Demand and Supply Forces in the Market for Law Interplaying through Jurisdictional Competition: Basic Theories and Cases

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Abstract

Inspired by corporate charter competitions in the 19th-century U.S. and contemporary Europe as well as the negative impact of the Sarbanes-Oxley Act of 2002 on the U.S. cross-listing market, this article draws positive lessons from the above stories that demand and supply forces underlying jurisdictional competition constrains regulating jurisdictions from disregarding business demands and from imposing excessive regulation, and that jurisdictional competition brought about by mobility or exit would push for legal flexibility. Through the positive arguments developed in this article, regulatory jurisdictions in East Asia could, to an extent, understand the true costs and benefits of regulation in the international dimension among others, and regulate in light of that understanding.

Keywords: Regulatory competition; Mobility; Law market forces; Globalization; Interest group competition

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I. Introduction

In the first decade of the 21st century, East Asian countries such as Japan, South Korea, China, and Taiwan have revamped or are in the process of considering overhauling their business association laws with a view to facilitating the establishment and operation of domestic and foreign firms. This change of regulatory attitudes demonstrates more and more intense international jurisdictional competition among legal jurisdictions in East Asia for worldwide mobile factors of production. These jurisdictional competition among legal jurisdictions in East Asia for worldwide mobile factors of production. These competitive incentives would push regulatory jurisdictions to “keep in mind that in addition to their vertical choice of form within given states, firms also have horizontal choice of statutes available across different states.” Therefore, regulating jurisdictions cannot but engage in jurisdictional competition through changes in the provision of better business association laws.

Accordingly, this article seeks to explore the fundamental dynamism between law market demand and supply forces (or underlying exit and voice rights) under international jurisdictional or regulatory competition, and then draws implications therefrom. Notably, the arguments developed in this article are not normative: There is no “grand solution” proposed to the normative questions of whether international jurisdictional competition is efficient or good to common people. Rather, the article tries to analyze law market dynamics under international jurisdictional competition in an attempt to build a more realistic foundation on how local governments should respond to international jurisdictional competition. For until we understand the dynamics, the grander normative arguments risk being simply pipe dreams -- diverting, but in the end making little difference. Through the positive arguments developed here, regulatory jurisdictions could, to an extent, understand the true costs and benefits of regulation in the international dimension among others, and regulate in light of that understanding.

As for the structure of this article, Section II introduces general theories regarding jurisdictional competition and draws lessons from them to later test basic cases of jurisdictional competition. First of all, the genesis of the jurisdictional competition theory can trace back to Charles Tiebout’s 1956 article, which, as Esty and Geradin compress, suggests that “decentralized governance, with horizontally arrayed jurisdictions competing to attract residents on the basis of differing tax and benefits structures, would generate increased social welfare and produce a Pareto-superior outcome.” Subsequently, I come to the law market theory. Incorporating Albert Hirschman’s theory regarding options of exit and voice, interactions between forces driving the law market connote the demand side of law market generated by “exit,” the supply side in regulating jurisdictions where interest groups compete to “voice” their respective preferences, and regulatory responses from local political forces to the above exit signals.

Then when it comes to the international dimension, “with globalisation -- intensified trade and greater factor mobility -- there is more immediate feedback to high-cost institutional systems and, with it, the need to adjust those systems, not only passively but possibly even proactively.” Hence, regarding underlying factors spurring the law market in a global setting, the increase of international factor mobility brought about by globalization lowers firms’ exit costs and then intensifies the international jurisdictional competition for mobile resources. Outflowing capital and emigrating labor would then compel regulatory jurisdictions to improve on the quality of their regulations. In other words, the international movement of production factors, delivered through domestic interest groups to political policy makers within a regulating jurisdiction, could galvanize the liberalization of excessive regulation.

Sections III and IV research further into specific law markets in corporate charters and international securities regulation. To begin with, from the 19th century jurisdictional competition of corporate law in the U.S., it is not difficult to infer not only that in a jurisdictional competition of repeated games, being a leader requires continuous respect for business demands, but also that if regulatory jurisdictions refuse to recognize business demands, firms have incentives to seek out more cost-effective or flexible laws in other jurisdictions, and this firm mobility would finally resign governments to lift overburdensome bans. Furthermore, the rise and fall of New Jersey in this competition for corporate charters illustrates the usual supply and demand forces at work in this corporate law market.

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In turn, *Centros* and other descendent cases adjudicated by the European Court of Justice (“ECJ”) have provoked not only some European competition in the form of “tramp” UK incorporations by companies based elsewhere in Europe, but also responses by other European countries, particularly by revising their minimum capitalization requirements and simplifying incorporation requirements. In other words, in the wake of *Centros*, all Member States are required essentially to adhere to business demands especially with respect to corporate law for small firms. In a word, law market forces interplaying in both corporate law markets of the 19th-century U.S. and contemporary Europe push regulatory transitions from mandatory to more flexible regimes. Although the breeding grounds of these two jurisdictional competitions seem in appearance to be disparate, underlying competitive dynamics is likely to be the same, in the sense that jurisdictional competition prompted by firms’ mobility could push relaxation of excessive regulation.

In Section IV, theoretically, the advantages of state competition in the U.S. might be extended to the international scene, with international jurisdictional competition in securities regulation such as disclosure and anti-fraud rules. Notwithstanding the debate between proponents and opponents of issuer choice, foreign firms already can choose to “bond” their integrity by cross-listing in the United States or other improved markets, thereby subjecting themselves to these legal regimes added to those in their home countries. Much evidence supports this bonding explanation of cross-listing. Nonetheless, full-fledged international competition used to be much more hobbled by the fact that the United States at the earliest insisted on regulating all trading within its borders regardless of where the firms are based exactly after the enactment of the Sarbanes-Oxley Act of 2002 (“SOX”). In fact, SOX impacted non-U.S. firms so negatively that many foreign issuers were driven to list shares elsewhere. Foreign firms’ mobility fed the demand side of this law market, which subsequently spurred the supply side within the United States. Therefore, the U.S. responded to criticisms from German and other foreign companies by issuing rules that partially exempt foreign firms from some SOX requirements. The SOX case not only implies that constraints on over-stringent SOX to foreign issuers would be imposed by jurisdictional competition among global cross-listing markets fuelled by capital mobility, but also that international jurisdictional competition would provoke a change in over-burdensome regulation to a more flexible regime.

Section V concludes. International securities regulation seems quite different from the two corporate law markets mentioned above in that the former is at work on the national level rather than within federal systems of the United States or Europe, but the SOX case implies that law market forces similar to those working as to corporate law within federal systems also work as to international securities regulation. As Ribstein and O’Hara stress, “[a]lthough federal securities laws arguably circumvent the [Internal Affairs Doctrine (the “IAD”)] by displacing state law, there is a market in international securities regulation that displays some of the same competitive processes as the market for state corporate law.” In other words, forces that operate in the law market generally apply in the international context as well.

II. The Theoretical Fundamentals of Jurisdictional Competition

A. Jurisdictional Competition Provoked by Mobility

The view of the law as a tradable good in a market comes from a broader theory originating in public economics with the publication of the Tiebout model in 1956, applicable to all public goods in general. In brief, this theory suggests that different state governments compete with each other in the supply of public goods to consumers who on their side can choose between the public goods offered according to

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7. Id. at 711-12.
8. H. Spencer Banzhaf & Randall P. Walsh, *Do People Vote with Their Feet? An Empirical Test of Environmental Gentrification* 1 (RFF Discussion Paper No. 06-10, 2006), available at http://ssrn.com/abstract=901657 (“Tiebout’s (1956) suggestion that people ‘vote with their feet’ to find the community that provides their optimal bundle of taxes and public goods has played a central role in the theory of local public finance over the past 50 years”). The basic structure underlying the Tiebout model is that “households do appear to vote with their feet in response to changes in public goods.” Id. at 4.
their preferences. Under this view, this market approach will most efficiently allocate public goods between the consumers according to their preferences, on the following conditions: (1) "people and resources are mobile" between jurisdictions; (2) "the number of jurisdictions is large;" (3) "jurisdictions are free to select any set of laws they desire;" and (4) "there are no spillovers," positive or negative externalities, among jurisdictions. Furthermore, Coffee adds another condition: “individuals or firms make the choice among jurisdictions … based simply on which jurisdiction … offers the most efficient and least costly regulatory regime.”

To sum up, the more fully these conditions are fulfilled, the more likely jurisdictional competition would be effective.

The above perspective is the regulatory competition or jurisdictional competition. As Geradin and McCahery note, regulatory competition is an economic theory of government organization that equates decentralization with efficient results. The theory makes an analogy between law and commodities, and then asserts that lower level governments -- local, state, or national, as opposed to federal or supranational -- should compete for citizens and factors of production when they regulate. It predicts that such competitively determined regulation will satisfy citizen preferences. The prediction has a normative implication for legal and political theory: just as price competition disciplines producers of private goods for the benefit of consumers, so regulatory competition promises to discipline government for the benefit of taxpaying citizens. Regulatory competition has been brought to bear on the entire range of federalism discussions, usually to support a devolutionary initiative or to oppose a proposal for federal intervention.

There was theoretical arbitrage to legal contexts early in the field of law and economics. Lawyers, economists and political scientists in the U.S. have applied it to a wide range of subjects, from corporate law, to banking, to environmental law, to intellectual property, and to trade law.

Easterbrook argues that competition among states for corporate charters is a good example of regulatory competition:

Although there has been a hubbub about the consequences of competition among the states for corporate charters, the data indicate that the competition has been beneficial to investors. Firms that announce plans to move their incorporation to Delaware realize significant gains. Because of the mobility of investment capital, it could hardly be otherwise. Delaware has no monopoly of investment opportunities, and if its corporate code did not offer features valuable to investors, they would place their money with firms incorporated elsewhere. Although it is hard to name other things as mobile as corporate charters and investment capital, it is also hard to find resources -- save for land -- that are immobile in the long run.

To summarize advantages derived from jurisdictional competition, as Romano argues,

[the learning of the empirical research is altogether consistent with the understanding of the workings of regulatory competition, that competing regulators have superior incentives to a single regulator regarding the adoption of requirements of no efficacy, or whose efficacy is not worth their cost. Competing regulators have superior incentives because, when firms can choose their regulatory regime, they will not opt for a regime that imposes increased costs unless the accompanying benefits are worth the additional expense. Firms will exit [from] the regime that is not cost-justified for one that is, and regulators will learn from the pattern of inflows...]

9.  Tiebout, supra note 2, at 424.
12.  For further discussion, see DENNIS C. MUELLER, PUBLIC CHOICE III 186-206 (2003).
and outflows of firms which rules meet a cost-benefit test. Under the plausible assumption that regulators seek to maximize the number of regulated firms within their jurisdiction, regulators in a competitive environment will, accordingly, not only react more quickly to regulatory mistakes, but also select a different set of rules from monopoly regulators, from whose regulatory authority firms cannot exit.16

More importantly, “while some view the normative aspect of [Tiebout’s] model (i.e., jurisdictional competition is efficient) as controversial, few would contest its positive aspect (i.e., competitive incentives drive local policies).”17 This article is just focused on a purely descriptive perspective that jurisdictional competition brought about by mobility will provoke changes in local laws to prevent the departure of capital.

B. The Interaction between Exit and Voice Rights under Interest Group Competition

Albert Hirschman argues that as members of a society such as a corporation or a country find that the quality of or the benefit provided by the human group is going down, they are fundamentally armed with two ways to respond: they might exit (break off the relation); or, they might voice (make an effort to mend or restore the relation by lodging their complaints or proposing some change).18 As Mueller discusses,

Albert Hirschman develops the useful distinction between processes in which individuals express their preferences via entry or exit decisions, and those in which some form of written, verbal, or voice communication is employed. An example of the first would be a market for a private good in which buyers indicate their attitudes toward the price-quality characteristics of a good by increasing or decreasing (entry or exit) their purchases. An example of the exercise of voice to influence a price-cost nexus would be a complaint or commendation of the product delivered to the manufacturer.19

Under federalism, the private individuals and firms that “are subject to state regulation need not be content with a ‘voice’ in the political process but can protect their interests through the right of ‘exit,’ that is, through the ability to avoid the difficulties of further association by picking up stock and going elsewhere.”20 Put simply, exit and voice rights can alternately and interactively check the monopoly power of local governments.21 In particular, exit rights and mobility underlying jurisdictional competition produce various benefits; letting a voter supplement his “voice” with an option to “exit” from the jurisdiction could strongly restrict local governments’ powers to tax and regulate. Exit rights powerfully transmit market forces to influence political or regulatory structures.22

In regard to interest group competition, “the legislature is itself a marketplace and interest groups compete with one another in that marketplace for legislature benefits.”23 O’Hara further explains:

In this competitive process, as with all others, groups that are more successful at creating benefits for themselves at low cost are more likely to obtain the benefits that they seek. Laws therefore tend to benefit those groups that are able to (1) organize cheaply and effectively; (2) prevent others from entering the group to usurp a share of the benefits; and (3) minimize intra-group competition that threatens to dissipate the proceeds obtained.24

Moreover, substantive regulations are often the product of three different types of interest groups: (1) groups

21. Id.
that derive advantages from regulation ("pro-regulatory" interest groups); (2) groups that assume the direct cost of regulation ("anti-regulatory" interest groups); and (3) "exit-affected" interest groups made up of those who are hurt if state regulations cause businesses or people to either leave the state or not come to the state in the first place. Generally speaking, "competition among organized interest groups may (but will not always) constrain the enactment of bad laws."26

Last but not least, exit by some can add voice to others who benefit by the presence of those who have exited. Specifically, exit rights have a bearing on laws and institutions in the sense that they promote "exit-affected" interest groups, those powerful local interests that derive benefit from discouraging exit or bringing in new members. While "the exit option motivates anti-regulatory interest groups that ‘stand in’ for the people and businesses that are directly hurt by a proposed law but are too weak by themselves to prevent its adoption,"27 it is necessary that legislators and regulators weigh the demands of both anti-regulatory and exit-affected groups against those of pro-regulatory interest groups. In a word, "mobility therefore provides an indirect voice to outsiders and a stronger voice to insiders who will be burdened by a proposed law."28

C. The Law Market Dynamics

Building on Tiebout’s theory and Hirschman’s typology, O’Hara and Ribstein bring up the theory of the law market:

A market for law may have significant implications for political theory. Under the traditional view of politics, people who do not like their leaders elect new ones. In other words, they exercise what Albert O. Hirschman has referred to as "voice." However, coordinating the electorate is cumbersome and costly. Moreover, the political marketplace is often dominated by interest groups that can influence politicians with money and votes to act in ways that might not serve the public interest. Voting is not the only source of political power. People can choose the applicable law by deciding where to live -- part of what Hirschman called "exit." ... Tiebout explicitly recognized a kind of consumer market in governments. There is no reason in principle this market would not embrace laws which, after all, are an important type of government-provided goods.29

As O’Hara and Ribstein further argue, the law market is referred to as the competitive mechanism through which "governing laws can be chosen by people and firms rather than mandated by states. This choice is created by the mobility of at least some people, firms, and assets and the incentives of at least some states to compete for people, firms, and their assets by creating desired laws."30 The term "Market" here does not point to "particular sets of idealized conditions of exchange, but rather simply to buyers demanding a commodity (law) and sellers being willing to provide it for a benefit;" this type of exchange is contrasted with "the view that law is decreed by government and forced on parties subject to its jurisdiction."31 As for the demand or "buyer" side of the market, "parties ‘shopping’ for law have created their own market by using several mechanisms such as exit options for avoiding costly regulation."32 As for the supply or "seller" side of the market, shopping generates incentives for some interest groups to favor contracting or legal flexibility (anti-regulatory interest groups), and thus to oppose those that prefer regulation (pro-regulatory interest groups). The interest group competition "involves not only the groups directly affected by the regulation, but also exit-affected interest groups, which have a stake in the parties’ decisions whether to locate, invest, or litigate in the state."33 In a word, the basic law market demand and supply forces specify the operations of this market.34
D. The International Law Market

(A) Jurisdictional Competition under Globalization

In general, “[t]he reduction in barriers to trade and the liberalization of financial markets, transportation and telecommunications have created the basis for the increase in flows of factors of production between jurisdictions.”35 This increase in mobility is also because of the drop in exit costs:

Since the 1960s, the competition among distant locations and national jurisdictions for mobile production factors, such as capital, has greatly intensified. In part this is due to advances in technology. In the second half of the 20th century, containerization, roll-on/roll-off ships, pipelines and jumbo jets have saved transport costs in innovative ways. But advances in transport technology pale in comparison to the revolutionary advances in communication (“the transportation of ideas”). The fax, satellite communication, fiber cables, computing and data compression, e-mail, microwave transmission and widely available portable video cameras have brought down the costs of long-distance communication by phenomenal margins. People are better informed about living and working conditions in distant places and civilizations.36

The above phenomenon is “globalization,” which is essentially “the phenomenon of increased international factor mobility.”37 Kasper further argues that “government administration is a production factor, since good government is an ingredient in production, raises the productivity of all the other production factors, and enhances a country’s attractiveness to mobile production factors.”38 Furthermore, Geradin and McCahery also find:

As countries move to a more liberalized domestic economy, questions of competition between jurisdictions abound. With the prospect of increased capital mobility, it is becoming conventional wisdom that national governments are forced to perform their economic policy functions more efficiently since governments that yield optimal levels of public goods may be more successful in the competition between jurisdictions for attracting mobile resources. The concern to attract mobile resources has shaped entire areas of governmental policy and plays a determinative role for firms locating new plants.39

Since national laws and institutions are an important type of government-provided goods, globalization has also galvanized international jurisdictional competition for mobile production factors by offering better laws and institutions.

To exemplify how globalization promotes international jurisdictional competition, as David Law argues, globalization involves intensifying international jurisdictional competition for investment capital and human talent that might give rise to implications for the worldwide development of constitutional law. Global investment and migration patterns may impact the extent to which countries maintain certain constitutional rights. He adds: “[A]s capital and skilled labor become increasingly mobile, countries will face a growing incentive to compete for both by offering bundles of human and economic rights that are attractive to investors and elite workers.”40 He further argues that in “a ‘world market’ in human rights,” countries bid for skilled workers by offering both pecuniary and non-pecuniary inducements that include greater or lesser degrees of personal freedom. … [C]ountries that do not boast the rights bundles available elsewhere must in effect pay skilled workers what might be called a “freedom premium” in order to compete successfully in the global market for human capital.41

35. Geradin & McCahery, supra note 13, at 1.
36. KASPER & STREET, supra note 4, at 344.
38. Id. at 11. In the second half of the 20th century, “[i]ncreasingly, local and national institutions are becoming a key cost factor that determines what is produced where -- not surprisingly, because coordination costs account often for half of all costs and because these are greatly influenced by prevailing institutions.” KASPER & STREET, supra note 4, at 345.
41. Id. at 1283.
Put differently, “economic globalization includes competition among nations for investment and human capital. Nations compete by offering investors and those with high levels of human capital -- the well-educated and trained -- attractive packages of benefits. An important component of those packages ... is constitutional protection.” What’s more, “[p]eople with high levels of human capital are just about as mobile as investment capital, and will locate themselves in nations that provide them with what they want by way of freedom.” Therefore, economic globalization forces national jurisdictions to offer better constitutional protection to engage in the international jurisdictional competition for investment capital and elite workers.

Finally, globalization, or the worldwide intensified movement of capital, know-how and firms across national borders, strengthens the exit option for the subjects of national jurisdictions. This phenomenon “weakens the power of governments. ... It is therefore useful to constrain the scope for opportunistic national interventions in international exchanges.” For example, as Andrews argues, “the degree of international capital mobility systematically constrains state behavior by rewarding some actions and punishing others.”

(B) Demand and Supply Forces in the Market for Law Interplaying through International Jurisdictional Competition

Following the insight of the law market as well as the dissection of globalization and jurisdictional competition, we can realize how law market forces are working in international jurisdictional competition. First of all, since globalization lowers exit costs across borders and enhances firm and capital mobility, globalization leads to international jurisdictional competition for worldwide mobile factors of production by offering better laws and institutions. We in turn come to the interactions between the economic process in the international environment and the political process within a jurisdiction when this jurisdiction engages in jurisdictional competition through changes in the provision of laws and institutions. Let’s suppose that the jurisdiction propose an excessive law favored by pro-regulatory interest groups, which create firms’ demand for legal flexibility and their incentive to leave. In the international economic process, firms, as “economic agents,” have some ability to manipulate jurisdictional choice. That is to say, this mobility, in the first place, can feed the demand side of the law market which firms’ exit rights underlie, and then spark competition for the supply of law by other jurisdictions on the international supply side. Exit and entry by firms seeking to avoid regulation creates costs and benefits for other interest groups in the jurisdiction. This mobility can thus activate the domestic interest group competition on the supply side. In particular, the exit or mobility may provide an indirect voice to outsiders and a stronger voice to insiders who will be burdened by the proposed law.

In the domestic political process, these “exit-affected” interest groups join with the groups that are directly burdened by the regulation to promote legal flexibility on the domestic supply side, even if the latter anti-regulatory groups could not alone defeat the regulation proposed by the pro-regulatory interest groups. This in turn pressures politicians or lawmakers within the regulating jurisdiction, as “political agents,” to discover that they need to supply laws and institutions which constitute “an attractive locational factor,” and to enable the relaxation of the excessive law. Hence, where regulation might be excessive, the jurisdictional competition could push the regulating jurisdiction to improve the substantive content of local laws. What’s more, “[l]egal changes would be provoked by firms’ increasing need for legal flexibility.” In other words, as Prof. Ribstein argues, “the mobility of firms, people and money across borders, transmitted through interest groups to political decision-makers, can produce long-
run legal changes.” 49 That is, the feedback mechanisms, options of exit (choice of location) and voice (political action), might be translated into the regulatory evolution, or the liberalization of excessive regulation.

III. Case Study I: The Law Markets for Corporate Charters

Basically, the corporate law market is simply a part of the broader market for law. 50 In general, a market for corporate law is based on parties’ contracting for or choosing, through incorporation, the law of a specific state or nation. This market, as a self-ordering phenomenon, could impose discipline on lawmaking by forcing states or nations to compete with one another. Additionally, respecting contractual choice-of-law, or recognizing the incorporation of a locally-based foreign corporation, would encourage legal improvements to evolve more rapidly and efficaciously. With firms’ ability to move among states or nations, the market for corporate law arises in both the U.S. and European federal systems despite local officials’ efforts to protect their lawmaking authority. 51 This article will hereby draw legal implications from the 19th-century jurisdictional competition for corporate charters in the U.S. and the developing corporate charter competition in Europe.

A. Jurisdictional Competition in the U.S.

Ribstein and O’Hara argue: “The increasing mobility of the corporation in the latter part of the 19th century was an important factor in developing the IAD,” 52 or the “Incorporation Theory.” 53 This rule holds “that the law of the state of incorporation governs the relationship between the managers, the shareholders, and the corporation. Corporations can choose their place of incorporation without having any other connection with the state of incorporation.” 54 To be sure, “the corporate law market might be said to be a product of the industrial revolution.” 55

As O’Hara and Ribstein note, when changes in business practices and technologies increased the benefits of prohibited practices and gave firms incentives to avoid regulatory impediments … firms had a choice either to engage in costly lobbying to remove local impediments or to move to states with laxer laws. Clearly they would welcome being able to choose a state’s law without physically moving there. 56

Historically, New Jersey thus became the first mover to attract foreign firms to incorporate locally. Grandy explains:

From 1888 through the general corporation law revision of 1896, New Jersey sought corporate charters by liberalizing its statutes. The constitutional amendments of 1875 set the stage for chartermongering by ending the era of special incorporation charters, requiring all corporations to charter under general laws. In 1888 two consecutive statutes allowed some corporations to merge and hold stock in other corporations. By 1893 the legislature had liberalized these laws so that most corporations could merge horizontally and hold stock in any foreign (non-New Jersey) state. These events highlighted the potential of a jurisdictional competition.

Id. at 66.


50. Ribstein & O’Hara, supra note 6, at 665.

51. See O’HARA & RIBSTEIN, supra note 25, at 217. O’Hara and Ribstein further argue:

Governments cannot control everyone everywhere. Physical mobility allows a person or firm to choose a single state whose laws would apply to all of her or its activities. States compete for mobile parties and their assets by attempting to provide the laws that they want. … [P]arties’ fundamental ability to choose among these bundles generates a willingness on the part of states to enforce choice-of-law clauses, which in turn facilitates an even more valuable market in laws governing particular relationships and disputes.

Id. at 66.

52. Ribstein & O’Hara, supra note 6, at 675.


54. Ribstein & O’Hara, supra note 6, at 662 (footnote omitted). However, as discussed below in Section III. B, until recently, Europe has long applied the so-called “real-seat” rule, under which the applicable law is that of the jurisdiction where the firm’s headquarters are located, but recent European case law has changed to adopt a type of the IAD. Id. at 706.

55. Id. at 675.

56. Id. at 676.
Jersey) or domestic corporation. General permission for New Jersey corporations to operate outside the state came in 1889, and by 1892 the state no longer required explicit permission -- all corporations could presume such consent. New Jersey partially protected corporations operating outside its borders through reciprocal and retaliatory laws: the taxes and obligations imposed upon New Jersey firms operating in other states were imposed upon firms from those states operating in New Jersey.\textsuperscript{57}

In other words, this fact demonstrates that states also have incentives to protect the IAD because it enables their own corporate laws to be respected elsewhere. State courts also realize that their judgments which do not recognize the IAD could negatively impact their own state’s corporations operating in other states.\textsuperscript{58} Meanwhile, the states also, in a sense, lost their power to exclude foreign corporations (i.e. the power not to enforce the IAD) during the first decade of the 20th century, since “the Supreme Court overruled its earlier decisions and gave the corporation what amounted to a constitutional right to do lawful business in every state.”\textsuperscript{59}

At any rate, the corporate law market soon got its first test. Woodrow Wilson, the then Governor of New Jersey, responded in 1913 to reformers’ protests against New Jersey’s monopoly-friendly law by convincing the legislature to pass amendments to its corporate law in order to limit holding corporations and impose stringent antitrust regulation. Delaware swiftly substituted for New Jersey by allowing “tramp” firms to register without being subject to New Jersey’s stricter laws. By the time New Jersey came to its senses and tried to recapture its business by reversing its regulation, it was too late -- Delaware had entrenched itself as a leader in corporate law business and gave the corporations no reason to reverse their new choices while firms lost their trust in the New Jersey legislature.\textsuperscript{60}

From a contemporary perspective, the corporate law market, or the jurisdictional competition for corporate charters fuelled by firm mobility, did drive moderation of excessive regulation. The history of the changes made by New York, Michigan, Massachusetts and other leading industrial states is illustrative. The removal by these states of the limitations upon the size and powers of business corporations appears to have been due to the conviction that it was useless to maintain them in the sense that local restrictions would be evaded by firms incorporating in, say, New Jersey.\textsuperscript{61} Indeed, as Yablon discusses, the basic contours of the law that emerged in New Jersey in the 1890s is [sic] essentially the same as the Delaware law that governs most publicly traded corporations today. Many of the changes that New Jersey instituted at that time -- such as the abolition of limitations on the size, duration, and power of corporations to hold and sell stock in other corporations, limitations on potential shareholder liability to creditors for issuing undervalued shares, and development of enabling statutes giving incorporators greater freedom to create and structure corporate powers -- were criticized at that time as removing important protections for the public. Most corporate law theorists today, however, would view them as reasonable, efficiency-promoting rules.\textsuperscript{62}

More importantly, the jurisdictional competition in the U.S. at the turn of the 20th century suggested that the actual content of a state’s corporate law might be less important than “its reputation and perceived commitment to the future content of its laws.”\textsuperscript{63} In truth New Jersey failed afterwards for not sticking to its previous commitment to respecting business demands. As a matter of fact, as Yablon argues,

\begin{footnotes}
\item[57] Christopher Grandy, New Jersey Corporate Chartermongering, 1875-1929, 49 J. Econ. Hist. 677, 681 (1989) (footnote omitted).
\item[58] Ribstein & O’Hara, supra note 6, at 685.
\item[59] HERBERT HOWENKAMP, ENTERPRISE & AMERICAN LAW, 1836-1937, at 249 (1991). In Western Union Telegraph Co. v. Kansas, the Supreme Court held: The exaction from a foreign telegraph company for the benefit of the permanent school fund of a “charter fee” of a given per cent of its entire authorized capital stock, as a condition of continuing to do local business in the state, is invalid under the commerce and due-process-of-law clauses of the Federal Constitution, as necessarily amounting to a burden and tax on the company’s interstate business and on its property located or used outside the state. See 216 U.S. 1, 18 (1910).
\item[61] Louis K. Liggett Co. v. Lee, 288 U.S. 517, 560-64 (1933) (Brandeis, J., dissenting).
\item[63] Id. at 376.
\end{footnotes}
[a]fter 1900, New Jersey no longer had a competitive advantage over other chartering states, either with respect to price or the actual content of its laws, but was still able to compete quite effectively for new incorporations primarily on its reputation for reliability and responsiveness to the concerns of big business. … Many have argued that similar reputational factors, still tempered by a conservative approach to change, remain the driving force in Delaware’s dominance.64

Therefore, it is not difficult to infer not only that in the jurisdictional competition of repeated games, being a leader requires continuous respect for business demands, but also that if regulatory jurisdictions refuse to meet business demands, firms have incentives to seek out more cost-justified laws in other jurisdictions. In turn this firm mobility would finally resign governments to lift excessive bans. Put differently, the rise and fall of New Jersey in this competition for corporate charters illustrates how the corporate law market works. As William Carney notes, [c]ostly rent extractions in corporate laws by [pro-regulatory] interest groups, beyond those attainable through market transactions, raise costs for firms and lower returns for shareholders. Such gains for [pro-regulatory] interest groups can survive only if local firms subject to such laws are protected from firms operating under more efficient legal regimes. Competitive forces from outside a state legal system weaken the power of [pro-regulatory] interest groups to engage in rent-seeking activities and cause the resulting laws to be more public-regarding [and flexible].65

From the perspective of the law market, at the turn of 20th century, legal changes were provoked by firms’ increasing need for legal flexibility. For example, state rules requiring shares to be priced at their initial sale price, or “par,” even as the market price rose or fell, significantly constrained corporate finance in modern capital markets. Firms could and probably did lobby their home states to ease these restrictions, but clearly found it easier to choose another states’ law without having to physically move there.66

If a state from which firms exit is unwilling to moderate the regulation or enforce the IAD to contain the outflow of firms and capital, just as the general law market forces “can pressure states to enforce contractual choice of law in order to encourage firms to maintain and enhance connections with their states,”67 the same underlying supply and demand forces in the market for law contribute to deregulation or the enforcement of the IAD in non-competing states. For instance, if firms avoid non-enforcing states, such exit-affected interest groups as lawyers may lose potential clients and litigation business. Therefore, “ignoring the IAD as applied to local firms could deter firms from making significant local investments, which might trigger a local political backlash against the regulation.”68 In sum, the output of these market interactions in the jurisdictional competition for corporate charters demonstrates that the U.S. corporate law market operates to satisfy business demands for legal flexibility.

B. Jurisdictional Competition in Europe

Not long ago, European countries had applied the so-called “real-seat” (siège réel, siège social) choice-of-law rule, under which the law of a “company’s real or effective seat,” its “central administration,” or its “brain or nerve center” where the main operational decisions are made, rather than that of statutory domicile (registered office), was followed by European nations except for the United Kingdom and the Netherlands.69 Nevertheless, as in the U.S., increased firm mobility provoked by liberal trade rules within the European Union (“E.U.”) put pressure on the choice of law rule. The revolution took place in 1999 with the Centros case, which were followed by two others -- the Überseering and Inspire Art cases. Generally speaking, theses cases clarified that the E.U. law fundamentally protects full-fledged Delaware-type corporate charter competition for “tramp” or, in European parlance “brass plate,” corporations.70
What should be emphasized first here is the seminal Centros case. On March 9, 1999, the ECJ held that Centros Ltd., incorporated in the UK, could not be denied registration in the Danish Business Register even though the company operated entirely within Denmark and was incorporated in the UK merely in order to avoid more stringent Danish incorporation requirements on minimum capital. In other words, the founders of a pseudo-foreign corporation publicly acknowledged that they intended to circumvent the Danish minimum capital rules, and the ECJ disallowed the Danish regulators from interfering. This case suggested that even though a company, as a pseudo-foreign corporation, simply wanted the more favorable and flexible law of the incorporation jurisdiction, the ECJ would also enforce the Incorporation Theory or the IAD, because the real seat doctrine violated the “freedom of establishment” given by Article 43(1) of the Treaty Establishing the European Community (the “EC Treaty”). As Enriques and Gelter note, “[c]orrespondingly, the ruling prevented Member States from imposing their own corporate law on such businesses, other than under very limited conditions. In the past few years, newly incorporated businesses have started to take advantage of this new development, choosing English law in relatively high numbers.”

In addition, the Inspire Art case should be stressed as well. On September 30, 2003, the ECJ further confirmed the decision by Inspire Art Ltd. -- a private company incorporated in Folkestone, England -- to incorporate there; meanwhile it had its main business extensively within the Netherlands. The Dutch Government maintained that the company were able to legally operate in the Netherlands. The Dutch Government stressed that Inspire Art Ltd.’s tactic was “permissible even if the only reason for incorporating in the UK was to circumvent Dutch minimum capital requirements.” That is, the ECJ stated that the Netherlands could not impose local regulations on a locally-based company that had incorporated elsewhere solely in order to circumvent these regulations.

The above cases determined a European version of the IAD or the Incorporation Theory, “by which firms that incorporate in one Member State of the E.U. are free to do business in any other Member State,” and stressed “that freedom of incorporation also holds for ‘round-trip’ incorporations, when residents of country A incorporate in country B with the sole purpose of doing business in country A.” Evidently, Centros and other following cases have galvanized not only certain European competition in the form of “tramp” UK incorporations by firms based somewhere else in Europe, but also regulatory responses by other European countries to modify their minimum capital rules and cutting down costs of incorporations.

To be concrete, as Enriques and Gelter discuss, the E.U. Second Directive requires public corporations to have a legal capital of at least €25,000, which need not be entirely covered by assets at the time of incorporation. With the Second Directive not applying to private limited companies (Ltds), Member States have been able to choose freely the amount for this set of corporations. This resulted in a broad variety of regulations, ranging from no such requirement...
in the [UK], Ireland, and Cyprus to a requirement of €35,000 in Austria. *Centros* has already induced France, effectively to abolish minimum capital for private corporations, and even the German Ministry of Justice proposed a reduction from €25,000 to €10,000. 82

Accordingly, since the adjudication of *Centros*, some regulatory arbitrage at the incorporation country in order to escape rules on minimum capital for private corporations have already led to “defensive regulatory competition,” by which a few Member States such as France and Germany have already begun to relax these requirements “that were apparently the outcome of isolation from competition.” 83 To put it another way, the regulatory arbitrage “can, at least partly, be credited for a trend toward the abolition of minimum capital requirements in some countries.” 84 Also, since these avoided minimum capital requirements are outdated as well as unhelpful to creditors and thus rational creditors should not be concerned about them, “then the changes in the law induced by corporate law arbitrage so far are not really an issue of creditor protection, but rather a removal of administrative slack affecting only the interests of the founders of new companies.” 85 More importantly, European countries are responding to the inflow of new incorporations to the UK by lowering or abolishing minimum capital requirements and costs of incorporation more generally. Further, “[t]his race to match [UK] standards shares characteristics with the regulatory competition emphasized by the U.S. corporate mobility,” even though the phenomena in the E.U. are different from those within the U.S. 86

What’s more, before the corporate charter competition in Europe was initiated, the legal system creating the U.S. common market where there is no tariffs made it possible for U.S. firms to exit from costly legal regimes from state to state, which explains the competitive difference between the U.S. and Europe. Exactly as Carney argues, “[t]hese different competitive settings explain substantive differences in corporate laws.” 87 In the U.S., since there are regulators competing with each other for corporate charters, “mandatory provisions that are not cost-justified will tend not to survive over time because firms will exit [from] the regime with the undesirable mandates, migrating to regimes in which they are absent.” 88 As discussed above, the “real-seat” rule might have obstructed jurisdictional competition in the E.U. Studying the difference between U.S. states’ corporation laws and those of E.U. Member States, William Carney found that there are a large percentage of the mandates in the E.U. company law directives; most of them don’t exist in any U.S. state’s laws. In effect, these mandates which used to be in U.S. state codes have been abolished for several decades since they are not favorable for contemporary business practices. 89 This evidence might support the suggestion that the ongoing jurisdictional competition for corporate charters in Europe is, after *Centros*, nudging European corporate law, at least for private limited companies, in the direction of legal flexibility. This trend of fewer excessive mandates in the corporate law market, or rather the trend toward the abolition of minimum capital requirements, can also be explained by applying the same general supply and demand law market forces as in the U.S. to European firms’ business demands for legal flexibility. 90 Furthermore, subsequent to *Centros*, all Member States in the E.U. are required essentially to adhere to business demands for regulatory products of legal flexibility, which are driving the European corporate law market.

To put it in more detail, even though Europe and the U.S. have distinct competitive environments, the same essential forces of the law market reign in both situations. 91 Legislators in both systems seek to regulate corporate governance under the support of local pro-regulatory interest groups just as they deal with other types of contracts. However, the ECJ rulings led by *Centros* have created an active incorporation market in the European Union. As Becht et al. note, “[i]n some countries in particular, entrepreneurs are increasingly aware that they can freely choose among all the limited liability

82. Enriques & Gelter, supra note 76, at 600-01 (alteration in original) (footnote omitted).
83. Id. at 600.
84. Id. at 613.
85. Id.
86. Becht et al., supra note 72, at 252 (alteration in original).
87. Carney, supra note 65, at 303.
89. Carney, supra note 65, at 319-24.
90. See O’Hara & Ribstein, supra note 25, at 117.
91. Ribstein & O’Hara, supra note 6, at 709.
vehicles in the E.U. to run a business in their home state."92 Small firms’ mobility, first enhanced by Centros and other following cases, feeds the demand side of the law market which their exit rights underlie, and then sparks competition for the supply of law by foreign jurisdictions. Those firms thus attempt regulatory arbitrage in other E.U. Member States to satisfy their demands for legal flexibility. For example, “[b]etween 2003 and 2006 more than 40,000 residents of Germany incorporated a UK Limited.”93 Apparently, on the international supply side, the UK has catered to this market, at least to the extent of lowering incorporation costs for small firms. Moreover, small firms’ exit strengthens their voice on the domestic supply side to petition for less costly regulation of incorporation. We can find evidence that the governments of France, Germany and the Netherlands carried through reform with a view either to facilitating establishment of small firms and entrepreneurship in their own countries or to preventing their losing jurisdictional control of considerable portions of their economies.94 Specifically, Becht et al. note that “there is a political cost of loss of control in the case of entrepreneurs choosing to incorporate abroad. If corporate law is a means of implementing a political agenda then politicians have an incentive to keep entrepreneurs from incorporating their companies abroad.”95 Put differently, the demand force, or the economic exit in the international environment signaled by small firms, bolsters their voice rights in the political process in the domestic context, and this domestic supply force then pressures politicians or lawmakers within respective Member States to enable the relaxation of outdated minimum capital requirements. In a word, spurred by the ECJ rulings, law market forces underlying jurisdictional competition among Member States are leading to local governments’ providing less costly corporate law, or rather the trend towards the lightening of rules on minimum capital at least for small firms.

C. Summary

What drives the corporate charter competitions in the 19th-century U.S. and contemporary Europe? Why do they end up with a trend towards legal flexibility, or liberalization of excessive regulation? To start with the implication from the U.S. story, for New Jersey to succeed, other states had to apply New Jersey law to New Jersey corporations. Why did they cooperate? The explanation ultimately rests at least partly on demand-side factors. Without broader recognition of New Jersey law, corporations might have decided to sell their stock and locate their factories and other corporate assets only in states that applied the IAD. To be sure, these moves could impose significant costs on firms, particularly if firms had to forgo conducting business with customers, suppliers or shareholders in non-cooperating states. But at the same time corporations benefited significantly from the flexible rules New Jersey offered. And they also had strong reasons to want a single corporate law to apply to their internal affairs.96 As Ribstein and O’Hara argue, the corporate law market is simply a part of the broader market for law. … [T]he law market exists because parties to most contractual relationships have a strong incentive to contract for the law applicable to those relationships. States enforce these contracts despite the fact that they have the effect of eroding connected states’ regulatory power. States cede this regulatory authority in order to attract, or at least to avoid repelling, mobile firms. In short, the IAD did not spring only from forces unique to corporations, but also from these general law market forces.97

Once more, the usual supply and demand forces of the law market are functioning in the European jurisdictional competition for corporate charters, even if “this time under different legal and cultural conditions from those in the United States.”98 It appears that the jurisdictional competition in Europe occurred later than that of the U.S., following the rash of American business mergers beginning in the 1880s by nearly a century. Even though there are different competitive conditions between Europe and the U.S., “[a]ny differences between the United States and the E.U. will not be because different forces are at work, but because the specific environment affects the strength of each of these forces --

93. Id.
94. Becht et al., supra note 72, at 252 (“Domestic incorporation is per se perceived to be important even if it does not bear directly on government revenues or the location of production or control”).
95. Id. at 243.
96. Ribstein & O’Hara, supra note 6, at 677-78.
98. Id. at 123.
the demand for regulation … the supply of regulation … and the resistance of local pro-regulatory interest groups.” To put it somewhat differently, even if the breeding grounds of these two phenomena seem in appearance to be disparate, the underlying competitive dynamics may, to an extent, be the same, in the sense that, responding to similar law market supply and demand forces, jurisdictional competition in both federal systems spurred by business demands for legal flexibility drove the provision of increasingly cost-effective corporate law. That is not merely because jurisdictional competition “provides regulators with incentives and the necessary information to be accountable and responsive to the demands of the regulated,” but also “because there is a feedback mechanism in a competitive system that indicates to decisionmakers when a regime need to be adapted and penalizes them when they fail to respond: the flows of firms out of regimes that are antiquated and into regimes that are not.” To sum up, as Romano argues, “[t]his is an important regulatory characteristic in the corporate context, because firms operate in a changing business environment, and their regulatory needs concomitantly change over time.”

IV. Case Study II: The Law Market for Cross-Listings

There are strong arguments favoring extending jurisdictional competition from the American competition between states for corporate charters into international competition between securities regulators. This normative concept of issuer choice has been in a fierce debate among scholars. Some commentators propose permitting issuers to choose their disclosure regime. Specifically, proponents of issuer choice argue that when foreign firms enter U.S. capital markets, they should be permitted to obey the securities laws of the jurisdiction that they choose rather than the regulations provided by the Securities and Exchanges Commission (“SEC”). The proposal of issuer choice, by taking regulatory monopolies away from regulatory agencies such as the SEC, would force the agencies to make improvement on the quality of their respective local regulations. In the meantime, opponents of issuer choice argue that it’s inevitable that jurisdictional competition in securities regulation would result in a race to the bottom where issuers would find jurisdictions with the least strict legal rules and the lowest degree of investor protection, which might drive the overall quality of securities regulation to decline. Nonetheless, “[p]artial competition exists already, through firms’ choices of where to list and issue their shares.” Furthermore, “[d]espite some commentators’ fears of a race-to-the-bottom in securities regulation, there is substantial evidence that issuers have chosen to bond their integrity by deliberately choosing regimes with more rigorous regulation.” In another word, foreign firms actually can choose to “bond” their insiders by cross-listing in the United States or other improved jurisdictions, thereby rendering themselves subject to these stricter legal rules in addition to the regulations in their home countries. Considerable evidence lends support to this bonding explanation of cross-listing.

Nevertheless, with SOX, “full-fledged international competition currently is hobbled by the fact that the United States insists on regulating all trading within its borders regardless of where the firms are based.” In contrast to the normative debate on issuer choice, this article seeks to elaborate on a positive statement that law market forces underlying international jurisdictional competition have provoked partial exemptions and relaxation of mandatory rules in SOX as the U.S. aims at encouraging foreign issuers to raise capital there.

To begin with, “the past two decades have witnessed the large-scale process of internationalization. … The U.S. loosened disclosure regulation for foreign issuers throughout the period of internationalization to maintain

99. Ribstein & O’Hara, supra note 6, at 710.
101. Id. at 1598-99.
a competitive advantage in attracting participants from the emerging markets.” After corporate catastrophes like Enron’s, Congress wrote SOX to strengthen the scope of federal regulation from disclosure to corporate internal governance while SOX was applied to domestic issuers and non-U.S. issuers, otherwise known as foreign private issuers (“FPI’s”), equally. Prof. Ribstein, however, notes:

[R]egulation may be perverse because markets do not always react to regulation the way regulators predict they will. For example, rather than pursuing the same activities more carefully, regulated parties may simply switch to safer activities that are less likely to lead to the sort of bad outcomes that attract regulatory scrutiny. A specific example of how markets can react to regulation concerns the risk that a party will simply move out of reach. Though federal regulation like SOX is harder for firms to avoid than state law, even the federal securities laws have limited reach. While it is unlikely that U.S.-based firms will move their activities offshore, stricter U.S. law might keep non-U.S.-based firms out of U.S. markets.109

Consequently, in order to attract back or retain non-U.S. issuers in the U.S. stock markets, the U.S. government release exemptions for FPIs from excessive regulation in SOX. SOX’s effect on the cross-listing market not only suggests that the higher costs of regulation within jurisdictions are imposed on firms, the more likely firms exit and flee to where regulation is more flexible, but also illustrates the competitive constraints on federal law.

A. The U.S. Regulation of Foreign Private Issuers

Most of the foreign issuers which have their shares traded in the U.S. would issue American Depository Receipts (“ADR’s). This method makes American investors not just able to make investment in non-U.S. securities without worrying that cross-border transactions could often be complicated and costly, but also to gain benefits from largely the same financial and corporate governance rights as domestic shareholders of the non-U.S. issuers may enjoy. As the JP Morgan ADR Reference Guide depicts, an ADR is issued by a U.S. bank serving as an agent to transfer and issue ADRs. Each ADR is represented by a particular number of a foreign firm’s domestic shares. There are four different kinds of ADR programs for foreign issuers to choose: Level I (over the counter, “OTC”), Level II (listed on exchanges), Level III (public offering), and Level IV (Rule 144A private placement). Normally, only Level II and Level III programs must obey the registration and reporting requirements of the Securities Exchange Act of 1934 (the “Exchange Act”).110

Table 1. Characteristics of ADR Programs111

<table>
<thead>
<tr>
<th>Primary exchange</th>
<th>Level I</th>
<th>Level II</th>
<th>Level III</th>
<th>Level IV (Rule 144A)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accounting standards</td>
<td>OTC “Pink Sheets”</td>
<td>NYSE, AMEX or NASDAQ</td>
<td>NYSE, AMEX or NASDAQ</td>
<td>PORTAL</td>
</tr>
<tr>
<td>SEC registration</td>
<td>Exempt</td>
<td>Full Registration</td>
<td>Full Registration</td>
<td>Exempt</td>
</tr>
<tr>
<td>Share issuance</td>
<td>Existing shares only (public offering)</td>
<td>Existing shares only (public offering)</td>
<td>New equity capital raised (public offering)</td>
<td>New equity capital raised (private offering)</td>
</tr>
<tr>
<td>Time to completion</td>
<td>10 weeks</td>
<td>10 weeks</td>
<td>14 weeks</td>
<td>16 days</td>
</tr>
<tr>
<td>Costs</td>
<td>$25,000</td>
<td>$200,000-700,000</td>
<td>$500,000-2,000,000</td>
<td>$250,000-5000,000</td>
</tr>
</tbody>
</table>


Traditionally, the SEC has been promulgating a regulatory scheme differentiating firms which issue shares in the U.S. market. Domestic issuers need to comply with a full-fledged regulatory model whereas FPIs need only to obey a less demanding alternative, or a lower degree of disclosure for raising public capital under the Securities Act of 1933. FPIs are also substantially exempted from the Exchange Act’s reporting provision. As Marks finds, [s]ince its inception in the 1930s and particularly throughout the period of internationalization in the 1990s, the SEC has expressed its desire to attract foreign issuers to U.S. capital markets through accommodating and reducing disclosure requirements for foreign private issuers. These regulatory decisions easing disclosure requirements have bolstered the demands of foreign firms in raising capital in the U.S. stock markets. Thus, the U.S. markets in the 1990s witnessed an explosion of foreign firms registering with the SEC, enabling their ability to raise capital in the U.S. markets.

The corporate catastrophes of Enron and other American conglomerates contributed to a re-consideration of what are the better regulatory regimes to prevent fraud. These frauds took place due to “monitoring failures at several levels, including directors, prominent accounting and law firms, institutional shareholders, debt rating agencies, and securities analysts, and apparently escaped detection by supposedly efficient securities markets. In response to arguments that government regulators needed to restore confidence in the securities markets, Congress passed the [SOX].” As Prof. Ribstein notes, SOX “reflects a potential shift in the philosophy underlying the U.S. securities laws from disclosure to substantive regulation of corporate governance” while “[t]his shift significantly affects foreign firms’ costs of complying with U.S. law.” In addition, breaking from past securities law tradition, Congress wrote SOX to apply to domestic issuers and FPIs alike. In spite of opposition and possible retaliation, the SEC is determined to apply this law equally. Why was there such a significant shift in regulatory philosophy? To answer this question, Marks argues:

One possible explanation for this shift in policy lies with congressional sentiment against U.S. companies that incorporate offshore for tax advantages [as pseudo-foreign corporations]. The practice, often referred to as “corporate inversion,” became a hot political issue after the September 11 terrorist attacks. Tyco left the U.S. to incorporate in Bermuda in 1997 to lower its effective tax rate. In May 2002, Stanley Works announced plans to reincorporate in Bermuda to save up to $30 million per year paid in taxes on foreign-earned income. Under intense political pressure, however, Stanley Works abandoned plans to reincorporate in Bermuda in August 2002, and Tyco began to consider a move back to the U.S. to end doubts about its transparency and corporate governance in October 2002. By applying SOX extraterritorially, Congress sent a message to U.S. companies considering a move offshore: foreign firms would no longer enjoy protection under the U.S. securities laws.

Since SOX was intended to cover all SEC reporting companies, there was no exception for FPIs, other than those issuing Level I and Level IV ADRs, which need not comply with SEC reporting requirements. SOX did not offer flexibility for the SEC to explain legislative intent and to provide foreign issuers with exemptions save rules related to the audit committee, which were later loosened from the initial regulation. For instance, the SEC on August 2, 2002 released its proposed rules -- Certification of Disclosure in Companies’ Quarterly and Annual Reports

113. Marks, supra note 108, at 238.
115. Id. at 300.
116. Marks, supra note 108, at 239 (alteration in original) (citation omitted).
117. This article will in Section IV. C discuss how the SEC, given physical exit and threats of exit by FPIs as well as voice for liberalization by interest groups related to FPIs, allowed accommodation of home country regulations that would create an audit committee equivalent in independence to that envisaged under the U.S. rules -- for instance, German firms are allowed to include labor representatives on the audit committee. Naturally, it was the international jurisdictional competition activated by FPIs’ exiting from U.S. stock markets that pushed the SEC to adopt a more flexible regime.
-- which were required under Section 302 of SOX. In line with the absence of flexibility, “the new rules provided no exemptions for foreign issuers and specifically emphasized that the ‘no exemption’ policy is required under [SOX]. However, the SEC has retained some flexibility in the timetable to implement the various provisions of [SOX].”

Therefore, as Davidoff points out, “the increased level of regulation imposed on non-U.S. issuers by the Sarbanes-Oxley Act has been qualitatively significant. It is also regulation that makes no attempt to take into account the special needs of non-domestic issuers.”

B. How the Sarbanes-Oxley Act of 2002 Impacts on Foreign Private Issuers

As commentators have said, SOX was poorly evaluated and hurriedly enacted during a regulatory panic. Most people now recognize that the direct compliance costs of SOX have been greater than expected. For example, as for SOX’s direct effect on the U.S. companies, compared with their UK counterparts after SOX, U.S. firms’ risk-taking dwindled substantially. The declines had something to do with several measures, which include pre-SOX board structure, firm size, and R&D expenditures. In comparison with the UK, initial public offerings (“IPOs”) in the U.S. were apparently fewer and fewer after the enactment of SOX; the decline was especially higher for R&D intensive industries. The overall evidence confirms the assertion that public U.S. companies’ risk-taking is deterred by SOX.

Moreover, SOX also reduces access to capital markets by the entrepreneurs U.S. markets depend on, especially FPIs. This indirect cost indicates the discouragement of foreign firms from trading in the United States, thereby eroding the U.S. dominance in world securities markets. This problem was also noted by the Supreme Court not long ago:

Adoption of petitioner’s approach would expose a new class of defendants to these risks. As noted in Central Bank, contracting parties might find it necessary to protect against these threats, raising the costs of doing business. Overseas firms with no other exposure to our securities laws could be deterred from doing business here. … This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets.

Indeed, SOX imposes substantial costs on FPIs to which it applies. It is said that SOX significantly lessens the trading of foreign securities in the U.S. capital market. For example, John Thain, former CEO of the New York Stock Exchange (“NYSE”), expressed that new listings by FPIs declined to half the annual totals prior to SOX during two years subsequent to the passage of SOX, and that New York’s share of FPIs’ cross-listings fell from 90% in 2000 to 10% in 2005, largely due to the high costs SOX imposed on non-U.S. issuers. Meanwhile, just when the United States, through SOX, increased costs imposed on smaller firms, London showed its regulatory advantage by providing these firms with a special low-cost market, Alternative Investment Market (“AIM”).

Furthermore, the latest report in the end of 2007 by the Committee on Capital Markets Regulation mentions that “[b]y any meaningful measure, the competitiveness of the U.S. public equity market has deteriorated significantly in recent years.” This deterioration can be observed, for example, from cross-listings in the U.S. and delistings by foreign companies. As for the former,

[t]raditionally, non-capital raising cross-listings by foreign companies reflect the desire to bond to high U.S. listing standards. These cross-listings in

119. Davidoff, supra note 112, at 132.
the U.S. have steadily declined to insignificance in 2007. Whereas 43 foreign companies cross-listed in the U.S. without raising capital in 2000, only 4 did so in 2007 through September. In 2006, 6 foreign companies cross-listed in the United States. The obvious inference is that foreign companies see diminishing value in bonding to U.S. standards.126

When it comes to the latter,

[i]n 1997, just 12 foreign companies -- 3.9% of all listed foreign companies -- opted to delist from the New York Stock Exchange. Foreign delistings rose to 30 in 2006 -- 6.6% of all listed foreign companies. Through October 2007, a record 56 foreign companies (including major European companies) -- or 12.4% of listed foreign companies -- have delisted. The significant rise in the delisting rate in 2007 likely reflects a relaxation of SEC rules that previously had made delisting much more difficult. Some say this spike reflects a pent-up demand to leave and now will level off. That may be, but such a pent-up demand is itself a negative judgment on the value of using the U.S. public equity market.127

There are mounting empirical studies to offer evidence of SOX’s negative effects on FPIs. To name a few, according to Xi Li’s work, responding to the enactment and enforcement of SOX, cross-listed FPIs get abnormal stock returns of -10%, on average, in both the U.S. and their home markets; however, Pink Sheets traded FPIs which need not comply with SOX are not impacted. Generally, better governed FPIs derive more negative abnormal returns. In comparison with the pre-SOX period, after SOX much more cross-listed FPIs voluntarily delist and deregister to prevent the subjection to SEC reporting requirements. The abnormal returns at the “going dark” announcements are negative prior to SOX whereas these returns are positive in the post-SOX period. Overall, the evidence suggests that cross-listed FPIs are burdened with excessive compliance costs imposed by SOX.128

Further, Susan Chaplinsky and Latha Ramchand have studied FPIs that delisted in the post-SOX period owing to the lesser likelihood that they have foreseen a shift in securities laws when they listed. Holding other factors constant, FPIs delisting in the pre-SOX period are significantly more likely to be from poor governance countries; however, it’s significantly more likely that those delisting in the post-SOX period are from good governance countries. Relative to firms that remain listed in the U.S. markets, FPIs voluntarily delisting without anticipating the enactment of SOX are smaller, less profitable firms with low growth, have lower analyst coverage, and take less advantage of capital-raising. 80% of the home markets of these FPIs caught off guard by SOX are developed and equipped with strong governance. It seems that these FPIs do not significantly benefit from U.S. listing while their home equity markets could practicably substitute for the U.S. markets, which thus caused those from good governance countries to exit from the U.S. markets.129

Kate Litvak presented several works as direct evidence of whether SOX hurt foreign firms. For instance, to begin with, she showed that the premium that investors are willing to pay for shares of foreign companies cross-listed in the U.S. associated with trading in the United States (FPIs cross-listed on Level I or IV) was roughly constant, whereas the premium concerned with being subject to U.S. regulation (FPIs cross-listed on Level II or III) diminished. FPIs that lost the most were those that were more profitable, riskier, and smaller, those with a higher degree of disclosure prior to SOX, and those from well-governed countries. As Litvak notes, “[t]hese results are consistent with the view that investors expected SOX to have greater costs than benefits for cross-listed firms on average, especially for smaller firms and already well-governed firms.”130 In addition, she finds:

stock prices of foreign firms subject to SOX declined (increased) significantly, compared to cross-listed firms not subject to SOX and to non-cross-listed firms, during key announcements indicating that SOX would (would not) fully apply to cross-listed issuers. In cross-sectional tests, high-disclosing firms and firms from high-disclosing countries experienced the strongest declines, while faster-growing companies experienced weaker

126. Id. at 3.
127. Id.
declines. This evidence is consistent with the view that investors expected SOX to have a net negative effect on cross-listed foreign companies, with high-disclosing and low-growth companies suffering larger net costs, and faster-growing companies suffering smaller costs, particularly when they are located in poorly governed countries.131

The studies discussed above display that FPIs subject to SOX are negatively impacted in terms of important losses of valuation premia, which might not be completely accounted for by the increased costs of direct compliance as these losses are significantly large. Her third study thus investigates one likely reason for the losses -- the complaint that SOX deters FPIs' risk-taking:

I use three sets of proxies for risk: (1) volatility of returns… (2) financial leverage… and (3) cash hording… I find evidence, across all measures, that the pair difference in risk declined significantly after SOX for [level-23-exposed foreign firms (that is, cross-listed companies listed on Level II or III and thus subject to SOX)] and did not decline for level-14 pairs, over the post-SOX period from 2003 through 2005. …High-Tobin’s Q firms experienced stronger reductions in risk.132

As she concludes,

[...]this evidence is consistent with the view that SOX negatively affected corporate risk-taking, and may have particularly affected firms that were already well-governed before SOX. It is also consistent with prior research finding significant declines in market valuations of SOX-exposed foreign firms; the magnitude of the declines cannot be fully explained by increased costs of compliance. The analysis in this paper offers a possible explanation for why investors may have reacted negatively to SOX.133

According to the study by Joseph Piotroski and Suraj Srinivasan, subsequent to the passage and implementation of SOX, there was little change in large FPIs’ preferences when they make a choice between American exchanges and the London Stock Exchange’s (“LSE”) Main Market. On the contrary, they find that after SOX small FPIs were less likely to engage in a U.S. listing in choosing between the NASDAQ and LSE’s AIM. Since small FPIs has less ability to assume the increased costs imposed by SOX, SOX negatively affects them.134 Also, based on Christopher Woo’s work,

[t]here is some support for the proposition that European and East Asian issuers have been increasingly accessing U.S. markets [but] more stringent U.S. securities regulations may end this trend. … Even with the releases [of exemptions], [SOX] has led to some increased requirements for [FPIs] and will therefore have a somewhat deterrent effect on them.135

SOX defenders might respond to these anti-SOX studies by saying that the deterioration of U.S. public equity market cannot all be attributed to SOX, and that this is partly a story of the rise of non-U.S. exchanges. For example, as Luigi Zingales explains,

the U.S. equity market share has dropped dramatically from 2000 to 2005. This drop cannot be explained by changes in the geographical or the sectoral composition of IPOs. The most likely cause is a combination of an improvement in the competitors (mostly European equity markets) and an increase in the compliance costs for publicly traded companies.136

Supporters for SOX might also point out that it is primarily the riskier stocks that exit from the U.S. markets. For instance, Nuno Fernandes, Ugur Lel and Darius Miller indicate that after the SEC on March 21, 2007 adopted Exchange

133. Id. at 5 (citation omitted).
134. Piotroski & Srinivasan, supra note 118.
Act Rule 12h-6 which better enables FPIs to deregister and terminate the reporting requirements concerned with a listing on major U.S. exchanges, the U.S. stock markets evaluated as negative the ability of FPIs from countries whose disclosure and governance are weak to more easily opt out of the strict U.S. reporting and legal regime, and that in particular as investor protections provided in FPIs’ home countries are weak, their U.S. shareholders would value U.S. securities laws very highly.  

Nonetheless, Craig Doidge, George Karolyi and Rene Stulz examined the attributes of 59 FPIs that immediately declared their potential deregistration after the adoption of the new SEC Rule 12h-6, what could have motivated them to do so, as well as what happened to them economically after such decisions. They find that before the decisions these firms grew significantly more slowly and gained lower stock returns than other U.S. exchange-listed FPIs. Weak evidence supports that FPIs in announcing deregistration derive negative stock returns; stronger evidence suggests that those with higher growth experience worse stock-price reactions. Examining stock-price reactions around events concerned with the enactment of SOX, they found negative stock-price reactions on average. Their evidence corroborates the hypotheses that FPIs cross-list in the U.S. with a view to raising capital at the lowest possible cost so as to financially support their growth opportunities, and that, as soon as those opportunities vanish, FPI’s insiders place less valuation on cross-listings in the U.S. so that there is a higher likelihood that they would deregister and list back home.  

Furthermore, an empirical study on the capital raising practices of Chinese companies found that all of the interviewees who were individuals possessing extensive experience in securities work in the U.S., Hong Kong, and China mentioned SOX as “being particularly irritating to foreign issuers, because it goes beyond what has historically been the purview of U.S. financial securities regulation.” This study further pointed out that “Chinese issuers find that public listings may not always generate a strong U.S. following,” and that “in order to avoid more stringent securities regulations, Chinese issuers often choose to list in Hong Kong [(one of the two major players in Asia while the other bigger one is Tokyo Stock Exchange)] instead of the U.S., with no significant repercussion.” This study shows that indeed FPIs have more stock exchanges outside the U.S., say, Hong Kong, to go to raise capital, but the problem is that, with SOX, the U.S. created a higher incentive for them to leave for other non-U.S. exchanges. This study also implies that even though it’s mainly the riskier stocks like those of Chinese issuers whose legal institutions of investor protection at home are relatively problematic, that exit from the American capital market, those stocks are still significant to the U.S. markets.

Finally, even if there has been controversy regarding the cause of the decline in cross-listings to some extent, the actual cause of the decline might not be that significant. Just as O’Hara and Ribstein note, “the actual effect of regulation is seldom clear. For the purpose of showing the political effect of exit on regulation, it is enough that the perception that the decline was attributable to regulatory cost triggered a demand to reduce the regulatory burden.”

C. Law Market Forces Contribute to Partial Deregulation

As explained above, the Congress in writing SOX and the SEC in the beginning had not been wary of the importance of maintaining legal flexibility requested by FPIs and respecting their business demands. Due to SOX’s heightened regulation over FPIs, the non-U.S. issuers in the post-SOX period have been cross-listing in other stock markets or voluntarily delist and deregister to avoid SEC reporting obligations. On the demand side of the cross-listing law market, they need to find a regulatory product of securities regulation which can bond their insiders but require lower compliance cost than the U.S. markets entail. Some improved markets such as LSE or HKSE are able to supply this type of regulatory product on the supply side.

140. Id. at 299 (alteration in original).
143. O’HARA & RIBSTEIN, supra note 25, at 229.
FPIs’ exercise of the “exit” option further strengthens their “voicing” complaints to the SEC. Under these law market forces at work, the SEC has adopted several exemptions to relax FPIs’ regulatory burdens and expects thus to retain FPIs in or attract them back to the U.S. stock markets. The exemptions of FPIs from SOX’s requirement of independent audit committees illustrate the regulatory transition from a strictly mandatory to more flexible regime.

Section 301 of SOX arguably imposes higher costs on FPIs than on U.S. issuers with lower benefits. SOX’s requirement of independent audit committees and its assigning “to the audit committee all responsibility for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting)” would lead to a significant revolution for corporations incorporated under civil law regimes. Civil law countries, such as Germany, often require that there should be a two-tier board with a lower managing board and an upper supervisory board. The lower managing board cannot act as the audit committee because none of the members are independent as defined by SOX. Nevertheless, because the upper board is composed half of employees, corporations have tended not to give the board “significant substantive responsibilities.”

Although FPIs have continued listing in the U.S., subsequent to the enactment of SOX they may start to hesitate to an extent. This phenomenon suggests that FPIs will take the exit option as a response to SOX. For instance, citing problems with SOX, Porsche has decided not to list shares in the U.S. and announced that it would not change its mind even after the proposed exemptions were adopted. Likewise Benfield Group Ltd, also citing SOX, has made a decision to list shares in London rather than in the United States. Daiwa Securities deferred its scheduled listing activity in 2002 to observe how the new regulations would turn out. Nippon Telegraph and Telephone took delisting into account while LVMH determined a delisting.

Facing up to this problematic regulation and motivated by FPIs’ exit, anti-regulatory and exit-affected interest groups associated with FPIs have attempted to voice their complaints. For instance, Sullivan & Cromwell (UK) argued that home country laws in some other jurisdictions to which FPIs are subject may entitle shareholders or another body to the power to select and supervise auditors. France Telecom argued that some entities in foreign governments are required to be a member of the audit committee for certain FPIs. Furthermore, Linklaters argued that the SEC has not considered protections provided by foreign law, that the German Corporations Act restrains a parent company from doing something at the expense of its subsidiaries’ benefits, and that it is thus unnecessary not to permit representatives from the parent company to vote on the audit committee of its subsidiary. Given potential conflicts from Section 301 as well as other sections of SOX, the European Commission filed a comment letter to make an appeal that there should be exemptions for European issuers from the requirements of SOX. The above comments demonstrate not only that “[w]ithout exemptions many foreign private issuers might find it hard to comply simultaneously with Section 301 and home country regulations,” but also that FPIs, perceiving excessiveness of the post-SOX cross-listing regulatory product, attempt to exercise their voice rights, that is, to improve the relationship with the U.S. stock markets through communication of the complaint or proposal for change.

In addition, the NYSE, one of the exit-affected interest groups, might be conscious of the problem with which SOX may burden foreign issuers and wrote to the SEC in the comment period. It stated that it was “aware of a number of companies that are considering either delisting (to avoid compliance with the audit committee requirements)

145. Id. at 1825.
148. Woo, supra note 135, at 19.
152. See Woo, supra note 135, at 18.
or delisting and deregistration (to avoid compliance with these and certain other provisions of [SOX]) [in particular provided that they] have not yet achieved a significant U.S. shareholder base.”153 It noted that companies such as the Benfield Group has chosen to list shares in London instead and that “[t]he London Stock Exchange has been quite openly using the regulatory hurdles associated with [SOX] as a marketing wedge against U.S. registration and listing.”154 The comment letter further stressed that SOX has led to “foreign regulators, companies and media questioning the right of Congress to change the rules for non-U.S. listed companies ‘in the middle of the game.’”155 Particularly, the NYSE supported the accommodation for controlling shareholders, for foreign governments, and for employee representatives. The NYSE also extended support to a proposed exemption of auditor oversight via some body other than the audit committee. What’s more, the NYSE might intend not to ask FPIs to comply with its additional independence requirements.156

Therefore, the SEC has been wary of how SOX would potentially discourage FPIs, and considering how to moderate conflicts between SOX and FPIs’ home country regulations and practices for some time. On January 8, 2003, it proposed rules on Section 301, entitled “Standards Relating to Listed Company Audit Committees,” including some exemptions from the audit committee requirement for FPIs.157 After receiving comment letters, such as those mentioned above, written in response to the proposed rules for “Standards Relating to Listed Company Audit Committees,” the SEC made a decision to broaden some of its proposed exemptions.158 The Final Release, implementing Section 301 of SOX, did give a few exemptions to FPIs. The Release clearly states that the SEC has “long recognized the importance of the globalization of the securities markets both for investors who desire increased diversification and international companies that seek capital in new markets.”159 The SEC realizes that U.S. investors progressively desire to make investments in foreign securities and tries to make sure that the announced new rules will not unduly burden FPIs. The Release emphasizes that although Section 301 does not differentiate between foreign and domestic issuers while the adoption of audit committees is a growing trend, the SEC will grant such exemptions and clarifications that FPIs will not be required to abide by legal rules in conflict with regulations in their home countries.160

D. Summary

The negative effect of SOX on FPIs has triggered a political dynamic that may have far-reaching consequences. In the beginning, “[a]voidance by non-U.S. firms of the U.S. market may reduce U.S. investors’ ability to diversify their portfolios. … [T]his avoidance may reduce the revenues of U.S. securities firms [as well as other exit-affected parties], thereby provoking these firms to lobby for reducing the regulatory burden on cross-listing firms.”161 Thereafter, the U.S. responded to criticisms from German companies and other groups by issuing rules that partially exempt foreign firms from some SOX requirements. Perhaps more importantly, as Butler and Ribstein discuss,

154. Id. (alteration in original).
155. Id.
156. Woo, supra note 135, at 20.
158. For a summary of the comments received, see Summary of Comments: Related to Proposed Standards Relating to Listed Company Audit Committees, http://www.sec.gov/rules/proposed/s70203summary.htm#P1123_88469 (last visited Nov. 8, 2008).
160. Id.
161. Ribstein, supra note 114, at 323 (alteration in original).
exemptions are, or should be, based on the costs of compliance, they arguably should apply to any firm that is incorporated under and must comply with the corporate law of another country, regardless of where the corporation’s operations are based. But any such exemption would invite U.S. firms to avoid U.S. law by incorporating elsewhere. To the extent that such competition forces U.S. regulators and legislators to reassess the damage they have done to American securities markets, such exits by U.S. firms could ultimately help correct the SOX mistake.\textsuperscript{162}

In other words, the SEC will face pressure from U.S.-based firms, who would use their “greater” voice in the U.S. political marketplace to lobby for exemptions similar to those granted to FPIs, to extend benefits of foreign exemptions to domestic firms.\textsuperscript{163} In fact, “in the wake of [SOX], many of the reforms passed to [foreign] issuers have been ultimately shared by U.S.-domiciled companies or are in the process of being considered for extension to U.S. companies.”\textsuperscript{164} That is, exit could lead to general deregulation.\textsuperscript{165}

\section*{V. Concluding Remarks}

In general, the phenomenon of SOX and the global cross-listing market discussed above demonstrates some dimensions of the law market:

First, it shows how even what would seem to be the most mandatory laws must compete in the law market given the increasingly global nature of competition. This competition can increase the level and quality of regulation, as shown by the rise of cross-listing firms. Second, SOX’s aftermath indicates that regulated firms may exit in the face of increased regulatory costs. Third, this history shows how the financial impact of exit on interest groups in regulating countries ultimately can cause states to make changes in their laws that reduce regulatory costs. Although these changes may be provoked by the most mobile firms, they have the potential of reducing costs for all firms, including those that have higher costs of exit.\textsuperscript{166}

In other words, in this law market for cross-listings we see “the usual law market forces could work for securities regulation, just as U.S. states ultimately came to apply the IAD to tramp corporations.”\textsuperscript{167} On the buy side of this law market, “regulation and non-enforcement of contractual choice of law create an incentive to leave,” and on the sell side “exit activates local industries that depend on the exiting firms; “[t]his, in turn, pressures politicians to enable jurisdictional choice, sometimes even for immobile locals.”\textsuperscript{168} In other words, feedbacks of exit and voice rights are translated into the regulatory evolution for the SEC to moderate the over-burdensome regulation imposed by SOX. This SOX case thus implies not merely that “the elements of the law market story apply in the international context,”\textsuperscript{169} but also that law market forces underlying international jurisdictional competition would provoke a change in excessive regulation to a more flexible regime.\textsuperscript{170}

\begin{itemize}
\item[\textsuperscript{162}] \textsc{Butler \& Ribstein}, supra note 107, at 74 (alteration in original).
\item[\textsuperscript{165}] Ribstein, supra note 114, at 325-26.
\item[\textsuperscript{166}] O’Hara \& Ribstein, supra note 25, at 31.
\item[\textsuperscript{167}] Id. at 124 (footnote omitted).
\item[\textsuperscript{168}] Ribstein \& O’Hara, supra note 6, at 711-12.
\item[\textsuperscript{169}] Id. at 712.
\item[\textsuperscript{170}] Alan Dignam and Michael Galanis also seem to confirm this conclusion:
\item[\textsuperscript{171}] One can further observe the continuing importance of macroeconomic pressures in the problems that the NYSE has had since the introduction of [SOX] in response to the Enron and WorldCom scandals. In a continuation of the regulatory competition created by capital mobility … since 2002 the NYSE has been losing out to the LSE for new listings because of the onerous nature of SOX. Because of capital mobility, companies around the world, including US companies, can simply choose to avoid the US regulatory regime when raising capital. As a result, the SEC in May 2007 produced new guidance on interpreting the most contentious aspects of SOX, with the intention of making it less burdensome.
\end{itemize}

In conclusion, inspired by corporate charter competitions in the 19-century U.S. and contemporary Europe as well as the negative impact of the Sarbanes-Oxley Act of 2002 on the U.S. cross-listing market, this article draws a positive lesson from the above stories that law market forces underlying jurisdictional competition would constrain jurisdictions from disregarding business demands and from imposing excessive regulation. Through the positive arguments developed in this article, regulatory jurisdictions in East Asia could, to an extent, understand the true costs and benefits of regulation in the international dimension among others, and regulate in light of that understanding.

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