally 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1074 (1987). Technical defects in service most often are cured by amendment, unless the defendant claims a lack of notice as a result. See id. §§ 1131-32.
169. Consider Federal Rule 15(c), which allows relation back of an amendment to add a party only when the party has had notice of the institution of the action. Notice may be equated with mere knowledge, without any formal notice given on the part of the plaintiff. E.g., Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 174-75 (3d Cir. 1977); Tretter v. Johns-Manville Corp., 88 F.R.D. 329, 331 (E.D. Mo. 1980).
simply: The Constitution requires that service of process be reasonably calculated to give defendant actual notice of the proceedings and an opportunity to be heard.\textsuperscript{170} This means that process must convey the necessary information to allow the defendant to make an informed judgment about what to do, as well as give adequate time to make an appearance. As the Supreme Court noted in the seminal case of \textit{Mullane v. Central Hanover Bank & Trust Co.},\textsuperscript{171} "when notice is a person's due, process which is a mere gesture is not due process."\textsuperscript{172}

We need not spend much time deliberating about the meaning of this general standard when applied to alien defendants because the methods for serving process abroad are controlled by specific treaties, statutes, and rules drafted with the constitutional standard in mind. Typically, compliance with those provisions will assure that due process requirements are satisfied.\textsuperscript{173} Major problems occur, however, in interpreting some of the specific requirements, as well as in determining which provisions apply in a particular case. A brief exploration, therefore, may be helpful.

A lawyer researching how to accomplish service of process on an alien outside the United States must consult several sources. The first thing to note is that in 1969 the United States ratified the Hague Convention on the Service Abroad of Judicial Documents in Civil or Commercial Matters.\textsuperscript{174} As of 1985, twenty-eight countries were parties to that Convention,\textsuperscript{175} so that if the defendant resides in one of those countries,

\textsuperscript{170} See Milliken v. Meyer, 311 U.S. 457, 463 (1940).
\textsuperscript{171} 339 U.S. 306 (1950).
\textsuperscript{172} Id. at 315.
\textsuperscript{173} One question that does arise is whether notice must be in the defendant's native language in order to satisfy due process. The Supreme Court has not ruled on the issue. The lower courts, however, appear to reject that conclusion. See Tahan v. Hodgeson, 662 F.2d 862, 865 (D.C. Cir. 1981) (Israeli default judgment upheld against U.S. defendant served in Jerusalem with papers drawn in Hebrew). As long as service is made in the language of the jurisdiction where the defendant is served, there can be no valid constitutional objection. See Guerrero v. Carleson, 9 Cal. 3d 808, 814, 109 Cal. Rptr. 201, 204-05 (1973) (service in United States in English on Spanish defendant upheld), \textit{cert. denied}, 414 U.S. 1137 (1987); Julen v. Larson, 25 Cal. App. 3d 325, 328, 101 Cal. Rptr. 796, 798 (1972) (service on United States defendant of Swiss process written in German held ineffective because, "[w]hile we do not require documents in a foreign language to be translated into English in order to be validly served, we think that at a minimum a defendant should be informed in the language of the jurisdiction in which he is served . . . that a legal action of a specific nature is pending against him at a particular time and place").
\textsuperscript{175} The text of the Hague Convention and a list of signatory countries and their dates of
service may proceed under it.\textsuperscript{176} Other methods for serving alien defendants may be found in Federal Rule of Civil Procedure 4(i) applicable in the federal courts, in various state service provisions, and in special state and federal statutes that specify a particular method of service in certain cases.\textsuperscript{177}

Each of these methods includes several alternative means of effectuating service, and the viability of using any particular one must be assessed in light of the foreign country's acceptance of its propriety. This latter restraint exists for two very practical reasons. First, in some countries service of process is viewed as a sovereign act so that any attempt to do so may be deemed a violation of that state's sovereignty and subject to sanction.\textsuperscript{178} Second, the use of a service method that is not accepted in the foreign country will mean that any American judgment that is forthcoming may not be enforced in that country,\textsuperscript{179} making the judgment useless unless the defendant has assets in the United States that may be seized.\textsuperscript{180} So, careful consideration of the various requirements is

ratification can be found in 28 U.S.C. appended to \textit{Fed. R. Civ. P. 4}. See also \textit{Restatement, supra} note 8, ch. 7, introductory note at 697.

\textsuperscript{176} Whether the Hague Convention provides the exclusive means of service is discussed \textit{infra} text accompanying notes 217-24.


\textsuperscript{178} See C. \textit{WRIGHT} \& A. \textit{MILLER, supra} note 165, \S 1133, at 367; Administrative Office of the United States Courts, Memorandum, Nov. 6, 1980, at 10, \textit{reprinted in B. Ristau, International Judicial Assistance (Civil and Commercial)} (1984) ("service of judicial documents is regarded in civil law countries as performance of a judicial function, and the laws of some countries (e.g., Austria, Japan, Switzerland, Yugoslavia) make it an offense for foreign officials to perform, without express permission from the local sovereign, judicial functions within their territories").


\textsuperscript{180} Absent a treaty obligation, process that comports with American law but violates the
essential.

The Hague Convention was drafted to accomplish three objectives.\textsuperscript{181} First, the drafters wanted to simplify the methods of serving in the territory of one state documents issued by the courts of another. Second, they desired to establish a system for service that best would ensure that the person served received actual notice in time to respond to pending litigation. Third, they created a means by which proof of service abroad easily could be made. To effectuate these goals, they developed a basic system for service, yet allowed for the use of several alternative methods, as long as the state in which service is made does not object to the particular method utilized. It is important to keep in mind that the Convention does not itself authorize service abroad. It merely provides methods of service that may be used if the plaintiff can invoke some other authority—a state or federal long-arm statute—allowing for service outside the forum's borders.\textsuperscript{182}

The unique contribution of the Convention is its creation of a "Central Authority" in each signatory state that is responsible for executing requests from abroad for service of judicial documents.\textsuperscript{183} The person serving process in the sending state must send to the Central Authority of the receiving state two copies of a "request," which conform to the model annexed to the Convention, as well as the original and a copy of the documents to be served.\textsuperscript{184} If the request does not comply with the requirements, the Central Authority will inform the sender of its objections and will not complete service until the defects are remedied.\textsuperscript{185} If


\textsuperscript{182} See DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 288-89 (3d Cir.), cert. denied, 454 U.S. 1085 (1981). The failure to understand that the requirements of both a long-arm statute and the Hague Convention must be met can lead to erroneous decisions. E.g., A.J. McNulty & Co. v. Rocamat, 132 Misc. 2d 1064, 1066, 506 N.Y.S.2d 393, 394 (1986) (holding that the Hague Convention only applies to defendants with no contacts with the state; when sufficient contacts exist, service under state law is permissible).

\textsuperscript{183} Hague Convention, supra note 174, art. 2. In the United States, the Central Authority is the Department of Justice. The Department does not facilitate service of American process abroad; American litigants must deliver their documents directly to the foreign Central Authority.

\textsuperscript{184} Id. art. 3.

\textsuperscript{185} Id. art. 4; see, e.g., Rivers v. Stihl, Inc., 434 So. 2d 766, 769 (Ala. 1983) (German Central Authority rejected because plaintiff failed to send the proper request form and failed to send copies written in German and English).
the request is in compliance, the Authority will arrange to have service accomplished by a method consistent with that country's internal law, or by a method requested, if that method comports with the internal law. Once service is effected, the Authority returns a certificate to the sender stating that service has been accomplished, the method used to do so, the date it was completed, and the person to whom process was delivered.

An important provision of the Hague Convention makes clear that use of the Central Authority is not the exclusive means of effecting service under the treaty, unless the receiving state has objected to the alternative methods. Specifically mentioned as alternatives are the freedom to send judicial documents by postal channels directly to the person to be served; the freedom to use "judicial officers, officials or other competent persons" of the sending state to effect service directly through comparable authorities of the receiving state; and the freedom of any person interested in the litigation to effect service through the judicial officers, officials, or competent persons of the receiving state.

Although these other means may be feasible in many cases, several signatory states have objected to one or more of them, so that an American lawyer attempting to serve process under the Convention must read carefully the objections filed by the receiving state. In addition, some problems of interpretation exist further complicating service. For example, some courts have held that "send" does not mean "serve" so that

186. Hague Convention, supra note 174, art. 5.
188. Hague Convention, supra note 174, art. 10.
190. Hague Convention, supra note 174, art. 10(b). The best example of this method is letters rogatory. See infra text accompanying notes 205-07. There is some ambiguity in article 10(b) in that the text does not make clear who are "competent persons" of the State of origin or destination. This could cause problems because under American law an attorney or any private person over the age of 18 is "competent" to deliver service of process. Under the laws of most civil law jurisdictions, however, only governmental officials of the State are "competent" to effect service. See B. RISTAU, supra note 181, § 4-26, at 167-68.
191. Hague Convention, supra note 174, art. 10(c); see also supra note 189.
service cannot be accomplished through the mails, even if the receiving state has not objected,\textsuperscript{194} although the weight of authority now appears to reject that interpretation.\textsuperscript{195}

Finally, the Hague Convention requires the documents sent to be written either in French or English, unless the receiving state has requested that documents served by the Central Authority be translated into its official language.\textsuperscript{196} Some countries have done so, so that to serve process by means of their Central Authority requires that all documents be translated into the official language.\textsuperscript{197} If service, however, is by a "particular method requested," or if the defendant accepts service voluntarily, the documents do not have to be translated.\textsuperscript{198}

In addition to the Hague Convention, provisions governing service of process on an alien defendant residing abroad may be found in the Federal Rules of Civil Procedure, as well as in some state statutes. In the federal courts, the methods for serving process abroad typically are governed by Federal Rule 4(i). Similar state service statutes may be used in state courts. These provisions are particularly critical when serving process in non-Convention countries, because they control in the absence of a specific state or federal statute designed for particular litigation. A brief description of how they operate will illustrate some of their special problems and features.

Federal Rule 4(i) was added to the Rules in the 1960s as part of a flurry of procedural reform that led to the signing of the Hague Convention.\textsuperscript{199} The rule was drafted to be flexible enough to allow an American plaintiff to effect service that would be legal under domestic law as well as conform to foreign law; and thus it set out five possible methods of


\textsuperscript{196} Hague Convention, supra note 174, arts. 7, 5.

\textsuperscript{197} Hague Convention, supra note 174, Declaration of the Federal Republic of Germany; see Teknekron Management, Inc. v. Quante Fernmeldetechnik, GmbH, 115 F.R.D. 175, 177 (D. Nev. 1987) (service on West German quashed because Germany requires translation and a large exhibit attached to the complaint was only in English).

\textsuperscript{198} See Weight v. Kawasaki Heavy Indus., Ltd., 597 F. Supp. 1082, 1086 (E.D. Va. 1984); B. RISTAU, supra note 181, at 150.

service, reflecting the diversity of foreign procedural rules.

The first method merely permits service to be made in conformity with the law of the foreign country in which service is to be effected. Necessarily, this approach assures that the receiving state can have no objections to the means of transmitting notice. When the law of that state is too difficult to ascertain or prohibitively restrictive, then the other methods of rule 4(i) offer useful alternatives.

The second method authorizes service to be made as directed by a foreign authority in response to a letter rogatory; that is, in response to a "request for judicial assistance addressed by a court of one state to a court or other competent authority of another state." This procedure is slow and can be expensive as well as confusing. Nonetheless, if process is served in a country like Switzerland, which regards service as a sovereign act to be done only by government officials, it may provide the only means of assuring the enforceability of the judgment abroad, as well as avoiding offense to the foreign government.

Personal service by the plaintiff is the third method authorized under the rule, and service by mail is permitted under rule 4(i)(D) as long as a signed receipt is obtained. The sole restraint on this power is that the method utilized must comport with American due process re-

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200. In 1984, an amendment was proposed to add reference to two additional service methods: that accomplished pursuant to a treaty or convention, and by diplomatic or consular officers when authorized by the Department of State. The amendment has not been approved yet. See C. Wright & A. Miller, supra note 168, § 1134, at 379-80.

201. See generally id. § 1134. Like the Hague Convention, rule 4(i) speaks only to the manner of service and not to whether extraterritorial service is permissible. See Martens v. Winder, 341 F.2d 197, 199 (9th Cir.), cert. denied, 382 U.S. 937 (1965).


203. When service is accomplished under foreign law, the rule also provides that it must be reasonably calculated to give actual notice, thereby assuring that American due process notions are honored even if not required in the foreign state.


206. Restatement, supra note 8, § 471, reporter's note 1.


208. For a description of how letters rogatory operate in Switzerland, see Miller, supra note 179, at 1079-84.

quirements. Although these methods may seem the easiest and most familiar to American litigants and lawyers, they are subject to strenuous objections by some foreign states. For example, Switzerland and the Soviet Union view service by mail as a violation not only of their internal law, but of customary international law as well. Finally, if none of the first four methods seem satisfactory, the fifth alternative allows the court to fashion a method of service according to the needs of a particular litigant in a particular case.

Before leaving this description of the various methods that have been authorized for serving process abroad, some reference to state law must be made. Although the bulk of transnational litigation probably occurs in the federal courts, litigation against alien defendants does arise in the state courts, as evidenced by the Helicopteros and Asahi cases. Many state service provisions do not contain any explicit treatment of methods of serving process abroad. A uniform act proposed during the 1960s was adopted by a few states. More recently, some states have enacted specific statutes governing how to serve process abroad. In general these provisions are similar to Federal Rule 4(i), designed to permit maximum flexibility for cases in which the vagaries of foreign law should be considered. Thus, they will not be treated separately here, other than to note that litigants should check their local authorities to determine whether applicable state provisions may be utilized.

The preceding description of the various provisions setting out service methods outside the United States illustrates the wide range of

211. See B. RISTAU, supra note 181, § 4-28, at 165.
212. FED. R. CIV. P. 4(i)(E). Given the wide range of methods available under the rule, this catch-all provision seldom is utilized. See, e.g., Vesco, 593 F.2d at 176 n.8 (associate of plaintiff’s law firm appointed to serve); Levin v. Ruby Trading Corp., 248 F. Supp. 537, 540 (S.D.N.Y. 1965) (service by ordinary mail to defendant at residence; to defendant's Canadian attorneys at their offices; and to Indiana attorney who was retained by defendant in connection with subject matter of suit).
213. The federal courts also are authorized to make use of state service statutes. FED. R. CIV. P. 4(e).
214. Some states merely provide that whenever service is to be accomplished outside their borders, it should be made “in the same manner as service is made within the state.” E.g., FLA. STAT. ANN. § 48.194 (West Supp. 1980); N.Y. CIV. PRAC. L. & R. 313 (McKinney 1980); ILL. ANN. STAT. ch. 110, § 16 (Smith-Hurd 1980).
215. See Uniform Interstate and Int'l Procedure Act § 2.01, reproduced with commentary in 11 AM. J. COMP. L. 415, 422-24 (1962). Only four states, the District of Columbia, and the Virgin Islands have enacted the Uniform Act. See B. RISTAU, supra note 181, §§ 3-4, at 60 & n.2.
216. E.g., CAL. CIV. PROC. CODE § 413.10 (West Supp. 1984); MASS. R. CIV. P. 4(e) (West 1978).
choices that may confront plaintiff’s counsel. In practice, however, not all these devices may be available. In particular, serious questions have been raised concerning whether service made on a defendant residing in a country that is a signatory to the Hague Convention must be in compliance with the Convention or whether the treaty merely supplements the methods listed in Federal Rule 4(i) or comparable state service provisions. Although language in some early cases suggested that the Convention was meant only to be supplementary to other service methods, the preponderance of both state and federal authority now recognize that the Convention sets out the exclusive means by which service can be accomplished in signatory states. Further, the fact that the defendant actually received notice of the suit will not cure a failure to comply with the requirements of the Convention.

The conclusion that the Convention’s service methods are exclusive seems unassailable. In addition, it does not work any undue hardship

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The Supreme Court implicitly approved the exclusivity of service under the Convention when it ruled that a later evidence convention was not exclusive, pointing to its failure to use the mandatory language in the Hague Service Convention. Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for So. Dist. of Iowa, 107 S. Ct. 2542 (1987).

219. See, e.g., Porsche A.G., 123 Cal. App. 3d at 762, 177 Cal. Rptr. at 159; Kadota, 125 Ariz. at 137, 608 P.2d at 74. But cf. Fox v. Regie Nationale Des Usines Renault, 103 F.R.D. 453, 455 (W.D. Tenn. 1984) (service through French Central Authority upheld even though proof of service form required under Convention defective). The court erroneously suggested that the Convention was complimentary to Federal Rule 4, and thus, following practice under that provision, technical defects could be ignored when notice clearly had been given. The result reached, however, seems correct because, as the court later noted, there was nothing in the Convention suggesting that it was inappropriate to exercise judicial discretion to overlook the type of defect that occurred "where no injustice or prejudice is likely to result to the party located abroad, or to the interests of the affected signatory country." Id.

220. The conclusion that the Hague Convention’s methods must be followed unless the domestic law of the receiving State has more liberal provisions is reinforced by the terms of
on a plaintiff who was unaware of the existence of the Convention when trying to serve because the remedy for improper service is not to dismiss the action, but merely to quash service and allow plaintiff the opportunity to follow the Convention's procedures. As a treaty, the Convention is "the supreme Law of the Land," and should supersede any conflicting state laws. Further, it is a self-executing treaty, having the same status in American domestic law as a federal statute. As the most recent "statute," its dominance over Federal Rule 4(i) should be clear.

The American Delegation to the Hague Conference conceded that the Convention might require some modifications in the practice of some states and would provide greater protection to the defendant who lives outside the United States in a Convention country than within the United States itself. They concluded, however, that "[m]inor modifications in domestic procedure relating to defendants in convention countries are well worth the benefits which will flow to U.S. defendants who may become involved in litigation abroad." 

article 15 of the Convention, forbidding default judgments unless it is established that the defendant was served in a foreign country in sufficient time to permit defending the action in the forum, and that the defendant was served by a method prescribed either by the internal law of the state where service was made or by the Convention. See also Bishop, International Litigation in Texas: Service of Process and Jurisdiction, 35 Sw. L.J. 1013, 1031-38 (1982).


In some cases neither the parties nor the court appear aware of the Convention and service has been upheld under Federal Rule 4(i) or state law, with no reference to whether it met the treaty's standards. E.g., Atlantic Lines, Ltd. v. M/V Domburgh, 473 F. Supp. 700, 704 (S.D. Fla. 1979); Smokey's of Tulsa, Inc. v. American Honda Motor Co., 453 F. Supp. 1265, 1267 (E.D. Okla. 1978); Louis Marx & Co. v. Fuji Seiko Co., 453 F. Supp. 385, 389 (S.D.N.Y. 1978); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 262, 329-30 (E.D. Pa. 1975). Although it is most likely that ignorance of the treaty on the part of all produced these results, one way of viewing these cases is that defendants failed to claim the protection of the Hague Convention and thus effectively consented to whatever method was used. Failure to raise service objections in a timely fashion may result in their waiver. See Photolab Corp. v. Simplex Specialty Co., 806 F.2d 807, 811 (8th Cir. 1986); Zisman v. Sieger, 106 F.R.D. 194, 197-98 (N.D. Ill. 1983); Supreme Merchandise Co. v. Iwahori Kinzoku Co., 21 A.D.2d 193, 194, 503 N.Y.S.2d 18, 19-20 (1986).

222. U.S. CONST. art. VI.

223. See Cipolla, 496 A.2d at 132 (citing Vorhees, 697 F.2d at 575).

224. Whenever there is a direct conflict between statutes or treaties and statutes, the last in time prevails. See Cook v. United States, 288 U.S. 102, 118-19 (1933).

225. See S. EXEC. REP. No. 6, 90th Cong., 1st Sess. 15 (1967).

226. Id.
III. But Is It Worth the Candle?—Enforcing Judgments Against Alien Defendants Abroad

The evaluation of any approach to the question when American courts can assert jurisdiction over alien defendants ultimately should consider whether a judgment entered against the defendant may be enforceable outside United States' borders. It is true that some defendants will comply, paying any judgment entered, and yet others more recalcitrant may have property within the United States that may be used to satisfy outstanding judgments. Neither of these solutions, however, may be feasible in a wide range of other cases. If so, all the efforts spent in the litigation will be useless, unless the foreign courts agree to honor the American court's judgment. That determination will depend, at least in part, on whether the enforcing State acknowledges that the

227. Concerns about the binding effect of the judgment in terms of issue and claim preclusion also exist. However, there are some important differences between foreign courts' recognition of preclusion notions and their agreement to enforce American judgments, and the two types of judgment effects should not be assumed to receive identical treatment. For example, the reluctance of some countries to recognize notions of issue preclusion comparable to our own may prevent that effect. See generally Casad, Issue Preclusion and Foreign Country Judgments: Whose Law?, 70 IOWA L. REV. 53, 62-70 (1984). Yet, the failure to give full recognition to the issues decided in a United States proceeding does not mean that enforcement of the judgment that was reached will not be forthcoming. On the other hand, insofar as enforcement and preclusion depend on finding adequate jurisdiction and notice, the question of what is the foreign standard for assessing those criteria is the same in both contexts.

228. National political and economic concerns also compel that we at least consider whether assertions of jurisdiction may be viewed as too self-serving in the international realm. See von Mehren & Trautman, supra note 16, at 1127; Note, The Long-Arm Reaches the International Manufacturer—A Criticism, 8 WILLAMETTE L. REV. 54, 61 (1972).

229. Commonly recognized additional grounds for refusing enforcement are that the judgment was obtained by fraud, or its recognition would be contrary to natural justice or public policy. See G. CHESHIRE & P.M. NORTH, PRIVATE INT'L LAW 659-65 (10th ed. 1979) (England); Blom, The Enforcement of Foreign Judgments in Canada, 57 OR. L. REV. 399, 421-25 (1978); Brenscheidt, The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany, 11 INT'L LAW. 261, 266-67 (1977); Comment, French Courts Recognize Foreign Money Judgments: One Down and More to Go, 13 AM. J. COMP. L. 72, 76-77 (1964). These grounds also form the basis for attacking foreign court judgments in American courts. See RESTATEMENT, supra note 8, § 482. Additionally, several foreign countries refuse enforcement if the judgment was entered in violation of a forum selection clause in a contract. E.g., Civil Jurisdiction and Judgments Act of 1982, ch. 27, § 32 (England); U. DROBNIG, AMERICAN-GERMAN PRIVATE INT'L LAW 350-51 (1972).

At one time reciprocity also typically was demanded, although it now generally has fallen into disuse. See RESTATEMENT, supra note 8, § 481 comment d; E. SCOLES & P. HAY, CONFLICT OF LAWS § 24.35 (1982). But see Royal Bank of Canada v. Trentham Corp., 665 F.2d 515 (5th Cir. 1981) (Texas includes reciprocity as ground for discretionary non-recognition); GERMAN CODE OF CIV. PRO. § 328 I(5); R. CASAD, CIVIL JUDGMENT RECOGNITION AND THE INTEGRATION OF MULTIPLE-STATE ASSOCIATIONS 21 (1981) (Central America); T. HATTORI & D. HENDERSON, CIVIL PROCEDURE IN JAPAN § 11.02[1] (1985).

This Article is limited to exploring the two grounds for nonrecognition on which our
United States court had the power to reach the alien defendant. Thus, it becomes essential to consider questions of jurisdiction and notice not only from an American viewpoint, but also from an international perspective to find what common ground may exist, as well as what pitfalls to avoid.

As was discussed earlier, the adoption of the Hague Convention on service of process in the United States and so many other countries has provided a uniform standard to control notice methodology questions. A failure to follow those procedures or a lack of notice will mean that any judgment that is reached will not be enforceable abroad. An inquiry into what constitutes sufficient jurisdiction to assure an enforceable judgment cannot be answered as easily.

The attempt to obtain some insights on that question must proceed in two stages, recognizing that the scope of proper jurisdiction commonly is defined differently depending on whether the issue is raised in initial proceedings or later, during attempts at judgment enforcement. It is widely recognized that in most foreign countries the rules governing proper jurisdiction for enforcement purposes are much narrower than those authorizing jurisdiction as a matter of first instance. For judg-

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230. See Restatement, supra note 8, § 482 comment c.

231. See supra text accompanying notes 174-98.

232. In some countries, a failure of notice suggests that the judgment does not comport with notions of natural justice or violates public policy and thus is unenforceable. See G. Cheshire & P.M. North, supra note 229, at 664; U. Drobnig, supra note 229, at 351; R.H. Graveson, Conflict of Laws: Private Int’l Law 632 (7th ed. 1974). Because of notice concerns, it also is common for default judgments to be denied enforcement unless personal service is accomplished. See R. Casad, supra note 229, at 149-53. Japan takes these concerns one step further and provides that judgments entered in suits against Japanese nationals will not be enforced at all unless personal service was accomplished or the defendant appeared in the action. See T. Hattori & D. Henderson, supra note 229, § 11.02[1].


In contrast, an American court will evaluate the jurisdiction of a foreign tribunal against traditional American due process standards. See Restatement, supra note 8, § 482 comment c, at 796. However, jurisdiction inquiries on foreign judgments do differ somewhat from the treatment accorded sister state judgments under the full faith and credit clause. Recognition may be refused if jurisdiction is based solely on service within the foreign country and the forum was inconvenient—essentially on grounds of forum non conveniens. Uniform Foreign Money Judgments Recognition Act § 4(b), 13 U.L.A. 263 (1980). Further, § 5(a) of the Act, which sets out six jurisdictional bases such that if a foreign judgment rests on one of them it must be granted recognition, includes bases much more limited than usually recognized under most state long-arm statutes. See Scoles & Aarnas, The Recognition and Enforcement of For-
ment purposes the question often asked is whether proper "international jurisdiction" existed and courts look to their own country's rules on conflict of laws to determine the answer. The internal jurisdiction rules applicable to nonresident defendants may, in fact, be much broader. The result of this phenomenon has been described most aptly by Professor Juenger: "[P]ursuant to the laws of several European nations, jurisdiction is largely controlled by the law of the jungle, and unfortunately their recognition practices are as narrow as their jurisdictional assertions are broad, except to the extent that treaties afford relief.

Consequently, it seems appropriate to consider not only whether a judgment under our model approach would be likely to satisfy notions of international jurisdiction, but also whether, if that is not so, it comports with other countries' notions of internal jurisdiction. The first inquiry responds to enforcement concerns; the second gives some indication whether the use of our model would create any major disruption in the international order. Although a comprehensive world-view is beyond our abilities here, a sampling of several countries provides some insight into those questions.

At present the United States has no treaties with any country regarding the general enforcement of money judgments. The only treaty

235. The effect of each enforcement court looking to its own conflicts laws rather than some uniform standard is that there is little agreement on what constitutes "international jurisdiction." See Graupner, Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe, 12 INT'L & COMP. L.Q. 367, 374 (1963).
236. For example, in England international jurisdiction is limited to residence and voluntary submission. See infra text accompanying notes 245-48. English courts, however, are empowered to assert jurisdiction over nonresidents in various actions involving contracts, as well as when torts are committed substantially within the country. See G. CHESHIRE & P.M. NORTH, supra note 229, at 91-93. In contrast, German courts will enforce a foreign judgment only if the rendering court would have had jurisdiction under German law, thereby merging their notions of internal and international jurisdiction. See deVries & Lowenfeld, supra note 13, at 339-40.
238. Two specialized agreements do exist. First, the United States entered into treaties with Denmark, France, The Netherlands, and Sweden, among others, regarding the mutual enforcement of one another's tax judgments. See Atik, The Problem of Reciprocity in Transnational Enforcement of Tax Judgments, 8 Yale J. of World Pub. Ord. 156, 162 n.49 (1981). Second, the United States signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958. 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 4739. Thus, its arbitration awards will be enforced in other signatory states,
that appears to have been seriously pursued was with England.\textsuperscript{239} Although the treaty was initialled in 1977, unfortunately it never was adopted, allegedly because of serious reservations the English had regarding American tort and treble damage antitrust judgments.\textsuperscript{240} Thus, enforcement of American judgments abroad depends totally on the internal law of the enforcing state.\textsuperscript{241}

Enforcement of foreign judgments commonly proceeds from notions of comity.\textsuperscript{242} Judgments are enforced, even in the absence of an agreement to do so, as a matter of respect for the sovereign power of the rendering state.\textsuperscript{243} Nonetheless, certain exceptions may prevent enforcement.\textsuperscript{244} Although each state determines for itself what exceptions to apply, a failure of jurisdiction typically is included. Because the scope of the term "jurisdiction" depends upon the enforcing state's rules subject to the terms and requirements of that convention. See generally \textit{Restatement}, supra note 8, § 487.

\textsuperscript{239} See E. Scoles \& P. Hay, supra note 229, § 24.39, at 971.


\textsuperscript{241} Enforcement of foreign country judgments within the United States similarly depends on finding whether the foreign court's assertion of jurisdiction comports with American standards. There is no uniform federal rule controlling the recognition of foreign judgments; the issue generally has been considered a matter of state law, because it is not controlled by any statute or treaty. \textit{Restatement}, supra note 8, § 481 comment a. The Uniform Foreign Money Judgments Recognition Act governs practice in several states and sets out the common exceptions to enforcement recognized in the United States. 13 U.L.A. 263 (1986).

\textsuperscript{242} See Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); \textit{see also} Barry, \textit{Comity}, 12 Va. L. Rev. 353 (1926).

England and the Commonwealth nations are exceptions to this rule. In England, foreign judgments are enforced because the judgment is viewed as having created an obligation on the part of the defendant. See Schibsby v. Westenholz, L.R. 6 Q.B. 115, 159 (1870); Williams v. Jones, 13 W. & M. 633 (1845). Thus, English courts approach the problem by considering whether the rendering court had the power to create a debt enforceable under English law, requiring an inquiry into whether there was jurisdiction in the rendering court under English conflict of law principles. A similar approach, relying on vested rights rather than comity is used in Central America. See R. Casad, supra note 229, at 17.

\textsuperscript{243} Not all countries acknowledge the need to respect each other's judgments. The Netherlands, for example, refuses to recognize any foreign country money judgments in the absence of a treaty. See Stein, \textit{Civil Procedure} in \textit{Introduction to Dutch Law for Foreign Lawyers} 258-59 (1978).

\textsuperscript{244} \textit{See supra} note 229. Practice on what exceptions to enforcement exist varies widely between countries. See \textit{Restatement}, supra note 8, ch. 8, introductory note at 777-78.
of conflict of laws, there is no clear international agreement on the question of what constitutes sufficient jurisdictional power. A brief description of some of the varying rules will illustrate.

At one end of the spectrum lie England and the Commonwealth nations. While sharing a common law tradition with the United States, these nations recognize a most narrow definition of jurisdiction for judgment purposes. Under English conflicts rules, a foreign court has the power to enter a binding judgment only when the defendant is a resident in the forum country when the action is commenced or if the defendant voluntarily submits to jurisdiction. A corporation will be deemed a resident only if it has a permanent place of business in the foreign country and does substantial business there; simply doing business is not enough. Thus, an English individual who vacations in California, rents a car there and then proceeds to have a collision injuring several Californians, would be secure in the knowledge that should the plaintiffs sue in California, any judgment they obtained would not be enforceable in England because the American court would not be deemed to have proper international jurisdiction. Jurisdictional immunity also can be claimed by English manufacturers who regularly send their products into the United States, but who maintain no places of business here. Jurisdiction asserted under our model approach based on national contacts would not be recognized; even jurisdiction asserted using the current state contacts approach is outside the limited English view of international jurisdiction.

Jurisdiction notions are somewhat broader in many civil law countries when evaluating whether to enforce a foreign judgment. For ex-

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245. For a comprehensive review, see K. Patchett, Recognition of Commercial Judgments and Awards in the Commonwealth 1-191 (1984). Because Commonwealth rules are so similar to those in England, they are not treated separately in this Article.

246. English notions of when defendant voluntarily submits are much narrower than American ones. In particular, § 33 of the Civil Jurisdiction and Judgments Act of 1982, ch. 27, provides that the defendant will not be deemed to have submitted if he has appeared in the foreign proceeding to object to jurisdiction or to protect property seized in the proceeding. In the federal courts in the United States, once defendant appears to contest jurisdiction, he must pursue his objection by way of appeal and cannot later collaterally attack the judgment on the jurisdiction grounds. See J. Friedenthal, M. Kane & A. Miller, supra note 95, § 3.26, at 184.


249. For a discussion of the various rules regarding jurisdiction for judgments purposes applicable in Common Market countries, see 2 G. Delaume, Transnational Contracts: Applicable Law and Settlement of Disputes §§ 10.02-.05 (April 1986).
ample, in Germany international jurisdiction notions are merged with internal law and a foreign judgment may be enforceable if the rendering court would have had jurisdiction had it followed German law. It has been said that these rules permit jurisdiction whenever there is a reasonable connection between the forum and the persons involved or the subject matter, but in any event more than transient service. Although that statement seems to suggest that a broad test similar to the American minimum contacts standard is utilized, that conclusion would be unwise. Under the procedural codes applicable to German courts, as well as similar codes in countries such as Italy and Japan, various specific bases of jurisdiction are set out that are very reminiscent of many American long-arm statutes. Thus, proper jurisdiction under German law exists when a tort has been committed or a contract is to be performed there, or the suit involves property situated in the country.

These more liberal views are by no means dominant among major trading nations. France, for example, continues to maintain that in the absence of a treaty or the voluntary submission of a French citizen to a foreign tribunal, French courts have exclusive jurisdiction over all French nationals. Effectively, this means that American judgments against French citizens are unenforceable in France regardless of what jurisdiction approach is taken in the United States proceeding.

Against this background, judgments under our model approach that are premised on territoriality and an assessment of national contacts

250. Germany still requires reciprocity, so that judgment enforcement may flounder on that ground even if jurisdiction is proper, however. See U. DROBNIG, supra note 229, at 353-61; Brendscheidt, supra note 229, at 268-73.


252. See U. DROBNIG, supra note 229, at 353-61; Brenscheidt, supra note 229, at 265.

253. Nonresident aliens may be sued in Italian courts if the claim concerns tangible or movable property in Italy or obligations that arise or are to be performed there. See G. CERTOMA, supra note 251, at 91-92.

254. In Japan, jurisdiction may be asserted over nonresident aliens at the place of performance of an obligation, at their place of business if the claim arises out of that business or in tort actions at the place of wrong. See T. HATTORI & D. HENDERSON, supra note 229, at § 4.05[4].


256. FRENCH CODE OF CIV. P. arts. 14-15; see Campbell, supra note 233, at 335; Graupner, supra note 235, at 370.

257. An exception occurs if the French defendant fails to raise the exclusivity issue. Then the court will look to see whether the American court had concurrent jurisdiction, which will be determined by looking to the various potentially proper jurisdictional bases in French law had suit been brought there. See G. DELAUME, supra note 249, § 10.03.
seem likely to receive at least no worse a reception than those obtained under the current state contacts standard. Insofar as jurisdiction is asserted on the basis of a state long-arm statute having criteria similar to those used in some of the civil law countries, then, regardless of what contacts are relevant to assess whether American notions of due process are satisfied, any judgment should be fully enforceable. Conversely, in countries such as France or England, which effectively do not recognize any judgments premised on long-arm jurisdiction, judgment enforcement will be prevented no matter what contacts the defendant has had with the forum state or with the United States. Nonetheless, the gains flowing from our model approach in rationalizing American law on this question, as well as in expanding the possible circumstances when jurisdiction can be asserted over alien defendants who, it must be remembered, may agree to pay whatever judgment ultimately is entered, still support shifting to a focus on national territorial power as a basis for jurisdiction in suits against aliens. The only remaining question is whether that standard will be viewed as exorbitant by other nations and thus should be avoided.

Two sources are useful in assessing that issue. First, it is worth noting how the standards just described have been altered in those countries that have entered into conventions or treaties with other nations regarding judgment enforcement.258 Of particular interest is the 1968 Brussels Convention,259 which is a multilateral agreement among members of the European Economic Community. The Convention provides not only rules of enforcement, but also, more importantly, partially harmonized standards for international jurisdiction among the signatory states.260

258. Most European countries appear to handle foreign judgment enforcement by treaty or Convention. See R. SCHLEISINGER, H. BAADE, M. DAMASKA, P. HERZOG, COMPARATIVE LAW 401-02 n.92 (5th ed. 1988); E. SCOLES & P. HAY, supra note 229, at 970. England also has entered into several treaties regarding foreign judgment enforcement. See Campbell, supra note 233, at 323. For an examination of several existing treaties, see Graupner, supra note 235, at 379-81.


Second, we will look briefly at some of the internal jurisdiction rules utilized abroad to compare them to our proposed standard.

Under the Brussels Convention, jurisdiction may be asserted over domiciliary defendants in signatory states only on the bases listed, but any judgment then entered is fully enforceable in all nations party to the Convention. Although domicile remains the primary basis for asserting jurisdiction, specific alternative grounds are listed. For example, jurisdiction may be founded in contract actions at the place of performance and in tort cases where the harmful act occurred. Additionally, jurisdiction may be asserted over a business that has a branch or establishment in the forum if the claim arises out of the operation of that branch. As can be seen, these bases are comparable to, though somewhat narrower than, those found in many state long-arm statutes. Since nations such as England and France are parties to the Convention, they too have agreed to recognize international jurisdiction on these grounds, even though, as already noted, they would not do so for judgments from nonsignatory countries. Therefore, we at least may assume that such bases of jurisdiction are not anathema, but, indeed, represent a rather widely-shared view of acceptable practices.

Reference to the Convention’s list of jurisdictional grounds also suggests that a shift in American practice to a territorial theory premised on national contacts would not be viewed with any particular concern internationally. The Convention’s jurisdictional bases refer to contacts with a particular country, not to a specific venue within that country. There are two circumstances, however, in which jurisdiction would be upheld under our approach, which require closer scrutiny.

There is a complete absence in the Convention’s jurisdiction provisions of anything comparable to American notions of general jurisdiction. This raises the question whether it would be unacceptable for a United States court to enter a judgment against an alien defendant who has had substantial contacts with the forum, but whose contacts are unrelated to the underlying cause of action. Of course, if that is so, then

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A multilateral judgment recognition scheme also exists in Central America, although it does not attempt to establish uniform jurisdiction standards. That scheme is examined most thoroughly in R. CASAD, supra note 229.

261. Brussels Convention, supra note 259, art. 2.
262. Id. art. 5(1).
263. Id. art. 5(3).
264. Id. art. 5(5).
266. See Juenger, supra note 237, at 1207-08.
current American standards that authorize general jurisdiction based on state contacts would be as suspect as jurisdiction asserted using a national contacts model. The question remains whether a judgment premised on general jurisdiction simply would not be recognized or whether that assertion of jurisdiction, in and of itself, would be viewed as excessive.

The answer is not wholly clear. The Convention does set out certain exorbitant bases of jurisdiction that it is agreed cannot be used against domiciliaries of member states. None of those include references to general jurisdiction. The only forbidden form that comes close is the German practice of asserting in personam jurisdiction premised on the presence of property in Germany. Objections to that form of jurisdiction stem from concerns about the possible insubstantial nature of the defendant’s contact if it is allowed based on the presence of any property, however fortuitous or small, and the failure to limit the judgment to the value of the property. Because general jurisdiction is permissible under American constitutional standards only when there has been substantial contact, the same objections should not pertain. Nonetheless, it probably would be dangerous to assume silence means acceptance. A more likely explanation is that general jurisdiction as we know it in the United States is not utilized in any of the signatory countries, thus not necessitating its inclusion.

The list of recognized exorbitant jurisdictional bases does contain something of specific interest, however. When England acceded to the Convention in 1978, the list was expanded to include a reference to transient jurisdiction, which still was permissible in the English courts. Thus, insofar as premising American jurisdiction over alien defendants on theories of territoriality appears to support allowing jurisdiction premised solely on the fact that the defendant was served with process while present in the country, that conclusion should be reevaluated.
Perhaps not surprisingly, looking outside the Convention at some of the internal jurisdiction rules utilized by various countries leads to very similar conclusions about possible international reaction to our model approach. Jurisdiction over nondomiciliaries most often is premised on the fact that a tort occurred in the place where suit is brought or the dispute involves a contract having some relationship with that state. It also may be asserted in disputes involving property if the property is within the forum's control.273 Because these very contacts appear in many of our long-arm statutes and are the basis for asserting proper specific jurisdiction under American law, their continued use in United States litigation should pose few international repercussions.274

The biggest question remains the acceptability of jurisdiction premised on unrelated contacts—general jurisdiction. The only comparable approach abroad is the attempt when dealing with corporations to determine whether the entity is doing sufficient business within the forum to be deemed "present" or "residing" there for jurisdiction purposes.275 This inquiry often is limited to determining the principal place of business or the "seat" of the defendant,276 however, it does not come close in scope to American notions of general jurisdiction. At the same time, it bears repeating that what may be unacceptable to the rest of the world is not what contacts are deemed significant, state or national, but that unrelated contacts provide any support at all for the assertion of

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273. See generally G. CERTOMA, supra note 251, at 91-92; G. DELAUME, supra note 234, at 151-54; U. DROBNIG, supra note 229, at 321-22; R. GINSBURG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 185 (1965); T. HATTORI & D. HENDERSON, supra note 229, at § 4.05[4]; J. MORRIS, supra note 247, at 316-17; deVries & Lowenfeld, supra note 13, at 330-31 (Germany); von Dryander, supra note 255.

274. Although the jurisdictional bases are very specific in most civil law countries, a finding that a particular case falls within them ends the inquiry and there is no need to look for additional contacts, as would be required under American law. Thus, in some cases American courts actually may be refusing jurisdiction that would be recognized internationally. As asserted by one commentator, for example, if the Volkswagen case had been decided under German law, the fact that injury occurred in the forum would be sufficient to establish the commission of a tort there and subject defendant seller to jurisdiction without any further inquiry into the seller's contacts. See von Dryander, supra note 255, at 690-91.

275. See G. CHESHIRE & P.M. NORTH, supra note 229, at 79-83.

276. See G. DELAUME, supra note 249, § 8.13; deVries & Lowenfeld, supra note 13, at 307 (Switzerland). But cf. T. HATTORI & D. HENDERSON, supra note 229, § 4.07[2] (if case has international aspect and defendant company has some legal connection with Japan, that may suffice to confer jurisdiction).
jurisdiction.277

This brief review of judgment enforcement abroad reveals that, although there are some significant barriers to enforcement, they would not be exacerbated by adopting a jurisdictional scheme premised on territorial power and an assessment of national contacts. Insofar as assertions of jurisdiction in particular cases based on unrelated contacts or the transient presence of the defendant in the United States might appear to create problems, the judicious use of forum non conveniens may serve to alleviate those difficulties.278

Conclusion

The current state of American law on the subject of when and how to assert jurisdiction over alien defendants needs adjustment. Although notice and service of process questions have received specialized treatment, the failure to address adequately the unique jurisdictional concerns in international litigation has been a serious problem. The main difficulty has been the tendency to try to force what essentially is a special form of litigation into molds developed for internal purposes. This has resulted in confusion and in a failure to assert jurisdiction in cases in which doing so would not have offended either our own due process notions or the sensibilities of other nations.

Regardless of the court in the United States in which suit is filed, jurisdiction in these international cases must be viewed as the assertion of sovereign power by the nation over alien defendants. Correspondingly, it should be tested by looking to the contacts of the defendant with the nation as a whole. The inconvenience of a particular forum may be addressed through the ability of the courts to transfer cases and to dismiss for forum non conveniens. Additional concerns about whether a particular case is dominated by foreign elements, suggesting that a foreign state's interests would not favor American court adjudication on the matter, also may be handled by application of already well-developed forum non standards. Although this approach will not secure increased enforcement abroad of American judgments, it at least is in keeping with

277. Interestingly, one form of jurisdiction recognized elsewhere that is considerably broader than the American contacts standard is jurisdiction over multiple defendants. Jurisdiction is allowed on condition that one of the defendants is domiciled in the forum, or, in the case of England, has been served within the jurisdiction. E.g., Brussels Convention, supra note 260, art. 6(1); see G. Delaume, supra note 249, ¶ 8.14.

278. Forum non does not seem to be recognized in civil law countries. See Juenger, supra note 237, at 1205, 1211. Nonetheless, its use by United States courts to resist jurisdictional assertions that might be deemed intrusive by other countries will avoid any potential problems and thus offers a needed safety valve to our jurisdictional scheme.
what appears to be widely shared views of acceptable practice in other countries. Perhaps a well-developed approach on our own part may be the premise for some serious discussions with other nations concerning future agreements on judgment enforcement.