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Global Settlements: Promise and Peril

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Abstract

In 2010, Morrison v. National Australia Bank Ltd. destabilized the world of securities litigation by denying those who purchased their securities outside the U.S. the ability to sue in the U.S. (as they had previously often done). Nature, however abhors a vacuum, and practitioners and other jurisdictions began to seek ways to regain access to U.S. courts. Several techniques have emerged: (1) expanding settlement classes so that they are broader than litigation classes and treating the location of the transaction as strictly a merits issue that defendants could waive; (2) adopting U.S. law as applicable to securities issued abroad by crosslisted companies (as Israel has done); (3) use of the Netherland's WCAM statute to effect a global resolution of a settlement class; and (4) coordination between the courts in both jurisdictions in the case of a cross-listed stock. On the horizon is still a more ambitious technique: use of supplemental jurisdiction to permit a class of foreign claimants to be combined with a class of U.S. claimants. Early decisions have divided on this technique. This article suggests guidelines for courts to follow in whether to allow foreign claimants in securities actions to re-enter the U.S.

Keywords: Canadian securities litigation, class action, comity, extraterritorial, Israeli securities litigation, Morrison, Netherlands class action, Petrobras, plaintiff's attorneys, securities fraud, securities litigation, settlement class, supplemental jurisdiction, WCAM

JEL Classifications: G14, G15, G18, G28, G30, G38, K22, K41, K42

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GLOBAL SETTLEMENTS: Promise and Peril

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"As a moth is drawn to the light, so is litigant drawn to the United States"
-Lord Denning

This paper has been prepared for the International Conference on Class Actions and Collective Redress, to be held at the University of Haifa, Israel, on March 28-29, 2019

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ABSTRACT

In 2010, Morrison v. National Australia Bank Ltd. destabilized the world of securities litigation by denying those who purchased their securities outside the U.S. the ability to sue in the U.S. (as they had previously often done). Nature, however abhors a vacuum, and practitioners and other jurisdictions began to seek ways to regain access to U.S. courts. Several techniques have emerged: (1) expanding settlement classes so that they are broader than litigation classes and treating the location of the transaction as strictly a merits issue that defendants could waive; (2) adopting U.S. law as applicable to securities issued abroad by cross-listed companies (as Israel has done); (3) use of the Netherland's WCAM statute to effect a global resolution of a settlement class; and (4) coordination between the courts in both jurisdictions in the case of a cross-listed stock. On the horizon is still a more ambitious technique: use of supplemental jurisdiction to permit a class of foreign claimants to be combined with a class of U.S. claimants. Early decisions have divided on this technique. This article suggests guidelines for courts to follow in whether to allow foreign claimants in securities actions to re-enter the U.S.

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Global Settlements: Promise and Peril

By John C. Coffee, Jr.*

I. INTRODUCTION

"*As a moth is drawn to the light, so is a litigant drawn to the United States.*"

-- Lord Denning[1]

Always controversial and much debated,[2] the world of securities litigation was destabilized in 2010 when the U.S. Supreme Court handed down Morrison v. National Australia Bank Ltd.[3] Previously, under a long established "conduct or effect" test, it had been possible for a U.S. court to resolve securities fraud claims raised by purchasers or sellers who were neither U.S. citizens nor residents -- at least if either the securities transaction occurred in the U.S. (such as on a U.S. exchange) or substantial conduct in the planning or implementation of the fraud took place in the U.S.[4] Although the number of such "global" securities class actions so resolved by

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[1] See Smith Kline & French Lab v. Block, (1983) 1 W.L.R. 730, 733 (Eng.).

[2] This article does not consider the continuing debate over whether the securities class action truly achieves compensation or deterrence for its class members. For a recent critique, see Note, Congress, The Supreme Court And The Rise of Securities-Fraud Class Actions, 132 Harv. L. Rev. 1067 (2019).

[3] 561 U.S. 247 (2010). There is now a considerable literature on the impact of Morrison, but no clear consensus. One view is that Morrison has slightly reduced the risk of litigation for foreign firms, but chiefly made that risk more ascertainable. See Yuliya Guseva, Extraterritoriality of Securities Law Redux: Litigation Five Years After Morrison v. National Australia Bank, 2017 Columbia Business Law Review 199, 279 (2017).

[4] This doctrine derived from two important decisions of Judge Henry Friendly of the Second Circuit Court of Appeals. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

U.S. courts was actually small, several settlements or judgments just prior to Morrison had each exceeded $1 billion and raised deep anxieties in the business community.[5]

In any event, Morrison, reversed this "conduct or effect" test and held that the antifraud provisions of the U.S. federal securities laws reached only securities transactions that occurred in the U.S. This made the location of the trade critical, and many litigants formerly covered were now barred from recovery in U.S. courts. To illustrate, if a stock were cross-listed on the New York Stock Exchange and the stock exchange of any of London, Toronto or Tel Aviv, the claims of those shareholders who had purchased on the non-U.S. exchange could not be included in the U.S. class action (and thus they could seemingly not share in the settlement). Perhaps, these purchasers could sue in their own country or some other country where the stock was listed, but most of the world lacks a U.S. style "opt-out" class action that covers all class members who do not formally exit the action (or "opt out" in the parlance). Thus, most foreign shareholders, including those holding "negative value" claims,[6] were simply out of luck.

That was the starting point. The focus of this article is not Morrison, but the reaction to it. Relatively quickly, practitioners and other nations responded to Morrison, by seeking means by which their clients (much like Lord Denning's moth) could find a way back into the United

[5] Three cases stand out. First, in In re Royal Dutch Ahold N.V. Sec. & ERISA Litig., 2006 U.S. Dist. LEXIS 1928, at *48 (D. Md. 2006), the settlement was $1.1 billion, and the class was global, based on allegations that the fraud was planned in the United States. Second, in In re Nortel Networks Corp. Secs. Litig., 2003 U.S. Dist. LEXIS 15702 (S.D.N.Y. Sept. 5, 2003), the plaintiff class consisted of U.S. and Canadian investors, and the total settlement came to $2.9 billion. Finally, in In re Vivendi Universal, S.A., 242 F.R.D. 76, 109 (S.D.N.Y. 2007), the class consisted of persons from the U.S., France, England, and the Netherlands who acquired ordinary shares or American Depository Shares of Vivendi, and the preliminary judgment came to over $9 billion (this decision was ultimately reversed based on Morrison). For a review of these cases, see Robert Bartlett, Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon, The Myth of Morrison: Securities Fraud Litigation Against Foreign Issuers, U. of Pa. Law School Institute for Law and Economics Research Paper No. 18-34 (available at https://ssrn.com/abstract=3283527 (November 12, 2018). Some of these cases were "f-cubed" cases, in which the plaintiffs, the defendants, and the trading were all foreign to the U.S. Morrison was such a case, and most expected the Court to reject "f-cubed" cases, but the Court wrote far more broadly.

[6] "Negative value" claims are legal claims that, although meritorious, would cost the plaintiff more to enforce than the recovery would provide the plaintiff. In part, this is the product of the "American rule" under which each side bears its own legal costs.

States. Because foreign investors, particularly institutional ones, had become accustomed to participating in U.S. securities class actions (and receiving their share of the settlement without having to make any out-of-pocket payment), they understandably wanted either a substitute forum or a way to participate in U.S. settlements. Nature, it is said, abhors a vacuum, and a consequence of Morrison was the appearance of a seeming vacuum to which plaintiff's attorneys across a variety of jurisdictions responded with various attempts to fill the void. The clearest reactions to Morrison were in Canada and Israel, two jurisdictions with high numbers of companies cross-listed in the U.S.[7] In Israel, which has a particularly large number of firms cross-fitted in the U.S. for the size of its economy, Morrison seems to have provoked a change in Israeli law.[8]

Another important consequence of Morrison has been the increased use of the Netherland's WCAM statute.[9] That statute, originally enacted to deal with mass tort cases, permits a settlement class covering foreign plaintiffs to be filed and approved in the Netherlands so long as there is at least a token Netherlands plaintiff. Although the WCAM statute seemingly enables a global class to be resolved, it permits only a settlement class, not a litigation class. Thus, one can settle, but not sue, under WCAM.

This ability to settle when you cannot be sued raises a special danger: defendants may seek to reach a collusive (and cheap) settlement on a global basis in order to forestall litigation in a variety of forums. By offering lucrative attorney's fees to class counsel for a cheap settlement,

[7] For an overview as of 2010 of the reaction in Canada, see Adam C. Pritchard and Janis P. Serra, Securities Class Actions Move North. A Doctrinal and Empirical Analysis of Securities Class Actions in Canada, 47 Alberta L. Rev. 4 (2016). As of February 21, 2019, Israel had forty issuers listed on NASDAQ and 12 listed on the NYSE (for a total of 52 such cross-listed issuers). Only three Israeli companies are listed on the London Stock Exchange. See Market Data, Dual Listed Companies, TASE (2019), https://info.tase.co.il/Eng/MarketData/Stocks/MarketData/Pages/MarketData.aspx?action=2&dualTab=&SubAction=&Date=&issubmitted=1 (last visited Feb 21, 2019).
[8] See text and notes infra at notes 37 to 40.
[9] "WCAM" stands for *Wet Collectieve Afwikkeling Massaschade* (or "Act on Collective Settlement of Mass Claims"). For a brief overview, see John Coffee, The Globalization of Entrepreneurial Litigation: Law, Culture and Incentives, 165 U. Pa. L. Rev. 1896, 1905 - 1907 (2017).

defendants may be able to achieve this goal. That was the danger that the U.S. Supreme Court foresaw in Amchem Prods., Inc. v. Windsor,[10] in which Justice Ruth Bader Ginsburg, writing for the majority, observed, citing this author, that a plaintiff who could only settle and not sue was "disarmed" and might not be able to provide adequate representation to the class.[11] Since Amchem, plaintiffs have devised a variety of strategies, with some success, to steer around this decision, but Amchem remains the primary barrier in the U.S. to attempts to arrange settlement classes that work better for defendants than for the class members.

Collusion is, however, only one side of the coin; the other side is that many claimants in much of the world have no effective remedy, given that they hold "negative value" claims and no class action is authorized in their jurisdiction. For example, the United Kingdom lacks a class action applicable to securities fraud claims, and its citizens who traded in a U.S. issuer's stock on a U.K. exchange are without a practical legal remedy.[12] Thus, a settlement class brought in the Netherlands under the WCAM statute could be at the same time "fair" to U.K. citizens and "unfair" to Canadian citizens (who do have a class action remedy available to them). Fairness is to some degree in the eye of the beholder.

One further recent development looms particularly large. U.S. counsel may have found a way to outflank Morrison and could be on the verge of exploiting this new technique. In In re

[10] 521 U.S. 597 (1997)

[11] 521 U.S. at 621 ("[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and courts would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer. See Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1379-1380 (1995)").

[12] The U.K. does have a procedure for "collective securities actions" brought under Section 90 and 90A of the Financial Services and Markets Act 2000. Claimants are organized into a collective action (which resembles an "opt-in" class action) pursuant to a Group Litigation Order (or "GLO") entered pursuant to Part 19 of the Civil Procedure Rules. These have recently been used in several major cases by large investors, mainly institutions. See Matt Getz and Peter Barnett, "Collective Action and Securities Law in the U.K.: recent and anticipated developments and international trends," Butterworth's Journal of International Banking and Financial Law (May 2017) at 299-301. The U.K. has no "opt-out" procedure, which tends to be the only procedure that benefits smaller shareholders.

Petrobras Securities Litigation,[13] United States District Judge Jed Rakoff last year approved a $3 billion settlement against Petrobras, the Brazilian oil company, which settlement stands as the fifth largest U.S. securities class action settlement on record and the largest involving a foreign issuer. But before that settlement was approved, the Second Circuit Court of Appeals, the most experienced U.S. court in securities litigation, had first rejected an earlier attempt to certify the class.[14] Although the Second Circuit upheld Judge Rakoff on a number of difficult issues, it found that there was insufficient evidence as to where Petrobras's bonds had traded. Unlike Petrobras's common stock, which had clearly traded on the NYSE (and thus was within the scope of Morrison), the bonds could have traded outside the U.S. (such as in Brazil), even though these bonds still had to clear through the Depository Trust Company ("DTC") in New York in order to qualify for the settlement. Thus, this possibility of trading outside the U.S. implicated Morrison, and, more to the point, raised an "individual" issue as to the location of each bond's trade. Under the procedural rules applicable to class actions in the United States, a class can be certified only if the common issues of law and fact "predominate" over the individual issues.[15] Because the location of these bond trades (or, in the parlance, their "domesticity") was an individual issue that had to be decided with respect to each individual trade, the Second Circuit reversed Judge Rakoff's certification order and remanded the case to the district court for further proceeding to see if other evidence as to the bonds' domesticity could be obtained.

This ruling seemed to imply that the Petrobras bonds (unlike the Petrobras common stock) could not be included in the class. But, on remand, the case took an unusual turn. The

[13] 2018 U.S. Dist. LEXIS 10550 (S.D.N.Y. June 23, 2018).
[14] In re Petrobras Secs. Litig., 862 F.3d 250 (2d Cir. 2017)
[15] Rule 23(b)(3) of the Federal Rules of Civil Procedure requires in the case of a class action seeking monetary damages that the common issues of law and fact "predominate" over the individual issues. The location of each trade (i.e., whether it was domestic or foreign) would be an individual issue, thus precluding certification, unless common evidence could establish the location of all trades by class members.

parties simply agreed to settle and to include the disputed bonds within the settlement. Did this defy the appellate court's ruling? Judge Rakoff held that it did not, finding that the issue of "domesticity" did not relate to subject matter jurisdiction, but only to the merits. Defendants, he said, could waive any issue as to the merits, but not issues as to subject matter jurisdiction. Here, the district court was simply repeating a point that Morrison, itself, had stressed: extraterritoriality went to the merits, not the court's subject matter jurisdiction. Earlier Second Circuit decisions had also made this same point in allowing the defendant to waive defenses and achieve certification. Thus, Judge Rakoff upheld and approved as a settlement class an action that he could not have heard as a litigation class (if the defendant objected).

The bottom line here is that these decisions appear to give the defendant great discretion over whether cases that cannot be certified as litigation classes can be instead certified as settlement classes. If defendants have broad discretion in this regard, the likelihood is high that they may use this power to agree to a settlement class chiefly when the settlement terms favor it and undercompensate the class. Plaintiff's counsel, having no ability to get to trial and thus being "disarmed", may agree to such a settlement either because (a) it is the best that the class can get, or (b) the fees the plaintiff's attorneys will receive if the settlement is approved more than adequately compensate them (although not the class).

In truth, this is precisely the same problem that the WCAM statute also raises. If the only route to a recovery is through a settlement class, defendants have a veto power over the terms of the settlement and may exploit that power to insist on a cheap settlement far below the settlement that would have negotiated if a litigation class could have been certified.

To be sure, the facts of Petrobras do not reveal any such overreaching. The case only went marginally beyond the outer limits of the earlier litigation class to the extent that the location of some of the trading in the Petrobras's bonds was uncertain. This was not a case where common shares traded on the London or Brazilian exchanges were dumped into the class alongside the NYSE-traded common stock. Further, all of the lead plaintiffs in the case (several of whom held only U.S.-traded securities) had approved the expansion of the class, apparently because they believed any attempt to divide the Petrobras bonds into two categories (i.e., those traded in the U.S. versus those traded elsewhere) would have been prohibitively expensive.

Nonetheless, the Petrobras decision raises the question of whether in some future case the parties could extend a settlement class to cover securities that clearly could not have been included in the litigation class. For example, could equity securities of Petrobras traded on the London Stock Exchange have been similarly included? No clear, bright-line limit precluding such an expansion is immediately apparent.[16] Legal change comes incrementally, but once the expansion in the scope of the class was approved based on the use of a settlement class, further efforts to extend the class's scope by this technique in future cases become foreseeable.

At this point, a roadmap for this article is in order. Part II will begin by looking at legal developments in two countries (Canada and Israel) where cross-border securities litigation has increased -- probably because these countries both have a significant number of companies that are cross-listed in the U.S. and also recognize an American-style "opt out" class action. Then, it will turn to the recent use of the WCAM statute in the Netherlands as a means to resolve securities litigation that cannot be resolved in the U.S. Finally, it will examine the implications of the Petrobras litigation in the U.S. on the possible outer reaches of settlement classes in the U.S. and then survey the possible use of supplemental jurisdiction. The common question is whether what Morrison took away can be restored. Lastly, Part III will then survey possible limitations

[16] As discussed later, if there is a material difference in claim strength, a "fundamental conflict" may exist between the U.S. and the foreign claimants (that is, those who traded outside the U.S.) which would require subclassing and separate counsel. See text and notes infra at notes 48 to 49.

and compromises, given that both promise and peril surround the use of settlement classes to achieve global resolution.

II. CROSS-BORDER LITIGATION:

How Many Ways are There to Skin the Morrison Cat?

Two nations -- Canada and Israel -- share (1) a significant number of companies incorporated in their jurisdiction and cross-listed on a U.S. exchange, and (2) legal rules that permit a procedure functionally equivalent to an American "opt out" class action. The presence of these two factors distinguishes them from other countries (for example, the United Kingdom) that have many companies cross-listed in the U.S. but no class action procedure (at least none applicable to securities fraud cases). Given that a local class action procedure was available, it should not surprise that, in response to Morrison, plaintiff's attorneys in each jurisdiction used their class action device to represent local residents who, because they had purchased the securities of cross-listed firms on their own country's exchange, could no longer participate in a U.S. class action settlement. It was also unsurprising that bolder attorneys, anticipating the prospect of a larger recovery (and hence a large attorney's fee), sought to represent investors in a domestically incorporated firm on a global basis. Immediately, this raised the prospection of competition between the domestic class action and the U.S. class action, and the resolution of each is inevitably affected by the other. As next discussed, courts in both Canada and Israel have been sensitive to this problem -- but in different ways.

A. Canada. Canada did not provide a legal remedy for secondary market purchasers until 2005 when Ontario enacted legislation that has now been subsequently adopted in a similar form by most of the other major Canadian provinces.[17] Previously, only those who bought in the primary market (i.e., from the issuer or its underwriters) had a statutory cause of action. This statutory revision made it possible to bring in Canada the classic U.S.-style “stock drop” class action covering all persons who had purchased a Canadian issuer’s shares based on allegedly materially false information.

Canadian plaintiff’s attorneys were not slow in seeking to exploit this new opportunity. The first significant case that revealed the potential for conflict between U.S. and Canadian class actions was Silver v. IMAX.[18] Following a financial restatement by this firm that had pioneered a special film technology, overlapping class actions were filed in both the U.S. and Canada. The U.S. case proceeded more quickly, and a tentative settlement was reached. But the problem with achieving a settlement was that the Canadian action purported to represent many of the same class members, and the defendant issuer did not want to face the prospect of additional liability to the same class members after they were paid under the U.S. settlement. To reach a resolution, the U.S. and Canadian judges conferred and came to an agreement: the U.S. court made its approval of the settlement contingent on an amendment of the Canadian class definition to exclude all plaintiffs bound by the U.S. decision.[19] The Canadian court accepted this compromise.[20] As a practical matter, this informal resolution produced the equivalent of a global class action, because virtually all shareholders of IMAX Corp. were covered by one of the two settlements. Both courts approved the settlement as fair and reasonable.

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[17] See Pritchard and Sarra, supra note 7, at 5 (noting that five other Canadian provinces followed Ontario by 2008).

[18] There have been a host of decisions in both the U.S. and Canada. For the U.S. decisions, see In re IMAX Sec. Litig., 587 F. Supp. 2d 471 (S.D.N.Y. 2008); In re IMAX Sec. Litig., 272 F.R.D. 138 (S.D.N.Y. 2010); In re IMAX Sec. Litig., 283 F.R.D. 178 (S.D.N.Y. 2012). For the Canadian decisions, see Silver v. IMAX Corp., [2009] O.J. No. 5285 (Can. Ont. Sup. Ct. J.)(QL); Silver v. IMAX Corp., (2011) 105 O.R. 3d 212 (Can. Ont. Sup. Ct. J.); Silver v. IMAX Corp., 243 O.N.S.C. 1667 (Can). As a matter of full disclosure, the author points out that he was an expert witness for IMAX in the Canadian litigation.

[19] See In re IMAX Sec. Litig., 283 F.R.D. 178, 184 (S.D.N.Y. 2012).

[20] See Silver v. IMAX Corp., 2013 O.N.S.C. 1667.

Morrison probably simplified the border warfare that had begun to erupt between U.S. and Canadian class actions because it was no longer possible for U.S. class actions to cover Canadians -- unless they had purchased on the U.S. exchanges (as often they had). Still, Canadian counsel could "poach" class members that were lawfully within the U.S. class definition. For example, a Canadian class definition could seek to cover all shareholders of a Canadian class action or less ambitiously, all Canadian citizen or residents, even if they purchased on a U.S. exchange. The resolution in Silver v. IMAX Corp was not a broad decision that Canadian courts would not cover Canadians who purchased in the U.S., but was more narrowly based on the fact that a tentative settlement had been reached in the U.S. case, and neither court wanted to delay the distribution of the proceeds to the class members in that case (which of course included Canadians who had purchased on U.S. exchanges).

This prospect of an attempt to base a global class action in Canada came into view in 2018 in Yip v. HSBC Holdings plc.[21] In Yip, the plaintiff sought to sue HSBC Holdings, the parent holding company of HSBC, which is headquartered in London and active globally. Neither HSBC Holdings nor HSBC trades or has ever been listed in Canada, and the plaintiff purchased his shares on the Hong Kong Stock Exchange. HSBC Holdings does not operate in Canada, although HSBC does have Canadian branches. Under the Ontario statute, investors have a statutory cause of action against any "reporting issuer" (which HSBC Holdings was not) and "any other issuer with a real and substantial connection" to the province.[22] Yip thus posed the question of what facts would demonstrate a "real and substantial connection."[23]

[21] 2018 ONCA 626. As a matter of full disclosure, the author points out that he was an expert witness for HSBC in this litigation.
[22] See Securities Act, RSO 1990, C S.5, s1.
[23] For an overview of the Canadian law at issue in Yip, see Bryan Shaw, "Canadian Jurisdiction Over Cross-Border Securities Claims," https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2018/canadian-jurisdiction-over-cross-border-securities-claims/ (August 1, 2018).

Had plaintiffs succeeded in Yip, Canada might have become a forum in which virtually any major multinational corporation could have been sued. This would have been a shock, particularly to U.S. corporations, because the Canadian provincial securities statutes have a pro-plaintiff tilt, not requiring the plaintiff to prove either scienter or reliance (while U.S. law does). Unsurprisingly, this effort to make Canada a base for global securities litigation failed. The Ontario Court of Appeal upheld the lower court, which had ruled that jurisdiction must be based on one of four "presumptive connecting factors" for tort claims: (1) the defendant is domiciled or resident in the province; (2) the defendant carries on business in the province; (3) the tort was committed in the province; or (4) a contract connected with the dispute was made in the province.[24] Specifically, Yip held that a foreign holding company that supervises a global enterprise does not "carry on business" in Canada.[25] Nor did the fact that Canadian investors could access this company's disclosure online in Ontario establish jurisdiction.[26] Rather, before a corporation may be said to carry on business in Ontario (and presumably most other Canadian provinces whose statutes are similar), it must have a physical presence in the jurisdiction that is accompanied by a degree of sustained business activity.[27]

Arguably, these standards are comparatively expansive and would appear to permit many foreign corporations to be sued in Canada, even if they are not listed on Canadian exchanges. Thus, it is important that Yip also noted that a defendant may rebut plaintiff's showing of these presumptive connecting factors by showing that there is a clearly more appropriate forum for the dispute. Looking to Canadian decisions on forum non conveniens doctrine, Yip expressed a

[24] See Yip v. HSBC Holdings plc, 2017 ONSC 5332 aff'd 2018 ONCA 626.
[25] Id. at Para 41.
[26] 2017 ONSC 5332 at Para 39.
[27] 2017 ONSC 5332 at Para 159.

broad sympathy for the proposition that "[T]he more appropriate forum for secondary market claims will often favor the forum of the exchange(s) where the securities trade."[28]

The most recent Canadian decision takes Yip a step further. This 2018 case, Leon v. Volkswagen AG,[29] involved an attempted securities class action in Ontario against Volkswagen relating to the "defeat device" that Volkswagen allegedly installed in its diesel automobiles to circumvent emission control testing. Volkswagen, however, never traded nor listed in Canada.[30] The plaintiff bought American Deposit Receipts ("ADRs") through a Canadian broker who executed the order in the U.S. After initially attempting to sue in the U.S., the plaintiff withdrew when he was not selected as lead plaintiff and commenced an action in Ontario. The Ontario Superior Court rejected his suit on both jurisdictional and forum non conveniens grounds, stating:

> "There is nothing unfair in expecting Ontario residents who purchase a foreign company's shares on a foreign exchange (because the shares do not trade in Canada) to litigate their claims against this foreign defendant in the jurisdiction of the foreign exchange."[31]

Commentators have seen this decision as a de facto endorsement of Morrison.[32]

This expressed preference for looking to the location of the trading market may, however, be subject to one limitation. In Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP.,[33] the Ontario Court of Appeals did permit a class action to proceed in Ontario, even though the issuer was a foreign company (incorporated in Nevada) that operated in China. Of the 57 investors who purchased stock in this company in a private placement, only two were

[28] Id at Para 75. See also Kaynes v. BP, PLC, 2014 ONCA 580.
[29] Leon v. Volkswagen AG, 2018 ONSC 4265, CV-16-566618-CF (August 15, 2018).
[30] Id. at 2.
[31] Id. at 1.
[32] See Brendan O'Grady and Sarah Faber, "No Trading Places: Securities Class Actions Should Be Heard Where the Securities Were Sold, "October 1, 2018 (www.globalclass&collectiveactionsblog.com/2018/10/01/.
[33] 2016 ONCA 916 (December 6, 2016). The issuer was as Chinese hog farm (whose financial statements had clearly been materially overstated) that was riding a bubble in Chinese stock offerings.

from Canada and only one was from Ontario. 98% of the class members were thus non-residents of Ontario. Why then was this action allowed to proceed? The answer appears to be that the defendant was the Ontario auditor who prepared the issuer's audit report, and it had done so in Ontario.[34] In overview, this outcome looks as if Judge Friendly's "conduct test" survives in Canada.[35] The real fraud in the court's view was the reckless audit in Canada. Hence, Canada may follow both Morrison and Judge Friendly with respect to jurisdiction to adjudicate.

In any event, the bottom line is that, in the wake of Morrison, Canadian courts modified their law, accepting the idea of jurisdiction based on the location of the trade and thereby making it easier to settle U.S. securities class actions involving dual-listed Canadian companies. But for this change, securities class actions settled in U.S. courts might have had to exclude Canadian shareholders who traded in the U.S. to preclude their participation in both Canadian and U.S. class actions. The change thus benefitted Canadian investors.

B. Israel. Israel is believed to have the largest number of class actions on a per capita basis of any nation in the world.[36] In its recent decisions, Israel seems also to be deferring to the U.S., while also finding a means to assure that Israeli citizens will have a forum in which they can raise claims that are today barred from U.S. courts by Morrison. In Cohen v. Tower

[34] Canadian commentary on this case has stressed that "the action involved claims relating to an audit report that was prepared in Ontario against the defendant auditor that resided and carried on Business in Ontario." See Christine Doria, "No Jurisdictional Restraint Required: Ontario Court of Appeal Certifies Global Class Action," www.globalclassactionsblog.com/2017/02/24/no-jurisdictional-restraint-required-ontario-court-of-appeal-certifies-global-class-action/. (February 24, 2017). This, it said, satisfied three of the four presumptive connecting factors set out in Club Resorts Ltd. v. Van Breda, 20120 SCC 17 (2012). Still, this seems to give decisive importance to conduct within the province.

[35] For Judge Friendly's "conduct" test, see Bersch v. Drexel firestone, Inc., supra note 4; see also ITT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975).

[36] See Alon Klement and Rober Klonoff, Class Actions in the United States and Israel: A Comparative Approach, 19 Theoretical Inquiries in Law 151, 152 (2018) (noting that "about 1400" class actions were filed each year in Israel, which has a population of roughly 8 million, whereas 12,500 class actions were annually filed in state and federal courts in the United States with a population of 319 million).

Semiconductor Ltd.[37] the Israel Supreme Court was faced with an Israeli company that was dually listed on NASDAQ and the Tel Aviv Stock Exchange ("TASE"). It upheld a lower court that had ruled that the substantive law governing a dual-listed company alleged to have breached its disclosure obligations was the law of the foreign jurisdiction on which the shares are traded (which just happened to be the U.S.).[38]

Although the stock in Tower Semiconductor traded overwhelmingly in the United States, the actual class in this case consisted exclusively of holders of securities purchased on TASE (and not in the U.S.).[39] This result seems strange at first glance: the claims of shareholders in a domestic company who traded on their own country's exchange are to be determined by the law of a foreign jurisdiction. It is doubtful that Canada would do the same (i.e., applying U.S. law) with respect to purchasers on the Toronto Stock Exchange of a dual-listed Canadian company. But the result does give a cause of action to Israeli citizens who once would have been included in the U.S. class and is likely to produce outcomes that are consistent with the outcomes of the U.S. litigation.[40] In short, the net result is to fill the void left by Morrison.

[37] Civil Appeal 2889/18 (October 16, 2018). The decision was on an appeal of the ruling of the District Court at Tel Aviv-Yato (Judge Khaled Kabub) in Cohen v. Tower Semiconductor Ltd, C.A. 44775-02-16 (November 7, 2017). This appeal was unified with the Leave for Civil Appeal to the ruling of the District Court at Tel Aviv-Yato (Judge Ruth Ronen) in C.A. 28811-02-16, Damti v. Mannkind Corporation (October 12, 2017). In this unified appeal, the Israeli Supreme Court upheld both lower courts, but avoided stating its substantive rationale. It did, however, state that, "[I]n our opinion, the District Courts were correct in the judgments that are the subject of the Motion for Leave to Appeal and the Appeal above in their rulings regarding the application of foreign law."

[38] Cohen v. Tower Semiconductor Ltd., C.A. 44775-02-16.

[39] See Cohen v. Tower Semiconductor Ltd., supra note 37, at para. 3. Tower was incorporated in Israel in 1993 and its common stock was listed on NASDAQ in 1994 and on TASE in 2001. As of 2016, only 20% of Tower's common stock was traded on TASE. Unlike Tower, Mannkind was incorporated in the U.S. and was first listed on NASDAQ in 2015 and later on TASE. Technically, this opinion is not a "formal" precedent (because the appeal was withdrawn before the decision was issued), but the Israeli Supreme Court expressly stated that it agreed with the lower court's ruling and its interpretation of the case law. See Gil Orion and Jana Rabinovich, "Israel: The Supreme Court Reaffirms the Application of Foreign law to Dual-Listed Companies" Mondaq, January 31, 2019.

[40] That is, if the U.S. class action settles, it is likely that the Israeli class action will also settle. If the U.S. action is dismissed, it seems predictable that the Israeli action will fail also. It is also possible as later discussed, that the claims of Israeli-based purchasers can now be heard by a U.S. court pursuant to its supplemental jurisdiction once the action is founded on U.S. law. See text and notes infra at notes 51 to 61.

C. The Netherlands and WCAM. Still a third way for plaintiff's attorneys to respond to Morrison on behalf of their foreign clients is to utilize the WCAM statute in the Netherlands, which permits a global settlement class.[41] Of course, this will require that the defendants enter into a settlement, but that consent can be induced. Although the Netherlands has no procedure equivalent to a U.S. style "opt out" class action, it does permit a procedure that, when aggressively implemented, can produce a functional equivalent to an "opt-in" class action. Under Dutch law, a body known as a "*stichting*" (which literally translates as "foundation") can be transferred the legal rights of shareholders to bring suit on their behalf, thus creating an aggregation mechanism. The *stichting* has limited liability and essentially permits the separation of ownership and control. It has regularly been used in the Netherlands as a vehicle for litigation because it permits broad claim aggregation. Each *stichting* has its own board of directors with full authority to litigate, settle, and seek funding for the litigation from third party funders, but the proceeds of any settlement revert to the shareholders.

Beginning in 2009, American plaintiff's attorneys began to use the *stichting* to litigate major securities cases. In that year, Grant & Eisenhofer, a leading U.S. securities plaintiff's firm, employed the WCAM statute to settle a securities litigation against Royal Dutch Shell for $382 million -- then a record European securities litigation settlement. At about the same time, Royal Dutch Shell settled parallel litigation in the U.S., in effect splitting the plaintiffs into a U.S. class and a European settlement that covered everyone else.

This outcome attracted wide notice, but bigger things were to come. Following the 2008 crash, similar litigation was brought, initially through several *stichtings*, against Fortis, a major Dutch and Belgian banking and insurance firm that failed in the 2008 crash. One of these *stichtings* was again organized by the same U.S. law firms (who did not appear in court, but who

[41] See text and notes infra at note 9.

largely underwrote the litigation and negotiated financing for it with third party funders). The *stichting* procedure has, of course, one major limitation: a *stichting* cannot represent absent parties who have not joined the *stichting*. To reach a truly global settlement covering everyone, the parties in Fortis turned to the WCAM statute. Evidently, Fortis (and its successor, Ageas) were concerned that if they settled with the several *stichtings* suing them, other plaintiffs would continue to come out of the woodwork, each time seeking to better the last settlement.

The settlement initially proposed in the Fortis litigation under the WCAM statute illustrated the problems that sometimes attend settlement classes in the U.S.: some class members do markedly better than others. Specifically, the Fortis settlement, as proposed, would pay more to "active" class members (meaning those who had belonged to the original *stichtings*) than to "passive" class members (meaning the absent parties picked up through use of the WCAM statute). Although this disparity could be rationalized based on these plaintiff's earlier involvement and individual decision to opt in, the real difference may have been that most of those brought into the "opt-out" WCAM class never learned of the action and could not therefore object to the difference in payout. To its credit, the Amsterdam Court of Appeals rejected the settlement because of this disparity, but made clear that the class could be approved if this disparity was eliminated.[42] Eventually, the parties complied, and the settlement was approved in 2018.[43] The total settlement came to over $1.5 billion -- nearly four times the earlier Royal Dutch Shell settlement and a record for Europe.

A recovery on this scale motivates others (much as the reports of gold at Sutter's Mill sparked the Gold Rush of 1849). Unsurprisingly, similar *stichting* actions are now pending

[42] In June 2017, the Amsterdam Court of Appeal rejected the settlement, primarily because of the preferential terms given to the "active" shareholders. See Alison Frankel, "Dutch court approves $1.5 billion Fortis shareholder deal - but there's a catch," Reuters, Latest Venture Capital News, July 16, 2018.
[43] Ageas was forced to increase the settlement from $1.33 billion to $1.5 billion to equalize the payments to the passive shareholders. Id.

against Volkswagen (for its evasion of test controls) and Petrobras,[44] but these actions remain at an early stage. Nonetheless, the basic WCAM strategy has become established and seems to have two steps: (1) sue through one or more *stichtings* and demonstrate the viability of plaintiff's claims, and (2) once a settlement becomes likely, convert the litigation into a WCAM proceeding so that the defendant can obtain global relief and cover all persons who would be within the scope of an "opt-out" class action. In effect, there is a gear shift from an "opt-in" to an "opt-out" class, which is at the defendants' discretion. Of course, all class members have a right to opt out, but few exercise it (either in U.S. class actions or WCAM actions). Important legal issues remain, including how the parties can give legally adequate notice to persons around the world. But the WCAM procedure has the clear potential to achieve a global resolution (particularly in mass tort cases), and a stop in the Netherlands may become standard in attempts by counsel to resolve all claims in a major international case.

D. Petrobras and the Expansion of Settlement Classes. As noted earlier, the Petrobras settlement expanded a litigation class that the Second Circuit had rejected as overbroad into an even more expansive settlement class, which the district court approved as fair and reasonable. In fact, the expansion in Petrobras was fairly modest. Under the settlement class, all purchasers had to have either purchased their securities in the U.S. or settled through the Depository Trust Company. This last category covered bond holders, most of whom probably did transact in the U.S. (but some of whom who probably did not). In light of the Second Circuit's rejection of the first settlement, objectors claimed that this was impermissible -- both on the theory that those

[44] On September 19, 2018, the Rotterdam District Court ruled that, under traditional principles of international law, it had jurisdiction to adjudicate claims against Petrobras in a collective action, and it refused to stay the action pending resolution of actions in Brazil and the U.S. It did find, however, that it lacked jurisdiction with respect to certain non-Dutch defendants. See Stibbe, "Rotterdam District court rules on jurisdiction in Petrobras collective action." See www.stibbe.com/en/news/2018/december/rotterdam-district-court-rules-on-jurisdiction-in-petrobras-collective-action. As a matter of full disclosure, the author acknowledges that he has served as an expert witness for Petrobras in this Dutch proceeding.

who purchased extraterritorially should not have been permitted into the settlement class at all and on the somewhat subtler theory that a "fundamental conflict" existed between the interests of those who purchased inside the U.S. and those who purchased outside, which conflict required at a minimum the use of subclasses and different counsel for each subclass.

In response, Judge Jed Rakoff, the district court judge hearing the case, answered:

> "What this boils down to as a practical matter is that certain claimants who would have been unable to join the litigation classes previously certified by the Court because of extraterritorial impediments are now included in the settlement class so that the defendants can buy "global peace." In the Second Circuit, plaintiffs are entitled to settle even entirely non-meritorious claims."[45]

Indeed, the Second Circuit has so ruled,[46] but (as the Judge recognized) with some important limitations: First, "No class may be certified that contains members lacking Article III standing."[47] Second, if some claimants have legally or economically stronger claims than other claimants in the class, there may arise a "fundamental conflict" that goes "to the very heart of the litigation."[48] In this event, subclasses, each represented by different counsel, might be necessary in order that a single class counsel not be conflicted and subordinate the interests of the stronger claimants to those of the weaker claimants in order to gain a larger global settlement.

As a result, if a class action sought to include persons who bought their securities outside the United States within a class largely composed of those who bought inside the U.S., defendants could seemingly waive this legal deficiency and settle even non-meritorious claims. Still, a "fundamental conflict" might often exist between these different claimants that would require subclassing and different counsel. In short, although defendants can waive a "merits" issue such as "domesticity," the "weaker" claimants could not receive the same settlement

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[45] In re Petrobras Securities Litigation, supra note 13, at p. 11.
[46] See In re Am. Int'l Grp., Inc. Sec. Litig., 689 F.3 229, 243 (2d Cir. 2012)
[47] See Denney v. Deutsche Bank AG, 443 F.3d 253, 264-65 (2d Cir. 2006).
[48] See Charron v Weiner, 731 F.3d 241, 250 (2d. Cir. 2013).

amount as the "stronger" claimants. Rather, these would need to be "structural assurances of fair and adequate representation for the diverse groups and individuals"[49] within the class, which generally means that separate counsel would be required for each subclass.[50]

In short, one may be able to outflank Morrison by using a settlement class to cover extraterritorial claimants (such as, hypothetically, purchasers on the London Stock Exchange), and the defendants could again waive the "merits" issue of "domesticity." But this takes one only so far. One would still need to divide the class into domestic and foreign subclasses (each with different counsel). These counsel would be expected to bargain for their subclass so that the settlement paid a much higher amount per share to the domestic shareholders.

Why did this not happen in Petrobras? The short answer was that the differences between the various class members were relatively minor, and the court found that sophisticated lead plaintiffs had endorsed the settlement's allocation of the proceeds. If these lead plaintiffs, holding only securities purchased in the U.S., were willing to waive the issue of "domesticity," the court doubted that there could be any "fundamental conflict."

So where are we left? Petrobras shows that one can expand a settlement class incrementally, but one may need to use a complicated subclassing procedure. Moreover, defendants cannot be certain that these subclasses with new counsel will reach the resolution (and distribution of the proceeds) that they intended. In short, there is a large element of uncertainty.

But another possibility arises here that may be cleaner and simpler, which curiously may have been encouraged by Morrison. Let us suppose that the goal is to resolve the claims of

[49] See Amchem Products, Inc., v. Windsor, supra note 7, at 625.
[50] For representative cases rejecting settlements on this ground, see In re Literary Works in Electronic Database Copyright Litigation, 654 F. 3d 242 (2d Cir. 2011); In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223, 231 (2d Cir. 2016).

investors in a British company that is dual listed in New York and London. One could conceivably try to include those trading on the London Stock Exchange in an expanded U.S. settlement class by using a subclass with separate counsel (and with the defendant, of course, waiving the issue of "domesticity"). But this elaborate effort attempts to achieve a result that would not even have been possible prior to Morrison (at least if there was not substantial fraudulent conduct in the U.S.). And it simply may be too much for U.S. courts to swallow.

E. Supplemental Jurisdiction. One variation on the procedure used in Petrobras might be to file a securities class action under foreign law as a parallel action in the U.S. court and ask the court to hear these claims under the court's supplemental jurisdiction.[51] Effectively, 28 U.S.C. § 1367 codifies and expands the traditional concept of pendant jurisdiction[52] and provides the district court "the opportunity to pursue complete relief in a federal court lawsuit."[53] These supplemental claims (i.e., the foreign cause of action) could either be filed in the original lawsuit or could be added by an intervener.[54]

Inherently, this action would share the same key factual allegations (i.e. some alleged misstatements or omissions by the same issuer), and it could be filed as a class action under U.S. procedural rules. This idea of parallel actions under different nations' laws has been discussed by

[51] Under 28 U.S.C. § 1367(a), once the district court has original jurisdiction over some claims (hypothetically, a domestic securities class action), it also gains supplemental jurisdiction "over all other claims that are so related to claims in the action with such original jurisdiction that they form part of the same case or controversy under Article III of the U.S. Constitution." Thus, the foreign claims need to share the same nucleus of facts as the domestic claims, but that will seldom be an obstacle in a securities fraud case. In the case of securities fraud actions, the claims will usually be substantially related because the same allegedly misleading disclosures are usually released in both the domestic and foreign market. Section 1367(c) then identifies circumstances in which the court can decline such jurisdiction. See infra at note 60.
[52] See United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).
[53] See Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006).
[54] 28 U.S.C. 1367(a) expressly provides in its final sentence that supplemental jurisdiction includes claims "that involve the joinder or intervention of additional parties."

academics,[55] but only seldom attempted. The most recent effort in 2018 proved unsuccessful.[56] In In re Mylan N.V. Secs. Litig.,[57] the court declined to exercise supplemental jurisdiction over a securities class action under Israeli law with respect to purchases on TASE. In part it did so because two similar class actions against the same defendant were already pending in Israel.[58] But in addition, the court wrote:

> "[T]he United States has only a minimal interest, if any, in providing a forum to litigate the claims of foreign stockholders under foreign securities laws."[59]

Other U.S decisions have shown greater willingness to consider foreign securities claims.[60] Of course, now that Israel has deemed U.S. law to apply to cross-listed stocks that are

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[55] See, e.g., Hannah Buxbaum, Remedies for Foreign Investors Under U.S. Federal Securities Laws, 75 Law and Contemporary Problems 161, 177 (2012) (arguing that foreign investors injured by the same fraud as U.S. investors "might seek to have a U.S. court adjudicate their claims along with those investors who transacted domestically.").

[56] In Re Mylan N.V. Securities Litigation, 2018 U.S. Dist. LEXIS 52084 (S.D.N.Y. March 28, 2018). Other cases have also expressed doubts about exercising supplemental jurisdiction with regard to foreign securities fraud claims. See Stoyas v. Toshiba Corp., 191 F. Supp. 3d 1080, 1090 (C.D. Cal. 2016), rev'd on other grounds, 896 F.3d 933 (9th Cir. 2018). But in Stoyas, the court had already dismissed the U.S.-based action, so that the foreign action was supplemental to nothing that survived. Another case has concluded that supplemental jurisdiction may be sometimes appropriate (but only rarely) and generally inappropriate. See In re Toyota Motor Corp. Sec. Litig., 2011 WL 2675395 at *7 (C.D. Cal. July 7, 2011). See text and note infra at note 66.

[57] Id.

[58] Id. at 38. The Court then cited Morrison for the proposition that "some fear that [the U.S.] has become the Shangri-La for lawyers representing those allegedly cheated in foreign securities markets; see also Morrison, 561 U.S. at 270." This suggests a general aversion to foreign law claims. See also Dar El-Bina Eng'g. & Constr. Co. of Iraq v. Republic of Iraq, 79 F. Supp. 2d 374, 388 (S.D.N.Y. Jan. 7, 2000).

[59] In re Mylan N.V. Sec. Litig., supra note 56, at *56.

[60] At least two recent decisions have exercised supplemental jurisdiction over foreign law securities claims. First, in In re Verifone Holdings Inc. Securities Litigation, 2014 U.S. Dist. LEXIS 20044 (N.D. Calif. February 18, 2014), the district approved a settlement that included a large group of Israeli shareholders who purchased on TASE, and it expressly stated:

> "The Court finds that Morrison v. Australia Nat'l Bank Ltd., 130 S. Ct. 2869 (2010), does not deprive this Court of the ability to approve this settlement, which includes a general release of all claims, including those of Israeli investors based on foreign law."

Id. at *12 to *13. Although the Court's rationale is not entirely clear, approval of a settlement could generally be done under its supplemental jurisdiction.

Second, in Roofer's Pension Fund v. Papa, 2018 U.S. Dist. LEXIS 12585 (D.N.J. July 27, 2018), the Court held that it would "exercise supplemental jurisdiction over the Israeli law claims articulated in Count Four given the remaining federal law claims." Id. at *72, n. 24. Roofer's Pension Fund was not a settlement class and involved three counts of U.S. securities fraud claims and one count of Israeli securities fraud. Because this case was decided traded in both the U.S. and Israel, the first reason listed in 28 U.S.C. § 1367 for declining supplemental jurisdiction (i.e. that the claim is "novel or complex") seems no longer applicable.[61] A U.S. court can easily apply U.S. law to Israeli claims in both litigation and settlement classes (although, to be sure, this might tend further to make the U.S. a "Shangri-La for lawyers").[62]

Still, this analysis applies only to Israeli-listed stocks. In the case of stocks listed, for example, on the London Stock Exchange, U.K. law would presumably apply, and this might present a "novel or complex issue" for the court under § 1367(c).

The bottom line at this time is that U.S. courts can consider foreign law claims, but have divided in their willingness to do so. Nonetheless, one special case is easier: settlement classes. Consider, for example, a stock listed on both the New York and London Stock Exchanges. Plaintiff's attorneys in the U.S. and the defendant reach a deal on a settlement of the U.S. claims, but the defendant also wishes to cover the London-based claims as well. The plaintiff's attorneys have no objection because a larger case normally means a larger fee award in the U.S. Thus, a class action under U.K. law is filed before the same court, which is asked to exercise its supplemental jurisdiction over the new claims. The court is further informed by the parties that, unless a "global deal" and "global peace" can be negotiated, the defendant is unwilling to settle. Now, the court has a motivation to accept the foreign law claims, because in substance it means less work for it, as a global settlement will typically eliminate a very messy and time consuming

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prior to the holding in Tower Semiconductor that U.S. substantive law applies in the case of a dual listed stock, it should be even easier for a federal court today to follow Roofer's Pension Fund after that development.

[61] Under 28 U.S.C. § 1367(c), district courts have discretion to refuse to exercise supplemental jurisdiction if

> "(1) the claim raises a novel or complex issue of State law…"

Ordinarily, Israeli law would present novel issues for a U.S. judge, but after Tower Semiconductor, supra note 37, the U.S. judge need not face these issues as it has been instructed by Israeli courts to apply U.S. law.

[62] See supra note 58, citing language in Morrison.

case from its docket. One small detail, however, detracts from this happy outcome: the settlement gives the foreign claimants who traded in the U.K. somewhat less per share than those trading in the U.S. will receive. This is a scenario that both hints at collusion, but also provides credible reasons why a court might blink and exercise its supplemental jurisdiction.

III. HOW TO BALANCE PROMISE AND PERIL

The foregoing analysis has suggested that the easiest way to fill the void left by Morrison is through settlement class actions. These could be accepted by a U.S. court pursuant to its supplemental jurisdiction; or they could be certified as a settlement class that expands upon a litigation class (possibly with subclasses if a "fundamental conflict" exists); or a Dutch court could certify a WCAM settlement class. All these techniques have promise because they give remedies to purchasers in countries that lack a class action remedy. And they have peril because they invite collusion between plaintiff's attorneys and defendants.

But does one want to encourage such actions? Would Congress or the courts respond with hostility because they believe that creating such a forum in the U.S. would produce a return of allegedly abusive "f-cubed" class actions? Or do they simply not want to allow the U.S. to become a forum for global resolution because it might cause foreign issuers to flee the U.S.? This Part will consider these questions under two headings: (a) Protections Against Collusion, and (b) Should the U.S. Become a Forum for Global Resolution.

A. **Protections Again Collusion**.

To the extent collusion occurs, it typically involves an implicit deal between plaintiff's attorneys and defendants that subordinates the interests of class members (here, the foreign class members). What protections are feasible?

1. Subclassing and Independent Counsel. As earlier noted, if there is a material difference in the strength of their legal claims between the U.S. class members and the foreign class members, a "fundamental conflict" may arise that would require subclassing and independent counsel. The same result should follow if two different classes are consolidated or otherwise presented to the court for joint approval. The policy goal here is to protect the class members holding the stronger legal claims from having some portion of their settlement diverted to the class members in the other subclass or action in order to produce a predictably larger attorney's fee award. This problem is more acute in jurisdictions, such as the U.S., where attorneys normally receive a contingent fee award that is a percentage of the recovery. Thus, the first rule should be that a different counsel should represent each class or subclass. But that may not be enough. Plaintiff's attorneys naturally have friends and allies willing to help them. Reciprocity is normal in many professions. Moreover, if the parties to a U.S. class action settlement wish to add a foreign class to achieve a global settlement, the law firm they invite to represent this new class may see little downside. The actual work on the case will have been already done, and a fee determined as a percentage of the recovery can be very attractive.

Thus, a second safeguard should be to disfavor presumptively any settlement of a securities fraud suit in which there is a material difference in the amount received on a per share basis by the two classes. An absolute rule would be too strict, because there can be relevant differences in circumstances. Still, we can expect defendants to try and make the same distinctions between claimants as was attempted (and rejected) in the Fortis litigation.

2. Comity. Another means to this same end may be obtainable through the doctrine of comity. Suppose there is a U.S. securities class action brought against a company that is dual listed on the NYSE and Toronto Stock Exchanges. Suppose further that the U.S. class action is settled and the settlement class is extended to cover those who traded in Toronto. Alternatively, a Canadian settlement class is presented to the U.S. court to be approved under the court's supplemental jurisdiction. Assume that the U.S. court approves both classes (possibly because defendants insist that they will only settle on a global basis).

But must a Canadian court respect this settlement, even if it extinguishes claims that were then pending before it? In a contrast to a case in State X that also resolves claims of citizens in State Z, the constitutional requirement of "full faith and credit" does not apply in this international setting. Only the doctrine of international comity does, and it is a doctrine with weaker presumptions and more limitations.[63]

Indeed, Canadian case law has clearly held that its courts are not required to respect a settlement of a U.S. class action that settles claims over which it also has jurisdiction. In Currie v. McDonald's Restaurants of Canada Ltd.,[64] the Ontario Court of Appeals did deny res judicata effect to a U.S. class settlement where it found inadequate notice to Canadian class members (even though the U.S. court had approved the adequacy of notice). Arguably, a Canadian court might also deny preclusive effect to a U.S. judgment or settlement if it determined that the settlement was not fair or reasonable because it undercompensated the Canadian claimants. Of course, if Canadian courts were inclined to let the Canadian action continue to see if this action

[63] For an overview, see William S. Dodge, International Comity in American Law, 115 Colum. L. Rev. 2071 (2015).
[64] 2005 O.J. No. 505.

could obtain more, the incentive for defendants to enter into a settlement class in the United States would be greatly diminished. But some degree of uncertainty on the issue of res judicata may be desirable, because it will deter defendants from seeking to impose the cheapest possible terms on the foreign class. At present, there is at least a warning signal to those settling Canadian claims in the U.S. that a Canadian court may review for fairness.

B. Should the U.S. Become a Forum for Global Resolution?

Cases such as Vivendi in which plaintiffs won an initial judgment for $9 billion sent shock waves through the international business community.[65] Arguably, Vivendi told foreign corporations listed in the U.S. that they faced unascertainable and potentially catastrophic liability. Beyond simply this economic fear, there is also a fear that international comity will be disrupted. As one court phrased it:

> "[R]espect for foreign law would be completely subverted if foreign claims were allowed to be piggybacked into virtually every American securities fraud case, imposing American procedures, requirements, and interpretations likely never contemplated by the drafters of the foreign law."[66]

Although this is a fair point, it has little or no application to two cases: settlement classes and cases in which the foreign country (such as Israel) has expressly adopted U.S. law. In a settlement class, where the defendant has consented to the settlement class, there is neither interference with comity nor an extortionate threat. The defendant is probably seeking to use the settlement class to end the prospect of continuing individual or collective litigation abroad.

Still, even if defendants have more to gain than to lose from expanded use of supplemental jurisdiction, this does not itself supply an affirmative justification for enabling the

[65] See text and notes supra at 4. Vivendi was eventually reversed in light of Morrison.
[66] See In re Toyota Motor Corp. Sec. Litig., 2011 WL 2675395, at *7 (C.D.Cal. July 7, 2011).

U.S. to become a forum for global resolution. After all, allowing foreign claimants who traded abroad to resolve their claims in the U.S. imposes costs on U.S. courts and increases their workload.

Why then do this? The following reasons may supply justifications.

1. The Friendly Rationale. In first articulating the "conduct or effect" test, Judge Henry Friendly suggested that Congress (if they had thought about it) would not have wanted the U.S. to be used as a "base for fraud." Thus, he wrote the "conduct test" into U.S. law to enable U.S. courts to punish and deter fraud in the U.S where the level of fraudulent activity went beyond mere "preparatory steps" and involved the actual "perpetration of fraudulent acts."[67]

How strong is this justification today? If there is a fraud planned in the U.S., the Department of Justice and the SEC clearly have jurisdiction to bring criminal or enforcement actions. Indeed, Congress specifically amended the federal securities laws in the Dodd-Frank Act to give the SEC extraterritorial jurisdiction if there was substantial fraudulent conduct in the U.S.[68] This may weaken the need for private enforcement, as the U.S. already devotes greater public enforcement resources than any other nation to the prosecution of securities fraud.[69]

Conversely, one could argue the reverse: namely, that because the SEC has been instructed by Congress that it can pursue securities fraud extraterritorially whenever "significant steps in furtherance of the violation" are taken in the United States,[70] it may be consistent with this policy to permit private enforcement to resolve both the domestic and foreign components of a securities fraud in the United States. Here, it should be remembered that supplemental

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[67] See ITT v. Vencap, Ltd., 519 F.2d 1001, 1017-18 ("We do not think that Congress intended to allow the United States to be used as a base for manufacturing fraudulent securities devices for export…"); see also Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (2d Cir. 1975).

[68] See Section 27(b)("Extraterritorial Jurisdiction") of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

[69] For a discussion of the relative budgets devoted to securities enforcement in the U.S. and the U.K., see John C. Coffee, Law and the Market: The Impact of Enforcement, 156 U. Pa. L. Rev. 229 (2007).

[70] See Section 27(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

jurisdiction will only exist if the proposed foreign action is "substantially related" to a class action involving domestic securities fraud. Typically, when two such parallel actions are proposed, there will have been far more trading in the U.S. than abroad. Thus, U.S. courts are not being asked to play "policeman to the world," but only to resolve the remaining strands to the domestic scandal in one integrated proceeding. Even if this is not always true, U.S. courts are likely to limit (and should limit) their exercise of the power to these occasions.

2. Defendant's Interests. The defendant in any case where there is both a domestic class and a foreign class will typically be a U.S. corporation, and it must want an integrated resolution if it enters into a settlement class. Other cases need not be accepted, as discussed below. Such a resolution could spare the U.S. corporation from additional years of litigation and legal expenses, and an expedited resolution may allow it to move on from an embarrassing scandal. Finally, small claimants in foreign jurisdictions without a class action remedy may only receive a recovery if the U.S. permits such an action to be certified.

3. Uniformity in Legal Standards. In the Tower Semiconductor litigation, the Israeli Supreme Court appears to have believed that the most important consideration was the need for a common legal standard in multinational litigation.[71] Thus, it deferred to the foreign country's law, even where the defendant was incorporated and operated under Israeli law. Certainly, disparity in outcomes can be troubling. For example, if a U.S. company won a securities class action in the U.S. but lost in litigation brought by *stichtings* suing in the Netherlands, this inconsistency might reflect the impact of improper factors (including a home country bias). In general it seems likely that U.S. corporations and shareholders would prefer a global resolution in the U.S. to a piecemeal resolution in multiple jurisdictions over an extended period.

[71] See text and notes supra at notes 37 to 40.

A similar legal standard also facilitates planning and compliance by corporate defendants. Even in the field of securities regulation, there are important differences among jurisdictions. For example, the U.S. generally requires proof of scienter in secondary market cases (while Canada does not); similarly, the U.S. has a periodic disclosures system, while other jurisdictions (including Canada) require disclosure as soon as information becomes material.[72] As a practical matter, it is unlikely that a settlement class presented to a U.S. court for approval based on its supplemental jurisdiction would hold the defendant to higher standards than applied in the U.S.

The point here is not that there is an optimal rule as to which legal standards should govern, but only that U.S. interest groups probably gain from expanded use of supplemental jurisdiction in class action litigation.

C. A Proposed Balance.

The most likely scenarios in which a U.S. court will be asked to exercise its supplemental jurisdiction to resolve claims brought by persons who did not trade in the U.S. are: (1) settlement classes and (2) litigation classes governed by U.S. law (such as an Israeli class action). In these cases, no "novel or complex" issue seems likely to arise that justifies declining the case under 28 U.S.C. § 1347 (c)(1).[73] Still, merely the absence of a "novel or complex" issue does not imply that the case should be heard in a U.S. court. Even if the case is "substantially related" to another case in which class members did trade in the U.S., more seems necessary before the U.S. opens its courts to the foreign action. For example, suppose a German corporation that is listed on both

[72] In Basic Inc. v. Levinson, 485 U.S. 224, 239 n. 17 (1988) the Supreme Court noted that "silence, absent a duty to disclose, is not misleading…" Such a duty to disclose arises when the corporation sells stock and when SEC reporting obligations attach (such as when Form 10-K or Form 10-Q require periodic disclosures). Some other nations, including Canada, require disclosure of all material information at all times.

[73] 28 U.S.C. § 1367 (c) lists instances in which a court may decline to exercise supplemental jurisdiction, even when a case is "substantially related." Subsection (c)(1) specifies that the court may decline a case that raises a "novel or complex issue" of law. Foreign law will often present such issues.

a U.S. exchange and a European exchange is sued for securities fraud, eventually settles with investors who purchased in the U.S., and then seeks to achieve a global resolution by also settling claims in the U.S. action brought on behalf of investors numerous who traded in Europe. Before the court exercises its supplemental jurisdiction to take this case, it should ask itself three additional questions:

First, did fraudulent conduct occur in the U.S. that gives the U.S. a justification for accepting jurisdiction? This is, of course, the traditional "conduct" test that was overturned by Morrison. Although such conduct is insufficient under Morrison to permit the court to hear a litigation class, the absence of such conduct in the U.S. should properly lead the court to decline even a settlement class -- because the U.S. has no interest in acting as "policeman to the world."[74]

Second, are there any signs of collusion? How was class counsel for this settlement class selected? Is there a lead plaintiff who would satisfy the standards of the Private Securities Litigation Reform Act? The corporate defendant would predictably prefer to settle the foreign claims on a "reversionary" basis, meaning that any unclaimed amounts in the settlement will revert to the defendant. Because foreign claimants are less likely to learn of the U.S. settlement, they are also less likely to file claims, thus leading to a greater reversion to the defendant. Hence reversionary settlements need to be particularly discouraged in this context.[75]

Third, are there one or more pending actions in Europe involving substantial claimants that this settlement class would undercut and preclude? U.S. courts have no interest in

[74] Judge Henry Friendly fairly asked that courts inquire "whether Congress would have wished the precious resources of United States courts and law enforcement agencies be devoted" to the case. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975). A case in which no "significant steps" were taken in the United States provides little, if any, justification for the use of such resources.

[75] For strong criticism of reversionary settlements, see the opinion of Justice Sandra Day O'Connor in Waters v. Int'l Precious Metals Corp., 530 U.S. 1223, at 1224 (2000).

"poaching" on litigation that was already actively underway in Europe (or elsewhere). Indeed, in the Mylan N.V. case, the existence of pending actions in Israel was cited as an independent reason for the U.S. court not exercising its supplemental jurisdiction.[76] Here, rigid rules are undesirable, and the best approach may be for the U.S. court to consult informally with the foreign court (much as was done in Silver v. IMAX).[77] For example, if an action has been filed in Europe but lain dormant, the foreign court might have no objection to its resolution in the U.S. by a settlement class. Also, because few countries authorize "opt-out" actions, the pending foreign action is likely to be an "opt-in" class or an action by a *stichting* (or similar entity), with the result that carving out the small number of plaintiffs in this action from the U.S. settlement class may be easily done and probably represents the best accommodation to avoid friction between the U.S. court and the foreign court. In any event, because those claimants represented abroad could always opt out from the U.S. settlement class, it may make little difference whether the U.S. settlement class is defined to exclude these litigants in pending cases.

CONCLUSION

This article opened with the observation that nature abhors a vacuum. We have now surveyed a variety of means by which foreign claimants are seeking (with some success) to re-enter U.S. courts, notwithstanding Morrison. To be sure a case like Vivendi is no longer possible after Morrison.[78] Nonetheless, the vacuum created by Morrison appears to be under increasing pressure. Whether by means of an expansion of a litigation class (as was done in Petrobras) or by use of supplemental jurisdiction, those buying outside the U.S. may in time be able to participate in the resolution of a class action in the U.S. (at least in a settlement class). Moreover, to the

[76] See text and note supra at note 58 (noting existence of two pending class actions in Israel).
[77] See text and note supra at notes 18 to 19.
[78] See text and note supra at note 5 (noting $9 billion preliminary judgment).

extent these claims are not so resolved in the U.S., these claimants may turn to a WCAM action in the Netherlands. The question thus posed for defendants may soon become where do they want to resolve these claims (in the U.S. or abroad?), because Morrison has not made them disappear.

For courts (both in the U.S. and the Netherlands), two issues stand out: (1) how to prevent the settlement class from being abused (as it has sometimes been in the U.S.[79]), and (2) how to permit an integrated resolution of international claims without opening the litigation floodgates. This article has suggested standards to these ends.

Exercising uncharacteristic prudence, this author has stopped short of addressing the much more theoretical visions offered by other commentators who favor a global class action. Some visionaries seem to want nothing less than a form of World Court to resolve multinational litigation in a single sweeping decision.[80] Others believe high-stakes commercial cases should migrate to the United States or another country with a stable judiciary because corruption is an endemic problem in the developing world.[81] At this stage, this author prefers to be inductive, rather than deductive, and has attempted to describe what is actually happening and not to offer an ultimately desired end state. Even if corruption is a global problem that compromises some judiciaries, little evidence suggests that it is a problem that much affects securities litigation. Possibly, nations that are mature enough to develop securities markets have already as a precondition largely solved the problem of creating an honest, stable judiciary.

[79] For a case in which the Supreme Court found the settlements class to have been abused and warned against its "adventurous" use, see Ortiz v. Fibreboard Corp, 527 U.S. 815 (1999) (rejecting "limited fund" settlement class).

[80] For one bold such proposal, see Maya Steinitz, The Case for an International Court of Civil Justice, 67 Stan. L. Rev. ONLINE 75 (2014) (proposing court for foreign plaintiffs to obtain enforceable judgments against American corporations who commit torts abroad). See also Maya Steinitz and Paul Gowder, Transnational Litigation as a Prisoner's Dilemma, 94 North Carolina L. Rev. 751 (2016). The broader topic of mass torts is not within the scope of this article.

[81] See Jens Dammann and Henry Hansmann, Globalizing Commercial Litigation, 94 Cornell L. Rev. 1 (2008).

The bottom line is that incremental change appears to be coming. Even if the obstacles to the creation of a new international court or to convincing the U.S. to invite a potential flood of litigation are formidable to insurmountable, practitioners are finding new ways to settle global claims.[82] Morrison will not be overturned, but it is being outflanked. That should not surprise.

[82] And the primary means is through a migration back to U.S. courts, because they offer a combination of features -- opt out class actions, the permissibility of contingent fees, and no "loser pays" rule -- that attracts plaintiffs to the U.S., much like Lord Denning's moth. See supra note 1.

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