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HOLDING EVERYONE ACCOUNTABLE—THE NEED FOR THE CREATION OF AN INTERNATIONAL SECURITIES CLASS ACTION VENUE IN THE AGE OF GLOBALIZED ECONOMIES

By Emily Fallon[*]

I. INTRODUCTION

In 2010, few could have predicted how the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.* would impact the 2020 global securities landscape—overturning nearly forty years of precedent.[1] *Morrison* dramatically limited opportunities for international litigants to obtain redress through United States' ("U.S.") courts by disallowing "F-Cubed" cases—claims brought by *foreign* investors on *foreign* exchanges of *foreign* companies.[2]

Prior to *Morrison*, shareholders across the globe relied on American courts' application of securities law through the class action procedure to seek redress.[3] In the post *Morrison* era, shareholders around the globe feel the loss of an effective venue wherein they can no longer seek redress pursuant to U.S.' securities law.[4] While some countries have attempted to create their variation of the U.S.' securities class action procedure to provide a channel towards compensation for wronged investors,[5] these mechanisms are not sufficient to provide adequate access to justice to all shareholders regardless of their national origin.[6]

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[1] Nidhi M. Geevarghese, *A Shocking Loss of Investor Protection: The Implications of Morrison v. National Australia Bank*, 6 BROOK. J. CORP. FIN. &. COM. L. 235, 235 (2011).

[2] *Id.*

[3] *Id.*

[4] *Id.*; *see also* Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AMERICAN ACAD. POL. & SOC. SCI.7, 10 (2009); *see also* Calabresi & Schwartz, *The Costs of Class Actions: Allocation and Collective Redress in the U.S.. Experience,* 32 EUR. J. L. ECON. 169, 170 (2011). As a result of *Morrison*, American investors transacting abroad are left without sufficient protection against foreign securities fraud and bringing attention to the lack of uniform procedures to afford people the opportunity to litigate as a class to provide widespread access to justice in the judicial system.

[5] Deborah Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. KAN. L. REV. 965 (2017) (elaborating on the different steps taken by countries around the globe to provide opportunities for group litigation and class action procedures to provide more widespread access to justice for their citizens); *see also* S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?*, 88 NOTRE DAME L. REV. 899, 899 (2012); Bernard Murphy, *Access to Justice and the Evolution of Class Action Litigation in Australia,* 30 MELBOURNE U. L. REV. 399, 399 (2006); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 311 (2003).

[6] *See* Hensler, *supra* note 5 (explaining the concept of a "legal transplant" and how it is unreasonable to think that other jurisdictions can completely integrate a law from another country into their legal system because it would be impractical to think it would work without tailoring certain aspects to fit their own society's needs and expectations).

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In 2021, we live in a world where our economies, securities, and lives are wildly globalized and interconnected.[7] Opportunities for investors to seek compensation through securities litigation should reflect that interconnectedness. This article will examine recent developments in the securities class action landscape, and while headed in the right direction—will demonstrate the need to foster access to justice to serve the investors of our globalized economy adequately. This article will propose the creation of an international venue for securities class actions where investors—regardless of domicile or the origin of their security—will be afforded the opportunity to litigate collectively to seek compensation for securities fraud and hold international companies accountable.

This note will proceed in three parts. Section II will explain the historical policy background behind the U.S. class action model and Federal Rule of Civil Procedure 23 ("F.R.C.P. 23"), the impacts of the 1933 and 1934 securities law reforms, which will then lay the framework for *just* how important class action litigation is for protecting investors. This section concludes with a synopsis of the *Morrison v. National Australia Bank Ltd.* decision and the impact the Court's decision had on the entirety of the global securities class action landscape.

Section III opens with a high-level overview of a key issue in the global class action landscape, namely the lack of a uniform pathway towards recovery for harmed investors across the globe. The section proceeds with a breakdown of key features of the U.S. class action model, along with the introduction of a recent innovation to come out of the European Union ("E.U.")—the New Deal for Consumers which invented an international class action procedure.

The final section proposes a solution that would work to provide adequate, fair, and uniform opportunities for access to justice for securities investors across the globe. Inspired by the International Court of Justice, the New Deal for Consumers, and the U.S. class action model, this article poses the creation of an international securities class action venue. This venue would work to keep large companies honest by holding them accountable to their international investors, while promoting equal access to justice that is necessary in a world where our economies continue to become more globalized and interconnected.

PART II. BACKGROUND

While today's securities class action landscape is thoroughly developed, it did not simply happen overnight.[8] Through policy introduction and reform, class action litigation evolved over time through revisions of F.R.C.P. 23 in 1966 and the developing applications of the Securities and Exchange Act of 1934,[9] both discussed in turn below. As securities class actions became more common place in our judicial system, they fermented a role in society as

[7] *See generally* James R. Faulconbridge & Jonathan V. Beaverstock, *Globalization: Interconnected Worlds*, 331, 331-33, *in* HOLLWAY (2008).

[8] *See generally* Steve Cirami, *The Evolution of Securities Class Action Law: The SEC's Role in Compensating Investors*, BROADRIDGE (2021), https://www.broadridge.com/article/the-evolution-of-securities-class-action-law-the-secs-role-in-compensating-investors.

[9] *See* Richard L. Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903, 908-09 (2018), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2643&context=faculty_scholarship.

a procedural mechanism to afford widespread access to justice to all claimants.[10] Over time, U.S. courts became a hotbed for international securities litigation because international claimants recognized easily available opportunities for litigation—until a crucial Supreme Court decision in 2010 began to reshape litigation opportunities.[11]

A. The Origins and Evolution of "F.R.C.P. 23"

The current class action epoch began in July of 1966, when the then newly revamped F.R.C.P. 23 went into effect.[12] Under this mechanism, an individual was able to bring a suit acting as a representative party, on behalf of all members of a much larger group—the "class."[13] In order for the court to certify a legitimate class to proceed in class action litigation, the representative party must satisfy four requirements under F.R.C.P. 23(a): numerosity, commonality, typicality, and adequacy of a class representative and counsel.[14] Essentially, "a class will be certified for a class action if the question of law and fact common to class members predominates over any questions affecting only individual members."[15]

One of the quintessential characteristics of the U.S. class action model is the "opt-out" regime.[16] All relevant parties are automatically assumed into the class, and therefore bound to the subsequent decision by way of *res judicata*.[17] If a party would prefer to pursue litigation independently, the party must affirmatively remove itself from the class, "opting-out" of the lawsuit to litigate their own individual claim.[18] Up until the 1966 amendments, F.R.C.P. 23 was silent on whether absent class members were bound by subsequent judgments which led to experimentation with opt-in litigation.[19]

Some critics of the opt-out regime take the stance that it potentially offends due process rights by binding an unknowing class member to a subsequent judgment in a case they were potentially unaware of.[20] Counterarguments to this concept present the idea of promoting access to justice.[21] One of the driving forces behind class action litigation is promoting widespread access to justice—meaning even those claimants who have smaller

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[10] *See* Murphy, *supra* note 5, at 404.

[11] *See* Hensler, *supra* note 5.

[12] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356 (1967) (noting that many pushed for F.R.C.P. 23 to be revised in 1966 to promote access to justice at the height of the Civil Rights Movement, and that this social movement helped motivate lawmakers to make the judicial system more accessible to small claimants); David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, 90 WASH. U. L. REV. 587 (2013).

[13] *See* FED. R. CIV. P. 23.

[14] *Id.*

[15] *Id.; see also* Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804.

[16] *See generally* FED. R. CIV. P. 23; *see also* Marcus, *supra* note 7.

[17] *See generally* FED. R. CIV. P. 23.

[18] *See generally* Hensler, *supra* note 4; *see also* Calabresi, *supra note* 4, at 169-183.

[19] *See* FED. R. CIV. P. 23(3)(B); *see generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 HARV. L. REV. 591 (1968).

[20] *See* Tanya J. Moestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1 (2011) (recognizing the opt out structure of F.R.C.P. 23 creates the opportunity for people to raise concerns of democratic illegitimacy if people are unaware that they will be bound to a subsequent judgment in a claim they did not know was applicable to them).

[21] *See* Kaplan, *supra* note 19; *see* Hensler, *supra* note 4.

claims are able to have their day in court.[22] By aggregating all claims together through the class action mechanism, all claimants are afforded adequate redress opportunities regardless of their respective claim's "size" or compensatory value.[23]

B. Securities Law in the U.S. and Class Action Litigation: Securities Exchange Act of 1934

The Securities Exchange Act of 1934 governs the trading of securities in the U.S., creating the basis of regulating the financial markets and their participants in American markets.[24] Section 10(b) of the Securities Exchange Act ("Section 10 (b)") created a "Fraud on the Market" inspired cause of action for securities fraud under U.S. law.[25] Violations of the rule include executives making false statements in order to manipulate stock prices—either to benefit current shareholders or to hide losses or low revenue numbers to bring in new investors.[26]

The Fraud on the Market theory arguably provides the broadest justification for securities litigation under American law.[27] This theory promotes the idea that, "in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business."[28] Therefore, any misleading statements about the company defrauds investors of the actual value of their stocks.[29] In essence, the subsequent purchase of a stock after any misrepresentation about the value of a company creates a cause of action to commence litigation.[30] However, a litigant has the burden of proving that: (1) they relied on this misinformation when deciding to subsequently purchase a particular security; and (2) that the misinformation constituted an intentional misrepresentation.[31]

Unsurprisingly, the burden of proof to succeed on a Section 10(b) claim is relatively easy to achieve, which makes U.S. securities laws favorable to international investors—thus creating an accessible path towards compensation that would otherwise be unavailable in their

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[22] *See* Kevin M. Lewis and Wilson C. Freeman, *Class Action Lawsuits: A Legal Overview for the 115th Congress*, CONGRESSIONAL RESEARCH SERVICE, https://sgp.fas.org/crs/misc/R45159.pdf (last visited Oct. 11, 2021).

[23] Michael Hausfeld and Lauren Sorkin, *In Defense of Class Actions: A Response to Makan Delrahim's Commentary on the UK Mastercard Case*, COMPETITION POL. INT. (June 8, 2020), https://www.competitionpolicyinternational.com/in-defense-of-class-actions-a-response-to-makan-delrahims-commentary-on-the-uk-mastercard-case/#_ednref15; *see also* Calabresi *supra* note 4, at 169.

[24] *See* Securities Exchange Act of 1934, 15 U.S.C § 78A; William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PENN. L. REV. 69 (2011).

[25] *Id.*

[26] *See generally* 15 U.S.C § 78A; *see also* James Chen, INVESTOPEDIA, *Rule 10b-5* (Jan. 27, 2020), https://www.investopedia.com/terms/r/rule10b5.asp#:~:text=Rule%2010b%2D5%2C%20enacted%20in,legal%20perspectives%20regarding%20securities%20fraud.

[27] *See* Bratton, *supra* note 24; *see also* Hensler, *supra* note 4.

[28] *See* Basic Inc. v. Levinson, 485 U.S. 224 (1998).

[29] *See* Bratton, *supra* note 24.

[30] *See generally* 15 U.S.C. §78A; *see also* Basic 485 U.S. at 28.

[31] *See* 15 U.S.C. §78A.

own country.[32] Throughout the late 20th century, American courts faced a trend of "F-Cubed" securities litigation.[33]

Foreign plaintiffs, pursuant to F.R.C.P. 23, would file a claim under Section 10(b) in American federal courts against a foreign issuer for fraud concerning stock traded on a foreign exchange.[34]

C. Why are Securities Class Actions Important?

While the Securities Exchange Act of 1934 prohibited companies from engaging in "manipulative or deceptive practices" to lead investors to buy or sell securities on the open market, it is often believed that the federal government alone did not have the time, resources, or human capital to regulate securities and large companies solely through federal agencies.[35] The Securities Exchange Commission ("S.E.C.") is the sole federal agency responsible for securities law enforcement.[36] The S.E.C. has suffered from persistent underfunding for decades—which has undoubtedly lowered the efficiency and effectiveness of the agency.[37] The S.E.C. has "repeatedly acknowledged...that private litigation enables a level of compliance that would be impossible to achieve if enforcement were limited to the government."[38] A former S.E.C. chairman declared that private lawsuits, rather than government action, had become the "primary vehicle for compensating defrauded investors."[39]

Fundamental to the larger conversation surrounding the benefits of securities class action litigation is the concept of the "Private Attorney General," an individual who generally acts as a supplemental law enforcer to regulate congressional mandates through private civil litigation.[40] In the context of securities law, private law firms and lead plaintiffs assume the private attorney role in a class action to pursue compensation from a Section 10(b) or S.E.C. Rule 10b-5 ("10b-5") claim.[41]

D. Morrison v. National Australia Bank—U.S. Class Action Landscape Prior to 2010

It was no secret across the globe the benefits afforded to investors associated with U.S. securities class action litigation—the flexibility that the "Fraud on the Market" theory

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[32] *See* Chen, *supra* note 26.

[33] *See* Hensler, *supra* note 5.

[34] *See* NAPA, *Post-Morrison: The Global Journey Towards Asset Recovery*, 2 (2016) (highlighting the process foreign investors would take to sue for securities fraud in American courts pre-*Morrison*).

[35] *See generally* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why it Matters*, 57 VAND. L. REV. 2129 (2004) ("Private attorneys may be better at [discerning or pursuing private wrongdoing. Or supplement public enforcement by increasing the penalty wrongdoers must pay] because public attorneys may be fewer in number, underfunded, less skilled, or prone to political pressures").

[36] *See What We Do*, U.S. SECURITIES EXCHANGE COMMISSION, https://www.sec.gov/about/what-we-do.

[37] *See* Lisa A. Casey, *Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 B.Y.U.L. REV. 1239 (2003).

[38] *See* Rubenstein, *supra* note 35.

[39] *See* Casey, *supra* note 37.

[40] *See* Rubenstein, *supra* note 35.

[41] *Id.*

provided, coupled with the efficiency of class action litigation, propelled the U.S. to the forefront of securities class action litigation.[42] International investors were eager to pursue their claims pursuant to Section 10(b), and reap the benefits of the American judicial system.[43]

In 2010, the Supreme Court was tasked with evaluating whether Section 10(b) of the Securities Exchange Act of 1934 provided a cause of action for misconduct relating to securities traded on foreign exchanges in *Morrison v. National Australia Bank Ltd.*[44] In the decades leading up to *Morrison*, U.S. courts struggled to determine whether the anti-fraud provisions of U.S. securities laws applied to securities transactions involving foreign stocks of foreign investors.[45] Further, courts struggled to apply a uniform test across lower courts to determine if, in fact, certain securities cases could be brought within the U.S.—creating disparities across the U.S. judicial system domestically.[46]

In that case, National Australia Bank Ltd. purchased HomeSide Lending, a Florida company, that serviced mortgages.[47] From 1998 to 2001, company executives from National Australia Bank and HomeSide made several public statements that grossly overestimated the value of HomeSide's mortgage-servicing rights.[48] The plaintiffs, Australian owners of National Australia Bank's stock, brought suit against National Australia Bank and HomeSide in the U.S. District Court for the Southern District of New York, alleging a violation of Section 10(b).[49] The defendants moved to dismiss the complaint for failure to state a claim and lack of subject matter jurisdiction, which the District Court granted.[50] The plaintiffs subsequently appealed arguing that U.S. securities laws were applicable to their claim citing the several different "conduct" tests applied in lower federal courts—eventually the Supreme Court granted certiorari.[51]

When deciding the *Morrison* decision, the Supreme Court justices considered several different briefs submitted by different countries across the globe that begged the Court to reign in America's extraterritorial reach—they alleged that the current practices infringed

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[42] Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation After Morrison: Correcting the Supreme Court's "Transactional Test"*, 52 VA. J. INT'L L. 405, 413-414 (2012).

[43] *See id.*; *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) [hereinafter Morrison]; *see also* Geevarghese, *supra* note 1.

[44] *See* Morrison, 561 U.S. at 247; *see also* Geevarghese, *supra* note 1.

[45] *See* Morrison, 561 U.S. at 247; *see also* Geevarghese, *supra* note 1 (attributing this difficulty to interpret the extraterritorial application of U.S. securities law to the inherent ambiguity that was present in both the drafting of the F.R.C.P. and the 1933 and 1934 Securities laws).

[46] Geevarghese, *supra* note 1 (explaining that lower federal courts would create their own tests, which focused on "whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted" to a securities fraud claim with extraterritorial elements." Prior to Morrison, federal courts would approach the issues as whether U.S. courts had subject matter jurisdiction over a claim with extraterritorial elements if the claim was based on conduct taking place in the U.S. or felt effects from alleged conduct within the U.S.).

[47] Morrison, 561 U.S. at 247..

[48] *Id.*

[49] *Id.*

[50] *Id.* at 257.

[51] *Id.*

on international sovereignty, and that their own domestic courts were sufficiently equipped to handle such class action securities litigation.[52]

Taking this consideration with immense weight, the Court in *Morrison* essentially abolished all future opportunities to litigate their securities claims in U.S.' federal courts by rejecting lower courts' idea of the conduct test.[53] The Supreme Court found that absent clear congressional intent, legislation is only intended to apply domestically.[54] Therefore, since Section 10(b) lacked explicit extraterritorial intent, international litigants are not able to establish a valid cause of action under the U.S. securities laws and are unable to state a claim.[55] HomeSide and National Australia Bank's securities were not listed on a U.S. exchange, the relevant transactions did not take place in the U.S., and the Supreme Court found that Section10(b) did not reach the alleged fraud and dismissed the action due to failure to state a claim.[56]

E. The 2015 Volkswagen "Dieselgate" Scandal

In 2015, investors across the globe lost millions in the notorious Volkswagen emissions scandal ("Dieselgate").[57] Volkswagen intentionally rigged their vehicles to pass environmental regulation tests—prompting the cars to produce results that largely underreported the amount of emissions their cars produced.[58] When Volkswagen executives admitted to fixing their cars to produce fraudulent test results, their stock prices plummeted—leaving investors with enormous financial losses.[59]

Millions across the globe experienced significant financial loss and looked to take immediate action as a group of affected shareholders—but it was readily apparent not all

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[52] *Id.* at 269-70 (explaining how countries such as France, Australia and England had court systems as equally equipped as the United States to handle complex securities litigation, and how the United States are infringing in their national sovereignty allowing citizens of these countries to bring lawsuits in the United States rather than in their own justice system).

[53] *See id.*; *see generally* Geevarghese, supra note 1.

[54] Morrison, 561 U.S. at 248 ("Because Rule 10b-5 was promulgated under §10(b), it 'does not extend beyond conduct encompassed by §10(b)'s prohibition' Thus, if §10(b) is not extraterritorial, neither is rule 10b-5").

[55] *Id.* ("The Court determined that dismissal for failure to state a claim on which relief could be granted was warranted because (1) based on the presumption against extraterritoriality, there was no affirmative indication in the Exchange act that §10(b) applied extraterritorially and therefore it did not, (2) §10(b) applied only to transactions in securities listed on domestic exchanges and domestic transactions in other securities, and (3) the present case involved no securities listed on a domestic exchange, and all aspects of the purchases complained of by those shareholders who still had live claims occurred outside the United States").

[56] *Id.* at 247.

[57] *See* Tristan Shale-Hester, *VW Emissions Scandal: VW Installed 'Defeat Devices' in Thousands of Cars, High Court Finds*, AUTO EXPRESS, https://www.autoexpress.co.uk/volkswagen/92893/vw-emissions-scandal-vw-installed-defeat-devices-thousands-cars-high-court-finds; Russell Hotten, *Volkswagen: The Scandal Explained*, BBC (Dec. 10, 2015), https://www.bbc.com/news/business-34324772; *Dieselgate—Will Class-Action Lawsuits Come to Germans' Rescue?*, THE DW, https://www.dw.com/en/dieselgate-will-class-action-lawsuits-come-to-germans-rescue/a-44227778.

[58] *See* Shale-Hester, *supra* note 57; *see also* Hotten, *supra* note 57; *Dieselgate—Will Class-Action Lawsuits Come to Germans' Rescue?*, *supra* note 57.

[59] *See* Shale-Hester, *supra* note 57; *see also* Hotten, *supra* note 57; *Dieselgate—Will Class-Action Lawsuits Come to Germans' Rescue?*, *supra* note 57.

investors would have equal opportunity to pursue litigation under a class action regime.[60] Within months of Dieselgate unraveling Volkswagen's reputation, American shareholders initiated class action proceedings in accordance with F.R.C.P. 23 against Volkswagen seeking redress through the Fraud on the Market theory.[61] Not long after, Volkswagen dispersed a 4.3 billion dollar payout to their defrauded American shareholders.[62]

Across the Atlantic, European shareholders were at a standstill in their pursuit for compensation for years following Dieselgate.[63] Many European countries did not have class action procedures to help shareholders litigate efficiently and effectively; existing procedures were so infrequently used that European courts lacked the experience to handle the myriad of eligible Dieselgate claims.[64] Lawmakers across several European countries scrambled to try and pass legislation to help their investors try to collect some form of compensation, but their efforts were unsuccessful.[65]

PART III. LEGAL FRAMEWORK

The key features of a class action procedure are reflective of the policy objectives and jurisdictional culture of a given country.[66] The different procedural characteristics of a particular class action mechanism creates the way a class action device is implemented into a legal system and the path it follows towards promoting access to justice.[67] The U.S. class action model, as proscribed under F.R.C.P. 23, is defined by several distinctive procedural characteristics.[68] While different jurisdictions often critique the characteristics of the U.S. model, countries began to develop their own nuances when creating variations of the class action mechanism after the *Morrison* decision, hoping to avoid the *alleged* abuses that come with F.R.C.P. 23.[69]

After the Dieselgate scandal in 2015, the E.U. knew it was time to take action to afford more widespread opportunities to investors in respective Member States.[70] Although E.U. policymakers were hesitant to completely transplant F.R.C.P. 23 into their courts, they

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *See* Steve Cirami, *European Union has Spoken: Collective Actions are Important for Society*, CORPORATE COUNSEL BUSINESS JOURNAL Sept. 17, 2020, https://ccbjournal.com/articles/european-union-has-spoken-collective-actions-are-important-for-society; *see also* Hotten, *supra* note 57; *see also Dieselgate—Will Class-Action Lawsuits Come to Germans' Rescue? supra* note 57.

[64] Francesca Colli, *Why It's So Hard for Europeans to Get Compensation After Dieselgate,* THE CONVERSATION (Nov. 22, 2016) https://theconversation.com/why-its-so-hard-for-europeans-to-get-compen sation-after-dieselgate-68958.

[65] *See id.*; David H. Kistenbroker, Joni S. Jacobsen and Angela M. Liu, *Global Securities Litigation Trends*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Jul. 29, 2019).

[66] *See* Hensler, *supra* note 5.

[67] *See id.*

[68] Fed. R. Civ. P. 23.

[69] *See* Hensler, *supra* note 5.

[70] Katharina van Elten & Britta Rehder, *How the Diselgate Scandal Helped Bring American-Style Legal Conflict to Europe,* LSE (Dec. 3, 2020), https://blogs.lse.ac.uk/europpblog/2020/12/03/how-the-dieselgate-scandal-helped-bring-american-style-legal-conflict-resolution-to-europe/

recognized the value in aggregate litigation and collective redress.[71] Discussed below is the New Deal for Consumers—the E.U.'s first step towards providing their citizens more widespread access to justice through group litigation.[72]

A. Defining Features of Aggregate Litigation Procedures

Discussed in turn below are the key features of an aggregate litigation procedure: scope, standing, and opt-in or opt-out participation procedures. The affirmative presence or absence of any of these features sharply defines the way the procedure would look in practice in the court system.[73]

i. Scope

The "scope" of a class action statute determines under what circumstances the mechanism may be used to litigate as a group.[74] Typically, a class action procedure adopts a "trans-substantive" approach, meaning collective redress will be available for claimants.[75] The method allows for seeking justice for any violation, or it could proceed with a statutory framework which provides the type of claim able to litigate as a class.[76]

Trans-substantive procedures afford the most widespread opportunities for access to justice for potential class action litigants because it promotes uniformity and streamlines litigation procedures.[77] Further, it provides the greatest amount of opportunities for the procedure to be used in practice in courts because it can be used in any type of litigation subject matter—which could arguably be in support of why the U.S. procedure has continued to dominate the class action landscape.[78]

ii. Standing

Providing which type of party has the appropriate standing to represent a class member is another starkly defining feature of the collective redress mechanism.[79] Today, we

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[71] European Parliament Press Release, First EU Collective Redress Mechanism to Protect Consumers (Jul. 12, 2018) [hereinafter *Press Release*].

[72] *Id.*

[73] *See* Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 611-12 (2015) (explaining that the presence or absence of opt-out rights can matter greatly to aggregate litigation); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 804-05, 808 (2016) (explaining that the intersection of aggregate litigation with standing and scope are two important features that courts have pulled to regulate lawsuits).

[74] *See* Jeffrey C. Dobbins, *Legislative Transsubstantivity*, 12 NE. U. L. REV. 707 (2020).

[75] *See id.* at 713 ("Transsubstantive legal procedure is procedure that applies to the management of a case regardless of the substance of the case.").

[76] *See id.* ("Transsubstantive legal procedure is procedure that applies to the management of a case regardless of the substance of the case.") (further explaining substance-specific procedures are only applicable in certain limited areas of law, such as securities, medical-malpractice, landlord-tenant relationships, etc.).

[77] *Id.*

[78] *Id.*

[79] *See* Marcus, *supra* note 73, at 809 (explaining that the standing doctrine serves as a front-end control that ensures a plaintiff pursuing aggregate litigation against a particular defendant is the right person to do so).

see two different allocations of representation—either allowing private attorneys and law firms to serve the class in the litigation, or the creation of state sponsored public bodies to serve as representatives in the litigation.[80]

While each option addresses certain procedural concerns, the current trend under the U.S. class action model is allowing private firms to act as counsel while also allowing for different third-party funding opportunities to further help finance the litigation.[81] Private law firms provide heightened efficiency as a result of the resources available to them.[82] U.S. legal financing rules are arguably the most favorable to class action litigation.[83] Under this regime, lawyers are able to pursue class actions on a speculative basis using their own resources and capital, then charge a premium of the earned reward if the case is successful.[84]

Class action lawsuits are undoubtably expensive for all parties involved.[85] Without adequate financial resources, it is unlikely a class representative would pursue the litigation at all.[86] With the lack of appropriate resources available, public entities pose threats to delay litigation.[87] Additionally, publicly funded bodies create the intimidation of political influence limiting equitable access to justice by potentially falling victim to political whims, denying funding for certain cases, or receiving an unfair outcome as a result of a relevant political agenda.[88]

Recently, there is a noticeable trend towards the creation of public bodies to act as representation instead of traditional private law firms in collective litigation procedures.[89] Existing public bodies within jurisdictions, such as the Netherlands and most recently the E.U., have recognized values that promote heightened transparency amongst representation

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[80] *See generally* FED. R. CIV. P. 23.

[81] *Id.*; *see also* Charles H. Brower, *Public and Private Law in the Global Adjudication System: The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 DUKE J. COMP. & INT'L. L. 259 (2008).

[82] Sally Kane, *The Benefits of working in a Large Law Firm*, THE BALANCE CAREERS (Nov. 20, 2019), https://www.thebalancecareers.com/large-law-firm-employment-2164674.

[83] Deborah R. Hensler, *Can Private Class Action Enforce Regulations? Do they? Should they? in* COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS 238, 247 (Francesca Bignami ed., 2016).

[84] *See* Jasmin Kalajdzic, Peter Cashman & Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian, and U.S. Third Party Litigation Funding,* 61 AM. J. OF COMPAR. L. 93 (2013).

[85] *How is Money Divided in a Class Action Lawsuit?,* MORRIS BART, https://www.morrisbart.com/faqs/how-is-money-divided-in-a-class-action-lawsuit/ (Last visited Oct. 12, 2021).

[86] Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?,* 63 DEPAUL L. REV. 499, 510 (2014).

[87] *See id.* at 101. ("The involvement of a large and resourceful commercial litigation funder. [L]evels the playing field and in many respects serves to deter or undermine defensive forensic posturing designed to cause delay or to exhaust individual plaintiffs.").

[88] *See id.* at 142. ("In such an environment, the fiduciary duties of the funder to shareholders and partners may irreconcilably conflict with whatever duties are owed to respective plaintiffs…").

[89] *See* Brower, *supra* note 81; *see also* Collective Damages Act (WAMCA), Neth., (Jan. 1, 2020); *see also* Council of European Union Information Note, Proposal on Representative Actions for the Collective Interests of Consumers (Apr. 3, 2019) [hereinafter Information Note].; Directive on Representative Actions for the Protection of the Collective Interests of Consumers, and Repealing Directive, EUR. PARL. DOC. (2009/22/EC) (2019) [hereinafter *Directive*].

and class members, and avoid entrepreneurial litigation by lowering litigation costs to maintain legitimate interests.[90]

iii. Opt-In v. Opt-Out Participation

Participating as a class member in group litigation procedures can occur in one of two ways; one can affirmatively opt-in to be included in the class or opt-out of a class to be excluded.[91] In the opt-out procedure, applicable class members are inherently assumed to be a party to the litigation at its inception, unless they expressly remove themselves from the class.[92] As previously mentioned, the opt-out procedure is a key feature of F.R.C.P. 23, while simultaneously being one of the most controversial aspects of class action litigation under the U.S. model.[93] Opponents often tend to criticize potential opt-out litigation to infringe on an individual's due process rights.[94] They criticize it because of the possibility that class members who neglect to learn about the proceeding or fail to understand that they will be subsequently bound by the judgement when they otherwise would have acted differently.[95]

While this criticism is not entirely meritless, the applicable counterarguments demonstrate that opt-out litigation helps achieve one of the main goals of class action litigation—providing access to justice.[96] Opt-out litigation automatically creates a class with all relevant members, providing the broadest base for collection opportunities, while opt-in limits deterrence and access to justice because class members who are owed redress may not learn about the class proceedings or will be too disorganized to come forward and claim appropriate compensation.[97]

B. The New Deal for Consumers: The Group Litigation Act

Recognizing the failure to provide harmed European shareholders any form of adequate compensation, the E.U. launched the New Deal for Consumers.[98] This comprehensive reform package created new laws across a variety of consumer areas including data protection, telecommunications, health, and the financial sector—however, the unifying

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[90] *See* Brower, *supra* note 81.

[91] Scott Dodson, *An Opt-In Option for Class Actions,* 115 MICH. L. REV. 171, 173-184 (2016).

[92] *See id,* at 173 ("In an "opt-out" class, any person within the scope of the class definition is a class member by default unless she affirmatively excludes herself from the class and preserves her right to litigate individually. In an "opt-in" class, by contrast, a person within the scope of the class definition is by default not a class member unless she affirmatively joins the class.").

[93] *See id.*

[94] *See id.*

[95] *See id.* at 186 ("Many commenters criticize the opt-out mechanism as a poor proxy for consent because most class members—perhaps for the same reasons inertia or misunderstanding or lack of notice—will decline to exercise an opt-out right whether they want to remain in the class or not.").

[96] *See id.* at 185 ("Large classes help level the litigation playing field when brought against the largest or most well-heeled defendants. Large classes involving claims with a public dimension are most likely to raise public awareness." By this point, Dodson is explaining the power that a large, widespread class has through not only allowing a large amount of injured class members the opportunity to receive redress, but also promoting a deterrence effect towards defendants.).

[97] *Id.*

[98] *See* Press Release, *supra* note 71; *see also* Information Note, *supra* note 89.

movement was the creation of a group litigation procedure for all E.U. citizens under the Group Litigation directive.[99] As a result of this directive, E.U. citizens were afforded the opportunity to litigate as a class, regardless of their domicile within the E.U., to promote uniformity amongst European judicial processes.[100] Nodding to the failure of member states across the E.U. to provide adequate protections in the immediate wake of Dieselgate, E.U. lawmakers recognized the value and importance of an efficient collective redress mechanism.[101]

The E.U. legislature chose to distinguish their collective redress mechanism from the U.S. class action model by creating several nuances, with the hopes of avoiding the perceived pitfalls of their U.S. counterpart.[102] According to international critics, F.R.C.P. 23 opens the door to abusive litigation by allowing private law firms to lead the proceedings—alleging that these powerful firms are only seeking their contingency fee payout, rather than litigating the claim because they believe the class members deserve compensation.[103] As a result of working with law firms on a contingency fee basis, litigation costs skyrocket making it more expensive and unreasonable for litigants with smaller claims to afford their day in court, while simultaneously minimizing the amount class members receive from victorious settlements.[104]

According to the New Deal for Consumers, only state-certified, non-profit organizations, called "qualified entities," can act to initiate as the representative body in the class action procedure.[105] Qualified entities must "be independent bodies or consumer organizations with a legitimate interest in pursuing the interest of the consumers."[106] E.U. legislatures believed that qualified entities would reduce costs that would otherwise prevent an injured party from initiating a claim—a frequent critique of American class action litigation.[107] As previously mentioned, under the U.S. model, private law firms are funded on a contingency fee basis, meaning that when a settlement or payout is reached, the law firm is entitled to a large percent of the damages which reduces the amount of recovery class members actually receive.[108] By mandating that non-profit qualified entities lead the litigation, E.U. lawmakers intend for collective redress to be more widely available to class

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[99] *See* Press Release, *supra* note 71; *see also* Information Note, *supra* note 89.

[100] *See* Press Release, *supra* note 71; *see also* Information Note *supra* note 89; *see also* Directive, *supra* note 89.

[101] *See* Cirami, *supra* note 63; *see also* Press Release, *supra* note 71; *see also* Information Note, *supra* note 89. ("It underlined the possible benefits of collective judicial actions in terms of lower costs and greater legal certainty for claimants, defendants and the judicial system alike, from avoiding separate litigation of similar claims").

[102] Jamie Humphreys and Tracey Bischofberger, *This is Not a Class Action: Proposed Directive to Introduce Group Actions Across the EU Gaining Momentum*, COOLEY PUB. CO., (Oct. 29, 2019), https://products.cooley.com/2019/10/29/this-is-not-a-class-action-proposed-directive-to-introduce-group-actions-across-the-eu-gaining-momentum/; *see* Cirami, *supra* note 63; *see also* Directive, *supra* note 89.

[103] *See* Humphreys, *supra* note 102; Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year in Review*, NERA ECONOMIC CONSULTING (Feb. 12, 2020).

[104] *See* Humphreys, *supra* note 102; *see also* McIntosh, *supra* note 103.

[105] *See* Cirami, *supra* note 63; *see also* Directive, *supra* note 89.

[106] *Id.*

[107] *Id.*

[108] *Id.*

members who otherwise would be unable to afford litigation, while maximizing the amount of recovery injured investors actually receive.[109]

Additionally, when dealing with an international dispute, the E.U. collective redress procedure mandates an opt-in regime—meaning that relevant class members must affirmatively express their willingness to participate in the action to provide consistent and fair redress opportunities to all E.U. citizens.[110] E.U. lawmakers believed an opt-in model was most appropriately suited for the New Deal for Consumers because of its international nature—considering the critique of F.R.C.P. 23 that the U.S. opt-out model does not maximize access to justice.[111] If a securities group litigation proceeding is initiated under this new E.U. directive, E.U. citizens must affirmatively join the class in order to be bound by the judgment—to avoid the mistake of a binding an unknown class member would have otherwise preferred to handle their claim independently.[112]

Under the directive, E.U. courts will have the appropriate jurisdiction to handle international claims to provide a broad range of access to justice.[113] For example, a Swedish company could face class action litigation against defrauded shareholders in Belgium, France, the Netherlands, and any other eligible class member from any E.U. country—should they choose to enter into the proceedings under the New Deal for Consumers.[114] Had this been in place during the Dieselgate era, European investors could have relied on E.U. courts to provide compensation and hold Volkswagen accountable.[115]

The New Deal for Consumers is a strong example of a step in the right direction for creating sufficient protections and opportunities to pursue redress for shareholders, however it does not go far enough in a world where our economies continue to grow and become increasingly globalized. While the New Deal for Consumers provides the opportunity for international class actions to citizens of twenty-seven countries across Europe, what about those who invest in international companies who are not domiciled in the E.U.? Investors across the globe deserve to be afforded strong and uniform opportunities to seek redress and compensation when deserved.

PART IV. PROPOSED SOLUTION

In today's digital age, economies are more interconnected than ever before.[116] International companies continue to grow, gain investors from countless countries, and develop in our modern globalized world.[117] As more people continue to purchase stock in international companies on countless different exchanges, investors may be unaware that

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[109] *See* Humphreys, supra note 102.

[110] *See* Cirami, *supra* note 63; *see also* Directive, *supra* note 89.

[111] *Id.*

[112] *See* Directive, *supra* note 89; *see also* Information Note, *supra* note 89.

[113] *Id.*

[114] *See generally* Directive, *supra* note 89; *see also* Information Note, *supra* note 89.

[115] *See* Directive, *supra* note 89.

[116] JAMES MANYIKA ET AL., DIGITAL GLOBALIZATION: THE NEW ERA OF GLOBAL FLOWS (McKinsey Global Inst. ed. 2016) https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/digital%20globalization%20the%20new%20era%20of%20global%20flows/mgi%20digital%20globalization%20executive%20summary.ashx.

[117] *Id.*

relevant protections are only available depending on the investor's domicile and on what exchange the security was purchased.[118] International companies recognize the incentive to avoid litigation that would hold them accountable for defrauding their investors by expressly choosing not to list their stock on any given exchange that provides strong investor protections and effective class action litigation procedures.[119]

Today, there are sixty stock exchanges in existence worldwide, with numerous securities being listed on several different exchanges.[120] Companies such as Apple, Google, Tesla, Peloton and countless others have their stocks cross-listed on several exchanges worldwide in order to continue to grow their companies and expand their global audience.[121] As more companies continue to develop their international presence, another Dieselgate scandal is inevitable.[122] Without a uniform international approach, shareholders will yet again be at a loss absent a uniform international class action litigation procedure that could provide redress to defrauded shareholders and hold international companies accountable on the global stage.[123]

A. The Critical Need for an International Securities Class Action Venue in International Litigation

As companies continue to develop internationally, support from shareholders will not be geographically confined.[124] It is completely unrealistic to hold companies to different

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[118] *See International Investing*, SEC (Dec. 8, 2016), https://www.sec.gov/reportspubs/investor-publications/investorpubsininvesthtm.html.

[119] *See* Directive, *supra* note 89; *see* Morgan Hunsaker, *IPO Advantages and Disadvantages*, IPOH UB (Nov. 28, 2017), https://www.ipohub.org/ipo-advantages-disadvantages/; *see* John Baadsgaard, *Delisting and Deregistering – When and Why*, IPO HUB (Jan. 13, 2021), https://www.ipohub.org/delisting-and-deregistering-guidance/.

[120] Jeff Desjardins, *All of the World's Stock Exchanges by Size*, THE MONEY PROJECT, (Feb. 16, 2016), http://money.visualcapitalist.com/all-of-the-worlds-stock-exchanges-by-size/#:~:text=There%20are%2060%20major%20stock,total%20market%20for%20global%20equities.

[121] *See Search Results for "APPL"*, REUTERS, https://www.reuters.com/finance/stocks/lookup?searchType=any&search=APPL (last visited Oct. 15, 2021); *see Search Results for "alphabet inc"*, REUTERS, https://www.reuters.com/finance/stocks/lookup?searchType=any&comSortBy=marketcap&sortBy=&dateRange=&search=alphabet+inc (last visited Oct. 15, 2021); *see Search Results for "peloton interactive inc"*, REUTERS, https://www.reuters.com/finance/stocks/lookup?searchType=any&comSortBy=marketcap&sortBy=&dateRange=&search=peloton+interactive+inc (last visited Oct. 15, 2021); *see Search results for "tesla"*, REUTERS, https://www.reuters.com/finance/stocks/lookup?searchType=any&comSortBy=marketcap&sortBy=&dateRange=&search=tesla (last visited Oct. 15, 2021); *see also* Peter Rosenboom & Mathjis A. van Dijk, *The Market Reaction to Cross-listings: Does the Destination Market Matter?*, 33 J. OF BANKING & FIN. 1, 3-4 (2009) (explaining that cross-listing of stocks leads to an increase in the liquidity of a stock and a reduction in the cost of capital).

[122] *See* Kees Camfferman & Jacco L. Wielhouwer, *21st Century Scandals: Towards a Risk Approach to Financial Reporting Scandals*, 49 ACCT. AND BUS. RESEARCH 503, 507 (2019) (explaining that without a uniform international approach, financial reporting failures of various kinds will inevitably continue to occur).

[123] *See* Press Release, *supra* note 71.

[124] *See* David Devigne et al., *The Role of Domestic and Cross-Border Venture Capital Investors in the Growth of Portfolio Companies*, 40 SMALL BUS. ECON. 553 (2013) (explaining that investors are searching for investment opportunities outside their home regions).

standards when faced with shareholders from different countries that purchased their stock.[125] This article proposes the creation of an international venue modeled after the International Court of Justice, while implementing key features from F.R.C.P. 23 and the aggregate litigation procedure created by the New Deal for Consumers.

B. The Framework of the International Court of Justice

The International Court of Justice ("I.C.J.") acts as a world court through the judicial branch of the United Nations.[126] Only States that have accepted jurisdiction within the United Nations are subject to be party to a case in the I.C.J.[127] In its current practice, the I.C.J. solves legal disputes between states, called "contentious proceedings," and also has the ability to produce advisory opinions on legal questions referred to it by the United Nations specialized agencies or affiliated organizations.[128] The I.C.J. is composed of fifteen judges elected through delegates from the United Nations General Assembly and Security Counsel.[129] In order to achieve well-rounded representation, each Member State has the opportunity to nominate individuals to earn a seat on the I.C.J. through the election process.[130] Once elected as a Member of the Court, the delegate is neither a part of the government of his own country, nor of that of any other state in order to remain completely independent and promote a fair judicial system within the United Nations and the I.C.J.[131]

Contentious proceedings can be initiated in the I.C.J. in two ways.[132] First, through notification of a special agreement between both parties.[133] In this case, the document is bilateral in character, meaning there is neither an "applicant" nor "respondent in the dispute.[134] Second, is by way of unilateral application whereby a State submits an application

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[125] *See, e.g., Fact Sheets on the European Union*, EUROPEAN UNION, https://www.europarl.europa.eu/factsheets/en/sheet/83/financial-services-policy (last visited Oct. 29, 2021) (EU implemented the Markets in Financial Instruments Directive (2004/39/EC) that lays down uniform standards governing securities trading with the aim of improving competition and investor protection).

[126] U.N. Charter art. 7, ¶ 1 ("There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat."); U.N. Charter art. 92, ¶ 1 ("The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon...the present Charter."); *see generally* History of the ICJ, INT'L COURT OF JUSTICE, https://www.icj-cij.org/en-basic-toolkit#3 (last visited Oct. 15, 2021).

[127] U.N. Charter art. 3, ¶ 1; U.N. Charter art. 1 ¶ 3 ("To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, an in promoting and encouraging respect for rights and for fundamental freedoms for all..."); *see generally* History of the ICJ, *supra* note 76.

[128] U.N. Charter art. 96, ¶ 1; *see generally* History of the ICJ, *supra* note 76.

[129] U.N. Charter art. 92, ¶ 1 ("The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of Justice and forms an integral part of the present Charter."); *see generally* History of the ICJ, *supra* note 76.

[130] *See* History of the ICJ, *supra* note 76.

[131] *See id.*

[132] How the Court Works, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/how-the-court-works.

[133] *Id.*

[134] *Id.*

against a respondent State.[135] It is meant to provide the respondent State notice of the action, and the subject of the dispute based on the applicable treaty of declaration of acceptance of compulsory jurisdiction into the I.C.J.[136]

Once the action is initiated, oral proceedings take place in the court where the judgment is delivered in a public setting once it is deliberated.[137] Notably, by signing the Charter of the United Nations, Member States waive their right to appeal the judgment and must comply with the decision of the Court in any case to which it is a party.[138] This provides a sense of finality and promotes faith within the United Nations' justice system that the Court is readily capable of reaching fair and correct results that promote justice.[139]

C. The International Court for Securities Litigation

The proposed *International Court for Securities Litigation* ("I.C.S.L.") would exist as a branch of the I.C.J. to provide litigation opportunities both for domestic and international disputes. Akin to both F.R.C.P. 23 and the E.U.'s New Deal for Consumers, the I.C.S.L. will work to promote uniform opportunities to all investors harmed by securities fraud to provide justice through a unified judicial body.

i. Who Can be Subject to Litigation in the I.C.S.L.?

In this hypothetical venue, the first issue that must be tackled is how the court would establish personal jurisdiction over each company. The I.C.S.L. would establish jurisdiction over international companies by way of being a domiciliary in a Member State of the United Nations.[140] Essentially, if a company is incorporated or operates their principal place of business within a United Nations Member State, they are automatically subjected to I.C.S.L. proceedings because of their choice to conduct business within the borders of a Member State. Therefore, the problem of "F-Cubed" litigation which faced the *Morrison* Court is eradicated by establishing jurisdiction over appropriate parties prior to any securities violations.[141]

However, it is important to consider how to treat companies that are not a domiciliary in a Member State. The I.C.S.L. will mandate that for a Member State to allow an international company to cross-list their stock on their domestic exchange and expose their citizens to their company, that company will have to consent to jurisdiction in the I.C.S.L. if securities litigation were ever to arise in the future.

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[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *How the Court Works, supra* note 129; *Handbook*, INT'L CT. OF JUS., 96, https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf, (Dec. 31, 2018).

[140] *See* U.N. Charter art. 4, ¶ 1-2; William F. Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry on Business within the Territory*, 30 HARV. L. REV. 676, 679 (1917).

[141] Geevarghese, *supra* note 1, at 246.

ii. Proceedings and Structure of Litigation in the I.C.S.L.

Litigation in the I.C.S.L. will closely mirror the procedure to commence a contentious proceeding in the I.C.J., while creating a class action mechanism by implementing characteristics from the E.U.'s Collective Redress procedure put forth in the New Deal for Consumers and key features of the U.S. class action model under F.R.C.P. 23.[142]

Due to the international structure of this new venue, securities claims brought through aggregate litigation in the I.C.S.L. will impose an opt-in regime, similar to the new procedure created by the New Deal for Consumers.[143] While this does go against one of the most prominent features of the U.S. class action model, it is relevant to recognize the wide reach of the I.C.S.L. and the potential this has to offend the due process rights of shareholders who would be eligible to participate in any litigation.[144]

Further, scholars note the value of an opt-in regime for class actions noting the enhanced cohesiveness and representational character that eases class certification.[145] This concept goes hand-in-hand when organizing how the I.C.S.L. will effectuate appropriate notice requirements for relevant shareholders.[146] Under F.R.C.P. 23, the court must provide "reasonable notice" to all class members who are absent at the start of the litigation to inform them of their status as a class member in the case.[147] The I.C.S.L. will incorporate the "reasonable notice" standard into its notice requirement to mirror F.R.C.P. 23. Included in this reasonable standard is the requirement to make accurate and timely notices concerning the pendency of the class action, so that potential plaintiffs can make informed decisions about whether to participate.[148]

In order to accommodate the global diaspora of potential I.C.S.L. litigants, the internet and e-notices will be invaluable tools to make sure class members are aware of the subsequent action. The I.C.S.L. will maintain a current and up-to-date website with all of the upcoming securities class action cases with the option to translate the information provided on

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[142] *The EU Collective Redress Directive is Coming to Town*, JD SUPRA KNOWLEDGE CENTER, (Dec. 9, 2020), https://www.jdsupra.com/legalnews/the-eu-collective-redress-directive-is-80200/.

[143] *See generally* Dodson, *supra* note 91; *see also* Directive, *supra* note 89; *see also* Press Release, *supra* note 71 (noting that the EU disfavored opt-in litigation and affirmatively choose to take its procedure in a different direction than mirror F.R.C.P. 23).

[144] *See* Dodson, *supra* note 91 (arguing that it is unfair for someone to be bound by a judgment in a lawsuit they were entirely unaware was happening and they were a part of it—or ever further, bound someone to a judgement they would have chosen not to pursue or pursue independently but for the subsequent lack of notice to exercise their right to remove themselves).

[145] *See id.* (explaining that opt-in litigation is better equipped to promote efficiency in class action litigation due to providing an easier path to class certification.).

[146] *See* FED. R. CIV. P. 23; *see generally* Dodson, *supra* note 91.

[147] *See* FED. R. CIV. P. 23 (employing an objective "reasonableness" standard to assess whether such a requirement was met. In this case, the notice requirement of Rule 23 is satisfied if means to employ notice would have made a reasonable person aware that they were a member of a relevant class of litigants).

[148] *See generally* FED. R. CIV. P. 23; *see generally* Dodson, *supra* note 91 (elaborating on the importance of the notice requirement for potential class action litigation and the due process analysis that comes into play having to provide sufficient information to potential class members to inform their decision on whether or not to participate in the litigation).

the page into any of the Member State's native languages.[149] Further, the I.C.S.L. will collaborate with appropriate media consultants in Member States to create advertisements in traditional print media, press releases, audio news releases along with a toll-free international number to provide all relevant details for potential class members to make informed decisions about their potential standing in the relevant action.[150]

Given the opt-in nature of the court, the I.C.S.L. will alter the notice timeline. Under the U.S. model, the court must notify class members who are absent at the *start* of the litigation.[151] Here, the I.C.S.L. will inform class members *before* the litigation. This will foster the opt-in nature the I.C.S.L. intends to promote by notifying cohesive class members to join in the action to stream-line the class certification process.

When tasked with whether to certify a class pursuant to F.R.C.P. 23 under the U.S. class action model, courts determine numerosity, commonality, typicality, and adequacy of class representatives.[152] Once an action complies with all four conditions under F.R.C.P. 23(a), a class action must also satisfy at least one of three requirements of F.R.C.P. 23(b).[153] Typically, classes look to satisfy this requirement under F.R.C.P. 23(b)(3)—or the "Predominance Rule."[154]

The Predominance Rule requires that the court find that "questions of law or fact common to class members predominate over any questions affecting only individual members."[155] Essentially, the court analyzes whether questions of law or fact common to the members of the class will predominate over any questions affecting only individual members. Thereby making class treatment an efficient way to resolve the common questions[156] for all members of the class in a single adjudication.[157]

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[149] *In re Trans Union Corp. Privacy Litig.*, No. 00C4729, 2008 U.S. Dist. LEXIS 128501, at *12-14 (N.D. Ill. Jan. 3, 2008). (where the court found that the reasonableness requirement was met by establishing an up-to-date website to provide potential class members with timely information to inform them about the pending action).

[150] *Id.* (where consulting with a media advertisement agency to create advertisements in traditional print media, press releases, audio news releases along with a toll-free international number to provide information to potential class members about the pending litigation was reasonable to satisfy the notice requirement).

[151] *See* FED. R. CIV. P. 23.

[152] *See* FED. R. CIV. P. 23(A) (when determining whether to certify a class, the court determines whether the class is so numerous that joinder of all members is impractical; there must be questions of law or fact common to the class; that claims of the representative parties must be typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class).

[153] *See* FED. R. CIV. P. 23(B).

[154] *See* FED. R. CIV. P. 23(B)(3) ("the court finds that the questions of law and 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 efficiently adjudicating controversy...(A). the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action").

[155] *See* FED. R. CIV. P. 23(3).

[156] *Id.*

[157] *See* FED. R. CIV. P. 23(3)(B); *see generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 HARVARD LAW REVIEW 591 (1968) (explaining the Rule 23(b) requirement was aimed to help achieve access to justice for smaller claimants who may not have pursued litigation to gain compensation otherwise.).

The most efficient move for the I.C.S.L. to expand its global reach would be to transplant F.R.C.P. 23(a), 23(b) and 23(b)(3) into their procedure to certify a class of international litigants. Working to promote access to shareholder compensation, the I.C.S.L. will also adopt the Fraud on the Market theory to further help elevate the success of effected shareholders by allowing them to satisfy the Predominance Rule this way.[158]

As previously mentioned, F.R.C.P 23(a) provides the criteria for certifying a group of litigants to move forward as a class in an aggregate litigation procedure.[159] Under the numerosity, typicality, commonality and adequacy requirements, the ICSL will assess each potential class before the court to decide whether or not the group will continue to pursue opportunities for redress through class action litigation.[160] A class satisfies the first three requirements by demonstrating: (1) that the amount of applicable claim members are so numerous that joinder of such claims would be impractical; (2) that the claims of class members involve a common question of law and fact; and (3) that there is a sufficient connection between class members along with the lead plaintiff.[161]

Litigants seeking redress in the I.C.S.L. would look to certify their international class by demonstrating that aside from the large number of affected shareholders, groups of litigants reside in different countries which would make pursuing compensation as a class nearly impossible due to a wide diaspora if they were not certified to continue as a class in the I.C.S.L.[162] This exact scenario was anticipated by E.U. policy makers when drafting the New Deal for Consumers.[163] As a result, lawmakers crafted their collective redress procedure to work in a way to accommodate for cross-border litigation throughout the E.U. as previously discussed regarding the implementation of an opt-in participation approach.[164]

Further, the I.C.S.L. would recognize the Fraud on the Market theory for shareholders to assert a valid cause of action in the court.[165] Affected shareholders will exceed the commonality requirement by establishing that they deserve compensation from fraudulent practices by company executives that mislead innocent investors.[166] As previously mentioned, the burden is on a shareholders attempt to assert a claim pursuant to the Fraud on the Market theory to show their reliance on this intentional fraudulent misrepresentation when deciding whether to purchase a particular security.[167]

This may appear to be a high threshold of proof, however in today's world any and all information is available to everyone by the touch of a screen.[168] It is more than reasonable for company executives to be held accountable on a global stage, being that their actions are

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[158] *See generally* Bratton, *supra* note 24 (explaining that the Fraud on the Market Theory works to create a cause of action when deliberate misleading statements by company executes misrepresent the actual value of a company's shares); *see also* Chen, *supra* note 25.

[159] *See* FED. R. CIV. P. 23(A); *see generally* Kaplan, *supra* note 12.

[160] *See* FED. R. CIV. P. 23(A); *see generally* Kaplan, *supra* note 12.

[161] *See* FED. R. CIV. P. 23(A); *see generally* Kaplan, *supra* note 12.

[162] *See* FED. R. CIV. P. 23(A); *see generally* Kaplan, *supra* note 12.

[163] *See* Directive, *supra* note 89; *see also* Press Release, *supra* note 71.

[164] *See* Directive, *supra* note 89.

[165] *See* FED. R. CIV. P. 23(A); *see generally* Kaplan, *supra* note 12.

[166] *See* Basic Inc. v. Levinson, 485 U.S. 224 (1998); *see also* Erica P. John Fund, Inc., 563 U.S. 804; *see generally* Bratton, *supra* note 24.

[167] *See generally* 15 U.S.C § 78A.

[168] *See* Otika Vivian Ogechi, *Problems of the Current Availability of Knowledge,* THE CIRCULAR (March 17, 2021), https://thecircular.org/current-availability-of-knowledge/.

instantaneously broadcasted over the internet.[169] A potential investor is likely to be influenced by a dishonest tweet reporting an alleged concrete deal that would profoundly impact the growth of a company, or even a pharmaceutical company exaggerating their success and thoroughness in a critical vaccine trial.[170] The implementation of the Fraud on the Market Theory into the I.C.S.L. class action procedure promotes access to justice in a relevant way in today's digital age by emphasizing that the reputation and value of words of companies and their executives hold immense weight in the marketplace.[171]

Satisfaction of the adequacy requirement under F.R.C.P. 23(a) will require more procedural innovation to make the aspect workable in the I.C.S.L.[172] The adequacy requirement provides that when working under the U.S. class action model, courts must assess the interests and injuries of class members—both present and absent—to determine whether the attorneys hired to represent the class actually have the capabilities to represent the class competently.[173] Considering both the opt-in nature of the I.C.S.L. and the vast potential for disorganization due to the inherent international character of the proceedings, finding an appropriate mechanism for this aspect is incredibly sensitive.

It must also be noted that the class action industry dominates the legal field in both the U.S. and in other countries that have aggregate litigation procedures in place.[174] The class action industry employs countless attorneys and creates tremendous revenue across the globe, and if not handled appropriately, the creation of the I.C.S.L. could vastly limit the prosperity of the industry, and the relevancy of securities law firms across the globe.[175] However, the I.C.S.L. will work with private law firms and attorneys to stimulate and promote further growth of class actions, while also promoting widespread access to justice for harmed shareholders across the globe.[176]

The I.C.S.L. will incorporate a qualified entity that will appoint private law firms in each country where litigants are domiciled through the implementation of the concept of

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[169] *See* Joseph Johnson, *Worldwide digital population as of January 2021*, STATISTA (Apr. 7, 2021), https://www.statista.com/statistics/617136/digital-population-worldwide/.

[170] *See generally* Queen Muse, *Inovio Embroiled in Lawsuits Around Its Potential COVID-19 Vaccine*, INNOVATION: NEXTHEALTH PHILADELPHIA MAGAZINE (Jul. 6, 2020), https://www.phillymag.com/healthcare-news/2020/07/06/inovio-lawsuits-covid19-vaccine/ ("But Inovio's journey is not without flaws, most of which have been attributed to the company's inability to, for lack of a better phrase, shut up. Between mid-February and early March, Inovio's CEO, Joseph Kim made repeated claims that the publicly traded company had already discovered a vaccine for COVID-19…On March 12, a class action lawsuit was filed in the Eastern District of Pennsylvania court on behalf of Inovio shareholders who argued the company, specifically Kim's public statements had violated sections of the Securities Exchange Act of 1934.").

[171] *See generally* Kevin M. LaCroix, *Tesla Investors File Securities Suits Over Elon Musk's Take-Private Tweets*, THE D&O DIARY (Aug. 12, 2018) https://www.dandodiary.com/2018/08/articles/securities-litigation/tesla-investors-file-securities-suits-elon-musks-take-private-tweets/ ("On Friday, August 10, 2018, two Tesla investors each filed separate securities class action lawsuits against Tesla, Inc. and its Chairman, CEO, and largest shareholder, Elon Musk, based on Musk's tweets last Tuesday that he was considering a take-private deal for which he had "secured" funding and that only shareholder approval was required for completion of the deal…").

[172] *See* McIntosh, *supra* note 103

[173] *See generally* FED. R. CIV. P. 23(A).

[174] *See* McIntosh, *supra* note 103.

[175] *See id.* ("Between 2015 and 2018, federal securities class action filings dramatically increased, reaching a high of 433 cases in 2018, nearly doubled the level observed in 2014.").

[176] *See* McIntosh, *supra* note 103; *see also* Hensler, *supra* note 4.

qualified entities, akin to the E.U.'s New Deal for Consumers.[177] Private firms will then work with the I.C.S.L.'s qualified entity as a liaison between the court and all international litigants.[178] This strategy will increase efficiency and transparency in these types of suits.[179] First, having I.C.S.L. appointed attorneys in each country that has class members will allow the litigation to proceed with less hassle as the appointed attorney will handle all matters pertaining to class members in that particular country[180]—rather than having one international qualified entity become clogged with the entire workload of an international class.[181] Further, class members will feel more connected and confident in the litigation—even if it would be unfolding thousands of miles away—if they had a particular point of contact that is up to date on each stage of the proceeding.[182]

V. CONCLUSION

In 2021, the world is more interconnected than ever before in nearly every facet of our lives. Another widespread financial scandal in our lifetimes is inevitable and in a globalized society, more action should be taken to either prevent this type of fraud or, at least, provide fair opportunities for financial compensation when it does. The I.C.S.L. is necessary to protect regular investors, who are simply trying to make responsible financial decisions. It is of the upmost necessity to provide adequate safeguards to protect them against the growing wealth and arguable greed of growing international public corporations.

[177] *See generally* Directive, *supra* note 89; *see also* Information Note, *supra* note 89.

[178] *Compare* FED. R. CIV. P. 23, *with* Directive, *supra* note 89; *see also* Brower, *supra* note 81.

[179] *See* Brower, *supra* note 81.

[180] *Id; see also* Directive, *supra* note 89.

[181] Brower, *supra* note 81.

[182] *Id.*