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Recent Developments

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RECENT DEVELOPMENTS

ALIENS' RIGHTS—THE REFUGEE ACT OF 1980 AS RESPONSE TO THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES: THE FIRST TEST

I. INTRODUCTION

In April 1980 President Castro of Cuba announced that he would permit Cubans who wished to leave the island to do so, thus setting in motion a string of events that would culminate in the arrival in the United States of more than 125,000 Cuban refugees by late September.[1] On May 5 President Carter announced an "open heart and open arms" policy for the refugees,[2] and the following day he declared a state of emergency in the affected areas of Florida and authorized $10 million in relief aid.[3] By May 8, 500 Marines and 700 Florida National Guardsmen were needed to maintain order in the refugee camps.[4] Confronted with pressure from Congressional leaders to give the Cubans formal refugee status,[5] the possibility that felons and mentally disturbed individuals were among the refugees,[6] and reports that the total number of refugees had climbed past 30,000,[7] President Carter announced that the "Freedom Flotilla" of privately owned boats transporting refugees from Cuba to the United States was to be discontinued on pain of fines and criminal sanctions.[8] Carter proposed in its place an official airlift or sealift which would impose some order on the entry process. In spite of this development, Cuban refugees continued to pour into the United States[9] and during the

1. N.Y. Times, Sept. 27, 1980, at 1, col. 2.
2. *Id.*, May 6, 1980, at 1, col. 1.
3. *Id.*, May 7, 1980, at 13, col. 1. Two weeks after the shuttle began, approximately 10,000 Cubans had disembarked in Florida. *Id.*, May 4, 1980, at 1, col. 3.
4. *Id.*, May 8, 1980, at 12, col. 3.
5. *Id.*, May 13, 1980, at 14, col. 5.
6. *Id.*, May 11, 1980, at 18, col. 1.
7. *Id.*
8. *Id.*, May 15, 1980, at 1, col. 6.
9. N.Y. Times, Aug. 26, 1980, at 14, col. 6. According to some reports this was largely because the private boats were forced by Cuban officials to accept

rest of the summer efforts were concentrated on resettling the refugees and reimbursing local communities for expenses incurred in accommodating the new arrivals.[10] Meanwhile, the official Cuban newspaper *Granma* reported that Castro would not permit Cuban nationals deported from the United States to reenter Cuba.[11] Finally on September 6, President Castro closed the port of Mariel, thus terminating the Freedom Flotilla by denying the transporting boats access to a safe location for collecting their passengers.[12]

This mass migration of Cuban refugees into the United States began shortly before the May 15, 1980 effective date of the newly enacted Refugee Act of 1980 (Refugee Act).[13] An emergency situation of international magnitude, therefore, was the occasion of the first application of the provisions of the new Act which, among other things, broadened the definition of the term "refugee," and gave the President discretion in unforeseen emergency situations involving humanitarian or national interests to admit refugees in numbers beyond the annual quota. The central focus of this inquiry is the extent to which the United States application of the Refugee Act in the context of its general response to the crisis accorded with the United States rights and obligations, if any, under the relevant international conventions: the 1967 Protocol Relating to the Status of Refugees (Protocol)[14] and, by incorporation, the 1951 Convention Relating to the Status of Refugees (Convention).[15] Reference will also be made to the general international law on the right of nations to grant and refuse asy-

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the refugees. *Id. See also* note 37 *infra.*

10. *See, e.g.,* N.Y. Times, July 13, 1980, at 1, col. 3, and Aug. 8, 1980, at 12, col. 3.

11. N.Y. Times, June 5, 1980, at 21, col. 1. Secretary of State Muskie announced shortly thereafter that the United States would establish as a temporary measure "special detention centers" for those Cubans Castro refused to accept. *Id.,* June 8, 1980, § 22 at 2, col. 1. Several months later, Castro declined to cooperate with United States efforts to end hijacking attempts by disgruntled Cuban refugees wishing to return to Cuba. *Id.,* Sept. 17, 1980, at 17, col. 1. Several months later, however, Cuba and the United States entered into talks reportedly covering the possibility of Cuba's repatriation of certain exiles. *Id.,* Dec. 27, 1980, at 5, col. 5.

12. N.Y. Times, Sept. 27, 1980, at 1, col. 2.

13. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

14. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 268 [hereinafter cited as Protocol].

15. Convention Relating to the Status of Refugees of July 28, 1951, 189 U.N.T.S. 137 [hereinafter cited as 1951 Convention].

lum. These and related questions are of particular interest in view of the fact that the Cuban refugee crisis[16] represented the United States' first attempt to deal with a sudden mass influx of such proportions since its efforts to bring the United States immigration laws into closer conformity with the Protocol and Convention.

II. Domestic Application of United States Law

A. *Refugee Act of 1980*

The Refugee Act of 1980 went into effect on May 15, 1980, and thus governs legislation relating to the Cuban refugee situation. The new Act significantly changed, and was intended primarily to rectify the shortcomings of, the Immigration and Nationality Act of 1952 (INA)[17] by "provid[ing] a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."[18] To accomplish these purposes the Refugee Act established a general admissions category for refugees,[19] raised the annual quota for admission of refugees in normal times from 17,400 to 50,000,[20] permitted flexibility in the handling of emergency refugee situations,[21] limited the use of the parole authority to a case-by-case determination,[22] and established a separate provision dealing with asylum.[23] The INA, in contrast, provided only for conditional entrant status[24] or temporary entry by parole without a case-by-case determination[25] and did not have a special classification for political refugees. The following is a general overview of the major provisions of the new

16. The Haitians who arrived during the same period were involved in a different set of circumstances and are therefore outside the scope of this examination.

17. Immigration and Nationality Act of 1952, 8 U.S.C. § 1101-1252 (1952), *as amended by* Immigration and Nationality Act Amendments of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102 (1980).

18. Refugee Act of 1980 § 101.

19. *Id.* § 207(a)(1).

20. *Id.*

21. *Id.* § 207(b).

22. *Id.* § 203(f)(3).

23. *Id.* § 208.

24. 8 U.S.C. § 1152(a), 1152(e)(7), 1153 (1976).

25. 8 U.S.C. § 1182(d)(5) (1976).

Refugee Act.

1. Definition of Refugee

A major innovation in the Refugee Act is the definition of the term "refugee." The INA did not define "refugee" per se, but it did establish a separate category for aliens fleeing from, and unwilling or unable to return, because of "persecution or fear of persecution on account of race, religion, or political opinion,"[26] to any Communist or Communist-dominated area or any country in the Middle East. The new Refugee Act provides the first statutory definition of "refugee":

> (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, the country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person's nationality . . . and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.[27]

The definition of the term "refugee" expands the INA categories of race, religion, and political opinion to include those persecuted for their nationality or membership in a particular social group. The addition of these new grounds of persecution may significantly broaden the group of persons considered to be refugees. The practical effects of this provision are as yet unclear, since the legal status of the Cuban arrivals has not been determined. Several years before the enactment of the Act, however, in the widely cited case of *Matter of Dunar,* the Board of Immigration Appeals indicated that these two then-omitted classes (those persecuted for nationality and social group) were "generically similar" to the classes listed in the INA and that the "distinctions in terminology

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26. 8 U.S.C. § 1152(3)(7) (1976).
27. Refugee Act of 1980 § 201(a).

can be reconciled on a case-by-case consideration as they arise."[28] Such a view may, however, ignore the ease with which persecution on the grounds of nationality or membership in a particular social group can be disguised as enforcement of legitimate domestic law, thus making it appear distinct from persecution on the grounds of race, religion, or political opinion. The new provision, at least, provides an opportunity to unmask such false distinctions.

2. Annual Admission of Refugees and Admission of Emergency Situation Refugees

Section 207(a)(1) sets a yearly ceiling of 50,000 for refugee admissions in fiscal years 1980-82; after 1982 the President will set the ceiling after appropriate consultation with Congress. Admissions are to be "allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation."[29]

In unforeseen emergency situations in which the admission of the refugees would be impossible under the terms of section 207(a), but would be justified by grave humanitarian concerns or the national interest, section 207(b) allows the President, again after appropriate consultation, to "fix a number of refugees to be admitted . . . during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation . . . ."[30] Further, section 207(c)(1) allows the Attorney General, within the numerical limitation, to admit a refugee "who is not firmly resettled in any foreign country, is . . . of special humanitarian concern to the United States, and is admissible . . . as an immigrant under this Act."[31]

The United States has not undertaken any obligation to admit refugees of any type under the section 207(b) emergency admissions procedures because the terms of the Act are permissible rather than mandatory.

3. Asylum

Section 208(a) of the Refugee Act provides in part that the At-

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28. Matter of Dunar, BIA Interim Decision No. 2192, Apr. 17, 1973, 14 Administrative Decisions Under Immigration and Nationality Laws, 310, 320-21.

29. Refugee Act of 1980 § 207(a)(1).

30. *Id.* § 207(b).

31. *Id.* § 207(c)(1).

torney General shall establish "a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum."[32] If the alien is determined to be a refugee within the meaning of the Act, the Attorney General may, at his discretion, grant the asylum. The Attorney General may terminate the asylum if circumstances in the refugee's country of nationality change so as to render him a non-refugee within the meaning of section 201(a).[33]

4. Withholding of Deportation

Section 203(e), amending section 243(h) of the INA, is a critical portion of the Refugee Act. Section 243(h), which itself had been amended previously, read as follows:

> The Attorney General *is authorized to withhold* deportation of any alien . . . within the United States to any country in which in his opinion the alien would be subject to persecution *on account of race, religion, or political opinion* and for such period of time as he deems it to be necessary for such reason. (Emphasis added.)[34]

Section 203(e) of the Refugee Act amends the passage as follows:

> The Attorney General *shall not deport or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country *on account of race, religion, nationality, membership in a particular social group, or political opinion.* (Emphasis added.)[35]

The new version incorporates the two additional grounds of persecution already discussed in relation to the definition of "refugee," but more importantly it deprives the Attorney General of any discretion in the matter if deportation would result in the alien being subject to a deprivation of freedom.

B. *Official Policy and Efforts to Classify the Cuban Immigrants Under the New Act*

The initial United States response to the gathering of thousands of Cubans in the Peruvian Embassy in Havana, beyond

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32. *Id.* § 208(a).

33. Id. § 208(b). Under the terms of the Act, the procedure to be used by the Attorney General is left to his discretion. *Id.*

34. 8 U.S.C. § 1243(h) (1976).

35. Refugee Act of 1980 § 203(e).

an expectation that the Latin American nations would also offer asylum to the Cubans,[36] was an offer to accept 3,500 of them as refugees under the President's section 207(b) emergency powers.[37] Once that group had arrived, however, and it became clear that the exodus was quickly achieving major and unexpected proportions, the Administration decided to admit other Cubans on a 60-day temporary parole arrangement[38] in which individuals were to be processed as applicants for asylum on a case-by-case basis.[39] The availability of assistance to state and local communities that were attempting to deal with the influx was a primary concern of those who invoked the provisions of section 207.[40] Such assistance could most readily be provided under the terms of the new Act only if the immigrants were classified as refugees.[41]

On May 5, 1980, President Carter declared that the United States would welcome the Cubans with "open heart and open arms."[42] On May 14, after more than 30,000 Cuban refugees had arrived in southern Florida within the space of a month,[43] the President announced that the United States would end the Freedom Flotilla through the implementation of a five-point program

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36. N.Y. Times, Apr. 11, 1980, at 2, col. 3.

37. *Id.*, Apr. 15, 1980, at 1, col. 6.

38. Caribbean Refugee Crisis: Cubans and Haitians: Hearings Before the Comm. on the Judiciary, 96th Cong., 2d Sess. 38 (1980).

39. *Id.* at 52. The confusion surrounding the status of the refugees during the first month of the crisis, prior to the effective date of the Refugee Act, led to the following exchange between Senator Edward Kennedy, Chairman of the Senate Committee on the Judiciary, and Victor Palmieri, the United States Coordinator for Refugee Affairs:

> *Kennedy:* . . . It seems to me that section 207 [of the Refugee Act of 1980] applies. The administration ought to use . . . the range of benefits for community support, so that local communities will be given some assurance now, and not under some future action that may or may not be taken by the Congress or by the Administration, that they will receive some help.
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> *Palmieri:* . . . It seems clear to us that the act did not contemplate that for a very good reason. It discriminates between refugees processed abroad and people who come here as individuals, escape to our shores and seek asylum. To denominate as refugees people who come here in a sudden, mass, uncontrolled influx is a very dangerous thing to do.

Id. at 43.

40. *Id.*

41. Refugee Act of 1980 §§ 411-414.

42. N.Y. Times, May 6, 1980, at 1, col. 1.

43. *Id.*, May 11, 1980, at 18, col. 1.

that would emphasize treating the Cubans with "decency, fairness, and humanity," and working in cooperation with other nations and with international organizations.[44]

On June 4 the Carter Administration consulted with Congress as it was required to do under the Refugee Act, and was informed that Congressional leaders felt there was no likelihood that Congress would pass legislation clarifying the legal status of the refugees.[45] On June 17, the Senate approved by voice vote two amendments to a bill authorizing $100 million to state and local governments trying to cope with the crisis; these amendments stated that the Cubans would be considered refugees only for the purposes of the legislation, and required the President to report to Congress by July 1 on the legal status of the refugees.[46] Subsequently, on June 20, the Administration announced that the Cubans and certain Haitians already in the country would receive a temporary classification entitled "Cuban/Haitian Entrants (status pending)," which would entitle them to certain welfare benefits.[47] The parole granted earlier was also extended for six months,[48] which apparently meant that the entrants status was invoked with the parole authority of section 203(f)(3) of the new

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44. *President's Statement*, May 14, 1980, *reprinted in* 80 DEP'T STATE BULL. 70 (June 1980). The proposed program included (1) an airlift and sealift from Cuba to the United States and other countries for persons screened before departure; (2) the opening of a new family registration center in Miami; (3) a prohibition on trips to Cuba by unauthorized boats, with violators being subject to fines and criminal prosecution; (4) exclusion proceedings for criminals and others who pose a danger to the United States; and (5) consultation with international organizations and other countries to decide on relief measures that might be taken by the international community. *Id.* In spite of the strict sanctions applied to private boats that continued to make the crossing, the Freedom Flotilla continued until Castro terminated it in late September. N.Y. Times, Sept. 27, 1980, at 1, col. 2. During the interim period some captains of fishing boats had charged that Cuban officials threatened to seize their vessels if they did not accept refugees, N.Y. Times, May 16, 1980, at 14, col. 1, and there had been increasing dissatisfaction with the fact that criminals and other undesirables were among those arriving in Florida. *See, e.g.*, N.Y. Times, June 9, 1980, at 13, col. 2.

45. N.Y. Times, June 5, 1980, at 21, col. 1. On the same day, *Granma*, the official Cuban newspaper, reported that Cuba would not take back criminals deported by the United States. *Id.*

46. N.Y. Times, June 19, 1980, at 20, col. 1.

47. *White House Fact Sheet*, June 20, 1980, *reprinted in* 80 DEP'T STATE BULL. 81 (August 1980).

48. *Id.*

Act, and the Administration expressed its hope that those Cubans permitted to remain could, with Congress' approval, become permanent United States residents after two years.[49] Aliens arriving after June 19 would be considered for asylum on a case-by-case basis according to the terms of section 208(a), but those arriving illegally would be subject to "exclusion or deportation in accordance with U.S. immigration laws."[50] In the meantime, the Administration planned to ask Congress to establish a special "Cuban/Haitian Entrant" status for "recently arrived Cubans and Haitians."[51] The Cubans and Haitians who were already in the country should be treated as a group rather than screened individually, reportedly because the latter route would be "too cumbersome and time consuming."[52] The Administration declined to request that these people be classified as refugees partly because the Act's asylum procedures were not intended to accommodate mass migrations, and such classification might "compromis[e] the integrity" of the definition of "refugee" established in the Act by, in effect, rewarding illegal immigrants.[53] One Administration official was quoted as saying that classifying the aliens as refugees and thereby according them full refugee benefits would have the effect of encouraging other aliens to try to enter the United States illegally.[54] President Carter subsequently extended the Cubans' temporary special status to July 15, 1981.[55] At the present time, the questions surrounding the status of the Cubans persist unresolved.

III. INTERNATIONAL LAW

A. *Introduction*

The sources of international law used in this analysis include those set out in the Statute of International Court of Justice:[56]

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49. *Id.*
50. *Id.* at 81-82.
51. *Id.* at 81.
52. N.Y. Times, June 21, 1980, at 1, col. 6.
53. Interview with John Klekas of the State Department Cuban Refugee Task Force, *reprinted in Cuban Refugee Crisis: Quick Test for New Law,* 66 ABA J. 826 (1980).
54. Statement of Eugene Eidenberg, President Carter's Assistant for Intergovernmental Affairs. N.Y. Times, July 13, 1980, at 1, col. 3.
55. *Id.*, Jan. 13, 1981, § 2, at 7, col. 1.
56. Statute of the International Court of Justice, art. 38(1).

conventions, custom, principles of law, judicial decisions, and teachings of the publicists.[57] Because the United States has ratified the 1967 Protocol, which incorporates the 1951 Convention,[58] those agreements provide the focus of this discussion. Under the general international rule of *pacta sunt servanda,* a treaty is binding on the parties to it.[59] Arguably, however, the inclusion of a particular provision in a convention, or even a number of conventions, does not in itself establish the provision as an accepted principle of international law.[60]

B. *Right of a State to Grant Asylum to Refugees*

The right of a state to grant asylum at its discretion has been long recognized in international law.[61] This sovereign right is implicit in the terms of many of the binding and non-binding multilateral agreements, conventions, and resolutions on the treatment and status of refugees.[62] A theoretical limitation on this right to

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57. These sources of international law are listed in this order in the Statute. The order reflects the weight the Court gives to each source in its determinations. Note that the terms of conventions are the most persuasive.

58. *See* notes 14 & 15 *supra.*

59. *See, e.g.,* the International Law Commission's Commentary on Article 55 of the ILC draft on the "Law of Treaties", U.N. Doc. A/CN.4/L.106/Add. 3, July 17, 1964, *cited in* Whiteman, 14 DIGEST OF INTERNATIONAL LAW 222 (1965).

60. *Cf.* J. MOORE, *Progress of International Law in this Century,* in II COLLECTED PAPERS OF JOHN BASSETT MOORE 439, 445 (1944), *reprinted from The Nineteenth Century* 18-31 (1901), *cited in* Whiteman, 1 DIGEST OF INTERNATIONAL LAW 70 (1965).

61. As early as the eighteenth century Vattel said,

> Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and, in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner.

VATTEL, THE LAW OF NATIONS ch. 19, § 230 (1817).

62. *E.g.,* Article 1(1) of the Declaration on Territorial Asylum of 14 December 1967, G.A. Res. 2203, 21 U.N. GAOR, Supp. (No. 16), U.N. Doc. A/6316 (1967) states, "Asylum granted by a State, *in the exercise of its sovereignty,* to persons entitled to invoke article 14 of the Universal Declaration on Human Rights . . . shall be respected by all other States." (Emphasis added.) Article 14 of the Universal Declaration on Human Rights of December 19, 1948 (A/RES/217 (III)) states: "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of persecutions genuinely arising from non-political crimes or from acts contrary to

grant asylum can be found in the definition of "refugee" provided in the 1951 Convention as amended by the 1967 Protocol.[63] According to Article 1(A)(2), a refugee is one who,

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of [*sic*] a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[64]

Thus, an individual seeking haven from persecution for reasons other than those listed above could not properly be considered a refugee. Further, under traditional rules of international law, the terms of other treaties between the refugee's state of nationality and the receiving state may affect that individual's status as a refugee.[65]

The language of the Preamble to the 1951 Convention impliedly supports the contention that the state has a right to grant asylum by conspicuously failing to qualify that right: "The high contracting parties, . . . considering that the grant of asylum may place unduly heavy burdens on certain countries . . . ."[66]

It is generally accepted, however, that while a nation may freely exercise its sovereign right to grant asylum, it is under no obligation to do so. The failure of the conventions on the subject to identify any such obligation underscores the permissive nature of grants of asylum.[67] Accordingly, the right of a nation to provide

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the purposes and principles of the United Nations."

63. Protocol, *supra* note 14, at 268. The fact that sixty-seven nations are parties to the Protocol demonstrates the widespread acceptance of the definition. [1977] 31 Y.B.U.N. 621.

64. 1951 Convention, *supra* note 15, at art. 1(A)(2).

65. A. GRAHL-MADSEN, STATUS OF REFUGEES IN INTERNATIONAL LAW, 104 (1972). Atle Grahl-Madsen is a leading writer on the subject of refugees in international law.

66. 1951 Convention, *supra* note 15, at Preamble.

67. The Immigration and Naturalization Service apparently concurs with this interpretation of the 1951 Convention and 1967 Protocol. "The United Nations Convention and Protocol . . . relates to the treatment of refugees who are actually in the territory of the contracting state. It does not compel a contracting state to receive refugees . . . ." *Admission of Refugees Into the United States: Hearings Before the Subcom. on Immigration, Citizenship and Interna-*

refuge does not vest the individual asylum-seeker with the right to be granted asylum, which is the natural corollary of a state's obligation to grant asylum. Many international conventions on the subject reject the notion that a refugee has a "right" to asylum. Article 1(3) of the Declaration on Territorial Asylum, adopted by the United Nations General Assembly in 1967, recognizes each state's sovereignty with regard to granting asylum but implicitly rejects the notion of a "right" to be given asylum: "It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."[68] Nor does the 1951 Convention contain any reference to a right to be granted asylum.

It has been argued, however, that international law is now so consistent that is confers the right of asylum on the individual.[69] The theory is that the "main stumbling block" to the recognition of the individual's right of asylum is disagreement over the elements and application of this right.[70] Even though states do not recognize a right of asylum,

> [i]t is no accident that the asylum seeker came to be the individual first and foremost recognized as needing a status transcending the laws of any State. In effect, the law on asylum can be described as the earliest and most effective attempt towards an application of human rights and a recognition of the international status of certain individuals. Consequently, the refugee is the subject of international law *par excellence*.[71]

The notion that the individual may have a right to asylum in international law remains outside the mainstream of international law doctrine.[72]

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tional Law of the House Comm. on the Judiciary, Part II, 95th Cong., 1st & 2d Sess. 236 (1978) (statement of Leonel Castillo).

68. Declaration on Territorial Asylum, *supra* note 62, at art. 1(3).

69. Krenz, *The Refugee as a Subject of International Law*, 15 INT'L & COMP. L.Q. 90, 94 (1966) (quoting Sir John Salmond's definition of the proper subject of law: "A juridical person is any being whom the law regards as capable of rights and duties.").

70. *Id.* at 105. Krenz cites ancient writers, judicial decisions, resolutions of international organizations, and international conventions in support of his thesis.

71. *Id.* at 115.

72. The United States has failed to ratify documents containing language which may indicate some movement toward establishing a right of asylum for the individual. As early as 1948 this seemingly radical concept was set out in article XXVII of the American Declaration of the Rights and Duties of Man in

The refusal to recognize such a right is grounded in the notion that, under international law, refugees

> are not considered subjects of international rights and obligations . . . Most of the rules from which individuals may benefit have been construed as conferring rights not on the individual but on the State to whom he belongs. . . . [I]f individuals possess international rights and/or duties or even international procedural capacity, this is by virtue of international conventions.[73]

Under this analysis, the law of asylum encompasses the behavior of states rather than individuals. The omission of the concept of the individual's right of asylum from the Convention and Protocol more accurately reflects international law at the present time.

The right to asylum has not been widely adjudicated in the courts, but the existing cases adhere to the viewpoint that the granting of asylum is discretionary on the part of the receiving state. The United States Supreme Court early on expressed its willingness to abide by "the accepted maxims of international law, [that] every sovereign nation has the power, inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[74] This same view was echoed by the International Court of Justice in Judge Alvarez' celebrated dissenting opinion in the *Asylum Case*:[75] "[I]t is the state from which asylum is requested that must decide whether it wishes to grant it or not."

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the Final Act of the 9th International Conference of American States, Bogota, Columbia: "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek *and receive* asylum in foreign territory, in accordance with the laws of each country and with international agreements." (Emphasis added.) Similarly, the 1969 American Convention on Human Rights, OAS Official Recs. OEA/Ser. K/XVI/I.I, Doc. 65, Rev. 1, Corr. 2, Jan. 7, 1970 states in article 22(7): "Every person has the right to seek and *be granted* asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes." (Emphasis added.) Although limited by their terms to application in accordance with existing municipal law and relevant conventions, these provisions indicate at least some willingness to consider the individual as being vested with a right of asylum and therefore, by extension, the state as having a duty to grant asylum.

73. A. GRAHL-MADSEN, *supra* note 65, at 57.

74. Lem Moon Sing v. United States, 158 U.S. 538 (1895).

75. [1950] I.C.J. 266.

Nations are understandably reluctant to relinquish sovereignty in a matter that, for very practical reasons, traditionally has been within their discretion. The movement of a population group can effect major upheavals in the social, political, and economic order of a receiving nation, and can be orchestrated by the state of the refugee's nationality for self-serving reasons. Issues such as the portion of the burden to be carried by the nation as a whole or by each state in a federal system and the terms under which the refugees will be admitted, are properly determined by the receiving nation. The various factors entering into a country's decision to accept or reject asylum-seekers are inherently self-serving and nationalistic, and do not lend themselves to impartial appraisal by other nations or even an international organization. On the other hand, it is legitimate to ask at what point municipal law and the humanitarian principles reflected in the practice of states converge to form a generally accepted principle of international law—in this case the *obligation* of states to grant asylum or the *right* of the individual to be granted asylum.

C. *Right of the State to Expel Refugees Within the Territory of the State*

Articles 32 and 33 of the 1951 Convention govern the right of signatory states to expel refugees. Article 32 states in part: "1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."[76] And article 33, to which no reservation may be made,[77] provides in part: "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of [*sic*] a

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76. Article 32 continues in part:

> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require . . . .
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> 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

1951 Convention, *supra* note 15, at art. 32.

77. The fact that each signatory nation must agree to the terms of article 33 as written is significant because it indicates the centrality of this provision to the entire Convention and the importance placed upon it by signatory nations.

particular social group or political opinion."[78] The Convention distinguishes between refugees "lawfully in the territory" of the contracting state and those who have not gained lawful admission to the state. According to article 32(1), a refugee lawfully in the territory may be expelled *only* on grounds of national security or public order. Article 33(1), on the other hand, expresses the principle of *non-refoulement* in providing that no refugee shall be returned to a nation which will persecute him on his return; the provision applies to all refugees, whether or not lawfully admitted, who do not pose a threat to national security or a criminal threat to the community. Thus, a refugee who simply arrives in a nation and has not been duly admitted may be expelled but may not be returned to a persecuting nation unless he falls within one of the stated exceptions. A lawfully admitted refugee who does not represent a threat to the national security may be expelled only after "a decision reached in accordance with due process of law"[79] but even then he may not be returned to a persecuting nation.

The 1966 International Covenant on Civil and Political Rights (Covenant),[80] which the United States has not ratified, provides in article 13 that "[a]n alien lawfully in the territory of a State Party to the present Convention may be expelled therefrom only in pursuance of a decision reached in accordance with law . . . ."[81] The Covenant clearly applies only to individuals lawfully in the territory of the receiving state, and applies to refugees and all other aliens. It also requires due process but, conspicuously, does not prohibit *refoulement*. Article 13 should be read in conjunction with article 5(2), however, which states that nothing in the Covenant "derogates from any of the fundamental human rights recognized or existing in any State Party . . . pursuant to

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78. Article 33 continues:

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

1951 Convention, *supra* note 15, at art. 33.

79. *See* note 76 *supra*.

80. Int'l Covenant on Civil and Political Rights of December 16, 1966, U.N. Publ. OPI/246 (1966).

81. *Id.* art. 13.

law, conventions, . . . or custom . . . ."[82] In contrast, article 22 of the 1969 American Convention on Human Rights does not require that the alien be legally within the territory of the receiving state:

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.[83]

Article 22 reaffirms the principle of *non-refoulement* consistently with article 33 of the 1951 Convention, though it provides for no exceptions to the principle, and is not limited by its terms to refugees.

The Declaration on Territorial Asylum contains a similar provision in article 3(1):

> No person [entitled to invoke Article 14 of the Universal Declaration on Human Rights] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.[84]

Article 3(2) specifies that an exception may be made "only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons."[85] The wording of article 3(1) expands the concepts expressed in the 1951 Convention by referring to "rejection at the frontier"; the phrase indicates an intention to extend the right of *non-refoulement* to individuals who are not yet within the territory of the receiving state. The clear implication of this is that the receiving state has a duty to accept these aliens.[86]

Concern with the possibility of expulsion facing the refugee at the border, or illegally within the territory of a receiving state, was an impetus behind article 31(1) of the 1951 Convention, which states:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly

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82. *Id.* art. 5(2).
83. 1969 American Convention on Human Rights, *supra* note 72, at art. 22.
84. 1967 Declaration on Territorial Asylum, *supra* note 62, at art. 3(1).
85. *Id.* art. 3(2).
86. *See* II A. GRAHL-MADSEN, *supra* note 65, at 102.

> from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[86.1]

With article 33(1), this provision provides virtually complete protection for the refugee fleeing to the receiving state without the benefit of the usual preliminary legal formalities.

Whether the principle of *non-refoulement* has achieved the status of a general principle of international law is a subject of disagreement.[87] Nevertheless, the notion that the cumulative value of resolutions and declarations of international organizations are persuasive evidence of customary international law does have support, as evidenced by Judge Tanaka's celebrated dissenting opinion in the *South-West Africa Cases*:[88]

> What is required for customary international law is the repetition of the same practice; . . . resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeatedly. . . . This collective, cumulative and organized process of custom-generation can be . . . seen to have an important role from the viewpoint of the development of the international law.[89]

IV. Did the United States Behavior in the Cuban Refugee Crisis Conform With its Rights and Obligations Under General International Law?

A. *The Terms of the Refugee Act of 1980*

The United States rights and obligations towards refugees under international law are most clearly defined by the terms of the 1951 Convention and 1967 Protocol. Accession to the Protocol did not, however, either diminish the sovereignty of the United States by granting new rights to aliens,[90] or alter the pre-1980

86.1. 1951 Convention, *supra* note 15, at art. 31(1).

87. *See, e.g.*, G. Goodwin-Gill, International Law and the Movement of Persons Between States 141 (1978) and R. Plender, International Migration Law 244 (1972).

88. [1966] I.C.J. 248.

89. *Id.* at 291-93.

90. *See* Pierre v. United States, 547 F.2d 1281, *rehearing denied* 551 F.2d 863, *cert. granted* 434 U.S. 962, *on remand* 570 F.2d 95 (1977).

terms of the INA.[91] While the language of the Refugee Act was intended to[92] and does bring the INA into closer conformity with the Protocol, there is no evidence to indicate that this change was motivated by a belief that it was *required* by that agreement. Indeed, Congress could have passed legislation inconsistent with the terms of the Convention and Protocol if it had wished to do so.[93]

1. Definition of "Refugee"

The definition of "refugee" contained in section 201(a) of the new Act embraces the definition contained in Article 1(A)(2) of the 1951 Convention, and goes beyond it to include certain persecuted individuals who are still within the country of their nationality. Also, expanding the definition of persecution to include oppression based on nationality and membership in a particular social group brings the definition into conformity with the Convention, although the practical effect of this change is as yet unclear. The exclusion of persons who have themselves participated in persecution from this definition of "refugee" is consonant with article 1(F)(c) of the Convention, which excludes from its purview persons who have been "guilty of acts contrary to the purposes and principles of the United Nations."[94]

2. Annual Admission of Refugees and Admission of Emergency Situation Refugees

Section 207, which sets a normal yearly ceiling on refugee admissions and provides for emergency admissions by the President, is an exercise of the United States sovereign right to use discretion in granting asylum, a right implicitly recognized in the Preamble to the 1951 Convention and under general international

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91. "[A]ccession does not in any sense commit the contracting state to enlarge its immigration measures for refugees . . . . The Attorney General will be able to administer [the deportation provisions of the Immigration and Nationality Act] in conformity with the Protocol without amendment of the Act." Protocol Relating to Refugees, 90th Cong., 2d Sess. (1968) (testimony before the Senate Committee on Foreign Relations by Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs, Department of State) (Appendix: Executive Report No. 14 at 6).

92. *See* note 105 *infra*.

93. Congress may constitutionally pass legislation inconsistent with United States treaty obligations. Moser v. United States, 341 U.S. 41, 45 (1951).

94. 1951 Convention, *supra* note 15, at art. 1(F)(c).

law. United States law does not vest in individual refugees any right to be granted asylum;[95] even if domestic law did create such rights it would not create any binding international obligation because under traditional public international law the individual has no such rights.

3. Asylum

Section 208(a) provides that the Attorney General shall establish the procedure by which an alien within the territory or at a border may apply for asylum. The persuasive Declaration on Territorial Asylum states in article 1(3) that "[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."[96] This provision of the Refugee Act is also consonant with the principle of general international law that each state has complete sovereignty in deciding whether to grant asylum.[97] The termination of asylum provision is consistent with article 1(c)(5) of the 1951 Convention which states that the "Convention shall cease to apply to any [refugee] if . . . [he] can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of his country of nationality"[98] unless he shows that he should not be returned for reasons relating to his previous persecution. The Refugee Act does not clearly provide for this exception, but the use of the word "may" rather than "shall" in section 208(b) indicates that the exception stated in the 1951 Convention also exists under the Refugee Act.

4. Withholding of Deportation

Section 203(e) amends the INA to deprive the Attorney General of any discretion as to whether to deport an alien facing persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." Prior to the new enactment, United States courts frequently grappled with the issue of the amount of discretion the Attorney General could exercise consistent with the terms of the Protocol. In one landmark

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95. *See* note 80 *supra.*
96. Declaration on Territorial Asylum, *supra* note 62, at art. 1(3).
97. *See* text accompanying notes 61-75 *supra.*
98. 1951 Convention, *supra* note 15, at art. 1(c)(5).

case,[99] the Court ruled on Haitian petitioners' claim that they should not be deported because they would be subject to political persecution upon return to Haiti. In an opinion referring to an Amnesty International report on political conditions on the island at that time, the Court held that the immigration judge may have erred in his view that the petitioners would not be subjected to political persecution. The Court acknowledged the importance of the Protocol but stated that it had "not yet decided whether the Protocol restricts the Attorney General's discretion to refuse to stay deportation when he has determined that an alien would face persecution if deported."[100]

The question of the extent of the Attorney General's power appears to have been resolved because the language of the new provision is consistent with the principle of *non-refoulement* ascribed to in article 33(1) of the Convention. This resolution occurred because of a deliberate effort to conform domestic law with the Convention; the legislative history to the Refugee Act indicates that "[t]he Conference substitute adopts the House provision with the understanding that it is based directly on the language of the Protocol and that it is intended that the provision be construed consistent with the Protocol."[101]

The Refugee Act excludes from the provisions of section 243(h)(1) those aliens who have participated in one of the five specified types of persecution of another person, who have been convicted of a serious crime and therefore "constitute a danger to the . . . United States," who are suspected of pre-arrival "serious nonpolitical crimes," or who are considered upon "reasonable grounds" to be a "danger to the security of the United States."[102]

The second, third, and fourth of these grounds for deportation fall within the scope of the general language of article 33(2) of the Conventin:

> The benefit of the present provision may not . . . be claimed by a

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99. Coriolan v. Immigration and Naturalization Serv., 559 F.2d 997 (5th Cir. 1977).

100. *Id.* The Supreme Court in Immigration and Naturalization Serv. v. Stanisic, 395 U.S. 62 (1969) similarly left the issue unaddressed: "[I]t is premature to consider whether, and under what circumstances, an order of deportation might contravene the Protocol and Convention Relating to the Status of Refugees, to which the United States acceded on November 1, 1968." *Id.* at 80 n.22.

101. H.R. Rep. No. 212, 96th Cong., 1st Sess. 20 (1980).

102. Refugee Act of 1980 § 203(e).

> refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[103]

Arguably, the first ground for deportation, participation in the persecution of another person, is consonant with article 1(F)(c) of the Convention (as was the exception to the definition of "refugee" expressed in the Refugee Act) which excludes persons who have been "guilty of acts contrary to the purposes and principles of the United Nations."[104]

Though it is not clear whether the principle of *non-refoulement* has achieved the status of a principle of general international law, the new provision does accord with the theory of *non-refoulement*. If the United States follows the letter of the law in practice, it will contribute significantly to establishing *non-refoulement* as customary international law.

B. *United States Response to the Crisis in Light of the Relevant International Law*

1. Were the Cubans Technically Refugees?

The first question to be asked in examining the United States response to the Cuban refugee crisis, in light of the Convention and Protocol, is whether the incoming Cubans were refugees as that term is defined in the Convention. To qualify, each refugee must have left Cuba because of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of [*sic*] a particular social group or political opinion,"[105] and be unable or unwilling to return to Cuba for that same reason.

Social and political events in recent Cuban history indicate widespread intolerance of various groups and individuals. The Castro regime permitted only certain Cubans to leave the island during the refugee "crisis." The space in each boat transporting the refugees to the United States was allocated one-third to relatives of Cubans already in the United States, one-third to Cubans who had been waiting in the Peruvian Embassy to leave, and the final third to members of groups of which Castro wanted to rid

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103. 1951 Convention, *supra* note 15, at art. 33(2).
104. *Id.* art. 1(F)(c).
105. *Id.* art. 1(A)(2).

the island—including political dissidents.[106] This last group included persons who had been released from prison so that they could leave Cuba.[107] Intolerance of political dissidence in Cuba appears to have been a hallmark of the Castro regime. When he came to power in 1959, Castro abolished all political parties except the Partido Communista de Cuba (PCC), which has been characterized as an integral part of the government[108] as opposed to an independent political party. There have been no free elections in Cuba since 1959,[109] and in the first ten years alone of Castro's rule 500,000 people fled the island, a figure equivalent to eight percent of Cuba's population in 1959.[110]

Because of these factors and because Castro refused to repatriate any of these immigrants,[111] it might be inferred that many of those so eager to leave Cuba would be subject to persecution upon their return. The Administration's choice of the relatively ambiguous "Cuban-Haitian Entrant" status may indicate that it was not persuaded by the threat of future recrimination against the would-be immigrants. Perhaps the Administration's position was less a comment on its perception of political and social conditions in Cuba than a comment on its desire to balance an attitude of compassion for the Cubans against a policy of discouraging technically illegal immigrants. The United States reluctance to place the Cubans in the "refugee" category is less important than the fact that it *did* admit these individuals despite the traditional rule of international law that states are not obligated to grant

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106. N.Y. Times, May 11, 1980, at 2E, col. 1.

107. United States officials reportedly said at the time that "the overwhelming majority of them have been imprisoned for so-called 'antisocial' and 'antirevolutionary' offenses such as attempting to flee Cuba, refusing to work and criticizing or actively opposing the Castro regime." *Id.* at 18L, col. 1.

108. H. BLUTSTEIN, ET AL., AREA HANDBOOK FOR CUBA, 237 American University Foreign Area Studies (1971).

109. *Id.* at 229.

110. *Id.* at 64. The International Commission of Jurists stated only a few years after Castro came to power: "The legal guarantees of freedom, life, and property have been eliminated. The state has become a monolithic dictatorship that relentlessly directs or ends the citizen's life as it sees fit with no restraints or regard for the rights or dignity of the individual. International Commission of Jurists, Cuba and the Rule of Law (1962), *cited in* BLUTSTEIN, *supra* note 108. One of the most respected international human rights organizations, Amnesty International, has repeatedly expressed its concern over the plight of political prisoners in Cuba. *See, e.g.*, Amnesty International Rep. 1979, London.

111. *See* note 11 *supra.*

asylum. Since the final determination of the legal status of the Cubans has not been resolved it is too early to ascertain precisely the official United States position on their admission and on the conditions under which they may remain in the United States.

2. Asylum and Non-Refoulement

Nomenclature aside, the admission of the Cubans was a legitimate exercise of the United States sovereign discretion in granting asylum to refugees. The immediate response of the United States, both in accepting the Cubans and in calling for the cooperation of other nations, was extremely positive, and consistent with this country's tradition of accepting refugees from other nations, particularly nations under Communist influence. When the sheer impact of the immigration movement and the risks of the crossing between Cuba and Florida became clear, however, the Administration decided to terminate its support of the Freedom Flotilla and propose instead a more orderly official refugee transportation program.[112] This was not tantamount to a decision to refuse to accept the Cubans; on the contrary, Carter immediately proposed specific procedures for admitting the immigrants,[113] and those who continued to arrive were processed as their predecessors had been. Thus, the United States merely exercised its right to grant asylum in the manner in which it saw fit. Nor was the action tantamount to a violation of article 33 of the Convention, since none of the refugees were returned to Cuba. An attempt was made to return the criminals and other undesirable immigrants but Cuba, in violation of established principles of international law, announced that it would refuse to accept them.

V. Conclusion

The Refugee Act of 1980, reflecting United States commitments under the 1951 Convention and the 1967 Protocol, went into effect during a wave of immigration that created a state of emergency in strongly affected southern Florida. Under a severe test of its commitment to the terms of the 1967 Protocol and its implicit sense of moral obligation to grant asylum to individuals fleeing dictatorial rule, the United States responded positively in accepting the Cubans. Although the Administration undoubtedly

112. President's Statement, *supra* note 44.
113. N.Y. Times, June 5, 1980, at 21, col. 1.

did not intend by its treatment of the Cubans to lend credence to the theory that the individual has a right to asylum, its behavior, at least with respect to those Cubans who actually arrived in southern Florida, was consistent with that theory. The policy and actions of the United States, however, can be analyzed only in view of the emergency situation created by the influx. It is conceivable that the United States might have pursued other alternatives had the wave of immigration occurred more slowly.

More problematic, perhaps, is the refusal of the Administration to categorize the Cuban immigrants as refugees under the new definition set out in section 201(a). As noted, it is unlikely that this posture reflects a belief that most of these people would not be subject to some kind of persecution on their return to Cuba. The decision to treat the Cubans arriving after June 19 as applicants for asylum is consistent with the provisions of the Refugee Act. Whether that decision, and the decision to establish a "Cuban/Haitian Entrants" status for those aliens who had arrived before June 19th, violate the spirit the of the Act's provisions for admission of refugees of special humanitarian concern during unforeseen emergency refugee crises is a matter of interpretation. The overall question, therefore, appears to be not whether the Refugee Act of 1980 accords with the terms of the 1951 Convention and the 1967 Protocol, and with the general international law on the subject, but whether the handling of the Cuban refugee crisis, though consistent with principles of international law, was also in harmony with the intent of the Act and, by extension, the Protocol.

Gali Hagel

JURISDICTION—FOREIGN DEFENDANTS AND THEIR DEFECTIVE PRODUCTS: AN APPLICATION OF WORLD-WIDE VOLKSWAGEN CORP. v. WOODSON

I. INTRODUCTION

The recent Supreme Court decision in *World-Wide Volkswagen Corp. v. Woodson*[1] articulated limits imposed by the due process clause of the fourteenth amendment on state court exercise of *in personam* jurisdiction. *World-Wide* signaled a halt to a trend of expanding state court jurisdiction that began with the 1945 decision in *International Shoe Co. v. Washington,*[2] which laid waste to old mechanical notions of *in personam* jurisdiction and stressed a new due process analysis based on fairness. The *World-Wide* decision clarifies the Burger Court's position that the defendant's relation to the forum state is determinative on the issue of whether an assertion of jurisdiction comports with due process. Recent products liability litigation involving foreign corporate defendants emphasizes the Supreme Court's focus on the defendant's activities on questions of the constitutional scope of personal jurisdiction; yet, despite the language in *World-Wide,* federal court decisions have not resulted in a major jurisdictional advantage for foreign defendants whose products have penetrated the United States commercial arena. Indeed, more Supreme Court decisions are needed to guide the courts in applying *World-Wide* to the transnational legal arena; *World-Wide's* basic limitations on a state's assertion of jurisdiction are a result of the Burger Court's emphasis on federalism, an emphasis difficult to square with the myriad commercial and constitutional concerns inherent in commercial dealings with foreign nations.

II. LEGAL BACKGROUND

A. *The Due Process Liturgy of* International Shoe, McGee, *and* Hanson

Federal courts considering claims against foreign defendants must first determine if jurisdiction exists. Modern jurisdictional theory for domestic cases originated with the Supreme Court's

1. 444 U.S. 286 (1980).
2. 326 U.S. 310 (1945).

evaluation in *International Shoe* of the doctrines established in *Pennoyer v. Neff*.[3] In *Pennoyer*, the Supreme Court emphasized the concept of state territoriality[4] to justify assertions of jurisdiction based on a party's presence or property ownership in the forum state.[5] *International Shoe*[6] undermined *Pennoyer's* presence test[7] in favor of an analysis emphasizing defendant's social relations[8] with the forum and the concept of fairness:

> Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within 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.'[9]

The *International Shoe* Court suggested that a qualitative analysis[10] grounded in equitable principles[11] must be used to determine

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3. 95 U.S. 714 (1877).

4. "The basic premise of *Pennoyer* was that the states are independent sovereigns, which interact as do foreign nations. Justice Field . . . thought it impossible that the states could be other than independent adjudicatory bodies. They could not be mere parts of a coordinated whole." Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19, 30 (1980). For an excellent discussion of *Pennoyer*, its justification and rationale, see also Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241.

5. "[E]very State possesses exclusive jurisdiction over persons and property within its territory . . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory." 95 U.S. at 722.

6. In *International Shoe*, plaintiff Commissioner was authorized under a Washington statute to issue employees a notice of assessment of delinquent contributions to an unemployment compensation till. Plaintiff served process on a salesperson of International Shoe Company, a Delaware corporation that had no authority to make contracts in Washington, had no office or merchandise status in the state, and employed only eleven to thirteen employees in the state. The Washington Supreme Court found that "regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product in the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit . . . ." 326 U.S. at 313-14.

7. "To say that the corporation is so far 'present' there as to satisfy due process requirements . . . is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." 326 U.S. at 316-17.

8. *See generally* Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383 (1979).

9. 326 U.S. at 316.

10. "It is evident that the criteria by which we mark the boundary line be-

the propriety of asserting jurisdiction. Qualitative analysis involves a weighing of all the relevant factors peculiar to each case in order to determine whether exercising jurisdiction violates due process. The Court's dictum suggested that the convenience to the out-of-state defendant in having to litigate in the forum state is a factor to be included in this due process calculus.[12]

This notion of convenience to the defendant surfaced again twelve years later in *McGee v. International Life Insurance Co.*,[13] in which the Supreme Court allowed California's assertion of personal jurisdiction over a Texas insurance company "based on a contract which had substantial connection" with California.[14] Justice Black acknowledged that the modernization of transportation facilities, communication, and national commerce eliminated any unfairness in subjecting an out-of-state corporate defendant to jurisdiction in a state in which the defendant had been involved in economic activity.[15] In addition to this idea of convenience, the Court stressed that the interest of the forum state in adjudicating

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tween those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." *Id.* at 319.

11. "The *International Shoe* decision . . . permits the assumption of jurisdiction over any matter that bears a reasonable and substantial connection to the forum community." Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1147 (1966).

12. 326 U.S. at 317.

13. 355 U.S. 220 (1957). In *McGee*, plaintiff, beneficiary of decedent's life insurance policy which had been purchased by mail in California from a Texas corporation, sued the Texas corporation for refusal to pay out on the insurance contract. Plaintiff obtained a default judgment in California. In Texas, the court refused to enforce her judgment and held it void because service of process outside California could not subject the Texas defendant to California's jurisdiction. The United States Supreme Court reversed despite the fact that neither the Texas corporation nor an Arizona corporation whose insurance obligations had been assumed by the Texas corporation had any office in California or had ever done any other business there. *Id.* at 224.

14. *Id.* at 223.

15. Justice Black explained that there had been a

> fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may involve parties separated by the full continent. With the increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.

Id.

claims for its residents was another factor in its due process analysis.[16]

A year after *International Shoe*, the Supreme Court in *Hanson v. Denckla*[17] found Florida's exercise of jurisdiction over a Delaware trust company unconstitutional. The *Hanson* court said that an assertion of jurisdiction consistent with due process requires "that there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."[18] The Supreme Court was concerned about advocating a demise to the "territorial limitations on the power of the respective States."[19] *McGee* had already minimized the use of these territorial restrictions on assertions of jurisdiction by focusing on the plaintiff, the forum's interests, and the technological advances that decreased the burden on litigating in distant forums.[20] Jus-

16. "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents . . . [who] would be at a severe disadvantage if . . . forced to follow the insurance company to a distant State in order to hold it legally accountable." *Id.*

17. 357 U.S. 235 (1958). One of the issues in *Hanson* was whether Florida had jurisdiction over a Delaware trustee who was given power pursuant to a trust created in Delaware by decedent before her death. Decedent was domiciled in Florida before her death; therefore, when her will was probated in Florida, it was found that the power of appointment over the remainder interest in the trust assets was invalid under Florida law. A Delaware court subsequently refused to accord full faith and credit to the Florida Supreme Court's decision that the appointment was invalid. The Delaware court found that Florida had no personal jurisdiction over the Delaware trustee who was an indispensible party under Florida law. *Id.* at 243.

18. *Id.* at 253.

19. *Id.* at 250-51. Justice Warren explained:

> In *McGee* the Court noted the trend of expanding personal jurisdiction over nonresidents . . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the "minimal contacts" with that state that are a prerequisite to its exercise of power over him.

Id.

20. *See* notes 15 & 16 *supra*. Professor Kamp suggests that the *McGee* and *Hanson* decisions resulted in two different interpretations of *International Shoe*. He notes that courts following *Hanson* examined the physical and business contacts of each defendant and the forum state. "Under . . . [*McGee*], a defendant's individual contacts were not regarded as determinative. Rather, the courts weighed . . . the regulatory concerns of the state, the convenience of the

tice Warren's opinion distinguished *McGee* from *Hanson* on the ground that the former involved a cause of action arising from the out-of-state defendant's activity *in* the forum state (the solicitation of the insurance agreement with the California resident), whereas *Hanson* "disclose[d] no instance in which the [Delaware] trustee performed any acts in Florida"[21] sufficient to satisfy due process.[22] Despite the implications of *McGee*, the *Hanson* Court added that jurisdiction does not automatically attach simply because the state is the center of gravity of the dispute or the most convenient forum.[23]

B. *Application of Minimum Contacts:* Gray v. American Radiator & Standard Sanitary Corp. *and* Buckeye Boiler v. Superior Court of Los Angeles County

In response to the fresh enunciation of due process standards in *International Shoe* and its progeny, state legislatures enacted broad jurisdictional long-arm statutes.[24] After *Hanson*, state and federal courts grappled with the constitutional scope of these statutes for twenty years without receiving more concrete judicial guidelines from the United States Supreme Court. This resulted in a generally liberal approach to the exercise of personal jurisdiction and in a plethora of decisions favoring plaintiffs, thus paralleling the trend towards liberal compensation for the products liability plaintiff.[25] For example, in *Gray v. American Radiator &*

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parties, the location of witnesses, the law to be applied, and the possible alternative jurisdictions." Kamp, *supra* note 4, at 31, 33-35. *See also* Note, *Specific Jurisdiction: Can the Fourth Circuit Approach Survive Woodson?* 32 S.C.L. REV. 379, 388 (1980).

21. 357 U.S. at 252.

22. Using the Supreme Court's language and analysis in *World-Wide*, the trustee in *Hanson* would not reasonably have anticipated being haled into a Florida court. *See* text accompanying notes 63-64 *infra*.

23. 357 U.S. at 253.

24. *See generally* Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1965); Note, *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

25. "Without rigid jurisdictional restraints, it has been relatively simple for plaintiffs to join complex groups of defendants, strung out across the country in a multistate chain of manufacturing and merchandising, into a single suit which tests (as the theory contemplates) the liability of the product itself, rather than the conduct of the sellers." Payne, *Jurisdiction in Personam: World-Wide Volkswagen v. Woodson*, 15 FORUM 1023 (1980).

Standard Sanitary Corp.,[26] the Illinois Supreme Court analyzed the jurisdiction question using the conflicts of law fiction that equates the place of injury with the place in which the last event in the transaction occurs.[27] The Court interpreted the Illinois long-arm statute, which confers jurisdiction over in-state tortious acts, as encompassing tortious acts performed outside the state that result in injury within the forum.[28] In *Gray*, a boiler exploded in Illinois because of a faulty safety valve that had been negligently constructed in Pennsylvania and sold to an Ohio defendant that had fitted the valve onto the boiler and shipped it into Illinois where it was sold.[29] The Court cited convenience to the defendant and the forum's interest in having the claim litigated in Illinois as motivating factors in its decision to uphold Illinois' assertion of jurisdiction over the defendant manufacturer.[30] The Court explained that modern jurisdictional theory had been relaxed after *International Shoe* and stressed that the contacts found lacking in *McGee* were present in *Gray*.[31] Acknowledging that the record did not demonstrate exactly where the manufacturer's valves had been marketed, the Court justified its result on the "reasonable inference"[32] that the manufacturer had participated in a stream of commerce connected with Illinois. The Court also noted that the possible lack of voluntariness in the manufacturer's participation in Illinois' commerce "should not matter";[33] it concluded, however, that the manufacturer's reasonable expectation that the product would be used in Illinois[34] *does* matter. As manifested in *Gray*,[35] lower court decisions ex-

26. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

27. *Id.* at 435, 176 N.E.2d at 762.

28. "We think it is clear that the alleged negligence in manufacturing the valve cannot be separated from the resulting injury; and that for present purposes, . . . the tort was committed in Illinois." *Id.* at 435-36, 176 N.E.2d at 763.

29. *Id.* at 435, 176 N.E.2d at 762.

30. *Id.* at 436, 176 N.E.2d at 763.

31. *Id.* at 438-39, 176 N.E.2d at 764. The court was satisfied that "at the present time it is sufficient if the act or transaction itself has a substantial connection with the State of the forum." *Id.* at 438, 176 N.E.2d at 764.

32. *Id.* at 442, 176 N.E.2d at 766.

33. "Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here [in Illinois], it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State." *Id.*

34. *Id.*

35. The Court in *Gray* distinguished many of the major cases favoring a

panding the jurisdiction of the courts continued to surface during the twenty years after *Hanson*, though the Supreme Court remained silent on the contacts issue. In *Buckeye Boiler Co. v. Superior Court of Los Angeles County*,[36] the Supreme Court of California explicitly employed a qualitative analysis to determine the minimum contacts issue. The Court's test was inherited from *McGee*: it involved a balancing between "the inconvenience to the defendant in having to defend itself in the forum State against both the interest in the plaintiff in suing locally and the interrelated interest of the State in assuming jurisdiction."[37] In addition, the court stressed the fact that it was foreseeable that the product would enter the forum state.[38] Thus, according to the California Supreme Court, a defendant hoping to avoid jurisdiction must show that it was unforeseeable that his product would enter the forum state and that litigation in the forum state would severely inconvenience him[39] — burdens not mandated by *Hanson*'s "purposeful availment" analysis.

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more limited concept of jurisdiction. *Id.* at 444, 176 N.E.2d at 767. One of these cases, a pre-*Hanson* decision from the Fourth Circuit Court of Appeals, Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (1956), criticized the broad concept of state court jurisdicton: "Though the 'minimum contact' theory may have liberalizing tendencies, it was not so much an innovation on due process as it was a rephrasing of the prevailing fictional tests . . . ." *Id.* at 506. The *Erlanger Mills* discussion of state sovereignty presaged the Supreme Court's analysis in *World-Wide*:

> The Constitution . . . contemplates that the boundaries between the states shall have continued significance for some purposes though not for all. If one State may, without violation of the due process clause, extend the authority of its courts beyond its boundaries over persons and situations not sufficiently related to that State, the separate identity of the States will be reduced to a mere fiction.

Id. at 509. *See also* Kamp, *supra* note 4, at 37. It is not surprising that a hypothetical articulated in *Erlanger Mills* was adopted by the Supreme Court in its analysis of foreseeability in *World-Wide*. *See* 444 U.S. at 297.

36. 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

37. *Id.* at 899, 458 P.2d at 62, 80 Cal. Rptr. at 118.

38. *Id.* at 904, 488 P.2d at 65, 80 Cal. Rptr. at 121. Before *World-Wide*, several courts equated minimum contacts with foreseeability; minimum contacts existed if it was foreseeable that tortious activity outside the forum would result in injury within. *See* Note, *State Adjudicatory Jurisdiction Over Nonresident Defendants*, 15 TULSA L. REV., 827, 835 n.48, 852 nn.92 & 93 (1980).

39. 71 Cal. 2d at 905, 488 P.2d at 66, 80 Cal. Rptr. at 122.

c. *A Fresh Response:* Kulko v. Superior Court of California

After twenty years of lower federal court decisions, the United States Supreme Court began to provide additional constitutional guidelines for jurisdictional analysis.[40] In *Kulko v. Superior Court of California*,[41] the Court held that California's assertion of personal jurisdiction over a father in New York failed *International Shoe*'s minimum contacts test. The Court refused to allow the assertion of personal jurisdiction over the New York defendant merely because he sent his child into the forum state, thus causing an "effect" in the forum state.[42] This qualitative effects analysis, emphasizing both the results of defendant's activities and the forum state's interest in having a claim litigated, steers the jurisdictional inquiry away from a simple analysis of defendant's contacts with the forum.[43] The Court diminished the precedential impact of *McGee* by downplaying the idea of convenience and stressing the fact that the defendant's act was *not* one which the defendant could reasonably have expected to result in litigation

40. This activity began when the Supreme Court held that an assertion of *quasi in rem* jurisdiction is unconstitutional absent the necessary minimum contacts between the forum state and the person whose property is the subject of the attachment. Shaffer v. Heitner, 433 U.S. 186 (1977). *See generally* Note, *The Applicability of Shaffer to the Quasi-in-Rem Attachment of Foreigner's Assets*, 12 VAND. J. TRANSNAT'L L. 393 (1979) [hereinafter cited as Note]. The *Shaffer* rationale was used in Rush v. Savchuk, 444 U.S. 320 (1980), the companion case to *World-Wide*. *Rush* held unconstitutional a Minnesota court's utilization of *quasi in rem* jurisdiction over a defendant with no contacts with the forum. *Id.* at 322. After *Shaffer* and *Rush*, it appears that an exercise of jurisdiction *in rem* is also unconsitutional without a showing of sufficient minimum contacts. *Id.* at 328.

41. 435 U.S. 84 (1978). The husband made a special appearance when his wife attempted to modify their separation agreement in court and moved to quash service on the grounds that he lacked the necessary contacts with California to justify an assertion of jurisdiction. The trial court's denial of the motion was sustained by the California Supreme Court. Kulko v. Superior Court of Calif., 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977). The father had permitted one child to take up permanent residence with her mother in California and another child flew there to stay with his mother without his father's permission. The California Supreme Court found that the initial consent granted by the father constituted a fair and reasonable basis for extending personal jurisdiction over him. *Id.* at 524, 564 P.2d at 358, 138 Cal. Rptr. at 592.

42. 436 U.S. at 96.

43. *Id.* at 94. "As in *Hanson* . . ., the instant action involves an agreement that was entered into with virtually no connection with the forum State." *Id.* at 97.

in a state three thousand miles away.[44] This idea of foreseeability would later characterize the due process limitations articulated in *World-Wide*.[45]

D. World-Wide *and the Limits of Due Process*

World-Wide Volkswagen Corp. v. Woodson presented an Oklahoma products liability action brought by private plaintiffs against Seaway Volkswagen, Inc., the New York retailer of an allegedly defective Audi. Plaintiffs purchased the Audi in New York and were injured while driving through Oklahoma on their way to a new residence in Arizona. Plaintiffs joined as defendants the manufacturer, Audi;[46] Audi's importer, Volkswagen of America, Inc.; and the regional Audi distributor, World-Wide Volkswagen, a New York corporation. Seaway and World-Wide challenged the Oklahoma district court's exercise of jurisdiction; the trial court rejected this challenge and the defendants unsuccessfully attempted to obtain from the Supreme Court of Oklahoma a writ of prohibition restraining the trial judge.[47] The United States Supreme Court granted certiorari[48] and reversed, holding that, absent evidence of recordable sales or other business with retail customers in the forum state, a local retailer and regional distributor cannot constitutionally be subjected to *in personam* jurisdiction.[49]

Before addressing respondent's contentions, Mr. Justice White, chronicling the development of jurisdictional theory since *International Shoe*,[50] declared that the due process clause was "an instrument of interstate federalism"[51] and noted that "territorial limitations on the power of the respective States"[52] were limitations "express or implicit in both the original scheme of the Con-

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44. *Id.*

45. 444 U.S. at 297.

46. *Id.* at 288. The manufacturer, Audi, is Audi NSU Auto Union Aktiengesellschaft of Germany.

47. *Id.* at 289. The Oklahoma Supreme Court applied Oklahoma's long-arm statute, Okla. Stat. tit. 12, § 1701.3(a)(4) (1971). *Id.* at 289-90.

48. 440 U.S. 907 (1979).

49. 444 U.S. at 298.

50. This analysis was similar to *McGee*'s discussion of the modernization of the United States economy. *Id.* at 293.

51. *Id.* at 294.

52. The court considered *Hanson*'s discussion of restrictions on state sovereignty. *Id.*; *see* 357 U.S. at 250-51.

stitution and the Fourteenth Amendment."[53] Thus, Justice White reasoned that minimum contacts analysis may prevent a state from exercising jurisdiction when the defendant faces no inconvenience from litigation in the forum, the state has a strong interest in hosting litigation, and the state offers the most convenient forum.[54] Indeed, the minimum contacts analysis, reflecting the Court's concern with principles of interstate federalism, performs two functions: (1) it serves to avoid burdening a defendant with having to litigate in a distant forum and (2) it "acts to insure that the States, through their courts, do not reach out beyond the limits imposed on them by their states as coequal sovereigns in a federal system."[55]

World-Wide's minimum contacts analysis was of a quantitative character. Quantitative analysis necessitates examining the sum total of a defendant's forum-related activities to determine if the total number of contacts allows an assertion of personal jurisdiction without violation of due process. Although Justice White listed the types of contacts that Seaway and World-Wide Volkswagen did *not* have with Oklahoma,[56] the opinion implied that the existence of a combination of these contacts might justify an assertion of jurisdiction.[57] Justice White noted that the situs of the defective Audi in Oklahoma was "one, isolated occurrence,"[58] insignificant as opposed to "efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States."[59] This distinction is reminiscent of *Hanson*'s purposeful availment test and may require more than minimal contacts since the privileges and economic benefits accruing to manufacturers and distributors from the use of Oklahoma's highway

53. 444 U.S. at 293.
54. *Id.* at 294.
55. *Id.* at 291-92.
56. Justice White stated:

> Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market.

Id. at 295.
57. *See* Payne, *supra* note 25, at 1026.
58. 444 U.S. at 295.
59. *Id.* at 297.

system constitute the qualitative contacts needed to pass the *International Shoe* test.[60] The *World-Wide* Court did, however, cite *Gray* for the proposition that even "one, isolated occurrence" could subject national distributors and foreign manufacturers, who place goods in the stream of commerce and expect consumption in the forum state, to the forum state's jurisdiction.[61]

Thus it seems that *Gray* retains some vitality notwithstanding the fact that it involved a single, isolated occurrence.[62] *World-Wide*, however, overruled the concept of foreseeability expressed in cases such as *Buckeye Boiler*. Justice White admitted that the contacts with the forum established by the defendants in *Hanson* and *Kulko* were foreseeable in one sense, but explained that "the foreseeability . . . critical to due process analysis is not the mere likelihood that a product will find its way into the forum state."[63] Using *World-Wide*'s definition, foreseeability occurs when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[64] This definition complements *Hanson*'s purposeful availment test because a defendant that purposefully avails itself of the privilege of conducting activities within the forum should reasonably anticipate being haled into court there.

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60. Kamp, *supra* note 4, at 44. *See also* 444 U.S. at 307 (Brennan, J., dissenting).

61. 444 U.S. at 297-98. *Cf.* Gray v. Am. Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

62. *See* text accompanying note 29 *supra*.

63. 444 U.S. at 297.

64. *Id.* In a three-man dissent, Justice Brennan maintained that *International Shoe* mandated only that jurisdiction be fair and reasonable and did *not* "establish a mechanical test based on the quantum of contacts between a State and the defendant." *Id.* at 300. Justice Brennan felt that if certain concerns were invoked, "the significance of the contacts necessary to support jurisdiction would diminish." *Id.* These concerns included: (1) *McGee*'s emphasis on the state's interest in permitting the litigation to go forward; (2) the convenience to the defendant in having to defend in a distant forum; and (3) a situation involving a businessman's inability to control the movement of his goods. *Id.* at 300-01, 308-09. Justice Brennan could not reconcile the majority's distinction "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 a dealer knew the customer would, took them there." *Id.* at 306-07. He felt the majority contradicted itself by citing to *Gray* in which the defendant manufacturer "had no more control over which States its goods would reach than did the petitioners in this case." *Id.* at 307 n.12.

E. *The Historical Perspective After* World-Wide

Earlier due process cases are placed in a new analytical framework by the *World-Wide* decision. *World-Wide* interpreted *Hanson*'s territorial restriction analysis in terms of interstate federalism, thus resurrecting *Pennoyer*'s argument that jurisdiction is limited by the coequal status of states in a federal system. *International Shoe*'s minimum contacts test is utilized by the *World-Wide* Court in a quantitative, defendant-oriented manner in order to ascertain the procedural fairness that due process requires. Furthermore, *World-Wide*'s inquiry into whether a defendant should reasonably foresee litigating in the forum is the logical extension of *Hanson*'s purposeful availment test and *Kulko*'s rejection of a qualitative effects analysis. *World-Wide*'s unique foreseeability test qualifies lower court decisions such as *Buckeye Boiler* while lower court holdings based on a "stream of commerce-reasonable expectation" analysis are supported by *World Wide*'s recognition of *Gray*. Therefore, *World-Wide* provides a fresh perspective which must become part of any minimum contacts analysis applied to a transnational setting.

III. Recent Decisions

Recent federal court decisions have applied *World-Wide* to situations involving tortious injuries in the United States resulting from defective foreign products. The strong concern of federal courts, sitting as state courts in diversity actions, in providing a United States forum for litigating these products liability claims clashes with *World-Wide*'s limited focus on the defendant's contacts with the forum.[65] When confronted with the question of whether it is constitutional to assert jurisdiction over foreign corporations that distribute their products internationally, however, these courts appear only peripherally concerned with the principles of federalism underlying *World-Wide*. In these cases, the courts have emphasized that quantitative minimum contacts analysis may be necessary to determine foreseeability under the *World-Wide* standard.

A. Poyner v. Erma Werke Gmbh

Two months after *World-Wide*, the Sixth Circuit Court of Ap-

65. *See* Payne, *supra* note 25, at 1029.

peals decision in *Poyner v. Erma Werke Gmbh*[66] dealt with a transnational situation involving an assertion of jurisdiction over a foreign defendant. The *Poyner* court was relatively unconcerned with *World-Wide*'s emphasis on federalism and upheld an assertion of jurisdiction over a German-based firearms manufacturer, Erma Werke Gmbh (Erma). Plaintiff had sued Erma and Erma's New York based distributor, L.A. Distributors, Inc., after an Erma pistol caused gunshot wounds that left plaintiff a paraplegic.[67] Plaintiff, alleging both negligence and breach of warranty, obtained a default judgment against Erma[68] after Erma failed to respond to service of process issued pursuant to Kentucky's long-arm statute.[69] A motion for summary judgment[70] was granted on grounds that Erma lacked sufficient minimum contacts with Kentucky.[71] After concluding that the Kentucky long-arm statute conferred jurisdiction over the German manufacturer,[72] the Sixth Circuit articulated a three-part test for determining whether an assertion of personal jurisdiction passes constitutional muster.[73] First, the court asked whether Erma purposefully availed itself of the privilege of conducting business in Kentucky. The court agreed that Erma had utilized L.A. Distributors as its primary United States distributor and advertisor, sold its products to a Kentucky distributor, and maintained a salesman and warehouse in the Southeast.[74] Second, the Court inquired as to whether the cause of action arose from defendant's activities in the forum state.[75] The record disclosed only that L.A. Distributors had sold

66. 618 F.2d 1186 (6th Cir. 1980).

67. *Id.* at 1187.

68. *Id.*

69. KY. REV. STAT. § 454.210(2)(a) 4-5 (1968) (amended 1980).

70. 618 F.2d at 1187. Erma's insurance company, added as a defendant in a supplemental complaint, filed the motion for summary judgment. Erma's American-based parent corporation, Lear Siegler, Inc. (LSI), advised Erma not to respond to suit; therefore, Erma did not give its insurance company, Insurance Company of America, timely notice of the pending litigation. LSI too was added as defendant and held to be liable under the default judgment of the district court; however, the Sixth Circuit reversed this decision in Poyner v. Lear Siegler, Inc., 542 F.2d 955 (6th Cir. 1976), *cert. denied,* 430 U.S. 969 (1977).

71. 618 F.2d at 1187.

72. *Id.* at 1189-90.

73. This test was originally delineated in Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 381 (6th Cir. 1968).

74. 618 F.2d at 1191.

75. *Id.*

the defective pistol to the Nashville salesman and that a Kentucky resident had acquired it; the court, however, found it "more probable than not that this cause of action arose from Erma's activities in Kentucky."[76] The final inquiry concerned whether sufficient contacts existed and permitted the court to resurrect the federalism concerns articulated in *World-Wide*.[77] Yet the court not only recognized the significance of *McGee*'s emphasis on convenience to the defendant but also found "the interest of the commonwealth in adjudicating this dispute to be an important factor in the resolution of the issue at bar."[78] Then, paralleling the *McGee* discussion of modern commercial and technological advances, the court acknowledged that the United States was a center of international trade and concluded that the rapid growth in markets, transportation, and communication diminished the burden on a foreign enterprise forced to adjudicate in a state in which it engages in business activity.[79] The Sixth Circuit noted that a balancing process,[80] reminiscent of the process articulated in *Buckeye Boiler*, was the proper method of evaluating due process in this transnational arena. *World-Wide*'s unilateral focus on the defendant was thus ignored.[81] Moreover, the court explained that *World-Wide*'s emphasis on federalism was somewhat inapplicable to an international setting because "[w]hile minimum contacts also serve the related function of checking the jurisdictional reach of coequal sovereigns in a federal system, the impact of such a purpose is minimized in an international setting as opposed to interstate operations."[82]

B. Oswalt v. Scripto, Inc.

Unlike the Sixth Circuit Court of Appeals, the Fifth Circuit in *Oswalt v. Scripto, Inc.*[83] found Justice White's foreseeability

76. *Id.* The court later explained that the fact that the last recorded sale of the gun occurred in Tennessee did not affect its decision. *Id.* at 1192.

77. *Id.* at 1191.

78. *Id.*

79. *Id.*

80. "Given Erma's contacts with Kentucky and balancing the plaintiff's interest . . . to adjudicate his cause and obtain effective relief as against Erma's burden of litigating this matter in Kentucky, we conclude that it is reasonable and fair to require Erma to litigate the action in Kentucky." *Id.*

81. 444 U.S. at 294.

82. 618 F.2d at 1192.

83. 616 F.2d 191 (5th Cir. 1980).

analysis apropos. After suffering burns from a defective lighter, plaintiff sued both Tokai-Sekei, a Japanese cigarette lighter manufacturer and Scripto, Inc., its United States distributor.[84] The court considered the quantum of Tokai-Sekei's contacts with Texas and set forth a litany of negatives: the Japanese manufacturer had no office or agent in Texas; no record of doing business in the United States or with a United States company (except Scripto, which was to be Tokai-Sekei's exclusive distributor of the lighter); and no manufacturing, assembling, selling, or dealing organizations in this country.[85] The record, however, reflected that Scripto had purchased several million lighters from Tokai-Sekei in Japan and marketed three to four million lighters per year in the United States.[86] The Fifth Circuit agreed that Tokai-Sekei had reason to know the defective lighter would reach Texas and found this constructive knowledge sufficient to subject Tokai-Sekei to personal jurisdiction.[87]

The court articulated both *Hanson*'s purposeful availment test and *McGee*'s discussion of modern transportation and commerce,[88] but based its decision on the stream of commerce dictum

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84. Scripto cross-claimed against Tokai-Sekei and also filed a third-party complaint for contribution and indemnity against Holland-Hessol Co., Inc., manufacturer of Mrs. Oswalt's pajamas. Holland-Hessol then filed a third-party complaint against Ameretex, manufacturer of the fabric used in the pajamas. *Id.* at 193. Consequently, Oswalt and Scripto agreed to settle between themselves and filed a Joint Motion for Permission to Appeal the Texas district court's dismissal of Tokai-Sekei for lack of personal jurisdiction, but their attempt at obtaining an appeal of an interlocutory order pursuant to 28 U.S.C. § 1292(b) (1976) was denied by the Fifth Circuit. *Id.* They were granted their joint motion to sever Scripto's actions against Holland-Hessol and Ameretex; a new order repeating the dismissal of Tokai-Sekei for lack of personal jurisdiction was entered. *Id.* The district court judgment dismissing Tokai-Sekei, however, did not have a FED. R. CIV. P. 54(b) certificate. In addition the court failed to make any § 1292(b) representations and there was not a final order to dismiss Oswalt's claim against Scripto. *Id.* at 194. The court found that the agreement between the Oswalts and Scripto was tantamount to a stipulation of dismissal under FED. R. CIV. P. 41(a)(1)(ii). *Id.* As a result, the court concluded that the dismissal of Tokai-Sekei terminated the district court's litigation and was appealable. *Id.* at 195.

85. *Id.* at 197.

86. *Id.* at 198. Mrs. Oswalt purchased the lighter, which had been supplied by a Midland, Texas wholesaler, from Mr. Oswalt's daughter.

87. *Id.*

88. *Id.* at 199.

in *World-Wide*.[89] The Fifth Circuit failed to consider that *World-Wide*'s "stream of commerce-reasonable expectations" language leads to the conclusion that a product's destination may be just as foreseeable to a foreign manufacturer as it is to a local retailer or regional distributor.[90] Instead, the court said Tokai-Sekei should reasonably have anticipated being haled into a Texas court[91] because the lighters were delivered to Scripto with the understanding that they would be delivered to United States retail outlets.[92] The court proclaimed that this case fit "like a glove"[93] Justice White's manufacturing and distribution hypothetical in *World-Wide*.[94] Unlike Seaway (the local operator) and World-Wide Volkswagen (the regional distributor), Tokai-Sekei failed to limit its distribution system to avoid exposure to the jurisdiction of the Texas courts.[95]

The Fifth Circuit qualified dicta in its previous decisions without considering whether these decisions were in accord with *World-Wide*.[96] The court felt that the citation to *Gray* at the end of *World-Wide*'s "stream of commerce-reasonable expectations" analysis reinforced its decision. The court found further reinforcement from its decision in *Coulter v. Sears Roebuck & Co.*,[97] which also cited *Gray*.[98] The *Oswalt* court strategically utilized the *Gray* opinion, reasoning that Tokai-Sekei's contacts with Texas were more definite than the contacts found in *Gray*.[99] This reasoning anchored the *Oswalt* opinion within *Gray*'s controversial holding that one isolated occurrence in the forum state may justify a state's assertion of jurisdiction.

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89. *See* text accompanying note 29 *supra*.

90. Professor Payne suggested that *World-Wide*'s "stream of commerce-reasonable expectations" analysis supports such a conclusion. *See* Payne, *supra* note 25, at 1027.

91. 616 F.2d at 200.

92. *Id.* at 199.

93. *Id.* at 200.

94. *Id.* at 199-200. See discussion of Justice White's manufacturing and distribution hypothetical in *World-Wide*.

95. *Id.* at 200.

96. *Id.* at 201 & n.14.

97. 426 F.2d 1315 (5th Cir. 1970). In *Coulter*, the court stated that "it is sufficient to impose jurisdiction over a foreign manufacturer if he introduces his products into the 'stream of interstate commerce with reason to know or expect that his product would eventually be brought into Texas . . .'" 616 F.2d at 200.

98. *Id.* at 201-02.

99. *Id.*

C. DeJames v. Magnificence Carriers, Inc.

Like the Fifth Circuit in *Oswalt,* the United States District Court of New Jersey utilized *World-Wide*'s concept of foreseeability in its decision in *DeJames v. Magnificence Carriers, Inc.*[100] In *DeJames,* the court found that Hitachi Shipbuilding and Engine Company Ltd. was not amenable to suit for injuries caused by defective conversion work on a ship moored in New Jersey.[101] The defective conversion work had been performed by Hitachi in Japan.[102] The court first focused on the fact that the ship's situs in New Jersey at the time of the injury failed to provide sufficient contacts,[103] since Hitachi did not do business in New Jersey, maintain an office or agent there, or employ any salesman to sell its product there.[104] Plaintiff proferred[105] a stream of commerce rationale to argue that the nature of Hitachi's business, which involved work on isolated sailing vessels, meant that Hitachi "should expect to be haled into court in any forum where a defect in one of its ships causes harm."[106] The court responded that Hitachi had not placed its products into the forum through use of a specific, planned distributive scheme and that Hitachi did not envision marketing or distributing the vessel commercially.[107]

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100. 491 F.Supp. 1276 (D.N.J. 1980).

101. Plaintiff DeJames sued Hitachi and three charterers of the ship, invoking the district court's admiralty jurisdiction under 28 U.S.C. § 1333 (1976). *Id.* at 1277. Plaintiff alleged that defendant had contracted to convert the ship into an automobile carrier and that as a result of the work performed, he incurred injuries while working on the vessel docked in Camden, New Jersey. Hitachi moved to dismiss the complaint for lack of sufficient contacts with New Jersey to meet due process standards. *Id.*

102. *Id.*

103. Since this suit involved a federal claim, the court noted that the due process clause of the fifth amendment controlled, but that this did not undermine the application of *International Shoe,* a fourteenth amendment case. *Id.* at 1278.

104. *Id.* at 1279.

105. Plaintiff relied on the following pre-*World-Wide* decisions: Benn v. Linden Crane Co., 326 F. Supp. 995 (E.D. Pa. 1971); Smiley v. Gemini Inv. Corp., 333 F. Supp. 1047 (W.D. Pa. 1971); Keckler v. Brookwood Country Club, 248 F. Supp. 645 (N.D. Ill. 1965). *Id.*

106. *Id.*

107. [T]here was no distributive or marketing scheme whereby Hitachi sought to have the vessel in question marketed and sold through channels to a New Jersey resident. Hitachi's sole involvement with the vessel was under a contract made in Japan between itself and the ship's owners. . . . It had no *control* over the ship once it left Japan. It made no decision to

Finally, comparing *DeJames* and *World-Wide* on the facts, the court found that Hitachi had no reason to foresee litigation in New Jersey as a result of its work in Japan.[108] Unlike the Sixth Circuit Court of Appeals in *Erma,* the New Jersey District Court emphasized the premise that territorial restrictions on state courts still exist,[109] thus echoing *World-Wide*'s reliance on *Hanson.*

D. Plant Food Co-op v. Wolfkill Feed & Fertilizer

The analysis in *Plant Food Co-op v. Wolfkill Feed & Fertilizer*[110] does not significantly depart from that in *Oswalt or DeJames,* yet it indicates an application of *World-Wide* to cases in which the regional distributor has the "ability to control its contacts with the forum asserting jurisdiction and the benefits it derived from that conduct."[111] Plant Food, a Montana-based fertilizer dealer, placed an order for some ammonium nitrate fertilizer from a Washington corporation, Wolfkill, which ordered the fertilizer from a Washington corporation, A.R. Smith and Co., which in turn purchased the product from Pillsbury of Canada Ltd.[112] Pillsbury's fertilizer, shipped via a sight draft bill of lading listing Pillsbury as shipper and Smith as consignee, was mislabelled. The fertilizer caused extensive property damage to Plant Food's own bins and fertilizer[113] after it was unloaded into bins already containing ammonium nitrate. Relying on the Montana long-arm statute[114] and declaring that the action did indeed sound in tort, the Ninth Circuit affirmed the district court's decision for the plaintiff.[115]

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send the ship into New Jersey, nor did it seek to benefit from the laws of New Jersey or derive any profit there, either directly or indirectly.

Id. at 1280 (emphasis added).

108. *Id.*

109. *Id.* at 1280-81.

110. 633 F.2d 155 (9th Cir. 1980).

111. *Id.* at 159.

112. *Id.* at 156. Pillsbury purchased the fertilizer from Love Feeds, Ltd. of Alberta, Canada.

113. *Id.* at 157. The mislabelled ammonium nitrate was really ammonium sulfate and urea.

114. MONT. R. CIV. P. 4B (1979), *cited in* 633 F.2d at 158, confers personal jurisdiction for the commission of any act that results in accrual within the state of a tort action.

115. *Id.* at 157. Plant Food sued Wolfkill for damages in Montana district

The *Plant Food* court's due process discussion was brief but direct. The court found that Pillsbury had voluntarily entered the Montana market by shipping a mislabelled product into the forum state.[116] More importantly, the fact that Pillsbury, unlike the defendants in *World-Wide,* controlled its contacts with the forum state by choosing shipping destinations was found to be dispositive on the contacts issue.[117] The court determined that the bill of lading was evidence of Pillsbury's control and also demonstrated Pillsbury's knowledge that the product was destined for Montana.[118] Even though Pillsbury might not have known the product was defective, it was ready to reap financial benefits from its Montana activities and thus should have foreseen the possibility of litigating in Montana.[119]

IV. Conclusion

With the advent of these recent decisions involving foreign corporate defendants, it appears that *World-Wide*'s use of minimum contacts analysis to further interstate federalism will not provide as much of an impact in international products liability as will *World-Wide*'s foreseeability doctrine and its quantitative inquiry into defendant's forum-related activities. These latter two components of *World-Wide* are the basis for the different results achieved by the Supreme Court in the *World-Wide* decision itself and in Justice White's hypothetical. Likewise, these two compo-

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court on a claim of breach of warranty of description and implied warranty of merchantibility. Wolfkill filed a third-party complaint against Smith and Pillsbury. Pillsbury presented an employee affidavit to prove that after receiving shipping instructions from Smith, Love actually shipped the fertilizer although the bill of lading showed Pillsbury as shipper. After the court denied Pillsbury's motion to dismiss based on this affidavit, Pillsbury filed a third-party complaint against Love, and Smith cross-claimed against Pillsbury. Plant Food received a judgment against Wolfkill for partial damages. Then the court granted summary judgment to Smith against Wolfkill on Wolfkill's third-party complaint. *Id.* Finally, the court granted summary judgment against Pillsbury on the basis of both Wolfkill's third-party complaint and Smith's cross-complaint. *Id.* In the process both Wolfkill's motion for judgment against Smith and/or Love and Pillsbury's motion for a new trial were denied. Pillsbury appealed. *Id.*

116. *Id.* at 158-59.

117. *Id.* at 159.

118. "The bill of lading shows conclusively that Pillsbury knew, at least when it accepted the shipping instructions, that the product it sold was destined for Montana." *Id.*

119. *Id.*

nents produced the different results in *Oswalt* and *DeJames*.

Oswalt, which is gaining precedential strength,[120] faithfully extends the *World-Wide* analysis and develops a stream of commerce rationale to justify the exercise of personal jurisdiction in claims against foreign manufacturers based on product-related injuries occurring in the forum.[121] *Oswalt*'s stream of commerce analysis stands in opposition to the argument that a foreign manufacturer which utilizes a national distributor as a conduit for the marketing of its products has no expectation that its products will be purchased by consumers in the forum state.[122] Furthermore, *Oswalt* demonstrates that a quantitative consideration of a foreign defendant's contacts with the forum state is integral to

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120. *See* Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co. (America), 499 F. Supp. 829, 835 (D. Or. 1980); Red River Transp. & Dev. Co. v. Custom Airmotive, Inc., 497 F. Supp. 425, 428 (D.N.D. 1980); Dotson v. Fluor Corp., 492 F. Supp. 313, 317 (W.D. Tex. 1980); DeJames v. Magnificence Carriers, Inc., 491 F. Supp. 1276, 1279 (D.N.J. 1980); Long v. The Vessel "Miss Ida Ann," 490 F. Supp. 210, 213 n.1 (S.D. Tex. 1980).

Cascade Steel and *Dotson* are similar to *Oswalt* in that they involve foreign corporation defendants. Both decisions relied on *Oswalt*'s interpretation of *World-Wide*. 499 F. Supp. at 835; 492 F. Supp. at 37. In *Cascade Steel*, the Oregon District Court dismissed an antitrust suit against Japanese steel mills that "were aware of the ultimate destination of the steel sold to the [Japanese] trading companies, but . . . did not solicit sales from Oregon nor did they have any *control* over where the steel was to be shipped." 499 F. Supp. at 842 (emphasis added). The Japanese trading companies owned subsidiaries doing business in Oregon. *Id.* at 836.

Furthermore, in *Dotson*, a Texas district court found it constitutional to assert jurisdiction over a Saudi Arabian corporation that recruited Texas residents for employment in Saudi Arabia. The action involved a breach of contract and misrepresentation by the foreign corporation that "purposefully availed itself of the privilege of employing Texas residents." 492 F. Supp. at 317.

121. The court stated:

> [T]hese facts place this case squarely within the dictum of *World-Wide Volkswagen* implying that jurisdiction over a foreign manufacturer such as Audi is constitutional. By utilizing the distribution network in the United States established by Scripto, Tokai-Sekei has made efforts to serve indirectly the market for its products in Texas. Tokai-Sekei, precisely as the dictum describes, 'delivered its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.'

616 F.2d at 200.

122. The argument remains that a foreign manufacturer utilizing a local or regional distributor has no reason to expect its products will be purchased by consumers in a forum state outside the commercial range of the distributor's operations. *See* note 90 *supra* and accompanying text.

any finding of foreseeability under the *World-Wide* standard.[123] Whether a court chooses to use a stream of commerce analysis or a quantitative analysis of defendant's contacts with the forum, a finding of foreseeability under the *World-Wide* standard produces such consistent results that it is fair to summon a foreign manufacturer into the United States to account for the distribution of its product through the activities of a national distributor.

Oswalt's extension of liability to a foreign manufacturer accords with *World-Wide*; the *World-Wide* opinion, however, also emphasizes the need to minimize the burden of litigation in distant forums on local and regional domestic businesses.[124] *DeJames* fills this gap by focusing on the defendant and expands *World-Wide*'s protective scope to preclude assertions of jurisdiction against small foreign businesses that do not expect their product to enter a United States distribution network.[125] The *World-Wide* foreseeability criteria defined the line between the protection afforded Hitachi in *DeJames*[126] and the protection denied Pillsbury in *Plant Food.*[127] Both the *Plant Food* and *DeJames* courts acknowledged Justice White's statement in *World-Wide* that the guarantees of the due process clause bestow "a degree of predictabilility to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[128] The "minimum assurance" language gave rise to the Ninth Circuit's[129] and the New Jersey District Court's[130] characterization of a "control" element in minimum contacts analysis. Like the defendants in *World-Wide,* the defendant in *DeJames,* which did not control the movement of its

123. *See* text accompanying notes 85-87 *supra.*

124. *See* 444 U.S. at 294 and text accompanying note 137 *infra.*

125. *See* text accompanying notes 104-07 *supra.*

126. 491 F. Supp. at 1279.

127. 633 F.2d at 159.

128. 444 U.S. 297. Unlike the *DeJames* court, the *Plant Food* court did not incorporate this language directly into its opinion; it did, however, use this reasoning in reviewing Pillsbury's activities. "When it knew the fertilizer was bound for Montana, Pillsbury could have objected or made other arrangements if it found exposure to Montana's long-arm statute unacceptable." 633 F.2d at 159. The Fifth Circuit in *Oswalt* also recognized that defendant "Tokai-Sekei's distribution system was not structured to gain some 'minimum assurance" . . . that the lighters would be sold in Texas." 616 F.2d at 200.

129. *See* text accompanying note 111 *supra.*

130. 633 F.2d 155, 159 (9th Cir. 1980).

product, escaped the reach of New Jersey's personal jurisdiction. In contrast, the regional distributor in *Plant Food* did control the entry of the fertilizer into Montana, and thus it was appropriate to give Plant Food its day in court. Delineating a "control" element is, therefore, a valuable tool in applying *World-Wide*'s minimum contacts analysis to a transnational setting.[131]

Though the *Oswalt* and *DeJames* courts focused on the quantitative crux of the *World-Wide* opinion, the *Erma* court gave more attention to Justice White's interstate federalism discussion:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; [and] 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.[132]

The Sixth Circuit opinion in *Erma* pragmatically considers the applicability of *World-Wide*'s interstate federalism philosophy in a case involving a foreign defendant.[133] In holding that plaintiff's injuries arose from the foreign defendant's activities in Kentucky, the court avoided forcing a Kentucky plaintiff to seek redress in a distant foreign forum, despite the fact that the injuries plaintiff received in Kentucky were the result of a series of events set in motion in Germany.[134] By limiting the underlying federalism concerns in *World-Wide* to cases involving domestic defendants, the Sixth Circuit resurrected the two plaintiff-oriented considerations cited in *McGee* and in Justice Brennan's *World-Wide* dissent: convenience and state interest.[135]

If a court follows *Erma*'s interpretation of *World-Wide*'s federalism argument, it avoids denying plaintiff a day in court when there is no alternative forum in this country. Under these same circumstances, if Justice White's "interstate federalism" language is used (as it must be if minimum contacts analysis is to check the jurisdictional reach of coequal sovereign states), then an assertion of jurisdiction based on the necessity of giving the plain-

131. The Oregon District Court also used this "control" characterization in its analysis in *Cascade Steel*. *See* note 120 *supra*.

132. 444 U.S. at 294.

133. 616 F.2d at 198-99.

134. Poyner v. Erma Werke Gmbh, 618 F.2d at 1191.

135. *Id.* at 1192; *see* note 64 *supra*.

tiff an opportunity to litigate will be defeated by *World-Wide*'s quantitative inquiry into defendant's contacts with the forum.[136] Yet if a court confronted with these circumstances justifies application of *Erma*'s qualitative analytical approach because the case involves the jurisdictional reach of a state into another country (not into another coequal state), the court can circumvent *World-Wide*'s emphasis on the number of contacts defendant had with the forum and concomitantly provide plaintiff with a forum in the United States. The result, however, is dictated by *World-Wide*'s federalism mandate: the jurisdictional question is resolved at the expense of state sovereignty.

A complementary consideration follows: by adhering to *World-*

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136. In Shaffer v. Heitner, 433 U.S. 186 (1977), the Supreme Court suggested that a state's exercise of *in rem* jurisdiction may be constitutional when defendant's lack of amenability to suit in other forums would deny plaintiff an opportunity to litigate.

> *Shaffer* provides a hint of this special state interest in its reference to the "[s]tate's strong interest in assuring the marketability of property within its borders." Realizing that it was frequently inadequate to base *in rem* and *quasi-in-rem* jurisdiction upon the fiction that anyone claiming property within a state availed himself of forum benefits, the Court utilized the concept of state's interest in marketability of land as additional justification for the exercise of jurisdiction in cases where the defendant held property within the state, and was not amenable to suit in other forums. *Shaffer's* approval of the state interest doctrine is thus limited to cases of "jurisdiction by necessity," in which the ultimate consideration is to provide the plaintiff with at least one possible forum for his litigation.

Note, *supra* note 40, at 409.

Indeed, Justice Marshall's footnote gave vitality to a jurisdiction by necessity argument, for he stated that "[*Shaffer*] does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." 433 U.S. at 211 n.37. Yet *Shaffer* found that adjudicating interests in property demands the same due process standards for purposes of minimum contacts analysis as adjudicating interests of people who own that property. If an exercise of *in personam* jurisdiction over an out-of-state defendant violates due process, then an *in rem* assertion of jurisdiction over property owned by that defendant is equally unconstitutional. *See* note 40 *supra*. Therefore, Justice White's "interstate federalism" language in *World-Wide*, which prohibits *in personam* jurisdiction based solely on the necessity of providing defendant with *some* forum, should logically extend to *Shaffer*-type *in rem* proceedings. Thus, *World-Wide* indirectly answers the question posed by the *Shaffer* footnote: Minimum contacts analysis, remaining faithful to the rigid defendant-oriented focus of *World-Wide*, may "divest the State of its power to render a valid judgment" in both *in personam* and *in rem* actions, even if to do so would deny plaintiff his day in court. 444 U.S. at 294.

Wide's defendant-oriented focus, the products liability policy of compensating the plaintiff is diminished. Indeed, Justice White indicated that rejection of a *Buckeye Boiler*-type foreseeability standard avoided implying that [e]very seller of chattels would in effect appoint the chattel his agent for service of process."[137] Yet Justice White's statement may merely rephrase an aspect of products liability theory.[138] As *DeJames* demonstrates, a denial of jurisdiction based on the restrictive language in *World-Wide* discourages smaller foreign businesses which, like Hitachi, have direct and indirect income resulting from exposure of their work in ports all over the world, from increasing prices and sharing the commercial risks between the manufacturer and the public. As a result, plaintiffs like DeJames must bear the expense of travel abroad or forego their claims. Nevertheless, to obtain a different result would require some independent assumptions as are posited by the court in *Erma*; it was similar lower court ventures into due process analysis that prompted Supreme Court responses in *Kulko* and *World-Wide*.[139] What is needed are further Supreme Court formulae that analyze jurisdictional assertions over foreign products liability defendants in the context of *World-Wide*'s due process limits and also consider the whole foreign defendant issue in the perspective of the Supreme Court's current federalism philosophy.

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137. *Id.* at 296.
138. *See* Payne, *supra* note 25, at 1025.
139. *See* text accompanying notes 26-39 *supra*.