

# The Global Class Action and Its Alternatives

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*The “American-style” class action, when combined with private rights, is an important tool of American regulatory policy. And just as American regulation has global reach, the global class action is not unfamiliar to U.S. courts. Yet, global U.S. class actions are facing ever-stronger headwinds. In addition to the recent retrenchment of class actions and international litigation generally, U.S. courts have raised additional barriers to global class actions in particular. This Article’s first goal, therefore, is to document these developments and their consequences for regulation. Against this backdrop, this Article also reviews the options available to foreign lawmakers, foreign courts, foreign litigants and litigation funders, and foreign public enforcers. Foreign lawmakers may provide alternatives to global U.S. class actions; foreign courts and foreign litigants may explicitly or implicitly coordinate to approximate global class resolution; and foreign public enforcers may achieve the goals of global regulatory litigation while avoiding some of its legal impediments. Finally, this Article evaluates these various foreign responses from an institutional perspective, with special attention to the institutional incentives for lawmakers and law enforcers.*

## INTRODUCTION

Federal Rule of Civil Procedure 23 does not use words like “deterrence” or “private enforcement.”<sup>1</sup> But since its major overhaul in 1966,<sup>2</sup> the Rule 23

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1 Indeed, doing so could run afoul of the Rules Enabling Act, 28 U.S.C. § 2072.

2 See FED. R. CIV. P. 23 & Advisory Committee’s Notes; see also Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967).

class action has been a major tool of American regulatory policy.<sup>3</sup> This is particularly true for the enforcement of substantive rights for which individual suits would not be cost effective.<sup>4</sup> In these circumstances, aggregation — and in particular opt-out aggregation<sup>5</sup> — becomes a powerful subsidy for private enforcement and deterrence.<sup>6</sup> And just as American law has attempted to regulate behavior on a global scale,<sup>7</sup> the American class action has similarly provided a vehicle to enforce substantive rights globally.<sup>8</sup>

Students and practitioners of transnational litigation are no doubt familiar with Lord Denning’s famous quip: “As a moth is drawn to the light, so is a litigant drawn to the United States.”<sup>9</sup> Even if Lord Denning had been right

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3 See, e.g., STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS & RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010); Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

4 See sources cited *supra* note 3. For further discussion of “negative expected value” claims, see, for example, Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Actions and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

5 See FED. R. CIV. P. 23(b)(3).

6 See, e.g., 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, 2145-47 (2000) (suggesting that aggregation subsidizes private litigation).

7 This description includes regulation of extraterritorial conduct, extraterritorial parties, or extraterritorial claimants. See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (suggesting that Congress must be explicit if it intends to do all three). I do not, however, require that such regulation have an American provenance. See *infra* Sections III.B, III.D.

8 For examples of sources discussing global class actions in U.S. courts, see Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14 (2007); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1 (2009); Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 CORNELL L. REV. 87 (2011); and Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313 (2011). I assume for purposes of this Article that global regulation is a goal, though not necessarily a normatively preferable one. See *infra* notes 47, 112.

9 *Smith Kline & French Lab. Ltd. v. Block*, (1983) 1 W.L.R. 730, 733 (Eng.).

on the merits,<sup>10</sup> he consciously qualified his claim in the very next phrase: “*If* he can only get his case into their courts . . . .”<sup>11</sup> As it turns out, recent legal developments have made it more difficult to get global class actions into U.S. courts. In addition to the recent retrenchment of class actions and international litigation generally, U.S. courts have raised additional barriers to global class actions in particular.<sup>12</sup> This is not to say that U.S. courts have abandoned the business of global class actions altogether — the light may still be on, but it is not as bright as it could be.

Putative global class actions, by their global nature, are not prisoners to U.S. procedure. This Article therefore considers the ways that foreign lawmakers, foreign courts, foreign litigators and litigation funders, and foreign public enforcers have responded (and may yet respond) to these U.S. developments. In other words, what are the alternatives to the global U.S. class action? As documented below, various tools exist to allow foreign actors to approximate global class actions or provide substitutes for them.<sup>13</sup> From an institutional perspective, these vehicles can achieve some gains in enforcement and deterrence while furthering global integration and collaboration. But at the same time, the move toward more disaggregated forms of regulation also may risk undercutting social goals and individual interests.<sup>14</sup>

## I. THE DECLINE OF GLOBAL U.S. CLASS ACTIONS

To tell the story of the decline of global U.S. class actions would take volumes. Here, I only give broad strokes about developments that have undercut global private-enforcement class actions in U.S. courts.<sup>15</sup>

One major thrust comes from the general retrenchment of private-enforcement class actions. Although definitive data are not available, class certification under Rule 23(b)(3) seems to have become more difficult in recent

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10 For challenges to Lord Denning’s characterization, see Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT’L L. 31 (2011); and Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011).

11 *Smith Kline & French Lab.*, 1 W.L.R. at 733 (emphasis added).

12 See *infra* Part I.

13 See *infra* Part II.

14 See *infra* Part III.

15 See generally Zachary D. Clopton, *Class Actions and Executive Power*, 92 N.Y.U. L. REV. 878 (2017) (describing the special role of “private-enforcement class actions,” which are the subject of this article when applied to global claims).

years. Supreme Court decisions such as *Wal-Mart v. Dukes*<sup>16</sup> and *Comcast v. Behrend*<sup>17</sup> tightened particular requirements of Rule 23,<sup>18</sup> while *Amchem Products, Inc. v. Windsor* seemed to demand some sense of “cohesion” among class members.<sup>19</sup> Lower courts have further tightened class-certification law along various dimensions.<sup>20</sup> And although these decisions are limited to U.S. federal courts,<sup>21</sup> the Class Action Fairness Act of 2005 magnified their effect by increasing the federal courts’ jurisdiction over putative class actions.<sup>22</sup>

Arbitration further curtails private-enforcement litigation, and private-enforcement class actions in particular. The Federal Arbitration Act (FAA) is not new,<sup>23</sup> but it has taken on added prominence in recent years,<sup>24</sup> thwarting many private-enforcement claims that might otherwise have been filed as class actions.<sup>25</sup> For example, in *AT&T v. Concepcion*, the Supreme Court

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16 *Wal-Mart v. Dukes*, 564 U.S. 338 (2011) (discussing “commonality”). Admittedly, *Dukes* is primarily a decision about Title VII, *see, e.g.*, Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013), but its effects are not so limited.

17 *Comcast v. Behrend*, 133 S. Ct. 1426 (2013) (discussing “predominance”).

18 *See, e.g.*, Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34 (2011); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013).

19 *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997). *See generally* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651 (2014).

20 *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (collecting cases).

21 *See* Rules Enabling Act, 28 U.S.C. § 2072; FED. R. CIV. P. 1.

22 *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2 (2005) (codified in scattered sections of 28 U.S.C.). Importantly, federal courts have understood CAFA to apply to putative class actions even if the court ultimately denies certification, meaning that an un-certifiable case will remain as an individual suit in federal court. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. (forthcoming 2018) (collecting cases and sources).

23 *See generally* Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (2017) (originally adopted in 1925).

24 *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); Resnik, *supra* note 18.

25 *See, e.g.*, Clopton, *supra* note 22 (collecting cases); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015).

held that the FAA preempted a state law treating certain class-action waivers as unconscionable.<sup>26</sup> Against the backdrop of these decisions, arbitration is rapidly displacing litigation as defendants' preferred mode of dispute resolution, including for regulatory cases.<sup>27</sup>

In addition to this private-enforcement retrenchment, U.S. courts have demonstrated general trends toward "litigation isolationism" and "parochial procedure."<sup>28</sup> More specifically, decisions about the extraterritorial reach of U.S. laws,<sup>29</sup> *forum non conveniens*,<sup>30</sup> and personal<sup>31</sup> and subject-matter jurisdiction<sup>32</sup> may limit global suits of all stripes.

As if these developments were not bad enough for global class actions, U.S. courts also have reached decisions that specifically target global classes — and more may be on the horizon. As I have documented elsewhere,<sup>33</sup> various U.S. courts have excluded foreign citizens from U.S. classes based on the "superiority" requirement of Rule 23(b)(3).<sup>34</sup> The theory goes that some foreign courts will not bind absent class members to adverse class judgments, so plaintiffs from those countries may get a second bite at the apple.<sup>35</sup> Courts adopting this framework go country by country, excluding foreign citizens unless their home country's courts would grant preclusive effect to the U.S. class judgment against absentee plaintiffs.<sup>36</sup> I have explained the many reasons

26 AT&T v. Concepcion, 563 U.S. 333 (2011).

27 See sources cited *supra* note 24; see also Myriam Gilles, *Operation Arbitration: Privatizing Medical Malpractice Claims*, 15 THEORETICAL INQUIRIES L. 671 (2014).

28 See generally Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015); Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941 (2012). The exact causal mechanism is a subject for another forum.

29 RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016); *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013); *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247 (2010).

30 See Bookman, *supra* note 28 (collecting sources).

31 See, e.g., *Daimler v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires v. Brown*, 564 U.S. 915 (2011); *J. McIntyre v. Nicastro*, 564 U.S. 87 (2011).

32 *Kiobel*, 133 S. Ct. 1659.

33 See Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion*, 90 IND. L.J. 1387 (2015) (collecting cases).

34 See FED. R. CIV. P. 23(b)(3).

35 See Clopton, *supra* note 33. I refer to these second bites as "litigation options." *Id.*

36 For example, in *Anwar v. Fairfield Greenwich Ltd.*, 289 F.R.D. 105 (S.D.N.Y. 2013), the court certified a class of plaintiffs from the United States, Italy, Portugal, Greece, Malta, Denmark, Norway, Sweden, and Finland, but excluded from class treatment putative class members from Germany, Israel, Kuwait, Korea, North Korea, Pitcairn, Tokelau, Mongolia, China, Liechtenstein, Japan,

to think that this logic is flawed — and the tools available under existing law to mitigate the alleged problems.<sup>37</sup> But the point here is that, in many cases, global class actions are defeated where either domestic class actions or global individual claims could proceed.

In addition to these decisions denying certification based on superiority, global class actions face other special challenges. Rule 23 requires that class actions are manageable,<sup>38</sup> and some courts (and even more defendants) have claimed that the global nature of a class action creates manageability problems, particularly with respect to notice.<sup>39</sup> At least one court concluded that international choice-of-law issues made a named plaintiff not “typical” under Rule 23’s typicality requirement.<sup>40</sup> And in interstate cases, other courts have suggested that choice-of-law issues could undermine “predominance” as well.<sup>41</sup>

Yet another hurdle comes from *forum non conveniens*.<sup>42</sup> This younger-than-you-think doctrine gives courts discretion to dismiss cases in favor of a foreign forum based on a balance of interests.<sup>43</sup> Features of global class actions have been specifically singled out in this balancing process — and, unsurprisingly, they tip in favor of dismissal (i.e., against allowing the class action to proceed in U.S. courts).<sup>44</sup> Given a general disfavor of class actions and transnational litigation, it would not be surprising if global class actions

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Oman, Taiwan, United Arab Emirates, Qatar, Saudi Arabia, Bosnia, Andorra, San Marino, Namibia, Monaco, and South Africa. *See also* Clopton, *supra* note 33 (collecting other examples). This inquiry proceeds under FED. R. CIV. P. 44.1.

37 *See* Clopton, *supra* note 33; *see also* Kevin M. Clermont, *Solving the Puzzle of Transnational Class Actions*, 90 IND. L.J. SUPP. 69 (2015).

38 FED. R. CIV. P. 23(b)(3)(D) (instructing courts to consider “the likely difficulties in managing a class action”).

39 *See, e.g., In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291 (D. Del. 2003).

40 *See Smith v. Dominion Bridge Corp.*, 1998 WL 98998 (E.D. Pa. Mar. 6, 1998).

41 *See Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); Gary W. Johnson, Note, *Rule 23 and the Exclusion of Foreign Citizens as Class Members in U.S. Class Actions*, 52 VA. J. INT’L L. 963 (2012) (extending this logic to international cases).

42 *See Bookman, supra* note 28 (collecting sources).

43 *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (5th ed. 2011) (discussing doctrine and history). For the classic statement of U.S. *forum non conveniens* law, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

44 *See, e.g., In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305 (S.D. Fla. 2010) (enforceability of class judgments); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1371 (S.D. Tex. 1995) (multiple and complex choice-of-law questions in global class action support *forum non conveniens* dismissal); *In re*

fared particularly poorly when judges are given the wide discretion that *forum non conveniens* provides.<sup>45</sup>

In sum, there is reason to believe that global class actions are not given the same solicitous treatment they once received in U.S. courts. And because class actions are particularly important for regulatory litigation, we should expect a reduction in deterrence and compensation in those areas that rely on global private enforcement.<sup>46</sup>

## II. GLOBAL ALTERNATIVES

Law is dynamic, so a decline of global class actions in U.S. courts is not necessarily the end of the story. This Part considers opportunities to approximate or substitute for U.S. class actions available to: (A) foreign participants in multilateral treaty negotiations; (B) foreign lawmakers; (C) foreign judiciaries; (D) foreign-court litigators and litigation funders; and (E) foreign public-enforcement agencies.<sup>47</sup> These options are not mutually exclusive, and indeed many are already operating in concert in global cases.

### A. Multilateralism

The most obvious, but also perhaps the least likely, response to a decline in global U.S. class actions would be the rise of multilateral solutions. Multilateralism could manifest in many forms. Professors Maya Steinitz and Paul Gowder have argued for an International Court of Civil Justice — a truly international tribunal to hear global civil claims.<sup>48</sup> There also has long been interest in an international convention on judgments, or a dual convention on judgments and jurisdiction,<sup>49</sup>

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Silicone Gel Breast Implants Prod. Liab. Litig., 887 F. Supp. 1469 (N.D. Ala. 1995) (same).

45 See Gardner, *supra* note 28.

46 See sources cited *supra* note 3.

47 This Article is addressed to those foreign actors interested in pursuing enforcement and deterrence. Where relevant, I attempt to articulate the particular interests justifying that pursuit.

48 See, e.g., Maya Steinitz & Paul Gowder, *Transnational Litigation as a Prisoner's Dilemma*, 94 N.C. L. REV. 751 (2016).

49 See generally A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE (John J. Barceló III & Kevin M. Clermont eds., 2002); Samuel P. Baumgartner, *The Proposed Hague Convention on Jurisdiction and Foreign Judgments: Where We Are and the Road Ahead*, 4 EUR. J.L. REFORM 219 (2002); Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203 (2001).

which could facilitate global regulatory litigation.<sup>50</sup>

Despite their theoretical promise, it is hard to imagine multilateral solutions in the near term. For one thing, we have seen little progress so far on global civil justice — and the American-style class action seems to be a particular stumbling block for an international judgments convention.<sup>51</sup> From the intergovernmental perspective, it is not clear what any particular government would gain from such a treaty.<sup>52</sup> Especially given the current political climate, it seems unlikely that the United States government will soon put substantial resources behind an effort to promote global regulatory litigation.

## B. Foreign Lawmakers

Although I am not comfortable making a causal claim, the decline of global U.S. class actions has co-occurred with the rise of mass dispute resolution regimes in other jurisdictions. Professor S.I. Strong has looked closely at the rise of regulatory litigation in Europe,<sup>53</sup> Professor Tanya Monestier has asked whether Canada is the new “Shangri La” for global class actions,<sup>54</sup> and

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50 In addition to straightforwardly resolving issues of global jurisdiction, these treaties also could respond to particular issues in U.S. cases. For example, an agreement to enforce foreign class judgments would respond to some concerns of U.S. jurists. See Clopton, *supra* note 33.

51 See, e.g., Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 319-20 (2002) (“[M]uch of the attack on American-style judicial jurisdiction is not really about jurisdiction at all, but about unhappiness with other aspects of civil litigation in the United States — juries, discovery, class actions, contingent fees, and often substantive American law . . .”).

52 Although some states might see value in *any* international cooperation, such an interest does not point in the direction of these treaties in particular. See *infra* Part III (addressing other opportunities for cooperation and coordination).

53 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 (2012) (discussing *inter alia* the European Parliament resolution of February 4, 2011, Eur. Comm’n, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC (2011) 173 final (Feb. 4, 2011) (EC)).

54 Tanya J. Monestier, *Is Canada the New Shangri-La of Global Securities Class Actions?*, 32 NW. J. INT’L L. & BUS. 305 (2012) (“[G]lobal classes have come to Canada . . . [but t]he question is whether they are here to stay.”). For further examples of foreign aggregate litigation, see Clopton, *supra* note 33 (collecting sources and examples).

in this volume, Professors Alon Klement and Robert Klonoff survey Israel's increased openness to class actions in recent years.<sup>55</sup>

For a prominent example, the United Kingdom recently adopted the Consumer Rights Act.<sup>56</sup> The Act permits private-enforcement actions for violations of competition law, and authorizes the Competition Appeals Tribunal to bless opt-out suits.<sup>57</sup> In other words, a consumer antitrust class action in the American style is possible in the United Kingdom. Relying on the services of a U.S. law firm,<sup>58</sup> a fourteen-billion-pound Consumer Rights Act case was recently filed against MasterCard.<sup>59</sup> Previewing a theme picked up below, the case is reportedly supported by forty million pounds from litigation funders Gerchen Keller Capital.<sup>60</sup> Also noteworthy is that this U.K. innovation was one of many responses to the European Commission's recommendation for collective actions in Europe.<sup>61</sup>

Meanwhile, in the Netherlands, the Wet Collectieve Afwikkeling Massaschade (WCAM) provides for opt-out *settlement* without providing for opt-out *litigation*.<sup>62</sup> WCAM permits global class settlements, and indeed multiple

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55 See Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 THEORETICAL INQUIRIES L. 151 (2018). For developments elsewhere, see GLOBAL CLASS ACTIONS EXCHANGE, <http://globalclassactions.stanford.edu> (last visited Oct. 25, 2017) (collecting sources).

56 Consumer Rights Act, 2015, c. 15 (U.K.).

57 *Id.*

58 The firm is Quinn Emanuel Urquhart & Sullivan, LLP. See *£14 Billion Damages Claim Filed Against MasterCard by UK Consumers in Landmark Collective Action*, QUINN EMANUEL URQUHART & SULLIVAN, LLP, <http://www.quinnemanuel.com/the-firm/news-events/firm-news-14-billion-damages-claim-filed-against-mastercard-by-uk-consumers-in-landmark-collective-action> (last visited June 28, 2017).

59 *See id.*

60 *See id.*; see also *infra* Section II.D.

61 See Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law, 2013 O.J. (L 201) 60; see also Damien Geradin, *Collective Redress for Antitrust Damages in the European Union: Is This a Reality Now?*, 22 GEO. MASON L. REV. 1079 (2015).

62 See Wet Collectieve Afwikkeling Massaschade [WCAM 2005] [Collective Settlement of Mass Damage Act], codified at BURGERLIJK WETBOEK [BW] [CIVIL CODE], art. 7:907-10 (Neth.); WETBOEK VAN BURGERLIJKE RECHTSVORDERING [RV] [CODE OF CIVIL PROCEDURE], art. 1013 (Neth.); see also HÉLÈNE VAN LITH, *THE DUTCH COLLECTIVE SETTLEMENTS ACT AND PRIVATE INTERNATIONAL LAW* (2011).

global classes have settled cases using this procedure.<sup>63</sup> For example, one of the earliest settlements to use the WCAM process involved approximately 11,000 insurance policy holders from across Europe, the United States, and Thailand.<sup>64</sup> At the time of writing, there is a new proposal for collective *litigation* in the Netherlands. This proposal would allow some opt-out litigation, and it would be open to some “global” classes.<sup>65</sup>

In short, global collective action procedures are on the rise.<sup>66</sup> And, as Professor Deborah Hensler observed, once the class-action camel gets its nose under the tent, further reforms tend to follow:

Experience suggests that class action procedures adopted solely for certain types of cases are extended later to other case types. In some jurisdictions, the advent of class actions and group proceedings is contributing to changes in fee regimes: for example, the demise of restrictions on contingency fees and the introduction of one-way fee shifting. In other words, putting class action procedures on the books can exert pressure to remove or loosen the obstacles to using them.<sup>67</sup>

So as global regulatory litigation flees U.S. courts, other national procedural reforms may step up — permitting global resolution in new fora or in multiple fora in combination.

### C. Foreign Courts

The previous Section considered “legislative” changes in favor of global regulatory litigation, but judges and courts also can provide individualized opportunities for multijurisdictional resolution. Informal collaboration among judges could help resolve overlapping global claims — or, in other words,

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63 See VAN LITH, *supra* note 62 (collecting and analyzing cases).

64 See Clopton, *supra* note 33, App.

65 See Xandra Kramer, *New Dutch Bill on Collective Damages Action*, CONFLICT OF L. BLOG (Nov. 29, 2016), <http://conflictoflaws.net/2016/new-dutch-bill-on-collective-damages-action>; see also *infra* text accompanying note 67 (discussing Professor Hensler’s predictions).

66 Another possibility is substantive regulatory convergence — e.g., agreement on common standards for antitrust liability. Such convergence might facilitate global class actions by eliminating some conflict-of-laws and comity problems for domestic courts. See, e.g., sources cited *supra* notes 40-41; Monestier, *supra* note 54 (discussing these issues in Canadian class actions).

67 Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 309 (2011).

approximate a single global class action.<sup>68</sup> The IMAX securities litigation is illustrative.<sup>69</sup> Following a 2007 financial restatement, American and Canadian investors sued IMAX in overlapping securities class actions in U.S. and Canadian courts.<sup>70</sup> The cases proceeded in parallel until parties to the U.S. litigation reached a settlement. But the U.S. court refused to enter judgment until the Canadian court preapproved the agreement, which it did.<sup>71</sup> This informal coordination resulted in a truly global resolution reviewed for adequacy by two courts and enforceable in at least two jurisdictions.<sup>72</sup>

This type of judicial cooperation also may develop through more formalized channels. For cross-border insolvency proceedings, UNCITRAL promulgated a Model Law that has been adopted by more than forty countries,<sup>73</sup> including as the model for Chapter 15 of the U.S. Bankruptcy Code.<sup>74</sup> The Model Law not only calls upon judges to “cooperate to the maximum extent possible with foreign courts,”<sup>75</sup> but it also provides that judges are “entitled to communicate directly with, or to request information or assistance directly from, foreign

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68 I am referring here to jurisdictional cooperation on actual cases, rather than the sorts of informal judicial networks that further general policy goals. *See, e.g.*, Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1120-23 (2000) (collecting examples).

69 *See In re IMAX Sec. Litig.*, 283 F.R.D. 178 (S.D.N.Y. 2012); *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 142-44 (S.D.N.Y. 2010); *In re IMAX Sec. Litig.*, 587 F. Supp. 2d 471, 474-78 (S.D.N.Y. 2008); *Silver v. IMAX Corp.*, 2013 O.N.S.C. 1667 (Can.); *Silver v. IMAX Corp.*, (2012) 110 O.R. 3d 425 (Can. Ont. Sup. Ct. J.); *Silver v. IMAX Corp.*, (2011) 105 O.R. 3d 212 (Can. Ont. Sup. Ct. J.); *Silver v. IMAX Corp.*, [2009] O.J. No. 5585 (Can. Ont. Sup. Ct. J.) (QL).

70 *In re IMAX Sec. Litig.*, 283 F.R.D. at 181. The classes were overlapping but not identical. *See, e.g.*, *Silver*, 2013 O.N.S.C. 1667.

71 *See Silver*, 2013 O.N.S.C. at 1667. Technically, the U.S. court made its approval contingent on amendment of the Canadian class definition to exclude all plaintiffs purportedly bound by the U.S. decision. *See In re IMAX Sec. Litig.*, 283 F.R.D. at 184.

72 *See Clopton*, *supra* note 33 (describing these effects).

73 *See* U.N. COMM’N ON INT’L TRADE LAW (UNCITRAL) MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT ¶ 22, U.N. Sales No. E.99.V.3 (1997), enacted by G.A. Res. 52/158 (Jan. 30, 1998); *see also* STATUS: UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html) [hereinafter MODEL LAW].

74 *See* 11 U.S.C. §§ 1501-1532. *See generally* Peter M. Gilhuly, Kimberly A. Posin & Adam E. Malatesta, *Bankruptcy Without Borders: A Comprehensive Guide to the First Decade of Chapter 15*, 24 AM. BANKR. INST. L. REV. 47 (2016).

75 MODEL LAW, *supra* note 73, art. 25, ¶ 1.

courts.”<sup>76</sup> Although not addressed to class actions, the Hague Conference on Private International Law is promoting a set of general principles for judicial communications on child abduction cases.<sup>77</sup> This approach could be applied to foreign regulatory litigation as well. More generally, these types of coordinated approaches may facilitate the resolution of global claims when a single court system cannot provide complete relief acting alone.<sup>78</sup>

#### D. Lawyers and Litigation Funders

Private participants in global litigation also can manufacture alternatives to the global U.S. class action. In particular, enterprising lawyers can cobble together different procedural devices from different jurisdictions to reach global resolution. The U.S.-Canadian settlement to the IMAX litigation, mentioned above, is an example of this type of interjurisdictional resolution.<sup>79</sup>

Another example arises from the global securities litigation against Shell Oil. Lawsuits were filed in the United States purporting to represent U.S. and foreign shareholders.<sup>80</sup> The problem was that U.S. securities laws may not have provided a remedy for foreign claims.<sup>81</sup> Coincident with the U.S. proceedings, Shell negotiated a separate non-U.S. settlement with a special-

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76 *Id.* ¶ 2. American bankruptcy law, under the influence of UNCITRAL, also encourages this court-to-court communication. *See* 11 U.S.C. §§ 1525-1527. For example, section 1525 provides that “[t]he court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation.”

77 *See* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, DIRECT JUDICIAL COMMUNICATIONS: EMERGING GUIDANCE REGARDING THE DEVELOPMENT OF THE INTERNATIONAL HAGUE NETWORK OF JUDGES AND GENERAL PRINCIPLES FOR JUDICIAL COMMUNICATIONS, INCLUDING COMMONLY ACCEPTED SAFEGUARDS FOR DIRECT JUDICIAL COMMUNICATIONS IN SPECIFIC CASES, WITHIN THE CONTEXT OF THE INTERNATIONAL HAGUE NETWORK OF JUDGES (2013), <https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf>.

78 Interjurisdictional issue preclusion, or comity equivalents, also may approximate single-forum resolution. *See generally* Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53 (1984).

79 *See supra* notes 69-72 and accompanying text.

80 *See In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712 (D.N.J. 2007); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509 (D.N.J. 2005); Hensler, *supra* note 67, at 313-20.

81 *See Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (later applying the presumption against extraterritoriality to the Securities and Exchange Act of 1934).

purpose foundation, a shareholder advocacy group, two Dutch pension funds, and the U.S. law firm Grant & Eisenhofer.<sup>82</sup> Because the U.S. court ultimately dismissed the foreign claimants,<sup>83</sup> the WCAM settlement provided relief where the U.S. court could not.<sup>84</sup> Moreover, the settlement agreement provided that, should claimants in the U.S. proceeding receive a more favorable outcome, the WCAM settlement would be updated to provide equivalent relief.<sup>85</sup>

Any such reliance on private regulatory litigation means that attorney compensation must be obtained. When the opt-out class action is combined with contingency fees, suits may be brought where no one claimant would be willing to foot the bill.<sup>86</sup> But in jurisdictions in which contingency fees are unavailable for class suits (including under the U.K.'s Consumer Rights Act<sup>87</sup>), litigation financing might be necessary.<sup>88</sup> In this vein, it is perhaps unsurprising that the opt-out action against MasterCard in the United Kingdom is supported by third-party litigation financing.<sup>89</sup> More generally, the litigation financing industry in Australia seemed to arise to solve this fees problem, and consistent with Professor Hensler's prediction mentioned above, this pattern may be repeated worldwide.<sup>90</sup>

In sum, the combination of increasing opportunities for global litigation and the development of robust litigation financing facilitates responses to the declining global U.S. class action.<sup>91</sup> This observation is even more apt if creative lawyers can draw on the procedural tools and the litigation funding — not to mention the substantive law — from multiple jurisdictions in the same dispute.

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82 See Hensler, *supra* note 67, at 315-16.

83 See *Shell*, 522 F. Supp. 2d; *Shell*, 380 F. Supp. 2d.

84 See Hensler, *supra* note 67.

85 See VAN LITH, *supra* note 62. This has the feel of a “most-favored nation” provision in international trade law.

86 See Clopton, *supra* note 33.

87 Consumer Rights Act, 2015, c. 15 (U.K.); see *supra* text accompanying note 56.

88 See generally *Litigation Funding: The Basics & Beyond: Proceedings of the 2015 Conference*, 12 N.Y.U. J.L. & Bus. 511 (2016).

89 See *supra* note 58 and accompanying text.

90 See, e.g., Hensler, *supra* note 67 (describing the Australian experience and speculating about future developments).

91 See *id.* (reaching the same conclusion).

## E. Foreign Law Enforcers

Finally, the decline of global U.S. class actions may unintentionally embolden a new form that I call “diagonal public enforcement.”<sup>92</sup> The basic idea of diagonal public enforcement is that, in some situations, the enforcement arm of one jurisdiction may sue under the laws of a second sovereign in the second sovereign’s courts.

Diagonal public enforcement has certain procedural advantages. Because the law is “at-home” in the second court, these actions avoid the so-called “public law taboo” under which courts typically do not enforce foreign public law.<sup>93</sup> And because these governmental actions do not require the opt-out aggregation of individual claimants, they are not subject to the various strictures on class actions.<sup>94</sup> Notably, a foreign state seemingly could sue in U.S. courts as *parens patriae* — i.e., representing the interests of its citizens.<sup>95</sup> The conceptual comparisons between *parens patriae* and class actions are striking, except that *parens patriae* suits skip Rule 23 and other barriers to

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92 See Zachary D. Clopton, *Diagonal Public Enforcement*, 70 STAN. L. REV. (forthcoming 2018) (exploring this phenomenon in more detail at the international and domestic levels); see also Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against “Judicial Imperialism,”* 73 WASH. & LEE L. REV. 653 (2016) (discussing these cases, among others, as examples of foreign-state plaintiffs in U.S. courts). As noted, the label “diagonal” is drawn from Professor Kristen Eichensehr’s description of foreign states as “diagonal” amici in the U.S. Supreme Court. See, e.g., Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289, 291-92 (2016).

93 See, e.g., William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L.J. 161 (2002); Philip J. McConaughay, *Reviving the “Public Law Taboo” in International Conflicts Law*, 35 STAN. J. INT’L L. 255 (1999).

94 See Clopton, *supra* note 22 (explaining in detail the various provisions of U.S. class-action procedure that do not apply to governmental suits); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) (same).

95 See, e.g., *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600-05 (1982); Lemos, *supra* note 94, at 507-10; Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1864 (2000). Two courts of appeals rejected foreign *parens patriae* standing, but the Supreme Court has not resolved the issue, and the two appellate courts conceded that foreign *parens patriae* suits would be permissible under certain circumstances. See *Estado Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Serv. Emp. Int’l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073 (D.C. Cir. 2001).

aggregation.<sup>96</sup> In other words, foreign governments may bring global mass suits in U.S. courts without navigating many of the challenges for global class actions.<sup>97</sup>

A recent and salient example is the European Community's battles against Big Tobacco.<sup>98</sup> As part of a comprehensive strategy, the European Commission on behalf of the European Community brought suits against tobacco companies in U.S. courts under the U.S. racketeering statute.<sup>99</sup> That statute provides treble damages to any "person" harmed,<sup>100</sup> and "person" has been understood to include foreign sovereigns.<sup>101</sup> As a result, the Commission was able to bring a powerful damages action in U.S. courts without resorting to Rule 23.<sup>102</sup> This case is not alone: foreign governments have brought suits in U.S. courts relying on U.S. antitrust laws, environmental laws, and civil rights statutes, among others.<sup>103</sup>

In short, foreign government enforcers may help fill the gaps left by global U.S. class actions — in the same U.S. courts, and often on the same U.S. claims. These suits also create opportunities for foreign governments to collaborate with each other,<sup>104</sup> or with private litigants,<sup>105</sup> to enforce global

96 See Lemos, *supra* note 94; Clopton, *supra* note 22.

97 See *supra* Part I. Such claims are possible in other countries as well, though examples are hard to come by. See Clopton, *supra* note 92.

98 See *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016); see also Stephanie Francq, *A European Story*, 110 AM. J. INT'L L. UNBOUND 74 (2016).

99 See 18 U.S.C. §§ 1961-1968.

100 18 U.S.C. § 1964(c).

101 See, e.g., *RJR*, 136 S. Ct. at 2114 n.3 (Ginsburg, J., dissenting).

102 Ultimately, the Supreme Court rejected this suit based on statutory interpretation, but the Court did not rule out diagonal public enforcement in other contexts. *RJR*, 136 S. Ct. 2090.

103 See, e.g., *Gov't of the Dom. Rep. v. AES Corp.*, 466 F. Supp. 2d 680 (E.D. Va. 2006); *Estado Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Her Majesty the Queen in Right of the Province of Ont. v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989); *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978); *Pfizer v. Lord*, 522 F.2d 612, 613-14 (8th Cir. 1975) (including claims of India, Iran, the Philippines, and Vietnam); *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517 (S.D.N.Y. 2013); *Republic of Colom. v. Diageo N. Am., Inc.*, 531 F. Supp. 2d 365, 411 (E.D.N.Y. 2007); see also Buxbaum, *supra* note 92; Clopton, *supra* note 92.

104 See *supra* notes 98-103 (citing European Commission suit and other multi-sovereign claims); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016) (citing multi-U.S.-state enforcement actions).

105 Public and private enforcement may proceed together in U.S. courts. See, e.g., *MDL-2179 Oil Spill by the Oil Rig "Deepwater Horizon,"* U.S. DIST. CT.: E.

rights. Of course, these suits rely on the same U.S. courts that have been hostile to global U.S. class actions,<sup>106</sup> so it is possible that these doors are soon to close. But for the moment, these options remain possible.<sup>107</sup>

### III. INSTITUTIONAL ASSESSMENT

The simplest solution to global regulation would be a single global regulatory apparatus. This could take the form of a multilateral regime that provides the substantive law and allocates jurisdiction. Or it could take the form of a global hegemon, perhaps a maximalist American regulatory state. But the former, for reasons noted above, seems highly unlikely to develop anytime soon.<sup>108</sup> And the latter never really existed — American courts were never providing worldwide justice for all claims.<sup>109</sup> So while the choice between singular and plural solutions involves obvious tradeoffs,<sup>110</sup> in the present moment, these tradeoffs are almost beside the point. Because unitary solutions are not an option, we are left with some version of global pluralism.<sup>111</sup>

To assess our menu of pluralisms, the balance of this Part considers the aforementioned foreign developments in light of jurisdictional competition, jurisdictional cooperation, and enforcer incentives. The result of this institutional analysis is a mixed bag of opportunities and challenges.<sup>112</sup>

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DIST. OF LA., <http://www.laed.uscourts.gov/oilspill> (last visited Aug. 12, 2017).

106 *See supra* Part I.

107 Moreover, U.S. state courts may hear suits by foreign-state plaintiffs. *See, e.g.,* Republic of Pan. v. Am. Tobacco Co., 2006 WL 1933740 (Del. Super. Ct. 2006). Some state courts are less hostile to foreign claims than their federal counterparts, and *parens patriae* claims in state court would not be removable to federal court under CAFA. *See* Clopton, *supra* note 22.

108 *See supra* Section II.A.

109 *See* sources cited *supra* note 10; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401-463 (AM. LAW INST. 1986) (discussing limits on legislative, adjudicatory, and enforcement jurisdiction).

110 This ground is also well-covered by scholars of international relations and federalism.

111 The foreign legislative proposals described above assume overlapping but not universal jurisdiction. The aforementioned entrepreneurial judges and lawyers require multiple venues for litigation. And diagonal public enforcement by definition involves at least two states.

112 Of course, one might think that the loss of global class actions is a move (down) toward optimal enforcement. But the goal here is to assess the choice among efforts that seek to approximate or substitute for global U.S. class actions.

## A. Jurisdictional Competition

The global regulatory system involves a significant degree of concurrent jurisdiction, so when state actors make jurisdictional policy, they do so in light of other states' choices.<sup>113</sup> In other words, they can compete. In a public-choice framework, one might expect that concentrated interests (classically defendant interests) would dominate, meaning that jurisdictions should compete for the most defendant-friendly outcomes.<sup>114</sup> Here, that seemingly would mean competition for providing the weakest substantive law and the most meager methods of claim aggregation.<sup>115</sup>

The worldwide rise of opt-out schemes suggests that something else might be going on.<sup>116</sup> One possibility is that some jurisdictions are competing for litigation business. Professor Daniel Klerman coined the term “forum selling” to describe “all efforts to attract litigation to a court,” which may arise for reasons of “prestige, local benefits, or re-election.”<sup>117</sup> For example, Professors Klerman and Greg Reilly note that the Eastern District of Texas seemed to compete for patent cases by adopting practices and procedures that induce plaintiffs to “forum shop” to that court.<sup>118</sup>

With respect to global dispute resolution, perhaps the Dutch opt-out settlement mechanism is an attempt to “forum sell” for settlements. And, indeed, after only a handful of WCAM settlements, Dutch law firms began “advertising the attractiveness of settling under WCAM to their corporate

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Moreover, even if the U.S. regime over-deterred, we should demand independent justification to remedy that over-deterrence by singling out global class actions.

113 See *supra* Section II.B.

114 Cf. Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992) (describing jurisdictional competition in U.S. corporate law under which “states are driven to offer rules that benefit managers at the expense of shareholders”). The Supreme Court’s decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), may cut back on some of this forum selling.

115 As suggested in Section III.C below, overlapping aggregation tools might be used to defendants’ benefit.

116 See *supra* Section II.B.

117 Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012); Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245 (2014); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016).

118 Klerman & Reilly, *supra* note 117, at 243 (“As a result of [forum selling], over a quarter of all patent infringement suits in 2014 and almost one-half in the first part of 2015 were filed in the Eastern District of Texas, in spite of the fact that this district is home to no major cities or technology firms.”).

clients.”<sup>119</sup> Meanwhile, Professor Monestier reports that a prominent American plaintiffs’ attorney moved his securities practice to Canada after *IMAX* validated global class actions in Canada.<sup>120</sup> And following *Shell*, the U.S. firm Grant & Eisenhofer appears to have developed a cottage industry in global mass claims in foreign courts.<sup>121</sup>

Another possibility is that new opportunities for private mass actions represent domestic austerity measures, rather than direct forms of international competition. As others have noted, one major advantage of private enforcement is that it shifts enforcement costs off governmental budgets.<sup>122</sup> Aggregation is an ideal tool for this purpose because it subsidizes private enforcement at (virtually) no charge to the public fisc.<sup>123</sup> But even this domestic frame has a competitive component. One reason to “outsource” enforcement is to preserve resources for other modes of interstate competition. Money saved on enforcement can be used in competition for tax revenues or corporations or citizens. For example, the less a state spends on enforcement, the more it can spend on direct subsidies.<sup>124</sup>

That said, even if we knew which form of competition was occurring, it would be impossible to reach normative conclusions without agreeing on optimal enforcement levels and normative priorities. Depending on one’s

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119 Hensler, *supra* note 67, at 323.

120 See Monestier, *supra* note 54, at 307-08 (describing Michael Spencer).

121 The firm has collaborated on mass actions in the Netherlands against Fortis, in Germany against Porsche and Volkswagen, in France against Vivendi Universal, in Japan against Olympus, and in the United Kingdom against the Royal Bank of Scotland. See GRANT & EISENHOFER, <http://www.gelaw.com>; see also Clopton, *supra* note 33; Hensler, *supra* note 67. Indeed, Professor Nagareda suggested that the *Shell* WCAM settlement was part of “an effort by [Grant & Eisenhofer] to gain effective control of that litigation in the face of an attempt by a rival law firm (Bernstein, Liebhard & Lifshitz) to get all shareholders worldwide into a single U.S.-court class action.” See Nagareda, *supra* note 8, at 38.

122 See, e.g., Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 827 (2008) (“budget constraint hypothesis”); David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1751 (2013) (“[I]n an era of deepening fiscal austerity, private enforcement should be an increasingly attractive alternative to traditional — and on-budget — regulatory mechanisms.”).

123 See Resnik, *supra* note 6, at 2145-47 (suggesting that aggregation subsidizes private litigation).

124 See, e.g., Nelson D. Schwartz, *Trump Sealed Carrier Deal with Mix of Threat and Incentive*, N.Y. TIMES, Dec. 2, 2016, at A1 (describing seven million dollars in incentives to keep Carrier jobs in Indiana).

priors, each form of competition presents some risks: under-enforcement when competing for defendants;<sup>125</sup> over-enforcement when competing for plaintiffs;<sup>126</sup> and agency costs when delegating to private firms.<sup>127</sup>

We can, however, consider these effects from an institutional perspective. It is notable that many of the aforementioned regulatory developments have arisen through normal lawmaking processes subject to democratic pressures.<sup>128</sup> To my mind, one uncomfortable feature of “forum selling” is that the sellers have been unelected and unaccountable judges making low-salience decisions that are difficult to challenge on appeal.<sup>129</sup> The United Kingdom’s adoption of the Consumer Rights Act, on the other hand, went through the formal lawmaking process.<sup>130</sup> That process is designed to resolve those normative questions antecedent to policymaking. Further, when these domestic developments track multinational efforts,<sup>131</sup> they may represent steps on the road to regulatory convergence.

## B. Jurisdictional Cooperation

Concurrent jurisdiction for regulatory litigation has created opportunities for judicial cooperation as well. UNCITRAL’s Model Law and Chapter 15 of the Bankruptcy Code call for judge-to-judge communication.<sup>132</sup> The informal coordination that reportedly occurred in IMAX and other cases fits the same model.<sup>133</sup> Coordination of this sort may promote global resolution without a unitary global forum.

That said, judicial cooperation may create institutional worries at two levels. First, *ex parte* judicial communication may contaminate dispute resolution.<sup>134</sup> Second, this type of “ad hoc procedure” is not tied to the normal lawmaking

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125 See *supra* note 115 and accompanying text.

126 See, e.g., Klerman & Reilly, *supra* note 117; Lemos, *supra* note 94.

127 See, e.g., Burbank, Farhang & Kritzer, *supra* note 3.

128 See *supra* Section II.B.

129 See Klerman & Reilly, *supra* note 117.

130 See *supra* note 55 and accompanying text.

131 See, e.g., *supra* note 60 and accompanying text (discussing European Commission recommendation).

132 See *supra* notes 68-71 and accompanying text.

133 See *supra* notes 72-75 and accompanying text.

134 See, e.g., Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053 (2013) (discussing *ex parte* judicial communication in class actions and MDLs, and recounting objections to it).

process, and thus is less transparent and politically accountable.<sup>135</sup> The former issue can be dealt with by procedure. Section 1525 of the Bankruptcy Code, for example, subjects judicial communication to “notice and participation.”<sup>136</sup> In other words, we have institutional tools to mitigate these concerns. The latter issue is, in a sense, more troublesome, because judicial cooperation is necessarily case-specific and ad hoc. But the same could be said of *any* judicial resolution. As long as the effects of the proceeding are limited to that case<sup>137</sup> — and as long as due process is protected — then nothing here is outside of the institutional mainstream. Our focus, therefore, should be ensuring that these conditions are met when judicial cooperation is needed.

Notably, interstate coordination may further these protective efforts by applying the procedures of two or more states.<sup>138</sup> In *IMAX*, not only did the proceedings approximate global relief, but the double approval of American and Canadian courts (hopefully) meant that the outcome was more “accurate” and due process was better protected. Indeed, unlike in many single-jurisdiction class actions, the Canadian judicial review in *IMAX* was truly adversarial. Canadian plaintiffs’ counsel had the incentive to try to convince the Canadian court that the proposed settlement was inadequate, and with counsel’s assistance, the Canadian judicial review could be more searching.<sup>139</sup>

At least in the near term, judicial-cooperation efforts likely will not replace all of the enforcement (and deterrence) lost from unitary approaches.<sup>140</sup> But these judicial collaborations can augment existing enforcement options, and to the extent that we value international cooperation, these approaches can help there too.<sup>141</sup>

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135 See, e.g., Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017).

136 See *supra* note 76.

137 Nonmutual estoppel stretches this notion, but that doctrine is not universal and not without exceptions. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

138 The same could be said of substantive law: if a global class action is divided into four domestic class actions, full global recovery will result only if all four systems find liability.

139 See *supra* notes 69-71; Clopton, *supra* note 33. Canadian counsel would lose the attorney fees for those class members that were excluded from the Canadian suit. *Id.*

140 See *supra* notes 108-109 and accompanying text.

141 International cooperation may be an inherent good — increasing participation in the international system. Or it may have instrumental value — educating judges, improving decisions, and paving the way for regulatory convergence.

### C. Enforcer Effects: Private

The enforcement of substantive rights not only requires lawmakers but also law enforcers. This Section focuses on private enforcers, and the next Section turns to their public counterparts.

For better or worse, private enforcers are motivated by private interest.<sup>142</sup> So when private enforcers are introduced to competing regimes, presumably they will choose among them to maximize private gains.<sup>143</sup> The same effect would obtain if plaintiffs can mix and match among “cooperating” jurisdictions<sup>144</sup> — they will mix and match to maximize outcomes.<sup>145</sup> In other words, multijurisdictional competition or cooperation combined with plaintiff forum choice seemingly shifts the law in a pro-plaintiff (and thus pro-enforcement) direction.<sup>146</sup> Whether this shift is a good idea will depend on one’s priors, but the effect should be acknowledged.

The results are more complicated when we introduce the private-enforcement class action. First, attorney monitoring is notoriously weak for class actions, and thus agency costs are notoriously high.<sup>147</sup> Therefore, jurisdictional choice for class actions may have a systematic bias not toward plaintiffs but toward

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142 See Clopton, *supra* note 104 (collecting sources).

143 One of the oddities of *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) is that the Court seemingly ignored this primary driver of forum selection.

144 These jurisdictions could directly cooperate as in the previous Section, or they could “cooperate” in the sense that one jurisdiction applies some part of the law of another.

145 See *supra* Section II.D. This sort of mismatch is a common challenge in multi-sovereign systems. For example, critics of the Supreme Court’s decision in *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), worried that combining federal aggregation with state remedies undermined the goals of state regulation. See, e.g., Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 53-58 (2010). More generally, Professor Richard Nagareda observed: “The affording or withholding of aggregate treatment is most problematic from an institutional standpoint when it operates as a backdoor vehicle to restructure the remedial scheme in applicable substantive law.” Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1877-88 (2006).

146 See, e.g., Klerman & Reilly, *supra* note 117 (suggesting that forum selling will produce systematically pro-plaintiff law).

147 See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1377 (2000);

plaintiffs' attorneys. The problem is magnified in "mismatch" situations.<sup>148</sup> The private-enforcement revolution recognized the need to incentivize private parties and lawyers with fee shifting, statutory damages, and other tools.<sup>149</sup> Presumably, decisions about these incentives are coherent *within* a system.<sup>150</sup> But here, poorly monitored private attorneys may pick the most attorney-friendly provisions from multiple systems, resulting in outcomes that deviate from both optimal enforcement levels and from plaintiff (client) interests.<sup>151</sup> And as noted above, information problems undercut judicial policing of such conflicts.<sup>152</sup>

These attorney effects also create opportunities for defendants.<sup>153</sup> In brief, the possibility of overlapping class actions with different class counsel may allow defendants to hold a "reverse auction" among class counsel for the lowest settlement amount.<sup>154</sup> This works because each class counsel may be willing to accept a lower settlement in order to ensure some attorney compensation — and, again, court and individual-plaintiff monitoring may be weak.<sup>155</sup> To make this more concrete, defendants may use the option of

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Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337.

148 The mismatch I am describing is different from the "regulatory mismatch" of Samuel Issacharoff and others, though that type of mismatch is possible here too. See Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649 (2008); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006).

149 See, e.g., FARHANG, *supra* note 3.

150 At least we hope so. See *supra* note 145.

151 I said that some attorneys *may* forum shop for fee provisions, though some data suggest that this is not a primary factor in venue choice for U.S. class actions overall. See James D. Cox, Randall S. Thomas & Lynn Bai, *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WIS. L. REV. 421; Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010).

152 See Clopton, *supra* note 33 (collecting sources).

153 See generally Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000).

154 See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354 (1995); John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 853-54 (1995).

155 See Clopton, *supra* note 33 (collecting sources).

a WCAM settlement with Dutch counsel to undermine global litigation in other courts.<sup>156</sup>

In sum, agency costs between attorneys and clients combined with information asymmetries between parties and courts may create opportunities for regulatory arbitrage that inure to the benefit of plaintiffs' counsel — and potentially to defendants as well. Again, whether these costs are worth paying returns us to those difficult normative questions that are beyond the scope of this project.

Even without resolving those questions, though, we can consider the available institutional responses. First, as I have written elsewhere, the reverse-auction risk is less severe when interjurisdictional preclusion is not guaranteed.<sup>157</sup> The dual review of IMAX, for example, might detect some agency problems.<sup>158</sup> Perhaps this type of process could be encouraged. Second, Professor Samuel Issacharoff, among others, has wondered whether litigation financing might be a potential salve to agency costs in class actions.<sup>159</sup> Requiring litigation financing seems unlikely, but it would not be surprising if judges (subconsciously or not) accounted for the presence of financing in their management of these multijurisdictional cases.<sup>160</sup>

#### **D. Enforcer Effects: Public**

The final version of global pluralism is diagonal public enforcement.<sup>161</sup> Unlike previous suggestions, this approach relies on public actors. And unlike typical forms of international cooperation, diagonal public enforcement involves the global combination of public actors of different types — i.e., executive enforcers from one state and the lawmaking institutions from another.<sup>162</sup>

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156 See *supra* note 62 and accompanying text; see also *supra* note 121.

157 See Clopton, *supra* note 33.

158 See *id.*; see also *supra* note 139 and accompanying text.

159 See Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561 (2014); see also Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012).

160 For example, if litigation financing were the norm, objectors to class settlements might point to a lack of financing as a reason for courts to look more closely. See FED. R. CIV. P. 23(e)(5) (objections).

161 See *supra* Section II.E.

162 In this way, these suits depart from the types of transgovernmental collaboration described by Anne-Marie Slaughter and others. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Christopher A. Whytock, *A Rational Design Theory of Transgovernmentalism*, 23 B.U. INT'L L.J. 1 (2005).

These unusual features produce unusual results. To begin with, it must be conceded that diagonal public enforcement likely faces substantial resource constraints.<sup>163</sup> The lack of resources is a major drag on public enforcement and a major justification for complementary private enforcement.<sup>164</sup> Thus, diagonal-enforcement proposals likely will not make up for all of the lost private enforcement.<sup>165</sup>

Turning to jurisdictional choice, public enforcers have many of the same opportunities as private enforcers to pick and choose. Indeed, in response to the resource problem, public enforcers might be able to “forum shop” to improve enforcement efficacy.<sup>166</sup> However, public enforcers are not subject to the same fee-pressures as their private counterparts.<sup>167</sup> This is not to suggest that public enforcers are purely public-interested. But presumably they are driven *less* by fees than their private counterparts, and they are subject to democratic checks not present for private enforcement.<sup>168</sup>

Diagonal public enforcement also achieves some gains associated with international collaboration. These enforcement actions come with the imprimatur of multiple states; they may encourage collaboration among state actors; and they may serve as early steps in the development of truly transnational solutions. In light of resource constraints, coordinated public actors also may be able to distribute cases to the least-cost enforcers and to collaborate in ways that multiply their efficacy.<sup>169</sup>

Certainly, diagonal public enforcement is not flawless. In addition to standard critiques regarding duplication, over-enforcement, and incoherence,<sup>170</sup>

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163 I should also concede that, as noted *supra* note 106 and accompanying text, these suits may find U.S. courts inhospitable for the same reasons that those courts have curtailed global class actions. *See supra* Part I. But they remain possible under current law; they may have continued vitality under U.S. state law; and they may present a model for other lawmakers seeking to increase enforcement litigation in their courts.

164 *See* Clopton, *supra* note 104 (collecting sources).

165 *See* Clopton, *supra* note 15 (making an analogous domestic argument).

166 In this way, diagonal public enforcers may be more like the hypothetical forum-shopping plaintiffs described above. *See supra* Section III.C.

167 *See supra* note 151 and accompanying text.

168 *See* Clopton, *supra* note 104. I also do not mean to suggest that there are no potential conflicts between citizens and public enforcers. *See, e.g.,* Lemos, *supra* note 94. But again, those conflicts are subject to democratic checks, and they are no different than the conflicts in many other governmental activities.

169 *See* Clopton, *supra* note 104 (discussing signaling among enforcers, and describing circumstances in which collaboration may be more than the sum of its parts).

170 *See, e.g.,* Burbank, Farhang & Kritzer, *supra* note 3; Lemos, *supra* note 94.

this unusual type of international cooperation raises an unusual institutional concern. Returning to jurisdictional choice, public enforcers might opt for foreign courts and foreign law if: home courts are closed to certain claims;<sup>171</sup> home law makes establishing liability more difficult;<sup>172</sup> or home law offers weaker remedies for the same conduct.<sup>173</sup> These explanations are not laws of nature. There must be some reason why the home legislature has not authorized such a suit, or the home courts will not hear it.<sup>174</sup> In this way, diagonal public enforcement seems to upset domestic separation-of-powers arrangements in the enforcing state.

This concern is legitimate, but upon closer inspection, it is not entirely apt. Public enforcement typically is subject to domestic institutional constraints. For example, in the United States, *parens patriae* authority may be limited by statute.<sup>175</sup> Lawmakers thus may rely on their own system's procedures to stop their public enforcers from pursuing diagonal enforcement.

So rather than suggest that diagonal public enforcement is an end run around the separation of powers, I think it is more appropriate to suggest that it flips some institutional burdens. Lawmakers must affirmatively act to rein in diagonal enforcement, rather than making no-enforcement the

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That said, it is not obvious why diagonal enforcement would be worse on these measures than private enforcement. Indeed, given overlapping interests of state actors, diagonal public enforcement might perform better than private enforcement.

171 This may be the result of jurisdictional difficulties or differences in the available causes of action.

172 *E.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 240 (1981) (strict liability possible in the United States but not Scotland).

173 For example, the aforementioned European Commission suit relied on the federal Racketeer Influenced and Corrupt Organizations Act (RICO), which provides for treble damages. 18 U.S.C. §§ 1961 *et seq.* See *supra* notes 98-103 and accompanying text. For further discussion of these choices, see Buxbaum, *supra* note 92; and Clopton, *supra* note 92.

174 There is, of course, another possibility: the home legislator prefers a system in which foreign parties may be harshly regulated abroad (e.g., in U.S. courts), while domestic parties might escape the reach of those foreign courts. In these cases, the forum state should have no objection to this outcome because it authorized the diagonal enforcement in the first place.

175 See, e.g., *Lemos*, *supra* note 94. In Europe, the European Court of Justice has articulated the circumstances under which the EU treaties permit the European Commission to litigate in foreign or international tribunals. See, e.g., *Case C-73/14, Council v. Commission*, 2015 E.C.J. (holding that the EU treaties authorized the Commission to appear before the International Tribunal for the Law of the Sea); *Case C-131/03, Reynolds Tobacco and Others v. Comm'n*, 2006 E.C.J. (approving of a lawsuit in U.S. courts that led to the *RJR* decision).

default state.<sup>176</sup> In this way, diagonal public enforcement may be a potential positive for domestic institutions and for transnational regulation — making inaction costlier for domestic lawmakers and raising the global profile of underappreciated regulatory challenges.<sup>177</sup>

## CONCLUSION

As U.S. courts have closed some doors to global class actions, foreign lawmakers, foreign courts, foreign litigators, and foreign enforcers have developed tools to offset some of the lost enforcement, deterrence, and compensation. Importantly, each of these approaches depends on different institutional actors with different institutional incentives. As a result, the effects of these approaches will vary across issue areas and jurisdictions.

Overall, while I suspect that these efforts will not perfectly substitute for lost global class actions in the near term, they may represent meaningful steps. And although each suggestion presents some risks to individuals and to governance, those risks might be mitigated by careful attention. Finally, if we are vigilant, the partiality of these solutions may create a positive externality, promoting multilateral convergence — if not multilateral action — in global regulatory policy.

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176 Cf. Josh Chafetz, *Gridlock?*, 130 HARV. L. REV. F. 51, 59 (2016) (suggesting that the “[major questions] doctrine privileges only nonregulatory baselines, while allowing for regulatory ones to be rolled back more easily”).

177 These benefits are consistent with the benefits of extraterritorial regulation described by Heather Gerken and others in the context of horizontal federalism. See Heather K. Gerken, *The Taft Lecture: Living Under Someone Else’s Law*, 84 U. CIN. L. REV. 377 (2016); Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014). In other work, I explain in more detail the connections between diagonal public enforcement and horizontal federalism. See Clopton, *supra* note 92.