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***Morrison v. National Australia Bank* and the Growth of the Global Securities Class Action Under the Dutch WCAM**

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***Morrison v. National Australia Bank* and the Growth of the Global Securities Class Action Under the Dutch WCAM**

STEVEN MCNAMARA†

ABSTRACT

In 2010 the U.S. Supreme Court fundamentally reset the jurisdictional sweep of U.S. securities law in *Morrison v. National Australia Bank*. No longer could foreign plaintiffs access the U.S. courts if a defendant engaged in conduct in the U.S. affecting securities prices outside the U.S., or conduct outside the U.S. had a significant effect on securities prices inside the U.S. Under *Morrison*'s new "transactional test" only purchasers of securities on a U.S. exchange or in a U.S. transaction would be able to bring securities fraud claim under Section 10(b). The *Morrison* decision therefore greatly heightens the importance of alternative non-U.S. jurisdictions hosting securities fraud lawsuits. Prior to *Morrison*, however, the Netherlands had already begun to host global securities settlements under its statute allowing for the settlement of mass claims, the *Wet Collectieve Afwikkeling Massaschade* (WCAM). As of 2019, the WCAM has been used to settle global securities fraud claims in four major cases, including the 1.2 billion euro settlement in the *Fortis* case, the largest ever outside the United States. The WCAM differs in crucial ways from the U.S. securities fraud class action regime, however. Most importantly, because the WCAM does not afford plaintiff shareholders a collective means to sue, the balance of power shifts decisively

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towards the defendant as compared to the American system. A close look at *Morrison* and the WCAM settlements to date illustrates that to some extent the development of this law is an example of regulatory competition. Indeed, both the U.S. Supreme Court and the Dutch courts have understood their role as affording differing, though complementary, systems for solving securities fraud claims. The theory of regulatory competition is not the only cause driving the development of a global class action mechanism under Dutch law, however. The jurisprudential commitments of the Supreme Court's conservative wing, as well as principles of justice and the workings of chance, have also shaped the development of this new body of law. This Article surveys the WCAM as a mechanism to settle securities fraud claims, with an eye towards comparing it to its American counterpart. While critics of the American system will be heartened by the fact that plaintiffs are deprived of the ability to launch *in terrorem* litigation, the Dutch system fails to improve on the more trenchant flaws of the American securities fraud class action regime.

TABLE OF CONTENTS

INTRODUCTION 482

I. MORRISON V. NATIONAL AUSTRALIA BANK: CLOSING THE COURTROOM DOORS 486

 A. *The Conduct and Effects Test*..... 487

 B. Morrison v. National Australia Bank..... 492

 C. *The Political Economy of Morrison* 497

II. THE DUTCH MASS SETTLEMENT MECHANISM AND THE GROWTH OF THE GLOBAL SECURITIES SETTLEMENT 504

 A. *The WCAM*..... 504

 B. *Securities Settlements under the WCAM*..... 511

 1. Shell Petroleum 512

 2. Vedior 516

 3. Converium 517

 4. Fortis 522

 5. Petrobras..... 526

 6. Failed Settlements and the Limits of the WCAM: *British Petroleum and Rabobank*..... 530

III. IN COMPARISON: THE WCAM AND THE AMERICAN SECURITIES FRAUD CLASS ACTION 535

 A. *Altering the Balance of Power* 536

 B. *The Problems of Circularity and Deterrence* 539

 C. *Lawyers’ Incentives* 544

 D. *The Political Economy of the WCAM Securities Settlement*..... 551

CONCLUSION 557

INTRODUCTION

The U.S. Supreme Court's landmark 2010 decision in *Morrison v. National Australia Bank* shut the U.S. Federal courthouse doors to securities fraud lawsuits on behalf of shareholders purchasing securities in foreign transactions.¹ As a result, interest in foreign alternatives to the U.S. securities fraud class action on the part of would-be plaintiffs and their legal representatives has increased greatly. While a number of jurisdictions have provisions allowing for mass claims to be brought before their courts, none of them have the complete list of factors that make securities class actions viable in the United States: opt-out class rules, the possibility of substantial monetary damages, the American rule for litigation funding (i.e., no "loser pays" or English rule cost-shifting for unsuccessful plaintiffs), and the fraud-on-the-market standard for demonstrating reliance on a defendant's statements.² Furthermore, of the jurisdictions that do allow an opt-out mass action in a securities claim, only the Netherlands has hosted truly global settlements under something approaching an American-style class action mechanism.

While *Morrison* heightens the importance of the Dutch statute allowing for the settlement of mass claims, its use in securities cases actually predates *Morrison*. The *Wet Collectieve Afwikkeling Massachade* (the WCAM) was enacted in 2005, and was first used in a securities settlement in *Shell Petroleum* in 2007.³ Since then, three more securities settlements have been concluded under the WCAM, with the ongoing *Petrobras* action as another potential settlement.

1. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

2. See John C. Coffee, *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895, 1896–97 (2017); Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307–08 (2011).

3. Hof's-Amsterdam 29 mei 2009, JOR 2009, 197 m.nt. AFJA Leitjen (*Shell Petroleum NV/Dexia Bank Nederland NV*) (Neth.) [hereinafter *Shell Petroleum*] (translated by author). See *infra* notes 121–48 and accompanying text.

While only five in total, these actions are of major importance. At 1.2 billion euros *Fortis* is the largest securities settlement ever outside the U.S. The value of a Petrobras settlement would likely exceed that, as the U.S. action settled for \$2.95 billion in 2018.⁴ Enough securities cases have now been settled under the WCAM to establish it as a potential alternative to the American class action where plaintiffs can no longer access American courts. That said, the specific requirements of the WCAM shift the leverage in a settlement negotiation decisively towards the defendants, so many cases that would have otherwise been viable under American law will fail to settle under the Dutch statute. The WCAM does not offer a clean replacement or substitute for the American class action but rather a more limited mechanism that gives a conclusive effect to a settlement otherwise reached by the parties.

The fact that the WCAM offers a more limited avenue to plaintiffs suggests the central question this Article will explore: Given the extensively documented flaws of the American securities fraud class action, to what extent does the WCAM represent an improvement over its American counterpart? Does the WCAM avoid at least some of the problems that call the efficacy of the American securities class action regime into question while at the same time offering real benefits to investors and corporations? At first glance, critics of the American class action may be heartened by the fact that the Dutch procedure does not offer a class-wide cause of action, thereby depriving would-be plaintiffs and their legal representatives of the ability to launch *in terrorem* litigation designed solely to extract a settlement. The WCAM does shift leverage to the defendants, often decisively, in the settlement negotiations that will precede any legal proceedings in the Amsterdam Court of Appeals. On the other hand, simply shifting advantage to the

4. *In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858, 864 (S.D.N.Y. 2018), *aff'd*, 784 Fed. App'x 10 (2d Cir. 2019).

defendants, which critics would presumably think a good thing, does not address the more trenchant criticisms of the American class action. These center around circularity: due to the unique structural features of the American securities class action, any remedy it affords generally involves one group of shareholders compensating another group. This is because in a securities class action, one class of shareholders, generally the long-term, “buy and hold” investors, pays for a damage award going to shareholders, often short-term traders, who bought or sold shares during the class period. And in addition to circularity, up to 50% of the total cost of administering this remedy will go to the legal fees of plaintiffs’ and defense counsel. While the problems of a circular remedy and expensive legal fees are central to the criticism of the American class action, they are not the only legitimate complaints. Also important are questions concerning the efficacy of any deterrent effect the current regime might have and the incentives for plaintiffs’ lawyers in these cases.

Surveying *Morrison* and the recent settlements concluded under the WCAM, this Article comes to the following conclusions: First, the WCAM offers only a limited improvement upon the American securities fraud class action. While offering plaintiffs only a settlement mechanism and not a cause of action greatly reduces the ability of plaintiffs to launch “strike suits,” the fundamental circularity embodied in the American class action remains. From an economic standpoint, then, the Dutch synthetic class action represents only a crude sort of improvement over the American class action. It greatly reduces the incidence of vexatious litigation, but any settlement concluded will still be essentially circular. And in radically reducing the amount of cases, the Dutch regime does away with the compensatory and other benefits that those settlements do provide in the U.S., whatever their flaws. Secondly, its deterrent effect is subject to the same questions and uncertainties as with the American securities class action. There probably is in fact a

deterrent effect, and beyond that a symbolic value, in allowing for securities class actions, but it is difficult to quantify and will therefore remain open to criticism on purely economic grounds. Thirdly, the story of *Morrison* and the growth of this new alternative is important as a matter of political economy. It illustrates that growth in the law is neither purely a matter of economic rationality, considerations of justice or fairness, or chance, but involves an admixture of all three. From a political-economic standpoint it is understandable, and ultimately desirable, that alternatives for collective litigation are being developed in non-U.S. jurisdictions. Securities regulation in the real world is not just a matter of economics narrowly conceived, but also involves factors that are political and ultimately moral.

I. *MORRISON V. NATIONAL AUSTRALIA BANK*: CLOSING THE COURTROOM DOORS

The legal causes contributing to the growth of the Dutch synthetic securities class action include both Dutch and American factors. With one exception, the WCAM settlements concluded so far are the fruit of a series of parallel securities litigations in the United States and the Netherlands. Prior to *Morrison*, non-U.S. shareholders were dismissed from the U.S. Federal litigation in both *Royal Dutch/Shell*⁵ and *Converium*,⁶ while the entire U.S. action against Fortis was dismissed.⁷ These three decisions were all based on the conduct prong of the pre-*Morrison* “conduct and effects test,” which gave the Federal courts jurisdiction where “the defendant’s conduct in the United States was more than merely preparatory to the fraud”⁸ As these cases demonstrate, the conduct test kept foreign plaintiffs out of U.S. court where shareholders purchased their shares abroad and the intrinsic connection of the alleged fraudulent activity to the United States was weak. In overturning the conduct and effects test, *Morrison* goes substantially further. Its “transactional test” allows a U.S. Federal court jurisdiction over a 10b-5 claim “only in transactions in securities listed on domestic exchanges, and domestic transactions in other securities”⁹ On the American side, then, the original legal cause of the WCAM securities settlement was the restrictive application of the conduct test, which is now supplanted by *Morrison*’s far more restrictive transactional test.

5. *In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712, 724 (D.N.J. 2007).

6. *In re Scor Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 569 (S.D.N.Y. 2008).

7. *Copeland v. Fortis*, 685 F.Supp.2d 498 (S.D.N.Y. Feb. 18, 2010).

8. *In re Royal Dutch/Shell*, 522 F. Supp. 2d at 717 (citing *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991)).

9. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010).

Morrison is important on a number of levels. By erecting barriers to lawsuits with significant foreign elements, it presages the current anti-global moment. Within American law, it is an important case in a line of decisions strengthening the presumption against extraterritoriality, which makes it much more difficult for foreign plaintiffs to bring cases in United States federal court.¹⁰ It also reflects the desire of the Supreme Court's conservative wing to reduce the litigation risk businesses face, which includes reducing the sweep of the private right of action under Rule 10b-5.¹¹ And as a matter of jurisprudence, it is most obviously a repudiation of a body of judge-made law investing later judges with significant discretion.

A. *The Conduct and Effects Test*

Prior to *Morrison*, U.S. courts developed two tests to determine whether a securities claim with significant foreign elements could be brought in U.S. court. Together these are labelled the "conduct and effects test."¹² Under the law developed by the Second Circuit, and then adopted by the other circuits, if significant conduct concerning a foreign securities fraud occurred in the U.S., or a foreign securities fraud resulted in specific harmful effects on U.S. securities markets, the U.S. Federal courts had subject matter jurisdiction in such a case. The development of this law was prompted by the lack of clear indication in the Securities Exchange Act of 1934 (the Exchange Act or the 1934 Act) itself as to its extraterritorial application. This lack of clear

10. See, e.g., *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016) (RICO); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (Alien Tort statute); *Microsoft v. AT&T Corp.*, 550 U.S. 437 (2007) (intellectual property); *F. Hoffman -La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (antitrust); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (anti-discrimination law). See generally Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1097–99 (2015).

11. See *infra* notes 71–78 and accompanying text.

12. See *SEC v. Berger*, 322 F.3d 187, 192–93 (2d Cir. 2003).

direction opened the door for Judge Henry Friendly and others on the Second Circuit to develop a body of judge-made law. While strong policy reasons supported the conduct and effects test, and the statutory interpretation supporting it was plausible, it was still open to criticism on both legal and policy grounds. Judge Bork, and later Justice Scalia, both characterized it as an act of judicial legislation.¹³ Scholars also criticized it as indeterminate, as well as potentially leading to comity problems with foreign nations and their securities regulators.¹⁴

The effects prong of the conduct and effects test begins with *Schoenbaum v. Firstbrook*.¹⁵ Schoenbaum had invested in Banff Oil Ltd., a Canadian company with stock trading on both the Toronto Stock Exchange and the American Stock Exchange. Schoenbaum alleged that sales of treasury stock to its controlling shareholder and a French bank fraudulently deprived the company of value, because the directors knew of valuable oil discoveries prior to the sales which weren't factored into the price.¹⁶ When the District Court granted defendants' motion to dismiss on the basis of lack of subject matter jurisdiction,¹⁷ Schoenbaum appealed and the Second Circuit reversed. Chief Judge Lumbard's opinion is grounded in a rather subtle reading of the Exchange Act. The District Court below focused on Exchange

13. See *Morrison*, 561 U.S. at 261; *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987).

14. See, e.g., Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89 (2004); Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207 (1996); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WISC. L. REV. 465 (2009); Donald C. Langevoort, *Schoenbaum Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace*, 55 LAW & CONTEMP. PROBS. 241 (1992).

15. *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968).

16. *Id.* at 205.

17. *Schoenbaum v. Firstbrook*, 268 F. Supp. 385 (S.D.N.Y. 1967), *aff'd in part, rev'd in part*, 405 F.2d 215 (2d Cir. 1968).

Act Section 30(b), which specifies that in the absence of SEC regulations, the Act does not apply “to any person in so far as he transacts a business in securities without the jurisdiction of the United States[.]”¹⁸ The Second Circuit however construes Section 30(b) in light of Section 30(a), which gives the SEC authority to regulate the overseas activities of broker-dealers engaging in transactions on foreign exchanges. The court thus cabins the import of 30(b) by interpreting it as permitting broker-dealers “to conduct transactions in securities outside of the United States without complying with the burdensome reporting requirement of the Act and without being subject to its regulatory provisions”¹⁹ On the court’s understanding, then, Section 30(b) does not imply that there is no extraterritorial application of the Exchange Act, but rather that in the absence of SEC rules that would otherwise govern such activity, broker-dealers are free to transact on foreign stock exchanges.²⁰ Further support for the Act’s extraterritorial application is found in SEC interpretations applying it abroad.²¹ The Second Circuit thus determines that foreign transactions resulting in detrimental effects on the domestic securities markets are subject to the Exchange Act.

The conduct prong begins four years later with Judge Friendly’s decision in *Leasco Data Processing Equipment Corp. v. Maxwell*.²² Here, Leasco alleged that defendant Maxwell and others fraudulently induced it to purchase \$22 million of stock in Pergamon Press in conjunction with a planned acquisition.²³ There were numerous false

18. *Id.* at 392.

19. *Schoenbaum v. Firstbrook*, 405 F.2d 200, 207 (2d Cir. 1968).

20. *Id.*

21. *Id.* at 206–07.

22. *See Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

23. *Id.* at 1332–33.

communications concerning Pergamon's financial condition and profitability, as well as a rumored outside takeover bid, all made in an attempt to sell Pergamon at an inflated price.²⁴ Pergamon was a British company and Leaseco had purchased the stock on the London Stock Exchange; some of these misstatements allegedly occurred in the U.S., while others were made in the U.K.

Judge Friendly begins his analysis by observing that we are here concerned with the question of the extent to which a state can regulate conduct within its own borders, not whether it has prescriptive jurisdiction concerning the effects of conduct that occurs abroad.²⁵ Looking at both Section 17 of the Securities Act of 1933 and Section 10(b) of the 1934 Act, he observes that neither are limited in their applicability to the main subject of their respective acts: the "registration of securities offered for sale by issuers or underwriters unless the securities or transactions were exempted"²⁶ in the case of the 1933 Act, and sales of securities on the organized stock markets for the 1934 Act.²⁷ The next step is to conclude that just as Congress intended to protect sales of securities not listed "on organized United States markets, we cannot perceive any reason why it should have wished to limit the protection to securities of American issuers."²⁸ Extending this analysis further, the court asks, as Justice Stevens later would in *Morrison*, whether Congress would have intended the anti-fraud provisions of the securities law to cover a foreign promoter coming to New York and making fraudulent claims intending to induce an American to purchase securities in a foreign company.²⁹

24. *Id.* at 1331–32.

25. *Id.* at 1333–34.

26. *Id.* at 1335.

27. *Id.* at 1336.

28. *Id.*

29. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 285 (Stevens, J., concurring); *Leasco*, 468 F.2d at 1336–37.

Acknowledging that this is close case, the court determines that the 1934 Act should cover such activity, at least “when substantial misrepresentations were made in the United States.”³⁰

Judge Friendly’s decision in *Bersch v. Drexel Firestone Inc.*³¹ is also important for the conduct and effects test. *Bersch* purchased shares of I.O.S., Ltd., a Canadian mutual fund manager, in an offering in the Bahamas.³² The court was confronted with the question of the degree of conduct or effects in the U.S. required for extraterritorial application of the Exchange Act. As for conduct, although “Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners,” that principle does not extend “to cases where the United States activities are merely preparatory or take the form of culpable nonfeasance and are relatively small in comparison to those abroad.”³³ As for the level of effects required, there is subject matter jurisdiction only when fraudulent acts committed abroad “result in injury to purchasers or sellers of . . . securities in whom the United States has an interest, not where acts simply have an adverse effect on the American economy or on American investors generally.”³⁴

Bersch is therefore doubly significant. In instructing the courts to disregard small or de minimis actions, or very general effects, it invests courts with an important, fact-intensive role. And in arriving at this position, the *Bersch* court itself is engaged in a similar act of judging, but on the level of statutory interpretation, as were the *Schoenbaum* and *Leasco* courts. The decision balances an assumed general desire on the part of Congress to protect Americans from securities fraud, even when a case has significant foreign

30. *Leasco*, 468 F.2d at 1337.

31. *Bersch v. Drexel Firestone Inc.*, 519 F.2d 974 (2d Cir. 1975).

32. *Id.* at 980.

33. *Id.* at 987.

34. *Id.* at 989.

circumstances, with an awareness that judicial economy should preclude considering cases with minimal activity conducted in the U.S. or only general, diffuse effects on American markets. It is a sophisticated balancing act that places the judiciary in a central role, both in its legal function as construing the meaning of Federal statutes and in the fact-finding role of a District court judge.

The conduct and effects test begun by *Schoenbaum*, *Leaseco*, and *Bersch* was adopted by the other Circuits in varying forms, some more stringent and others more permissive.³⁵ While it was criticized as indeterminate and potentially injurious to international comity, Congress never stepped in to rewrite the law in this area, thereby seemingly signaling its agreement.³⁶ The test of the Exchange Act's extraterritorial application stood as a body of judge-made law until the decision of the U.S. Supreme Court in *Morrison v. National Australia Bank*.

B. *Morrison v. National Australia Bank*

In overturning the conduct and effects test, *Morrison v. National Australia Bank* shuts the door to securities claims arising out of foreign transactions. Its transactional test replaces the conduct and effects tests with a bright-line rule that allows 10(b) claims concerning "only transactions in securities listed on domestic exchanges, and domestic transactions in other securities . . ."³⁷ *Morrison* is of a piece with other recent Supreme Court decisions restricting the ability of foreign plaintiffs to access U.S. courts, with Justice Scalia's opinion for the majority driven by his signature textualist mode of interpretation and its concomitant

35. See Joshua L. Boehm, *Private Securities Fraud Litigation after Morrison v. National Australia Bank: Reconsidering a Reliance-Based Approach to Extraterritoriality*, 53 HARV. INT'L. L. J. 249, 256–57.

36. As Justice Stevens emphasizes in his *Morrison* concurrence. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 278 (2010).

37. *Morrison*, 561 U.S. at 267.

emphasis on legislative supremacy. While the opinion is open to serious criticism, its transactional test also responds to real defects in the previous body of caselaw under the conduct and effects test. By shutting the doors to the U.S. Federal courts for foreign securities lawsuits, *Morrison* greatly increases the importance of the development of procedural mechanisms applicable to mass claims in securities suits outside the United States.

The *Morrison* plaintiffs purchased shares in National Bank of Australia (“NAB”), an Australian company, on the Australian Stock Exchange.³⁸ (While NAB also had American Depositary Shares, or ADRs, trading on the New York Stock Exchange, these were not at issue in the lawsuit.³⁹) In 1998 NAB purchased HomeSide Lending, Inc., a Florida company engaged in the American mortgage servicing business.⁴⁰ As a mortgage servicer, its value was dependent upon the mortgage servicing rights it possessed. When these were written down by \$450 million in July 2001, and a further \$1.75 billion in September 2001, investors brought a securities fraud suit against its parent, NAB. They alleged that HomeSide had manipulated the financial models used to value the mortgage-servicing rights, and that even after senior executives at both NAB and HomeSide became aware of misstatements based on these models, they failed to correct them.⁴¹

Because some of the conduct that occurred during the

38. *Morrison v. Nat’l Austl. Bank, Ltd.*, 547 F.3d 167, 169 (2d Cir. 2008), *aff’d*, 561 U.S. 247 (2010). Robert Morrison, who was dismissed as a plaintiff in the case before it reached the Supreme Court, was an American who purchased ADRs in National Australia Bank on the New York Stock Exchange, while the remaining three plaintiffs were Australians who had purchased their shares abroad. National Australia Bank’s Ordinary Shares traded on the Australian Stock Exchange as well as the Tokyo and London Stock Exchanges. *Id.* at 168.

39. See Genevieve Beyea, *Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L. J. 537, 564–66 (2011).

40. *Morrison*, 561 U.S. at 251.

41. *Id.* at 252.

alleged fraud took place in the United States, plaintiffs hoped to bring their case under the “conduct” prong of the conduct and effects test. *Morrison* was a so-called “F-cubed” (or “foreign cubed”) case, involving a foreign plaintiff purchasing shares in a foreign company on a foreign stock exchange.⁴² As such, it was the type of case with the least obvious connection to the United States.⁴³ The Southern District of New York found that the activities in the United States were “at most, a link in the chain of an alleged overall securities fraud” and granted defendants’ motion to dismiss on the basis of lack of subject matter jurisdiction.⁴⁴ The Second Circuit affirmed,⁴⁵ and plaintiffs appealed to the Supreme Court.

Justice Scalia’s majority opinion begins by recasting what had long been understood as a question of subject matter jurisdiction into a merits question: “But to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question.”⁴⁶ The practical import of this is to convert the Rule 12(b)(1) dismissal for lack of subject matter jurisdiction into a Rule 12(b)(6) dismissal.⁴⁷ The recasting is important on a jurisprudential level as well, however. The transformation of a jurisdictional question into a merits one deprives a lower court of the ability to determine *sua sponte* as a matter of “adjudicative jurisdiction” whether

42. See Beyea, *supra* note 39, at n. 3 (crediting Stuart M. Grant and Diane Zilka for coining the term “Foreign Cubed” lawsuit to refer to suits brought by foreign plaintiffs concerning the stock of foreign companies traded on foreign exchanges in their article *The Role of Foreign Investors in Federal Securities Class Actions*, in CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES NUMBER B-1442 93, 96 (Practicing L. Inst. ed., 2004)).

43. See Beyea, *supra* note 39, at 539.

44. *In re Nat’l Aust. Bank Sec. Litig.*, 2006 U.S. Dist. LEXIS 94162, at *25 (S.D.N.Y. 2006).

45. *Morrison v. Nat’l Austl. Bank*, 547 F.3d 167, 177 (2d Cir. 2008), *aff’d*, 561 U.S. 247 (2010).

46. *Morrison*, 561 U.S. at 254.

47. *Id.*

it has authority to hear a case.⁴⁸ Re-casting the (formerly) jurisdictional question as a merits question converts it into a matter of prescriptive jurisdiction, where the legislature holds sway.⁴⁹ Now Congress, not the judiciary, possesses the proper authority to determine whether or not a given case falls under the securities law. Recasting the jurisdictional question as a merits question supports the opinion's politics of legislative supremacy.⁵⁰

After correcting this “threshold error,” *Morrison* then turns to the question of the extraterritorial application of the Exchange Act. In the cases formulating the conduct and effects test, “the Second Circuit had excised the presumption against extraterritoriality from the jurisprudence of § 10(b) and replaced it with the inquiry whether it would be reasonable (and hence what Congress would have wanted) to apply the statute in a given situation.”⁵¹ Quoting Judge Bork, the majority observes “that rather than courts’ ‘divining what Congress would have wished’ if it had addressed the problem[, a] more natural inquiry might be what jurisdiction Congress in fact thought about and conferred.”⁵² The Court then reviews three provisions of the Exchange Act. The definition of “interstate commerce” includes “trade, commerce, transportation, or communication . . . between any foreign country and any State.”⁵³ *EEOC v. Aramco* however pointed out that the Court had “repeatedly held that

48. See Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1312 (2014).

49. See Maria Slobodchikova, *Private Right of Action in Transactions with Cross-Border Security-Based Swaps*, 35 REV. BANKING & FIN. L. 739, 753–56 (2016).

50. See Lea Brilmayer, *New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 666–67 (2011).

51. *Morrison*, 561 U.S. at 257.

52. *Id.* at 260 (quoting *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987)).

53. 15 U.S.C. § 78c(a)(17) (2012).

even statutes that contain broad language in their definitions of ‘commerce’ that expressly refer to ‘foreign commerce’ do not apply abroad.”⁵⁴ Next, Section 2(2) of the Exchange Act states that “prices established and offered in such transactions are generally disseminated and quoted” abroad.⁵⁵ The antecedent of “such transactions” was transactions on U.S. exchanges, however, and the Court determines that this is not enough to support a foreign application. Finally, the Court analyzes Section 30 of Exchange Act, interpreting it as the District court in *Schoenbaum* had.⁵⁶ Section 30(b) states that “[t]he provisions of [the Exchange Act] or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States” unless he does so in violation of regulations promulgated by the Securities and Exchange Commission “to prevent the evasion of [the Act].”⁵⁷ In the interpretation of the Solicitor General, and Judge Lumbard writing for the Second Circuit in *Schoenbaum*, this passage presumes that the Act does apply abroad in the first instance.⁵⁸ The *Morrison* majority rejects this view, stating that it would be odd to indicate the extraterritorial application of the entire statute in such a roundabout manner.⁵⁹ Furthermore, § 30(a) does specify that the provisions of the Act shall apply extraterritorially when a broker or dealer uses a foreign exchange to effect a transaction that would be impermissible on a U.S. exchange.⁶⁰ The majority opinion agrees with the District Court in *Schoenbaum*, holding that the Exchange

54. *Morrison*, 561 U.S. at 262-63 (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991)).

55. 15 U.S.C. § 78b(2) (2012).

56. See *Schoenbaum v. Firstbrook*, 268 F. Supp. 385, 392 (S.D.N.Y. 1967).

57. 15 U.S. § 78dd(b) (2012).

58. *Morrison*, 561 U.S. at 263-64; *Schoenbaum v. Firstbrook*, 405 F.2d 200, 207-08 (2d Cir. 1968).

59. *Morrison*, 561 U.S. at 264.

60. *Id.* at 264-65.

Act does not apply extraterritorially.⁶¹

Even though the presumption against extraterritoriality applies, the facts of *Morrison* concern the conduct prong of the conduct and effects test. Because some of the allegedly fraudulent activity took place within the United States, the Court engages in a further inquiry, asking after the “focus” of the statute and whether it should apply in this case.⁶² The Court finds that the “focus” of the 1934 Act is “not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”⁶³ With this determination, the court finds that the Exchange Act does not apply here. It then announces the new transactional test to replace the conduct and effects test: “And it is in our view only such transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.”⁶⁴

C. *The Political Economy of Morrison*

Morrison is a landmark case in American securities law, and has received significant attention from both academics and practitioners in the decade since it was handed down. For purposes of this Article, there are four principal points to note: first, from the American side, the restrictive application of the conduct and effects test and then *Morrison* are primary legal causes of the development of non-U.S. securities class actions. They are however negative causes in the sense that they do not themselves enable this development, but merely spur it on. Second, the *Morrison*

61. *Id.* at 265.

62. Commentators have focused criticism of the *Morrison* opinion on this step; see, e.g., Brilmayer, *supra* n.50, at 661–66; Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1045 (2011); Franklin A. Gevurtz, *An Introduction to the Symposium and an Examination of Morrison’s Impact on the Presumption Against Extraterritoriality*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 173, 176–77 (2014).

63. *Morrison*, 561 U.S. at 266.

64. *Id.* at 267.

opinion itself appears to be primarily driven by Justice Scalia's jurisprudential commitments, not economic ones, including even matters of "judicial economy." Third, the transactional test can simultaneously be understood as implementing a theory of regulatory competition advocated by law and economics scholars as part of their criticism of the U.S. securities class action. Fourth, the concept of territoriality embodied in *Morrison* is a throwback to 19th century jurisdictional conceptions.

First, the complete closing of the courtroom doors by *Morrison* is the key legal factor driving the development of alternatives to the U.S. securities fraud class action in the past decade. While a number of countries did include some form of class action mechanism in their laws prior to *Morrison*, its effect has been to prompt entrepreneurial lawyers to test these other jurisdictions. This has brought about what Professor Coffee terms the "synthetic class action," which uses the Dutch WCAM settlement mechanism in combination with third-party funding structures to arrive at what functionally amounts to a class action covering non-U.S. investors in multi-national corporations.⁶⁵ While the Netherlands is the most important site for non-U.S. class actions, and is the focus of Part II of this Article, noteworthy cases have also occurred in Japan, Canada, Australia, Germany, and the U.K.⁶⁶ Had *Morrison* not closed the doors to the U.S. courts for foreign investors, this period of legal experimentation and rapid development would likely not

65. See Zachary D. Clopton, *The Global Class Action and Its Alternatives*, 19 THEORETICAL INQUIRY L. 125 (2018); Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Actions are Spreading Globally*, 65 U. KAN. L. REV. 965 (2017); see also Bookman, *supra* note 10, at 1115–16; John C. Coffee, *The Globalization of Securities Litigation*, CLS BLUE SKY BLOG (Sept. 19, 2016), <https://clsbluesky.law.columbia.edu/2016/09/19/the-globalization-of-securities-litigation>.

66. See David H. Kistenbroker, Joni S. Jacobsen & Angela M. Liu, *Global Securities Litigation Trends*, DECHERT LLP (July 2019), <https://www.dechert.com/knowledge/onpoint/2017/11/developments-in-global-securities-litigation.html>.

have occurred.⁶⁷ *Morrison* is therefore the key negative cause of the growth in global securities class actions. It doesn't itself enable or allow these claims, but by forcing plaintiffs and their counsel to explore jurisdictions other than the U.S. it spurred their development.

Second, the majority opinion in *Morrison* is obviously motivated by Justice Scalia's larger jurisprudential commitments. These are most famously to a textual mode of statutory interpretation as well as to the principle of legislative supremacy. While the *Morrison* majority's exercise of statutory interpretation is open to criticism, courts have struggled since the 1960s with the question of the extraterritorial application of U.S. securities law.⁶⁸ The Second Circuit's reading of the 1934 Act is subtle and non-obvious, relying on a roundabout interpretation of Section 30 to argue that Congress implicitly intended the Act to apply abroad. By focusing on the statute and failing to find any clear indication that Congress intended the 1934 Act to apply abroad,⁶⁹ Justice Scalia is using his familiar method of focusing on the text of a law itself to divine its meaning. This

67. *See Coffee, supra* note 2, at 1900.

68. The *Schoenbaum* Court discusses both *Kook v. Crang*, 182 F. Supp. 388 (S.D.N.Y. 1960) and *Ferraioli v. Cantor*, CCH Fed. Sec. L. Rep. ¶ 91, 615 (S.D.N.Y. 1965), which the District Court below relied on. *See Schoenbaum*, 405 F.2d at 208. Both these cases rejected the extraterritorial application of the 1934 Act; the Second Circuit believed that *Kook* properly interpreted Sec. 30(b) to disallow application of Sec. 7(c) of the 1934 Act, while *Ferraioli* extended this too far in holding that an isolated transaction in Canada was not subject to the Act. *See also Zoelsch, v. Arthur Andersen & Co.*, 824 F.2d 27, 31–33 (D.C. Cir. 1987) (discussing the presumption against extraterritoriality but ultimately deferring to the Second Circuit). For development of the argument that the 1934 Act should not apply extraterritorially, see Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677 (1990).

69. Whether or not the majority is hereby instituting a "clear statement rule" is in dispute in *Morrison*. Compare the majority's declaration that "Subsection 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect," *Morrison*, 561 U.S. at 265, with Justice Stevens's claim that "the Court seeks to transform the presumption from a flexible rule of thumb into something more like a clear statement rule." *Id.* at 278.

is in direct contrast to Judge Friendly's "purposive" mode of interpretation in *Leaseco* and *Bersch*.⁷⁰ The decision also furthers Justice Scalia's commitment to legislative supremacy by depriving lower Federal court judges of the discretion to determine whether a foreign securities case meets the threshold for subject matter jurisdiction in U.S. court.

Behind these jurisprudential commitments also sits a political commitment of the modern conservative legal movement, of which Justice Scalia was the most important figure. This is the goal of raising the barriers to lawsuits against corporate defendants that are perceived as meritless or frivolous.⁷¹ As Justice Stevens notes in his *Morrison* concurrence—in the judgment only, and really a dissent—the majority opinion is part of a sweep of securities law decisions trimming back the private right of action under Rule 10b-5.⁷² Such decisions include *Central Bank of Denver*⁷³ and *Stoneridge*⁷⁴ as well as more recent cases

70. See Boehm, *supra* note 35, at 254–55. Of course, it is Judge Friendly's creation of the conduct and effects test after considering what "Congress would have wanted" that is the target of Justice Scalia's criticism. *Morrison*, 561 U.S. at 255–61.

71. See Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton*, 57 ARIZ. L. REV. 37, 40 (2015); Arthur R. Miller, McIntyre in Context: A Very Personal Perspective, 63 S.C. L. REV. 465, 477 (2012); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006); Bookman, *supra* note 10, at 1085, 1107. A crucial victory for this movement was the passage of the Private Securities Litigation Reform Act of 1995 (PSLRA). See John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1534–36 (2006).

72. *Morrison*, 561 U.S. at 286 (quoting his dissent in *Stoneridge Inv. Partners v. Sci.-Atlanta*, 552 U.S. 148, 175 (2008)); cf. John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1, 3 (2015) (noting that securities law cases in the Roberts court have been "significantly more 'expansive'" than in the Powell era).

73. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

74. *Stoneridge*, 552 U.S. at 159.

including *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*⁷⁵ and *Janus Capital Group*⁷⁶ (though not *Halliburton II*,⁷⁷ which preserves the reliance presumption). Furthermore, such decisions are of a piece with decisions by the Roberts court in the areas of civil procedure and class action claims, which continue the trend begun under the Rehnquist court to restrict the ability of plaintiffs to bring claims in federal court against business defendants.⁷⁸ *Morrison* therefore may not only be motivated by matters of jurisprudence, but also by what can be termed matters of political economy—the commitment of the conservative judicial movement to restrict the ability of plaintiffs’ lawyers to bring cases in federal court against corporate defendants.

Even though the jurisprudential commitments of the conservative wing of the Court most obviously drive *Morrison*, its transactional test is commensurate with the criticism of class action lawsuits pursued by law and economics scholars since the 1980s.⁷⁹ Professors Choi and Guzman, and Romano, among others, have all advocated for a system of regulatory competition in the area of securities law.⁸⁰ Just as the states could be seen as offering competing legal regimes for corporate law, these scholars advocated for

75. 551 U.S. 308, 328–29 (2007).

76. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 146–48 (2011).

77. *Erica John Fund, Inc. v. Halliburton Co. (Halliburton II)*, 563 U.S. 804, 811–13 (2011).

78. See Coates, *supra* note 72, at 3.

79. See Beyea, *supra* note 39, at 550–51, 558–60 (citing Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT’L L. & BUS. 207, 219–39 (1996) and Choi & Silberman, *supra* note 14, at 480–88).

80. Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998); see generally Stephen Choi, *Promoting Issuer Choice in Securities Regulation*, 41 VA. J. INT’L L. 815 (2001); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L. J. 2359 (1998); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRY L. 387 (2001).

a similar system in securities law. This could occur through a legal regime that allowed issuers to choose the level of securities regulation that would apply to them, or through transnational competition in securities regulation. By limiting the protections of the 1934 Act to investors purchasing securities in United States-based transactions, the transactional test can be seen as instantiating this theory.⁸¹ Because only these transactions would be covered, issuers would now have the choice in deciding where to list their securities. If they believed investors would be better off without the protections of U.S. securities law, and the attendant costs of defending against securities class action lawsuits, they would have the choice not to sell their securities in U.S.-based transactions.⁸² The transactional test therefore is a step in the direction of allowing issuer and investor choice in securities law, and so can be seen as implementing the theory of regulatory competition in securities law put forward by law and economics scholars.⁸³

Finally, it is important to note that the conception of territoriality embodied in the transactional test is a throwback to a nineteenth century conception.⁸⁴ Whether conceived of as a question on the merits or of subject matter jurisdiction, a test that rests on a firm distinction between what is inside U.S. borders and everything else sits in tension, sometimes severe, with modern financial practice.⁸⁵

81. See Beyea, *supra* note 39, at n.86; Choi & Silberman, *supra* note 14.

82. There is evidence to suggest that in fact investors do not value the private right of action against international corporations. See John Armour, et al., *Investor Choice in Global Securities Markets* 42 (EUR. CORP. GOVERNANCE INST., WORKING PAPER NO. 371, 2017); Amir N. Licht, et al., *What Makes Bonding Stick? A Natural Experiment Involving the U.S. Supreme Court and Cross-Listed Firms* 31 (EUR. CORP. GOVERNANCE INST., WORKING PAPER NO. 524, 2017).

83. See Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law after Morrison v. National Australia Bank*, 97 MINN. L. REV. 132, 142 (2012).

84. Bookman, *supra* note 10, at 1098; see Colangelo, *supra* note 62, at 1080.

85. See Edward Greene & Arpan Patel, *Consequences of Morrison v. NAB, Securities Litigation and Beyond*, 11 CAP. MKTS. L. J. 145, 159–60 (2016); see also

While the recent cases reviving the presumption against extraterritoriality depend on a clear border between what is inside and outside the U.S., in drawing this line in twenty-first century financial law *Morrison* represents “extraterritoriality on steroids.”⁸⁶ While beyond the scope of this Article, many of the difficulties of applying *Morrison* to the world of contemporary finance stem from fact patterns where it is not clear what—if any—jurisdiction a transaction occurs in.⁸⁷ Part of the significance of *Morrison* then is that it attempts to erect firm borders in a globalizing world.⁸⁸ Indeed, *Morrison*, and the strengthening of the presumption against extraterritoriality more generally, can be seen as a precursor to the current anti-global moment we are now witnessing in many polities across the world.

Armour et al., *supra* note 82, at 9–11 (discussing how technological development causes geographic proximity to decrease in importance).

86. Colangelo, *A Unified Approach*, *supra* note 62, at 1057.

87. See Hannah L. Buxbaum, *Remedies for Foreign Investors under U.S. Federal Securities Law*, 75 L. & CONTEMP. PROBS. 161, 167 (2012); Christopher Calfee, *Can't See the Forest for the Trees: Where Does a Purchase or Sale of Securities Occur?*, 2 AM. U. BUS. L. REV. 153, 154–55 (2012).

88. See Amir Licht, *Liability for Transnational Securities Fraud, Quo Vadis?* 31 (European Corp. Governance Inst., Working Paper No. 272, 2014).

II. THE DUTCH MASS SETTLEMENT MECHANISM AND THE GROWTH OF THE GLOBAL SECURITIES SETTLEMENT

While *Morrison* incentivizes shareholders and their representatives to look for alternatives to the American securities fraud class action, the implementation of legal mechanisms allowing for mass claims in non-U.S. jurisdictions is the positive factor leading to the development of the global securities class action. While a number of jurisdictions potentially allow for these claims, so far the most important one has been the Netherlands. Not only is the Dutch WCAM flexible and easy to use when companies and shareholder representatives agree on a settlement, the liberal interpretation of its jurisdictional requirements by the Amsterdam Court of Appeals has allowed for truly global settlements. Part II below first surveys the main features of the WCAM, and then takes an in-depth look at its application in securities fraud cases so far.

A. *The WCAM Mechanism*

The *Wet Collectieve Afwikkeling Massachade* was originally enacted to provide the manufacturer of the synthetic hormone DES a means to settle the many claims that arose after children were born with birth defects to mothers using the drug.⁸⁹ DES presented a classic mass tort situation, where thousands of children were born with birth defects caused by the drug. While originally added to the Dutch Civil Code (and the Dutch Code of Civil Procedure) to allow for settlement of this type of claim in a manner which would provide compensation to the victims and finality to the wrongdoer, the WCAM was not restricted to mass tort cases and was soon applied to other types of claims.

89. See Bart Krans, *The Dutch Act on Collective Settlement of Mass Damages*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 281, 284 (2014). The DES case was settled in 2006. See Hof's-Amsterdam 1 juni 2006, NJ 2006, 461 m.nt. (Foundation Centre DES et al.) (Neth.). The WCAM comprises Articles 7:907–910 of the Dutch Civil Code [hereinafter, DCC] and Article 1013 of the Dutch Code of Civil Procedure [hereinafter, DCCP] (translated by author).

Because it only allows for a settlement, and not a collective action determining liability, it is fundamentally different from the class action lawsuit that American lawyers are familiar with under Rule 23 of the Federal Rules of Civil Procedure.⁹⁰ Although a proposal to allow for legal actions that would determine damages in mass claims was introduced in the Dutch Parliament in 2016,⁹¹ the WCAM itself does not give would-be plaintiffs that right. Its scope is more modest: It allows the parties to a settlement agreement to petition the Court of Appeals in Amsterdam, bypassing the Court of First Instance, to declare the agreement binding between the parties.⁹² While this procedure is far more limited than what American lawyers think of as a class action lawsuit, its limited nature has actually allowed it to function effectively as the vehicle to resolve mass claims on a global scale in certain cases. A look at its essential legal features illustrates why this is so.

First, because all parties to a Settlement Agreement are required to petition the court to declare the settlement binding, it requires that the parties themselves agree to conclude the dispute before the courts become involved.⁹³ Under the WCAM, the Amsterdam Court of Appeals only gives a mutually agreed upon settlement effect. If the parties can agree, the settlement is presumably mutually beneficial to all parties given the factual and legal context of the dispute. The parties to the settlement will be an association (*Stichting*) or foundation (the Dutch Association for Shareholders, *Vereniging voor Effectenbezitters* or “VEB” is a

90. See Hensler, *supra* note 65, at 971 (“Variations in Class Action Design”).

91. See Jan de Bie Leuveling Tjeenk & Bart van Heeswijk, *Netherlands*, CLASS ACTIONS L. REV. 133–36 (2019).

92. DCCP 1013(3). Standing in a WCAM action is limited to a foundation or association. See Ianika Tzankova, *Everything You Wanted to Know about Dutch Foundations but Never Dared to Ask: A Checklist for Investors* (Tilburg L. Sch. Legal Stud. Res. Papers Series, Working Paper No. 04, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730618.

93. See Krans, *supra* note 89, at 287.

foundation involved in the settlements discussed below) set up to represent the interests of those who have suffered harm, and the parties that have (allegedly) caused the harm.⁹⁴ The association or foundation can bring a legal action for a declaratory judgment to determine the liability of defendants on an opt-in basis, but such a proceeding is not required to bring a settlement before the Amsterdam court.⁹⁵ (Nor would the result of such an action have *res judicata* effect in another action.⁹⁶) By making the involvement of the court dependent on the mutual agreement of the parties, any settlement reached is presumably mutually beneficial, given the alternatives.⁹⁷ If any party does not agree to a proposed settlement, it cannot be declared binding by the court.

A number of factors incentivize the shareholder representatives to accept an agreement. Perhaps most important is that after a settlement is declared binding, if parties who would be beneficiaries under the settlement do not opt out within a specified time period they will be barred from bringing a separate claim.⁹⁸ Because the WCAM is an “opt-out” mechanism, not an opt-in one as is typical elsewhere outside the U.S.,⁹⁹ it automatically operates to include individual beneficiaries of the settlement after it has been given binding effect by the Court.¹⁰⁰ On the side of the party allegedly causing the harm, there can also be strong

94. DCC 7:907(1).

95. See Coffee, *supra* note 2, at 1903–04. Such an action would be brought under DCC 3:305. See Tjeenk & Heeswijk, *supra* note 91, at 135–36.

96. See Tomas Arons & Willem H. van Boom, *Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands*, EUR. BUS. L. REV. 857, 864 (2010).

97. See Coffee, *supra* note 2, at 1906.

98. See Willem H. Van Boom, *Collective Settlements of Mass Claims in the Netherlands*, in *AUF DEM WEG ZU EINER EUROPÄISCHEN SAMMELKLAGE* 171, 185 (Matthias Casper et al. eds., 2009).

99. Hensler, *supra* note 65, at 974 (stating that Australia, Canada, and Israel follow the U.S. in having opt-out procedures).

100. See Tjeenk & Heeswijk, *supra* note 91, at 132.

incentives to settle. Most important is finality. Because of its opt-out nature, defendants who settle under the WCAM are given peace of mind that the large majority of potential claims will be settled.¹⁰¹ Once a settlement is declared binding, potential plaintiffs who have not opted out after the end of the opt-out period set by the court, usually three to six months, are barred from bringing claims.¹⁰² Furthermore, the fact that a settlement is made independently of any substantive legal action means that defendants willing to settle are not subject to the risks of American-style discovery.¹⁰³ While Dutch law contains only limited discovery obligations, a settlement sidesteps the risks of discovery altogether.¹⁰⁴ For both plaintiffs and defendants, then, a settlement under the WCAM can be attractive.

The fee structures in WCAM settlements also incentivize working towards a settlement. While Dutch rules concerning legal practice forbid contingency fees, they do not prevent third party litigation funding.¹⁰⁵ American law firms specializing in class actions have therefore been able to create funding structures that effectively surmount the prohibition on contingency fee lawyering in the Netherlands.¹⁰⁶ An American law firm can act as a match-maker between the Dutch *stichtings* or foundations representing the interested parties, a law firm in the

101. See Coffee, *supra* note 2, at 1906.

102. See Tjeenk & Heeswijk, *supra* note 91, at 136–37.

103. An exception to this general principle would be when parties representing Dutch entities have access to discovery materials available in a parallel litigation in the U.S. See Deborah R. Hensler, *A Class-Action ‘Mash-Up’: In Re Royal Dutch/Shell Transport Securities Litigation*, CLASS ACTIONS IN CONTEXT 178 (Deborah R. Hensler et al. eds., 2016).

104. See Jan de Bie Leuveling Tjeenk & Dennis Horeman, *The Netherlands*, in 4 SECURITIES LITIGATION REVIEW 207 (William Savitt ed., 2018) (detailing limited discovery available in Dutch civil procedure).

105. Coffee, *supra* note 2, at 1904–05; see Tjeenk & Heeswijk, *supra* note 91, at 136.

106. For an in-depth look at how this developed, see JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE (2015).

Netherlands bringing the settlement to the Amsterdam Court, and third-party litigation funders such as hedge funds. The Dutch law firm is paid its standard hourly rate, regardless of success. The Dutch courts however allow for the other parties (i.e., the American law firm and the third-party funders) to be paid out of the amount of the settlement award. In *Converium* the courts specifically allowed fees of 20% of the total award, and justified this decision on the basis of the typical American practice.¹⁰⁷ Financially then, the WCAM really is a “synthetic” class action insofar as it allows the replication of the American financial incentives for plaintiffs’ representatives in bringing a claim in the first place.

The web of Dutch and European Union jurisdictional rules at stake and the Amsterdam Court’s flexible approach to their implementation are also critical.¹⁰⁸ While the Netherlands does have a number of important global enterprises, and some of the key parties to the settlements so far have been businesses domiciled (or with very substantial business) in the Netherlands, it is a small country. The primary jurisdictional challenge then is for the Court to legitimately claim jurisdiction over parties to the agreement that are not located there. While some of the mass tort actions the WCAM was intended to apply to have all, or mostly, Dutch “interested parties,” in the securities fraud settlements this is generally not the case. In *Converium*, for example, only 3% of the shareholders who would benefit from the settlement were domiciled in the Netherlands.¹⁰⁹

Before outlining the jurisdictional bases used in the WCAM settlements, a terminological point is important. In

107. See *infra* notes 176–78 and accompanying text.

108. See generally HÉLÈNE VAN LITH, THE DUTCH SETTLEMENT ACT AND PRIVATE INTERNATIONAL LAW 32–33, 48 (2010); Xandra E. Kramer, *Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 235, 237–38 (2014).

109. See *infra* notes 166–74 and accompanying text.

the Court's decisions approving the settlements discussed below, the parties bringing the settlement action before the court are termed "petitioners," while the parties who would be bound by it are termed "defendants" or "interested parties" (*belanghebbenden*).¹¹⁰ To American ears at least, this is confusing, because "defendants" here denotes the shareholders who would be the plaintiffs in an American class action. The reason for this awkward use of terminology stems from a mismatch between the WCAM statute and the Brussels Regulation governing cross-border litigation.¹¹¹ Article 2 of the Brussels I Regulation governing international legal claims allows for "general jurisdiction at the court of the place of the domicile of the 'person to be sued.'"¹¹² Despite the awkward fit, Article 2 of Brussels I provides Dutch courts with jurisdiction over the settlement action where at least one of the "defendants" is located in the Netherlands.

There are three principal routes by which the Amsterdam court can assume jurisdiction. For Dutch parties, jurisdiction comes under Article 2(1) of the Brussels I Regulation on Enforcement of Judgments. As stated above, jurisdiction over a person "to be sued" is proper in the courts where she is domiciled.¹¹³ For non-Dutch parties domiciled in the European Union or a country that is a member of the Lugano Convention (Switzerland, Iceland, and Norway), jurisdiction is proper under Art. 6(1) of the Brussels I Regulation:

A person domiciled in a Member State may also be sued: 1. Where he is one of a number of defendants, in the courts for the place where

110. See van Lith, *supra* note 108, at 39; Kramer, *supra* note 108, at 250–51, 259 (explaining the reason for this and then observing that "[i]t is submitted that this approach is highly questionable.").

111. See Kramer, *supra* note 108, at 251; see also Arons & van Boom, *supra* note 96, at 876–77; Thijs Bosters, *Goals of the Brussels Regulation Regarding Jurisdiction*, in COLLECTIVE REDRESS AND PRIVATE INTERNATIONAL LAW IN THE E.U. 165 (2017).

112. Art. 2 para. 1 EC.

113. *Id.*

any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings¹¹⁴

Finally, for non-Dutch, non-E.U., and non-Lugano Convention persons, jurisdiction comes under Art. 3 of the Dutch Code of Civil Procedure, “Legal Proceedings initiated by a petition.” Article 3(a) provides for jurisdiction if either the petitioner, or one of them if there are more than one, is domiciled in the Netherlands.¹¹⁵ And Article 3(c) is a catch-all provision that provides jurisdiction where “the legal proceedings are otherwise sufficiently connected with the Dutch legal sphere.”¹¹⁶

A final key aspect of the WCAM is its inherent flexibility as to the legal liability, if any, underlying a claim.¹¹⁷ While Dutch procedural law will apply to the settlement agreement itself, and E.U. and international law to the enforceability of a settlement, the substantive legal liability at stake in a claim can come from any jurisdiction. Because the parties to the settlement craft the agreement itself, and merely bring it before the Amsterdam Court, the underlying basis for the claim can be based on any jurisdiction’s law, or the law of multiple jurisdictions. While this can result in difficulties concerning differing amounts of compensation provided to different classes of plaintiffs in the Schedule appended to the settlement,¹¹⁸ it allows the WCAM maximum flexibility to implement a settlement without forcing the Court into conflict of laws issues. Combined with the incentives the

114. *Id.* at 6(1).

115. DCCP Art. 3(a).

116. DCCP Art. 3(c); *see van Lith, supra* note 108, at 47–48.

117. The fact that the part of the WCAM statute in the Dutch Civil Code is located in Book 7 dealing with contracts signals that it grounded in contract, not tort. There is therefore no requirement as to the underlying legal basis for liability, but rather simply an agreement of the parties to settle a dispute. *See Arons & van Boom, supra* note 96, at 868.

118. *See Krans, supra* note 89, at 285 (discussing damage scheduling).

various parties have to enter into the agreement, this flexibility with respect to the underlying liability at stake is essential to creating a truly global class action.

B. *Securities Settlements under the WCAM*

The WCAM was added to the Dutch Civil Code and Code of Civil Procedure in 2005, and the Amsterdam Court of Appeals has approved on average two settlements per year in the period 2005–2014.¹¹⁹ Four of the settlements concern securities fraud allegations and so represent global synthetic securities class actions. The progression of these cases shows a pattern of increasing jurisdictional sweep, as well as an increase in value up to \$1.2 billion euros in the 2018 *Fortis* settlement. The ongoing *Petrobras* litigation presents another potentially very important case. Not only might its settlement value exceed that of *Fortis*, but in a preliminary action to determine liability brought under Article 3:305 of the DCC the Rotterdam Court of First Instance recently declined to honor an arbitration clause in the corporate charter that Judge Rakoff of the Southern District of New York upheld in the parallel U.S. securities class action.¹²⁰ The securities settlements so far show the Amsterdam Appeals Court becoming more comfortable with an expansive application of governing jurisdictional law, as well as a pattern of increasing settlement values. Two recent failed attempts at settlements however demonstrate the need for caution on the part of shareholders and their attorneys. Despite the willingness of the courts to interpret jurisdictional and other requirements of the WCAM statute liberally, when the parties can't agree to a settlement, shareholders have little leverage to press a claim.

119. See *Focus on Collective Redress: The Netherlands*, THE BRIT. INST. OF INT'L & COMP. L., <https://www.collectiveredress.org/collective-redress/reports/thenetherlands/caselaw>.

120. See discussion *infra* Section II.B.4.

1. *Shell Petroleum*

Shell Petroleum began when the company announced restatements of its oil reserves previously put forward in its securities filings. During the period 1998–2002, Royal Dutch/Shell (“RDS”) managers were extremely aggressive in booking oil reserves.¹²¹ Similar to some of the more familiar accounting scandals from the early 2000s, this amounted to an exercise in hoping that future performance would justify the very optimistic numbers posted. When SEC guidelines clarified how oil and natural gas reserves were to be accounted for, the company was forced to lower its estimate of its reserves by a total of 4.47 billion barrels, or 23% of reserves as earlier stated.¹²² The effect of the series of restatements in early 2004 was a \$13.84 billion loss in market capitalization.¹²³

Plaintiffs quickly filed suit in the District Court of New Jersey. Due to the Third Circuit’s liberal interpretation of the conduct test, plaintiffs’ counsel Stanley Bernstein of Bernstein, Liebhard & Lifshitz hoped that the court would allow a global class of shareholders.¹²⁴ Bernstein’s aggressive lawyering, however, dissuaded RDS’s General Counsel from offering a settlement.¹²⁵ Instead, the company fought back, arguing that the non-U.S. plaintiffs should be dismissed.¹²⁶ The court initially rejected Defendants’ Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.¹²⁷ As the case progressed in U.S. court, RDS opened discussions with Grant & Eisenhofer P.A., the U.S. law firm representing two large Dutch pension funds that were considering opting out

121. *See In re: Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509, 527–30 (D.N.J. 2005).

122. *Id.* at 517.

123. *Id.*

124. *See Hensler, supra* note 103, at 175.

125. *See id.* at 177–78.

126. *In re Royal Dutch*, 380 F. Supp. 2d at 539.

127. *Id.*

of the class action.¹²⁸ These negotiations were a prelude to the settlement of the claims of both U.S. and non-U.S. investors. In 2007, a special master, appointed by Judge Pisano, recommended dismissing the non-U.S. plaintiffs due to insufficient conduct on the part of RDS in the U.S. to meet the conduct test.¹²⁹ In conjunction with the negotiation of a settlement offer and its acceptance by the Amsterdam Court of Appeals, Judge Pisano granted defendants' motion to dismiss the non-U.S. plaintiffs.¹³⁰

*Shell Petroleum*¹³¹ is important as both the first securities settlement brought under the WCAM and the beginning of a line of parallel securities claims in U.S. courts and the Netherlands.¹³² In addition to simply being the first settlement given effect under the WCAM, the treatment of jurisdictional issues by the Dutch court and the bargaining position of the parties are important. The direct parties to the settlement include the two Royal Dutch/Shell entities, a *stichting* or foundation formed to represent shareholders, the VEB (*Vereniging von Effectenbezitters* or Dutch Investors Association), and foundations representing two Dutch pension funds. For the direct parties to the settlement, Shell Petroleum N.V. (a Dutch Company), Shell Transport and Trading Company Ltd. (a U.K. corporation), as well as the shareholder representatives, jurisdiction is not an issue as they are applicants petitioning the court for a binding declaration.¹³³ The court does, however, discuss its

128. See Hensler, *A Class Action Mash-Up*, *supra* note 103, at 178.

129. See *In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712, 714 (D.N.J. 2007).

130. *Id.* at 723–24.

131. Hof's-Amsterdam 29 mei 2009, JOR 2009, 197 m.nt. AFJA Leitjen (Shell Petroleum NV/Dexia Bank Nederland NV) (Neth.) [hereinafter *Shell Petroleum*] (translated by author).

132. See Kaal & Painter, *supra* note 83, at 154–55 (discussing the phenomenon of parallel or “piggyback” securities litigations in different national courts).

133. See *Shell Petroleum* ¶ 5.1. Although the decision here does not specifically cite Art. 6(1) of the Brussels Regulation, the Court's reference to a “close

jurisdiction over the U.K. RDS entity, Shell Transport and Trading Company Ltd., under the Brussels I Regulation. The court finds that jurisdiction over the U.K. company is proper on account of the required “close connection” between the claims concerning Shell Petroleum N.V. and Shell Transport and Trading Company Ltd.¹³⁴

Finding jurisdiction over the “interested parties” in the settlement, who would be the plaintiffs in an American class action, presents a more complex but by no means insurmountable challenge. As noted above, a mass action with many plaintiffs presents an awkward fit with both Dutch and European civil procedure.¹³⁵ The Amsterdam court surmounts this problem by conceiving of the interested parties, i.e., the shareholders, as defendants.¹³⁶ The court distinguishes three categories of interested parties: those in the Netherlands, those outside of the Netherlands but in an E.U. member or Lugano Convention country, and everyone else. The numbers of these three categories of “interested persons” or shareholders with addresses known to the applicants were 798 in the Netherlands,¹³⁷ 103,685 in the U.K.,¹³⁸ and 7,105 others.¹³⁹ That leaves approximately 400,000 with unknown addresses.¹⁴⁰ The *Shell Petroleum* court interprets the applicable jurisdictional rules in an expansive manner, thereby allowing it to give effect to a settlement covering hundreds of thousands of shareholders not in the E.U., other Lugano convention countries, or the U.S.

connection” indicates that is the provision giving it jurisdiction over the U.K. entity. See also VAN LITH, *supra* note 108, at 33.

134. See *Shell Petroleum*, ¶ 5.26; see also Kramer, *supra* note 108, at 254; VAN LITH, *supra* note 108, at 33.

135. See notes 110–12 *supra* and accompanying text.

136. See *Shell Petroleum*, ¶ 5.10(b).

137. *Id.*, ¶ 5.10(a).

138. *Id.*, ¶ 5.10(b).

139. *Id.*, ¶ 5.10(c).

140. *Id.*, ¶ 5.13.

The WCAM is also fundamentally flexible with respect to the legal claim at stake. Commensurate with the fact that the application of the settlement parties to the court is voluntary, there is no legal requirement as to the nature of the claims being settled or that parties admit liability. In *Shell Petroleum*, the original claims on behalf of the worldwide plaintiffs, as well as plaintiffs purchasing shares in U.S. transactions, were brought under U.S. securities law. The non-U.S. plaintiffs were dismissed from the case on account of insufficient conduct within the United States to meet the standard of the conduct test.¹⁴¹ (Recall that the New Jersey Federal Court's 2007 decision is pre-*Morrison*.) The Amsterdam Court however does not discuss any particular theory of legal liability for the claims, and the settlement expressly states that the Royal Dutch/Shell entities do not admit liability.¹⁴² The WCAM settlement mechanism neither requires a specific law as the basis for liability nor an admission or determination of fault. It is important to note, though, that in the settlement negotiations in the Netherlands, the shareholder representatives had a crucial point of leverage against the company that would be lacking in some later cases: approval of the U.S. settlement, and dismissal of the claim on the part of non-U.S. shareholders, was contingent upon reaching the foreign settlement.¹⁴³

The amount of the settlement is also noteworthy. Shareholders in the Dutch settlement received approximately \$359 million in total compensation, plus attorneys' costs of approximately \$50 million.¹⁴⁴ (In the parallel U.S. settlement, shareholders received

141. In re *Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712, 724 (D.N.J. 2007).

142. See Mitchell A. Lowenthal et al., *The Shell Settlement and the Dutch Act on Collective Settlement of Mass Damages*, CLEARY GOTTlieb (Apr. 16, 2007).

143. See In re *Royal Dutch/Shell*, 522 F. Supp. 2d at 715; see also Hensler, *supra* note 103, at 180.

144. See Hensler, *supra* note 103, at 181–82.

approximately \$80 million.¹⁴⁵) The total loss in market capitalization alleged by plaintiffs, and thus the total value of the alleged claims of both U.S. and non-U.S. shareholders, was \$13.84 billion.¹⁴⁶ While the Amsterdam court does not explicitly discuss the total value of the claims against the RDS entities, it does state that the settlement before it (of \$352 mil.) will provide between 9.79% and 12.46% of the estimated damages, leading to a total non-U.S. claim in the vicinity of \$3.5 billion.¹⁴⁷ Not only does the total amount of both settlements put *Shell Petroleum* firmly in the category of a “Mega Settlement,” it is significantly higher than the typical median settlement (2–3%) as a percentage of estimated damages.¹⁴⁸ The fact that the U.S. settlement was conditioned upon reaching a Dutch one likely played a significant role in reaching such a high percentage.

2. *Vedior*

The Vedior settlement was the second securities settlement brought under the WCAM.¹⁴⁹ It was a small and straightforward case. On November 30, 2007, Dutch multinational staffing firm Randstad agreed to acquire its competitor Vedior.¹⁵⁰ Vedior shares traded at 12.36 euros when the market opened at 9 a.m. on November 30.¹⁵¹ As rumors began to circulate concerning the deal, Vedior shares climbed to 13.63 by 10:45 a.m. By the time the Netherlands

145. *See id.* at 185.

146. *In re Royal Dutch/Shell*, 380 F. Supp. 2d 509, 517 (D.N.J. 2005).

147. *Shell Petroleum*, ¶ 6.16.

148. *See SECURITIES CLASS ACTION SETTLEMENTS: 2016 REVIEW AND ANALYSIS*, CORNERSTONE RESEARCH (2016).

149. Hof's-Amsterdam 15 juli 2009, JOR 2009, 325 m.nt. ACW Pijls [ECLI:NL:GHAMS:2009:BJ2695BJ2691] (Randstad Holding) (Neth.) [hereinafter *Vedior*] (translated by author).

150. *See* Reed Stevenson, *Dutch Staffing Firm Randstad to Buy Rival Vedior*, REUTERS (Dec. 3, 2007), <https://www.reuters.com/article/us-vedior-randstad/dutch-staffing-firm-randstad-to-buy-rival-vedior-idUSL0357707620071203>.

151. *See Vedior*, at ¶ 2.3.

Authority for the Financial Markets halted trading in Vedior on the Euronext exchange at 11:34 a.m., the price had reached 15.80. When trading resumed at 1:20 p.m., the price was 15.80.¹⁵²

The VEB and a stichting set up to pursue these claims reached a settlement with Randstad, which had acquired Vedior. The agreement provided that Randstad would offer compensation to those who sold Vedior shares before the halt of trading on the morning of November 30 amounting to 80% of the difference between what they sold the shares at and the re-opening price of 15.80.¹⁵³ The total fund available for Vedior shareholders who sold in that period came to 4.25 million euros.¹⁵⁴ *Vedior* represents a straightforward failure of disclosure and breaks no new ground as a WCAM settlement.

3. *Converium*

Converium represents the next step in the evolution of securities settlements under the WCAM. Like *Royal Dutch/Shell*, it was a parallel litigation that began in U.S. Federal court.¹⁵⁵ Unlike its predecessor, however, the connection to the Netherlands was much less obvious, as no corporate entity and a mere 3.0% of the shareholders were domiciled in the Netherlands. *Converium* is therefore important because of the very broad interpretation of the governing jurisdictional statutes the court offers in its preliminary opinion in the case, which provide it with near-universal jurisdiction.¹⁵⁶ The court's second decision, approving the final settlement, is also important on account

152. *Id.*

153. *Id.* at ¶ 2.6.

154. *Id.* at ¶ 4.18.

155. See *In re Converium Holding AG Sec. Litig.*, No. 04 Civ. 7897, 2006 WL 3804619 (S.D.N.Y. Dec. 28, 2006).

156. Hof's-Amsterdam 12 november 2010, JOR 2011, 46 m.nt. JS Kortmann [ECLI:NL:GHAMS:2010:BO3908] (Scor Holding/Interim Decision) (Neth.) [hereinafter *Converium I*] (translated by author).

of its discussion and approval of a contingency fee.¹⁵⁷ The 20% contingency fee modelled on the American practice represents an important advance for the synthetic class action, because it allows attorneys to push forward these cases with the hope of winning an award based on the size of the final judgment.¹⁵⁸

Converium was a Swiss reinsurance firm with its common stock trading on the Swiss Stock Exchange and ADRs on the New York Stock Exchange.¹⁵⁹ In 2001, it was spun off from its parent company, Zurich Financial Services, in an IPO. Although Converium increased its reserves before the IPO by a total of \$112 million, earlier estimates performed by actuarial consultants found that it was under-reserved by \$350 million.¹⁶⁰ Its December 11, 2001 IPO was the largest IPO ever of a reinsurer, with 35 million shares sold for \$1.76 billion. In the years to follow, however, its financial woes continued. On July 20, 2004, it announced a \$400 million charge due to a required increase in its North American unit's reserves.¹⁶¹ This news led to an immediate collapse in its stock price of nearly 50%. A number of plaintiffs then brought class action lawsuits in U.S. Federal court against Converium, Zurich Financial Services, and the IPO underwriters UBS and Merrill Lynch. The lawsuits were consolidated and assigned to the Southern District of New York in 2006. After Judge Cote granted defendant's motion to dismiss the claims of non-U.S. investors under the pre-

157. Hof's-Amsterdam 17 januari 2012, JOR 2012, 51 m.nt. BJ de Jong [ECLI:NL:GHAMS:2012:BV1026] (Scor Holding) (Neth.) [hereinafter *Converium II*] (translated by author).

158. What amounts to a contingency fee was in fact paid to the law firm Grant & Eisenhofer in *Shell Petroleum*, so this was not strictly speaking the first WCAM securities settlement involving such a payment. See Hensler, *supra* note 2, at 318. The *Converium II* judgment is important however for its explicit treatment and blessing of a contingency fee to be paid to the non-Dutch attorneys.

159. See *In re Converium Holding*, 2006 WL 3804619 at *22.

160. See *id.* at *4.

161. See *id.* at *21.

Morrison conduct test,¹⁶² a Dutch *stichting* was formed to pursue a WCAM settlement.

In 2008, the American investors reached an \$85 million settlement with SCOR, the successor by merger to Converium, and Zurich Financial Services.¹⁶³ Representatives of the Dutch investors and SCOR reached an agreement on the non-U.S. claims on July 8, 2010.¹⁶⁴ When they petitioned the Amsterdam Court of Appeals to declare the settlement binding, the court allowed them the opportunity to first receive a provisional judgment concerning the court's jurisdiction in the case before the interested parties, the shareholders, would be served notice of a hearing on the substance of the petition.¹⁶⁵ The petitioners accepted this proposal, and on November 12, 2010 the court issued its first opinion.

The connection with the Netherlands was significantly less than in *Shell Petroleum*. Converium was a Swiss corporation that had merged into SCOR Holding AG, another Swiss corporation. Prior to the merger, Converium shares traded on the SWX exchange in Switzerland, with ADRs trading on the New York Stock Exchange (the NYSE). Furthermore, of the approximately 12,000 stockholders excluded from the U.S. class action, only 200 were known to be domiciled in the Netherlands.¹⁶⁶ There were also approximately 8,500 Swiss shareholders and 1,500 shareholders domiciled in the United Kingdom.¹⁶⁷ The court

162. *In re Scor Holding (Switzerland) AG Litigation*, 537 F. Supp. 2d 556 (S.D.N.Y. Mar. 6, 2008).

163. *See* Converium Holding Case 08/29/2008, SHAREHOLDERS FOUNDATION, Aug. 29, 2008. (The total loss of Converium market capitalization on July 20, 2008 was approximately \$1 billion, and by the first week of September Converium shares had dropped to \$8.86 from \$25.02 six weeks earlier. *See also* *In re Converium Holding*, 2006 WL 3804619, at *21–22.)

164. *See Converium I*, ¶ 1.

165. *Id.*

166. *Id.* at ¶ 2.3.

167. *Id.*

was thus faced with the question of determining jurisdiction over a non-Dutch petitioner, SCOR Holding, and the shareholders or “interested parties” from the Netherlands, elsewhere in the E.U., and outside the E.U.

The court begins its jurisdictional analysis by noting that the proceedings before it are “a civil and commercial matter as referred to in Article 1(1) of the EEX Regulation—the Brussels I Regulation—and the EVEX Convention” (or the Lugano Convention).¹⁶⁸ Under Brussels I, Art. 5, jurisdiction is proper “with the court of the place where the obligations under the agreements are to be performed.”¹⁶⁹ Since the Dutch foundation (the Stichting Converium Securities Compensation Foundation) will be responsible for distributing the settlement amounts, this will occur in the Netherlands. As for the interested parties whose rights will be foreclosed by this settlement, jurisdiction is proper over those shareholders domiciled in the Netherlands under Article 2(1) of the Brussels I Regulation.¹⁷⁰ For non-Dutch shareholders domiciled in the European Union or a Lugano convention state—most importantly Switzerland, but also Iceland and Norway—jurisdiction is proper under Article 6, preamble and (1), of Brussels I and the Lugano Convention.¹⁷¹ The court emphasizes here that because the settlement closes off other avenues of redress for parties who don’t opt-out, “[t]here for this reason exists such a close connection between these claims that the sound administration of justice requires the claims to be simultaneously heard and judged in order to avoid incompatible court decisions in the event that the claims were to be individually adjudicated.”¹⁷² Thus, just as in *Shell Petroleum*, by referring to the “close connection” that is set

168. *Id.* at ¶ 2.7.

169. *Id.* at ¶ 2.8.

170. *Id.* at ¶ 2.10.

171. *Id.* at ¶ 2.11.

172. *Id.*

forth in the Brussels I Regulation, Art. 6(1), the Amsterdam Court of Appeals emphasizes the importance of the foundational principle of justice of that mandates treating like cases alike.¹⁷³

Finally, for shareholders not domiciled in the Netherlands, the E.U., or in a Lugano Convention state, jurisdiction is proper pursuant to Article 3 of the Dutch Code of Civil Procedure (the “DCCP” or *Wetboek van Burgerlijke Rechtsvordering*), preamble and sections (a) and (c), in conjunction with DCCP Section 1013(3). This is because the obligations of the parties to the petition are to be performed in the Netherlands, and the involvement of the Foundation “means the matter is sufficiently connected to the Dutch legal order.” Through this expansive interpretation of the relevant provisions of the regulations governing international private law jurisdiction, as well as the Dutch Code of Civil Procedure, the court finds jurisdiction in a case where the responsible parties as well as the vast majority of shareholders are located outside the Netherlands.¹⁷⁴

The court’s discussion of the parallel litigation in the Southern District of New York demonstrates that, in the wake of *Morrison*, it understands its role as complementary

173. Brussels I, Art. 6(1) reads:

A person domiciled in a Member State may also be sued: 1. Where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings

Council Regulation 44/2001, art. 6, 2001 O.J. (L 012) 1 (EC), on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

174. See Xandra E. Kramer, *Enforcing Mass Settlements in the European Judicial Area: EU Policy and the Strange Case of the Dutch Collective Settlements (WCAM)* in *RESOLVING MASS DISPUTES: ADR AND SETTLEMENT OF MASS CLAIMS* 79–82 (Christopher Hodges & Astrid Stadler, eds., 2013) (discussing the broad assertion of worldwide jurisdiction on the part of the *Converium* court, and concluding “[i]t is submitted that the way in which the Amsterdam Court established its jurisdiction in *Converium* is not entirely convincing.”); see also *Collective Redress in the Netherlands*, U.S. Chamber Institute for Legal Reform (Feb. 6, 2012).

to that of the U.S. court. The Dutch court notes that the WCAM provides a means to give a binding settlement “for the benefit of persons with respect to which the District Court declined jurisdiction,” and so together the Dutch and the American actions amount to “mutually complementing settlements.”¹⁷⁵

Converium’s other major legal advance is the court’s explicit approval of an amount equal to 20% of the total settlement ($\$58.4 \times .2 = \11.68 million) to be paid to the American counsel in the case.¹⁷⁶ While the shareholders objected to this amount, the court noted that it is appropriate under Dutch law to consider what is appropriate and reasonable in the United States.¹⁷⁷ While the total amount of the settlement here is much smaller than in its predecessor, *Shell Petroleum*, the discussion and approval of an American-style contingency award for the foreign lawyers performing much of the work on the case is crucial because it sets into place one of the key economic elements allowing for the development of the “synthetic class action.”¹⁷⁸

4. *Fortis*

The *Fortis* litigation arose out of an expensive, ill-fated banking merger prior to the global financial crisis. The *Fortis* settlement is important both for its massive size—at 1.2 billion euros, it is the largest ever in a securities case outside the U.S.¹⁷⁹—and the nuanced treatment the court offers of its financial ramifications for different parties in the agreement. *Fortis* demonstrates that the WCAM offers

175. *Id.* at ¶ 2.6.

176. *Converium II*, ¶ 6.5.1.

177. *Converium II*, ¶ 6.5.2.

178. See Coffee, *supra* note 2, at 190 (discussing financing structures of WCAM actions).

179. Kevin La Croix, *Dutch Court Declares Largest-Ever European Investor Claims Settlement Binding*, THE D&O DIARY (July 30, 2018), <https://www.dandodiary.com/2018/07/articles/international-d-o/dutch-court-declares-largest-ever-european-investor-claims-settlement-binding/>.

corporate defendants a valuable means of settling shareholder litigation, as well as recognition of the benefits and appropriateness of American-style contingency fee awards in the international context.

Fortis N.V./S.A. was a Dutch/Belgian bank with its customer base in the Benelux countries. The claims against it grew out of its involvement in 2007 with the Royal Bank of Scotland and Santander Bank in acquiring the assets of ABN AMRO, a leading Dutch bank. The three financial institutions paid 71.9 billion euros (U.S. \$101 billion) for ABN AMRO in October 2007 and then split its assets, with Fortis taking those located in the Netherlands.¹⁸⁰ When the financial crisis struck a year later, Fortis's assets were already depleted from the acquisition at the same time that it suffered substantial losses on structured finance securities backed by U.S. mortgages. The value of its shares collapsed from 22 euros in September 2007 to 1 euro in October 2008,¹⁸¹ and the Dutch government stepped in with a bailout in October 2008.¹⁸²

Shareholders filed a class action lawsuit in the Southern District of New York in October 2008 alleging that Fortis executives misstated the bank's financial condition in 2007 and 2008 and misrepresented the value of its structured finance assets. The U.S. lawsuit was dismissed in 2010 for failing to meet the standards outlined in the conduct and effects test.¹⁸³ Lawyers representing various groups of shareholders then pursued actions in Belgium and the

180. Bloomberg News, *Consortium Wins Control of ABN Amro*, N.Y. TIMES (Oct. 9, 2007), <https://www.nytimes.com/2007/10/09/business/worldbusiness/09bank.html>.

181. The plaintiffs argued for a class period in the U.S. case from September 17, 2007 to October 14, 2008. See *Copeland v. Fortis*, 685 F. Supp. 2d 498, 500 (S.D.N.Y. 2010).

182. See Ingrid Melander & Niclas Mika, *Netherlands Nationalizes Dutch Fortis Units*, REUTERS (Oct. 3, 2008), <https://www.reuters.com/article/us-fortis-belgium/netherlands-nationalizes-dutch-fortis-units-idUSTRE49263E20081003>.

183. See *Fortis*, 685 F. Supp. 2d at 502–03 (S.D.N.Y. 2010).

Netherlands.¹⁸⁴ (These lawsuits were not brought under the WCAM, but DCCP 3:305 which allows for an opt-in mass claim to determine liability.) The successor entity to Fortis, Ageas S.A., agreed to a settlement with four shareholder representatives in June 2017. When the parties petitioned the Amsterdam Court of Appeals for approval, however, the settlement was rejected.¹⁸⁵ The court objected in particular to the fact that the compensation scheme awarded shareholders who had actively participated in bringing the claim a substantially larger award (approximately 50%) than non-participating shareholders. It also objected to the lack of transparency concerning the fees that would be awarded to the shareholder representatives.

The parties refashioned the settlement agreement and petitioned the court once more. On July 13, 2018, the court approved the 1.2 billion euro settlement.¹⁸⁶ In addition to its massive amount, it is important in its treatment of the compensation awarded to both shareholders and the organizations representing them. Unlike the first proposal, the final settlement awards active and passive shareholders compensation in equal measure. The court explained that the intent behind the WCAM is to prevent parties experiencing a loss from having to institute separate legal proceedings, and that allowing separate recovery amounts would work against this.¹⁸⁷ Moreover, parties are entitled to “await the outcome of a collective settlement” before deciding on whether to institute their own proceedings.¹⁸⁸ Discrimination against passive claimants would hinder both of these policies motivating the WCAM.

184. *See Coffee, supra* note 2, at 1902 n.24.

185. Hof's-Amsterdam 16 juni 2017, JOR 2018, 10 m.nt. Kortman (Ageas S.A./N.V./[H]) (Neth.).

186. Hof's-Amsterdam 13 juli 2018, JOR 2018, 246 m.nt. Tzankova (Ageas S.A./N.V./[H]) (Neth.) [hereinafter *Fortis*] (translated by author).

187. *Id.* ¶ 5.1.3.

188. *Id.*

On the other hand, the court allowed for an additional 25% compensation in the form of a “cost addition” to go to active claimants.¹⁸⁹ This amount is awarded to reimburse these shareholders for the time and expense incurred in bringing the claims to a resolution. Furthermore, a “success fee” awarded to the shareholder representatives indirectly allows the litigation funders and lawyers to be paid on a contingency basis.¹⁹⁰ As the court explains, claimants registered with FortisEffect will pay a result-dependent fee of 10% to FortisEffect; those registered with SICAF will pay a 25% fee, and institutional investors with Deminor a 21% fee (on average).¹⁹¹ Shareholders registered with VEB also pay significant fees. The court explains that the fee arrangements of the shareholder representatives involve either significant risk on the part of the organization (in the case of VEB and Deminor) or third-party funding in the case of FortisEffect and SICAF. The additional compensation for active claimants is deemed reasonable, and so acceptable under WCAM.¹⁹² In addition to its record-breaking amount, then, *Fortis* is important as it confirms the policy of the *Converium* court to allow litigation funding on a contingency basis, as long as any amounts paid are reasonable and do not appear to detract from the amount paid to claimants. While the court’s insistence on equal base compensation for passive and active shareholders alike drew criticism from the plaintiffs’ bar that it ignored the problem of “free-riding” shareholders,¹⁹³ it does allow for compensation of costs that

189. *Id.* ¶ 5.44.

190. *See id.* ¶¶ 5.1.4; 5.12; 5.15; 5.18–21 (discussing the ramifications of the success fee and its role in compensating the “interest organizations” (VEB, Deminor, FortisEffect, and SICAF) which must compensate the litigation’s funders).

191. *See id.* ¶ 5.15.

192. *See id.* ¶¶ 5.22, 5.30; Krans, *supra* note 89, at 292–94 (discussing the court’s analysis regarding WCAM’s reasonableness, as required by Art. 7:907 para. 3.b. BW (Neth.)).

193. Alison Frankel, *Dutch Court Approves \$1.5 Billion Fortis Shareholder Deal—But There’s A Catch*, REUTERS (July 16, 2018), <https://www.reuters.com/>

include significant contingent amounts.¹⁹⁴

Where *Fortis* breaks new legal ground is in its use of a two-step litigation strategy.¹⁹⁵ This first involves obtaining a declaratory judgment against the issuer under DCCP 3:305, then using that judgment as leverage in negotiating a global settlement under the WCAM. After the U.S. case against *Fortis* was dismissed, various shareholder representatives pursued judgments in the Belgian and Dutch courts.¹⁹⁶ Since there was substantial connection to the Netherlands because *Fortis* and ABN/AMRO were Dutch banks, these claims could not be dismissed on jurisdictional grounds, as later happened with British Petroleum. The actions filed in the Belgian and Dutch courts thus operated to give the shareholder representatives substantial leverage before the case progressed to negotiations for a settlement to be brought under the WCAM. The *Fortis* settlement is therefore important due to its massive size, its approval of third-party litigation funding structures compensating entrepreneurial lawyers, and the preliminary use of DCCP 3:305 to compel the issuer to reach a settlement.

5. *Petrobras*

While still ongoing, the *Petrobras* litigation is both substantial—the parallel class litigation in the U.S. settled

article/us-otc-fortis/dutch-court-approves-1-5-billion-fortis-shareholder-deal-but-theres-a-catch-idUSKBN1K62OY.

194. See Tom Vos, *Revised € 1,3 Billion Settlement in the Fortis Case Approved by Dutch Court*, CORPORATE FINANCE LAB (July 16, 2018), <https://corporatefinancelab.org/2018/07/16/revised-e13-billion-settlement-in-the-fortis-case-approved-by-dutch-court/>.

195. See Coffee, *supra* note 2, at 1908; Franziska Weber & William H. van Boom, *Dutch Treat: The Dutch Collective Settlement of Mass Damage Act (WCAM 2005)*, 1 CONTRATTO E IMPRESA/EUROPE 69, 72 (2011), <http://ssrn.com/abstract=1872363> (June 25, 2011) (discussing use of Art. 3:305 as a preliminary step towards negotiations for a settlement under the WCAM); *but see* Tomas Arons & Willem H. van Boom, *Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands*, EUROPEAN BUSINESS LAW REVIEW 864–865 (2010) (discussing the limitations of Art. 3:305).

196. Coffee, *supra* note 2, at 1902 n.24.

for \$2.95 billion in June 2018¹⁹⁷—and legally important. The securities fraud claims are based in the “Operação Lava Jato” corruption scandal at Petrobras, the Brazilian oil company. Petrobras executives were accused of participating in rigged auctions for contracts with suppliers.¹⁹⁸ When the company paid inflated prices on construction projects and acquisitions of property, 1–5% of the total price would be transferred back to the executives. The executives, who were appointed at the behest of the ruling coalition’s political parties, also transferred funds to their respective parties. When news of the scandal broke in 2014, the market capitalization of Petrobras fell from \$310 billion to \$39 billion and the price of ADRs on Petrobras common stock traded on the NYSE fell by 80.92%.¹⁹⁹

Plaintiffs filed five separate class action lawsuits in the Southern District of New York alleging securities law violations. These were consolidated in February 2015 and assigned to Judge Jed Rakoff.²⁰⁰ In addition to the claims of investors who purchased securities in transactions meeting the *Morrison* criteria for admission to U.S. Federal court, plaintiffs’ lawyers also brought claims of non-U.S. investors under Brazilian law. Judge Rakoff dismissed the claims relating to securities purchased on the Brazilian Bovespa, as they were covered by Article 58 of Petrobras’s bylaws, which contained a mandatory arbitration provision.²⁰¹ He declined, however, to dismiss the claims of plaintiffs purchasing Petrobras securities on the NYSE.²⁰² These purchasers

197. *In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858, 864 (S.D.N.Y. 2018).

198. See Jonathan Watts, *Operation Car Wash: Is this the Biggest Corruption Scandal in History?*, THE GUARDIAN (June 1, 2017), <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>.

199. See *In re Petrobras Sec. Litig.*, 116 F. Supp. 3d 368, 373–75 (S.D.N.Y. 2015).

200. *Id.* at 373.

201. *Id.* at 386–87.

202. *Id.* at 388–89.

would not have consented to be bound by the arbitration provision in the Company's bylaws, which covered "disputes . . . involving the Corporation, its shareholders, [and] managers" arising from "the rules issued . . . by the Brazilian Securities and Exchange Commission (Comissão de Valores Mobiliários – CVM) as well as in all further [rules applicable] to the operation of the capital market in general."²⁰³ As a result, the defendants' motion to dismiss was granted in part but denied in part. The claims of U.S. purchasers were allowed to proceed, and a class was certified.²⁰⁴ These claims settled in January 2018 for a whopping \$2.95 billion, making it the fifth-largest securities class action settlement in U.S. history.²⁰⁵

After the claims of purchasers on the Bovespa were dismissed, plaintiffs' attorneys formed foundations in the Netherlands to pursue claims there but with reportedly little hope of success.²⁰⁶ Nevertheless, on September 19, 2018 their efforts led to an important preliminary victory. The Rotterdam District Court ruled that it had jurisdiction in a collective action for a declaratory judgment under Article 3:305 of the Dutch Civil Code.²⁰⁷ Not surprisingly, the court ruled that it had jurisdiction over the Petrobras entities domiciled in the Netherlands, Petrobras Global Finance B.V., Petrobras Oil & Gas B.V., and Petrobras International Braspetro B.V.²⁰⁸ The court then determined that Article 7

203. *Id.* at 386.

204. *In re Petrobras Sec. Litig.*, 312 F.R.D. 354, 372 (S.D.N.Y. 2016).

205. Kevin LaCroix, *Petrobras Settles U.S. Securities Suit Based on Corruption-Related Allegations for \$2.95 billion*, THE D&O DIARY (Jan. 3, 2018), <https://www.dandodiary.com/2018/01/articles/securities-litigation/petrobras-settles-u-s-securities-suit-based-corruption-related-allegations-2-95-billion/>.

206. Kevin LaCroix, *Dutch Court OKs Petrobras Claim Jurisdiction Despite Brazilian Arbitration Clause*, THE D&O DIARY (Sept. 23, 2018), <https://www.dandodiary.com/2018/09/articles/international-d-o/dutch-court-oks-petrobras-claim-jurisdiction-despite-brazilian-arbitration-clause/>.

207. Rechtbank-Rotterdam 19 september 2018, TVA 2019, 10 (Petrobras) (Neth.) [hereinafter *Petrobras*] (translated by author).

208. *Id.* ¶ 5.3.

of the DCCP provided it with jurisdiction over Petrobras in Brazil because some of the complaints “are so closely connected as to justify a joint hearing for reasons of efficiency, in order to prevent irreconcilable judgments from being given in the event that the cases were heard and determined separately.”²⁰⁹

The Rotterdam court also ruled that the arbitration provision in the Petrobras bylaws did not preclude the Dutch courts from hearing the claims of investors purchasing their shares on the Bovespa. Contrary to Judge Rakoff, the Rotterdam court determined that “this text of article 58 under Brazilian law does not satisfy the conditions to be imposed on it and is not valid.”²¹⁰ The argument in favor of this interpretation turns on a rather fine point. The court found that the English language translation of the Petrobras Articles of Association available on its website until 2014 stated that “Disputes or controversies involving the Corporation, its shareholders, managers and members of the Audit Board shall be resolved according to the rules of the Market Arbitration Chamber”²¹¹ It did not however explicitly state that any such disputes be resolved in arbitration, as its revised translation later did: “It shall be resolved *by means of arbitration*, obeying the rules provided by the Market Arbitration Chamber”²¹² The court therefore ruled that the original English-language text available to investors on the Petrobras website “is the only version which is of significance to the present issue on

209. *Id.* ¶ 5.13.

210. *Id.* ¶ 5.38. See LaCroix, *supra* note 206 (characterizing the ruling as “both interesting and unexpected”); Daan Barbiers, *Rotterdam District Court Rules on Jurisdiction in Petrobras Collective Action*, STIBBEBLOG (Dec. 17, 2018), <https://www.stibbe.com/en/news/2018/december/rotterdam-district-court-rules-on-jurisdiction-in-petrobras-collective-action>.

211. *Petrobras*, *supra* note 207, ¶ 2.2.

212. *Id.* ¶ 5.29 (quoting Article 58 of Petrobras’ bylaws) (emphasis added by court).

jurisdiction.”²¹³ Since Brazilian law provides that access to the national courts is a fundamental right, the court held that the text should clearly and specifically state that any disputes must not be put before the national court, but before an arbitral tribunal.²¹⁴ Since the English language translation of Article 58 failed to do so, the court ruled that Article 58 was invalid under Brazilian law.²¹⁵

With this determination, the proceedings against Petrobras were allowed to continue. To be sure, these are preliminary actions that can only result in a determination of liability, not a monetary judgment. Such a proceeding, however, can be an important precursor to pursuing a settlement against corporate defendants. While the U.S. Petrobras settlement is noteworthy for its massive size, so far the Dutch proceeding is noteworthy for its disregard of an arbitration provision that the U.S. court upheld.

6. Failed Settlements and the Limits of the WCAM: *British Petroleum* and *Rabobank*

In addition to the settlements reviewed above, and the ongoing Petrobras action, two failed attempts to reach a settlement are important. For shareholders and their legal representatives they stand as warnings, demonstrating the limits of the WCAM. When initial settlement negotiations fail, the foundation backing the claims is forced to apply to the Dutch courts for a declaratory judgment under DCC 3:305. This provision was added to the Dutch Civil Code in 1994 and allows a foundation or association to obtain a classwide determination of liability against a corporation.²¹⁶ A DCC 3:305 action does not allow for a classwide monetary judgment, however, nor does it have *res judicata* effect in

213. *Id.* ¶ 5.33.

214. *Id.* ¶ 5.37.

215. *Id.* ¶ 5.38.

216. *See van Boom, supra* note 98, at 175–77.

further proceedings by individual parties.²¹⁷ Nevertheless, its statement of liability can be valuable to shareholders and a DCC 3:305 action is often used as a first step in the WCAM settlement process.²¹⁸ For shareholders forced to travel this route, though, these two recent cases demonstrate its pitfalls.

The British Petroleum (BP) case concerns losses relating to the 2010 Deepwater Horizon disaster and associated disclosure both before and after the oil spill on the part of BP. In June 2016, BP agreed to pay \$175 million to settle claims in a U.S. Federal class action lawsuit.²¹⁹ In their attempted parallel claim in the Netherlands, non-U.S. shareholders could not reach an agreement with BP. When the negotiations failed, VEB turned to the Amsterdam District Court, seeking a declaration under DCC 3:305(a) that would establish BP's liability. Such a declaration would then lend support to the claims of individual shareholders in court (although causality in each individual claim would still need to be established), or more likely, reopen settlement negotiations with an eye to bringing an agreed upon settlement before the Amsterdam Court of Appeals.

In September 2016, the Amsterdam District Court ruled that it lacked jurisdiction in the case.²²⁰ Under European Union law, as explained in *Universal Music* in 2016, tort actions must be brought in the Member State where either

217. *Id.* at 177.

218. Coffee, *supra* note 2, at 1908.

219. New Class Claims Administrator's Proposed Distribution Model for the Combined Halliburton Energy Services, Inc. and Transocean Ltd. Settlements Fund, *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, No. 2:10-md-02179-CJB-SS (E.D. La. Apr. 4, 2016).

220. Rechtbank-Amsterdam 28 september 2016, JOR 2017, 37 m.nt. Welling-Steffens (V.E.B./B.P. P.L.C.) (Neth.); Kevin LaCroix, *Dutch Court Dismisses Collective Investor Action against BP on Jurisdictional Grounds*, THE D&O DIARY (Oct. 13 2016), <https://www.dandodiary.com/2016/10/articles/international-d-o/dutch-court-dismisses-collective-investor-action-bp-jurisdictional-grounds/>.

the defendant is domiciled or the harmful event occurred.²²¹ The location of a harmful event is furthermore subdivided into two categories: either the location of the event giving rise to the damages (the *Handlungsort*), or the place where the initial damages occurred (the *Erfolgsort*).²²² Since the oil spill at the center of the BP litigation occurred in the Gulf of Mexico, VEB argued that the damages occurred in the Netherlands, since the securities accounts of Dutch shareholders were located there. Relying on the European Court of Justice's *Universal Music* decision, the Amsterdam District Court determined that the location of a securities account alone, without other factors connecting it to the event, was insufficient to establish jurisdiction.

British Petroleum thus illustrates the secondary line of defense available to a corporation accused of wrongdoing. Because the jurisdictional requirements for parties bringing an action under DCC 3:305(a) are much more restrictive than those at play in approving a settlement under the WCAM, plaintiffs are deprived of an important point of leverage when settlement negotiations fail. When compared to the American class action context Article 3:305 reinforces the general position of strength of a putative defendant (in the American sense) under the WCAM. The corporation is free to walk away from settlement negotiations that, from its perspective at least, do not appear to be leading to a beneficial outcome.

While not a securities case, the Rabobank litigation illustrates a different pitfall for shareholders and their lawyers. In 2015, a foundation formed by Dutch attorney Pieter Lijesen filed a collective action under DCC 3:305 on behalf of its members against Rabobank.²²³ The claim was

221. Case C-12/15, *Universal Music Int'l Holding B.V.*, 2016 E.C.R.; Roos Elemans, *Universal Music: Locating Purely Financial Damage*, STIBBEBLOG (July 26, 2016), www.stibbeblog.nl/all-blog-posts/commercial-litigation/universal-music-locating-purely-financial-damage.

222. *Universal Music Int'l Holding B.V.*, 2016 E.C.R. ¶¶ 20–22.

223. See Kevin C. Mortimer & Joel D. Rothman, *Dutch Foundation Dismissed*

based on alleged insufficient disclosure of the risks associated with interest rate swaps sold from 2005 to 2011 by Rabobank. Over 8,000 swaps were sold to enterprises that wanted to hedge against interest rate risk on floating rate loans. The Foundation claimed that in addition to engaging in manipulation of the EURIBOR and LIBOR rates, Rabobank failed to meet its duty of care in properly informing customers of the risks associated with the swaps.

Rabobank successfully argued that the Foundation did not sufficiently protect the interests of the parties for whom the claim was filed.²²⁴ Until December 2015, when Rabobank objected in its reply to the Foundation's original claim, Attorney Lijesen was the only director of the Foundation and there was no supervisory board.²²⁵ Furthermore, the Foundation was set up solely to pursue these claims, and Lijesen appeared to be in the business of setting up claims foundations to pursue like cases. The court determined that the structure of the Foundation was insufficient to protect the claims of the enterprises for which it was ostensibly acting. Furthermore, the various claims were improperly bundled together under 3:305(a). Not only did the various swaps differ in important ways, the individual circumstances leading to an alleged violation of the duty of care were sufficiently different to render a bundled claim improper. The court thus declared the Foundation's claim inadmissible under DCP 3:305(a).²²⁶

Rabobank and British Petroleum thus illustrate that when shareholders attempt to pursue a declaration of liability on a class-wide basis, their claims can fail due to insufficient contact with the Netherlands, a Foundation that

for Inadequate Safeguarding of Members' Interests, MINTZ INSIGHTS (July 14, 2016), <https://www.mintz.com/insights-center/viewpoints/2451/2016-07-dutch-foundation-dismissed-inadequate-safeguarding-members>.

224. *Rechtbank-East Brabant*, 29 June 2016, JOR 2016, 278 m.nt. Lemstra (Foundation of Interest Flash Claim/Cooperative Rabobank U.A.)(Neth.), ¶ 5.22.

225. *Id.* ¶ 5.24.

226. *Id.* ¶ 5.56.

does not adequately safeguard the interests of its purported beneficiaries, or what American lawyers would think of as a lack of commonality of claims. While these pitfalls are not within the WCAM itself, they are obstacles that a foundation or association will face when it seeks a determination of liability as a preliminary step to entering into settlement negotiations. Without such a determination, particularly where the defendant does not face obvious and certain liabilities, or at least legal costs, settlement negotiations may be inconclusive. These cases therefore illustrate a second-line threat to the viability of a WCAM action.²²⁷

227. See Joel D. Rothman, *Viability of Dutch Claims Foundations in Question*, MINTZ INSIGHTS (Jan. 18, 2017), <https://www.mintz.com/insights-center/viewpoints/2451/2017-01-viability-dutch-claims-foundations-question>.

III. IN COMPARISON: THE WCAM AND THE AMERICAN SECURITIES FRAUD CLASS ACTION

Since its enactment in 2005, a handful of securities cases have come under the WCAM: four settlements, one ongoing major action, and at least one failed attempt at a settlement in a major case. During the same period, over 2,000 “core” securities class actions (excluding M&A-related actions) have come before the U.S. federal courts.²²⁸ Despite the small number of cases on the Dutch side, it is possible to draw some lines of comparison. The vast disparity in numbers points to the most important difference. Since it does not offer shareholders a cause of action but merely a settlement mechanism, only the very strongest claims are likely to lead to settlement under the WCAM. Beneath this crucial difference, however, are some crucial similarities. Most importantly, the familiar criticisms of the American securities fraud class action on account of its circularity and questionable deterrent effect also apply to the Dutch regime.

This combination of similarity and difference leads to a mixed appraisal of the WCAM. Since it does not provide a basis to determine liability and damages in a mass claim, the WCAM leads to a radical reduction in the amount of securities cases brought before the courts. For the harsher critics of the American system, this result in itself will likely be something to cheer. On the other hand, since the settlements under the WCAM replicate the core problems with the American class action, the Dutch system fails as a more sophisticated advance over the American one. This failure points towards some final political-economic reflections. The emergence of the WCAM as an alternative to the American courts was a result of a confluence of factors. Jurisprudential considerations on the part of the American and Dutch courts, the economic benefits of a global settlement to multi-national corporations, and the

228. See CORNERSTONE RESEARCH, *SECURITIES CLASS ACTION FILINGS: 2018 YEAR IN REVIEW* 41 (2018).

unintended application of the WCAM statute to securities cases have all played causal roles. Law, economics, and serendipity all figure into the development of the global synthetic securities class action.

A. *Altering the Balance of Power*

The most important difference between the WCAM and the American securities fraud class action concerns the bargaining power of defendants (here used in the American sense) in the respective systems. Since the Dutch WCAM does not offer a cause of action but only a mechanism for all parties to petition the court to give binding effect to a settlement already agreed upon, the WCAM shifts power decisively to the corporation who would be the defendant in an American class action.²²⁹

Under the WCAM, a corporation faces no immediate threat that it will lose a litigation on the merits because the WCAM does not offer a means to determine liability. Any threat to the corporation is therefore substantially more remote. It may have to defend against individual claims, but it is always free to walk away if it does not feel further negotiations will lead to what it perceives to be an advantageous resolution of the possible claims at stake.²³⁰ (The British Petroleum case reviewed above appears to represent such a situation.²³¹) The only real consequence to walking away will be that the company remains open to multiple individual claims.²³² Depending on the ability of individual plaintiffs to bring such claims, and the liability the company might face under the law of the various shareholder jurisdictions, this is often a risk a corporation is willing to run.

229. See COFFEE, *supra* note 106, at 216–18.

230. See Krans, *supra* note 89, at 287–89 (discussing incentives in settlement negotiations); Coffee, *supra* note 2, at 1906.

231. See *supra* notes 219–22 and accompanying text.

232. See Arons & van Boom, *supra* note 195, at 868.

From the point of view of the corporate defendant, then, the negotiation process before a WCAM settlement can be considered a form of non-binding alternative dispute resolution.²³³ It allows for a settlement to be given conclusive, and preclusive, effect, but imposes no consequences if the corporation leaves the table. As compared to settlement talks before trial in an American securities fraud class action, the defendant here has the favorable position, with no immediate downside to rejecting a deal not perceived to be to its advantage. It is interesting to compare the WCAM statute to the proposal for replacement of securities fraud class actions by arbitration presented by Hal Scott and Leslie Silverman.²³⁴ They propose allowing corporations to adopt bylaw amendments which would replace the classwide securities fraud class action with binding arbitration. Their proposal differs from the WCAM in that it provides for binding, not non-binding, arbitration, and it also mandates individual, not class-wide or consolidated arbitration. The WCAM does not go as far as the Scott and Silverman proposal in shifting power to the defendant, because WCAM settlement talks are entered into by representatives of many, if not most, of a company's shareholders, but the binding nature of their arbitration proposal would force a defendant to live with an adverse decision.

Given that the balance of power in a WCAM negotiation greatly favors the corporation allegedly causing harm, what could induce it to settle? Recall that in *Shell Petroleum*,

233. See Kramer, *supra* note 174, at 63–74 (analyzing the WCAM as a variety of ADR).

234. Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J. L. & PUB. POL'Y 1187 (2013). Other commentators also have proposed modifying the ability of shareholders to maintain a private class action. See John C. Coffee, *No Exit? Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919 (1988); A.C. Pritchard, *Stoneridge Investment Partners v. Scientific-Atlanta: The Political Economy of Securities Class Action Reform*, 2007–2008 CATO SUP. CT. REV. 217 (2007–2008).

settlement of the parallel action in U.S. federal court was conditioned upon reaching a settlement of the global claims outside the United States.²³⁵ In *Converium*, non-U.S. shareholders had been dismissed from the U.S. action but were able to press their claim in negotiations with the new parent company SCOR.²³⁶ And in *Fortis*, shareholder representatives successfully pressed individual actions under DCCP 3:305 as a preliminary to a WCAM settlement.²³⁷ In all these cases a settlement under the WCAM offered the corporation the prospect of a final resolution to the dispute. Because a judgment approved by the Amsterdam Court of Appeals will be enforced throughout Europe through the Brussels regulation on the enforceability of judgments, the main benefit offered to an alleged corporate wrongdoer by the WCAM mechanism is the prospect of finality.²³⁸

As a consequence of the balance of power between shareholders and corporations under the WCAM, only the strongest cases are likely to result in a settlement. If a claim is weak due to either the facts or the law in non-U.S. jurisdictions, the benefits to a corporation are likely to be too small for a settlement to offer an attractive means of resolving a case.²³⁹ This shift in the balance of power in turn explains the vast difference in the number of American securities litigations and WCAM settlements. For many critics of the American securities class action this will be something to cheer. The WCAM does not give would-be plaintiffs the ability to launch *in terrorem* litigation designed to force a settlement, but it does offer defendants an avenue

235. See *supra* note 130 and accompanying text.

236. See *supra* notes 162–64 and accompanying text.

237. See *supra* notes 183–86 and accompanying text.

238. See Arons & van Boom, *supra* note 195, at 865–68; Kaal & Painter, *supra* note 83, at 167.

239. See Weber & van Boom, *supra* note 195, at 73 (detailing incentives for defendants to settle); Arons & van Boom, *supra* note 195, at 868.

to a global settlement where the price is right.²⁴⁰ While it allows lawyers to create a synthetic class action, the WCAM does not open the floodgates to vexatious litigation. For those who see at least some value in the American system, though, the WCAM may be viewed with caution.²⁴¹

B. *The Problems of Circularity and Deterrence*

Beneath this overarching difference, similarities between the Dutch and the American systems emerge. Most importantly, the problems surrounding the justification of the American securities class action that have been the subject of extensive discussion over recent decades are replicated under the WCAM. Because the payments to shareholders and their representatives come from the companies themselves, the problem of circularity is present in the Dutch settlements. And just as in the American context, the nature of the deterrent effect a settlement may have on corporate executives is unclear. While the WCAM greatly reduces the total incidence of claims against corporations, it fails to offer any improvement on the two most important questions concerning the economic efficacy as well as the justice of the American securities class action.

Circularity is the lynchpin of the economic critique of the securities fraud class action. It stems from the realization that, unlike in other types of class actions, any recovery to shareholders who have been harmed by corporate misrepresentations or fraud is ultimately funded by the shareholders themselves.²⁴² In this general sense, then, a securities class action represents a circular flow of money

240. See Kaal & Painter, *supra* note 83, at 167.

241. See, e.g., COFFEE, *supra* note 106, at 216–17; see also Hensler, *supra* note 2, at 312.

242. See Jill E. Fisch, *Confronting the Circularity Problem in Private Securities Litigation*, 2009 WIS. L. REV. 333, 337; John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1556 (2006); James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 509 (1997).

from one group of shareholders to another, with lawyers for the plaintiffs taking a significant cut in the form of a contingency fee.²⁴³ Defense counsel are paid for by the shareholders as well. Despite this circularity, a securities class action can result in meaningful compensation for certain shareholder groups.²⁴⁴ When shareholders who purchased at prices inflated by fraud are compensated for the difference in the price they purchased at and the “true value” of the shares, they are made whole. Nevertheless, unlike in other types of mass actions, the unique structure of the securities fraud class action means that the flow of funds is fundamentally circular, in that it runs from one group of shareholders to another.²⁴⁵

The phenomenon of circularity has both economic and moral aspects. Economically, circularity should be seen as a reduction in the efficiency of the compensatory function of the securities fraud class action rather than its complete negation.²⁴⁶ From the point of view of shareholders who have exited their investments, complete compensation is in principle possible. Nevertheless there is always some circularity in the sense that the amounts paid ultimately come from the shareholders themselves (barring the unusual case where decisionmakers are forced to pay personally). And even if direct compensation and legal costs are paid by insurance, it is the shareholders who pay the premiums on the insurance policies. The irreducible economic aspect of

243. See Donald C. Langevoort, *On Leaving Corporate Executives “Naked, Homeless and Without Wheels”: Corporate Fraud, Equitable Remedies, and the Debate Over Entity Versus Individual Liability*, 42 WAKE FOREST L. REV. 627, 635 (2007) (stating that legal costs account for approximately 50% of the cost of the securities class action remedy).

244. See James Cameron Spindler, *We Have a Consensus on Fraud on the Market—And It’s Wrong*, 7 HARV. BUS. L. REV. 67, 92–93 (2017) (explaining that in certain circumstances, defrauded shareholders can be made whole).

245. See Coffee, *supra* note 242, at 1561–62 (contrasting enterprise liability in a mass tort case with securities fraud).

246. See Spindler, *supra* note 244, at 86–87 (citing Cox, *supra* note 242, at 509–10).

circularity is that amounts paid in compensation and legal fees are ultimately paid for by shareholders.

The fact that the shareholders paying compensation and legal bills are innocent of any wrongdoing gives the problem of circularity a moral sting. In the typical mass tort case, for example, the shareholders of a corporation that pays a judgment to the victims of its actions have indirectly benefitted from the tortious act because the company would have made money from selling an unsafe product or manufacturing products in violation of environmental regulations, for example. In a securities fraud mass action, however, those funding the recovery—the present shareholders of the company, who either retained their shares or purchased them after an incident of securities fraud—cannot be said to be beneficiaries of any wrongdoing.²⁴⁷ It is typically the executives who have benefitted, for example by earning large bonuses because the company's stock price was kept artificially high, not the shareholders who have continued to hold their stock in the company. Morally, the shareholders who retain their stock are as blameless as those shareholders being compensated, with the only difference that those receiving compensation happened to buy or sell their corporate shares during the class period.²⁴⁸ Adding to the problem of innocent shareholders funding securities fraud recoveries is the make-up of the different classes of shareholders. A large portion of the shareholders who receive compensation will be short-term traders such as hedge funds, while buy and hold investors are often less sophisticated “Main Street” investors.²⁴⁹ This adds a political dimension to the perceived

247. See Coffee, *supra* note 242, at 1562.

248. See Merritt B. Fox, *Why Civil Liability for Disclosure Violations When Issuers Do Not Trade?*, 2009 WISC. L. REV. 297, 309 (arguing that fairness concerns do not justify compensating diversified investors because to do so would be unfair to undiversified ones).

249. See Coffee, *supra* note 242, at 1559–60.

moral injury of a circular shareholder recovery.²⁵⁰

Circularity has been the heart of the critique of the American securities class action, and commentators such as Fox who accept the deterrence rationale often conclude that the compensatory rationale is weak.²⁵¹ Turning to the WCAM, it is not surprising that it offers no improvement on the American securities class action as far as the compensatory rationale is concerned. Its origins as a mechanism to enable mass settlement of more traditional tort claims means that it fails to deal with the problem of circularity. The WCAM settlement is therefore open to the same critique as its American counterpart. While it may be too much to expect that the legislature or judges in a foreign jurisdiction such as the Netherlands thoroughly investigate the possible problems in applying a mass claims statute to a type of case it was not originally designed for, the WCAM securities settlements replicate the circularity inherent in their American counterparts.

Deterrence is the other main justification for the securities class action. The threat of a lawsuit, the argument goes, will have a deterrent effect that incentivizes accurate statements and disclosure on the part of the company and its executives. While it is hard to measure the deterrent effect of such a threat, if real it presents a solid justification for the present system.²⁵² Unfortunately, just as with the compensation rationale, even if in theory there is a deterrent effect, a number of factors serve to weaken its force in practice. Most importantly, the actors whose statements give

250. See COFFEE, *supra* note 106, at 145–46 (“It is hard to imagine a set of rules that would be less politically acceptable (if they were understood) than a system that involuntarily transfers money from ordinary citizens to hedge funds.”).

251. See Fox, *supra* note 248; see also Langevoort, *supra* note 243, at 635–36.

252. See generally Fox, *supra* note 248; Coffee, *supra* note 242; see also Fisch, *supra* note 242 (proposing a corporate governance rationale justifying the threat of the securities fraud class action). *But see* Richard Booth, *The Future of Securities Litigation*, 4 J. BUS. & TECH. L. 129, 148–49 (2009) (questioning the deterrence rationale).

rise to a securities class action are typically insulated from any personal liability for their misstatements.²⁵³ Under the terms of an insurance policy covering such a settlement it is important that the corporate executives not admit intentional or even reckless wrongdoing.²⁵⁴ A recovery for the plaintiffs then requires that the executives responsible for a misstatement not admit to any wrongful conduct. The structural imperative that decisionmakers not assume personal responsibility thus directly cuts against the possibility of a securities class action actually having a deterrent effect. Plaintiffs' lawyers will not be able to recover in most securities class action lawsuits if they pursue a claim resulting in personal liability.

The Dutch securities settlements concluded so far are unsurprisingly devoid of any discussion of the deterrent effect to be had from the threat of a securities fraud claim. First, the focus of the WCAM is on compensation of victims and the corresponding benefit of finality that a settlement brings to the alleged wrongdoer.²⁵⁵ Second, because the WCAM does not involve a cause of action, there is no direct threat against a would-be wrongdoer, only the benefit of a possible settlement. While the arguments for a deterrence rationale in the American context should hold good in the Dutch context,²⁵⁶ they are rather far removed from the practicalities of the individual settlements thus far

253. See Langevoort, *supra* note 243, at 640–46 (proposing the use of equitable actions to recoup ill-gotten gains from fraud on the part of corporate executives); Coffee, *supra* note 242, at 1570 (explaining how insurance coverage of directors and officers deprives class actions lawsuits of their deterrent effect).

254. See Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1469 (2004).

255. See Arons & van Boom, *supra* note 195, at 868 (“[I]t is clear that the settlement aims primarily at financial compensation for injured individuals. . .”).

256. See Kramer, *supra* note 174, at 64 (noting the deterrence rationale in the European context); see also U.S. CHAMBER INST. FOR LEGAL REFORM, THE GROWTH OF COLLECTIVE REDRESS IN THE EU: A SURVEY OF DEVELOPMENTS IN 10 MEMBER STATES 50 (2017) (arguing against a deterrence motive for collective actions in Europe).

concluded under the WCAM.

C. *Lawyers' Incentives*

A strong line of criticism of the American securities class action concerns the structural incentives it creates for lawyers, particularly those representing the plaintiffs. In short, the criticism is that the American system of lawyer-driven mass actions incentivizes lawyers to work for their own interests, not those of their clients.²⁵⁷ It also incentivizes nuisance claims or “strike suits,” where claims are filed in weak cases simply to extract a settlement out of the defendants. Given that there is substantial evidence to support at least some version of these criticisms, do the same problems arise under the WCAM? What incentives do lawyers have here, and how are shareholders' interests protected? Furthermore, can the WCAM mechanism lead to a “race to the bottom” where competing shareholder representatives can engage in a reverse auction to settle the claims at the lowest possible cost to the defendant?

Like other European jurisdictions, the ban on contingency-fee lawyering in the Netherlands prevents lawyers from receiving a fee based on their success in resolving the claim.²⁵⁸ Nevertheless, the securities cases resolved under the WCAM are funded by third-party litigation funders, often hedge funds, and the settlement amounts paid to the claimant representative organizations include a “success fee,” so in practice they do represent a type of contingency-fee lawyering. To work around the Dutch rules governing legal practice and the potential imposition of “loser-pays” fee shifting, a complex funding structure is

257. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 19–27 (1991). *But see* COFFEE, *supra* note 2, at 91–94.

258. See Tjeenk & van Heeswijk, *supra* note 91, at 136.

used.²⁵⁹ First, the Dutch attorneys working on the case are paid their standard hourly rate, as required by Dutch rules governing the practice of law. The claimant organizations such as VEB, Deminor, and the various *stichtings* involved in each case enter into funding agreements with third-party litigation funders. The funder covers the upfront costs of the litigation in exchange for a large slice (estimated at 40–50%) of the settlement if successful.²⁶⁰ Crucially, a claimant organization also purchases an insurance policy protecting it against the imposition of litigation costs in a “loser-pays” system in case the claim is unsuccessful.²⁶¹ This structure provides for the essential work-around of the Dutch rules against contingency-fee lawyering thereby allowing for something like an American class action lawsuit. The Amsterdam Court of Appeals has specifically blessed this, noting that the use of third-party litigation funding in these cases enables them to go forward and is therefore justified on public policy grounds.²⁶²

Given this structure, the incentives of lawyers in the Dutch actions in the end approximate those in the American system. While the rules against contingency fees insulate the Dutch attorneys from the specific incentives governing their American counterparts, since they are paid their standard hourly rate, entrepreneurial American law firms such as Grant & Eisenhofer have played an important role in these cases as well. Since their compensation is determined by their success or failure in achieving a settlement for their clients, they will be subject to similar incentives as in their cases in the U.S. Indeed, a look at the details of the three

259. See Coffee, *supra* note 2, at 1904–05; Hensler, *supra* note 2, at 318–19.

260. See Coffee, *supra* note 2, at 1904; see also U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 256, at 29–32.

261. See Coffee, *supra* note 2, at 1904.

262. See Fortis, *supra* note 186, ¶ 5.1.4 (“More generally, the Court has explicitly acknowledged that collective proceedings can be expensive and that it is of social importance that collective proceedings can be conducted, so that financing should be found for them.”).

most important WCAM settlement cases shows similar results as in American securities fraud class actions. These results have two different implications for fears that the WCAM mechanism may facilitate a “race to the bottom” of competing plaintiffs’ attorneys. Within the Dutch system itself there are substantial safeguards protecting against a race to the bottom, including both the oversight of the courts and economic factors surrounding the representation of shareholders. On an international basis, however, there is the possibility that defendants can use a Dutch settlement to undermine a settlement more advantageous to shareholders in another jurisdiction. (Indeed, in *Shell Petroleum* this arguably occurred.)

A look at the fee amounts in the major Dutch settlements is instructive. In *Shell Petroleum*, lawyers handling both the U.S. claims and the foreign claims dismissed under the then-prevailing conduct test received separate fee awards. The Bernstein, Liebhard & Lifshitz firm received a fee award of \$30 million for its work in the U.S. case, which had total damages of approximately \$89 million that RDS paid to settle the U.S. claims.²⁶³ They also negotiated a fee of \$27 million with RDS for their work on the global claims prior to their dismissal, which the court approved.²⁶⁴ In the global case settled under the WCAM, Grant & Eisenhofer received a fee of approximately \$50 million. Such an amount comes to a total of \$107 million in legal fees on total awards in both cases of \$471 million. If the legal fees are added to the total award, coming to a figure of \$578 million, legal fees would comprise 18.5% of the total amount.²⁶⁵

Such amounts are on the high side for American securities class action settlements in this range, but not

263. See Hensler, *supra* note 103, at 186.

264. *Id.* at 187.

265. Note that the fee amounts going to law firms are in addition to (not a percentage taken out of) the compensation given to shareholders. See Hensler, *supra* note 2, at 318.

outside the realm of the ordinary.²⁶⁶ Aside from the fee amounts, however, there is another aspect to the case which Professors Coffee and Hensler each explore.²⁶⁷ Through its representation of major institutional investors, Grant & Eisenhofer essentially intervened in the U.S. case by opening negotiations for a global non-U.S. settlement with Royal Dutch/Shell. This intervention likely led to lower total costs to RDS, and, at least in Professor Coffee's estimation, raises the prospect of a race to the bottom on the international level.²⁶⁸ In this precedent-setting case, where the U.S. settlement was conditioned upon the global non-U.S. settlement in the Netherlands, this fear is justified. Nevertheless, RDS shareholders received a total of \$471 million. Relying on the testimony of expert witnesses Allen Ferrell and Michael Perino that its fee award comprises between 9.79% and 12.46% of the estimated damages for non-U.S. plaintiffs, the Dutch court characterizes this as a reasonable and even generous award.²⁶⁹ Compared to the average award in an American securities class action, this judgment is undoubtedly correct.²⁷⁰

Converium likewise involves ordinary fee awards in both the U.S. and the Dutch actions. In the U.S. case, plaintiffs'

266. Eisenberg, Miller & Germano report that the mean fee percentage in securities class actions lawsuits in [U.S. federal court] from 2009 to 2013 is 23%, and the median award is 25%. See Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 952 (2017) (Table 4. Fee and Class Recoveries, by Case Category, 2009–2013). Since the average fee as a percentage of the class action award declines as the size of the award increases, however, these fee amounts may be high. See Hensler, *supra* note 103, at 186–87 (citing Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248 (2010)).

267. See Coffee, *supra* note 106, at 217; Hensler, *supra* note 2, at 314–19; see also Clopton *supra* note 65, at 146.

268. See Coffee *supra* note 106, at 217.

269. See *Shell Petroleum*, *supra* note 131, ¶ 6.15.

270. See CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2016 REVIEW AND ANALYSIS 7 (2016) (finding median settlements as a percentage of estimated damages in 2016 of 2.5%).

attorneys were awarded 20% (plus \$4.5 mil. of litigation expenses) of the total award of \$84.6 million.²⁷¹ In the Dutch settlement, the Amsterdam Court of Appeals likewise approved a total settlement of \$58.4 million, with 20% of that amount going to the Principal Counsel, the trio of U.S. law firms handling the American litigation and assisting in the Dutch litigation.²⁷² *Converium* is noteworthy for its explicit discussion of this contingency fee award. The court rejects the argument made by certain shareholder representatives that such an amount is excessive. It notes that much of the work was in fact performed in the U.S. by Principal Counsel, and declares that under Dutch law “it is possible to take account of that which is customary in the U.S. and is seen as reasonable.”²⁷³ Also important is the *Converium* court’s discussion of the discrepancy in per share awards between the U.S. action and the Dutch one. The court acknowledges this, but finds that it reflects the fact that “the legal position of the non-U.S. exchange purchasers is substantially different from that of the U.S. exchange purchasers.”²⁷⁴

The fees in the *Fortis* case also come to about the same amount, although in a significantly more complex context, as the four shareholder representatives—VEB, Deminor, FortisEffect, and SICAF—received varying amounts. The court rejected the first proposed settlement in part because of lack of transparency concerning fees, and also because the “active claimants” who had joined a shareholder representative group (and paid fees up front) would have received around 50% greater compensation amounts than the passive ones.²⁷⁵ The second settlement, which the court approved, paid shareholders the same amounts, plus a “cost

271. See Order Awarding Attorneys’ Fees and Expenses, *In re SCOR Holding (Switzerland) A.G. Litig.*, (S.D.N.Y.) (Dec. 17, 2008) (No. 04-7897).

272. See *Converium II*, *supra* note 157, ¶ 6.5.3.

273. *Id.* ¶ 6.5.2.

274. *Id.* ¶ 6.4.2.

275. See *supra* notes 185–88 and accompanying text.

addition” to account for costs incurred by the active shareholders. The second settlement also approves of fees from Ageas (the successor to Fortis) totalling 45 mil. euros, “success fees” of approximately 83.5 mil. euros, and costs of 29.6 mil. euros.²⁷⁶ In addition to this, FortisEffect members pay a fee of 10%, SICAF members 25%, and Deminor members 21%.²⁷⁷ VEB is non-profit. Given these numbers, a ballpark figure of 20% fees paid to representative organizations, their attorneys, and third-party litigation funders seems likely. This number in fact appears quite high for a case of this size, with a settlement value of \$1.5 billion.²⁷⁸

The cost of these settlements to shareholders is on the high side then, particularly for Fortis shareholders. Nevertheless, the recovery and fee amounts do not appear outside the range of reasonable settlements (with the exception of *Fortis*). This suggests that within the context of the Netherlands, the WCAM is not leading to a “race to the bottom” on the part of competing representative organizations and their lawyers. The structure of the WCAM in fact appears to prevent this, because any representative organization or injured party can have a seat at the table and voice its opinion on a proposed settlement even if it has not been involved in settlement negotiations.²⁷⁹ While there may be grounds to suspect that the representative organizations are charging high fees for their services, as the *Fortis* court suggests, within the Netherlands itself the structure of the WCAM settlement process does not appear to simply allow for one organization to cut a deal at the lowest cost with a defendant and then have that declared binding on all claimants.

276. See *Fortis*, *supra* note 186, ¶¶ 5.14–15; see also *Vos*, *supra* note 194.

277. *Fortis*, *supra* note 186, ¶¶ 5.36–38.

278. See Eisenberg & Miller, *supra* note 266, at 265 (reporting a mean fee award of 12% for awards greater than 175.5 million).

279. See van Boom, *supra* note 98, at 182.

In addition to the procedural protection afforded to interested parties is the active role the WCAM gives to the Amsterdam Court of Appeals. Most important is the requirement under DCC 907(3) that the court find a settlement “reasonable.”²⁸⁰ While this term can mean different things to different parties, all the WCAM settlements so far find the court taking this requirement seriously.²⁸¹ This reflects the position of the drafters of the statute that the court would play an active role to protect the interests of claimants. The open-ended nature of the term “reasonable” also allows for the court to factor in a broad range of considerations here, including the standard practice in American courts where contingency-fee lawyering in class actions prevails.

On the whole, the interests of lawyers in the WCAM settlements roughly approximate those of lawyers in American securities class actions. While the Dutch lawyers are insulated from the pressures American attorneys have to settle cases, at times in conflict with their clients’ interests, the American firms involved in the WCAM settlements are only paid if there is a settlement. The costs of settlement appear high, but with the exception of *Fortis* are comparable to those in the U.S. Also shaping the incentives of lawyers representing the shareholders is the fact that a greater proportion of corporate shares in Europe are held by institutional investors.²⁸² This should lead to a greater alignment of incentives between shareholders and their lawyers, as individual shareholders (and the organizations

280. Art. 7:907 ¶ 3(b) BW (Neth.); see van Boom, *supra* note 98, at 181–82 (detailing the Dutch Judiciary’s initial discomfort over “the open texture of the fairness criteria” in the WCAM); see also Kamerstukken II 2003/04 (Parliamentary Proceedings Second Chamber 2003/04) 29 414, no. 3 (WCAM Explanatory Memorandum).

281. See Krans, *supra* note 89, at 292–93.

282. See Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, 3 VA. L. & BUS. REV. 191, 195 (2008); see also Armour et al., *supra* note 82, at 7–8 (detailing the rise in collective investment both in the U.S. and Europe).

representing them) have a greater incentive to object to positions taken by their lawyers which may fail to serve their interests to the fullest extent. In settlement negotiations, lawyers representing both sides are aware that investors have the right to opt-out of a settlement and press an individual claim, thereby prompting negotiators on both sides to work for a settlement that will be perceived as adequate by shareholders.²⁸³ Lawyers' incentives under the WCAM may offer some improvement at the margin as compared to the American system, but they are largely similar.

D. The Political Economy of the WCAM Securities Settlement

Comparing the WCAM with the American securities fraud class action then reveals an overarching point of difference and a number of points of similarity. Because the settlement mechanism does not provide a means to sue but only to settle with a defendant, leverage in the negotiation shifts, often decisively, to the defendant. When the defendant does have sufficient incentive to settle, however, similarities with the American securities fraud class action emerge. Lawyers work for their cut, and the familiar problems of circularity and questionable deterrent effect appear. And while within the Netherlands itself procedural and structural features of the WCAM protect against the ability of one shareholder representative to undercut others in a reverse auction scenario, on a transnational basis there is the possibility that a Dutch settlement can be used to undercut potential actions in other jurisdictions.

A full comparison of the WCAM with the American securities fraud class action should also consider the larger forces that shaped its development as well as its meaning for securities regulation going forward. Since these forces have a large admixture of the political, as well as accidental factors, in addition to purely economic ones, they fall under

283. See Arons & van Boom, *supra* note 195, at 872–73.

the rubric of “political economy” broadly considered. While the use of this term by law and economics-minded scholars seems to have a pejorative connotation,²⁸⁴ indicating interest group, institutional, or other political forces that cause a regulatory regime to deviate from the ideal of efficiency, such forces are of course operative in shaping any real-world regulatory system. Whether construction of a regulatory system in the absence of all political-economic forces would even be possible, and normatively desirable if it were, is beyond the scope of this article. Be that as it may, in addition to more traditional economic forces, political and jurisprudential considerations, as well as matters of chance, have shaped the development of the WCAM’s application to securities cases. Political-economic factors are also important to the larger significance of the WCAM for securities regulation and international financial law.

It must be remembered that the WCAM was enacted into Dutch law to provide a mechanism for settling mass tort cases, not securities cases.²⁸⁵ Its application to securities claims occurred when Royal Dutch/Shell, which was a defendant in Federal District Court in New Jersey, sought another forum to resolve claims of non-U.S. shareholders.²⁸⁶ It was subsequently used by enterprising American lawyers seeking a vehicle for mass claims that would not survive in American courts under the then-prevailing “conduct and

284. See, e.g., Steven M. Davidoff, *Rhetoric and Reality: A Historical Perspective on the Regulation of Foreign Private Issuers*, 79 U. CIN. L. REV. 619, 621 (2010); William Bratton & Michael Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 75 (2011); Merritt B. Fox, *The Political Economy of Statutory Reach: U.S. Disclosure Rules in a Globalizing Market for Securities*, 97 MICH. L. REV. 696 (1998).

285. See *supra* note 89 and accompanying text. The Dutch Parliament’s Explanatory Memorandum explains that while the immediate reason for the passage of the WCAM statute is to allow for compensation in the DES case, it is intended to be a statute of general application to “mass damages” cases. There is however no mention of its application to securities cases. See Kamerstukken II 2003/04 (Parliamentary Proceedings Second Chamber 2003/04) 29 414, no. 3 (WCAM Explanatory Memorandum).

286. See Hensler, *supra* note 103, at 180–81.

effects” test. Its use in securities cases is serendipitous, then—while resourceful lawyers would have likely tested it sooner or later, the Dutch Parliament enacting the statute does not appear to have considered the application of the law to securities cases. On the other hand, the development of the securities settlements under the WCAM is not only driven by chance but also by economic rationality, since it offers a cost-effective means for a corporation to buy closure when faced with numerous similar damages claims.²⁸⁷ And principles of justice must be counted as a third causal factor. In *Converium*, the court emphasizes the principle of treating like cases alike in order to justify its expansive interpretation of the jurisdictional law before it.²⁸⁸ This is an important jurisprudential principle ultimately grounded in deontological reasoning;²⁸⁹ in the legal literature it comes under the rubric of “fairness.”²⁹⁰ Furthermore, the development of the WCAM as a means of settling securities cases can be justified on the grounds of providing “access to justice” for shareholders harmed by corporate fraud.²⁹¹ While the American experience with securities fraud class actions raises serious questions as to the genuineness of this justice, they can and do provide compensation to defrauded investors. Beyond that, the class action lawsuit serves an important symbolic function in securities regulation.²⁹²

287. See *supra* note 238 and accompanying text.

288. See *supra* notes 172–73 and accompanying text.

289. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272–78 (1977); JOHN RAWLS, *A THEORY OF JUSTICE* 208 (rev. ed. 1991) (“The rule of law implies the precept that similar cases be treated similarly.”).

290. See, e.g., Jeremy Waldron, *Moral and Legal Luck: Lucky in Your Judge*, 9 *THEORETICAL INQ. L.* 185, 191–92 (2008); Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 *CHI.-KENT L. REV.* 63, 74–76 (1989).

291. See Arons & van Boom, *supra* note 195, at 859; see also Beyea, *supra* note 39, at 567; Hensler, *supra* note 65, at 970.

292. See Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 *HARV. L. REV.* 1067, 1085 (2019); see also COFFEE, *supra* note 106, at 227 (discussing the role of symbolic justice in the securities class action context).

In addition to factors of chance, economics, and justice, the policy justifications used by the courts in key decisions have also been important in the development of the WCAM as a mechanism for settling securities disputes. As explored by Professors Kaal and Painter, the WCAM can be seen as an example of forum competition in securities regulation.²⁹³ While in hindsight they appear to overstate the similarity of the WCAM securities settlement and its American counterpart, because the lack of a means to bring a mass claim under the WCAM against an unwilling defendant represents a fundamental and often decisive difference with the American regime, their theory of forum competition is supported by the self-understanding of both the American and Dutch courts. As detailed in Part I above, the U.S. Supreme Court in *Morrison* believed that it was appropriate to hand off foreign securities cases to other jurisdictions that it believed had a closer connection to them.²⁹⁴ While Justice Scalia's opinion grounds this position in the doctrine of comity, it was also likely influenced by the economic argument for rejecting the conduct and effects test presented by Professors Choi and Silberman.²⁹⁵ And from the Dutch side, *Shell Petroleum* and *Converium* show the Amsterdam Court of Appeals understanding its role as complementary to the U.S. courts in the wake of *Morrison*.²⁹⁶ In the recent *Petrobras* action, the Rotterdam Court of First Instance appears to have taken forum competition even further. In distinction to Judge Rakoff in the Southern District of New York, the Rotterdam court ruled that the arbitration provision in the Petrobras Bylaws was defective, thereby

293. See Kaal & Painter, *supra* note 83; see also Hensler, *supra* note 65, at 969.

294. See *supra* note 14 and accompanying text.

295. Indeed, the *Morrison* decision cites Choi and Silberman. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 250 (2010) (citing Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class Actions*, 2009 WIS. L. REV. 465 (2009)); see also Beyea, *supra* note 39, at 551 n.86.

296. See *Shell Petroleum*, *supra* note 131, ¶¶ 3.11–14, 3.25; *Converium I*, *supra* note 156, ¶ 2.5; *Converium II*, *supra* note 157, ¶ 6.4.2.

permitting the claim under DCCP 3:305 to proceed.²⁹⁷ On both the part of the Dutch and American courts then, a doctrine of complementarity and even competition should be counted as a policy choice (albeit one grounded in an economic argument) driving the development of this law.

A further matter of political economy, as pointed out by Professor Langevoort and others, has also been important in the development of the WCAM.²⁹⁸ This is that the U.S. economy contains a significantly higher number of retail investors than the European ones. As a consequence, the importance of allowing an opt-out class action is greater in the U.S. context than in Europe, because a larger proportion of the shares of an American company will be held by shareholders with negative value claims. In Europe, by contrast, a larger proportion of a corporation's shares will be held by investors with an incentive to bring individual claims against a corporation they believe has defrauded them. Furthermore, in the context of a WCAM settlement, many of these institutional investors have an incentive to join a shareholder representative such as VEB, or a *stichting*, and to press for a settlement providing substantial compensation. A corporation involved in settlement talks under the WCAM will therefore be incentivized to offer a generous enough settlement to satisfy the shareholder representatives as well as shareholders not represented by any foundation who have the right to opt-out of any settlement.²⁹⁹ In distinction to the American securities class action then, the relatively greater concentration of ownership in institutional investors in Europe may have the effect of balancing the disparity of bargaining power created by the lack of a right to sue collectively as well as policing the conduct of the lawyers involved on the shareholder side.

297. See *supra* notes 210–15 and accompanying text.

298. See *supra* note 282 and accompanying text.

299. See Arons & van Boom, *supra* note 195, at 872–73; Krans, *supra* note 89, at 298–99.

A final consideration of political economy in the WCAM securities cases concerns their significance for the system of international securities regulation. The application of the WCAM to securities cases appears to be an example of Professor Brummer's "conservation theory of international financial law," under which regulatory power is not destroyed but rather transferred.³⁰⁰ As *Morrison* shut the doors of the U.S. courts to foreign securities claims, the Netherlands experimented with hosting them. Furthermore, insofar as they complement the American securities fraud class action, they can be seen as an example of a loose sort of convergence in international financial law.³⁰¹ While the pressures toward convergence are less in securities law than other areas of financial regulation, and what convergence there is is less complete, the past decade has witnessed the rapid development of a number of national legal regimes to handle securities fraud cases collectively.³⁰² While the Dutch experience cautions that problems of circularity and effective deterrence will likely remain after a mass claim (or settlement) procedure is enacted, considerations of both economic efficiency and access to justice have prompted a host of countries to implement some form of collective action, usually opt-in, for securities fraud cases. In distinction to our present anti-global mood, these considerations appear to have prompted some convergence in national regimes of securities regulation. The American and Dutch regimes are just two of these systems, but they are among the most important as they represent (in the Dutch case, through the operation of the convention on judgments) the largest economic blocks of the Western world.

300. See Chris Brummer, *Territoriality as a Regulatory Technique: Notes from the Financial Crisis*, 79 U. CIN. L. REV. 499, 524 (2011).

301. See Armour et al., *supra* note 82, at 21–22.

302. See Coffee, *supra* note 2; Hensler, *supra* note 65; Kistenbroker et al., *supra* note 66.

CONCLUSION

The story of *Morrison*, the WCAM, and the growth of the international securities settlement is complex. *Morrison* is driven by both Justice Scalia's jurisprudential commitments as well as the fear that the U.S. courts had become a "Shangri-La" for the securities fraud class action.³⁰³ For scholars who have long voiced criticisms of the U.S. securities fraud class action regime on economic grounds, *Morrison* and the WCAM settlement mechanism are both something to applaud: *Morrison* because it closes the courtroom doors for those suits with the least obvious connection to the United States, and the WCAM because its experiment fundamentally reshuffles the balance of power between corporations and the legal representatives of the shareholders. While economics are not the only driving factor in this development, the WCAM does represent an important instance of regulatory competition. A close look at the WCAM and the settlements under it, however, shows that the Dutch regime offers only a crude sort of improvement on its American counterpart: its denial of a cause of action in a mass claim greatly reduces the amount of cases in the system, but those that do settle are still fundamentally circular and have questionable deterrent effect. The WCAM is an interesting and important development in global securities regulation, but investors and corporate issuers will have to await a future era less hostile to supra-national regulation for a more sophisticated alternative to the American securities class action.

303. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 270 (2010).