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INTRODUCTION

The number of class actions in the United States with foreign class members—alternatively known as global, multinational, international, or transnational class actions—has steadily increased in the past few years.[1] The increase can be attributed to a combination of the global presence of multinational corporations[2] and the aggressively broad reach of American class action attorneys.[3]

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1. See, most recently, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (refusing to apply U.S. securities laws in a class action brought by foreign class members against a foreign bank). The issue is not new. U.S. courts have been including foreign people in class definition for almost half a century. For an earlier example in the area of securities litigation class actions, see Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 977–78 (2d Cir. 1975) ("[T]he suit here is a class action on behalf of thousands of plaintiffs preponderantly citizens and residents of Canada, Australia, England, France, Germany, Switzerland, and many other countries in Europe, Asia, Africa, and South America."); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 799 (1985) (brought on behalf of a class of about 28,000 members, residing in all 50 States, the District of Columbia, and several foreign countries). For earlier examples in the area of mass tort, see, for example, *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y. 1983).

> The plaintiff class is defined as those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . . The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id.; *In re* Dow Corning Corp., 244 B.R. 634, 641–42 (Bankr. E.D. Mich. 1999) (a worldwide class of women affected by silicone breast implants). A high profile worldwide class action was brought on behalf of victims of the Nazi holocaust. *See In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139 (E.D.N.Y. 2000). *See generally* SWISS BANK SETTLEMENT, http://www.swissbankclaims.com (last updated Feb. 29, 2012); *see also* Bowling v. Pfizer, Inc., 143 F.R.D. 138, 139–40 (S.D. Ohio 1992) (a "futures only" worldwide class of people affected by allegedly defective heart valves). Needless to say, the idea of binding "future class members" creates a new set of obstacles for the recognition of U.S. class actions abroad. *See* Isabelle Romy, *Class actions américaines et droit international privé suisse*, AKTUELLE JURISTISCHE PRAXIS [AJP] 783, 796–97 (1999) (Switz.).

A related issue is the rise of international class arbitration. *See* S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 53, 89 (2008) (discussing the increasing numbers of international class arbitrations and the attendant problems with the international recognition of class arbitration awards and arguing that, although "parties will likely oppose enforcement of international class awards under the New York Convention on due process and public policy grounds," ultimately "international class awards should be given the same presumption of enforceability as other international awards").

2. *See* Hannah Buxbaum, *Multinational Class Actions under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 16 (2007)

Once a judgment is obtained or a settlement is reached in an American opt-out class action in which at least some of the class members are foreigners, the issue remains whether such judgment will be recognized and enforced in foreign courts. If the class action judgment is against the interest of the foreign class members, some foreign courts might not allow foreign class members to be bound by such adverse judgment. If the class action judgment or settlement is less than the amount foreign class members believe they should be entitled to, a foreign court might not enforce the result. The question therefore remains whether the class action defendant will be able to assert res judicata against the foreign absent class members in a subsequent proceeding, or whether foreign absent class members will be able to bring their own individual or class action lawsuits abroad.

This is an important procedural issue for foreign class members as well as U.S. courts.[4] Yet there are few examples of foreign courts enforcing U.S. class action judgments or court-approved settlements.[5] This Article

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("The globalization of financial markets has brought about the globalization of securities litigation"); George A. Bermann, *U.S. Class Actions and the "Global Class*,*"* 19 KAN. J.L. & PUB. POL'Y 91, 93 (2009) ("The emergence of multinational classes in securities, antitrust, and mass tort claims is something we can expect in a world of truly international markets."); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1 (2009).

> In our world, no formal political state has authority of a scope commensurate with modern global business. As a result, our world is one that virtually invites regulatory mismatches. The underlying dispute is likely to be global, as might well be the desired preclusive scope for litigation. But aggregate litigation necessarily must proceed in some court within some government whose territorial authority stops considerably short of the entire globe.

Id. at 13.

3. *See* Rolf Sturner, *International Class Actions from a German Point of View*, *in* CURRENT TOPICS OF INTERNATIONAL LITIGATION 107 (Mohr Siebeck, Rolf Sturner & Masanori Kawano eds., 2009) [hereinafter CURRENT TOPICS] ("American law firms are therefore fishing for claimants all over the world with the intention to represent a worldwide international class in American courts.").

4. *See* John C. L. Dixon, *The Res Judicata Effect in England of a US Class Action Settlement*, 46 INT'L & COMP. L.Q. 134 (1997) (Eng.) (foreign class members need to know the consequences of opting out, remaining in, or ignoring a class action notice and U.S. courts need to know the binding nature of its class action decree).

5. *See* Andrea Pinna, *Recognition and Res Judicata of US Class Action Judgments in European Legal Systems*, 1 ERASMUS L. REV. 31, 38 (2008) ("[T]he specificities of [the class action] procedure make it nearly impossible to apply reasoning by analogy, simply because European courts have not had the opportunity to rule on similar situations."); Bermann, *supra* note 2, at 96 ("[N]o foreign court has ever addressed the question [of foreign class action judgment recognition]."); Marina Matousekova, *Would*

will attempt to answer some of these questions that have confounded U.S. courts and commentators. Although this Article's scope is largely limited to the enforceability of U.S. class action judgments and court-approved settlements in Latin America, the conclusions are applicable to all countries, particularly within the civil law tradition.

Individual U.S. judgments are routinely recognized and enforced in Latin America, but class action proceedings present some very specific considerations that do not arise in the litigation of individual claims. Because of these differences, the recognition of U.S. class action judgments and settlements presents unique challenges to foreign courts.

The resolution of this issue may have a significant effect on U.S. class action law as well. Many American courts have denied certification of a foreign class due to lack of "superiority," whenever there is a concern that the foreign court will not recognize[6] the resultant judgment or court-

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French Courts Enforce U.S. Class Action Judgments?, 2006 CONTRATTO E IMPRESA 651, 653 (It.) ("the issue of whether an American class action judgment could be recognized and enforced in France . . . . has not yet been referred to any French judge"); Jonathan Harris, *The Recognition and Enforcement of US Class Action Judgments in England*, 2006 CONTRATTO E IMPRESA 617 (It.) ("There is no clear English authority as to whether, and in what circumstances, a United States class action judgment is entitled to recognition and enforcement in England."); Dixon, *supra* note 4, at 150 ("The law in this area is difficult to analyse as there is no case that has really come close to considering this issue."); *see also In re* Vivendi Universal, S.A. Sec. Litig., 242 F.R.D 76, 102–05 (S.D.N.Y. 2007) (no authority in England, Germany, Austria, and the Netherlands). *But see* Rechtbank Amsterdam, 23 juni 2010, No. 398833/HA ZA 08-1465 (Stichting Onderzoek Bedrijfs Informatie Sobi/Deloitte Accountants B.V.) (Neth.) (where an Amsterdam court recognized a U.S. class action judgment as binding upon non-U.S. residents who did not opt out of *In re* Royal Ahold N.V. Sec. & ERISA Litig., No. Civ.103MD01539, 2006 WL 132080 (D. Md. Jan. 9, 2006), where the fraudulent acts occurred in the United States); *Amsterdam Court Recognizes US Class Settlement*, STIBBE (June 25, 2010), http://www.stibbe.nl/upload/166c3273c01297daa3dd301435.htm; Sturner, *supra* note 3, at 114 (discussing a case in which the State District Court of Stuttgart refused recognition of a U.S. class action judgment).

6. The Author uses the expression "will not recognize" loosely. There is no uniform standard as to how confident a U.S. court must be as to whether the foreign court would recognize the potential class action judgment or settlement. *Compare* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975) (establishing the "near certainty" standard by holding that an American court need not certify a class action involving foreign class members when it is near certain that a foreign court may not recognize or enforce the class judgment), *with Vivendi*, 242 F.R.D. at 95. *In re* Vivendi Universal established the "more likely than not" standard by holding that a court may consider in the certification of a class involving foreign class members, whether it is likely or probable that a foreign court may recognize and enforce the class judgment, and stating that

> [i]t seems more appropriate, instead, to evaluate the risk of nonrecognition along a continuum. Where plaintiffs are able to establish a probability that a

approved settlement and the defendant risks possible litigation elsewhere regarding the same conflict, even after the U.S. class action has concluded.[7] This approach, conditioning class certification on the enforceability of the result abroad, has garnered the support of the International Bar Association.[8]

> foreign court will recognize the res judicata effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement. . . . Where plaintiffs are unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class. The closer the likelihood of non-recognition is to being a "near certainty," the more appropriate it is for the Court to deny certification of foreign claimants.

Id. at 95. *See generally* Matthew H. Jasilli, Note, *A Rat Res? Questioning the Value of Res Judicata in Rule 23(b)(3) Superiority Inquiries for Foreign Cubed Class Action Securities Litigations*, 48 COLUM. J. TRANSNAT'L L. 114, 121–31 (2009) (discussing several standards developed by U.S. courts); Michael P. Murtagh, *The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies*, 34 HASTINGS INT'L & COMP. L. REV. 1 (2011) (same); Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TULANE L. REV. 1, 13–20 (2011) (same).

7. In the tradition of class action litigation, each actor is behaving in his or her own interest. Class counsel wants to include foreign class members to increase the settlement value of the claim and, consequently, attorney's fees. Defendants want to exclude foreign class members to reduce the scope of liability and, consequently, the value of the judgment or the settlement value of the claim. *See* Sturner, *supra* note 3, at 107–08; *see, e.g.*, *Vivendi*, 242 F.R.D. at 92 (class action on behalf of foreign class members partly dismissed for lack of superiority); Mohanty v. Bigband Networks, Inc., No. C 07-5101, 2008 WL 426250, at *5 (N.D. Cal. Feb. 14, 2008) (the class representative is not typical). See the discussion of *forum non convenies* in Monestier, *supra* note 6, at 11 n.24; Buxbaum, *supra* note 2, at 35, 39–41 (stating that, out of forty-five class claims involving foreign class members in securities class actions, fourteen had generated no specific resolution on the question of subject-matter jurisdiction, sixteen had excluded all foreign class members, and fifteen cases included all or some foreign class members. Many of the foreign class members were from Canada, a country that has a regulatory scheme that is similar to that of the United States, but some involved class members from countries which have different legal systems, like the Netherlands, Germany, and France).

8. *See* IBA LEGAL PRACTICE DIV., GUIDELINES FOR RECOGNISING AND ENFORCING FOREIGN JUDGMENTS FOR COLLECTIVE REDRESS 13 (Int'l Bar Ass'n ed., 2008) [hereinafter IBA LEGAL PRACTICE, GUIDELINES] ("It is appropriate for a court to assume jurisdiction over foreign class members if . . . it is reasonable for the court to expect that its judgment will be given preclusive effect by the jurisdictions in which the [absent] foreign class members . . . would ordinarily seek redress."). Although the language of the guidelines seems to apply only to the situations when the foreign class member prevails and "seek[s] redress," the IBA Task Force was cognizant that the most pressing issue was probably when the foreign class members would have their rights precluded. *See id.* at 12–13.

It is beyond the scope of this Article to discuss whether U.S. courts should certify transnational class actions (either with an opt-in or an opt-out procedure) regardless of the potential recognition of the result in a foreign court.[9] The objective of this Article is limited to determining

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> [D]uring its deliberations, the Task Force noted that a request to 'recognise and enforce' a traditional foreign judgment most commonly occurs when a foreign judgment creditor is trying to collect on the judgment. That is, a creditor is seeking to enforce an unsatisfied judgment obtained from a foreign country against a recalcitrant judgment debtor. However, the Task Force anticipates that these Guidelines will only rarely be invoked in those situations. Rather, the Task Force contemplates that these Guidelines will be most commonly used in situations where the preclusive effect of a foreign judgment will be at issue so as to prevent an absent claimant from re-litigating a claim that has been resolved by a foreign collective redress judgment.

Id.

9. *See Bersch*, 519 F.2d at 997 n.48 (proposing an opt-in class action to increase the possibility of enforcement abroad of U.S. class action judgments); Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 87–89 (2003) ("[T]he opt-in procedure is a superior device from a due process perspective."); Monestier, *supra* note 6, at 1–2 (proposing the adoption of the opt-in device for foreign class members). *But see* Janet Walker, *Crossborder Class Actions: A View from Across the Border*, 2004 MICH. ST. L. REV. 755, 769–71 [hereinafter Walker, *A View from Across the Border*] (stating that an opt-in solution for non-residents would not solve the problem of fairness to foreign class members). *See infra* Part II.B. (A U.S. Court Cannot Validly Obtain Personal Jurisdiction over Foreign Absent Plaintiff Class Members).

Linda Sandstrom Simard and Jay Tidmarsh propose the abandonment of the consensus that courts should not certify a class action with foreign citizens from countries that do not recognize an American judgment. *See* Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 CORNELL L. REV. 87, 87–129 (2011). According to the authors, the most efficient test is to determine whether or not the foreign class member is likely to commence a subsequent foreign proceeding. Using standard tools of economic analysis, the authors propose the class action should "include foreign citizens with claims that are not individually viable and exclude foreign citizens with claims that are viable." *See id.* at 87. The idea is not new. It has been argued by plaintiff attorneys and commentators. *See, e.g.*, Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the US Federal Courts*, 90 CORNELL L. REV. 1563, 1595–96 (2005).

> When considering the res judicata concerns introduced by foreign class members, few federal judges are factoring in the actual likelihood of repeat litigation . . . . The risk that absent foreign class members will sue again in the courts of their home countries is often more theoretical than actual . . . . The practical difficulties involved in litigating abroad, however, usually make this theoretical possibility impracticable. If judges were to weigh these factors more carefully when considering certification of a class, in most cases they would discover

whether Latin American countries would recognize and enforce a U.S. class action judgment or court approved settlement.

This Article is structured in two parts. In order to illuminate the issues behind the recognition of a U.S. class action judgment in Latin America, Part I of this Article classifies Latin American countries into four categories, and discusses the obstacles to recognition of a U.S. class action judgment that are applicable to specific Latin American countries according to each nation's individual approach to class action litigation.

The first category is comprised of countries that do not allow class actions for damages. Some of the countries in this category may have some form of injunctive class actions with varying levels of sophistication.[10]

> that the risk of repeat litigation in foreign courts is minor and does not justify exclusion of foreign claimants.

Id. at 1595–96. There are other compelling arguments that supplement that analysis. For example, class actions may not be available abroad and the defendant may not be subject to jurisdiction abroad. *See also id.* at 1569, 1598–99 (stating that, because the objective of the small-claim class action is to deter corporate misconduct and preserve investor confidence in the marketplace (global deterrence), not efficiency "courts should adopt a presumption in favor of including foreign claimants in small claim class action lawsuits").

The perceived unfairness to defendants being exposed to litigation abroad may be more theoretical than real for yet another reason: by the time the U.S. class action is settled, the statute of limitations may have precluded any possibility of litigation abroad. *See* Peter L. Murray, *Class Actions in a Global Economy*, *in* CURRENT TOPICS, *supra* note 3, at 95, 103; *see also* Jasilli, *supra* note 6, at 118–19 ("the binding effect of judgments should not be addressed as part of the superiority inquiry of Rule 23(b), but should be replaced by the subject-matter inquiry for the extraterritorial application of U.S. securities laws.").

10. Most civil law scholars reserve the name "class actions" exclusively for "class action for damages" and some only use the expression to designate an "opt-out class action for damages." The many examples of injunctive class actions in their legal tradition are not considered "class actions." *See, e.g.*, Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301, 316–17 (2006–2007).

> Just because there is no class action device [in Switzerland] does not mean, however, that there is no procedural vehicle to allow for group litigation in Switzerland. . . . Probably the best known such device is the association suit (*Verbandsklage* in German). [T]he Swiss legislature first introduced the *Verbandsklage* in the area of unfair competition, granting associations that are authorized by their bylaws to pursue the economic interests of their members to bring claims of violations of the Unfair Competition Act on behalf of those members. However, associations are limited to claiming declaratory relief and injunctions to stop the alleged violations.

Id.; *see also infra* 139–42 and accompanying text (discussing the tradition in civil law scholarship to use different terminology based on immaterial differences of the different types of class actions, such as whether they are opt in or opt out, brought by a class member or an association, injunctive, or damages).

Other countries may have specifically rejected proposals to enact class actions for damages. Other countries simply do not have any type of class action at all.

The second category is comprised of countries that do have class actions for damages in their legal systems, but judgments in such actions are only binding if favorable to the interests of the class. In these countries, the binding effect of settlements is often controversial.

The third category is composed of countries that have class actions for damages, with the final judgment binding on the class regardless of the outcome, but these countries adopt a system of opt-in class action procedure. In an opt-in system, absent class members must take affirmative steps to include themselves in the class action before they may be bound by the judgment.

The fourth category of Latin American countries is composed of countries that have a class action system that is substantially similar to the U.S. model. The systems may not be exactly the same in all aspects, but the differences are not relevant for the purpose of recognition. These countries adopt an opt-out class action procedure in which the judgment is binding whether favorable or not to the class and also allow class action settlements.

The Latin American countries (or any country for that matter) that fall under the first three categories would likely not recognize or enforce a U.S. class action judgment or settlement because the peculiarities of each country's class action model present insurmountable obstacles. Because the fourth category of countries has a class action device that is substantially similar to the U.S. model, the class action rules alone do not pose an obstacle to recognition of an American class action judgment. Whether these countries would recognize a U.S. class action judgment will depend on other factors, discussed in Part II.

Part II of this Article discusses general obstacles to recognition of a U.S. class action judgment or court approved settlement in all Latin American countries, regardless of the particular class action apparatus. It argues that, regardless of which of the four categories a Latin American country falls into, none of them would recognize or enforce a class action judgment or court-approved settlement for at least three additional reasons.

First, the class action notice to foreign class members will likely be deemed inadequate, both under the standards of the specific Latin American country and the standards of U.S. class action law. This is the case even where the notice is translated with flexibility and the utmost sensitivity for the cultural and legal peculiarities of each Latin American country, and even where notice is written to be devoid of any legalism

and accessible to the Latin American public (itself a very challenging hurdle). There is a strong probability that absent class members will simply not understand the legal implications of the class action notice and what it requires of them. Being completely unfamiliar with the American class action device, the idea that one must actively exclude oneself from a proceeding to which the person was not formally served with process is completely alien to the nationals of these countries.

Second, a U.S. court cannot validly obtain jurisdiction over Latin American absent class members that have no contacts with the United States. No Latin American country would recognize a U.S. judgment (whether it is a class or an individual action) against a national who lacked significant contact with the United States and is not subject to jurisdiction there, even if the person was to be properly served with process through rogatory letter.

Third, Latin American countries are not likely to recognize a foreign judgment that binds their nationals in a proceeding in which they were not made parties through formal service of process or notice performed through rogatory letters.

These three obstacles are applicable to all Latin American countries, regardless of which of the four categories they fit.

Finally, this Article concludes that no Latin American country would recognize or enforce a U.S. opt-out class action judgment or court approved settlement which would bind foreign nationals.

I. OBSTACLES TO RECOGNITION OF A U.S. CLASS ACTION JUDGMENT DERIVED FROM SPECIFIC CLASS ACTION RULES

The various Latin American class action regimes are as diverse as the Latin American culture itself. Each country has its own perspective on class action litigation, ranging from (a) countries that do not have class action for damages, (b) countries where a class action judgment is binding only if it is favorable to the class, (c) countries that adopt an opt-in class action mechanism, and (d) countries that adopt a class action model that is substantially similar to the American model. Not only are these legal approaches to class action litigation different from one another, but they differ significantly from the U.S. system.[11]

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11. *See* Ángel R. Oquendo, *Upping the Ante: Collective Litigation in Latin America*, 47 COLUM. J. TRANSNAT'L L. 248, 251 (2008–2009) (explaining how Latin American legal systems have transplanted the concept of class action litigation from the United States and "radically transformed it. They have established causes of action inspired by the U.S. class action, but based on autochthonous institutions, in order to creatively process group rights. Additionally, they have designed procedural means for the vindication of comprehensive guarantees.").

As one might expect, individual countries with unique class action rules will review a U.S. class action judgment from different perspectives. These perspectives will influence a nation's willingness to recognize and enforce the U.S. judgment.

A. Countries That Do Not Have Class Actions for Damages

Several Latin American countries, including Venezuela,[12] Peru,[13] Uruguay, Costa Rica,[14] El Salvador, Bolivia,[15] and the Dominican Republic,[16] do not have class action for damages available within their respective legal systems.[17] Some of these nations may allow for injunctive class

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12. *See* JUAN ESTEBAN KORODY TAGLIAFERRO, EL AMPARO CONSTITUCIONAL Y LOS INTERESES COLECTIVOS Y DIFUSOS (2004) (Venez.) (a book about injunctive class actions in Venezuela); Enrique Luis Fermín Villalba, *La Cosa Juzgada y Sus Efectos Extensivos en las Sentencias Sobre Intereses Difusos y Colectivos en la Jurisprudencia de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela*, *in* CODIGO MODELO DE PROCESOS COLECTIVOS: UN DIALOGO IBEROAMERICANO 585 (Antonio Gidi & Eduardo Ferrer eds., 2009) (Mex.) [hereinafter UN DIÁLOGO IBEROAMERICANO] (article about injunctive class actions in Venezuela).

13. *See* Antonio Gidi, *Comentario: Artículo 82 del Código Procesal Civil Peruano*, *in* I CÓDIGO PROCESAL CIVIL: COMENTADO "POR LOS MEJORES ESPECIALISTAS" 360–70 (Johan S. Camargo Acosta ed., 2010) (Peru) (discussing and critiquing the Peruvian class action); *see also* Aníbal Quiroga León, *La Proteción de Intereses Difusos y Colectivos en la Legislación Peruana y el Proyecto de Código Modelo de Procesos Colectivos para Ibero-América*, *in* UN DIÁLOGO IBEROAMERICANO, *supra* note 12, at 476.

14. In a recent project to enact the new Code of Civil Procedure in Costa Rica, Article 128 would not allow res judicata effect if the judgment was issued based on insufficient evidence. CÓDIGO PROCESAL CONTENCIOSO ADMINISTRATIVO [ADMINISTRATIVE PROCEDURE CODE], Ley No. 8508 de 4 de abril de 2006, art. 128 (Costa Rica); *see infra* Part I.B. (Countries in Which a Class Action Judgment is Binding Only if Favorable to the Class).

15. *See* Diego Rojas & Ariel Morales, *Bolivia: Litigation Reference*, CR&F ROJAS ABOGADOS, http://www.latinlawyer.com/reference/topics/60/jurisdictions/99/bolivia (last visited Apr. 22, 2012).

16. *See* Marcos Peña-Rodríguez, Laura Medina Acosta & Rosa E Díaz Abreu, *Dominican Republic: Litigation Reference*, JIMÉNEZ CRUZ PEÑA, http://www.latinlawyer.com/reference/topics/60/litigation (last visited Apr. 23, 2012) ("In civil and commercial matters, class actions are not expressly foreseen in the law. In environmental and criminal matters as well as in consumer protection actions, non-profit organisations or associations or groups of individuals, may pursue a claim when the collective interests have been affected.").

17. The situation in Europe is very similar—although injunctive class actions are usually available in Europe, several European countries still do not have class actions for damages. *See* CIVIC CONSULTING (LEAD) & OXFORD ECONOMICS, EUR. COMM'N—DG SANCO: EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY OF COLLECTIVE REDRESS MECHANISMS IN THE EUROPEAN UNION: FINAL REPORT, PART I: MAIN REPORT 20 (2008), *available at* http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-

actions with varying levels of sophistication. This ranges from a broad recognition of injunctive class actions for the defense of the environment or consumer to a more limited allowance of injunctive class actions for the protection of the public interest, which is derived from the Roman popular action (*actio popularis*).[18]

These countries would likely not recognize a U.S. class action judgment because opt-out class actions for damages are alien to their procedural traditions and to do so would be contrary to both due process of law and public policy. More specifically, these countries would not accept that their nationals would be bound by a judgment issued in a proceeding to which they were not made parties and had no day in court.

It is a common rule of law that a party can only pursue the party's individual interest in court, not the interests of others. A corollary of this principle is that a person has the right to decide whether or not to bring a lawsuit. These doctrines are embodied in the principles known as *principio dispositivo* in Portuguese, Spanish, and Italian, *Dispositionsmaxime* in German, and *nul ne plaide par procureur* in French, and could be loosely translated as the principles of party control or party autonomy.[19]

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final2008-11-26.pdf ("Almost half ([thirteen]) of EU Member States currently have some mechanisms of collective redress, while the others do not."). The information in the European Commission Report includes in the definition of "collective redress" mechanisms that are not a class action for damages, like those in France, Austria, Germany, and England. However, it excludes Poland, which enacted a class action statute after 2008, but it offers a good overview of the reality in Europe. *See id.* Annex 8 (listing the type of collective redress available in European countries); *see also* Nagareda, *supra* note 2, at 26. The author links the recent development in class action legislation in Europe with the integration of European Markets, but this does not explain a similar development in Latin America and elsewhere.

18. Some Latin American countries may have had popular actions in their legal systems for more than a century. *See* JOSÉ CARLOS BARBOSA MOREIRA, *A ação popular do direito brasileiro como instrumento de tutela jurisdicional dos chamados interesses difusos*, *in* TEMAS DE DIREITO PROCESSUAL (1977) (Braz.) (discussing the Roman *actio popularis* as injunctive class action); Oquendo, *supra* note 11, at 271–77; CARLO FADDA, L'AZIONE POPOLARE: STUDIO DI DIRITTO ROMANO ED ATTUALE (1894) (It.) (discussing the popular action in Roman law).

19. These principles have a long pedigree in the history of civil law civil procedure. *See* ARTHUR ENGLEMANN ET AL., A HISTORY OF CONTINENTAL CIVIL PROCEDURE 179, § 72 & 389–90, § 105 (Robert Wyness Miller trans. & ed., 1969) (discussing the *Dispositionsmaxime* since medieval German law and Roman law); LEOPOLD WENGER, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE 80 (Otis Harrison Fisk trans., 1955) (discussing the principle in Roman law); *see also* Baumgartner, *supra* note 10, at 321 (discussing the principle of *Dispositionsmaxime* as a traditional obstacle to class action legislation). *But see* Matousekova, *supra* note 5, at 673–74 (considering that the French principle of *nul ne plaide par procureur* would not be an obstacle to the recognition of a U.S. class action judgment in France).

These foundational principles of civil procedure present barriers to countries that have yet to adopt the class action device. These old principles should not discourage a country from adopting class actions in their domestic legal systems. Quite the contrary, I have dedicated most of my career proposing the adoption of class actions in all civil law countries. However, before a country is psychologically and culturally ready to adopt a new procedural paradigm, it is impossible to escape from these barriers.[20] It is difficult to contemplate a country that would recognize

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20. It is commonplace for opponents, particularly those potential class action defendants, to consider class actions unconstitutional for a myriad of reasons, as class actions are being discussed in the political process. *See, e.g.*, Roberth Nordh*, Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms, and a Forthcoming Proposal*, 11 DUKE J. COMP. INT'L L. 381, 384 (2001) (discussing criticisms from the industry against the introduction of class actions in Sweden); Richard B. Cappalli & Claudio Consolo, *Class Actions for Continential Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217 (1992); *see also* Linda S. Mullenix, *Lessons From Abroad, Complexity and Convergence*, 46 VILL. L. REV. 1 (2001); Edward F. Sherman, *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 401 (2002) ("Other countries have eyed the American class action with both admiration and suspicion."); Baumgartner, *supra* note 10, at 310 ("proponents of [class actions] in Switzerland face considerable doctrinal, jurisprudential, cultural, and economic objections"); Thomas D. Rowe, *Foreword: Debates over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 DUKE J. COMP. INT'L L. 157 (2001); Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. INT'L L. 405, 413–17 (2000) [hereinafter Taruffo, *Remarks on Group Litigation*] (discussing European resistance to class actions and the perceived need to prevent the class action Frankenstein monster from "penetrating the quiet European legal gardens"); Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L.J. 141 (2010); Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL'Y 281 (2006).

Opposition to class actions is also derived from a misunderstanding of the reality of American civil litigation. *See* Sherman, *supra*, 403.

> Horror stories about an overly litigious society, entrepreneurial plaintiff attorneys, runaway jury verdicts, abusive class action practices, and legal blackmail through meritless suits that drive up business costs are well-known abroad. Whether or not such stories convey an accurate picture, most other countries view American class actions as a Pandora's box that they want to avoid opening.

Id.; Filippo Valguarnera, *Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action*, 10 GLOBAL JURIST (2010), *available at* http://www.astrid.eu/Riforma-de6/Dossier—C/Valguarnera_Global-Jourist_2_2010.pdf; Baumgartner, *supra* note 10, at 315–16, 348–49 (opposition to class action also derived from propaganda of U.S. "tort reform movement," and insensitive behavior of U.S. courts towards legitimate international interests.); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 180 (2009) (acknowledging "that the aversion

and give preclusive effect to a judgment issued by means of a procedural device as exotic as an opt-out class action, when that device does not exist in the country's own legal system.[21]

The reason for the absence of class actions in some Latin American countries is similar to the resistance of other civil law countries throughout the world in adopting the device. Those countries struggling with the need to adopt such legislation could study the Model Class Action Code recently proposed by this Article's author, and specifically tailored for the peculiarities of the civil law tradition.[22]

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to the American-style class action corresponds to sustained critiques of class actions in the United States as well," and mentioning the recent law reforms that "limited the class action as an effective vehicle for resolution of mass personal injuries").

> At bottom, the gulf between the European and American developments in class actions and other forms of aggregation reflects a deeper divide than doctrines and formal laws alone would reveal. For the civil law countries of continental Europe, the resistance to collectivist measures of adjudication is in part a continuation of what Hayek has termed a "constructivist rationalism"—a deep-seated belief in the importance of rationalist expertise in top-down administrative decisionmaking. What characterizes the American legal tradition—what Hayek in turn would term "spontaneous order"—is the common law attachment to the bottom-up competitive evolution of legal rules.

Id. at 208–09.

21. *See* IBA LEGAL PRACTICE, GUIDELINES, *supra* note 8, at 5 (stating that the Guidelines are applicable only in countries that recognize class actions ("collective redress") in their domestic legal system.)

22. *See generally* Antonio Gidi, *The Class Action Code: A Model for Civil-Law Countries*, 23 ARIZ. J. INT'L & COMP. L. 37 (2005) [hereinafter Gidi, *The Class Action Code*]. This project has been translated into several languages and published in several countries. *See, e.g.*, Antonio Gidi, *Código de Processo Civil Coletivo: Um Modelo Para Países de Direito Escrito*, 111 REPRO 192 (2003) (Braz.); Antonio Gidi, *Il codice del processo civile collettivo: Un modello per i paesi di diritto civile*, 2 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE, ANNO LIX FASC. 697 (Alessandro Barzaghi trans., 2005) (It.); Antonio Gidi, *Le Code de L'Action Collective: Un Modéle Pour les Pays de Droit Civil*, *in* GILBERTE CLOSSET-MARCHAL & JACQUES VAN COMPERNOLLE, VERS UNE "CLASS ACTION" EN DROIT BELGE? 147–63 (M. Guy Sohou & Caroline Gilbert trans., 2008) (Belg.) (introductory study in Dutch by Stefaan Voet); Antonio Gidi, *Código de Proceso Civil Colectivo: Un modelo para países de derecho civil*, 11 REVISTA PRACTICA DE DERECHO DE DAÑOS 56 (Adriana León & Joaquín Silguero Estagnan trans., 2003) (Spain); Antonio Gidi, *Código de Proceso Civil Colectivo: Un modelo para países de derecho civil*, *in* MEMORIAS XXVI CONGRESO COLOMBIANO DE DERECHO PROCESAL 601 (2005) (Colom.); Antonio Gidi, *Código de Proceso Civil Colectivo: Un modelo para países de derecho civil*, *in* EDUARDO OTEIZA, PROCESOS COLECTIVOS 463 (2006) (Arg.); Antonio Gidi, *Código de Proceso Civil Colectivo: Un modelo para países de derecho civil*, *in* 126 REVISTA JURIDICA DEL PERU 93 (2011) (Peru); Antonio Gidi, *Código de Proceso Civil Colectivo: Un modelo para países de derecho civil*, *in* 16 REVISTA VASCA DE DERECHO PROCESAL Y ARBITRAJE 753 (2004) (Spain).

Naturally, the reason why a U.S. opt-out class action judgment would not be recognized or enforced in civil law countries is not simply because these countries do not have the same or a substantially equivalent procedural device in their legal system.[23] The explanation is more complex.[24]

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23. *See* Romy, *supra* note 1, at 796 (stating that the mere fact that Swiss law does not have a procedure similar to the U.S. class action does not mean that such procedure violates the Swiss public order. It is necessary to investigate whether such representative action violates the fundamental principles of the Swiss procedural law).

> International public policy does not prevent a juridical situation created abroad to produce effect in the forum simply because the legal institution or the procedure applied do not exist. In other words, the mere fact that a legal rule or a procedural tool that does not exist, or even could not be enacted, in the country where a foreign judgment is asked to produce its *Res Judicata* effects, is not enough to consider the foreign judgment to be contrary to public policy. The application of foreign rules is only contrary to the international public policy of the forum if these rules contradict the main, essential and fundamental legal principles of the forum.

Pinna, *supra* note 5, at 41; Matousekova, *supra* note 5, at 665 ("the mere fact that such actions do not currently exist in French law does not make them incompatible with our legal tradition"); Harris, *supra* note 5, at 639–40 ("Of course, the English court's own rules of civil procedure do not need to be mirrored when it comes to the recognition and enforcement of foreign judgments in England."); Leonardo Greco, *A tutela jurisdicional internacional dos interesses coletivos*, *in* ESTUDOS DE DIREITO PROCESSUAL 471 (2005) (Braz.) (discussing several procedural differences). *But see* Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 7–8 (2002) ("Foreign courts are more likely to scrutinize the procedural aspects when presented with American judgments resulting from class actions because the procedure is unique and, to most legal practitioners in the rest of the world, largely unfamiliar.").

24. In the same vein, the mere fact that an opt-out class action exists in a foreign country does not mean *ipso facto* that the courts of that country would recognize a U.S. class action judgment. *See infra* Part I.D. (Countries That Have a Class Action System That is Substantially Similar to the United States) (stating that even countries that have a class action system substantially similar to the United States will not recognize a U.S. class action judgment); *see also infra* Part II (discussing the reasons). But the opposite seems to be the conclusion of Andrea Pinna and Tanya J. Moestier. *See* Pinna, *supra* note 5, at 46, 49, 60.

> The first way of addressing the public policy issue is to verify whether there are similar procedural tools in the legal system of the foreign forum. If that is the case, the *Bersch* test is positive and, most of the time, the US court then certifies a class including the relevant absent class members . . . . [T]he recent initiatives of several European legal systems to introduce class actions or procedural techniques of consolidation of individual judicial application into collective claims, some by including an opt-out mechanism, tend to indicate that the hostility towards class actions is disappearing progressively. This should facilitate the recognition, at least in some European legal systems, of US class action

For example, as we have seen, most of these countries have allowed some sort of "representative litigation" for injunctive claims for several decades.[25]

Moreover, even though these legal systems do not have an opt-out class action, there is a high probability that a U.S. class action judgment would be recognized and enforced against the defendant (as opposed to the absent class members).[26] As long as class action defendants have had their day in court according to U.S. law, and as long as enforcement would not violate local public policy, none of the objections raised in this Article are applicable as to foreign recognition of a U.S. class action as against a defendant.[27]

> judgments, since the contrariety to public policy of the forum can hardly be upheld.

Id. at 46, 49; *see also* Monestier, *supra* note 6, at 43 ("At a very broad level, the more the foreign country regime resembles that which exists in the United States, the more likely a U.S. court is to conclude that the foreign court would accord preclusive effect to a U.S. class judgment."). Contrary to the position of these authors, as will be seen more fully below, even countries that have class action legislation substantially similar to the U.S. model will probably deny recognition of a class action judgment issued by a foreign court. *See infra* Part II.

25. *See In re* Vivendi Universal, S.A. Sec. Litig., 242 F.R.D 76, 100–05 (S.D.N.Y. 2007). In addressing the issue of whether its class decree would be recognized abroad, the *Vivendi* court based its decision substantially on whether the laws of several countries have procedural devices analogous to the class action device. The court considered that countries, like Germany, that did not have any class action equivalent, would not recognize a U.S. class action decree. The court also stated that "the Dutch Legislature has recently enacted class action legislation in other contexts indicating that recognition of a judgment in this case would not be contrary to fundamental principles of fairness in Dutch law." *Id.* at 105. The Court made similar assessment of England, France, and Austria. *See* Jasilli, *supra* note 6, at 114, 128 (strongly criticizing *Vivendi* for relying in this method as based on dubious foundation and stating that "[n]owhere are either analogous forms of action or emerging legal norms held out as even reliable, not to mention powerful, evidence for assessing the likelihood of foreign recognition of a judgment"); *see also* Harris, *supra* note 5, at 637.

> English law permits group and representative actions in English courts. The availability of such actions in English courts may be an indication that English courts will not regard the U.S. class action procedure as so unfamiliar to an English court as to warrant a refusal to recognise a US class action judgment.

Id.

26. *See* Bermann, *supra* note 2, at 95. It is also entirely possible that foreign courts would recognize U.S. class action judgments against U.S. class members. *See infra* notes 34–35 and accompanying text.

27. *See* Bermann, *supra* note 2, at 95 ("Though not impossible, it is hard to imagine that foreign courts will consider it fundamentally unfair for the defendant company to have had to defend itself in a class action in a U.S. court, if everything else about the

The only objection that a class action defendant could raise in a foreign court against recognition of a U.S. class action judgment is an argument based on mutuality.[28] Mutuality is a preclusion doctrine in American civil procedure which states that a party can invoke issue preclusion against an opponent only if that same party was bound by the judgment as well.[29] It was traditionally thought that the rules of issue preclusion must be symmetric: a third party should not be able to benefit from a favorable judgment if that third party could not have been prejudiced by an unfavorable result.[30] However, the mutuality doctrine, which was once the general rule in the United States,[31] has been largely abandoned.[32]

Some civil law courts might initially feel uncomfortable recognizing a class action judgment against a defendant when the same judgment would not have been recognized against the absent class members had it been unfavorable to the interests of the class. Such uneasiness, however, is misguided. Most modern civil law systems are accustomed to treating unequal parties in ways that compensate for their inequalities and level the procedural playing field. For example, in consumer law, civil law

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proceeding was proper."); *see also* Murtagh, *supra* note 6, at 8 ("foreign defendants with enough contacts with the U.S. to support jurisdiction tend to also have assets in the U.S. sufficient to support the enforcement of a judgment in the U.S."); Sturner, *supra* note 3, at 108 (same).

28. *See* Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n, 19 Cal. 2d 807, 814, 122 P.2d 892, 895–96 (1942).

29. *See id.*

30. *See id.* at 894 ("The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him."); Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607, 608 (1926) ("The estoppel or bar of the judgment operates mutually if the one taking advantage of it would have been bound by it, had it gone the other way.").

31. *See* Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127 (1912) ("It is a principle of general elementary law that estoppel of a judgment must be mutual."); Triplett v. Lowell, 297 U.S. 638, 645 (1936).

> [A] person who is not a party or privy to a party to an action in which a valid judgment other than a judgment in rem is rendered . . . is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action.

RESTATEMENT (FIRST) OF JUDGMENTS § 93(b) (1942).

32. *See Bernhard*, 122 P.2d at 895–96 (allowing defensive use of non-mutual issue preclusion); Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found., 402 U.S. 329, 348–50 (1971) (same); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (allowing offensive use of non-mutual issue preclusion).

countries consider forum selection and arbitration clauses binding on the companies that draft contracts of adhesion but not on the consumers.[33]

Foreign courts would have an easier time recognizing a class action judgment against a strictly American class member (one who is domiciled, acquired the good or service, and suffered damage in the United States) than a foreign class member (who is domiciled, acquired the good

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33. Class action defendants raise the same "mutuality" arguments in U.S. courts in the hopes of attacking the class certification of transnational classes. The arguments that it is substantially unfair to bind class defendants to a class action judgment but not bind foreign class members is also deeply rooted in the concepts that support the doctrine of mutuality, although we are talking here of a novel concept of "mutuality of claim preclusion," as opposed to the traditional "mutuality of issue preclusion." *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975). Stating that the fact that a foreign court may not recognize a U.S. class action judgment

> must be considered not simply in the halcyon context of a large recovery which plaintiff visualizes but in those of a judgment for the defendants or a plaintiffs' judgment or a settlement deemed to be inadequate. As Judge Frankel stated in his order permitting the case to proceed as a class action: if defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been.

Id.; *see also* Walker, *A View from Across the Border*, *supra* note 9, at 763, 797.

> [I]t is unfair to purport to bind defendants to a result that some plaintiff class members might be free to accept or to reject as they please at some later date. To do so would require a defendant to respond to a claim by a class of indeterminate size and scope. . . . It is an important feature of fairness to the defendant, if not a requirement of due process, for the court to take into account the likely challenges to the preclusive effect of its certification order in defining the class.

Walker, *A View from Across the Border*, *supra* note 9, at 763.

> The argument of defendants in resisting class-action lawsuits that include foreign investors is that if they, as defendants, are successful, they may still face a potential lawsuit in a foreign jurisdiction brought by the absent class plaintiffs. . . . [Defendants] argue that the lack of 'preclusion protection' amount[s] to a due process violation.

Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 480, 482 (2009). Arguably defendant's assertion that it is unfair to certify a class action when the judgment would not be recognized abroad does not come into play when the defendant itself also seeks class certification, usually coupled with a global class settlement. Defendants, even those who originally challenged the certification of a foreign class as unfair, are perfectly content to get the settlement approved and deal with the risk of non-enforceability "when, and if, it were to develop." *See* Monestier, *supra* note 6, at 29–33 ("[T]he preclusive effect of a U.S. judgment abroad is only a problem if the defendant says it is."); Murray, *supra* note 9, at 101–03 (discussing the behavior of the defendant in the *Royal Ahold* case).

or service, and suffered damage abroad),[34] because most obstacles raised on this Article are not applicable to American class members. After all, in such cases, the notice was performed in the United States and the U.S. courts had jurisdiction over the American absent class member.[35] However, the question remains as to whether binding a person who was not made party to a proceeding would violate the public policy of the recognizing country.

In any event, between a wholly foreign class and a wholly American class, there are several different possibilities, depending on the many variables in a specific case, including the domicile of the class member, the domicile of the defendant, where the defendant committed the allegedly wrongful act, where the class member interacted with the defendant, and where the damage occurred. All these variables significantly affect the issues discussed in this Article, including issues of personal jurisdiction, subject matter jurisdiction, and notice.

B. Countries in Which a Class Action Judgment is Binding Only if Favorable to the Class

Brazil's system of governing class actions for damages is both similar to and different from its American counterpart.[36] Brazil has a relatively mature and sophisticated legislation[37] and scholarship on the subject of class actions for damages.[38] Brazil's class action system is set forth in the

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34. These types of class members are commonly known as "foreign cubed" or "f cubed class," because the three elements of the transaction are foreign. Choi & Silberman, *supra* note 33, at 466. In securities class actions, it means that foreign investors purchased shares of foreign issuers on foreign stock exchanges. *Id.* For purposes of comparison, a class comprised of U.S. domiciliaries who acquired the good or service in the United States and suffered damages in the United States, could be called "American cubed class" or "a-cubed class."

35. *See infra* Part II (Obstacles to Recognition of a U.S. Class Action Judgment Derived from Traditional Rules) (discussing notice and personal jurisdiction of absent class members).

36. *See* Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 318–20 (2003) [hereinafter Gidi, *Class Actions in Brazil*] (discussing Brazilian class actions in the comparative law context);

37. *See* Lei No. 8078, de 11 de Setembro de 1990, DIARIO OFICIAL DA UNIÃO [D.O.U.] de 11.9.1990 (Braz.) [hereinafter Brazilian Consumer Code]; Lei No. 7347, de 24 de Julho de 1985, D.O.U. de 25.7.1985 (Braz.).

38. *See*, *e.g.*, MARCELO ABELHA, AÇÃO CIVIL PUBLICA E MEIO AMBIENTE (2003) (Braz.); GREGORIO ASSAGRA DE ALMEIDA, DIREITO PROCESSUAL CIVIL COLETIVO BRASILEIRO (2003) (Braz.); 4 FREDIE DIDIER JR. & HERMES ZANETI JR., CURSO DE DIREITO PROCESSUAL CIVIL. PROCESSO COLETIVO (2011) (Braz.); PEDRO DA SILVA DINAMARCO, AÇÃO CIVIL PUBLICA (2001) (Braz.); ELPIDIO DONIZETTI & MARCELO MALHEIROS CERQUEIRA, CURSO DE PROCESSO COLETIVO (2010) (Braz.); EURICO FERRARESI, AÇÃO

Brazilian Consumer Code, which is a trans-substantive procedural legislation applicable to all types of claims across all substantive law areas.[39]

There are several differences between the class action regimes in Brazil and the United States.[40] For example, associations and public entities are granted standing to sue in Brazil, but not individual class members.[41] This difference between the Brazilian and American models, however, is largely insignificant for the purposes of international recognition of U.S.

POPULAR, AÇÃO CIVIL PUBLICA E MANDADO DE SEGURANÇA COLETIVO (2009) (Braz.); LUIZ PAULO DA SILVA ARAUJO FILHO, AÇÕES COLETIVAS: A TUTELA JURISDICIONAL DOS DIREITOS INDIVIDUAIS HOMOGENEOS (2000) (Braz.); JOSE DOS SANTOS CARVALHO FILHO, AÇÃO CIVIL PUBLICA (6th ed. 2007) (Braz.) [hereinafter FILHO, AÇÃO CIVIL PUBLICA]; LUIZ MANOEL GOMES, JR., CURSO DE DIREITO PROCESSUAL CIVIL COLETIVO (2008) (Braz.); 2 ADA PELLEGRINI GRINOVER, KAZUO WATABABE & NELSON NERY JR., CODIGO BRASILEIRO DE DEFESA DO CONSUMIDOR COMENTADO PELOS AUTORES DO ANTEPROJETO (2011) (Braz.); MARCIO FLAVIO MAFRA LEAL, AÇÕES COLETIVAS: HISTORIA, TEORIA E PRATICA (Sergio Antonio Fabris ed., 1998) (Braz.); RICARDO DE BARROS LEONEL, MANUAL DO PROCESSO COLETIVO (2002) (Braz.); PEDRO LENZA, TEORIA GERAL DA AÇÃO CIVIL PUBLICA (2d ed. 2005) (Braz.); RODOLFO DE CAMARGO MANCUSO, AÇÃO CIVIL PUBLICA (2004) (Braz.); HUGO NIGRO MAZZILLI, A DEFESA DOS INTERESSES DIFUSOS EM JUIZO (2007) (Braz.) [hereinafter MAZZILLI, A DEFESA DOS INTERESSES DIFUSOS EM JUIZO]; HUMBERTO DALLA BERNARDINA DE PINHO, A NATUREZA JURIDICA DO DIREITO INDIVIDUAL HOMOGENEO E SUA TUTELA PELO MINISTERIO PUBLICO COMO FORMA DE ACESSO A JUSTIÇA (2002) (Braz.); ELTON VENTURI, PROCESSO CIVIL COLETIVO (2007) (Braz.); JOSE MARCELO MENEZES VIGLIAR, TUTELA JURISDICIONAL COLETIVA (1999) (Braz.); LIONEL ZACLIS, PROTEÇÃO COLETIVA DOS INVESTIDORES NO MERCADO DE CAPITAIS (2007) (Braz.); TEORI ALBINO ZAVASCKI, PROCESSO COLETIVO (2007) (Braz.).

39. *See* Brazilian Consumer Code, art. 110 (providing that class actions are applicable to the judicial protection of any group right).

40. Class actions in Brazil have attracted considerable attention in the English language scholarship. *See* Keith S. Rosenn, *Procedural Protection of Constitutional Rights in Brazil*, 59 AM. J. COMP. L. 1009, 1031–33 (2011); Roger W. Findley, *Pollution Control in Brazil*, 15 ECOLOGY L.Q. 1, 38–52 (1988); Antonio Herman V. Benjamin, *Group Action and Consumer Protection in Brazil*, *in* GROUP ACTIONS AND CONSUMER PROTECTION 141, 141–55 (Thierry Bourgoignie ed., 1992); Oquendo, *supra* note 11, at 250; Manuel A. Gómez, *Will the Birds Stay South? The Rise of Class Actions and Other Forms of Group Litigation across Latin America*, 43 U. MIAMI INTER-AM. L. REV. (forthcoming 2012) (manuscript at 42–54), *available at* http://dx.doi.org/10.2139/ssrn.1930413. The Brazilian class action may have influenced the ALI's Principles of Aggregate Litigation and its novel concept of the indivisibility of the class action remedy (or of the class substantive right) as a criterion to determine the right to opt out. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04, at 118–29 (2010); *see also* Gidi, *Class Actions in Brazil*, *supra* note 36, at 311, 350–54 (discussing the indivisibility of class claims from a comparative perspective and suggesting that "[r]ecognition of the concept of indivisible class claims would be an important evolution in American class action law. . . . [F]or example, to decide whether there should be a right to 'opt out' of the class or not.").

41. Brazilian Consumer Code, art. 82.

class action judgments. The most important difference, and the one that is relevant to this Article, is that Brazilian class action judgments are binding only to the extent that they are favorable to the interests of the class members.[42]

An examination of the Brazilian class action model is important because it has been replicated by several other Latin American countries.[43] Further, it was the basis for the Model Class Action Code for Latin America, sponsored by the Ibero-American Institute of Civil Procedure.[44]

1. A Peculiar Approach to Res Judicata in Latin American Class Actions

Article 103 of the Brazilian Consumer Code regulates the res judicata effect of class actions in Brazil.[45] The statute prescribes that a class action judgment shall bind all members of the class, but the judgment cannot prejudice the individual rights of absent class members.[46] Therefore, the class judgment does not bind individual class members unless it is favorable to the class.[47]

Put simply, if the class action is decided in favor of the group, all absent members of the class benefit from the decision. If the class action is decided against the group, however, the class members are not bound by

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42. *See id.* art. 103.

43. *See infra* I.B.3. (The Peculiar Res Judicata Model is Followed by Some Latin American Countries).

44. *See* Ada Pellegrini Grinover, Kazuo Watanabe & Antonio Gidi, *Código Modelo de Procesos Colectivos para Iberoamérica*, 9 REVISTA IBEROAMERICANA DE DERECHO PROCESAL 251 (2006) (Arg.) [hereinafter Grinover, Watanabe & Gidi, *Código Modelo de Procesos Colectivos para Iberoamérica*]. Although the Author was a co-reporter of the Ibero-American Class Action Code, he distances himself from the adoption of this type of res judicata regime. In other opportunities, both prior to and after the enactment of the Ibero-American Class Action Code, he manifested his opinion in favor of a "whether favorable or not" approach to class action judgments, as long as supported by judicial control of adequacy of representation, judicial approval of class action settlements, adequate notice, and the right to opt out, among other guaranties of fairness to absent class members. *See* Gidi, *The Class Action Code*, *supra* note 22, at 47 (providing, in Article 18 of the Author's own proposed Class Action Model Code that "[r]es judicata shall bind both the class and its members whether the judgment is favorable or not [to the class]"); ANTONIO GIDI, RUMO A UM CÓDIGO DE PROCESSO CIVIL COLETIVO 286–99 (2008) (Braz.) [hereinafter GIDI, RUMO A UM CÓDIGO DE PROCESSO CIVIL COLETIVO] (critiquing the Brazilian model of res judicata and discussing the Author's proposal of the Class Action Model Code).

45. *See* Brazilian Consumer Code, art. 103.

46. *Id.*

47. This rule is in sharp contrast to the American class action. *See generally* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

the decision and may still go to court to pursue their individual rights in individual actions. The only impact of a decision adverse to the class is that the same class action cannot be brought again, but class members may sue individually.

According to the Brazilian class action statutes, only the benefits from the class decree are extended to the individual absent members—these members cannot be prejudiced by an unfavorable decision.[48] Civil law scholars call this situation an extension *in utilibus* (from the Latin "useful") of the class decree, because it happens only when the decree is favorable to the interest of the group.[49] It is also known as res judicata *secundum eventum litis*, a Latin expression that means that the ultimate effect of the class judgment would depend on the outcome of the litigation, or more specifically, whether the class won or lost the action.[50] In common law terminology, it could also be called "one-way preclusion."[51]

The idea of a res judicata *secundum eventum litis* in Brazilian class action is derived from a rather famous debate in Italian civil procedure scholarship in the 1970s. At a time when Italian scholars were enamored with the American class action, some Italian scholars came to believe that res judicata *secundum eventum litis* would serve as an Italian solution to the difficulties of adopting class actions in the Italian legal system.[52] Other Italian academics were against such a proposal.[53] The Brazilian scholars who drafted the Brazilian class action law adopted the Italian scholars' res judicata *secundum eventum litis* concept.[54]

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48. *See* Brazilian Consumer Code, art. 103, paras. 1–2.

49. See the seminal article of Ada Grinover, one of the academic co-authors of the Brazilian Consumer Code. Ada P. Grinover, *Da Coisa Julgada no Código de Defesa do Consumidor*, 33 REVISTA DO ADVOGADO 8 (1990) (Braz.) [hereinafter Grinover, *Da Coisa Julgada no Código de Defesa do Consumidor*].

50. *Id.*

51. *See* Gidi, *Class Actions in Brazil*, *supra* note 36, at 388 (proposing that terminology).

52. Andrea Proto Pisani, *Appunti preliminari per uno studio sulla tutela giurisdizionale degli interessi collettivi (o più esatamente: superindividuali) innanzi al giudice civile ordinario*, *in* LE AZIONI A TUTELA DEGLI INTERESSI COLLETTIVI 284–86 (Vittorio Denti ed., 1976) (It.) [hereinafter LE AZIONI A TUTELA]; Giorgio Costantino, *Brevi note sulla tutela giurisdizionale degli interessi collettivi davanti al giudice civile*, DIR. E GIUR. 235 (1974); Vittorio Denti, *Relazione introdutiva*, *in* LE AZIONI A TUTELA, *supra*, at 18; Michele Taruffo, *Intervento*, *in* LE AZIONI A TUTELA, *supra*, at 330–36.

53. Mauro Cappelletti, *Appunti sulla tutela giurisdizionale di interessi collettivi o diffusi*, *in* LE AZIONI A TUTELA, *supra* note 52, at 205–06; VINCENZO VIGORITI, INTERESSI COLLETTIVI E PROCESSO: LA LEGITTIMAZIONE AD AGIRE 111–12, 127–28 (1979) (It.).

54. *See* Gidi, *Class Actions in Brazil*, *supra* note 36, at 324–25, 404 ("The Brazilian class action traces its origins to academic papers delivered in Italy in the 1970s, when a group of Italian scholars began studying American class actions.").

Class members in a Brazilian class action have only a single opportunity to pursue class litigation. Should the group prevail, all individual absent class members will benefit from the favorable decision. If the group loses, however, only the right to litigate collectively on behalf of the group will perish, and only additional class action litigation on the same controversy is precluded. In this respect, the class judgment is binding on the group as a whole, whether favorable or not. However, individual rights stemming from the same controversy are not precluded, and the absent class members retain the opportunity to sue individually to vindicate their individual rights. Moreover, absent class members are not bound by any findings made in the class action, since there is no concept of issue preclusion in Brazil.[55]

Res judicata *secundum eventum litis* was adopted in Brazil because interested persons are not necessarily made parties to a class action, given a direct day in court, or personally informed of the action's existence. The Brazilian legislature therefore considered it acceptable that an individual benefit from the class decree, but not be prejudiced by it. After all, there are no compelling reasons for excluding absent class members from the benefits of a successful class action, but the Brazilian legislature believed that important due process guarantees might be violated or impaired should an adverse decision have a preclusive effect.[56]

This unnecessarily complex class action res judicata rule is well-settled in Brazil.[57] Several Brazilian scholars and courts consider it a violation

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55. Issue preclusion is a controversial topic in U.S. class action litigation. *See* Antonio Gidi, *Issue Preclusion Effect of Class Certification Orders*, 63 HASTINGS L.J. 1023, 1028–56 (2012) [hereinafter Gidi, *Issue Preclusion*] (discussing the issue preclusive effect of class certification orders); Antonio Gidi, *Loneliness in the Crowd: Why Nobody Wants Opt-Out Class Members to Assert Offensive Issue Preclusion Against a Class Defendant* (forthcoming 2012) (on file with the author) (discussing the use of offensive issue preclusion by opt-out class members).

56. *See generally* Grinover, *Da Coisa Julgada no Código de Defesa do Consumidor*, *supra* note 49.

57. There are literally dozens of law review articles and books about res judicata in Brazilian class actions. *See, e.g.*, Gidi, *Class Actions in Brazil*, *supra* note 36, at 397; RENATO ROCHA BRAGA, A COISA JULGADA NAS DEMANDAS COLETIVAS (2000) (Braz.); IBRAHIM ROCHA LITISCONSÓRCIO, EFEITOS DA SENTENÇA E COISA JULGADA NA TUTELA COLETIVA (2002) (Braz.); MOTAURI CIOCCHETTI DE SOUZA, AÇÃO CIVIL PÚBLICA (2003) (Braz.); RONY FERREIRA, COISA JULGADA NAS AÇÕES COLETIVAS (2004) (Braz.); NILTON LUIZ DE FREITAS BAZILONI, A COISA JULGADA NAS AÇÕES COLETIVAS (2004) (Braz.); ROBERTO CARLOS BATISTA, COISA JULGADA NAS AÇÕES CIVIS PÚBLICAS (2005) (Braz.); JÚLIA MARIA MILANESE BUFFARA, COISA JULGADA NAS DEMANDAS COLETIVAS (2005) (Braz.); LUIZ RODRIGUES WAMBIER, SENTENÇA CIVIL: LIQUIDAÇÃO E CUMPRIMENTO (2006) (Braz.); CHRISTIANINE CHAVES SANTOS, AÇÕES COLETIVAS E COISA JULGADA (2006) (Braz.); RODOLFO DE CAMARGO MANCUSO, JURISDIÇÃO COLETIVA E COISA

of due process to bind an absent class member whose individual rights were negatively impacted by a class action of which they were not made party to by service of process and did not have an opportunity to be heard personally about their interests.[58]

Brazil recently had an opportunity to reconsider its exotic class action judgment rule. In 2003, this Article's author proposed a new class action law by which a judgment, whether favorable or not, would bind all absent class members.[59] Several other proposals followed, all of which chose to maintain the Brazilian approach to class action res judicata with some minor changes.[60] In 2009 the Brazilian federal government pro-

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JULGADA (2007) (Braz.); JOSÉ ROGÉRIO CRUZ E TUCCI, LIMITES SUBJETIVOS DA EFICÁCIA DA SENTENÇA E DA COISA JULGADA CIVIL (2007) (Braz.); CAMILO ZUFELATO, COISA JULGADA COLETIVA (2011) (Braz.); *see also* Oquendo, *supra* note 11, at 282–83, discussing the

> complex set of *res judicata* rules . . . . The judgments in these actions, consequently, have extremely asymmetrical *res judicata* effects. When the plaintiff seeks to enforce [damages], the purported beneficiaries profit from a victory, but do not have to endure the consequences of a defeat. . . . [And class members] usually also benefit from a favorable determination, but are not bound by an unfavorable outcome.

Id.

58. *See generally* Grinover, *Da Coisa Julgada no Código de Defesa do Consumidor*, *supra* note 49.

59. *See* Gidi, *The Class Action Code*, *supra* note 22, at 47 (providing, in Article 18 of the Author's own proposed Class Action Model Code that "[r]es judicata shall bind both the class and its members whether the judgment is favorable or not [to the class]."). The Author's proposal is discussed in GIDI, RUMO A UM CÓDIGO DE PROCESSO CIVIL COLETIVO, *supra* note 44, at 286–99. Other Brazilian scholars have also proposed a shift to a res judicata whether-favorable-or-not standard, but mostly for reasons of fairness to the defendant and procedural economy. *See, e.g.*, José Ignácio Botelho de Mesquita, *Na ação do consumidor, pode ser inútil a defesa do fornecedor*, 33 REVISTA DO ADVOGADO 81 (1990) (Braz.); José Rogério Cruz e Tucci, *Código do Consumidor e processo civil: Aspectos polêmicos*, 671 REVISTA DOS TRIBUNAIS 35, 39 (1991) (Braz.); LEAL, *supra* note 38, at 209–12; ALUISIO GONÇALVES DE CASTRO MENDES, AÇÕES COLETIVAS NO DIREITO COMPARADO E NACIONAL 261–63 (2002) (Braz.); DINAMARCO, *supra* note 38, at 104–06; Luiz Norton Baptista de Mattos, *A litispendência e a coisa julgada nas ações coletivas segundo o Código de Defesa do Consumidor e os anteprojetos do Código Brasileiro de Processos Coletivos*, *in* DIREITO PROCESSUAL COLETIVO E O ANTEPROJETO DE CÓDIGO BRASILEIRO DE PROCESSOS COLETIVOS 194, 207 (Ada Pellegrini Grinover, Aluisio Gonçalves de Castro Mendes & Kazuo Watanabe eds., 2007) (Braz.) [hereinafter DIREITO PROCESSUAL COLETIVO].

60. See, for example, the projects spearheaded by Ada Pellegrini Grinover and Aluisio Gonçalves de Castro Mendes. *See generally* ALVARO LUIZ VALERY MIRRA, PARTICIPAÇÃO, PROCESSO CIVIL E DEFESA DO MEIO AMBIENTE 500–11 (2011) (Braz.) (discussing the res judicata rules of some but not all of the projects).

posed Bill 5139, which would create a new class action statute.[61] The Bill maintained the current approach to class action res judicata, with one significant change: it provided that class action judgments have binding effect, whether favorable or not, only when the decision is based on issues of law, not issues of fact or evidence.[62] In 2009, Brazilian Congress enacted Law 12016 regulating a class action against acts of the government and no changes were made or proposed to the peculiar Brazilian class action res judicata rule.[63]

Therefore, a U.S. class action judgment or court-approved settlement will only be recognized in Brazil if the result benefits the interests of the absent class members. Accordingly, if the plaintiff class prevails in the U.S. class action, individual class members may enforce such judgment in Brazil. If the plaintiff class does not prevail in the United States, individual class members will not be negatively precluded and will remain free to litigate their claims in Brazil on an individual or class basis.[64] Similarly, the terms of a class settlement will not bind those class members who are dissatisfied with them, and such class members are not precluded from bringing an individual action to litigate anew the settled claims.

Rhonda Wasserman has addressed the problem of inconsistent recognition of U.S. class action judgments and court-approved settlements

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61. *See* Projeto de Lei No. 5139, de 29 de Abril de 2009 (pending Determination of Appeal in the Officers of the House of Representatives (MESA)) (Braz.), *available at* http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=432485.

62. *See id.* art. 25. Although the Author participated in the drafting of this project, the Author distances himself from the idea that it makes sense to distinguish issues of law from issues of fact or evidence for purposes of res judicata. This choice assumes that issues of law are obvious and easily ascertainable by courts, independently of an adequate representative and adequate maturity of the discussion, whereas issues of fact and of evidence are not. As it is well known by all who follow the developments on mass litigation, the first years of litigation are plagued by uncertainties of issues of fact, evidence, and in many cases, novel issues of law as well. Therefore, it is common for the first lawsuits to be decided against the interest of the plaintiffs. As the litigation gradually "matures," the uncertainties fade away and the plaintiffs start to be successful. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989).

63. *See* Lei No. 12016, de 7 de Agosto de 2009, art. 22, D.O.U. de 7.8.2009 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12016.htm; *see also* GOMES ET AL., COMENTÁRIOS À NOVA LEI DO MANDADO DE SEGURANÇA 197–211 (2009) (Braz.); ANDRE VASCONCELOS ROQUE & FRANCISCO CARLOS DUARTE, MANDADO DE SEGURANÇA 168–77 (2011) (Braz.); Antonio Herman Benjamin & Gregório Assagra de Almeida, *Comentários ao artigo 22*, *in* MAIA FILHO ET AL., COMENTÁRIOS À NOVA LEI DO MANDADO DE SEGURANÇA 294–329 (2010) (Braz.); *see also* CASSIO SCARPINELLA BUENO, DIREITO PROCESSUAL CIVIL 268–69 (2010) (Braz.); HERMES ZANETI JR., O "NOVO" MANDADO DE SEGURANÇA COLETIVO (2012) (Braz.).

64. Greco, *supra* note 23, at 471.

abroad in a different context.[65] According to Wasserman, in addition to the issue of recognition, American courts should also consider the level of preclusive effect a foreign court would grant to the class action result.[66] Wasserman further states that "even if a foreign court were to recognize an American class action judgment, the defendant could face a risk of relitigation if the judgment were not accorded robust preclusive effect."[67] She concludes, "[i]t is not enough for American courts entertaining motions to certify transnational class actions to determine whether an American judgment will be recognized abroad. They also need to determine the preclusive effects, if any, that the judgment will have if it is recognized abroad."[68]

2. Class Representatives Have No Authority to Settle and Compromise the Rights of Absent Class Members

In general, Brazilian class actions are initiated by the office of the public prosecutor or by associations.[69] Class members do not have standing to bring class actions in Brazil. Brazilian class actions are therefore similar to *parens patriae* standing and associational standing in the United

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65. *See* Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 314–15 (2011).

> In considering [the] argument against certification [of a class of foreign nationals], American courts often use judgment recognition and preclusion terminology interchangeably. They discuss the "possibility" that a foreign court may not recognize a judgment and the fear that an American class action judgment "might not be given preclusive effect in foreign courts" as though recognition and preclusion analyses are identical. But they are not.

Id.

66. *See id.* at 316, 325–28 ("American courts are conflating what should be a two-step analysis into one. They should be asking, first, would the foreign court recognize the American class action judgment? And second, if it would, what preclusive effect, if any, would the American class action judgment have in the foreign court?").

67. *See id.* at 316.

68. *See id.* at 379.

69. There has been some field research about which type of class representative is more active, associations or the office of the public prosecutor. *See* PAULO CEZAR PINHEIRO CARNEIRO, ACESSO À JUSTIÇA: JUIZADOS ESPECIAIS CÍVEIS E AÇÃO CIVIL PÚBLICA. UMA NOVA SISTEMATIZAÇÃO DA TEORIA GERAL DO PROCESSO (2d ed. 2003) (Braz.); *see also* Luiz Werneck Vianna & Marcelo Baumann Burgos, *Entre Princípios e Regras: Cinco Estudos de Caso de Ação Civil Pública*, 48 DATA RIO DE JANEIRO 777, 782 (2005) (Braz.), *available at* http://www.scielo.br/pdf/dados/v48n4/28479.pdf; CENTRO BRASILEIRO DE ESTUDOS E PESQUISAS JUDICIAIS [CEBEPEJ] & BANCO MUNDIAL, TUTELA JUDICIAL DOS INTERESSES METAINDIVIDUAIS: AÇÕES COLETIVAS (Sept. 2007) (Braz.).

States.[70] Most other Latin American countries have standing doctrines similar to the Brazilian model.[71]

The powers of the Brazilian class representative are very limited. Since the substantive rights of the class do not belong to the representative but to the group as a whole, a class representative cannot freely dispose of the group's rights. These rights are considered "inalienable rights" ("*direitos indisponíveis*"). Therefore, representatives are allowed to make only peripheral concessions over how the defendant may adjust its behavior in response to the class proceeding. Most Brazilian scholars agree that class representatives in Brazil lack broad powers for negotiating a settlement of the group's rights.[72] Therefore, according to the few Brazil-

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70. *See* Gidi, *Class Actions in Brazil*, *supra* note 36, at 382–84 (discussing *parens patriae* and associational standing in the United States and comparing it to the Brazilian class action).

71. *See generally* Oquendo, *supra* note 11, at 262–71; Gómez, *supra* note 40 (manuscript at 30–83). *But see* Issacharoff & Miller, *supra* note 20, at 193–95 ("The interests of nonprofit consumer organizations may reflect ideological considerations that may not necessarily coincide with the economic interests of consumers.").

72. *See* Paulo Cezar Pinheiro Carneiro, *A proteção dos direitos difusos através do compromisso de ajustamento de conduta*, 6 LIVRO DE ESTUDOS JURÍDICOS 234 (1993) (Braz.); Gidi, *Class Actions in Brazil*, *supra* note 36, at 341–44; Fernando Grella Vieira, *A Transação na Esfera de Tutela dos Interesses Difusos e Coletivos: Compromisso de Ajustamento de Conduta*, *in* AÇÃO CIVIL PÚBLICA 224–26, 238–40 (Édis Milaré ed., 2001) (Braz.) [hereinafter AÇÃO CIVIL PÚBLICA 2001]; ANTONIO AUGUSTO MELLO DE CAMARGO FERRAZ, ÉDIS MILARÉ & NELSON NERY JR., A AÇÃO CIVIL PÚBLICA E A TUTELA JURISDICIONAL DOS INTERESSES DIFUSOS 43–44 (1984) (Braz.); CELSO ANTÔNIO PACHECO FIORILLO, MARCELO ABELHA RODRIGUES & ROSA MARIA BARRETO BORRIELLO DE ANDRADE NERY, DIREITO PROCESSUAL AMBIENTAL BRASILEIRO 174–79 (1996) (Braz.); FRANCISCO SAMPAIO, NEGÓCIO JURÍDICO E DIREITOS DIFUSOS E COLETIVOS 101–20 (Lumen Juris ed., 1999) (Braz.); Marcelo Dawalibi, *Limites subjetivos da coisa julgada em ação civil pública*, *in* AÇÃO CIVIL PÚBLICA 2001, *supra*, at 538–42; Édis Milaré, *A Ação Civil Pública em Defesa do Ambiente*, *in* AÇÃO CIVIL PÚBLICA 193, 225–29, 255–56 (Édis Milaré ed., 1995) (Braz.) [hereinafter AÇÃO CIVIL PÚBLICA 1995]; LUIS ROBERTO PROENÇA, INQUÉRITO CIVIL 123–25, 138–40 (2001) (Braz.); PINHO, *supra* note 38, at 170; ADRIANO PERÁCIO DE PAULA, DIREITO PROCESSUAL DO CONSUMO 48–49, 238–240, 290–94 (2002) (Braz.); FILHO, AÇÃO CIVIL PÚBLICA, *supra* note 38, at 221–22; GEISA DE ASSIS RODRIGUES, AÇÃO CIVIL PÚBLICA E TERMO DE AJUSTAMENTO DE CONDUTA 4, 51–52, 59–62, 112, 122–23, 142–59, 176–80, 189, 207–08, 236 (2d ed. 2006) (Braz.); Daniel Fink, *Alternativa à ação civil pública ambiental (reflexões sobre as vantagens do termo de ajustamento de conduta)*, *in* AÇÃO CIVIL PÚBLICA 2001, *supra*, at 118–22; MAZZILLI, A DEFESA DOS INTERESSES DIFUSOS EM JUÍZO, *supra* note 38, at 375–77, 385–86, 391–94, 540–41; HUGO NIGRO MAZZILLI, O INQUÉRITO CIVIL 361–62, 375–76, 392–94 (2d ed. 2000) (Braz.); Hugo Nigro Mazzilli, *Compromisso de ajustamento de conduta—Análise à luz do Anteprojeto do Código Brasileiro de Processos Coletivos*, *in* DIREITO PROCESSUAL COLETIVO, *supra* note 59, at 231, 238–42; MANCUSO, AÇÃO CIVIL PÚBLICA, *supra* note 38, at 316–39; PAULO DE TARSO BRANDÃO, AÇÃO CIVIL PÚBLICA 127–35 (1996) (Braz.);

ian scholars that have addressed the issue, a class settlement agreement does not bind absent members who disagree with its terms and the same class action (or individual actions) may be brought again to protect the rights of the dissatisfied members.[73] Therefore, the courts of Brazil will not permit the rights of absent class members to be negatively impacted, whether by foreign judgment or by a foreign court's approval of a settlement.

Most Latin American class action statutes simply do not contemplate the settlement of class claims, leaving uncertainty as to whether the class representative can freely negotiate a settlement on behalf of the group.[74]

3. The Peculiar Res Judicata Model Followed by Some Latin American Countries

Several Latin American countries adopt a class action model that is somewhat similar to the unique model followed in Brazil. As a matter of fact, they are directly derived from the Brazilian model.[75]

VIGLIAR, *supra* note 38, at 137–41, 165–66; ABELHA, *supra* note 38, at 93–96; LENZA, TEORIA GERAL DA AÇÃO CIVIL PÚBLICA, *supra* note 38, at 77–85; MARCELO PAULO MAGGIO, CONDIÇÕES DA AÇÃO 115–16 (2005) (Braz.); LEONEL, *supra* note 38, at 323–27, 348–49; GOMES, *supra* note 38, at 163–71; ZAVASCKI, *supra* note 38, at 78–79, 151–54; GREGÓRIO ASSAGRA DE ALMEIDA, CODIFICAÇÃO DO DIREITO PROCESSUAL COLETIVO BRASILEIRO 94–95, 118, 125, 155 (2007) (Braz.); GREGÓRIO ASSAGRA DE ALMEIDA, DIREITO PROCESSUAL COLETIVO BRASILEIRO 545–46 (2003) (Braz.); ROBSON RENAULT GODINHO, A PROTEÇÃO PROCESSUAL DOS DIREITOS DOS IDOSOS 85–86 (2007) (Braz.); DIDIER & ZANETI, *supra* note 38, at 305–08. Only a minority of scholars believe that representatives possess a large amount of power relating to settlement. *See* PATRICIA MIRANDA PIZZOL, LIQUIDAÇÃO NAS AÇÕES COLETIVAS 149–53, 211 (1998) (Braz.); PAULO DE BESSA ANTUNES, A TUTELA JUDICIAL DO MEIO AMBIENTE 128–32 (2005) (Braz.).

73. *See* MAZZILLI, A DEFESA DOS INTERESSES DIFUSOS EM JUÍZO, *supra* note 38, at 166; Marcelo Dawalibi, *Limites Subjetivos da Coisa Julgada em Ação Civil Pública*, *in* AÇÃO CIVIL PÚBLICA 2001, *supra* note 72, at 526, 538–42.

74. There are exceptions. Some class action legislation in Latin America does specifically provide for class action settlement. *See, e.g.*, L. 472, agosto 6, 1998, Diario Oficial [D.O.] 43.357, arts. 56, 61 (Colom.) (providing that a class action judgment or settlement binds class members who do not request to opt out). In Mexico and Panama, the law clearly states that a class action may be resolved by settlement, but does not state clearly its binding effect on class members. However, since both of them specifically provide for court approval of the settlement and in both of them the court must determine whether the interests of the absent class members are adequately protected, it is only natural that court-approved class action settlements have the same binding effect as a class action judgment. *See* Código Federal de Procedimientos Civiles [CFPC] [Federal Civil Procedure Code] art. 595, *as amended*, Diario Oficial de la Federación [DO], 30 de Agosto de 2011 (Mex.); Ley 45, de 31 de Octobre de 2007, art. 129.7 (Pan.).

75. *See supra* Parts I.B.1. (A Peculiar Approach to Res Judicata in Latin American Class Actions) (discussing the Brazilian approach to class action res judicata).

In Chile, Article 54 of the Consumer Protection Law provides that judgments in favor of the plaintiff class bind all those who were harmed by the defendant's conduct.[76] According to the statute, the binding effect is limited to a favorable decision that "declares the defendant's liability."[77] Comparatively, even though Peru has only injunctive class actions, according to Article 82.6 of the Civil Procedure Code, only a favorable class action judgment will bind absent class members.[78] Meanwhile, Costa Rica does not even have class actions.[79] It currently only allows individual lawsuits to be consolidated.[80] However, a recent bill proposing a new Code of Civil Procedure seeks to create a class action mechanism by providing that a judgment in a class action for damages will only have binding effect if favorable to the class.[81] In the case of an unsuccessful class action, class members would not be bound and may bring their own individual lawsuits.[82]

Some Latin American countries were influenced by an older Brazilian class action res judicata rule. According to Article 16 of Law 7347 of 1985 (largely modified by the class action res judicata rule enacted with the Consumer Code in 1990), injunctive class action judgments would bind all absent class members, unless the judgment was in favor of the defendant due to a lack of evidence.[83] In the case of dismissal due to lack of evidence, any representative may bring the same class action lawsuit, with the same cause of action, as long as new evidence is produced.[84]

This former Brazilian rule was adopted in article 194 of the Código Procesal Civil Modelo para Iberoamerica, a model code enacted by the Iberoamerican Civil Procedure Institute. From the Model Code, it migrated to the Uruguayan Code. Even though Uruguay has only injunctive

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76. Law No. 19496, Marzo 7, 1997, DIARIO OFICIAL [D.O.], art. 54 (Chile).

77. *Id.*

78. CÓDIGO PROCESAL CIVIL [CÓD. PROC. CIV.] [CIVIL PROCEDURE CODE], Law No. 10 de 1 de agosto de 1993, art. 82.6 (Peru), *available at* http://www.iberred.org/sites/default/files/codigo-procesal-civil-per.pdf.

79. *See* CÓDIGO PROCESAL CONTENCIOSO ADMINISTRATIVO [ADMINISTRATIVE PROCEDURE CODE], Ley No. 8508 de 4 de abril de 2006 (Costa Rica).

80. *See id.* art. 48.

81. *See* Proyecto de Codigo General, Expediente No. 15979, de 11 de agosto de 2005, art. 128.3 (Costa Rica).

82. *See id.* art 128.3; *see also* Sergio Artavia Barrantes, *La Protección de los Intereses de Grupo en el Proyecto del Código Procesal General de Costa Rica*, *in* UN DIÁLOGO IBEROAMERICANO, *supra* note 12, at 568, 575–76 (discussing a previous class action bill in Costa Rica in which there would be no res judicata effect, if a class action judgment was obtained through lack of evidence).

83. *See* Lei No. 7347, de 24 de Julho de 1985, art. 16, D.O.U. de 25.7.1985 (Braz.).

84. *Id.*

class actions, according to article 220 of the *Código General del Proceso*, there is no res judicata effect if a class action proceeding fails due to lack of evidence.[85]

Therefore, even if any of Chile, Peru, or Costa Rica would recognize a foreign judgment in a class action for damages, it would probably do so only to the extent that the class judgment is favorable to the interests of absent class members, or if in Uruguay, only if the judgment was not based on lack of evidence.

The Model Class Action Code for Latin America, sponsored by the Ibero-American Institute of Civil Procedure, substantially adopts the new Brazilian rule on res judicata.[86] Since previous model codes approved by the Ibero-American Institute of Civil Procedure have been extremely influential in Latin America, it is possible that the Model Class Action Code for Latin America will set the tone for the enactment or reform of class action laws in Latin America.[87]

A similar type of class action preclusive effect also exists in an injunctive class action in Germany[88] and Switzerland.[89]

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85. This model was also adopted on the Portuguese class action. *See* Lei No. 83/95, art. 19.1, de 31 de Agosto de 1995, DIARIO DA REPUBLICA [D.R.], no. 201, de 31.08.1995 (Port.).

86. *See* Grinover, Watanabe & Gidi, *Código Modelo de Procesos Colectivos para Iberoamérica*, *supra* note 44. Although the Author was a co-reporter of the Ibero-American Class Action Code, he distances himself from the adoption of this type of res judicata regime. In other opportunities, both prior to and after the enactment of the Ibero-American Class Action Code, I manifested my opinion in favor of a "whether favorable or not" approach to class action judgments, as long as supported by judicial control of adequacy of representation, judicial approval of class action settlements, adequate notice, and the right to opt out, among other guaranties of fairness to absent class members. *See* Gidi, *The Class Action Code*, *supra* note 22, at 47 (providing, in article 18 of my own proposed Class Action Model Code that "[r]es judicata shall bind both the class and its members whether the judgment is favorable or not [to the class] . . . ."); GIDI, RUMO A UM CÓDIGO DE PROCESSO CIVIL COLETIVO, *supra* note 44, at 286–99 (critiquing the Brazilian model of res judicata and discussing my proposal of the Class Action Model Code).

87. *See* Ada Pellegrini Grinover, *Novas Tendências em Matéria de Legitimação e Coisa Julgada nas Ações Coletivas*, *in* ADA PELLEGRINI GRINOVER & PETRONIO CALMON, DIREITO PROCESSUAL COMPARADO 499 (2008) (Braz.).

88. *See* Wasserman, *supra* note 65, at 350 (describing the German model); Sturner, *supra* note 3, at 110 (same).

89. *See* Baumgartner, *supra* note 10, at 325–26.

> [T]he judgment in a *Verbandsklage* [injunctive class action brought by an association] has res judicata effect between the suing association and the defendant, but not between the defendant and individual members of the association [or other associations, who may bring the same injunctive class action again]". However, the judgment in a *Verbandsklage* is likely to have binding effects between defendant and individual members (and between defendant and other as-

C. Countries That Adopt an Opt-In Class Action

Although a very popular model in Europe, only one Latin American country adopts an opt-in class action mechanism: Mexico. In Mexico, absent class members must opt into the class action in order to be able to participate in the class action judgment.[90] Without the affirmative step of opting into the class action, absent class members in Mexico are not bound by any class action judgment or court approved settlement.[91] Curiously, absent class members may opt in even after the judgment is issued.[92] Therefore, presumably class members will only opt into a class action when they agree with its outcome. This peculiarity makes the Mexican class action strikingly similar to the Brazilian res judicata rule described above because, in practice, only a favorable class action judgment will impact class members.[93] It is also painfully similar to the old practice of "one-way intervention" of the spurious class actions before the 1966 amendment to Rule 23.[94]

The Author participated in all discussions related to the drafting of the Mexican Class Action Act, enacted in 2011.[95] The Consulting Group ap-

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> sociations) as a practical matter because neither may want to risk new litigation on the same claim, most likely with the same outcome.

Id.

90. *See* CFPC, *as amended*, arts. 594, 605, DO, 30 de Agosto de 2011 (Mex.) (amending the Mexican Federal Civil Procedure Code to include a title dedicated to class action).

91. *See id.*

92. *See id.*

93. *See supra* Part I.B. (Countries in Which a Class Action Judgment Is Binding only if Favorable to the Class).

94. The short-lived practice of one-way intervention was the subject of much academic attention, in spite of its little practical importance. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 105–06 (1966) (Advisory Committee's Notes on FED. R. CIV. P. 23); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 385–86 (1967); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 829 n.50 (1946) [hereinafter *Federal Class Actions*]; *see* ZECHARIAH CHAFEE JR., SOME PROBLEMS OF EQUITY 275, 278–80 (1990); FLEMING JAMES, JR., CIVIL PROCEDURE 500–01 (1965); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 710–14 (1940); Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1395–96 (1976); *see also* Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 121–26 (1974).

95. *See* Alberto Benítez, Eduardo Ferrer Mac-Gregor & Antonio Gidi, *Iniciativa de Reforma al Código Federal de Procedimientos Civiles*, *in* UN DIÁLOGO IBEROAMERICANO, *supra* note 12, at 447 (proposing the original draft of what would later become the Mexican class action law). The legislation in Mexico is too recent and there

pointed by the Mexican Senate debated the merits of opt-in and opt-out class action legislation several times, leading to heated discussion. The original class action initiative presented by the Drafting Committee suggested an opt-out class action.[96] Moreover, the Consulting Group was specifically alerted to the fact that the inertia in the use of an opt-in procedure would tend to keep classes very small, therefore minimizing the power of the device and, as a result, the power of the people.[97] However, the Mexican Senate succumbed to a powerful lobby of major corporations and chose an opt-in system.[98]

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is no case law or scholarship on the subject, but a few articles were written before its enactment. *See, e.g.*, Lucio Cabrera Acevedo, *La Legitimación Para Actuar en Juicio de las Asociaciones Privadas en México Especialmente en Matéria Ambiental*, *in* UN DIALOGO IBEROAMERICANO, *supra* note 12, at 555; EDUARDO FERRER MAC-GREGOR, JUICIO DE AMPARO E INTERES LEGITIMO: LA TUTELA DE LOS DERECHOS DIFUSOS Y COLECTIVOS (2d ed. 2004) (Mex.); Luis Alfredo Brodermann Ferrer, *Los Efectos de la Sentencia en las Acciones de Grupo en México*, 63 ALEGATOS 335 (2006); *see also* LAS ACCIONES PARA LA TUTELA DE LOS INTERESES COLECTIVOS Y DE GRUPO (José Ovalle Favela ed., 2004) (Mex.) [hereinafter LAS ACCIONES PARA LA TUTELA] (the fact that no Mexican authors published an article in this 2004 book is evidence that the subject was almost unknown in Mexico until immediately before the enactment of the class action legislation).

96. *See* Benítez, Mac-Gregor & Gidi, *supra* note 95. This was the initial project commissioned by the Mexican Senate. The final statute that was ultimately enacted is substantially different in relevant parts.

97. Empirical research has substantially validated what most people already knew: only a small percentage of class members actually opt out and even a smaller amount will bring their own individual lawsuit. *See* THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 52–53 (Fed. Judicial Ctr. 1996) ("In all four districts, the median percentage of members who opted out was either 0.1% or 0.2% of the total members of the class and 75% of the opt-out cases had 1.2% or fewer class members opt out."); JAY TIDMARSH, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 11 (Fed. Judicial Ctr. 1998) (providing number of class members who opted out of mass tort settlement class actions); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532, 1559–60 (2004) ("Opt-outs . . . are rare: on average, less than 1 [%] of class members opt-out.").

98. Disclaimer: together with Professors Alberto Benítez and Eduardo Ferrer Mac-Gregor, the Author was one of the three academic drafters of the class action bill that led to the enactment of the Mexican Class Action Statute. However, the Author has no responsibility for its ultimate contents. The adoption of an opt-in class action regime as well as many other misguided choices and traps for the unwary that will make the Mexican class action largely ineffectual in practice was a political decision and the Mexican Senate carries the sole responsibility before the Mexican people. Several important aspects of the project we originally proposed were later abandoned in the political process.

This opt-in avenue seems to be a common tragic path in class action legislation throughout the civil law world, particularly in Europe. Initially, good-intentioned bills propose an opt-out class action, only to have the idea blocked by the legislature in a crude illustration of the political process. For example, the original proposal for the Swedish opt-in class action was originally devised as an opt-out device.[99] The Scottish Law Commission's proposal was to adopt an opt-in class action, although it was clear from its report that the proposal was originally drafted as an opt-out mechanism.[100] In England, in November 2008, the Civil Justice Council proposed a transsubstantive opt-in/opt-out class action.[101] In July 2009, the British Ministry of Justice rejected this proposal.[102]

Indeed, several civil law countries, mostly in Europe, employ an opt-in class action, such as Sweden,[103] Italy,[104] Finland,[105] Poland,[106] Russia,[107]

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99. *See* Nordh, *supra* note 20, at 399–400.

100. *See* SCOTTISH LAW COMM'N, MULTI-PARTY ACTIONS 21–28, 33–37 (1996).

101. *See* CIVIL JUSTICE COUNCIL, "IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS": DEVELOPING A MORE EFFICIENT AND EFFECTIVE PROCEDURE FOR COLLECTIVE ACTIONS—FINAL REPORT (John Sorabji et al. eds., Nov. 2008) (U.K.) [hereinafter IMPROVING ACCESS TO JUSTICE], *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at800175_improving_access.authcheckdam.pdf. The report was largely based on an extensive report written by Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need*, *in* IMPROVING ACCESS TO JUSTICE, *supra*, at 97–102.

102. *See* Ministry of Justice, The Government's Response to the Civil Justice Council's Report: "Improving Access to Justice through Collective Actions" 11, ¶ 35 (July 2009) (U.K.), *available at* www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf; Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States. A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409 (2009) [hereinafter Mulheron, *Opt-Out*]; Rachael Mulheron, *Justice Enhanced: Framing an Opt-Out Class Action for England*, 70 MOD. L. REV. 550 (2007).

103. *See* 14 § LAG OM GRUPPRÄTTEGÅNG (Svensk författningssamling [SFS] 2002:599) (Swed.) ("A member of the group who does not give notice to the court in writing, within the period determined by the court, that he or she wishes to be included in the group action shall be deemed to have withdrawn from the group."). The Swedish law is considered a model in Europe, for those who favor an opt-in model. However, in terms of population and social equality Sweden is considerably different from other major European countries, like Italy, France, England, Ukraine, Spain, Poland, Russia, or Germany. It would be understandable if Monaco or Liechtenstein (each with a population smaller than 40,000) would adopt an opt-in class action, but the same recipe cannot work well in Russia (population of 142 million) or Germany (population of 81 million).

104. *See* Codice del consumo [Consumer Code], art. 140-bis, amended 2009 (It.) (stating that the class judgment will bind only those who enroll in the class); Claudio Consolo, *É Legge una Disposizione Collettiva Risarcitoria: Si è Scelta la Via Svedese Dello 'Opt-in' Anziché Quella Danese Dello 'Opt-out' e il Filtro ('l'Inutil Precauzione')*, 25 IL CORRIERE GIURIDICO 5 (2008) (It.) (discussing the enactment of an opt-in class action in Italy, rather than an opt-out class action). *See generally* Angelo Dondi, *On Some Draw-*

and Japan.[108] This seems to be the European Commission preference as well, at least for the moment.[109]

Only a few European countries, such as Portugal[110] and the Netherlands,[111] have adopted the opt-out model. Belgium attempted to adopt an

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backs in the Italian Road to Class Actions, 12 ZZP INT'L 13 (2007) (It.) (general criticism to the then recently enacted Italian class action statute); Michele Taruffo, *La Tutella Collettiva: Interessi in gioco ed Esperienze a Confronto*, 2007 RIV. TRIM. DIR. PROC. CIV. 529 (2007) (It.); CLAUDIO CONSOLO, PAOLO BUZZELLI, MARCO BONA & PAOLO A. BUZZELLI, OBIETTIVO CLASS ACTION: L'AZIONE COLLETTIVA RISARCITORIA (2008) (It.); Elisabetta Silvestri, The Italian 'Collective Action for Damages': An Update (2008) (unpublished paper) (It.), *available at* http://globalclassactions.stanford.edu/sites/default/files/documents/Italian_Collective_Action_for_Damages.pdf; Andrea Giussani, *Enter the Damage Class Action in European Law: Heading towards Justice on a Bus*, 28 CIV. JUST. Q. 132 (2009); *see also* Dreyfuss, *supra* note 23, at 34–36 (Italian courts may not recognize the class action binding effect on "class members who did not participate personally in the action").

105. *See* 8 § RYHMÄKANNELAKI (13.4.2007/444) (Fin.) ("A class member as defined, who has delivered, within the time limit, a written and signed letter of accession to the class shall belong to the class.").

106. *See* Ustawa o dochodzeniu roszczen w postepowaniu grupowym [Class Actions Law], DZIENNIK USTAW 7 § 44, Dec. 17, 2009 (Pol.); Magdalena Tulibacka1 & Radoslaw Goral, An Update on Class Actions and Litigation Funding in Poland (Nov. 2011) (unpublished paper), *available at* http://globalclassactions.stanford.edu/sites/default/files/documents/Polish%20civil%20justice%20updatePDF.pdf (stating that "roughly one year after the Polish class actions procedure came into force, [forty] class action complaints were filed in various courts," mostly against the Polish Government [the State Treasury] not private businesses).

107. *See* Arbitrazh Protsessual'nyi Kodeks Rossiiskoi Federatsii [APK RF] [Code of Commercial Procedure of the Russian Federation] art. 225.14 (Russ.) (stating that the class member may join the class claim by forwarding a document); *see also* Ivan Marisin & Vasily Keznetsov, *Russia*, *in* GLOBAL LEGAL GROUP, THE INTERNATIONAL LEGAL GUIDE TO: CLASS & GROUP ACTIONS 2011, ch. 21, ¶¶ 1.3–1.4 (2011), *available at* http://www.iclg.co.uk/khadmin/Publications/pdf/3983.pdf.

108. *See* MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996, art. 30 (Japan) (instituting a limited representative action, known as appointed party system, in which persons having a common interest may appoint one member as the representative for the entire body); Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767, 782–83 (1997).

109. *Compare* CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS 128, 130 (2008) [hereinafter HODGES, REFORM OF CLASS AND REPRESENTATIVE ACTIONS] (noting the European Commission's policy decision that "the opt-in procedure is to be preferred and the opt-out avoided in any Community measures that may be put forward. There may be further heated debate on this issue, but this political decision is likely to stick and to be influential with Member States"), *with* Mulheron, *Opt-Out*, *supra* note 102, at 450–51 (discussing more recent official publications and noting a shift in the position of the European Commission towards a more favorable view of the opt-in device). One can only hope that Hodges' prediction is incorrect and Europe would ultimately adopt a sensible opt-out class action.

opt-out system, but failed and currently does not have any type of class action legislation yet.[112]

The Netherlands is in a class of its own. It is a curious and unique case of a country that did not adopt a class action litigation rule, but adopted (i.e., copied) the untested and much more recent, controversial, and risky "settlement class actions" (or "settlement-only class actions").[113] The Dutch statute allows a class settlement that would have binding effect against every class member that does not exclude him or herself from the class (opt out).[114] However, counterintuitively, the statute does not provide for a class action.[115] The Dutch legislature considered that, because most class action cases brought in the United States settle anyway, it would be more efficient to "cut to the chase" and adopt only the rules in U.S. class action legislation that are most commonly used.[116] The Dutch legislature simply ignored or rejected the common sense idea that without the threat of class action litigation, class action settlement negotiations cannot be conducted at arm's length between the class and the defendant. The possibility of a class resolution of the controversy is entirely in the hands of the good will of the defendant. If the defendant does not want to settle on a class-wide basis, the class has no power to bring a

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110. *See* Lei No. 83/95, art. 15, de 31 de agosto de 1995, D.R., no. 201, de 31.08.1995 (Port.) (providing class members' opt-out rights). The Portuguese class action is called popular action (*acção popular*), adopting the traditional Roman Law terminology. It is important to note, however, that in Portugal a class judgment will not bind absent members if it was decided against the interest of the class due to lack of evidence. *See id.* art. 19.1; *see supra* Part I.B.3. (The Peculiar Res Judicata Model is Followed by Some Latin American Countries) (discussing how some Latin American countries follow a res judicata rule that is similar to an old Brazilian system). *See generally* Mariana Grança Gouveira & Nuno Garoupa, *Class Actions in Portugal*, *in* THE LAW AND ECONOMICS OF CLASS ACTIONS IN EUROPE 342 (Jürgen G. Backhaus, Alberto Cassone & Giovanni B. Ramello eds., 2012).

111. *See* Wet collectieve afwikkeling massaschade [WCAM] [Dutch Collective Settlement of Mass Damage Act], (Dutch Civil Code, s. 7:908.2), Staatsblad van het Koninkrijk der Nederlanden [Stb.] 2005, p. 380 (Neth.).

112. In Belgium, there is a government proposal to introduce an opt-out class action, based on the Quebec system. *See* Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: The Last of the European Mohicans*, *in* THE BELGIAN REPORTS AT THE CONGRESS OF WASHINGTON OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 305, 337–44 (Eric Dirix & Yves-Henri Leleu eds., 2011); *see also* STEFAAN VOET, EEN BELGISCHE VERTEGENWOORDIGENDE COLLECTIEVE RECHTSVORDERING (2012) (Dutch).

113. *See* WCAM (Dutch Civil Code, s. 7:908.2), Stb. 2005, p. 380 (Neth.).

114. *Id.*

115. *Id.*

116. This is the equivalent of a country adopting rules for same-sex divorce without previously having adopted any legislation on same-sex marriage. After all, most marriages end up in divorce anyway.

class action and take the matter to judicial resolution.[117] This deplorable rule has been the object of much hype in Europe and elsewhere, at a level of attention and adulation that is beyond comprehension. Part of it is because of its use in a "successful" international agreement.[118] But another part is marketing for those interested in making Amsterdam a hub for international class actions, as well as multinational companies who feel extremely comfortable in such defendant-friendly environment. The natural drawbacks of the "settlement class actions," which is worrisome enough in the United States, are greatly magnified in the Netherlands, a country that resultantly will never have any practical experience with trying a class action.[119]

Norway[120] and Denmark[121] have adopted a middle ground between these two models. Their default rule is opt in, but the opt-out device can be used in some circumstances, such as in cases of small claims. In Denmark, only the Consumer Ombudsman can initiate an opt-out class action.[122] This hybrid opt-in/opt-out device was reflected in other class action proposals in Europe.[123] This middle ground proposal is certainly

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117. *See generally* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 621 (1997).

> [In a system in which class settlement is allowed,] despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations [would not be able to] use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation.

Id.

118. *See* Nagareda, *supra* note 2, at 37–41 (discussing, from a critical perspective, the circumstances of the settlement in the United States and The Netherlands of the Royal Dutch Shell case).

119. *See infra* notes 214–23 and accompanying text (discussing the Converium/Morrison settlement in the United States and The Netherlands).

120. *See* Lov om mekling og rettergang i sivile tvister [Act Relating to Mediation and Procedure in Civil Disputes] av 17 juni 2005 JUSTIS- OG BEREDSKAPSDEPARTEMENTET [JD] 2005:8 §§ 35-6, 35-7, 35-8 (2005) (Nor.), *translated at* http://www.ub.uio.no/ujur/ulovdata/lov-20050617-090-eng.pdf.

121. *See* RETSPLEJELOVEN [Administration of Justice Act] § 254(e)(6), (8) (2008) (Den.).

122. *See id.*

123. *See, e.g.*, GUILLAUME CERUTTI & MARC GUILLAUME ET AL., RAPPORT SUR L'ACTION DE GROUPE 29–31 (Dec. 2005) (Fr.), *available at* http://lesrapports.ladocumentationfrancaise.fr/BRP/054004458/0000.pdf; *Commission Green Paper on Consumer Collective Redress*, at 10, 12–13, COM (2008) 794 final (Nov. 27, 2008).

influenced by similar experimentation elsewhere a couple of decades ago, such as in the United States,[124] England,[125] and South Africa.[126]

Although class actions have existed in Spain for more than a decade, the situation there is still uncertain. The language of Spanish class action law is ambiguous[127] and legal commentators have contradictory and uncertain opinions on how to interpret these vagueries.[128]

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124. *See* Edward Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 33–34, 70–71 (1996) (proposing to add a new Rule 23(c)(1)(A) giving discretionary power to the court to determine whether a class action should proceed in an "opt-out" or "opt-in" basis); *see also* Edward Cooper, *Class-Action Advice in the Form of Questions*, 11 DUKE J. COMP. INT'L L. 215 (2001). This flexible approach is adopted in Pennsylvania state class actions. *See* PA. R. CIV. P. 1711 (1999).

125. *See* LORD WOOLF, ACCESS TO JUSTICE FINAL REPORT ¶ 46 (2000), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/sec4c.htm (arguing that "[t]he court should have the power to [maintain a class action] on an 'opt-out' or 'opt-in' basis, whichever contributes best to the effective and efficient disposition of the case").

126. SOUTH AFRICAN LAW COMM'N, THE RECOGNITION OF A CLASS ACTION IN SOUTH AFRICAN LAW 38 (Working Paper 57, Project 88, Nov. 1995) (S. Afr.). The proposed Public Interest Actions and Class Actions Act in South Africa, gives the court discretionary powers to adopt an opt-in notice (in limited circumstances), an opt-out notice, or no notice at all. *Id.*; Wouter Le R de Vos, *Reflections on the Introduction of a Class Action in South Africa*, 1996 J.S. AFR. L. 639, 646–48.

127. *See* LEY DE ENJUCIAMIENTO CIVIL [L.E. CIV.] [CODE OF CIVIL PROCEDURE] art. 222.3 (2000) (Spain) (providing that the class action judgment is binding on nonparties) and *id.* art. 519 (allowing, in some circumstances, that class members benefit from a class judgment during the phase of its enforcement). Spain, therefore, does not provide specifically neither for an opt-in nor for an opt-out provision. *Id.*

The Spanish group litigation regime has a special development on Consumer Law. The last version of Consumer Protection Act (Consolidated Text of the General Consumer and User Protection Act and other supplementary laws: Texto Refundido de la Ley General de Defensa de los Consumidores y Usuarios) has been passed by Legislative Royal Decree 1/2007 of 16 November 2007. B.O.E. 2007, 49181 (Spain). Provisions related to consumer actions are in articles 53 to 58. *See* Pablo Gutiérrez de Cabiedes, *Comentario a los artículos 53 a 58*, COMENTARIOS A LAS NORMAS DE PROTECCION DE LOS CONSUMIDORES 414–74 (2011) (Spain).

128. *Compare* PABLO GUTIERREZ DE CABIEDES HIDALGO, GROUP LITIGATION IN SPAIN: NATIONAL REPORT (2007), *available at* http://law.stanford.edu/display/images/dynamic/events_media/spain_national_report.pdf, *with* JUAN MONTERO AROCA ET AL., DERECHO JURISDICCIONAL: PROCESO CIVIL 488 (Tirant lo Blanch ed., 18th ed. 2010) (Spain) (discussing the Spanish class action in Spain as mandatory, *i.e.*, without possibility of opting out, and the res judicata producing effects whether the judgment was favorable or not); ANDRÉS DE LA OLIVA SANTOS & IGNACIO DÍEZ-PICAZO GIMÉNEZ, DERECHO PROCESAL CIVIL: EL PROCESO DE DECLARACIÓN 501 (2000) (same) (Spain); MANUEL ORTELLS RAMOS, DERECHO PROCESAL CIVIL 150, 567 (6th ed. 2005) (Spain) (same); Lorena Bachmaier Winter, *La Tutela de los Derechos e Intereses Colectivos de Consumidores y Usarios en el Proceso Civil Español*, *in* LAS

Germany does not have class actions for damages, but has recently implemented a "test case" or "model case" device.[129] It is not really an "opt-in" device because the decision on the "model case" will bind all shareholders that filed a claim in court.[130]

Rachel Mulheron has said that "[e]ssentially, it is a question of policy as to whether a person's legal rights should be determined without [their] express consent and [a] mandate to participate in the litigation."[131] There is no doubt that the matter is highly controversial.[132] However, this is not

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ACCIONES PARA LA TUTELA, *supra* note 95, at 1, 47–48, *with* Lorenzo M. Bujosa Vadell, *El acceso a la justicia de los consumidores y usuarios*, *in* DERECHOS DE LOS CONSUMIDORES Y USUARIOS 1780–86 (Alicia de León Arce & Luz María García García coords., 2d ed. 2007) (Spain) (admitting that the literal interpretation of the law provides for a mandatory class action without a right to opt out, but considering that it would be unconstitutional to bind class members, at least against their interest, without giving them opt-out rights, and proposing that the class judgment must bind the class members only if favorable), *with* José Luis Vázquez Sotelo, *La Tutela de los Intereses Colectivos y Difusos en la Nueva Ley de Enjuiciamiento Civil Española*, *in* LAS ACCIONES PARA LA TUTELA, *supra* note 95, at 177, 188–89 (considering unconstitutional a class action judgment that is binding on absent members whether-favorable-or-not). *See also* JAVIER LÓPEZ SÁNCHEZ, EL SISTEMA DE LAS CLASS ACTIONS EN LOS ESTADOS UNIDOS DE AMÉRICA (2011) (Spain) (providing a Spanish perspective on the American class actions); Pablo Gutierrez de Cabiedes Hidalgo, *La nueva Ley de Enjuiciamiento Civil y los daños con múltiples afectados*, 37 ESTUDIOS DE DERECHO JUDICIAL 133, 192–98 (2001) (Spain).

129. *See* Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten [KapMuG] [Capital Markets Model Case Act], Aug. 15, 2005, BUNDESGESETZBLATT, TEIL I [BGBL. I] at 2437, § 2, ¶ 1 (Ger.).

130. *See generally* Eberhard Feess & Axel Halfmeier, *The German Capital Markets Model Case Law (KapMuG)—A European Role Model for Increasing the Efficiency of Capital Markets? Analysis and Suggestions for Reform* 10 (Working Paper, Jan. 30, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684528&. Stating that the German model case is neither an opt in nor an opt out,

> since the claimant has no choice whether to participate or not in the model case proceedings. An investor can either not sue at all, thereby foregoing his potential claim due to the relatively short limitation period, or she brings an action which will then automatically be included in the model case proceedings. This no-option rule was chosen to avoid parallel proceedings by collecting cases in one court.

Id.; *see also* Baumgartner, *supra* note 10, at 342–44 (discussing "pilot suits" or "model suits" that has existed since the 1980s in Switzerland, but which, in contrast from the German counterpart, do not have a binding effect on third parties).

131. *See* RACHAEL MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE 29 (2004) [hereinafter MULHERON, CLASS ACTION IN COMMON LAW LEGAL SYSTEMS].

132. *See generally* 2 ONTARIO LAW REFORM COMM'N, REPORT ON CLASS ACTIONS 467 (1982) (Can.) [hereinafter ONT. LAW REFORM COMM'N]. The report, written three decades ago, notes that

a matter of policy choice, but an example of the influence of raw political power. No good faith governmental policy can justify an opt-in approach, especially in the case of small claims class actions (negative value class claims).[133] The only reason why countries adopt opt-in class action is because of the lobby of major corporations and the interest of the government itself.

Most major Western common law countries, such as the United States,[134] Canada,[135] and Australia,[136] have adopted opt-out class actions.

> [o]ne of the most controversial issues in the design of a class action procedure is whether class members should be bound automatically by the judgment, unless they exclude themselves from the action after certification, or whether class members . . . should be required to take affirmative action after certification in order to be bound by the judgment.

Id.; Mulheron, *Opt-Out*, *supra* note 102, at 412. ("[T]here is, in this author's view, one question which hovers above all others: should European Member States implement an *opt-out* form of collective redress?").

133. The disadvantage of the opt-in approach is clear and a near unanimity in class action scholarship. *See, e.g.*, ONT. LAW REFORM COMM'N, *supra* note 132, at 467–92; Issacharoff & Miller, *supra* note 20, at 202–08 (discussing four disadvantages of the opt-in approach: low incentive for representatives [and class counsel], low participation rate for class members, lack of global peace for defendants, and low deterrence); Mulheron, *Opt-Out*, *supra* note 102, at 413 ("there is an overwhelming *evidence of need* for an opt-out collective redress mechanism, in order to supplement presently existing procedural devices available to claimants."). No credible theory that the opt-in approach is a superior method of adjudicating collective or mass wrongs has ever been advanced. *See* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 36–42, 13–33, 169–73 (2009) (advancing the proposition that "a process that requires absent claimants to affirmatively opt into a class proceeding is preferable to an opt-out procedure, purely as a matter of democratic theory"); HODGES, REFORM OF CLASS AND REPRESENTATIVE ACTIONS, *supra* note 109, at 118–30, 245–46 (favoring an opt-in approach). Even Christopher Hodges, however, admits that an opt-in approach may "constitute a barrier to genuine claimants joining a case because of issues of lack of knowledge of the procedure and costs, and thus a barrier to justice." *Id.* at 120. He further recognizes that this is particularly relevant in small value claim and "[t]he result is that justice is not served if an acceptable majority of those who have rights are not vindicated, if damage goes uncompensated or unrectified and if defendants keep illicit gains." *Id.*

134. FED. R. CIV. P. 23(c).

135. *See, e.g.*, Code of Civil Procedure, R.S.Q., c. 40, s. 56, art. 1007 (Can.) (providing that "[a] member may request his exclusion from the group by notifying the clerk of his decision, by registered or certified mail, before the expiry of the time limit for exclusion" and that "[a] member who has requested his exclusion is not bound by any judgment on the demand of the representative"); Province of Ontario Class Proceedings Act, S.O. 1992, c. 6, art. 9 (Can.) (providing that "[a]ny member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order"); British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50, art.

England, however, despite originating class actions,[137] remains the only major Western common law country without any class action system at all. The British system consists of only a modest device that could be described as a voluntary (i.e., opt-in) aggregation of similar individual lawsuits.[138]

16(1) (Can.) (providing that "[a] member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order"). Curiously, the British Columbia Act provides an opt-in procedure for non-residents of that province. *See id.* § 16(2) ("[A] person who is not a resident of British Columbia may . . . opt in to [the] class proceeding."). *See generally* WARD K. BRANCH, CLASS ACTIONS IN CANADA, ch. 10 (2006) (discussing the opt out device in Canadian class actions); ELAINE ADAIR ET AL., DEFENDING CLASS ACTIONS IN CANADA 328 (Kathleen Jones-Lepidas ed., 2d ed. 2007) (Can.) (same); Walker, *A View from Across the Border*, *supra* note 9, at 767–71 ("The combined effect of the residency requirement for the local operation of the opt-out class action regime and the opt-in requirement for non-residents is intended to prevent uncertainty from arising in respect of the binding effect of the certification of a multi-jurisdiction class."); *see also* ALBERTA LAW REFORM INST., CLASS ACTIONS: FINAL REPORT NO. 95, ch. 4 (2000) ("an 'opt out' system is the normal choice in Canada").

136. *See Federal Court of Australia Act 1976* (Cth) s 33(j)(2) (Austl.) (providing that "A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed"); *see also* MULHERON, CLASS ACTION IN COMMON LAW LEGAL SYSTEMS, *supra* note 131, at 29–38 (discussing the opt-out models of the various common law countries).

137. *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

138. *See* Civil Procedure Rules [CPR], 1998, S.I. 1998/3132, r. 19.10 (U.K.) (regulating the Group Litigation Order, by which a person who already brought an individual lawsuit may request that his or her individual case be consolidated with other similar cases and may also request to be removed later). *See generally* NEIL ANDREWS, ENGLISH CIVIL PROCEDURE 971–1011 (2003); ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE 517–18 (2003); CHRISTOPHER HODGES, MULTI-PARTY ACTIONS 29–46 (2001).

Although England does not have a class action device, some English commentators that directly faced the issue have tentatively opined that a U.S. class action judgment would be recognized and enforced in England, while others have offered a different opinion. *See* Dixon, *supra* note 4, at 134.

> The law in this area is difficult to analyse as there is no case that has really come close to considering this issue. Rather, there are a number of cases that deal with aspects of the issue. After assessing the principles inherent in those cases, I have come to the conclusion that the US judgment approving the settlement of the class action has a good chance of being upheld in England.

Id.

> [I]t is impossible to be certain on the existing state of English law whether a judgment in a US class action would be recognised and enforced in England in respect of absent claimants who did not opt out of the class action. However, a

Some scholars perceive substantial differences between these types of class actions by reference to contingent procedural variations. For example, some scholars consider that "collective actions" are opt-in procedures and "class actions" are opt-out procedures.[139] Other scholars consider that "collective actions" are those brought by associations and public agencies, whereas "class actions" are brought by class members. These distinctions and the differences in names are immaterial, however, because the various methods represent the same procedural device with slightly different formalities.[140] However, the fact that European scholars try to unsuccessfully distance themselves from the so called "American-style" class actions demonstrates their hostile attitude toward the class action device.[141] The mere existence of the derisive qualification "American-style" class action is troubling.[142]

> good case for such a judgment's recognition and enforcement in England can be made.

Harris, *supra* note 5, at 650. That was enough to convince one U.S. court. *See In re* Vivendi Universal, S.A. Sec. Litig., 242 F.R.D 76, 103 (S.D.N.Y. 2007).

> While the issue is hardly free from doubt, based on the affidavits before it, the Court concludes that English courts, when ultimately presented with the issue, are more likely than not to find that U.S. courts are competent to adjudicate with finality the claims of absent class members and, therefore, would recognize a judgment or settlement in this action.

Id. But see ADRIAN BRIGGS & PETER REES, CIVIL JURISDICTION AND JUDGMENTS 572–73 (4th ed. 2005) (Eng.) (stating that an American class action judgment would have no preclusive effect in England); Mulheron, *Opt-Out*, *supra* note 102, at 446 n.221 (same).

139. *See* Douglas W. Hawes, *In Search of a Middle Ground Between the Perceived Excesses of US-Style Class Actions and the Generally Ineffective Collective Action Procedures in Europe*, *in* PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION: ESSAYS IN HONOUR OF EDDY WYMEERSCH 200, 200–22 (Michel Tison et al. eds., 2009); GAËTANE SCHAEKEN WILLEMAERS, THE EU ISSUER—DISCLOSURE REGIME: OBJECTIVES AND PROPOSALS FOR REFORM 151 (2011).

140. *See* Gidi, *Class Actions in Brazil*, *supra* note 36, at 334–39 (discussing the concept of "class actions"); *see also supra* note 10 and accompanying text (discussing the tradition in civil law scholarship to mistakenly consider the expression "class action" to refer only to class action for damages, not injunctive class action).

141. *See* Gidi, *Class Actions in Brazil*, *supra* note 36, at 335–37 (preferring the adoption of the terminology "collective action" in Romance languages, but adopting the terminology "class action" in English, and treating them as synonyms).

142. *See generally* Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. INT'L L. 321, 346 (2001) ("Europe neither needs nor wishes to import U.S.-style class action litigation."); *see also* Nagareda, *supra* note 2 (discussing European aversion to U.S.-style class actions).

One of the reasons traditionally given in civil law countries against the adoption of an opt-out class action is the fear that binding absent class members—especially to an unfavorable decision—in a proceeding to which they were not a party due to service of process or voluntary intervention would violate the due process of law.[143] This faulty legal argument simply masks the fact that the legislature is opposed to the enactment of a powerful class action device. Many lawmakers are also afraid of scaring business away from their countries, when in a globalized market, companies often flee to a more business-friendly environment.

In such countries, there is a strong predisposition to reject recognition of U.S. opt-out class actions, considering it a violation of the due process of law.[144] At the same time, it is highly likely that most countries would

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> And, yet, one need spend only a few minutes in conversations with European reformers before the proverbial "but" enters the discourse: "But, of course, we shall not have American-style class actions." At this point, all participants nod sagely, confident that collective actions, representative actions, group actions, and a host of other aggregative arrangements can bring all the benefits of fair and efficient resolution to disputes without the dreaded world of American entrepreneurial lawyering.

Issacharoff & Miller, *supra* note 20, at 180. Not all scholars, of course, use the expression "U.S.-style class action" derisively, but it would be convenient to retire its use. There is no such a thing as a U.S.-style class action. The concept of class action is universal: it is simply an action in which a person (a class member, an association or a governmental agency) represents the interests of a group of people in court (for an injunction or damages). What authors want to designate is a class action that is embedded in the American litigation context (of discovery, contingency fees, entrepreneurial lawyers, punitive damages, high jury awards, high attorney's fees, etc.). *See* Gidi, *Class Actions in Brazil*, *supra* note 36, at 320–23, 334–35.

143. *See* HODGES, REFORM OF CLASS AND REPRESENTATIVE ACTIONS, *supra* note 109, at 119–30 (discussing also the risk of abuse). The irony was not missed by a commentator; Nagareda, *supra* note 2, at 30–31.

> On this point, the contrast between the United States and Europe makes for an ironic juxtaposition. The nation known in stylized fashion for a kind of "cowboy" individualism actually accords less normative significance to the individual civil claim, in a sense, than do nations in which ideals of socialism and collectivization continue to enjoy greater purchase.

Id.

144. *See* Pinna, *supra* note 5, at 39–41. Pinna states that, after analyzing several affidavits or expert opinions on the matter,

> These reasons [of potential refusal of recognition] seem to be based on the idea that the features of a class action procedure offend the very foundations of domestic law of the European legal systems . . . . [I]t is clear that everywhere in

recognize a foreign opt-in class action judgment, even if the country in question does not have any type of class action in its legal system.[145]

Moreover, as will be more fully developed below, in countries where the legal system only accepts opt-in class actions (or no class actions at all), class members will not be able understand a notice based upon the concept of an opt-out procedure. The idea that one must "exclude" oneself from a class action in order to not be bound by it is simply alien to the people in these countries. The level of notice provided in these situations is simply inadequate to satisfy due process.[146]

D. Countries That Have a Class Action System That is Substantially Similar to the United States

The only country in Latin America that has a class action system that is substantially similar, in the relevant part, to the U.S. model is Colombia.

> Europe the main problem with US class actions is the opt-out mechanism and its asserted contrariety to the domestic foundations of civil procedure.

Id. Paradigmatic of this attitude is the brief filed by the French government in the Supreme Court case *Morrison v. National Australia Bank Ltd.*: "the opt-out aspect of U.S. class actions runs afoul of fundamental French public policy and due process principles." *See* Brief for Republic of France as Amicus Curiae Supporting Respondents, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191); *see also* Mulheron, *Opt-Out*, *supra* note 102, at 412 ("for most European Member States, the concept [of an opt-out class action] is an anathema."); Sturner, *supra* note 3, at 110 (opt-out class actions are a violation of the right to be heard provided for in the German Constitution). *But see* Matousekova, *supra* note 5, at 676 ("Arguably, as criticisable as they may be, foreign class actions do not constitute such intolerable offence to the French forum.").

145. *See, e.g.*, Pinna, *supra* note 5, at 39–40 (stating that "[I]t is almost certain that European legal systems will give *Res Judicata* effect to 'opt-in' class-actions judgments, but this is not self-evident regarding opt-out class actions," but concluding that "European legal systems are presently less allergic to class-action-like procedures than they used to be" and predicting that the courts of Europe will recognize U.S. opt-out class actions); IBA LEGAL PRACTICE, GUIDELINES, *supra* note 8, at 5, 22 (stating that judgments against class members who opted into a class action would be recognized by reference to traditional rules of recognition and stating that "a person who opts in has accepted the jurisdiction of the court and any judgment in the action should be binding on him or her subject to generally recognised exceptions"); Murtagh, *supra* note 6, at 27–28 (stating that an opt-in class action would "enhance the likelihood of foreign courts recognizing class action judgments because the class action would only purport to bind plaintiffs who had affirmatively opted into the class, as opposed to absent parties who did not participate in the case in any way," but cautioned that recent case law may have precluded the possibility of the certification of an opt-in class action).

146. *See supra* Part II.A. (Class Action Notice in Latin America Would Be Inadequate).

Colombia has a reasonably long tradition of sophisticated legislation[147] and scholarship[148] on the subject of class actions for damages. The current class action statute, enacted in 1998, is carefully worded and extremely detailed, and includes eighty-six rules, totaling several dozen pages.[149] Contrary to the reality and trend in Latin America, Colombia's class action device, especially its class action for damages, is in many significant ways very similar to the U.S. model.

It is true that, in certain respects, Colombia's class action model differs from the U.S. model. However, these are mere procedural differences that are not relevant for the purposes of this Article. The important point is that Colombia has adopted an opt-out class action mechanism and the class judgment binds absent class members whether it is favorable to the interests of the class or not.[150] In addition, the Colombian class action model specifically allows for court-approved settlements.[151]

Because Colombia has a class action model that is similar to the United States' in relevant part, the specificities of the Colombian class action do not represent an obstacle to the recognition of a U.S. class action judgment or court-approved settlement.[152] Rather, the obstacles to such rec-

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147. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 88; L. 472, agosto 6, 1998, D.O. 43.357, arts. 56, 61 (Colom.).

148. *See, e.g.*, MARTÍN BERMÚDEZ MUÑOZ, LA ACCIÓN DE GRUPO: NORMATIVA Y APLICACIÓN EN COLOMBIA (Universidad del Rosario ed., 1st ed. 2007) (Colom.); RAMIRO BEJARANO GUZMÁN, PROCESOS DECLARATIVOS: CIVILES, AGRARIOS, DE FAMILIA, ARBITRAMENTO: ACCIONES POPULARES Y DE GRUPO: LEY DE CONCILIACIÓN (3rd ed. 2005) (Colom.); PEDRO PAULO CAMARGO, LAS ACCIONES POPULARES Y DE GRUPO: GUÍA PRACTICA DE LA LEY 472 DE 1998 (4th ed. 2004) (Colom.); JAVIER TAMAYO JARAMILLO, LAS ACCIONES POPULARES Y DE GRUPO EN LA RESPONSABILIDAD CIVIL (2001) (Colom.); PABLO A. MORENO CRUZ, EL INTERÉS DE GRUPO COMO INTERÉS JURÍDICO TUTELADO (2002) (Colom.); LUIS FELIPE BOTERO ARISTIZÁBAL, ACCIÓN POPULAR Y NULIDAD DE ACTOS ADMINISTRATIVOS: PROTECCIÓN DE DERECHOS COLECTIVOS (1st ed. 2004) (Colom.); Jairo Parra Quijano, *Acciones populares y acciones para tutela de los intereses coletivos*, 2 REVISTA IBEROAMERICANA DE DERECHO PROCESAL 120 (2002) (Colom.); Jairo Parra Quijano, *Algunas Reflexiones Sobre la Ley 472 de 1998 Conocida en Colombia con el Nombre de Acciones Populares y Acciones de Grupo*, *in* LAS ACCIONES PARA LA TUTELA, *supra* note 95, at 111; *see also* Gómez, *supra* note 40 (manuscript at 30–42).

149. *See* L. 472, agosto 6, 1998, D.O. 43.357 (Colom.).

150. *See id.*

151. *See id.* arts. 56, 61; *supra* Part I.B.2. (Class Representatives Have No Authority to Settle and Compromise the Rights of Absent Class Members) (discussing the impossibility of settlement and disposition of group rights in class actions in some Latin American countries).

152.

> On the one hand, if the foreign country has a class-action-like remedy, courts in that country may be more likely to recognize a class-action judgment that in-

ognition are to be found elsewhere. These obstacles include the traditional prerequisites for recognition of any judgment, i.e., inadequacy of class notice,[153] lack of jurisdiction over absent class members,[154] and the need for rogatory letters to communicate with absent class members.[155]

E. Countries with Unique Considerations

Three Latin American countries—Argentina, Panama, and Ecuador—do not fit neatly into any of the four categories discussed above. Argentina is a country in a state of transition with respect to class actions, and Panama and Ecuador have an ambiguous class action regulation.

Argentina is in a class of its own, being perhaps the most unpredictable country in Latin America regarding class actions for damages. Article 43 of the Argentinean Constitution sets the overall favorable tone for the

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> cludes opt-out class members. But at the same time, the availability of an alternative remedy may mean that there is a more appropriate alternative in that country and plaintiffs need not be part of a U.S. class action lawsuit . . . . The availability of an alternative remedy may be a factor . . . on the question of class certification in a case where the connections with the case are largely foreign. Whether a class-action lawsuit is a superior method of proceeding may depend in part on what procedures for settlement or adjudication exist in the foreign forum.

Choi & Silberman, *supra* note 33, at 479, 485–86; *see also* Murtagh, *supra* note 6, at 36–44 (proposing that the inclusion of foreign class members in U.S. class actions may not be a superior method of deciding the controversy, since many countries now, particularly in Europe, have adequate remedies to protect group rights).

> It seems likely that courts outside the United States might consider their own standards for certifying class actions in determining whether to recognize the certification of a class action by another court and to treat absent class members as precluded from bringing claims before them. If a court regards the reasons for including absent non-resident plaintiffs in a class certified elsewhere to be consistent with the objectives of its own class action regime, it may be more likely to give preclusive effect to the certification order.

Walker, *A View from Across the Border*, *supra* note 9, at 776; *id.* at 797 (stating that "there do not appear to be obvious systematic bases" for Canadian courts to deny preclusive effect to U.S. class action judgments); Buxbaum, *supra* note 2, at 60 ("[S]ystems that themselves use class actions are likely to enforce claim preclusion [of U.S. class action judgments]."). Although it is true that legal systems that adopt an opt-out class action are more likely to recognize U.S. class action judgments, there are other obstacles to recognition. *See also* Catherine Piché, *The Cultural Analysis of Class Action Law*, 2 J. CIVIL L. STUD. 102 (discussing a case in which a Québec court refused recognition of an Ontario class action judgment).

153. *See infra* Part II.A.

154. *See infra* Part II.B.

155. *See infra* Part II.C.

country's openness to class actions.[156] Recently, the Supreme Court in the *Halabi* case criticized the absence of class action legislation. The Court went so far as to say that Article 43 is self-executing and that lower courts may entertain class proceedings even in the absence of written procedural norms, quite a departure from the civil law tradition.[157] Moreover, Argentinean scholarship on the subject is vast and sophisticated.[158]

The fact remains, however, that Argentina still does not have legislation on class actions for damages. Currently, several committees are proposing different class action legislation, but no main project has formally emerged thus far. Although it is fair to predict that Argentina will likely enact class action legislation in the next few years, it is impossible to foresee its content.

However, despite the good will expressed by the Supreme Court and the Constitution, and despite the sophistication of jurists, the current circumstances in Argentina are not favorable to an effective class action system. Most of the existing provincial class action laws are either opt-in systems or permit only a limited binding effect for class action judgments. For example, in the Provinces of Catamarca, La Pampa, and Chubut, class actions are opt in, and in the Provinces of Rio Negro and Corrientes, the class judgment is only binding if it is favorable to the class. In the General Law of Environment, in the consumer and environmental laws of the Province of Buenos Aires, and in the Código Procesal de la Província de Tierra del Fuego, the class action judgment is not

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156. Art. 43, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (providing for lawsuits for the protection of group rights in general, including specifically those related to the environment, discrimination, consumer, and antitrust.).

157. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/2/2009, "Halabi, Ernesto c. P.E.N. / ley 25.873 –dto. 1563/04 s/amparo law 16.986," La Ley [L.L.] (2009) (Arg.).

158. *See, e.g.*, LEANDRO J. GIANNINI, LA TUTELA COLECTIVA DE DERECHOS INDIVIDUALES HOMOGÉNEOS (2007) (Arg.); JAVIER H. WAJNTRAUB, PROTECCIÓN JURÍDICA DEL CONSUMIDOR (2004) (Arg.); ENRIQUE M. FALCÓN, 6 TRATADO DE DERECHO PROCESAL CIVIL Y COMERCIAL (2007) (Spain); PROCESOS COLECTIVOS (Eduardo Oteiza, ed., 2006) (Arg.); FRANCISCO VERBIC, PROCESOS COLECTIVOS (2007) (Arg.); GUSTAVO MAURINO, EZEQUIEL NINO & MARTÍN SIGAL, LAS ACCIONES COLECTIVAS (2005) (Arg.); OSVALDO ALFREDO GOZAÍNI, PROTECCIÓN PROCESAL DEL USUARIO Y CONSUMIDOR (2005) (Arg.); Roberto Berizonce & Leandro Giannini, *La Acción Colectiva Reparadora de los Daños Individualmente Sufridos en el Anteproyeto Iberoamericano de Procesos Colectivos*, *in* UN DIÁLOGO IBEROAMERICANO, *supra* note 12, at 63; Patricia Bermejo, *Algunas Reflexiones Sobre la Aplicación del Anteproyecto de Código Modelo de Procesos Colectivos para Ibero-América en la República Argentina*, *in* UN DIÁLOGO IBEROAMERICANO, *supra* note 12, at 490; *see also* Gómez, *supra* note 40 (manuscript at 54–64).

binding on the class if the judgment was in favor of the defendant due to a lack of evidence.[159] This mechanism was also the proposal of a group of scholars, judges, and practitioners who met in Mendoza in 2005 to discuss the subject of class actions in the XXIII National Civil Procedure Conference (Conclusion 9).[160] The Argentine scholarship generally is divided.[161]

If Argentina adopts either an opt-in class action or a class action system in which a judgment will be binding only if favorable to the class, it is doubtful that Argentina will recognize a foreign class action judgment or court-approved class action settlement.[162]

Panama is in a completely different situation. It has an extremely undeveloped class action system with no class action tradition whatsoever. The class action regulation is found solely in Article 129 of Law 45 of 2007, a statute that governs consumer protection.

Class actions in Panama, as is the case in many other Latin American and European countries, are limited solely to actions for damages or injury resulting from a product or service.[163] Therefore, the type of class

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159. *See* VERBIC, *supra* note 158, at 261–66. For a broad comparative study of provincial class action law in Argentina, see MAURINO, NINO & SIGAL, *supra* note 158, at 359–76. *See also* Law No. 5034, Cat., Aug. 14, 2001, [68] B.O.P. 2001–24, art. 20 (Catamarca, Arg.); Law No. 1352, LPa., Nov. 14, 1991, B.O. 13–12–1991 (La Pampa, Arg.); Law No. 4572, Cht., June 20, 2006 (Chubut, Arg.); CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA PROVÍNCIA RIO NEGRO [CÓD. PROC. CIV. Y COM. RNG.] art. 225 (Pablo Verani & Oscar Alfredo Machado eds., 1998) (Arg.); CÓDIGO DE PROCEDIMIENTOS EN LO CONTENCIOSO ADMINISTRATIVO DE LA PROVINCIA DE CORRIENTES [C.C.A. CTES.] art. 85 (Arg.); Ley General del Ambiente, Law No. 25675, Nov. 6, 2002, B.O. 28–11–2002, art. 33 (Buenos Aires, Arg.); Law No. 147, TFg., July 1, 1994, B.O.T. 17–08–94, art. 192 (Tierra del Fuego, Arg.).

160. *See* FALCÓN, *supra* note 158, at 1000.

161. *Compare* GIANNINI, LA TUTELA COLECTIVA DE DERECHOS INDIVIDUALES HOMOGÉNEOS, *supra* note 158, at 188–92 (proposing a res judicata whether favorable or not as long as there is judicial control of adequacy of representation) *and* Alejandro C. Verdaguer, *Litispendencia y cosa juzgada en los procesos colectivos*, *in* PROCESOS COLECTIVOS, *supra* note 158, at 369 (same), *with* MAURINO, NINO & SIGAL, *supra* note 158, at 334 (proposing to adopt both the opt-in and the binding effect only if the judgment is favorable).

162. *See supra* Part I.B. (Countries in Which a Class Action Judgment is Binding Only if Favorable to the Class) (discussing the reasons why these countries would not recognize a U.S. class action judgment); *supra* Part I.C. (Countries that Adopt an Opt-In Class Action) (same).

163. *See* Ley 45, de 31 de Octobre de 2007 (Pan.). This is an inexplicably common development in civil law countries. Instead of enacting a transsubstantive rule on class action litigation, some countries limit the class action applicability to specific areas of substantive law, like securities, antitrust, consumer, etc. *See, e.g.*, Taruffo, *Remarks on Group Litigation*, *supra* note 20, at 406 (stating that most European countries do not ap-

action available in Panama is significantly different and more limited than that available in the United States.

The main difficulty is that while Panama adopts an opt-out class action device, it is not clear whether the binding effect is "whether favorable or not" or *secundum eventum litis*. The statute simply states that the judgment binds all class members.[164] The Author is aware of less than a dozen class action cases in Panama, and all were denied certification or dismissed for procedural reasons, except for one settlement. Therefore, there is no case law on the matter. The Author is not aware of any books or law review articles on the subject.[165]

A literal interpretation of the statute seems to provide for binding effect "whether favorable or not," but a constitutional interpretation, on due process of law grounds, could lead to an effect *secundum eventum litis*, especially because of the statute's lack of adequate protection of class members' rights through adequate notice, judicial control of adequate representation, etc.

Ecuador is yet in a different situation. Despite being a country with no tradition of scholarship on class actions,[166] Ecuador does have a class

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proach class action litigation in general terms and take into consideration only particular instances of collective interests, such as those involved in consumer and environmental protection).

> while the American class action can be used to litigate, in principle, all subject-matters, the continental European representative group actions are mostly regulated by laws covering specific legal fields, most commonly consumer litigation and environmental issues. From a practical point of view, the piecemeal legislation that characterizes group litigation in most European countries is the product of two opposing forces: the general tendency to restrict group litigation as much as possible and the political pressure coming from certain social groups such as consumer associations and environmentalists. While the state is not willing to grant a general solution, it is forced to concede partial ones.

Valguarnera, *supra* note 20, at 37–38. This course of conduct is not only indefensible, it is also unsustainable in the long run. With time, either the legislature will extend class actions to all areas of substantive law or courageous courts will simply apply these statutes in other situations by analogy.

164. *See* Ley 45, de 31 de Octobre de 2007 (Pan.).

165. *But see* MARCO A. FERNÁNDEZ, CONDICIONES GENERALES DE COMPETENCIA EN PANAMA 16–17, U.N. Doc. LC/L.2394-P, U.N. Sales No. S.05.II.G.137 (2005) (a publication about antitrust law in Panama, with a two-page description of the Panamenian class action).

166. Probably there has never been any legal article published about class action before the enactment of the Environmental Management Law of 1999 and possibly none has been published for several years after its enactment.

action system.[167] In 1999, Ecuador enacted its Environmental Management Law (the "EML"), which is mostly dedicated to substantive law, but contains several procedural rules.[168] The EML was first used in the litigation between indigenous people from the Amazon Forest and the large oil companies of Texaco and Chevron. This action, after a decade-long litigation process that still seems to show no end, resulted in an eighteen billion dollar verdict in 2011, the largest verdict in history.[169]

The EML does not speak to key elements of a functioning class action system, demanding great judicial creativity to apply it in practice.[170] Although it is clear that the EML allows class actions to recover damages for the restoration of the environment as a whole, it is not clear whether it also allows class actions for individual damages. If the statute will be interpreted to allow class actions for individual damages, it is not clear about the binding effect of the judgment or the possibility of settlement. There is also no indication as to whether the EML adopts an opt-in or an opt-out system.

II. OBSTACLES TO RECOGNITION OF A U.S. CLASS ACTION JUDGMENT DERIVED FROM TRADITIONAL RULES

In addition to the obstacles discussed above, which are derived from the specific class action rules of each country, there are at least three other major obstacles to the recognition of U.S. class action judgments that are applicable to all Latin American countries. It is important to stress that there are other obstacles to recognition of a U.S. class action judgment and that the existence of only one obstacle is sufficient to frustrate recognition.

The first obstacle is that the U.S. class action notice delivered outside of the United States will invariably be deemed inadequate both according to U.S. class action law and the domestic laws of the specific Latin American country. The second obstacle is that the U.S. court in many cases will not be able to obtain personal jurisdiction over Latin American

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167. Ley No. 37 de Gestión Ambiental [Law of Environmental Management], de 30 de julio de 1999, R.O. 245, arts. 28, 29, 41, 42, 43 (Ecuador), *available at* http://www.ambiente.gob.ec/sites/default/files/archivos/leyes/gesion-ambiental.pdf.

168. *Id.*

169. *See* JAMES E. BERGER & CHARLENE C. SUN, RECENT DEVELOPMENTS: CHEVRON-ECUADOR DISPUTE 1–2 (Mar. 2011), *available at* http://www.paulhastings.com/assets/publications/1870.pdf; Lou Dematteis & Suzana Sawyer, *Boiling Oil: ChevronTexaco Faces Ecuador's Courts*, IN THESE TIMES (Dec. 2003), http://www.thirdworldtraveler.com/South_America/Boiling_Oil.html.

170. *See* Law of Environmental Management, de 30 de julio de 1999, R.O. 245 (Ecuador).

absent class members. The third, and more technical, obstacle is that formal service of process through rogatory letters is essential to perfect personal jurisdiction over foreign absent class members in Latin America.

These factors are examined in more detail below.[171]

A. Class Action Notice Would Be Inadequate

Although Brazil has had a sophisticated class action system for almost twenty years, its proceedings completely ignore absent class members. A Brazilian class action proceeding is conducted solely by the class representatives, usually by the office of the state or federal attorney general or by an association. Brazilian class action statutes offer no meaningful notice to absent class members.[172] The notice requirement is satisfied merely by a single bureaucratic publication in an official newspaper.[173] Brazil is a geographically vast and undeveloped country. Therefore, it would be impossible to create an adequate and effective notice device in such circumstances.[174]

Further, Brazil does not have an opt-out form of class action. The absence of a right to opt out is explained by the fact that class members do not *need* to opt out of the class in Brazil because their individual rights would never be bound by a class judgment or settlement. The opt-out device is only justified in a system in which the class judgment is binding on absent class members, regardless of whether the case's ultimate outcome is favorable or not to the class. Therefore, an opt-out system is incompatible with Brazil's system of res judicata *secundum eventum litis*. Where absent members will not be bound by an unfavorable outcome, they need not exclude from the class.[175]

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171. Although this article is focused on Latin American countries, the obstacles herein discussed are equally applicable to any other country.

172. *See* Gidi, *Class Actions in Brazil*, *supra* note 36, at 341; *see also* CARNEIRO, *supra* note 68, at 57–58, 220–22, 228, 236; José Marcelo Menezes Vigliar, *Alguns aspectos sobre a ineficácia do procedimento especial destinado aos interesses individuais homogêneos*, *in* A AÇÃO CIVIL PÚBLICA APÓS 20 ANOS 328–29 (Édis Milaré coord., 2005); DE ASSIS RODRIGUES, *supra* note 71, at 41–42, 138–39, 279, 302, 303, 312, 313; VENTURI, *supra* note 38, at 395–99.

173. *Id.*

174. Brazil has approximately 170 million inhabitants, *The World Fact Book: Brazil*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/br.html (last visited Apr. 22, 2012), unevenly spread over approximately 8.5 million square kilometers, *id.*, an area larger than the Contiguous United States (*i.e.*, excluding Alaska, Hawaii, and Puerto Rico).

175. *See* Gidi, *Class Actions in Brazil*, *supra* note 36, at 399; *see also supra* Part I.B. (Countries in Which a Class Action Judgment is Binding Only if Favorable to the Class).

Because the notion of having one's rights bound by a failure to "opt-out" is a foreign concept in Brazil, and in most Latin American countries other than Colombia, it would be fundamentally unfair and a denial of due process to bind absent class members who do not opt out of a class action conducted under the laws of a foreign country. This is even more evident when the absent class members have no contacts with the foreign country and thus no reason to expect being haled into a foreign court.

The same reality of class action notice is true in other Latin American countries, including Peru,[176] Panama,[177] and Colombia.[178] In each of these countries, notice is given in a bureaucratic manner in the official newspaper.[179] If it would be fundamentally unfair and a denial of due process to bind absent class members in countries that lack a tradition of effective class action notice; the effect is even more manifest in those countries with no established rules on class action notice at all. The problem is compounded in the many countries that do not have class actions for individual damages,[180] and in those countries that adopt an opt-in class action procedure.[181]

Even if, hypothetically, a country which does not have an opt-out class action model would be interested in recognizing a U.S. class action judgment, the problem remains as to how to convey adequate notice to people (class members) who know nothing about the concept of a class action or the notion of opting out of one. How can absent class members receive meaningful notice if they do not know and have no way of knowing what class actions are?[182] Apart from the difficulties of adequate no-

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176. *See* CÓD. PROC. CIV., Law No. 10 de 1 de agosto de 1993, art. 82.5 (Peru) (providing for class notice in the Official Reporter).

177. Ley 45, de 31 de Octubre de 2007, art. 129 (Pan.) (providing for class notice in a newspaper of national circulation).

178. *See* L. 472, agosto 6, 1998, D.O. 43.357, art. 53 (Colom.); *see also* MUÑOZ, *supra* note 148, at 335–37 (stating that in Colombia the class action notice is a fiction).

179. Costa Rica does not have a class action notice provision, but if it will have one, it will probably be in the Official Reporter. *See* Proyecto de Codigo General, Expediente No. 15979, de 11 de agosto de 2005, art. 125 (Costa Rica) (a bill proposing class action notice in the Official Reporter).

180. *See supra* Part I.A. (Countries that Do Not Have Class Actions for Damages).

181. *See supra* Part I.C. (Countries that Adopt an Opt-In Class Action).

182. *See* Bassett, *supra* note 9, at 65–66.

> As unintelligible as a legal notice may seem to a U.S. citizen, a foreign citizen is likely to find it even more so . . . . [t]hus, potential language issues, unfamiliarity with the U.S. legal system, and the natural human tendency to ignore that which we do not understand, all combine to render notice potentially ineffectual for foreign claimants.

tice, how can absent class members have a meaningful opportunity to opt out if they have no idea what an opt-out class proceeding is?[183] How can an absent class member in a foreign country have a meaningful opportunity to be heard, to participate in the proceeding, and to control the adequacy of the representative if the class proceeding is being conducted in a foreign land, using a foreign language with complex legal jargon?[184]

Latin Americans are simply not accustomed to receiving official messages from the judiciary informing them that they are part of a judicial proceeding, let alone to having an obligation to actively exclude themselves from it in order not to be bound by the result. Since the whole idea is simply alien to Latin Americans, any notice stating that they are part of an unknown kind of judicial proceeding in the United States would likely be read as ludicrous.

Finally, there is the issue of the content of the notice itself. How would one draft a notice to effectively communicate the idea that the claim of a foreigner, with no contact to the United States, is the object of litigation in the courts of that country? The notice could not merely be a translation of the English version, but would have to be written from scratch, in a form accessible to the Latin American lay public and devoid of legal jargon. In addition, the drafter might need to be sensitive to the cultural and legal peculiarities of each Latin American country. This is a very challenging hurdle.[185] There is a strong probability that absent class members

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Id.; Buschkin, *supra* note 9, at 1582–83 (discussing the unintelligible character of a U.S. class action notice to a foreigner); Bermann, *supra* note 2, at 96.

183. *See* Bassett, *supra* note 9, at 74.

> Without careful and clear language, the non-U.S. recipient is unlikely to understand its significance, and therefore is more likely merely to discard it, thus frustrating both purposes of the opt-out notice. If the notice is not understood, an absent class member will not be able to opt out from the existing class litigation, thereby remaining in the class, although not necessarily by choice, which foils the notion of implied consent to the court's jurisdiction.

Id.

184. *See id.* at 67.

> [E]ven for those recipients who are able to decipher the class action notice, providing a foreign claimant with notice of the pending class litigation does not immediately translate into an opportunity to be heard. Retaining counsel in the location where the class litigation is proceeding can be both difficult and expensive for a U.S. citizen living within the country, but handling such a matter from outside the U.S. is exponentially more so.

Id.

185. Debra Lyn Bassett suggests adding a cover letter to the notice.

will simply not understand the legal implications of the class action notice and what it requires of them. Therefore, the class action notice will likely be deemed inadequate, both under the standards of the specific Latin American country and the standards of U.S. law.[186]

In light of the inherent inadequacy of class action notice, it would be a denial of due process for a U.S. court to require a foreign class member residing in Latin America to take affirmative steps to "opt out" of an American class proceeding on threat of forfeiture of the foreigner's right to pursue individual actions. This would not only violate the constitutional guarantee of due process of law of the Latin American constitutions,[187] but also the U.S. Constitution.

B. A U.S. Court Cannot Validly Obtain Personal Jurisdiction over Foreign Absent Plaintiff Class Members[188]

In order to recognize and enforce a foreign judgment, Latin American nations generally demand that the rendering court have jurisdiction over the parties.[189] Therefore, no Latin American country would recognize a

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> To facilitate the recipient's comprehension, [class action] notice . . . . should include a cover letter, in the language of the recipient's home country, addressed to the specific individual recipient, explaining the purpose of the notice in a straightforward manner without legal jargon.

Bassett, *supra* note 9, at 90. However, it seems that it would be better to incorporate the contents of the cover letter in the notice itself. As a matter of fact, the whole notice must be written in the target language, not mechanically translated from English.

186. *See* FED. R. CIV. P. 23(c)(2)(b) ("the court must direct to class members the best notice that is practicable under the circumstances").

187. *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, sect. LIV (Braz.) ("No person shall be deprived of his or her property without due process of law.").

188. Personal jurisdiction over foreign class members is not the only problem faced in an international class action. Other important issues are subject matter jurisdiction, the extraterritorial application of U.S. law (prescriptive or legislative jurisdiction), forum non conveniens, etc. *See generally* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (discussing subject matter jurisdiction); *In re* Parmalat Sec. Litig., 497 F. Supp. 2d 526 (S.D.N.Y. 2007) (discussing extraterritorial application of U.S. law); Buxbaum, *supra* note 2 (discussing subject matter jurisdiction); Choi & Silberman, *supra* note 33 (discussing extraterritorial application of U.S. law); *In re* Royal Dutch/Shell Transp. Sec. Litig., 522 F. Supp. 2d 712, 724 (D.N.J. 2007) (holding that the court did not have subject matter jurisdiction over claims by non-U.S. class members); Jasilli, *supra* note 6, at 114.

189. *See* CÓD. PROC. CIV., Law No. 295 de 24 de julio de 1984, art. 2104.2 (Peru), (providing that the foreign court must have jurisdiction according to its own private international law and to general principles of international jurisdiction.); Ley No. 36.511 de Derecho Internacional Privado [Private International Law Statute], de 6 de agosto de 1998, art. 53.4 (Venez.), *available at* http://www.analitica.com/bitblio/congreso_venezuela/private.asp (providing that the

U.S. judgment against a foreigner who lacked significant contacts with the United States and was not properly subject to jurisdiction there.

Typically the focus of personal jurisdiction revolves over a defendant because the judgment will generally be enforced against the defendant. Moreover, by taking the active step of bringing a lawsuit, the plaintiff consents to jurisdiction in the foreign court, thereby rendering moot the issue of personal jurisdiction over the plaintiff. Therefore, in traditional individual litigation, it is unnecessary to discuss the court's personal jurisdiction over a plaintiff.

In the class action setting, however, in addition to personal jurisdiction over the defendant, the court must also consider personal jurisdiction over the absent class members. After all, the absent plaintiffs' rights are being affected in much the same way as the defendant's.[190] And contrary to a plaintiff in an individual lawsuit, the issue of personal jurisdiction over absent class members was not rendered moot by any affirmative step of subjecting voluntarily to the court's jurisdiction.[191]

Therefore, a foreign class action judgment that is issued without personal jurisdiction over absent class members is void and would not be recognized in Latin America. The fact is that there are simply no accepted standards under which United States courts would have personal

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foreign court must have jurisdiction according to Venezuelan law); Regimento Interno de Supremo Tribunal Federal [Internal Rules of the Supreme Court] art. 217 (2008) (Braz.) (providing that a prerequisite of enforcement of foreign judgments is that the foreign court have jurisdiction over the party). This rule is well-settled in the Brazilian legal system. *See* Lei Introdução ao Código Civil, Decreto-Lei No. 4.657, de 4 de Setembro de 1942, D.O.U. de 09.09.1942, art. 15 (Braz.) (same); *see also* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, BGBL.I 3202, *as amended*, art. 328.1.1 (Ger.) (German courts would not recognize a foreign judgment if the foreign court did not have jurisdiction according to the German law).

190. Rolf Sturner compares a class action judgment that is unfavorable to the class to a negative declaratory judgment denying liability. *See* Sturner, *supra* note 3, at 115.

191. *See* Romy, *supra* note 1, at 793–94 (stating that under Swiss law the rules of jurisdiction over defendants should be applied to absent class members by analogy). *But see* Harris, *supra* note 5, at 617, 618, 625, 630, 635, 650 (It.) (placing a disproportionate importance throughout the article in the fact that the absent person is the plaintiff not the defendant: "[w]e shall see that the English rules on recognition and enforcement of foreign judgments, as stated in the authorities and leading works, are concerned with the position of the defendant and not that of the claimant."). *Id.* at 625. ("the requirements of jurisdictional competence are all focused on the position of the defendant. There is nothing in English law to suggest that a foreign court's jurisdictional competence depends upon the position of the claimant to the action."). *Id*. at 650 (Orthodox principles of English law are concerned with jurisdictional competence over a defendant and not over a claimant.).

jurisdiction over foreign absent class members domiciled outside the United States who have had no contacts with the United States.[192]

Assuming the foreign class member received actual adequate notice, the issue then becomes whether, by not affirmatively opting out of the U.S. class action, a foreign class member consented to the jurisdiction of U.S. courts.[193] In the Author's opinion, because foreign absent plaintiff class members are not taking the active step of bringing a lawsuit against the defendant but rather are being represented in court, absent class members cannot be said to have consented to the jurisdiction of a U.S. court.

The U.S. Supreme Court in *Phillips Petroleum Co. v. Shutts* held that a state court in the United States may properly assert jurisdiction over out-of-state absent class members that lack minimum contacts with the state.[194] However, this solution is not universal. In some, but not all, Canadian provinces, class members who are not residents of that province (known as "extraprovincial class members"), must take the affirmative step of opting in to a class action that purports to have nationwide ef-

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192. *See* Sturner, *supra* note 3, at 115 ("It is unlikely that German group members will always have sufficient contacts with U.S. to meet the requirement . . . . to support U.S. jurisdiction under German law.").

193. Andrea Pinna has correctly distinguished the issue of jurisdiction over foreign absent class members in an opt-out class action from the issue of non-conformity of the opt-out mechanism with the public policy of the foreign country. These are two completely different issues.

> Although this legal issue [jurisdiction over foreign absent class members] is often confused with the matter of conformity of the opt-out mechanism with public policy, it must be distinguished intellectually because the two issues do not converge at the same level of scrutiny of the foreign judgment. However, in practice, the answer to the question of the validity of consent to US jurisdiction by absent class members can depend strongly on the analysis of the actual opt out mechanism. Indeed, when it is considered that the right for absent class members to opt out from a class action lawsuit grants them sufficient protection and is therefore not contrary to international public policy, it is possible to conclude that the absence of opting out is also a valid consent of the absent plaintiff to the jurisdiction of US courts.

Pinna, *supra* note 5, at 58.

194. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (holding that a court may exercise jurisdiction over damage claims of absent class members without minimum contacts with the rendering state, as long as the court provides "minimal procedural due process protection," such as adequate notice, adequate representation, an opportunity to be heard, and an opportunity to opt out).

fect.[195] This provincial rule may not be very effective for a nationwide class action within a country,[196] but it may prove to be an effective option in the international context.[197]

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195. *See* British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50, art. 16(2) (Can.) (providing that "a person who is not a resident of British Columbia may . . . . opt in to [the] class proceeding").

196. The Saskatchewan Class Actions Act of 2002 and the Alberta Class Proceedings Act of 2003 adopted a similar rule based on the British Columbia Class Proceedings Act, but they were repealed in 2007 and 2010 respectively. *See* ALBERTA LAW REFORM INST., *supra* note 135, at 92–100 (proposing an opt-in class action for non-residents). *Compare* Peter W. Hogg & S. Gordon McKee, *Are National Class Actions Constitutional?*, 26 NAT'L J. CONST. L. 279 (2010), *with* Janet Walker, *Are National Class Actions Constitutional?—A Reply to Hogg and Mckee*, 48 OSGOODE HALL L.J. 95 (2010).

197. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 997 n.48 (2d Cir. 1975) (recognizing that the affidavits presented by party-appointed experts had stated that if that class action was certified in opt-in form, it would be "far more likely, although still not certain," that foreign jurisdictions would recognize the class action judgment as binding to the class members who decided to opt in.

> Potential language barriers, unfamiliar legal procedures, and potential intimidation in dealing with the courts and lawyers of another country all tend to increase the risks of fear, confusion, and misunderstandings by foreign claimants. Requiring foreign claimants to affirmatively opt in, rather than absurdly construing their silence as an agreement to be bound by the class litigation, will ensure that their consent is genuine.

Bassett, *supra* note 9, at 87–89; *id.* at 88 ("[T]he opt-in procedure is a superior device from a due process perspective."); *id.* at 89 ("This provides superior due process protections, and avoids the loss of individual rights under circumstances where neither minimum contacts nor genuine consent exist."); Monestier, *supra* note 6, at 1–2 (arguing, after a convincing criticism of the current practice, that it is impossible to determine *ex ante* whether foreign courts would recognize U.S. class action judgments or settlements and proposing the adoption of the opt-in device for foreign class members). According to Monestier,

> [A]n opt-in regime presents a more principled way of determining foreign claimants' class membership in a U.S. class action because an opt-in class action: eliminates the res judicata problem altogether, allows all foreign claimants to participate in U.S. litigation if they so choose, provides additional protections for absent foreign claimants, respects international comity; and sufficiently deters defendant misconduct.

Id. at 61; *see also* IBA LEGAL PRACTICE, GUIDELINES, *supra* note 8, at 5, 22 (stating that judgments against class members who opted into a class action would be recognized by reference to traditional rules of recognition and stating that "a person who opts in has accepted the jurisdiction of the court and any judgment in the action should be binding on him or her subject to generally recognised exceptions"). *But see* Walker, *A View from Across the Border*, *supra* note 9, at 769–71 (stating that an opt-in solution for non-residents would not solve the problem of fairness to foreign class members); Kern v. Siemens Corp., 393 F.3d 120 (2d Cir. 2004) (reversing a first instance court who certified

In many ways, the issues discussed in this subchapter relating to personal jurisdiction directly mirror the issues faced by the U.S. Supreme Court in *Shutts* and in the Canadian nationwide opt-in provisions. However, the personal jurisdiction over foreign absent plaintiff class members involve more complex considerations than in a wholly domestic setting.

First, the rule of jurisdiction over out-of-state class members established in *Shutts* is not necessarily applicable as a rule of jurisdiction over foreign class members.[198] The issues of jurisdiction over a foreign person involve different considerations that are not present in the analysis of jurisdiction over an out-of-state, or extraprovincial, class member. Therefore, it cannot be said that *Shutts* authorizes jurisdiction over foreign class members.[199]

Second, the focus of this Article is not whether, according to U.S. law, U.S. courts have jurisdiction over foreign absent class members. For the purposes of this Article, it is irrelevant where U.S. courts consider the limits of their international jurisdiction. The objective of this Article is not to determine whether the U.S. court may certify a class action that includes foreign class members. Since the focus of this Article is to determine whether a U.S. class action judgment can be enforced abroad, the laws of the foreign countries are determinative, not the determination of the U.S. Supreme Court in *Shutts*. The laws of the foreign countries

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an opt-in class action for foreign class members. According to the Second Circuit an opt-in class action is prohibited under Rule 23). *See also* Buschkin, *supra* note 9, at 1577 (cautioning against adopting the opt-in class action as a default rule for foreign claimants, but recognizing that a certified opt-in class action is better than a dismissed opt-out class action:

> if the judge must choose between denying all foreign claimants access to the class or certifying foreign claimants under an opt-in class in order to solve potential jurisdictional concerns, the opt-in class is the more desirable of these options because the opt-in class gives foreign claimants to opportunity to obtain redress.

Strong, *supra* note 1, at 96 (stating that opt-in arbitrations would be easier to be recognized in some civil-law countries).

198. *See generally* Bassett, *supra* note 9, at 61 ("a transnational class raises any number of specialized due process concerns, as contrasted with a class comprised solely of U.S. citizens. However, despite facing a class with foreign claimants, *Shutts* completely ignored the impact of their presence."); *see also id.* at 79 ("If the class action includes foreign claimants, additional due process protections may be necessary as a means of ensuring that the assertion.").

199. *But see* Pinna, *supra* note 5, at 58–59 (stating that *Shutts* is also applied in the context of foreign class members and concluding that, "[t]herefore, according to US law, a US court has jurisdiction over foreign absent class members since they have an actual right to opt out.").

would not accept such broad assertion of personal jurisdiction by U.S. courts.[200]

As Isabelle Romy observes, an unrestricted refusal to recognize U.S. class action judgments could lead to unfair results.[201] Taken to its extreme, even U.S. class members dissatisfied with a class action judgment, either because the class lost or because the class recovery was insufficient, could escape U.S. res judicata doctrine by bringing individual suits in foreign countries against the class defendant.[202] Romy proposes a compromise whereby foreign absent class members do not consent to U.S. jurisdiction by merely not exercising the right to opt out.[203] Because foreign class members are not parties to the class proceedings, Romy submits that they are not bound by the U.S. class judgment and may bring a lawsuit against the defendant in Switzerland.[204] However, foreign absent class members who *are* subject to jurisdiction in the United States, for example because they are domiciled in the United States, are considered party to the class proceeding and therefore are bound by it.[205]

However ingenious the Romy compromise may be, it remains to be seen whether civil law countries, particularly those without a class action device or those that adopted an opt-in class action, would recognize any opt-out class judgment issued by a foreign court, even one involving a purely American class. Romy's proposal seems to conflate two different and independent obstacles to the recognition of opt-out class judgments. While her compromise removes the obstacle of the lack of jurisdiction over foreign absent class members, it does nothing to reduce the concerns that an opt-out class procedure may be against the public policy of the recognizing country.[206] The author's compromise is consistent, however, with her own belief that opt-out class actions do not in principle violate the Swiss public order when all the members of the class are identified.[207]

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200. *See, e.g.*, Sturner, *supra* note 3, at 114 (discussing a case in which the State District Court of Stuttgart refused recognition of a U.S. class action judgment because the U.S. court did not have personal jurisdiction over foreign absent class members, according to German law.).

201. *See* Romy, *supra* note 1, at 793–94.

202. *Id.*

203. *Id.*

204. *Id.*

205. *See id.*

206. *See supra* Part I.A. (Countries that Do Not Have Class Actions for Damages) & Part I.C. (Countries that Adopt an Opt-In Class Action).

207. *See* Romy, *supra* note 1, at 796–99 (stating that an opt-out class action judgment would violate Swiss public order whenever the class includes people who are not identified).

However well-intentioned the certification of a worldwide class action, there is the lingering concern that the United States views itself as a "Courthouse for the World" to right the wrongs committed all over the planet. Enforcing U.S. class actions worldwide may be thought to encourage "arrogant and imperialistic" American behavior[208] which may even be viewed as an "intrusion into the internal social policies and cultures of other sovereign states."[209]

Although this view of American egotism is not shared by all,[210] the foregoing suggests that the most important exercise may not be to deter-

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208. *See* Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 37 TORT & INS. L.J. 999, 1018 (2002) ("The political impact of enhancing the power of American jurisprudence in this manner is nothing less than imperialistic."); Monestier, *supra* note 6, at 74 ("It is arrogant and imperialistic for U.S. courts to attempt to bind foreign claimants to a result reached in an action thousands of miles away that they had no knowledge of or control over."); *see also* Peta Spender & Michael Tarlowski, Case Note, Morrison v. National Australia Bank Ltd.: *Adventures on the Barbary Coast:* Morrison *and Enforcement in a Globalised Securities Market*, 35 MELB. U. L. REV. 280, 291–92 (2011) (discussing the extraterritorial jurisdiction of U.S. courts in global securities class actions and the perceptions of the United States as security police or legal and economic imperialist). *But see* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 175 (2d Cir. 2008) ("[W]e are an American court, not the world's court, and we cannot and should not expend our resources resolving cases that do not affect Americans or involve fraud emanating from America.").

209. *See* Faulk, *supra* note 208, at 1000.

> The use of U.S. [class actions] . . . to resolve claims of nonresident foreign litigants represents a major intrusion into the internal social policies and cultures of other sovereign states. Although 'globalism' may be useful as a commercial cliché, its intrusion into jurisprudence is disturbing, especially when procedural devices that are not yet recognized internationally are used to resolve claims arising from conduct that occurs beyond the forum state's borders.

Id.

210. *See* Pinna, *supra* note 5, at 61 (concluding that, "because [European consumers] would not be able to benefit from the access to justice granted by US courts even against a non-[European] defendant. . . . [F]rom a policy perspective, refusing to recognize a US class action judgment is not a good solution for European countries."); Seth A. Northrop, Note, *Exporting Environmental Justice by Importing Claimants: The Suitability and Feasibility of the Globalization of Mass Tort Class Actions*, 18 GEO. INT'L ENVTL. L. REV. 779, 781, 803 (2006) (considering U.S. class action "a vehicle for otherwise voiceless plaintiffs to resist the exploitation at the hands of U.S.-based [multinational corporations]" and discussing the risk of impunity of U.S. corporations for their actions abroad); Buschkin, *supra* note 9, at 1588–93 (discussing the behavior of multinationals operating in a global economy that know that they are subject to class actions for their wrongdoing in the United States, but "a large portion of the globe is easy prey to their lucrative, but illegal, selling practices" and discussing the impact of that behavior in the U.S. market.) According to the author,

mine whether foreign courts might recognize and enforce U.S. class action judgments and settlements against the interests of foreign class members. Rather, perhaps the most revealing analysis may be to determine whether U.S. courts are willing to recognize and enforce foreign class action judgments and settlements (or the generic collective redress alternatives indigenous to "exotic" legal systems) against the interests of American citizens that may have been included as foreign absent class members in these lawsuits.[211] Indeed, American courts would look rather foolish if, after an established case law of consistent certification of foreign classes based primarily on the expectation that foreign courts would recognize U.S. class action judgments, American courts realize that they do not have the stomach to recognize foreign class action judgments against American defendants or American class members.[212]

Two recent examples are particularly compelling.[213]

> [i]f foreign claimants are excluded from securities classes, everyone loses. Foreign claimants suffer because they lose their investments, U.S. corporations suffer because it becomes more difficult to raise capital, and U.S. citizens suffer as foreign investors pull their money out of U.S. financial markets and the economy declines as a result.

Id. at 1593.

211. *See* Buxbaum, *supra* note 2, at 61.

> Until the United States is ready to contemplate a system in which even the claims of U.S. investors, based on U.S. trading, are subject to the laws of another country, it is inappropriate to solve the problem of multiple proceedings by suggesting that they all take place in U.S. courts.

Id.

> [T]he day will soon come when American courts will have to decide whether to give effect to class or other aggregate judgments rendered by foreign courts purporting to bind U.S. class members. Unless American courts are fully prepared to enforce such foreign judgments, they would be wise to exhibit some restraint in assuming jurisdiction over foreign claimants in U.S. class actions.

Monestier, *supra* note 6, at 75 n.260.

212. Naturally, this criticism is limited to the idea that U.S. courts must condition the certification of a foreign class to the expectation that foreign courts will recognize the U.S. class action judgment.

213. The class action case in Ecuador brought by indigenous people against Texaco (later Chevron) that led to an eighteen billion dollar verdict against Chevron is beyond the scope of this Article, because the issue there relates not to the binding nature of a class action judgment against absent class members, but against the class defendant. Suffice it to remind that the class action was originally filed in the United States and dismissed on a *forum non conveniens* motion filed by the defendant, who demonstrated confidence in the Ecuadorian judicial system and willingness to try the case there. This is commonly referred to as "forum shopper's remorse." *See* Aguinda v. Texaco, Inc., 142 F.

In January 2012, the Amsterdam Court of Appeals approved a global class action settlement.[214] The class included all non-U.S. class members that had been previously excluded from the corresponding U.S. securities class action titled *Morrison v. Nat'l Austl. Bank Ltd.*[215] The class action settlement was approved despite the facts that the cause of action had taken place outside the Netherlands,[216] the defendant was a Swiss company,[217] and only a small percentage of the class members were from the Netherlands.[218] The Amsterdam court declared that the settlement was binding on all class members who did not opt out.[219] This is more worrisome for European than U.S. class members, because internal rules

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Supp. 2d 534, 545–46 (S.D.N.Y. 2001) ("[T]he Court is satisfied on the basis of the record before it that the courts of Ecuador can exercise with respect to the parties and claims here presented that modicum of independence and impartiality necessary to an adequate alternative forum."); Sequihua v. Texaco, Inc. 847 F. Supp. 61, 64 (S.D. Tex. 1994) ("[i]t is clear from the affidavits of two former Ecuadorian Supreme Court justices that an adequate forum is available in Ecuador . . . . Ecuador provides private remedies for tortious conduct and maintains an independent judicial system with adequate procedural safeguards."). *But see* Christopher Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV 1444 (2011).

> [U]nder existing law these seemingly inconsistent arguments are not necessarily inconsistent at all. Due to differences between the forum non conveniens doctrine and the judgment enforcement doctrine, it is possible to argue consistently that a foreign court is available, adequate, and more appropriate for dismissal purposes but suffers from inadequacies that preclude enforcement.

Id. The authors also propose suggestions to avoid the access-to-justice gap created with this dubious strategy. For more on this topic see Lucien J. Dhooge, Aguinda v. Chevrontexaco*: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 19 J. TRANSNAT'L L. & POL'Y 1 (2009–2010); Judith Kimerling, *Transnational Operations, Bi-National Injustice: Chevrontexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445 (2006–2007). Disclaimer: the author of this Article has worked as a consultant in the litigation.

214. *See* STICHTING CONVERIUM SECURITIES COMPENSATION FOUND., http://www.converiumsettlement.com (last visited Apr. 25, 2012) [hereinafter CONVERIUM SETTLEMENT].

215. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010); CONVERIUM SETTLEMENT, *supra* note 214.

216. *See* CONVERIUM SETTLEMENT, *supra* note 214.

217. *Id.*

218. *Id.*

219. *Id.*

within the European Union make recognition of judgments difficult to evade.[220]

Amsterdam is aggressively vying to establish itself as a hub for worldwide class action settlements.[221] This is a particularly serious problem for European class members because of the ease with which European judgments are enforced throughout the European Union. Considering that the Netherlands has a settlement class action device but not the possibility of class-action litigation,[222] it is more probable that the country will become a "judicial hellhole" in which class members' claims will be sucked into.[223]

In 2011, a Canadian court certified a class action including absent U.S. class members.[224] This may suggest a potential problem because the threshold for bringing a class action in Canada is lower than the increasingly stringent U.S. restrictions on class certification. For example, Canadian class action law correctly did not implement the number one killer of class actions in the United States: the predominance requirement. Moreover, its requirement that the class action must be a "preferable" procedure is less demanding than the number two killer of class actions

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220. *See* Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, EC, Dec. 21, 2007, 2007 O.J. (L 339); Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) (EC).

221. Other legal markets will gladly compete with Amsterdam for a share of the international legal business that the United States may have discarded after *Morrison*. *See* Spender & Tarlowski, *supra* note 208, at 280, 314 (discussing *Morrison* from an international perspective and predicting that Australia could attract transnational class litigation in the aftermath of Morrison: "It is very likely that *Morrison* will have a centrifugal effect on transnational securities litigation, and securities class actions may flow to jurisdictions that have adopted the opt-out procedure. One consequence of this might be that more securities class actions will be commenced in Australia.").

222. *See supra* notes 113–19 and accompanying text (describing and critiquing the Dutch Collective Settlement of Mass Damage Act).

223. *See* Nagareda, *supra* note 2, at 41 ("The remaining question is whether Amsterdam ultimately will emerge as the trans-Atlantic successor to anomalous state courts within the United States—as a kind of procedural 'red-light district' for aggregate dealmaking, like its namesake for other transactions pursued by consenting parties.").

224. *Compare* Silver v. Imax Corp., 2011 ONSC 1035 (Can.) (a Canadian class action including absent U.S. claimants), *with* McCann v. CP Ships Ltd., [2009] O.J. No. 5182 (Ont. Can. S.C.J.) (QL) (excluding non-Canadian class members in the class, even those that had purchased their shares in Canada) *and* McKenna v. Gammon Gold Inc., 2010 ONSC 1591, ¶¶ 96–110, 115–18 (Can.) (same). *See generally* Tanya J. Monestier, *Is Canada the New 'Shangri-La' of Global Securities Class Actions?*, 32 NW J. INT'L LAW & BUS. (forthcoming 2012) ("*Imax* is truly the first case of its kind in this respect—never before has a global class of claimants on such a large scale been certified in a Canadian court.").

in the United States: the requirement of "superiority."[225] Therefore, American plaintiff class action attorneys may try to bypass the more stringent Rule 23 prerequisites established by a conservative federal judiciary by simply crossing the border and filing the same class action a few hundred miles to the north. After that, they would only need to bring the judgment back south and enforce it in the same federal court that had denied class certification months before.[226]

C. Formal Notice through Rogatory Letters is Essential

Finally, even if it were possible for a U.S. court to acquire personal jurisdiction over Latin American nationals with no contacts with the United States,[227] and even if it were possible to provide adequate notice

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225. *See* Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269, 272–73 (2001) (stating that "[i]n certain respects the Canadian legislation is more liberal in facilitating class actions than its American counterpart" and that "[t]he Canadian criteria for certification of a proceeding as a class action are relatively undemanding.") (citations omitted); BRANCH, *supra* note 135, at 4.870 (stating that the "preferable" standard is a lower threshold for certification than "superiority"); DEFENDING CLASS ACTIONS IN CANADA, *supra* note 135, at 13, 14, 30–32, 116, 157, 158, 163, 177 (stating that certification in Canadian class actions is a simpler and less onerous process than in the United States and that the requirements that correspond to numerosity, typicality, and predominance are "generally less burdensome for plaintiffs." The author also states that certain claims that might not satisfy the typicality and predominance requirements of U.S. class action law may satisfy the Canadian class action requirements. The author also cites class actions that have been certified "despite a finding that individual issues predominated over common issues." Even in Quebec, the only Canadian province that adopted the predominance requirement, such requirement is less restrictive than in the United States.). It is symptomatic of the Canadian approach to class actions that the Ontario Law Reform Commission carefully considered and expressly rejected the predominance requirement. *See* ONT. LAW REFORM COMM'N, *supra* note 132, at 344–47. The Report states that the predominance requirement of U.S. FED. R. CIV. P. 23

> has served to prevent the successful assertion of many class action in various substantive law areas . . . . notwithstanding the arguments of commentators and some courts that such actions are, indeed, appropriate for class treatment . . . . Accordingly, we believe that the commonality threshold test for class actions should not be too onerous.

Id.; *see also* Gidi, *The Class Action Code*, *supra* note 22, at 39–40 (not adopting the predominance prerequisite in article 3 of the code).

226. *See* Gidi, *Issue Preclusion*, *supra* note 55, at 1028–56 (discussing whether an order denying class certification has issue preclusive effect in other courts).

227. *See supra* Part II.B. (A U.S. Court Cannot Validly Obtain Personal Jurisdiction over Foreign Absent Plaintiff Class Members) (arguing that U.S. courts cannot acquire personal jurisdiction over Latin American nationals with no contact with the United States).

to Latin American nationals,[228] most Latin American countries would still refuse to recognize and enforce U.S. class action judgments and settlements.

The final obstacle lies in the notice to class members. Similarl to what was discussed above regarding personal jurisdiction,[229] the rules of service of process are usually addressed from the point of view of the defendant. However, in the case of absent class members, it is necessary to notify them of the class action proceeding and of their right to opt out or to participate in the proceeding.[230] Whether a simple notice is sufficient or whether a formal service of process is necessary, absent class members located outside the United States must be informed through internationally acceptable means.

Most Latin American countries will not accept as adequate notice to their domiciliaries anything short of service by rogatory letter as a prerequisite to recognizing or enforcing a foreign judgment.[231] A simple notice, as is required under Rule 23,[232] is insufficient, even if it could be legally adequate. It is not that these countries do not know the concept of notice by publication or by mail in domestic litigation. But the requirements of notice in international litigation are a completely different matter.

CONCLUSION

A judgment or court-approved settlement in a U.S. class action for damages would not be recognized or enforced in Latin American countries. The reasons have to do not only with the peculiarities of the class action device in each Latin American country, but also with adequate

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228. *See supra* Part II.A. (Class Action Notice Would Be Inadequate) (arguing that class action notice would not be adequate).

229. *See supra* Part II.B. (A U.S. Court Cannot Validly Obtain Personal Jurisdiction over Foreign Absent Plaintiff Class Members).

230. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985); *see supra* note 196.

231. See FED. R. CIV. P. 4(f) and corresponding state court rules, for example, MASS. R. CIV. P. 4(e), MINN. R. CIV. P. 4.04. *See also* Inter-American Convention on Letters Rogatory, arts. 4–13, Jan. 30, 1975, O.A.S.T.S. No. 43, 1483 U.N.T.S. 288; Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters arts. 5, 8–11, 15–16, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969); Sturner, *supra* note 3, at 111–13 (stating that Germany would require individual service of process in "strict compliance with the provisions of the Hague Service Convention" and that notice by publication would probably not be allowed).

232. *See* FED. R. CIV. P. 23(c)(2).

notice, personal jurisdiction, and the requirement of international notice by rogatory letter.

One of the many reasons why so many transnational class actions are brought in the United States is because there is a worldwide dearth of entrepreneurial plaintiff class action attorneys.[233] However, with the rapid proliferation of the class action device in Latin America, Europe, and Asia, litigants will soon have to face the enforceability, in the United States, of foreign class action judgments or settlements. This Article posits that American courts, American defendants, American class members, and American entrepreneurial plaintiff class action attorneys will readily come to the conclusion that foreign courts have no business deciding matters that are of the exclusive interest of American class members.

233. A few other reasons are the existence of discovery, contingency fees, punitive damages, and the opt-out class action device itself in the U.S. legal system. For a broad discussion of Comparative Civil Procedure, see UGO A. MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW 489–563, 684–706, 707–828, 855–62 (2009). *See also* JAMES R. MAXEINER, FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE (2011) (comparing civil law and American civil procedure from a critical perspective).

APPENDIX[234]

Argentina. National Constitution[235]

Artículo 43. Toda persona puede interponer acción expedita y rápida de amparo, siempre que no exista otro medio judicial más idóneo, contra todo acto u omisión de autoridades públicas o de particulares, que en forma actual o inminente lesione, restrinja, altere o amenace, con arbitrariedad o ilegalidad manifiesta, derechos y garantías reconocidos por esta Constitución, un tratado o una ley. En el caso, el juez podrá declarar la inconstitucionalidad de la norma en que se funde el acto u omisión lesiva.

Podrán interponer esta acción contra cualquier forma de discriminación y en lo relativo a los derechos que protegen al ambiente, a la competencia, al usuario y al consumidor, así como a los derechos de incidencia colectiva en general, el afectado, el defensor del pueblo y las asociaciones que propendan a esos fines, registradas conforme a la ley, la que determinará los requisitos y formas de su organización.

Argentina. Law 24240 of Consumer Protection (amended 2008)[236]

Artículo 54. . . . La sentencia que haga lugar a la pretensión hará cosa juzgada para el demandado y para todos los consumidores o usuarios que se encuentren en similares condiciones, excepto de aquellos que manifiesten su voluntad en contrario previo a la sentencia en los términos y condiciones que el magistrado disponga.

Argentina. Law 25675 General Environmental Law[237]

Artículo 33. Los dictámenes emitidos por organismos del Estado sobre daño ambiental, agregados al proceso, tendrán la fuerza probatoria de los informes periciales, sin perjuicio del derecho de las partes a su impugnación. La sentencia hará cosa juzgada y tendrá efecto erga omnes, a excepción de que la acción sea rechazada, aunque sea parcialmente, por cuestiones probatorias.

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234. Some statutes below have been heavily edited to include only the excerpts that are relevant to the arguments developed in this argument about the enforceability of a U.S. class action judgment or court-approved class action settlement.

235. Art. 43, CONST. NAC. (Arg.).

236. Law No. 26361, Apr. 3, 2008, [3] B.O. 1378, *amending* Law No. 24240, art. 54 (Arg.).

237. Ley General del Ambiente, Law No. 25675, Nov. 6, 2002, B.O. 28–11–2002, art. 33 (Buenos Aires, Arg.).

Argentina. Conclusions of the Mendoza Conference (2005)[238]

9. Ha de regularse la extensión subjetiva de los efectos de la cosa juzgada erga omnes, excepto cuando la pretensión fuera rechazada por insuficiencia de pruebas, en cuyo caso la cosa juzgada será meramente formal, pudiendo cualquier legitimado intentar otra acción, con idéntico fundamento, valiéndose de nueva prueba.

Asimismo, en la hipótesis de rechazo basado en las pruebas producidas, cualquier legitimado podrá intentar otra acción, con idéntico fundamento, cuando sugiere nueva prueba sobreviviente que no hubiera podido ser producida en el proceso. El reexamen por cuestiones probatorias no podrá fundarse en nuevas tecnologías, ni en supuestos que habiliten la revisión de la cosa juzgada.

Brazil. Law 8078, Consumer Code (enacted 1990)[239]

Artigo 103. Nas ações coletivas de que trata este código, a sentença fará coisa julgada:

I - erga omnes, exceto se o pedido for julgado improcedente por insuficiência de provas, hipótese em que qualquer legitimado poderá intentar outra ação, com idêntico fundamento valendo-se de nova prova, na hipótese do inciso I do parágrafo único do art. 81;

II - ultra partes, mas limitadamente ao grupo, categoria ou classe, salvo improcedência por insuficiência de provas, nos termos do inciso anterior, quando se tratar da hipótese prevista no inciso II do parágrafo único do art. 81;

III - erga omnes, apenas no caso de procedência do pedido, para beneficiar todas as vítimas e seus sucessores, na hipótese do inciso III do parágrafo único do art. 81.[240]

§ 1° Os efeitos da coisa julgada previstos nos incisos I e II não prejudicarão interesses e direitos individuais dos integrantes da coletividade, do grupo, categoria ou classe.

§ 2° Na hipótese prevista no inciso III, em caso de improcedência do pedido, os interessados que não tiverem intervindo no processo como litisconsortes poderão propor ação de indenização a título individual.

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238. XXIII Congreso National de Derecho Procesal [XXIII National Congress of Procedural Law], Mendoza, Arg., Sept. 22–24, 2005, *Conclusiones*, para. 9.

239. Lei No. 8078, de 11 de setembro de 1990, D.O.U. de 11.9.1990 (Braz.). The Brazilian legislation is extensive. *See, e.g.*, Lei No. 7.347, de 24 de julho de 1985, D.O.U. de 25.7.1985 (Braz.).

240. There is no significant difference between the Latin expressions *erga omnes* (against all) and *ultra partes* (beyond the parties). Both mean that the class decree binds all absent members of the class, with the qualification that the decision cannot prejudice their individual rights. *See* Gidi, *Class Actions in Brazil*, *supra* note 36, at 387–88.

§ 3° Os efeitos da coisa julgada de que cuida o art. 16, combinado com o art. 13 da Lei n° 7.347, de 24 de julho de 1985, não prejudicarão as ações de indenização por danos pessoalmente sofridos, propostas individualmente ou na forma prevista neste código, mas, se procedente o pedido, beneficiarão as vítimas e seus sucessores, que poderão proceder à liquidação e à execução, nos termos dos arts. 96 a 99. . . .

Chile. Law 19.496, Consumer Protection Law (amended 2004)[241]

Artículo 54. La sentencia ejecutoriada que declare la responsabilidad del o los demandados producirá efecto erga omnes, con excepción de aquellos procesos que no hayan podido acumularse conforme al número 2) del inciso final del artículo 53, y de los casos en que se efectúe la reserva de derechos que admite el mismo artículo.

La sentencia será dada a conocer para que todos aquellos que hayan sido perjudicados por los mismos hechos puedan reclamar el cobro de las indemnizaciones o el cumplimiento de las reparaciones que correspondan.

Si se ha rechazado la demanda cualquier legitimado activo podrá interponer, dentro del plazo de prescripción de la acción, ante el mismo tribunal y valiéndose de nuevas circunstancias, una nueva acción, entendiéndose suspendida la prescripción a su favor por todo el plazo que duró el juicio colectivo. El tribunal declarará encontrarse frente a nuevas circunstancias junto con la declaración de admisibilidad de la acción dispuesta en el artículo 52.

Colombia. Law 472 Class Action Law (enacted August 5, 1998)[242]

Artículo 56. Exclusión del grupo. Dentro de los cinco (5) días siguientes al vencimiento del término de traslado de la demanda, cualquier miembro de un mismo grupo podrá manifestar su deseo de ser excluido del grupo y, en consecuencia, no ser vinculado por el acuerdo de conciliación o la sentencia. Un miembro del grupo no quedará vinculado a los efectos de la sentencia en dos situaciones:

a) Cuando se haya solicitado en forma expresa la exclusión del grupo en el término previsto en el inciso anterior;

b) Cuando la persona vinculada por una sentencia pero que no participó en el proceso, demuestre en el mismo término que sus intereses no fueron representados en forma adecuada por el representante del grupo o que hubo graves errores en la notificación.

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241. Law No. 19496, Marzo 7, 1997, D.O., art. 54 (Chile).

242. L. 472, agosto 6, 1998, D.O. 43.357, arts. 56, 61, 66 (Colom.). The Colombian Law 472 is extensive, with eighty-six rules written in several dozen pages.

Transcurrido el término sin que el miembro así lo exprese, los resultados del acuerdo o de la sentencia lo vincularán. Si decide excluirse del grupo, podrá intentar acción individual por indemnización de perjuicios.

Artículo 61. Diligencia de conciliación. De oficio el juez, dentro de los cinco (5) días siguientes al vencimiento del término que tienen los miembros del grupo demandante para solicitar su exclusión del mismo, deberá convocar a una diligencia de conciliación con el propósito de lograr un acuerdo entre las partes, que constará por escrito. . . . El acuerdo entre las partes se asimilará a una sentencia y tendrá los efectos que para ella se establecen en esta ley. El acta de conciliación que contenga el acuerdo hace tránsito a cosa juzgada y presta mérito ejecutivo.

Artículo 66. Efectos de la sentencia. La sentencia tendrá efectos de cosa juzgada en relación con quienes fueron parte del proceso y de las personas que, perteneciendo al grupo interesado no manifestaron oportuna y expresamente su decisión de excluirse del grupo y de las resultas del proceso.

Costa Rica. Code of Administrative Procedure (enacted 2008)[243]

Artículo 48 inc. 5) La sentencia dictada en este proceso - intereses de grupo, corporativos, difusos o procesos grupales - de conformidad con las reglas establecidas en el presente Código, producirá con su firmeza, cosa juzgada material respecto de todas las partes que haya concurrido en él.

Costa Rica. Bill 15979, Proposed Code of Civil Procedure (published 2010)[244]

Artículo 128. Efectos de la sentencia. Los efectos de las sentencias que se dicten en procesos para la tutela de intereses supraindividuales, se regirán por las siguientes disposiciones:

1) En tutela de intereses difusos, tendrá efecto de cosa juzgada material respecto de cualquier persona, salvo que la demanda se declare sin lugar por insuficiencia de pruebas. No se perjudicarán las acciones de indemnización por daños personalmente sufridos, reclamados individualmente, pero si la demanda es declarada con lugar beneficiará a las víctimas y a

243. CÓDIGO PROCESAL CONSTENCIOSO ADMINISTRATIVO, Ley No. 8508 de 4 de abril de 2006, art. 48 (Costa Rica).

244. Proyecto de Codigo General, Expediente No. 15979, de 11 de agosto de 2005, art. 128 (Costa Rica).

sus sucesores, que podrán proceder a la liquidación en la etapa de ejecución.

2) En tutela de intereses colectivos, tendrá efectos de cosa juzgada material respecto de quienes no hayan figurado como parte, pero limitadamente al grupo, categoría o clase, salvo improcedencia por insuficiente de pruebas. Los efectos de cosa juzgada que aquí se establecen, quedan limitados al plano colectivo, no perjudicando intereses individuales.

3) Tratándose de intereses individuales homogéneos, tendrá efecto de cosa juzgada material respecto de cualquier persona afectada, cuando se declare con lugar la demanda. Si fuere desestimatoria, los interesados no litigantes podrán demandar a título individual.

4) Los sujetos no litigantes a quienes se extiendan los efectos de una sentencia estimatoria, deberán hacer valer sus derechos en ejecución del proceso para la tutela de intereses supraindividuales.

5) Los efectos de cosa juzgada que aquí se establecen, quedan limitados al plano colectivo, no perjudicando intereses individuales.

6) En las relaciones jurídicas continuadas, si sobreviniera modificación en el estado de hecho o de derecho, la parte podrá pedir la revisión de lo que fue decidido por sentencia.

7) Cuando la demanda hubiere sido denegada, con base en las pruebas producidas, cualquier legitimado podrá intentar una acción, con idéntico fundamento, cuando surgiere prueba nueva, sobreviniente, que no podía haber sido producida en el proceso.

Mexico. Federal Code of Civil Procedure (amended 2011)[245]

Artículo 594. Los miembros de la colectividad afectada podrán adherirse a la acción de que se trate, conforme a las reglas establecidas en este artículo.

En el caso de las acciones colectivas en sentido estricto e individuales homogéneas, la adhesión a su ejercicio podrá realizarse por cada individuo que tenga una afectación a través de una comunicación expresa por cualquier medio dirigida al representante a que se refiere el artículo 585 de este Código o al representante legal de la parte actora, según sea el caso.

Los afectados podrán adherirse voluntariamente a la colectividad durante la substanciación del proceso y hasta dieciocho meses posteriores a que la sentencia haya causado estado o en su caso, el convenio judicial adquiera la calidad de cosa juzgada.

Dentro de este lapso, el interesado hará llegar su consentimiento expreso y simple al representante, quien a su vez lo presentará al juez. El

245. CFPC art. 594, *as amended*, DO, 30 de Agosto de 2011 (Mex.).

juez proveerá sobre la adhesión y, en su caso, ordenará el inicio del incidente de liquidación que corresponda a dicho interesado.

Los afectados que se adhieran a la colectividad durante la substanciación del proceso, promoverán el incidente de liquidación en los términos previstos en el artículo 605 de este Código.

Los afectados que se adhieran posteriormente a que la sentencia haya causado estado o, en su caso, el convenio judicial adquiera la calidad de cosa juzgada, deberán probar el daño causado en el incidente respectivo. A partir de que el juez determine el importe a liquidar, el miembro de la colectividad titular del derecho al cobro tendrá un año para ejercer el mismo.

En tratándose de la adhesión voluntaria, la exclusión que haga cualquier miembro de la colectividad posterior al emplazamiento del demandado, equivaldrá a un desistimiento de la acción colectiva, por lo que no podrá volver a participar en un procedimiento colectivo derivado de o por los mismos hechos.

Tratándose de acciones colectivas en sentido estricto e individuales homogéneas sólo tendrán derecho al pago que derive de la condena, las personas que formen parte de la colectividad y prueben en el incidente de liquidación, haber sufrido el daño causado.

El representante a que se refiere el artículo 585 de este Código tendrá los poderes más amplios que en derecho procedan con las facultades especiales que requiera la ley para sustanciar el procedimiento y para representar a la colectividad y a cada uno de sus integrantes que se hayan adherido o se adhieran a la acción.

Panama. Law 45 (2007)[246]

Artículo 129. Reglas Procesales. El ejercicio de las acciones de clase, en materia de consumo, corresponde a uno o más miembros de un grupo o clase de personas que han sufrido un daño o perjuicio derivado de un producto o servicio. Tal ejercicio se entiende en beneficio del respectivo grupo o clase de personas. La Autoridad, las asociaciones de consumidores organizados o un grupo de consumidores que nombre un representante están legitimados para demandar.

Las acciones de clase se rigen de acuerdo con las siguientes reglas:

El miembro de la clase que desee excluirse podrá hacerlo antes de que se fije fecha para la audiencia preliminar.

7. Las transacciones quedan sujetas a la aprobación del juez, quien velará por que los derechos concedidos en la presente Ley queden debidamente protegidos.

246. Ley 45, de 31 de Octobre de 2007, art. 129 (Pan.).

8. La sentencia afectará a todos los miembros que pertenezcan a la clase, aunque no hayan intervenido en el proceso.

Panama. Law 29 (1996)[247]

Artículo 172. Reglas Procesales. El ejercicio de las acciones de clase corresponden a uno o más miembros, de un grupo o clase de personas que han sufrido un daño o perjuicio derivado de un bien o producto; tal ejercicio se entiende en beneficio del respectivo grupo o clase de personas. La Comisión y las asociaciones de consumidores organizadas están legitimadas para demandar. Las acciones de clase se rigen de acuerdo con las siguientes reglas:

1. Uno o varios miembros de una clase podrán demandar, como representantes de todos los miembros de la clase, en cualquiera de los siguientes casos: si el grupo fuere tan numeroso que la acumulación de todos los miembros resultare impracticable; si existieren cuestiones de hecho o de derecho común al grupo; si las pretensiones de los representantes fueren típicas de las reclamaciones de la clase; si las reclamaciones, de tratarse separadamente, fueren susceptibles de sentencia, incongruentes y divergentes; si las reclamaciones, de tratarse individualmente, resultaren ilusorias;

3. El tribunal, al acoger la demanda, la fijará en lista y publicará edicto por cinco (5) días consecutivos en un diario de reconocida circulación nacional, para que, en el término de diez (10) días, contados a partir de su última publicación, el demandante y todas las personas pertenecientes al grupo comparezcan a hacer valer sus derechos, a formular argumentos o a participar en el proceso. Una vez surtido su trámite, se procederá a la notificación de la demanda;

5. Mediante la presentación de poderes al tribunal, a favor del abogado que promovió la demanda, o de un apoderado de su elección, el interviniste se adhiere a la demanda, asumiendo con ello la obligación de cubrir los honorarios correspondientes, conforme lo señale el juez, que se pagarán de acuerdo con la cuantía de la condena;

6. La sentencia afectará a todos los demandantes que pertenezcan a dicho grupo, aunque no hayan intervenido en el proceso;

7. Las partes que no hubieren comparecido como terceros, podrán formular sus reclamaciones en la fase de ejecución, mediante el procedimiento de liquidación previsto en los artículos 983, 984 y 985 del Código Judicial, y obtener la indemnización correspondiente;

247. Ley 29, de 1 de Febrero de 1996, art. 172 (Pan.).

Panama. Judicial Code (amended in 2008)[248]

1421-I. Si hubiera un gran número de actores o demandados, el tribunal podrá consolidar las acciones utilizado su discreción en implementar medidas prácticas para que el caso se desarrolle con rapidez, dentro de los límites del debido proceso. La prueba que sea común a las partes podrá producirse una sola vez, para evitar repeticiones inútiles.

En estos procesos podrán intervenir terceros coadyuvantes por hechos ocurridos en el extranjero, que guarden conexión con los hechos o las partes en la demanda instaurada en Panamá, aunque los efectos de aquellos hechos no se hubieran producido en Panamá.

Cuando se lesionen derechos subjetivos individuales, provenientes de origen común y tengan como titulares a los miembros de un grupo, categoría o clase, los afectados, los colectivos de afectados o las organizaciones no gubernamentales constituidos para la defensa de derecho colectivos estarán legitimados para promover la acción en defensa de los derechos individuales homogéneos.

Peru. Code of Civil Procedure (enacted 1995, amended 2002)[249]

Artículo 82. Patrocinio de intereses difusos. Interés difuso es aquel cuya titularidad corresponde a un conjunto indeterminado de personas, respecto de bienes de inestimable valor patrimonial, tales como el medio ambiente o el patrimonio cultural o histórico o del consumidor.

Pueden promover o intervenir en este proceso, el Ministerio Público, los Gobiernos Regionales, los Gobiernos Locales, las Comunidades Campesinas y/o las Comunidades Nativas en cuya jurisdicción se produjo el daño ambiental o al patrimonio cultural y las asociaciones o instituciones sin fines de lucro que según la Ley y criterio del Juez, este último por resolución debidamente motivada, estén legitimadas para ello.

En estos casos, una síntesis de la demanda será publicada en el Diario Oficial El Peruano o en otro que publique los avisos judiciales del correspondiente distrito judicial. Son aplicables a los procesos sobre intereses difusos, las normas sobre acumulación subjetiva de pretensiones en lo que sea pertinente.

En caso que la sentencia no ampare la demanda, será elevada en consulta a la Corte Superior. La sentencia definitiva que declare fundada la demanda, será obligatoria además para quienes no hayan participado del proceso.

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248. Ley 32, de 1 de Agosto de 2006, art. 1421-I (Pan.).

249. CÓD. PROC. CIV., Law No. 10 de 1 de agosto de 1993, art. 82.6 (Peru).

La indemnización que se establezca en la sentencia, deberá ser entregada a las Municipalidades Distrital o Provincial que hubieran intervenido en el proceso, a fin de que la emplee en la reparación del daño ocasionado o la conservación del medio ambiente de su circunscripción.

Uruguay. General Code of Procedure (enacted 1998)[250]

Artículo 220. Efectos de la cosa juzgada en procesos promovidos en representación de intereses difusos. La sentencia dictada en procesos promovidos en defensa de intereses difusos (artículo 42) tendrá eficacia general, salvo si fuere absolutoria por ausencia de pruebas, en cuyo caso, otro legitimado podrá volver a plantear la cuestión en otro proceso.

Venezuela. Consumer Protection Law[251]

Artículo 80. Acciones individuales o colectivas. La defensa de los derechos establecidos en esta Ley podrá ser ejercida tanto a título individual como colectivo. Podrá ser ejercida colectivamente cuando se encuentren involucrados intereses o derechos colectivos o difusos.

El reclamo administrativo de indemnización por parte de todos los representados colectivamente podrá negociarse también de manera colectiva o individual, según sean los intereses de los representados.

250. CÓDIGO GENERAL DEL PROCESO, art. 220 (1998) (Uru.).

251. Ley No. 37.930 de Protección al consumidor y al usuario, de 4 de mayo de 2004, art. 80 (Venez.).