The Globalization of Securities Markets: Effects on Investor Protection

SHELLEY THOMPSON*

I. Introduction

The globalization of the securities markets is well underway. This article argues that internationally merging markets result in an increased need for investor protection. The current trend, however, is to maintain the sovereign schemes that regulated each market prior to international mergers rather than to combine schemes of investor protection. Part II examines the problems associated with this trend, including a regulatory race to the bottom and a more vulnerable global marketplace. Part III analyzes the international differences in investor protections in terms of both regulation and litigation. U.S. capital markets have maintained their integrity, in part, because the United States has the most comprehensive securities regulation scheme in the world. Similarly, despite serious drawbacks, U.S. courts have been the easiest place for defrauded investors to receive redress. As the securities markets globalize, however, defrauded investors will have fewer remedies in the United States. And outside the United States, although litigation as a form of investor redress is technically possible, it is highly impractical and very rare. This article describes the resulting issues faced by both U.S. and non-U.S. investors in the globalizing markets.

* Shelley Thompson has practiced securities litigation in New York for over six years. She has also performed extensive *pro bono* litigation and volunteer work on behalf of foreign-born U.S. residents. She is a member of the International Section of the American Bar Association, the New York State Bar Association, and the International Bar Association. Ms. Thompson received her *Juris Doctor* and *Masters of Arts* in International Affairs from American University in Washington, D.C., and her *Bachelors* in Political Science from the University of Colorado at Boulder. Prior to law school, she was the Direct of Investor Relations for a public company in Colorado that traded on U.S. and international exchanges. Originally from Denver, Ms. Thompson enjoys outdoor activities wither her husband and son. She has traveled extensively in Latin America and is proficient in Spanish.

II. Globalization of the Securities Markets

A. Mergers and Alliances

The world's capital markets have experienced a surge of international mergers over the past several years, including the following: In September 2000, major European stock markets in Amsterdam, Brussels, and Paris merged to form Euronext, NV ("Euronext"), the first combined European exchange.[1] Euronext became the largest equity market and the second-largest derivatives market in Europe.[2] In 2006, NASDAQ attempted a takeover of the London Stock Exchange (LSE), purchasing a 28.75-percent block.[3] In 2007, those LSE shares were purchased by Borse Dubai and another 20-percent stake in the LSE was purchased by the Qatari Investment Authority as the two Middle-Eastern stock exchanges vied for control of major European exchanges, including the OMX AB, operator of stock exchanges in Sweden, Denmark, Finland, Latvia, Estonia, Lithuania, and Iceland.[4] On February 23, 2007, the LSE and Tokyo Stock Exchange (TSE) signed a cooperation agreement.[5] On December 19 and 20, 2006, respectively, shareholders of the Euronext and New York Stock Exchange (NYSE) overwhelmingly approved the planned merger of those two major exchanges to create the world's largest stock exchange.[6] The French press reported that the NYSE-Euronext exchange would begin by carrying listings worth an astounding $25.8 trillion in market capitalization.[7] On January 10, 2007, the NYSE purchased a stake in the largest stock exchange in India.[8] And on January 31, 2007, the NYSE formed an alliance with the TSE.[9] Before the alliance, the TSE was the next-largest exchange in the world and the most liquid market in Asia with trading volume comparable to that of the NYSE and listings worth $4.6 trillion in market capitalization.[10] In furtherance of the internationally merging markets, on August 29, 2007, the TSE announced it would list foreign exchange-traded funds (ETFs). And in September 2007, both the NASDAQ and the NYSE announced they were opening offices in Beijing, as President Bush's Treasury Secretary is pushing China to open its capital markets to U.S.

1. Euronext, Euronext Story: Introduction 2 (2006), http://www.euronext.com/ /000/010/661/106612.pdf. The Portuguese exchange and LIFFE, an English derivatives exchange, joined Euronext in 2002. *Id.*

2. *Id.*

3. NASDAQ attempted a hostile takeover of the LSE, which until now has been unsuccessful. Nandini Sukumar & Edgar Ortega, *NASDAQ Fails in Bid to Take Over London Stock Exchange*, Int'l Herald Trib., Feb. 12, 2007, *available at* http://www.iht.com/articles/2007/02/11/bloomberg/bxnasdaq.php.

4. Jason Singer & Jenny Clevstrom, *Borse Dubai Raises Bid for OMX to $4.9 Billion*, Wall St. J. Online, Sept. 27, 2007, http://online.wsj.com/article_email/SB119078930180839808-lMyQjAxMDE3OTIwNDcyODQ5Wj.html.

5. *Global Exchange Dance Card*, Wall St. J. Online, Sept. 20, 2007, http://online.wsj.com/article_email/SB117398871210938462-lMyQjAxMDE3NzIzNDkyODQ4Wj.html.

6. *New York Stock Exchange Shareholders Back Euronext Merger*, France 24, Dec. 20, 2006, http://www.france24.com/france24Public/en/archives/news/business/2006121-bourse-transatlantique.html.

7. *Id.*

8. Shailendra Bhatnagar & Jonathan Keehner, *NYSE, Others Buy 20 Pct Stake in India's NSE Bourse*, Reuters, Jan. 10, 2007, http://www.reuters.com/article/idUSBOM13676220070110?pageNumber=11.

9. Jenny Anderson & Martin Fackler, *NYSE Cements Strategic Alliance with Tokyo Bourse*, Int'l Herald Trib., Feb. 1, 2007, at 11, *available at* 2007 WLNR 1936518.

10. *Id.*

banks and as Chinese companies are increasingly raising capital on international exchanges.[11]

For the exchanges, which earn money based on volume, these international mergers are lucrative. For listing companies, the mergers mean easier access to the world's capital markets resulting in substantially greater ability to raise money. But what does globalization of the securities markets mean for investors?

B. Increased Need for Investor Protection

1. *Global Competition Among Regulators*

One promise made each of these mergers possible: an agreement that each exchange will proceed as a separately regulated entity.[12] The exchanges will merge across borders, but the sovereign investor-protection schemes canvassing each country will not merge.[13] This means that companies will be able to enjoy the benefits of listing on an international exchange while avoiding U.S. regulation by listing, in form, on the non-U.S. exchange.[14]

Permitting companies to list on global exchanges, while simultaneously allowing them to choose the most favorable and least onerous national regulatory scheme, will result in global competition among regulators.[15] And where the very purpose of regulation is to protect the public where competition does not, competition between regulators will likely lead to less protection for the public.[16] This is one of the primary arguments against

11. James T. Areddy, *China Will Allow NASDAQ To Open an Office in Beijing*, Wall St. J. Online, Sept. 28, 2007, http://online.wsj.com/article_email/SB119086361380541096-lMyQjAxMDE3OTIwNDgyNjQzWj.html

12. Anuj Gangahar, *Markets: NYSE and Euronext Recast an International Dynamic*, Fin. Times UK, Dec. 23, 2006, at 31, *available at* 2006 WLNR 22436273.

13. *Id.*

14. *Id.*; *see also* Anuj Gangahar, *NYSE, Euronext Outline Regulatory Regime*, Fin. Times Online, Sept. 22, 2006, *available at* 2006 WLNR 16536700 ("Euronext would have a Dutch foundation for its markets to prevent U.S. authorities from affecting rules and requirements for listing stock in European countries."); *see also* Jacob Zamansky, *How an Exchange Merger can Create Big Losers*, Fin. Times Asia, Aug. 24, 2006, at 9, *available at* 2006 WLNR 14655586 ("The [NYSE-Euronext] merger will most likely give less-than-pristine U.S. companies a chance to play the game of regulatory arbitrage, shifting to national exchanges in Europe to escape tough U.S. regulations."); James Kanter, *Questions for Europe as Exchanges Combine: What Deal Helps the Economy the Most?*, Int'l Herald Trib., June 14, 2006, at 16, *available at* 2006 WLNR 10319862.

15. Riva Froymovich, *Regulatory Burden May Undermine NYSE Deal—A Single Cross-Atlantic Regulatory Scheme is Seen as Unlikely*, Investment News, Nov. 20, 2006, at 27, *available at* 2006 WLNR 20211153 (quoting Paul Bennett, Chief Economist of the NYSE, "Regulators will have to, in some sense, compete with each other"); *see also* George Dallas & Hal Scott, *The End of American Dominance in Capital Markets*, Fin. Times UK, July 20, 2006, at 17, *available at* 2006 WLNR 12475754 ("Now exchanges are moving abroad in part to avoid the U.S. capital market's regulatory regime.").

16. In the case of capital markets, the regulators may be more motivated to attract issuers to their jurisdiction than to protect investor interests. Iris H-Y Chiu, *Delegated Regulatory Administration in Mandatory Disclosure – Some Observations from EU Securities Regulation*, 40 Int'l Law. 737, 767 (2006); *see also* Marc I. Steinberg, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 Mich. J. Int'l L. 207, 237 (1999) ("While regulatory competition can be beneficial to the extent that it encourages innovation and diversity in the securities arena, such competition must be kept within certain limits. Under such circumstances, competition may discourage regulators from adopting rules that are too stringent, while at the same time allowing market participants to select the most appropriate regulatory levels.").

globalization in other areas.[17] Moreover, since exchanges are involved in setting corporate governance and financial reporting standards, the international mergers will mean lower standards for all. Therefore, as the globalization of securities markets takes place, investors will become less and less protected.[18]

Global competition among regulators has already begun. For example, in the United States, corporate interests are working to roll-back U.S. securities regulation, arguing that the globalization of the securities markets, when combined with tough U.S. investor-protection rules, is already causing companies to list outside the United States.[19] Their principal argument, outlined in the Interim Report of the Committee on Capital Markets Regulations published on November 30, 2006 (the "Report"), is that investor-protection rules are causing America to lose its competitive edge as the world's primary capital market.[20]

This argument is true in some respects. If globalization of the securities markets continues with no global investor protection scheme, then companies will inevitably choose markets where they can raise the most money with the least amount of regulation possible. To help level the global playing field, the Report proposes the following changes to U.S. securities laws:

- Relaxing internal controls requirements and excluding companies with less than a $75 million market cap from internal controls requirements;
- New rules rendering shareholder lawsuits difficult, if not impossible;
- Virtually immunizing outside board members and auditors from liability to shareholders;
- Replacing shareholder lawsuits with arbitrations and eliminating investors' long-standing right to jury trials in shareholder lawsuits;
- Sharp new limits on the powers of state attorneys general with respect to investor protection.[21]

But there are problems with the logic the Report employs to arrive at these recommendations. First, in order to prove that capital-raising activities are already fleeing abroad, it relies principally on the increased listings of Initial Public Offerings (IPOs) on exchanges other than those in the United States.[22] But those statistics are misleading. There is no recent downward trend in IPOs linked to investor protection regulations. In fact, the percentage of foreign IPOs in the United States in 2004 after the implementation of the Sarbanes-Oxley Act of 2002 (SOX), a set of regulations implemented to curb growing U.S. corporate fraud, was higher than any year since 2000, higher than all but two years

17. Chakravarthi Raghavan, *Globalization Needs International Regulations*, THIRD WORLD NETWORK ONLINE, http://www.twnside.org.sg/title/regu-cn.htm ("Those arguing for a deregulated world economy should bear in mind that many of the regulations were put in place in order to tackle the excesses of the laissez faire doctrines of industrial society.").

18. Steinberg, *supra* note 16, at 263 ("race to the bottom . . . may impair market integrity and provide insufficient investor protection"). It is important, however, to distinguish between multinational market-institutional investors and other investors. *See infra*, note 31.

19. COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT 12-15, 19-21 (2006), *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

20. *Id.*

21. *Id.* The report also proposes certain positive improvements in the area of corporate governance. *Id.* at 16-18.

22. *Id.* at 29-37.

since 1990, and dramatically higher than 2003.[23] The amount of money raised by foreign companies in U.S. IPOs has grown since SOX was implemented, reaching $5.8 billion in the first eight months of 2006, its highest level since 2000.[24]

In reality, a myriad of economic considerations by listing companies drives the varied yearly levels of IPOs in the United States. Factors unrelated to investor protections that influence IPO listings in the United States include: (a) the strength of the U.S. market—in years where the U.S. market is rallying, the United States tends to attract more foreign issuers because they believe they will get the best price per share in the United States; (b) the privatization of state-owned companies—the largest IPOs in 2005 were dominated by privatizations of state-owned companies (which naturally list on their home exchanges), particularly in China and France, accounting for all of the top five IPOs that year;[25] (c) investment banking fees—higher fees are charged by U.S. investment banking firms compared to fees charged by European firms, causing some companies to list outside the United States;[26] and (d) other factors unrelated to SOX, such as currency issues or difficulty entering the United States on business travel due to immigration rules.[27]

Research has shown that the benefit of listing on U.S. markets, in terms of how much capital can be raised, is still several times greater than U.S. regulatory compliance costs.[28] Until the entire cost-benefit analysis performed by listing companies results in the United States being a less favorable place in which to raise capital, there will be no downward trend in U.S. listings.[29]

The report's second flaw in logic is that, while it cites record-high securities litigation settlements as a sign that restrictions on lawsuits are needed, those records are driven not by frivolous litigation but instead by record-high levels of fraud in recent years, fraud which was committed prior to the implementation of SOX. For example, of the $9.4 billion in securities litigation settlements in 2005, $6.2 billion came from the WorldCom settlement alone, a massive fraud by a single company.[30] Of the $17.2 billion in settle-

23. Craig Karmin & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, WALL ST. J., Jan. 26, 2006.

24. Lynn Cowan, *Foreign Companies Cash in on U.S. Exchanges*, WALL ST. J., Aug. 28, 2006.

25. *23 out of 24 IPOs*, MY DAILY FATWA, http://mydailyfatwa.blogspot.com/2006/09/23-out-of-24-ipos.html [hereinafter 23 out of 24 IPOs]; *see also* ERNST & YOUNG, ACCELERATING GROWTH: GLOBAL IPO SURVEY 2005.

26. LEONIE BELL ET AL., OXERA CONSULTING LTD., THE COST OF CAPITAL: AN INTERNATIONAL COMPARISON 4 (City of London 2006).

27. *23 out of 24 IPOs*, *supra* note 25.

28. *See, e.g.*, Chiu, *supra* note 16, at 767 ("Issuers of securities are largely attracted to markets based on considerations of investor preferences, such as for strong disclosure laws, market depth, and liquidity. They may be concerned with regulatory cost, but higher standards of public offer disclosure that impose high regulatory costs have not deterred issuers because of the potential gains from a larger and stronger market.").

29. It is worth noting that, while the average cost of SOX compliance has been pegged at $3.8 million per year for large companies, the average U.S. CEO compensation in 2005 was approximately $10.5 million. *Sarbanes-Oxley Compliance Costs are Dropping*, SARBANES-OXLEY COMPLIANCE J., Apr. 17, 2006, *citing* survey by FIN. EXECUTIVES INT'L, *available at* http://www.s-ox.com/news/detail.cfm?articleid=1785; Joann S. Lublin & Scott Thurm, *Money Rules: Behind Soaring Executive Pay, Decades of Failed Restraints*, WALL ST. J., Oct. 12, 2006.

30. TODD FOSTER ET AL., NERA ECONOMIC CONSULTING, RECENT TRENDS IN SHAREHOLDER CLASS ACTION LITIGATION: FILINGS PLUMMET, SETTLEMENTS SOAR 5 (2006), *available at*: http://www.nera.com/image/BRO_Recent_Trends_SEC1288_FINAL_0307.pdf; *see also* LAURA E. SIMMONS & ELLEN M. RYAN,

ments in 2006, $7.1 billion came from the Enron settlements alone.[31] The number of securities class actions filed in 2006 was actually much lower than any year since the passage of the Private Securities Litigation Reform Act of 1995 (PSLRA),[32] a law aimed at curbing frivolous securities fraud class actions. And the amount of total investor damages in securities fraud cases continues to be many times higher than the damages ultimately paid by defendant companies. In 2006, for example, the median class action settlement was a mere 8.7 percent of shareholder dollar loss caused by disclosures of fraud.[33] In the ten years leading up to 2005, corporate fraud caused, on average, $680 billion per year in damages in the United States.[34] So despite record-high settlements, corporate defendants are still returning only a fraction of losses caused by fraud to investors.

Corporate fraud scandals continue in the United States and resulting damages are growing, even with current regulations in place. This demonstrates that the United States should strengthen investor protections, not weaken them leaving investors more vulnerable to risk and making U.S. financial markets less stable.

In sum, the United States should not begin the regulatory race to the bottom in response to globalization of the securities markets. Reduction in accountability for public companies and their auditors will lead to less global and domestic confidence in U.S. markets, causing the United States to lose its status as the safest investment market in the world. Indeed, the market integrity created by our nation's investor protections, including "full disclosure" rules,[35] is precisely what drives the current competitive advantage held by U.S. markets.[36]

CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS, 2006 REVIEW AND ANALYSIS 1-2 (2006), *available at* http://securities.cornerstone.com/pdfs/settlements_2006.pdf.

31. *Id.*

32. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION CASE FILINGS, 2006: A YEAR IN REVIEW 1 (2007), *available at* http://securities.cornerstone.com/pdfs/YIR2006.pdf.

33. FOSTER ET AL., *supra* note 30, at 7; *see also* SIMMONS & RYAN, *supra* note 30, at 9.

34. CORNERSTONE RESEARCH, *supra* note 30, at 11.

35. *See* Joel Seligman, President, Univ. of Rochester, Address at the 33rd Annual Sec. Regulation nst.: The SEC and Politics (Jan. 18, 2006).

36. Marc I. Steinberg, *Insider Trading, Selective Disclosure, and Prompt Disclosure: A Comparative Analysis*, 22 U. PA. J. INT'L ECON. L. 635, 636 (Fall 2001) ("effective enforcement elevates the U.S. framework to preeminence among securities markets"); *see also* Chiu, *supra* note 16, at 744-45 ("The well-known Efficient Capital Markets Hypothesis posits that if information regarding a corporation that may affect stock prices is released promptly into the market, then stock prices would accurately reflect the value of the stock, and this facilitates investor resource allocation in order to achieve an efficient capital market. Stock price accuracy in the market encourages investor confidence, and investor confidence is important both to the liquidity of the market, as well as to the sufficiency of investor base for the primary market where issuers make their initial public offers. . . [d]isclosure of information to secondary markets thus serves the purpose of preventing corporate abuse. . . [m]andatory disclosure also allows information to be disseminated in a standardized fashion and levels the playing field for different investors with varying degrees of sophistication where access to information is concerned.").

2. *The Globalization of Securities Markets Means More Investors, More Securities Fraud, and More Volatility*

As the capital markets merge and more companies seek investors all over the globe, the pool of vulnerable investors will increase.[37] This further increases the need for investor protection. Globalization of the securities markets also means that one act of securities fraud will cause investor losses around the globe. Therefore, securities fraud committed by multinational companies listing on international exchanges will impact the whole world's capital markets, causing market instability on a global scale.

Instances of securities fraud may also increase because the growth in securities markets worldwide will mean that internationally listed companies will soon come under the same pressure U.S. companies have been under from Wall Street to regularly increase earnings each period.[38] This pressure was responsible for many of the largest accounting scandals in past years, such as Enron, WorldCom, Cendant, AOL Time Warner, Nortel Networks, and others. As market pressure becomes global in nature, so will accounting fraud.

Another obvious problem with the globalization of the securities markets is that problems impacting one nation's market will more easily impact the rest of the world. Recent international market volatility caused by the U.S. credit crisis is one example.[39] Both U.S. and non-U.S. investors investing in both U.S. and non-U.S. markets felt the unsettling volatility of the markets caused by U.S. mortgage-lending practices.[40] Thus, globalization of the markets results in less stable economies and increased risk for investors around the world.

A final reason for increased investor protection is fairness. If globalization of the markets provides companies with increased ability to raise money,[41] then those investors from whom companies receive money should benefit from increased protection as well. If the securities markets continue down the path of globalization, a delicate balance should be struck between incentives for companies to list in a given venue and corresponding responsibilities. In return for capital raised, listing companies should be required to internalize the costs of the benefits received. While, historically, there have been problems harmonizing international securities regulations, the continued globalization of the securi-

37. Multinational market-institutional investors, such as international brokerage houses and banks, should be distinguished from other investors. Multinational market-institutional investors have several advantages, including real-time information on and access to the world's markets, currencies, and securities offerings. By way of example, a market-institutional investor could "price up" an IPO in another country by purchasing large blocks of the security very early and selling just after the average investor has had a chance to purchase the same security. The multinational market-institutional investor could then convert the proceeds into an international currency for one of its international affiliates or use it to purchase international real estate. In instances like this, the multinational market-institutional investor generally has a clear and substantial advantage over other types of investors.

38. Zamansky, *supra* note 14.

39. Lee Barney, *Subprime Crisis Extending Beyond Credit Markets*, Money Management Executive, Aug. 6, 2007, 2007 WLNR 15070598 ("The subprime mortgage crisis appears to be spreading beyond the credit markets, dampening not only the U.S. stock market, but also international markets . . . . Another indication of the growing ripple effect of the subprime crisis in the U.S. is foreign investors', particularly hedge funds', exposure to these securities through asset-backed securities.").

40. *Id.*

41. Kanter, *supra* note 14 (arguing that the Euronext-NYSE merger will result in companies' ability to raise larger amounts of money for lower cost).

ties markets could provide new incentives for requiring corporate responsibility in disclosure on an international level.[42]

III. International Differences in Investor Protections

A. Regulation

The U.S. Securities and Exchange Commission (SEC) is a unique agency comparable to no other regulator in the world. The SEC is more aggressive than its European or other international counterparts.[43] Although its effectiveness fluctuates with staff surges and shortages caused by politics, the scope of its activity is broad—it regulates every registered broker-dealer, securities market or association, issuer selling securities, investment company, public accounting firm, and every "person" who engages in securities fraud in the United States.[44] In addition to the protection of the SEC, investors in the United States have some rights to engage in binding arbitration under the exchange where the fraud takes place.[45]

U.S. securities laws require "full disclosure" by issuers,[46] meaning companies listing in the United States must continuously keep investors apprised of virtually all material information on the company—that is, all information a reasonable investor would consider important in his investment decision, and in a timely manner.[47] Listing companies must file all reports with the SEC and post them on a centralized system to which investors have access, called "EDGAR." Reported financials must comply with U.S. Generally Accepted Accounting Principles (GAAP), which are detailed, specific, and uniform rules intended to provide a consistent measure of financial performance across companies.[48]

Outside the United States, on the other hand, no such regulatory scheme exists. For example, the European Union has no central agency for securities regulation; rather, each country is responsible for its own regulation. The Committee of European Securities Regulators (CESR) is an independent committee of European Union member states' securities regulators, but it has no enforcement powers. Investors in European markets may

42. *See e.g.*, Steinberg, *supra* note 16, at 237, 261-65 (suggesting a three-level, international system of disclosure requirements).

43. Zamansky, *supra* note 14.

44. Seligman, *supra* note 35.

45. *See e.g.*, NASD Code of Arbitration Procedure, *available at* http://www.finra.org/arbitrationmediation/arbitration/codeofarbitrationprocedure/index.htm; *see also* NYSE Arbitration Rules, *available at* http://wallstreet.cch.com/NYSE/NYSE/Rules (follow "Arbitration Rules" hyperlink).

46. Steinberg, *supra* note 16, at 210 ("The primary focus of the U.S. securities laws is on full disclosure.").

47. The nature of continuous disclosure in U.S. regulation was improved dramatically with the implementation of reporting requirements in 2004 and 2006 that broadened the list of "material events" which must be immediately disclosed by listing companies in the United States. *See SEC Votes to Adopt Additional 8-K Requirements and to Propose Amendments to Form 20-F and Fund Manager Disclosure Requirements*, SEC News Digest, Mar. 11, 2004, http://www.sec.gov/news/digest/dig031104.txt. These amendments were made in furtherance of SOX goal of mandating disclosures on a "rapid and current basis," closing what some referred to as a "black hole" in U.S. disclosure regulations. Steinberg, *supra* note 36, at 658-59.

48. In terms of bringing non-U.S. companies to U.S. reporting standards, the SEC has recently shown a willingness to permit non-U.S. companies to report their books with non-GAAP investors, like the International Financial Reporting Standards (IFRS). Unfortunately for investors, the SEC's current plan is to eliminate the requirement that non-U.S. companies listing in the United States reconcile their financial statements to U.S. GAAP by 2009. Fed. Secs. Law Reps. No. 2267, Mar. 14, 2007, at 11.

only file a complaint with weak state or industry-run ombudsman programs, which merely recommend non-binding settlements.[49] Europe does not have a centralized system for continuous issuer disclosure like the EDGAR system. Indeed, until recently, Europe did not mandate continuous disclosure by issuers at all.[50] And, while recently enacted European laws require disclosure, such disclosure is self-regulated rather than enforced.[51] Although Europe has seen increased securities regulation recently with the adoption of the Prospectus Directive,[52] the Market Abuse Directive,[53] the Markets in Financial Instruments Directive,[54] and the Transparency Directive,[55] the problem with these new rules is that issuers are still permitted to make disclosures in disparate ways. This means that investors may not be able to find material information on companies in which they invest, and even if they do, the information they find may be incomplete.[56]

In sum, investors in European markets are highly vulnerable and enjoy fewer protections than investors in U.S. markets.[57] This means less integrity of the marketplace.[58] Additionally, some argue that lack of regulation abroad coincides with more corporate fraud abroad. This state of affairs is exacerbated by the toothless investor protection schemes abroad, under which it is nearly impossible for investors to seek redress for losses caused by fraud.[59]

B. Litigation

In the United States, some argue that civil litigation for securities fraud is essential because it serves the dual purpose of regulating corporate fraud where the SEC lacks the resources and returning to investors losses caused by fraud. Others argue that securities litigation in the United States is excessive and benefits primarily the plaintiffs' attorneys involved. In any event, as the markets continue to globalize, securities fraud will take place on a global scale and investors may seek redress through litigation inside or outside the United States for losses caused by fraud. What issues will investors face?

1. *Advantages of the U.S. System*

The U.S. judicial system continues to be the easiest place in the world for investors to recover damages caused by fraud. Typically, claims are brought in federal court under the

49. Zamansky, *supra* note 14.

50. Certain European states' national regulations, however, provide for some form of ongoing disclosure. For example, U.K. listing rules state that "any information that will lead to substantial movement in the price of the listed securities must be immediately released." Steinberg, *supra* note 16, at 217. French stock exchange supervisors require listed companies to disclose "all major structural changes and transactions likely to affect the price of [their] shares." *Id.* at 220. These rules are not enforced, however, to require the continuous disclosure of material events, as mandated in the United States. Steinberg, *supra* note 16.

51. Chiu, *supra* note 16, at 746.

52. Council Directive 2003/71, 2003 O.J. (L 345) 64 (EC).

53. Council Directive 2003/6, art. 6, 2003 O.J. (L 96) 16 (EC).

54. Council Directive 2004/39, 2004 O.J. (L 145) 1 (EC).

55. Council Directive 2004/109, 2004 O.J. (L 390) 38 (EC).

56. Chiu, *supra* note 16.

57. Zamansky, *supra* note 14.

58. *Id.*

59. *Id.*

Securities Act of 1933 (the "Securities Act") or under the Securities Exchange Act of 1934 (the "Exchange Act"). In order to state a claim for securities fraud, an investor must demonstrate the company made a materially false and misleading statement on which the investor relied in purchasing his security and that caused the investor losses.[60]

Investors may bring individual actions in the United States against a company; however, typically one investor's losses are not large enough to warrant the cost of litigation. Therefore, most U.S. securities litigation is brought under Federal Rule of Civil Procedure 23 (Rule 23), the U.S. class action device. Rule 23 allows a court to certify a case brought by one investor as a class action on behalf of all similarly situated individuals, if:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.[61]

The court will also evaluate whether common questions of law or fact predominate over individual issues and whether a class action is a superior method to adjudicate the controversy.[62]

Importantly, Rule 23 permits opt-out classes. The opt-out procedure requires dissemination of notice to class members, after which all those who fit into the class definition automatically become members of the class except those who take affirmative steps to opt out.[63] This procedure benefits defendants because it means any class judgment will be binding on all similarly situated individuals, so there is no risk of repeat future litigation. It also benefits plaintiffs because it results in a very large class size, encompassing all similarly situated individuals whether or not they have signed up. The large class size creates higher damages and, therefore, higher settlement amounts.

In the United States, most securities fraud litigation is also made possible by the availability of contingency fees, the practice of charging for the lawyer's services only if the lawsuit is successful or favorably settled. Contingent fees often consist of a percentage of the plaintiff's recovery, which may be equal to or up to several times more than the actual hours the attorneys spent litigating the case (the "multiplier"). This system provides an incentive for plaintiffs' attorneys to take on cases even where the plaintiffs are unable or unwilling to pay attorneys' fees upfront. The multiplier allows plaintiffs' attorneys to spread the risk of losing any one case over many cases.[64] In the case of securities class actions, the fees requested by the attorneys for the class are reviewed and approved by the court and then deducted from the class damages paid by the defendants or the defendants' insurer(s).[65]

60. *See, e.g.*, Lawrence v. Cohn, 325 F.3d 141, 147 (2d Cir. 2003).

61. FED. R. CIV. P. 23(a).

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

63. FED. R. CIV. P. 23(c)(2). The Federal Rules were amended in 2003 to allow courts to require a second round of notice to class members at the time of settlement. FED. R. CIV. P. 23(e)(3).

64. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004) (arguing contingency fees provide access to the courts for those who would not otherwise have access).

65. *See infra* § III.B.2.a.

An additional advantage to litigating in the United States is that, generally speaking, each party is responsible for its own litigation costs regardless of who wins or loses. This limits the risk of litigation for each party to his own costs.

The United States also enjoys relatively liberal discovery rules, allowing all litigants to seek documents, testimony, and other forms of information from each other that will help prove or disprove the allegations. Therefore, plaintiffs can subpoena or otherwise seek the information they need to prove the allegations in their case after they have filed the case.[66]

2. *Disadvantages of the U.S. System*

a. U.S. Plaintiffs' Attorneys

Interestingly, many of the advantages of the U.S. system are also cited by its critics, both inside and outside the United States, as disadvantages. The contingency fee, for example, which makes securities class actions in the United States possible, often results in massive windfalls for U.S. plaintiffs' attorneys. U.S. plaintiffs' attorneys are motivated to settle cases for a fraction of the total class damages in order to avoid the risk of losing at trial[67] and also to more quickly recover their fees. Subject to court approval, the plaintiffs' attorneys fees are deducted from the total settlement, after which expenses and administration take a portion of the money that remains. The remainder is distributed to those class members who file claims. Class members often rightfully complain that they receive pennies on each dollar lost in the fraud that formed the basis of the class action.[68]

Another criticism of U.S. class action attorneys is that they operate on their own behalf more than on behalf of their clients. This is because plaintiffs' attorneys litigating securities class actions in the United States are placed in a position very distant from their clients. They represent a large, silent class of individuals with whom they rarely communicate. Therefore, securities class action attorneys typically operate on behalf of the class with little to no oversight by the investor who brought the case. Even where large institutional investors lead the litigation, plaintiffs' attorneys have significant freedom to direct and settle the case as they choose. This lack of client oversight, when combined with average settlements of tens of millions of dollars each (the average securities fraud class

66. But, the PSLRA amended the securities laws to provide that plaintiffs must plead their claims with particularity upfront and are not entitled to discovery until after defendants' motion to dismiss has been adjudicated. *See* 15 U.S.C. § 78u-4(b)(3)(B).

67. Very few securities class actions ever make it to trial.

68. A typical example is as follows: A class action is brought by Investor, on behalf of a Class, against Defendant Company for securities fraud. Total estimated damages for the Class are $7.6 billion, according to plaintiffs' most conservative estimate. Attorneys for Defendant Company and Investor agree to settle the case for $300 million, or 4% of estimated damages. After some litigation, Attorneys for Investor have spent 32,000 hours working on the case, and they posit that their billable hourly rate averages $400 per hour, for a total of $12.8 million. But Attorneys for Investor ask that the court allow them to keep 15% of the settlement in attorney fees (contingency fees sought in securities litigation typically range from 5-35%), which amounts to $45 million, or a multiplier of 3.5 times of the attorneys' hourly rate. Plaintiffs' experts and claims administration take another $3.5 million of the settlement. The remainder, $251.5 million, is distributed to 100,000 claimants, who receive, on average, 3-5% of their investment losses in Defendant Company. So an investor who lost $100,000 during the class period as a result of the fraud may receive approximately $4,000 after years of litigation.

action settlement in 2006 was $106.6 million)[69] and corresponding attorneys' fees, leads to self-interested attorneys.

A related criticism of the U.S. system is that although securities fraud cases serve to keep corporate fraud in check, the damages are not usually paid by the wrongdoers; rather, they are paid by the defendant companies' directors' and officers' liability insurance policies. U.S. plaintiffs' attorneys have little incentive to demand payment directly from those who committed the wrongs because it is in their best interest to settle the case quickly, on terms favorable to the attorneys for the individual and company defendants.

b. Lack of Corporate Governance Reforms

Settlements that include corporate governance reforms to protect the defendant company's shareholders in the future would be a more favorable result for investors. Theoretically, shareholders should have a say in the corporate governance of public companies in areas such as executive power to make important decisions, executive compensation, auditor independence, company social and environmental practices, improved shareholder voting mechanisms and elections, company ethics, and more.[70] But in reality, U.S. corporate law has developed in a way that gives shareholders little, if any, control over corporate governance, while U.S. executives have power to do virtually whatever they want with the corporation and its assets. The problem is compounded by serious conflicts of interest in large corporations, such as executives choosing the remuneration consultants who certify that the company's executive compensation is fair. Ultimately, the lack of shareholder control results in increased corporate fraud and crime and unprecedented levels of U.S. executive compensation, much of which is undisclosed and has little relation to the company's true performance and viability, predecessor pay, and comparable pay in other countries or within the company's peer group.[71]

Therefore, one of the few remaining avenues in the United States to achieve corporate governance reforms is in combination with securities fraud class action settlements. Although the increase in institutional investors leading U.S. securities cases has coincided with an increase in corporate governance reforms achieved as part of class action settlements, reforms are still lacking, in part, because plaintiffs' attorneys have other priorities when settling cases, as described above.

c. The Historical Reluctance of U.S. Courts to Think Globally

As globalization of the securities markets takes place, an additional disadvantage of the U.S. court system will be its historical reluctance to adjudicate issues that are global in nature. Comity, *forum non conveniens*, and jurisdiction are all doctrines U.S. courts have

69. SIMMONS & RYAN, *supra* note 30, at 2.

70. Shareholders show an interest in seeking corporate responsibility of all kinds. For example, in 2005, shareholders of Hormel Foods, Seaboard Corp., Smithfield Foods, and Tyson Foods put forward resolutions requesting those companies evaluate the sustainability and impact of concentrated animal feeding operations. INSTITUTIONAL SHAREHOLDER SERVICES, CORPORATE GOVERNANCE AT A CROSSROADS, 2005 POSTSEASON REPORT 43 (2005). More than 40 shareholder resolutions were filed in 2005 concerning risk and exposure with respect to climate change and greenhouse gas emissions. *Id.*

71. Average CEO pay equaled 369 times as much as average worker earnings in 2005, "compared with 131 times in 1993 and 36 times in 1976." Lublin & Thurm, *supra* note 29.

employed to decline to address global matters in the past.[72] Comity and *forum non conveniens* consider whether there is an adequate alternative forum in another country. This approach leads to an unrealistic result because, even where there is an adequate foreign remedy, litigation outside the United States is much less practical[73] and therefore unlikely to take place. Dismissal of the case from U.S. court is tantamount to plaintiffs having no remedy at all.[74]

In a similar exercise, when multinational corporate defendants employ jurisdictional defenses, U.S. courts often consider whether a judgment rendered in the United States will be recognized in foreign countries.[75] Defendants argue that jurisdiction is inappropriate because the resolution of the case in the United States would have no finality if they can later be subject to multiple and potentially inconsistent adjudications in other countries.[76] Often both parties supply expert affidavits, with plaintiffs arguing the judgment may be recognized abroad, and defendants arguing it will not be recognized.[77] This method, again, is an impractical way to determine the propriety of hearing a case in the United States, because in practice, regardless of the result of this analysis, the litigation will not be brought because of litigation barriers outside the United States.[78] Therefore, a U.S. court provides the only realistic remedy.

Another development in U.S. courts that works against investors in the globalized markets is U.S. courts' unwillingness to apply vicarious liability theories to hold multinational organizations liable. For example, liability theories such as the "one-firm" argument, partnership by estoppel, actual or apparent agency, joint venture, control, and alter ego have often been rejected by U.S. courts, despite the clear global nature of the corporations at issue.[79]

---

72. *See, e.g.*, DiRienzo v. Philip Serv. Corp., 294 F.3d 21 (2d Cir. 2002); *In re* Royal Dutch/Shell Transport Secs. Litig., 380 F. Supp. 2d 509, 548 (D.N.J. 2005); *In re* Royal Ahold N.V. Secs. & ERISA Litig., 351 F. Supp. 2d 334, 357 (D. Md. 2004).

73. *See infra* § III.B.3.c.

74. Laurel E. Miller, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1482 (1991); *see also* Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650 (1992).

75. *See In re* Royal Ahold N.V. Secs. & ERISA Litig., 219 F.R.D. 343, 352 (D. Md. 2003).

76. *Id.*

77. When considering whether to remove the case from U.S. courts, some courts have applied a "near certainty" test, considering whether it is "nearly certain" that the foreign court will *not* enforce the judgment. "[I]f there is some possibility that a class action judgment would be enforceable – or at least have some substantial effect – in the foreign jurisdiction at issue, then class certification is proper." *In re* Turkcell Iletisim Hizmetler, A.S. Secs. Litig., 209 F.R.D. 353, 360 (S.D.N.Y. 2002); Jordan v. Global Natural Res., Inc., 102 F.R.D. 45, 52 (S.D. Ohio 1984) ("[A]n American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce a judgment rendered in the United States," quoting Bersch v. Drexel Firestone, Inc., 519 F.2d 924, 996 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018, 96 S. Ct. 453, 46 L. Ed. 2d 389 (1975)); *see also In re* Royal Dutch/Shell Transport Secs. Litig., 380 F. Supp. 2d at 546-47.

78. *See infra* § III.B.3.c.

79. *See, e.g.*, *In Re* Lernout & Hauspie Secs. Litig., 230 F. Supp. 2d 152, 170 (D. Mass. 2002) (rejecting "single entity" theory against KPMG International); *In re* Citric Acid Litig., 191 F.3d 1090, 1106 (9th Cir. 1999) (Coopers & Lybrand International did not exercise management, authority or control over constituent member firms); Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP, No. 03CV0613, 2004 WL 112948, at *3 (S.D.N.Y. Jan. 22, 2004) (member firms in an international accounting association are not part of a single firm and are neither agents nor partners of other member firms by virtue of using the same brand

In sum, U.S. courts have historically been reluctant to tackle international issues. With the growth of multinational corporations and internationally merging capital markets, this reluctance will translate into fewer investor protections in U.S. courts.

d. Jurisdictional Issues Faced by Non-U.S. Investors in U.S. Courts

Globalization of the securities markets has already resulted in an increased number of non-U.S. investors seeking redress for fraud. It has also resulted in increased litigation in the United States against non-U.S. defendants, including issuers, executive management, and accountants. Where the plaintiff investors are U.S. residents, they need only establish personal jurisdiction over the non-U.S. defendants. Where the plaintiffs are non-U.S. investors, they must also demonstrate that the U.S. court has subject matter jurisdiction over their claims, a bigger challenge.

i) Personal Jurisdiction

Minimum contacts with the United States generally establishes U.S. jurisdiction over a defendant in a securities case.[80] For example, business contacts inside the United States may establish personal jurisdiction over a non-U.S. member of a U.S. accounting firm.[81] Similarly, an accountant's knowledge that an audit opinion will be incorporated in a U.S. securities filing is sufficient for the exercise of specific jurisdiction.[82] In general, travel, communication, training, client development, and referral of client work to the United States increase the chance of establishing personal jurisdiction in the United States over non-U.S. parties.[83]

ii) Subject Matter Jurisdiction

As an initial matter, suits based on foreign transactions, foreign securities, foreign investors, and/or foreign investors are neither specifically excluded nor included within the coverage of the Exchange Act.[84] The legislative history is silent with respect to the question. As a result, in determining whether to include foreign investors in a class, U.S. courts use their own discretion. Sometimes, defendants challenge inclusion of foreign investors under Rule 23 (e.g, whether a class action is a "superior" method for adjudicat-

name); *In re* Asia Pulp & Paper Sec. Litig., 293 F. Supp. 2d 391 (S.D.N.Y. 2003) (rejecting "one-firm" theory with respect to Arthur Andersen International); *In re* CBT Group PLC Secs. Litig., No. C-98-21014-RMW, 2000 WL 33339615 (N.D. Cal. Dec. 29, 2000) (dismissing claims against Ernst & Young Int'l); Goh v. Baldor Elec. Co., No. 3:98 MC 064 T, 1999 WL 20943, at *2 (N.D. Tex. Jan. 13, 1999) (Ernst & Young Int'l not under "common ownership" and individual member firms maintain separate revenues and have separate profits pools); *In re* AM Int'l, Inc. Secs. Litig., 606 F. Supp. 600, 607 (S.D.N.Y. 1985) (dismissing fraud claims against non-U.S. Price Waterhouse entities under "one-firm" theory).

80. Cromer Fin. Ltd. v. Berger, 137 F. Supp. 2d 452, 473 (S.D.N.Y. 2001).

81. *Id.* at 477-79 (subjecting Ernst & Young Bermuda to general jurisdiction in the United States based on its solicitation of business in the United States, participation in audits for U.S. clients, travel to the United States, and consultations with its U.S. counterpart).

82. Reingold v. Deloitte Haskins & Sells, 599 F. Supp. 1241, 1259 (S.D.N.Y. 1984).

83. *See, e.g., Cromer Fin. Ltd.*, 137 F. Supp. 2d at 477-79; Gutierrez v. Cayman Islands Firm of Deloitte & Touche, 100 S.W. 3d 261 (Tex. App.—San Antonio, 2002) (finding specific personal jurisdiction over Deloitte Cayman member firm based on audit of Texas-based entity where the majority of audit work was performed by Deloitte's U.S. member firm).

84. *See, e.g.*, Itoba Ltd. v. LEP Group PLC, 54 F. 3d 118, 121 (2d Cir. 1995).

ing the case[85] or whether international notice will be adequate[86]), and other times the challenge is raised in terms of whether the court has subject matter jurisdiction over the foreign purchasers' claims. In both cases, the court may look at whether a judgment rendered in the United States will be recognized in foreign countries.[87] As stated above, this is an impractical method of determining the appropriateness of hearing the case in the United States because, in practice, the litigation will not be brought elsewhere; therefore, the U.S. court provides the only realistic remedy.

In determining whether they have subject matter jurisdiction over foreign investors' securities claims, U.S. courts apply the "conduct test."[88] The conduct test looks at whether the defendant company's conduct within the United States played a part in the perpetration of securities fraud on investors outside the United States.[89]

How substantial the U.S. conduct must be, in relation to the fraud, varies across the federal circuit courts. By way of example, the Third Circuit has applied a relatively low standard, holding that the federal securities laws "do grant jurisdiction in transnational securities cases where at least some activity designed to further a fraudulent scheme occurs within this country."[90] Where most of the defendants are U.S.-based but the victims of the fraud were foreign entities, the Third Circuit has held subject matter jurisdiction existed, even where there was no impact on U.S. investors.[91]

But the application of the conduct test is extremely fact-specific and dependent on the presiding judge. In the more recent district court securities cases in the same circuit, subject matter jurisdiction has been denied where both the plaintiffs and defendants were not U.S.-based and where most of the fraud occurred overseas.[92] Furthermore, the district courts in the same circuit have clarified that the U.S. conduct must be "significant" and "material" to the perpetration of the fraud, and more than merely "preparatory."[93] Although the Third Circuit has explicitly rejected the more stringent Second Circuit requirement that the conduct in the United States directly "caused" the harm to plaintiff,[94]

85. *In re* DaimlerChrysler AG Secs. Litig., 216 F.R.D. 291, 300 (D. Del. 2003).

86. *Id.* at 301.

87. *See, e.g.*, *In re* Vivendi Universal, 241 F. R.D. at 233 (S.D.N.Y. 2007); *In re Royal Ahold N.V.* 219 F.R.D. at 352.

88. *See* Tri-Star Farms Ltd. v. Marconi PLC, 225 F. Supp. 2d 567, 573 (W.D. Pa. 2002). The related "effects test" does not apply to non-U.S. investors, because it considers whether conduct outside the United States has had a substantial adverse effect on U.S. investors or markets. *Id.*; *see also In re* Alstom S.A. Secs. Litig., 406 F. Supp. 2d 346, 369 (S.D.N.Y. 2005) ("The effects test . . . has no bearing in an action involving the claims of foreign purchasers of a foreign company's securities on foreign exchanges").

89. *Tri-Star Farms*, 225 F. Supp. 2d at 573.

90. SEC v. Kasser, 548 F.2d 109, 115, 114 (3d Cir. 1977).

91. *Id.* at 115 (finding the execution of an investment contract in New York and the maintenance of records in the United States evidence that "the defendants' conduct occurring within the borders of this nation was essential to the plan to defraud"); *see also* Straub v. Vaisman & Co., Inc., 540 F.2d 591, 595 (3d Cir. 1976) (finding the fraudulent scheme was conceived in the United States, and an American securities broker was responsible for the wrongful omissions, so the conduct test was met).

92. *Tri-Star Farms*, 225 F. Supp. 2d at 569; Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 367 (D. Del. 2006). These cases were class actions rather than individual cases; whereas, *Kasser* and *Straub* were not class actions.

93. *Tri-Star Farms*, 225 F. Supp. 2d at 576.

94. The more stringent conduct test, adopted by the Second, Fifth, and D.C. Circuits requires defendants' activities in the United States to have "directly caused" plaintiff's claimed losses. *Itoba Ltd.*, 54 F.3d at 122. In the Second Circuit, an additional factor "tipping the scales in favor" of jurisdiction is also required to estab-

the Third Circuit cases nonetheless indicate it is difficult to establish subject matter jurisdiction where plaintiffs and defendants are not based in the United States and the stock was purchased overseas.

For example, in *Tri-Star Farms*, the court refused to assert subject matter jurisdiction over securities claims brought by a foreign plaintiff that purchased securities of a foreign company on a foreign exchange.[95] The court reasoned that: 1) the alleged fraudulent scheme was conceived in the United Kingdom by British citizens; 2) the scheme involved only the ordinary shares of the corporation and not the ADRs traded on the NASDAQ; 3) foreign citizens were primarily responsible for the alleged misrepresentations; 4) the only fraudulent conduct that occurred in the United States was the inclusion of some of the misrepresentations in SEC-filed documents and press; and 5) the defendants had not used the United States as a "base of operations for perpetrating fraud."[96] In sum, the court found the U.S. conduct was not "significant and material" to the perpetration of the fraud.[97]

In *Daimler-Benz*, another district court within the Third Circuit refused to assert subject matter jurisdiction over the securities claims of a class of foreign investors that purchased securities on a foreign exchange.[98] In that case, which concerned the merger between Daimler-Benz, a German corporation, and U.S.-based Chrysler, the defendant's activities in the United States included: (1) some merger negotiations; (2) partial drafting of the registration statement/proxy-prospectus that was filed with the SEC; (3) a headquarters in the United States for Daimler Chrysler; and (4) substantial business conducted in the United States.[99] Emphasizing the fact that the defendants were not U.S. nationals, the court found that "conduct occurring within the borders of the United States was not essential to the plan to defraud."[100]

Courts in other jurisdictions are split on the issue of whether subject matter jurisdiction exists with respect to a foreign investor's federal securities claims against a foreign defendant. Generally, courts have found that subject matter jurisdiction exists where a plaintiff demonstrates that a significant portion of the allegedly fraudulent conduct occurred in the United States, that the conduct was material to the entire fraudulent scheme, and that

---

lish subject matter jurisdiction over non-U.S. investors' claims. *See* Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 129 (2d Cir. 1998) (despite the fact solicitations to purchase the security were made directly to Florida, the court denied subject matter jurisdiction where "no relevant interest of the United States was implicated"). The Third, Eighth, and Ninth circuits have neither adopted the "causation" requirement nor the tipping factor. *See, e.g.*, Robinson v. TCI/US W. Cable Commc'ns., Inc., 117 F.3d 900, 905-07 (5th Cir. 1997) (adopting the Second Circuit's stringent test, but finding subject matter jurisdiction where a key event in the fraud, a mailing which triggered the injury, took place in the United States); *but see* Butte Mining PLC v. Smith, 876 F. Supp. 1153, 1166 (D. Mont. 1995) (applying the causation requirement). Courts in the Tenth Circuit have not expressly adopted the "causation" requirement, but have applied it in at least one case. Starlight Int'l, Inc. v. Herlihy, 13 F. Supp. 2d 1178, 1183 (D. Kan. 1998) (finding bank transfers and travel to the United States to be conduct of material importance to the fraud so as to establish subject matter jurisdiction).

95. *Tri-Star Farms*, 225 F. Supp. 2d at 569.

96. *Id.* at 571, 577-79.

97. *Id.* at 577-78.

98. *Daimler-Benz AG*, 410 F. Supp. 2d at 367.

99. *Id.* at 371.

100. *Id.*

financial statements or similar reports had been filed by the defendant with the SEC.[101] But several courts have denied subject matter jurisdiction where the only conduct inside the United States is the dissemination of false and misleading statements in SEC filings and press releases.[102]

Because some courts have accepted subject matter jurisdiction over non-U.S. investors' claims, certification of classes of both U.S. and non-U.S. investors has taken place in certain cases.[103] But because of the fact-specificity of the conduct test and the courts' broad discretion, non-U.S. investors cannot know in advance whether their claims will be heard in American courts.

---

101. *See In re* Royal Ahold N.V., 351 F. Supp. 2d 334 (D. Md. 2004) (finding subject matter jurisdiction existed where defendant's American subsidiary substantially contributed to the fraud and was material to defendant's success in attracting shareholders in the United States and abroad); *In re* Cable & Wireless, PLC, Secs. Litig., 321 F. Supp. 2d 749 (E.D. Va. 2004) (finding that subject matter jurisdiction existed over foreign plaintiff's claims against British defendant where a substantial portion of the fraud occurred in the United States relating to fictitious swap transactions); *In re* Vivendi Universal, 381 F. Supp. 2d 158 (S.D.N.Y. 2003) (subject matter jurisdiction existed where: 1) defendant filed fraudulent 20-F and 6-K reports with the SEC, 2) defendant undertook a fraudulent scheme involving the acquisition of several U.S. entertainment companies, 3) defendants took on a $21B debt position by way of fraudulently assuring investors, via false and misleading SEC filings, that the company had sufficient cash flow; and 4) individual defendants spent half of their time in the United States over the class period to further the fraudulent scheme); *In re* Gaming Lottery Secs. Litig., 58 F. Supp. 2d 62 (S.D.N.Y. 1999) (finding subject matter jurisdiction where almost half the defendant company's assets were located in the United States, two-thirds of its revenues were generated by U.S. operations, and most of its shares were registered to U.S. residents); Leonard v. Garantia Banking Ltd., No. 98CV4848(LMM), 1999 WL 944802, at *6 (S.D.N.Y. Oct. 19, 1999) (finding subject matter jurisdiction where wire transfers took place in the United States and the defendant's ADR's trade on U.S. exchange); *Itoba Ltd.*, 54 F.3d 118 (2d Cir. 1995) (finding subject matter jurisdiction where the defendant company filed a fraudulent Form 20-F with the SEC, since the uncorrected SEC filing was "more than merely preparatory" to the alleged conduct and was central to foreign plaintiff's purchase of defendant's stock on a foreign exchange); Alfadda v. Fenn, 935 F.2d 475, 478-79 (2d Cir. 1991) (finding subject matter jurisdiction where plaintiffs, most defendants, and most conduct were based overseas, but where meetings and negotiations took place in the United States).

102. Burke v. China Aviation Oil (Singapore) Corp., Ltd., 421 F. Supp. 2d 449 (S.D.N.Y. 2005) (finding no subject matter jurisdiction where false and misleading financial statements were posted on issuers website); *In re* Bayer AG Secs. Litig., 423 F. Supp. 2d 105, 112-13 (S.D.N.Y. 2005) (finding no subject matter jurisdiction over foreign purchaser claims against German pharmaceutical company where U.S. conduct centered around the company's misleading statements in promoting its drug in the United States); *In re* Alstom S.A. Secs. Litig., 406 F. Supp. 2d 346 (S.D.N.Y. 2005) (finding no subject matter jurisdiction over foreign purchaser's claims where foreign defendant's U.S. conduct centered around the preparation and dissemination in the United States of false and misleading SEC filings, even where the company maintained customers and corporate offices throughout the United States); *In re* Baan Co. Secs. Litig., 103 F. Supp. 2d 1, 10 (D.D.C. 2000) (finding no subject matter jurisdiction existed where the only fraudulent actions alleged in the United States were the filing of forms with the SEC and the dissemination of press releases); Kaufman v. Campeau Corp., 744 F. Supp. 808, 810 (S.D. Ohio 1990) (holding U.S. securities laws "were not intended to protect foreigners who purchase stock on foreign exchanges" and that including false information in SEC filings was not enough to meet the conduct test); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975) (finding no subject matter jurisdiction existed where U.S. conduct included the release of false prospectus statements that emanated from foreign countries, and where the defendants' had no intention that the securities be sold to U.S. investors).

103. *In re Vivendi Universal, supra* note 87; *In re* Nortel Networks Corp. Secs. Litig., No. 01CV1855, 2003 WL 22077464 (S.D.N.Y. Sept. 8, 2003); Krangel v. Golden Rule Res., Ltd., 194 F.R.D. 501 (E.D. Pa. 2000); *In re Gaming Lottery Secs. Litig.*, 58 F. Supp. 2d at 62.

3. *Litigation Abroad*

In terms of litigation, the comparison between U.S. and international redress for investors is different than that for regulation. In some venues, investor protection is offered solely by the state, and private causes of action are not available or viable.[104] In other venues, litigating abroad to recover damages for securities fraud is legally possible yet not practical and quite uncommon. Indeed, investor suits are rare in most every part of the world outside the United States. The reasons are both cultural and procedural. Culturally, non-Americans are far less comfortable with the idea of litigation than Americans, and litigation is far more common in the United States than elsewhere. Procedurally, there are barriers that serve to prohibit litigation abroad.[105]

With respect to securities fraud litigation, this phenomenon is best explained with a country-specific example. For purposes of this article, Dutch law is used because it is somewhat comparable to European laws in general and because the Netherlands is the home of Euronext.

a. The Dutch Example—Technically, Legal Redress is Available

In the Netherlands, the law is similar to that in the United States in terms of investors' ability to bring claims for securities fraud.[106] Indeed, Dutch law is technically favorable for investors in certain respects when compared to U.S. law. Similar to the United States, in order to state a claim for securities fraud in the Netherlands, plaintiffs must show that the executive management of the supervisory board members of the Dutch entity (the N.V. or Naamloze Vennootschap) issued a "misrepresentation of its financial position," on which shareholders relied, causing plaintiffs to suffer damages.[107] In both the United States and the Netherlands, the company, its executive management, and its accountants may be held liable.[108] The primary elements of a securities fraud claim in the United States when compared to the Netherlands are briefly described in the below chart:

---

104. In Turkey, for example, the Capital Markets Board of Turkey (CMB) is the regulatory and supervisory authority in charge of regulating the securities markets. Listing companies in violation of securities regulations can be held liable by the CMB for damages, or their executives can be held criminally responsible. But in Turkish courts, it takes approximately two to three years to initiate proceedings and many more years for the court to deliver a judgment, and there is no viable private right of action for investors.

105. *See infra* § III.B.3.c.

106. It is worth noting, however, that damages are not available for a derivative cause of action brought on behalf of the company by a shareholder. Poot/ABP, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 2 December 1994, [NJ] 1995, 288 (Neth.).

107. *See* 139 Burgerlijk Wetboek [BW]2 & 150 BW2 (Civil Code Neth.); *see also* 162 BW6 (Civil Code Neth.), general principles of Dutch tort law, which provides liability for an unlawful (defined as improper, unreasonable, or unfair) act attributable to a person or entity causing damage. Statements made in prospectuses, as opposed to annual reports, are covered in 194-95 BW6 (Civil Code Neth.).

108. The Dutch Supreme Court, however, has not had the opportunity to rule on accountants' liability for incorrect or incomplete accounting reports regarding publicly traded companies. Moreover, there is some debate in the Netherlands as to which third parties should be held accountable for damages relating to an issuer company's fraud. There seems to be some consensus that third parties who have close ties to the company, such as shareholders, indeed have this right.

Elements	U.S. Claim	Dutch Claim
Scienter	**In 1995, the PSLRA was passed in the United States that, among other things, required that plaintiffs in U.S. securities litigation must plead scienter with particularity.[109] Scienter refers to a mental intent to deceive, manipulate, or defraud. Thus, plaintiffs must show defendants knowingly or recklessly made the false and misleading statements with intent to defraud.[110] Recent case law indicates this burden will become increasingly difficult to meet.[111]**	Under Dutch law, investors do not have to show scienter. Instead, Dutch law presumes, if the misrepresentations were made in the company's public filings, that the directors, executive management, and the supervisory board members are responsible for them.[112] The burden, which is high under Dutch law, then shifts to the director or supervisory board member to disprove that the statement is not attributable to him.[113] Similarly, the Dutch tort rules do not pose a scienter requirement.[114]
Loss Causation	**Plaintiff must adequately allege loss causation—that the client's loss was the direct result of the company 's fraud being revealed to the market.[115]**	**Similar to U.S. standards, it is necessary under Dutch law to show loss causation—that the damage was related to the event giving rise to the liability.[116]**
Reliance	**In order to allege securities fraud in the United States, plaintiffs must show that they relied on the defendants' materially false and misleading statements and were injured as a result.[117] The doctrine of fraud-on-the-market, however, provides that a court can presume reliance where the market for the securities is efficient.[118] This is because, where there is an efficient market for the security, all publicly available good and bad information on the company is assumed to be digested into and reflected by the company's stock price.[119]**	**Under Dutch law, a theory similar to U.S. fraud-on-the-market doctrine applies. Therefore, showing actual reliance is not necessary.**

109. *See e.g.*, Ezra Charitable Trust v. Tyco Int'l Ltd., 466 F.3d 1, 6 (1st Cir. 2006).

110. *Id.*

111. *Higginbotham v. Baxter Int'l., Inc.*, 495 F.3d 753 (7th Cir. 2007) (holding accounts of anonymous sources in plaintiffs' complaints must be "steeply discounted"); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 249 (U.S. June 21, 2007) (holding plaintiffs must plead facts rendering inference of scienter "at least as probable" as any plausible opposing inference).

112. 139 BW2 (Civil Code Neth.).

113. This exculpation burden is somewhat easier for supervisory board members than for executive board members. 150 BW2 (Civil Code Neth.).

114. 162 BW6 (Civil Code Neth.).

115. Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005) (artificial inflation alone is not sufficient to establish loss causation).

116. 163 BW6; 139 BW2;98 BW6 (Civil Code Neth.).

117. Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988).

118. *Id.*

119. Whether there was an efficient market for the stock is addressed on a case-by-case basis. Problems arise where the stock is covered by few analysts, it is traded over-the-counter, it trades with very low volume,

Damages	**Plaintiffs must prove actual damages under U.S. securities laws. The PSLRA sets forth the rule that actual damages are calculated using the price paid for the security versus the security's average price during the ninety - day period following the corrective announcement.[120] Loss calculations, however, are more complicated, because they consider the artificial inflation when the shares were purchased, minus the artificial inflation when the shares were sold. Artificial inflation, in turn, is calculated by analyzing the stock price during the relevant period using a variety of criteria, including market event studies.**	Although plaintiffs need not show actual damages under Dutch law, like U.S. law, damages under Dutch law are determined by the amount of artificial inflation in the stock price caused by the misrepresentations.[121] The damage scenario is more favorable in the Netherlands because the Dutch court has the authority and freedom to assess damages in the manner it considers most appropriate.[122] This is better for investors than U.S. law because it gives the plaintiffs the possibility to raise any plausible damage theory that can be supported. If the extent of the damage cannot be determined precisely, a Dutch court has the freedom to estimate the damage.[123]
Statute of Limitations	**Claims can be brought in the United States for a period of up to five years from the false and misleading statements, or two years from the date of discovery of the fraud.[124]**	**The statute of limitations in the Netherlands is five years from the day the shareholder becomes aware of the damage and the identity of the person responsible, or up to twenty years from the event causing the damage.[125]**

As the above chart demonstrates, the legal elements of a securities fraud claim in the Netherlands are similar to those in the United States, if not more favorable to the defrauded investor. In practice, however, investor suits in the Netherlands are rarely brought. Those that have been brought have settled before reaching the Dutch Supreme Court; therefore, there is little precedent to apply when considering Dutch litigation.

---

it is volatile or not responsive to news, or it maintains a low float. *In re* Xcelera.com Secs. Litig., 430 F.3d 503, 515 (1st Cir. 2005). Plaintiffs must affirmatively put forth evidence of an efficient market. *See In re* Initial Pub. Offering Litig., No. 05-3349 CV, 2006 WL 3499937 (2d Cir. Dec. 5, 2006).

120. 15 U.S.C. § 78u-4(e).

121. *See* Finad/Worst, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 8 juni 1995, NJ 692 (ann. DJV) (Neth.); Plaintiff/Defendant, Hoge Raad der Nederalanden [HR] [Supreme Court of the Netherlands], 8 April 2005, NJ 371 (Neth.); Belastingadviseur/Van Ess, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 3 April 1992, NJ 396 (ann. DJV) (Neth.); *see also* M.J. KROEZE, AFGELEIDE SENADE EN AFGELEIDE ACTIE [DERIVATIVE DAMAGES AND DERIVATIVE SUITS] (2004); VEB/ Philips, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 7 November 1997, NJ 268 (ann. DJV) (Neth.) (actual value of the corporation remains unchanged while the true value is obscured.)

122. *See* 97 BW6 (Civil Code Neth.). The court may also estimate damages, if the precise damage number cannot be determined. It may also limit damages for reasonableness and fairness, in its discretion. Typically, damage awards in the Netherlands and Europe are substantially lower than those granted by U.S. courts.

123. But, the few cases brought in the Netherlands with respect to securities fraud have usually settled before making it to the Dutch Supreme Court. As a result, it is somewhat difficult to determine which damage methodologies a court in the Netherlands would accept in a securities fraud matter.

124. 28 U.S.C.A. § 1658(b). Section 11 claims under the Securities Act for false statements in a prospectus, must be brought within three years of the statement or one year of discovery. 15 U.S.C. § 77(m).

125. 310 BW3 ¶ 1 (Civil Code Neth.). In addition, the Dutch Statute of Limitations can be tolled with notice.

Reasons for this void in investor litigation include the following factors, more fully described in the next two sections: (1) no class action lawsuit device; (2) the presence of the loser-pays rule; and (3) no contingency fees.[126] Additionally, there is a cultural aversion to litigation in the Netherlands, as in most European countries.

b. Availability of Class Actions

As stated above, in the United States, most securities fraud litigation occurs by utilizing Rule 23, the U.S. federal class action device. This allows investors with relatively small losses to recover as a group. Class actions have not been available in most countries outside the United States until recently. Several countries have now implemented some form of class action device or are moving in that direction, mostly in response to group consumer or health claims rather than investor claims.[127] Those regions or countries that have made some movement toward permitting class actions are discussed in detail below.

In Europe, attorneys characterize their law as beginning to implement more and more American characteristics as a result of the dominance of American companies and globalization.[128] For example, several European countries are considering or have recently implemented some sort of class action device. But, the European devices are principally opt-in mechanisms rather than the opt-out system more easily utilized in the United States, as described above.[129]

For example, in November 2005, Germany implemented a new securities litigation law that permits shareholders to file actions in groups of ten against companies for misleading statements.[130] In 2003, Sweden began permitting class actions on an opt-in basis, but the mechanism has hardly been used—indeed, only one class has ever been certified—and it has yielded no large wins for plaintiffs.[131] In the United Kingdom, shareholders can now form associations to bring actions; however, there have not been any significant settlements under this law yet.[132] In Norway, a new class action law begins this year.[133] The Irish, Italian, French, and Finnish governments are considering legislation to implement a class-like litigation device.[134]

In August 2005, the Netherlands implemented a law on the Collective Settlement of Mass Damage Claims, which provides for settlement classes.[135] It is unique in that it does so on an opt-out basis, as opposed to an opt-in basis. Therefore, although it does not permit class actions, it permits opt-out settlement classes. This benefits both plaintiffs

126. The final barrier to litigation described below, restrictive discovery procedures, does not necessarily apply in the Dutch scenario. This is because the Dutch Enterprise Chamber has broad power to subpoena documents and testimony when investigating an investor's claim of securities fraud.

127. Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World*, 2006 ABA Annual Meeting, Section of Litig. (2006).

128. Heather Smith, *Is U.S. Exporting Class Actions to Europe?*, FULTON COUNTY DAILY REPORT, Mar. 1, 2006, at 2.

129. Harbour & Shelley, *supra* note 127.

130. Smith, *supra* note 128, at 4.

131. *Id.* at 5.

132. Ted Allen, *Interest in Class Actions Grows Outside the U.S.*, INSTITUTIONAL SHAREHOLDER SERVICES ONLINE, June 14, 2005, http://slw.issproxy.com/2005/06/000565print.html.

133. Smith, *supra* note 128, at 5.

134. Peter Geier, *Europe Tests Waters on Class Action Suits*, FULTON COUNTY DAILY REPORT, Dec. 8, 2006.

135. *Id.*

and defendants by permitting redress and settlement of claims that effect thousands of people, while limiting defendants' future liability by precluding claimants from bringing similar suits after the settlement. In April 2007, the Dutch law was utilized for the first time in a securities fraud context when Royal Dutch Shell agreed to a settle with all European investors for over $350 million for securities fraud allegations surrounding its overstatement of reserves revealed in 2004.[136]

In South Korea, the Securities Class Action Act (SCAA) became effective on January 1, 2005.[137] This law was designed to provide a remedy for investors in large Korean-listed companies by permitting damage claims caused by false disclosures in registration statements or annual reports, as well as insider trading, share price manipulation, and inadequate audits.[138] The law was amended shortly after its enactment to provide corporate defendants a grace period to correct statements.[139] No securities class actions have been brought under the law.[140]

Australia and Canada have been the most accommodating countries to securities class actions outside the United States. In Australia, securities class actions have existed since 1992, and more recently, investors have sought corporate governance reforms through private actions under the Corporations Act, Trade Practices Act, and the Securities and Investments Commission Act.[141] Differences, however, include significantly lower damage awards, no fraud-on-the-market theory, no contingency fees, and presence of the loser-pay rule.[142]

In Canada, securities class actions are permitted but rarely brought.[143] But with new legislation and the combination of U.S. and Canadian plaintiffs' attorneys heading up Canadian securities fraud cases, there may be an increase in securities litigation in Canada. In 2005, the Ontario Securities Act was amended to create liability for misleading statements made in the secondary market (as opposed to those made in prospectuses).[144] Therefore, investors now have the right to sue for misrepresentations in any filed documents or public statements as well as failure to make a timely disclosure of a material change in the issuer's business.[145] A second new law recently strengthened the ability of Canadian institutional investors to bring suits.[146] Another minor change in Canadian law is a new SOX-like requirement that CFOs certify companies' financial statements. Similar to U.S. and Dutch law, some form of the fraud-on-the-market theory exists in Canada so that individual reliance is not necessary to prove. Also, Canadian securities law does not impose the stringent U.S. scienter requirement. But, significant corporate defenses

136. *See* Grant & Eisenhofer P.A., Royal Dutch Shell, http://www.gelaw.com/RoyalDutchShell.cfm (last visited Nov. 6, 2007).

137. Douglas Stuber et al. *International Securities and Capital Markets—Developments in 2005*, 40 INT'L LAW. 701, 714 (2006).

138. *Id.*

139. *Id.*

140. *Id.*

141. Allen, *supra* note 132.

142. *Id.* In Australia, a conditional fee exists, but fees earned are no where near those earned by plaintiffs' lawyers in the United States. *Id.*

143. *Id.*

144. Ontario Securities Act, R.S.O., ch. 5.5, s 138.3 (1990).

145. Stuber et al, *supra* note 136, at 703.

146. Ontario Securities Act, S. O., ch 22 (2002).

exist under Canadian law, the loser-pay rule applies to all cases, and damages recoverable for corporate fraud are substantially less than those available in the U.S. system.[147] Indeed, in October 2007, the Supreme Court of Canada awarded costs against the plaintiff in a securities class action.[148]

In sum, not only is certain foreign law equal or favorable to U.S. law in terms of bringing investor suits but, increasingly, more countries have implemented some form of class-action device that would theoretically make investor suits possible. Why are investor suits outside the United States virtually non-existent? The following barriers to litigation answer this question.

c. Barriers to Litigation Abroad

i) Loser-Pays Rule

In the United States, each party to litigation is generally responsible for his or her own attorney's fees, although there are some exceptions to this rule in certain states and for frivolous litigation. In the Netherlands, Europe generally, and many other countries around the world, a losing party is always potentially liable for a portion of the prevailing parties' legal fees and costs as well as court costs.[149] This is a huge deterrent to litigation because it presents great risk to litigants.

By way of example, in 2003, when 55,000 shareholders of a British rail operating company sued the government for approximately $275 million for allegedly trying to bankrupt and re-nationalize it, the shareholders had to put up a total of $3.6 million to cover government lawyers' fees before the trial could begin.[150] This caused 6,000 of the class members to drop out, and for the plaintiffs' attorneys to have to fund some of the costs of the litigation.[151] In general, few plaintiffs are willing or able to risk bearing the other party's legal fees or court costs in order to engage in litigation.

ii) No Contingency Fees

As stated above, most U.S. securities fraud litigation is made possible by plaintiffs' attorneys' ability to receive contingency fees. Outside the United States, class actions are not usually functional, even where there is a legislative device providing for class actions, in part because contingency fees do not exist in other parts of the world. There is a strong disapproval of U.S.-style contingency awards for plaintiffs' attorneys in other countries.[152]

147. *Id.*; *see also* Angela Marion Lee, *New Canadian Law Holds Firms Accountable*, PENSIONS & INVESTMENTS, Feb. 20, 2006, *available at* 2006 WLNR 3248548.

148. Kerr v. Danier Leather, Inc., 2007 S.C.C. 44, 31321, [2007] S.C.J. No. 44, *available at* 2007 Can. Sup. Ct. LEXIS 45.

149. In the Netherlands, for example, whether fees and costs will be awarded is a matter for the court's discretion. Typically, the award of fees is a relatively small amount compared to the actual costs of the litigation (it may be mitigated or reduced to nothing, depending on the degree to which a party prevails and the strengths of the positions taken in the course of proceedings), but it can nonetheless be substantial in major litigation when combined with the court's costs. Court costs vary; for example, in the Dutch Enterprise Chamber, costs depend on how many investigators the court assigns to the case and how many hours they spend working on the case.

150. Smith, *supra* note 128.

151. *Id.*

152. Peggy Hollinger, *France Mulls Allowing Class- Action Suits*, FIN. TIMES ONLINE, Jan. 7, 2005 (faulting the U.S. contingency fees for a "bonanza of frivolous lawsuits").

In Europe, for example, collecting contingent fees is prohibited. Although there are certain procedures available for "success fees," where the plaintiff attorney's fee is increased on success of the litigation, the upside payments are far lower than those U.S. plaintiffs' attorneys typically receive.[153]

iii) Restrictive Discovery Procedures

Outside of the United States, discovery procedures are far more restrictive. As a result, parties do not have substantial access to each other's documents and testimony to prove or disprove allegations. In many countries, for example, parties have little or no subpoena power, which is available in the United States. For example, under the German Code of Civil Procedure, parties may not be compelled to testify and are not under an unqualified obligation to answer interrogatories.[154] This means that if plaintiffs do not already have what they need to prove their case, relying on discovery procedures in countries other than the United States will often lead to case dismissal.[155] This is a further deterrent to plaintiffs considering litigation abroad.

IV. Conclusion—A Look at the Future

As demonstrated above, the United States continues to be the most favorable place in the world for investors to seek redress for fraud. This is because the regulatory scheme in the United States is the strongest in the world, and litigation is relatively accessible.

However, globalization of the securities markets will increasingly provide companies with an opportunity to access the world's markets while avoiding U.S. regulation and litigation. To compound this problem, U.S. courts may not be ready to shed their historical reluctance to deal with global issues, despite the changed landscape with respect to the international marketplace.

In countries other than the United States, regulatory schemes are substantially weaker than the U.S. scheme. And in terms of litigation abroad, both U.S. and non-U.S. investors face obstacles that, until now, have precluded virtually all securities litigation outside the United States.

As argued above, internationally merging markets will result in more investors, increased likelihood of securities fraud, and a more internationally interdependent marketplace, all of which lead to an increased need for investor protection. But increased investor protection is not part of the globalization trend. Combined, these factors will likely result in greater risk for investors and far less integrity and stability in the world's capital markets.

153. Smith, *supra* note 128, at 3.
154. Kurt Riechenberg, *The Recognition of Foreign Privileges In United States Discovery Proceedings*, 9 NW. J. INT'L L. & BUS. 80, 91 (1988).
155. Miller, *supra* note 74, at 1388.