International Jurisdiction in Products Liability Cases (Analysis of Asahi and Post-Asahi Cases)

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by

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by

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International Jurisdiction in Products Liability Cases
(Analysis of Asahi and Post-Asahi Cases)

Chapter I. Introduction

With the increase of foreign trade, more and more foreign manufacturers and distributors have become involved in products liability litigation in the United States. Whether the courts in the United States (both federal and state) have jurisdiction over them or not is a primary concern for those foreign companies.\(^1\) In many cases, their foreign products reach the forum states through the stream of commerce, and then they are distributed to the U.S. customers by regional distributors, wholesalers and retailers. Therefore, in many products liability cases in which defective products of foreign manufacturers and distributors cause injuries to persons in the United States, those foreign companies do not have a direct relationship with the forum states. Therefore, they cannot clearly anticipate whether they will be subject to the jurisdiction of the forum states.

However, those manufacturers and distributors derive legal and economic benefits from the direct or indirect sale of their products in the forum states, and those states have an interest in protecting their residents from defective products. It is

\(^{1}\) Plaintiffs must bear in mind the enforceability of the judgment. When defendants do not have assets in the forum state, plaintiffs are forced to seek the recognition and enforcement of the judgment at a place where the defendant has assets to pay any resulting judgment. Whether their second forum will recognize and enforce the judgment of the original forum depends on whether the first court has jurisdiction over the case under the standards of the second forum. Christof Von Dryander, Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure, 16 INTL LAW 671, 672 (1982).
sometimes unfair to permit them to escape from the reach of the forum state’s judicial power.

The extent and reach of the forum state’s judicial power\(^2\) are limited by the Due Process Clause of the United States Constitution,\(^3\) and the courts in the United States have developed and refined the concept of “minimum contacts”\(^4\) through a series of court decisions in order to assure due process for nonresident defendants.\(^5\) Stream of

\(^2\) The forum state’s personal jurisdiction is generally classified into two categories: general jurisdiction and specific jurisdiction. When a defendant has continuous and substantial contacts with the forum state, the court has general jurisdiction over the defendant, and a plaintiff can sue the defendant in the forum state on any claim, even one that has no connection itself with the forum state. On the other hand, when a controversy is related to or arises out of a defendant’s contacts with the forum, the court has specific jurisdiction over the defendant as to claims arising out of those contacts, and a plaintiff can sue the defendant in the forum state although the defendant’s contacts with the forum state are relatively small or isolated, so called “minimum contacts.” *Helicopteros Nacionales De Colombis v. Hall*, 466 U.S. 408, 414 (1984). This article mainly discusses specific jurisdiction.

\(^3\) In *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1877), the Supreme Court of the United States held that the exercise of a state’s jurisdiction was limited by the Due Process Clause of the Fourteenth Amendment of the Constitution and a judgment inconsistent with the Due Process Clause was void in the rendering state and was not entitled to full faith and credit elsewhere. U.S. CONST. amend. XIV, §1. “[No State] shall deprive any person of life, liberty, or property, without due process of law.” In the same way, the Due Process Clause of the Fifth Amendment limits the United States’ power to exercise personal jurisdiction. U.S. CONST. amend. V. “[No person shall] be deprived of life, liberty, or property, without due process of law.”

\(^4\) “Minimum contacts” means the contacts between defendant and forum state which is required for the exercise of the forum state’s personal jurisdiction over the defendant in order to assure due process for the defendant. In *International Shoe Co. v. State of Washington*, Chief Justice Stone wrote, “[d]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” 326 U.S. 310 at 316 (1945)(quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). See also infra pp. 5-6.

\(^5\) When determining whether a court in the United States has personal jurisdiction over a nonresident defendant, the court is obligated to engage in two-step analysis: first, the
commerce theory is advocated in order to show that minimum contacts exist between
the forum state and the nonresident defendant who does not have any direct contact
with the forum state but who has placed its products into the ordinary channels of sale
and has derived a benefit from the resulting sale of its products in the state.6

This article first looks at the origin and the development of the concept of
minimum contacts in the leading United States court cases and then examines the
minimum contacts in the international setting in the decision of the Supreme Court in
court must determine whether the state’s long-arm statute and applicable civil rules
confer personal jurisdiction, and second, the court must determine whether granting
jurisdiction under those statute would deprive the defendant of due process. See infra

6 The Supreme Court of the United States defined, in World-Wide Volkswagen v.
Woodson, the stream of commerce to mean that “the forum State does not exceed its
power under the Due Process Clause if it asserts personal jurisdiction over a corporation
that delivers its products into the stream of commerce with the expectation that they
will be purchased by consumers in the forum State, and those products substantially

The theory was first applied in the context of an interstate products liability
action in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 442
(1961), and then the application of the theory was extended to other type of cases. See
Hahn v. Vermont Law School, 698 F.2d 48, 49 (1st Cir. 1983)(breach of contract);
Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Pty. Ltd., 647 F.2d 200,
201 (D.C. Cir. 1981)(trademark infringement); Data Disc, Inc. v. Systems Technology
Ass’n, 557 F.2d 1280, 1283 (9th Cir. 1977)(fraud).

In Gray, plaintiff, an Illinois resident, sued an Ohio manufacturer of a hot water
heater safety valve after the hot water tank exploded and injured the plaintiff in Illinois.
The defendant’s sole contact with Illinois was that the safety valve, manufactured and
sold in Ohio and incorporated in the water heater by a finished product manufacturer in
Pennsylvania, had malfunctioned and injured plaintiff in Illinois. The Supreme Court
of Illinois recognized the application of the Illinois long-arm statute, and sustained the
jurisdiction of Illinois over the defendant. The court held that the Ohio manufacturer
indirectly derived a substantial benefit from the sales of the finished water heater in
Illinois of which its valve was a component, and benefited from the protection of
Illinois laws. Then the court concluded that the component parts manufacturer was
reasonably required to defend the suit in Illinois, which arose out of the defects in its
products that reached an Illinois consumer “in the ordinary course of commerce.” 22
Ill.2d. at 442.
the *Asahi* case. Next, this article discusses the federal and state court decisions after *Asahi* and looks at how American courts after *Asahi* have applied the stream of commerce theory in international settings. The article then reviews foreign countries' approaches to this problem, especially Japan and European civil law countries. Finally, this article concludes that foreign manufacturers and distributors, whose products reach the United States through the normal course of commercial distribution and causes injuries in the United States, should be subject to the jurisdiction of the courts in the United States.
Chapter II. Origin and Development of Minimum Contacts

A. International Shoe Co.

In International Shoe Co. v. State of Washington,\(^7\) the Supreme Court of the United States laid down the modern approach to the constitutional limitations on a state’s exercise of judicial power over persons outside its boundaries. The Court abandoned the strict and restrictive jurisdictional principle rendered in *Pennoyer v. Neff*,\(^8\) which required the physical presence of a defendant within the boundaries of the state when served in order to exercise personal jurisdiction over a nonresident defendant.\(^9\) Instead, the Court in *International Shoe* established the minimum contacts test.

\(^7\) 326 U.S. 310 (1945). In *International Shoe*, the State of Washington sued a Delaware corporation, which had its principle place of business in St. Louis, Missouri, in a court of Washington seeking to recover contributions for commissions paid its salesmen in the state under the Washington Unemployment Compensation Act. The defendant argued that it was not a corporation of the State of Washington and was not doing business there since all its sales were in interstate commerce rather than local. Then the defendant insisted that the exercise of jurisdiction by Washington over it was inconsistent with the Due Process Clause of the Fourteenth Amendment of the Constitution.

\(^8\) 95 U.S. 714 (1877). In *Pennoyer*, the validity of *quasi in rem* judgment against nonresident defendant was at issue. The Court ruled for the defendant on the grounds that the property serving as the basis for jurisdiction was not attached when the litigation began.

\(^9\) *Id.* at 733. In *Pennoyer*, the Supreme Court of the United States defined two fundamental principles that marked the limits of a state’s jurisdiction. The first principle was that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.” *Id.* at 722. The second principle was that “no State can exercise direct jurisdiction and authority over persons or property without its territory.” *Id.* The Court noted that the jurisdiction of a state stemmed from the authority of an independent state over persons and property within its territory and it
The Court held that states had jurisdiction over nonresident defendants, if they had "certain minimum contacts with the forum State"\(^{10}\) such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice."\(^{11}\) The Court justified the minimum contacts doctrine by the benefit and protection of the law of the state in which the defendant exercised the privilege of conducting activities.\(^{12}\) The Court stated that "to the extent that a corporation exercises the privilege of conducting activities within a state,"\(^{13}\) it was not unreasonable to require the corporation to respond to a suit in the state, as one of its obligations corresponding to the exercise of that privilege.\(^{14}\)

Then the Court found substantial contacts between the defendant and the state which were sufficient to support the claim for taxes on the commissions generated by the activities of its sales representatives in the state. The Court based its decision on the facts that the defendant regularly and systematically solicited orders in the state through eleven to thirteen salesmen employed by the defendant and that the defendant regularly shipped a substantial volume of merchandise to purchasers within the state.\(^{15}\) Thus the

was limited by the Constitution. \textit{Id.} These principle of \textit{Pennoyer} dominated court decisions in the United States for over sixty years. However, with the increase of corporate activities outside the boundaries of the state of incorporation, the courts developed the fictional concepts of "implied consent," "corporate presence," or "doing business within the forum State," in order to subject nonresident corporations to a state's jurisdiction under the principle of \textit{Pennoyer}.

\(^{10}\) 326 U.S. at 316.

\(^{11}\) \textit{Id.}

\(^{12}\) \textit{See Id.} at 319.

\(^{13}\) \textit{Id.}

\(^{14}\) \textit{See Id.}

\(^{15}\) \textit{See Id.} at 313-14.
Court concluded that the exercise of jurisdiction of the court of Washington over the Delaware corporation did not offend the Due Process Clause.\textsuperscript{16}

As the Court noted, defendant’s contacts with the forum state should be assessed in light of “the fair and orderly administration of the laws,”\textsuperscript{17} based on the quality and nature of defendant’s activities. The Court did not require defendant’s physical presence in the forum state for the exercise of jurisdiction.\textsuperscript{18} As the result, the Court opened the way for more flexible and broader application of the state’s jurisdiction over nonresident defendants.

However, the concept of minimum contacts is literally vague, and it does not necessarily give a clear guidance for nonresident defendants whether they will be subject to the jurisdiction of a forum state. The concept of minimum contacts and its relationship with the “notions of fair play and substantial justice”\textsuperscript{19} have been developed and clarified in the subsequent cases.

B. McGee

Since \textit{International Shoe}, courts in the United States have relaxed the minimum contacts requirement and expanded the jurisdiction of states over nonresident defendants. For example, in \textit{McGee v. International Life Ins. Co.},\textsuperscript{20} the Supreme Court

\textsuperscript{16} See \textit{Id.} at 320

\textsuperscript{17} \textit{Id.} at 319.

\textsuperscript{18} See \textit{Id.} at 316.

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} 355 U.S. 220 (1957). In \textit{McGee}, plaintiff was the named beneficiary of an insurance policy purchased by her son, a California resident. Defendant was a Texas insurance company that assumed the insurance obligations of a predecessor company. Plaintiff’s son had accepted defendant’s offer by mail to insure him and had paid premiums by mail until he died. When the Texas insurance company refused to pay the proceeds of the policy, plaintiff sued in a state court in California. The California court rendered
of the United States sustained the assertion of jurisdiction by a California court over a nonresident defendant, although the defendant’s sole contact with California was only a single offer of a contract of insurance by mail to the insured. The Court held that, when “the suit was based on a contract which had substantial connection with [the forum state],” the courts have jurisdiction over the nonresident defendant under the Due Process Clause.

Although the Court referred to the defendant’s contacts with the forum state and minimum contacts were critical elements for the exercise of jurisdiction, the contact was very limited under the facts in this case. The Court did not insist that defendant’s contacts with the forum state be regular or systematic. It was enough that the insurance company had initiated the contact with a resident, the suit was based on that contact, and the state had a strong regulatory interest in the subject of the litigation.

Instead of the suit emphasizing the defendant’s contacts with the forum state, the Court emphasized the interest of the forum state, the interest of the plaintiff, the location of the evidence, and the inconvenience to the defendant. The Court examined these factors and concluded that the state’s “manifest interest in providing effective means of redress for its residents” and the plaintiff’s interest in suing in the forum state outweighed the inconvenience to the defendant.

judgment for plaintiff, and defendant challenged the court’s power to exert personal jurisdiction over it based on the issuance of a single policy of insurance to a state resident by mail.

21 Id. at 223.

22 See Id. at 222. The defendant had no office or no sales agent in California, and as far as the record showed it had done no continuous business in California except for the policy involved in this case. Id.

23 See Id. at 223- 24.

24 Id. at 223.
The Court expressly stated that its decision relied on the judicial trend toward the expansion of the scope of a state’s judicial power over nonresident defendants. The Court attributed the judicial trend to “the fundamental transformation” of the national economy which invited a great increase of interstate business activities. In addition, the Court justified the broad application of the state’s jurisdiction by the development of “modern transportation and communication” which had made the defense of a suit in foreign state substantially less burdensome for the nonresident defendant.

C. World-Wide Volkswagen

Contrary to the expansive trend of personal jurisdiction represented by McGee, in World-Wide Volkswagen v. Woodson, the Supreme Court again restricted the exercise of a state’s personal jurisdiction over a nonresident defendant, emphasizing the protection of a nonresident defendant and the need to consider interstate federalism.

Responding to plaintiff’s argument that it was foreseeable for the defendants to be sued in Oklahoma, the Court stated that even though foreseeability was a critical

25 See Id. at 223-24.
26 See Id. at 222-23.
27 Id. at 222.
28 Id. at 223.
29 444 U.S. 286 (1980). In World-Wide Volkswagen, the plaintiffs who were involved in an automobile accident in Oklahoma sued both the automobile manufacturer, the U.S. distributor and a regional distributor and local retailer from New York in a state court of Oklahoma. The Supreme Court held that the court of Oklahoma could not constitutionally exercise its jurisdiction over the regional distributor and local retailer, because neither corporation sold cars to Oklahoma customers nor solicited business in Oklahoma.
30 See Id. at 292.
element in the due process analysis, it was not the mere likelihood that its product would reach the forum state, but defendant’s reasonable anticipation of “being haled into court” in the forum state that must support the exercise of jurisdiction.

Then, referring to the Hanson v. Denckla, the Court held that when a defendant “purposefully avails itself of the privilege of conducting activities within the forum State,” the defendant could reasonably anticipate “being haled into court there” and the exercise of forum state’s jurisdiction was reasonable and consistent with the Due Process Clause.

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31 Id. at 297. The Court stated that, even though it was foreseeable that purchasers of automobiles in New York may take them to Oklahoma, plaintiff’s unilateral activities of bringing the defendant’s products into the forum state were not enough to satisfy the minimum contacts requirement between the seller and the forum state. Id. To support its opinion, the Court further indicated that “[i]f foreseeability were the criterion” of the minimum contacts, “[e]very seller of chattels would in effect appoint the chattel his agent for service of process,” and “[h]is amenability to suit would travel with the chattel.” Id. at 296.

32 357 U.S. 235 (1958). In Hanson, a settler of a Delaware trust subsequently moved to Florida and exercised the power of appointment over the trust while living in Florida. After her death, one of the decedent’s children filed suit in a Florida court contesting the validity of the trust. The Supreme Court of the United States found the contacts between the Delaware trustee and Florida were insufficient and refused to permit Florida to exercise jurisdiction over the Delaware trustee. The Court emphasized defendant’s relationship with the forum state and held that no state might assert its jurisdiction over a nonresident defendant, unless the defendant “purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” Id. at 253. Then the Court held that the mere fact that the settler and most of appointees and beneficiaries were domiciled in Florida would not give the court personal jurisdiction over the nonresident trustee. Id. at 254.

33 444 U.S. at 297.

34 The Court cited the purpose of the Due Process Clause in adding predictability to the legal system to give a potential defendant assurance as to where he would be sued. See Id. at 297. Notice that one’s activities could subject one to suit in the forum state makes it reasonable and fair to actually subject the party to the state’s power. The Court stated that when the defendant had clear notice that it could be sued in the forum state, it could alleviate the risk of litigation “by procuring insurance, passing the
Then the Court denied the exercise of personal jurisdiction of Oklahoma over the New York corporations, stating that the car owner’s unilateral activity in bringing a product sold by defendant elsewhere into the forum state was not enough to satisfy the minimum contacts requirement, even though it was foreseeable that purchasers of an automobile might take it to Oklahoma.\(^3^5\)

The majority opinion in *World-Wide Volkswagen* took a narrow view of the minimum contacts and denied the exercise of Oklahoma’s jurisdiction. Nevertheless, the Court at the same time approved the stream of commerce theory in dictum.\(^3^6\) The Court stated that:

“*[F]orum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State, and those products subsequently injure forum consumers.*”\(^3^7\)

expected costs on to customers, or, if the risks are too great, severing its connection with the State.” *Id.* See also *Shaffer v. Heitner* 433 U.S. 186, 218 (1977).

\(^3^5\) In his dissenting opinion, Justice Brennan contended that the majority “focused too tightly on the existence of contacts between the forum state and the defendant” placing too “little weight to the strength of the forum state’s interest in the case and fail to explore whether there would be any actual inconvenience to the defendant.” *Id.* at 299. Justice Brennan further stated that:

“It is difficult to see why the Constitution should distinguish between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there. In each case the seller purposefully injects the goods into the stream of commerce and those goods predictably are used in the forum State.” *Id.* at 306-07.

\(^3^6\) The stream of commerce theory was approved several times in the lower courts after *Gray*. However, *World-Wide Volkswagen* was the first case in which the Supreme Court of the United States approved the theory.

\(^3^7\) *Id.* at 297-98. The Court cited *Gray* in support of this proposition. See *supra* note 6.
Although, the Supreme Court approved the stream of commerce theory in dictum in *World-Wide Volkswagen*, whether the Court would be satisfied merely by a defendant's act of placing its product in the stream of commerce or whether it would require defendant's further action in more purposefully directing its marketing efforts at the forum state was not spelled out. The lower courts struggled with interpreting the language in *World-Wide Volkswagen* and reached inconsistent conclusions in subsequent cases.

In *Wide-World Volkswagen*, the Court further articulated a two-prong analysis enumerating multiple factors to be considered in the fairness and reasonableness test. 

38 See 480 U.S. 102, 110-12.

39 Some courts read the Court in *World-Wide Volkswagen* to allow the exercise of personal jurisdiction based merely on a defendant's activity of placing the product in the stream of commerce aware that it would reach the forum state through the action of others. See *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984)(Where a component parts manufacturer in Washington placed its products into the stream of commerce without limiting the states in which the products would be sold, the Fifth Circuit found sufficient minimum contacts between the manufacturer and State of Louisiana.); *Hedrick v. Shoji Co.*, 715 F.2d 1355 (9th Cir. 1983)(The Ninth Circuit Court affirmed the exercise of jurisdiction of Oregon over the Japanese manufacturer in a products liability case stating that "[a] manufacturer or supplier of a defective products who knew or should have known that a product would enter the stream of foreign commerce can be subjected, consistently with due process, to a forum state's long-arm jurisdiction and be sued in the forum where the injury occurred."). Other courts understood that the *World-Wide Volkswagen* court required defendant's activities be more purposefully directed toward the forum state rather than merely placing its product in the stream of commerce knowing its destination. See *Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984)(The Eighth Circuit denied the jurisdiction of Iowa over a Japanese car seat manufacturer in a product liability case finding that the "defective product has not been designed, marketed, or placed into the American commerce by (the defendant), even though the Japanese manufacturer could foresee that its product would reach the United States.").

40 See *Id.* at 292. The Court stated that determination of personal jurisdiction begins with consideration of whether a nonresident defendant had minimum contacts such that the defendant purposefully availed himself of the benefit of the forum state. *Id.* at 297. Only if minimum contacts are present, should the reasonableness and fairness of the forum state's exercise of jurisdiction be considered. *Id.* at 294.
As those multiple factors, the Court indicated (1) "the burdens on the defendant," (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) "the shared interest of the several States in furthering fundamental substantive social policies." These multiple factors were refined and restated in *Burger King* and *Asahi*. Emphasizing the territorial limitation on the sovereign power of each state from the point of federalism, however, the Court concluded that the interstate federalism concerns superseded the consideration of other multiple factors.

**D. Burger King Corp.**

Reflecting the different views of the Due Process Clause's limitation on a state's jurisdiction, the courts in the United States went in two divergent directions. In addition, even after *World-Wide Volkswagen*, the relationship between the minimum contacts test and the fairness and reasonableness test had not been clarified. In *Burger King Corp. v. Rudzewicz*, Justice Brennan established a general framework for the due process analysis and utilized a two-pronged test.

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41 *Id.*

42 The Court stated that:

"Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunal of another State; even if the forum State has a strong interest in applying its law to the controversy; 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."

*Id.*

43 471 U.S. 462 (1985). In *Burger King*, a national franchiser sued a Michigan franchisee in the national company's headquarters state of Florida alleging breach of franchise obligations and trademark infringement. The Supreme Court of the United...
Justice Brennan first looked to the contacts of the nonresident defendant with the forum state. He held that the purpose of the Due Process Clause was to add predictability as to whether the potential defendant could be sued in the forum state.\(^4^4\) Thus, if the defendant had "purposefully directed"\(^4^5\) his activities toward the residents of the forum state, and the litigation had arisen out of or related to those activities, the defendant had a fair warning and a reasonable expectation of being sued in the forum state.\(^4^6\)

In referring to the stream of commerce theory, Justice Brennan stated that the "forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State"\(^4^7\) and those products subsequently injure forum consumers. Thus, in *Burger King*, Justice Brennan reaffirmed again in dicta the stream of commerce theory articulated in *World-Wide Volkswagen*, and attributed the legitimacy of the theory to a

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\(^4^4\) See *Id.* at 472.

\(^4^5\) *Id.* The "purposefully directed" phrase was intentionally used by Justice Brennan in order to include within the scope of the minimum contacts a nonresident defendant's out-of-state activities that cause effects in the forum state.

\(^4^6\) See *Id.*

\(^4^7\) *Id.* at 473.
fair warning and a reasonable prediction that the defendant would be sued in the forum state.\textsuperscript{48}

Further, Justice Brennan explained that purposefully-established minimum contacts must be found \textit{before} the examination of the fairness and reasonableness of subjecting the defendant to litigation in the forum state. He stated that “\textit{once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in the light of other factors to determine whether the assertion of personal jurisdiction would comport with “fair play and substantial justice.”}\textsuperscript{49}

In addition, the Court articulated the relationship between the minimum contacts test and the fairness and reasonableness test, holding that: (1) even if the minimum contacts are slight, so long as the fairness and reasonableness is strong, courts have jurisdiction over the defendant,\textsuperscript{50} (2) if the defendant purposefully directed his activities toward the forum state so that the minimum contacts test is plainly satisfied, the burden of the proof shifts to the defendant to show that other factors might make jurisdiction unreasonable,\textsuperscript{51} and (3) even if the defendant purposefully engaged in the activities within the forum state and the minimum contacts requirements are satisfied, the defendants can avoid the exercise of state’s jurisdiction over them by the strong

\textsuperscript{48} As the reason to make the exercise of forum state’s jurisdiction legitimate, the court noted that, (1) a state has a “manifest interest” in providing a convenient forum for its residents and protecting them from the injuries caused by the defendant’s out-of-state activities, (2) it is unfair to allow nonresident defendant to escape from the obligation arising from interstate activities, and (3) owing to the modern transportation and communication it had become less burdensome for the defendants to litigate in the another forum’s jurisdiction. \textit{See Id.} at 473-74.

\textsuperscript{49} \textit{Id.} at 476.

\textsuperscript{50} \textit{See Id.} at 474.

\textsuperscript{51} \textit{See Id.} at 477.
showing of unfairness or unreasonableness.\textsuperscript{52} Thus, Justice Brennan clarified the minimum contacts test and showed how it and the fairness and reasonableness test are mutually related each other.

As the factors to be considered in the fairness and reasonableness test at the second prong, Justice Brennan examined five factors enumerated in \emph{World-Wide Volkswagen} and considered the concrete interests of each party and the forum state. Then considering defendant’s substantial and continuous relationship with Florida and defendant’s failure to show the unfairness and unreasonableness of the exercise of jurisdiction in Florida,\textsuperscript{53} he concluded that the exercise of long-arm jurisdiction over the defendant did not offend the Due Process Clause.

\textbf{E. Asahi}

Although the minimum contacts test had evolved primarily in domestic cases, in \emph{Asahi Metal Industry Co. v. Superior Court of California},\textsuperscript{54} the Supreme Court applied the minimum contacts test to the international context. In this case the Court first unanimously held that it would be unfair and unreasonable for a court of California to exert jurisdiction over a Japanese component parts manufacturer for an indemnification cross-claim by the Taiwanese manufacturer of the final product, once the products liability claim by the injured plaintiff had been settled and dismissed. On the issue of whether the Japanese manufacturer had established minimum contacts with California, the Court was severely divided into two four-justice plurality opinions, and a third opinion by the ninth justice. As the result of its fractured opinion, the Court failed to

\textsuperscript{52} \textit{See Id.} at 477-78.

\textsuperscript{53} \textit{See Id.} at 487.

\textsuperscript{54} 480 U.S. 102 (1987).
provide a clear standard for lower courts and both state and federal courts have struggled to apply *Asahi* and have not done so consistently.\(^{55}\)

\(^{55}\) See infra Chapter IV.
Chapter III. Asahi

A. Background

In 1978 while Gary Zurcher was driving his Honda motorcycle in California, he lost control of his motorcycle and caused an accident in which he was severely injured and his wife was killed.\(^56\) In September 1979, Zurcher and his deceased wife’s children filed a product liability action in a court of California against Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), a Taiwanese manufacturer of the tire tube, and Sterling May Co., a California retailer.\(^57\) Zurcher alleged in the complaint that the accident was caused by a defect of the tire manufactured by Cheng Shin. Cheng Shin, in turn, filed a cross-complaint seeking indemnity from its co-defendants and from Asahi Metal Industry Co., Ltd. (Asahi), a Japanese manufacturer of the tire tube’s valve assembly.\(^58\) Asahi moved to quash Cheng Shin’s service of summons, arguing that Asahi did not have the required minimum contacts with California, so that the exercise of personal jurisdiction over Asahi would be inconsistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution.\(^59\) Zurcher’s claims against Cheng Shin and the other defendants were eventually settled and dismissed,

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\(^{56}\) See 480 U.S. 102 at 105.

\(^{57}\) See Id. at 106.

\(^{58}\) See Id.

\(^{59}\) See Id.
leaving only Cheng Shin's indemnity action against Asahi pending in the California court.\(^6^n\)

The trial court found the following facts. Asahi is a major manufacturer of tire valve assemblies in Japan and sells its assemblies to several manufacturers including Cheng Shin for the use as component parts in tire tube products.\(^6^n\) Asahi had done substantial business with Cheng Shin for ten years, exporting its valve assemblies from Japan to Taiwan,\(^6^n\) although the sales to Cheng Shin represented a small portion of Asahi’s gross income.\(^6^n\) Cheng Shin purchased valve assemblies from other suppliers as well, and sold its final products all over the world including the United States.\(^6^n\) Even though Asahi did not have direct contact with California, substantial numbers of Asahi’s valve assemblies reached California after being incorporated in tires.\(^6^n\) While Asahi was aware that the valve assemblies sold to Cheng Shin would reach California,\(^6^n\)

\(^6^n\)See Id.

\(^6^n\)See Id.

\(^6^n\)See Id. In 1978, Cheng Shin bought 150,000 tire valve assemblies from Asahi. In 1979; 500,000. In 1980; 500,000. In 1981; 100,000. In 1982; 100,000. See Id.

\(^6^n\)See Id. The sales to Cheng Shin represented 1.24 percent of Asahi’s gross income in 1981 and 0.44 percent of its gross income in 1982. See Id.

\(^6^n\)See Id. Cheng Shin alleged that the sale to California amounted to approximately 20 percent of the sale in the United States. See Id.

\(^6^n\)See Id. at 107. In 1983 an attorney for Cheng Shin conducted an informal examination of the tire tubes sold in a Solano Country motorcycle store, finding that among 115 tire tubes in the store, 97 were manufactured in Japan or in Taiwan. Among 97 Japanese or Taiwanese tubes, 21 contained Asahi valve assemblies. Among 21 Asahi valve stems, 12 were incorporated into Cheng Shin tire tubes. The store contained 41 other Cheng Shin tubes that incorporated the valve assemblies of other manufacturers.

\(^6^n\)See Id. In an affidavit, a manager of Cheng Shin stated that he would have discussed with Asahi the fact that Cheng Shin’s tubes were sold throughout the world and specifically in the United States. See Id.
Asahi’s president declared that Asahi never contemplated that sales to Cheng Shin in Taiwan would subject it to litigation in California.\textsuperscript{67}

The Superior Court of California denied Asahi’s motion to quash service of summons, finding that “Asahi had the requisite minimum contacts with California and that jurisdiction was fair and reasonable.”\textsuperscript{68} The court relied on the following factors: (1) a significant number of tubes with Asahi valve assemblies were sold in California, (2) Asahi sold a substantial number of valve assemblies to Cheng Shin, (3) Cheng Shin was doing substantial business with California, and (4) Asahi knew that its valve assemblies would be incorporated into tubes sold in California.\textsuperscript{69}

The California Court of Appeals\textsuperscript{70} issued a writ of mandate ordering the Superior Court of California to quash service of summons,\textsuperscript{71} holding that mere foreseeability that some of its products incorporated into final products would be used in California was not a sufficient basis for requiring Asahi to defend this action a California court.\textsuperscript{72}

The Supreme Court of California reversed the decision of the Court of Appeals,\textsuperscript{73} holding that the minimum contacts requirement was satisfied when a

\textsuperscript{67} See Id.

\textsuperscript{68} Zurcher v. Dunlop Tire & Rubber Co., No. 76180 (Super. Ct., Solano County, Cal., Apr. 20, 1983).

\textsuperscript{69} See Id. at 107. The Supreme Court of California stated that it was not unreasonable for Asahi to defend products defect claims on an international scale, since Asahi was doing business on an international scale. See Id.

\textsuperscript{70} 147 Cal. App.3d 30 (Ct. App. 1985).

\textsuperscript{71} See Id. at 744.

\textsuperscript{72} See Id.

\textsuperscript{73} 39 Cal.3d 35 (1985).
component parts manufacturer intentionally sold its products to another manufacturer, knowing that its component parts incorporated into final products would be sold in the forum State.\textsuperscript{74} The court held that: (1) Asahi was doing substantial business in California through Cheng Shin and indirectly benefited from these sales of finished products including its component parts.\textsuperscript{75} (2) Asahi knew that some of its products would probably reach to California\textsuperscript{76} and should reasonably have anticipated being haled into court in California.\textsuperscript{77} Then the court concluded that even though Asahi did not have direct ties with California\textsuperscript{78} and did not design or control the distribution system that carried its valve assemblies into California,\textsuperscript{79} Asahi had sufficient contacts with California so that the exercise of jurisdiction over Asahi was consistent with constitutional due process.

The Supreme Court of California further examined whether the exercise of jurisdiction satisfied the fairness and reasonableness test.\textsuperscript{80} Although the court acknowledged that the state’s interests was not so strong as if it were directly providing a means of redress for its injured resident, the California court found the state had a substantial interest in asserting jurisdiction over Asahi.\textsuperscript{81} First, the state had an interest in protecting its consumers through having foreign manufacturers comply with state

\textsuperscript{74} See Id. at 50.
\textsuperscript{75} See Id. at 48.
\textsuperscript{76} See Id.
\textsuperscript{77} See Id.
\textsuperscript{78} See Id.
\textsuperscript{79} See Id. at 49.
\textsuperscript{80} See Id. at 52-53.
\textsuperscript{81} See Id. at 53.
safety standards. Second, the state had an interest in the administration of its laws and had jurisdiction when most of the evidence was within its boundaries. Third, the state had an interest in avoiding conflicting decision with foreign countries.

The Supreme Court of the United States granted certiorari and reversed the decision of the Supreme Court of California. Following the decision in Burger King, the court used the two-prong analysis to determine whether California could exert jurisdiction over Asahi consistent with due process.

B. Holding

1. Minimum Contacts

While all nine justices agreed that the exercise of jurisdiction by California over Asahi on the indemnity claim was inconsistent with the Due Process Clause, the Court was sharply divided into three opinions on the issue of whether the placement of the products into the stream of commerce with awareness that the products would reach the forum state would satisfy the minimum contacts test. Justice O'Connor wrote for four judges and ruled that Asahi lacked minimum contacts with California.\(^2\) Justice Brennan, writing for four justices, found jurisdiction based on the stream of commerce could be upheld.\(^3\) Justice Stevens, the ninth justice, found that examination of minimum contacts was not necessary since the court found the exercise of the jurisdiction was unfair to the defendant.\(^4\) The confusion in the Court’s opinion

\(^2\) *Asahi*, 480 U.S. at 104 (1987). Chief Justice Rehnquist, Justice Powell, and Justice Scalia joined in Justice O’Connor’s opinion. *Id.*

\(^3\) See *Id.* at 116. Justice White, Justice Marshall and Justice Blackmun joined in Justice Brennan’s opinion. *Id.* Note that Justice White, the author of the *World-Wide Volkswagen*, supported Justice Brennan’s opinion regarding the stream of commerce.

\(^4\) See *Id.* at 121 Justice White and Justice Blackmun joined in Justice Steven’s opinion.
reflected the justices' different views on the stream of commerce theory and the limitation of the state's judicial power over nonresident defendants.

In Part II-A of her opinion, Justice O'Connor focused her examination on the defendant's action in the forum state as the basis of minimum contacts, and she held that when the defendant purposefully avails itself of the privilege of conducting activities within the forum state, it was not unreasonable to subject the defendant to suit there. For the exercise of personal jurisdiction over a nonresident defendant, Justice O'Connor required "substantial connection" between the defendant and the forum state originating from the defendant's activities "purposefully directed" toward the forum state. She then concluded that the mere act of placing a product into the stream of commerce, with awareness that continuing commercial transactions would sweep the product into the forum state, was not enough to conclude that the defendant parts manufacturer had purposefully directed activities toward the forum state.

To make defendant's activities count as purposefully directed toward the forum state, Justice O'Connor would require that defendant engage in additional conduct indicating an intent or purpose to serve the market in the forum state. As such additional conduct by the defendant, Justice O'Connor listed acts like (1) "designing the product for the market in the forum State," (2) "advertising in the forum State," (3) "establishing channels for providing regular advice to customers in the forum State," or

85 See Id. at 110. In this context, Justice O'Connor noted Hanson and World-Wide Volkswagen. See supra pp. 9-13.

86 See Burger King, 471 U.S. at 475, and McGee, 355 U.S. at 223.

87 The phrase of "purposefully directed" was first used in Burger King, by Justice Brennan. See Burger King, 471 U.S. at 476. See also supra note 45.

88 See Asahi, 480 U.S. at 112.

89 See Id. at 112.
(4) “marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.” 90 Then, examining the acts of Asahi toward California, Justice O’Connor concluded that the exercise of personal jurisdiction over Asahi by the Superior Court of California exceeded the limits of due process, since Asahi did none of the acts that could turn selling a component to the manufacturer of the finished product outside the United States into “purposefully directing” its products to California by engaging in efforts to market its products there.91

Justice Brennan rejected Justice O’Conner’s approach that required a defendant to have additional contacts beyond placing its products into the stream of the commerce aware that it would reach the forum state.92 Justice Brennan noted that “the stream of commerce refers not to unpredictable current or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sale.”93 Justice Brennan reasoned that as long as the defendant put the products into the stream of commerce aware that its products would reach to the forum state, the lawsuit in the forum state is not a surprise for the defendant.94 Further, he argued that the defendant

90 Id.

91 See Id. at 112-13. Justice O’Connor examined Asahi’s conduct and stated that (1) “[T]here is no evidence that Asahi designed its product” for the market in California, (2) Asahi “does not advertise or otherwise solicit business in California,” (3) “Asahi does not do business in California,” and “[I]t has no office, agents, employees, or property in California,” (4) “[I]t did not create, control, or employ the distribution system that brought its valves to California.”

92 See Id. at 116-17. Justice Brennan stated that this is one of those rare cases in which “minimum contacts requirements inherent in the concept of ‘fair play and substantial justice’... defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.” Id. (quoting Burger King, 471 U.S. at 477-78).

93 Id. at 117.

94 See Id.
who had placed its products in the stream of commerce benefited directly or indirectly from the sale of the products in the forum state regardless of whether the defendant "directly conducts business in the forum state, or engages in additional conduct directed toward the forum State."\(^{95}\)

Justice Brennan objected that Justice O'Conner's opinion represented a marked retreat from the Court's analysis in *World-Wide Volkswagen*, noting that the Court in *World-Wide Volkswagen* carefully distinguished the case in which the defendant's products reached a forum state through a regular chain of distribution from the case in which the consumer fortuitously transported defendant's products to the forum state.\(^{96}\) In the former case, Justice Brennan noted that, according to *World-Wide Volkswagen*, due process merely requires the defendant's expectation that their products would be purchased by consumers in the forum state once the defendant delivered its products into the stream of commerce.\(^{97}\)

Justice Brennan also noted that in *World-Wide Volkswagen* the Court had cited *Gray* in which the Supreme Court of Illinois applied the stream of commerce theory and asserted jurisdiction over a component parts manufacturer that did not have direct contact with Illinois.\(^{98}\) He concluded from the facts that Asahi was aware of the operation of the distribution system and Asahi received economic benefit from the sales

\(^{95}\) *Id.* He pointed out that "most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct." *Id.* at 117.

\(^{96}\) See *Id.* at 118-20. The Court held that consumer's unilateral activities of bringing defendant's products into the forum state was, even if it was foreseeable, not a sufficient constitutional basis for personal jurisdiction over the defendant. See *World-Wide Volkswagen*, 444 U.S. at 295. See supra note 31.

\(^{97}\) *Asahi*, 480 U.S. at 119-20. See * supra* p. 11.

\(^{98}\) See * supra* note 6.
in California. Thus, shipping tire valve assemblies to Taiwan with notice that they would be incorporated in tires sold to the U.S. market was sufficient to support a finding that minimum contacts existed between Asahi and the state where its product eventually caused harm to a consumer.99

Justice Stevens concurred in the judgment. If the exercise of jurisdiction by the forum state was unreasonable and unfair, examination of minimum contacts was not necessary to determine whether a state court’s assertion of personal jurisdiction was constitutional.100 Nevertheless, Justice Stevens rejected Justice O’Connor’s distinction between a “mere awareness” that a component would find its way into the forum state and “purposeful availment” of the forum’s market.101 Instead, Justice Stevens asserted that the purposeful availment determination in the stream of commerce setting required “a constitutional determination that is affected by the volume, the value and the hazardous character of the components.”102 Then he implicitly recognized minimum contacts between Asahi and California, stating “a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute “purposeful availment” even though the item delivered to the forum state was a standard products marketed throughout the world.103

99 See Asahi, 480 U.S. at 121.

100 Justice Stevens found that “this case fit within the rule that minimum requirement inherent in the concept of fair play and substantial justice’ may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.” Id. at 121-22. (quoting Burger King, 471 U.S. at 477-78).

101 See Id. at 122.

102 Id. Justice Stevens noted that over the course of its dealings with Cheng Shin, Asahi had arguably engaged in a higher quantum of conduct than “[t]he placement of a product into the stream of commerce, without more.” Id.

103 Id.
2. Traditional Notions of Fair Play and Substantial Justice

After addressing the role of fairness and reasonableness in the due process analysis, the Court evaluated five factors articulated in *World-Wide Volkswagen* and restated in *Burger King*, and concluded that the exercise of personal jurisdiction over Asahi would be unreasonable and unfair. Justice O’Connor delivered the opinion of the Court. Eight Justices concurred in her opinion in this section in ruling that the indemnity cross complaint by Cheng Shin against Asahi should be dismissed.

First, the Court determined that the burden on the defendant was severe. As the special circumstances of this case which imposed a severe burden on Asahi, the Court noted that Asahi would have been compelled to traverse the long distance from Asahi’s Japanese headquarters to the forum in California and Asahi must submit its

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104 See *Id.* at 113. Quoting *International Shoe*, Justice O’Connor stated that “[t]he strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction over Asahi under circumstances that would offend traditional notions of fair play and substantial justice.” *Id.*

105 As the factors to be considered in the fairness and reasonableness test, the Court noted five points: (1) “the burden on the defendant,” (2) “the interests of the forum State,” (3) “the plaintiff’s interest in obtaining relief,” (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and (5) “the shared interest of the several States in furthering fundamental substantive social policies.” *Id.* at 113. See *supra* pp. 13,16.

106 See *Id.* at 116.

107 Only Justice Scalia dissented in this section. Justice Scalia joined Justice O’Connor’s opinion in the first prong analysis. However, he did not joined in Justice O’Connor’s opinion in fairness and reasonableness test. His position implied that once the court found defendant’s insufficient contacts with forum state, it was not necessary to assess the fairness and reasonableness for the exercise of state’s jurisdiction. His position reflected the two-pronged analysis in *Burger King*, in which the Court required the presence of purposefully established minimum contacts before examining the fairness and reasonableness of the exercise of jurisdiction.

108 See *Id.* at 114.
dispute with Cheng Shin to a foreign legal system. The Court then stated that the “[u]nique 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.”

Second, the Court discussed the interests of the plaintiff and the forum state. The Court noted that “[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.” However, the Court found that here these interests were slight and did not justify the serious burdens on the defendant.

The Court reasoned that Cheng Shin had not demonstrated that California was a more convenient forum than Taiwan or Japan for the litigation of the indemnification claim between these Taiwanese and Japanese corporations. The Court also found that the interest of California had considerably diminished, because neither party was a resident in California, and it was uncertain whether California law would govern the indemnity claim.

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109 See Id.

110 Id.

111 See Id.

112 Id.

113 See Id.

114 See Id.

115 See Id. at 114-15. The Court rejected the assertion of Supreme Court of California that the state had an interest in protecting its consumers by ensuring tort foreign manufacture comply with the state’s safety standard. The Court reasoned that California could deter component part manufacturers indirectly from unsafe practice by exercising
Finally, the Court considered the interests of the “several States” in the efficient judicial resolution of the dispute and the advancement of substantive policies.\textsuperscript{116} The Court held that, in international cases like \textit{Asahi}, those interests were represented by “the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court.”\textsuperscript{117} Although, the Court did not apply these international interests in this case, it indicated that those interests “as well as the Federal interest in Government’s foreign relations policies,”\textsuperscript{118} would “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.”\textsuperscript{119}

C. Analysis

1. Fairness and Reasonableness

As stated in part II-B, both parties in the dispute of Cheng Shin’s indemnification claim in \textit{Asahi} were foreign corporations and no forum resident was involved in this dispute.\textsuperscript{120} In addition, Cheng Shin’s indemnification claim was based on the contract between a Taiwanese corporation and a Japanese corporation, and jurisdiction over the manufacturers and sellers of the final products. \textit{See} 480 U.S. at 115.

\textsuperscript{116} \textit{See Id.}

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.} The Court further noted that “[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field” (referring \textit{United States v. First National City Bank}, 379 U.S. 378 (1965)).

\textsuperscript{120} \textit{See supra} P.27.
related to the shipment from Japan to Taiwan. Therefore, the interests of California to resolve Cheng Shin’s indemnification claim in that forum were very limited. Further, the interest of Cheng Shin in obtaining the relief in California was not so strong because Cheng Shin could seek the relief in the courts of Taiwan or Japan even if the jurisdiction of California were denied. In addition, the burden on Asahi to defend litigation in California was very severe. Asahi’s officials must travel the long distance from the Japanese headquarters to the forum in California to attend the trial, and Asahi must submit its documents under an unfamiliar foreign country’s judicial system. In the light of these facts, the burden on Asahi overcame the interests of Cheng Shin and the State of California. The Court correctly held that the exercise of jurisdiction of California against Asahi was unfair and unreasonable on this claim for indemnity.

However, Asahi should be distinguished from the case where a resident of the forum state sues a foreign corporation to recover injuries suffered in the forum state. In such case, both the plaintiff and the forum state may have strong interests in asserting jurisdiction over the foreign company. The forum state has a strong interest in providing an effective means of redress for its injured resident who would find it impractical to sue in the defendant’s home jurisdiction. A resident plaintiff has a strong interest in avoiding the expenses, inconvenience, and potential bias of the foreign defendant’s jurisdiction. The assertion of jurisdiction over a foreign corporation in these circumstances is not necessarily unfair and unreasonable.

121 See Asahi, 480 U.S. at 115.

122 See supra p. 27.

123 See supra pp. 26-27.

124 This alternative handicaps a resident plaintiff in several ways. First, litigating in a foreign country is extremely expensive. Second, foreign courts may be unfamiliar with
2. Federalism and International Considerations

Following the admonishment of World-Wide Volkswagen, the Supreme Court in Asahi emphasized the "shared interest of the several States in furthering fundamental substantive social policies."\(^{125}\) Then the court further held that, in an international case like Asahi, this substantial social policy is represented by the consideration on "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court."\(^{126}\)

Certainly, the assertion of a state's jurisdiction over a foreign defendant affects the foreign relations of the United States by creating the possibility of retaliatory actions by other nations. Further, it necessarily involves each state in the scope of the federal power over foreign relations and foreign commerce to a constitutionally impermissible degree.\(^{127}\) In international cases like Asahi, courts need to pay a special caution to the fairness and reasonableness of the limitation on the state's judicial power, international relationships, and the government's foreign policies.

However, the federalism consideration should not be given too much weight in the due process analysis. The argument for limitation based on federalism is that the states stand as coequal sovereigns and possess rights against each other. Therefore, a state may not assert jurisdiction over a person or property located in another state, United States products liability laws that may govern the case. Finally, other countries' courts may be biased in favor of a national defendant, applying their own products liability laws, which generally offer plaintiffs fewer chances of recovery.

\(^{125}\) Asahi, 480 U.S. at 113. In World-Wide Volkswagen, the Supreme Court held that the interstate federalism concerns superseded the considerations of other factors in the fairness and reasonableness test. See World-Wide Volkswagen, 444 U.S. at, 292.

\(^{126}\) See Asahi, 480 U.S. at 115.

because to do so would violate a right possessed by another coequal sovereign. This territorial sovereignty theory of jurisdiction is traditionally traced to the case of Pennoyer.\textsuperscript{128} The argument is based on the contention that the several states of the United States are in all respects like independent countries, except insofar as the federal constitution controls. The Pennoyer Court never asserted that there was a direct constitutional basis for the territorial theory of jurisdiction, but rather assumed that this theory followed from the concept of sovereignty rooted in international law as that concept extended to the United States’ federal system. However, when a product manufacturer in a foreign country caused injuries to persons in another country, the manufacturer has already invaded another country’s sovereign power through the sale of its defective product in that country. Therefore, the foreign countries’ sovereign power itself is not a reason to reserve the judicial power of the forum state. Further, in international law, the right to assert immunity from jurisdiction belongs to the nation and does not belong to the individual defendant. Territorial sovereignty does not provide a theoretical basis for the right of a foreign defendant to move for a dismissal of an action on the grounds of absence of personal jurisdiction.

The purpose of due process is to protect the liberty of individuals by providing a potential defendant assurance as to where he will be sued.\textsuperscript{129} As the Supreme Court of

\textsuperscript{128} Pennoyer, 95 U.S. 714 (1877). In Pennoyer, the Supreme Court established two principles of public law respecting the jurisdiction of an independent state over person and property: First is that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.” Second is that “no State can exercise direct jurisdiction and authority over persons or property without its territory.” Id. at 733. See supra note 9.

\textsuperscript{129} See Yvonne Luketich Blauvelt, Personal Jurisdiction After Asahi Metal Industry Co., v. Superior Court of California, 49 Ohio St. L.J. 853, 856 (1988).

“Although interstate federalism is an important federal constitutional concern, the due process clause of the fourteenth amendment does not address that concern. The purpose of the due process clause is to protect person against unfair or arbitrary treatment at the hand of the government. If the due process
the United States stated in *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, the federalism consideration is not relevant with the Due Process Clause.\(^{130}\)

3. The Stream of Commerce

The stream of commerce is a "regular and anticipated flow of products from manufacture to distribution to retail sale."\(^{131}\) Once a participant in this process places its products in the stream of commerce, knowing that "the final product is being marketed in the form State,"\(^{132}\) these manufacturers can reasonably anticipate being sued in the forum state. In addition, the burden on the defendant to litigate in the forum state corresponds to the defendants' economic and legal benefit "from the retail sale of the final product in the forum State."\(^{133}\) Therefore the exercise of the forum state's jurisdiction over foreign manufacturers is not inconsistent with the Due Process Clause, standard in the International Shoe makes it fair to adjudicate in the court of one state, then the interests of federalism, embodied in the full faith and credit clause of article IV of the Constitution, will be served by requiring that all states give effect to that state's judgment."

\(^{130}\) In *Insurance Corp., of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982), note 10, the Supreme Court stated that:

"The restriction on state sovereign power described in World-Wide Volkswagen Corp., however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federal concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected."

\(^{131}\) *Asahi*, 480 U.S. at 117.(Brennan, J.)

\(^{132}\) *Id.*

\(^{133}\) *Id.*
as far as they have placed their products into the stream of commerce with the awareness that their products will reach the forum states.\textsuperscript{134}

In \textit{World-Wide Volkswagen}, the Supreme Court approved in dictum the forum state’s exercise of personal jurisdiction over a nonresident defendant that delivered its products into the stream of commerce with the expectation that its products would be purchased by consumers in the forum state.\textsuperscript{135} To satisfy the purposeful availment requirement, the Court did not require any additional conduct other than defendant’s “expectation” of purchase of the products in the forum state. By requiring defendant’s additional conduct, Justice O’Connor in \textit{Asahi} imposed artificial barriers to personal jurisdiction and implicitly rejected the stream of commerce theory endorsed in \textit{World-Wide Volkswagen}. Justice O’Connor overlooked the fact that the company manifested the basic commercial purpose to profit from the market through a regular course of sales. Imposing an additional conduct requirement unduly protects indirect shippers and manufacturers from the exercise of personal jurisdiction of the forum state in which they have profited.\textsuperscript{136}

\textsuperscript{134} See Id.

\textsuperscript{135} See \textit{supra} p. 11.


“Moreover, Justice O’Connor’s restrictive view of the stream of commerce may give foreign manufacturers a competitive edge over their American counterparts. American manufacturers must include in the cost of goods expenses associated with potential products liability litigation. An additional contacts requirement removes from domestic court jurisdiction foreign manufacturers whose only contacts are indirect forum sales. Foreign manufacturers, thus freed from litigation expenses, would benefit from lower costs. As a result, foreign producers could potentially enjoy a competitive advantage over United States manufacturers in both the domestic and international marketplace. Given that jurisdiction is proper over manufacturers who benefit from forum sales, due process
Further, her opinion fails to comport with the realities of international commerce. It is not usual that foreign component parts manufacturers, whose products are incorporated into final products by the foreign final product manufacturers and sold in the United States, engage in the additional conducts noted by Justice O'Connor in Asahi. All of these activities are usually undertaken by final product manufacturers or replacement parts manufacturers.137 Under Justice O'Connor's opinion, most of foreign component part manufacturers would not be subject to the jurisdiction of the courts in the United States, even if a large amount of their products are continuously incorporated into final products and are continuously sold in the United States over many years and despite knowledge that their products will reach the United States.138

The purpose of the Due Process Clause is to provide a defendant with reasonable predictability whether its activities will cause it to be subject to litigation in

principles should not be twisted to grant foreign manufacturers greater forum benefits by exempting them from jurisdiction.


“Although “designing,” “advertising,” “advising,” or “marketing” with specific reference to the forum state tends to establish intent to serve that market, there are activities that almost invariably would be undertaken by manufacturers of final consumer products or of replacement parts. It would be highly unusual for a nonreplacement component part manufacturer to engage in these types of consumer oriented activities. This is especially so with respect to a component part that is attached to, and not readily separable from, the final consumer product such as the valve stem of a tire tube. A literal reading of the O’Connor plurality suggests that a foreign component part manufacturer could not be sued in a jurisdiction in which its product was systematically and continuously distributed with its knowledge and acquiescence over many years so long as the manufacturer did not engage in consumer oriented activity in the forum state.”

138 See Id.
the forum state, thereby permitting it to take steps to alleviate the risk of litigation by procuring insurance, etc.\textsuperscript{139} When a foreign corporation is aware of the destination of its products, it can reasonably assume that it could cause injuries in the destination state, and consequently it is given clear notice that it might be sued in the forum state for claims relating to the sale of its products. Therefore, it is not unreasonable to subject the foreign corporation to the suit in the forum state. Justice O’Connor distinguished between the defendant’s mere awareness of the destination of its product and its purposeful availment of the forum. For the purpose of notice, Justice O’Connor’s additional conduct requirement is not necessarily for manufacturers who already have notice that they may be subject to litigation in the forum because they knew that their products are sold in the forum state.

4. New Approach for the Stream of Commerce

A foreign defendant should be subject to the forum state’s personal jurisdiction if it places its products in the stream of commerce with the expectation that these products will reach the forum state and the products cause damage to residents in the forum state. In products liability actions, the balance should be weighed for the protection of consumers. In some cases, it is possible that a foreign defendant may not actually know that its products are sold in some distant forum. Proof of defendants knowledge will be difficult because all the material information is in the hands of a distant defendant. However, the determination that the defendant was not aware of the final destination of its products would deprive the resident of the United States of the right to sue foreign corporations and recover for damages in products liability cases in the United States. When a manufacturer directly or indirectly makes regular sales in a forum state and enjoys the benefit from the sale of its products in the forum state, it is

\textsuperscript{139} See supra note 34.
not unreasonable that the manufacturer be subject to the jurisdiction of the forum state. When the product has been sold regularly in the state, a defendant should not be permitted to use its ignorance of its commercial activities as a shield to avoid jurisdiction. Even under this approach, the due process principle will protect the defendant from jurisdiction arising out of an unknown, isolated or fortuitous sale, since the random conduct does not constitute purposeful availment.

Therefore, once a foreign company places its product in the stream of commerce, and the product reaches the forum state through the normal course of commercial distribution and causes injuries to a forum state’s resident, the foreign company should be subject to the jurisdiction of the forum state.
Chapter IV. Application of Asahi

This chapter examines how American courts have applied Asahi to foreign manufacturers in products liability cases for the purpose of international jurisdiction.

A. Component Parts Manufacturers

The defendant in the third party indemnification claim in Asahi was the manufacturer of the tire valve assembly. Its products were imported into the United States only after being incorporated into the finished tire in Taiwan. Component parts manufacturers like this are one step removed from U.S. consumers and the forum state than are finished product manufacturers or the national distributors who are engaged in the marketing or sales of their products in the United States. When component parts are incorporated into the finished products outside of the forum state, the contacts of the component parts manufacturer with the forum state are relatively limited. Therefore, most of the lower courts after Asahi have found that minimum contacts between forum state and component parts manufacturers do not exist unless those manufacturers have more extensive contacts with the forum state.

1. Felix v. Bomoro Kommanditgesellschaft

For example, in Felix, the Court of Appeals of California denied the exercise of jurisdiction of California over a German component parts manufacturer whose products were incorporated into the finished products in Germany.

The administrator of the deceased, who was killed in an automobile accident in California in 1982, brought a products liability action, inter alia, against Bomoro Kommanditgesellschaft (Bomoro), a German automobile door latch assembly manufacturer. The suit alleged a defect in the design of the door latch assembly which caused the decedent to be thrown from the vehicle during the accident. Bomoro moved to quash service on the ground it lacked the requisite minimum contacts with California.

The vehicle in which the deceased was riding at the time of the accident was manufactured in West Germany in 1965 by Volkswagen and was known in the industry as a model Type III. Bomoro supplied its automobile door latch assemblies to Volkswagen as a component part of the Type III. When Bomoro started the sales of the door latch assemblies to Volkswagen, Bomoro was informed by Volkswagen that all vehicles were to be marketed and sold in Europe and not in the United States. Although Volkswagen of America (VWOA) did not commence importing Type III vehicles from Germany to the United States until the 1966 model year, an undetermined number of newly manufactured 1965 automobiles were purchased in Europe by unauthorized dealers and others and shipped to the United States.

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141 See Id. at 108-09.

142 See Id. at 109.

143 See Id.

144 See Id.

145 See Id. Bomoro insisted that it “did not know and could not reasonably have expected or anticipated that its products assembled by Volkswagen into the Model Type III ... would find their way to California.” Id.

146 See Id. at 110. The court also found that beginning in late 1965, VWOA imported and sold in excess of 4,723 1966 model year Type III vehicle to authorized distributors
Regarding the foreseeability of the destination of the component parts, the California Court of Appeals noted that, "[i]n today’s rapidly shrinking commercial world with its increasing emphasis on integrated and interdependent goods, it is of course possible for a foreign manufacturer of component parts to reasonably expect that the stream of distribution will carry its products into each of the 50 states and, indeed, around the world."\textsuperscript{147} However, the court went on to state that this kind of expectation that its product might reach the forum state was not enough to satisfy the minimum contacts requirement for the exercise of personal jurisdiction.\textsuperscript{148} The court stated that "[i]ndividuals and corporations alike must be given fair notice about which activities will make them amenable to suit in a forum state."\textsuperscript{149}

After acknowledging the list of Justice O’Connor’s additional conducts in \textit{Asahi} as examples of the plaintiff’s activities which would satisfy the minimum contacts requirement, the court required defendant’s activities purposefully directed toward the forum state for the exercise of jurisdiction.\textsuperscript{150} The court stated that “a foreign corporation must knowingly avail itself of the benefits accruing from its activities within the forum before jurisdiction will attach.”\textsuperscript{151} The court further stated that “[t]he appropriate test is not knowledge or awareness of the ultimate destination of the

who in turn sold their inventory to authorized dealerships doing business throughout the United States. \textit{Id.}

\textsuperscript{147} \textit{Id.} at 114-15.

\textsuperscript{148} \textit{See Id.}

\textsuperscript{149} \textit{Id.} at 115.

\textsuperscript{150} \textit{See Id.} at 116.

\textsuperscript{151} \textit{Id.}
product, but whether the manufacturer has purposefully engaged in forum activities so it can reasonably expect to be haled into court there.\textsuperscript{152} Based on this standard, the court denied the exercise of jurisdiction of California on the ground that the sole contact that Bomoro had with California was that Volkswagen sold automobiles in California which contained the door latches manufactured by Bomoro in Germany.\textsuperscript{153} The court based its decision on the facts that all of the sales and distribution of the finished products were conducted by Volkswagen, and Bomoro was not involved in the sale or distribution of them.\textsuperscript{154} Then the court concluded that “[t]he contacts in this case are simply too fortuitous and tenuous to warrant the exercise of personal jurisdiction.”\textsuperscript{155}

2. \textit{Wilson v. Kuwahara Co.}\textsuperscript{156}

In the same way, in \textit{Wilson}, a Federal District Court in Michigan denied the exercise of jurisdiction over a Japanese wheel assembly manufacturer. In this case, the widow of a bicyclist killed in an accident brought a products liability action, inter alia, against Kuwahara Co. (Kuwahara), a Japanese bicycle manufacturer, and Yanagihara Kogyo Co. (Yanagihara), a Japanese wheel assembly manufacturer, alleging that the accident was caused by a defect in the bicycle wheel assembly.\textsuperscript{157} Kuwahara then filed

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} See \textit{Id.}

\textsuperscript{154} See \textit{Id.}

\textsuperscript{155} \textit{Id.}


\textsuperscript{157} See \textit{Id. at} 526.
cross-claim seeking indemnification against Yanagihara, and Yanagihara filed a motion to dismiss for lack of personal jurisdiction.¹⁵⁸

Yanagihara’s wheel assembly at issue was sold to a Japanese distributor in Japan, and the distributor in turn sold the wheel assembly to Kuwahara. Then, Kuwahara incorporated the wheel assembly into its bicycle in Japan.¹⁵⁹

To justify the exercise of jurisdiction over Yanagihara, Kuwahara contended that Yanagihara was aware that Yanagihara’s parts might be distributed in the United States after incorporated into the final products.¹⁶⁰ However, the District Court rejected Kuwahara’s contention, stating that the mere awareness of the destination of the products was not enough to satisfy the minimum contacts requirement. In denying the exercise of jurisdiction over Yanagihara on the ground that Yanagihara had not purposefully availed itself of the privilege of conducting activities in Michigan,¹⁶¹ the court concluded that “Yanagihara’s only significant Michigan connection is through the sale of a wheel in Japan to another Japanese company, who then sold the wheel in Japan to a third Japanese company, who then transferred the wheel to this country, where it found its way to Michigan.”¹⁶²

_Felix_ and _Wilson_ are quite similar to _Asahi_ in that the component parts were incorporated into the finished products in foreign countries and were not specifically manufactured or designed for the use of U.S. consumers. Further these defendant had

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¹⁵⁸ See _Id._ at 527.

¹⁵⁹ See _Id._ at 526-57.

¹⁶⁰ See _Id._ at 529.

¹⁶¹ See _Id._ at 532.

¹⁶² _Id._
not engaged in any activities related to the sale of their products in the forum state. Hence, it is not surprising that after *Asahi*, jurisdiction was found lacking in these cases.

3. *Falkirk Mining Co. v. Japan Steel Works, Ltd.*

Thus, in cases where foreign component parts were sold and incorporated in the finished products in foreign countries, the courts have usually found that minimum contacts with the forum state were lacking. However, in *Falkirk Mining*, the Eighth Circuit found minimum contacts were not present even where the component products were incorporated into the finished products in the forum state and the component products were specifically manufactured or designed for use by customers in the United States. Although this was not a products liability action, this case shows the impact of *Asahi* in the lower courts.

In *Falkirk Mining*, Falkirk's parent corporation entered into a contract with Marion Power Shovel (Marion), whose principle place of business was in Ohio, for the purchase and construction of a walking dragline crane (dragline) to be used in strip mining coal. Marion then agreed to purchase six eccentric cams for incorporation into draglines from Mitsui & Co. Inc. (Mitsui U.S.A.), the American subsidiary of Mitsui & Co., Ltd (Mitsui). Mitsui then contracted with Japan Steel Works Ltd. (Japan Steel Works), a Japanese steel equipment manufacturer, to manufacture the six cams. Japan Steel Works made two cams following the specification and drawings of Marion for use in the construction of the draglines. One of the eccentric cams was delivered from Japan Steel Works to Mitsui in Japan. Mitsui or Mitsui U.S.A. then transferred the

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906 F.2d 369 (8th Cir. 1990).

See *Id.* at 371. The court found that officials of Marion "monitored Japan Steel’s manufacturing process in Japan to insure compliance with contract specifications and timeliness requirements." *Id.*

See *Id.*
cam to Kobe, Japan, and delivered it to Marion. Marion's agent shipped the cam to North Dakota. Marion then incorporated the cam in the dragline at the site of Falkirk in North Dakota. After the cam was installed in the dragline, the cam cracked. Falkirk filed an action to recover damages against Japan Steel Works alleging the breach of implied and express warranties, negligence and strict liability. Japan Steel Works moved to dismiss on the grounds that the district court lacked personal jurisdiction.

The Eighth Circuit ruled that there was no jurisdiction over Japan Steel Works because Japan Steel Works did not purposefully direct its activities toward North Dakota. The court found that "aside from one isolated, unrelated visit by Japan Steel engineers to North Dakota to install plastic injection machines at a 3M plant, neither Japan Steel nor Japan Steel Works America (an American subsidiary of Japan Steel Works) has purposefully availed itself of the laws and protections of the State of North Dakota."

Falkirk contended that the fact that the cam was incorporated into the dragline at the Falkirk Mine in North Dakota was sufficient to subject Japan Steel Works to personal jurisdiction of North Dakota. However, the court did not think the place where the cam was installed should be the determinative factor in the minimum contacts examination. The court stressed that Japan Steel Works entered into a contract with Mitsui or Mitsui U.S.A. and delivered the completed product to Mitsui in Japan.

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166 See Id. at 371-72.

167 See Id. at 372.

168 See Id.

169 See Id. at 375-76.

170 Id. at 375.

171 See Id.
The court further noted that Japan Steel Works manufactured the cam in accordance with specifications provided by Marion, not by Falkirk, and there was no evidence that Japan Steel Works knew the ultimate destination of the cam.\textsuperscript{172}

Thus, Japan Steel Works did nothing more than place its products in the stream of commerce outside the United States. Referring to the Supreme Court decision in \textit{Asahi}, the court held that “the placement of the products into the stream of commerce, without more, does not constitute an act of the defendant purposefully directed toward the forum state.”\textsuperscript{173}

Thus, in cases of foreign component parts manufacturers which do not engage in an additional contact, the courts after \textit{Asahi} have found minimum contacts absent, even if the manufacturers placed their products into the stream of commerce with knowledge that they would ultimately reach the United States.

4. \textit{Showa Denko K.K. v. Pangle}\textsuperscript{174}

On the other hand, when the component parts manufacturer has engaged in purposeful activities in the forum state, lower courts have found a sufficient basis for the exercise of jurisdiction. For example, in \textit{Showa Denko}, the Court of Appeals of Georgia found sufficient minimum contacts between a Japanese drug materials manufacturer and State of Georgia where the Japanese drug materials manufacturer purposefully engaged in nationwide marketing activities in the United States through its subsidiary in New York.

\textsuperscript{172} See \textit{Id.}

\textsuperscript{173} \textit{Id.} at 376.

Juanita Pangle, a Georgia resident, was severely injured when she contracted eosinophilia myalgia syndrome allegedly as a result of ingesting L-tryptophan, an amino acid used as a dietary supplement. The amino acid was produced in Japan by Showa Denko K.K. (Showa Denko). Although Showa Denko had not directly committed any act in Georgia related to L-tryptophan for human consumption, its New York subsidiary, Showa Denko America, Inc. (SDA), marketed and distributed Showa Denko’s raw materials to twenty-three pharmaceutical manufacturers in nine states, including Florida and South Carolina. The raw materials were then incorporated into diet supplement pills by American manufacturers and sold throughout the nation. Showa Denko moved to dismiss Pangle’s action filed against it in Georgia on the ground that personal jurisdiction was lacking.

The Court of Appeals of Georgia found sufficient minimum contacts between Showa Denko and the State of Georgia because “Showa Denko should have reasonably anticipated being haled into court in Georgia.” The Georgia court chose to apply the traditional stream of commerce analysis set forth by the United States Supreme Court in

175 See Id. at 245.

176 See Id. at 246-47. The court found that SDA sold approximately $4,000,000 worth of L-tryptophan in the United States during 1989.

177 See Id. These manufacturers included “nationally marketed brands such as Nature’s Bounty as well as General Nutrition Products, Inc., and Walgreen Laboratories, Inc., which operated retail stores throughout the country.” Id.

178 See Id. at 245.

179 Id. at 250. The court noted that even under the rational set forth in Asahi, Showa Denko’s act established the necessary minimum contacts with Georgia. See Id. at 245. The court stated that; “The record in this case shows S.D.A.’s contact with Nature’s Bounty required S.D.A. to comply with the laws of all states and the United States. Thus, Showa Denko, through its agent, agreed to produce the product so that it would be marketable in all states, including Georgia.” Id.
World-Wide Volkswagen, reasoning that the “splintered view of minimum contacts in Asahi provides no clear guidance on this issue.”\(^{180}\)

The court held that “[w]ether the introduction of a product into the stream of commerce establishes minimum contacts with a state in which the product is ultimately sold depends on the foreseeability that the product would be sold there.”\(^{181}\) Unlike World-Wide Volkswagen where the defendant’s product reached forum state by plaintiff’s unilateral activities, in this case, “it is not happenstance that the product was ultimately consumed in Georgia.”\(^{182}\) The court found that “[p]laintiff’s purchase and use of defendant’s product in Georgia was a result of defendant’s deliberate and purposeful nationwide distribution of its product.”\(^{183}\) Hence, when “a foreign manufacturer sells its product to a United States distributor knowing that its product will be sold in every state, it should reasonably expect to be haled into court in Georgia for an injury caused in this state by that product.”\(^{184}\)

In upholding jurisdiction, the court distinguished the case from Asahi where the foreign component parts manufacturer sold its products to another foreign country’s finished products manufacturer.\(^{185}\) Here, Showa Denko shipped its products into the

\(^{180}\) Id. In this point, the court referred to Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383, 386 (5th Cir. 1989) where similarly the Fifth Circuit found that it was not bound by Asahi to reject the World-Wide Volkswagen stream of commerce analysis.

\(^{181}\) Id. at 247-48.

\(^{182}\) Id. at 248.

\(^{183}\) Id.

\(^{184}\) Id.

\(^{185}\) See Id.
United States through its American subsidiary which acted as its agent for selling the products to manufacturers throughout the nation.\textsuperscript{186}

5. \textit{Haedike v. Kodiak Research, Ltd.}\textsuperscript{187}

In the same way, in \textit{Haedike}, a United States District Court in Illinois found constitutionally sufficient minimum contacts between the State of Illinois and a German component parts manufacturer. Fritz Hintermayer, GmbH, Bing-Vergaser-Fabrik (Bing) is a German corporation manufacturing carburetors to be incorporated into Rotax engine packs Bombardier-Rotax, GmbH (Rotax) is an Austrian company manufacturing engine packs for aviation use. Bing’s carburetor at issue was incorporated into a Rotax engine pack in Austria by Rotax.\textsuperscript{188} Then, through Rotax’s Canadian distributor, the Rotax engine pack at issue in this case was sold to an aircraft manufacturer in Florida for installation in an aircraft.\textsuperscript{189} Because of the defect in the carburetor, the aircraft crashed, and plaintiff Haedike was injured in Illinois. Haedike filed a products liability action against Rotax and Bing, and Bing challenged the court’s jurisdiction over it.

The United States District Court found sufficient minimum contacts to support the exercise of Illinois’ jurisdiction over Bing. The court acknowledged the validity of the stream of commerce theory,\textsuperscript{190} holding that the critical element in the examination

\textsuperscript{186} See Id. at 250.


\textsuperscript{188} See Id. at 680.

\textsuperscript{189} See Id. at 680-81.

\textsuperscript{190} See Id. at 683-84.
of minimum contacts was whether the defendants purposefully availed themselves of the privilege of conducting activities within Illinois.\textsuperscript{191}

Here, the court noted that “Bing placed its products, including the allegedly defective carburetor incorporated into Haedike’s aircraft, into “the stream of commerce” with the expectation that they would be purchased by consumers in Illinois.”\textsuperscript{192} Thus, under the stream of commerce theory, the Illinois court could exert its jurisdiction over Bing. Moreover, the court further found that Bing maintained an extensive business relationship with the United States. For example, Bing had entered into an agency agreement with a Nebraska distributor granting it the “sole sales right” of Bing carburetors, Bing had sold its carburetors directly to United States companies, every BMW motorcycle sold in the United States was equipped with a Bing carburetor, and a large number of Bing’s carburetors had been sold in Illinois.\textsuperscript{193} Thus, in light of all these contacts with the United States the court concluded that “Bing should have reasonably foreseen being subject to the jurisdiction of an Illinois court.”\textsuperscript{194}

Bing not only supplied its component parts to Rotax in Austria for use in the engines manufactured by Rotax, it also exploited Illinois’ market itself through aggressive marketing and sales efforts. The nature of its ties to the forum were much different from that of the component parts product manufacturer in Asahi. The court noted that “Bing’s status as a foreign corporation pales in comparison to its aggressive economic strategy which included the development and supply of an Illinois market.”\textsuperscript{195}

\textsuperscript{191} See Id. at 683.

\textsuperscript{192} Id.

\textsuperscript{193} See Id. at 684.

\textsuperscript{194} Id.

\textsuperscript{195} Id.
6. Analysis

In Asahi, the claim of the forum resident had already settled and the only remaining claim was a third-party indemnification claim between the Taiwanese corporation and the Japanese corporation. The interest of the forum in adjudicating the dispute was reduced by the settlement of the claim of the California resident. Therefore, in Asahi, the limitations placed on the exercise of the forum state’s judicial power were understandable. However, lower courts after Asahi have been reluctant to uphold jurisdiction over foreign component part manufacturers even in claims brought by forum residents to recover for their injuries. In Wilson and Falkirk, the court denied the exercise of jurisdiction even though the forum resident or corporation was attempting to sue the foreign component parts manufacturer directly. In Felix, the foreign component parts manufacturer was involved in the case by the original defendant’s indemnification claim; however, the claim of the original plaintiff had not settled. In these cases, the courts had a strong interest to provide a proper forum for resident plaintiffs and to solve all claims in the same court. However, the courts did not distinguished the case from Asahi on this basis, and denied the exercise of jurisdiction. Thus, in the lower courts after Asahi, concerns about the lack of minimum contacts owing to the application of the stream of commerce theory have not usually been overcome by arguments about the reasonableness of the assertion of jurisdiction.

B. Justice O’Connor’s Approach

The distinction between the component parts manufacturer and finished product manufacturer is not the sole basis for determining the amenability of the foreign company to suit in the United States. Some lower courts, following Justice O’Connor’s stream of commerce plus additional conduct approach in Asahi, look for the four factors
described by Justice O'Connor\(^{196}\) as the threshold of the minimum contacts determination. However, what kind of conduct will satisfy the requirement of additional contacts to constitute a jurisdictionally sufficient nexus very much depends on the concrete facts of each case. This section will examine how the courts have applied Justice O’connoir’s additional conduct approach.

1. **Dittman v. Code-A-Phone Corp.\(^{197}\)**

In *Dittman*, plaintiff Dittman filed a products liability action against Code-A-Phone Corporation (Code-A-Phone) to recover damages for an injury caused by a defective cordless telephone. Code-A-Phone in turn filed a third-party complaint against Uniden Corporation of Japan (Uniden Japan), a Japanese manufacturer of the cordless telephone, seeking indemnity for any damages awarded to Dittman. Uniden Japan contested Indiana’s jurisdiction.

A federal District Court in Indiana found sufficient minimum contacts between Uniden Japan and Indiana for the exercise of personal jurisdiction. Although Code-A-Phone was an American distributor of Uniden Japan, Uniden Japan itself engaged in marketing and sales efforts throughout the United States through its subsidiary in Indianapolis.\(^{198}\) The court emphasized the relationship between Uniden Japan and its

\(^{196}\) As examples of such additional conducts, Justice O’Connor named, (1) designing the product for the market in the forum State, (2) advertising in the forum State, (3) establishing channels for providing regular advice to customers in the forum State, or (4) marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *See supra* p. 22.

\(^{197}\) 666 F. Supp. 1269 (N.D.Ind. 1987).

\(^{198}\) *See Id.* at 1270-71.
American subsidiary and found that those operations were not completely separated.\footnote{See Id. at 1273. The court noted that "jurisdiction is not solely on the parent-subsidiary relationship, but rather on the way in which this relationship operated in this case." \textit{Id}.} To clarify the parent-subsidiary relationship of Uniden Japan, the court noted the facts that the American subsidiary processed the FCC application on behalf of Uniden Japan and officers of Uniden Japan spend considerable amount of their working time in Indianapolis.\footnote{See Id.} The court concluded that Uniden Japan was a major participant in the American cordless telephone market and therefore the assertion of personal jurisdiction over Uniden Japan was appropriate.\footnote{See Id. at 1272. The court distinguished the case from \textit{Asahi}, noting that, "unlike \textit{Asahi}, who marketed a component which was integrated into a larger product," Uniden Japan sold a finished product to Code-A-Phone as one of the marketing efforts of itself throughout the United States. \textit{Id}.} Thus in \textit{Dittman}, Uniden Japan’s conduct in directly marketing its products in the U.S. through its American subsidiary satisfied Justice O’Connor’s additional conduct requirement.

\section*{2. \textit{Benitez-Allende v. Alcan Aluminio Do Brasil}}\footnote{857 F.2d 26 (1st Cir. 1988).}

In \textit{Benitez-Allende}, residents of Puerto Rico filed products liability actions in Puerto Rico against Alcan Aluminio do Brasil, S.A. (Alcan/Brasil), a Brazilian pressure cooker manufacturer, to recover for injuries suffered because of defective pressure cookers of Alcan/Brasil. The First Circuit affirmed the exercise of jurisdiction over Alcan/Brasil. The court found that: (1) Alcan/Brasil hired an American sales representative and asked him to solicit orders in Puerto Rico to sell its pressure cookers in the American market, and (2) Alcan/Brasil sold 300,000 pressure cookers to
Americans between 1977 and 1981, 240,000 of which were sold in Puerto Rico. Based on these facts, the court concluded that the deliberate marketing efforts of Alkan/Brasil in Puerto Rico were sufficient to satisfy Justice O’Connor’s additional conducts requirement.


In *Vermeulen*, a Georgia resident brought a products liability action in Georgia seeking recovery for damages suffered in an automobile accident, against Regie Nationale Des Usines Renault (RNUR), a French vehicle manufacturer. The Eleventh Circuit found that RNUR satisfied Justice O’Connor’s additional conduct requirement in four points.

First, RNUR designed the car for Georgia’s market by modifying the vehicles to accommodate the American market. Although RNUR had not designed the car specifically for the Georgia market, the court noted that the fact that RNUR designed its products for the United States generally as part of a nationwide marketing effort in order to promote the widest distribution of RNUR’s car was sufficient to satisfy this standard.

Second, RNUR advertised the car through a nationwide advertising campaign which reached Georgia. Although it was not clear which advertising was specifically

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203 *See Id.* at 29.

204 *See Id.* at 30.

205 975 F.2d 746 (11th Cir. 1992).

206 *See Id.* at 758.

207 *See Id.*

208 *See Id.*
directed at Georgia, the court stated that the fact that RNUR’s car was nationally advertised and such advertising reached Georgia was sufficient to establish the necessary relation between Georgia and RNUR.\textsuperscript{209}

Third, RNUR established channels for providing regular advice to their customers in Georgia through dealerships of their American distributor.\textsuperscript{210} The court noted that, according to the dealership agreement between RNUR and its American dealer, the American dealer must “use its best efforts to assure that Dealers will comply with all sales and service manuals that Renault may from time to time issue relating to the sale and servicing of Renault products and other matters covered by [the Distributor’s Agreement] or the Dealer franchises.”\textsuperscript{211}

Finally, RNUR created and maintained the distribution network that brought its car into Georgia.\textsuperscript{212} The court found that RNUR agreed with its American distributor to create a nationwide distribution network over which RNUR retained ultimate control, and it was actually involved into the distribution network.\textsuperscript{213} Because of the totality of contacts between RNUR and the American market, it is not at all surprising that jurisdiction over it was upheld. It clearly met the higher standards for jurisdiction set by Justice O’connor in Asahi. The importance of this case probably lies in the willingness of the Eleventh Circuit to allocate national contacts to a particular state when suit is brought by an injured consumer.

\textsuperscript{209} See Id.

\textsuperscript{210} See Id.

\textsuperscript{211} Id.

\textsuperscript{212} See Id. at 759-60.

\textsuperscript{213} See Id.

In *Tobin*, plaintiff Kathy Tobin was severely injured by the side effects of the dosage of ritodrine manufactured by Duphar B.V. (Duphar), a Netherlands corporation. Tobin filed a products liability action against Duphar and Astra Pharmaceutical Products Inc. (Astra), an American distributor of Duphar’s products, seeking recovery of damages. Duphar contested jurisdiction alleging that Astra was an independent distributor and Duphar had simply placed its products into the stream of commerce. The district court dismissed the action against Duphar on the ground that Duphar had not engaged in any additional conduct as required by Justice O’Connor in *Asahi*.

Plaintiff appealed the dismissal of Duphar.

The Sixth Circuit reversed, finding sufficient minimum contacts between Duphar and State of Kentucky. The court held that Duphar’s marketing activities in the United States satisfied Justice O’Connor’s additional conduct requirement in *Asahi*. Duphar directly submitted a New Drug Application to the FDA for approval and conducted clinical studies in the United States. The court found that Duphar’s conduct would satisfy Justice O’Connor’s requirement of “designing the product for the market in the forum state.” In addition, Duphar sought and obtained a United States distributor to exploit the United States market. Thus, the court concluded that Duphar was “marketing the product through a distributor who has agreed to serve as the

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214 993 F.2d 528 (6th Cir. 1993).

215 See *Id.* at 542.

216 See *Id.* at 544.

217 See *Id.* at 543.

218 *Id.*
sales agent in the forum State." Based on these findings, the court concluded that Duphar had not simply placed its product into the stream of commerce.

Responding to Duphar’s contention that it had done nothing particularly in the Kentucky market as distinguished from any other state, the court stated that “if we were to accept defendant’s argument on this point, a foreign manufacturer could insulate itself from liability in each of the fifty states simply by using an independent national distributor to market its products.” The court concluded that “by licensing Astra to distribute ritodrine in all fifty states it employed the distribution system that brought ritodrine to Kentucky.”

Thus, court in Tobin made it clear that when a foreign manufacturer sets up its marketing system to exploit the American market to sell its products throughout the United States, the manufacturer can not insulate itself from suit in the forum state solely because it used an independent distributor to sell its products.


Soo Line Railroad Company (Soo Line) filed a products liability action in Minnesota against Hawker Siddeley Canada, Incorporated (Hawker Siddeley), a

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219 See Id. at 544.

220 See Id.

221 Id.

222 See Id.

223 See Id. The court cited Mott v. Schelling and Co., 966 F.2d 1453 (6th Cir. 1992). In Mott, the Sixth Circuit found the necessary additional conducts where an Austrian industrial equipment manufacturer actively cultivated the American market in addition to having an independent distributor for the sale and resale of its products in the United States.

224 950 F.2d 526 (8th Cir. 1991).
Canadian manufacturer of railroad cars, to recover damages allegedly caused by a defective wheel. Hawker Siddeley sold its railcars to a Canadian corporation in Canada and then the railcar leased to another Canadian corporation. The accident happened in Minnesota while Soo Line was transporting the railcar on its tracks.

Soo Line contended that Hawker Siddeley had significant contact with Minnesota by virtue of its compliance with standards and requirements established by the Association of American Railroads (AAR). In order to receive AAR approval, Hawker Siddeley had to submit its plans, products, and premises to testing and inspection. Soo Line argued that through designing the product for the discrete market, Hawker Siddeley could reasonably expect to be haled into court anywhere within the interchange service market.

However, the Eighth Circuit found minimum contacts between Hawker Siddeley and State of Minnesota lacking. The court held that “Hawker Siddeley did not design its railcars for use in Minnesota per se; it designed its railcars for use in most of North America.” The court stated that, even if many of Hawker Siddeley’s railcars had

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225 See Id. at 528.

226 See Id.

227 See Id.

228 See Id. at 529. All cars used in the interchange service market must comply with AAR standard. Interchange service refers to the capacity for railcars to be transferred from one railroad to another. The AAR’s standards promote interchange by establishing requirement relating to both standardization and quality of equipment. The market covered by the AAR interchange service agreement is almost all railroads in Mexico, Canada, and the forty-eight contiguous United States. See Id. at 528.

229 See Id. at 529.

230 See Id.

231 Id. at 530.
traveled through Minnesota from the actions of a third party, this result alone was not enough to satisfy the minimum contact requirement.\(^{232}\)

Thus the Eighth Circuit followed Justice O’Connor’s plurality opinion in Asahi, and required defendant’s additional conduct in order to find constitutionally sufficient minimum contact. Further, the court narrowly interpreted Justice O’Connor’s additional conduct requirement. Under this decision, manufacturing a product to meet national standards that are applied across the United States does not satisfy Justice O’Connor’s additional conduct requirement for a particular state.

6. **Brabeau v. SMB Corp.**\(^{233}\)

As the Sixth Circuit showed in Tobin, when foreign manufacturers use American marketing distributors or sales agents to sell their products systematically, courts have found sufficient contacts to uphold jurisdiction in states where the products caused harm. However, in other cases, courts have denied jurisdiction over foreign manufacturers even if they sold their products to American distributors.

For example, in Brabeau, plaintiff Juania Brabeau, was injured while operating a printing press at her work place. Brabeau brought a suit in a Michigan state court against SMB Corporation (SMB), the German printing press manufacturer, to recover for the injuries suffered due to the defective machine.

The printing press was manufactured by SMB in Braunschweig, Germany, following the order from Brechteen, an employer of Brabeau, to SMB.\(^{234}\) All of the negotiations for the contract, inspection, testing, and acceptance of the machine were

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\(^{232}\) See Id.


\(^{234}\) See Id. at 875.
made by the personnel of Brechteen in Braunschweig, Germany. The shipment was made to Michigan following the instruction from Brechteen. The payment was made directly from Brechteen’s parent in Weinheim, Germany, to SMB in Braunschweig.\textsuperscript{235} Thus the actual purchase and transfer of possession of the machine was made in Germany by the employer of the plaintiff. Brechteen elected to locate the press in Michigan; it could have located the machine anywhere in the world. SMB had no control over where Brechteen located the printing press.\textsuperscript{236}

A Federal District Court in Michigan applied Justice O’Connor’s approach to the stream of commerce and held that SMB lacked the additional conducts to support jurisdiction. In \textit{Brabeau}, all of the process from the contract to manufacture and sale of the printing press were done in Germany and SMB had done no activity in Michigan. The court concluded that SMB had not done anything in the State of Michigan which would satisfy Justice O’Connor’s additional conduct requirement.\textsuperscript{237} The court emphasized the fact that SMB had done no business in Michigan except the sale of only one printing press to Brechteen.\textsuperscript{238}

7. \textit{Perry v. Okada Hardware Co.}\textsuperscript{239}

In \textit{Perry}, Hirota Tekko K.K. (Hirota), a Japanese manufacturer of a WECO maul, sold its mauls to Okada Hardware Company (Okada) in Japan for export to the

\textsuperscript{235} \textit{See Id.}

\textsuperscript{236} \textit{Id.}

\textsuperscript{237} \textit{See Id. at} 877. Although one of SMB’s technicians had visited to Michigan to install the printing press, however, the court held that this one isolated visit by an SMB employee did not rise to the level of the minimum contacts. \textit{See Id.}

\textsuperscript{238} \textit{See Id.}

\textsuperscript{239} 779 P.2d 659 (Utah. 1989).
United States. Okada exported them to a California distributor, who then sold them to the regional distributor. The regional distributor then sold the mauls to retailers throughout the west coast and Rocky Mountain area. Linda Thayne bought a WECO maul from one of the retailers in Idaho. She gave the maul to her father in Utah. Perry borrowed it from him and was injured in Utah while splitting logs with the maul. Parry filed a products liability action to recover for his injuries against Hirota and Okada claiming jurisdiction existed tender the stream of commerce theory.

The Supreme Court of Utah rejected the exercise of jurisdiction over Hirota and Okada, stating that “an intentional and knowing distribution of the product in the western United States is not necessarily sufficient to satisfy the “minimum contacts” requirement.” The court found that “Hirota and Okada had not taken active steps to sell its products in Utah or Idaho,” and that “Hirota and Okada were informed of potential sales to the western United States, but they neither came to Utah nor sent sales representatives to Utah to facilitate the marketing and purchase of their product.” The court held that Hirota and Okada did not have minimum contacts with Utah because Hirota and Okada had not engaged in even one of the additional acts outlined.

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240 See Id. at 660. The court found that “[California distributor] had submitted numerous orders to Okada over an extended period of time prior to plaintiff’s injury.” Id.

241 During the transaction of business, the representative of the California distributor traveled to Japan and the representative of Okada and Hirota traveled to the United States to discuss the sale and distribution of their products. On these occasion, Hirota and Okada were informed from the regional distributor that their maul would be sold in western United States. See Id.

242 Id. at 667.

243 Id.

244 Id.
in Asahi.245 The court noted that “[i]n this case, the only contact that [the defendant] has with Utah which is related to the cause of action is the fact that [the defendant’s] product happened to fail and cause damage in the State.”

In Perry, the attenuation between the manufacturer and the from state was greater than normal. The product was sold in Idaho to the consumer, and it was moved to Utah by the consumer’s unilateral activities. Thus, the court noted that “[t]he World-Wide Volkswagen court made it clear that a seller of chattels does not, in effect, appoint the chattel his agent for service of process.”247 The court concluded that defendant’s knowledge of “the mere possibility that a maul might be taken from Idaho into Utah would be insufficient to make Hirota and Okuda subject to Utah’s jurisdiction,” in the absence of any of those additional factors cited by Justice O’Connor’s opinion.248

8. Analysis

When the defendant is a foreign corporation, the courts that follow Justice O’Connor’s approach treat Justice O’Connor’s additional conduct requirement as the threshold for finding minimum contacts. For example, in Dittman, the Court found sufficient minimum contacts between the Japanese manufacturer of the cordless telephones and Indiana on the ground that the Japanese corporation engaged in the marketing activities in Indiana through its subsidiary in Indianapolis. In Benitez, the First Circuit affirmed the exercise of Puerto Rico’s jurisdiction over a Brazilian corporation on the ground that it had directly engaged in the marketing and sales activities for its products in Puerto Rico through its American sales representative. In

245 See Id. at 660.

246 Id. at 667.

247 Id. See 444 U.S. at 296.

248 See Id.
Vermeulen, the French defendant had exploited the Georgia market through a nationwide marketing effort, and distribution channels that it controlled. Similarly, in Tobin, although the Netherlands corporation used an independent American distributor to sell its products in the United States, the Sixth Circuit affirmed the exercise of jurisdiction on the ground that the defendant licensed and controlled the distribution system that sold its product nationwide.

On the other hand, when the products reached the forum state as a consequence of sales concluded between companies outside the U.S. as in Brabeau, or where the foreign manufacturer had sold its products to a U.S. distributor and through a series of transfer over which it had no control or direction the product had injured someone in the forum state, the failure to meet the additional conduct requirements outlined by Justice O'Connor foreclosed jurisdiction. Even though those courts denied the assertion of jurisdiction on the ground that the defendants lacked the additional conduct set out by Justice O'Connor in Asahi, these cases could easily reach the same conclusion under the analysis of World-Wide Volkswagen.

C. Justice Brennan’s Approach

By requiring a defendant to have additional conduct beyond selling its product with awareness that it could by further commercial exchange reach the forum state, Justice O'Connor limited the scope of personal jurisdiction over defendant manufacturers. However, even after Asahi, some lower courts have continued to apply the traditional stream of commerce theory for the exercise of jurisdiction. These courts have emphasized the lack of consensus among Justices on the issue of minimum contacts and have concluded that the Supreme Court in Asahi provided no clear guidance for the lower courts about the continued efficacy of the stream of commerce theory.
1. Mason v. Lli Luigi and Franco Dal Maschio

The Seventh Circuit has affirmed the validity of the standard stream of commerce theory despite the Supreme Court’s decision in Asahi. For example, in Mason, the Seventh Circuit applied the stream of commerce theory set out in World-Wide Volkswagen and affirmed the exercise of jurisdiction of Illinois over an Italian partnership whose machine caused personal injury to an Illinois resident in Illinois.

The plaintiff, Daraleen Mason, was injured by a broom flagging machine (also known as a cutter/flagger) manufactured by an Italian partnership Franco Dal Maschio while she was working for Libman Broom Company (Libman) in Illinois. Dal Maschio sold its cutter/flagger machines to Werner Petzold & Co. (Petzold) in Maryland, and Petzold in turn sold the machines to Libman. Plaintiff filed her products liability action against Dal Maschio to recover for damages caused by the accident. Dal Maschio contended that it would violate the Due Process Clause of the Fourteenth Amendment to apply the Illinois long-arm statute to it.

The Seventh Circuit distinguished this case from Asahi and held that “Asahi is of no avail to Dal Maschio’s position.” In Asahi, both of the parties in the third-party indemnification claim were foreign corporations and the claims of the forum resident had already settled. In Mason, the plaintiff was a forum resident and plaintiff and the forum state had a strong interest to pursue the litigation in Illinois. Applying the

249 832 F.2d 383 (7th Cir. 1987).

250 See Id. at 384-85.

251 See Id. at 385.

252 Id. at 386.

253 See Id. The court stated that, “[u]nlike Asahi, this case does not involve an action for contribution between two foreign corporations.”
stream of commerce theory set out in *World-Wide Volkswagen*, the court held that Dal Maschio delivered “its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.”

Dal Maschio was found to have “purposefully availed itself of the privilege of conducting activities within the forum state.” The machine involved in the accident was designed and manufactured by Dal Maschio especially for use of Libman, and Dal Maschio sent its employee several times to Libman in Illinois to show how to set up, operate and service the machines and to teach its personnel. In addition, Werner Petzold, the owner of Petzold, was in fact Dal Maschio’s in-house export manager rather than an independent distributor, and he sold Dal Maschio’s machinery to Libman on several occasions. Thus, Dal Maschio’s activities in Illinois satisfied the purposeful availment requirement. The Italian manufacturer, Dal Maschio, had designed and manufactured the products especially for the Illinois consumer and had shipped them to Illinois through its in-house export manager. Even under Justice O’Connor’s narrow approach, the court could find sufficient minimum contacts between Dal Maschio and State of Illinois.

2. *Irving v. Owens-Corning Fiberglas Corp.*

In the same way, in *Irving*, the Fifth Circuit refused to apply Justice O’Connor’s narrow approach to the stream of commerce on the ground that “the [Supreme] Court’s

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254 Id.

255 Id. The court quoted *World-Wide Volkswagen*, 444 U.S. at 297.

256 See Id.

257 See Id.

258 864 F.2d 383 (5th Cir. 1989).
splintered view of minimum contacts in Asahi provides no clear guidance on this issue.\textsuperscript{259}

In Irving, employees of Uvalde Rock Asphalt Company (Uvalde) in Houston filed products liability actions against Jugometal Enterprise for Import and Export of Ores and Metals (Jugometal), a Yugoslavian asbestos distributor, seeking recovery for injuries arising from the exposure to asbestos at their work places. Jugometal was a Yugoslavian asbestos distributor and had shipped Yugoslavian asbestos to the Port of Houston. Jugometal had supplied about 5,000 metric tons of Yugoslavian asbestos to Uvalde each year from 1956 to 1970 pursuant to a contract with Huxley Development Company (Huxley), an American broker of Yugoslavian asbestos.\textsuperscript{260}

The Fifth Circuit chose to apply the traditional stream of commerce theory as described in World-Wide Volkswagen and found sufficient minimum contacts between Jugometal and State of Texas\textsuperscript{261} because of Jugometal’s important role in the sale of the asbestos from Yugoslavia to Houston. Jugometal conveyed the asbestos to a freight forwarder for shipment to Houston, and shared the cost of quality-control testing by a Houston lab and received Huxley’s debits for the bag-cleaning charges of another Houston company. Jugometal accepted payments for the asbestos and stored asbestos.\textsuperscript{262} These activities satisfied the minimum contacts requirement because they showed that Jugometal received economic benefits from the sale of asbestos and placed no limitation on the sale of the asbestos.\textsuperscript{263}

\textsuperscript{259} \textit{Id.} at 386.

\textsuperscript{260} See \textit{Id.} at 384.

\textsuperscript{261} See \textit{Id.} at 386.

\textsuperscript{262} See \textit{Id.}

\textsuperscript{263} See \textit{Id.} at 387.
Although Jugometal was not doing business in Texas and was not directly solicited asbestos sales in Texas, Jugometal authorized Huxley to drum up American buyers for Yugoslavian asbestos throughout the United States. Even though the court did not mentioned it explicitly, Jugometal’s marketing activities in Texas arguably satisfied Justice O’Connor’s additional conduct requirement of the marketing the product through a distributor who has agreed to serve as the sales agent in the forum state.

3. Hall v. Zambelli

In Hall, a federal District Court in West Virginia declined to apply Justice O’Connor’s narrow approach to the stream of commerce issue. The plaintiff, a West Virginia resident, was injured while he was working as a volunteer during a fireworks display. He was hit in the eye when a fireworks shell exploded prematurely at a low altitude. He brought suit in West Virginia against Onda Enterprises, Ltd. (Onda), a Japanese manufacturer of the allegedly defective fireworks shell. Onda challenged West Virginia’s exercise of personal jurisdiction over Onda claiming that it had little or no contact with the State of West Virginia. Onda asserted that it sold its products to

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264 See Id. at 384.
265 See Id. at 387.
267 See Id. at 753.
268 See Id.
269 See Id. at 754.
Zambelli, a Pennsylvania fireworks displayer, in Tokyo, Japan, and Zambelli took the products to West Virginia for the fireworks display.\textsuperscript{270}

After careful examination of the three different opinions in \textit{Asahi}, the \textit{Hall} court held that the stream of commerce theory maintained precedential value even after \textit{Asahi} because \textit{Asahi} did not give a clear new standard for the stream of commerce owing to the lack of consensus among Justices.\textsuperscript{271} Further the court distinguished the case from \textit{Asahi}. Asahi was a manufacturer of a component which was incorporated into the finished product in a foreign country. Onda, on the other hand, manufactured finished products for sale to an identified customer in the United States. Asahi was one step removed from a connection with the United States and the forum state. Then the court stated that “[t]his was not the traditional stream of commerce case where a manufacturer attaches a part to a product which ends up in some remote, unanticipated market.”\textsuperscript{272}

The \textit{Hall} court also distinguished \textit{World-Wide Volkswagen} “where the [Supreme] Court rejected the notion that the purchaser of a product could by unilateral action subject the selling defendant to jurisdiction in a foreign forum.”\textsuperscript{273} In \textit{World-Wide Volkswagen} the defendant, New York car dealer, could not profit from the consumer’s travel through Oklahoma. Here, in \textit{Hall}, both Onda and Zambelli were commercial entities and the more firework displays performed by Zambelli, the more

\textsuperscript{270} \textit{Id}. at 754-55. Onda argued that it had no knowledge of the particular fireworks display which resulted in the plaintiff’s injuries. \textit{Id}. at 755.

\textsuperscript{271} \textit{Id}. at 756.

\textsuperscript{272} \textit{Id}. at 757.

\textsuperscript{273} \textit{Id}. at 756.
profits Onda realized. Zambelli’s fireworks display in West Virginia, thus, could be distinguished from the “unilateral activities” in World-Wide Volkswagen.

Based on the relationship between Onda and Zambelli, the Hall court found sufficient minimum contacts between Onda and West Virginia. The buyer and seller were both commercial entities and they shared a common interest in the sale of the products. Onda benefited from the use of its product in West Virginia. Although Zambelli was a Pennsylvania resident, Onda knew the scope of Zambelli’s operation. Onda “should have had every expectation that its products would be used” in West Virginia. Onda had no direct conducts with West Virginia, and it did not have any control over Pennsylvania fireworks displayer. Hence, none of the additional conduct listed by Justise O’Connor appears to have been met, yet.

However, this case, Onda was a finished product manufacturer and it did directly sell its products to Zambelli, a fireworks displayer. The accident happened during the fireworks display by Zambelli. Considering Onda’s knowledge about the area of display by Zambelli, the exercise of West Virginia’s jurisdiction over Onda is appropriate. As the Hall court noted, there was no manufacturer or distributor in the chain of the stream of commerce other than Onda and Zambelli. This case should be distinguished from the other cases which involve a longer, more attenuated stream of commerce chain.

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274 See Id. at 756. The court stated: “The buyer and seller here are both commercial entities. One feeds on the other. The more markets Zambelli, the fireworks displayer, served, the more markets Onda, the fireworks manufacturer, served.” Id.

275 See Id.

276 See Id. at 757. The court noted that the representative of Onda visited the plant of the American distributor in Pennsylvania, and Onda could know the scope of the operation of the American distributor. See Id.
4. *CSR Limited v. MacQueen, III* \(^{277}\)

CSR Limited (CSR) was a sales agent for its partially owned subsidiary that mined raw asbestos fibers in Australia.\(^{278}\) The raw asbestos fibers were sold F.O.B. Freemantle, Australia, and other ports in Western Australia to Johns Manville Corporation (Johns Manville), an American manufacturer of asbestos products, which then distributed the asbestos throughout the United States.\(^{279}\) CSR contested the exercise of personal jurisdiction on the ground that it had no knowledge and no control concerning the use and distribution of the asbestos in the United States.\(^{280}\)

The Supreme Court of Appeals of West Virginia found sufficient minimum contacts between CSR and West Virginia based on the traditional stream of commerce theory. Concerning the Supreme Court decision in *Asahi*, the court stated that in West Virginia, courts “always be congruent with the outer edge of the due process envelope that, as determined by the Supreme Court of the United States, circumscribes jurisdiction.”\(^{281}\) Then the court found that CSR introduced its fibers into the stream of American commerce knowing that its products would be used in West Virginia.\(^{282}\) To support its decision, the court further stated that CSR had an ongoing commercial relationship with the largest American manufacturer of asbestos products, and it was

\(^{277}\) 190 W.Va. 695 (1994).

\(^{278}\) See Id. at 696.

\(^{279}\) See Id.

\(^{280}\) See Id.

\(^{281}\) Id. at 698.

\(^{282}\) See Id. at 697.
actively engaged in development and introduction of products that contained its raw materials.  

In CSR, CSR’s sole relationship with West Virginia was that its products reached West Virginia through an American distributor’s nationwide distribution system. Even though CSR knew that its product would be sold in West Virginia, it had no other relationship with West Virginia. The court stated that “personal jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause’ and can be exercised without the need to show additional conduct by the defendant aimed at the forum state.”

5. **Salinas v. CMMC**

In *Salinas*, The Texas Court of Appeals followed the Fifth Circuit decision in *Irving*, and applied the traditional stream of commerce theory to find minimum contacts. A Hill Country employee, Ambrocio Salinas, suffered injuries due to a defective wine press manufactured by CMMC, a French wine equipment product manufacturer. Salinas filed a products liability action against CMMC seeking recovery for his injuries. The wine press was sold by CMMC to KLR Machines, Inc. (KLR), an American independent distributor of machinery used in the wine and juice industries. KLR in turn sold the wine press to Hill Country in Texas. Other than a

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283 *See Id.* at 698.

284 *See Id.* at 697.


286 864 F.2d 383 (5th Cir. 1989).

287 *See* 903 S.W.2d. at 140.

288 *See Id.*
few isolated sales of equipment in the state, CMMC had no other contacts with Texas.\textsuperscript{290} CMMC, citing \textit{Brabeau}, contested the exercise of personal jurisdiction over it.\textsuperscript{291}

The Texas Court of Appeal explicitly adopted Justice Brennan's approach and found the necessary minimum contacts between the State of Texas and CMMC. The court reasoned that the Fifth Circuit and the Texas Supreme Court "have embraced Justice Brennan's position that no additional conduct is required if the defendant is aware that its product is being marketed in the forum state."\textsuperscript{292}

The court declined to follow \textit{Brabeau} because the Fifth Circuit and Texas Supreme Court have taken a different approach than the Sixth Circuit to the stream of commerce issue.\textsuperscript{293} Further, the court stressed an important factual difference between \textit{Brabeau} and this case. In \textit{Brabeau}, the actual purchase and transfer of possession of the machine was made in Germany and the machine was sent to Michigan by the

\textsuperscript{289} See id. After KLR and Hill Country entered into a contract for the sale of the wine press, CMMC sent the press to the port of Houston by FOB France, and it was then transported by truck directly to Hill Country in Cedar Park, Texas. See id.

\textsuperscript{290} See id. at 141.

\textsuperscript{291} See id. at 143. In \textit{Brabeau}, a worker in a Michigan printing company was injured while using a press manufactured by a German company and sold to the plaintiff's employer. The court refused to assert personal jurisdiction over the German manufacturer, reasoning that the defendant had not purposefully availed itself of Michigan's law. See supra pp. 56-57.

\textsuperscript{292} Id. at 143-44. The \textit{Salinas} court quoted the Fifth Circuit in \textit{Irving v. Owens-Corning Fiberglas}, 864 F.2d 383, 386 (5th Cir. 1989), and the Texas Supreme Court in \textit{Keen v. Ashot Ashkelon, Ltd.}, 748 S.W.2d 91, 93 (Tex. 1988), decisions in which the traditional stream of commerce rationale had been employed after \textit{Asahi}.

\textsuperscript{293} See 903 S.W.2d at 143.
plaintiff’s employer. In Salinas, the product was sold to the American customer and shipped from France to Texas by the French manufacturer.

The court noted that, if CMMC had sold its product to an entity in another state who subsequently and unilaterally transported it to Texas, the “stream of commerce alone [would not] suffice to allow a Texas court to assert jurisdiction.” The mere placement of the products into the stream of commerce without the knowledge of the destination of their products is not enough to satisfy the minimum contacts requirement even under traditional stream of commerce theory. However, in Salinas, CMMC shipped its wine press directly from France to Texas and the independent distributor KLR never possessed it. It was clear that CMMC placed its products into the stream of commerce with the knowledge that its products would reach Texas. The Salinas Court found sufficient minimum contacts stating that “CMMC purposefully availed itself of the privileges of conducting business in the state of Texas.”

Moreover, in Salinas, CMMC modified the product to comport with the standards that the Texas company requested. Hence, the court observed that

\[^{294}\text{See Id.}\]


\[^{296}\text{See Id. at 144. Further, the court distinguished the case from Asahi because, in this case, CMMC sold a completed press to a known user in Texas. CMMC’s contact with Texas was more direct.}\]

\[^{297}\text{See Id. at 144.}\]

\[^{298}\text{See Id.}\]

\[^{299}\text{See Id.}\]
CMMC’s modification of the products for the forum market satisfied even Justice O’Connor’s additional conduct requirement in *Asahi*.  


Although a Federal District Court in Texas applied Justice Brennan’s approach in *Smith*, the court denied the exercise of Texas’s jurisdiction over the Japanese manufacturer that placed its products into the stream of commerce. The Texas resident, Edwin Smith, suffered injuries to his face when an engine lathe was inadvertently started by a co-worker, causing a metal work-piece to fly from the lathe to Smith’s face. The plaintiff filed this products liability action, against the Japanese manufacturer, Dainichi Kinzoku Kogyo Co., Ltd. (Dainichi-Japan) alleging a defect in the design of the lathe. Dainichi-Japan moved to dismiss for lack of personal jurisdiction.

The lathe at issue was manufactured by Dainichi-Japan and sold to a Japanese export company (Gomiyama Japan) in Japan. Gomiyama Japan, then sold the lathe to their American subsidiary, Gomiyama USA, Inc. (Gomiyama USA), to be imported into the United States. Gomiyama USA sold the lathe to an American machine tool retailer, Machinery Sales Co., Inc. (Machinery Sales), which was a California corporation that had business exclusively in California, Arizona, and Nevada.

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300 See *Id.*


302 See *Id.* at 849.

303 See *Id.*

304 See *Id.*

305 See *Id.*
Ultimately, Machinery Sales sold the lathe to Martin-Decker, the plaintiff's employer, in California. Thereafter, Martin-Decker transported the lathe to its machine shop in Cedar Park, Texas, where plaintiff Edwin Smith was injured.\(^\text{306}\)

The *Smith* court found that Dainichi-Japan was not registered to do business in Texas, did not have an office, agent, or employee in Texas, and did not sell its products or conduct any business in Texas.\(^\text{307}\) The court also found that the lathe in question was not sold to Smith's employer in Texas, but was sold in California and transported to Texas by Smith's employer.\(^\text{308}\) Under these circumstances, the court held that Dainichi-Japan should not be subject to jurisdiction because it did not place its lathe into the stream of commerce with the expectation that it would be purchased by or used by Texas consumers.\(^\text{309}\)

The court stressed that Dainichi-Japan sold its lathes to a Japanese distributor in Japan. This distributor transported them to the United States and distributed them to an independent, regional retail distributor with limited sales areas.\(^\text{310}\) The lathe in question was sold by a regional retailer which served only the states of California, Arizona and Nevada. Dainichi-Japan neither owned nor controlled the distribution of its products in the United States.\(^\text{311}\)

Quoting *Burger King*, the court stated that "a defendant must purposefully avail himself of the privilege of conducting business in the forum state and without this

\(^{306}\) See *Id.*

\(^{307}\) See *Id.* at 852.

\(^{308}\) See *Id.*

\(^{309}\) See *Id.*

\(^{310}\) See *Id.*

\(^{311}\) See *Id.*
purposeful availment a defendant will not be haled into a jurisdiction solely as a result of the unilateral activity of another party or a third person.312 Here, the customer, Martin-Decker bought the lathe in question in California and later transported it to Texas.313 Thus this lathe came into Texas solely because of the unilateral act of Martin-Decker. Dainichi-Japan had no part in bringing the lathe to Texas and had no reason to expect that this lathe would be moved by Martin-Decker to Texas.314 Therefore, the court concluded that this court could not exercise personal jurisdiction over Dainichi-Japan where the only significant contact that Dainichi-Japan had with Texas was the result of the unilateral act of third party.315

Thus even under the World-Wide Volkswagen approach, when the product is brought to the forum state by the consumer’s unilateral activity, the manufacturer would not be subject to the forum state’s jurisdiction where it had not purposefully availed itself of the privilege of conducting activities in the forum state.

7. Analysis

Even the courts which purport to take Justice Brennan’s approach have sought to buttress the result by finding additional conduct by the defendant within the forum state to support their decisions. For example, the Seventh Circuit in Mason affirmed the exercise of jurisdiction when the foreign defendant placed its products into the stream of commerce with the knowledge that its products would reach the forum state and design the equipment to the specific customer’s specifications and sold the product to the customer though its own in-house exporter.

312 Id. at 853.

313 See Id.

314 See Id.

315 See Id.
In *Smith*, a Federal District Court in Texas found sufficient minimum contacts lacking where the Japanese manufacturer had sold its equipment for import to the United States but had not controlled or directed its resale and shipment to the state where it caused an injury. In *Smith*, plaintiff's employer moved the allegedly defective equipment to Texas after he bought it in California. This case was analogous to *World-Wide Volkswagen* in that someone other than the defendant caused the equipment to be moved to the forum state. Even under Justice Brennan's approach, such unanticipated and undirected acts of others can exceed the stream of commerce's limits.

In *Hall*, a Federal District Court in West Virginia found sufficient minimum contacts between the Japanese fireworks manufacturer and West Virginia, although the Japanese defendant had not had any direct contact with West Virginia. However, in this case, the accident was caused by the activities of a fireworks displayer, and the Japanese manufacturer knew the scope of displayer's business. As the court noted, this case should be distinguished from other cases which simply rely on the stream of commerce because there were no intermediate entities in the chain of the stream of commerce. The Japanese fireworks manufacture sold its goods to the Pennsylvania fireworks displayer and benefited economically from its use of the fireworks in whatever states it put on its fireworks displays.

In *Irving* and *Salinas*, the foreign distributors shipped their products directly to the forum state's consumer or distributor. These defendants knew clearly the destination of their products and they profited from the sale of their products in the forum state. Although the courts in these cases found sufficient minimum contacts on the ground that the foreign manufacturers placed their products in the stream of commerce, these manufacturers had established direct contact with the forum state through the sales of their products.
D. The Impact of Asahi on Domestic Manufacturers

In *Asahi*, the defendant in the third-party indemnification claim was a foreign corporation and the Supreme Court stressed repeatedly its awareness of the special burdens placed on a defendant forced to litigate at great distance in a foreign country’s legal system. The Supreme Court in *Asahi* did not make it clear whether the limitations on the stream of commerce theory should be applied in the same way to domestic cases. Even when American manufacturers have been sued, however, many lower courts after *Asahi* have declined to use the stream of commerce theory on the ground that the Supreme Court in *Asahi* restricted the application of the theory.


For example, in *Boit*, when a contractor, Babson, used an electric hot air gun to strip paint from the exterior calpboards of the Boits’ home in Hill, Maine, heat from the hot air gun penetrated the exterior wall of their home and ignited materials inside the wall, causing a fire that seriously damaged the home and belongings. Babson testified that after receiving a Brookstone catalog in his home in Maine, he placed a written order with Brookstone for the hot air gun that is the subject of the Boits’ complaint. Brookstone subsequently shipped the hot air gun to Babson through the mail. Babson also testified that the hot air gun was labelled “Gar-Tec” and that the box in which the gun was shipped contained an operator’s manual that bore the word “Gar-Tec” in one-inch high letters.

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316 967 F.2d. 671 (1st Cir. 1992).

317 See Id. at 673.

318 See Id. at 674. Babson testified that after receiving a Brookstone catalog in his home in Maine, he placed a written order with Brookstone for the hot air gun that is the subject of the Boits’ complaint. Brookstone subsequently shipped the hot air gun to Babson through the mail. Babson also testified that the hot air gun was labelled “Gar-Tec” and that the box in which the gun was shipped contained an operator’s manual that bore the word “Gar-Tec” in one-inch high letters. See Id.
when the hot air gun used on his home was sold by Gar-Tec to Brookstone, a national retailer with a national mail order business, Gar-Tec should have foreseen that the hot air gun could end up being sold to a customer in Maine, and that for this reason Gar-Tec should have reasonably anticipated being haled into court in Maine. On the other hand, Gar-Tec argued that it was an Indiana corporation with its principal place of business in Indiana and it had never conducted or transacted any business in Maine, had never advertised in Maine, had never employed any persons in Maine, and had never owned any real estate or other property in Maine.

The First Circuit upheld the district court’s dismissal of plaintiff’s complaint on the ground that Boit failed to make a prima facie showing that Gar-Tec sold the hot air gun to Brookstone. However, the court further stated that even if Boit could establish that Gar-Tec sold the hot air gun to Brookstone and that Gar-Tec knew the hot air gun would be sold by Brookstone to a customer in Maine, the court still could not find a sufficient basis to exert personal jurisdiction over Gar-Tec.

Responding to Boit’s contention that Gar-Tec placed its products into the stream of commerce with the expectation that it would reach Maine, the court stated that “[t]he test is not knowledge of the ultimate destination of the product, but whether the manufacturer has purposefully engaged in forum activities so that it can reasonably expect to be haled into court there.” To support its decision, the court noted that the

319 See id. at 679.

320 See id. 673-74.

321 See id. at 681. Boit did not submitted any evidence which showed that Gar-Tec sold hot air gun to Brookstone.

322 See id.

323 Id. at 682.
circuit courts that addressed the stream of commerce issue after *Asahi* have adopted Justice O’Connor’s plurality view.\(^\text{324}\) Then the court stated that the only contact that Gar-Tec had with Maine was Gar-Tec’s alleged act of selling the hot air gun to Brookstone which sold the gun through the mail to Babson in Maine. There was no evidence that Gar-Tec intended to serve the market in Maine. Therefore, the court concluded that “the district court could not have constitutionally exercised personal jurisdiction over Gar-Tec.”\(^\text{325}\)

2. *Dehmlow v. Austin Fireworks*\(^\text{326}\)

Contrary, in *Dehmlow*, the Seventh Circuit followed traditional stream of commerce theory while Illinois resident sued Kansas manufacturer. In *Dehmlow*, Craig Dehmlow, an Illinois resident, was seriously injured in Barrington, Illinois, when fireworks sold by defendant Austin Fireworks (Austin) improperly exploded.\(^\text{327}\) Austin was a Kansas fireworks manufacturer and distributed the fireworks to a Wisconsin corporation for the purpose of displaying the fireworks in Illinois and other Midwestern states.\(^\text{328}\)

The Seventh Circuit first examined the fairness and reasonableness factors in the due process analysis and held that the exercise of Illinois’ personal jurisdiction over the defendant was fair and reasonable.\(^\text{329}\) The court found that the burden on the defendant

\(^{324}\) See *Id.* at 683. See *Madara v. Hall*, 916 F.2d 1510, 1516-17 (11th Cir. 1990); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-76 (8th Cir. 1990).

\(^{325}\) *Id.* at 683.

\(^{326}\) 963 F.2d 941 (7th Cir. 1992).

\(^{327}\) See *Id.* at 943.

\(^{328}\) See *Id*.

\(^{329}\) See *Id.* at 945-46.
was not unreasonably heavy. The court stated that, unlike *Asahi*, the exercise of Illinois’ jurisdiction here “does not extend beyond national boundaries and the defendant does not have to defend itself in a foreign nation’s judicial system.” Then, the court found both Dehmlow and the state had a strong interest in adjudicating the case in Illinois. Dehmlow was a citizen of Illinois and injured there. The State of Illinois had a strong interest in applying its products liability law to assure adequate remedial relief for its citizen. Further the “interstate judicial system’s interest in resolving the case efficiently” was served by adjudicating the claim in Illinois where the accident occurred.

The court next examined the minimum contacts between the defendant and the State of Illinois. The court first noted that it had previously endorsed the stream of commerce theory. The court expressed its intention to maintain the stream of commerce theory, even though the plurality opinion of the Supreme Court in *Asahi* required defendant’s additional conduct. The court stated that, even after *Asahi*, the theory was determinative in the minimum contacts analysis, because “the Supreme Court established the stream of commerce theory, and a majority of the Court has not yet rejected [the theory].”

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330 *Id.* at 945.

331 See *Id.*

332 See *Id.*

333 As the case which recognized the stream of commerce theory, the court cited *Mason v. Luigi & Franco Dal Maschio*, 832 F.2d 383, 386 (7th Cir. 1987). See supra pp. 60-62.

334 963 F.2d at 947. The court further noted that “[w]e may not depart from Court precedent on the basis of a belief that present Supreme Court Justices would not readily agree with past Court decisions.” *Id.*
Then the court found the defendant sold fireworks to its customer with the knowledge that its products would reach Illinois. Thus the Seventh Circuit resolved the case based on the traditional stream of commerce theory. However, considering the split opinions in *Asahi* on this issue, the court further examined defendant’s additional conduct following Justice O’Connor’s plurality opinion in *Asahi*. The court found Austin had the additional conducts required by Justice O’Connor’s plurality opinion because Austin knew that its fireworks would be used in Illinois, and Austin actively solicited business in Illinois.335


In the same way, in *Ruston*, the Fifth Circuit followed the traditional stream of commerce theory in a domestic setting. Ruston Gas Turbines, Inc. (Ruston), a Texas corporation and a buyer of gus turbine engine systems, originally filed an action in Texas against Donaldson Company, Inc. (Donaldson), a Delaware corporation with its principal place of business in Minnesota, for breach of contract, breach of warranty, and strict products liability.337 Donaldson then filed a third-party complaint for contribution or indemnity against Corchran, Inc. (Corchran), a Minnesota corporation that had subcontracted with Donaldson to manufacture certain component parts of the systems sold by Donaldson to Ruston.338 Corchran filed a motion to dismiss the third-party

335 *See Id.* at 947-48.

336 9 F.2d 415 (5th Cir. 1993).

337 *See Id.* at 417.

338 *See Id.*
claim for lack of personal jurisdiction on the ground that it had no direct contact with Texas.\textsuperscript{339}

Regarding the minimum contact between Corchran and Texas, the Fifth Circuit clearly chose to follow the stream of commerce analysis in \textit{World-Wide Volkswagen} and not rely on the plurality opinion in \textit{Asahi}.\textsuperscript{340} Referring to the decision in \textit{Irving},\textsuperscript{341} the court stated that the Fifth Circuit had continued to follow the traditional stream of commerce theory established in the majority opinion of \textit{World-Wide Volkswagen}.\textsuperscript{342}

The court found that Corchran intentionally placed its products into the stream of commerce by delivering them to a shipper destined for delivery in Texas.\textsuperscript{343} The court noted that, at the time the goods left Corchran’s plant in Minnesota, Corchran not only could have foreseen that the products might end up in Texas, it knew as a fact that the products were going to be delivered to a specific user in Houston, Texas.\textsuperscript{344} Then the court found the constitutionally sufficient minimum contact between Corchran and Texas for the exercise of personal jurisdiction over it.\textsuperscript{345}

In \textit{Ruston}, the defendant in a third-party indemnification claim was a component parts manufacturer that lacked the additional conduct required by the plurality opinion in \textit{Asahi}. The Fifth Circuit, nevertheless, reaffirmed its willingness to apply Justice

\textsuperscript{339} See Id.

\textsuperscript{340} See Id.

\textsuperscript{341} See Supra pp.

\textsuperscript{342} 9 F.2d 415, 420.

\textsuperscript{343} See Id.

\textsuperscript{344} See Id.

\textsuperscript{345} See Id.
Brennan's approach to the stream of commerce analysis in domestic cases as well as international cases.

4. **Lesnick v. Hollingsworth & Vose Co.**\(^{346}\)

Stanley Lesnick, a Maryland resident, had smoked Kent brand cigarettes for about twenty years when he died from lung cancer allegedly caused by the inhalation of crocidolite asbestos which was incorporated in the Kent cigarettes' filters. Lesnick's wife filed the action against Lorillard, Inc. (Lorillard), a New York corporation with its principal place of business in New York, and Hollingsworth & Vose Co. (Hollingsworth), a Massachusetts corporation with its principal place of business in Massachusetts.\(^{347}\) Hollingsworth filed a motion to dismiss for lack of personal jurisdiction.

The filter medium was manufactured by Hollingsworth in Massachusetts and was then shipped to Lorillard's cigarette manufacturing plants in Kentucky and New Jersey where it was incorporated into the cigarettes.\(^{348}\) Hollingsworth acknowledged that, when it sold the material for cigarette filters to Lorillard, it placed the material in commerce knowing that it would eventually be sold in Maryland and other states as a component of Kent cigarettes.\(^{349}\) However, Hollingsworth argued that under *Asahi*,

\(^{346}\) 35 F.3d 939 (4th Cir. 1994).

\(^{347}\) See *Id.* at 940. Hollingsworth had no presence in Maryland by having any office, agent, or employee there, and it had no customers in Maryland. It was not registered to do business there and directed no marketing effort or other activities toward the state. It had derived less than one percent of its income from Maryland through Lorillard's sale of cigarettes there. See *Id.* at 946.

\(^{348}\) See *Id.* at 940.

\(^{349}\) See *Id.*
mere knowledge is not enough to establish personal jurisdiction, and its activities must have been purposefully directed toward Maryland.\textsuperscript{350}

The Fourth Circuit adopted justice O’connor’s “purposeful availment” denied the exercise of personal jurisdiction by Maryland over Hollingsworth on the ground that Hollingsworth lacked needed minimum contacts with Maryland. The court noted the Supreme Court decisions in \textit{World-Wide Volkswagen} and \textit{Asahi} as the precedent for the examination of minimum contacts. Then the court summed up the law by stating that “[t]he touchstone of the minimum contacts analysis remains that an out-of-state person have engaged in some activities purposefully directed toward the forum state.”\textsuperscript{351}

The Fourth Circuit denied plaintiff’s contention that the state does not exceed the limit of its judicial power if it asserts personal jurisdiction over a corporation that delivered its products into the stream of commerce with the expectation that they will be purchased in the forum state.\textsuperscript{352} Even if the arrangement between Lorillard and Hollingsworth represents some conduct beyond the mere sale to Lorillard of filter material, the court stated that “it does not rise to the level of establishing jurisdiction because none of the conduct is in any way directed toward the state of Maryland.”\textsuperscript{353}

The court found that Hollingsworth’s lacked minimum contacts with Maryland because Hollingsworth had not engaged in any activities purposefully directed toward the forum state. For the example, the court noted that Hollingsworth had not done any of the activities that satisfy Justice O’Connor’s additional conducts requirement. The

\textsuperscript{350} See \textit{Id.} at 941.

\textsuperscript{351} \textit{Id.} at 945.

\textsuperscript{352} See \textit{Id.} at 946.

\textsuperscript{353} \textit{Id.} at 946-47.
court noted that Hollingsworth had not changed production to comply with Maryland regulations nor had it set up a customer relations network there.354

5. **Bond v. Octagon Process, Inc.**355

In *Bond*, a Federal District Court in Georgia denied application of the traditional stream of commerce theory and required the defendant to have more sufficient contacts with the forum state in order to exercise personal jurisdiction. The plaintiff Oliver Bond, a national guard member, suffered injuries from using a cleaning solvent while he was engaged in service for the National Guard in Georgia.356 The solvent was manufactured by Octagon Process, Inc. (Octagon), a New Jersey corporation, for the sale only to the U.S. government. The product had never been sold to any private purchaser.357 Plaintiff filed an action in Georgia against Octagon to recover for the damage alleging that Bond’s injuries were caused by the defendant’s failure to provide adequate warnings of the dangers of exposure to solvents at low temperatures.358 Octagon sought dismissal based on the lack of personal jurisdiction.359

A Federal District Court in Georgia denied the exercise of personal jurisdiction of Georgia over Octagon on the ground that “Asahi had made it clear that defendant’s mere awareness that its products would reach the forum state via the stream of

354 See Id. at 946-47.


356 See Id. at 710.

357 See Id. at 711.

358 See Id.

359 See Id.
commerce was not enough to form sufficient minimum contacts." The court stated that "[a]s Asahi makes clear, the essential question is whether the defendant, regardless of his status as a manufacturer or distributor, has done some act purposefully directed toward the forum state so as to form sufficient minimum contacts with the state such that he could anticipate being haled into court there." Then the court held that, when Octagon sold the solvent to the Department of Defense, which acted as the independent distributor of Octagon, Octagon merely placed its product into the stream of commerce and had done no other conduct purposefully directed toward Georgia.

Plaintiff claimed that Asahi should be distinguished from cases like this, in which both of the parties were Americans. Plaintiff argued that the main reason that the Supreme Court found a lack of jurisdiction over Asahi was that the exercise of jurisdiction over Asahi would impose on Asahi the unique burdens of defending itself in a foreign legal system. Plaintiff stressed that where both of the parties were Americans, the burden on the defendant to defend itself in the forum state was not so severe.

However, the Bond Court did not distinguish the domestic case from Asahi in determining whether the defendant had minimum contacts with the forum state. The court stated that plaintiff's contention concerned whether exercising jurisdiction over the defendant was reasonable or not, and it had nothing to do with whether the defendant had sufficient minimum contacts with the forum state. Thus, the Bond

360 Id. at 713-14.
361 Id. at 714.
362 See Id.
363 See Id.
364 See Id.
court refused to distinguish between international cases and domestic cases in the application of the stream of commerce theory.


In *Rodriguez*, following the Supreme Court decision in *Asahi*, a Federal District Court in Puerto Rico expressly rejected the application of the stream of commerce theory. When a Puerto Rico resident, Amesto Rodriguez, was inflating a tire, the tire suddenly exploded and the tire rim broke into two pieces that hit his hand. Rodriguez's right hand was permanently injured by the accident.[^366] Rodriguez filed a products liability action in Puerto Rico against Fullerton Tires Corp. (Fullerton), a California tire dealer, alleging that the rim breakage was caused by a defect in the product and/or a defect in the manufacturing or design of the rim.[^367] Fullerton, in turn, filed a third-party complaint against Custom Metal Spinning Corporation (Custom Metal), a California tire rim manufacturer, who sold the tire rim at issue to Fullerton in California. Custom Metal filed a motion to dismiss for lack of personal jurisdiction.

Fullerton argued that Custom Metal was a manufacturer of sand racing tire rims, and it could foresee that its tire rim would be used for sand racing in Puerto Rico where the climate and topography were amenable to make sand racing a conceivable and foreseeable sport.[^368] Thus, Fullerton argued that Custom Metal “made deliberate efforts


[^366]: See Id. at 123.

[^367]: See Id. at 124.

[^368]: See Id.
to serve, either directly or indirectly, a potential market by placing [its] product in the stream of commerce."\textsuperscript{369}

The Federal District Court in Puerto Rico refused to adopt Fullerton's argument on the ground that the United States Supreme Court in \textit{Asahi} refused to adopt the stream of commerce theory.\textsuperscript{370} To support its decision, the court stated that: "Such argument, if accepted without the added requirement of minimum contacts, would open a Pandora's Box which could release the evils of universal jurisdiction upon all sand-racing equipment manufacturers. Such companies would be forced to litigate claims on every tropical island where sand- buggies are driven, regardless of whether the manufacturers of the product intended to market their product in any particular region."\textsuperscript{371}

Then the court held that Custom Metal did not have sufficient minimum contacts with Puerto Rico because it did not have perform any activities in Puerto Rico and it did not purposefully avail itself of the privilege of conducting business in Puerto Rico.\textsuperscript{372} The court noted that merely to place its products into the stream of commerce in California was not enough to find that it had purposefully availed itself of any market where tires containing its rims were sold by its customer.\textsuperscript{373}

\textsuperscript{369} \textit{Id}.

\textsuperscript{370} \textit{See Id.} at 125-26.

\textsuperscript{371} \textit{Id.} at 126.

\textsuperscript{372} \textit{See Id.} at 128-29.

\textsuperscript{373} \textit{See Dalmau Rodriguez v. Hughes Aircraft Co.}, 781 F.2d 9 (1st Cir. 1986).
7. Analysis

The defendant in the third-party indemnification claim in *Asahi* was a foreign
corporation and the Court considered defendant’s foreign status in the fairness and
reasonableness test. The Supreme Court noted that the “unique burdens placed upon
one who must defend oneself in a foreign legal system” should be given significant
weight in evaluating the fairness and reasonableness factors.\(^{374}\) The Supreme Court did
not make it clear whether the constitutional restraint on the stream of commerce theory
would be applied in the same way to domestic cases. However, the lower courts after
*Asahi* have carried over Justice O’Connor’s narrow approach to the stream of
commerce in the domestic cases as well.

In *Bond*, a Federal District Court in Georgia found minimum contacts lacking
between a New Jersey manufacturer and the State of Georgia on the ground that the
stream of commerce alone was not enough to allow the forum state to exert jurisdiction
where the product was sold outside the state and distributed by another for use there. In
the same way, in *Boit*, the First Circuit denied the assertion of Maine’s jurisdiction over
an Indiana corporation on the ground that the defendant did not purposefully engage in
forum activities so that it could reasonably expect to be haled into court there where its
product was sold by a national retailer. In *Lesnic*, the Fourth Circuit also required
defendant’s purposeful activities toward the forum state for the exercise of forum
state’s jurisdiction stating that to sell material to a national cigarette manufacturer was
not enough. And, in *Rodriguez*, a Federal District Court in Puerto Rico also rejected the
pure stream of commerce theory and held jurisdiction was lacking over a California tire
rim manufacturer that sold its products to another California company that in turn
marketed them to the forum state. Only the Seventh Circuit in *Derhmlow* was prepared
to uphold jurisdiction under the traditional stream of commerce rationale and even that

\(^{374}\) 480 U.S. at 114.
court identified some direct contacts between the manufacturer and the forum state rather than rely exclusively on the stream of commerce rationale.

E. Assessment of the Court Decisions

Asahi was not an appropriate case for addressing the confusion in minimum contact theory after World-Wide Volkswagen.\(^\text{375}\) First, Asahi was not named as a defendant by the plaintiff, but was brought into the suit by the original defendant by third-party indemnification claim. Second, the underlying suit between plaintiff and defendant had already settled, and no forum State’s resident was involved in the indemnification claim as a party. Third, the real issue was not the protection of a forum resident, but the interpretation of the contract between the Taiwanese company and the Japanese company that had been entered into Japan or Taiwan. The lower courts after Asahi could easily distinguish the cases in front of them from Asahi. Instead, the lower courts have turned Asahi’s doubts about stream of commerce into a constitutional constraint on personal jurisdiction.

In Asahi, the foreign defendant was a component parts manufacturer whose products were incorporated into the finished products in another foreign country before they were shipped to the U.S. market for sale. By and large, in light of Asahi, American courts today tend not to find a jurisdictionally sufficient level of contacts to allow personal jurisdiction over the foreign manufacturer of component parts. Moreover, the courts in the United States have applied Justice O’Connor’s narrow approach in Asahi to the stream of commerce theory even when the defendants are finished product manufacturers or their U.S. distributors. When the foreign corporation does not engage

in purposeful activities in the forum state, the lower courts typically refer to *Asahi* to deny the finding of minimum contacts on the ground that the foreign companies had not engaged in the additional conduct required by Justice O'Connor. Moreover, Justice O'Connor’s approach to the stream of commerce has been applied even in domestic cases in which the manufacturer was simply located in another American state.

In *Asahi*, the Justices were sharply divided into three opinions on the issue of how to use the stream of commerce to find minimum contacts. Reflecting the diversity in the opinions in the Supreme Court, lower courts also divided regarding whether they will maintain the efficacy of the stream of commerce theory. Therefore, even after *Asahi*, some courts have adhered to the pre-*Asahi* case law and have continued to use the stream of commerce rationale as Justice Brennan’s opinion warrants, citing the absence of clear guidance from the Supreme Court in *Asahi*. The confusion among the courts has come at the expense of the predictability and foreseeability that foreign manufacturers and distributors need in order to know whether they will be subject to jurisdiction in the courts of the United States.
Chapter V. Jurisdiction in Other Countries

The scope of personal jurisdiction in the United States can be compared with that used in the legal system of other countries. Civil law countries take different approaches on the issue of whether they have jurisdiction over a foreign company. The analysis and comparison of these judicial systems is useful and valuable for understanding and for the future development of the United States' legal system. This chapter discusses the exercise of jurisdiction over foreign companies whose products caused injuries to their residents by European civil law countries. In addition, considering the increase of trade and resulting legal controversies between Japanese corporations and residents of the United States, this article examines the Japanese judicial view on this important procedural issue.

A. Germany

The courts of Germany decide the limits of judicial power of Germany over foreigners through the interpretation of venue provisions of the German Code of Civil Procedure (Zivilpöezessordnung, ZPO). Under the ZPO, a plaintiff can sue a defendant at the place of defendant’s domicile when the defendant is a natural person, or at the place of its seat when the defendant is a legal person or other entities. Therefore, when a defendant has a domicile or seat in a foreign country, the

376 These rules are primarily provided in terms of allocation of cases among various courts in Germany.

377 ZPO §§ 12, 13. The provision spells out the Roman law principle of actor sequitur forum rei.
courts of Germany in principle do not have jurisdiction over the defendant, and the plaintiff must go to foreign country to sue the defendant under these provisions.

However, in addition to this general jurisdiction that is decided by defendant’s domicile or seat, the ZPO further provides specific jurisdiction. Section 32 provides that the court of the district where the tortious act is conducted has jurisdiction for actions in tort.\(^{379}\) The purposes of this provision is to achieve procedural economy (especially the access to evidence) and to avoid unfairness to force the tort victim to go to the place of tortfeasor’s general jurisdiction to seek redress.\(^{380}\) While the meaning of tortious act has been disputed, it is generally recognized that section 32 provides a basis for jurisdiction at the place of the event as well as at the place where that event results in damage.\(^{381}\) Therefore, when a foreign company sends a product to Germany and the product caused an injury in Germany, the German court has jurisdiction over the foreign company for the claim of redress of injury caused by the defendant’s product. While defendant’s contacts with a forum State is an important element in the United States, in Germany the contacts of defendants with Germany are not considered.\(^{382}\) Foreign companies will be subject to Germany’s judicial power, as long as their products cause injuries in Germany, notwithstanding their intention or knowledge of the destination of their products. Thus German courts have a wide range of jurisdiction over foreign

\(^{378}\) ZPO § 17 (1). Corporations must choose one of the following three places as the seat of the corporation in the article of association: the location where the management is situated, the location where the corporation maintains an establishment, or the location where the administration of the corporation is conducted. Akt Ges § 5 (2).

\(^{379}\) ZPO § 32 provided that: “[f]or actions in tort the court of the district within which the tortious act was committed has jurisdiction.”

\(^{380}\) Christof Von Dryander, Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure, 16 Int'l Law. 671, 687-88 (1982).

\(^{381}\) See id. at 690.

\(^{382}\) See id. at 690-92.
companies in product liability cases under the German law. Even in the cases like *World-Wide Volkswagen* or *Asahi*, German courts acquire a judicial power over foreign companies.\(^{383}\)

B. France

While France also belongs to the civil law countries like Germany, France takes a completely different approach than Germany on the issue of international jurisdiction. Under Article 14 of the *Code Civil*,\(^ {384}\) every French national can sue a foreigner in a French court without regard to the contacts of defendant with France.\(^ {385}\) Article 14 of the *Code Civil* depends exclusively upon the French nationality of the plaintiff, and defendant’s domicile, residence or presence in France are not required at all for the exercise of a French court’s jurisdiction over foreigners.\(^ {386}\) Further, French courts have given an expansive interpretation to this clause, and they construed that the term of “obligation” in Article 14 to refer not only to contractual situations but also to any legal duties, notwithstanding the nature of the cause of the claim.\(^ {387}\) Therefore, when a

\(^{383}\) In *World-Wide Volkswagen*, the notion that amenability to suit of the seller of chattels would travel with the chattel is vigorously rejected by the Supreme Court of the United States. *See supra* note 31.

\(^{384}\) *Code Civil* Article 14 provided that:

An alien, though not residing in France, can be cited before the French courts, for the performance of obligations contracted by him in France with a Frenchman; he can be brought before French courts for obligations contracted by him in a foreign country toward Frenchmen.


\(^{386}\) *See Id.*

\(^{387}\) *See Id.* at 320. *See also Comp. Du Britannia v. Comp. Du Phénix, Cour de Cassation*, Ch. Reg., Dec. 13, 1842, 43 Sirey 1, 14.
French national suffered injuries by the defective product of a foreign company, he can sue the company in a court of France, not withstanding the place of injury.

Internal venue rules have also been applied to determine the international jurisdiction of French courts. French courts have used these rules to provide bases for adjudicatory jurisdiction when neither plaintiff nor defendant is of French nationality, and Articles 14 and Article 15 are inapplicable.\(^{388}\) As do most civil law countries, France follows the general principle \textit{actor sequitur forum rei}, and therefore plaintiff must sue at defendant’s domicile.\(^{389}\) However, other domestic venue rules relating to the place of the activities out of which the litigation arises have also become rules of adjudicatory jurisdiction in international cases. Article 20 provides that in a tort action the complaint may also be filed in the tribunal where the act causing the injury took place.\(^{390}\) Therefore, when a foreign citizen is injured by a foreign company’s defective product in France, he can sue the foreign company in France based on Article 20.

\section*{C. Brussels Convention}

To determine the international jurisdiction of member countries and to facilitate the recognition and enforcement of judgments, six members of the European Community (Belgium, Germany, France, Italy, Luxembourg and Netherlands) signed the Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters on September 27, 1968 (Brussels Convention).\(^{391}\) Then the Brussels Convention extended its area to other European Community member

\(^{388}\) Henry J. Steineret et al., \textit{Transnational Legal Problems} 708 (4th ed. 1994).

\(^{389}\) \textit{Code de Procédure Civile}, art. 59 sec. 1.

\(^{390}\) See Henry et al., \textit{supra} note 204, at 708.

\(^{391}\) Sep. 27, 1968, 15 J.O. (L 299) 32.
countries. Further, the member countries of the Brussels Convention joined in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters at Lugano on 16 September 1988 (Lugano Convention) with the six member countries of the European Free Trade Association. Through the Lugano Convention, the regime of the Brussels Convention was extended to all of western Europe.

The Brussels Convention sets forth that the defendant’s domicile has general jurisdiction. In the case of a company, its principle place of business is treated as its domicile. The Brussels Convention expressly excludes the applicability of Article 14 of the Code Civil of France, and Article 23 of the German Code of Civil Procedure when a person in a signatory country sues another person in another signatory country. Moreover, the Convention further provides special jurisdiction in several matters. Under Article 5, No. 3 of the Convention, “the courts for the place where the harmful event occurred” have jurisdiction “in matters relating to tort.” The European Court of Justice construed the clause broadly and held that victims of tortious acts may sue either at the place whether the tortious acts were committed or at the place where the damage occurred. Therefore, when a person of a signatory country of the

392 The Convention was first revised to accommodate the accession of Denmark, Ireland and the United Kingdom. 1978 O.J. (L 304) 77. It was again amended upon the accession of Greece, 1982 O.J. (L 388) 1, Spain and Portugal, 1989 O.J. (L 285) 1.

393 These six member countries of European Free Trade Association are Austria, Switzerland, Norway, Sweden, Finland and Iceland.

394 Brussels Convention, supra note 206, article 2, par 1.

395 Brussels Convention, supra note 206, article 53, par 1.

396 Brussels Convention, supra note 206, article 3.

397 Brussels Convention, supra note 206, article 5.

398 Brussels Convention, supra note 206, article 5, No. 3.
Convention is injured by a defective product sold by a company of another signatory country of the Convention, he can sue the company in the court of his domicile if that is where the injury occurred.

The Brussels Convention is applied only for the cases between parties belonging to the signatory countries, and it is not extended to the cases when citizens of non-signatory countries are involved in the controversy.\(^{400}\) In such cases, *Code Civil* of France or the German Code of Civil Procedure are applied, and those countries have a wide range of jurisdiction over foreign companies as described above.

D. Japan

Although, the Japanese Code of Civil Procedure (Minsoho) does not have specific provisions that provide for international jurisdiction, like Germany, the courts of Japan decide the limits of international jurisdiction through the interpretation of the venue provisions of the Code of Civil Procedure set out for the internal territorial jurisdiction. However, when the application of the internal venue provisions to international settings would lead to unfair results for the parties, Japanese courts deny the exercise of jurisdiction of Japan in accordance with the principle of justice. Several cases illustrate this principle in practice.

1. *Goto v. Malaysian Airline System Berhad*

In *Goto v. Malaysian Airline System Berhad*,\(^{401}\) the Supreme Court of Japan clearly articulated the principle of international jurisdiction.\(^{402}\) In *Goto*, an airplane of

\(^{399}\) Judgment 30, 1976, Court of Justice of European Community, cas 21/76 8 ECR 1735 (1976). See also Christof Von Dryander, *supra* note 197, at 688.

\(^{400}\) Henry J. Steiner et al., *supra* note 204, at 710.

Malaysian Airline System Berhad (Malaysian Airline) flying from Penang to Kuala Lumpur crashed in Johore Bahrin in Malaysia and all crew and passengers died.\(^403\) The successors of one of the Japanese passengers filed a claim seeking compensation for damages in Nagoya District Court of Japan against Malaysian Airline alleging the breach of an air transport contract.\(^404\)

The Court held that the limits of international jurisdiction should be decided in accordance with the principle of justice that would secure the impartiality between parties and a speedy and fair trial, and the internal venue provisions set out in the Code of Civil Procedure served this purpose.\(^405\) Then the Court applied article 4 paragraph 3 of the Code of Civil Procedure\(^406\) and affirmed the exercise of the jurisdiction of Japan.

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\(^{402}\) The Supreme Court of Japan held that the jurisdictional power of the country should be exercised as an effect of the national sovereignty and the scope of jurisdiction shall in principle be tantamount to that of the national sovereignty. Therefore, if a defendant is a foreign company which has its head office abroad, it is generally beyond the jurisdiction of Japan, unless it is willing to subject itself to the jurisdiction of Japan. However, if a case is concerned with the land of Japan or if a defendant has a legal connection with Japan, he can be exceptionally subject to the jurisdiction of Japan, notwithstanding his nationality or residence. *Id.* at 1226.

\(^{403}\) See *Id.*

\(^{404}\) See *Id.*

\(^{405}\) See *Id.* As such places set forth in the internal venue provisions of the Code of Civil Procedure, the Court indicated the domicile of the defendant (*MINSOHO* art. 2), the place of the principle office or principle place of the business (*MINSOHO* art. 4), the place where the obligation is performed (*MINSOHO* art. 5), the place where the defendant’s property is located (*MINSOHO* art. 8), and a place of tort (*MINSOHO* art. 15).

\(^{406}\) Code of Civil Procedure Article 4 provides that:

1. The general forum of a judicial person or any other association or foundation shall be determined by the place of its principle office or principle place of business, or in case there is no office or place of business, by the domicile of the principle person in charge of its affairs.

2. [Omitted]
over the Malaysian corporation based on the facts that the defendant appointed its representative in Japan and it had established a place of business in Tokyo.\textsuperscript{407}

2. \textit{Yabutani v. The Boeing Co.}

In \textit{Yabutani v. The Boeing Co.},\textsuperscript{408} the Tokyo District Court more concretely examined fairness factors. In \textit{Yabutani}, the successors of the deceased passengers who died in a crash of a Boeing 727 in Japan filed products liability actions against the Boeing Company (Boeing), an American airplane manufacturer, in Tokyo District Court seeking compensation of deaths. The Tokyo District Court affirmed the exercise of Japanese jurisdiction over the American company holding that “the place where the act was committed” in Article 15 paragraph 1 of Japanese Code of Civil Procedure\textsuperscript{409} included both of “the place of injurious act” and “the place of effect.”

The court went on to state that, in determining international jurisdiction, the court must consider which court would be appropriate for deciding the lawsuits correctly, impartially and efficiently. The court stated that when the burden on the defendant to defend the lawsuit at “the place of effect” was markedly greater than the benefit to the plaintiff and the convenience for the collection of evidence, the jurisdiction at “the place of effect” should be denied by the principles of justice.

3 In regard to the general forum of a foreign association or foundation, the provisions of paragraph 1 shall apply to the office, place of business or person in charge of its affairs in Japan.

\textsuperscript{407} Even though the accident was not related with defendant’s business in Japan, the Court affirmed the application of Article 4 paragraph 3 of Japanese Code of Civil Procedure. \textit{See} 35 \textit{Minshu} 1224, 1227.

\textsuperscript{408} 754 \textit{Hanrei Jiho} 58 (Tokyo District Court, July 24, 1974).

\textsuperscript{409} Code of Civil Procedure Article 15 provides that:

1 A suit relating to a tort may be brought before the court of the place where the act was committed.
However, in this case, the court found that: (1) defendant was a corporation possessing large amount of capital and engaged in the manufacture of aircraft capable of flying all over the world, (2) many of defendant’s products were manufactured to be used in Japan and defendant could foresee the lawsuit in Japan, (3) if the case were held in the United States, plaintiff’s expenses and efforts in pursuing the litigation would be overwhelming so that it was practically impossible for the plaintiff to sue the defendant in the United States, and (4) to decide which country was more convenient to collect the evidence was too difficult at the first stage of the litigation.


In *Shinzaki Bussan v. Nankaseimen Co.*, an American employee who was injured by a defective machine manufactured by Shinzaki Bussan sued Shinzaki Bussan and an American importer of the machine in California court. In response to the indemnification claim from the importer of the machine, Shinzaki Bussan filed a claim in Tokyo District Court seeking negative declaration of liability to pay damages.

Under the Japanese Code of Civil Procedure, the Japanese court had jurisdiction. However, the Tokyo District Court denied the exercise of jurisdiction of Japan over the American importer stating that the exercise of jurisdiction by Japan would be unfair and unreasonable in this case.

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2 [Omitted]

410 1390 Hanji 98 (Tokyo District Court, Jan. 29, 1991)

411 *Id.* at 99.

412 See *supra* note 226. The court stated that “the place where the act was committed” in the article 15 paragraph 1 of Japanese Code of Civil Procedure includes “the place of the injurious act was committed.”
As the fairness factors, the court noted that: (1) there was some possibility of an inconsistent result between the American litigation and Japanese litigation, (2) most of the evidence was located in the United States, (3) plaintiff had benefited from the sale of its products in the United States, (4) the litigation in the United States was foreseeable for the Japanese manufacturer, and (5) the American importer could not foresee being sued in Japan.


In Shinagawa Hakurenga Co., Ltd. v. Houston Technical Ceramics Inc.,\textsuperscript{413} Shinagawa Hakurenga Co., (Shinagawa Hakurenga), a Japanese ceramic manufacturing company, sold ceramic products to Houston Technical Ceramics Inc., (Houston Technical Ceramics), an American company. Houston Technical Ceramics filed a suit in Texas seeking damages sustained as a result of the defective products of Shinagawa Hakurenga in accordance with the Texas Deceptive Trade Practice Act. In response, Shinagawa Hakurenga filed this action in Japan seeking a declaration that the plaintiff was not liable to pay any damages to the defendant.

Although the Tokyo District Court found a sufficient basis for the exercise of jurisdiction under the venue provision of Japanese Code of Civil Procedure, the court further stated that when exceptional circumstances made the exercise of jurisdiction unfair, the court must deny the assertion of jurisdiction.

Then the court considered the advantage and disadvantage to the parties to pursue the litigation in Japan or in the United States. The court found that: (1) the witness about the defects of the products was in Japan, (2) even though Houston Technical Ceramics sued Shinagawa Hakurenga in Texas, general venue of Shinagawa Hakurenga was situated in Japan, (3) even if Houston Technical Ceramics won the suit

\textsuperscript{413} 703 Hanrei Taimuzu 246 (Tokyo District Court, 1989).
in Texas, it must enforce the judgment only in Japan, and (4) the case arose out of international trading between companies and the litigation in Japan was not against the expectation of Houston Technical Ceramics. Then the court concluded that the exercise of jurisdiction of Japan over Houston Technical Ceramics did not violate the principle of fairness between the parties.

Thus, like *Asahi*, Japanese courts consider the fairness factors like the foreseeability to the defendant of suit in a particular forum, location of the evidence, the possibility of inconsistent judgments and what kind of benefit had the defendant obtained in the forum, for the exercise of jurisdiction over foreigners. These considerations are quite similar to the fairness and reasonableness factors in *Asahi*. However, unlike *Asahi*, Japanese courts look defendant’s contacts with the forum as only one of the fairness factors and do not make such contacts a precondition as do American courts.
Chapter VI. Conclusion

Prior to Asahi, foreign manufacturers and distributors who placed their products into the stream of commerce with the expectation that their products would reach the forum state could be subjected to the jurisdiction of the forum state where the products caused harm to residents.414 The stream of commerce theory provided a sufficient basis for the forum state to exert its judicial power outside its territorial boundaries. After Asahi, these same foreign manufacturers and distributors are not subject to the forum state’s jurisdiction unless they had direct contacts with the forum state. By requiring defendant’s additional conduct, a plurality of the Supreme Court in Asahi has allowed these foreign manufacturers and distributors to effectively immunize themselves from suit by many injured plaintiffs. The decision in Asahi placed both American residents and American manufacturers in a disadvantageous position against foreign companies.

First, by virtue of constitutional constraints on a state’s jurisdiction, American residents can not recover for damages caused by defective products manufactured by a foreign company which does not have direct contacts with the forum state. Most foreign Component parts manufacturers will not have any of the additional contacts

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414 In Nelson v. Park Industries, Inc. 717 F.2d 1120 (7th Cir. 1983), the Seventh Circuit affirmed the exercise of personal jurisdiction under Wisconsin long-arm statute over a Hong-Kong manufacturer and distributor on the ground that they placed their products into the stream of commerce with awareness that their products would be sold in the United States by their American distributor, a national retail chain. The Hong Kong manufacturer and distributor argued that they did not originate the distribution system and they had no control over the distribution in the United States. However, the Seventh Circuit held that they should reasonably anticipate being subject to suit in any forum within that market where their product caused injury, as far as they were aware of the distribution system in the United States and benefited from the sales in the United States. See Id. at 1124-26. This case was cited by Justice Brennan in Asahi. See Asahi 480 U.S. 102, 117 note 1.
listed by Justice O'Connor and even finished product manufacturers can often arrange to sell their products to U.S. distributors without establishing direct contacts with any particular state. Once a court has found that the defendant does not have direct contacts with the forum state, the court will usually deny the exercise of the forum state's jurisdiction even though the state has a strong interest in adjudicating the case. In a domestic case, a plaintiff who is compelled to sue the manufacturer of a component or finished product in its home state can still obtain legal redress. At worst, there is inconvenience and extra expense to the plaintiff, but at least there is viability to the products liability claim since it can be tried in an American court within the a same legal system. On the other hand, when an injured plaintiffs sue foreign manufacturers or distributors, they must bring the suit in the courts of the foreign country where the language and legal system are completely different. The plaintiff who is forced to pursue a litigation in a foreign legal system is faced with a serious burden. To immunize a foreign company from suit in the state where its product caused harm may deprive forum residents of the right to recover damages. This result is inconsistent with the notion of products liability which should provide compensation for harm to injured persons. The cost of injuries resulting from defective products should be borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

Second, the limitation by Justice O’Connor on the stream of commerce theory places American manufacturers and distributors in a disadvantageous position as a result of their exposure to suits in civil law countries. If a product manufactured in the United States causes an injury in one of these civil law countries, the injured person has a specific jurisdiction over the American manufacturer for the claim of redress. Therefore, when the American manufacturers export their products to civil law countries, they must include in the cost of goods expenses associated with potential
products liability litigation in the foreign countries. On the other hand, in the United States, an additional conduct requirement removes from domestic court jurisdiction foreign manufacturers and distributors whose sole contacts with the forum state come from putting their products in the stream of commerce destined for the U.S. market. Therefore, when the foreign manufacturers or distributors export their products to the United States, they can avoid the payment of high insurance costs by virtue of immunity from the exercise of any particular state's jurisdiction. As a result, foreign manufacturers can potentially enjoy a competitive advantage over the United States manufacturers in both domestic and international marketplaces. Since it is neither unfair nor unreasonable that jurisdiction is exerted over manufacturers who benefit economically from sales to residents of the forum state, due process should not be construed to grant foreign manufacturers exemption from jurisdiction.

Certainly component part manufacturers and distributors usually do not have control over the distribution systems of the finished products in the foreign country. However, as they make their specific products to be sold in the forum state, they can usually foresee the final destination of their products as far as the products will be sold through normal course of business. From the business viewpoint, those manufacturer and distributors have clear notice where their products will be sold and could cause harm. Jurisdiction could be made foreseeable. The courts of the United States should exert their jurisdiction over foreign manufacturers and distributors whose products cause injury as far as their products reach the forum state through the normal course of business.
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