General Jurisdiction and the Transnational Law Market

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I. INTRODUCTION

In the case of *DaimlerChrysler AG v. Bauman*, the Supreme Court has been asked to decide whether a German corporation is subject to personal jurisdiction in California based on its subsidiary's contacts with the State, even though the case does not arise out of or relate to either entity's contacts with the State. The plaintiffs, twenty-two Argentinian residents, brought suit in a California federal district court and asserted claims under international, federal, California, and Argentinian law for alleged injuries to them by a *different* DaimlerChrysler subsidiary in Argentina. Rather than suing in Argentina (the place of injury) or in Germany (the defendant's state of incorporation and principal place of business), the plaintiffs sued in California based on the contacts of a separate subsidiary of DaimlerChrysler that imports and distributes Mercedes-Benz vehicles in California. The plaintiffs allege the district court had general jurisdiction over DaimlerChrysler under an agency or affiliate theory. In their view, DaimlerChrysler is subject to suit in California for harms occurring anywhere in the world because of its subsidiary's

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contacts there. Their theory is that the contacts of a subsidiary can be imputed to the corporate parent to establish general jurisdiction even when the two entities maintain formal separation under corporate law.

The jargon of personal jurisdiction obscures key questions in this case: Why was this case brought in California? Did California have some special interest in the case that justified the exercise of personal jurisdiction over a German corporation when the acts or omissions complained of had no relationship with California? Asking these questions uncovers what is at the heart of this case. Foreign plaintiffs are forum shopping transnationally to find a forum with favorable substantive and procedural law to plead and prove their case or to force a settlement. As much as this case is about general jurisdiction, it is also about the growth of a transnational law market where plaintiffs shop the world for favorable courts and law, and states and defendants respond to that forum shopping.

In this essay, I argue that the question of the metes and bounds of general jurisdiction in the context of agency or affiliate jurisdiction should not obscure the practical realities of modern-day transnational litigation. Inasmuch as the *Bauman* case is about general jurisdiction, it is, perhaps more importantly, about the role of U.S. courts in policing transnational forum shopping. This transnational forum shopping exists as part of a transnational law market where litigants encourage courts to compete for transnational cases. The Supreme Court should take account of these facts as part of its analysis.

This essay is divided into four parts. Part II reviews the background of the *Bauman* case. Part III explores *Bauman* as an example of transnational forum shopping. Part IV develops the idea of a transnational law market and applies it to the case. Part V explains how general jurisdiction fits into this transnational market for law and examines what the governing rules for general jurisdiction might look like in light of that market.

II. BACKGROUND

On January 14, 2004, residents of Argentina brought suit against DaimlerChrysler, a German corporation, in the Northern District of California. The plaintiffs asserted claims under the Alien Tort Statute ("ATS"),[1] the Torture Victim Protection Act ("TVPA"),[2] various international treaties and declarations, federal common law,

1. 28 U.S.C. § 1350 (2012).
2. *Id.*

and the laws of California and Argentina. They alleged that Mercedes-Benz Argentina ("MBA"), a subsidiary of DaimlerChrysler, directed and collaborated with Argentine state security forces to kidnap, detain, torture, and kill plaintiffs or their relatives in Argentina as part of that country's "Dirty War" from 1975–1977. The plaintiffs did not sue MBA, the alleged tortfeasor, in California. Instead, according to the complaint, DaimlerChrysler was liable as the parent company of MBA for its alleged role in directing or aiding and abetting the acts of MBA that harmed the plaintiffs or, alternatively, was vicariously liable for the acts of MBA.[3]

As the complaint is framed, there is no connection with the forum state, California, or with the United States. The alleged unlawful activities all occurred in Argentina and were undertaken, if at all, by a German corporation's Argentine subsidiary. If there were any aiding and abetting or vicarious liability for the acts of MBA, it would be for acts occurring in either Argentina or perhaps (and this is unclear in the complaint) in Germany. California was a forum of choice but not a forum where any acts, omissions, or harms occurred. The only relationship with California was that the plaintiffs wished to sue there.

There is not specific jurisdiction in California. Indeed, there is not specific jurisdiction in any other U.S. forum, as no acts giving rise to the claims occurred anywhere in the United States. This would seem to be a classic case where the due process, convenience, and venue functions of personal jurisdiction would compel dismissal.[4] No harms occurred in the United States, no acts giving rise to the harms occurred in the United States, and no defendant is a domiciliary of the United States. How can this case, a so-called "f-cubed" case where *foreign* plaintiffs sue a *foreign* defendant for acts occurring in a *foreign* country, be filed in California? Enter general jurisdiction.

First, the plaintiffs argued that general jurisdiction existed because DaimlerChrysler had "continuous and systematic contacts" with California.[5] Second, the plaintiffs argued that because another, separate subsidiary of DaimlerChrysler, Mercedes-Benz USA, LLC ("MBUSA"), was subject to general jurisdiction in California,[6] *its*

3. Bauman v. DaimlerChrysler Corp., No. C-04-00194, 2007 WL 486389, at *1 (N.D. Cal. Feb. 12, 2007), *rev'd*, 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3461 (U.S. Apr. 22, 2013) (No. 11–965).

4. *See* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 562 (1991) (describing the different functions of the doctrine).

5. *Bauman*, 2007 WL 486389, at *4.

6. MBUSA did not dispute that it was subject to general jurisdiction in California. *Id.* at *10. This is debatable in light of the Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

jurisdictional contacts should be attributed to DaimlerChrysler, thus permitting general jurisdiction over DaimlerChrysler even though there was no relationship between the claims and MBUSA or DaimlerChrysler's activities in California.[7]

The district court rejected both arguments. As to the plaintiffs' argument for continuous and systematic contacts, the district court has since been shown to be correct in light of the standards for general jurisdiction recently articulated by the Supreme Court.[8] According to the Court, a "court may assert general jurisdiction over foreign (sister-state or foreign country) corporations to hear any and all claims against them when their affiliations with the forum state are so 'continuous and systematic' as to render them essentially at home in the forum state."[9] The Court has imposed these heightened requirements for the exercise of general jurisdiction because a state may legitimately exercise adjudicative power over a defendant's worldwide conduct only when the defendant is so closely connected to the forum state as to be analogous to a citizen or resident.[10] In light of this, only in cases where a foreign corporation is incorporated in the forum state, has its principal place of business there, or is otherwise "at home" in the forum state is general jurisdiction proper.[11] DaimlerChrysler itself is not subject to personal jurisdiction (general or specific) in California based on its contacts with the forum state. This is so because there were no acts or omissions occurring in California, DaimlerChrysler is incorporated abroad, its principal place of business is abroad, and it does not own property, manufacture or sell products, or employ workers in the United States. DaimlerChrysler is, therefore, in no sense "at home" in California.

As to the second theory espoused by the plaintiffs, and according to the district court, a "subsidiary's contacts may be imputed to the parent . . . where the subsidiary acts as the general agent of the parent," which is determined by whether the subsidiary "performs services sufficiently important to the parent corporation that if it did not have a representative to perform them, the parent corporation

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7. *Bauman*, 2007 WL 486389, at *10.

8. *See Goodyear*, 131 S. Ct. at 2850 (holding that a North Carolina state court could not exercise general jurisdiction over foreign companies that were not "at home" in North Carolina).

9. *Id.* at 2851.

10. *See* Milliken v. Meyer, 311 U.S. 457, 462–64 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.").

11. *Goodyear*, 131 S. Ct. at 2853–54.

would undertake to perform similar services."[12] In the district court's view, the plaintiffs could not meet this test because others could have performed the services, and DaimlerChrysler did not exercise operational control over MBUSA.[13] The district court also held that it would be unreasonable to assert jurisdiction.[14]

Plaintiffs did not appeal the district court's finding that DaimlerChrysler was not subject to general jurisdiction under a continuous and systematic theory. Thus, the only question before the court of appeals was whether the contacts of a subsidiary with the forum state may be attributed to its parent for purposes of general jurisdiction.[15]

At first, a panel of the Ninth Circuit affirmed the decision of the district court. Nine months later, the Ninth Circuit panel granted rehearing and vacated its opinion. Without hearing a second oral argument, the panel reversed itself and held:

> [u]nder the controlling law, if one of two *separate* tests is satisfied, we may find the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum. The first test, not directly at issue here, is the 'alter ego' test. It is predicated upon a showing of parental *control* over the subsidiary.[16] [The second test,] which *is* applicable here, is the 'agency' test. That test is predicated upon a showing of the *special importance* of the services performed by the subsidiary: The agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have *a representative* to perform them, the corporation's own officials would undertake to perform substantially similar services.[17]

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12. Bauman v. DaimlerChrysler Corp., No. C-04-00194, 2007 WL 486389, at *4 (N.D. Cal. Feb. 12, 2007), *rev'd*, 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3461 (U.S. Apr. 22, 2013) (No. 11–965).

13. *Id.*

14. *Id.*

15. Plaintiffs also made an argument under Federal Rule of Civil Procedure 4(k)(2). The district court held that this argument was untimely, and the Ninth Circuit affirmed this holding.

16. Bauman v. DaimlerChrysler Corp, 644 F.3d 909, 919 (9th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3461 (U.S. Apr. 22, 2013) (No. 11–965).

17. *Id.*

Under this test, the panel asked: "Are the services provided by MBUSA sufficiently important to DaimlerChrysler that, if MBUSA went out of business, DaimlerChrysler would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative?"[18] Applying this test, the Ninth Circuit held that DaimlerChrysler was subject to general jurisdiction in California on account of MBUSA's operations in California and that the assertion of jurisdiction would be reasonable.[19]

As the case comes before the Supreme Court, the question is whether it violates due process for a court to exercise general jurisdiction over a foreign corporation for alleged torts committed by the corporation's subsidiary in Argentina, based solely on the fact that another of the corporation's subsidiaries performs services on the corporation's behalf in the forum state. As framed, this question hides the real issue at the heart of this case: transnational forum shopping.

III. TRANSNATIONAL FORUM SHOPPING

Recall from the Introduction that Argentine plaintiffs sued a German corporation in the Northern District of California for alleged harms that occurred in Argentina, purportedly caused by an Argentine subsidiary of the German corporation. When put in these terms, one might wonder: Why would these plaintiffs bring suit in the United States? Indeed, the Justices should ask the plaintiffs' lawyers why they brought the case in California.[20]

Some observations are easy to offer. First, the Argentine plaintiffs were suing under U.S. federal law; there were originally claims under the ATS and TVPA.[21] The plaintiffs might argue that federal common law, international law, or California law gives the United States and a federal court in California an interest in hearing this case. They might also argue that there should be jurisdiction in the United States over these claims because a forum state always has an interest in applying its law (recall that violations of federal common law and California law are also alleged), even to harms occurring abroad, caused by a foreign corporation. The plaintiffs'

18. *Id.*

19. *Id.*

20. *Cf.* Transcript of Oral Argument at 9, Kiobel v. Royal Dutch Petroleum, No. 10–1491, 2012 U.S. Trans. LEXIS 17, at *10 (U.S. argued Feb. 28, 2012) (illustrating a similar question asked by Justice Alito).

21. These claims have now been extinguished in light of two other recent Supreme Court cases. Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1669 (2013); Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1710 (2012).

belated Federal Rule of Civil Procedure 4(K)(2) argument could be seen as making this claim as to the alleged violations of federal common law. Yet, that invocation was an afterthought. More so, the Court, to date, has avoided conflating choice of law with personal jurisdiction. In the Court's view, the fact that the law of the United States or California should be applied is irrelevant to the personal jurisdiction inquiry.[22]

Second, the plaintiffs might believe there would be little likelihood of recovery in Argentina, given that the alleged actions were taken in concert with the government of Argentina and based on statute of limitations law in Argentina. As such, plaintiffs are searching for a disinterested and open forum in the United States to hear such claims. While courts may use *forum non conveniens* to deal with such cases, the Court has kept separate personal jurisdiction and *forum non conveniens* inquiries.[23]

But what about Germany? Surely German courts and law have an interest in policing the activities of a German corporation. Surely German courts are fair and disinterested. Why not file the case there? Enter transnational forum shopping.

There are several reasons why a foreign plaintiff would want to bring suit in a U.S. forum against a foreign defendant in the first instance. First, U.S. substantive law is thought to be more generous to plaintiffs than the laws of other countries. Second, as compared to other countries, U.S. procedural law—in particular, notice pleading and liberal discovery—gives plaintiffs substantial leverage in pleading, proving, trying to a favorable verdict, and settling their case. Third, U.S. damages law—especially punitive damages and substantial jury awards—–present the potential for a windfall for plaintiffs, or, at a minimum, significant leverage to force defendants to settle.[24] For these reasons, a foreign plaintiff would be expected to choose a U.S. forum to bring suit, if possible as a matter of jurisdiction, even in cases where the harms complained of occurred abroad and even in cases where the evidence is located abroad.

It is not surprising that litigants in transnational cases engage in strategic forum-shopping behavior to maximize their chances of

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22. *But see* Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM & MARY L. REV. 1489, 1557–58 (2013) (offering an approach where choice of law might be relevant for jurisdictional analyses in transnational cases).

23. *But see* Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531, 1560–66 (2011) (exploring the overlap between personal jurisdiction and *forum non conveniens*).

24. Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 509, 511–12, 516 (2008).

legal recovery.[25] As one might recall from the first year of law school, substantial time is spent acculturating lawyers to the benefits of forum choice. In one's study of civil procedure, for instance, students examine in exhausting detail doctrines that impact forum choice and intersect with forum shopping such as subject matter jurisdiction, personal jurisdiction, the *Erie* doctrine, and venue. While forum shopping is the equivalent of a legal "dirty word," it is, in fact, "only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favorably presented: this should be a matter neither for surprise nor for indignation."[26] Federal civil procedure doctrines are designed to encourage the just and fair resolution of cases in light of the fact that parties engage in strategic behavior to find the forum where their likelihood of success is the greatest.

General jurisdiction is one such doctrine. There is little question that a defendant should be amenable to suit in at least one forum, and that forum should be, at a minimum, its "home" forum. Avoiding a defendant's home forum is, however, not just about convenience to the plaintiff or a presumed risk of home-state justice. Indeed, it is hard to see how it is more convenient to have this case heard in the United States as opposed to Germany, except for the fact that the U.S. lawyers, likely litigating the case on contingency, are based here. And there is no reason to believe that the German courts would favor a German corporation alleged to have violated human rights. Something more is at work. Enter the transnational law market.

IV. THE TRANSNATIONAL LAW MARKET

In light of the above, it is clear why the plaintiffs would want to forum shop to the United States in this particular case—namely, more favorable substantive law, more favorable law regarding damages, more favorable procedure, and more favorable discovery, to name but a few. The case, however, also shows how fora may compete for legal business through the expansion or contraction of jurisdiction. A federal court applying California personal jurisdiction law to permit such suits even when the forum has no interest in the case is an illustration of California courts competing for legal business by creating opportunities for suit that do not exist (or do not exist as robustly) elsewhere. If the forum opens its courts to these cases, there

25. Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1372 (2004).

26. The Atlantic Star, [1974] A.C. 436 at 471 (U.K.).

will be benefits to the forum and its lawyers. What are these benefits? Perhaps justice or perhaps sustenance for U.S. lawyers. The fact that courts and litigants might view the legal system in this way illustrates that jurisdictional law is more than just a due process framework for adjudication; it is a market.

As Professors Erin O'Hara and the late Larry Ribstein explain in their foundational book *The Law Market*, the market for law contains the following elements:

> First, there must be some significant demand for alternative laws as evidenced by the parties' ability and willingness to take the necessary steps to avoid undesired laws and to select the laws of other states. Second, some states must be willing and able to supply the desired laws. Third, political forces must respond to enhanced choice. . . . Fourth, federal statutory or constitutional law may play a role in the completion by either facilitating or hindering party choice.[27]

Put in slightly different terms, on the demand side, plaintiffs seek out law that meets their needs for convenient, swift, and substantial recovery. As explained above, we have already seen the ways in which forum shopping illustrates the demand side of the transnational law market.

There is another side to the story—the supply side. States compete to offer legal actors what they want. This means that parties engage in forum shopping in light of the fact that different jurisdictions *compete* to apply law and for legal services. Forum shopping by litigants and forum competition by legal systems go hand in hand.[28] There would be no reason for a party to undertake the Herculean efforts to shop between various jurisdictions if fora did not craft different legal rules and open their courts to such cases. Different legal rules may be the result of happenstance or legal culture; they may also be the result of concerted efforts on the part of fora to compete for legal business.

Historically, the potential for a transnational law market was quite limited. A plaintiff injured in one state would only have the law and the courts of that state to bring her case under, regardless of the

27. ERIN O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 166 (2009).

28. *See* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1553 (2003) (understanding markets "requires an understanding of both supply and demand conditions in order to identify the resulting equilibrium").

benefits or disadvantages of suing in that state. This was so because travel and financial limitations constrained a plaintiff's ability to file in a foreign jurisdiction.

In today's world of increasing globalization there is significant movement of goods, people, and services across borders. Transnational litigation "is now a sophisticated multi-billion dollar industry[] driven by the globalization of business and the possibility of securing an enormous money judgment against a multinational corporation."[29] A party can thus forum shop for favorable law and courts transnationally in the same way that they would shop for any other good or service.[30] Plaintiffs might even be encouraged to forum shop because third parties engage in litigation financing incentivizing plaintiffs to bring cases in various fora.[31] There is, therefore, a transnational market for law where forum competition is enabled due to the increased mobility of parties that has been in a significant way brought about by third party financing of litigation.[32]

A plaintiff would choose to forum shop transnationally if the plaintiff could find another forum that opens its courts to cases where the likelihood of recovery is greater, and if the plaintiff could pay, or find a financier to pay, for the litigation. This might mean a European forum, or, indeed, a U.S. forum, assuming the forum has jurisdiction over the case.

The basic idea is that "[j]urisdictions compete to offer legal rules and adjudication procedures that attract users. The payoff for the jurisdiction from this competition is franchise and other taxes, fees for lawyers and officials and judges, and collateral benefits for other businesses in the jurisdiction, such as banks and broker-dealers."[33] The payoff might also be the perceived benefit of a forum applying its law and using its courts to govern transnational activity. Jurisdictions must show plaintiffs that they will supply recovery if it is sought there. In sum, litigant demand and jurisdictional supply connect to help the transnational litigant localize her case.

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29. Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 HARV. INT'L L.J. (forthcoming 2013).

30. O'HARA & RIBSTEIN, *supra* note 27, at 1.

31. Roger Parloff, *Have You Got a Piece of This Lawsuit?*, FORTUNE/CNNMONEY (June 28, 2011), http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/.

32. *See generally* Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 320-23 (2011) (providing an overview of this phenomenon in the context of transnational class actions).

33. Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After* Morrison v. National Australia Bank, 97 MINN. L. REV. 132, 140 (2012).

Legal and political forces giving plaintiffs enhanced forum choice also play a role in the transnational law market.[34] As recognized by Judge Reinhardt, dissenting from the first panel decision:

> The majority has formulated a stringent new test for determining whether an agency relationship exists for the purposes of establishing personal jurisdiction. Although the majority's goal of providing some clarity to our rather muddled case law on the subject is laudable, the test the majority imposes goes too far, requiring a much stronger relationship between parent and subsidiary than is necessary or desirable. *The result is to shield foreign corporations from actions in American courts—although they have structured their affairs so as to reap vast profits from American markets—and to deprive plaintiffs, including those who allege grave human rights abuses, of access to justice.*[35]

From the foregoing, we can glimpse what is really at stake behind the legal jargon of general jurisdiction. To the defendant, this is about fairness. Put another way, "those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter."[36] To the plaintiffs, this is about access to justice. There would be better or more justice in the United States than elsewhere. The Supreme Court must balance these competing goals as it resolves the general jurisdiction question in the *Bauman* case.

V. WHAT ROLE FOR GENERAL JURISDICTION?

Surprisingly, little attention is explicitly paid to both of these two, at times, competing aims—fairness to defendants *and* access to justice for plaintiffs—in the complex web of personal-jurisdiction speak. This is not the case, however, if one is familiar with the jurisdictional rules of the European Union ("EU"), where these aims are balanced concretely through jurisdiction-selecting rules.

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34. O'HARA & RIBSTEIN, *supra* note 27, at 166.

35. Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1098 (9th Cir. 2009), *cert. granted*, 80 U.S.L.W. 3461 (U.S. Apr. 22, 2013) (No. 11–965). Upon rehearing, Judge Reinhardt authored the controlling second panel opinion that is now before the Supreme Court.

36. J. McIntyre Mach. v. Nicastro, 131 S. Ct. 2780, 2787 (2011) (plurality opinion of Kennedy, J.).

Under the Brussels Regulation,[37] which governs assertions of personal jurisdiction against domiciliaries of EU member states, the whole point is to make plain that the correct balance is general jurisdiction based on corporate domicile, which means the state of incorporation, central administration, or principal place of business, *and* access to justice through specific jurisdiction in any other forum where the claims arise from or are connected to the jurisdiction. As relevant here, "[c]orporations domiciled in Europe are typically *not* subject to general jurisdiction in the courts for the place in which they are established through a branch or agency."[38]

Note, however, that these rules do not apply to suits against non-member state defendants. So, for instance, if a U.S. (California) defendant corporation were sued on the facts here in Germany, the governing procedural law would be the jurisdictional law of Germany and not the Brussels Regulation. German procedural law, however, would require the same result. Under German law, jurisdiction would exist in the corporation's state of incorporation or place of business.[39] Under EU and German law, therefore, general jurisdiction constrains the transnational law market and permits general jurisdiction only in those states that have an interest in the case.

In light of the foregoing, how can U.S. courts police the transnational law market? First, as to general jurisdiction, the importance of clear rules that denote where a foreign corporation is subject to suit are paramount. Second, it should be recognized that the *Bauman* case is not just about due process, agency or affiliate jurisdiction, or any of the alternative tests offered by the Ninth Circuit. Instead, this case is about fairness to the defendant *and* access to justice for the plaintiffs. Third, these considerations must be analyzed in light of current realities in the transnational law market. Jurisdictional tests developed in the early part of the twentieth century may be unable to answer these questions without discarding antiquated formulas in favor of present-day litigation realities. The due process analysis that currently consumes U.S. courts in determining personal jurisdiction is perhaps ill-equipped to take account of the transnational law market.

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37. Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 2 (1), 2001 O.J. (L 12) (EC), *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF.

38. INTERNATIONAL LAW ASSOCIATION, INTERNATIONAL CIVIL LITIGATION AND THE INTERESTS OF THE PUBLIC, *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1021 (emphasis added).

39. ZIVILPROZESSORDNUNG [ZPO] [Code of Civil Procedure], Dec. 5, 2005, BUNDESGESETZBLATT [BGBL I] 3202, as amended § 17, para. 1, sentences 1–2 (Ger.).

It is here that we can learn from the EU. Until Congress sees fit to undertake the balancing necessary, as the EU has done through the Brussels Regulation, the common-law development of jurisdictional rules should not lose sight of the practical realities at stake. Unless it is clear that a corporation's affiliate is really just the corporation itself, its "alter ego," the default rule for general jurisdiction should be that suit is proper only in the corporation's principal place of business or state of incorporation (here Germany), or in the place of the harm (Argentina or perhaps Germany).

The benefits of such an approach are as follows. First, in transnational cases there would be increased coordination between jurisdictional regimes. Such coordination would recognize that transnational cases impact various sovereigns. It is useful, therefore, to look to well-recognized principles of European law in determining the U.S. approach to jurisdiction.[40]

Second, agency or affiliate jurisdiction is itself a poor vehicle for analyzing the case. One would be hard-pressed to find any transnational corporation that does not depend in some part on an agent or affiliate to conduct business. Indeed, the Ninth Circuit's rule allowing imputation whenever a subsidiary's actions are "sufficiently important" to a parent corporation is so broad as to render nearly every foreign company subject to jurisdiction in the U.S. when there is a subsidiary here. Unless we are willing to say (and I do not think that we are) that U.S. corporations who have subsidiaries abroad should be subject to suit for all claims where their subsidiaries are domiciled, fairness requires U.S. courts to exercise restraint in cases such as this.

Finally, one should not lose sight of the plaintiff's need for justice in the individual case. Yet, we should not be so bold as to assume that justice in the United States is the only justice that should count. Unless it can be shown that no other forum would grant the plaintiffs access to justice, U.S. courts should resist creative assertions of general jurisdiction. If we do otherwise, we risk turning over state adjudicatory authority to the vagaries of the transnational law market.

V. CONCLUSION

In this essay, I have endeavored to strip away the legal language of general jurisdiction that at best confounds and at worst complicates the present-day realities of the transnational law market. The guideposts for general jurisdiction should be fairness *and* access

40. *Nicastro*, 131 S. Ct. at 2803–04 (Ginsburg, J., dissenting) (comparing the U.S. and EU approaches to personal jurisdiction).

to justice. In establishing these posts, a turn towards the EU approach to jurisdiction merits careful consideration. If we do otherwise, we risk unleashing a brave new world of transnational litigation where litigants demand that courts compete for these cases. The end result will not only be jurisdictional conflict between sovereigns, but, perhaps more problematic, forum competition where fairness and access to justice are subsumed in a market for law driven by litigants and their lawyers.