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# Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective

Linda J. Silberman

*New York University School of Law*, linda.silberman@nyu.edu

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**GOODYEAR AND NICASTRO: OBSERVATIONS FROM A TRANSNATIONAL AND  
COMPARATIVE PERSPECTIVE**

Linda J. Silberman\*

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I. INTRODUCTION

The two recent Supreme Court personal jurisdiction cases—*Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>1</sup> and *J. McIntyre Machinery, Ltd. v. Nicastro*<sup>2</sup>—are “transnational” cases and involve the jurisdictional reach of a court in the United States over foreign defendants when a U.S. plaintiff seeks a forum in the United States.<sup>3</sup> In *Goodyear*, a case of general jurisdiction, the North Carolina plaintiffs were killed in a bus accident in Paris, France, resulting from an allegedly defective tire manufactured by foreign subsidiaries of Goodyear USA.<sup>4</sup> The plaintiffs argued that there was jurisdiction over the foreign manufacturers in North Carolina because the foreign defendants also sold their product (or similar ones) in the United States, including in North Carolina.<sup>5</sup>

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\*Martin Lipton Professor of Law, New York University School of Law. My appreciation to the Filomen D’Agostino and Max E. Greenberg Research Fund for its financial support of this research.

1. 131 S. Ct. 2846 (2011).

2. 131 S. Ct. 2780 (2011).

3. Both actions were brought in the respective state courts. Under existing law, the jurisdictional reach of the federal courts in those states would have been no broader. See FED. R. CIV. P. 4(k)(1)(A).

4. *Goodyear*, 131 S. Ct. at 2850.

5. See Brief for Respondents at 43, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (No. 10-76), 2010 WL 5125441, at \*43.

In *Nicastro*, which presented a case of specific jurisdiction, the New Jersey plaintiff was injured by a metal-shearing machine in a work-related accident in New Jersey.<sup>6</sup> The press was manufactured in England, where the defendant was incorporated, and the machines were distributed in the United States through the English manufacturer's independent Ohio distributor.<sup>7</sup> Although there is little said in either *Goodyear* or *Nicastro* that indicates the Justices believed that there should be any difference of treatment between domestic defendants in the interstate context and foreign defendants in the international context, the Supreme Court's earlier opinion in *Asahi Metal Industry Co. v. Superior Court of California*<sup>8</sup>—with its “reasonableness” prong<sup>9</sup>—certainly could be read to have made just such a distinction.<sup>10</sup>

In thinking about jurisdiction in the international marketplace, two different perspectives—a transnational one and a comparative one—may be useful in assessing the two recent Supreme Court decisions. A transnational perspective raises the question of whether there should be a distinct jurisdictional analysis for these cross-border cases, and in particular, whether and how a foreign defendant's contacts with the United States as a whole might be factored into such an analysis. There are various possibilities, including that of congressional action, to change the “minimum contacts” inquiry in regard to the defendant's activity from that of contacts *with a particular state* to contacts with the *United States as a whole*.<sup>11</sup> A comparative look at the two cases provides insight into the structure of other countries' jurisdictional regimes in mirror transnational cases to *Goodyear* and *Nicastro*, and reveals the different values reflected in other systems' jurisdictional rules. In *Nicastro*, Justice Ginsburg's dissent called attention to the European Union Regulation on Jurisdiction and Judgments (the Brussels Regulation).<sup>12</sup> She observed that United States plaintiffs are at a disadvantage in comparison to plaintiffs who seek to acquire jurisdiction over foreign defendants who cause an injury in their forum state,<sup>13</sup> as was the situation in *Nicastro*. The particular procedural burdens that defendants face in defending in courts in the United States (as opposed to defending in courts in other countries)—such as exposure to juries, class actions, and discovery—may

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6. *J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion).

7. *Id.*

8. 480 U.S. 102 (1987).

9. *Id.* at 113.

10. *Id.* at 114 (“The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.”).

11. As discussed in greater detail at text accompanying notes 130–134 *infra*, I believe an aggregate contacts approach is appropriate for specific jurisdiction but not for general jurisdiction.

12. *J. McIntyre*, 131 S. Ct. at 2803 & n.16 (Ginsburg, J., dissenting) (citing Council Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, 4 [hereinafter EU Regulation] (amended by Commission Regulation 1496/2002, 2002 O.J. (L 225) (amending Annex I & II))).

13. *Id.* at 2803.

be more significant than Justice Ginsburg acknowledges, at least to the extent she is comparing relative “advantages” and “disadvantages” of suit in particular fora. But she is certainly correct that the place of injury is a well-accepted jurisdictional basis elsewhere;<sup>14</sup> indeed, that rule is embraced in national law in many countries of the world and is not limited to regional arrangements within the European Union.<sup>15</sup>

## II. SHOULD THERE BE A DIFFERENT STANDARD FOR TRANSNATIONAL CASES?

### A. *The Reasonableness Standard of Asahi*

Although the constitutional test for jurisdiction set forth in *International Shoe Co. v. Washington*<sup>16</sup>—that a defendant have “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”<sup>17</sup>—was hardly a bright-line rule, the subsequent enactment of state specific-act statutes and some guidance from the Supreme Court achieved some measure of predictability.<sup>18</sup> Something of a sea change came in *Asahi*, when the Supreme Court not only delivered a 4-to-4 split on the issue of what actually sufficed for “minimum contacts”<sup>19</sup> (does a defendant’s act of placing goods—in that case, a component part—into the stream of commerce suffice?), but also added as an element of the constitutional inquiry whether the assertion of jurisdiction would be “reasonable.”<sup>20</sup> It is interesting to note that the Part II–B “unreasonableness” prong of *Asahi* was not subscribed to by all of the Justices who split 4-to-4 on the minimum contacts point.<sup>21</sup> Justice Scalia, the only present Justice who

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14. See *id.* (citing EU Regulation, art. 5, *supra* note 12, at 4).

15. See OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 504 (Oscar G. Chase & Helen Hershkoff eds., 2007).

16. 326 U.S. 310 (1945).

17. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

18. The traditional “minimum contacts” test required that the defendant’s activities in the state be balanced against the state’s regulatory and litigation interests—hence the requirement that the defendant have “certain minimum contacts . . . such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” Linda J. Silberman, “*Two Cheers*” for *International Shoe* (and *None* for *Asahi*): *An Essay on the Fiftieth Anniversary of International Shoe*, 28 U.C. DAVIS L. REV. 755, 759 (1995) [hereinafter Silberman, *Two Cheers*] (quoting *Int’l Shoe*, 326 U.S. at 316 (emphasis added)). As reformulated in *Asahi*, the test now appears to be a formal two-step process, where “minimum contacts” must first be satisfied, and if the requisite contacts are found, the court proceeds to assess jurisdiction on more general “reasonableness” grounds. See *id.* at 760–61.

19. Compare *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (O’Connor, J.), with *id.* at 116–117 (Brennan, J., concurring in part). Justice Stevens did not join the “minimum contacts” part of the opinion because it was “not necessary to the Court’s decision.” *Id.* at 121 (Stevens, J., concurring in part).

20. See *id.* at 113–14.

21. See *id.* at 105.

remains from the *Asahi* court, looked no further than the lack of minimum contacts.<sup>22</sup>

Indeed, because *Asahi* was a case involving a foreign defendant, one might have concluded that the Court had added the reasonableness prong as an element of comity when jurisdiction was to be asserted over a foreign-country defendant.<sup>23</sup> The claim before the Court in *Asahi* was an indemnity claim by the Taiwanese manufacturer of the tire tube against the Japanese component manufacturer of the valve part.<sup>24</sup> And the Court's opinion on reasonableness highlighted the fact that *Asahi* was a Japanese corporation and noted that the "unique burdens placed upon one who must defend oneself in a foreign legal system" should be given significant weight in making that assessment.<sup>25</sup>

However, the post-*Asahi* cases in the state and federal courts did not limit the reasonableness prong to foreign-country defendants,<sup>26</sup> although my own read of many of the cases suggests that most of the cases that ultimately invoke unreasonableness as the basis for rejecting specific jurisdiction actually involve foreign defendants.<sup>27</sup> But extracting such a principle is difficult because only a few years before in the Supreme Court's decision in *Helicopteros Nacionales de Colombia, S.A. v. Hall*<sup>28</sup>—a general jurisdiction case involving a Colombian defendant<sup>29</sup>—no mention of reasonableness was made. Of course, that may be because the Justices determined that the defendant's activity was insufficient to account for general jurisdiction, and thus there was no reason for such an issue to be addressed. Alternatively, there seems to be some doubt as to whether the reasonableness prong applies in cases of general jurisdiction,<sup>30</sup> even though

22. *See id.*

23. *See* Brief for the Am. Chamber of Commerce in the United Kingdom & the Confederation of British Indus. as Amici Curiae Supporting Petitioner, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (No. 85-693), 1986 WL 727584, at \*15 (urging a specialized jurisdictional standard for foreign defendants); Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 27-34 (1987) [hereinafter Born, *Reflections*] (offering support for a separate jurisdictional standard when foreign defendants are involved in transnational litigation).

24. *Asahi*, 480 U.S. at 106.

25. *Id.* at 114.

26. *See, e.g.*, *LaMarca v. Pak-Mor Mfg. Co.*, 733 N.E.2d 883, 889 (N.Y. 2000) (citing *Asahi*, 480 U.S. at 106-07) (state court, Texas defendant); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573 (2d Cir. 1996) (quoting *Asahi*, 480 U.S. at 113) (federal court, Delaware defendant).

27. *See, e.g.*, *Miller v. Nippon Carbon Co.*, 528 F.3d 1087, 1089 (8th Cir. 2008) (defendant is a Japanese manufacturer); *TH Agric. & Nutrition, L.L.C. v. Ace European Group Ltd.*, 488 F.3d 1282, 1285 (10th Cir. 2007) (defendant is a Dutch-owned insurance company); *Benton v. Cameco Corp.*, 375 F.3d 1070, 1073 (10th Cir. 2004) (defendant is a Canadian seller of uranium); *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1483 (9th Cir. 1993) (defendants are Swedish doctors).

28. 466 U.S. 408 (1984).

29. *Id.* at 409.

30. *See, e.g.*, *Metro. Life*, 84 F.3d at 577 (Walker, J., dissenting) (disagreeing with application of reasonableness standard in domestic case of general jurisdiction, noting that the Supreme Court had not yet instructed that the reasonableness inquiry should be applied to assertions

general jurisdiction may present the strongest case for its invocation.<sup>31</sup>

Perhaps the reasonableness prong does not emerge in either *Goodyear* or *Nicastro* for the same reason it was not part of the discussion in *Helicopteros*: the Court determined that the requirement of minimum contacts was not met, and thus had no reason to proceed further. If these decisions signal the Court's retreat from its two-part analysis of minimum contacts and reasonableness, there would be no quarrel from me. I have previously criticized *Asahi*, arguing that reasonableness is an indeterminate standard for a constitutional test and that concerns about the burdens on a foreign defendant can be taken care of by a nuanced doctrine of forum non conveniens that leaves the discretion to the trial court.<sup>32</sup>

### 1. *Why a Separate Test for Transnational Cases*

Whatever vehicle is invoked, special concerns may warrant attention to the foreign status of the defendant in thinking about appropriate forum access rules,<sup>33</sup> but those concerns can point in opposite directions. One fundamental question in the United States is whether a foreign defendant can even invoke the protections of the Due Process Clause. The Supreme Court has answered that question "yes," at least as regards private defendants.<sup>34</sup> In determining as a matter of policy whether there should be different considerations when jurisdiction is asserted over a foreign defendant, there are competing concerns. On the one hand, there is concern that the plaintiff, if he cannot sue the foreign defendant in the United States, may not be able to sue at all. The burdens of

of general jurisdiction); *cf.* *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 n.2 (9th Cir. 1993) (citing *Asahi*, 480 U.S. at 113) (indicating in a case involving foreign defendant that the reasonableness standard of *Asahi* was not limited to the specific jurisdiction context).

31. In most cases of general jurisdiction, the connection between the forum state and the particular claim is attenuated, and thus the reasonableness factors may have a more significant role to play in ensuring an appropriate forum. *See* B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1129, 1138 (1990). In particular, the "procedural and substantive policies of other nations"—identified in *Asahi*—have particular resonance in transnational cases of general jurisdiction. Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 900–01 (2004).

32. *See* Silberman, *Two Cheers*, *supra* note 18, at 759–60, 766; *see also* Howard B. Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C. L. REV. 729, 805 (1988) ("[T]he current test is difficult to apply, and is unlikely to promote consistent and predictable results.").

33. I use the term "forum access" because it is not only formal rules of jurisdiction that determine the proper forum, but also, at least in common law countries, the additional mechanism of forum non conveniens. Thus, "special concerns" with respect to the transnational case, and in particular the foreign defendant, might be taken into account through either formal jurisdictional rules or via forum non conveniens.

34. *Asahi*, 480 U.S. at 113 & n.\*, 114–15. *See also* Born, *Reflections*, *supra* note 23, at 21–22. As regards foreign states, however, the Supreme Court has questioned whether foreign states are "persons" protected by the Due Process Clause. *See* GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 308 (5th ed. 2011).

travel, distance, and costs—as well as access to a lawyer abroad—may make litigation abroad impractical or impossible.<sup>35</sup> On the other hand, a foreign defendant who is sued in the United States faces burdens of cost and distance, particularly since the U.S. system is one of the few that requires a defendant to pay its own legal fees even if ultimately successful. More generally, domestic institutions and attitudes within a particular country can differ markedly from those in foreign states, increasing the litigation burden of the foreign defendant.<sup>36</sup> Thus, there is reason for a judicial system to take into account the impact of its unique procedures when designing its forum access rules over foreign defendants in transnational cases.<sup>37</sup> Judicial systems vary in numerous ways, including rules about cost-shifting or not; regimes of criminal and civil liability, such as an *action civile* in some countries; and as regards the United States, its rules on class actions, juries, and discovery that have not found broad acceptance elsewhere.<sup>38</sup>

## 2. *The Question of a Separate Standard in Canada*

Interestingly, the issue of whether there should be a different jurisdictional standard over foreign defendants in transnational cases was recently before the Supreme Court of Canada on appeal from *Charron Estate v. Village Resorts Ltd.*,<sup>39</sup> which joined two cases—*Van Breda v. Village Resorts Limited* and *Charron v. Bel Air Travel*. Both cases involved suits against domestic and foreign defendants brought by Canadian plaintiffs who were killed or seriously injured at resorts in Cuba.<sup>40</sup> In an earlier series of Ontario cases—the “*Muscutt*

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35. See *Delong Equip. Co. v. Wash. Mills Abrasive Co.*, 840 F.2d 843, 850–51 (11th Cir. 1988) (stating that any inconvenience to foreign defendants is overridden by the greater inconvenience of requiring plaintiff to “pursue its cause of action in a foreign forum”).

36. See Born, *Reflections*, *supra* note 23, at 24–26.

37. See Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 54–55 (2006) (arguing that the interests of foreign states and sovereignty concerns are the basis for limiting the jurisdictional reach of U.S. courts over foreign defendants).

38. This is only to say that a state should have a strong justification to provide a forum in light of its unique procedures that will be applicable.

39. (2010), 98 O.R. 3d 721 (Can. Ont. C.A.), leave to appeal to S.C.C. granted, 2010 CarswellOnt 4917 (WL) & 2010 CarswellOnt 4829 (WL). The Supreme Court of Canada issued its opinion on April 18, 2012. *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, available at *Judgments of the Supreme Court of Canada*, SUPREME COURT OF CANADA, <http://scc.lexum.org/en/2012/2012scc17/2012scc17.html> (last visited Apr. 18, 2012).

40. In *Charron*, the Ontario husband and wife had booked an all-inclusive vacation package to Cuba through an Ontario travel agent. The husband was killed while scuba-diving at the Cuban resort, and the estate and family brought suit in Ontario against numerous defendants, including the Cuban resort, the Cayman management company that manages the resort, the Cuban scuba diving equipment provider, the diving instructor, and the captain of the diving boat. *Charron Estate*, 98 O.R. 3d 721, paras. 2, 5–6. In *Van Breda*, an Ontario couple had arranged a trip to a different Cuban resort through an Ontario defendant who operated a web-based business. The male of the couple had agreed to work as a part-time tennis instructor in exchange for the trip. His female

*Quintel*<sup>41</sup>—the Ontario Court of Appeal decided five companion cases evaluating an assertion of jurisdiction based upon damage suffered by plaintiffs in Ontario.<sup>42</sup> The cases involved plaintiffs who returned to Ontario following accidents elsewhere.<sup>43</sup> One of the cases involved an accident in another province against provincial defendants,<sup>44</sup> whereas the other cases involved accidents outside of Canada where defendants were both Canadian and foreign.<sup>45</sup> In

partner was injured while using the resort's exercise equipment and was rendered a paraplegic. Suit was brought in Ontario against several defendants, including the Cuban resort and the Cayman corporation that operated and managed the resort. *Id.* at paras. 9–12. Service on the foreign defendants in both cases was based on the procedural rules of Ontario, *see id.* para. 7; para. 13, which authorize service outside the jurisdiction, *inter alia*, where the contract was made in Ontario, Ont. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 17.02(f)(i); where the defendants carry on business in Ontario, *id.* at s. 17.02(p); where damages were sustained in Ontario, *id.* at s. 17.02(h); and where out-of-province defendants are necessary and proper parties to a proceeding properly brought against another person served in Ontario, *id.* at s. 17.02(o).

41. *Muscutt v. Courcelles* (2002), 60 O.R. 3d 20 (Can. Ont. C.A.); *Leufkens v. Alba Tours Int'l Inc.* (2002), 60 O.R. 3d 84 (Can. Ont. C.A.); *Lemmex v. Sunflight Holidays Inc.* (2002), 60 O.R. 3d 54 (Can. Ont. C.A.); *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. 3d 76 (Can. Ont. C.A.); *Gajraj v. DeBernardo* (2002), 60 O.R. 3d 68 (Can. Ont. C.A.). *See generally* JEAN-GABRIEL CASTEL & JANET WALKER, 1 CANADIAN CONFLICT OF LAWS § 11.5, at 11-37–11-45 (6th ed. 2005).

42. *Muscutt*, 60 O.R. 3d 20, para. 10; *Leufkens*, 60 O.R. 3d 84, para. 11; *Lemmex*, 60 O.R. 3d 54, para. 26; *Sinclair*, 60 O.R. 3d 76, para. 11; *Gajraj*, 60 O.R. 3d 68, para. 11. *See also* Ont. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 17.02(h) (authorizing service outside Ontario for claims “in respect of damage sustained in Ontario arising from tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed”). In Canada, judicial jurisdiction, at least in the first instance, is a function of provincial law. There is now a uniform statute on judicial jurisdiction and forum non conveniens—the Uniform Court Jurisdiction and Proceedings Transfer Act (CJPTA)—but it has only been adopted in a few provinces, not including Ontario. *See* Uniform Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, C. 28 (Can.), *available at* [http://www.ulcc.ca/en/us/Uniform\\_Court\\_Jurisdiction\\_+\\_Proceedings\\_Transfer\\_Act\\_En.pdf](http://www.ulcc.ca/en/us/Uniform_Court_Jurisdiction_+_Proceedings_Transfer_Act_En.pdf); *Enforcement Law Projects*, UNIFORM LAW CONFERENCE OF CAN., <http://www.ulcc.ca/en/cls/index.cfm?sec=3> (last visited Feb. 16, 2012). The CJPTA contains a list of provisions (for instance, contracts claims where the contractual obligations were to be performed in the province and tort claims where the tort was committed in the province) that presumptively establish a “real and substantial connection.” CJPTA, *supra*, s. 10. In addition, it remains open to the plaintiff to establish other connections. *See generally* Vaughan Black & Stephen G.A. Pitel, *Reform of Ontario's Law on Jurisdiction*, 47 CANADIAN BUS. L.J. 469, 479 (2009) (stating that the CJPTA's list is not exclusive and it “remains open to the plaintiff to establish the required connection in cases not wholly covered by the listed presumptions”). The Canadian Supreme Court, in its April 18, 2012, decision in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (affirming the *Charron* and *Van Breda* decisions), clarified that the factors in rule 17.02 of the Ontario Rules of Civil Procedure relate to situations in which service out of the province is allowed and were not adopted as conflicts rules of jurisdiction. However, because the rules represent an “expression of wisdom and experience drawn from the life of the law,” some of them “are based on objective facts that may also indicate when courts can properly assume jurisdiction.” *Id.* at para. 83.

43. *Muscutt*, 60 O.R. 3d 20, paras. 4–5; *Leufkens*, 60 O.R. 3d 84, paras. 2–9; *Lemmex*, 60 O.R. 3d 54, paras. 2–14; *Sinclair*, 60 O.R. 3d 76, paras. 2–6; *Gajraj*, 60 O.R. 3d 68, paras. 2–5.

44. *Muscutt*, 60 O.R. 3d 20, paras. 4–7.

45. *Leufkens*, 60 O.R. 3d 84, paras. 2–9; *Lemmex*, 60 O.R. 3d 54, paras. 2–11; *Gajraj*, 60 O.R. 3d 68, paras. 2–5; *Sinclair*, 60 O.R. 3d 76, paras. 2–6.

applying the Ontario rule, the Court of Appeal drew a distinction between the provincial and foreign-country defendants, permitting jurisdiction over the Canadian defendants but not the foreign defendants.<sup>46</sup> The court observed that as to interprovincial cases, the Canadian judicial structure was arranged such that there was no basis for concern about differential qualities or substantial burdens among provincial courts.<sup>47</sup> Moreover, the court also recognized a distinction between interprovincial and international cases with respect to choice of law, stating there was “less need to worry about sovereignty or the difficulty of applying ‘foreign’ law where the act in question occurs in another province rather than another country.”<sup>48</sup>

Jurisdiction in Canada has been understood to require not only a “real and substantial connection” but also to satisfy a standard of “order and fairness,”<sup>49</sup> although the relationship between those requirements was somewhat unclear and remains unsettled after the Canadian Supreme Court’s decision in *Club Resorts*.<sup>50</sup> In any event, the inquiry into order and fairness had led courts in Canada to call particular attention to the transnational case. In *Muscutt*, the Court of Appeal for Ontario identified a multi-factor test that expressly includes

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46. See *Leufkens*, 60 O.R. 3d 84, para. 35; *Lemmex*, 60 O.R. 3d 54, para. 47.

47. See *Muscutt*, 60 O.R. 3d 20, paras. 95, 97.

48. *Id.* at para. 97. The Court of Appeal in *Charron-Van Breda* modified the *Muscutt* test to some degree, noting that factors such as whether the case was international or interprovincial and other comity concerns would be considered as part of the “real and substantial connection” analysis rather than as separate factors in a jurisdictional analysis. *Charron Estate v. Village Resorts Ltd.* (2010), 98 O.R. 3d 721, paras. 106–08. The Supreme Court of Canada’s recent decision in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, affirming the Court of Appeal’s rulings, did not address the question of whether there should be a different standard for an international (as contrasted with an interprovincial) case.

49. See generally Janet Walker, *Beyond Real and Substantial Connection: The Muscutt Quintet*, in ANNUAL REVIEW OF CIVIL LITIGATION 61, 74, 77 (Todd Archibald & Michael Cochrane eds., 2002) (discussing Canadian courts’ jurisdictional test).

50. Compare Janet Walker, *Muscutt Misplaced: The Future of Forum of Necessity Jurisdiction in Canada*, 48 CANADIAN BUS. L.J. 135, 136 (2009) (suggesting that the constitutional requirement of order and fairness does not necessarily limit jurisdiction but may serve as a framework for jurisdiction and allow for a forum of necessity jurisdiction), with Tanya J. Monestier, *A “Real and Substantial” Mess: The Law of Jurisdiction in Canada*, 33 QUEEN’S L.J. 179, 185 (2007) (“[I]t is contrary to the very foundation of the real and substantial connection test for courts to independently consider factors such as fairness to the individual litigants in evaluating jurisdiction *simpliciter*.”). In *Club Resorts*, the Canadian Supreme Court noted that:

[A] clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met.

*Club Resorts Ltd.*, 2012 SCC 17, para. 79. The court also stated that principles such as fairness, efficiency, or comity “may influence the selection of factors or the application of the method of resolution of conflicts,” and such concerns “might rule out reliance on some particular facts as connecting factors.” *Id.* at para. 84.

whether “the case is interprovincial or international in nature.”<sup>51</sup> Two other *Muscutt* factors—“[t]he court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdiction basis,” and “[c]omity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere”<sup>52</sup>—have special resonance in the transnational case. The first requires the court to determine whether the court at the foreign defendant’s home would exercise jurisdiction in similar circumstances and whether a provincial court would recognize a judgment rendered on those jurisdictional grounds.<sup>53</sup> The second looks to whether the judgment in the Canadian province would be recognized in the country where enforcement of a judgment against the foreign defendant would likely take place.<sup>54</sup>

These aspects of the jurisdictional test in Canada made the jurisdictional analysis even more speculative and costly than the present U.S. due process analysis. There was often conflicting expert testimony about issues of mirror-jurisdiction and likely enforcement in a foreign jurisdiction; thus, the jurisdictional inquiry was more complicated than it needed to be. This complexity may explain why the Supreme Court of Canada decided to reformulate its approach to jurisdiction more generally in its recent decision in *Club Resorts Ltd. v. Van Breda*, decided just as this Article was going to print. The Court expressed a desire to ensure greater predictability and consistency in jurisdictional analysis and the need for greater direction on how to apply the “real and substantial connection” test. To that end, the Court identified a list of presumptive connecting factors that would constitute a “real and substantial connection,” observing that other factors might be identified over time. In addition, the Court noted that the presumption is not irrebuttable, but that the burden of rebutting it rests on the party challenging jurisdiction. The presumption can be rebutted by demonstrating that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.<sup>55</sup>

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51. *Muscutt*, 60 O.R. 3d at 49. The Canadian Supreme Court had not formally adopted the *Muscutt* factors, although Justice Bastarache cited the *Muscutt* factors approvingly in a Supreme Court case involving choice of law. See *Castillo v. Castillo*, [2005] 3 S.C.R. 870 (Can.), para. 45 (noting the eight *Muscutt* factors: “the connection between the forum and the plaintiff’s claim; the connection between the forum and the defendant; unfairness to the defendant in assuming jurisdiction; unfairness to the plaintiff in not assuming jurisdiction; the involvement of other parties to the suit; the court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; whether the case is interprovincial or international in nature; and comity and the standard of jurisdiction, recognition and enforcement prevailing elsewhere.” (citing *Muscutt*, 60 O.R. 3d at 45–51)).

52. *Muscutt*, 60 O.R. 3d at 48, 51.

53. *Id.* at 48–49, paras. 93–94.

54. *Id.* at 51, para. 102.

55. *Club Resorts Ltd.*, 2012 SCC 17, paras. 81–100.

3. *Comparisons Between the United States and Canada with Respect to a Separate Standard for Transnational Cases*

a. *The Relationship Between the Defendant and the Forum*

The constitutional standard for jurisdiction as developed in Canada is different from that in the United States in a number of ways. One key aspect of the constitutional due process jurisdiction jurisprudence as developed in the United States—and emphasized in both *Goodyear* and *Nicastro*—is the emphasis on the connection between the forum and the *defendant*.<sup>56</sup> Because it is the defendant’s relationship with the forum that is the “touchstone” of the U.S. constitutional analysis, there is already a built-in concern for the defendant. In Ontario (as in many other provinces), however, there are several broader rules thought to justify the assertion of jurisdiction—for example, where the plaintiff has suffered damages,<sup>57</sup> or where an out-of-province defendant would be a necessary party to a proceeding in which a defendant was served in the province<sup>58</sup>—and thus, perhaps a greater need for concern for a foreign defendant in such a case. However, the Supreme Court of Canada, in its recent opinion in *Club Resorts Ltd. v. Van Breda*, observed that the use of damage sustained in a place as a connecting factor “risks sweeping into that jurisdiction claims that have only a limited relationship with the forum” because the injury occurs in one place but the pain and inconvenience resulting from it occurs in another country and later in a third one.<sup>59</sup> Accordingly, the Court held that the fact that damage was sustained in the forum could not be accorded effect as a presumptive connective factor (without distinguishing between the interprovincial or international context). In affirming jurisdiction in both *Charron* and *Van Breda*, the Supreme Court relied upon other connecting factors. In *Charron*, the fact Mrs. Charron suffered damage in Ontario upon her return to Ontario after her husband’s death in Cuba did not constitute a presumptive connecting factor within the meaning of the “real and substantial connection” test. However, the Court found that the foreign defendant carried on business in Ontario and derived benefits from the presence of an office in Ontario held out to the public as representing the brand defendant used to promote its business, thereby establishing a presumptive connecting factor. Because its business activities in Ontario were directed at attracting Ontario residents to stay as paying guests at the Cuban resort where the accident occurred, the claim was found to be related

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56. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (quoting *Int’l Shoe*, 326 U.S. at 316).

57. See Ont. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 17.02(h).

58. See *id.* at s. 17.02(o).

59. *Club Resorts Ltd.*, 2012 SCC 17, para. 89. The Court of Appeal had also declined to give presumptive effect to the factors set out in the Ontario Rules 17.02(h) (damage sustained in Ontario) and 17.02(o) (necessary or proper party). *Id.* at para. 55.

to the defendant's activities and the presumption was not rebutted. In *Van Breda*, the Court found that there was a sufficient connection between the subject matter of the litigation and Ontario on the basis of a contract made in Ontario by an independent travel agent representing the foreign hotel and the male of the couple, whether the benefit of the contract was extended to his female partner.<sup>60</sup>

*b. The Relevance of Recognition and Enforcement*

The experience in Canada also highlights the relationship between the rules of direct jurisdiction and rules of indirect jurisdiction on recognition and enforcement. As noted above, whether or not a potential Canadian judgment would be recognized abroad had become part of the jurisdictional inquiry in Canada.<sup>61</sup> And, although the issue of recognition and enforcement of a potential judgment might have some influence on how jurisdictional rules are shaped and is clearly significant as a practical matter to any lawyer bringing suit, there is no reason why recognition and enforcement need be part of the formal jurisdictional analysis. In many cases, particularly those against large multi-national corporations with assets everywhere, recognition and enforcement of a judgment will not be an issue. For example, a U.S. judgment rendered against a foreign defendant will be able to be enforced against assets that the defendant has in the United States. But in those cases where enforcement abroad will be necessary, a U.S. judgment against a foreign-country defendant may never be enforced, and this will be particularly true where U.S. jurisdiction is deemed exorbitant.<sup>62</sup> This may be one reason to applaud the Supreme Court's decision in *Goodyear*, which has potentially put limits on the ever expanding concept of general "doing business" jurisdiction and brings general jurisdiction more closely in line with that of other countries.

As for recognition and enforcement of a U.S. judgment abroad in a product liability case like *Nicastro*, the exercise of U.S. jurisdiction would not be perceived as exorbitant. As noted earlier, place of injury is a common basis of

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60. *Id.* at paras. 114–23.

61. See *supra* text accompanying note 54. To what extent this will continue to be a part of the jurisdictional analysis after the Supreme Court of Canada's decision in *Club Resorts Ltd.* is unclear. *Club Resorts Ltd.*, 2012 SCC 17, para. 92. In another case, decided on the same day, the Court assessed the enforceability abroad of a Canadian judgment as part of its forum non conveniens analysis. *Breeden v. Black*, 2012 SCC 19, paras. 23, 35–36, available at *Judgments of the Supreme Court of Canada*, SUPREME COURT OF CANADA, [http://scc.lexum.org/en/2012/2012scc19/2012\\_scc19.html](http://scc.lexum.org/en/2012/2012scc19/2012_scc19.html) (last visited Apr. 19, 2012). In *Club Resorts*, the Canadian Supreme Court also rejected a forum non conveniens motion, identifying factors that may be considered on such a motion, including the enforceability abroad of a Canadian judgment. *Club Resorts Ltd.*, 2012 SCC 17, para. 110.

62. See Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 351 (2004) [hereinafter Silberman, *Jurisdictional Rules and Recognition Practice*].

jurisdiction in most countries. To the extent there is resistance to the enforcement of U.S. product liability judgments abroad, it is the result of other aspects of U.S. litigation, such as the existence of rules of strict liability, broad discovery, and large jury awards.<sup>63</sup>

A misunderstanding about the relationship between an assertion of direct jurisdiction and an acceptance of “indirect jurisdiction” in the context of recognition and enforcement of a foreign judgment may well have contributed to the plurality’s concerns about the reach of jurisdictional authority in *Nicastro*.<sup>64</sup> The plurality (as well as plaintiff’s counsel in response to a question at oral argument) assumed that if “purposeful availment” were found in the context of an assertion of U.S. jurisdiction over the foreign manufacturer McIntyre, a court in the United States would have to “honor a judgment by a court of Madras against an American manufacturer who had as little contact with Madras as exists here.”<sup>65</sup> As Justice Ginsburg pointed out in her contribution to that colloquy, courts in the United States presently have a liberal policy of recognition and enforcement of foreign-country judgments.<sup>66</sup> And it is accurate that under existing practice, courts have tended to adopt a “mirror image” standard in assessing the jurisdiction of a foreign court.<sup>67</sup> But no such equivalence is required. Under English law, for example, the liberal grounds acceptable for assertions of direct jurisdiction of English courts are not regarded as appropriate for a foreign court’s exercise of jurisdiction to justify recognition and enforcement in England; England accepts only the limited grounds of

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63. See, e.g., Linda J. Silberman, *Some Judgments on Judgments: A View from America*, 19 KING’S L.J. 235, 245 (2008) [hereinafter Silberman, *Some Judgments*] (noting “a resistance to enforcement of US judgments abroad on the basis of punitive damage awards or ‘excessive’ jury verdicts in tort cases”); Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 302 (1989) (discussing issues that may prevent complete recognition and enforcement of U.S. products liability judgments).

64. “Direct jurisdiction” is an assertion of jurisdiction over a defendant by a court in order to provide a forum in which a plaintiff may bring its action. “Indirect jurisdiction” refers to the authority exercised by a court of a country whose judgment is sought to be recognized or enforced in another country.

65. During the oral argument, that question was posed by Justice Scalia to plaintiff’s counsel. Transcript of Oral Argument at 33, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343) [hereinafter *J. McIntyre* Transcript]. During the subsequent colloquy, Justice Breyer also expressed concerns about recognizing and enforcing a foreign judgment against an American company when there was limited activity by the defendant. *Id.* at 34–35.

66. See *id.* at 35. Recognition and enforcement of foreign judgments in the United States is generally a matter of state law. See Ronald A. Brand, *Enforcement of Foreign Money Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 262 (1991). The standards are reflected in common law decisions and in case law interpreting the Uniform Acts—either the *Uniform Foreign Money-Judgments Recognition Act* (1962), or the revised *Uniform Foreign-Country Money Judgments Recognition Act* (2005). UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. pt. 2, 43 (2002) [hereinafter UFMJRA]; UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, 13 U.L.A. pt. 2, 21 (Supp. 2011) [hereinafter UFCMJRA].

67. See Silberman, *Jurisdictional Rules and Recognition Practice*, *supra* note 62, at 351, 353.

presence, residence, and various forms of consent or submission as appropriate jurisdictional bases for indirect jurisdiction.<sup>68</sup> The same is true in Switzerland, where the jurisdictional grounds that will support a foreign judgment are more restrictive than the rules under which a Swiss court will itself take jurisdiction in cross-border cases.<sup>69</sup> In Canada, until the Supreme Court decisions in *Morguard Investments Ltd. v. De Savoye*<sup>70</sup> and *Beals v. Saldanha*,<sup>71</sup> the standards for indirect jurisdiction with respect to recognition of interprovincial and foreign-country judgments were substantially more limited than the rules for assertions of direct jurisdiction. Notwithstanding *Morguard* and *Beals*'s identification of a correlation between the standards for direct and indirect jurisdiction, there may remain distinctions between them.<sup>72</sup> It may well be that the Justices who joined the plurality in *Nicastro* had a sense that an assessment of the appropriate extraterritorial reach of judicial jurisdiction could best be understood by viewing it from the perspective of an American defendant that would be subject to jurisdiction abroad.<sup>73</sup> But they were wrong to have assumed that by upholding jurisdiction they were necessarily endorsing a standard whereby a court in the United States would be required to accept a foreign country's assertion of jurisdiction on that basis at the recognition and enforcement stage.<sup>74</sup> Nonetheless, given the decision in *Nicastro*, U.S. manufacturers who sell products abroad and are subject to suit at the place of injury in the absence of targeting are unlikely to have a foreign judgment enforced against them in the United States. Thus, the *Nicastro* standard will also be the standard for recognition and enforcement in the United States—clearly where the defendant is a U.S. defendant and probably even where the defendant is foreign.

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68. See 1 DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 14R-048, at 588–89 (Sir Lawrence Collins et al. eds., 14th ed. 2006).

69. See NOREL ROSNER, CROSS-BORDER RECOGNITION AND ENFORCEMENT OF FOREIGN MONEY JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 301–02 (Ulrik Huber Institute for Private Law, University of Groningen 2004).

70. [1990] 3 S.C.R. 1077, 1092 (Can.) (interprovincial judgment).

71. [2003] 3 S.C.R. 416, 433 (Can.) (foreign-country judgment).

72. See Janet Walker, *Are National Class Actions Constitutional? A Reply to Hogg and McKee*, 48 OSGOODE HALL L.J. 95, 119 (2010).

73. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (plurality opinion).

74. Under present law, recognition and enforcement is a matter of state law. The UFMJRA and the recent revision to that Act—the UFCMJRA—provide that a foreign-country judgment may not be refused recognition if certain standards are met. See UFMJRA, *supra* note 66, § 5(a), at 73; UFCMJRA, *supra* note 66, § 5(a), at 31. Place of injury is not one of the specified grounds, although both Acts provide that other bases of jurisdiction may be recognized. See UFMJRA § 5(b); UFCMJRA § 5(b). As noted, most courts have found an acceptable basis of jurisdiction if U.S. due process standards are satisfied. See Silberman, *Jurisdictional Rules and Recognition Practice*, *supra* note 62, at 351–52.

*B. Looking Ahead: Asserting Direct Jurisdiction*

The Supreme Court's restrictive interpretation of constitutional jurisdictional reach in *Nicastro* may be the catalyst for federal legislation to change the result to permit jurisdiction over a foreign defendant who exploits the U.S. market as a whole. Certainly, there has been significant criticism of the plurality decision in *Nicastro*,<sup>75</sup> including a vigorous dissent by Justices Ginsburg, Kagan, and Sotomayor.<sup>76</sup> McIntyre's counsel conceded in oral argument that the defendant "wanted to sell its product anywhere that the distributor could find," but then insisted that although the United States was "targeted" as the market, no individual state was actually targeted.<sup>77</sup> That argument is accepted by the plurality, along with an elaborate discourse about the sovereign authority of the individual states.<sup>78</sup>

As Justice Ginsburg's dissent argues, it is difficult to fathom how McIntyre is not targeting each of the various states in the United States when it is attempting to sell as many machines as it can in the U.S. market.<sup>79</sup> Moreover, as she points out, New Jersey—which processes more metal than any other U.S. state—was an obvious target for sales of McIntyre's product.<sup>80</sup>

The fact that foreign manufacturers usually target the United States as a whole and not a particular state has led to proposals in the past to require foreign manufacturers who have caused injury to U.S. plaintiffs in product liability cases to answer in courts in the United States. As the federal rule makers did

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75. See, e.g., Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465 (2012); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481 (2012); John Vail, *Six Questions in Light of J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 513 (2012); Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245 (2011) (noting, with regard to *McIntyre*, that "[t]he Supreme Court performed miserably"); Allan Ides, *A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. (forthcoming 2012); Alan B. Morrison, *The Impacts of McIntyre on Minimum Contacts*, 80 GEO. WASH. L. REV. 1, 12 (2011) (noting that "the legal world surely would have been better off if [*McIntyre*] had never been decided"); Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 241 (2011) (noting that *McIntyre* and *Goodyear* "may serve to increase the confusion of the lower courts about the requirements for establishing both general and specific jurisdiction").

76. See *J. McIntyre*, 131 S. Ct. at 2794 (Ginsburg, J., dissenting).

77. See *J. McIntyre* Transcript, *supra* note 65, at 5–7.

78. See *J. McIntyre*, 131 S. Ct. at 2789–90 (2011) (plurality opinion) ("[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States. Furthermore, foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums. . . . These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.").

79. See *id.* at 2801 (Ginsburg, J., dissenting).

80. See *id.*

previously in Rule 4(k)(2) with respect to federal question cases,<sup>81</sup> proposed bills for federal legislation focused on foreign defendant's contacts with the United States as a whole. For example, a 1987 proposal would have authorized federal court jurisdiction over foreign defendants who injured United States claimants in the United States if the foreign defendants "knew or reasonably should have known that the product would be imported for sale or use in the United States."<sup>82</sup> The bill would have made the federal court in the district in which the injury occurred the appropriate United States court—in effect, a place of injury venue rule to displace the broader venue option for alien defendants under § 1391(d).<sup>83</sup> A more recent proposal is the Foreign Manufacturers Legal Accountability Act of 2011,<sup>84</sup> which would require foreign manufacturers that desire to distribute certain products in the United States to establish registered agents in the United States, specifically in a state with a "substantial connection to the importation, distribution, or sale of the covered product."<sup>85</sup> Noting that many Americans are unable to recover damages from foreign manufacturers for lack of jurisdiction and that the inability to apply U.S. tort law to such manufacturers places domestic manufacturers at a competitive disadvantage,<sup>86</sup> the bill seeks to ensure that foreign manufacturers "are subject to the jurisdiction of State and Federal courts in at least one State."<sup>87</sup> Manufacturers would not be permitted to sell certain products in the United States unless they registered an agent for service of process and consented to the jurisdiction of the State in which the registered agent is located.<sup>88</sup>

Although aimed in the right direction, the bill has several flaws, including the failure to limit jurisdiction to cases where the injury occurs in the United States as the result of the distribution of the product in the United States.<sup>89</sup> Also, it appears to impact the jurisdiction of state courts, which may present some federalism issues.<sup>90</sup> More generally, however, the underlying philosophy of the

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81. FED. R. CIV. P. 4(k)(2).

82. S. 1996, 100th Cong. (1987) (proposing 28 U.S.C. § 1658, entitled "Personal Jurisdiction over Citizens or Subjects of Foreign States in Certain Actions"). See also H.R. 3662, 100th Cong. (1987) (proposing a bill to amend U.S. District Court jurisdiction regarding certain actions involving U.S. citizens and foreign persons).

83. See 28 U.S.C. § 1391(d) (2006).

84. See S. 1946, 112th Cong. (2011). Prior bills were introduced and hearings held in the House and Senate in 2009 and 2010. See, e.g., *Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Comm. on the Judiciary*, S. 1606, 111th Cong. (2009) (discussing defective products that are manufactured outside of the United States but cause injuries to persons in the United States).

85. S. 1946, § 5(a)(2).

86. See *id.* § (2).

87. *Id.* § (3).

88. *Id.*

89. See *id.* § 5(c)(1).

90. See *id.* § 8 (stating that this act trumps any provision of state law that is inconsistent with it).

legislation, which is based upon “consent,” highlights the tension that exists as the result of *Nicastro* as to whether jurisdiction is to be considered a function of “sovereign authority” and consent, as Justice Kennedy would have it,<sup>91</sup> or predicated upon minimum contacts and fairness, as Justice Ginsburg suggests.<sup>92</sup>

Justice Ginsburg’s dissent in *Nicastro* offers an interesting variation on the concept of contacts with the United States as a whole. She would probably agree that an approach that looked to the foreign defendant’s contacts with the United States as a whole would require action by Congress or the rule makers. Treating contacts with the United States as a whole to assess due process may be sensible as regards a foreign-country defendant with respect to its amenability to jurisdiction in the United States, although there are specific concerns about the exercise of general jurisdiction that indicate nationwide contacts should be limited to the exercise of specific jurisdiction since the United States is likely to have a more attenuated regulatory interest in providing a forum when general jurisdiction is involved. As to specific jurisdiction, Justice Ginsburg offers a common-sense approach that does not require adoption of nationwide contacts through federal legislation. With respect to a foreign-country manufacturer that enlists a U.S. distributor to develop a market throughout the United States, Justice Ginsburg’s dissent in *Nicastro* argues that such a manufacturer certainly can be said to “purposefully avail[] itself” of a United States market nationwide and therefore also of the state into which the product is sold and causes injury.<sup>93</sup>

### III. A BRIEF COMPARATIVE LOOK AT JUDICIAL JURISDICTION IN TRANSNATIONAL CASES

In assessing the Supreme Court’s decisions in *Goodyear* and *Nicastro*, it is useful to focus on some of the unique features of the United States jurisprudence as compared with that of other systems. A transnational case offers the opportunity to examine the values that underlie the framework of a jurisdictional regime.

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91. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787–88 (2011) (plurality opinion). Justice Kennedy refers to a defendant “submit[ting] to a State’s authority” in a variety of ways, including “submission through contact with and activity directed at a sovereign” with respect to suits “connect[ed] with the defendant’s activities” in the forum. *Id.*

92. *Id.* at 2798–99 (Ginsburg, J., dissenting) (“Whatever the state of academic debate over the role of consent in modern jurisdictional doctrines, the plurality’s notion that consent is the animating concept draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful.”).

93. *Id.* (internal quotation marks omitted). That such a standard may still emerge is possible. The two concurring Justices, Breyer and Alito, seem to have joined the plurality on the basis that the record indicated only one machine was sold and shipped by the distributor into New Jersey. *See id.* at 2791 (Breyer, J. & Alito, J., concurring). The additional facts about the New Jersey market, such as the size and scope of New Jersey’s scrap-metal business described in Justice Ginsburg’s opinion, were not sufficiently presented in the record. *Id.* at 2792.

In the United States, it is the affiliation between the *defendant and the forum* that is critical, and this is true for the interstate as well as the transnational case. Whether the values reflected are those about sovereignty and consent to authority or the sense of a fundamental principle of what is fair, remains clouded after the two recent Supreme Court decisions. In a legal system such as that of France, the interest of the state in providing a forum for its nationals—whether as plaintiff or defendant—justifies the exercise of jurisdictional authority in certain cases,<sup>94</sup> although there has been some pushback from that in recent decisions.<sup>95</sup> In other systems, the place where the events occur and where witnesses are located are significant factors in shaping the rules of jurisdiction because of a concern about litigational convenience and because those events provide a regulatory justification to exercise authority over the matter.<sup>96</sup> Often, the rules of transnational jurisdiction in a particular country will reflect more than one of these interests.

One can find the approach of many civil law countries reflected in the approach of the European Regulation (the Brussels Regulation),<sup>97</sup> keeping in mind that it is a regional transnational regime rather than a broader set of jurisdictional rules for all transnational cases. But it is a useful example because the European Union (EU) rules are similar to the national jurisdictional rules of many countries. Moreover, there is now an ongoing consideration of a “Recast” of the Regulation where, if enacted, the Regulation would displace national rules of judicial jurisdiction in all EU countries and, as reformulated and amended with certain additions for defendants from third states, would apply to non-EU

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94. See CODE CIVIL [C. CIV.] art. 14, 15 (Fr.), translated in THE FRENCH CIVIL CODE 4 (John H. Crabb trans., rev. ed. 1995). Article 14 provides: “A foreigner, even if not residing in France, may be cited before French courts for the execution of obligations by him contracted in France with a Frenchman; he may be brought before the courts of France for obligations by him contracted in foreign countries towards Frenchmen.” *Id.* Article 15 provides: “A Frenchman may be brought before a court of France for obligations by him contracted in a foreign country, even with a foreigner.” *Id.* Other rules of domestic jurisdiction set forth in Articles 42 through 48 of the New Code of Civil Procedure—which include the place of performance of the contract or the place where the wrongful act was done or loss or damage incurred—apply in international cases as well. See, e.g., NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] arts. 46 (Fr.), available in English at Code of Civil Procedure, LEGIFRANCE.GOUV.FR, 4–5 (Sept. 30, 2005), [http://195.83.177.9/upl/pdf/code\\_39.pdf](http://195.83.177.9/upl/pdf/code_39.pdf).

95. See generally Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 473, 487–499 (2006) (providing an extensive survey of the past and current use of Article 14).

96. See, e.g., ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 21(1) (Ger.), translated in GERMAN COMMERCIAL CODE & CODE OF CIVIL PROCEDURE IN ENGLISH 194 (Charles E. Stewart trans., 2001) [hereinafter GERMAN CIVIL PROCEDURE] (where a person maintains a commercial establishment and the claim relates to the conduct of the business at such establishment); *Id.* § 29(1) (for a dispute arising out of contractual relations or the existence thereof at a place at which the obligation in dispute is to be performed); *Id.* § 32 (where the tort was committed over complaints relating to torts).

97. EU Regulation, *supra* note 12.

defendants, including U.S. defendants.<sup>98</sup> However, the views of some experts invited by the European Parliament to comment on the Recast Proposal indicate reservations to a universal European approach to jurisdiction.<sup>99</sup>

In general, the EU view is that litigation should take place at the home of the defendant (i.e., its domicile)<sup>100</sup> or in one of a limited number of places based on particular events.<sup>101</sup> As regards general jurisdiction—suit on any claim—the domicile of a corporation or a legal entity is its statutory seat, or central administration, or principal place of business.<sup>102</sup> Thus it is substantially more limited than the U.S. concept of general “doing business” jurisdiction, and much closer to the notion of being sued at home. It is this “at home” concept that is picked up by Justice Ginsburg in her opinion in *Goodyear*,<sup>103</sup> and is the focus of Professor Stein’s paper in this Symposium.<sup>104</sup> As for specific jurisdiction, or as the EU knows it, special jurisdiction, the occurrence of events in the forum—such as the place of performance in a contract case, the place of the commission of the tortious act or the effect of the injury in a tort case,<sup>105</sup> or claims arising

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98. See *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, at 3, COM (2010) 748 final (Dec. 14, 2010) [hereinafter EU Recast] (proposing changes to the current Regulation, which only applies where the defendant is domiciled in the EU).

99. Among the criticisms are that unilateral renunciation of natural jurisdiction without reciprocity is inappropriate, that certain jurisdictional rules were designed for the purpose of European integration and not always appropriate to cover defendants domiciled in third states, and the redesigned system could introduce new complexities. See Andrew Dickinson, *Note on The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, 12 (Sept. 15, 2011), PE 453.200, [hereinafter *Note on Recast*], <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=49431>; Alexander Layton, *Note on Recast*, 9–11 (Sept. 15, 2011), PE 453.203, <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=49443>; Illaria Pretelli, *Note on Recast*, 22–28 (Sept. 15, 2011), PE 453.205, <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=60669>. Cf. Horatia Muir Watt, *Note on Recast*, 12–15 (Aug. 15, 2011), PE 453.199, <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=49450> (last visited Feb. 18, 2012) (“There is no reason not to extend the existing rules, if exclusion of foreign defendants no longer makes sense in view of the vastly accelerated and interconnected economic and social context in which we now live.”).

100. See EU Regulation, art. 2, *supra* note 12, at 3.

101. See, e.g., art. 5, *id.* at 4.

102. Art. 60, *id.* at 13.

103. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”). Justice Ginsburg further stated that “the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Id.* at 2853–54.

104. Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 523 (2012).

105. The European Court of Justice interpreted the provision in Article 5(3) of the EU Regulation, that suit may be brought in matters of tort “‘where the harmful event occurred’ or may

from the activities of a branch—are bases for jurisdiction because they offer a litigation-convenient forum and because the state may have a regulatory interest in asserting its authority.<sup>106</sup> Specialized circumstances—concern for the “little guy”—lead to specialized rules for maintenance creditors,<sup>107</sup> consumers,<sup>108</sup> and insureds,<sup>109</sup> who are permitted to sue defendants at the domicile of the plaintiff (or habitual residence if it is a claimant seeking support). There is also a desire to have a single litigation where there are multiple defendants, and that is the policy behind the rule that confers jurisdiction over defendants when one defendant is domiciled in the forum state, if the claims are closely connected and it is expedient to hear them together to avoid irreconcilable judgments.<sup>110</sup> For similar reasons, another provision permits a person to be sued as a third party in an action in a warranty or other third party proceedings in the court seized of the original proceeding, unless the proceedings were instituted with the object of undermining the jurisdiction of the otherwise competent court.<sup>111</sup>

The overall effect of the Regulation is to identify a limited number of possible fora from which a plaintiff can choose where to sue, thus minimizing opportunities for forum shopping among the Member States. To the extent that certain bases of jurisdiction are deemed inappropriate or “exorbitant,” they are expressly listed and prohibited.<sup>112</sup> Exorbitant bases of jurisdiction include nationality of the plaintiff, property of the defendant, and presence of the defendant in the forum.<sup>113</sup> The EU rules (and many similar national rules) reflect other values of civil law jurisprudence: there are formal rules imposed; there is no overlay of residual constitutional limitation discretion, either through overriding constitutional limitations on jurisdictional authority (such as through

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occur,” to refer to either the place of the tortious act or the place or the place of injury. Case 21/76, *Bier v. Mines de Potasse d’Alsace S.A.*, 1976 E.C.R. 1735, 1743 (quoting EU Regulation, *supra* note 12, at 4). However, in the specific context of defamation, the Court of Justice imposed a more restrictive interpretation, holding that a plaintiff could sue at the place where the publisher of the defamatory publication is established for all of the harm caused, but could only sue in the place of distribution for the damage caused in that State, even if that State was the State of the plaintiff’s domicile or habitual residence. See Case C-68/93, *Shevill v. Press Alliance S.A.*, 1995 E.C.R. I-450, I-465. In a recent case, the European Court modified that rule, in a case involving the alleged infringement of personality rights by means of content placed on an internet website, to permit suit to be brought for all of the damage in the place where the alleged victim has his centre of interests, which will often correspond to the habitual residence. See Joined Cases C-509/09, *eDate Adver. GmbH v. X*, 2011 E.C.R. \_\_\_ & C-161/10, *Martinez v. MGN Ltd.*, 2011 E.C.R. \_\_\_ at para. 52 available at <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=509/09&td=ALL>.

106. See EU Regulation, art. 5, *supra* note 12, at 4.

107. Art. 5(2), *id.*

108. Art. 15(1) & art. 16, *id.* at 6–7.

109. Art. 9(1)(b), *id.* at 5.

110. Art. 6(1), *id.* at 4–5.

111. Art. 6(2), *id.* at 5.

112. See Annex I, *id.* at 18. Of course, any ground of jurisdiction not provided for in the Regulation is also prohibited.

113. *Id.*

the Due Process Clause in the United States or order and fairness in Canada<sup>114</sup>) or through retained discretion to resist the exercise of jurisdiction because another forum is more desirable (as in the common law doctrine of *forum non conveniens*). The EU does reinforce its emphasis on the avoidance of forum shopping and limited fora by adopting a strict first-in time *lis pendens* rule for situations in which parallel litigation involving the same claims may be brought.<sup>115</sup>

The EU Recast offers an interesting perspective in thinking about transnational cases. By establishing “European rules” for jurisdiction, the Recast would eliminate various exorbitant assertions of jurisdiction now contained in the national laws of various EU countries.<sup>116</sup> Thus, for example, the French Article 14 nationality of the plaintiff basis of jurisdiction is eliminated, as is Article 23 of the German Code, permitting jurisdiction on the basis of the presence of property in the forum, as well as transient (presence) jurisdiction in the United Kingdom. Most of the jurisdictional provisions now found in the EU Regulation are extended to reach defendants domiciled in third countries. Interestingly, however, Article 6(1), which provides for jurisdiction over multiple defendants when any one of them is domiciled in the EU, is only applied to other defendants domiciled in the EU.<sup>117</sup> This exception may suggest a special concern for the burdens on a non-EU defendant.

Although eliminating some exorbitant bases of jurisdiction, the proposed EU Recast also reflects the view that more expansive jurisdiction may be necessary when there is no Member State that can take jurisdiction.<sup>118</sup> The Recast provides that in such a situation, jurisdiction lies with the courts of the Member State where property belonging to the defendant is located, provided that the value of the property is not disproportionate to the value of the claim and there is a sufficient connection with the forum.<sup>119</sup> Similarly, a forum *necessitatis* may be a basis for jurisdiction when no Member State otherwise has jurisdiction and the right to access to justice is required because proceedings cannot reasonably be brought in a third State with which the dispute is closely connected, or a judgment given in a third State would not be entitled to recognition and enforcement, and the dispute has a sufficient connection with the forum Member State.<sup>120</sup>

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114. See Walker, *supra* note 49, at 77.

115. EU Regulation, art. 27, *supra* note 12, at 9. In addition, where a related (but not the same) action is pending in the court of a different Member State, “any court other than the court first seised *may* stay its proceedings.” Art. 28, *id.* (emphasis added).

116. Not only are courts permitted to exercise such exorbitant jurisdiction against non-EU defendants, but the recognition of judgment provisions of the EU Regulation require Member States to recognize the judgment of a foreign state against defendants from third states. See EU Regulation, art. 33, *supra* note 12, at 10 (subject to limited exceptions in Art. 34–35).

117. EU Recast, art. 6(1), *supra* note 98, at 25.

118. See art. 25, *id.* at 33–34.

119. *Id.*

120. Art. 26, *id.* at 34.

This “access to justice” principle is not new to the proposed EU Recast. For example, the Swiss have a similar provision which provides: “If this statute does not provide for jurisdiction in Switzerland, and proceedings abroad are impossible or highly impracticable, jurisdiction lies with the Swiss judicial authorities or administrative authorities at the place which has a sufficient connection with the case.”<sup>121</sup>

As one sees from this brief comparative sketch, the rules of international jurisdiction in many countries are for the most part much more expansive than those in the United States. The constitutional due process status accorded to judicial jurisdiction in the United States—and its concomitant focus on the forum’s connection to the defendant—make it impossible in the United States to make the kinds of policy choices allowing maintenance creditors or consumers to sue at home<sup>122</sup>—as many other jurisdictional regimes permit. Perhaps that requirement—of purposeful conduct by the defendant with the forum—turns out to be particularly appropriate in the context of foreign defendants—when one considers the exceptionalism of the U.S. procedural regime. In that sense, Justice Ginsburg’s concern about “disadvantage” to U.S. plaintiffs<sup>123</sup> overlooks some of the differences between litigating in the United States and litigating in Europe, where there tends to be a more harmonized and accepted set of procedural norms.

The one area of jurisdiction where the assertion of jurisdiction by courts in the United States is substantially broader than that of many other countries is the general doing business jurisdiction—that is, where jurisdiction may be asserted on the basis of defendant’s substantial activity in the forum state, even when the claim is unrelated to those activities.<sup>124</sup> The underlying rationale for such jurisdiction is that the extensive and continuous activities in the forum state by the defendant represent a manifestation of the defendant’s presence there—analogueous to the physical presence or domicile of an individual. Interestingly, Justice Ginsburg talks about the paradigm forum for an individual being that of domicile, and then goes on to say the “equivalent place” is one in which the corporation is fairly regarded as “at home”,<sup>125</sup> she then identifies domicile, place

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121. LOI FÉDÉRALE DE DROIT INTERNATIONAL PRIVÉ [PIL] [FEDERAL LAW ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, SR 291, art. 3 (Switz.), *translated in SWITZERLAND’S PRIVATE INTERNATIONAL LAW STATUTE 1987*, at 30 (Pierre A. Karrer & Karl. W. Arnold, trans. 1989).

122. *See, e.g.*, *Kulko v. Superior Court*, 436 U.S. 84, 97, 101 (1978) (“But the mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State’s judicial jurisdiction.”).

123. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (Ginsburg, J., dissenting).

124. For earlier discussions of the general “doing business” jurisdiction, *see* Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 137 (2001); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (2001).

125. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011).

of incorporation and principal place of business as “paradigm” bases for the exercise of general jurisdiction.<sup>126</sup> Justice Ginsburg does not mention the concept of “presence” or “tag,”<sup>127</sup> which has always seemed to me the closer parallel with “systematic and continuous activities” in an attempt to find an analogue to the physical presence of the individual. Professor Stein posits that the Supreme Court in *Goodyear* seeks a proxy for “home” as a place to sue a corporation;<sup>128</sup> if he is correct, there is a tension with the Supreme Court’s earlier opinion in *Burnham*.<sup>129</sup> More likely, *Goodyear* will be read to identify a place where the corporation can be said to be “present” in the same way that the physical presence of the individual defendant is manifest. Whether *Goodyear* will lead to clarification of the current mystifying case law remains to be seen.

Supreme Court guidance on what constitutes sufficient activities for general jurisdiction has been quite limited. On one end of the spectrum is *Perkins v. Benguet Consolidated Mining Co.*,<sup>130</sup> where the entire operations of a Philippines corporation that had been closed down during the Japanese occupation and moved to Ohio, were considered sufficient for general jurisdiction.<sup>131</sup> In those circumstances, the application of general jurisdiction was quite close to the more internationally accepted bases of jurisdiction over corporate defendants, such as place of incorporation, principal place of business, or central administration. Moreover, given the era in which *Perkins* was decided, an even somewhat more expansive definition of general jurisdiction would have filled a gap at a time when specific jurisdiction had not yet emerged. At the other end of the spectrum is *Helicopteros v. Hall*,<sup>132</sup> where the activity—which consisted of purchases of helicopters and equipment from a Texas company along with sending pilots for training and some contract negotiations—was held to be constitutionally insufficient.<sup>133</sup>

Using those parameters, *Goodyear* was an easy case. Mere sales into the forum state whether direct or as part of the stream of commerce would not seem to manifest the presence of the corporation there. Indeed, the result should not change even under a theory of aggregate contacts that measured the contacts of the foreign Goodyear subsidiaries with the United States as a whole.

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126. *Id.*

127. Jurisdiction based on service of a summons on the defendant due to temporary presence in the state—so-called “tag” jurisdiction—was upheld by the Supreme Court in *Burnham v. Superior Court*, 495 U.S. 604, 619, 625 (1990).

128. Stein, *supra* note 104, at 539, 541–44.

129. *Burnham* was a domestic U.S. case and did not involve jurisdiction over a foreign defendant. See *Burnham*, 495 U.S. at 608. Also, the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF UNITED STATES (published pre-*Burnham*) took the position that such transitory presence is not an appropriate basis of jurisdiction under international law principles. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1987).

130. 342 U.S. 437 (1952).

131. *Id.* at 447–48.

132. 466 U.S. 408 (1984).

133. *Id.* at 411, 418–19.

Whether Justice Ginsburg's unanimous opinion for the Court, with its multiple references to the corporation being sued "at home," signifies a requirement of some type of physical manifestation—as there was in *Perkins*—is not clear. But if such a requirement were to emerge, it would make tag jurisdiction and doing business jurisdiction closer equivalents. Such a requirement would increasingly align the United States with rules of general jurisdiction over corporations elsewhere. Some countries, such as Germany, limit suit against a corporation to its statutory seat.<sup>134</sup> Article 60 of the EU Regulation defines the domicile of a corporation as the place where it has its statutory seat, central administration, or principal place of business.<sup>135</sup> In both Germany and the EU, a foreign defendant is subject to jurisdiction if it has created an "establishment" in the forum, but only if the claim is directly related to the activities of the branch office or other establishment<sup>136</sup>—an example of specific and not general jurisdiction. England, in its national law, does permit general jurisdiction over foreign defendants who are physically present in the forum.<sup>137</sup> As to presence for a corporation, England requires there to be a fixed "place of business"—some kind of physical manifestation—in order for the forum to assert general jurisdiction over a foreign company.<sup>138</sup>

An advantage of a physical presence requirement for general jurisdiction in the United States would eliminate much of the indeterminacy of the doing business jurisdiction. Doing business is in the first instance a matter of state law, and thus there is no uniform standard. And at the constitutional due process level, the Supreme Court decisions, which are few and far between, have not offered much guidance. Another open issue with respect to doing business jurisdiction relates to when a multi-national corporation that has subsidiaries located in the United States will be regarded as itself doing business in the United States.<sup>139</sup> A variation of this "group of companies" or "single enterprise"

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134. See GERMAN CIVIL PROCEDURE, *supra* note 96, § 17(1).

135. EU Regulation, art. 60, *supra* note 12, at 13.

136. See GERMAN CIVIL PROCEDURE, *supra* note 96, § 21(1); EU Regulation, art. 5(5), *supra* note 12, at 4.

137. See 1 DICEY, MORRIS & COLLINS, THE CONFLICT OF LAWS 346 (Sir Lawrence Collins et al. eds., 14th ed. 2006 & Supp. 2011).

138. *Id.*

139. Although the presence of a subsidiary alone does not establish the parent corporation's presence in the state, see *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998), the interrelationship of business activities between the corporation may be sufficient to make the subsidiary subject to jurisdiction, see *Gelfand v. Tanner Motor Tours, Ltd.* 385 F.2d 116, 120–21 (2d Cir. 1967) (discussing company's agent actions in relation to the "doing business" test). See generally *Obligations of a Company Belonging to an International Group and Their Effect on Other Companies of that Group*, in 65-I ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 191–326 (1993); *Obligations of Multinational Enterprises and Their Member Companies*, in 66-II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 463–73 (1996).

doctrine might have been addressed in the *Goodyear* decision, but it was not raised below or in the petition, and thus the Court said the point was forfeited.<sup>140</sup>

The expansive interpretations of doing business jurisdiction in the United States have been a source of criticism abroad. In the international context, multinational defendants with offices or extensive activities in the United States have been sued in the United States on claims that bear no relationship to their activities in the United States.<sup>141</sup> In the recent negotiations for a world-wide jurisdiction and judgments convention at the Hague Conference, efforts were made to curtail that type of jurisdiction by placing it on the prohibited list.<sup>142</sup> The United States objected, and this was one of the issues over which the Hague negotiations broke down.<sup>143</sup>

As a practical matter, the doctrine of forum non conveniens curbs some of the excesses of general jurisdiction,<sup>144</sup> although a dismissal on forum non conveniens grounds is less likely if the plaintiff is a U.S. resident. There are other hurdles that may face a lawyer who seeks to ground an action in the United States on doing business jurisdiction. A judgment based on such jurisdiction is unlikely to be enforced by any other country, and if the defendant does not have assets in the United States, enforcement of such a judgment elsewhere is unlikely. In some cases, of course, the foreign defendant will have assets in the United States and then enforcement abroad will be unnecessary. Moreover, some courts have required garnishees, including foreign banks subject to jurisdiction in the United States, to turn over assets of the judgment debtor that they hold outside of the forum state, thereby providing an enforcement mechanism even when the foreign debtor and the assets are outside the state.<sup>145</sup>

A nationwide “doing business standard” that requires some type of office or physical manifestation of the corporation’s presence might bring a greater measure of predictability to assertions of general jurisdiction, and perhaps subsequent cases will so interpret *Goodyear*. To the extent that the requirement is to be one of “bricks and mortar,” the “presence” of the corporation will necessarily be that with a particular state, and an aggregate contacts theory for general jurisdiction would seem unnecessary. Should courts in the aftermath of *Goodyear* continue to view general jurisdiction as based on a more amorphous set of “systematic and continuous contacts,” an aggregate theory of contacts would be inappropriate for a jurisdiction ground that is already suspect abroad.

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140. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (citing Brief for Respondents at 43, *Goodyear*, 131 S. Ct. 2846 (No. 10-76), 2010 WL 5125441, at \*43).

141. See Twitchell, *supra* note 124, at 173.

142. For a more elaborate discussion of the negotiations over that provision, see Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 338–46 (2002).

143. See *id.*

144. *Id.* at 344. See also Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 SAN DIEGO L. REV. 1035, 1055 (2004).

145. *Koehler v. Bank of Bermuda Ltd.*, 911 N.E.2d 825, 831 (N.Y. 2009).

As transnational cases, both *Goodyear* and *Nicastro* raise issues that are different from the classic interstate case and were deserving of more consideration in that context. Perhaps this Symposium panel will facilitate more conversation on that front.