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Foreign Citizens in Transnational Class Actions

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FOREIGN CITIZENS IN TRANSNATIONAL CLASS ACTIONS

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This Article addresses an increasingly important question: When, if ever, should foreign citizens be included as members of an American class action? The existing consensus holds that courts should exclude from class membership those foreign citizens whose country does not recognize an American class judgment. Our analysis begins by establishing that this consensus is flawed. Rather, to minimize the costs associated with relitigation in a foreign forum, we must distinguish between foreign claimants who are likely to commence a subsequent foreign proceeding from those who are unlikely to do so; distinguishing between those who come from recognizing and nonrecognizing countries creates needless inefficiency. Using standard tools of economic analysis, we examine the benefits and costs of the consensus rule and compare them to the costs and benefits of other possible rules. In this comparison, the consensus rule tends to perform poorly. As a matter of theory, the most efficient rule for deciding which foreign citizens to include and exclude is evident, but real-world informational constraints frustrate the application of this rule in practice. Because no rule regarding the inclusion and exclusion of foreign citizens is the most efficient in all situations, we propose that courts use rebuttable presumptions: include foreign citizens with claims that are not individually viable and exclude foreign citizens with claims that are viable.

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INTRODUCTION

In *Morrison v. National Australia Bank Ltd.*, the Supreme Court held that "§ 10(b) of the Securities Exchange Act of 1934 provides [no] cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[1] In thus limiting "foreign-cubed" securities class actions—class actions brought by foreign investors in connection with foreign securities sold on foreign exchanges[2]—*Morrison* is a significant securities litigation decision with important implications for the extraterritorial effect of American law. But the case does not address an increasingly pressing question that affects all transnational class actions: When, if ever, should foreign citizens be included as members of American class actions?[3]

The question is not a new one. Judge Henry J. Friendly first raised it thirty-five years ago in *Bersch v. Drexel Firestone, Inc.*[4] Since *Bersch*, courts have tied the answer to res judicata and the recognition of judgments: if a court in the country of which putative class members are citizens will not recognize the judgment of an American court, then the court should exclude those citizens from the class action. *Bersch*'s reasoning was twofold. First, Judge Friendly argued that class actions "impose[ ] tremendous burdens on overtaxed district

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1 130 S. Ct. 2869, 2875 (2010). Justice Sotomayor did not participate in the case. Justice Breyer concurred in part and concurred in the judgment; Justice Stevens, joined by Justice Ginsburg, concurred in the judgment. Both concurrences declined to join the majority opinion due to the breadth of its holding, although both agreed that, on the facts of the case, the foreign plaintiffs could not assert a claim under American law.

2 For pre-*Morrison* analyses of "foreign-cubed" actions, see Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 17 (2007); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 466. "Foreign-cubed" actions are also known as "f-cubed" actions. Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 33 n.147 (2009). According to the Court of Appeals in *Morrison*, the phrase "foreign-cubed" was coined in 2004. *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 172 (2d Cir. 2008), *aff'd*, 130 S. Ct. 2869 (2010).

3 Although *Morrison* prevents some foreign litigants from becoming class members in American securities fraud actions, the decision fails to address mass torts with foreign victims, antitrust claims with effects on foreign victims, and suits involving foreign victims who bought or sold securities on American markets.

4 519 F.2d 974 (2d Cir. 1975).

courts"—burdens that were unnecessarily shouldered when foreign courts were free to disregard American judgments.[5] Second, Judge Friendly emphasized basic fairness and mutuality: if a foreign class member could bind the defendant to a result that favored the class member but a defendant could not bind the foreign class member to a result that favored the defendant, the class action was a one-way ratchet that always operated to the detriment of the defendant.[6]

The doctrinal hook that courts usually use to exclude foreign members from nonrecognizing countries is the "superiority" element of Rule 23(b)(3) of the Federal Rules of Civil Procedure.[7] In the words of a noteworthy recent case, *In re Vivendi Universal, S.A. Securities Litigation*, "res judicata concerns have been appropriately grafted onto

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5 *Id.* at 996. In another part of the opinion, Judge Friendly had held that federal courts could give extraterritorial effect to section 10(b) of the Securities Exchange Act when the United States has an interest in either the purchasers or sellers of the securities at stake. *Id.* at 984–90. *Morrison* abrogated this conclusion. *Morrison*, 130 S. Ct. at 2877–83. It was on this point that Justice Stevens departed from the majority; he preferred Judge Friendly's balancing approach to the majority's flat rule that gave section 10(b) no extraterritorial effect. *See id.* at 2889–90 & n.1 (Stevens, J., concurring).

6 *Bersch*, 519 F.2d at 996 ("[I]f defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been.").

7 Rule 23(b) describes four different types of class action. *See* FED. R. CIV. P. 23(b)(1)(A), (b)(1)(B), (b)(2), (b)(3). A court can certify a (b)(3) class only when it "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* at 23(b)(3).

These two elements are usually called the "predominance" and "superiority" prongs. *See also id.* at 23(b)(3)(A)–(D) (listing four "matters pertinent to these findings"). Because Rule 23(b)(3) is the only class action available when class members primarily seek damages, and because the (b)(3) class action is the most common form of class action, *see* JAY TIDMARSH & ROGER H. TRANGSRUD, MODERN COMPLEX LITIGATION 379 (2d ed. 2010), the inclusion of foreign class members is principally a concern in, and has been litigated in the context of, Rule 23(b)(3). One of the few circumstances in which (b)(1) or (b)(2) class actions have sought to include foreign citizens involves medical-monitoring claims. *See, e.g.*, Bund Zur Unterstützung Radargeschädigter e. V. v. Raytheon Co., No. EP-04-CV-127-PRM, 2006 WL 3197645, at *4–*5 (W.D. Tex. Aug. 30, 2006) (noting that both American and German citizens were members of a class seeking medical monitoring). In recent years, however, courts have been hostile to certifying medical-monitoring claims. *See, e.g.*, Grovatt v. St. Jude Med., Inc. (*In re* St. Jude Med., Inc., Silzone Heart Valve Prods. Liab. Litig.), 425 F.3d 1116, 1121 (8th Cir. 2005) (rejecting certification of a medical-monitoring class and noting that "[a]lthough Rule 23(b)(2) contains no predominance or superiority requirements, class claims thereunder still must be cohesive").

Nonrecognition can also be relevant to other class-action issues. For instance, some courts have also used a home country's unwillingness to recognize an American class judgment as a reason to deny a foreign plaintiff's request to serve as a class representative. *See, e.g.*, Borochoff v. Glaxosmithkline PLC, 246 F.R.D. 201, 203, 205 (S.D.N.Y. 2007); *In re* Royal Ahold N.V. Sec. & ERISA Litig., 219 F.R.D. 343, 355 (D. Md. 2003). *But see* Marsden v. Select Med. Corp., 246 F.R.D. 480, 486 & 489 n.7 (E.D. Pa. 2007) (appointing an Austrian citizen as lead plaintiff and dismissing concerns that Austria would not recognize the judgment as "speculative").

the superiority inquiry."[8] Although peripheral issues still occupy courts and commentators,[9] the consensus view is that, when foreign citizens hail from a country that is unlikely to recognize an American class judgment or settlement, courts should exclude them from an American class action.[10]

This consensus is wrong for a simple reason: it assumes that foreign class members will inevitably sue in their home country. In recent years, however, mass-aggregation devices, some of which will entertain the claims of foreigners, have proliferated around the world.[11] Thus, English subjects dissatisfied with an American class

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8 242 F.R.D. 76, 95 (S.D.N.Y. 2007); *see also* Kern v. Siemens Corp., 393 F.3d 120, 129 n.8 (2d Cir. 2004) (noting "significant doubts" about the superiority of a class action that included Austrian citizens when Austrian courts would not bind these citizens to an American class judgment).

9 One issue is the standard of proof that the person opposing the class must bear. *Bersch* had suggested that a defendant must show to a "near certainty" that a foreign country will not recognize the judgment; a "possibility" was insufficient. 519 F.2d at 996. More recently, *Vivendi* has rejected this language insofar as it purported to create a standard of proof; instead, it "evaluate[d] the risk of nonrecognition along a continuum" in determining the superiority (or lack thereof) of including foreign class members: "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." 242 F.R.D. at 95. Other courts have adopted *Vivendi*'s approach. *See, e.g.*, *In re* Alstom SA Sec. Litig., 253 F.R.D. 266, 282 (S.D.N.Y. 2008); *Marsden*, 246 F.R.D. at 486.

A second issue is the extent to which preclusion, as opposed to recognition, issues should play into the superiority analysis. The usual focus has been on the foreign court's willingness to recognize an American class judgment. But Professor Wasserman has recently argued that, even if a foreign court will recognize such a judgment, a separate question is the scope of the preclusive effect that the judgment will receive in the foreign court. Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 316 (2011).

Third, American courts sometimes disagree over a foreign court's law. For instance, *Vivendi* held that Germany would, more likely than not, refuse to recognize an American judgment, and excluded German citizens from the class. *See* 242 F.R.D. at 103–05. On the other hand, another court thought this conclusion was "far from clear." *See* Frietsch v. Refco, Inc., No. 92 C 6844, 1994 WL 10014, at *11 (N.D. Ill. Jan. 13, 1994). Likewise, *Vivendi* held that France would, more likely than not, recognize an American judgment, and included French citizens in the class. *See* 242 F.R.D. at 95–102. But the Republic of France's amicus brief in *Morrison* calls that conclusion into doubt. *See* Brief for the Republic of France as Amicus Curiae Supporting Respondents at 26 & n.20, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191).

10 *See Vivendi*, 242 F.R.D. at 104–05. For additional cases, see, for example, Cromer Fin. Ltd. v. Berger, 205 F.R.D. 113 (S.D.N.Y. 2001) (certifying a class that included foreign investors); CL-Alexanders Laing & Cruikshank v. Goldfield, 127 F.R.D. 454 (S.D.N.Y. 1989) (denying certification of a class of foreign investors); compare Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 373 (D. Del. 2006) (noting nonrecognition issues in the course of dismissing a securities fraud case).

11 American-style class actions remain uncommon, but in recent years numerous countries have adopted class actions or their equivalents to resolve mass disputes. For overviews of recent efforts, see Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 9–17 (2009); Christopher Hodges, *Collective Redress in Europe: The New Model*, 29 CIV. JUST. Q. 370, 372–74 (2010); Rachael

judgment or settlement might attempt to relitigate the claim in an aggregate proceeding conducted in a non-English forum that does not recognize the American outcome. Moreover, if the claim is individually viable, a foreign class member who is dissatisfied with the American class judgment or settlement has reason to press the claim in a hospitable foreign forum.[12] It is the generic risk of class members' relitigation in a foreign forum—not the risk of foreign citizens' relitigation in their home country—that raises the concerns Judge Friendly identified.[13] Excluding citizens from nonrecognizing countries is a poor cure for this problem.

It is time, therefore, to reconsider the circumstances in which foreign citizens can become members of an American class action. Using standard tools of economic analysis, this Article makes two arguments. First, it argues that the weight *Bersch* and *Vivendi* place on (non)recognition is too great. Because *Bersch* and *Vivendi* seek to

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Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409, 415–27 (2009). For example, in 2005 the Netherlands enacted the *Wet collectieve afwikkeling massaschade* (Collective Settlement of Mass Damages Act, or WCAM), a statute that allows Dutch courts to settle—but not litigate—transnational disputes on a class-wide, opt-out basis. Stb. 2005, p. 340, *translated in* MINISTERIE VAN VEILIGHEIDE EN JUSTITIE, DE NEDERLANDSE WET COLLECTIEVE AFWIKKELING MASSASCHADE 8–12 (2008), *available at* http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/richtlijnen/2008/06/24/de-nederlandse-wet-collectieve-afwikkeling-massaschade/litwcamfrenknl.pdf. For a description of WCAM, see MINISTERIE VAN VEILIGHEIDE EN JUSTITIE, THE DUTCH "CLASS ACTION (FINANCIAL SETTLEMENT) ACT" ("WCAM") (2008), *available at* http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/circulaires/2008/06/24/the-dutch-class-action-financial-settlement-act-wcam/wcamenglish.pdf.

The WCAM is open not only to Dutch citizens, but also to citizens of other countries. *See* Madeleine Giansanti Çağ et al., *Europe*, 44 INT'L LAW. 645, 652 (2010) (noting that two recent settlements in Dutch courts "demonstrate that WCAM has truly global potential to settle class claims, at least against Dutch defendants"). Because Dutch courts would likely accord an American class judgment preclusive effect, *see Vivendi*, 242 F.R.D. at 105, class members dissatisfied with the outcome of an American class action would probably be unable to use the WCAM procedure. But that fact does not preclude the possibility that a country that does not recognize American class judgments or settlements might create a WCAM-type process and hold itself open to the claims of citizens from other countries.

12 It is possible that dissatisfied American citizens also might attempt to relitigate overseas, but they face significant legal obstacles to such an end run. *Cf. In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 769 (7th Cir. 2003) (issuing an antisuit injunction against plaintiffs who attempted to commence state-court class actions after the federal court held that no federal-court class action was permissible). *But see In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998) (reversing an antisuit injunction against a state-court class action designed to settle a case on terms that the federal court had disapproved when the federal court lacked personal jurisdiction over the state-court class members). In this Article, we assume that an American court could prevent American citizens from commencing subsequent litigation in a foreign forum, but that it could not prevent foreign citizens from doing so (or at least that those countries that would not recognize an American class judgment or settlement would also not recognize an American antisuit injunction against foreign class members). This assumption leaves only the issue of foreign citizens bringing subsequent proceedings in a foreign forum.

13 *Cf. Bersch*, 519 F.2d at 996 (summarizing Judge Friendly's concerns).

avoid relitigation in foreign tribunals, the logical starting point is to analyze the incentives that foreign citizens have to file either an initial or a subsequent foreign proceeding. This analysis discloses that any rule including and excluding foreign citizens yields certain benefits and generates certain costs. A foreign country's (non)recognition of the American outcome is relevant in determining these benefits and costs, but it plays only a small role. Indeed, to maximize benefits, it often makes sense to include as class members citizens from countries that would not recognize an American class judgment or settlement, and it is sometimes necessary to exclude citizens from countries that would recognize an American class judgment or settlement.

Second, the Article argues that, in most real-world applications, the *Bersch-Vivendi* rule is more costly (i.e., less efficient) than other rules regarding the inclusion or exclusion of foreign citizens.[14] Indeed, although no rule regarding foreign class membership is costless, we can even specify the rule that is most efficient in theory: American courts should include foreign citizens as long as the benefit that these citizens receive from the American class action exceeds their expected net benefit from subsequent foreign litigation and conversely should exclude foreign citizens whose expected net benefit in a subsequent foreign proceeding exceeds the benefit they receive in the American proceeding. Because of the informational difficulties in applying this rule and other alternatives to the *Bersch-Vivendi* rule, however, we conclude by suggesting that American courts should use a series of presumptions that, taken together, capture most of the benefits of the ideal rule.

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14 Throughout our analysis, we assume that a class including foreign citizens meets all other requirements for class certification. Specifically, federal class actions must satisfy Rule 23(a) in addition to Rule 23(b)(3).

This Article focuses on Federal Rule 23 for two reasons. First, many states employ class-action rules or statutes comparable to Rule 23. *See generally* Thomas D. Rowe, Jr., *State and Foreign Class-Actions Rules and Statutes: Differences from—and Lessons for?—Federal Rule 23*, 35 W. ST. U. L. REV. 147 (2007) (reviewing various state class-action approaches). Second, with the advent of the Class Action Fairness Act (CAFA), class actions that include foreign members fall within federal jurisdiction—via either original or removal jurisdiction—as long as one defendant is a citizen of an American state and the total amount in controversy exceeds $5 million. 28 U.S.C. §§ 1332(d)(2)(B), 1453(b) (2006). Most transnational class actions are likely to meet these conditions. *Cf. id.* § 1332(d)(4)–(5), (9) (listing certain exceptions to CAFA jurisdiction).

We further limit our discussion to Rule 23(b)(3) class actions (and not Rule 23(b)(1) or (b)(2) class actions) because most class actions are (b)(3) damages class actions. *See supra* note 7. In limiting the discussion to (b)(3) class actions, which involve an opt-out right, *see* FED. R. CIV. P. 23(c)(2)(B)(v), we also avoid thorny personal-jurisdiction questions that would arise if an American court sought to bind a foreign citizen to an American judgment without affording an opt-out right. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812–15 (1985) (holding that the Due Process Clause requires state courts to provide an opt-out right to class members over whom it does not have personal jurisdiction, but leaving open whether this requirement applied in all cases or only in cases seeking damages).

We prove our claims in five steps. In Part I we demonstrate that the *Bersch-Vivendi* analysis is flawed. Part II lays the foundation for our analysis by describing in economic terms the circumstances under which a plaintiff chooses to form an American class action, an American judge determines superiority, and a foreign class member has an incentive to bring a foreign suit after the American class action concludes. Part III then uses the *Bersch-Vivendi* rule as the vehicle for identifying the full range of benefits and costs that any rule of inclusion or exclusion creates. It concludes that, in light of the present developments in American class-action law and foreign collective-action laws, the *Bersch-Vivendi* rule is very costly. Part IV then examines five other rules—ranging from a rule automatically including all foreign citizens who otherwise meet the requirements of Rule 23 to a rule automatically excluding all foreign citizens—and finds that each imposes costs that make it less than ideal in some circumstances. Therefore, Part V concludes by showing that a series of presumptions—starting with a presumption that foreign citizens who possess small-stakes claims should be included in the American class action, even if they come from a nonrecognizing country—is superior to either the *Bersch-Vivendi* rule or any of Part IV's alternatives.

I

PROBLEMS WITH THE *BERSCH-VIVENDI* CONSENSUS

The *Bersch-Vivendi* rule,[15] which permits American courts to include only those foreign citizens whose home countries recognize American class judgments or settlements, suffers from two critical flaws. First, the approach fails to account for the fact that foreign claimants can forum shop. Like all litigants, foreign claimants will choose the forum that maximizes their expected return, whether that forum is in their home country or in a foreign country. By granting class membership to claimants whose home forum will recognize an American class judgment or settlement, the *Bersch-Vivendi* rule ignores the fact that dissatisfied class members who hail from recognizing countries may file subsequent litigation outside of their home countries.

For example, *Vivendi*[16] held that an American class judgment would, more likely than not, be recognized in France, England, and the Netherlands, but not in Germany and Austria.[17] Based on this

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15 *Bersch*, 519 F.2d at 996; *Vivendi*, 242 F.R.D. at 95. For additional cases, see *supra* note 10.

16 Vivendi was a corporation organized under the laws of France. Throughout the class period, approximately 25% Vivendi's shareholders were U.S. citizens, 37% were French citizens, and the remainder were other European nationals. *See Vivendi*, 242 F.R.D. at 81.

17 *Id.* at 96, 102, 104–05.

analysis, the court concluded that French, English, and Dutch shareholders should be included in the class, but German and Austrian shareholders should be excluded.[18] While this holding protected Vivendi from the risk that German or Austrian shareholders would relitigate in their home courts,[19] it failed to extinguish the risk that dissatisfied French, English, or Dutch class members might relitigate in a German or Austrian court.[20] Of course, some French, British, or Dutch citizens might find such a suit too troublesome, but relitigation by claimants who want another bite at the apple and who are willing and able to sue again in a distant but hospitable forum remains a distinct possibility. In a world in which mass-aggregation devices are proliferating and foreign victims of widespread harm have more cost-effective forums from which to choose, the *Bersch-Vivendi* rule is less and less capable of achieving the benefits of the lessened burden on American courts and the fairness that Judge Friendly touted when he excluded foreign citizens from nonrecognizing countries.[21]

Second, and relatedly, the *Bersch-Vivendi* rule ignores certain costs. Some costs arise from the actions of the foreign claimants we have just discussed: foreign citizens who are included in the American class action because their countries will recognize the American judgment or settlement, are dissatisfied with the result, and have a sufficient amount at stake to make relitigation in a nonrecognizing country worthwhile. Relitigating these claims in nonrecognizing forums imposes costs. Other costs arise from the inaction of a different group of foreign citizens: those citizens from nonrecognizing countries who are excluded from the American class action and whose claims are not sufficiently valuable to commence suit in a foreign forum, even though their claims had value in the American class action. These foreign citizens fail to receive adequate compensation, and the

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18 *Id.* at 105–06 ("Because lawsuits could be brought by Austrian and German nationals against defendants alleging the same wrongdoing that underlies the allegations in this case, the Court concludes that the adjudication of German and Austrian shareholders' claims in this class action is not necessarily superior."). The court did not explain why it chose only these countries for analysis.

To the extent that *Vivendi* permitted citizens from the United States, England, France, and the Netherlands who purchased Vivendi securities on foreign stock exchanges to become American class members, the Supreme Court has effectively abrogated this result. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010). In light of *Morrison*, the district court in *Vivendi* has narrowed the class to consist of all persons from the United States, England, France, and the Netherlands who acquired American Depository Receipts of Vivendi and has dismissed allegations by U.S. and foreign purchasers of Vivendi's ordinary shares on overseas exchanges. *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 587 (S.D.N.Y. 2011).

19 Of course, the holding does not protect the defendants from initial suits filed by German or Austrian shareholders in foreign courts.

20 We assume that the plaintiffs are able to satisfy the procedural and jurisdictional requirements to file in these forums.

21 *See supra* notes 4–6 and accompanying text.

law fails to deter wrongdoers fully—even though the American class action might have delivered a measure of both compensation and deterrence.[22]

We do not suggest that the *Bersch-Vivendi* rule lacks any benefit; to the contrary, the rule avoids important costs, such as the expense of litigating in an American courtroom the meritless claims of excluded foreign citizens who would not have sued elsewhere.[23] But the consensus approach, while trumpeting the savings it achieves, is blind to the costs it imposes—costs that might exceed whatever savings the rule achieves. Therefore, courts need a better understanding of the costs and benefits of different approaches to including or excluding foreign class members before choosing a rule concerning foreign citizens' membership in transnational class actions.

Because the issue involves a comparison of costs, benefits, probabilities, and risks regarding legal claims, an economic approach seems an especially fruitful, but thus far unexplored, method of analysis. The next Part lays the foundation for this analysis.

II
ASSUMPTIONS

This Part begins by describing the incentives of the plaintiff seeking certification of the American class action. It then examines the superiority analysis that American courts use to decide whether to certify a Rule 23(b)(3) class action—an analysis that, properly construed, excludes some but not all foreign citizens from participating in the American lawsuit. Finally, this Part examines the incentives of foreign citizens who are included in the American class action to bring a foreign action after the conclusion of the American class action.

The analysis assumes that plaintiffs—including putative class representatives and class members—are rational economic actors who seek to maximize their wealth and are risk neutral.[24]

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22 The *Bersch-Vivendi* rule imposes other costs as well. *See infra* notes 66–76 and accompanying text.

23 *See infra* notes 59–64 and accompanying text.

24 Both assumptions are common in the economic literature analyzing incentives to sue or settle. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 598 (7th ed. 2007); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56–58 (1982). For the most part, these assumptions are not especially critical, at least when the parties retain their same attitude toward wealth maximization and risk preference throughout the course of the American and potential foreign litigation. *But see infra* note 105 (discussing the effect of risk taking on the calculus of foreign citizens who must decide whether to sue in a foreign forum).

A. Incentives for a Plaintiff to File an Individual or Class Suit

A plaintiff will file a suit only if the expected gains from the suit outweigh the expected costs of litigation. Because American courts generally operate under the "American rule," which requires that each party bear its own costs of litigation,[25] a putative plaintiff will consider only her own costs of litigation.[26] Therefore, a plaintiff will file suit only when her expected net benefit (expected gross benefit minus her expected costs of litigation) exceeds zero.[27]

In a sense, the decision of a plaintiff to file a class action is not that different. The American class action rests upon the idea that a self-appointed agent serves as a private attorney general, seeking collective redress on the agent's own behalf and that of absent class members.[28] A wealth-maximizing plaintiff will not take on this role unless

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25 *See* Kansas v. Colorado, 129 S. Ct. 1294, 1298 (2009). There are exceptions to the rule. First, losing parties sometimes must pay some costs of the winning party. *See, e.g.*, 28 U.S.C. § 1920 (2006). Second, some statutes provide for fee shifting, under which the losing party also pays the winning party's attorneys' fees. *See, e.g.*, 42 U.S.C. § 1988(b) (2006). *See generally* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247–62 (1975) (discussing the American rule and its exceptions).

26 These costs include not only the cost of litigating, but also the cost of errors by the decision maker. POSNER, *supra* note 24, at 593–95.

27 Shavell, *supra* note 24, at 58–60 & nn.15–22. In formal terms, if P_I represents the probability of winning an individual suit, L_I represents the value of the recovery if the plaintiff wins, and C_I represents the expected costs that the plaintiff must bear, a plaintiff will bring an individual suit when

$$P_I \times L_I - C_I > 0.$$

The simple term C_I masks a complex reality. Because a successful plaintiff might be able to shift some costs or fees to the defendant (and conversely might bear some of the costs or fees of a successful defendant) even under the American rule, the precise formula for filing suit is

$$P_I \times L_I - [C_{I(P-NS)} + (1-P_I)C_{I(P-S)} + (1-P_I)C_{I(\Delta-S)}] > 0,$$

where $C_{I(P-NS)}$ is the amount of the plaintiff's costs and fees that are nonshifting (i.e., costs that the plaintiff must bear regardless of the suit's outcome), $(1-P_I)C_{I(P-S)}$ is the expected value of the plaintiff's costs and fees that the successful plaintiff can shift but the losing plaintiff must bear, and $(1-P_I)C_{I(\Delta-S)}$ is the expected value of the defendant's costs and fees that the losing plaintiff must bear.

For simplicity, we refer to the expected net benefit, $P_I \times L_I - C_I$, as ENB_I. Thus, a plaintiff will file an individual suit when $ENB_I > 0$.

28 *See* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 184 (2009); *cf.* Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 22–24 (1996) (arguing that class actions provide a mechanism to allow private interests with small claims to protect public values); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2145 (2000) (suggesting that the incentive structure at play in the American class-action rule was seen as an alternative to centralizing enforcement power within the government).

the expected benefit from the class action[29] exceeds the expected benefit of an individual action.[30]

Because a class action can increase the probability of recovery and possibly the amount of recovery, and because it can spread the cost of litigation across all class members,[31] in some circumstances the expected net benefit from a class action exceeds the expected net benefit from a different form of action, and a plaintiff will seek class certification. A classic example is the "large-scale, small-stakes" (or "negative-value") suit, in which individual litigation is cost-prohibitive given the small amount at issue for any plaintiff. Only by aggregating claims and spreading the costs of litigation among all members does prosecution of the claims become viable. [32]

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29 In formal terms, if P_{CA} represents the probability of winning a class action, L_{CA} represents the value of the recovery to the plaintiff if the class action succeeds, and C_{CA} represents the expected costs that the plaintiff must bear in the class action, then a plaintiff will bring a class action when

$$P_{CA} \times L_{CA} - C_{CA} > 0,$$

or equivalently,

$$ENB_{CA} > 0.$$

The term C_{CA} is a shorthand form for the sum of nonshifting and shifting costs and fees that the plaintiff might be expected to bear. *See supra* note 27. One difference in class-action litigation is that class representatives often are not expected to bear the plaintiffs' costs of litigation, but rather bear only the fractional share of those costs (calculated by dividing the costs by the number of class members). This difference can result in a lower exposure to costs as a class representative in class-action litigation than the plaintiff might encounter in individual litigation. *See generally* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1160 n.106 (2009).

30 Thus, a plaintiff will choose to file a class action when

$$ENB_{CA} > ENB_I.$$

A plaintiff may have litigation options other than individual suit or class action, such as joinder with similarly situated plaintiffs under Rule 20(a)(1) or multidistrict litigation under 28 U.S.C. § 1407. These additional options do not affect the basic point: a plaintiff will choose a class action when it yields a greater net benefit to her than any other form of litigation and will not choose a class action when another form of litigation yields a greater expected net benefit.

31 For an analysis of the ways in which a Rule 23(b)(3) class action can increase the probability and amount of recovery or decrease costs in an amount sufficient to make a plaintiff seek class certification, see Tidmarsh, *supra* note 29, at 1149–50, 1167–69; see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims."). The plaintiff may also seek class certification when it is not in her best financial interests to do so—either because she is altruistic or because the lawyer, who can obtain a much larger fee in a class action, deceives the plaintiff about the form of litigation that is in her best interests. *See* Tidmarsh, *supra* note 29, at 1147, 1150, 1161, 1166, 1169. For present purposes, it is sufficient to state that plaintiffs sometimes file class actions, whether for economic or other reasons.

32 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))); *see also Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting) (noting that using Rule 23 can "transform a $500 case into a $5,000,000 award"). For a classic article on large-scale, small-

Although it sometimes makes sense for a plaintiff to file a class action, it is not always in the best interests of all of the members of the putative class. Indeed, there is reason to worry that the class representative and class counsel will pursue their own interests at the expense of the class and seek to capture all or most of the extra value created by class aggregation for themselves and some subset of class members, thus leaving other class members worse off than before. [33] To avoid this prospect, Rule 23 and the Due Process Clause require that class representative(s) and class counsel adequately represent the interests of all class members. [34] Although the precise content of this requirement is uncertain,[35] we adopt a minimal definition of adequacy: class representatives and class counsel can "do no harm."[36] Their actions must leave class members in no worse a position than they would have occupied had they exercised their individual decisions to bring suit.[37]

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stakes litigation and the agency-cost problems it poses, see Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

33 A famous example is described in *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 508 (7th Cir. 1996), in which a state-court negative-value class settlement had resulted in a $2.19 recovery and a $91.33 assessment of attorneys' fees for some class members—thus leaving these class members $89 to the bad as a result of their lawsuit. *Cf.* Issacharoff & Miller, *supra* note 28, at 184 (noting the power of the "unselected and effectively unsupervised agent" to bind absent class members).

34 *See* FED. R. CIV. P. 23(a)(2)–(4), (g); Hansberry v. Lee, 311 U.S. 32, 43–46 (1940) (discussing due process considerations regarding adequate class representation). Although only Rule 23(a)(4) specifically mentions the adequacy of the class representative's representation, the commonality requirement of Rule 23(a)(2) and the typicality requirement of Rule 23(a)(3) "tend to merge" into the adequacy requirement of Rule 23(a)(4). Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982). Rule 23(g) discusses the conditions under which class counsel is deemed adequate.

35 Tidmarsh, *supra* note 29, at 1151–58.

36 *Id.* at 1177.

37 In formal terms, if $ENB(i)_{CA}$ represents the expected net benefit to class member i in a class action and $ENB(i)_I$ represents the expected net benefit to class member i had i brought an individual action, then class representation is adequate when, for each and every class member i,

$$ENB(i)_{CA} = ENB(i)_I, \text{ where } ENB(i)_{CA} = 0.$$

For the calculation of $ENB(i)_{CA}$, see *supra* note 29; for the calculation of $ENB(i)_I$, see *supra* note 27.

For an argument supporting this definition of adequacy in nonformal terms, see Tidmarsh, *supra* note 29, at 1177; see also PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 cmt. f (2010) [hereinafter AGGREGATE LITIGATION] ("[A] lawyer may not help one client by harming another. . . . A lead lawyer must act for the benefit of all parties and represented persons . . . ."). The formulation has been criticized as too minimal, especially in negative-value cases, because it allows the class representative(s) and class counsel to capture all the excess value from class aggregation rather than to share it equitably among class members. Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 KAN. L. REV. 917, 944–47 (2010). Although these concerns are overdrawn due to real-world constraints on the self-aggrandizing behavior of class representatives and counsel, *see* Tidmarsh, *supra* note 29, at 1190–99, no one argues for a lower floor on adequate representation than "do no harm." We therefore adopt that floor as the minimal necessary statement of adequacy.

The need to assume the mantle of adequate representation undoubtedly limits the incentive for some plaintiffs to seek class certification. But, as the persistence of class-action litigation shows, the increase in either the probability of success, the quantum of recovery, or the economies of scale achieved by a class action often makes it worthwhile for a plaintiff to seek to represent a class of similarly situated individuals—including, in some cases, citizens of foreign countries.

B. The Court's Decision to Certify a Class Action

Having set out the terms under which a plaintiff has an incentive to file an American class action that contains foreign members, we now address the judge's decision whether to certify a Rule 23(b)(3) class containing such members. We assume that the class meets the requirements of Rule 23(a), as well as the predominance requirement of Rule 23(b)(3). The judge must then address Rule 23(b)(3)'s superiority requirement.

Rule 23(b)(3) requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy."[38] Courts have not always interpreted this requirement literally, sometimes stating that, as long as the class action was "manageable" or common issues predominated, superiority was established.[39] But most courts do in fact read the superiority requirement literally, comparing the class action with other methods for resolving the dispute.[40] We

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38 FED. R. CIV. P. 23(b)(3).

39 On using manageability as a surrogate for superiority, see FED. R. CIV. P. 23(b)(3)(D) (stating that "the likely difficulties in managing a class action" can be considered in deciding whether a class action meets the requirements of predominance and superiority); see also Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1304–07 (9th Cir. 1990) (upholding certification after examining only issues of manageability); compare Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 191 (3d Cir. 2001) (noting that a class action must be the "best" method for resolving the dispute, but in fact analyzing superiority almost exclusively in terms of the class action's manageability); Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 491 (E.D. Cal. 2006) ("Whether a case is manageable as a class action can be an overriding consideration in determining superiority." (internal quotation marks omitted)). *But see* Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. (*In re* Visa Check/MasterMoney Antitrust Litig.), 280 F.3d 124, 140 (2d Cir. 2001) ("[F]ailure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored . . . .").

On using predominance to determine superiority, see *In re* TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 291, 314 (N.D. Cal. 2010) ("[I]f common questions are found to predominate in an antitrust action, . . . courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied." (internal quotation marks omitted)).

40 *See, e.g.*, *In re* Cmty. Bank of N. Va., 418 F.3d 277, 309 (3d Cir. 2005) ("The superiority requirement asks a district court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." (internal quotation marks omitted)); Klay v. Humana, Inc., 382 F.3d 1241, 1269 (11th Cir. 2004) ("Our focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation might

define superiority similarly: only when the expected net benefits from class treatment exceed the expected net benefits from other forms of handling the dispute—such as individual litigation, voluntary or involuntary joinder, consolidation, multidistricting, bankruptcy, antisuit injunctions, or preclusion[41]—should a court certify a class action.

Superiority is determined along two dimensions. First, a class action should be optimally sized, meaning that class members should be added as long as the marginal gain from adding an additional class member exceeds the marginal cost of doing so.[42] Second, the expected net benefit from using a class action (calculated by subtracting the cost of using a class action from the expected gross benefit of using the class action) should be greater than the expected net benefit from using each other form for resolving the dispute (calculated by subtracting the cost of using that form of resolution from the expected gross benefit of using that form of resolution).[43] The combination of these two aspects of superiority ensures that a certified class action yields the greatest social benefit consistent with the adequacy-of-representation requirement that no class member be made worse off.

This definition of superiority constructs a truly superior class action, which yields more aggregate benefits to the victims of the defendant's wrongdoing than any other aggregation mechanism or

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be realistically available to the plaintiffs."). The American Law Institute has also taken this view. *See* AGGREGATE LITIGATION, *supra* note 37, § 2.02(a)(1) (arguing that a court should use a class action to resolve common issues when doing so will "materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives, so as to generate significant judicial efficiencies"); *id.* cmt. b ("The judicial inquiry . . . is inherently comparative . . . .").

41 On the range of alternatives to class treatment, see TIDMARSH & TRANGSRUD, *supra* note 7, at 51–248, 565–629.

42 This "marginal benefit exceeding marginal loss" rule for determining optimal class size generally holds true, but is imprecise when there are multiple equilibrium points at which the marginal benefit of adding an additional class member equals the marginal cost of doing so. For a full analysis, see David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 GEO. WASH. L. REV. 542, 554–68 (2011). In analyzing whether a foreign court's nonrecognition of an American outcome should serve as yet another ground for finding a lack of superiority—the concern of this Article—we can ignore concerns for optimal class size, except to note that the optimal size of the class helps to define the aggregate benefit that the class can expect to achieve. The size of this aggregate benefit, as well as the effect of excluding class members on this benefit, is relevant to our analysis. *See infra* note 49 and accompanying text.

43 If the total number of victims is N and the optimal number of class members is G, so that $N = G$, we can define superiority as

$$ENB(G)_{CA} > ENB(N)_{\alpha \to \Omega},$$

where $ENB(G)_{CA}$ represents the expected net benefit from the class action (i.e., $P(G)_{CA} \times L(G)_{CA} - C(G)_{CA}$), and $ENB(N)_{\alpha \to \Omega}$ represents the sum of expected net benefits from any dispute-resolution alternative or combination of dispute-resolution alternatives (individual adjudication, multidistricting, foreign litigation or resolution, multiple smaller class actions, and so on) available to any or all of the victims.

combination of mechanisms. It is important to note that this formulation of superiority works in the aggregate, not at the individual level. It does not require that the benefit to any given class member is greater than the benefit that a victim of the defendant's wrongdoing might receive through the dispute-resolution mechanism that is best for that victim.[44] Thus, even if some class members could do better by not being included in the class action, it is permissible to include them in the class action when the benefit to the class from their inclusion exceeds the benefit to the individual class members from their exclusion.[45] On the other hand, the court should exclude from the class any class members for whom the combination of the expected net benefit from the class action without those members and the expected net benefit they will achieve in separate proceedings exceeds the expected net benefit from a class action including them.[46]

This definition of superiority might require a court to exclude some foreign class members. For instance, given the difficulty of effecting notice overseas,[47] as well as likely difficulties in calculating and delivering a remedy to foreign citizens, the cost of including certain foreign class members might exceed the expected benefits derived from adding their claims. In that situation, the optimally sized class

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44 The adequacy-of-representation requirement demands only that class treatment leave each class member no worse off than the member would have been had she pursued an individual remedy. *See supra* note 37 and accompanying text. But some class members might have done better with another form of dispute resolution than with either a class action or an individual action. Moreover, those victims excluded from an optimally sized class might have benefitted from some aggregation mechanism now made unworkable because of the class certification.

45 Formally, in a class of G members, there may be some class member(s) k for whom $ENB(k)_a > ENB(k)_{CA}$, where $ENB(k)_a$ represents the expected net benefit that member k could receive in a separate proceeding or set of proceedings and $ENB(k)_{CA}$ represents the expected net benefit that k could receive in the class action (i.e., $P(k)_{CA} \times L(k)_{CA} - C(k)_{CA}$). If K represents the total number of class member(s) k, it is permissible to include member(s) k in the class when

$$ENB(G)_{CA} > ENB(G\text{–}K)_{CA} + ENB(K)_a,$$

where $ENB(G\text{–}K)_{CA}$ is the expected net benefit of a class action that does not include member(s) k (i.e., $P(G\text{–}K)_{CA} \times L(G\text{–}K)_{CA} - C(G\text{–}K)_{CA}$).

46 Formally, in a class of size G, there may be some class member(s) l for whom $ENB(l)_a > ENB(l)_{CA}$, where $ENB(l)_a$ represents the expected net benefit that l could receive in a separate proceeding or set of proceedings and $ENB(l)_{CA}$ represents the expected net benefit that l could receive in the class action (i.e., $P(l)_{CA} \times L(l)_{CA} - C(l)_{CA}$). If L represents the total number of class members l, then these member(s) should not be included when

$$ENB(G)_{CA} < ENB(G\text{–}L)_{CA} + ENB(L)_a,$$

where $ENB(G\text{–}L)_{CA}$ is the expected net benefit of a class action that does not include members l (i.e., $P(G\text{–}L)_{CA} \times L(G\text{–}L)_{CA} - C(G\text{–}L)_{CA}$).

47 *See generally* Jeanne C. Finegan, *Five Key Considerations for a Successful International Notice Program*, 78 U.S.L.W. 2611 (Apr. 20, 2010) (discussing issues about giving effective class notice to foreign citizens). Notice of the right to opt out must be given in all Rule 23(b)(3) class actions. *See* FED. R. CIV. P. 23(c)(2)(B). In addition, the court will direct that notice be given in the event of a settlement, *see id.* at 23(e)(1), and can direct that notice be given for other major litigation events, *see id.* at 23(d)(1)(B).

does not include those citizens. Likewise, if the laws of a significant number of countries apply to the case, then the management of the American class action might become so difficult and costly that the inclusion of foreign citizens might not be worthwhile.[48] And some foreign class members might have a more effective remedy available to them in their home country or in another country. Unless their exclusion submarines the viability of the claims of the remaining members of the putative American class by an amount that exceeds the additional benefits these foreign citizens obtain in the foreign proceeding,[49] the lack of the class action's superiority requires a court to exclude foreign class members on this ground.

Therefore, courts are sometimes justified in excluding foreign class members on superiority grounds. But such exclusions have nothing to do with whether a foreign court will (or will not) recognize an American class judgment or settlement. The present issue, however, is whether a foreign country's (non)recognition of an American class judgment or settlement constitutes an independent step in the superiority analysis. Before we can address that question, we need to describe one more matter: the incentive that foreign citizens have to file foreign proceedings after the conclusion of the American class action.

C. Incentive to File a Subsequent Foreign Suit

The *Bersch-Vivendi* rule overlooks an essential intermediate step by assuming that citizens of a foreign country will in fact file subsequent

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48 *Cf.* Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) (refusing to certify a nationwide mass-tort class action in part because "variations in state law may swamp any common issues and defeat predominance"). *But see* Klay v. Humana, Inc., 382 F.3d 1241, 1261, 1262 (11th Cir. 2004) (acknowledging *Castano*'s rule but stating that "if a claim is based on a principle of law that is uniform among the states, [or] if the applicable state laws can be sorted into a small number of groups, each containing materially identical standards, then certification . . . can be appropriate").

49 For example, assume that fifty Americans and five million Dutch citizens are injured. Each American suffers a loss of $10,000; each Dutch citizen a loss of $1. Assume as well that the probability of recovery in an American class action is 40% (a $200,000 expected benefit for the Americans and a $2,000,000 expected benefit for the Dutch). Costs of $220,000 are assessed proportionally ($20,000 against the Americans and $200,000 against the Dutch). Further assume that, in a WCAM settlement in the Netherlands, *see supra* note 11, the defendant proposes to settle the Dutch citizens' claims for $2,100,000, but refuses to settle the American claims. Costs in the WCAM proceeding are $210,000. Finally, assume that the loss of the Dutch class members makes a class suit by the fifty Americans less valuable, so that the Americans would recover a total of only $50,000 ($200,000 less costs of $150,000) if the Dutch citizens were excluded. In this situation, the greater social benefit is achieved with a single American class action ($2,200,000 – $220,000, or $1,980,000) than with a combination of an American class action for American citizens and a WCAM proceeding for Dutch citizens ($50,000 + ($2,100,000 – $210,000), or $1,940,000)—even though the Dutch citizens themselves are not as well off being included in the American class action (receiving only $1,800,000 ($2,000,000 – $200,000) in the American class action, as opposed to $1,890,000 ($2,100,000 – $210,000) in the WCAM proceeding).

suits in their home forums when those forums do not enforce the American judgment or settlement. But that assumption does not necessarily hold true.

In examining a foreign citizen's incentive to file or participate in a subsequent suit,[50] we begin by designating as X the gross amount that a foreign class member who is included in the American class action receives from the judgment or settlement. The value of X could be $0 (in the event the class loses or the settlement results in no compensation to the foreign class member), or it could be some amount greater than $0.[51] We now make two assumptions about X. First, we assume that the foreign court will offset X from the amount that it will award in the foreign proceeding for the same injury.[52] Second, we assume that a foreign citizen will choose the form of foreign proceeding (whether an individual action or an aggregated suit or settlement) that yields the greatest individual benefit.[53]

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50 Although we talk about the incentives that foreign citizens have to file a subsequent suit, our analysis includes both those who file a suit and those who become willing parties to it. For instance, our analysis includes those who join a suit filed by another and those who decline to opt out of a collective proceeding in which they have opportunity to do so.

51 Because of the "do no harm" requirement for determining adequacy of representation, *see supra* notes 35–37 and accompanying text, X cannot fall below $0.

52 In American law, a party cannot generally obtain "more than a single full compensatory recovery for an injury. . . . If . . . earlier recoveries truly compensate the plaintiff for the same injury, they can and will be used to offset the current damages award." Niccum v. Meyer (*In re* Meyer), Nos. 97-2318, 97-2492, 98-2090, 1998 WL 538160, at *6 (7th Cir. Aug. 21, 1998). *But see* Zivitz v. Greenberg, 279 F.3d 536, 540 (7th Cir. 2002) ("[C]ourts should not impose a setoff against a recovery from injuries separate and distinct from those for which the plaintiff was already compensated . . . ." (citing Pasquale v. Speed Prods. Eng'g, 654 N.E.2d 1365, 1382 (Ill. 1995))); Turner v. Municipality of Anchorage, 171 P.3d 180, 190 (Alaska 2007) ("The purpose of offset . . . is avoiding double recovery; therefore, if the prior payment was for a different injury than the one compensated at trial, no issue of double recovery arises."); RESTATEMENT (SECOND) OF TORTS § 920A(2) (1977) (describing situations in which an offset is not appropriate). Although our assumption is that a foreign court will deduct the gross amount received by a plaintiff in the American action, the plaintiff nets less than this amount in the American case due to the costs of litigation (i.e., for a foreign class member f, the amount netted is $X(f) - C(f)_{CA}$).

Some foreign courts adopt a similar principle. *See* Ásmundsson v. Iceland, 2004-IX Eur. Ct. H.R. 307, 319 (2004) (describing "the basic principle in the law on liability that the claimant should receive full compensation, but not more"); Miller v. Cooper, [1994] 1 S.C.R. 359, 396 (Can.) ("[In tort actions,] the plaintiff is not entitled to a double recovery for any loss arising from the injury."); *id.* at 369 (McLachlin, J., dissenting) ("The ideal of compensation which is at the same time full and fair is met by awarding damages for all the plaintiff's actual losses, and no more. . . . Double recovery is not permitted."); Jameson v. Cent. Elec. Generating Bd., [2000] 1 A.C. 455 (H.L.) 471–72 (appeal taken from Eng.) ("The basic rule is that a plaintiff cannot recover more by way of damages than the amount of his loss. . . . The principle of full satisfaction prevents double recovery." (internal quotation marks omitted)).

If a foreign court does not offset any recovery received in the American proceeding, then X can be treated as $0.

53 In the event that the foreign citizen chooses to bring an aggregate proceeding, we do not assume that the foreign citizen will pick the form of proceeding that maximizes the recovery to the group as a whole. Nor do we assume that the foreign citizen is bound by a

Under these assumptions, it is easy to specify the circumstance in which a foreign class member has an incentive to file or participate in a subsequent foreign proceeding: a foreign class member will choose to file a subsequent foreign suit only if the amount that she expects to realize from the foreign proceeding (i.e., the expected gross benefit of a foreign suit minus X, the gross amount already obtained in the American suit) exceeds the cost of bringing the foreign suit.[54]

In calculating the expected net benefit of a foreign suit, however, a foreign class member must factor in the risk that the foreign forum in which the claim is filed will recognize the American judgment or settlement. If the foreign forum recognizes the judgment or settlement and gives it preclusive effect, then the foreign class member will receive nothing; if the court does not recognize the judgment or settlement, then the case can proceed.[55] Thus, the issue of nonrecognition bears on foreign class members' incentive to sue; it is a downside risk that makes participation in a subsequent suit more risky and the expected recovery less valuable.[56]

"do no harm" principle that requires the foreign citizen to ensure that others brought within the aggregated proceeding are at least as well off as they would be had they retained control of their own case, *cf. supra* note 37 and accompanying text (adopting this principle for an American class representative), or that those who are not left as well off can opt out of the proceeding. If we were to adopt these additional assumptions, the cost to the foreign citizen of bringing an aggregated foreign proceeding would rise, making commencement of a foreign proceeding less desirable or likely. We decline to make these assumptions in order to test our analysis under circumstances that maximize the incentive to file subsequent foreign proceedings.

54 This choice is a variant of the choice made by a plaintiff initially deciding whether to sue. *See supra* Part II.A.

55 We assume here that the foreign forum will give the American class judgment or settlement claim-preclusive effect. For a discussion of a foreign forum affording the judgment or settlement issue-preclusive effect, see *infra* note 56.

56 Thus, a class member f will initiate or participate in a suit in a foreign forum when

$$P_N \times P(f)_F \times L(f)_F - C(f)_F > X(f),$$

where P_N is the probability that the foreign forum will not recognize the American judgment or settlement, $P(f)_F$ represents the probability of recovery by a foreign class member f in a foreign forum, $L(f)_F$ represents the expected recovery that the foreign class member will receive in the foreign forum, $C(f)_F$ represents the costs of proceeding in a foreign forum, and $X(f)$ represents the gross amount received by the foreign class member in the American class proceeding (i.e., the setoff amount).

Because the foreign courts of which we are aware apply the "loser pays" rule, *see, e.g.*, INTERNATIONAL CIVIL PROCEDURE 752 (Shelby R. Grubbs ed., 2003) (noting that in Switzerland the losing party must pay both court costs and the winning party's attorneys' fees), the calculation of $C(f)_F$ is somewhat complex. It is roughly equivalent to the formula already described *supra* note 27; because shifting of attorneys' fees to the losing party is highly probable, its terms have more bite. Thus, $C(f)_F$ is more precisely represented as

$$C_{F(p\text{-}NS)} + (1\text{-}P)\,C_{F(p\text{-}S)} + (1\text{-}P)\,C_{F(\Delta\text{-}S)},$$

where $C_{F(p\text{-}NS)}$ represents the amount of the plaintiff's costs in the foreign litigation that are nonshifting (i.e., costs that the plaintiff must bear regardless of the suit's outcome), $(1\text{-}P)\,C_{F(p\text{-}S)}$ is the expected value of the plaintiff's costs and attorneys' fees that the successful plaintiff can shift but the losing plaintiff must bear, and $(1\text{-}P)\,C_{F(\Delta\text{-}S)}$ is the expected value

Therefore, some—but not all—foreign citizens who are included in an American class action will have an incentive to file or participate in a subsequent foreign proceeding. A foreign forum's willingness to recognize an American class judgment or settlement is a relevant concern for foreign citizens considering whether to commence a foreign proceeding. What is not yet clear, and what Parts III and IV address, is whether a foreign court's willingness to recognize an American class judgment or settlement is also a relevant concern for an American court deciding whether to include citizens from that country as members in the American class action—in other words, whether the *Bersch-Vivendi* rule is right.

III

THE BENEFITS AND COSTS OF THE *BERSCH-VIVENDI* RULE

From an economic point of view, the goal of any legal rule, including a rule regarding class membership, is to yield the greatest social benefit (or, put differently, to minimize social cost).[57] This Part illustrates that, in many circumstances, the *Bersch-Vivendi* rule is likely to be more costly than a rule that includes foreign citizens in American class actions without regard to the attitude of the citizens' home forum toward recognition of American class judgments and settlements.[58]

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of the defendant's costs and attorneys' fees that the losing plaintiff must bear. It is important to note that, unlike the formula discussed *supra* note 27, these costs are the *additional* costs of the foreign proceeding; any costs obviated by the prior American litigation (perhaps certain discovery costs) are not included. On the other hand, any additional costs generated by the prior litigation (perhaps a dispute over whether some evidence discovered in the American case is admissible in the foreign proceeding) are included. For simplicity, we represent this constellation of costs as $C(f)_F$.

The equation in the first paragraph of this footnote assumes that a court's recognition of the American judgment or settlement would bar the subsequent foreign claim. If the American judgment or settlement instead precluded relitigation only of an issue, *see* Wasserman, *supra* note 9, at 344–45 (discussing issue-preclusive effects of American judgments in foreign litigation), then the equation would be slightly different. There would need to be two calculations of expected net benefit, one made on the assumption that relitigation of the issue is not barred and the other made on the assumption that it is barred. The first calculation would be multiplied by P_N, the second by $(1-P_N)$. The two products would then be averaged.

57 We measure social welfare on a global scale. Although some rules of class membership might be more favorable to one court system or another (for instance, a flat rule excluding all foreign citizens imposes far fewer costs on American courts than any rule of inclusion), our interest is in finding the rule that imposes the lowest overall cost on all interested parties—plaintiffs, defendants, and the dispute-resolution systems of all involved countries.

58 As we have described, the adequacy requirement of Rule 23(a) or the superiority element of Rule 23(b)(3) might lead an American court to exclude a foreign citizen from the class. *See supra* notes 7, 47–49 and accompanying text. The issue here is whether the (non)recognition of an American class judgment or settlement by a foreign citizen's own court system is a separate and distinct ground for exclusion of that citizen.

We begin by identifying the benefits of the *Bersch-Vivendi* rule. There are five in total (two relating to the inclusion of foreign citizens from recognizing countries and three relating to the exclusion of foreign citizens from nonrecognizing countries). First, the *Bersch-Vivendi* approach provides compensation in the American class action to the included foreign citizens.[59] Second, for those included citizens who would have had an incentive to sue in a foreign forum but for the recovery they received in an American class action, the rule saves excess costs, if any, associated with the avoided foreign litigation.[60] Third, the rule still allows excluded foreign citizens with an incentive to litigate to obtain compensation in a foreign forum.[61] Fourth, for excluded foreign citizens with an incentive to litigate overseas, the approach saves the excess costs, if any, associated with the avoided American class action.[62] Fifth, for those foreign citizens who lack an incentive to sue in a foreign forum *and* whose claims ultimately would have been found to lack merit in the American case, the *Bersch-Vivendi*

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59 The foreign citizens from recognizing countries who are included in the class under the *Bersch-Vivendi* rule fall into two categories: those with an incentive to commence a subsequent foreign proceeding and those without such an incentive. A foreign citizen j from a recognizing country has an incentive to commence a subsequent foreign proceeding when the equation $X(j) < P_N \times P(j)_F \times L(j)_F - C(j)_F$ holds true. *See supra* note 56. A foreign citizen h from a recognizing country has no incentive to commence a subsequent foreign proceeding when the equation $X(h) > P_N \times P(h)_F \times L(h)_F - C(h)_F$ holds true. *See supra* note 54 and accompanying text. Therefore, if we let H represent the total number of class members h and J represent the total number of class members j, the net benefit of including these class members in the American class action is represented by the equation $X(H) - C(H)_{CA} + X(J) - C(J)_{CA}$, or $X(H + J) - C(H + J)_{CA}$.

60 If H_I represents the total number of foreign citizens from recognizing countries who would have sued but for the recovery they received in the American class action (i.e., those foreign citizens h_I for whom $X(h_I) > P_N \times P(h_I)_F \times L(h_I)_F - C(h_I)_F$, and $P(h_I)_F \times L(h_I)_F - C(h_I)_F > 0$), these avoided costs can be expressed as $C(H_I)_F - C(H_I)_{CA}$, if $C(H_I)_F > C(H_I)_{CA}$.

61 An excluded foreign citizen q from a nonrecognizing country has an incentive to commence a foreign proceeding when the equation $P(q)_F \times L(q)_F - C(q)_F > 0$ holds true. *See supra* Part II.A. We use the variable $Y(Q)$ to represent the total benefit the citizens q receive in the foreign proceeding. The net benefit to these class members is represented by the equation $Y(Q) - C(Q)_F$.

62 For this cost, we consider all the duplicative or unnecessary costs that are avoided—including the costs of the plaintiffs, the costs of the defendants, and the costs of the court—rather than just the costs of the plaintiffs. These avoided costs can be expressed as $C(Q + \Delta + court)_{CA} - C(Q + \Delta + court)_F$, if $C(Q + \Delta + court)_{CA} > C(Q + \Delta + court)_F$. For simplicity, we use the variable $C(Q)_{CA(all)}$ to represent the total of these avoided costs.

Not all costs are duplicative or unnecessary. For instance, if a foreign court is willing to use a deposition taken in the American case, taking the deposition in the American court is not an unnecessary cost. On the other hand, if the foreign court would require a new deposition, the American deposition is duplicative; or if a foreign court does not permit the use of the American deposition, the cost of the American deposition is unnecessary. Likewise, the cost of giving notice to the excluded class members, *see supra* note 47 and accompanying text, is avoided.

rule avoids the costs spent in the American case to litigate the claims.[63]

The total benefit of the *Bersch-Vivendi* rule is the sum of these benefits and avoided costs.[64] If any of these five terms is less than zero, it is treated as being equal to zero. In some situations, it is possible that the *Bersch-Vivendi* rule will yield no benefit. For instance, when the only putative foreign class members are citizens of nonrecognizing countries with no incentive to litigate in a foreign country, none of the benefits of the *Bersch-Vivendi* rule are realized. But these are rare cases. In most situations, the *Bersch-Vivendi* rule will yield some benefit.

On the other hand, the *Bersch-Vivendi* rule imposes eight costs. Three of these costs relate to the inclusion of some citizens (those from recognizing countries), four relate to the exclusion of other citizens (those from nonrecognizing countries), and one relates to the rule's administrability. First, as we have seen, citizens from countries that recognize an American class judgment or settlement might still commence subsequent actions in a nonrecognizing country.[65] Additional compensation, if any, that these citizens obtain in subsequent foreign suits is an error cost when both the American and foreign courts are compensating for precisely the same injuries and attempting to achieve precisely the same deterrence of defendants' conduct that the prior American case accomplished.[66] A second, related cost is the expense incurred by these plaintiffs, by the defendants, and by the foreign tribunal resolving these subsequent suits.[67] A third cost arises when some included foreign citizens could have obtained larger net recoveries in a foreign proceeding due to noncumulative forms of compensation that a foreign court would have granted, but the citizens no longer have an incentive to obtain the additional relief be-

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63 An excluded foreign citizen r from a nonrecognizing country has no incentive to commence a foreign proceeding when the equation $P(r)_F \times L(r)_F - C(r)_F < 0$ holds true. For some individuals r_l within this group, the American case would have yielded nothing (i.e., $X(r_l) = 0$). The benefit from avoiding litigation expenses for this group is $C(R_l)_{CA}$. The amount of this benefit is not likely to be large. If the claim would have been found to lack merit in the American class action on liability grounds, the presence of the foreign citizen probably added nothing to the class's cost of attempting unsuccessfully to prove that liability. If the claim would have been denied on grounds that required individual proof of the excluded citizen's claim (e.g., on damages grounds), however, this cost does arise. Another cost that exclusion avoids is the cost of giving individual notice to the excluded members.

64 In other words, the total net benefit is (1) $X(H + J) - C(H + J)_{CA}$ + (2) $C(H_l)_F - C(h_l)_{CA}$ + (3) $Y(Q) - C(Q)_F$ + (4) $C(Q)_{CA(all)}$ + (5) $C(R_l)_{CA}$. *See supra* notes 59–63 and accompanying text.

65 *See supra* notes 15–21 and accompanying text; *supra* Part II.C.

66 If J represents the total number of foreign citizens with an incentive to file subsequent foreign litigation, *see supra* note 59, the net amount of overcompensation can be represented as $Y(J) - C(J) - X(J)$, if $Y(J) > X(J)$ and $Y(J) - C(J) > 0$.

67 We can represent this cost as $C(J)_{F(all)}$.

cause of the relief obtained in the American class action. From the viewpoint of the foreign tribunal, the American action has led to undercompensation and underdeterrence.[68]

Fourth, excluded foreign citizens (i.e., those from nonrecognizing countries) who have no incentive to commence foreign proceedings but who would have had meritorious claims in the American class action fail to receive compensation for the harms they suffer; their undercompensation (or, equivalently, the defendants' underdeterrence) is a significant cost of the *Bersch-Vivendi* rule.[69] Fifth, if excluded foreign citizens with an incentive to commence a foreign proceeding receive less net compensation in the foreign litigation than the amount that they would have received had they been included in the American class action, and the extra amount of the putative American award would have compensated these citizens for injuries that the foreign court would not allow, this undercompensation is a cost.[70] Sixth, to the extent that the American class action would have been more efficient in obtaining recovery of the same damages at lower cost, the *Bersch-Vivendi* rule imposes a cost on the excluded citizens.[71] Seventh, when a class is reduced to less than optimal size through the exclusion of some foreign class members needed to optimize the size of the class, the recovery for the remainder of the class is less than the recovery an optimally sized class would have recovered. Members of the American class action thus receive less re-

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68 If H_I represents the total number of foreign citizens from recognizing countries who would have sued but for the recovery they received in the American class action, *see supra* note 60, if $Y(H_I)$ represents the amount of nonduplicative relief they would have received in a foreign forum, and if $C(H_I)_F$ represents the costs that the plaintiffs h_I would have expended to obtain this relief, this cost can be expressed as $Y(H_I) - C(H_I)_F$. It is unlikely that this cost will exist in many lawsuits, or that it will be a significant factor in the remainder. The reason is that the requirement of superiority already excludes many foreign citizens who can obtain better relief in a foreign proceeding. *See supra* notes 43–46, 49 and accompanying text.

69 If R represents the total number of excluded foreign citizens from nonrecognizing countries without an incentive to commence a foreign proceeding, *see supra* note 63, we can represent the net amount of this cost as $X(R) - C(R)_{CA}$. As we have described, some individuals within this group, r_I, have claims that lack merit (i.e., $X(r_I) = 0$). *See supra* note 63. For these individuals, exclusion under the *Bersch-Vivendi* rule does not generate this particular cost.

70 If Q represents the total number of excluded foreign citizens from nonrecognizing countries with an incentive to commence a foreign proceeding, *see supra* note 61, $X(Q)$ represents the amount of nonduplicative relief that the plaintiffs q would have received in the American class action, and $C(Q)_{CA}$ represents the total costs that the plaintiffs q would have expended to obtain this relief in the American court, we can represent this amount as $X(Q) - C(Q)$.

71 If Q represents the total number of excluded foreign citizens from nonrecognizing countries with an incentive to commence a foreign proceeding, *see supra* note 61, we can express this cost as $C(Q)_F - C(Q)_{CA}$, if $C(Q)_F > C(p)_{CA}$.

covery than they might otherwise have, once again resulting in undercompensation and underdeterrence.[72]

Eighth, and finally, the *Bersch-Vivendi* rule imposes costs because the parties and judge in the American case must invest time and energy to determine whether a foreign country will recognize an American class judgment or settlement.[73]

The total cost of the *Bersch-Vivendi* rule is the sum of these eight costs, not all of which are implicated in any given case. For instance, if the only foreign class members came from recognizing countries and they had claims of insufficient value to justify relitigation in a foreign forum, only the last cost (determining whether the citizens' home country will recognize the judgment) is implicated. But this is a rare case, and in most situations, the *Bersch-Vivendi* rule will impose more significant costs.[74]

If the costs of the *Bersch-Vivendi* rule outweigh its benefits, the rule cannot be justified on economic grounds. Conversely, if its benefits outweigh the costs, then the rule stands on firmer footing—unless an even less costly alternative exists. A cursory examination of the last few paragraphs and footnotes, which have tried to describe these benefits and costs in quantitative terms, reveals the complexity of determining the value of the *Bersch-Vivendi* rule. Indeed, many of the benefits and costs cannot be quantified with certainty.

Even if precise calculations cannot be made, several points are evident. First, the *Bersch-Vivendi* rule is far from costless. Second, there are realistic situations in which the costs of the rule outweigh its benefits. For instance, if no foreign citizens have viable claims in any foreign forum, then the rule avoids no relitigation costs, while exclusion denies citizens from nonrecognizing countries the opportunity to receive compensation in an American forum.

Third, given the structure of modern American class-action law and changes in the international mass-aggregation environment, it is

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72 For a discussion of optimal class size, see *supra* note 42 and accompanying text. Because the *Bersch-Vivendi* rule excludes any foreign citizen q from a nonrecognizing country who will file in a foreign forum, as well as any foreign citizen r from a nonrecognizing country who will not file after exclusion, we represent this cost with the variable $Z(Q + R)$. In some cases, the absence of some foreign class members will not affect the value of the American class action for remaining class members; this cost arises only if $Z(Q + R)$ is positive.

73 For instance, in *Vivendi*, the parties "submitted voluminous competing expert declarations on the question of whether foreign courts would grant preclusive effect to a United States judgment or settlement in this action." *See In re* Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76, 95 (S.D.N.Y. 2007). We represent this cost with the variable $\hat{a}$.

74 In other words, the total net cost is: (1) $Y(J) - C(J) - X(J)$ + (2) $C(J)_{F(all)}$ + (3) $Y(H_1) - C(H_1)_F$ + (4) $X(R) - C(R)_{CA)}$ + (5) $X(Q) - C(Q)$ + (6) $C(Q)_F - C(Q)_{CA}$ + (7) $Z(Q + R)$ + (8) $\hat{a}$. *See supra* notes 65–73 and accompanying text. If any of these eight costs is less than zero, it is treated as being equal to zero; that set of costs does not exist on the facts presented.

no longer evident that the rule produces the result that it seeks: the avoidance of relitigation and its attendant costs.[75] Relitigation is unlikely in negative-value cases and in cases in which there are few foreign forums that both decline to recognize the American outcome and have cost-effective mechanisms for compensating mass injuries. Thus, even if a foreign citizen's home country refuses to recognize an American class judgment or settlement, excluding this citizen from the American class action makes little sense when the expected per-capita benefit from foreign litigation is low and the expected per-capita cost of litigating in a nonrecognizing forum is high (i.e., the negative-value condition). Conversely, including foreign citizens from recognizing countries makes little sense when the foreign citizens' individual cases have positive value and a nonrecognizing country has a cost-effective forum to resolve these cases on an individual or group basis.[76] Yet the *Bersch-Vivendi* rule calls for this result in both situations.

The structure of American class actions and the posture of mass-aggregation devices elsewhere in the world further undermine the *Bersch-Vivendi* rule. Today American courts often decline to certify class actions when the claims are independently viable; in particular, federal courts have tended to restrict the use of Rule 23 to negative-value or small-value suits of the kind for which the *Bersch-Vivendi* approach is least effective.[77] At the same time, although the number of foreign countries with collective-action processes is growing (thus expanding the number of cost-effective foreign forums in which excluded citizens can file),[78] countries with collective-action processes are likely to recognize an American class judgment or settlement.[79] The combination of these two realities means that the *Bersch-Vivendi* rule principally operates to exclude the foreign citizens least likely to relitigate and most in need of an effective American remedy.

Indeed, both *Bersch* and *Vivendi* were securities fraud actions, which typically involve small stakes for most investors and are there-

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75 *Cf.* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975) (noting the policy concern of relitigation as a reason for disallowing foreign citizens to join domestic class suits).

76 Harder cases lie in the middle: when either the foreign citizens' cases have positive value or there are hospitable and cost-effective foreign forums, but not both.

77 For federal cases declining to certify mass torts in part because they were positive-value suits and in part because their value put inordinate pressure on the defendant to settle, see, for example, Castano v. Am. Tobacco Co., 84 F.3d 734, 748–49 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299–1300 (7th Cir. 1995).

78 *See supra* note 11 and accompanying text.

79 *See In re* Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76, 105 (S.D.N.Y. 2007) (noting that the Netherlands' recent enactment of its WCAM procedure made it likely that it would recognize an American class judgment).

fore ideally suited to class treatment under Rule 23.[80] Neither *Bersch* nor *Vivendi* suggested that nonrecognizing countries had cost-effective processes for aggregating and resolving the claims of excluded shareholders.[81] In neither case, therefore, was significant relitigation in nonrecognizing forums likely to occur—even if the American class action yielded a disappointing outcome for foreign citizens. As a result, the costs of relitigation that *Bersch* and *Vivendi* avoided were probably less than the undercompensation and underdeterrence that excluding foreign class members caused.

Another real-world dynamic makes the *Bersch-Vivendi* approach even more problematic. The relitigation that the *Bersch-Vivendi* rule seeks to avoid is most likely to occur when the American class judgment or settlement gives foreign citizens less relief than was expected.[82] Such cases, however, would usually be classified as weak—they fail to yield the expected benefit. As a practical matter, the loser-pay rule that foreign tribunals employ[83] creates a disincentive to file weak claims.[84] Therefore, the feared relitigation that the *Bersch-Vivendi* approach sought to stanch is unlikely to materialize in practice, while the costs of failing to compensate or undercompensating excluded foreign citizens loom large.

IV
BEYOND *BERSCH* AND *VIVENDI*: BENEFITS AND COSTS OF OTHER APPROACHES

Given the costs of the *Bersch-Vivendi* rule, we now consider whether other options are less costly. We analyze five contenders: a rule allowing the inclusion of all foreign citizens (the inclusion rule); a rule that excludes all foreign citizens (the exclusion rule); a rule

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80 *See id.* at 92 ("In a case such as this, where each individual plaintiff can only have a fraction of the interest in the outcome of the litigation as the defendants, any interest the members of the class might have in individually controlling the prosecution of separate actions is heavily outweighed by the obvious benefits of pressing their claims as a class.").

81 Indeed, *Vivendi* conceded the opposite with respect to Germany, in which "collective actions remain unknown." *Id.* at 104–05. Rather than relying on this fact as a reason to include German class members, however, the court used it as a reason to exclude these members—likely meaning that German shareholders received no redress for Vivendi's allegedly unlawful behavior.

82 Recall that, in many cases in which foreign claimants possess claims of greater value in a foreign forum, they will be excluded from the American class action on superiority grounds. *See supra* notes 43–46, 49 and accompanying text.

83 *See supra* note 56 and accompanying text.

84 For an economic analysis demonstrating this intuitive point, see Barbara Luppi & Francesco Parisi, *Litigation and Legal Evolution: Does Procedure Matter?* 18–20 (Univ. of Minn. Law Sch. Legal Studies Research Paper No. 10-09, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1555784. For a discussion of empirical evidence on fee shifting, see Avery Wiener Katz & Chris William Sanchirico, *Fee Shifting in Litigation: Survey and Assessment* 25–34 (Univ. of Pa. Law Sch. Inst. for Law & Econ. Research Paper No. 10-30, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1714089.

that excludes foreign citizens with an incentive to relitigate in a foreign forum (the incentive rule); relatedly, a rule that excludes foreign citizens who can be expected to have an incentive to relitigate (the expected-incentive rule); and a rule that mimics a foreign citizen's decision whether to opt out (the forced opt-out rule). We examine each rule in light of the five benefits and eight costs that we identified in evaluating the *Bersch-Vivendi* rule.

A. The Inclusion Rule

A rule including all foreign citizens who otherwise meet the criteria of Rule 23[85] can yield the first two benefits identified in our discussion of the *Bersch-Vivendi* rule: compensation in an American forum and avoidance of excess litigation costs that would have arisen in the foreign forum.[86] Because no foreign citizens are excluded, however, this rule does not yield the third through fifth benefits, which measure the gains that accrue as a result of excluding some foreign citizens.[87]

On the cost side, the inclusion rule avoids the four costs of exclusion as well as the fifth cost of administering the rule.[88] But the three costs of inclusion—the two costs that arise because of the possibility of relitigation[89] and the third cost that arises when included citizens might have been better compensated in a foreign forum[90]—remain. Indeed, these three costs are likely to be greater under the inclusion approach than under the *Bersch-Vivendi* approach because the inclusion of a greater number of foreign citizens in the American case in-

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85 Rejecting the *Bersch-Vivendi* approach does not mean that all foreign citizens would therefore become class members. Other requirements of Rules 23(a) and (b) might require exclusion of some foreign citizens. *See supra* notes 7, 47–49 and accompanying text.

86 *See supra* notes 59–60 and accompanying text. Realization of the second of these benefits is contingent on the relative cost-effectiveness of the American class action.

87 *See supra* notes 61–63 and accompanying text. The sentence in the text is a slight overstatement. Because included foreign claimants typically have the right to opt out of the American class action, *see supra* note 14, the inclusion rule still realizes the third through fifth benefits for those citizens who opt out. Typically, however, few class members opt out. *See* THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 52–53 (1996) (noting a median opt-out rate of 0.1% or 0.2% of the total class membership in a study of federal class actions). The opt-out rate will likely be even lower for foreign citizens because of the considerable difficulty of supplying foreign citizens with an effective notice of their right to opt out. *See supra* note 47 and accompanying text. The incentive for foreign citizens to opt out is especially weak if they can lurk in the American class action and see what it yields, while retaining the option to file a later case for additional recovery in a nonrecognizing foreign forum.

88 *See supra* notes 69–73 and accompanying text. Again, because claimants may opt out, the text in the sentence is not precisely accurate. Given that the number who opt out is likely to be inconsequential and that these claimants also generate certain benefits, *see supra* note 87 and accompanying text, we treat the benefits and costs of opting out as a wash.

89 *See supra* notes 65–67 and accompanying text.

90 *See supra* note 68 and accompanying text.

creases the chance that some foreign claimants will be dissatisfied and will commence a subsequent foreign proceeding.

The inclusion rule's ability to deliver a level of compensation for all foreign citizens and to eliminate most of the categories of cost associated with the *Bersch-Vivendi* rule makes the inclusion rule sound like a clearly superior alternative. Not necessarily. In readily imaginable circumstances—for instance, when every foreign citizen has a claim in a foreign tribunal whose value exceeds the value of the claim in the American class action and further has ready access to a nonrecognizing foreign forum with a cost-effective mass-aggregation device—the *Bersch-Vivendi* rule is more efficient. The reason is that the *Bersch-Vivendi* rule limits sure-to-be-incurred relitigation costs and allows excluded foreign citizens to realize the full value of their claim overseas.

Nonetheless, if the only choice was either to adopt the *Bersch-Vivendi* approach or to reject it in favor of the inclusion rule, the *Bersch-Vivendi* approach performs worse over a broader range of situations. The present law on American class actions, which favors certification only in cases of small value,[91] tips the scale against the *Bersch-Vivendi* rule; small-stakes cases are less likely to result in subsequent litigation, thus limiting the downside relitigation costs of the inclusion rule. So do the loser-pay rules of foreign legal systems and the likelihood that foreign countries with effective mass-aggregation rules will recognize the American judgment or settlement.[92] In making this argument, we are sensitive to the reality that rejecting the *Bersch-Vivendi* rule will result in relitigation, with all of its attendant costs. But the flip-side costs of the *Bersch-Vivendi* rule—especially undercompensation and underdeterrence in the small-stakes cases that are standard fare for American class actions—are generally greater.

The choice of rule, however, is not binary; we need not accept the *Bersch-Vivendi* approach *in toto* or reject any exclusion of foreign citizens. Other rules are possible.

B. The Exclusion Rule

The rule opposite to a rule automatically including all foreign citizens who meet the terms of Rule 23 is a rule excluding all foreign citizens even when they meet the terms of Rule 23. The benefits and costs of this exclusion rule are the mirror images of those for the inclusion rule. Because all foreign citizens are excluded, no citizens receive any benefits from the American class action; hence, neither of the first two benefits is realized.[93] On the other hand, for those foreign citizens with an incentive to sue, the third and fourth benefits,

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91 *See supra* note 77 and accompanying text.

92 *See supra* notes 78–79, 83–84 and accompanying text.

93 *See supra* notes 59–60 and accompanying text.

which arise from compensation these foreign citizens receive in a foreign forum and the avoidance of unnecessary costs from the American class action, are realized; and for those foreign citizens who lack an incentive to sue and whose claims were meritless, the fifth benefit is also realized.[94]

On the cost side, because all foreign citizens are excluded, none of the first three costs arises—including, most significantly, the costs associated with relitigation in a foreign forum.[95] Nor does the final cost—the administrative cost of determining which citizens to include and which to exclude.[96] But the fourth through the seventh costs, especially the failure to compensate foreign citizens with no incentive to file overseas and the loss to the American citizens remaining in the American class action from a suboptimal class, are a greater concern.[97]

Aside from its administrative simplicity (a benefit it shares with the inclusion rule), the exclusion rule appears to be an unattractive alternative. Recall that some foreign citizens with an incentive to sue have already been excluded from the class on superiority grounds.[98] The exclusion rule banishes the remainder—those whose presence in the class adds more expected value to the class than the expected value they would obtain from proceeding in a foreign forum. In doing so, we devalue the claims of the American citizens remaining in the class action more than the foreign citizens gain in their foreign cases. In addition, the exclusion rule incurs the cost of failing to deliver any compensation to those foreign citizens who lack an incentive to pursue a foreign claim. Therefore, unless the risk of relitigation is high and the costs of that relitigation are large, the costs for the remaining American members and for the uncompensated foreign members make the exclusion rule difficult to justify.

The chances of relitigation are greatest when the American class action so strongly disappoints foreign citizens that they have an incentive to file a subsequent foreign proceeding. The quintessential example occurs when the class loses the American case. Due to the operation of loser-pay rules in foreign forums and the vagaries of finding a hospitable foreign tribunal,[99] however, it is not true that even a disappointing American result will necessarily unleash a torrent of foreign relitigation. Nor is it true that every American class action will

94 *See supra* notes 61–63 and accompanying text.

95 *See supra* notes 65–68 and accompanying text.

96 *See supra* note 73 and accompanying text.

97 *See supra* notes 69–72 and accompanying text.

98 *See supra* note 49 and accompanying text.

99 *See supra* notes 78–79, 83–84 and accompanying text.

reach a disappointing result; indeed, it is a rare criticism of American class actions that they systematically underdeliver a remedy.[100]

The exclusion rule suffers from other problems as well. To begin, there are obvious problems of comity when American courts close their doors to foreigners simply by virtue of their citizenship. Next, closing the doors of federal courthouses to foreign citizens is inconsistent with the Class Action Fairness Act of 2005, in which Congress authorized federal courts to exercise jurisdiction over a class action when "any member of a class of plaintiffs is . . . a citizen or subject of a foreign state and any defendant is a citizen of a State."[101] No Federal Rule of Civil Procedure, including Rule 23, can "limit the jurisdiction of the district courts."[102]

While intolerably overbroad, the exclusion rule, like the *Bersch-Vivendi* rule, points toward the right idea: exclude those foreign citizens likely to commence a foreign proceeding. The following three sections examine other rules that seek to implement this insight.

C. The Incentive Rule

An immediately attractive possibility is to exclude from the American class those foreign citizens who have an incentive to file subsequent foreign litigation but include foreign citizens who lack an incentive to litigate subsequently.[103] Like the *Bersch-Vivendi* rule, this

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100 The usual concern with class actions is the opposite: that they use the power of large numbers to convert weak claims into litigation juggernauts that defendants must settle at an inflated price. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims."); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (issuing a writ of mandamus against an order certifying a class action in part because of "a concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability").

101 28 U.S.C. § 1332(d)(2)(B) (2006). By virtue of the generous jurisdictional and removal provisions of the Class Action Fairness Act, *see id.* §§ 1332(d)(2)–(4), 1453(b), most class actions involving foreign citizens are likely to land in federal court.

102 FED. R. CIV. P. 82.

103 Again, we assume that the included citizens otherwise meet the requirements of Rule 23 or the comparable state-court rule. *See supra* note 7 and accompanying text. For an extended discussion of the circumstances under which foreign citizens have incentive to file subsequent foreign litigation, see *supra* Part II.C. In brief, a court should include any foreign citizen s when

$$X(s) > P_N \times P(s)_F \times L(s)_F - C(s)_F$$

and exclude any foreign citizen t when

$$P_N \times P(t)_F \times L(t)_F - C(t)_F > X(t).$$

See supra note 56 (discussing this formula in detail). The group of foreign citizens S is the combination of the groups of foreign citizens H and R in our prior analysis. *See supra* notes 59, 63 and accompanying text. The group of foreign citizens T is the combination of groups of foreign citizens J and Q. *See supra* notes 59, 61 and accompanying text.

rule includes some foreign citizens and excludes others. But the groups of foreign citizens included and excluded are different. Rather than focusing on the legal status of an American judgment in a foreign citizen's home country, this rule focuses on the incentive that foreign litigants have to relitigate in a foreign forum.

Like every rule including some class members and excluding others, this incentive rule has benefits and costs. Mapping the five benefits and eight costs onto this rule,[104] the incentive rule potentially realizes all five benefits: compensation to every victim as well as possible savings from avoided litigation expenses (depending on the comparative costliness of the American and foreign proceedings and the number of excluded citizens whose claims are ultimately found to lack merit in a foreign proceeding).

On the cost side, the picture is more complicated. None of the first six costs arises. The first and second costs, which occur when included foreign citizens who are dissatisfied with the American class judgment or settlement relitigate, do not arise; by definition, the included foreign citizens obtain more from the American case than they expect to receive overseas, and therefore will not sue again. The same is true of the third cost, which arises only when included citizens could have obtained more compensation in a foreign action. As long as the American class action results in an actual gross benefit to included foreign class members that equals or exceeds the expected net benefit from a subsequently available foreign proceeding, none of these three costs associated with relitigation occur.[105]

Similarly, because every foreign citizen now has an incentive to bring or participate in an action in some forum (those with an incentive to sue in a foreign forum will sue overseas, and those without an incentive will remain members of the American class action), the fourth, fifth, and sixth costs—all of which occur when excluded class members fail to recover the appropriate, less costly compensation that the American class action could have delivered—do not arise.

On the other hand, under the incentive rule, the seventh cost—the diminution in value of the American class action after exclusion of certain foreign citizens—is in play. Because this rule excludes valuable claims (claims that are worth even more overseas than they are in an American court), the chance of a collapse in the value of the American class action is higher under this rule than under the *Bersch-*

104 *See supra* notes 59–73 and accompanying text.

105 An exception to this statement involves foreign citizens who are risk takers and who are therefore unduly optimistic about their chances to recover more in subsequent foreign proceedings than they obtained in the American class judgment or settlement. For these class members, the second cost is in play, and possibly the first if the gamble pays off with a higher foreign judgment. Previously we assumed risk neutrality. *See supra* note 24.

Vivendi rule. Unless exclusion of the foreign claims completely submarines the value of the American class action, however, it seems unlikely that this cost outweighs the benefits of the incentive rule.

As attractive as the incentive rule thus far appears, the eighth cost—the administrability of the incentive rule—imposes a nearly insuperable barrier. Because nonrecognition is a relevant variable in calculating the expected net benefit of a foreign proceeding, courts must incur the expense of determining whether foreign forums will recognize an American class judgment or settlement, as they do under the *Bersch-Vivendi* rule.[106] In addition, the court bears the burden of determining the expected value of foreign citizens' claims in a foreign forum—a calculation that requires an American court to learn about the law and the costs associated with every nonrecognizing foreign system, and then to learn enough about the facts of the case to make an educated guess about foreign citizens' expected outcome in each system.

But this is not all. The critical value in the incentive rule is the gross payoff of the American class action to each foreign class member; this value is the fulcrum point that separates those who should be included and those who should be excluded.[107] But this amount will be known at the time of class certification only in rare cases.[108] The incentive rule demands the impossible of an American court: *before* the court certifies the class, it must predict perfectly how much compensation each foreign claimant will receive *after* the completion of the American action.[109]

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106 In actuality, the cost is slightly different under the two rules. Under the *Bersch-Vivendi* rule, a court needs to determine whether each foreign citizen's home country will (or will not) recognize the American result. Under the incentive rule, the court must determine whether *any* foreign country will not recognize the American result and then factor in the cost to foreign citizens of suing in that forum. Although the latter inquiry is probably easier and less expensive to accomplish, we treat this cost as a wash when comparing the *Bersch-Vivendi* rule and the incentive rule.

107 We previously designated this point with the variable *X*. *See supra* text accompanying notes 50–51.

108 For instance, in some settlement class actions the value of the benefit to each class member is known at the time that the class is certified. But such cases are rare. In the first place, settlement class actions are difficult to certify. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 848–61 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619–29 (1997). In the second place, even when certification is possible, the settlement agreement often does not specify the exact benefit that a class member receives; the settlement often establishes schedules or criteria for compensation that require subsequent individualized application. *See, e.g.*, JAY TIDMARSH, FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 76 & n.191, 79–83 (1998) (describing a worldwide mass-tort settlement class action in which class members were scheduled to receive different levels of compensation based on numerous factors).

109 A related difficulty is the implicit requirement of Rule 23(a) that a class be defined with sufficient specificity that the parties and court can determine who must receive notice of the right to opt out and who will be bound by the judgment. Bratcher v. Nat'l Std. Life Ins. Co. (*In re* Monumental Life Ins. Co.), 365 F.3d 408, 413 (11th Cir. 2004). Under the

Despite this fatal flaw, it is worth returning to the basic point of the incentive rule. In theory, it is in most circumstances the least costly rule for deciding whether to include foreign citizens in American class actions. It reaps all the benefits of proper inclusion and exclusion, and it imposes only the seventh and eighth costs. Therefore, in theory, it is far superior to the *Bersch-Vivendi* rule, the inclusion rule, and the exclusion rule. The problem with the rule is an informational demand that renders the rule unusable in most real-world situations. Because the incentive rule holds such promise, however, it is worth considering whether the rule can be tweaked in a way that accounts for the near impossibility of knowing in advance what the American class action will in fact yield for foreign citizens. The following section considers two rules designed to do so.

D. *Ex Ante* Alternatives: The Expected-Incentive Rule and the Forced Opt-Out Rule

The evident solution to minimize the informational barrier in the incentive rule is to substitute for the actual gross benefit that the American class action will bestow on foreign citizens another term that is as close to this benefit as possible and is knowable at the time of the class-certification decision. As an economic matter, there are two logical substitutes, both of which substitute for the actual (or *ex post*) gross benefit an expected (or *ex ante*) benefit. The first is the expected gross benefit that a foreign class member will receive.[110] Under this "expected-incentive rule," an American court should include foreign citizens for whom the expected *gross* benefit of the American class action is greater than or equal to the expected net benefit of the foreign proceeding; it should exclude those foreign citizens for whom the expected net benefit of the foreign proceeding is greater than the expected gross benefit of the American class action.[111]

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incentive rule, a court's order defining the class would need to contain language along the lines of this: "Class membership extends only to those foreign citizens who will receive more from this class action than they expect to receive as a net benefit in a foreign proceeding." Depending as it does on subsequent contingencies, such a class definition may be too vague to satisfy Rule 23(a). *See* Rice v. City of Phila., 66 F.R.D. 17, 20–22 (E.D. Pa. 1974) (refusing to certify a damages class action when the class definition swept presently unknowable future class members into the class).

110 If we let P_{CA} represent the probability of winning a class action and L_{CA} represent the value of the recovery to the plaintiff if the class action succeeds, the expected gross benefit for class member i is $P(i)_{CA} \times L(i)_{CA}$, or $EGB(i)_{CA}$.

111 Thus, if EGB_{CA} represents the expected gross benefit of an American class action and ENB_F represents the expected net benefit of a foreign proceeding, a court should include any foreign citizen u for whom $EGB(u)_{CA} = ENB(u)_F$ is true, and exclude any foreign citizen v for whom $ENB(v)_F > EGB(v)_{CA}$ is true.

The second substitute is the expected *net* benefit that a foreign class member will receive in the American class action.[112] This "forced opt-out rule" changes the first term in the equation, so that only those foreign citizens for whom the net (as opposed to gross) expected benefit of the American class action exceeds the expected net benefit of a foreign proceeding remain in the American class.[113]

In theory, the expected-incentive rule is superior to the forced opt-out rule because the expected gross benefit more closely tracks the actual gross benefit of the (theoretically) ideal incentive rule. The expected-incentive rule also eliminates the need for the court to calculate the cost of the American class action—a calculation that the expected net benefit requires.[114] But the forced opt-out rule has one advantage: it mimics the opt-out decision that fully informed, wealth-maximizing foreign citizens would make. Such citizens would calculate their expected net recovery in the American class action and their expected net recovery in a foreign proceeding. They would then choose the proceeding that yielded the greatest benefit to them.[115] Because some foreign class members might not be fully informed, and others might lurk in the American class action with the knowledge that an available foreign forum will not recognize the American class judgment or settlement, there is no guarantee that foreign citizens will opt out as rational actors might. The forced opt-out rule effectively "opts out" these citizens, avoiding some of the costs associated with lack of information or strategic behavior.

In terms of the benefits and costs of the expected-incentive rule, they map fairly well onto the benefits and costs of the incentive rule.[116] Indeed, if the court accurately estimates the exact recovery that foreign claimants later receive, the expected-incentive rule reaps all the benefits of the incentive rule and imposes only the seventh cost

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112 The expected net benefit for class member i is $P(i)_{CA} \times L(i)_{CA} - C(i)_{CA}$, or $ENB(i)_{CA}$. See *supra* note 29 for an explanation of this calculation.

113 Thus, a court should include any foreign citizen a for whom $ENB(a)_{CA} = ENB(a)_F$ is true, and exclude any foreign citizens b for whom $ENB(b)_F > ENB(b)_{CA}$ is true.

114 For the formula calculating the expected net benefit, see *supra* notes 29, 112.

115 *See supra* notes 29–30 and accompanying text.

116 The expected-incentive rule is not perfect in this regard. In choosing to stay in or opt out of the American class action, a fully informed, wealth-maximizing foreign citizen without the safe harbor of a nonrecognizing foreign forum would compare net benefits of the American class action to net benefits of the foreign proceeding. The expected-incentive rule compares gross American benefits to net foreign benefits because of the fact that a foreign court will set off the gross proceeds, not the net proceeds, in the subsequent foreign litigation. *See supra* note 52 and accompanying text. Therefore, foreign citizens will not commence subsequent foreign proceedings unless they can net more than the American gross. In excluding only those foreign citizens expected to net more overseas than they are expected to gross in the American class action, the expected-incentive rule therefore contains a slight bias in favor of inclusion. As a result, the number of possible dissatisfied foreign citizens rises, and the chance of relitigation and undercompensation increases.

(the loss in value to the remaining class members from the exclusion of some of their number) and the eighth cost (the expense of administering the expected-incentive rule—principally, the cost of obtaining the information to calculate the expected gross benefit in the American case and the expected net benefit in the foreign proceeding).

But the likelihood of perfect estimation is very low. The American court is likely to overestimate the recovery in the American class action for some foreign citizens, and to underestimate it for others. Both overestimation and underestimation reduce the benefits of the expected-incentive rule and impose costs. In general terms, overestimating the benefit that foreign class members would receive in the American case increases the likelihood of foreign relitigation. Conversely, underestimating the benefit excludes from the class action some foreign citizens who would have received greater net compensation in the American case. Significantly, however, underestimating the American recovery still provides foreign citizens with some opportunity for recovery in either an American or a foreign proceeding[117]—an important contrast to the *Bersch-Vivendi* rule.

A similar but not identical analysis pertains to the forced opt-out rule. Because it uses the expected net benefit, which is a lower number than the expected gross benefit, using the forced opt-out rule leads to the exclusion of more foreign citizens than using the expected-incentive rule. As a result, in relation to the expected-incentive rule, the forced opt-out rule reduces the risk of relitigation and its attendant costs, but increases the risk of undercompensation of foreign citizens and its attendant costs. This is true even if the American court perfectly predicts the expected net benefit; to include and exclude the "right" foreign citizens (i.e., the citizens that the incentive rule would include and exclude), a court applying the forced opt-out rule would need to overestimate, rather than correctly estimate, the expected net benefit.[118]

Therefore, in comparing the expected-incentive rule to the forced opt-out rule, the expected-incentive rule performs better than the forced opt-out rule when a judge can estimate the expected gross

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117 Recall that the American class action must have a nonnegative expected net value for each class member. *See supra* note 37 and accompanying text. Therefore, the expected gross value of the American class action will be a positive number, and the American class action will exclude only those foreign citizens whose expected net benefit in a foreign proceeding is even greater than this number. Hence, foreign citizens will either remain in the American class or have an incentive to pursue their claims overseas.

118 The reason is that, to match the incentive rule, the expected net benefit would need to match the actual gross recovery (i.e., $ENB_{CA} = X$). Because the expected net benefit subtracts expected costs of litigation, while the actual gross benefit does not subtract the actual costs of litigation, the two terms will be equal only if a court overestimates the expected gross benefit.

benefit with some accuracy. The expected-incentive rule also performs better as a judge's likelihood of underestimating the American recovery increases. Conversely, the forced opt-out rule performs better as a judge's likelihood of overestimating the American recovery increases.

Both rules, however, suffer from the significant practical drawbacks of the incentive rule. For both rules, if their operation results in the exclusion of some foreign citizens, the seventh cost (the loss in value to the remaining American class members) is an issue. [119] More important, the eighth cost (the cost of administering the rule) again rears its head. Unlike the incentive rule, no variable is impossible to calculate,[120] but like the incentive rule, the calculation of the variables needed to make a fairly accurate assessment of the citizens to include and exclude requires courts to have information about the likelihood and amount of recoveries in both American and foreign proceedings, and (for the forced opt-out rule) about the costs of the American litigation as well. Because a court is not likely to have the full information necessary to make its calculations accurately, the risk of error is high.[121]

It is tempting to argue that the error costs in administering either of the *ex ante* rules will balance themselves out over time: because there will be too much inclusion in some cases and too much exclusion in others, the soundest strategy is for courts to pick one of the *ex ante* rules (likely the expected-incentive rule, because it more closely replicates the incentive rule and is less fraught with error) and stick with it. But that argument will not do. In the first instance, costs might be systematically skewed in one direction. Second, and relatedly, the rule that proves more costly might change over time. For instance, if American courts generally certify only small-stakes cases, and if there are no cost-effective nonrecognizing foreign forums, then the rule that errs on the side of including more foreign class members (i.e., the expected-incentive rule) will typically increase benefits and

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119 Both *ex ante* rules alter the ordinary concept of superiority. Usually, superiority requires that the class action be superior (in other words, yield the greatest expected net benefit) for the class as a whole. *See supra* notes 43–46 and accompanying text. The expected-incentive rule excludes putative class members who impose a high risk of relitigating in nonrecognizing foreign forums, even if their exclusion is not optimal for the American class action as a whole. But this loss to the American class might be necessary to reduce the costs associated with foreign relitigation and with certain forms of undercompensation.

120 Under the incentive rule the actual gross benefit is usually impossible to calculate at the time of class certification. *See supra* notes 107–09 and accompanying text.

121 For one example of a case in which the district court badly misjudged the likely recovery and the expected attorneys' fees, see *In re* Cendant Corp. Litig., 264 F.3d 201, 241, 280–86 (3d Cir. 2001) (noting that the district judge, in selecting lead counsel based on fee structure, badly underestimated the value of the ultimate settlement, which was $3.2 billion rather than the millions that the district judge anticipated).

reduce costs. But circumstances can change. Perhaps changes in the underlying law will make foreign citizens' cases more valuable, or cost-effective nonrecognizing foreign forums will spring up. At that point, a rule erring on the side of exclusion (i.e., the forced opt-out rule) might be better. Picking a single rule fails to account for the reality that the evolution of collective-action processes—both in the United States and overseas—remains fluid, as does the nature of the claims that might be asserted in these processes.

E. Summary

The discussion in the last two Parts reveals three points of significance. First, as long as foreign forums that do not recognize an American class judgment or settlement exist, and as long as some foreign forums might yield greater net recoveries for some foreign citizens than the American class action, the decision regarding foreign citizens' membership in an American class action imposes costs (even as it also generates benefits). Some costs arise from inclusion; others arise from exclusion. Therefore, when a defendant's wrongful actions toward large numbers of victims reach across national borders, no decision to include or exclude foreign citizens in a class action—regardless of what that decision is—is costless.[122]

Second, assuming that we wish to minimize the costs (or, conversely, maximize the benefits) of foreign citizens' membership in the American class action, no rule regarding the inclusion or exclusion of foreign citizens is optimal for all circumstances. In some cases (when no foreign citizen has a claim worth relitigating), including all foreign citizens is least costly. In some cases (when all foreign citizens have claims worth relitigating and a nonrecognizing foreign forum in which to proceed), excluding all foreign citizens might be the best way to go, although the answer still depends on the effect of exclusion on the value of the American class action. No single rule adequately captures the range of factual variations on which the choice of the least costly rule depends. The incentive rule does the best job in theory, but its practical difficulties make the incentive rule impossible to adopt in most real-world settings.

Third, the *Bersch-Vivendi* rule is not the least costly rule, especially in light of the present structure of Rule 23 and the evolving state of collective-action processes overseas. It overemphasizes the costs of relitigation (some of which will materialize anyway), and it undervalues the loss of compensation to excluded citizens. For that reason, the

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122 If we alter the assumptions at the start of this paragraph—so that all foreign forums will recognize the American class judgment or settlement and no greater compensation is ever available in a foreign forum—then a rule automatically including foreign citizens is costless. But on the realistic assumptions above, every rule is indeed costly.

rule should be rejected. But it is difficult to reject an established rule when no other rule emerges as clearly superior; and, as we have seen, no rule is clearly superior in all situations.

Although no single rule always performs best, the past two Parts reveal that certain factors are relevant in analyzing the benefits and costs of various alternative rules. This fact suggests that the best way to handle foreign citizens' membership in American class actions might not be a rule, but rather a multifactor standard. The next Part develops such an approach.

V
PRESUMPTIVE RULES FOR CLASS MEMBERSHIP

As this analysis has emphasized, any approach to the inclusion or exclusion of foreign citizens must begin by considering the incentive that foreign citizens do, or do not, have to relitigate in a foreign forum. If foreign citizens have an incentive to relitigate, then their inclusion generates costs that can be avoided by their exclusion;[123] on the other hand, if foreign citizens have no incentive to relitigate, the feared costs will not materialize, and problems of undercompensation and underdeterrence arise.[124] In either event, the starting point for determining the benefits and costs of various rules for inclusion or exclusion is the incentive to litigate. In determining this incentive, the factors include the stakes of the litigation, the existence of foreign forums that will not recognize the American class judgment or settlement, the likelihood of recovery in such foreign forums, the capacity of such forums to resolve efficiently the claims presented to it, and the likelihood and efficiency of the American class action to achieve a recovery for included foreign citizens.[125]

In addition to the incentive to litigate, two other factors have also emerged as significant in evaluating various alternatives for inclusion and exclusion. The first is the effect of excluding some foreign citizens on the value of the claims of those remaining in the American class action. If the costs associated with relitigation are low, and if the value of the American class action for remaining class members will collapse without those foreign citizens who might relitigate, there is reason to include the foreign citizens in the class despite the costs associated with relitigation. Conversely, if the costs of relitigation are high, and the exclusion of foreign citizens with an incentive to litigate

123 As we have shown, the costs associated with relitigation are broader than the additional litigation expenses of a second lawsuit. *See supra* notes 65–67 and accompanying text.

124 *See supra* notes 68–71 and accompanying text.

125 *See supra* Part II.C.

has little effect on the value of the remaining claims, exclusion is more likely to be appropriate.

Third, the administrability of a rule is critical. The "ideal" rule (i.e., the rule that minimizes costs in most circumstances) is the incentive rule, but it is practical only when the benefits of the American class action are known and the expected benefits of a foreign proceeding are easily ascertained.[126] Similar practical problems infested *ex ante* rules designed to mimic the incentive rule.[127] As we have seen, flat rules with no or low costs of administration—the inclusion rule, the exclusion rule, and even the *Bersch-Vivendi* rule (although here the costs of administration are not negligible[128])—have other costs that make them undesirable as a general rule for foreign class membership. But they do enjoy an advantage that has turned out to be significant in this area: simplicity.[129]

Taking these factors into account, we propose that American courts determine the status of foreign citizens in American class actions through a series of steps that are simple to administer and approximate the results that an incentive rule would achieve:

1. A court should presumptively include foreign citizens when they assert small-stakes claims (i.e., claims that would not be viable in an American court if pursued individually).
2. A defendant can overcome the presumption of inclusion by identifying foreign citizens for whom there exist one or more foreign forums (including arbitral forums) that:
   a. Are open to these citizens;
   b. Do not recognize an American class judgment or settlement;
   c. Provide cost-effective procedures for resolving small-stakes cases; and
   d. Employ rules of substantive, procedural, or remedial law that are likely to result in a more favorable outcome for the foreign citizens than the rules employed in the American court will produce.
3. The court can nonetheless include those foreign citizens who meet the criteria in (2) when:
   a. The foreign citizens expressly consent to be bound by the American class judgment or settlement; or
   b. The foreign citizens are unlikely to pursue their claims in the identified foreign forum(s), and the expected loss in value in the American class action from the exclusion of these citizens outweighs the expected costs of relitigation if these citizens are included.

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126 *See supra* Part IV.C.

127 *See supra* Part IV.D.

128 *See supra* note 73 and accompanying text.

129 *See supra* Parts III, IV.A, IV.B.

4. The court should presumptively exclude foreign citizens whose claims would be viable as individual suits in an American court. The class representative(s) can overcome this presumption for some or all foreign citizens by showing that:
   a. The foreign citizens expressly consent to be bound by the American class judgment or settlement; or
   b. No foreign forum open to those citizens will refuse to recognize the American class judgment or settlement.

At the most basic level, these presumptions divide small-stakes cases from large-stakes cases. The reason is simple. The principal concern driving the exclusion of foreign citizens is the fear of relitigation.[130] Relitigation is more likely when the claims are valuable enough to pursue in a foreign forum. Therefore, we begin with a presumption that claims valuable enough to bring independently in an American court should be excluded, because these are the cases for which there exists an evident incentive to relitigate in the event of an unfavorable American judgment or settlement. Conversely, we begin with the presumption that cases too small to bring independently in an American court are also too small to bring in a foreign forum. The lack of an incentive to relitigate eliminates concern for incurring relitigation costs. On the other hand, the exclusion of these claims from the American class action causes the undercompensation of these foreign citizens.

Both presumptions—the presumption of including small-stakes foreign claims and the presumption of excluding large-stakes foreign claims—are rebuttable. Defendants can overcome the presumption to include small-stakes foreign claims by pointing to one or more specific foreign forums that are "hospitable" to these claims. Hospitability first requires a showing that the foreign forum will be able to hear the claims (i.e., jurisdictional, venue, and comity concerns pose no barrier to resolving the claims). It also requires a showing that the foreign forum has a collective-action mechanism akin to the American class action; if it does not, there is little realistic chance that the small-stakes cases will in fact be relitigated.

Relatedly, hospitability requires that the foreign forum's substantive, procedural, or remedial rules provide an incentive to relitigate. Because the claims are small-stakes in nature, there is no incentive to relitigate them in a foreign forum unless the rules of the foreign forum provide some advantage unavailable in the American case (e.g., they are more cost-effective to bring on a collective basis or foreign law makes them large enough in size that, although regarded as small-

130 *Cf.* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975) (identifying the potential problem of relitigation as the motivation for excluding foreign citizens from domestic class actions).

stakes cases in the United States, they are large-stakes cases in the foreign forum). If the substantive law, procedures, and remedies are basically the same as they are in the American class action, the American court can logically conclude that the expected outcome in the two proceedings (the American and the foreign) would be comparable; in this case, there is little likelihood that relitigation will occur.

Finally, hospitability also requires a demonstration that any identified foreign forums meeting the other criteria will not recognize the American judgment. To this limited extent, the concern for nonrecognition that underlies the *Bersch-Vivendi* rule affects the proper approach to inclusion and exclusion of foreign citizens.

Our expectation is that defendants will rarely overcome the presumption favoring inclusion of small-stakes foreign claims. As we have said, most foreign forums with cost-effective collective-action processes are also likely to recognize an American class judgment or settlement.[131] In the event that the defendants succeed, however, the pendulum swings back in favor of exclusion because of the high risk of relitigation. The third step, however, describes two circumstances in which the court can decline to exclude foreign citizens despite this risk.

The first circumstance (step 3(a)) raises the possibility that foreign citizens might consent to be bound by the American judgment. Consent is a factor strongly favoring inclusion in the American action,[132] but it is unlikely that, in small-stakes cases, many foreign plaintiffs will provide consent.

The second circumstance (step 3(b)) calls attention to the reality that, even if a foreign forum is hospitable to hearing the claims of excluded foreign citizens, these citizens might not sue in that forum. The failure to sue causes a loss to the foreign citizens who will not sue (or at least will not recover as much) in an overseas forum. As we previously described, the exclusion of foreign citizens can also result in a loss in the value of the claims that remain in the American class action.[133] Together, these two losses might be greater than the sav-

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131 *See supra* notes 78–79 and accompanying text. It is possible that the defendants might rebut the presumption only as to a subset of the foreign claims; for instance, the identified foreign forum might hear claims brought only by its own nationals.

132 Express consent is required and would likely take the form of a motion to intervene. *See* FED. R. CIV. P. 24(a)–(b) (describing conditions under which intervention of right and permissive intervention are permitted); *cf. id* at 23(d)(1)(B)(iii), (C) (recognizing the possibility that class members will intervene). Declining to opt out of the class action is an inadequate indicator of consent, given the reality of opt-out practice. *Cf. supra* note 87 (discussing the rarity of opting out). Instead, express consent is equivalent to an opt-in process. A defendant could avoid the effect of a foreign citizen's consent by showing that, in at least one hospitable foreign forum, the foreign citizen's express consent would not bar relitigation.

133 *See supra* note 49 and accompanying text.

ings from avoided relitigation. If so, the claims for which the costs of exclusion are greater than their savings should be included in the American class action.

Admittedly a court must strike this balance on less than perfect information. But the American court can get some guidance by examining the nature of the foreign process. For instance, a critical issue is whether the foreign forum employs a class-action-like approach in which a class representative can press claims on behalf of others,[134] or whether the forum requires claimants to take affirmative, opt-in steps to present their claims. If the latter, then the theoretical openness of a forum in, say, Abu Dhabi means little to claimants from Britain; it is unlikely that they will press their claims in such a distant forum. And if they are not likely to press their claims, then the cost of their undercompensation is weightier than the cost of their (unlikely) relitigation. Therefore, in applying this factor, it is important for a court to be realistic about the likelihood that potentially excluded citizens will pursue claims in the hospitable forum that the defendants have identified.

In applying the two limits stated in the third step, a court might be able to address inclusion and exclusion surgically. For instance, in the example above, the court might choose to include British citizens but exclude all citizens from Abu Dhabi other than the twenty who expressly consented to be bound by the American class judgment or settlement. Likewise, if the court already knows the value of the American class judgment or settlement for certain foreign citizens (as, for instance, with some settlement class actions), it might be able to determine the likelihood of relitigation based on this recovery. In other cases, however, the court might need to apply a flat rule, either including or excluding all foreign citizens. The upshot of the third step—especially step 3(b)—is that a court can apply whichever specific rule (inclusion rule, exclusion rule, *Bersch-Vivendi* rule, or incentive rule) best accommodates the facts.

The fourth step establishes an opposite presumption of exclusion for foreign citizens with large-stakes claims. The reason is again evident. If a case is regarded as large-stakes in an American court, it is likely viable as an independent action in a foreign forum as well. Because these cases pose the greatest risk of relitigation, they are prime candidates for exclusion. But there may be less here than meets the eye. Although American courts have interpreted Rule 23 to allow class treatment of small-stakes cases, they have been skeptical of class

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134 If a class-action-like process were available, another relevant consideration would be the duties of loyalty that this representative owes to the represented foreign citizens. If the foreign process imposes no duty, then the risk of undercompensation (but not necessarily underdeterrence) remains. *See supra* notes 37, 53 and accompanying text.

treatment for claims that are independently viable.[135] Until this interpretation changes, this presumption of exclusion operates only in the rare circumstance when a set of large-stakes claims nonetheless passes through the Rule 23 gauntlet.

The presumption can be overcome. As with small-stakes cases, step 4(a) provides that a foreign citizen's consent to be bound is a relevant reason to include the citizen in the class; and here, given the stakes in the litigation, it is likely that some foreign citizens will have enough interest in their claims to make their preference to be included known to the American court. In such a situation, the attitude of any identified nonrecognizing foreign forums toward such consent—in particular, whether they will enforce the foreign citizen's consent—determines the effect that the American court should give to that consent.

The second circumstance under which the presumption can be overcome (step 4(b)) is narrower than the comparable second circumstance for the opposite presumption (step 3(b)). A class representative must show that none of the identified nonrecognizing foreign forums is open to the foreign citizen. If any such forum is open, the large stakes in the litigation provide an incentive for the foreign citizen to pursue the case in this foreign forum. True, if they had been allowed to participate in the American class action, the citizens might have received more (or at least enough to eliminate the incentive to relitigate), but the risk of relitigation, with its attendant costs, is greatest in this area. A flat rule, rather than a rule allowing the court to balance costs of undercompensation against costs of relitigation, seems a more realistic way to limit costs in light of the parties' litigation incentives.

The framework we propose is not costless. It is shaped around the parties' incentives to sue and to relitigate and structured to be administratively simple. Admittedly, it achieves neither objective perfectly. But, no rule in this area is costless,[136] and the "best" rule in theory is impossible to administer in practice.[137] The framework balances the plaintiffs' interest in adequate compensation, the defendants' interest in finality, the American courts' interest in adminstrability, and the shared international interest in appropriate deterrence.

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135 *See* FED. R. CIV. P. 23(b)(3)(A) (stating that a relevant factor in determining certification of opt-out class actions is "the class members' interests in individually controlling the prosecution or defense of separate actions"); Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) (reversing the certification of a mass tort in part because the claims were individually viable); *supra* note 32 and accompanying text.

136 *See supra* note 122 and accompanying text.

137 *See supra* Part IV.C.

CONCLUSION

One of strengths of the *Bersch-Vivendi* consensus is its appeal to a rough sense of justice: foreign citizens ought not to be able to take advantage of membership in an American class action if they can walk away from an unfavorable result and sue again in their home country.[138] But this rough sense of justice frustrates the delivery of compensation to deserving victims and fails to deter defendants adequately. Moreover, it is only partially successful in preventing the relitigation that it was designed to avoid. Rough senses of justice are usually just that—rough. A more refined sense of justice should now prevail. The *Bersch-Vivendi* consensus imposes significant costs—costs that can usually be avoided or reduced with a framework of rules more sensitive to the parties' incentives to litigate. If delivering compensation fairly and efficiently to class members and deterring wrongful behavior are the ultimate goals of class actions, the time to replace the *Bersch-Vivendi* rule is now.

138 *See supra* note 6 and accompanying text.