Notes

Who Bears the Burden: Assessing the Likelihood of Foreign Recognition of a U.S. Class Action Judgment

Ever since the Second Circuit's 1975 decision in Bersch v. Drexel Firestone*, U.S. courts have grappled with whether to include foreign plaintiffs in U.S. opt-out class action lawsuits. The notion of an opt-out class action runs contrary to many countries' conceptions of public policy. It is thus an open question whether these countries would recognize a U.S. court's judgment in an opt-out class action. U.S. courts and commentators are concerned by the potential for foreign plaintiffs in an opt-out class action to relitigate an adverse judgment abroad. Various standards have been developed to guide courts in navigating this issue. The Southern District of New York's 2016* Petrobras *decision is seminal. In it, the court altered the prevailing* Vivendi *standard for assessing the likelihood of foreign recognition of the judgment in a U.S. opt-out class action lawsuit. The* Petrobras *Court declined to follow the* Vivendi *standard and shifted the burden of showing the likelihood of nonrecognition from the party seeking class certification to the party resisting class certification. This Note situates the* Petrobras *decision in relation to previously articulated standards and considers the evolution of these standards. This Note argues for the applicability of* Petrobras' *burden-shift beyond the securities context and suggests that it is time for courts to reconsider the relevance of the issue of foreign recognition to class certification. It concludes by raising several uncertainties regarding the practical application of* Petrobras' *burden-shift.*

INTRODUCTION

The class action regime in the United States is predicated on a presumption of preclusive symmetry between plaintiffs and

defendants.[1] Unlike in most other legal systems,[2] the results of U.S. class actions are binding upon not only the defendant and affirmatively participating plaintiffs, but upon each plaintiff who failed to affirmatively exercise his or her right to "opt-out" of the action.[3] Beyond serving the interests of judicial efficiency, an opt-out class action regime offers potential benefits to both plaintiffs and defendants.[4] Opt-

1. *See* Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion*, 90 IND. L.J. 1387, 1389 (2015) ("The conventional wisdom, to the extent it exists, rejects litigation options and the asymmetric risk of relitigation they represent."); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975) ("if defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been."), abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 175 (2003) ("The ideal of symmetry in class action litigation played an important and well-documented role in the creation of the opt-out class action.").

2. *See* Antonio Gidi, *The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America*, 37 BROOK. J. INT'L. L. 894, 930, 934 (2012) (noting that only a few European countries, including Portugal and the Netherlands, have adopted an opt-out class action regime, while "[m]ost major Western common law countries, such as the United States, Canada, and Australia, have adopted opt-out class actions"; further noting that in the Latin American context, Colombia is the only country with an opt-out class action system which is "substantially similar" to the U.S. model); Andrea Pinna, *Recognition and Res Judicata of US Class Action Judgments in European Legal Systems*, 1 ERASMUS L. REV. 31, 40 (2008) ("Traditionally, in all European legal systems the principle is that one becomes a plaintiff only by having actually manifested one's intention to bring a claim and by not remaining silent."); Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 347 (2011) (first quoting Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 6 (2009); then quoting John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 302, 330 (2010)):

> [W]hile Europe has embraced aggregate litigation, it "stops markedly short of full-fledged embrace for U.S.-style class actions." Professor Coffee identifies two reasons for Europe's reluctance to fully embrace American-style opt-out class actions: first, Europeans fear that opt-out class actions will "invite[ ] abuse by giving a positive settlement value to nonmeritorious actions," and second, Europeans believe that "a litigant should not be bound by agents that the litigant has not authorized to act on the litigant's behalf."

3. Under Rule 23(b)(3)'s superiority requirement, a court may permit the maintenance of a class action only when the court finds that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). In a Rule 23(b)(3) class action in which proper notice was provided to the interested parties, the judgment in the class action must "include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members." FED R. CIV. P. 23(c)(3)(B).

4. *See* Ilana Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1564–65 (2005):

out class actions promise defendants a more extensive resolution of potential claims while ensuring "that individuals with small, but legitimate, legal claims receive compensation for their injuries."[5] From the perspective of a prevailing defendant, the value of an opt-out class action rests in its preclusive effect, which is extended by Full Faith and Credit to all U.S. courts.[6] In return for risking a substantial judgment in favor of the plaintiffs, a successful defendant is rewarded with a judgment that precludes the plaintiffs from relitigating their claims against it.

But what happens when a portion of the plaintiff class is comprised of foreign plaintiffs? While Full Faith and Credit ensures that the preclusive effect of a judgment in a defendant's favor will be recognized domestically, it provides no such guarantee regarding foreign courts.[7] This is a problem, because while a prevailing defendant will want the litigation's outcome to be as definitive as possible, the notion of an opt-out class action is rejected by many countries' legal systems.[8] There are indications that many countries' courts would be unlikely to recognize the preclusive effect of such a judgment.[9] A foreign plaintiff may therefore have the potential to relitigate a failed claim outside of the United States. This threatens to shatter the symmetry that underlies and legitimizes class actions. As Professor Clopton puts it: "The result is an asymmetry between defendants bound by a judgment versus some passive plaintiffs with the option to bring a new suit in a foreign forum if they are unsatisfied with the first result. Some passive

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> First, [an opt-out class action] conserves judicial and party resources by binding absent class members to the final class settlement or judgment, thereby minimizing the number of separate lawsuits against the same defendant on the same set of facts. Second, it provides a cost-effective method for injured parties to litigate small claims.

5. *Id.* at 1584; *see also* Clopton, *supra* note 1, at 1401–02 ("At a minimum, opt-in reduces the number of plaintiffs, which necessarily reduces the number of individuals receiving compensation."). For a discussion with specific regard to foreign plaintiffs, see Janet Walker, *Crossborder Class Actions: A View from Across the Border*, 2004 MICH. ST. L. REV. 755, 770 (2004).

6. U.S. CONST. art. IV, § 1.

7. Clopton, *supra* note 1, at 1395 ("While U.S. courts grant full faith and credit to sister court judgments, there is no international legal obligation for foreign courts to do the same.").

8. *See infra* Section I.B.3; *see also supra* note 2.

9. *See supra* note 2; *see also* George A. Bermann, *U.S. Class Actions and the "Global Class,"* 19 KAN. J.L. & PUB. POL'Y 91, 92 (2009) (noting that "professions of international comity notwithstanding," the transnational litigation scene resembles "a civil procedural 'state of nature,' if not inter-jurisdictional warfare"); Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1300–01 (2004) (describing the state of transnational litigation and measures to improve international comity).

plaintiffs in transnational class actions thus possess 'litigation options.'"[10] This is not a theoretical problem: The time is long past when U.S. class actions played themselves out on the purely domestic stage. The new paradigm is one in which certification in U.S. litigation is sought for a class consisting heavily and possibly even preponderantly of nationals or residents of other countries. The emergence of multinational classes in securities, antitrust, and mass tort claims is something we can expect in a world of truly international markets.[11]

Nor is this a new problem. Ever since Judge Friendly's 1975 decision in *Bersch v. Drexel Firestone, Inc.*, [12] American courts have grappled with how best to address the reality of foreign plaintiffs.

This Note addresses the standard that courts within the Second Circuit have adopted in making this determination. In particular, this Note seeks to examine the evolution of that standard from *Bersch* to the present. Part I considers Rule 23(b)(3)'s superiority requirement and the normative values underlying its application to class actions involving foreign plaintiffs. It then reviews two major decisions that defined and redefined the standard for including foreign plaintiffs within a U.S. class action—*Bersch* and *In re Vivendi*, *Universal S.A*.[13]—before turning to a brief case study of the res judicata issue's treatment in *Vivendi* and *In re Alstom S.A.* to illustrate how their standards operate in practice.[14] Part II reviews the effect of the Supreme Court's decision in *Morrison*[15] on class certification and examines a recent shift from the *Vivendi* standard. In his 2016 *In re Petrobras* decision, Judge Rakoff of the Southern District of New York modified the *Vivendi* standard by shifting the burden of proof from plaintiffs to defendants in securities class actions.[16] Three years later, in *Villella v. Chemical Mining Company of Chile*, Judge Ramos of the Southern District of New York reiterated the adoption of the *Petrobras* burden-shift.[17] Part III argues that *Petrobras* represents a greater divergence from *Vivendi* than is immediately apparent, while at the same time the emergence and reaffirmation of the *Petrobras* burden-shift follow policy arguments credited by the

10. Clopton, *supra* note 1, at 1388–89.

11. Bermann, *supra* note 9, at 93.

12. 519 F.2d 974, 966 (2d Cir. 1975) (establishing the "near certainty" standard for assessing the likelihood of foreign nonrecognition of a U.S. class action judgment).

13. *In re* Vivendi, Universal S.A., 242 F.R.D. 76, 95 (S.D.N.Y. 2007).

14. *In re* Alstom SA Sec. Litig., 253 F.R.D. 266 (S.D.N.Y. 2008).

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

16. *In re* Petrobras Sec. Litig., 312 F.R.D. 354, 363 (S.D.N.Y. 2016).

17. Villella v. Chem. and Mining Co. of Chile, 333 F.R.D. 39, 59 (S.D.N.Y. 2019).

Vivendi Court in trending toward a less exclusionary class regime. Part III goes on to argue that *Petrobras'* burden-shift is applicable outside of the securities context and that it is time for a reconsideration of the res judicata inquiry's place in class certification.[18] It concludes by highlighting remaining uncertainties as to *Petrobras'* practical application.

I. THE OLD STANDARD(S): *BERSCH*, *VIVENDI*, AND ALTERNATIVE APPROACHES

Part I charts the evolution of the Second Circuit's standard for certifying classes including foreign plaintiffs. It begins by providing an overview of Rule 23(b)(3)'s superiority requirement, before moving to a consideration of prevailing scholarly approaches to its application. It then provides an overview and analysis of the *Bersch* and *Vivendi* decisions. Part I concludes with a comparison of the *Vivendi* and Alstom court's opposing conclusions following their application of the *Vivendi* standard.

A. Rule 23(b)(3) and Perspectives on the Normative Values Underlying its Application to Class Actions with Foreign Plaintiffs

1. Rule 23(b)(3)'s Superiority Requirement

Rule 23(b)(3) of the Federal Rules of Civil Procedure provides that in order for a court to permit the maintenance of a class, it must be the case that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[19] In determining whether a class action is superior, a court may look to the following factors: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.[20]

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18. Because the *Vivendi* and *Petrobras* decisions concerned securities class actions, other courts have been hesitant to apply their standards in non-securities contexts. *See infra* Section III.B.

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

20. FED. R. CIV. P. 23(b)(3)(A)–(D).

This superiority requirement has become "[t]he main battleground for certification of transnational class actions" and the filter through which courts have excluded groups of foreign nationals from the plaintiff class.[21] Courts most often rely on the third factor under Rule 23(b)(3) when assessing the superiority of transnational class actions with foreign plaintiffs.[22] The fact remains, however, that at no point does Rule 23(b)(3) mention what a court ought to do when confronted with foreign plaintiffs.[23]

In the absence of any clear statutory directive, courts have historically resorted to "grafting an analysis of the potential of foreign recognition of the U.S. judgment onto the superiority inquiry."[24] As Professor Bermann has noted, the fact that courts nonetheless insist on considering the likelihood of foreign recognition of their judgments is, in itself, "worth noting for . . . it reveals a profound sensitivity to the delicacy of multinational class actions."[25] Judicial attentiveness to the issue of foreign recognition begs the question: Why should U.S. courts care whether a judgment will be recognizable abroad?[26] This is an especially pertinent question given the reality that, as discussed below, U.S. courts' "lack of knowledge about foreign procedural systems may be the single most pervasive barrier to making informed choices in transnational litigation."[27]

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21. Michael P. Murtagh, *The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies*, 34 HASTINGS L. REV. 1, 6 (2011). However, as this Note will go on to explain, recent developments have indicated a trend against resolving the certification of a class composed of foreign plaintiffs under Rule 23(b)(3)'s superiority requirement. *See infra* Section II.B.

22. *See* Murtagh, *supra* note 21, at 9–10.

23. *See* Gary W. Johnson, *Rule 23 and the Exclusion of Foreign Citizens as Class Members in U.S. Class Actions*, 52 VA. J. INT'L L. 963, 965 (2012).

24. Philippe S.E. Schreiber, *A Rat Res? Questioning the Value of Res Judicata in Rule 23(b)(3) Superiority Inquiries for Foreign Cubed Class Action Securities Litigation*, 48 COLUM. J. TRANSNAT'L L. 114, 117 (2009).

25. Bermann, *supra* note 9, at 95.

26. On this point, Professor Bermann writes:

> Arguably, a U.S. court should not care whether a future adverse judgment in the class action will be granted preclusive effect in subsequent litigation abroad. For any number of practical reasons, such litigation is not likely to be brought, and so predicting the preclusive effect of the U.S. judgment may be an entirely academic exercise. Even if such subsequent litigation were probable, the U.S. court need not really care; it could simply go ahead and run the risk of including large numbers of persons in the class action, as against whom the resulting judgment may not be res judicata at a later date in their home court. What is there to lose?

Id.

27. Baumgartner, *supra* note 9, at 1385–86.

2. Suggested Approaches in the Scholarship

While some scholars have taken the position that U.S. courts should not consider the extent of the potential foreign preclusive effect of their judgment,[28] the majority follow the courts in suggesting at least some engagement with the issue. Most have advocated for the adoption of a primarily exclusionary regime.[29] That is, a regime that holds that when in doubt as to whether courts of a particular country will accord preclusive effect to a judgment, a U.S. court ought to exclude foreign citizens of that country from the plaintiff class. By contrast, few, if any, scholars have advocated for a presumptively inclusionary approach. Between these two opposing poles, various alternative solutions have been advanced, ranging from the encouragement of

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28. Tanya Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1, 60–61 (2011):

> [T]he practice of courts attempting to predict the eventual res judicata effect of a U.S. class judgment will fail to yield any definitive answers, and as such is not an appropriate method of assessing the "superiority" of a transnational class proceeding . . . . It is submitted that the best approach is also the simplest: avoiding the res judicata problem altogether. Courts can do this by interpreting Rule 23 to allow for an opt-in mechanism for foreign claimants, such that they will only be bound by the result of a U.S. class judgment if they affirmatively consent to participate in the litigation.

Notably, Professor Monestier does not go so far as to suggest that the issue of uncertain preclusive effect upon foreign plaintiffs is moot. She notes that "[w]hether plaintiffs are included or excluded in a U.S. class action matters to the parties and impacts litigation decisions; therefore, it will not suffice to include foreign claimants in the mere hope that a foreign court would accord res judicata effect to an eventual judgment." *Id.* at 64. Rather, her intention is to propose a new mechanism for dealing with this issue: the opt-in class action. However, as she acknowledges, the Second Circuit has emphatically rejected the application of an opt-in standard under Rule 23(b)(3). *Id.* at 65 (citing Kern v. Siemens Corp., 393 F.3d 120, 124, 126 (2d Cir. 2004)).

29. *See* Clopton, *supra* note 1, at 1399–1400 (finding that "[t]he few scholarly commentaries to address these issues tend to track this logic [of exclusion]," and that "what unifies these scholarly approaches . . . is that they ask courts to identify relevant plaintiffs and exclude them from opt-out class actions"); Murtagh, *supra* note 21, at 3 ("[T]his article . . . advocates for the exclusion of foreign class members from opt-out class actions where it is unclear whether the foreign courts would give res judicata effect to the judgment."); Keven M. Clermont, *Solving the Puzzle of Transnational Class Actions*, 90 IND. L.J. 69, 70 n.11 (2015) ("Most of the literature aligns with the exclusionary viewpoint."). However, it does not appear to be the case that any scholar has advocated for a purely exclusionary approach which would exclude "all foreign citizens even when they meet the terms of Rule 23." Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 CORNELL L. REV. 87, 113 (2011). As used in this Note, the term "exclusionary approaches" refers broadly to the panoply of suggested approaches rather than to the strawman of a purely exclusionary regime.

private preclusion agreements between parties,[30] to a series of rebuttable presumptions aimed at reaching the most efficient outcome.[31]

Several rationales have been advanced in support of these approaches. These rationales track the traditional substantive values underlying the American class action regime,[32] values such as "deterrence, compensation, fairness, and efficiency."[33] Such values are frequently in tension with one another.[34]

B. The Old Standard from Bersch *Through* Vivendi *and* Alstom

1. *Bersch* and the "Near Certainty" Standard

Careful judicial treatment of the issue of transnational preclusion began with Judge Friendly's 1975 decision in *Bersch v. Drexel Firestone*. A complaint alleging securities fraud was filed by a U.S. citizen, Howard Bersch, "on behalf of thousands of plaintiffs preponderantly citizens and residents of Canada, Australia, England, France, Germany, Switzerland, and many other countries in Europe, Asia, Africa, and South America."[35] One of the issues before the court on appeal was whether the class certification was appropriate given the preponderance of foreign plaintiffs within the purported class.[36]

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30. *See* Clopton, *supra* note 1, at 1415. Clopton sketches out a system in which:

> [a]ttorneys for both parties agree on the wording of [private preclusion offers which promise a potential recovery premium in favor of the release of any foreign claims], and then the court notifies option holders of the private preclusion offer using the normal procedure for sending opt-out notices. Although the offers are negotiated on a subclass-wide basis, individualized consent would be required to release the foreign claims and qualify for the premium recovery. Plaintiffs' counsel (whose fee may be increased if the total recovery is increased) and defendant (who seeks to avoid costly relitigation) work together to identify option holders and encourage them to take the deal.

31. *See* Simard & Tidmarsh, *supra* note 29, at 115–16 (developing a rule aiming to "exclude from the American class those foreign citizens who have an incentive to file subsequent foreign litigation but include foreign citizens who lack an incentive to litigate subsequently"). In order to realize this goal, the authors provide the reader with an economic formula. *Id.* at 115 n.103.

32. *See* Clopton, *supra* note 1, at 1392 (providing a non-exhaustive list of substantive values advanced by class actions).

33. *Id.*

34. *See* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 663 n.32 (2014) ("[I]t is the procedure that must yield if it seriously interferes with individual control, even if the result is reduced efficacy in achieving deterrence and compensation goals.").

35. Bersch v. Drexel Firestone Inc., 519 F.2d 974, 977–78 (2d Cir. 1975).

36. *Id.* at 993.

Notably, the approach which the court eventually adopted—the "near certainty" standard—was proposed by neither the plaintiffs seeking certification nor the defendants. The latter contended only that "the question of the inclusion of the foreign purchasers is not properly before [the court] because it was not within [the district court's 28 U.S.C. Section] 1292(b) certificate and that [the court of appeals] is limited to a remand to the district court for further consideration."[37] The court dismissed this argument on the grounds of a broader interpretation of 28 U.S.C. § 1292(b) and an emphasis on the virtues of judicial efficiency.[38] Plainly, this was an issue which the *Bersch* court aimed to resolve itself.

However, the court did not do so using the defendants-appellants' theory that, under *Zahn v. International Paper Co.*,[39] "a person who cannot sue in the federal courts as a named plaintiff because of lack of jurisdiction over his claim, may not be part of a class represented by a named plaintiff over whose claim the federal court has jurisdiction."[40] While ultimately finding in their favor on the exclusion of the foreign plaintiffs, the court opted not to "resolve [the] difficult issue" raised by the appellants' theory.[41] Rather, the court developed its own rationale for the exclusion of the foreign plaintiffs:

> The management of a class action with many thousands of class members imposes tremendous burdens on overtaxed district courts, even when the class members are mostly in the United States and still more so when they are abroad. Also, while an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, *the case stands differently when this is a near*

37. *Id.*

38. *Id.* at 994 ("[Judge Carter] could hardly have been blind to the savings that would result from a ruling on our part that the action could not be maintained on behalf of the many thousands of foreign purchasers if that was our conclusion.").

39. Zahn v. Int'l Paper Co., 414 U.S. 291, 299 (1973).

40. *Bersch*, 519 F.2d at 995.

41. *Id.* at 996 (noting a split amongst commentators as to whether "the effect of *Zahn* is limited to cases where a jurisdictional amount is required," or whether it is also applicable to "possible broader implications"). The crux of the issue facing the court was how to reconcile *Zahn* with Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). The court held:

> [T]he complete diversity necessary under Strawbridge v. Curtiss, 7 U.S. 267 (1806), was not destroyed by the intervention as plaintiffs in a class action of a class having the same citizenship as the defendant unless this portion of [B]en-[H]ur rests on the distinction between being originally named and later intervening as plaintiffs.

Bersch, 519 F.2d at 995.

> *certainty*. This point must be considered not simply in the halcyon context of a large recovery which plaintiff visualizes but in those of a judgment for the defendants . . . if defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been.[42]

The *Bersch* court's holding seems to have been motivated by two primary concerns: judicial efficiency, and, perhaps more importantly, fairness. However, it is worth lingering on how the court imagined its decision would promote judicial efficiency. It is self-evident that a massive reduction in the number of foreign plaintiffs in a class renders a class action more manageable from the perspective of the court.[43] Indeed, in the immediate case, the court's "near certainty" standard worked to dramatically reduce the size of the class by excluding all of the foreign plaintiffs.[44] But this raises the question: How did the court come to the determination that the appellants had proven foreign non-recognition to a "near certainty"? The answer, it turns out, is that only the appellants submitted any evidence regarding the likelihood of nonrecognition.[45]

In the absence of any contradictory evidence to the alternative, it was easy for the court to find that the appellant's burden had met the

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42. *Id.* (emphasis added). While the court's opinion does not explicitly specify which party bears the burden, the practical working of the standard, as well as its employment in *Bersch*, suggests that the party resisting class certification bears the burden. *See* Bermann, *supra* note 9, at 97 ("At least one court has suggested that the party resisting class certification on judgment non-recognition grounds must show that non-recognition is a '"near certainty."') (citing *Bersch*, 519 F.2d at 996).

43. The *Bersch* court provided an illustration of one of the "tremendous burdens" imposed on courts by adjudicating cases with a variety of foreign plaintiffs: "On the facts of this case one must have pause over sending notices only in English . . . . On the other hand, if notice is to be sent in several languages, can the court simply delegate responsibility to insure accuracy?" *Bersch*, 519 F.2d at 996 n.47; *see also* Simard & Tidmarsh *supra* note 29, at 102 ("[I]f the laws of a significant number of countries apply to the case, then the management of the American class action might become so difficult and costly that the inclusion of foreign citizens might not be worthwhile."); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 680 (1979) (observing "the manageability problems" that can be "created by sheer class size").

44. *Bersch*, 519 F.2d at 997 ("We therefore direct that the district court eliminate from the class action all purchasers other than persons who were residents or citizens of the United States.").

45. *Id.* at 996–97:

> Here the record contains uncontradicted affidavits that England, the Federal Republic of Germany, Switzerland, Italy, and France would not recognize a United States judgment in favor of the defendant as a bar to an action by their own citizens, even assuming that the citizens had in fact received notice that they would be bound unless they affirmatively opted out of the plaintiff class.

"near certainty" standard. Given the ease of this determination, and its dramatic result on the size of the plaintiff class, the court believed its decision to be promoting judicial efficiency. The conclusion under the "near certainty" standard was not very taxing for the appellate court to reach and the exclusionary outcome aimed to make the resolution of the case less taxing for the district court.[46] However, in practice, the *Bersch* court's standard soon proved less workable. As litigants became wise to the need to introduce expert testimony and affidavits as to preclusive effect, contradictory evidence on preclusive effect made simple application of the *Bersch* standard more difficult.[47] In such a complicated arena of dueling evidence, what does "near certainty" really mean? The *Bersch* standard proved unworkable and required modification.[48]

2. *Vivendi* and The "More Likely Than Not" Standard

The *Vivendi* court rejected the Second Circuit's *Bersch* standard for the certification of a class including foreign plaintiffs. Like *Bersch*, *Vivendi* concerned a complaint alleging securities fraud.[49] A class action lawsuit was brought against a French corporation on behalf of a global class of plaintiffs who had purchased shares of its ordinary shares or American Depositary Shares (ADS) during an approximately two-year period.[50] The majority of the plaintiff class was composed of approximately twenty-five percent American shareholders and thirty-seven percent French shareholders.[51] The remaining members of the class hailed predominately from other European

46. *See supra* note 43.

47. Professor Bermann writes the following of one emblematic instance of this phenomenon:

> In a recent securities action against Royal Dutch Shell, the federal district court examined the likely fate of a future U.S. class action judgment in no fewer than eight foreign jurisdictions, with each side in the dispute proffering opinions and reply opinions by foreign country experts on the question. As the analysis was conducted on a country-by-country basis, it resulted in thirty-two separate opinions in all, with no two countries taking exactly the same position for the same reasons and, thus, leading the court to appoint two opposing "super synthetic experts" who could somehow make sense of the whole.

Bermann, *supra* note 9, at 100.

48. *See infra* note 61 and accompanying text.

49. *In re* Vivendi, Universal S.A., 242 F.R.D. 76, 79 (S.D.N.Y. 2007).

50. *Id.* at 80–81.

51. *Id.* at 81.

countries with "around five-percent" being "held by shareholders in other unidentified countries."[52]

Given the makeup of the plaintiff class, the defendants argued that on the basis of Judge Friendly's opinion in *Bersch*, "all foreign plaintiffs must be excluded from the class because it is a 'near certainty'" that their resident countries will not afford the court's judgment preclusive effect.[53] The court noted that it would "consider this aspect of their opposition to be an attack on the superiority of class action treatment of the claims of foreign purchasers."[54] That is, the court "grafted" the res judicata concerns raised by the defendants onto the superiority prong of Rule 23(b)(3).[55] This was not an innovation on the part of the *Vivendi* court. As the court noted following a survey of some of the cases preceding *Bersch*,[56] "[t]he foregoing cases . . . reveal that the res judicata concerns have been appropriately grafted onto the superiority inquiry."[57]

The court's decision in *Vivendi* came several decades after Judge Friendly created the *Bersch* standard. In the intervening period, the *Vivendi* court noted that "courts in this district and elsewhere have considered, in a somewhat haphazard way, the risk of nonrecognition by a foreign court."[58] To demonstrate this point, the court surveyed the approaches adopted in various post-*Bersch* cases cited by the defendants.[59] The decisions either abandoned the "near certainty"

52. *Id.*

53. *Id.* at 92.

54. *Id.*

55. *See supra* note 24.

56. *See infra* notes 60–61.

57. *Vivendi*, 242 F.R.D. at 95; *see also* Clopton, *supra* note 1, at 1396–97 ("These courts typically channeled *Bersch's* concern into Rule 23's 'Superiority' requirement."); Simard & Tidmarsh, *supra* note 29, at 89–90 (citing *Vivendi*, 242 F.R.D. at 95, for the proposition that "[t]he doctrinal hook that courts usually use to exclude foreign members . . . is the 'superiority' element of Rule 23(b)(3)").

58. *Id.* at 93.

59. *Id.* at 93–95.

standard altogether,[60] or adopted it in differing fashions.[61] Accordingly, the *Vivendi* court did "not find the 'near certainty' standard to be a particularly useful analytical tool."[62]

The court recognized that the "near certainty" standard had proven very difficult to meet absent a situation featuring "unopposed affidavits" like in *Bersch*.[63] "There is no indication," the court explained, "that only this degree of certitude calls into question the superiority of a class action. Nor is it likely that only where nonrecognition is a 'mere possibility' ought a court to find superiority established."[64] Accordingly, in departing from *Bersch*, the *Vivendi* court offered two innovations to the standard for assessing superiority based on res judicata concerns. First, the court shifted the degree of certitude required from a "near certainty" of nonrecognition, to a showing that recognition is "more likely than not."[65]

Second, in altering the required degree of certitude, the court shifted the burden of proof from the defendant to the plaintiff, stating: "[w]here *plaintiffs* are able to establish a probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment, *plaintiffs* will have established this aspect of the superiority requirement."[66] In shifting the burden, the court cited to *In re IPO Securities Litigation*[67] as "placing [the] burden on plaintiff not just to

60. *See id.* at 93 ("While it is not clear what standard Judge Mukasey applied with respect to the claim preclusion issue, it would appear that he considered an uncontested affidavit stating to a certainty that a British court would not recognize a U.S. judgment insufficient on its own to deny class certification.") (citing CL-Alexanders Laing & Cruickshank v. Goldfeld, 127 F.R.D. 454, 459 (S.D.N.Y. 1989)); *see also id.* at 94 (citing *In re* DaimlerChrysler AG Sec. Litig., 216 F.R.D. 291 (D. Del. 2003)).

61. *Id.* at 94 (comparing differing applications of the *Bersch* standard in Cromer Fin. Ltd. v. Berger, 205 F.R.D. 113 (S.D.N.Y. 2001), and *In re* Lloyd's Am. Tr. Fund Litig., No. 96 Civ. 1262, 1998 WL 50211, at *15 (S.D.N.Y. Feb. 6, 1998)). While the *Cromer* court cited to *Bersch* for its conclusion that "[t]he res judicata effect of a class action is 'a factor that must be considered in evaluating the superiority of the class action device'" under a near certainty of nonrecognition standard, *Cromer*, 205 F.R.D. at 134, the *Lloyd's* court "read *Bersch* as applying only to whether a class action should proceed under principles of pendent jurisdiction, and emphasized that *Bersch* did not directly address the issue of superiority under 23(b)(3)." *Vivendi*, 242 F.R.D. at 94.

62. *Vivendi*, 252 F.R.D. at 95.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (emphasis added).

67. *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006), *decision clarified on denial of reh'g sub nom. In re* Initial Pub. Offering Sec. Litig., 483 F.3d 70 (2d Cir. 2007).

produce 'some evidence' of compliance with Rule 23, but to show that its requirements are met."[68] The logic is as follows. Under Rule 23, "parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)."[69] The initial burden of proof thus rests with the plaintiffs. Because the *Vivendi* court adopted the then-common approach of grafting the res judicata concerns onto the superiority prong of Rule 23(b)(3), the court also needed to formally shift the burden of proof from the defendants to the plaintiffs to satisfy Rule 23.

Unlike the *Bersch* court, the *Vivendi* court provided a highly detailed application of its new standard to the conflicting affidavits before it.[70] The remainder of this Part will describe the portion of the court's analysis dealing with whether France would recognize the preclusive effect of its judgment.[71] The Part will then conclude by comparing the *Vivendi* court's assessment to that of the *Alstom* court to illustrate the remaining uncertainties in applying the "more likely than not" standard.

3. Case Study of France: Preclusive Effect?

In turning to the application of its new standard, the *Vivendi* court noted that "[b]oth sides have submitted voluminous competing expert declarations on the question of whether foreign courts would grant preclusive effect to a United States judgment or settlement in this action."[72] The court began by considering "the likelihood of recognition by a French court."[73] The court proceeded through its analysis by first recognizing two points of agreement between the parties as to the irrelevance of the United States' "rules for recognition of foreign judgments" to this question.[74] Again citing to the declarations submitted

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There, the Second Circuit considered "the issue, surprisingly unsettled in this Circuit, as to what standards govern a district judge in adjudicating a motion for class certification under Rule 23." *Id.* at 26.

68. *Vivendi*, 242 F.R.D. at 95 (citing *In re* Initial Pub. Offerings, 471 F.3d at 33).

69. Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997).

70. *Vivendi*, 242 F.R.D. at 95–110.

71. The *Vivendi* court addressed "first, and in greater detail, the likelihood of recognition by a French Court" because "a vast majority of the foreign shareholders" were French nationals. *Vivendi*, 242 F.R.D. at 95–96.

72. *Id.* at 95.

73. *Id.* at 96.

74. Citing to various declarations submitted by the parties, the court found that: (1) "there is no bilateral . . . agreement between France and the United States governing the

by the parties' experts, the court then addressed the relevant French law.[75] This required a fairly involved engagement with the expert declarations as "[t]he issue of whether a United States class action judgment would be recognized and enforced in France has never been directly addressed by French courts."[76]

While the court had no decisive French judgment to guide its determination, the declarations revealed that "[u]nder French case law, before a foreign decision may be enforced or recognized . . . in France, it must first be subjected to the 'exequatur' procedure," which, if granted, incorporates the underlying judgment "into the exequatur judgment which then receives enforceability and res judicata effect in France."[77] Both parties agreed that the grant of exequatur in France was governed by the *Cour de cassation*'s[78] decision in *Munzer*.[79] The experts disagreed as to whether each of the *Munzer* conditions had been met.[80] The court's analysis of the third of these conditions, that of public policy, is most important, as it is a frequent point of contention in similar cases and of the court's analysis of the legal systems of the other disputed countries.[81]

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recognition and enforcement of judgments and jurisdictional decisions rendered by their respective courts"; (2) French law does not require reciprocity ("reciprocity" meaning that, for example, in order for a French court to give effect to a U.S. court's judgment, a U.S. court would be required to give effect to French judgments). *Id.* at 96.

75. *Id.*

76. *Id.*

77. *Id.*

78. The *Cour de cassation* is France's highest court. *Id.*

79. Munzer c. dame Jacoby-Munzer (*Cour de cassation* [Cass.] [supreme court for judicial matters] 1e civ., Jan. 7, 1964, J.C.P. II No. 13590 (Fr.).) held that the following conditions must be met for a grant of exequatur:

> (1) [T]he foreign court must properly have jurisdiction under French law . . . (2) the foreign court must have applied the appropriate law under French conflict-of-law principles . . . (3) the decision must not contravene French concepts of international public policy . . . and (4) the decision must not be a result of fraude á la loi (evasion of the law) or forum shopping.
>
> *Vivendi*, 242 F.R.D. at 96.

80. *Vivendi*, 242 F.R.D. at 96–102.

81. *See* Clermont, *supra* note 29, at 69 ("The foreign court usually refuses recognition either on the ground of public policy or on the ground that the U.S. court lacked the personal jurisdiction required to bind a passive class member."); Bermann, *supra* note 9, at 98 ("Assuming neither a personal jurisdiction nor a notice difficulty, in principle might a foreign judgment nevertheless be denied recognition in the country on the basis that granting recognition would violate its 'public policy?' The legal answer in principle is invariably 'yes.'"); John C.L. Dixon, *The Res Judicata Effect in England of a US Class Action Settlement*, 46 INT'L & COMPAR. L.Q. 134, 148 (1997):

The court began its consideration with the uncontroversial observation that "French law does not recognize opt-out class actions."[82] While the lack of any explicit recognition of opt-out class actions by French courts provides "some indication that such actions are contrary to French public policy," the ultimate question is whether an opt-out class action would "infringe principles of universal justice" as understood by French courts.[83] Relying on their expert declarations, the defendants raised three arguments in support of nonrecognition. First, that under the French principle of *nul ne plaide par procureur*,[84] French law requires that each party in a lawsuit must be individually identified by name, not merely by a class representative.[85] Second—and relatedly—that opt-out class actions offend traditional French notions of due process under which one must affirmatively enter a suit as a plaintiff.[86] The court explained that third, "contingency fees are prohibited under French law because such fees reduce the amount of compensation available to plaintiffs."[87]

By contrast, the plaintiffs' experts "argue[d] that defendants misinterpret[ed] and misappl[ied] the principle of nul ne plaide par procureur," in that the principle really stands for the view "that a party to a court proceeding cannot appear as acting in its own interest when in reality it exercises the rights of a third party whose identity is concealed."[88] This is because, they claimed, the purpose behind the principle is to "avoid procedural fraud so that a defendant knows about specific defenses."[89] Given that the defendants in the present action "know the plaintiffs represent the absent class members, who are the

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> Although there are many arguments that can be raised against a plea of res judicata, in this case they boil down essentially to the contention that the US judgment ought not to be enforced as a matter of public policy because it was obtained in circumstances opposed to natural justice.

82. *Vivendi*, 242 F.R.D. at 100.

83. *Id.* (quoting Lautour v. Guiraud (*Cour de cassation* [Cass.] [supreme court for judicial matters] 1e civ., May 25, 1948) D. Jur. No. 357 (Fr.)) ("[F]oreign rules . . . are not contrary to the French conception of international public policy merely because they differ from mandatory provisions of French law, but only insofar as they infringe principles of universal justice considered in French conception as having universal value.").

84. "No one can claim in court by proxy." Pinna, *supra* note 2, at 44.

85. *Vivendi*, 242 F.R.D. at 100.

86. *Id.*

87. *Id.*

88. *Id.* at 101.

89. *Id.* One of the plaintiff's experts also claimed that "the rule is the French equivalent of the real party-in-interest requirement of Rule 17" which provides that "[a]n action must be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a)(1).

real parties," there is little risk of procedural fraud.[90] Moreover, one of the plaintiffs' experts "point[ed] to case law confirming that nul ne plaide par procureur is not part of the French conception of international public policy and is not a basis to set aside a foreign judgment."[91] In addition to rebutting the defendant's reliance on *nul ne plaide par procureur*, the plaintiffs brought to the court's attention that, in France, both trade unions and copyright holders can institute group actions on behalf of other individuals without their affirmative consent.[92]

Ultimately, having weighed "both parties detailed affidavits," the *Vivendi* court held that it was more likely than not that "an opt-out class judgment would not offend French concepts of international public policy."[93] Interestingly, the court went on to note that "[w]hile it is clear that such class actions are presently not permitted, it is equally clear that the ground is shifting quickly."[94] While acknowledging that opt-out class actions are not currently permitted in France, the court found the fact that they are the subject of an ongoing debate (perhaps trending in favor of their acceptance) marked sufficient evidence that they are "not so contrary to French public policy that [their] use would be deemed . . . contrary to 'international public policy.'"[95]

The foregoing description of the court's reasoning illustrates the difficulties inherent in a U.S. court's making a determination in reliance upon often-conflicting expert testimony. The court's holding, while not incorrect,[96] is hardly the only reasonable interpretation of French law. Shortly after its decision in *Vivendi*, the Southern District of New York was presented with a similarly transnational securities class action in *Alstom*.[97] There, the plaintiffs sought to certify a class composed of U.S., Canadian, French, English, and Dutch citizens.[98] As in *Vivendi*, the defendants argued that the "foreign investors should

90. *Vivendi*, 242 F.R.D. at 101.

91. *Id.* The *Vivendi* court appears to have been particularly impressed by this use of case law by the plaintiffs. *See also* Wasserman, *supra* note 2, at 375–76 n.325 (providing a selection of European nations' conceptions of what procedural guarantees constitute international public policy or "natural justice").

92. *Vivendi,* 242 F.R.D. at 100.

93. *Id.* at 101.

94. *Id.* (relying on the fact that "[d]efendant's own expert . . . noted this development").

95. *Id.* at 101–02.

96. Pinna, *supra* note 2, at 45 (agreeing with the *Vivendi c*ourt's decision, but noting that "it is unusual for the French executive to intervene in a dispute between private parties").

97. *In re* Alstom SA Sec. Litig., 253 F.R.D. 266 (S.D.N.Y 2008).

98. *Id.* at 272.

be excluded from the Proposed Class," thereby compelling the court to engage in a superiority analysis under Rule 23(b)(3).[99]

The *Alstom* court followed the *Vivendi* court in grafting the res judicata concerns onto the superiority inquiry.[100] The *Alstom* court also adopted *Vivendi*'s "more likely than not" (or "probability") standard in lieu of *Bersch*'s "near certainty" (or "possibility") standard.[101] In so doing, the court noted the issues of proof inherent in the *Bersch* standard.[102] Given that the "more likely than not" standard is included within the superiority inquiry, the initial burden of proof under the standard falls on the plaintiffs.[103] In other words, the standard adopted by the *Alstom* court, and the reasoning behind its adoption, was identical to that expressed in *Vivendi*. However, despite this ostensibly uniform approach to the res judicata issue, the two courts managed to reach opposing conclusions on the question of whether preclusive effect would be granted to the court's judgment by French courts.[104]

The *Alstom* court began its consideration of the potential for French preclusion by surveying *Vivendi*'s approach.[105] On the issue of public policy, the court found, contra *Vivendi*, that:

> A French court would likely conclude that any judgment rendered by this Court involving absent French class members offends public policy because absent French investors did not consent to this Court's jurisdiction over their claims and the United States' class action procedure would deny them an adequate opportunity to participate in the litigation.[106]

The court reached this assessment by concluding that *Vivendi* had placed undue stock in the fact that France allows for forms of collective actions to proceed.[107] The real question was not whether collective actions are against French public policy, but whether collective actions utilizing an opt-out mechanism violate French public policy.[108] That is, while French public policy might not find there to be anything

99. *Id.* at 281.

100. *Id.*

101. *Id.* at 282.

102. *Id.*

103. *Id.*

104. Monestier, *supra* note 28, at 24.

105. *Alstom*, 253 F.R.D. at 282–83.

106. *Id.* at 286.

107. *Id.*

108. *Id.*

inherently problematic about collective actions, the United States' opt-out approach to class actions goes beyond the pale. The *Alstom* court also found support for its holding in the fact that, among several other factors, the "Attali Commission, which was appointed by French President Nicolas Sarkozy, issued its final report on the subject in January of 2008" and found that opt-out class actions were not consistent with French public policy.[109]

Following *Alstom*, the *Vivendi* defendants filed a "motion for partial reconsideration of the certification decision in respect of French shareholders."[110] In their motion, the defendants cited the factors and recent developments considered by the *Alstom* court.[111] However, the *Vivendi* court held firm in its original decision, and again "cit[ed] to the recent trend in France and in other countries to adopt some form of group litigation."[112]

In sum, two courts within the same district, deciding cases within a year of one another on a substantially similar record, and applying the same standard, reached opposing conclusions in that application. As Professor Andrea Pinna has observed, "it is remarkable to see that in the very same procedure and concerning the very same country, the experts will diverge considerably in their views."[113] While it is hardly remarkable that two courts would diverge in their assessment of similar factual records, their divergence speaks to the sheer uncertainty present in any domestic assessment of foreign law as it relates to the likelihood of preclusion.[114] Although the standard for assessing res judicata concerns has recently evolved from that used by the *Vivendi* and *Alstom* courts, this fundamental uncertainty persists.

II. THE NEW BURDEN: *PETROBRAS* AND *VILLELLA*

Part II briefly considers the impact of *Morrison* on transnational securities class actions, before turning to a discussion of

109. *Id.* at 287.

110. Monestier, *supra* note 28, at 24 (citing *In re* Vivendi Universal, S.A. Sec. Litig. (Vivendi II), No. 02 Civ. 5571, 2009 WL 855799, at *1 (S.D.N.Y. Mar. 31, 2009)).

111. *Id.* (citing Vivendi II, 2009 WL 855799 at *3).

112. *Id.* at 25.

113. Pinna, *supra* note 2, at 39 (attributing this divergence to "the uncertainty of the answer and also by the fact that American courts do not require a certainty of recognition, but merely a strong probability").

114. Monestier concludes that this blatant disconnect and inherent uncertainty in application "should give courts pause about the appropriateness of looking to foreign preclusion law in the domestic certification analysis." Monestier, *supra* note 28, at 25.

Judge Rakoff's response to *Morrison* in *Petrobras* and the *Villella* court's affirmation of *Petrobras*' burden-shifting.

A. Morrison *and the End of Foreign-Cubed Class Actions*

The litigation in *Bersch*, *Vivendi*, and *Alstom* concerned securities class actions. In the securities context, a foreign-cubed class action is one which is "brought against a foreign issuer on behalf of a class that includes foreign investors who purchased securities on a foreign exchange."[115] As time passed, the increasing prevalence of foreign-cubed securities class actions (or, more generally, those involving a great deal of foreign plaintiffs) led to vigorous discussion and calls for reform.[116]

Prior to the Supreme Court's 2011 decision in *Morrison*:

> under a long established "conduct or effect" test, it had been possible for a U.S. court to resolve securities fraud claims raised by purchasers or sellers who were neither U.S. citizens nor residents — at least if either the securities transaction occurred in the U.S. (such as on a U.S. exchange) or substantial conduct in the planning or implementation of the fraud took place in the U.S.[117]

Under this conduct test, "investors in foreign markets will sometimes be able to establish that fraudulent conduct occurring within the United States affected the price at which they traded and thereby caused them harm," thus creating the "jurisdictional basis for foreign-cubed class actions."[118]

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115. Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 14 (2007).

116. *See* Wasserman, *supra* note 2, at 313 (observing that "[a]s global markets have expanded and transborder disputes have multiplied, American courts have been pressed to certify transnational class actions" before turning to the effects of *Morrison*); John C. Coffee, Jr, *Global Settlements: Promise and Peril*, 22 U. PA. J. BUS. L. 1, 2–3 (2019) (noting that securities litigation is "[a]lways controversial and much debated," and that "[a]lthough the number of . . . 'global' securities class actions . . . resolved by U.S. courts was actually small, several settlements just prior to *Morrison* had each exceeded $1 billion and raised deep anxieties in the business community"); Murtagh, *supra* note 21, at 1 ("Much recent discussion of transnational litigation has focused on 'foreign-cubed' securities class actions.").

117. Coffee, *supra* note 116, at 2.

118. Buxbaum, *supra* note 115, at 57. In addition to the "conduct or effect test," states can assert jurisdiction in transnational settings through the "objective territoriality" test, "subjective territoriality" test, "active and passive personality principles," "protective or security principle," and the "universality principle." *See generally* Cedric Ryngaert, *The Concept of*

All this changed after *Morrison*. There, the Court "reversed this 'conduct or effect' test and held that the antifraud provisions of the U.S. federal securities laws reached only securities transactions that occurred in the U.S." so that "many litigants formerly covered were now barred from recovery in U.S. courts."[119] The effects of *Morrison* on the future of securities class actions litigation have been extensively debated.[120] At the very least, *Morrison* represents the end of foreign-cubed securities class actions and therefore at least some reduction in the number of transnational class actions confronting U.S. courts.[121] This indeterminate reduction led Judge Rakoff, in his decision in *In re Petrobras*, to modify the *Vivendi* standard for the certification of a class containing foreign plaintiffs in the context of securities class actions.

Jurisdiction in International Law, *in* RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW 50 (Alexander Orakhelashvili ed., 2015).

119. Coffee, *supra* note 116, at 3; *see also* Morrison v. Nat'l Aust. Bank Ltd., 561 U.S. 247, 265 (2010) ("In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.").

120. Scholars have assessed the impact of *Morrison* on a spectrum, with some heralding it as the death of the transnational class action regime and others predicting its ultimate effect to be relatively minor. For an emblematic instance of the former, see Michael Palmisciano, *Going Dutch: The Effects of Domestic Restriction and Foreign Acceptance of Class Litigation on American Securities Fraud Plaintiffs*, 53 B.C.L. REV. 1847, 1862 (2012) ("In light of *Morrison* . . . some have suggested that 'it is not a stretch to wonder if we are hearing the death knell of the class action.'") (quoting Scott Dodson, *Squeezing Class Actions*, SCOTUSBLOG (Aug. 30, 2011, 3:35 PM), https://www.scotusblog.com/2011/08/squeezing-class-actions/ [https://perma.cc/4UK7-TXZH]). For a sampling of expressions of the alternative view, see Murtagh, *supra* note 21, at 44 ("*Morrison* will stop the flow of foreign-cubed and foreign-squared securities fraud cases, but it will by no means put a halt to transnational litigation and the accompanying risk of nonrecognition abroad."); Wasserman, *supra* note 2, at 314 ("*Morrison* is unlikely to inhibit the filing of transnational class actions involving securities listed on domestic stock exchanges . . . . In short, even after *Morrison*, class counsel are likely to keep filing transnational class actions and defense counsel are likely to keep opposing them."); Coffee, *supra* note 116, at 5 ("U.S. counsel may have found a way to outflank *Morrison* and could be on the verge of exploiting this new technique.").

121. *See* Murtagh, *supra* note 21, at 44 ("*Morrison* will stop the flow of foreign-cubed and foreign-squared securities fraud cases . . . ."); Wasserman, *supra* note 2, at 313–14 ("The Supreme Court's recent decision in *Morrison* . . . is likely to reduce the number of 'foreign-cubed' or 'f-cubed' securities fraud class actions filed in the United States, at least in the short term."). By reducing the number of transactional class actions confronting U.S. courts, *Morrison* limited the number of situations in which foreign recognition of a United States court's judgment would be at issue during class certification. *See infra* Section III.A.

B. Petrobras

The *Petrobras* litigation, the subject of this Section, ultimately resulted in an approximately "$3 billion settlement against Petrobras, the Brazilian oil company, which . . . stands as the fifth largest U.S. securities class action settlement on record and the largest involving a foreign issuer."[122] The sheer size of this settlement has sparked some discussion within the scholarship,[123] as well as considerable media attention.[124] This Note is not concerned with the structure of the *Petrobras* settlement.[125] Rather, this Note will examine the class certification which facilitated the settlement.[126]

The general details of the course of the *Petrobras* litigation are as follows. In March of 2015, lead plaintiff Universities Superannuation Scheme Ltd (USS), alongside plaintiffs Union Asset Management

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122. Coffee, *supra* note 116, at 5.

123. *See id.*; Shai Berman, *Claimless Claimants and the Preclusion Premium*, 120 COLUM. L. REV. 389, 390 (2020) (arguing that "the fact that class counsel expanded the settlement class to include claimants outside the bounds of any trial-certifiable class indicates that counsel may have bargained away the strong claims of some class members for below their fair value in order to allow the defendants to purchase increased preclusion"); Steven McNamara, *Morrison v. National Australia Bank and the Growth of the Global Securities Class Action Under the Dutch WCAM*, 68 BUFF. L. REV. 479, 526–30 (2020).

124. *See generally* Chad Bray & Stanley Reed, *Petrobras of Brazil to Pay $2.95 Billion Over Corruption Scandal*, N.Y. TIMES (Jan. 3, 2018), https://www.nytimes.com/2018/01/03/business/dealbook/brazil-petrobras-corruption-scandal.html [https://perma.cc/7AH4-RPP9]; Brendan Pierson, *Petrobras to Pay $2.95 Billion to Settle U.S. Corruption Lawsuit*, REUTERS (Jan. 3, 2018, 4:42 AM), https://www.reuters.com/article/us-petrobras-classaction/petrobras-to-pay-2-95-billion-to-settle-u-s-corruption-lawsuit-idUSKBN1ES0L2 [https://perma.cc/8V3J-LQYU].

125. *But see Petrobras Sec. Litig.*, 2018 U.S. Dist. LEXIS 10550 (S.D.N.Y. 2018). Professor Coffee has observed of the settlement that it "raises the question of whether in some future case the parties could extend a settlement class to cover securities that clearly could not have been included in the litigation class." Coffee, *supra* note 116, at 7.

126. At present, the most thorough account of the *Petrobras* court's class certification decision is the following:

> [B]efore that settlement was approved, the Second Circuit Court of Appeals, the most experienced U.S. court in securities litigation, had first rejected an earlier attempt to certify the class. Although the Second Circuit upheld [the court] on a number of difficult issues, it found that there was insufficient evidence as to where Petrobras's bonds had traded.

Coffee, *supra* note 116, at 5 (citing *In re* Petrobras Sec. Litig., 862 F.3d 250 (2d Cir. 2017)). It is worth emphasizing that, as Professor Coffee notes, while the Second Circuit vacated Judge Rakoff's class certification, it did not do so on the basis of the burden-shifting he employed. Indeed, as this Section will discuss, that same approach was recently reaffirmed in the Southern District of New York in Villella v. Chem. and Mining Co. of Chile, 333 F.R.D. 39 (S.D.N.Y. 2019).

Holding AG ("Union") and the Employees' Retirement System of the State of Hawaii ("Hawaii ERS") filed a Consolidated Amended Complaint (CAC) alleging that:

> Petrobras was at the center of a multi-year, multi-billion dollar bribery and kickback scheme, in connection with which defendants made false and misleading statements in violation of the Securities Exchange Act of 1934 ("Exchange Act"), the Securities Act of 1933 ("Securities Act"), and Brazilian law.[127]

The defendant, Petrobras, "is a corporation organized under the laws of Brazil, whose common and preferred shares are listed on the Brazilian stock exchange," which also sponsored American Depository Shares on the New York Stock Exchange.[128] Petrobras was once, in 2009, the world's fifth-largest company, with a market capitalization of $310 billion.[129] "[F]ollowing the disclosure of widespread fraud and corruption at the Company which led to the arrest of high-level Petrobras executives," Petrobras' market capitalization declined to $39 billion.[130]

The corruption scheme occurred between January 22, 2010, and March 19, 2015.[131] Having embarked on a plan to expand its petroleum production capacity, Petrobras needed to construct new production facilities.[132] Only a few Brazilian companies were capable of the required construction, and these companies, with the assistance of several Petrobras executives, "formed a cartel for the purposes of circumventing Petrobras' competitive bidding process."[133] These executives would inform the companies of Petrobras' estimated cost of a project.[134] Then, the companies would "agree among themselves which company would win the Petrobras contract and adjust their bids to conform to Petrobras' parameter allowing for a 15-20% profit above that figure" to which they would add "'a three-percent political adjustment,' which would be used to pay kickbacks" to the executives involved in the scheme.[135]

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127. *In re* Petrobras Sec. Litig., 116 F. Supp. 3d 368, 372–73 (S.D.N.Y. 2015).

128. *Id.* at 373.

129. *Id.*

130. *Id.* at 374.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

In addition, "[b]ecause the Brazilian government was Petrobras' majority shareholder," the company was arranged so that "each of [its] seven divisions . . . was allocated to one of the political parties forming the majority coalition . . . ."[136] These political parties "had the power to appoint the directors of the divisions under their control, as well as to nominate all members of Petrobras' Board of Directors, including its President."[137] In return for their appointment, the division directors were to use company funds to provide kickbacks to their political sponsors.[138]

According to the CAC, the result of this corruption was that Petrobras overpaid billions of dollars for many of the refineries which it constructed over the course of the scheme.[139] The scheme ended after the rampant corruption was uncovered in 2015, during an operation conducted by the Brazilian Federal Police.[140] In light of this discovery, "the price of Petrobras' common ADS fell by 80.92% and the price of its preferred ADS fell by 78.01%."[141]

In 2016, the court issued an opinion responding to the plaintiffs' motion "to certify two classes, one for their Securities Act claims and one for their Exchange Act claims."[142] In opposing the plaintiffs' motion, the defendants (Petrobras, two of its wholly-owned subsidiaries, various related individual defendants, and the underwriters of Petrobras' debt offerings[143]) argued that the plaintiffs failed to satisfy the requirements of Rules 23(a) and 23(b)(3).[144] Before deciding on the issue, the court held an evidentiary hearing on December 21, 2015, where it heard the testimony of competing expert witnesses for the parties.[145] In its 2016 opinion, the court began by finding that the plaintiffs had satisfied the Rule 23(a) requirements for class certification.[146]

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* (asserting, for example, that "Petrobras acquired a refinery in Pasadena, Texas for a total of $1.18 billion, including interest and legal fees, when a Belgian oil company had purchased the same refinery just a year earlier for only $42.5 million").

140. *Id.* at 375.

141. *Id.*

142. *See In re* Petrobras Sec. Litig., 312 F.R.D. 354, 357 (S.D.N.Y. 2016).

143. *Id.*

144. *Id.* at 358.

145. *Id.*

146. *Id.* at 362. The four requirements being that:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of

The court then turned to consider the defendants' claim that the plaintiffs had failed to satisfy Rule 23(b)(3)'s superiority requirement.[147]

In holding that the superiority requirement for class certification had been met, the court cited to the following factors:

> Petrobras was a massive company with investors around the globe. Notwithstanding Petrobras's size and its numerous and far-flung investors, the interests of the class members are aligned and the same alleged misconduct underlies their claims. Moreover, the thousands of individual class members who have not opted-out have a minimal interest in controlling the course of the litigation; there are significant efficiency gains to be reaped from concentrating the litigation in a single forum; and the likely difficulties in managing the class action are readily surmountable.[148]

That is, due to the sheer scale of the potential litigation, a class action—though comprising many plaintiffs from many different countries—was superior to other adjudicatory methods. Concerns for judicial efficiency and administrability pointed strongly in favor of superiority. Further, and unlike the defendants, the court reasoned that "the volume of opt-outs demonstrates the need for a class action in these circumstances. Otherwise, the court risks the present stream of individual actions growing into an unmanageable flood."[149]

Following this analysis, the court noted that the defendants raised an alternative argument under Rule 23(b)(3)'s superiority requirement.[150] Citing *Vivendi*, the defendants argued that "[a] class action can only be considered a superior method of adjudication if absent class members will be bound by a judgment issued in the action."[151] Accordingly, they claimed that in order for certification of the class, the plaintiffs must "establish a probability that a foreign court will recognize the res judicata effect of a U.S. class judgment."[152] Because

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> the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> FED. R. CIV. P. 23(a).

147. *See Petrobras*, 312 F.R.D. at 362.

148. *Id.* at 363.

149. *Id.*

150. *Id.*

151. Def.'s Joint Mem. of Law in Opp'n to Pl.'s Mot. for Class Certification at 12; *Petrobras*, 312 F.R.D. at 357.

152. *Id.* (quoting *In re* Vivendi, Universal S.A., 242 F.R.D. 76, 95 (S.D.N.Y. 2007)).

the plaintiffs failed to make this showing, "any class that is certified must be limited to United States investors."[153] In other words, the *Petrobras* defendants made much the same argument as the defendants in previous Rule 23(b)(3) cases such as *Vivendi* and *Alstom*.

The plaintiffs, however, responded with an altogether novel argument which was, in large part, adopted by the court:

> Relying on inapplicable cases pre-dating *Morrison's* bright line test, Defendants argue that superiority requires Plaintiffs to demonstrate that foreign courts will "probably" recognize a U.S. judgment. Unlike the authority that Defendants rely upon, Plaintiffs pursue claims only for purchases on a U.S. exchange or in connection with U.S. transactions. See *In re Vivendi Universal, S.A.*, 242 F.R.D. 79, 99 (S.D.N.Y. 2007) ("the issue here is whether U.S. law was properly applied with respect to non-U.S. investors who did not purchase Vivendi securities on the NYSE"). Defendants point to no post-*Morrison* decision denying certification on this issue. Further, Judge Kaplan, in a case that involved non-exchange traded securities, rejected a defendant's nearly identical, conclusory argument, stating "where, as here, defendants do not identify which foreign entities' home countries would not give preclusive effects to this action, this argument carries little weight." *In re IndyMac Mortgage-Backed Sec. Litig.*, 286 F.R.D. 226, 243 (S.D.N.Y. 2012).[154]

In this paragraph of their memorandum, the plaintiffs raised two separate arguments. The first, and more original, being that the Supreme Court's decision in *Morrison* essentially abrogated the *Vivendi* standard. The plaintiffs cited no direct authority for this assertion. The plaintiffs did observe—correctly—that "[u]nlike the authority that Defendants rely upon, Plaintiffs pursue claims only for purchases on a U.S. exchange or in connection with U.S. transactions."[155] However, while the *Vivendi* court did not consider the potential for French recognition of the shares purchased on the NYSE, this was because the court had received an uncontradicted affidavit explaining that "French law recognizes that when a French company trades securities on foreign exchanges it is subject to the laws of those

153. *Id.* at 12.

154. Class Pl.'s Reply Mem. of Law in Further Supp. of Mot. for Class Certification at 4–5, *Petrobras*, 312 F.R.D. at 357.

155. *Id.* at 4.

countries . . . ."[156] The *Petrobras* plaintiffs, by contrast, had not made a similar showing of recognition.

The plaintiffs' second argument, that the defendants must make some actual showing of res judicata concerns, was, like the first, adopted by the court. Still, the one case to which the plaintiffs cited as authority for this argument in turn failed to cite any relevant authority for the proposition that defendants bear a burden of identification.[157]

Since neither party to the *Petrobras* litigation devoted more than a paragraph of their memorandums to the question of international preclusion, it is not surprising that the court, in its 2016 opinion, provided a relatively brief consideration of their arguments. The court began its analysis by noting that the defendants argued for the application of *Vivendi*'s "more likely than not" standard in assessing the likelihood of foreign recognition.[158] This heretofore dominant standard was rejected by the court, which correctly observed that it "is not aware of any binding precedent that sets out such a requirement."[159] Echoing the plaintiffs' memorandum, the court went on to note that *Vivendi* was decided before *Morrison* and that "*Morrison* materially lessens the foreign res judicata concerns animating" *Vivendi*.[160]

In the remainder of its consideration of the potential for foreign recognition of the res judicata effect of a U.S. class action judgment, the court accepted and elaborated upon the plaintiffs' second argument that the defendants had failed to adequately identify which countries would not grant the judgment preclusive effect.[161] Notably, the court found the defendants failed to make this showing even though "defendants also propose including in the Class definitions lists of countries whose residents would be excluded from the Classes," because "defendants have not explained in any detail why these particular

156. *Vivendi*, 242 F.R.D. at 98 (citing Decl. of Alexis Mourre in Support of Pl.s' Mot. for Class Certification at 139, Dec. 6, 2005; *id.* at 95). Additionally, "virtually all of Vivendi's ADSs—which traded on the NYSE—were held by persons or entities in North America." *Id.* at 81.

157. *In re* IndyMac Mortg.-Backed Sec. Litig., 286 F.R.D. 226, 243 (S.D.N.Y. 2012). Curiously, the *IndyMac* court cited only to *Vivendi* for support.

158. *Petrobras*, 312 F.R.D. at 363.

159. *Id.*

160. *Id.* It should be noted, see *supra* note 120, that the confidence displayed by the court regarding *Morrison*'s impact on issues of international recognition is by no means universal. The court also observed that *Vivendi* "only concluded that res judicata concerns could be one consideration that could lead to the exclusion of foreign plaintiffs from a class." *Petrobras*, 312 F.R.D. at 363 (citing *Vivendi*, 242 F.R.D. at 95). *See infra* Section III.A for a critique of the Court's reliance on *Morrison*.

161. *Petrobras*, 312 F.R.D. at 363.

countries would not recognize a U.S. class action judgment in this case."[162] Nowhere in its analysis did the court make any explicit reference to which party bears the initial burden of proof in the res judicata inquiry. It is nonetheless plain from the preceding quotation that, unlike under *Vivendi*, the initial burden is to be borne by the defendant.

C. Villella

In 2019, another decision in the Southern District of New York reiterated (and clarified) the burden-shifting left implicit in the *Petrobras* decision.[163] The facts underlying the dispute in *Villella* were similar to those in *Petrobras*. The defendant, Sociedad Química y Minera de Chile S.A. (SQM), is a producer and worldwide distributor of fertilizer and chemicals based in Chile.[164] Its American Depository Shares have been listed on the NYSE since 1993.[165] In 2018, lead plaintiff, the Council of the Borough of South Tyneside Acting in Its Capacity as the Administering Authority of the Tyne and Wear Pension Fund (Tyne & Wear),[166] filed a motion for class certification[167] on behalf of all individuals who purchased SQM's ADS shares between June 30, 2010, and June 18, 2015.[168] "Tyne & Wear alleges that it purchased a total of 376,521 shares and suffered damages in excess of $4.4 million during the Class Period as a result of SQM's securities violations."[169] The events leading to the alleged securities violations are as follows.

In early 2015, SQM found itself the target of an investigation by the Attorney General of Chile for "using fake invoices and phony services to illegally bribe politicians."[170] On March 16, 2015, SQM issued a press release announcing that the company's board had voted to terminate its chief executive officer for obstructing the investigation.[171] Two days later, on March 18, 2015, SQM announced that three of its "board members appointed by its largest noncontrolling

162. *Id.*

163. Villella v. Chem. and Mining Co. of Chile, 333 F.R.D. 39, 54 (S.D.N.Y. 2019).

164. *Id.* at 47.

165. *Id.*

166. *Id.*

167. *Id.* at 49.

168. *Id.* at 47.

169. *Id.*

170. *Id.*

171. *Id.* at 48.

shareholder, the Potash Corporation of Saskatchewan, Inc., had resigned from the board" because a majority of the board had rejected their requests to more fully cooperate with the investigation.[172] Plaintiffs alleged that as a result of both of these disclosures from SQM, "[its] shares dropped more than 15% from its price on February 25, 2015."[173] Then, in March and April of 2015, the Chilean tax regulatory agency and the securities regulator began criminal investigations into SQM executives and representatives—five of whom were ultimately charged.[174] Finally, "[t]he investigation also led to an admission by SQM's chief financial officer . . . that SQM made one thousand payments to companies without any consideration of whether they were based on services rendered."[175] After the investigation, SQM filed a Form 6-K with the SEC summarizing its findings.[176]

The *Villella* court's 2019 opinion granted the plaintiff's motion for class certification.[177] In its motions to dismiss the plaintiffs' motion for class certification, SQM argued that the plaintiff class failed to meet Rule 23(a)'s typicality requirement.[178] The court considered this argument at some length[179] before finally rejecting it.[180] Following its analysis of SQM's Rule 23(a) argument, the court turned to consider three changes proposed by SQM to the class definition.[181] The second of these proposed changes was the exclusion "of foreign members of the putative class because their home countries might not give preclusive effect to any judgment of this Court."[182] The court summarily dispensed with this argument. Citing only to *Petrobras*,

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* The report explained that "payments were made on invoices that lacked supporting documentation, that SQM's books did not accurately reflect questioned transactions, and that SQM lacked sufficient controls over expenses," but "also stated that it found no evidence demonstrating that the payments were made in order to induce a public official to act or refrain from acting"—a finding disputed by Tyne & Wear. *Id.*

177. *Id.* at 59–60.

178. *Id.* at 51, 55.

179. *Id.* at 55–58.

180. *Id.* at 58.

181. *Id.*

182. *Id.* The first and third proposed changes were, respectively, "that the class period should be reduced because none of the statistically significant financial releases . . . occurred in the first half of the class period as now defined," and that "traders who . . . sold their stock before January 2015" (the date of SQM's first corrective disclosure) should be removed from the class. *Id.* at 58, 59.

the court wrote that "SQM does not . . . propose which countries would refuse [recognition of the court's judgment] or why. The burden to do so rests on SQM, and it has failed to meet it."[183]

While the burden-shifting from plaintiffs to defendants remained implicit in the 2016 *Petrobras* decision, the 2019 *Villella* opinion spelled out the shift more clearly. Under *Petrobras*, the defendants—not the plaintiffs—bear the initial burden of showing a probability of nonrecognition.[184] By contrast, under the *Vivendi* standard, it was the plaintiffs who bore the burden of showing the probability of recognition.[185] Notably, while the court cites *Vivendi* throughout its opinion, the court never referenced *Vivendi* concerning the question of foreign recognition.[186] It appears that the *Villella* court—although the first (and thus far, the only) court to cite to *Petrobras* on the question of foreign recognition—considered the abandonment of the *Vivendi* standard to be settled.[187]

The current *Petrobras* standard cannot be properly understood without tracing the evolution of its precursors over the last fifty years. While *Bersch*'s "near certainty" of nonrecognition standard represented the first comprehensive attempt at fashioning a standard for assessing the likelihood of foreign recognition of a U.S. class action judgment, it proved to require an unrealistic degree of certainty.[188] The *Vivendi* standard strayed from the *Bersch* standard by changing the degree of certainty to a showing that recognition is "more likely than not."[189] In addition, the *Vivendi* standard grafted the res judicata inquiry onto the superiority prong of Rule 23(b)(3).[190] The current *Petrobras* standard represents a bridge between the *Bersch* and *Vivendi*

183. *Id.* at 58–59.

184. *In re* Petrobras Sec. Litig., 312 F.R.D. 354, 363 (S.D.N.Y. 2016).

185. *See supra* note 68 and accompanying text.

186. Villella v. Chem. and Mining Co. of Chile, 333 F.R.D. at 56, 57, 58, 59 (S.D.N.Y. 2019) (citing *In re* Vivendi Universal, S.A. Sec. Litig., 123 F. Supp. 3d 424 (S.D.N.Y. 2015)).

187. The seemingly complete abandonment of the *Vivendi* standard is not at all, however, as clear as *Villella* would seem to imply. Other district courts outside of the Southern District of New York have continued to apply the *Vivendi* standard. *See* Hunichen v. Atonomi LLC, No. C19-0615-RAJ-SKV, 2021 WL 5858811, at *5 (W.D. Wash. Nov. 12, 2021) (quoting *In re* Vivendi, S.A. Sec. Litig., 838 F.3d 223, 263–64 (2d Cir. 2016), for the proposition that plaintiffs bear the burden of demonstrating that some foreign courts would "grant preclusive effect to a class judgment"); Audet v. Fraser, 332 F.R.D. 53, 84 (D. Conn. 2019) (citing *In re* Vivendi, Universal S.A., 242 F.R.D. 76 (S.D.N.Y. 2007), as establishing the plaintiff's burden).

188. *See supra* note 47 and accompanying text.

189. *See supra* note 65 and accompanying text.

190. *See supra* note 66 and accompanying text.

standards. Like the *Vivendi* standard, the *Petrobras* standard does not require a showing of a "near certainty" of nonrecognition.[191] But the *Petrobras* standard also represents a return to the *Bersch* standard's placement of the burden of proof on the issue of foreign nonrecognition back on the defendants. The *Petrobras* standard occupies an uneasy space between the *Bersch* and *Vivendi* standards. The following Part examines the tensions surrounding the application of the *Petrobras* standard.

III. THE SHIFT TOWARD A LESS EXCLUSIONARY REGIME AND ANALYSIS OF THE NEW BURDEN

Part III considers the policy justifications underlying the *Vivendi* and *Petrobras* decisions. It argues that although the *Petrobras* court rejected the *Vivendi* standard's grafting of the res judicata issue onto the Rule 23(b)(3) superiority inquiry, this rejection followed policy arguments credited by the *Vivendi* court in trending toward a less exclusionary class regime. In other words, the *Petrobras* court's rejection of *Vivendi* may itself be understood as rooted in *Vivendi*'s dicta. Part III goes on to consider the scope of *Petrobras*' applicability and the potential removal of the res judicata inquiry from class certification. It concludes by flagging remaining uncertainties as to the functioning of *Petrobras*' burden-shift during class certification.

A. Comparing Vivendi *and* Petrobras*: Convergence Through Divergence*

As compared to the standard provided in *Bersch*, the *Vivendi* standard represented a move toward a more exclusionary regime.[192] As Professor Monestier explains:

> Courts using the "near certainty" approach are likely to include foreign claimants in a U.S. class action because it will be difficult to establish that nonrecognition in a foreign jurisdiction is a near certainty. Those same foreign claimants, however, are less likely to be included in a U.S. class action under a "probability" or "evidentiary value" standard. Under this latter standard, plaintiffs may be unable to show that a foreign court will

191. It is not clear, however, exactly what degree of certainty the *Petrobras* standard *does* require. *See infra* Section III.C.

192. Monestier, *supra* note 28, at 16.

> "more likely than not" enforce a U.S. class judgment. Consequently, the inclusion or exclusion of a foreign claimant will often turn on nothing more than the particular standard chosen by a U.S. court in evaluating res judicata concerns.[193]

Such is the legacy of the *Vivendi* standard. However, having outlined the application of its "more likely than not" standard to the question of recognition in various countries, the court concluded by considering the potential policy ramifications influencing its decision.[194] In doing so, the court addressed two arguments pointing in favor of a less restrictive standard. First, the court observed:

> In a global economy, companies do business across international borders and sell their securities worldwide, and acts of corporate misconduct—whether committed in the United States, abroad, or both—may have substantial effects on the United States market. Where, as here, the Court has determined that significant alleged conduct occurred in the United States warranting application of the federal securities laws to foreign actors . . . the United States has a strong interest in the enforcement of those laws where applicable.[195]

While this concern was meaningful to the *Vivendi* court, it has since been greatly ameliorated by the Supreme Court's decision in *Morrison*.[196] Indeed, it was the effective resolution of this concern that led the *Petrobras* court to discard the *Vivendi* standard.[197] The court's second concern, by contrast, remains pertinent.

While the threat of a judgment's foreign nonrecognition may be real, there exist "practical realities that reduce the risk that defendants would in fact be prejudiced by any potential nonrecognition in the form of duplication of effort or inconsistent results."[198] This was an

193. *Id.* at 19.

194. *In re* Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76, 106–07 (S.D.N.Y. 2007).

195. *Id.* at 106.

196. *See supra* Section II.A.

197. *See supra* note 160 and accompanying text.

198. *Vivendi*, 242 F.R.D. at 106 (citing Cromer Fin. Ltd. v. Berger, 205 F.R.D. 113, 135 n.32 (S.D.N.Y. 2001)); Buschkin, *supra* note 4, at 1597; *see also* Bermann, *supra* note 9, at 95; *supra* note 25 and accompanying text for a related perspective; Simard & Tidmarsh, *supra* note 29, at 102–05 (considering the incentives impacting the likelihood of the filing of a subsequent suit by a foreign citizen); Pinna, *supra* note 2, at 48–49:

> [I]n the Vivendi Universal case the exclusion of German investors from the US class action did not necessarily oblige these investors to bring a claim in France

argument raised in *Vivendi* by the plaintiffs, who suggested that the defendant's res judicata concerns were "more hypothetical than real."[199] Summarizing a declaration submitted by one of the plaintiff's experts, the court enumerated the difficulties presented by these "practical realities."[200] In light of the court's extensive and approving summation of this argument, the fact that the standard which it ultimately adopted proved more exclusionary than that provided by *Bersch* comes almost as a surprise.[201]

Unlike the *Vivendi* court, the *Petrobras* court did not expressly consider the practical (un)likelihood of subsequent litigation. The *Petrobras* court did appear to allude to the concerns expressed in the *Vivendi* court's first argument in favor of a less exclusionary approach by noting that "*Morrison* materially lessens the foreign res judicata concerns animating" *Vivendi*.[202] Notably, while both courts did consider the role of United States courts in applying federal securities laws to foreign actors,[203] the *Vivendi* court cited to one of the Second Circuit cases which *Morrison* abrogated—*IIT v. Vencap Ltd.*—as evidence in favor of adopting a less exclusionary approach.[204]

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individually. In practice, such individual cross-border claims are very unlikely to be submitted anyway, at least on a large scale. This is because collective actions are often alternatives to the practical impossibility to access justice individually as a result of the frequent disproportion between legal costs and the compensation that can be expected from a successful judgment.

199. *Vivendi*, 242 F.R.D. at 106–07.

200. *Id.* at 107:

> [A]bsent class members who were dissatisfied with an adverse judgment, would be pressing claims (1) already adjudicated against them, (2) without the benefit of contingency fee arrangements, (3) with the added risks of having to pay defendants' counsel fees and costs of litigation. Further, such plaintiffs would be facing the risk that defendants would be able to successfully invoke this Court's jurisdiction to prevent recovery.

201. *Id.* In concluding its discussion of the risk of nonrecognition, the court wrote that:

> [w]hile it could be argued that practical considerations weigh strongly in favor of allowing all foreign purchasers to participate in plaintiffs' proposed class, the Court elects to proceed with caution and limit the class to foreign shareholders whose courts, in the unlikely event of successive litigations, are likely to give *res judicata* effect to any judgment herein. This double layer of security should allay defendants' legitimate concerns.
>
> *Id.* at 107

202. *See supra* note 159–160 and accompanying text; *see also supra* note 28 and accompanying text.

203. *See supra* Section II.A.

204. *See Vivendi*, 242 F.R.D. at 106 ("Congress did not intend 'to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when they are peddled only to foreigners.'") (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975), *abrogated by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010)).

The *Vivendi* court considered the United States' interest in enforcing its securities laws (regardless of the form of conduct that created the jurisdictional basis) to be a valid argument in favor of adopting a less exclusionary approach. The goal of maximally deterring "acts of corporate misconduct" is best served by allowing foreign claimants into the plaintiff class.[205] What mattered for the *Vivendi* court during class certification was not how often claims arising from corporate misconduct came before it, but how to best deter such misconduct in the future.

By contrast, the *Petrobras* court appears to have understood the argument for excluding fewer foreign plaintiffs in terms of scale. Because *Morrison* removed the jurisdictional basis for foreign-cubed class actions, it limited the number of situations in which foreign recognition of a United States court's judgment would be at issue during class certification. After *Morrison*, courts could expect fewer foreign plaintiffs to have claims within their jurisdiction. They could thus expect fewer foreign plaintiffs within any given proposed class. With fewer foreign plaintiffs participating in securities actions, the frequency with which courts would be required to consider the risk of foreign nonrecognition would, in turn, decrease. But it does not then necessarily follow, as *Petrobras* seems to imply, that a decrease in the frequency or extent of res judicata concerns indicates that the standard for assessing these concerns when they do arise should shift away from exclusion.

Still, while the two courts present different arguments in favor of a less exclusionary approach, both—in either their holding or in dicta—perceive value in such an approach. Accordingly, while *Petrobras* represents a shift away from the workings of the *Vivendi* standard, the *Vivendi* court recognized the policy rationales behind it. When considered from this perspective, the shift may not represent as sharp of a departure as it may initially seem.

B. Petrobras *as Applicable Beyond the Securities Context*

As noted above, in developing its new standard, the *Petrobras* court placed great weight on *Morrison*'s limitation of the reach of United States securities laws.[206] The rationale behind the court's standard is therefore largely rooted in the securities context. Likewise,

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205. *Vivendi*, 242 F.R.D. at 106 (citing Buschkin, *supra* note 4, at 1569 (advocating for a "default presumption in favor of including foreign claimants in . . . class action lawsuits" because otherwise it would lessen the deterrent effect of class adjudication.)).

206. *See supra* Section III.A.

the *Vivendi* and *Bersch* courts developed their standards with an eye toward the United States' enforcement of its securities laws.[207] But the res judicata concerns raised in and addressed by these cases are not limited to the securities context.

Particularly since *Morrison* "significantly reduced the universe of transnational securities class actions," commentators have observed that attention should also be directed toward "other substantive subject areas such as product liability, consumer protection, and antitrust."[208] However, given *Bersch*, *Vivendi*, and *Petrobras*' factual bases in securities class actions, courts have been hesitant to adopt their standards for addressing res judicata concerns when faced with non-securities actions. Outside of the securities context, courts have not followed either *Vivendi* or *Petrobras* in their respective approaches to the res judicata issue.

The court's treatment of the issue in *Dear v. Q Club Hotel, LLC* is illustrative.[209] In *Dear*, the "action involve[d] a dispute among owners of a beachfront hotel and condominium units" in Fort Lauderdale.[210] The plaintiffs moved to certify the plaintiff class under Rule 23.[211] In response to this motion, the defendants argued "that the foreign citizenship of many Unit Owners will create management challenges because foreign courts may not recognize the finality of this Court's ruling."[212] While the court ultimately dispensed with this argument by finding that the defendants had failed to "identify which foreign entities' home countries would not give preclusive effects to

207. *See id.*; Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975):

> When, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.

208. Monestier, *supra* note 28, at 12–13 & n.27; *see also* Simard & Tidmarsh, *supra* note 29, at 88 n.3 ("Although *Morrison* prevents some foreign litigants from becoming class members in American securities fraud actions, the decision fails to address mass torts with foreign victims [and] antitrust claims with effects on foreign victims."). To this point, Professor Bermann has explained of a securities hypothetical that "[w]e could easily replicate the scenario by converting our hypothetical international securities case into a mass tort or product liability claim." Bermann, *supra* note 9, at 94.

209. No. 15-60474-CIV, 2016 WL 7477734 (S.D. Fla. Dec. 8, 2016).

210. *Id.* at *1.

211. *Id.*

212. *Id.* at *6.

this action,"[213] the court was careful to distinguish its analysis from the context of securities actions.[214]

Citing to *Vivendi* and *Bersch*, the court recognized that "concerns that foreign governments will not recognize a U.S. court's decision may bar class certification in certain contexts, such as in securities litigation."[215] In this brief acknowledgment of the case law concerning the res judicata issue's application to class certification in the context of securities litigation, the court suggested that a similar application might be warranted outside of that context.[216] It was careful, however, to distinguish between the context underlying the present action and the context of securities litigation. In the end, the court was saved from having to discuss the extent of the applicability of the standards enumerated by *Bersch* and *Vivendi*.[217]

The court's failure to address *Bersch* and *Vivendi*'s applicability is unfortunate. Many of the same justifications for *Petrobras* and the *Bersch* and *Vivendi* standards extend beyond the securities context. As a baseline, the value of judicial efficiency in the administration of class actions is best served by outright eliminating foreign plaintiffs and thereby simplifying the class, rather than by including them. However, no commentator—and no court—has advocated for such an extreme position.[218] It was the absence of such a bright-line rule which led Judge Friendly to fashion the *Bersch* standard. Insofar as *Bersch* provided a mechanism for distinguishing between which foreign plaintiffs ought to be excluded from a class, it appeared to promote the values of efficiency and administrability.[219] In effect, however, the working of the standard itself proved to require more time and expense from all parties.[220] Later courts have crafted standards that are perhaps more functional than that of *Bersch*, but as the previous sections of this Note have illustrated, the decision to avoid a bright-line rule of exclusion or

213. *Id.* (quoting *In re* IndyMac Mortg.-Backed Sec. Litig., 286 F.R.D. 226, 243 (S.D.N.Y. 2012)).

214. *Dear*, 2016 WL 7477734, at *6.).

215. *Id.* (citing *In re* Vivendi Universal, S.A., 242 F.R.D. 76, 80 (S.D.N.Y. 2007); Bersch v. Drexel Firestone Inc., 519 F.2d 974, 997 (2d Cir. 1975); *In re* DaimlerChrysler AG Sec. Litig., 216 F.R.D. 291, 301 (D. Del. 2003)).

216. *Id.*

217. The court followed *IndyMac* in requiring the defendants to identify which countries deny preclusive effect to the court's judgment. *See also supra* note 150 and accompanying text. Notably, the precedent adopted by the court to avoid engagement with the *Bersch* and *Vivendi* standards was provided by *IndyMac*—itself a case about securities litigation.

218. *Cf. supra* note 28.

219. *See supra* note 43 and accompanying text.

220. *See supra* note 47 and accompanying text.

inclusion of foreign plaintiffs necessarily introduces a significant degree of complexity into the litigation.

The introduction of this complexity is not, of course, senseless. Courts must balance efficiency with fairness.[221] Fairness to the plaintiffs, in receiving a commensurate recovery, and fairness to the defendants, in ensuring that if they "prevail against a class they are entitled to a victory no less broad than a defeat would have been."[222] These are not concerns intrinsic to the securities context. Rather, like the second rationale considered in *Vivendi* for a less exclusionary standard—the practical unlikelihood of foreign nonrecognition and relitigation—these concerns are values underlying the class action regime.[223]

Indeed, *Vivendi*'s recognition of the practical unlikelihood of relitigation provides support (albeit implicitly) to the *Petrobras* court's decision to shift the burden established in *Vivendi*, and, by placing the burden on the defendants, weigh the scales against exclusion. *Petrobras*' burden shifting is arguably justified beyond the securities context in light of the practical unlikelihood of foreign relitigation and the United States' interest in deterring corporate misconduct beyond the securities context.

For example, commentators have identified mass torts as another context in which courts must confront the question of foreign nonrecognition.[224] While mass tort class actions, like securities class actions, are intended to serve the goals of promoting judicial efficiency and the deterrence of corporate misconduct, the mass tort context differs from the securities context in a few key ways. To this point, Professor Coffee has noted three characteristics of mass tort class actions that render them particularly prone to settlement.[225] After describing these three characteristics, Professor Coffee observes a preliminary distinction: that individual mass tort claimants are likelier than individual securities claimants to possess large and individually viable claims. It is this preliminary distinction that seems most contrary to

221. *See supra* notes 32–33 and accompanying text.

222. Bersch v. Drexel Firestone Inc., 519 F.2d 974, 996 (2d Cir. 1975).

223. *See supra* note 198 and accompanying text.

224. *See supra* note 204 and accompanying text.

225. *See* John C. Coffee, Jr, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1350–52 (1995) (noting that in the mass torts context: (1) courts are especially willing to accept settlements due to docket inundation; (2) defendants are prone to offering inducements to settle; (3) claimants are often "future claimants" who have "not yet experienced any symptomatic illness or disease, but rather share only a statistically enhanced risk of future illness because of their exposure to a toxic product or process" and are thus likely to "remain rationally apathetic" about the legal proceeding; and (4) individual mass tort claimants are often possess large individual claims).

the wholesale adoption of the *Petrobras* standard into the mass torts context. After all, the *Petrobras* standard is the latest iteration of a series of standards for assessing the likelihood of foreign nonrecognition within the securities context.[226] If there is a meaningful difference between the likelihood of foreign relitigation in mass torts class actions as opposed to securities class actions then the *Petrobras* standard's more inclusive approach toward foreign plaintiffs may prove untenable within the mass torts context.

Professor Coffee explains that "class actions divide economically into 'small claimant' classes and 'large claimant' classes."[227] In "small claimant" classes, claimants lack individually viable claims and are reliant on other class members to attract competent counsel.[228] In "large claimant" classes, "most class members can attract competent counsel to represent them in individual actions on a contingency basis".[229] As a result, defendants often resist class certification for "small claimant" classes while encouraging the certification of "large claimant" classes in order to obtain broad preclusive settlements.[230] Professor Coffee cites securities class actions as an example of "small claimant" classes and mass torts class actions as an example of "large claimant" classes.[231] In effect, a mass tort claimant often has a greater incentive to opt out of a class action than a securities claimant.

In the abstract, a foreign mass tort claimant might therefore be likelier than a foreign securities claimant to relitigate her claim abroad in the event of an adverse judgment by a U.S. court. However, as Professor Coffee notes, "foreign claimants have little chance at a substantial recovery if foreign law is applicable to their claim."[232] If foreign mass tort claimants are no likelier to relitigate an adverse U.S. court judgment abroad than foreign securities claimants, the *Petrobras* standard's inclusive approach to foreign plaintiffs should be applicable in both contexts. Instead of developing a web of context-specific standards to assess the likelihood of foreign recognition of a U.S. class

226. *See supra* Section II.B.

227. Coffee, *supra* note 225, at 1351.

228. *Id.*

229. *Id.*

230. *Id.* at 1352.

231. *Id.* at 1351–52.

232. *Id.* at 1409 n.264; *see also* Pinna, *supra* note 2, at 50 ("Traditionally, European legal systems deny courts the power to award damages . . . that go beyond what is necessary to compensate the injury suffered by the victim. Punitive damages are really a peculiarity of U.S. law."); *supra* note 193 and accompanying text.

action, courts should look to the already-existing standards developed within the securities context.

C. Petrobras*' Burden-Shifting, Superiority, and Remaining Uncertainties*

This Note has examined the *Petrobras* court's analysis of the issue of potential foreign nonrecognition of its judgment.[233] The defendants raised this issue by citing to *Vivendi*'s "more likely than not" standard which grafted the preclusion inquiry into the Rule 23(b)(3) analysis.[234] Accordingly, the *Petrobras* court considered this issue alongside a variety of other Rule 23(b)(3) arguments raised by the defendants.[235] In emphatically rejecting the *Vivendi* standard, the court also rejected the long tradition of grafting foreign res judicata concerns onto the Rule 23(b)(3) analysis. To this effect, the court wrote that it "concludes that foreign res judicata concerns are not a bar to the superiority of a class action."[236] This conclusion follows necessarily from the court's decision to shift the initial burden from the plaintiff to the defendant. This is because, in assessing superiority under Rule 23(b)(3), the burden to demonstrate superiority rests with the plaintiffs.[237]

It would not be entirely unreasonable, however, to understand the court as having gone further than merely shifting the initial burden from the plaintiff to the defendant. In finding that the potential for foreign nonrecognition is "not a bar to the superiority of a class action," the court might be understood as declaring non-recognition irrelevant to class certification.[238] Taken literally, the court seems to suggest that the entire enterprise of courts concerning themselves with the costly process of weighing the likelihood of preclusive effect is misguided. The alternative to this process would be the adoption of a bright-line rule of either inclusion or exclusion of foreign plaintiffs.

There is good reason to believe that the court did not intend to go that far. The court's conclusion that "foreign res judicata concerns are not a bar to a class action" was premised on the fact that "defendants have not explained in any detail why . . . particular countries

233. *See supra* Section II.B.

234. *See supra* note 142 and accompanying text.

235. *See In re* Petrobras Sec. Litig., 312 F.R.D. 354, 363–73 (S.D.N.Y. 2016).

236. *Id.* at 363.

237. *See supra* note 66 and accompanying text.

238. *See supra* note 236 and accompanying text.

would not recognize a U.S. class action judgment in this case."[239] It would be absurd for the conclusion that the res judicata issue is of no concern during class certification to be drawn from the defendant's failure to adequately raise the issue.

This is not to say, however, that the removal of any consideration of foreign res judicata concerns from class certification would itself be absurd.[240] For the same reasons that *Petrobras*' burden-shift ought to be applied beyond the securities context—namely, the sheer unlikelihood of foreign relitigation alongside the general goal of deterrence—a more decisive move toward including all foreign plaintiffs is worthy of consideration.[241] After all, this is precisely the position considered by the *Vivendi* court.[242] While that court "elect[ed] to proceed with caution and limit the class to foreign shareholders whose courts, in the unlikely event of successive litigations, are likely to give *res judicata* effect to any judgment herein," it noted the existence of strong arguments to the alternative.[243] A bright-line rule of inclusion best serves the values of fairness and deterrence by allowing more plaintiffs to seek redress in U.S. courts. Moreover, given the unlikelihood of relitigation abroad, courts can rightly ask: "What is there to lose?"[244] Given the conceded strength of these arguments, perhaps it is time for courts to consider them anew. The very uncertainty surrounding the practical application of *Petrobras*' move toward excluding fewer foreign plaintiffs points toward the virtues of a bright-line rule of inclusion.

In any event, it seems much more likely that the *Petrobras* court aimed to remove the res judicata issue from the Rule 23(b)(3) superiority inquiry while still preserving its use under another basis. In this sense, *Petrobras* may represent a step back toward Judge Friendly's consideration of the risk of the res judicata issue outside of the Rule 23(b)(3) superiority inquiry. To this point, the *Vivendi* court noted of another court's treatment of *Bersch* that it "read *Bersch* as applying only to whether a class action should proceed under principles of pendent jurisdiction, and emphasized that *Bersch* did not

239. *Petrobras*, 312 F.R.D. at 363.

240. *See* Simard & Tidmarsh, *supra* note 29, at 113 (suggesting that while still non-optimal, "if the only choice was either to adopt the *Bersch-Vivendi* approach or to reject it in favor of the inclusion rule, the *Bersch-Vivendi* approach performs worse over a broader range of situations").

241. *See supra* Section III.A; *see also supra* note 28 and accompanying text.

242. *See supra* Section III.A.

243. *In re* Vivendi Universal, S.A., 242 F.R.D. 76, 107 (S.D.N.Y. 2007).

244. Bermann, *supra* note 9, at 95.

directly address the issue of superiority under Rule 23(b)(3)."[245] It is uncertain where, if not under Rule 23(b)(3), the *Petrobras* court grounded the res judicata analysis.

It is also unclear how exactly *Petrobras*' burden-shift affects the standard for assessing the likelihood of nonrecognition. The two cases which have thus far employed the burden-shift—*Petrobras* and *Villella*—resolved the foreign recognition issue through a finding that the defendants had failed to meet their burden of explaining "in any detail why . . . countries would not recognize a U.S. class action judgment."[246] Neither court reached the stage in their analysis at which an evidentiary standard would be required. Thus, the question that naturally follows is: What standard are courts following *Petrobras* to use for dictating the degree of certainty of recognition (or nonrecognition) required of the court's judgment before excluding foreign plaintiffs? It is unclear whether *Petrobras* represents a return to *Bersch*'s standard of "near certainty" of nonrecognition, a continuance of *Vivendi*'s "more likely than not standard" (although now, because the burden is to be borne by the party resisting class certification, to be directed at the likelihood of nonrecognition), or something altogether different.[247] It is important that this question be resolved. Otherwise, litigants and courts may find themselves faced with the same uncertainty which prevailed before Judge Friendly's "near certainty" standard.

As was the case with *Vivendi*, there is reason to believe that the *Petrobras* decision will continue to exercise persuasive authority on other courts.[248] Regardless, this much is clear: While it was accurate, in 2009, to observe in light of *Vivendi* that "support is growing for shifting the burden to the party urging class certification, but requiring it to do no more than demonstrate that recognition abroad of an eventual adverse class action judgment is 'more likely than not,'" the same cannot be said today.[249]

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245. *Vivendi*, 242 F.R.D. at 94 (citing *In re* Lloyd's Am. Tr. Fund Litig., No. 96 Civ. 1262, 1998 WL 50211, at *15 (S.D.N.Y. Feb 6, 1998)).

246. *In re* Petrobras Sec. Litig., 312 F.R.D. 354, 363 (S.D.N.Y. 2016).

247. Although no court has expressly advocated for such a solution, it is also possible that the *Petrobras* court meant to imply that the sheer complexity of the res judicata analysis warrants the adoption of different evidentiary standards on a case-by-case basis.

248. In particular, the *Villella* decision may indicate a general willingness in the Southern District of New York to follow *Petrobras*. *But see supra* note 186 and accompanying text for the continued vitality of the *Vivendi* standard outside of the Southern District of New York.

249. Bermann, *supra* note 9, at 97.

CONCLUSION

This Note has aimed to accomplish three objectives: first, to provide the reader with an overview of some of the standards by which American courts have come to assess the likelihood of foreign recognition of their judgments; second, to provide the first sustained discussion of the 2016 *Petrobras* decision's implications upon these standards; and finally, to begin the work of positioning the *Petrobras* decision within the history of judicial attentiveness to the issue of foreign recognition. Some of the questions raised in this Note, such as precisely how widely adopted *Petrobras*' burden-shifting will become, can only be answered with the passage of time. Other questions, such as whether *Petrobras* represents a normative improvement over *Vivendi*, deserve further study and debate.

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