

2013

## Jurisdictional Imputation in DaimlerChrysler AG v. Bauman: A Bridge Too Far

Linda J. Silberman

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>

---

### Recommended Citation

Linda J. Silberman, Jurisdictional Imputation in DaimlerChrysler AG v. Bauman: A Bridge Too Far, 66 *Vanderbilt Law Review* 123 (2024)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol66/iss7/9>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Jurisdictional Imputation in *DaimlerChrysler AG v. Bauman*: A Bridge Too Far

*Linda J. Silberman\**

I.	INTRODUCTION .....	123
II.	MULTINATIONAL ENTERPRISES: ALTER EGO AND AGENCY THEORIES IN GENERAL AND SPECIFIC JURISDICTION .....	124
III.	THE ROLE OF REASONABLENESS IN GENERAL JURISDICTION CASES .....	130
IV.	SOME MISCELLANEOUS OBSERVATIONS .....	132

## I. INTRODUCTION

In *Kiobel v. Royal Dutch Petroleum*,<sup>1</sup> the Supreme Court significantly curtailed extraterritorial application of the Alien Tort Statute (“ATS”). However, a separate issue often overlooked in several of the ATS cases involving foreign country defendants is the question of adjudicatory (i.e. personal) jurisdiction. Indeed, the issue could have been presented in *Kiobel* itself, where the claims asserted against Royal Dutch Shell (a Netherlands corporation) and Shell Transport (an English corporation) were based on allegations that the Royal Dutch/Shell Transport group itself had orchestrated and directed the abuses that were carried out by their Nigerian subsidiaries in Nigeria against the Ogoni people. In the related companion case against the same defendants, *Wiwa v. Royal Dutch Petroleum Company*,<sup>2</sup> plaintiffs relied upon the presence of U.S. direct and indirect subsidiaries that did business in New York, and in particular, on an indirect subsidiary’s maintenance of an Investor Relations Office in New York that did work for Royal Dutch and Shell as the basis for

---

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

1. 569 U.S. \_\_ (2013).  
2. 226 F.3d 88 (2d Cir. 2000).

jurisdiction over Royal Dutch/Shell Transport in New York. The Magistrate Judge rejected plaintiffs' theories of jurisdiction, but the District Judge, Kimba Wood, found that the sole business of the Investor Relations Office—nominally a part of an indirect subsidiary, Shell Oil (a Delaware corporation)—was the performance of investor relationship services for Royal Dutch/Shell Transport and was sufficient to constitute the defendants' presence in New York. The Second Circuit agreed, holding that the activities of the Investor Relations Office were attributable to the defendants, thereby giving them a substantial physical corporate presence in New York and subjecting them to jurisdiction. Although the *Wiwa* case eventually settled, the same jurisdictional issue was present in *Kiobel*. However, there was some question as to whether the jurisdictional issue was properly raised in the district court in *Kiobel*, and in any event, it was not before the Supreme Court on the grant of certiorari.<sup>3</sup>

*DaimlerChrysler AG v. Bauman* now offers the Supreme Court the opportunity to address the jurisdictional issue directly, and its decision may affect not only ATS cases but also a broad range of other cases where a foreign corporation may be held subject to jurisdiction in the United States because of the activities of its subsidiaries. *Bauman* is similar to *Kiobel* in that jurisdiction over the German corporation, DaimlerBenz A.G., (formerly DaimlerChrysler AG) ("Daimler") rests on the California activities of its indirect U.S. subsidiary, Mercedes-Benz USA ("MBUSA"), itself a Delaware corporation with its principal place of business in New Jersey. As to MBUSA's California activities, the Ninth Circuit opinion identifies various offices of MBUSA in California as well as its role as distributor of Mercedes cars in the United States, including California. The claims against Daimler are based on alleged human rights violations committed by Mercedes-Benz Argentina ("MBA"), an Argentine subsidiary of Daimler, in Argentina against former employees of MBA and their families during the "Dirty War."

## II. MULTINATIONAL ENTERPRISES: ALTER EGO AND AGENCY THEORIES IN GENERAL AND SPECIFIC JURISDICTION

There are two theories that have traditionally accounted for the imputed jurisdiction over a parent on the basis of the activities of its subsidiary: an alter ego theory and an agency theory. However,

---

3. Interestingly, at the oral argument in *Kiobel* Justice Ginsburg raised the question of whether the defendants were subject to personal jurisdiction in New York. Plaintiffs' counsel asserted that the point was waived by defendants' failure to raise the issue properly in the district court, and defendants' counsel countered that jurisdiction had not been waived. But there was not further attention to the issue of personal jurisdiction at the Supreme Court.

only the agency theory is relied upon by the Ninth Circuit in *Bauman*. Classic “agency” may be something of a misnomer in this context. My corporate law colleagues tell me that the kind of control required by classic agency theory does not fit most parent-subsidary relations, particularly ones involving a foreign parent and a U.S. subsidiary. In this context, of course, the question is not one of corporate law or even liability, but rather the relationship of companies for the purpose of attributing jurisdiction.<sup>4</sup> A more functional approach for dealing with imputation of jurisdiction might be one that does not rely on formal notions of agency at all, but embraces concepts closer to a “group of companies”<sup>5</sup> or “multinational enterprise” approach.<sup>6</sup> But more particularly, in both *Kiobel* and *Bauman*, the issue is one of general jurisdiction, where the claims being asserted have little or no connection to the forum activity, and the imputation of jurisdiction is less justified.

In the human rights context in particular, proposals have been generated to suggest that a multi-factored test should be used to permit a forum to treat a parent and subsidiary as the same entity or vice versa in some circumstances.<sup>7</sup> But whether courts rely on the agency theories adopted by some courts, or adopt the more policy-oriented enterprise approach, they should give greater attention to the differences between general and specific jurisdiction in applying such theories. The high threshold that is required to “pierce the corporate veil” (i.e. the alter ego theory) may justify an assertion of general jurisdiction (as well as specific jurisdiction) over a sham subsidiary. However, mere agency—or even the more liberal “multinational

---

4. See generally Lonny Hoffman, *Further Thinking About Vicarious Jurisdiction: Reflecting on Goodyear Dunlop Tires Operations, S.A. v. Brown and Looking Ahead to DaimlerChrysler AG v. Bauman* (University of Houston Law Center, Research Paper No. 2013-A-4), available at <http://ssrn.com/abstract=2263715>; Lonny Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023 (2004); Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies and Agency*, 74 CAL. L. REV. 1 (1986).

5. The “group of companies” doctrine has been used to hold certain non-signatories bound to an arbitration agreement. See *Dow Chemical Group v. Isover-Saint Gobain*, Case No. ICC-4131/1982, (Interim Award, 1982).

6. See Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM J. COMP. L. 493 (2002); see also *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.* 508 F. Supp. 1322 (E.D.N.Y. 1981) (Weinstein, C.J.).

7. See, e.g., INTERNATIONAL LAW ASSOCIATION, FINAL REPORT: INTERNATIONAL CIVIL LITIGATION AND THE INTERESTS OF THE PUBLIC (Sofia Conference (2012) (Guideline 2.2: Connected claims); see also INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON INTERNATIONAL CIVIL AND COMMERCIAL LITIGATION, FOURTH AND FINAL REPORT: JURISDICTION OVER CORPORATIONS, (New Delhi Conference 2002) (Principle 4—Groups of Corporations).

enterprise” concept—is much harder to justify in the context of general jurisdiction.<sup>8</sup>

Cases relying on the doctrinal niceties of either alter ego or agency theories for the assertion of *general jurisdiction* must first look to state law to determine what is required (a) to impute the behavior of one entity to the other and (b) to assess whether the activities satisfy the required standard of “corporate presence” or “doing business,” usually defined by a certain level of “systematic and continuous activities.” When the courts turn to the Due Process inquiry, the focus of the case law has usually been more on whether the level of activity meets the constitutional Due Process standard for general jurisdiction than the role of Due Process with respect to the “imputation” question. But the latter inquiry is particularly important because any such imputation departs from the “general principle of corporate law deeply ingrained in our economic and legal system that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries.”<sup>9</sup>

Whether any of these state-law alter ego or agency theories will survive as a basis for the assertion of general jurisdiction after *Goodyear Dunlop Tire Operations, S.A. v. Brown*<sup>10</sup> is unclear. If, as some have argued, Justice Ginsburg’s “at home” language has limited the exercise of general jurisdiction to the defendant’s state of incorporation and principal place of business—as is the case in most other countries<sup>11</sup>—the activities of a foreign corporation’s subsidiary will be relevant in general jurisdiction cases only in the limited circumstances where the subsidiary is itself incorporated or has its principal place of business in the forum state. Whether or not general jurisdiction is so circumscribed, I want to suggest that for most *general jurisdiction* cases, the contacts of a U.S. subsidiary should be relevant only when the alter ego standard is met. The more expansive agency or enterprise theories are most appropriate in cases of specific jurisdiction, and possibly (as I will illustrate) in some narrowly defined cases of general jurisdiction. Of course, human rights activists

---

8. Note that in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2012), plaintiffs argued that the Goodyear entities should be treated as a single enterprise such that jurisdiction in North Carolina over the parent Goodyear North America should also constitute jurisdiction over the foreign subsidiary manufacturers. The Supreme Court declined to consider the plaintiff’s “single enterprise” theory because it was not properly raised below.

9. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (citations and internal quotations omitted).

10. 131 S.Ct. 2846 (2011).

11. See Linda J. Silberman, *Goodyear and Nicastro: Observations From a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 608 (2012).

who would like to see the United States as the global policeman for the world will not be happy with this outcome.

The existing case law with respect to jurisdiction based on corporate affiliations is mostly muddled.<sup>12</sup> On issues of jurisdiction (as well as for other issues), courts in the United States have “pierced the corporate veil” to treat legally distinct entities as a single entity and have attributed the subsidiary’s contacts to the parent for purposes of the jurisdictional inquiry. Such an alter ego theory is invoked when the parent has complete control over the subsidiary or where there has been complete integration of the parent and the subsidiary. Courts have also used an agency theory to find that the acts of the subsidiary can be treated as those of the parent for particular purposes, including jurisdiction.<sup>13</sup> However, as noted earlier, foreign parents rarely exert the kind of control over U.S. subsidiaries necessary to satisfy classic doctrines of agency. Indeed, the agency theories invoked by various courts in imputing jurisdiction to a parent on the basis of the subsidiary’s activities differ remarkably. The result is that courts in particular states and circuits have presented global forum-shopping opportunities for plaintiffs for claims that have little or nothing to do with the United States, as was true of *Kiobel* and now *Daimler*.

Notwithstanding the inconsistency within formal agency theory, jurisdiction over the parent on the basis of activities of the subsidiary is justified as a matter of policy when there is a connection between the dispute and the foreign defendant. In such cases, the defendant’s use of the subsidiary or affiliate has a direct connection with the claim being asserted. Consider, for example, an injury suffered by a U.S. plaintiff in a state in the United States by a defective product manufactured by a foreign defendant who sells the product outside the United States. The product is sold to a third party through the foreign defendant’s U.S. subsidiary, which distributes the

---

12. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 175-203 (5th ed. 2011).

13. The criteria for imputation on an agency theory may be different, depending on whether imputation is being used for service of process, for jurisdiction, for liability, or for discovery. For example, service upon Daimler through its U.S. subsidiary may suffice under U.S. law to avoid “service abroad” under the Hague Service Convention, see *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988), even if the U.S. subsidiary’s California activities are not sufficient to impute to the parent Daimler in order to assert personal jurisdiction. In the actual case, service was made on Daimler Chrysler Corporation, a wholly owned subsidiary of DaimlerChrysler AG, at its Michigan headquarters. Daimler filed a motion to dismiss on grounds of insufficiency of service as well as for lack of personal jurisdiction. However, Daimler ultimately withdrew its challenge to service of process but continued with its motion to dismiss for lack of personal jurisdiction. See *Bauman v. DaimlerChrysler AG*, 2005 WL 3157472 (N.D. Cal., Nov. 22, 2005).

product in the United States. An injury in the forum state allegedly caused by the foreign manufacturer justifies jurisdiction there for several reasons: the state has a strong regulatory interest in accidents that occur within its jurisdiction, litigation convenience is best served in an action at the place of injury, and a foreign defendant in these circumstances can expect to defend a suit in a forum where it has been in a chain of activity that causes an injury there. In the absence of a formal subsidiary relationship, the Supreme Court of the United States, in a split opinion in *J. McIntyre Machinery, Ltd. v. Nicaastro*,<sup>14</sup> has held that a defendant who uses an *independent* U.S. distributor to market throughout the United States is not subject to suit on the basis of an injury in the forum state. As Justice Ginsburg pointed out in her dissent in *McIntyre*, the United States is an outlier in this regard, and injury in the forum state—without more—is a basis for jurisdiction in most other countries.<sup>15</sup> Justice Ginsburg and the two other dissenters were prepared to find jurisdiction on the basis of the nationwide distribution activity of the foreign defendant's independent U.S. distributor. Jurisdiction over a foreign parent on the basis of the marketing activity of its subsidiary is even easier to justify in a specific jurisdiction tort case, and perhaps may even be persuasive to other Justices on the Court.

A comparative perspective is also revealing in this context. An interesting case from the European Court of Justice, *Sar Schotte GmbH v. Parfums Rothschild Sarl*,<sup>16</sup> highlights this emphasis on the general/specific jurisdiction distinction. The case involved a contract dispute between a German corporate seller and a French buyer of various perfumery articles. Sar Schotte, a German company, initially sued Rothschild GmbH, the German parent of Parfums Rothschild Sarl ("Sarl"), and then realized only the French subsidiary Sarl was liable for payment under the contract. The plaintiff then sued the French subsidiary Sarl. The issue thus became whether the French company Sarl could be sued in Germany under the relevant European (Brussels) Regulation Art. 5 (5),<sup>17</sup> which provides for jurisdiction "as regards a dispute arising out of the operation of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated." The German court of first instance thought there was no jurisdiction in Germany since

---

14. 131 S. Ct. 2780 (2011).

15. Justice Ginsburg specifically references the European Union Regulation on Jurisdiction and Judgments (the Brussels Regulation), *see Nicaastro*, 131 S. Ct. at 2803 and n.16.

16. Case C-218/86 (1987), E.C.R. 4905.

17. Council Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, 4, Art. 5 (5) ("EU Regulation").

Rothschild GmbH could hardly be regarded as an “agency or establishment” of Sarl in that Sarl was the subsidiary of Rothschild GmbH. The appeals court stayed proceedings to request a ruling from the European Court of Justice on the point. The European Court ruled that even where a legal entity maintained no dependent branch, agency or other establishment, the pursuit of activities through an independent company with the same name and identical management and the use of such entity as an extension of itself would satisfy the jurisdictional requirements of article 5 (5). The Court’s analysis is instructive. It emphasized that when there is a close connection between the dispute and the court, and third parties are doing business with an establishment acting as an extension of another company, those parties must be able to rely on the appearance created.

It is tempting to draw a bright line between general and specific jurisdiction in imputing the actions of a subsidiary to the parent, or even vice versa. But some cases may give pause in adopting such a rigid dichotomy. Consider, for example, the textbook case, *Frummer v. Hilton International, Inc.*,<sup>18</sup> where a New York plaintiff suffered injuries in a shower accident at the London Hilton, owned by a UK corporation. Jurisdiction in New York was based on the New York activities of the Hilton Reservation Service, a separate New York corporation that acted as an agent for the UK hotel company in facilitating bookings, although there was no showing that the New York company had booked this particular reservation. The decision by the New York Court of Appeals was not grounded in Due Process but rather on an interpretation of New York’s “doing business” jurisdiction. If the “general doing business” jurisdiction survives *Goodyear*, the assertion of jurisdiction over the UK corporation in New York in *Frummer* would not seem particularly unfair. The business of the New York subsidiary, booking hotel reservations for the UK parent, related closely to the business that gave rise to the claim against the parent—negligence in the operation of aspects of the hotel’s facilities in the UK.

Contrast that situation with the situation in *Bauman*, where the activities of the U.S subsidiary were attributed to the German parent, not in order to assert claims that arose in Germany, but rather to impose responsibility of the German parent for wrongs committed in a third country—Argentina—by yet a different subsidiary located in that third country. Notwithstanding that the business of all the entities related to the manufacture and sale of Mercedes-Benz cars, the claim for violation of human rights in Argentina has little to do

---

18. 19 N.Y.2d 533, 227 N.E.2d 851 (1967).



with the activities of Daimler in California.<sup>19</sup> If you will, there is just too much “unrelatedness” to justify jurisdiction for such claims.

One final comparative example also comes to mind for similar reasons. Many countries have a jurisdictional rule, similar to Article 6 (1) of the European Regulation,<sup>20</sup> which permits jurisdiction over all defendants when any one of them is domiciled in the forum state, if the claims are so closely connected that they should be heard together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. The rule is not specific to parents and subsidiaries, although it might indeed cover such cases. However, even under Art. 6 (1), there must be a good faith claim asserted against the anchor defendant in order to bring in the other defendants.<sup>21</sup> Thus, in a case like *Bauman*, where no claim is asserted against the U.S. subsidiary nor could one in good faith be alleged, jurisdiction would fall short even under a provision like Art. 6 (1).

### III. THE ROLE OF REASONABLENESS IN GENERAL JURISDICTION CASES

One other aspect of the Ninth Circuit’s decision in *Bauman* that the Supreme Court may or may not choose to address is the application of the “reasonableness” prong of the Due Process analysis in general jurisdiction cases. It has never been clear whether the multifactor-based reasonableness inquiry extends to cases of general jurisdiction at all, and it will be interesting to see if the Supreme Court has anything to say about it here.

In *Goodyear*, the Court found no sufficient connection between the defendant and the forum state, and thus had no reason to reach the issue. Yet Justice Ginsburg, in footnote 5 of her opinion for a unanimous Court, commented that the plaintiff’s relationship to the forum is not part of the analysis of general jurisdiction although a plaintiff’s residence in the forum “may strengthen the case for the exercise of specific jurisdiction.”<sup>22</sup> One cannot tell whether the

---

19. Even the most recent proposal from the International Law Association, see FINAL REPORT: INTERNATIONAL CIVIL LITIGATION FOR HUMAN RIGHTS VIOLATIONS, *supra* note 7, would not find U.S. jurisdiction over Daimler on these facts. The proposal on “connected claims” would operate as follows: When a human rights claim is asserted against a corporation incorporated in the United States (or with its principal professional activity carried on in the United States), there is a basis to bring in other closely connected corporations as defendants who form part of the same corporate group or who took part in a concerted manner in the activity giving rise to the cause of action. But in *Bauman*, there is no allegation against the U.S. corporation for human rights violations.

20. EU Regulation, *supra* note 17, Art. 6 (1).

21. See, e.g., Case C-103/05, *Reisch Montage AG v. Kiesel Baumaschinen Handels GmbH*, 2006 E.C.R. (ECJ 12 July 2006).

22. 131 S. Ct. at 2857.

reference is a wholesale rejection of *Asahi's* reasonableness prong in the context of general jurisdiction or merely an assertion that connections of the plaintiff are not to be taken into account for general jurisdiction purposes. Her point is most curious if taken as the latter. One could certainly argue, as I have done elsewhere,<sup>23</sup> that general “doing business” jurisdiction has its strongest justification in cases where a citizen or resident plaintiff has brought the suit. As for the role of reasonableness in general jurisdiction cases, most courts, in both interstate and transnational cases of general jurisdiction, have applied “reasonableness” as an aspect of the constitutional standard without much discussion. However, in one early case, *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*,<sup>24</sup> Judge Walker dissented from the majority’s view that the exercise of jurisdiction was unreasonable, notwithstanding that the Court had found sufficient contacts for the exercise of general jurisdiction. Judge Walker observed that the Supreme Court had not yet instructed that the reasonableness inquiry should be applied to assertions of general jurisdiction.<sup>25</sup> He further criticized the reasonableness prong of the Due Process test as more appropriately accounted for in the doctrine of *forum non conveniens*, and complained that “the sprouting like weeds of multi-pronged tests for the reasonableness inquiry in the circuits in both specific and general jurisdiction cases has left the legal garden in disarray.”<sup>26</sup> Still, the “general doing business jurisdiction”—U.S. style—presents the strongest case for “reasonableness” scrutiny because it offers a potential curb on the forum-shopping opportunities that such general jurisdiction presents.

If the Supreme Court does not use *Bauman* as the vehicle to expand upon Justice Ginsburg’s “at home” language to limit general jurisdiction over corporations to the paradigm cases of place of incorporation, principal place of business, or statutory seat, as most countries have done, it nonetheless presents a welcome opportunity for the Supreme Court to jettison the two-part “contacts” and “reasonableness” test of *Asahi*. A return to the more traditional *International Shoe* formulation of “minimum contacts . . . such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’ ”<sup>27</sup> underscores the need for *balancing* a state’s interest in asserting jurisdiction in light of the defendant’s

---

23. See Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 319 (2002).

24. 84 F.3d 560 (2d Cir. 1996).

25. *Id.* at 573.

26. *Id.* at 577.

27. Linda J. Silberman, “Two Cheers” for *International Shoe* (and None for *Asahi*): An Essay on the Fiftieth Anniversary of *International Shoe*, 28 U.C. DAVIS L. REV. 755, 759 (1995).

contacts with the forum, and also offers a mechanism that can distinguish related and unrelated claims in assessing Due Process. And the particular concerns about the burdens imposed on a foreign defendant reflected in the *Asahi* opinion can be considered as part of that “balancing,” or alternatively through a nuanced doctrine of *forum non conveniens* that leaves discretion to the trial court.<sup>28</sup>

*Bauman* also provides the Court with the opportunity to set down clearer markers for parent-subsidiary relationships in the jurisdictional context. The clearest case for imputation—for both general and specific jurisdiction—is one in which the corporate structure is only a sham. However, no such contention is made in the *Bauman* case. A functional approach (rather than formal agency principles) that imputes the activities of a subsidiary to a parent (and even vice versa, as the *Sarl* case illustrates) is most appropriate in cases of specific jurisdiction, and might possibly extend to a general jurisdiction case like *Frummer*, where the activity of the subsidiary is closely related to the claim being asserted. But such line-drawing in the category of general jurisdiction cases may be so difficult that one is moved to constrain imputation on an agency theory to cases of specific jurisdiction.

#### IV. SOME MISCELLANEOUS OBSERVATIONS

It is difficult to comment on the *Bauman* case without noting how odd the grant of certiorari was in the first place. The petition for certiorari was pending before the Supreme Court for almost two years, and the Court agreed to hear the case only days after it decided *Kiobel*. Once the Court in *Kiobel* determined that the Alien Tort Statute did not apply extraterritorially in a “foreign-cubed” case (foreign plaintiffs, foreign defendant, foreign conduct), one would have expected the Court to have remanded *Bauman*, which presented a similar configuration, in light of *Kiobel*. Even if personal jurisdiction were ultimately sustained in *Bauman*, the claims asserted under the Alien Tort Statute would have to be dismissed under the *Kiobel* precedent.

Although the Complaint asserted additional claims under California and Argentine law, there does not appear to be any basis for federal subject matter jurisdiction once the federal Alien Tort

---

28. *Id.* at 759–60.

claims (as well as claims under the Torture Victim Protection Act<sup>29</sup>) are dismissed.<sup>30</sup>

One can only surmise that the Ninth Circuit panel's inexplicable flip-flop after its initial 2-1 affirmance of the district court's dismissal for lack of personal jurisdiction may have persuaded the Supreme Court to take the case.<sup>31</sup> The original Ninth Circuit panel granted rehearing, and then without additional oral argument the same panel changed its mind and unanimously reversed the district court, holding that Daimler was subject to general jurisdiction on the basis of the contacts of its subsidiary MBUSA.<sup>32</sup> When rehearing *en banc* was denied on a closely divided vote, Judge O'Scannlain wrote a blistering dissent, joined by seven other Ninth Circuit judges.<sup>33</sup> Judge O'Scannlain noted that MBUSA was not named as a party to the lawsuit even though the Ninth Circuit panel relied upon MBUSA's California contacts to subject Daimler to general personal jurisdiction for matters arising in Argentina. He criticized the panel for expanding the agency test beyond all proportion, such that it violated Due Process, and complained that it was difficult to find any limits on agency jurisdiction given the panel's formulation. Judge O'Scannlain viewed the panel decision as completely inconsistent with the Supreme Court's recent holding in *Goodyear*, commenting that "Daimler is hardly 'at home' in California when sued only for its Argentine subsidiary's activities in Argentina."<sup>34</sup>

Judge O'Scannlain also raised concerns about the need for international comity and noted that foreign governments have often objected to the expansive reach of some aspects of U.S. jurisdiction, with jurisdiction by imputation being one such example. He warned that "retaliatory jurisdiction laws" in other countries might reverberate to the detriment of U.S. corporations carrying on business abroad.<sup>35</sup>

---

29. The Supreme Court held in *Mohammed v. Palestinian Auth.*, 132 S. Ct. 1702 (2012), that only individuals could be held liable under the TVPA.

30. The action was brought by Argentinian plaintiffs against the German corporation Daimler Chrysler AG. Federal subject matter jurisdiction in suits between aliens is not permitted under the diversity statute, and is outside the limits of Article III of the Constitution. Given the threshold dismissals of the federal claims, supplemental jurisdiction would certainly not be exercised.

31. *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 10088 (9th Cir. 2009), *vacated*, 603 F.3d 1141 (9th Cir. 2010).

32. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011).

33. *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774 (9th Cir. 2011).

34. *Bauman*, 676 F.3d at 779.

35. *Id.*

I am conscious of the need for a comparative perspective in thinking about judicial jurisdiction.<sup>36</sup> Although formal corporate separateness is a hallmark of most jurisdictions in the world, many countries have quite expansive jurisdictional provisions such as EU Regulation 6 (1), permitting the joinder of additional defendants when the forum is the domicile of one of the defendants, the theory being the connectedness of the claims and the desire to avoid irreconcilable judgments.<sup>37</sup> What is striking about *Bauman* is that no allegations are made against the U.S. subsidiary MBUSA and that the claims arise not in the country of the relevant defendant (as in *Frummer*), but in a third country. In any event, I do not think there is much to fear by way of “retaliatory jurisdiction.” Such laws do not appear to be on the books any longer, if indeed there were ever such rules of jurisdiction.<sup>38</sup> The principle of corporate separateness prevails in most countries and should trump any desire for retaliation. A more compelling argument is that the United States should strive for harmonization when the rest of the world has the better policy.

---

36. See Silberman, *supra* note 11, at 591.

37. Such a provision would violate U.S. due process standards if the additional defendant itself had no contacts with the forum state. U.S. due process standards focus on the relationship between the individual defendant and the forum state rather than on the relationship between the forum and the litigation alone.

38. Judge O’Scannlain cites an early article of Gary Born, see Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT’L & COMP. L. 1, 15 (1987). Two of the examples Born cites—Italy and Belgium—presently contain no such provision in their jurisdictional rules. I am not clear if the predecessor statutes did have such a provision, and I have not as of yet been able to ascertain the laws in the other two jurisdictions cited by Born. I make this point particularly because the concern about retaliatory jurisdiction is also emphasized in the Brief of the Chamber of Commerce as Amici Curiae in Support of Certiorari in the *Bauman* case. I do think that other points made in the Chamber Brief are more persuasive: that foreign investment may be curtailed, and that harmonization of jurisdiction is important as a means for fostering foreign relations and furthering global commerce.