REVISTA DIREITO PÚBLICO

POST-STRUCTURAL LITIGATION FROM THE FACTS TO THE LAW: TRANSNATIONAL CLASS-ACTIONS, RECOGNITION, PUBLIC POLICY, DUE PROCESS, FOREIGN ABSENTEES

Litigância Pós-Estrutural: dos Fatos ao Direito — Ações Coletivas Transnacionais, Reconhecimento, Política Pública, Devido Processo e Ausentes Estrangeiros

Litigación Postestructural: de los Hechos al Derecho — Acciones Colectivas Transnacionales, Reconocimiento, Política Pública, Debido Proceso y Ausentes Extranjeros

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ABSTRACT: A federal court should approach the presence of foreigners in a global class-action for monetary relief with an open mind. It should keep them in so long as it can conclude, upon a reflective comparative law analysis, that the judiciary in their nation of origin would uphold the ultimate ruling. For example, Iberian American absent class-members should normally stay on board inasmuch as virtually every jurisdiction in their region would allow a U.S. adjudicator to arrive at this conclusion. Accordingly, they would fail, on grounds of res judicata, if they ever tried to re-litigate the matter back home upon a defeat on the merits in the United States. In particular, a tribunal from any one of seven representative regional countries (Mexico, Venezuela, Colombia, Panama, Peru, Ecuador, and Brazil) would most probably find such a U.S. judgment consistent with local due process, as well as with the remaining requirements for recognition. In other words, it would hold that absentees stemming from its jurisdictional territory could not legitimately complain about the preclusive effect since they would have free ridden on the efforts of their representatives with a chance at compensation, would have benefited from numerous fairness controls, and could have similarly faced preclusion in their homeland based on a suit prosecuted by someone else without their authorization. Judges in the United States should engage in a similar in-depth deliberation to decide whether to welcome citizens from anywhere else in the world to the litigation.

KEYSWORD: Transnational litigation; International class actions; Recognition of foreign judgments; due process of law; International judicial cooperation.

RESUMO: Um tribunal federal deve abordar a presença de estrangeiros em uma ação coletiva global de reparação pecuniária com mente aberta. Deve mantê-los na demanda sempre que puder concluir, a partir de uma análise reflexiva de direito comparado, que o Poder Judiciário de seu país de origem reconheceria a decisão final. Por exemplo, os membros ausentes de classes ibero-americanas de-

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vem, em regra, permanecer incluídos, uma vez que praticamente todas as jurisdições da região permitiriam que um julgador norte-americano chegasse a essa conclusão. Assim, eles não poderiam intentar nova ação em seus países de origem, em virtude da coisa julgada, caso viessem a ser derrotados quanto ao mérito nos Estados Unidos. Em especial, é altamente provável que um tribunal de qualquer um dos sete países representativos da região (México, Venezuela, Colômbia, Panamá, Peru, Equador e Brasil) considerasse tal decisão norte-americana compatível com o devido processo legal local, bem como com os demais requisitos de reconhecimento. Em outras palavras, entenderia que os ausentes oriundos de seu território jurisdicional não poderiam legitimamente contestar os efeitos preclusivos da decisão, pois teriam se beneficiado dos esforços de seus representantes com a possibilidade de indenização, teriam usufruído de diversos mecanismos de controle de equidade e poderiam igualmente enfrentar a preclusão em seu próprio país com base em uma ação movida por terceiros sem sua autorização. Juízes nos Estados Unidos devem realizar deliberação igualmente profunda para decidir se devem admitir cidadãos de outras partes do mundo em tais litígios.

PALAVRAS-CHAVE: Litígio transnacional; Ações coletivas internacionais; Reconhecimento de sentenças estrangeiras; devido processo legal; cooperação judicial internacional.

RESUMÉN: Un tribunal federal debe abordar la participación de extranjeros en una acción colectiva global de reparación monetaria con una actitud abierta. Debe mantenerlos en el proceso siempre que pueda concluir, a partir de un análisis reflexivo de derecho comparado, que el poder judicial de su país de origen reconocería la sentencia final. Por ejemplo, los miembros ausentes de clases iberoamericanas deberían, por lo general, permanecer incluidos, dado que prácticamente todas las jurisdicciones de la región permitirían que un juez estadounidense llegara a dicha conclusión. En consecuencia, no podrían volver a litigar el asunto en su país de origen, por efecto de la **cosa juzgada**, si resultaran derrotados en cuanto al fondo del caso en los Estados Unidos. En particular, es muy probable que un tribunal de cualquiera de los siete países representativos de la región (México, Venezuela, Colombia, Panamá, Perú, Ecuador y Brasil) considere dicha sentencia estadounidense compatible con el debido proceso local, así como con los demás requisitos de reconocimiento. En otras palabras, entendería que los ausentes provenientes de su territorio jurisdiccional no podrían impugnar legítimamente el efecto preclusivo, puesto que se habrían beneficiado de los esfuerzos de sus representantes con una posibilidad de compensación, habrían gozado de diversos mecanismos de control de equidad y podrían igualmente enfrentar la preclusión en su propio país sobre la base de una demanda promovida por terceros sin su autorización. Los jueces en los Estados Unidos deberían realizar una deliberación igualmente profunda para decidir si admiten ciudadanos de cualquier otra parte del mundo en el litigio.

PALABRAS CLAVE: Litigio transnacional; Acciones colectivas internacionales; Reconocimiento de sentencias extranjeras; Debido proceso legal; Cooperación judicial internacional.

INTRODUCTION

The internationalization of business and the diversification of the population have profoundly impacted the law. Ever more often, the U.S. judiciary has had to adjudicate claims staked by foreigners, who may or may not reside in the United States, and has had to face the corresponding logistical and cultural challenges (Sosa v. Álvarez-Machaín, 2004). In class actions, it has additionally confronted the problem of not knowing whether its ultimate ruling would attain recognition in the event of relitigation abroad in forums possessing a different system of collective adjudication (Anwar v. Fairfield Greenwich, Ltd., 2013; Lomeli v. Sec. & Inv. Co. Bahr., 2013; St. Stephen's Sch. v. PricewaterhouseCoopers Accountants N.V., 2014). Under these circumstances, the temptation simply to dismiss foreign absent class-members from the suit looms large.

This Article will argue that, particularly when dealing with a global class, which encompasses a sizeable proportion of non-citizens, federal courts should actually engage in intense comparative reflection to determine whether their counterparts in other nations would or would not enforce their judgments. Concentrating on Iberian America, it will maintain that they should keep a passive claimant on board so long as his or her jurisdiction of origin could appreciate U.S. class-actions as fair and compatible with local fundamental legal principles. A similar approach suggests itself with respect to absentees from other parts of the world.

Consequently, the Article will itself assess whether tribunals in Iberian America would likely uphold a final decision in a damages class-suit lodged in the United States. In particular, it will ascertain whether they would do so if any of the absent Iberian American class-members instituted an essentially identical complaint back home upon an adverse definitive determination north of the border. The discussion will consider Iberian America generally but focus specifically on a representative sample of seven countries: Mexico, Brazil, Venezuela, Colombia, Panama, Peru, and

Ecuador. It will determine the likelihood of judicial enforcement in the region as a whole and in these specific jurisdictions.

Part I will identify the filing of an identical libel back home by absent class-members from Iberian America upon a disappointment here as the most likely—though still rather improbable—scenario for an actual confrontation of the question before me. It will attribute the relative likelihood to the practical implausibility of all other options; the improbability, to conceivable civilian impediments to the reprise, in consortium with the high chance of dismissal for either lack of jurisdiction or expiration of the statute of limitations. Despite these attributions, one can predict a courthouse rejection of the reiteration.

The next such segment (II) will list the main conditions for recognition:

(1) Reciprocity from the State of Origin

(2) The Foreign Court's Jurisdiction over the Matter

(3) Sufficiency of Service Alongside Defensive Opportunities

(4) The Judgment's Finality

(5) Absence of Any Pending Similar Domestic Suit

(6) Respect for Areas of Exclusive National Jurisdiction

(7) Compatibility with Public Policy.

It will underscore the presumption in favor of enforcement. The relevant legislations incorporate some or all of these items. Of course, they differ in their details.

The subsequent subdivision (III) will demonstrate the fulfillment of the first six requirements. It will size these up in succession for each of the seven countries in the sample (Mexico, Venezuela, Colombia, Panama, Peru, Ecuador, Brazil). The ensuant partial sections (IV(A-F)) will corroborate the satisfaction of the seventh too. They will define (1) "public policy." Under this definition, it will foremost include (2) due process. The judgment would mesh with both. It would rest on fairness controls for all class actions, besides those under Federal Rule of Civil Procedure 23(b)(3).

A hypothetical Iberian American trier would agree with the Supreme Court north of the border on the opt-out regime's full comportment with the second concept.[2] Thereby, she might mind the latter's importation from the United States by her country, like all its neighbors, upon the preservation of the central components intact. (1) Her agreeability would solidify upon the local availability of analogous complaints—as those from five nations within the set (Mexico, Colombia, Panama, Peru, Brazil)—for the aggregation of interrelated claims of individuals acquiescent through an informal entry or the failure to opt out. (2) It should intensify upon the ubiquitous diffuse-rights lawsuits—throughout the seven countries in the assortment to, beyond them, almost all others across the regional territory—resemblant of those under Rule 23(b)(2), obligatory without consent to or individual notice about them.

With this intensification, she could sign off from anywhere else in the region. Her approval would rest on a comprehensive application of the criteria to the remnant jurisdictions. It might build on the upcoming one for the analytic subset.

Passive partakers in the litigation could not in earnest complain about an unconscionable bind on them. They would have free ridden on the efforts of their representative, with perhaps their sole chance at compensation. Each one of them would have benefited from the aforementioned safeguards. Moreover, she could have similarly experienced preclusion in her homeland upon a prosecution—unbeknownst to her, without her authorization—at the behest of someone else.

On the whole, the U.S. judiciary should waive Iberian Americans through. It should treat other "aliens" on a par after an analogous analysis. The achievement of "justice for all" requires a serious stab at their inclusion.

[2] *See infra* IV(D(1)).

I. CONCRETE SCENARIO

This speculation will imagine a determination from Iberian America about the recognizability of a decision in this controversy. It will visualize an absent class-member's interposition of a complaint there upon a reverse here. The terminal paragraphs will admit the unlikelihood of this concrete scenario. Despite this admission, they will rearticulate the near certainty of recognition.

Complainants may sue for monetary compensation under Rule 23(b)(3). Beyond predominance of commonality "over" disparateness, they must prove a cumulative "method[]" superior "to" others.[3] Thereby, the provision recommends contemplation of the "desirability" of concentration "in the particular forum."[4] Through this recommendation, it invites a contextualization of the probative attestation.

The judiciary may contemplate the presence of foreigners,[5] besides the consequent complication around their preclusion.[6] Upon this contemplation, it might deem their incorporation itself "undesirable." After all, they might imperil the ruling's finality.

Contrariwise, its "more likely than not" recognition in their homeland could seal the "superiority" proof.[7] Anything less would stymie it.[8] Before an ascertainment of the odds of an endorsement of her decision, however, a judge should discern the

[3] Fed. R. Civ. P. 23(b)(3).
[4] Fed. R. Civ. P. 23(b)(3)(C).
[5] In discussing "the desirability or undesirability of concentrating the litigation of the claims in [the] particular forum," the *Vivendi* court started out by noting that the "Plaintiffs' proposed class definition [encompassed] a significant number of foreign class[-]members." *In re* Vivendi Universal, 242 F.R.D. at 92.
[6] *See, e.g.*, *In re* Vivendi Universal, 242 F.R.D. 76, 95 (S.D.N.Y. 2007) ("[*R*]*es judicata* concerns have been appropriately grafted onto the superiority inquiry."); Cromer Finance Limited v. Berger, 205 F.R.D. 113, 134 (S.D.N.Y. 2001) ("The res judicata effect of a class action judgment is a factor that must be considered in evaluating the superiority of the class action device.").
[7] *In re* Vivendi Universal, 242 F.R.D. 76, 95 (S.D.N.Y. 2007) *Id.* at 95 ("Where plaintiffs are able to establish a probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement.").
[8] *Id.* ("Where plaintiffs are unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class.").

circumstances around the antecedent request. Upon this discernment, she can offer a more reliable prediction.

The federal judiciary tends to view the presence of foreigners, along with the corresponding res judicata complications, as relevant to the superiority inquiry,[9] especially to the element referred to in the last quotation.[10] Presumably, it deems a class action incorporating such persons less desirable to the extent that they may litigate again in their nations of origin upon a loss at trial and on appeal. From this perspective, the U.S. adjudicator must figure out whether judges there would defer to her ultimate ruling.

After a ruling favorable to them, plaintiffs should not pursue execution abroad. They would demand domestic enforcement. The original judge could outdo his prospective subsequent counterparts overseas on this front through a cluster of pluses: from ease of access to defendant's assets, through precise remedial tools, to broad contempt-prerogatives.[11] In sync, she could thereby discourage the defense from relitigation anywhere.

Upon an unfavorable adjudication, the claimants should not hazard another bite at the apple in Iberian America.[12] They might run into many an impediment, from general to specific. In general, a repeat litigant among them might have to brave: (1)

[9] *See, e.g.*, *In re* Vivendi Universal, 242 F.R.D. 76, 95 (S.D.N.Y. 2007) ("[*R*]*es judicata* concerns have been appropriately grafted onto the superiority inquiry."); Cromer Finance Limited v. Berger, 205 F.R.D. 113, 134 (S.D.N.Y. 2001) ("The res judicata effect of a class action judgment is a factor that must be considered in evaluating the superiority of the class action device.").

[10] In discussing "the desirability or undesirability of concentrating the litigation of the claims in [the] particular forum," the *Vivendi* court started out by noting that the "Plaintiffs' proposed class definition [encompassed] a significant number of foreign class members." *In re* Vivendi Universal, 242 F.R.D. at 92.

[11] *See* ÁNGEL OQUENDO, LATIN AMERICAN LAW (2017) at 68 (A civil law court, in contrast to its common law counterpart, "does not have contempt powers to enforce its orders.").

[12] *See generally*, Anwar v. Fairfield Greenwich, Ltd., 289 F.R.D. 105, 120 (S.D.N.Y. 2013) ("The Court . . . takes into account the unlikely ability of plaintiffs from the relevant Latin American countries to bring a duplicative action in their home countries.").

non-contingency lawyers,[13] (2) payment of the attorney's fees of the other side upon defeat,[14] (3) fact- rather than notice-pleading,[15] (4) want of discovery,[16] (5) a higher "deep-seated[-]conviction," in lieu of a more-likely-than-not, standard of proof,[17] (6) evidence adduction before a judge, not a jury,[18] (7) unattainability of unbound judicial powers against contemptible conduct.[19] In particular, she might face an uphill battle against dismissal for (1) deficiency of jurisdiction, upon the defendant's residence, alongside the alleged injury's occurrence, in the United States,[20] or (2) the statute of limitation's expiration after a probable long original proceeding.

She might lodge a complaint despite these disincentives. After such a lodgment, a motion to dismiss should terminate her venture. Beyond the grounds above, it could repose on res judicata. Of course, the defendant would not have to cash in overseas on their exoneration. On the contrary, it could sit on the latter for ready interposition against any reignition endeavor by its adversaries.

The aforementioned obstacles might explain the paucity of caselaw on point. In the voice of *Anwar v. Fairfield Greenwich*, "the majority of Latin American courts" has "not . . . addressed" the enforceability of "class-action judgments" from north of

[13] *Id*. (Litigants "may not enter into a contingency fee agreement with their lawyer. They must therefore pay up front and hope for a victory on the merits in order to obtain a reimbursement. . . .").
[14] *Id*. ("The trial court also orders the defeated party to reimburse the other side's attorney's fees. Litigants must therefore keep in mind that if they lose, they will have to cover their adversary's litigation expenses, as well as their own.").
[15] *See* Scott Dodson, *Comparative Convergences in Pleading Standard*s, 158 U. PA. L. REV. 441, 443 (2010) ("Unlike civil law countries, which require detailed fact pleading and often evidentiary support at the outset, . . . Rule 8 requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' a formula that has traditionally focused on notice rather than facts.").
[16] *See* OQUENDO (2017), *supra* note 11, at 66 ("The parties . . . do not have to go through a protracted . . . discovery phase.").
[17] *See* Kevin M. Clermont, *Standards of Proof Revisited*, 33 VT. L. REV. 469, 471 (2009) ("Instead of asking whether some fact X (say, that the defendant executed the promissory note disputed in a noncriminal, or civil, lawsuit) is more likely true than not, the Civil Law asks whether the fact is so probable as to create an inner and deep-seated conviction of its truth.").
[18] *See* OQUENDO (2017), *supra* note. at 66-67 ("The parties . . . do not have to . . . prepare the case for jury trial. The judge decides both legal and factual issues.").
[19] *See supra* note **Erro! Indicador não definido.**(2017) at and accompanying text.
[20] *See*, *infra*, Section IV(C).

the border.[21] Per the latest calibration, the entirety has remained silent on them to this day.

Iberian American tribunals could only refuse recognition in an arbitrary fashion. In consonance with the last precedent's prediction, they would "more likely than not recognize" the outcome.[22] Indeed, my assessment will assume them capable of its argumentations. Under this assumption, it will calculate their chances at much greater than fifty percent. Obviously, the judiciary anywhere might engage in arbitrariness for different reasons: miscalculation, incompetence, bias. Nevertheless, it should conduct itself for the most in a predictable, judicious manner. In any event, the parties may settle with the Court's approval.[23] They could invoke the resultant compact in Iberian American jurisdictions, such as the seven under examination, qualid contract,[24] sometimes res judicata,[25] against any extra answerabilities. In this

[21] Anwar v. Fairfield Greenwich, Ltd., 289 F.R.D. 105, 120 (S.D.N.Y. 2013).
[22] *Id*. at 119-120. *See also id*. at 120 ("[It is] more likely than not that the courts of the various [Latin American] jurisdictions would recognize, enforce, and give preclusive effect to a judgment in this action."). *In re Vivendi Universal* defines the general standard: "Where plaintiffs are able to establish a probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement. . . . Where plaintiffs are unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class. The closer the likelihood of non-recognition is to being a "near certainty," the more appropriate it is for the Court to deny certification of foreign claimants." 242 F.R.D. 76, 95 (S.D.N.Y. 2007).
[23] Fed. R. Civ. P. 23(e).
[24] *See* Cd. Civ. (D.F.) (Mex.) (1928), art. 2944 ("La transacción es un contrato por el cual las partes haciéndose recíprocas concesiones, terminan una controversia presente o previenen una futura."); Cd. Civ. (Venez.) (1982), art. 1713 ("La transacción es un contrato por el cual las partes, mediante recíprocas concesiones, terminan un litigio pendiente o precaven un litigio eventual."); Cd. Civ. (Colom.) (1887), art. 2469 ("La transacción es un contrato en que las partes terminan extrajudicialmente un litigio pendiente o precaven un litigio eventual."); Cd. Civ. (Pa.) (1916), art. 1500 ("La transacción es un contrato por el cual las partes, dando, prometiendo o reteniendo cada una alguna cosa, evitan la provocación de un pleito o ponen término al que habían comenzado."); Cd. Civ. art. 1302 (Peru) (1984) ("Por la transacción las partes, haciéndose concesiones recíprocas, deciden sobre algún asunto dudoso o litigioso, evitando el pleito que podría promoverse o finalizando el que está iniciado."); Cd. Civ. (Ecuador) (2005), art. 2348 ("Transacción es un contrato en que las partes terminan extrajudicialmente un litigio pendiente, o precaven un litigio eventual."); Cd. Civ. (Braz.) (2002), art. 840 ("É lícito aos interessados prevenirem ou terminarem o litígio mediante concessões mútuas.").
[25] *See* Cd. Civ. (D.F.) (Mex.) (1928), art. 2953 ("La transacción tiene, respecto de las partes, la misma eficacia y autoridad que la cosa juzgada. . . ."); Cd. Civ. (Venez.) (1982), art. 1718 ("La transacción

vein, (1) a settlement would operate as the functional equivalent of (2) an adjudication. Accordingly, the discussion will focus on the latter from now on. It will bear upon the former mutatis mutandis.

II. RECOGNITION REQUIREMENTS

The various Iberian American countries set comparable parameters for the recognition in their territory of a judicial decision from abroad. They thus evince influences in plenty: from the regional debate on the topic;[26] through the 1928 Private International Law Convention,[27] with Antonio Sánchez de Bustamante y Sirven as author in chief; to the 1979 Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards.[28] Each of the nations under examination provides a case in point.[29]

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tiene entre las partes la misma fuerza que la cosa juzgada."); Cd. Pro. Civ. (Venez.) (1990), art. 255 ("La transacción tiene entre las partes la misma fuerza que la cosa juzgada."); Cd. Civ. (Colom.) (1887), art. 2483 ("La transacción produce el efecto de cosa juzgada en última instancia. . . ."); Cd. Civ. (Pa.) (1916), art. 1506 ("La transacción tiene para las partes la autoridad de la cosa juzgada."); Cd. Civ. (Peru) (1984), art. 1302 ("La transacción tiene valor de cosa juzgada."); Cd. Civ. (Ecuador) (2005), art. 2362 ("La transacción surte el efecto de cosa juzgada en última instancia.").

[26] There has been an "intense cross-fertilization of procedural ideas in the region." Oquendo (2017), *supra* note 11, at 755. *See generally id.* at 5 ("[T]he various systems of law [in Latin America] resemble each other . . . [due to] a shared history as well as . . . an intense process of cross-fertilization."); 114 ("In the realm of public law, Latin American countries [have] . . . focused considerably on each other's law. European and North American influences often arrived *via* sister Iberian American nations. This intense cross-fertilization . . . has continued to this day.").

[27] *See* Convention on Private International Law (Bustamante Code), Feb. 20, 1928, 86 L.N.T.S. 111, O.A.S. T.S. No. 34.

[28] Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, O.A.S. T.S. No. 51, 1439 U.N.T.S. 91.

[29] "Generally, the relevant Latin American countries, regardless of whether they are signatories, look to the principles embodied in the Bustamante Code and Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards . . . to determine whether to recognize a foreign judgment." Anwar v. Fairfield Greenwich, Ltd., 289 F.R.D. 105, 119 (S.D.N.Y. 2013), *partially aff'd sub. nom.* Lomeli v. Sec. & Inv. Co. Bahr., 546 F App'x 37 (2d Cir. 2013) (summary order), *vacated on unrelated grounds sub. nom.* St. Stephen's Sch. v. PricewaterhouseCoopers Accountants N.V., 570 F. Appx. 37 (2d Cir. 2014) (summary order).

The relevant regimes apply upon the inexistence of a special treaty, like with the United States in each instance. Via a polar presumption, they compel enforcement except upon failure in the satisfaction of any of these conditions:

(1) Reciprocity from the State of Origin,

(2) The Foreign Court's Jurisdiction over the Matter,

(3) Sufficiency of Service Alongside Defensive Opportunities,

(4) The Judgment's Finality,

(5) Nonexistence of a Pending Similar Domestic Suit,

(6) Respect for Areas of Exclusive National Jurisdiction,

(7) Compatibility with Public Policy.

These criteria may contextually vary in their specific formulation. Despite this variance, they converge in essence for present purposes. For clarity, the discussion will stick to the numbering above. It will not adhere to that of the different legal systems.

The applicable scheme may require certain solemnities. For instance, it may demand authentication atop translation of the original decision. This analysis will not attend to such requirements. Under the assumption of their fulfillment, it will zero in on the aforementioned substantive ones.

First, Chapter VI of the Mexican Federal Code of Civil Procedure regulates the "Execution of Judgments."[30] At the outset, Article 569 enunciates: "In Mexico, foreign judgments . . . shall be . . . recognized so long as they do not run counter to public policy."[31] Hence, it presumes recognition, approaching public policy as an exceptional ground of refusal, without an allusion to the other prerequisites. Nonetheless,

[30] CÓDIGO FEDERAL DE PROCEDIMIENTOS CIVILES [CD. FED. PRO. CIV.] (Mex.) (1943), Lib. IV, Título [Tít.] I, Capítulo [Cap.] VI, arts. 569-577 ("Ejecución de Sentencias"). *Cf.* CÓDIGO DE PROCEDIMIENTOS CIVILES [CD. PRO. CIV.] (D.F.) (Mex.) (1932), Tít. VII, Cap. VI ("De la Comparación Procesal Internacional"); CÓDIGO DE COMERCIO (Mex.) (1889), Lib. V, Tít. I, Cap. XXVII. ("Ejecución de Sentencias").

[31] CD. FED. PRO. CIV. (Mex.) (1943), art. 569 ("Las sentencias . . . [extranjeras] tendrán eficacia y serán reconocidos en la República en todo lo que no sea contrario al orden público.").

the latter crop up subsequently in connection with execution. They should govern recognition too.

Article 571 imposes "conditions" on "execution." It embraces every single one of those from the inventory above:

> (1) "[T]he tribunal may deny execution upon proof that in the country of origin, foreign judgments . . . are not executed in analogous cases."[32]
> [...]
> (2) "The judge . . . rendering the judgment must have had jurisdiction to consider and decide the matter under recognized international law rules . . . compatible with those [of] this Code."[33]
> [...]
> (3) "The defendant must have been personally notified and served [for an assurance of] his right to a hearing [atop] his defense."[34]
> [...]
> (4) "[The judgment] must constitute res judicata in the country [of issuance,] with no further ordinary appeal available."[35]
> [...]
> (5) "The original action may not involve a matter presently pending before a Mexican tribunal in a dispute between the same parties."[36]
> [...]
> (6) "[The judgment] may not [stem] from an in rem action."[37]
> [...]
> (7) "The obligation enforced by the original action may not run counter to public policy in Mexico."[38]

Typically, this provision focuses on the exclusive local jurisdiction over proprietorial suits.

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[32] *Id.* art. 571 ("[E]l tribunal podrá negar la ejecución si se probara que en el país de origen no se ejecutan sentencias . . . [extranjeras] en casos análogos.").
[33] *Id.* art. 571(III) ("Que el juez . . . sentenciador haya tenido competencia para conocer y juzgar el asunto de acuerdo con las reglas reconocidas en el derecho internacional que sean compatibles con las adoptadas por este Código[.]").
[34] *Id.* art. 571(IV) ("Que el demandado haya sido notificado o emplazado en forma personal a efecto de asegurarle la garantía de audiencia y el ejercicio de sus defensas[.]").
[35] *Id.* art. 571(V) ("Que [la sentencia] tenga[] el carácter de cosa juzgada en el país en que fue[] dictad[a], o que no exista recurso ordinario en su contra[.]").
[36] *Id.* art. 571(VI) ("Que la acción que les dio origen no sea materia de juicio que esté pendiente entre las mismas partes ante tribunales mexicanos[.]").
[37] *Id.* art. 571(II) ("Que [la sentencia] no haya[] sido dictad[a] como consecuencia del ejercicio de una acción real[.]").
[38] *Id.* art. 571(VII) ("Que la obligación para cuyo cumplimiento se haya procedido no sea contraria al orden público en México[.]").

Second, the 1998 Law of Private International Law controls this area in Venezuela.[39] It sets forth among its "requirements" all of those originally enumerated but the first (1):

> (2) "The tribunals issuing the judgments must have jurisdiction over the cause of action. . . ."[40]
> (3) "The defendant must have been duly served, must have had sufficient time to appear, and must have benefited from procedural guaranties that would reasonably allow him to build a defense."[41]
> (4) "The judgments must constitute res judicata according to the law of the state in which they were issued."[42]
> (5) "No lawsuit on the same matter, between the same parties, and initiated prior to the issuance of the foreign judgment may be pending before Venezuelan tribunals."[43]
> (6) "The judgments may neither impinge upon real property rights pertaining to real estate located in Venezuela nor effectively deprive Venezuela of any exclusive jurisdiction it may have over the matter at stake."[44]
> (7) "Legal determinations based on . . . foreign law . . . shall produce effects in Venezuela, unless they contradict . . . the essential principles of the Venezuelan public policy."[45]

The first five items derive from Article 53. They evoke its several subparts, besides its heading "The Validity of Foreign Judgments."[46] The seventh one figures as

[39] Ley de Derecho Internacional Privado [L. Der. Int'l Priv.], Gaceta Oficial 36.511 (Venez.) (1998).
[40] *Id.* art. 53(4) ("Que los tribunales del Estado sentenciador tengan jurisdicción para conocer de la causa. . . .").
[41] *Id.* art. 53(5) ("Que el demandado haya sido debidamente citado, con tiempo suficiente para comparecer, y que se le hayan otorgado en general, las garantías procesales que aseguren una razonable posibilidad de defensa.").
[42] *Id.* art. 53(2) ("Que tengan fuerza de cosa juzgada de acuerdo con la ley del Estado en el cual han sido pronunciadas.").
[43] *Id.* art. 53(6) ("que no se encuentre pendiente, ante los tribunales venezolanos, un juicio sobre el mismo objeto y entre las mismas partes, iniciado antes que se hubiere dictado la sentencia extranjera.").
[44] *Id.* art. 53(3) ("Que no versen sobre derechos reales respecto a bienes inmuebles situados en la República o que no se haya arrebatado a Venezuela la jurisdicción exclusiva que le correspondiere para conocer del negocio.").
[45] *Id.* art. 5 ("Las situaciones jurídicas creadas de conformidad con [el] Derecho extranjero . . . producirán efectos en la República, a no ser que contradigan . . . los principios esenciales del orden público venezolano.").
[46] *Id.* art. 53 ("De la Eficacia de las Sentencias Extranjeras").

the fifth of the "General Provisions" of Chapter I.[47] It recalls its Mexican analogue in its embrace of a presumptive implementation.

Third, Title XXXVI of Book Five of the Colombian Code of Civil Procedure deals with "Judgments . . . Issued Abroad."[48] It contains among its "requirements" all of the formerly listed except the second (2):

> (1) "Judgments pronounced in a foreign country . . . shall have, absent a treaty, the same force as that granted there to those issued in Colombia."[49]
> (3) "[T]he defendant must have been duly served and afforded the opportunity to contest the charges, in accordance with the law of the state of origin, all of which is presumed by virtue of the judgment's finality."[50]
> (4) "The judgment must be final under the law of the country of origin. . . ."[51]
> (5) "There may be neither a pending suit nor a final judgment in Colombia on the same matter."[52]
> (6) "The judgment may not involve rights pertaining to real property located on Colombian territory. . . ."[53]; nor any "matter over which Colombian judges have exclusive jurisdiction."[54]
> (7) "The judgment may not run counter to Colombian laws related to public policy."[55]

Significantly, the provision takes a unique approach. It starts from the premise of a suitable summons.

[47] *Id.* Cap. I, arts. 1-10 ("Disposiciones Generales").
[48] DECRETO 1400 & 2019, CÓDIGO DE PROCEDIMIENTO CIVIL [CD. PRO. CIV.] (Colom.) (1970), Lib. V, Tít. XXXVI, arts. 693-97 ("Sentencias . . . Proferid[a]s en el Exterior").
[49] *Id.* art. 693 ("Las sentencias . . . pronunciadas en un país extranjero . . . tendrán, [de no haber un tratado,] la fuerza . . . que allí se reconozca a las proferidas en Colombia.").
[50] *Id.* art. 694(6) ("Que . . . se haya cumplido el requisito de la debida citación y contradicción del demandado, conforme a la ley del país de origen, lo que se presume por la ejecutoria.").
[51] *Id.* art. 694(3) ("Que se encuentre ejecutoriada de conformidad con la ley del país de origen. . . .").
[52] *Id.* art. 694(5) ("Que en Colombia no exista proceso en curso ni sentencia ejecutoriada . . . sobre el mismo asunto.").
[53] *Id.* art. 694(1) ("Que no verse sobre derechos reales constituidos en bienes que se encontraban en territorio colombiano. . . .").
[54] *Id.* art. 694(4) ("Que el asunto sobre el cual recae, no sea de competencia exclusiva de los jueces colombianos.").
[55] *Id.* art. 694(2) ("Que no se oponga a leyes u otras disposiciones colombianas de orden público. . . .").

Fourth, the 2014 Panamanian Code of Private International Law governs "The Process of Recognition [Alongside] Execution of Foreign Judgments."[56] It posits a catalogue of "requirements" comprising all of those initially numerated with the exception of the fifth (5):

> (1) "Upon the nonexistence of a special treaty with the state of origin, the judgment may be executed, [except] in case of proof that . . . no compliance with the decisions rendered by Panamanian tribunals takes place [there]."[57]
> (2) "The judgment must have been rendered by a tribunal with jurisdiction. . . ."[58]
> (3) "The defendant [must have been] personally served with the complaint. [T]he proceedings abroad must have allowed him to contest the charges."[59]
> (4) The "foreign judgment [must] constitute res judicata. It must be firm and final, [plus] no longer subject to appeal."[60]
> (6) "The judgment may not encroach upon the Panamanian judiciary's exclusive jurisdiction, [such as that] over [local] real estate . . . ."[61]
> (7) "The judgment may not infringe upon fundamental principles or rights under public policy of Panama."[62]

Panamanian law may merely *permit* execution upon the existence of reciprocity. Through this sheer permissiveness, it would contradistinguish itself from that of Colombia.

Fifth, Peru's 1984 Civil Code talks about the "Recognition of Foreign Judgments. . . ."[63] Amid this talk, it bespeaks their "Execution."[64] Article 2104 catalogs

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[56] LEY [L.] 7, CÓDIGO DE DERECHO INTERNACIONAL PRIVADO [CD. DER. INT'L PRIV.] (Pan.) (2014), Tít. VIII, Cap. III ("Proceso de Reconocimiento y Ejecución de Sentencia Extranjera").
[57] *Id*. art. 178 ("Si no hubiera tratados especiales con el Estado en el que se haya pronunciado la sentencia, esta podrá ser ejecutada, [s]alvo prueba de que en dicho Estado no se dé cumplimiento a las dictadas por tribunales panameños.").
[58] *Id*. art. 179 (1) ("Que la sentencia haya sido dictada por un tribunal competente. . . .").
[59] *Id*. art. 179 (2): "Que . . . la demanda . . . haya sido personalmente notificada al demandado. Es decir, que el proceso evacuado en el extranjero haya cumplido con el principio del contradictorio.").
[60] *Id*. art. 179 (La "sentencia extranjera" debe estar "revestida de autoridad de cosa juzgada y . . . en el resorte de su jurisdicción . . . firme y no sujeta a recurso alguno.").
[61] *Id*. art. 179 (1) ("Que la sentencia . . . no haya conculcado la competencia privativa de los tribunales panameños. Se entiende que la competencia sobre bienes inmuebles ubicados en la República de Panamá es de competencia privativa de los jueces panameños.").
[62] *Id*. art. 179 (3) ("Que la sentencia pronunciada por tribunal extranjero no conculque principios o derechos fundamentales del orden público panameño.").
[63] CD. CIV. (Peru) (1984), Lib. X, Tít. IV ("Reconocimiento y ejecución de sentencias . . . extranjer[a]s.").
[64] Id.

seven "requirements." These mirror those proposed at the beginning of this comparative inquiry. They will hark back to them.

> (1) "Reciprocity must be proven."[65]
> (2) "The foreign tribunal must have had jurisdiction over the matter in accordance with the rules of private international law [besides] general principles on international procedural jurisdiction."[66]
> (3) "The defendant must have been served according to the law of the forum, [before] a reasonable amount of time to appear [alongside] procedural guaranties to conduct his defense."[67]
> (4) "The judgment must constitute res judicata under the law of the forum."[68] It "may not clash with an earlier one that meets the requirements for . . . execution established in this Title."[69]
> (5) "There may be no trial pending in Peru between the same parties on the same matter, . . . initiated before the lodgment of the complaint from which the judgment ensued."[70]
> (6) "The judgment may not involve matters within Peru's exclusive jurisdiction."[71]
> (7) It "may not run counter to public policy or good morals."[72]

Redolent of its Colombian counterpart, Article 2102 proclaims: "Upon the unavailability of a treaty with the country" of departure, "the judgment shall" enjoy the "effect" of those from a "Peruvian tribunal[]" there.[73] Under the successive provision, "it shall" rejoice in "no force whatsoever" upon noncompliance with them.[74] Article

[65] *Id*. art. 2104 (8) ("Que se pruebe la reciprocidad.").
[66] *Id*. art. 2104 (2) ("Que el tribunal extranjero haya sido competente para conocer el asunto, de acuerdo a sus normas de Derecho Internacional Privado y a los principios generales de competencia procesal internacional.").
[67] *Id*. art. 2104 (3) ("Que se haya citado al demandado conforme a la ley del lugar del proceso; que se le haya concedido plazo razonable para comparecer; y que se le hayan otorgado garantías procesales para defenderse.").
[68] *Id*. art. 2104 (4) ("Que la sentencia tenga autoridad de cosa juzgada en el concepto de las leyes del lugar del proceso.").
[69] *Id*. art. 2104 (6) ("Que no sea incompatible con otra sentencia que reúna los requisitos de reconocimiento y ejecución exigidos en este título y que haya sido dictada anteriormente.").
[70] *Id*. art. 2104 (5) ("Que no exista en el Perú juicio pendiente entre las mismas partes y sobre el mismo objeto, iniciado con anterioridad a la interposición de la demanda que originó la sentencia.").
[71] *Id*. art. 2104 (1) ("Que no resuelvan sobre asuntos de competencia peruana exclusiva.").
[72] *Id*. art. 2104 (7) ("Que no sea contraria al orden público ni a las buenas costumbres.).
[73] *Id*. art. 2102 ("Si no hay tratado con el país en el que se pronunció la sentencia, tiene ésta la misma fuerza que en aquel país se da a las sentencias pronunciadas por los tribunales peruanos.").
[74] *Id*. art. 2103 ("Si la sentencia procede de un país en el que no se da cumplimiento a los fallos de los tribunales peruanos, no tiene fuerza alguna en la República.").

838 of the civilly procedural codification presupposes "reciprocity."[75] It levies "the burden of negative proof" on deniers of the latter.[76]

Sixth, Ecuador's General Organic Code of Processes announces that "foreign judgments . . . shall be complied with" even "upon the lack of international treaties," like "conventions."[77] It treats compliance as the rule, not the exception. Adjudicatory enforces must handle three (3, 4, and 7) of the seven conditions above. They must ascertain:

> (3) "That . . . the defendant was legally notified and the parties' defense . . . assured."[78]
> (4) "That the judgment constitutes res judicata under the laws of the country" of rendition.[79]
> (7) That it does not, whenever "against a state," "contravene constitutional provisions," "the law," "international treaties," alongside plus conventions in force."[80]
> The last item smacks of public policy. Still, it embodies a cardinal, separate proviso.
> Seventh, Brazil's 2015 Code of Civil Procedure features a series of "indispensable requirements."[81] As in Venezuela, it includes all of those previously numbered, with the exception of the first (1). The decision
> (2) "[must have been] pronounced by an authority with jurisdiction."[82]
> (3) "[must have been] preceded by a regular summons, even if ultimately entered by default."[83]

[75] CÓDIGO PROCESAL CIVIL [CD. PRO. CIV.] (Peru) (1993), art. 838 ("Se presume que existe reciprocidad respecto a la fuerza que se da en el extranjero a las sentencias . . . pronunciad[a]s en el Perú. Corresponde la prueba negativa a quien niegue la reciprocidad.").
[76] Id.
[77] CÓDIGO ORGÁNICO GENERAL DE PROCESOS [CD. PRO. CIV.] (Ecuador) (2015), art. 104(4) ("A falta de tratados y convenios internacionales, se cumplirán [las sentencias extranjeras].").
[78] *Id.* art. 104(4) ("Que . . . la parte demandada fue legalmente notificada y que se haya asegurado la debida defensa de las partes.").
[79] *Id.* art. 104(2) ("Que la sentencia pasó en autoridad de cosa juzgada conforme con las leyes del país en donde fue expedida.").
[80] *Id.* art. 104 ("Para efectos del reconocimiento de las sentencias en contra del Estado . . . deberá además demostrarse que no contrarían las disposiciones de la Constitución y la ley, y que estén arregladas a los tratados y convenios internacionales vigentes.").
[81] LEI [L.] 13105, CÓDIGO DE PROCESSO CIVIL [CD. PRO. CIV.] (Braz.) (2015), art. 963 ("requisitos indispensáveis").
[82] *Id.* art. 963(I) ("[A decisão deve ter sido] proferida por autoridade competente.").
[83] *Id.* art. 963(II) ("[A decisão deve ter sido] precedida de citação regular, ainda que verificada a revelia.").

(4) "[must] be effective in the country" of origin,[84] aside from "definitive."[85]
(5) "[may] not run counter to Brazilian rulings with a res judicata effect."[86]
(6) "[may not impinge upon the] exclusive jurisdiction of Brazil's judicial authorities."[87]
(7) "[may] not offend public policy."[88]

Per Article 26(2), the recognition of a foreign judicial determination, in contrast to other instances of international legal cooperation, does not ride on the submission of a diplomatic confirmatory statement about the existence of reciprocity.[89] The ensuant partition (26(3)) draws a line in the sand. It bans the cooperative gesture at stake upon a breach of "Brazilian . . . fundamental norms."[90]

My comments will now measure a future decision against these prerequisites. They will color it apt for recognition. A judge should recognize it. She could only cast it off as unrecognizable through arbitrariness.

The analysis will turn to the first six standards (III). After these, it will transition to the denser seventh one (IV). In the journey through this density, I will rely on six divisions (A-F).

III. FROM RECIPROCITY TO RESPECT FOR EXCLUSIVE LOCAL JURISDICTION

Arguendo, the plaintiffs are prosecuting the original complaint in the federal judicial district of the main facts alongside the defendants domicile. They are not zooming in on real property located in Iberian America. Jurisdiction rests on diversity

[84] *Id*. art. 963(III) ("[A decisão deve] ser eficaz no país em que foi proferida.").
[85] *Id*. art. 961(1).
[86] *Id*. art. 963(IV) ("[A decisão deve ter sido] não ofender a coisa julgada brasileira.").
[87] *Id*. art. 964 ("[A decisão não pode entrar em matéria de] competência exclusiva da autoridade judiciária brasileira.").
[88] *Id*. art. 963(VI) ("[A decisão deve] não conter manifesta ofensa à ordem pública.").
[89] *Id*. art. 26(2) ("Não se exigirá a reciprocidade [manifestada por via diplomática] para homologação de sentença estrangeira.").
[90] *Id*. art. 26(3) ("Na cooperação jurídica internacional não será admitida a prática de atos que contrariem ou que produzam resultados incompatíveis com as normas fundamentais que regem o Estado brasileiro.").

of citizenship, under the law of a state that has adopted the 2005 Uniform Foreign-Country Money Judgment Recognition Act.[91]

First, Mexico, Colombia, Panama and Peru require reciprocity in the open. They should ordinarily concede its existence. So should the remaining nations, insofar as integrative of the requirement sub silentio.

Under the statute, a judge "shall recognize" decisions from abroad.[92] She must carve out an exception, evocative of that under each Iberian American equivalent above, for their shortage of: (1) impartiality; (2) "due process"[93]; (3) "jurisdiction over the defendant,"[94] besides "the subject matter"[95] (4) "notice of the proceeding in sufficient time"[96] for a defense; atop for: (1) "fraud"[97] around them, (2) their repugnance to "public policy,"[98] (3) their "conflict[] with another . . . conclusive"[99] one; though not for the unrecognizability of their local counterparts there. "A party" in opposition to "recognition" must establish, before her, the existence of "a ground for nonrecognition . . . ."[100]

Second, she would enjoy the requisite jurisdictional power over the subject matter in: Mexico, Venezuela, Panama, Peru, Brazil. Beyond these, any other nation with such prerequisite by intimation should concede her this enjoyment. Per Mexico's Federal Code of Civil Procedure, she "must have had jurisdiction to consider and decide the matter under [1] recognized international law rules . . . compatible

[91] UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (Unif. Law Comm'n 2005).
[92] *Id*. § 4(a).
[93] *Id*. § 4(b)(1).
[94] *Id*. § 4(b)(2).
[95] *Id*. § 4(b)(3).
[96] *Id*. § 4(c)(1).
[97] *Id*. § 4(c)(2).
[98] *Id*. § 4(c)(3).
[99] *Id*. § 4(c)(4).
[100] *Id*. § 4(d).

with [2] those" of the codification.[101] Indeed, the latter atop the former should vest her with jurisdiction. In particular, she would sit "in the defendant's domicile," before "collective," "personal actions."[102] These may sound in contract, like delict.[103] They exclude those around real property.[104] For reinforcement, he could cite any "agree[ment]" for the fulfillment of a related "obligation" there.[105]

Before Panama, Venezuela itself legislated separately on private international law. The Venezuelan 1998 Law of Private International Law would jurisdictionally empower her in the "territory" of the "facts," "obligations," or "contracts."[106] In sync, the Panamanian 2014 Code of Private International Law should confer "jurisdiction" upon her in "torts" upon "tribunals" from the location of "the harm['s]" occurrence; "in personal actions," that of "the defendant's domicile"; otherwise, those of his "goods" alongside his "assets."[107]

In Peru, the 1984 Civil Code solely invokes international legal norms.[108] She could exercise her jurisdictional power under these upon her seat at the locus of

[101] Cd. Fed. Pro. Civ. (Mex.) (1943), art. 571(III) ("Que el juez o tribunal sentenciador haya tenido competencia para conocer y juzgar el asunto de acuerdo con las reglas reconocidas en el derecho internacional que sean compatibles con las adoptadas por este Código.").
[102] Cd. Fed. Pro. Civ. (Mex.) (1943), art. 24(II) ("El [lugar] del domicilio del demandado, tratándose de acciones reales sobre muebles o de acciones personales, colectivas o del estado civil . . . .").
[103] *See* Black's Law Dictionary Online Second Edition, http://thelawdictionary.org/personal-action/ (last visited on Jan. 25, 2019) ("A personal action seeks to enforce an obligation imposed on the defendant by his contract or delict; that is, it is the contention that he is bound to transfer some dominion or to perform some service or to repair some loss.").
[104] "Personal rights," according to the influential Chilean Civil Code, "are those that may only be vindicated against certain persons. . . . Personal actions originate in these rights." Cd. Civ. (Chile) (1857), art. 578 ("Derechos personales . . . son los que sólo pueden reclamarse de ciertas personas. . . . De estos derechos nacen las acciones personales."). *See also* Cd. Civ. (Colom.) (1887), art. 666; Cd. Civ. (Ecuador) (2005), art. 596. "Real property rights," in contrast, "are those that we have over a thing, unrelated to any particular person. . . . Real actions originate in these rights." Cd. Civ. (Chile) (1857), art. 577 ("Derecho real es el que tenemos sobre una cosa sin respecto a determinada persona. . . . De estos derechos nacen las acciones reales."). *See also* Cd. Civ. (Colom.) (1887), art. 665; Cd. Civ. (Ecuador) (2005), art. 595 (same).
[105] *Id.* art. 24(II) ("El del lugar convenido para el cumplimiento de la obligación.").
[106] L. Der. Int. Priv. (Venez.) (1998), arts. 40 & 47.
[107] Cd. Der. Int. Priv. (Pan.) (2014), *Id.*, art. 13.
[108] Cd. Civ. (Peru) (1984), Lib. X, Tít. IV ("Reconocimiento y ejecución de sentencias . . . extranjer[a]s."). *Id.*, art. 2104 (2) ("Que el tribunal extranjero haya sido competente para conocer el asunto,

many relevant connections: actions, resources, duties. Furthermore, upon a ruling on the merits. 28 U.S.C. § 1391(b)(2) would have her, for venue, place "substantial . . . events," "omissions," plus properties behind "the action" within her "judicial district."[109] Her application of local law would have to rest on "contacts" "significant" enough for the creation of "state interests."[110] Thereby, it would not come across as an "arbitrary," "fundamentally unfair" one.[111]

The Brazilian Code of Civil Procedure, somewhat like its Mexican counterpart, exclaims: "An action based on a personal right . . . shall" unroll "in the forum of the defendant's domicile."[112] Once again, she could boast jurisdiction under this standard because of the domicile, in her judgeship's seat, of the defensive party. Upon the inexistence of any domiciliary, residential link of these "to Brazil," atop "the plaintiff['s]" residence abroad, moreover, "any forum," like hers, would fly.[113]

For the third parameter, the summons in harness with the trial will unfold under the Federal Rules. Consequently, it will afford the defendant suitable service besides occasion for a vigorous defense, in honor of an express mandate in all seven countries. For sure, none of these calls, with respect to anyone else, for: notification, summons, litigious opportunities. All the same, absent class-members will receive individual notice, with a chance of participation in the litigation.[114] They will benefit overall from a series of safeguards coherent with due process in Iberian America like the United States.[115]

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de acuerdo a sus normas de Derecho Internacional Privado y a los principios generales de competencia procesal internacional.").

[109] 28 U.S.C. § 1391(b)(2).

[110] Allstate Insurance Co. v. Hague, 449 U.S. 302, 313 (1981).

[111] *Id*.

[112] L. 13105, Cd. Pro. Civ. (Braz.) (2015), art. 46 ("A ação fundada em direito pessoal . . . será proposta, em regra, no foro de domicílio do réu.").

[113] L. 13105, Cd. Pro. Civ. (Braz.) (2015), art. 46 ("A ação fundada em direito pessoal ou em direito real sobre bens móveis será proposta, em regra, no foro de domicílio do réu.").

[114] Fed. R. Civ. P. 23(c)(2)(B), 23(d)(1)(B)(iii), & 24.

[115] *See, infra*, Part IV(D)(2-3).

Fourth, the ultimate decision will possess finality, "binding" everyone.[116] It will amount to "claim preclusion" ("merger" alongside "bar") before the seven Iberian American regimes under consideration.[117] These should reaffirm it as such in this department. They could not demur to it.

Fifth, this inquiry presupposes the dearth of any pending identical domestic suit, per the explicit demands (from Mexico, Brazil, Venezuela, Colombia, Peru) atop any implicit ones. It zeroes in on the very first Iberian American complaints. These would precede any others.

Per the omnipresent sixth standard, the controversy does not touch upon real estate located in Iberian America. It should not impinge upon any other local jurisdictional prerogatives either.

IV. PUBLIC POLICY

A. From Definition to Overview

In Iberian America, a tribunal may refuse a final judicial decision from abroad counter to public policy. Thereby, it should not undermine the presumption in favor of recognition. The exception in question applies upon a clear collision with the polity's vital precepts.[118]

Atop French scholar Henri Capitant, the Panama's Supreme Court has defined the notion before us as one that: "encompasses norms" for the advancement of "the interests of individuals, guaranteeing societal coexistence." This notional

[116] Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984).
[117] *See id*.
[118] *Cf*. Anwar v. Fairfield Greenwich, Ltd., 289 F.R.D. 105, 115 (S.D.N.Y. 2013) ("Therefore, the Court concludes that, where a plaintiff sufficiently demonstrates that the stated policy of a foreign country is to recognize and enforce foreign judgments, or that its law is generally inclined to favor that course of action, such a showing would create a rebuttable presumption that, absent an affirmative showing to the contrary, recognition of a particular United States judgment, even in class action litigation, does not violate a foreign country's public policy.").

contributor "to social," "collective welfare," under the guidance of universal "precepts" (such as: "justice," "morality"), merits enshrinement in the "Constitution."[119] It comprises a series of shared normative, constitutional convictions about people's well-being.

The concept should degenerate to neither the laws in force nor current official politics. It sets itself apart by its development over time, under the influence of numerous institutions, toward permanence.

Statutes besides policies may coincide with it. However, they often do not. Hence, one must check for further corroboration in other sources of diverse sorts: judicial, jurisprudential, organic, constitutional, international.

For example, a judge in an extradition proceeding may have to assess a foreign capital sentence for consistency with public policy.[120] She might observe the unobtainability of the death penalty under her own penal code. Her government may oppose any amendment. Nonetheless, she must look for the requisite denunciation—categorical, definitive—before any repudiation of the punishment before her.

From the Mexican Supreme Court's vantage:

> Public policy takes the law [alongside] the caselaw into account, ultimately constituting a norm [with] a nullifying effect under extreme circumstances. [Not resting] on a sum of purely private interests, [it] touches upon others of such importance, . . . forbidding acts [detrimental to] the collectivity, the state, or the nation, even [despite a suffering by] the concerned parties of no loss, [or an acquiescence by these].[121]

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[119] [Grupo Capital Factoring v. Karikal Investment], Exp. No. 852-02, Sala 4ta Neg. Gen., Ct. Supr. Jus. (Pan.) (2008) ("[E]l orden público comprende las normas y principios que defiende los intereses de los particulares y que garantiza la convivencia en sociedad, busca la seguridad social y colectiva, donde se destacan los principios de justicia y moral que deben regir en todo Estado; además de concebirse como los principios fundamentales estipulados en nuestra constitución.").

[120] In Argentina, for example, extradition will not "lie whenever it would run counter to . . . public policy." L. 24767 (Arg.) (1998), art. 10 (No "procederá la extradición cuando existan especiales razones de . . . orden público[.]").

[121] 3ra Sala, 5ta Época, Seman. Jud. Fed., T. XXXVII, p. 1835, Supr. Ct. Just. Nac. (Mex.) (1933) ("El orden público que tiene en cuenta la ley y la jurisprudencia, para establecer una norma sobre las nulidades radicales, no puede estar constituido por una suma de intereses meramente privados; para que el orden público esté interesado, es preciso que los intereses de que se trate, sean de tal manera

A foreign judgment must clash with these crucial interests, perhaps fundamental principles. It should injure the entire society.

A decision in the case at bar would comply with U.S. law on substance atop procedure. Therefore, it would jell with cardinal norms in Iberian America. Absentees might raise due process concerns because of the preclusive aftereffect for them. They could protest the want of any consultation with them.

Due process with its strict ban on legally arbitrary deprivations (of: life, liberty, property) has become a central component of the constitution everywhere across Iberian America.[122] It traveled southward in the nineteenth century from the United States,[123] toward every corner of this vast territory.[124] Inquiries into its compatibility with the preclusion, under Rule 23(c)(3)(B), of a person without her consent to the complaint would unfold throughout the south in step with the north.

importantes, que, no obstante el ningún perjuicio y aun la aquiescencia del interesado, el acto prohibido pueda causar un daño a la colectividad, al Estado o a la nación.").

[122] *See generally* OQUENDO (2017), *supra* note 11, at 382 ("Since the attainment of independence in the nineteenth century, Latin American constitutions have guaranteed . . . due process.").

[123] *See, e.g.*, *id*. at 803 ("Article 14 [of the Mexican Federal Constitution] enunciates various guaranties that echo U.S. constitutional principles such as the ban on *ex post facto* laws and due process."), 289 ("Articles 14 and 16 [of the Mexican Federal Constitution] echo the due process clauses of the U.S. Constitution's fifth and fourteenth amendments."), 789 (Constitution (Brazil) (1988), Title II (Fundamental Rights and Guarantees), Chapter I (Individual and Collective Rights and Duties), Article 5(LIV): "No one shall be deprived of his or her liberty or assets without due process of law."). The District Court on Civil and Labor Matters for the State of Nuevo Leon in Mexico, for its part, has observed that "the notion due process of law, which has its origins in Anglo-American law, was exported to Mexico" and that, in this respect, "the United States and Mexico honor the same principle." Exp. Jud. 32/9009-II, Juz. Dist. Mat. Civ. & Tbjo. Nuevo León (Mex.) (2010), pp. 22-23 ("[E]l debido proceso legal cuyo origen es el derecho anglosajón . . . se exportó a México.") ("[E]n Estados Unidos de América como en México se consagra el mismo principio.").

[124] *See* CONST. art. 18 (Arg.); CONST. arts. 115(II), 117, 180 (Bol.); CONST. art. 5(LIV) (Braz.); CONST. art. 19(3) (Chile); CONST. art. 29 (Colom.); CONST. art. 39 (Costa Rica); CONST. art. 94 (Cuba); CONST. art. 69 (Dom. Rep.); CONST. art. 76 (Ecuador); CONST. arts. 14-15 (El Sal.); CONST. arts. 12, 267 (Guat.); CONST. arts. 90, 94 (Hond.); CONST. art. 14 (Mex.); CONST. art. 33 (Nicar.); CONST. art. 32 (Pan.); CONST. art. 17 (Para.); CONST. art. 139(3) (Peru); CONST. art. 2(7) (P.R.); CONST. art. 7 (Uru.); CONST. art. 49 (Venez.).

A tribunal in Iberian America, like the United States, would pass on the procedural setup's fairness to absent class-members.[125] It would probe into: (1) the sufficiency of the notice to them; (2) the preservation their right to an appearance for themselves; (3) the protection of their interest through those around them with clout: representatives, attorneys, judges. The next two subdivisions (B, C) will, in succession, deal with all class-actions, before those controlled by Rule 23(b)(3).

An Iberian American judge would consider comparable homegrown suits. She should determine the degree of their incorporation of Rule 23(b)(3) features apparently violative of due process. Section E will first discuss regional suits for an analogous vindication of many homogenous interrelated individual entitlements. It will analyze them through their bindingness on scores of people through an informal opt-in or the neglect of an opt-out. Accordingly, the analogous scheme from the United States should not come across as iniquitous.

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[125] *See generally* OQUENDO (2017), *supra* note 11, Ch. XII, §§ C, E (Due Process Case Law in Mexico and Brazil). Latin American tribunals, like their U.S. counterparts, essentially assess whether existing procedures treat concerned individuals fairly. In Melgar Castillejos v. President, for example, the Mexican Supreme Court held that the preliminary internment of a person for mental incompetence without a hearing violates due process. It declared: "We conclude that the challenged statute could lead to confinement and appointment of a tutor when the person concerned is in full possession of all of his or her capacities. The statutory provisions clearly deny him or her the opportunity to make allegations or introduce evidence to establish his or her lucidity, for they do not entitle him or her to intervene in the process." *Id*. at 752-753. In Brazilian Union of Composers v. Villarinho, Brazil's Supreme Court reasoned along parallel lines when it struck down an organization's decision to throw out a member without allowing him to respond: "[The complainant's] expulsion . . . without guaranteeing him an ample defense, cross-examination, and constitutional due process disadvantages him considerably. He can no longer exercise the copyright related to the performance of his works. Moreover, even if plaintiff had joined other similar entities, at the national or international level, the imminent disciplinary exclusion would burden him. . . ." *Id*. at 792. Precisely in an execution proceeding, the District Court on Civil and Labor Matters for the State of Nuevo Leon in Mexico took an analogous approach in rejecting the defendant's objection to the service of process under Texas law. It stated: "This tribunal cannot question the particular mechanisms available [in the United States] to enforce the right to a hearing . . . for one cannot expect the summons in that nation to comport with Mexican law, only that it assure the defendant the right to fair treatment." Exp. Jud. 32/9009-II, Juz. Dist. Mat. Civ. & Tbjo. Nuevo León (Mex.) (2010), p. 23 ("este juzgado no puede cuestionar los mecanismos [estadounidenses] para hacer efectiva la garantía de audiencia; . . . por lo que es imposible pretender que el emplazamiento en esa nación sea conforme a la legislación mexicana; lo relevante es que se asegure al demandado la garantía de trato.").

Then, the same segment will analyze diffuse-rights suits, resemblant of Rule 23(b)(2) actions alongside citizen suits, existent in every one of the nations under consideration, atop all over the continent. It will expose them as wresting the individual right to sue from an absentee without any consent from her, notification to her, or a bail-out opportunity for her. The analysis will stress the irrelevance of the substantive entitlement's collectiveness, versus individuality. It will close with an assessment of Rule 23(b)(3) actions, like ubiquitous diffuse-rights suits, consistent with due process besides public policy.

As a whole, the ensuant partitions will endorse the holding in *Anwar v. Fairfield Greenwich, Ltd.*, about a Rule 23(b)(3) "judgment['s]" basic compatibility with "public policy."[126] Nevertheless, they will progress from "the absence . . . of any authority" on its manifest incompatibility[127] to a demonstration of its coherence.

An Iberian American judge should realize the upshot of a refusal of recognition. In practice, she would deprive the defendant itself of due process, discriminating against it. In particular, it would have risked effective liability to absent class-members without a correspondent, complete exoneration in prospect upon a victory on the merits against them. They could not rightfully denounce the preclusive impact on them, upon their shot at compensation through the effort of others, with ample benefits en route: procedural protection, information, exit option. Moreover, the same sweeping res judicata effect could have struck them in their lands of origin.

B. Class-Action "Absenteeism"

On first impression, a judgment in the present controversy might encroach upon due process through its preclusion of absent class-members upon their failure to "opt out." They might deplore the lack of conferment with them before preemption of their litigation.

[126] Anwar v. Fairfield Greenwich, Ltd., 289 F.R.D. 105, 119 (S.D.N.Y. 2013).
[127] *Id*. at 120.

Class actions exist precisely for the advantage of those represented. With meticulousness, the drafters of Rule 23, besides its judicial interpreters, have secured the entitlements of each absentee. Like their Iberian American counterparts, they have relied on due process. Therefore, a judge in Iberian America should deem the U.S. class action itself alongside the final decision compatible with the local conception of due process.

The Advisory Committee on the 1966 Amendment, responsible in essence for the current Rule 23,[128] viewed its mission as the fair treatment, consistent with due process,[129] of the totality of class members subject to preclusion through the ultimate ruling. It perceived as a main deficiency of the original version the unavailability of "an adequate guide to the proper extent of the judgments in class actions," besides an "address" of "the question of the measures available during the course of the action" for an assurance of "procedural fairness. . . ."[130] In response, the end product:

> [...] provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class[,] and refers to the measures which can be taken [for] the fair conduct of these actions.[131]

The representatives appear themselves. They can shift for themselves. Therefore, issues of fairness arise for the most with respect to those under their purview.

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[128] Ortiz v. Fibreboard, 527 U.S. 815, 833 (1999) ("[M]odern class action practice emerged in the 1966 revision of Rule 23."); Amchem v. Windsor, 521 U.S. 591, 613 (1997) ("Rule 23, governing federal-court class actions, stems from equity practice and gained its current shape in an innovative 1966 revision.").

[129] Clark v. Arizona, 548 U.S. 735, 771 (2006) ("[D]ue process requires" "the standard of fundamental fairness,"); Daniels v. Williams, 474 U.S. 327, 331 (1986) ("[T]he Due Process Clause promotes fairness."); Landon v. Plasencia, 459 U.S. 21, 34-35 (1982) ("The role of the judiciary is limited to determining whether . . . procedures meet the essential standard of fairness under the Due Process Clause."); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) ("[D]ue process of law" encompasses "traditional standards of fairness").

[130] Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment) (Difficulties with the Original Rule).

[131] *Id*.

The Supreme Court has interpreted many of the "specifications of the Rule" as part of a design for the protection of the latter.[132] In this sense, it has detected in the prerequisites under subsections (a) and (b) a "focus" on the sufficiency of the class's "unity" for a fair binding of absentees "by their representatives," "to inhibit appraisals of the chancellor's foot kind. . . ."[133]

Rule 23 structures the whole procedure for class actions for the assurance of fair treatment. For instance, it requires the certification of the class ahead of the game. Representatives must show, inter alia, that their capacity for a fair, adequate protection of "the interests of the class."[134] The certificatory "inquiry" should "uncover conflicts of interest."[135]

The Supreme Court has explained how these controls safeguard the absentees' well-being:

> A plaintiff class . . . cannot first be certified unless the judge, with the aid of the named plaintiffs and defendant, conducts an inquiry into the common nature of the named plaintiffs' and the absent [members'] claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the [absentees'] interest. *See, e. g.*, . . . Fed. Rule Civ. Proc. 23. Unlike a defendant in a civil suit, [an absent] class [member] is not required to fend for himself. . . . The court and named plaintiffs protect his interests.[136]

These checks should guarantee the absentees' profit from the litigation.

> After this battery of preliminary tests, the tribunal must then "appoint class counsel."[137] It "may consider . . . counsel's ability to" a fair, adequate representation of "the interests of the class."[138] Of course, several "applicant[s]" may seek appointment before it. Then, it must appoint the [one]

[132] *Amchem*, 521 U.S. at 620.
[133] *Id*. at 621.
[134] Fed. R. Civ. P. 23(a)(4).
[135] *Amchem*, 521 U.S. at 625.
[136] Phillips Petroleum v. Shutts, 472 U.S. 797, 809 (1985).
[137] Fed. R. Civ. P. 23(c)(1)(A).
[138] Fed. R. Civ. P. 23(g)(1)(B).

> best [for] the interests of the class." The Rule defines the "Duty" of the appointee thus: She "must fairly," "adequately represent the interests of the class."[139]

Moreover, the judge engages with extraordinary intensity. She must look after the welfare of class members.

> In conducting [the] action . . . , the court may issue orders that . . . require—to protect [them,] fairly conduct[ing] the action—giving appropriate notice to [them] of (i) any step in the action; (ii) the proposed extent of the judgment; or (iii) [their] opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action.[140]

She may also "impose conditions on their representative[s]," such as the elimination of "allegations about representation of [those] absent [among them] and that the action proceed accordingly or . . . deal with similar procedural matters."[141]

In a parallel vein, Rule 23 compels the securement of her "approval" for important developments: conciliation, voluntary dismissal, compromise.[142] Furthermore, it demands an identification before her of "any agreement . . . in connection with [any] proposal" for these, alongside "reasonable" "notice . . . to all" concerned among them.[143] They "may," at this juncture, "object." Their withdrawal of the objection would ride on her permission upon a "finding," after a hearing, of fairness, reasonableness, and adequacy.[144]

With these constraints, the law upholds their due process. It specifically manifests "concern . . . for" the absentees among them, atop a "continuing solicitude for

[139] Fed. R. Civ. P. 23(g)(4).
[140] Fed. R. Civ. P. 23(d)(1)(B).
[141] Fed. R. Civ. P. 23(d)(1)(C-E).
[142] Fed. R. Civ. P. 23(e).
[143] Fed. R. Civ. P. 23(e)(3, 1).
[144] Fed. R. Civ. P. 23(e)(5, 2).

their rights."[145] At the end of the day, they need not "do anything," sitting "back," witnessing "the litigation['s]" unfoldment, "content" with the "safeguards" under her "for his protection."[146]

An Iberian American colleague of hers could himself ascertain any infringement upon the entitlements of the passive participants among them. He would understand the inner mechanism as one in the interest of these. The strictures would suffice for purposes of Iberian American due process, atop that from the United States.

Ultimately, those absent among them, like their U.S. peers, could hardly cry "foul" before him ex post facto. After all, they would have free ridden on the plaintiffs' efforts, with a chance at compensation upon a favorable ruling, with the benefit—throughout the proceedings—of actors (judge, attorney, representative) solicitous, by law, of their welfare around the affair at hand. He would regard the entire arrangement as a patently fair one. Through the collective litigation, they had staked their claim without any of the requisites: northward travel, familiarization with the legal system, hire of a lawyer, separate complaint.

C. THE OPT-OUT REGIME

"Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages" toward "secure judgments binding [on] all class members save those" among them with an affirmative exclusion-election.[147] Not surprisingly, it introduced supplemental parameters precisely for the enhancement of fairness for all. At the outset, the judge must verify the predominance of "questions of law or fact common" to them "over . . . individual" ones, alongside the superiority of the chosen "to other

[145] *Phillips*, 472 U.S. at 810.
[146] *Id*.
[147] *Amchem*, 521 U.S. at 614-615.

available methods for" fair, efficient adjudication.[148] She must assess their "interest . . . in" individual control over "the prosecution . . . of separate actions. . . ."[149]

At her behest, they must receive [1] the best notice . . . practicable under the circumstances, including [2] individual notice to all" those among them identifiable "through reasonable effort."[150] She "must" have the latter "sent to all" those among them with reasonably ascertainable "names" atop "addresses.[151] "The notice must"

> clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members. . . .[152]

The Advisory Committee set forth this notification regime to ensure compliance with due process: "This mandatory notice . . . , together with any discretionary notice which the court may find it advisable to give . . . , is designed to fulfill requirements of due process . . . ."[153]

An Iberian American tribunal would value these special measures to keep an absent member abreast of any significant developments and to permit her to exit. It would view them as purposely protective of absentees among them. The framers' efforts would come across as more than sufficient in a region that essentially shares the due process concept with the United States.

Phillips Petroleum Co. v. Shutts confronts the argument about "[1] the 'opt out' procedure['s] insufficiency, besides "that" of the requirement of "[2] the 'opt in'"

[148] Fed. R. Civ. P. 23(b)(3).
[149] Fed. R. Civ. P. 23(b)(3)(A).
[150] Fed. R. Civ. P. 23(c)(2)(B).
[151] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974).
[152] Fed. R. Civ. P. 23(c)(2)(B)(i-vii).
[153] Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment) (Subdivision (d)).

counterpart for "Due Process . . . ."[154] For the sake of clarity, it explained the latter as one upon the consent of "each class member . . . to his inclusion . . . ."[155] The oft divided justices, in unanimity on this occasion, "reject[ed]" a due processual requirement of an option-in.[156] They retorted it with an insistence on the satisfactoriness, for "jurisdiction,"[157] of "the protection" available.[158]

For them: "The interests of [absentees] are sufficiently protected by the forum . . . with a request for exclusion . . . within a reasonable time . . . ."[159] They elaborated their thinking:

> If the forum . . . wishes to bind an absent [class-member] concerning a claim for money damages or similar relief at law, it must provide minimal procedural due[-]process protection. The [absentee] must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, . . . due process requires at a minimum that an absent [class-member] be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class[-]members.[160]

They underscored the acquiescence through a declination of the allowable bail-out.

> [T]he "opt out" procedure . . . is by no means *pro forma*, and . . . the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an "opt out" form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so. [W]e do not think that the Constitution requires . . . sacrific[ing] the obvious advantages in judicial efficiency resulting from the "opt out" approach for the protection of [such a] rara avis. . . .[161]

[154] *Phillips*, 472 U.S. at 811.
[155] *Id*.
[156] *Id*. at 812.
[157] *Id*. at 811.
[158] *Id*. at 815.
[159] *Id*. at 814.
[160] *Id*. at 811-812.
[161] *Id*. at 813-814.

The "advantages in judicial efficiency" inure foremost to the benefit of absentees. Therefore, these can scarcely repudiate the judgment as inequitable to them.

An Iberian American judge would, on the heels of her U.S. colleagues, reason for these safeguards' sufficiency. She should espouse the comportment of Rule 23(b)(3) class-actions, like that of the comparable local suits from the next Subsection, with (1) due process alongside (2) public policy. Once again, the former should not yield different answers on the two sides of the border.

Iberian American absent class-members, like their U.S. counterparts, could not with just cause subsequently remonstrate by her against their incorporation. She would rebuff any remonstrations from them. After all, they would have learned about the litigation details, with a fair chance to stay aboard or jump ship.

She could assess the influence of background conditions on their informational access besides their consent capacity. Her assessment would alert her to the transparent communicative channel at their disposal. They could hardly allege disconnection.

D. SUMMONS BESIDES SERVICE

In extremis, they might invoke the Inter-American Convention on Letters Rogatory. As pleaders, they could plead for additional protections through it.[162]

It applies to "service of process" alongside "summonses."[163] Evidently, all these should benefit their usual addressees: those in the dock. The Additional Protocol dispels any doubt about the matter. It annexes Form B with its express mention of "the defendant" as the recipient.[164]

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[162] See generally Antonio Gidi, The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America, 37 BROOK. J. INT'L L. 893, 938–39 (2012).

[163] Convención Interamericana sobre Exhortos o Cartas Rogatorias, art. 2, Jan. 30, 1975, O.A.S. T.S. No. 43, 1438 U.N.T.S. 287 ("notificaciones"; "emplazamientos"). The official English version speaks of "service of process" and "summonses." Inter-Am. Conv. Letters Rog., art. 2, Jan. 30, 1975, 1975 U.S.T. LEXIS 589, 1438 U.N.T.S. 287, O.A.S. T.S. No. 43.

[164] Form. B, Anexo, Protocolo Adicional a la Convención Interamericana sobre Exhortos o Cartas Rogatorias, May 8, 1979, O.A.S. T.S. No. 56, 1438 U.N.T.S. 322 ("citación al demandado"). The official

Miguel Ángel Narváez Carvajal's apposite manual focuses in the main on the Inter-American system, Latin America, plus Ecuador. In its own words: Through this "international judicial cooperation," "national judges" besides "tribunals" may "summon the defendant" via the "judicial organs of other states. . . ."[165]

In re Vivendi Universal supports this interpretation. It would refuse to read into such an accord a command to serve Rule 23(b)(3) absentees. Per its reading, "service of process in [the] context [of the analogous Hague Service Convention] refers to the formal delivery of an initial pleading to an *opposing* party, i.e., the defendant." It does not require "notice by plaintiff to a member of [her] class."[166]

Might due process in itself, beyond international law, command a summons for absentees? Actually, (1) a summons under Federal Rule of Civil Procedure 4 would inform them less comprehensively about the relevant aspects of the procedure than (2) the 23(c)(2)(B)(i-vii) notification.

The former would, in essence, explicate to them the consequences of "failure to appear and defend."[167] It would "name the court and the parties," alongside "the plaintiff's attorney," for them.[168] The latter would describe to them major elements: "the action," "class," "claims."[169] It would flesh out primordial mechanics for them: participation, "exclusion," "the binding [judgmental] effect."[170]

Of course, service to them would include the complaint like the summons.[171] More importantly, it would take place in person,[172] not by mail. However, the plaintiff

English version reads "service on [the addressee] as a defendant." Form. B, Annex Add. Proto. Inter-Am. Conv. Letters Rog., May 8, 1979, 1975 U.S.T. LEXIS 589, 1438 U.N.T.S. 322; O.A.S. T.S. No. 56.

[165] MIGUEL ÁNGEL NARVÁEZ CARVAJAL, MANUAL SOBRE EXHORTOS Y CARTAS ROGATORIAS 26 (2014) ("La cooperación judicial internacional [permite a] las juezas, jueces y tribunales nacionales . . . citar al demandado [a través de los] órganos judiciales de otros Estados. . . .").

[166] In re Vivendi Universal, 242 F.R.D. 76, 104 (S.D.N.Y. 2007).

[167] Fed. R. Civ. P. 4(a)(1).

[168] *Id.*

[169] Fed. R. Civ. P. 23(c)(2)(B)(i-vii).

[170] *Id.*

[171] Fed. R. Civ. P. 4(c)(1).

[172] Fed. R. Civ. P. 4(c)(2).

must serve them by grace of either advantage. Atop the other information available to them, they may ask for a copy of the complaint. The remaining controls under Rule 23 sufficiently guard their interests.

A unanimous *Phillips Petroleum v. Shutts* rebuffed an attempt to guarantee (1) them all of the due process protections of (2) the defense. It raises the much heavier weight on the latter than them.

> The burdens placed by a State upon [them] are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim . . . or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, . . . forced to respond in damages or . . . comply with some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney's fees. These burdens are substantial. . . .[173]

In comparison:

> Besides [the] continuing solicitude for their rights [under Rule 23], absent . . . class[-]members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear, . . . are almost never subject to counterclaims or cross-claims, or liability for fees or costs, . . . are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind [them] for any damages, although a valid adverse judgment may extinguish any of [their] claims which were litigated.[174]

Vivendi concurs against them. It discards a senseless evaluation of their "due process right to adequate notice in terms of [the satisfaction of] the service requirements of Rule 4 . . . ."[175]

[173] *Phillips*, 472 U.S. at 808.
[174] *Id*. at 810.
[175] *Vivendi*, 242 F.R.D. at 104.

E. Representative Litigation

1. Across the Board

For reassurance, an Iberian American tribunal could point to (1) homegrown suits evocative of (2) class actions. They could not reject the latter except upon an improbable rejection of the latter.

Lately, the entire region has been warming to collective litigation in general, to a greater extent than Europe. At times, it might be exceeding Anglo America in this regard.[176] In light of this trend, an adjudicator in Iberian America should not find U.S. class actions inherently aberrant or, at any rate, contrary to public policy.

I will first examine a widespread suit with a resemblance to a Rule 23(b)(3) action. It binds absentees who have either opted in rather informally or not opted out at all. Then, I will consider a ubiquitous suit evocative of a Rule 23(b)(2) action, alongside a citizen suit. They preclude them despite the want of assent from or notice to them.

A judge from Iberian America could invoke either procedural device in her recognition of the judgement against them. She could reject their contention of unfairness.

2. Reminiscences of 23(b)(3) Suits

Iberian America has been authorizing the agglomeration of singular, similar, interrelated entitlements, in the vein of Rule 23(b)(3), upon casual entrance, sometimes neglect of a simple exit. It has been naming them "homogenous individual." Of the seven countries under consideration, five have ventured into this domain. Two (Mexico, Colombia) include a candidate through commission. In contrast, the remaining three (Panama, Peru, Brazil) incorporate her via omission.

[176] See Ángel R. Oquendo, *Upping the Ante: Collective Litigation in Latin America*, 47 Colum. J. Transnat'l L. 248-91 (2009).

The Mexican Federal Code of Civil Procedure provides for the safekeeping of "rights . . . pertaining to"[177] people similarly situated, around diverse matters in oscillation from "consumption" to ecology.[178] It confers nonexclusive standing to "the representative of the collectivity."[179] Others may enroll upon "informing [her] by any means,"[180] perhaps even email or orally. They will reap "payment" upon their enrollment in the collective behind her.[181] She, in turn, "represent[s]" the ensemble in tandem with the enrollees.[182] Article 586 echoes procedurally posited parameters from the United States with the following language: Her "representation . . . shall be adequate."[183]

Colombian Law 472 of 1998 executes the constitutionalized mandate for a regulation of "group"[184] filings "by a . . . number" of claimants" upon a "harm" to each from "the same source."[185] After attestation of "liability," it secures "indemnification

[177] Código Federal de Procedimientos Civiles [Federal Code of Civil Procedures] [Cd. Fed. Pro. Civ.] art. 581(III) (Mex.) ("Acción individual homogénea: Es aquélla de naturaleza divisible, que se ejerce para tutelar derechos e intereses individuales de incidencia colectiva, cuyos titulares son los individuos agrupados con base en circunstancias comunes . . . .").
[178] *Id.* art. 578 ("La defensa y protección de los derechos e intereses colectivos . . . sólo podrán promoverse en materia de relaciones de consumo de bienes o servicios, públicos o privados y medio ambiente . . . .").
[179] *Id.* art. 585(II) ("Tiene[] legitimación activa para ejercitar las acciones colectivas: . . . El representante común de la colectividad").
[180] *Id.* art. 594 ("En el caso de las acciones colectivas . . . individuales homogéneas, la adhesión a su ejercicio podrá realizarse por cada individuo que tenga una afectación a través de una comunicación expresa por cualquier medio dirigida al representante . . . .").
[181] *Id.* ("Tratándose de acciones colectivas . . . individuales homogéneas sólo tendrán derecho al pago que derive de la condena, las personas que formen parte de la colectividad . . . .").
[182] *Id.* ("El representante . . . representa[] a la colectividad y a cada uno de sus integrantes que se hayan adherido . . . a la acción.").
[183] *Id.* art. 586 ("La representación . . . deberá ser adecuada.").
[184] L. 472, art. 1 (Colom.) ("La presente ley tiene por objeto regular las acciones populares y las acciones de grupo de que trata el artículo 88 de la Constitución Política de Colombia.").
[185] *Id.* art. 3 ("Son aquellas acciones interpuestas por un número plural o un conjunto de personas que reúnen condiciones uniformes respecto de una misma causa que originó perjuicios individuales para dichas personas."); *see also id.* art. 46 ("Las acciones de grupo son aquellas acciones interpuestas por un número plural o un conjunto de personas que reúnen condiciones uniformes respecto de una misma causa que originó perjuicios individuales para dichas personas.").

for the loss."[186] The trier "shall ensure the respect of foundational tenets: "due process, [formal] guaranties, . . . equality . . . ."[187]

The filer stands in for others also aggrieved through "the injurious" conduct.[188] They must neither "sue [on their own] nor grant [her] power of attorney."[189] She may have them enlist with a simple written communication, without the normally necessitated notarization. They may submit a document: (1) "containing their name," (2) identifying their "injury," atop its origins, (3) expressing their "willingness to accept the judgment and to join."[190]

Under Panamanian Law 45 of 2007, the "members of a . . . class" may, upon a "prejudice . . . from a product or service," prosecute a suit. They incorporate by default those likewise prejudiced.[191] After "admitting" the libel, the adjudicative body "shall register it."[192] It must "publish an announcement . . . in a nationally circulating newspaper . . . .[193]

[186] *Id.* art. 3 ("La acción de grupo se ejercerá exclusivamente para obtener el reconocimiento y pago de indemnización de los perjuicios."); *see also id.* art. 46 ("La acción de grupo se ejercerá exclusivamente para obtener el reconocimiento y pago de indemnización de los perjuicios.").
[187] *Id.* art. 5 ("El Juez velará por el respeto al debido proceso, las garantías procesales y el equilibrio entre las partes.").
[188] *Id.* art. 48 ("En la acción de grupo el actor . . . representa a las demás personas que hayan sido afectadas individualmente por los hechos vulnerantes . . . .").
[189] *Id.* (No hay "necesidad de que cada uno de los interesados ejerza por separado su propia acción, ni haya otorgado poder.").
[190] *Id.* art. 55 ("Cuando la demanda se haya originado en daños ocasionados a un número plural de personas por una misma acción u omisión, . . . quienes hubieren sufrido un perjuicio podrán hacerse parte dentro del proceso [con] un escrito en el cual se indique su nombre, el daño sufrido, el origen del mismo y el deseo de acogerse al fallo y de pertenecer al conjunto de individuos que interpuso la demanda. . . .").
[191] L. 45, art. 129 (Pan.) (2007) ("El ejercicio de las acciones de clase, en materia de consumo, corresponde a uno o más miembros de un grupo o clase de personas que han sufrido un daño o perjuicio derivado de un producto o servicio. Tal ejercicio se entiende en beneficio del respectivo grupo o clase de personas.").
[192] *Id.* art. 129 (3) ("El tribunal, al acoger la demanda, la fijará en lista . . . .").
[193] *Id.* ("El tribunal . . . publicará un edicto . . . en un diario de reconocida circulación nacional . . . .").

The "plaintiff and all persons" within the grouping "may appear to vindicate their rights . . . ."[194] They may "formulate arguments or . . . participate" in the prosecution.[195]

Anyone may "exclude himself."[196] In contraposition, he must do so before "the scheduling of the preliminary hearing."[197] Finally, the resolution "shall bind" all irrespective of their intervention.[198]

Moreover, Law 19 of 2008 creates a cause to actualize aggregate entitlements through international litigation. It predicates: After an encroachment, (1) "those impacted" or a representative outfit may carry the banner.[199] The text does not spell out: (1) what notification the speakers must send to those for whom they purport to speak, (2) whether these must expressly exit or enter, (3) how the proceedings will transpire, or (4) what res judicata consequences the ultimate ruling will possess. Presumably, regular preclusion norms apply. They would forestall any additional adjudication on the original claims.

[194] *Id.* ("El . . . demandante y todas las personas pertenecientes al grupo" pueden comparecer "a hacer valer sus derechos . . . .").
[195] *Id.* ("El . . . demandante y todas las personas pertenecientes al grupo" pueden comparecer "a formular argumentos o a participar en el proceso.").
[196] *Id.* art. 129(4) ("El miembro de la clase que desee excluirse podrá hacerlo . . . .").
[197] *Id.* art. 129(4) ("El miembro de la clase que desee excluirse" deberá "hacerlo hasta antes de que se fije fecha para la audiencia preliminar.").
[198] *Id.* art. 129(8) ("La sentencia afectará a todos los demandantes que pertenezcan a dicho grupo, aunque no hayan intervenido en el proceso.").
[199] L. 19, art. 1421-I (Pan.) (2008) ("Cuando se lesionen derechos subjetivos individuales, provenientes de origen común y tengan como titulares a los miembros de un grupo, categoría o clase, los afectados, colectivos de afectados o las organizaciones no gubernamentales constituidas para la defensa de derechos colectivos estarán legitimados para promover la acción en defensa de los derechos individuales homogéneos.").

The provisions of the Peruvian codified consumer-enactment empower the "National Institute for the Defense of Competition and for the Protection of Intellectual Property"[200] to "defend the collective" well-being of its clients[201] as well as to "delegate [this] authority . . . to [specialized] associations" active in this area though seemingly not individuals.[202] The agency may proceed on behalf of "all those concerned . . . except whoever declares . . . in writing the desire not to [effectuate her guaranties] or to do so separately"[203] A non-appealable disposition on the substance should bar those who have not bailed out in this manner from litigating anew.

In addition, the Constitutional Court has crafted a comparable contraption to enforce entitlements under the Constitution. In 2008, it explained that in the face of "*an unconstitutional state of affairs*,"[204] characterized by "a generalized" infringement upon "fundamental" freedoms,[205] anybody affected "may file a complaint."[206]

[200] CÓDIGO DE PROTECCIÓN Y DEFENSA DEL CONSUMIDOR [CODE FOR CONSUMER PROTECTION AND DEFENSE], L. 29571, art. 105 (Peru) (2010) ("El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (Indecopi) es la autoridad con competencia primaria y de alcance nacional para conocer las presuntas infracciones a las disposiciones contenidas en el presente Código, así como para imponer las sanciones y medidas correctivas establecidas . . . .").

[201] *Id.* art. 131.1 ("El Indecopi . . . está facultado para promover procesos en defensa de intereses colectivos de los consumidores . . . .").

[202] *Id.* ("[El] Indecopi . . . puede delegar la facultad señalada en el presente párrafo a las asociaciones de consumidores debidamente reconocidas, siempre que cuenten con la adecuada representatividad y reconocida trayectoria.").

[203] *Id.* art. 131.3 (El Instituto "representa a todos los consumidores afectados . . . si aquellos no manifiestan expresamente y por escrito su voluntad de no hacer valer su derecho o de hacerlo por separado . . . .").

[204] Tribunal Constitucional del Perú, Sept. 4, 2009, [Lovón Ruiz-Caro v. Ministerio de Relaciones Exteriores,] Expediente **[Record]** No. 05287-2008-PA/TC (Peru) (on file with author), ¶ 10 (§ 2.3) ("Existen instituciones procesales que se relacionan con la represión de actos lesivos homogéneos, tales como . . . la técnica del estado de cosas inconstitucional.").

[205] *Id.* ¶ 12 (§ 2.3.2) ("El Tribunal Constitucional . . . busca extender los alcances *inter partes* de las sentencias a todos aquellos casos en que de la realización de un acto u omisión se hubiese derivado o generado una violación generalizada de derechos fundamentales de distintas personas.").

[206] *Id.* ¶ 21 (§ 2.5.1(a)) ("En este supuesto (actos individuales homogéneos), cada persona afectada en sus derechos en forma individual puede presentar la demanda . . . .").

"The effects of the decision . . . may extend to" those parallelly positioned.[207] According to the opinion, they essentially expand out to those who did not act as litigants, "did not otherwise take part, . . . but find themselves in precisely the . . . situation" previously reckoned as unfolding unconstitutionally.[208]

Obviously, the opining jurists were primarily thinking of a case in which the trying adjudicator determines that a "threat or violation" has occurred.[209] Nonetheless, they should approach the preclusive repercussions of a contrary determination identically in fairness to the accused. Eventually, the judiciary will have to field this question. In the meantime, it should steer clear of the irony of holding that Rule 23(c)(3)(B), which does afford the defendant equitable treatment in this sense, violates due process.

Several Brazilian parties—from the Procurator General, through the government, to governmental or nongovernmental organizations—may institute public civil actions to address "moral" like "pecuniary damage" to, inter alia, "the environment"; the consuming population; the "urban order"; "goods or rights with artistic, aesthetic, historic, touristic, or scenic value."[210] They may have the violator preliminarily

[207] *Id.* ("[L]os efectos de la decisión sobre un caso particular pueden extenderse a otras personas en similar situación . . . .").
[208] *Id.* ¶ 12 (§ 2.3.2) ("La característica esencial de la declaración de una determinada situación como un *estado de cosas inconstitucional* consiste en extender los efectos de una decisión a personas que no fueron demandantes ni participaron en el proceso que dio origen a la declaratoria respectiva, pero que se encuentran en la misma situación que fue identificada como inconstitucional.").
[209] *Id.* ¶ 21 (§ 2.6.5) ("La sentencia en los procesos de tutela de derechos fundamentales debe ser actuada en forma inmediata, lo que es acorde con la protección judicial rápida y efectiva que debe existir en materia de amenaza o violación de estos derechos . . . .").
[210] L. 7347, art. 1 (Braz.) (1985) ("Regem-se pelas disposições desta Lei . . . as ações de responsabilidade por danos morais e patrimoniais causados: (I) ao meio ambiente; (II) ao consumidor; (III) à ordem urbanística; (II) aos bens e direitos de valor artístico, estético, histórico, turístico e paisagístico . . . .").

perchance permanently enjoined to comply with her duties.[211] She may have to: cease her impingements, endure "execution," pay a "fine" upon refusal.[212]

The "judge" may head in these directions sua sponte.[213] Intriguingly, any "monetary condemnation . . . shall flow into a fund" for "reconstitution."[214] The co-administrators must administer the monies from the standpoint of the "community."[215]

On matters of consumption, the pertinent codification's "Title III," which subsidiarily "controls" the litigious effort,[216] allows the assertion of homogenously structured and commonly sourced "interests" or guaranties.[217] It calls for notice on a mutualized as opposed to individualized basis: "Upon the docketing [of the inaugural pleadings, a bulletin] shall be posted in an official periodical so that [those] interested . . . may intervene . . . ."[218]

The legislation describes "the res judicata" impact as "[e]*rga omnes*,"[219] translatable from Latin into "toward all," to foreclose subsequent lawyering by those integrated during the previous round. It adds a key qualification by specifying that

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[211] *Id.* art. 11 ("Na ação que tenha por objeto o cumprimento de obrigação de fazer ou não fazer, o juiz" poderá determinar "o cumprimento da prestação da atividade devida . . . .").
[212] *Id.* art. 11 ("Na ação que tenha por objeto o cumprimento de obrigação de fazer ou não fazer, o juiz" poderá determinar "a cessação da atividade nociva, sob pena de execução específica, ou de cominação de multa diária . . . .").
[213] *Id.* ("[O] juiz determinará o cumprimento . . . independentemente de requerimento do autor.").
[214] *Id.* art. 13 ("Havendo condenação em dinheiro, a indenização pelo dano causado reverterá a um fundo . . . , sendo seus recursos destinados à reconstituição dos bens lesados.").
[215] *Id.* ("Havendo condenação em dinheiro, a indenização pelo dano causado reverterá a um fundo gerido por um Conselho Federal ou por Conselhos Estaduais de que participarão necessariamente o Ministério Público e representantes da comunidade . . . .").
[216] *Id.* art. 21 ("Aplicam-se à defesa dos direitos e interesses difusos, coletivos e individuais, no que for cabível, os dispositivos do Título III da lei que instituiu o Código de Defesa do Consumidor.").
[217] CÓDIGO DE DEFESA DO CONSUMIDOR [CODE FOR CONSUMER DEFENSE], L. 8078, art. 81(III) (Braz.) (1990) ("A defesa coletiva será exercida quando se tratar de . . . III - interesses ou direitos individuais homogêneos, assim entendidos os decorrentes de origem comum.").
[218] *Id.* art. 94 ("Proposta a ação, será publicado edital no órgão oficial, a fim de que os interessados possam intervir no processo como litisconsortes . . . .").
[219] *Id.* art. 103(III) ("Nas ações coletivas de que trata este código, a sentença fará coisa julgada: . . . III - erga omnes . . . .").

such foreclosure will operate "solely for the benefit of all the victims," besides "their survivors in case the petitioners prevail."[220] Consequently, if the complainants lose, those riding on their coattails may relitigate. Brazil's lawmakers have thus overtly trodden the path hinted at by Peru's justices. Hence, they encountered the unfairness problem already discussed.

In light of these various suits, a tribunal from any of these nations or elsewhere in Iberian America will tend to regard Rule 23(b)(3) actions as compatible with public policy. It should view them as comparable enough to the local suits to justify ruling that they do not contravene any of the relevant systemic principles. The differences in the details should not affect the analysis.

Of course, Iberian American absent class-members seeking a second bite at the apple might press for the rejection of an adverse U.S. judgment unless the jurisdiction at the receiving end imposes a stand-in on persons who have not extricated themselves from the imposition. Despite helping Mexicans alongside Colombians, this position does not sound very persuasive. After all, it construes as decisive a contingency unrelated to public policy—to wit, how the constructively present partake in the ongoing controversy under the statutory parameters locally in force. Adopters of an opt-in arrangement, the countries of the just mentioned nationals could have institutionalized an opt-out regime instead without altering their legally or constitutional basic framework. Actually, Mexico's Congress originally considered a proposal that would have necessitated a "member [to] request his exclusion."[221] It ultimately discarded it. Nations without legislation on point (Venezuela, Ecuador) may very well still embrace such an approach.

[220] *Id.* ("[A] sentença fará coisa julgada: . . . III - . . . apenas no caso de procedência do pedido, para beneficiar todas as vítimas e seus sucessores . . . .").
[221] Iniciativa Ad. Disposiciones Cd. Fed. Pro. Civ. (Acciones y procedimientos colectivos), Dip. Jaime Fernando Cárdenas Gracia (Feb. 9, 2010), art. 554 ("miembro de la colectividad o grupo . . . pedir su exclusión").

Once again, adjudicators may not resist recognition merely because the foreign statute applied differs from its domestic counterpart. They would have to ascertain, additionally, an unmistakable clash with long-standing, deep-rooted societal precepts. As in the death penalty example invoked in Section IV(D)(1), the judicial inquiry would have to turn up a conflicting cardinal norm in the fundamental laws, charter, ratified international treaties, et cetera. However, no such conflict exists with 23(b)(3) actions.

Consistently, the United States District Court for the Southern District of New York rejected in *Anwar v. Fairfield Greenwich, Ltd.* the objection that tribunals in Spain would rely on the divergence between Spanish transindividual suits and 23(b)(3) actions to refuse to recognize the ultimate ruling in the latter:

Defendants fail to identify an explicit conflict with public policy that would bar recognition of the judgment. The mere fact that [local] law does not explicitly embrace a foreign legal mechanism does not mean that it would find the judgment so repugnant that it would reject it as violating public policy.[222]

Absentees from Iberian America could not rightfully decry the broad preclusive reverberation of a final decision as an iniquity. They could have hardly expected the U.S. class-action, about which they would have individually received detailed information, to unfold as a comparable homegrown suit, about which they would have realistically known little.

In particular, a resident citizen of practically any state in the region could not credibly protest that she did not read the notifying letter, assuming that she had to plump for the suit as under some of the regional regimens (Mexico, Colombia). Nor could she reasonably hope to escape preclusion through this protestation. Naturally, she could more convincingly object if her legal system of origin would never terminate, through an action that she did not unambiguously approve, her right to sue.

[222] Anwar v. Fairfield Greenwich, Ltd., 289 F.R.D. 105, 118 (S.D.N.Y. 2013).

Nevertheless, I will now show that virtually all Iberian American jurisdictions permit the termination under these circumstances.

3. EVOCATIONS OF 23(B)(2) ACTIONS

So-called diffuse-rights actions, which resemble those under civilly procedural Rule 23(b)(2) or citizen suits in the United States, have developed dramatically, ubiquitously in Iberian America over the last three decades.[223] They usually entitle anyone to represent the polis as a whole or a specific subgroup, without forcing her to attest an individualized injury. She may press for equitable, often reparative, relief to substantiate societal safeguards around diverse assets: from ecology to precious monuments.

The almost universally exercisable unconstitutionality-complaint provides a special case in point.[224] Apparently unprecedented north of the border and having outdistanced its forebears on the European Continent, it empowers her to actualize

[223] CONST. art. 43 (Arg.) (1995), CÓDIGO PROCESUAL CONSTITUCIONAL [CONSTITUTIONAL PROCEDURE CODE] arts. 71-86 (Arg.) (2011); CONST. arts. 135, 136, 137 (Bol.) (2009); L. del Tribunal Constitucional Plurinacional [L. Trib. Const. Plurinacional] [Law of the Plurinational Court] arts. 94-100 (Bol.) (2010), CD. PRO. CONST. art 68-71 (Bol.) (2012); L. JURIS. CONST. art. 33 (C.R.) (2010); CONST. art 67(1) (Dom. Rep.) (2015); Ley Orgánica del Poder Judicial de la República [Organic Law of the Judicial Power] art. 9 (Nicar.) (2021); CONST. art. 134 (Para.) (1992); CÓDIGO GENERAL DEL PROCESO [CD. GEN. PRO.] arts. 42, 220 (Uruguay) (1988). In the region, Cuba stands out as the only country without any such suits. Nonetheless, it has faced proposals for their institutionalization. *See, e.g.,* Lenia Zoraida Madera Páez, Los derechos colectivos y difusos de los consumidores: realidad o virtualidad en el sistema jurídico cubano [Consumers' Collective and Diffuse Rights: Reality or Virtuality in the Cuban Legal System] (2015) (M.A. dissertation, Havana University).

[224] CONST. art. 43 (Arg.) (1995); CONST. arts. 132, 136, 137 (Bol.) (2009), CD. PRO. CONST. art. 72-78 (Bol.) (2012), L. Trib. Const. Plurinacional arts. 101-108 (Bol.) (2010); CONST. art. 102(I)(a) (Braz.) (restricted standing); CONST. art. 93 (Chile) (1980); CONST. art. 241(4) (Colom.); L. de la Jurisdicción Constitucional [Law of Constitutional Jurisdiction] arts. 48, 75 (C.R.) (1989); CONST. art. 185 (1) (Dom. Rep.) (2015); CONST. art. 436(2) (Ecuador) (2008); CONST. art. 98 (El Sal.) (1983), L. de Procedimientos Constitucionales [Law of Constitutional Procedure] art. 2 (El Sal.) (2006); CONST. art. 267 (Guat.) (1993), L. de Amparo, Exhibición Personal y de Constitucionalidad [Law of the Protective Writ, Habeas Corpus, and Constitutionality] art. 134(d) (Guat.) (1986); CONST. art 185 (Hond.) (2005), L. Sobre Justicia Constitucional [Law of Constitutional Justice] art. 94 (Hond.) (1994); CONST. art. 105(II) (Mex.) (restricted standing); CONST. art. 187 (Nicar.) (1987); Ley de Amparo y Sus Reformas [Law of Protective Writ and Its Amendments] arts. 2, 6, 18 (Nicar.) (1988); CONST. art. 206(1) (Pan.); CONST. arts. 132, 260 (Para.) (1992), CÓDIGO PROCESUAL CIVIL [CIVIL PROCEDURE CODE] art. 550 (Para.) (1988); CONST. art. 203(5) (Peru); CONST. art. 26 (Venez.).

the polity's commitment to adherence by legislators alongside administrators to constitutionalized constraints. She may have unconstitutional norms invalidated before their application. Independently of the entitlement effectuated or the remedy requested across the board, the dispositional outcome normally hinders everyone else from attempting anew. Essentially, it extinguishes her priorly available license to litigate.

Such devices bear critical relevance to the discussion. They actually operate more extremely than those under Rule 23(b)(3) inasmuch as they (1) encompass mostly a considerably larger constellation of non-consenting partakers, (2) afford those so grouped no personal notice at all, and (3) accord them no opportunity to opt out. In light of their pervasiveness across the Iberian American expanse, though, the bench there could hardly regard them as unfamiliar, let alone as contrary to public policy.

The implement under the microscope has seemingly lived through a lengthy history. It might have descended from civil-law popular suits. These date back at least to ancient Rome. They have sported from the start expansive preclusive resonance. The *Corpus Juris Civilis* pertinently proclaims: "If such an action is repeatedly brought on the same cause and fact, the ordinary exception of res judicata may be raised."[225]

During the nineteenth century, the framers of codes across the region regularly codified existent law, which evidently absorbed its Roman ancestor without mediation or through the Spanish statutory compilation *Siete Partidas*. In this spirit, they

[225] CORPUS JURIS CIVILIS, 47.23.3 (534) ("Sed si ex eadem causa saepius agatur [agetur], cum idem factum sit, exceptio vulgaris rei iudicatae opponitur.") "If a particular matter had been disposed of in a popular action, the respondent in a subsequent action based upon the same cause of action could plead res judicata." Johan D. Van der Vyver, Actiones Populares *and the Problem of Standing in Roman, Roman-Dutch, South African and American Law*, 1978 ACTA JURIDICA 191, 192 (1978). *Cf*. 3 WILLIAM BLACKSTONE, COMMENTARIES *162 ("But if any one hath begun a *qui tam* or popular action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself.").

may have incorporated the prevalent popularized prosecution explicitly besides the corresponding foreclosure aftereffects. For example, Chile's current codification, drafted by Venezuelan Andrés Bello in 1855, institutes several specimens of this incorporation for particularized purposes: (1) to protect the life of unborn children, (2) to preserve passage through the streets, (3) to remove objects that hang from buildings and may fall on passersby, (4) to eradicate a potential harm endangering an indefinite number of neighbors close by.[226] It was adopted verbatim by seven neighboring nations (Colombia (1860), Panama (1860, 1917), El Salvador (1860), Ecuador (1861), Venezuela (1863), Nicaragua (1871), Honduras (1880, 1906)), heavily influencing codifiers elsewhere: from Argentines (1876) to Paraguayans (1876).[227]

Since the 1990s, Iberian America has experienced an explosion in this form of enforcement. It has embraced not merely derivative alongside associational suits, in which shareholders or associates head to the courthouse on behalf of a corporation or an association, but additionally wide-ranging ones for the effectuation of diffusely defined guaranties. Constitutions and statutes promote these pursuits, including the unconstitutionality variant cited earlier. En route, they may expressly stress the preemptive impact with respect to all. Not surprisingly, every single one of the jurisdictions under consideration has participated in this subcontinental movement.

Mexico authorizes "collective" complaints "to safeguard diffuse . . . rights" besides "interests," understood as those held by "an indeterminate . . . collectivity" of similarly situated people.[228] It construes them as those aimed "at . . . compelling

[226] CD. CIV. arts. 75, 948, 2328, 2333 (Chile). *See also* CD. CIV. arts. 91, 1005, 2355, 2359 (Colom.); CD. CIV. arts. 61, 990, 2228, 2236 (Ecuador). The Panamanian Civil Code, in turn, authorizes popular actions to enforce the ban on the exaction of compound interests and to remove or alter, as well as to recover damages caused by, a construction obstructing a public way. CD. CIV. arts. 994-A, 625 (Pan.).
[227] *See* Bernardino Bravo Lira, *Relaciones entre la codificación Europea y la Hispanoamericana*, 9 REVISTA DE ESTUDIOS HISTÓRICO-JURÍDICOS, 51, 60 (1984).
[228] CD. FED. PRO. CIV. art. 580(I) (Mex.) ("[L]as acciones colectivas son procedentes para tutelar . . . [d]erechos e intereses difusos y colectivos, entendidos como aquéllos de naturaleza indivisible cuya titularidad corresponde a una colectividad de personas, indeterminada o determinable, relacionadas

the defendant to repair . . . by reestablishing the status quo ante or through an alternate reparation."[229]

Significantly, an adjudication on the merits wrests the entitlement to insist on them, before an adjudicator, from all outstanding statutorily licensed candidates for vindicator. For the attainment of standing, the controverted affair indeed "may not have become a conclusively adjudicated one as a result of previous litigation."[230] In a parallel vein: "A judgment" neither "appealed" nor subject to appeal will have comparably preventive "consequences."[231] Presumably, it will prevent reiteration even by a different suitor. Otherwise, the judiciary would risk confronting an endless sequence of like libels.

Correspondingly, the "Procurator General" alongside "33%" of one of the parliamentary organs may contradict the constitutionality of a state's or the federation's enactments "within" about a month of their "publication."[232] The foremost adjudica-

por circunstancias de hecho o de derecho comunes."); *id.* art. 581(I) ("[De] los derechos e intereses [es] titular . . . una colectividad indeterminada . . . .").

[229] *Id.* art. 581(I) (La acción "tiene por objeto reclamar judicialmente del demandado la reparación del daño causado a la colectividad, consistente en la restitución de las cosas al estado que guardaren antes de la afectación, o en su caso al cumplimiento sustituto de acuerdo a la afectación de los derechos o intereses de la colectividad. . . .").

[230] *Id.* art. 588(V) (Es "requisito[] de procedencia de la legitimación en la causa . . . : Que la materia de la litis no haya sido objeto de cosa juzgada en procesos previos.").

[231] *Id.* art. 614 ("La sentencia no recurrida tendrá efectos de cosa juzgada.").

[232] CONST. art. 105(II) (Mex.) ("Las acciones de inconstitucionalidad podrán ejercitarse, dentro de los 30 días naturales siguientes a la fecha de publicación de [una] norma [federal o estatal], por: [e]l equivalente al 33% de los integrantes de [los cuerpos legislativos que promulgaron esta o por el] Procurador General de la República.").

tory institution may strike them down by a vote of eight-out-of-eleven at a minimum.[233] Upon any lesser margin, it must sustain them. Its intervention would forestall, for "inadmissibility," any succeeding bid of this species within the narrow temporal window conceded.[234]

On Venezuelan soil, anyone may "vindicate" her entitlements, among them "those" collectively or diffusely describable.[235] She may "defend them with effectiveness" besides promptness.[236] Succinctly, the legislated regimen invites her to engage in the safekeeping of "collective" alongside "diffuse" guaranties.[237]

Besides: "The summons shall be published in a national or regional newspaper . . . ."[238] Those "concerned" may "appear in the courtroom within ten days . . . ."[239] Around the "Tacit Notification," a warning issues: "After the expiration of the deadlines set . . . , upon the elapse of ten additional workdays, all . . . shall be presumed

[233] *Id.* ("The Supreme Court's resolutions may only invalidate the challenged norms upon the approval of a majority of at least eight votes.") ("Las resoluciones de la Suprema Corte de Justicia sólo podrán declarar la invalidez de las normas impugnadas, siempre que fueren aprobadas por una mayoría de cuando menos ocho votos."); *id.* art. 94 ("The Supreme Court shall consist of 11 justices.") ("La Suprema Corte de Justicia de la Nación se compondrá de 11 ministros . . . .").

[234] Suprema Corte de Justicia de la Nación [Sup. Ct.] [Supreme Court], Pleno [Plenum], Nov. 1, 2000, Recurso de reclamación en la acción de inconstitucionalidad [Procedural Motion on Unconstitutionality Action] 1/95, Reg. No. 6764, at 31, 193, Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo III, Noviembre [November] de 2000, página 461 (Mex.) (on file with author) (quoting Exposición de motivos de la ley reglamentaria del artículo 105 constitucional [Preamble to Regulatory Law for Constitutional Article 105]) ("[S]e establece la improcedencia respecto de aquellas acciones en las que exista . . . cosa juzgada.").

[235] CONST. art. 26 (Venez.) ("Toda persona tiene derecho de acceso a los órganos de administración de justicia para hacer valer sus derechos e intereses, incluso los colectivos o difusos . . . .").

[236] *Id.* ("Toda persona tiene derecho . . . a la tutela efectiva de [sus derechos e intereses, incluso los colectivos o difusos] y a obtener con prontitud la decisión correspondiente.").

[237] Ley Orgánica del Tribunal Supremo de Justicia [Organic Law on the Supreme Court] [L. Orgánica Trib. Sup.], art. 146 (Venez.) (2010) ("Toda persona podrá demandar la protección de sus derechos e intereses colectivos o difusos.").

[238] *Id.* art. 153 ("El cartel de emplazamiento será publicado en un diario de circulación nacional o regional, según el caso . . . .").

[239] *Id.* ("[L]os interesados [pueden] concurr[ir] dentro del lapso de diez días . . . .").

notified."[240] The ultimate ruling should cover all addressees. It should terminate their right to prosecute. Upon this termination, any new inaugural pleading "shall be declared inadmissible."[241]

Moreover, "the Constitutional Chamber" of the top tribunal must hear popularized disputes of constitutionality.[242] It has itself democratized them. In 2010, the jurists chambered in this venue explained that any citizenship holder could "interpose[]" such a "nullity" suit.[243] They have deemed her as such "procedurally interested," " qualified enough" for the "challenge."[244] The ramifications of "the adjudgment" profit from universality "in scope."[245]

Passed in 1998, Colombian Law 472 controls prosecutorial exertions in the name of the populace "for the protection of" any jointly enjoyed entitlement.[246] It waves them through "against any wrongs of commission or omission by [the] authorities, besides private persons, who may have [thereby] violated or threaten[ed]" the targeted liberties.[247] "The members" of the ensemble in question may be alerted "through a means of mass communication," like any other "effective" alternative "in

[240] *Id.* art. 154 ("Cuando venzan los lapsos previstos en el artículo anterior, deberá dejarse transcurrir un término de diez días de despacho para que se entienda que los interesados han quedado notificados.").
[241] *Id.* art. 150(3) ("[S]e declarará la inadmisión de la demanda . . . [c]uando haya cosa juzgada.").
[242] *Id.* art. 32 ("De conformidad con la Constitución . . . , el control concentrado de la constitucionalidad sólo corresponderá a la Sala Constitucional . . . mediante demanda popular de inconstitucionalidad . . . . ").
[243] Tribunal Supremo de Justicia [Trib. Sup.] [Supreme Court], Sala Constitucional [Constitutional Chamber], July 22, 2010, [Asociación Civil Súmate v. Consejo Nacional Electoral,] Sentencia [Judgment] 796, (Venez.) (on file with author) ("[L]a acción de nulidad por inconstitucionalidad es una acción popular que puede ser ejercida por cualquier ciudadano . . . .").
[244] *Id.* ("[V]ale decir, que toda persona tiene, en principio, la cualidad o interés procesal para la impugnación de las leyes o actos con rango de ley, por medio de la acción de nulidad por inconstitucionalidad.").
[245] L. Orgánica Trib. Sup., art. 32 (Venez.) (2010) ("Los efectos de dicha sentencia serán de aplicación general.").
[246] L. 472, art. 2 (Colom.) (1998) ("Acciones populares. Son los medios procesales para la protección de los derechos e intereses colectivos.").
[247] *Id.* art. 9 ("Las acciones populares proceden contra toda acción u omisión de las autoridades públicas o de los particulares, que hayan violado o amenacen violar los derechos e intereses colectivos.").

view of all possible beneficiaries."[248] An opinion "upholding the . . . claim . . . may grant": an injunction," an indemnification, a requisition "to restore the previously prevailing conditions."[249] It impedes re-litigation by the litigants alongside "the public."[250]

In addition, a civic actor may postulate the "unconstitutionality" of "laws."[251] The 1991 Decree 2067 cautions that any such postulation against those of these that have "benefited" beforehand "from" a favorable definitive determination "shall be dismissed."[252] "The Constitutional Court," in its own phrasing, seizes "the norms submitted to it for examination" to "ascertain[] . . . their validity . . . in a generally obligatory manner, opposable to everybody, with no exception whatsoever."[253] In 2012, it conditioned this opposability on the identicalness of: "the normative content" besides the "charges" on the table.[254]

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[248] *Id.* art. 21 ("A los miembros de la comunidad se les podrá informar a través de un medio masivo de comunicación o de cualquier mecanismo eficaz, habida cuenta de los eventuales beneficiarios.").
[249] *Id.* art. 34 ("La sentencia que acoja las pretensiones del demandante de una acción popular podrá contener una orden de hacer o de no hacer, condenar al pago de perjuicios . . . y exigir la realización de conductas necesarias para volver las cosas al estado anterior. . . .").
[250] *Id.* art. 35 ("La sentencia tendrá efectos de cosa juzgada respecto de las partes y del público en general.").
[251] CONST. art. 241(4) (Colom.) ("[L]a Corte Constitucional . . . cumplirá las siguientes funciones: . . . "Decidir sobre las demandas de inconstitucionalidad que presenten los ciudadanos contra las leyes").
[252] Decreto 2067, art. 6 (Colom.) (1991) ("Se rechazarán las demandas que recaigan sobre normas amparadas por una sentencia que hubiere hecho tránsito a cosa juzgada. . . .).
[253] Corte Constitucional de Colombia [Ct. Const.] [Constitutional Court], Oct. 21, 1998, Sentencia C-600/98, at 9 (Colom.) (on file with author) (citation omitted) ("§ VI.3") ("La Corte Constitucional, en lo que hace a las normas sometidas a su examen, define, con la fuerza de la cosa juzgada constitucional . . . , su exequibilidad o inexequibilidad . . . , con efectos *erga omnes* y con carácter obligatorio general, oponible a todas las personas y a las autoridades públicas, sin excepción alguna.").
[254] Ct. Const., Aug. 1, 2012, Sentencia C-608/12, ¶ 2.4.1.3, at 20 (Colom.) (on file with author) ("[P]ara que pueda hablarse de la existencia de cosa juzgada en estricto sentido, es preciso que la nueva controversia verse (i) sobre el mismo contenido normativo del mismo precepto examinado y (ii) sobre cargos idénticos a los analizados en ocasión anterior."); *id.*, ¶ 2.4.1.5, at 22-23 ("[L]a Corte . . . solamente podrá declarar la existencia de cosa juzgada constitucional cuando exista (i) identidad de contenido normativo y de disposición acusada, lo que exige un análisis del contexto de aplicación de la norma, e (ii) identidad de cargos tanto desde el punto de vista de la norma constitucional que se considera desconocida, como del hilo argumentativo del concepto de violación.").

On Panamanian territory, Law 24 of 1995 welcomes one to exercise an "environmental" cause on "not an individual or direct" detriment but rather a menace to diffusely configured, communal "interests."[255] Definitionally, these disseminate "throughout" the community, pertaining "to each [of its] constituents."[256] They "derive from" neither "proprietary titles" nor "concrete" guaranties or comportments.[257] Once again, a presumption of generalized preclusion should attach.

Furthermore, the Plenum of the premier adjudicative body must "decide" on the constitutionality of "laws . . . challenged" by anybody.[258] In 2009, it foreclosed such a filing after a resolved prior one whenever the two involved indistinguishable "facts" alongside "grounds."[259] Its reasoning unfurled thus: "[T]he requirement of identity of parties . . . is frequently mentioned. Nonetheless, the [constitutionally characterized realm] requires certain modifications because its issues": transcend interpersonal . . . relations," "touch upon purely legal matters," "impact society as an entirety, not sheerly the complainants . . . ."[260]

[255] L. 24, art. 78 (Pan.) (1995) ("En cumplimiento de la presente Ley, toda persona podrá interponer acción pública ambiental, sin necesidad de asunto previo cuando por su naturaleza no exista una lesión individual o directa, sino que atañe a los intereses difusos o a los intereses de la colectividad.").
[256] *Id.* art. 3(4) ("Interés difuso" es "aquel que se encuentra diseminado en una colectividad[] [y] corresponde a cada uno de sus miembros . . . .").
[257] *Id.* ("Interés difuso" es "aquel que . . . no emana de títulos de propiedad, derechos o acciones concretas.").
[258] CONST. art. 206(1) (Pan.) ("La Corte Suprema de Justicia . . . en pleno conocerá y decidirá . . . sobre la inconstitucionalidad de las Leyes . . . que por razones de fondo o de forma impugne ante ella cualquier persona.").
[259] C**orte Suprema de Justicia [Supreme Court],** Pleno **[Plenum]**, July 21, 2009, [Jované de Puy v. art. 233, Cd. Electoral,] Expediente **[Record]** No. 937-08, (Pan.) (on file with author) ("El segundo requisito . . . para . . . cosa juzgada . . . requiere que la demanda primaria y la presente, contengan los mismos hechos o fundamentos").
[260] *Id.* ("[S]e habla del requisito de identidad de partes, que alude a la concurrencia al proceso de los mismos sujetos vinculados con la decisión que da lugar a la supuesta cosa juzgada. Sin embargo, en este punto el hecho de tratarse de la rama constitucional produce cierta modificación, ya que en este ámbito del derecho, las cuestiones trascienden las relaciones jurídicas entre personas para versar aspectos netamente de derecho, produciendo consecuencias a todo el conglomerado social y no exclusivamente al o los promotores de la acción de inconstitucionalidad.").

As an upshot of the initial plaintiff's effort, all his contenders lose their right to process the purported violator. The quoted sentences specify what sometimes remains implied: The conclusive collectivized resolution may subsequently block somebody who strictly speaking played the part of neither a joiner nor an intervenor at the outset.

In Peru, one "may file for a protective writ when a threat to or a violation of [ecological besides] other diffuse [entitlements] that boast constitutional stature is at stake. . . ."[261] The trier may approve: an annulment, the "restoration of the status quo ante," an injunctive measure,[262] "monetary compensation."[263] Anyway, "a final decision" preempts subsequent actualization attempts.[264] According to the highest constitutionally specialized forum, it weighs "on '*all [those] in a situation identical to that of whoever lodged the [libel] in the first place*.'"[265] The justices have saddled this

[261] CÓDIGO PROCESAL CONSTITUCIONAL [CONSTITUTIONAL PROCEDURAL CODE] [CD. PRO. CONST.], L. 28237, art. 40 (Peru) (2004) ("Asimismo, puede interponer demanda de amparo cualquier persona cuando se trate de amenaza o violación del derecho al medio ambiente u otros derechos difusos que gocen de reconocimiento constitucional . . . ."). "A protective (*amparo*) action . . . shall lie against acts or omissions that stem from any authority, official, or person and that encroach upon or threatens . . . constitutionally recognized rights." CONST. art. 200(2) (Peru) ("La Acción de Amparo . . . procede contra el hecho u omisión, por parte de cualquier autoridad, funcionario o persona, que vulnera o amenaza los . . . derechos reconocidos por la Constitución.").

[262] CD. PRO. CONST., L. 28237, art. 55 (Peru) (2004) ("La sentencia que declara fundada la demanda de amparo contendrá alguno o algunos de los pronunciamientos siguientes: Declaración de nulidad . . . ; Restitución . . . ordenando que las cosas vuelvan al estado en que se encontraban . . . ; Orden y definición precisa de la conducta a cumplir . . . .").

[263] *Id.* art. 59 ("[L]a sentencia firme [puede contener] una prestación monetaria . . . .").

[264] *Id.* art. 6 ("[L]a decisión final . . . adquiere . . . autoridad de cosa juzgada.").

[265] Tribunal Constitucional [Trib. Const.] [Constitutional Court], Sept. 4, 2009, [Lovón Ruiz-Caro v. Ministerio de Relaciones Exteriores,] Expediente No. 05287-2008-PA/TC, ¶ 21 (§ 2.5.1(a)) (Peru) (on file with author) (quoting EDUARDO FERRER MAC-GREGOR, JUICIO DE AMPARO E INTERÉS LEGÍTIMO: LA TUTELA DE LOS DERECHOS DIFUSOS Y COLECTIVOS 16 (2003)) ("La sentencia respectiva surtirá efectos respecto de "*todos los demás integrantes de la colectividad que se encuentren en una posición idéntica al que ejercitó la acción correspondiente*."). *See also* Trib. Const., Mar. 20, 2009, [Viuda de Mariátegui v. S.U.N.A.T. & T.F., S.A.,] Expediente No. 04878-2008-PA/TC, ¶ 31 (§ 2.5.1(a)) (same).

weight on shoulders far "beyond" those of the filer.[266] Incidentally, they have reckoned "the class action [in the United States] related" to guaranties typified by diffusion[267] alongside the approach to adequate representation there not "foreign" to the homegrown "constitutional" system.[268]

To boot, the republic regulates (1) popular besides (2) unconstitutionality proceedings.[269] The former of them allow one to dispute the administration's strictures legally, constitutionally.[270] The latter enable a contingent of no fewer than "five thousand citizens"[271] to contest the constitutionality of laws.[272] In either scenario, a "firm" settlement of the substance possesses universal preemptive implications.[273]

The relevant Ecuadorian enactment emphasizes that "natural" alongside "juridical persons," besides a collection of people, may precautionarily, imprescriptibly sue for satisfaction on account of any environmentally exacted "damage."[274] It has

[266] *Lovón Ruiz-Caro*, Expediente No. 05287-2008-PA/TC, ¶ 21 (§ 2.5.1(a)) ("Los efectos de la decisión, por lo tanto, va[n] más allá de la persona o grupo que presentó la demanda . . . .") . *See also Viuda de Mariátegui*, Expediente No. 04878-2008-PA/TC, ¶ 31 (§ 2.5.1(a)) (same).
[267] Trib. Const., Oct. 18, 2006, 5270-2005-PA/TC 3, ¶ 13 (Peru) (on file with author) ("[L]a acción colectiva (*class action*) [está] relacionada con los derechos difusos . . . .").
[268] *Id.* at 4 (¶¶ 13-14) ("[L]a obligación de comprobar que el representante proteja equitativa y adecuadamente los intereses del grupo . . . no . . . resulta ajena a nuestro ordenamiento constitucional.").
[269] CD. PRO. CONST., L. 28237, arts. 75-108 (Peru) (2004) (Tit. VI-VIII).
[270] *Id.* arts. 76, 84.
[271] CONST. art. 203(5) (Peru), ("Están facultados para interponer acción de inconstitucionalidad: Cinco mil ciudadanos con firmas comprobadas por el Jurado Nacional de Elecciones.").
[272] CD. PRO. CONST. (Peru), L. 28237, art. 77 (2004) ("La demanda de inconstitucionalidad procede contra las normas que tienen rango de ley . . . .").
[273] *Id.* art. 82 ("Las sentencias del Tribunal Constitucional en los procesos de inconstitucionalidad y las recaídas en los procesos de acción popular que queden firmes tienen autoridad de cosa juzgada, por lo que . . . producen efectos generales . . . ."). *See also id.* art. 81.
[274] CÓDIGO ORGÁNICO DEL AMBIENTE [ORGANIC CODE ON THE ENVIRONMENT], pmbl. (Ecuador) (2017) (El derecho de "la naturaleza [a] restauración será independiente de la obligación que tienen el Estado y las personas naturales o jurídicas de indemnizar a los individuos y colectivos que dependan de los sistemas naturales afectados.") ("Para garantizar el derecho individual y colectivo a vivir en un ambiente sano y ecológicamente equilibrado, el Estado se compromete a: 1. Permitir a cualquier persona natural o jurídica, colectividad o grupo humano, ejercer las acciones legales y acudir a los órganos judiciales y administrativos, sin perjuicio de su interés directo, para obtener de ellos la tutela efectiva en materia ambiental, incluyendo la posibilidad de solicitar medidas cautelares que permitan cesar la amenaza o el daño ambiental materia de litigio."); *id.* art. 9(6) ("Toda persona, comuna, comunidad,

the "defense" shoulder the "burden" of persuasion, recalling the ecologically focused freedoms at play as "inalienable," "non-waivable," "indivisible," "progressive" ones.[275] Presumptively, res judicata precepts apply. Under them, an unreviewable judicial arbitration bars any later litigation.

Pursuant to the construction of its foremost institutional interpreter, the 2008 instrument of governance in the same jurisdictional terrain envisages the vindication of "diffuse rights."[276] Literally, it "commits to" clearing willing human alongside organizational representatives to secure preliminary besides permanent redress for the environment, "without prejudice to" whatever might directly interest them.[277] A priori, they stand in for the "population" as the possessor of the guaranties underneath.[278]

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pueblo, nacionalidad y colectivo . . . tienen derecho a ejercer las acciones legales y acudir a los órganos judiciales y administrativos, sin perjuicio de su interés directo, para obtener de ellos la tutela efectiva del ambiente, así como solicitar las medidas provisionales o cautelares que permitan cesar la amenaza o el daño ambiental."); *id.* art. 304 ("Cualquier persona natural o jurídica podrá adoptar las acciones legales ante las instancias judiciales y administrativas correspondientes y solicitar medidas cautelares que permitan cesar la amenaza o el daño ambiental. Adicionalmente, el juez condenará al responsable al pago de 10 a 50 salarios básicos unificados, de conformidad con la gravedad del daño que se logró reparar, a favor del accionante."); *id.* art. 305 ("Las acciones para determinar la responsabilidad por daños ambientales, así como para perseguirlos y sancionarlos serán imprescriptibles.").

[275] *Id.* pmbl. ("La carga de la prueba sobre la inexistencia de daño potencial o real recaerá sobre el gestor de la actividad o el demandado"); *id.* art. 4 ("[L]os derechos de la naturaleza y de las personas, comunas, comunidades, pueblos, nacionalidades y colectivos a vivir en un ambiente sano y ecológicamente equilibrado . . . son inalienables, irrenunciables, indivisibles, de igual jerarquía, interdependientes, progresivos y no se excluyen entre sí.").

[276] Ct. Const., Apr. 14, 2009, Res. 927-2006-RA, Registro Oficial Suplemento 117 (Ecuador) (Así, "tratándose de la vulneración a derecho difusos, . . . está[n] legitimado[s] para proponer una acción de amparo . . . los actores . . . al encontrarse facultados conforme lo manda la . . . vigente Constitución del 2008 . . . en el Art. 397 . . . .").

[277] *See* CONST. art. 397(1) (Ecuador) ("[E]l Estado se compromete a: 1. Permitir a cualquier persona natural o jurídica, colectividad o grupo humano, ejercer las acciones legales y acudir a los órganos judiciales y administrativos, sin perjuicio de su interés directo, para obtener de ellos la tutela efectiva en materia ambiental, incluyendo la posibilidad de solicitar medidas cautelares . . . .").

[278] *See id.* art. 14 ("Se reconoce el derecho de la población a vivir en un ambiente sano y ecológicamente equilibrado . . . .").

In concordance with this clearance, unconstitutionality causes permit one to question the constitutionality of unapplied laws alongside regulations.[279] The applicable legislation spells out the preclusive aftermath: "[T]he exercise of abstract constitutional review . . . shall have general besides prospective effects."[280] Upon analyzing this language, Álvaro Gutiérrez Godoy "conclude[s]—. . . in expectation of the necessary caselaw development—that" the culminating declaration" ubiquitously, prospectively "banishes" the assailed norm.[281]

In Brazil, the 1988 charter establishes that the citizenry may pursue "a popular action" "to annul . . . acts harmful to" governmental "property" alongside governmentally undertaken conduct "that impinges upon": "the administrative-integrity principle, the environment," "historical" besides "cultural goods."[282] The enacted regulatory regimentation underscores that the dispositions ending quests of the sort preclude "*erga omnes*": to wit, all.[283] It excepts exclusively those amounting to a dismissal "for insufficiency of proof."[284] Consequently, an unappealable pronouncement that lies outside this exclusion would thwart anybody else from reigniting the controversy.

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[279] *See id.* art. 436(2) (Ecuador). L. Orgánica de Garantías Jurisdiccionales y Control Const. [Organic Law on Judicial Guaranties and Constitutional Control], art. 98 (Ecuador) (2009).

[280] L. Orgánica Garantías Jurisdiccionales y Control Const., art. 95 (Ecuador) (2009) ("Las sentencias que se dicten en el ejercicio del control abstracto de constitucionalidad surten efectos de cosa juzgada y producen efectos generales hacia el futuro.").

[281] Álvaro Gutiérrez Godoy, *El control constitucional en Ecuador y Colombia: un análisis comparado*, 8 IURIS DICTO: REV. COLEGIO JURISPRUDENCIA 55, 56-57 (2009) ("De lo anterior podemos concluir que, basados en la normativa y a la expectativa del necesario desarrollo jurisprudencial, para el caso ecuatoriano la declaratoria de inconstitucionalidad conlleva a la desaparición del ordenamiento jurídico de la norma acusada, haciendo tránsito a cosa juzgada constitucional, con efectos generales (*erga omnes*) y hacia el futuro (*ex nunc*).").

[282] CONST. art. 5(LXXIII) (Braz.) (Qualquer "cidadão é parte legítima para propor ação popular que vise a anular ato lesivo ao patrimônio público ou de entidade de que o Estado participe, à moralidade administrativa, ao meio ambiente e ao patrimônio histórico e cultural.").

[283] L. 4717, art. 18 (Braz.) (1965) ("A sentença terá eficácia de coisa julgada oponível erga omnes . . . :").

[284] *Id.* (Se "a ação [for] julgada improcedente por deficiência de prova . . . , qualquer cidadão poderá intentar outra . . : com idêntico fundamento, valendo-se de nova prova.").

Correlatively, the Public Ministry—alongside: chief executives or lawmaking leaderships of central besides immediate subcentral governments; "political parties," "unions," the "Bar Association"—may likewise "originally" assert the unconstitutionality of statutes before the forum of final instance.[285] In 2020, it foregrounded that, "as a rule," the "cause" results in "the impossibility . . . of a reconsideration" of the target afterward,[286] except upon the nonexistence of "material identity" with the supposed iteration.[287]

Evocative of 23(b)(2) actions alongside citizen suits, all these procedures turn on a genuinely joint assertion. Despite their divergence from actions that agglomerate an assortment of similar individually interrelated pretentions, they obviously may matter enormously to those who may gain by them. Illustratively, someone may understandably care about the possibility of fighting against the pollution of a nearby mutualized lake as much as, or more than, the contamination of her backyard.

Importantly, the ruling in a diffuse-rights suit does deprive absent community members of an individual entitlement: namely, that to sue. It robs them, so to speak, of their day in court. Absentees individually lose the right to litigate on their substantive collective entitlements, like their substantive individual entitlements in a Rule 23(b)(3) action.

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[285] CONST. art. 102(I)(a) (Braz.) ("Compete ao Supremo Tribunal Federal, precipuamente, a guarda da Constituição, cabendo-lhe: processar e julgar, originariamente: a ação direta de inconstitucionalidade de lei ou ato normativo federal ou estadual . . . :"); *id.* art. 103 ("Podem propor a ação direta de inconstitucionalidade . . . : I - o Presidente da República; II - a Mesa do Senado Federal; III - a Mesa da Câmara dos Deputados; IV - a Mesa de Assembléia Legislativa ou da Câmara Legislativa do Distrito Federal; V - o Governador de Estado ou do Distrito Federal; VI - o Procurador-Geral da República; VII - o Conselho Federal da Ordem dos Advogados do Brasil; VIII - partido político com representação no Congresso Nacional; IX - confederação sindical ou entidade de classe de âmbito nacional.").

[286] Procurador-Geral da República [Procurator General of the Republic], Aug. 20, 2020, Ação Direta de Inconstitucionalidade [Direct Action of Unconstitutionality] 6.494-Distrito Federal [ADI 6.494 / DF], at 14-15 (Decorre "da causa pedir aberta em ação direta a inviabilidade, em regra, de rediscussão de lei ou de ato normativo já declarado constitucional pelo Supremo Tribunal Federal . . . :").

[287] *Id.* at 11 (Quando numa "ação direta" de inconstitucionalidade "não se debate" o mesmo assunto do que numa anterior "não há identidade material entre" elas.).

(1) A decision in a diffuse-rights suit differs from (2) one in a 23(b)(3) class action only in the minimal respect just discussed: The former entails a loss of an individual procedural entitlement connected to a collective substantive one, the latter that of an individual procedural entitlement with a connection to an individual substantive one. Iberian American judges could only arbitrarily find an infringement upon due process besides public policy in one instance but not in the other. Most likely, they would not do so.

Absentees from Iberian America could not really complain. They could not truthfully say that back home, they would never face preclusion through an action that they did not themselves advance or, at a minimum, consent to. After all, a diffuse-rights suit precludes the entire citizenry in precisely this manner. It does so ever more recurrently in virtue of its increased availability alongside its popularity.[288]

F. SUMMATION

The first section (A) defined the concept of public policy, atop that of due process. It summarized the ensuing discussion. The next three (B-D) maintained that a tribunal in Iberian America would very probably hold that class-action judgments in general besides those under Rule 23(c)(3)(B) in particular treat absent class-members fairly, in tune with the two notions.

Per subsequent segment's subdivisions (E(1-3), the holding would find further support in the availability of homogenous-individual-rights suits, which recall 23(b)(3) actions, binding absentees who have either stepped in rather informally or simply failed to opt out. It would attain definitive confirmation in the fact that ubiquitous analogues to 23(b)(2) actions alongside citizen suits invariably wrest the right to sue from the represented collectivity's non-assenting absent members.

[288] *See generally* Oquendo (2009), *supra* note 176.

At the outset, this ponderation noted that a refusal of recognition would discriminate against the defendant. It emphasized that absentees could not reject the decision's res judicata impact as unjust to them. They would have taken a free ride on the litigation with their only realistic chance at compensation, would have benefited from a wide array of safeguards, such as those around notice besides exit, and could have faced preclusion under similar circumstances in their homeland.

CONCLUSION

The discussion started by imagining a concrete situation in which an Iberian American tribunal might confront the question whether to recognize the judgment. As the most likely (yet rather improbable) scenario, it posited one in which absent class-members launch an identical complaint in Iberian America after a defeat against them alongside their allies. In the end, they will probably not embark upon renewed litigation because of the overarching civilian obstacles in the way, besides the high chance of dismissal either for lack of jurisdiction or expiration of the statute of limitations. In any event, the subsequent adjudicator would dismiss the endeavor in deference to the prior decision.

Part II listed these as the main conditions for recognition in Latin America.

(1) Reciprocity from the State of Origin

(2) Foreign Court's Jurisdiction over the Matter

(3) Sufficiency of Service and Defensive Opportunities

(4) Judgment's Finality

(5) Absence of Any Pending Similar Domestic Suit

(6) Respect for Areas of Exclusive National Jurisdiction

(7) Compatibility with Public Policy

It showed the incorporation of many of them, atop a presumption in favor of enforcement, within the relevant legislation from the nations under examination: Mexico, Venezuela, Colombia, Panama, Peru, Ecuador, Brazil.

The ensuant judge would almost certainly agree with the U.S. Supreme Court on the comportment of the opt-out regime with due process. The version of this concept before her would have traveled from the United States throughout Iberian America. Despite this transcontinental travel, it would have preserved its essential components intact.

Furthermore, she could point to actions—in her own country or others inside her cultural region—for the aggregation, along the lines of Rule 23(b)(3), of similar interrelated personal claims of non-parties. These acquiesce likewise upon the failure to opt out or an informal entrance.

During her finale, she could accentuate the diffuse-right suit existent throughout the subcontinent. Resemblant of that under the previous provision (23(b)(2)), it binds innumerable absentees, without their consent or individual notice to them, through the extinction of an individual procedural entitlement besides a collective substantive one. Upon this trajectory, she could recognize the judgment from almost anywhere within the territory on the table.

The judiciary in the United States should, in principle, allow Latin American citizens into large representative suits for economic indemnification. Naturally, it should approach the presence of other foreigners just as openly, conducting a comparative law analysis analogous to that undertaken in this Article. After all, the pursuit of justice for all demands the inclusion, across the board, of the traditionally excluded.

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