Global Antitakeover Devices

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This Article explores a "hidden" mechanism that insulates management from hostile takeovers and activist intervention: the global antitakeover device ("GAD"). A GAD is based on the ability of public firms to "mix and match" between different forms of regulation by cross-listing on multiple stock exchanges or incorporating in foreign jurisdictions. This action subjects any hostile engagement with these firms to multiple jurisdictions' regulatory frameworks and creates regulatory barriers, complexity, and uncertainty. This Article provides a comprehensive analysis of these GADs, the costs they generate to potential bidders, and the unique features they possess relative to traditional antitakeover devices.

GADs are not an isolated phenomenon. Their potential economic impact is significant, as one in seven firms traded on U.S. exchanges are incorporated or cross-listed in foreign jurisdictions. Moreover, the impact of these devices could extend beyond the market for corporate control, as foreign firms could also enjoy additional insulation from activist hedge funds. The Article also locates GADs in the wider theoretical literature on cross-listing and offers policy recommendations for overcoming GADs' insulation effects.

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The authors wish to thank Avi Bell, Lucian Bebchuk, John Coffee, Jesse Fried, Zohar Goshen, Assaf Hamdani, Marcel Kahn, Jacob Nussim, Gideon Parchomovsky, and participants in the Harvard Corporate Governance Forum, Hebrew University Corporate Governance Workshop, and the Bar-Ilan Law, Economics and Business Workshop for their helpful comments.

Introduction

Corporate activity is becoming ever more global. This increased globalization is reflected both in the growing number of cross-border M&A transactions in recent years and the pervasive phenomenon of cross-listing, through which companies raise equity from various financial markets located in different jurisdictions.[1]

The globalization of financial corporate activity is based on an important building block: the ability of the corporation to "mix and match" regulatory regimes in order to optimize the mix of regulations to which it is subject. A corporation has the power to alter the form of regulation to which it is subject in two major ways: (i) by selecting (or changing) the location of incorporation, and (ii) by selecting (or changing) one or multiple exchanges for listing its securities.[2] The ability of a corporation to separate its physical location, or its principal place of business, from the location of its incorporation or listing permits the corporation to pick and choose the regulatory schemes it desires.[3]

The academic literature has long recognized that the globalization of corporate activity and financial markets impacts many fields, including

1. *See infra* Section III.A.

2. *See* Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649, 1652, 1692 (2015).

3. *See infra* notes 7-8 and accompanying text.

taxation,[4] intellectual property,[5] antitrust,[6] financial regulation,[7] and foreign corrupt practices.[8] This Article focuses on an additional important dimension of global corporate activity that has not received much attention from policymakers and researchers thus far: the effect of globalization on the market for corporate control and antitakeover defenses.

To illustrate this effect, consider the following example. In November 2007, BHP Billiton announced it was seeking to purchase rival mining company Rio Tinto Group in an all-stock deal. By its sheer size alone, BHP Billiton's $147 billion dollar "hostile" offer was a landmark deal, aimed at creating the largest mining company in the world. A formal hostile bid was announced in February 2008. Since both BHP Billiton and Rio Tinto are dual-listed companies with different arms in separate jurisdictions, the legal complexity of pursuing the offer was enormous.

In fact, the lawyers who structured this transaction for BHP Billiton were required to address regulatory requirements across three jurisdictions. This effort culminated in three separate offers on equivalent terms to the shareholders of Rio Tinto on multiple stock exchanges. These included an offer in Britain, which is primarily governed by the U.K. takeover rules; a second offer in Australia, which is primarily governed by the Australian takeover rules; and a third offer in the United States, as the U.K. arm of Rio Tinto is also listed on the New York Stock Exchange (NYSE). That third offer was governed by U.S. and U.K. law and was intended as a subset of the British offer. The British and Australian offers were cross-conditional on each other and had to be closed simultaneously.[9] In addition, BHP Billiton also needed to comply with different accounting regimes as well as various governance and administration requirements for each

4. *See infra* note 51 and accompanying text.

5. *See, e.g.*, Margaret Chon, *Global Intellectual Property Governance (Under Construction)*, 12 THEORETICAL INQUIRIES L. 349 (2011).

6. *See, e.g.*, Joseph A. Clougherty, *Antitrust Holdup Source, Cross-National Institutional Variation and Corporate Political Strategy Implications for Domestic Mergers in a Global Context*, 26 STRATEGIC MGMT. J. 769 (2005); Jo Seldeslachts et al., *Settle for Now But Block for Tomorrow: The Deterrence Effects of Merger Policy Tools*, 52 J. L. & ECON. 607 (2009).

7. *See, e.g.*, Paul Sebastianutti, *What Is This Thing Called International Financial Law? Part 5*, 3 L. & FIN. MARKETS REV. 461 (2009).

8. *See, e.g.*, Mary Jo White, *Securities Regulation in the Interconnected, Global Marketplace*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 23, 2016), https://corpgov.law.harvard.edu/2016/09/23/securities-regulation-in-the-interconnected-global-marketplace [https://perma.cc/E873-XK8P].

9. For a description of the complexity of this deal, see *The Wonderful Complexity of BHP-Rio Tinto*, N.Y. TIMES: DEALBOOK (Feb. 8, 2008, 2:35 PM), https://dealbook.nytimes.com/2008/02/08/the-wonderful-complexity-of-bhp-rio-tinto [https://perma.cc/55TJ-BHCQ].

jurisdiction.[10] Slaughter and May, the law firm that advised BHP Billiton, had more than 30 lawyers working on the project at any one time.[11]

The most significant costs BHP Billiton incurred resulted from a delay in the offer process. This delay was driven by the immense complexity and uncertainty that accompanied disclosure regulations across multiple jurisdictions. In November 2008, almost a year after the initial acquisition announcement and as global nickel prices fell dramatically, BHP Billiton announced that it would drop its takeover bid, citing the "risks to shareholder value . . . [at] an unacceptable level."[12]

Let us now turn from mining to the pharmaceutical world. In April 2015, the largest hostile takeover attempt in history took place: Mylan, a Dutch generic pharmaceutical company based in London that was originally incorporated in Virginia and listed on the National Association of Securities Dealers Automated Quotations (NASDAQ), launched a tender offer to purchase the stocks of Perrigo, an Irish generic-pharmaceutical company originally incorporated in Michigan and dual-listed on NASDAQ and the Tel Aviv Stock Exchange (TASE).[13] The offer contained both cash and stock components.[14] At its peak, the offer was valued at $32.7 billion.[15]

Ten years earlier, Perrigo had acquired an Israeli pharmaceutical company using shares of its own stock.[16] As a result, roughly ten percent of Perrigo's stocks were still traded on the TASE (in addition to NASDAQ). This made Perrigo a firm with cross-listed stock—stock traded on more than one stock exchange.[17] When delivering its stock-based offer to Perrigo shareholders, Mylan effectively had to make a public offer of stock to the Israeli public

10. *See Innovative Structures - Dual Listed Companies*, ALLENS ARTHUR ROBINSON 2 (July 2001), https://www.allens.com.au/pubs/pdf/ma/fomaaug01.pdf [https://perma.cc/3UVF-HFDP].

11. *Slaughter and May: All Hands on Deck for BHP's Rio Tinto Takeover Bid*, LAW. WKLY. (Mar. 25, 2008), https://www.lawyersweekly.com.au/news/632-slaughter-and-may-all-hands-on-deck-for-bhp-s-rio [https://perma.cc/KQ8G-EP24].

12. Amy Wilson, *BHP Billiton Withdraws $66bn Bid for Rival Miner Rio Tinto*, TELEGRAPH (Nov. 25, 2008, 8:11 AM), https://www.telegraph.co.uk/finance/newsbysector/industry/mining/3517199/BHP-Billiton-withdraws-66bn-bid-for-rival-miner-Rio-Tinto.html [https://perma.cc/93HS-V86R] (quoting BHP Billiton CEO Marius Kloppers).

13. Liz Hoffman, *Mylan Hostile Takeover Bid for Perrigo is Rare Nail Biter*, WALL ST. J. (Nov. 11, 2015, 8:34 PM), https://www.wsj.com/articles/mylan-hostile-takeover-bid-for-perrigo-is-rare-nail-biter-1447292062 [https://perma.cc/CWN6-3EEC].

14. Cynthia Koons, *Mylan's Hostile Bid for Perrigo Fails*, BLOOMBERG (Nov. 13, 2015, 8:43 AM), http://www.bloomberg.com/news/articles/2015-11-13/mylan-s-hostile-bid-for-perrigo-fails-as-40-of-shares-tendered.

15. Crayton Harrison, *Mylan Raises Offer to Acquire Perrigo to $32.7 Billion*, BLOOMBERG (Apr. 29, 2015, 11:16 AM), http://www.bloomberg.com/news/articles/2015-04-29/mylan-increases-takeover-proposal-for-perrigo-to-32-7-billion.

16. Dennis K. Berman, *Perrigo to Buy Israeli Drug Maker Agis Industries*, WALL ST. J. (Nov. 15, 2004, 12:01 AM), http://www.wsj.com/articles/SB110047210313573591 [https://perma.cc/E7XM-2T3Y].

17. David Wainer & Shoshanna Solomon, *Mylan Lists in Tel Aviv in Latest Salvo in Perrigo Battle*, BLOOMBERG (Nov. 4, 2015, 10:41 AM), https://www.bloomberg.com/news/articles/2015-11-04/mylan-lists-in-tel-aviv-in-latest-salvo-in-battle-for-perrigo.

shareholders and thus was required under Israeli securities law to publish a prospectus.[18] This process involved significant costs and substantial delay to the hostile bid.

Mylan tried to find a way around this requirement and was willing to list its stock on the TASE.[19] At the same time, Mylan tried to find an exemption to avoid publishing an additional prospectus. Perrigo objected to Mylan's attempted exemption and challenged it in court, seeking an injunction against Mylan directing that it cease all activities relating to the tender offer.[20] Even though both companies were initially U.S. companies listed on NASDAQ, they found themselves entangled in litigation over the tender offer in an Israeli court.[21] Eventually, the court rejected Perrigo's petition,[22] and Mylan was permitted to proceed with the tender offer, which ultimately failed.[23]

Here again, Perrigo's structure delayed the tender offer process and created substantial uncertainty, particularly by pursuing a legal battle in a foreign court. Mylan's executive team and its legal counsel were forced to assess the chances of winning a case in a foreign forum with which they were relatively unfamiliar. They also had to guess whether Israel's court and regulatory authorities would permit Mylan to be listed on the TASE, despite Mylan's poison pill (of dubious legality under Israeli law).[24]

Most recently, in November 2017, Broadcom, a semiconductor producer whose chips power cutting edge smartphones (including the iPhone), offered to acquire its rival Qualcomm for $130 billion dollars. This would have constituted

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18. Securities Law, 5728-1968, § 15(a), SH No. 541 p. 234 (Isr.).

19. David Weiner, *Mylan Gets Nod to List Stock in Tel Aviv to Lure Perrigo*, BLOOMBERG (Oct. 15, 2015, 10:53 AM), https://www.bloomberg.com/news/articles/2015-10-15/mylan-gets-nod-to-list-stock-in-tel-aviv-to-lure-perrigo-holders. Regarding the fees Mylan would have had to pay for listing, see *infra* note 41.

20. Perrigo objected on the grounds that Mylan did not qualify for listing on the TASE due to its adoption of a poison pill mechanism and for adopting two separate classes of securities, which it alleged were prohibited by TASE rules and Israeli securities law. *See* Amit Steinman, *Precedent Tel-Aviv District Court Ruling: Foreign Companies with a Dual-Class Poison Pill May Register for Trade on the TASE*, LEXOLOGY (Nov. 24, 2015), http://www.lexology.com/library/detail.aspx?g=7f0b74d9-3588-4c81-b93f-5aca7075d670 [https://perma.cc/58UX-NLEZ].

21. Mylan hired one of the top Israeli law firms for its representation against Perrigo and for its listing on the TASE—Meitar Liquornik Geva Leshem Tal. *Mylan Management Celebrated its Dual Listing at the Tel Aviv Stock Exchange by Taking Part in the Opening Bell Ceremony*, TEL AVIV STOCK EXCHANGE (Nov. 4, 2015), https://info.tase.co.il/Eng/NewsandEvents/PRArchive/2015/Pages/PR_20151104.aspx [https://perma.cc/D2D6-4UCA]; *see also* CC (TA) 40274-09-15 Perrigo Company Plc v. Mylan N.V. (Takdin) (2015) (Isr.).

22. *See id.*

23. Samantha Kareen Nair, *Mylan Fails in $26 Billion Takeover Bid for Perrigo*, REUTERS (Nov. 13, 2015, 12:40 PM), http://www.reuters.com/article/us-mylan-nl-perrigo-company-timeline-idUSKCN0T221W20151113 [https://perma.cc/6HYX-6CXP].

24. *See* Harry Phillips, *Cravath Advising Mylan on $29 Billion Unsolicited Perrigo Bid*, GLOBAL COMPETITION REV. (Apr. 14, 2015), http://globalcompetitionreview.com/news/article/38392/cravath-advising-mylan-29-billion-unsolicited-perrigo-bid [https://perma.cc/9RAQ-QYD4].

the largest-ever tech deal.[25] Qualcomm rejected the offer, claiming it did not reflect the company's true value.[26] Broadcom then pressured the Qualcomm board with a proposal to replace all eleven of its directors.[27] However, Broadcom's country of incorporation and location of headquarters—Singapore—turned out to be a significant hurdle that ultimately prevented the company from pursuing a hostile offer.

Broadcom had previously shifted its corporate domicile to Singapore to take advantage of the generous tax benefits the country offered.[28] The tax benefits, however, had the downside of attracting harsh U.S. scrutiny of any attempted acquisitions of a U.S. company by Broadcom. As a foreign company, Broadcom's hostile bid had to be approved by the U.S. Committee on Foreign Investments (CFIUS).[29] At some point, Broadcom's lawyers considered the possibility of "redomiciling" the company to Delaware before the Qualcomm investor vote on the deal. These redomiciling efforts eventually became moot after U.S. President Donald Trump blocked the takeover, citing national security concerns.[30] Broadcom subsequently withdrew its bid.

Although in this case it was the acquirer, rather than the target, that shifted its corporate domicile, the antitakeover effect was similar. The differences between jurisdictions imposed additional barriers and costs on the hostile bidder and delayed the takeover process. Had Broadcom remained a U.S.-domiciled company, its hostile offer would not have come under the CFIUS review.

These high-profile global hostile takeover cases illustrate a new type of "hidden" antitakeover measure that has not been previously discussed in the literature: the global antitakeover device (GAD). The core idea of GADs is that additional exposure to foreign legal jurisdictions, through cross-listing or reincorporation, can be used as an entrenchment device—imposing additional

25. Michael J. de la Merced, *Broadcom Targets Qualcomm in Largest-Ever Tech Deal*, N.Y. TIMES (Nov. 6, 2017), https://www.nytimes.com/2017/11/06/business/dealbook/broadcom-qualcomm-merger.html [https://perma.cc/68GE-6E34].

26. Qualcomm claimed that the Broadcom offer took advantage of a local depression of its stock price due to its licensing dispute with Apple. *See* James Fontanella-Kahn, *Qualcomm Poised to Reject Broadcom's Takeover Offer*, FIN. TIMES (Nov. 6, 2017), https://www.ft.com/content/a9e53d16-c74f-33f1-ad8e-1977024d8304 [https://perma.cc/EW77-LPRT].

27. Don Clark & Michael J. de la Merced, *Broadcom Proposes Unseating Qualcomm Board as Takeover Fight Escalates*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/technology/broadcom-qualcomm-board.html [https://perma.cc/A4HZ-LCSA].

28. Bolaji Ojo, *Broadcom-Qualcomm: Another Blunder in the Making*, EPS NEWS (Nov. 9, 2017), https://epsnews.com/2017/11/09/broadcom-qualcomm-tie-another-blunder-making [https://perma.cc/L8F3-GS95].

29. *See* Ted Greenwald, *Broadcom Bid Marks Upheaval in Chip Industry*, WALL ST. J. (Nov. 6, 2017), https://www.wsj.com/articles/broadcom-proposes-to-acquire-qualcomm-for-70-per-share-1509971816 [https://perma.cc/8MM9-9FQE]; *see also* Clark & de la Merced, *supra* note 27.

30. Huileng Tan, *Here Are the Real Reasons Trump Blocked Broadcom's Qualcomm Takeover*, CNBC (Mar. 13, 2018, 8:53 AM), https://www.cnbc.com/2018/03/13/trump-blocks-broadcoms-qualcomm-takeover-concerns-about-china-5g.html [https://perma.cc/G2KR-7C88].

barriers on hostile bidders for *any* target firm that is incorporated in a foreign jurisdiction or listed on a foreign exchange.

Consider, first, the case of a target that is cross-listed in multiple jurisdictions. To proceed with a hostile bid, a bidder must solicit consent from shareholders in two (or more) jurisdictions with different regulations for contested acquisitions. As a result, the bidder must bear various costs, including the costs associated with launching an additional tender offer; complying with the disclosure and other substantive corporate law requirements of the foreign jurisdiction, such as hiring local legal counsel to assist with the preparation of disclosure documents and advise on foreign corporate and securities law; and, most importantly, dealing with the delay in the tender offer process and the substantial uncertainty regarding the success of a hostile bid in a foreign jurisdiction, including potential legal battles in a foreign court, as in the Mylan example.

Now consider the case of corporate inversions—a relocation of a target's legal domicile to another jurisdiction. Shifting corporate domicile forces a hostile bidder to subject itself to the corporate law of the foreign jurisdiction. That subjection entails a number of legal and financial consequences, including increased uncertainty, litigation risks, and time delay. Moreover, when the foreign law includes certain limitations on takeover activity or shareholders' ability to exercise some of their basic rights, complying with the foreign law requirements can involve substantial costs for the acquiring company and may function as a significant bar to takeovers.

These costs are magnified for large takeovers, which require massive loans from risk-averse underwriting banks. Overall, cross-listing and inversions may have a chilling effect on the market for corporate control and deter certain acquirers from attempting takeovers of underperforming targets.

This Article makes several contributions to the existing literature.[31] First, it demonstrates how new forms of antitakeover and anti-activist devices may emerge in a quickly evolving global financial market and how such devices should be evaluated by policymakers, market participants, and academics. To that end, it discusses two central means of creating GADs—cross-listing and corporate inversions—and explains how they operate, discusses why they constitute a genuine concern for investors and regulators, and underscores the unique features of GADs relative to traditional antitakeover devices.

Second, it expands the existing scholarship on cross-listing by locating these global antitakeover devices in the wider theoretical literature on cross-listing. Previous studies on cross-listing highlight different potential motivations behind this action. Early studies emphasize business motivations, including the desire to increase the liquidity of the firm's stock and reduce the firm's costs of

31. For more information regarding the anti-takeover literature to which it contributes, see *infra*, Section I.D and accompanying footnotes. For more information regarding the cross-listing literature to which it contributes, see *infra* Part II and accompanying footnotes.

raising capital. Later studies focus on different explanations, such as the willingness of a foreign firm to credibly commit to a regime of enhanced disclosure and greater exposure in a shareholder-protective legal regime (the "legal bonding hypothesis"), the willingness to decrease disclosure liabilities (the "avoidance hypothesis"), and the desire to enhance a firm's presence in foreign markets (the "commercial bonding hypothesis"). This Article presents the "insulation hypothesis," which suggests that cross-listing can also be used as a device that grants management additional insulation from market-disciplinary forces.

Third, this Article provides preliminary evidence with respect to the economic significance of GADs. By presenting data on the growing activity of cross-listing and global M&A activity, it shows that GADs are more prevalent in the U.S. market than initially presumed. For instance, foreign companies constitute over fifteen percent of the companies listed on U.S. exchanges, and thus any hostile bid submitted to these foreign firms is subject to the corporate law of the foreign jurisdiction in which they are incorporated.[32] This suggests that one out of every seven companies listed in the United States has a potential GAD in place. The Article also demonstrates how the impact of GADs might extend beyond the corporate control market, as it could also grant foreign corporations additional protection from activist interventions by hedge funds.

Finally, this Article presents certain tools for mitigating the antitakeover and anti-activist protections generated by GADs. In particular, it demonstrates how investors and policymakers can address GADs' potential entrenchment effects by increasing their awareness of this phenomenon, by enhancing cooperation between exchanges around the world, and by subjecting the use of GADs through cross-listing and inversions to enhanced judicial review in the appropriate cases.

Before proceeding, a number of framing comments are in order. First, there is a long-standing, high-profile debate as to whether governance arrangements that deter hostile bidders or activist investors benefit long-term shareholders.[33] A normative evaluation of such measures is beyond the scope of this Article. From a policy perspective, revealing the role of GADs is important regardless of one's normative view of these measures. If one accepts the negative view of

32. *See infra*, Table 2 and note 125

33. For the view that board insulation reduces shareholder value, see Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637 (2013). For the view that shareholders benefit from antitakeover measures, see LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 63-73 (2012); William Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010). Regarding the positive evaluation of shareholder activism, see Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085 (2015). Regarding the negative evaluation of shareholder activism, see Martijn Cremers et al., *Hedge Fund Activism and Long-Term Firm Value* (2015) (unpublished manuscript), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2693231 [https://perma.cc/Y9GX-7HQN]; and Leo E. Strine, *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449 (2014).

governance arrangements that insulate management, it is important to be aware of additional forms of these measures in order to limit their use. If one accepts the positive view of these governance arrangements, understanding GADs is important because they may have certain advantages relative to traditional antitakeover devices from the perspective of target firms.

Second, the analysis presented in this Article does not suggest that GADs are always the primary motivation behind a decision to engage in global activity or to access a foreign exchange. Sometimes this decision will be motivated by tax, financial, or other reasons. In these cases, GADs would just be a side effect of that primary motivation. On other occasions, managers of target companies may consider GADs to be a primary or secondary motivation when deciding to engage in global activity. The most important point, however, is that once a decision to cross-list or incorporate in a foreign jurisdiction is made, for any reason, the additional antitakeover effect will be achieved.

Third, it could be argued that GADs impose significant costs not only on a bidder, but also on a target and thus prevent a target from utilizing GADs in the first place. We do not share this view. Certain targets may already have an office in a foreign jurisdiction, so shifting its location will be relatively cheap for them. Some targets may have other reasons for cross-listing, such as enhancing liquidity and presence in foreign capital markets that in aggregate could outweigh the potential costs of cross-listing. Finally, a target has the advantage of making the first move and deciding in which jurisdiction it will re-incorporate or cross-list. As a first mover, the target could choose an exchange in which it has a comparative advantage vis-à-vis potential acquirers in terms of its ability to comply with foreign law or due to strong financial connections.

It is also unlikely that an acquirer avoids the costs and uncertainty associated with a hostile offer to a dual-listed target by making an all-cash offer that does not require a prospectus. When it comes to the takeover of large public companies, it is generally implausible that an acquirer would have the necessary liquidity to make an all-cash offer. Furthermore, payment in stock provides significant tax advantages to target shareholders, increasing the likelihood that such offers are accepted. And in case the market overvalues an acquirer's stock, it provides the latter with an opportunity to take advantage of it, using its stock as merger consideration. All of these reasons lead to the conclusion that GADs represent a real, and not only a theoretical, concern.

The analysis of this Article is organized as follows. Part I presents the two central means of creating GADs and explains how they operate and what costs and concerns they are expected to generate. It also underscores the unique features of GADs, compared to traditional antitakeover devices such as poison pills and staggered boards. Part II contextualizes our analysis within the broader theoretical literature regarding cross-listing. Part III demonstrates the economic significance of GADs. By presenting data on the growing activity of cross-listing and global M&A activity, this Part shows that GADs are more prevalent in the U.S. market than initially presumed. It then demonstrates that the impact of

GADs could extend beyond the corporate control market by providing target firms with increased insulation from activist interventions by hedge funds. Finally, Part IV addresses the implications that stem from our analysis. We examine the potential implications of GADs on regulatory competition among exchanges and suggest a number of tools for mitigating the antitakeover and anti-activist protections generated by GADs.

I. The Rise of Global Antitakeover Devices ("GADs")

A. The Mechanisms of GADs

Various forms of global activity can be utilized as GADs. Below we present two major mechanisms: cross-listing in a foreign exchange and corporate inversions. Both mechanisms can impose significant costs on actors who might attempt to take over a target firm.

1. Cross-Listing on a Foreign Exchange

Cross-listing of shares occurs when a firm lists its equity shares on one or more foreign stock exchanges in addition to its domestic exchange. By cross-listing its stock on an additional exchange, a firm incorporated in one jurisdiction can more easily tap into the capital market associated with a foreign exchange. Cross-listing, especially on a large and liquid exchange, has traditionally been motivated by a number of economic concerns, including the desire of a foreign firm to increase its liquidity, reduce its cost of capital, expand its potential shareholder base, and enhance its visibility in foreign markets.[34] The cross-listing is expected to increase the volume and frequency of stock trades; greater liquidity, in turn, increases the firm's value.[35]

Even though a decision to cross-list on a foreign exchange could be motivated by purely economic reasons, the core argument presented in this Article is that such cross-listing has an additional, hidden effect: it could also serve as a mechanism that provides insiders with some insulation from hostile takeovers. The economic logic of our argument is that cross-listing imposes some set of additional costs on potential acquirers that pursue dual-listed targets, and these additional costs may deter accretive acquisitions.

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34. For a review of the economic reasons for cross-listing, see Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141, 143-45 (2003). For analysis of the impact of cross-listing on firm's liquidity, see Gordon J. Alexander, Cheol S. Eun & S. Janakiramanan, *Asset Pricing and Dual Listing on Foreign Capital Markets: A Note*, 42 J. FIN. 151, 151 (1987); John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1779 (2002); Robert C. Merton, *A Simple Model of Capital Market Equilibrium with Incomplete Information*, 42 J. FIN. 483, 485 (1987).

35. *See* Licht, *supra* note 34, at 143.

Consider a hostile bidder who is interested in taking over a target that is cross-listed in both domestic and foreign jurisdictions. Also, as is often the case in large takeovers, the hostile bidder's offer consists of both cash and stock.[36] However, the inclusion of a stock component in the merger offer complicates a takeover where the target is cross-listed. In particular, it forces a hostile bidder to choose between two undesirable options: (i) proceeding with the offer without soliciting consent from the public shareholders in the foreign jurisdiction, if the law of the applicable jurisdiction permits it,[37] or (ii) launching a tender offer in two different jurisdictions.

The first option, launching a tender offer in the domestic jurisdiction only, dramatically reduces the likelihood of a successful merger, by raising the percentage of votes needed to secure a takeover. Assume that 85% of a target's shares are traded in the domestic jurisdiction, and the rest are traded in the foreign exchange. In order to receive majority support for the bid, a hostile bidder needs to attract the support of approximately 59% of all domestic shareholders (50.1/85).[38] Considering retail investors' tendency to avoid voting due to rational apathy, this could be an extremely difficult task.[39] Moreover, a bidder that excludes the foreign shareholders of the target may not be able to consummate the transaction using a short-form merger.[40]

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36. For instance, 38% of mergers involving public U.S. targets announced during the 12-month period ending in November 2016 and valued at $100 million or more were stock-only deals or deals that involved some combination of cash and stock. *See* M&A AT A GLANCE, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (Dec. 2016), https://www.paulweiss.com/media/3848357/16dec16maag.pdf [https://perma.cc/LG2Q-G97H].

37. Many jurisdictions adopt "all-holders rules" that generally require that all offers be extended to all holders of securities of the same class. *See* Federico M. Mucciarelli, *Exclusion of US-Holders in Cross-Border Takeover Bids and the Principle of Equality in Tender Offers* (CEFIN Working Paper, 2009), http://ssrn.com/abstract=1399496 [https://perma.cc/W6Q8-62D9]. The United States, for example, has adopted such a rule in Rule 14d-10(a)(1) pursuant to the Exchange Act. However, if the number of shareholders in an additional jurisdiction is small and unnecessary to the success of the offer, certain jurisdictions allow a hostile bidder to exclude residents of a foreign country from the offer, subject to certain terms. For a detailed description of the exclusionary rules in the United States, see CROSS-BORDER BUSINESS COMBINATION TRANSACTIONS, SULLIVAN & CROMWELL LLP (Oct. 15, 2008), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Cross_Border_Business_Combination_Transactions.pdf [https://perma.cc/29S2-ZDSF]. Such exclusionary offers are common in the United States, United Kingdom, Germany, Italy, Japan, Australia, and Canada. *See* Mucciarelli, *supra* note 37, at 8-13. Note that a bidder can exclude shareholders of foreign jurisdictions only if both the jurisdiction in which the target incorporates and the jurisdiction in which the foreign shareholders reside permit it. This dual requirement reduces the likelihood of an exclusion. *See id.*

38. The public float after excluding the foreign exchange is 85%. Since the bidder has to receive at least 50.1% of the votes in order to proceed with the hostile bid, it will need the support of approximately 59% of U.S. shareholders (50.1/85).

39. *See* Kobi Kastiel & Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 DEL. J. CORP. L. 55, 61-64 (2016) (showing that in 2014, 24% of the shares in the S&P 500 were not voted).

40. For example, in most states in the United States, the support threshold for tender offers is 90% of the remaining shareholders. That was the law in Delaware until 2013, when a legal reform reduced the threshold to 50%. *See* Audra L. Boone, Brian J. Broughman & Antonio J. Macias, *Shareholder Decision Rights in Acquisitions: Evidence from Tender Offers* 1-2 (Ind. Legal Studies Research Paper No. 331, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629424 [https://perma.cc/Q8TU-BGYY].

The second option, launching two tender offers in two separate jurisdictions, increases the chance of a successful merger but entails high transaction costs. This option forces the hostile bidder to engage in a public offering of the bidder's stock in a foreign jurisdiction, with all the legal and financial consequences of such an offering. Complying with the foreign exchange's regulatory requirements often involves significant costs for the acquiring company. These costs can be broken into the following elements:

(i) The Direct Costs of Forcing a Foreign Public Offering. There are direct costs of preparing and filing a prospectus for the tender offer to foreign shareholders. These costs also include fees to domestic legal counsel, investment bankers, and accounting professionals. If the bidder becomes cross-listed on the foreign exchange, as Mylan did, it will also have to bear the listing fee and other related fees.[41]

(ii) Time and Opportunity Costs. The requirement to prepare and file a prospectus in a foreign jurisdiction before completing the takeover delays the merger process. This is a significant cost for the bidder, as time is a crucial element for the success of a takeover offer. Any delay in the hostile tender offer due to the requirement to prepare and file an additional prospectus or to become listed in the foreign jurisdiction considerably disadvantages the bidder.[42]

(iii) Uncertainty Costs and Litigation Risks. Exposure to foreign law may generate significant uncertainty on the bidder's side. The bidder and its legal counsel are unlikely to be familiar with the foreign law requirements and will have to hire local counsel. Additionally, the bidder may face a risk of adjudication in foreign courts, as was the case with Mylan.[43] When this happens,

41. In most OECD stock exchanges, there are two central fees for listed firms: a one-time registration fee, for which the average cap in OECD exchanges is $99,240, and an annual listing fee, for which the average cap is $64,000. Adi Libson, *The Impact of Directors' Conflict-Of-Interest on Passive Behavior: Evidence from Directors Representing Banks on the Tel-Aviv Stock Exchange* (2017) (unpublished manuscript) (on file with author). Registration and listing fees, however, are only a fraction of the bidder's costs. Even though there is no official figure or even estimation regarding the expenses Mylan incurred for its bid, Perrigo spent over $100 million to fend off Mylan's offer, and one would expect them to be roughly similar. Mark Sanchez, *Perrigo Spent $100M to Fight Off Mylan's Hostile Takeover*, MIBIZ (Mar. 6, 2016, 2:49 PM), https://mibiz.com/item/23406-perrigo-spent-[https://perma.cc/HA3Y-66VB]. Additional expenses include fees to domestic legal counsel, investment bankers, and accounting professionals. As the BHP Billiton case demonstrates, due to the complexity of launching a bid against a cross listed company, the bidder's law firm had more than thirty lawyers working on the project at any one time. See *infra* note 11. While it is difficult to isolate the expenses related to the bid in the foreign jurisdiction from the overall expenses on consulting and banking services, these additional are expected to be significant. For example, as the high-profile hostile takeover attempt of AstraZeneca by Pfizer demonstrates, Pfizer's overall costs for banking consulting services alone were estimated between $14 million and $18 million. *See* Denise Roland, *Pfizer and AstraZeneca to Reveal Cost of Takeover Battle*, TELEGRAPH (July 26, 2014, 4:06 PM), http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/10992588/Pfizer-and-AstraZeneca-to-reveal-cost-of-takeover-battle.html [https://perma.cc/W46S-2XWB].

42. *See* Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 890-91 (2002) (providing evidence of the positive effect of the delay of a hostile bid on the chances that a target firm remains independent).

43. *See supra* note 21 and accompanying text.

the bidder is likely to encounter difficulties in effectively assessing ex ante the chances of winning or losing in a foreign forum, which may well be more difficult to predict than the chances of winning in Delaware courts. An increase in the uncertainty of the hostile bid's success chances through the bidder's exposure to the potential litigation risk in foreign courts may deter the bidder from executing a bid in the first place.

(iv) Disclosure Standards Imposed by the Foreign Exchange. Certain foreign exchanges may impose stricter mandatory disclosure standards for any public offering conducted on the exchange, and as such subject the hostile bid to these enhanced disclosure requirements. If a foreign jurisdiction has more robust disclosure requirements than the ones that exist in the domestic exchange, then the bidder also loses the value of the otherwise private information that must be disclosed. Consider, for instance, the disclosure rule regarding the accumulation of ownership interest in a target firm. According to the rule enacted in the United States, the bidder must disclose this information ten days after it passes the five percent threshold.[44] Other jurisdictions have adopted lower ownership thresholds or shorter windows for the reporting requirements which would cause the bidder to disclose this information faster than under U.S. regulations.[45]

(v) Complying with Other Regulatory Standards Imposed by the Foreign Exchange. The foreign exchange may impose certain regulatory requirements on dual-listed firms even though these firms are not incorporated or domiciled in the foreign jurisdiction. By registering securities with the foreign exchange, the foreign bidder becomes subject to these other corporate governance, certification, and internal controls requirements of the foreign exchange.[46] An exchange could also include restrictions on takeover activity, and the bidder of a dual-listed target would have to comply, unless exempted, with these rules. For example, certain exchanges strictly prohibit the listing of a firm with antitakeover provisions in its charter or bylaws, such as staggered boards or poison pill provisions.[47] Others, such as the TASE and, until recently, the Hong

44. *See* 15 U.S.C. § 78m(d) (2018); 17 C.F.R. § 240.13d-1 (2018) (requiring beneficial owners of more than five percent of the voting class of a registered company's equity to file a Schedule 13D, reporting acquisition and other information such as identity and background of acquirer and purpose of purchase, within ten days).

45. Several foreign jurisdictions, such as the United Kingdom, Australia, Canada, and Hong Kong, require blockholders to disclose lower stakes or to disclose stakes more quickly than current U.S. rules. *See* Lucian Bebchuk & Robert Jackson, *The Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 40, 57-58 (2012).

46. For example, by registering securities with the SEC, a non-American bidder becomes subject to corporate governance, certification, internal controls, and disclosure requirements under the Sarbanes-Oxley Act. *See Mergers and Acquisitions 2016*, INT'L COMPARATIVE LEGAL GUIDES (Apr. 3, 2016), http://www.iclg.co.uk/practice-areas/mergers-and-acquisitions/mergers-and-acquisitions-2016/usa [https://perma.cc/W79Y-LM8L].

47. EXPECT THE UNEXPECTED—FOREIGN ANTITAKEOVER REGIMES, KIRKLAND & ELLIS LLP 1 (2015), https://www.kirkland.com/siteFiles/Publications/MAUpdate_072815.pdf [https://perma.cc/YL3Y-M94H] (noting the prohibition on the adoption of poison pills in Ireland and the United Kingdom); Carsten Gerner Beurle et al., *Is the Board Neutrality Rule Trivial? Amnesia About*

Kong Stock Exchange, strictly prohibit the listing of firms with a dual-class stock structure, and hostile bidders with such structures will not be permitted to list its shares on these exchanges.[48] Ironically, a target's decision to relocate its corporate domicile to a jurisdiction that prohibits the use of antitakeover devices provides the target with a strong defense against potential acquirers that include these antitakeover devices in their organizational documents.

2. Foreign Incorporations and Inversions

Corporate inversions occur when corporations relocate their legal domicile, typically through a merger or acquisition of a foreign firm, to another jurisdiction.[49] Many inversions are motivated by the tax benefits of shifting a firm's income to a low-tax jurisdiction such as Ireland or the Netherlands and thereby avoiding the American tax regime in favor of foreign tax treatment.[50] The relatively low barriers to shifting the incorporation of a company to a foreign country have made tax inversions a viable option,[51] and tax scholars have suggested various solutions to disincentivize them.[52]

A corporation could also be organized in a foreign jurisdiction but list its shares on a U.S. exchange. A recent example of a company taking this approach is Spotify, the music streaming services company. Spotify is headquartered in Sweden and incorporated in Luxembourg. In April 2018, the company went public through a direct listing of its shares on the New York Stock Exchange.[53] The final result in this case is similar to the one achieved by a corporate inversion: a foreign company that is traded on a U.S. stock exchange.

Corporate Law in European Takeover Regulation, 22 EUROPEAN BUS. L. REV. 559, 581-82 (2011) (referring to the British prohibition on adopting a staggered board).

48. *See* Securities Law, *supra* note 18; Jennifer Hughes & Josh Noble, *Hong Kong Exchange Gives Up on Dual-Class Share Plan*, FIN. TIMES (Oct. 5, 2015), https://www.ft.com/content/0bc597ee-6b42-11e5-aca9-d87542bf8673 [https://perma.cc/9WP5-3M2C].

49. *See* Talley, *supra* note 2, at 1650-51.

50. *Id.* ("In a typical inversion, a U.S. multinational corporation ('MNC') merges with a foreign company. The entity that ultimately emerges from this transactional cocoon is invariably incorporated abroad, yet typically remains listed in U.S. securities markets . . . . [C]orporate inversions permit domestic MNCs eventually to replace U.S. with foreign tax treatment of their extraterritorial earnings . . . .").

51. 26 U.S.C. § 951 (2018). This form of separation is possible only in a "personal" tax system such as the United States, in which tax is levied according to the nationality of the entity—taxing the worldwide income of a U.S. entity, whether a person or corporation.

52. Some suggested reforming the U.S. tax system altogether and moving it to a territorial rather than personal system. See Mihir A. Desai, *A Better Way to Tax U.S. Businesses*, HARV. BUS. REV. (July-Aug. 2012), https://hbr.org/2012/07/a-better-way-to-tax-us-businesses [https://perma.cc/2QV2-8ZB9]; *see also* Stop Corporate Inversions Act of 2014, S. 2360, 113th Cong. (2014). Others have recommended lowering the U.S. corporate tax rate. *See, e.g.*, Eric Toder & Alan Viard, *Replacing Corporate Tax Revenues with a Mark to Market Tax on Shareholder Income*, 69 NAT'L TAX J. 701 (2016) (advocating a zero percent corporate tax rate). A third group has focused on global mechanisms such as tax treaties to overcome the problem of the "race to the bottom." *See, e.g.*, Steven A. Bank, *The Globalization of Corporate Tax Reform*, 40 PEPP. L. REV. 1307 (2013).

53. Spotify Technology S.A., Form F-1, 51, 148 (Mar. 23, 2018).

The most important point for our purposes is that the legal consequences of a relocation of a U.S. firm to a foreign jurisdiction extend well beyond tax law and also implicate corporate and securities law. A foreign company, although listed on a U.S. exchange, is still subject to the corporate law of its jurisdiction of incorporation and must comply with that jurisdiction's takeover regulation, which may function as a significant bar to takeovers.

A prominent example is the *stichting* mechanism used in the Netherlands, which provides firms that decide to re-incorporate in that country with a powerful protection against hostile bids.[54] A *stichting*, which means "foundation" in Dutch, does not have any legal owners, and its only governing body prescribed by law is a board of independent trustees, authorized to act with a broad statement of purpose, including the preservation of the mission of the target company.[55] A Dutch company can grant a call option to a *stichting* to acquire a sufficient amount of preferred stock to exercise voting control over that company. The *stichting* is then entitled, in its sole discretion, to exercise these options to take voting control over the company, at least temporarily, if the foundation determines it is in the best interest of that company and necessary to maintain the status quo or preserve the mission of the target company.[56] With the ability to acquire approximately fifty percent of the voting power of the target at any time, the *stichting* is able to block both an unsolicited takeover bid and attempts by an activist to replace members of the board.[57]

Furthermore, the foreign law regulating takeovers may also include other restrictions, such as requiring a supermajority for a hostile bid to be accepted.[58] Foreign law could also deprive some other rights from shareholders, such as the right to file class action or derivative lawsuits.[59]

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54. Shayndi Raice & Margot Patrick, *The Rise of the 'Stichting,' an Obscure Takeover Defense*, WALL ST. J. (Apr. 22, 2015, 12:15 PM), http://www.wsj.com/articles/the-rise-of-the-stichting-an-obscure-takeover-defense-1429716204 [https://perma.cc/8U34-7375] ("More than 125,000 *stichtings* are registered in the Netherlands . . . . Their creators hail from Europe, the U.S. and elsewhere . . . .").

55. *Id.*

56. *See* Leonard Chazen & Peter Werdmuller, *The Dutch Poison Pill: How Is It Different from an American Rights Plan?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 1, 2015), https://corpgov.law.harvard.edu/2015/12/01/the-dutch-poison-pill-how-is-it-different-from-an-american-rights-plan [https://perma.cc/P7ML-GMTS]; Steven Davidoff Solomon, *The Unintended Twist of Tax Inversions*, N.Y. TIMES DEALBOOK (Apr. 24, 2015), https://www.nytimes.com/2015/04/25/business/dealbook/the-unintended-twist-of-tax-inversions.html [https://perma.cc/P3XX-WW6V].

57. *See* Raice & Patrick, *supra* note 55; *see also* Daniel E. Wolf, *Foreign Antitakeover Regimes,* HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 18, 2015), https://corpgov.law.harvard.edu/2015/08/18/foreign-antitakeover-regimes [https://perma.cc/58Z5-R4DP] ("[T]argets could try to drop 'crown jewel' assets into the foundation, seeking to put those assets beyond the control of the bidder even if it succeeds, or outside its reach to facilitate required antitrust divestitures.").

58. *See supra* note 38-40 and accompanying text.

59. For example, under Luxembourg law, the board of directors has sole authority to decide whether to initiate legal action to enforce a company's rights. See *supra* note 53, at 172, for the list of the main attributes of Luxemburg law that investors should be aware of.

In sum, foreign incorporations and inversions force the hostile bidder to comply with the corporate law of the foreign jurisdiction, with all the legal and financial consequences that entails. When the foreign law includes certain limitations on takeover activity or shareholders' ability to exercise some of their basic rights, complying with the foreign law involves substantial costs for the acquiring company and may function as a significant bar to takeovers. Compliance with foreign law also imposes uncertainty costs and litigation risks, as well as the time delay and opportunity costs discussed in the previous Subsection.

B. The Economic Effect of GADs

The previous Section revealed the main mechanisms that create GADs: cross-listing and incorporation in a foreign jurisdiction. It also showed that these two GAD mechanisms impose a set of costs on potential acquirers that pursue targets that have adopted them. These additional costs include the direct costs of forcing foreign public offering, the time delay and loss of opportunity costs, increased uncertainty and litigation risks, and the need to comply with the corporate law and listing standards of a foreign exchange or jurisdiction. When these costs, in the aggregate, are significant they could deter bidders from attempting to take over the dual-listed target in the first place. Since the costs of financing and preparing a hostile takeover could be extremely high, a bidder, who must incur a large fraction of these costs even if the takeover does not materialize, might be less willing to launch a hostile bid against a target with a GAD.[60]

These costs, however, have to be weighed against the potential value of an acquisition to the bidder after deducting all previous costs associated with the hostile bid. Where the new costs imposed by a GAD outweigh the value of the acquisition (or cast the deal into such doubt that its expected value could fall to near zero), the bid will be dropped. In that case, the costs of the GAD would discourage potential takeover activity, even if it increases share value, and thus serve as an effective defensive measure.

By way of illustration, assume that at time T_0, an executive of a U.S. publicly traded firm considers two investment opportunities: (i) a merger with another U.S. company and (ii) a merger with a company that is traded on a foreign exchange. Each of the two investment has different advantages and

60. Oracle spent $60 million on its hostile takeover bid for Peoplesoft. *Oracle's Peoplesoft Takeover Bid Can Go Ahead, Judge Rules*, RED HAT DEVELOPER'S J. (Sept. 10, 2004, 12:00 AM), http://redhat.sys-con.com/node/46287 [https://perma.cc/K6B2-C2LD]. On the flipside, Perrigo spent over $100 million to fend off Mylan's offer. See Sanchez, *supra* note 41. SABMiller incurred costs of $160 million in fending off Anheuser-Busch's offer, which was eventually accepted. Ben Martin, *SABMiller Spends £111m Defending Against AB Inbev and Keeping Hold of Staff*, TELEGRAPH (May 18, 2016, 12:05 PM), http://www.telegraph.co.uk/business/2016/05/18/sabmiller-profits-fall-as-costs-in-africa-mount-ahead-of-abinbev [https://perma.cc/YBM8-WRBC]. While the bidder's costs were not reported in the two last cases, they are expected to be similar, if not even higher.

disadvantages. For instance, a merger with a foreign firm could be more complex, but it has tax advantages. It also increases the presence of the U.S. firm in an emerging foreign market and provides the CEO with additional insulation from potential hostile bidders due to the factors discussed in the previous Section. Taking all considerations into account, the CEO chooses to merge the U.S. company with the foreign entity.[61]

At T_1, a hostile bidder, who is interested in taking over the dual-listed target, emerges. The target has 10,000,000 shares, and to complete the bid, the bidder has to make an offer that would be accepted by the holders of a majority of the target's outstanding stock (5,000,001). The current stock price of the target is $100 per share and is traded on NASDAQ and on another foreign exchange. The bidder is willing to purchase the target stock for $105 per share (including all estimated expenses related to the merger) but would walk away if the purchase price is higher as the merger would no longer be profitable to the bidder. The directors of the target object to the takeover, claiming that when the target's long-run projects come to fruition, the value of the stock will be significantly higher.

Since the target is cross-listed on a foreign stock exchange, the bidder has to file a prospectus or become listed on the foreign exchange in order to proceed with the offer. This will require the bidder to incur all of the additional costs mentioned above that accompany the bidding process, including the time delay and loss of opportunity costs, increased uncertainty and litigation risks, and the need to comply with the corporate law and listing standards of a foreign exchange or jurisdiction.

If the additional costs imposed by the GAD exceeds $50 million, then the GAD would discourage the hostile bid. This is because the GAD would increase the cost per share of the takeover by at least an additional five dollars, increasing the overall costs of the bid to $105 or more and thus making it an unprofitable proposition for the bidder.[62]

To be clear, the above analysis does not suggest that GADs will provide targets with absolute insulation from hostile takeovers. When the potential benefits that a bidder is likely to derive from a hostile acquisition of a foreign or cross-listed firm outweigh the additional costs imposed by GADs, then the bidder is likely to proceed with the hostile offer. Our analysis, however, does suggest that GADs impose some transaction costs on potential acquirers that may deter accretive acquisitions.

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61. A target may encounter a liquidity issue when implementing this defensive strategy and listing its stock on a foreign exchange. If the target firm is a large public company and the foreign exchange is relatively small in comparison to the U.S. exchanges, it will be hard for that foreign exchange to absorb all the stocks of the target, and the stock listed on the foreign exchange will be relatively illiquid. However, the target does not have to list all of its stock on a small, foreign exchange. As the Mylan example demonstrates, shifting as little as ten percent of the share float to a foreign jurisdiction could effectively prevent the bidder from obtaining a majority approval of the shareholders whose shares are traded on the U.S. exchange alone.

62. *See supra*, notes 41-60 and accompanying text. For examples of similar or even higher total estimated costs of global hostile mergers, see *supra* note 60.

Corporate law scholarship has long emphasized the strong interests managers have in adopting antitakeover mechanisms that insulate them from external monitoring pressures.[63] If one accepts that view, then there is a good basis to believe that managerial decisions regarding global corporate activity may also be motivated by corporate governance effects and incentives to insulate the firm from market forces.[64] But even if one assumes that GADs are never the main motivation behind a decision to engage in global activity (a very strong assumption), that does not change our core analysis. Once a decision to engage in cross-listing or inversions is made for whatever reason, the antitakeover effect of GADs will be achieved.

C. Are GADs of More Than Theoretical Concern?

In this Section, we address two potential critiques that question the ability of targets to use GADs as an antitakeover device. In particular, these critiques suggest that GADs could impose significant costs not only on a bidder, but also on a target, and thus prevent a target from utilizing it in the first place (Subsection II.C.1), and that GADs can easily be circumvented if the hostile bidder make an all-cash offer (Subsection II.C.2). We conclude that these critiques do not, either individually or collectively, provide a good basis for viewing GADs as a merely theoretical concern.

1. The Costs of GADs to Targets

While the mechanism underlying GADs imposes significant costs on a bidder who is interested in acquiring a target, it could also impose high costs on a potential target utilizing a GAD. This raises the question of whether the costs of GADs might prevent a target from utilizing it in the first place.

Targets will still have sufficient motivation to utilize GADs for a number of reasons. First, a target may already have an office in a foreign jurisdiction, so shifting its location will be relatively cheap.

Second, the use of GADs could be codetermined by other motivations for cross-listing for inversion. For example, motivations to shift the location of their

63. *See, e.g.*, Bebchuk, Coates & Subramanian, *supra* note 42, at 900-39 (providing theoretical, empirical, and policy analysis of effectiveness of staggered boards as an antitakeover tool); Ronald J. Gilson & Alan Schwartz, *Defensive Tactics and Optimal Search: A Simulation Approach* (Yale L. & Econ. Research Paper No. 552, 2016), https://ssrn.com/abstract=2805529 [https://perma.cc/VM9Y-XYSR] (providing preliminary evidence that defensive tactics "are unequivocally bad for acquirers; good for target shareholders at some levels, but not at higher levels; and can materially reduce efficiency in the market for corporate control"); *see also* Steven Davidoff Solomon, *The Case Against Staggered Boards*, N.Y. TIMES (Mar. 20, 2012, 12:43 PM), http://dealbook.nytimes.com/2012/03/20/the-case-against-staggered-boards [https://perma.cc/YB57-PSBH] (noting that "[a]cademics argue that the staggered board thus serves as a powerful antitakeover device and 'entrenches' the board" and surveying related literature).

64. This may also spur competition between jurisdictions based on the antitakeover framework they provide. For further discussion regarding the effect of GADs on competition between exchanges, see *infra* Section IV.A.

incorporation include tax, antitrust, and IP considerations. Target firms also have financial reasons for cross-listing, such as enhancing liquidity and presence in foreign capital markets. If these other motivations to engage in global activity are strong enough, a target that chooses to cross-list or shift its place of incorporation will also receive some protections through a GAD. Collectively, these benefits will often be sufficient for firms to adopt GADs.

Third, a target utilizing a GAD has the advantage of making the first move and deciding in which jurisdiction it should reincorporate or on which exchange it should list. The first mover has various options for GADs—jurisdictions and exchanges with various protections, disclosure requirements, accounting restrictions, board membership restrictions, and restrictions on antitakeover provisions and capital structure. A potential target could choose the exchange on which it has a comparative advantage—the one with the lowest compliance costs for the target but with higher compliance costs for a potential acquirer.

For instance, a target may already have a strong presence in a foreign jurisdiction, while its potential acquirers do not. A target with a single share class structure could also cross-list on an exchange that prohibits the use of unequal voting rights, thus deterring potential acquirers with dual-class capital structure. A target with many independent directors could list on an exchange that requires a certain portion of the board to qualify as independent directors, which would deter potential acquirers who do not have enough independent directors on the board. Therefore, the use of GADs does not necessarily entail the same costs for a target and potential acquirer.

2. Circumventing GADs by Cash Offers?

Even if one accepts the significance of GADs as an antitakeover mechanism, one may still wonder whether it could easily be circumvented. One possible way to reduce the hefty costs and significant uncertainty associated with a hostile offer to a dual-listed target would be to make an all-cash offer. An offer that does not contain a stock element would not be treated as a public offering and thus would not require the acquirer to create a prospectus and to fulfill other requirements of the foreign exchange.

Yet acquirers of large public companies often do not have the necessary liquidity to make an all-cash offer.[65] Moreover, one of the central driving forces behind many takeovers is the market's misevaluation of the acquirer's stock: when the market overvalues an acquirer's stock, the acquirer can take advantage of this by using its stock as merger consideration.[66] An acquirer with many investment opportunities might also try to avoid the risky debt required to

65. *See M&A at a Glance, supra* note 36 (stating that 40% of all deals include an in-kind component).

66. *See* Andrei Shleifer & Robert Vishny, *Stock Market Driven Acquisitions*, 70 J. FIN. ECON. 295, 309 (2003).

finance a cash-based takeover. Such debt could decrease the willingness of its management to undertake additional investments.[67] Furthermore, payment by stock provides significant tax advantages to the target's shareholders, increasing the likelihood that offers are accepted.[68]

At least in theory, an acquirer could also propose a more complex offer that includes cash-plus-stock consideration for shares sold to the acquirer on one exchange, and solely cash consideration for stocks sold on the more restrictive exchange. That way, an acquirer can circumvent the disclosure and other regulatory requirements in the foreign exchange by limiting the offer in that jurisdiction to cash while overcoming its liquidity constraints through stock consideration in the main exchange, where most of the target stocks will be held.

This type of offer, however, may raise legal concerns as it discriminates between holders of the same stock with the same cash flow rights by providing them with differential consideration. U.S. law, for instance, allows a bidder to offer securities to tendering target holders in foreign jurisdictions and to offer cash to tendering U.S. holders through an arrangement known as "vendor placement," as long as the target company is a foreign private issuer and U.S. security holders hold ten percent or less of the class of securities sought in the offer.[69] However, if the percentage of U.S. security holders is higher than ten percent, then vendor placement arrangements are generally subject to Securities Act registration unless exempted by the SEC.[70] Also, even if under U.S. law it would be possible to launch an offer with differentiated consideration, there is a high likelihood that foreign exchanges would not permit such an offer.[71]

Moreover, even if the use of differential consideration would be legally valid, it would not necessarily circumvent a GAD. If shareholders in the central

67. Kenneth J. Martin, *The Method of Payment in Corporate Acquisitions, Investment Opportunities and Management Ownership*, 51 J. FIN. 1227 (1996). Martin uses Tobin's Q as a proxy for firms' investment opportunities—a higher Tobin's Q reflects that the firm has greater investment opportunities. *See id.* at 1230. A positive correlation exists between Tobin's Q and the propensity of acquiring firms to pay in stock. *See id.* at 1243-44.

68. Alan J. Auerbach & David Reishus, *The Impact of Taxation on Mergers and Acquisitions*, *in* MERGERS AND ACQUISITIONS 69, 71-77 (Alan J. Auerbach ed., 1987). Even though the tax benefit is apparently for the shareholders of the target firm, whose immediate tax liability is lower when compensation is through stock, the acquiring firm may also gain from the tax benefit. As the tax benefit for the recipients is higher, they can adjust compensation downward. How the tax benefit is divided between the acquirer and the target's shareholders depends on the incidence of the tax benefit. Regarding the concept of tax incidence and how the party that receives a tax benefit is not necessarily the party that gains from the tax benefit, see D. Fulleron & G.E. Mecalf, *Tax Incidence*, *in* 4 HANDBOOK OF PUBLIC ECONOMICS 1787 (2002).

69. 17 C.F.R. § 240.14d-1(c)(1) (2018).

70. 17 C.F.R. § 240.14d-1(c)(2) (2018). *See also Cross-Border Business Combination Transactions*, *supra* note 37, at 26-27 (also noting that an exemption will be granted only if "the market for the bidder securities that would be to be issued in the exchange offer and sold pursuant to the vendor placement is highly liquid and robust and the number of bidder securities to be issued for the benefit of tendering U.S. holders is relatively small compared to the total number of bidder securities outstanding").

71. *See* Mucciarelli, *supra* note 37, at 13-15 (explaining that pursuant to article 3 of the EU Takeover Directive, Member States cannot derogate the general principle of equality among holders of the same class of securities).

exchange prefer cash over stock consideration, they could try to shift the listing of their stock from one exchange to the other.[72] Thus, an acquirer is unlikely to solve its liquidity constraint by making an offer with differential consideration to shareholders in different exchanges.

D. The Unique Features of GADs

Finally, in order to determine the significance of GADs as a defensive measure, we must clarify the circumstances of its use relative to traditional antitakeover measures, such as poison pills and staggered boards. In this Section, we explore the unique features of cross-listing as a defensive measure in contrast to the other conventional defensive measures.

1. Lack of Transparency

One of the major problems any company that adopts traditional antitakeover measures faces is the objection of public shareholders. As noted earlier, antitakeover measures are mostly espoused by managers and directors, and many shareholders see their enactment in a negative light, as it weakens their power to determine whether an offer should be accepted.[73] For that reason, shareholder resistance is often the central impediment for the enactment of antitakeover measures midstream.[74]

A GAD created through cross-listing can circumvent shareholder opposition. The existence of other prominent rationales for cross-listing, besides functioning as an antitakeover mechanism, camouflages the antitakeover function of cross-listing and reduces the chance that shareholders will rally against it. Management could argue that cross-listing is necessary for diversifying liquidity sources and increasing the visibility of the firm and its products in foreign markets, downplaying its antitakeover effect. A parallel mechanism is common when staggered boards are introduced at the same time as a merger.[75] One of the possible explanations for this phenomenon is that the adoption of a staggered board midstream is perceived by shareholders as a "side effect" of a large M&A deal.[76] Cross-listing conceals the antitakeover measure to an even greater extent, and this action is likely to avoid shareholder scrutiny.

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72. Even if shareholders may shift the listing of the stock, differential consideration may still be a form of discrimination. While a stock traded in exchange X can receive the compensation offered in X without additional costs of shifting the listing of the stock, the stock traded in exchange Y has to incur additional costs to receive the same compensation. Functionally, not all shareholders are given offers with the same economic value.

73. *See supra* note 63 and accompanying text; *see also* Bebchuk, *supra* note 33.

74. *See infra* note 87 (presenting data on institutional investors' efforts to eliminate the use of staggered boards midstream).

75. *See generally* Lucian Bebchuk & Ehud Kamar, *Bundling and Entrenchment*, 123 HARV. L. REV. 1549 (2010).

76. *Id.* at 1566 ("It is easier for shareholders to accept a governance choice that is built into the deal than to accept a salary demand made by managers as a condition to the deal.").

Even professional proxy advisory firms ignore the entrenchment impact of cross-listing. Institutional Shareholder Services' governance index, "Quick Score 3.0," which aims to assess a firm's takeover defenses, does not include any reference to whether a firm has cross-listed its stock.[77] This is also true of academic governance indexes that assess the level of a firm's takeover defenses, such as the "Entrenchment Index"[78] and the "G-Index."[79]

2. Lack of Judicial Review

The use of cross-listing as a GAD is unlikely to be exposed to the same level of judicial scrutiny that applies to conventional defensive measures. The GAD's defensive element is understood as a side effect of an action with an alternative central rationale: to increase liquidity or exposure in foreign markets. Under Delaware law, as in most jurisdictions in the United States, managerial and board business decisions are generally immune from judicial review. According to Delaware's business judgment rule, in order to legally question the legitimacy of a business decision, a plaintiff has to prove that the decision was not made on an informed basis, was not made in good faith, or was made without an honest belief that it was in the best interests of the company.[80]

However, when a poison pill is being maintained as a defensive measure, a standard of enhanced judicial scrutiny applies.[81] Faced with the "omnipresent specter" of board entrenchment, Delaware courts have articulated an intermediate standard of review, the "enhanced" business judgment rule.[82] According to that heightened standard of review, to justify the use of a defensive measure and shift the burden of proof back to the plaintiffs, the board has to show it had "reasonable grounds for believing a danger to corporate policy and effectiveness existed" and that the defensive tactic employed by the board was "reasonable in proportion to the threat posed."[83] By doing so, the board rebuts

77. *ISS Governance Quick Score 3.0: Overview and Updates*, INSTITUTIONAL SHAREHOLDER SERVICES 49-55 (2016), https://www.issgovernance.com/file/products/qs-technical-document-april-2016.pdf [https://perma.cc/CZ4A-2TH8].

78. Lucian Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783 (2009).

79. Paul A. Gompers, Joy L. Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107 (2003).

80. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

81. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. 1985); *see also* Air Products & Chemicals, Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011); Yucaipa Am. Alliance Fund II v. Riggio, 1 A.3d 310, 335 (Del. Ch. 2010) ("[I]t is settled law that the standard of review to be employed to address whether a poison pill is being exercised consistently with a board's fiduciary duties is . . . *Unocal* . . . .").

82. *Unocal*, 493 A.2d at 954-55.

83. *Id.*

the presumption that the decision to adopt antitakeover measures is motivated by self-interest.[84]

Unlike the adoption of a poison pill, a decision to cross-list could always be justified by other business rationales as its main purpose, in which case the enhanced business judgment rule does apply. For instance, the board could claim that the primary purpose for cross-listing is to enhance liquidity, increase access to new markets, save on taxes, and so on. Therefore, cross-listing is much less susceptible to heightened review, especially if the decision to cross-list was not done in the face of a hostile bid, and it is most likely to benefit from the protection of the business judgment rule, which would shield it from judicial intervention. This, in turn, could make it more attractive to target firms than traditional defensive measures, such as poison pills.[85]

Cross-listing, therefore, reduces the chances a target will face litigation as a consequence of utilizing this defensive form and saves the potential costs associated with this proceeding. Furthermore, even if litigation takes place, there is a greater chance that the court would reject the claim due to the likely application of the business judgment rule.

3. Persistence

Cross-listing as a global antitakeover device is also more difficult to retract than alternative antitakeover measures. While a poison pill can be redeemed at any time, it is more complex and difficult to undo a firm's decision to cross-list, which involves the foreign exchange as a third party. This is true even when compared to another powerful antitakeover provision, the use of staggered boards.[86] Activist shareholders that submitted non-binding shareholder proposals to de-stagger boards managed to reduce the number of firms with staggered boards from 60% of the S&P 500 firms in 2001 to fewer than 20% in 2014.[87]

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84. In *Unitrin v. American General Group*, the court determined that if the board cannot prove these two points, it confirms their conflict of interest, and the more stringent entire fairness test will apply for analyzing their decision. 651 A.2d 1361, 1377 n.18 (Del. 1995). Regarding the scope of the Enhanced Business Judgment Rule, see Mary Siegel, *The Problems and Promise of the "Enhanced Business Judgment Rule,"* 17 U. PA. J. BUS. L. 47 (2014).

85. While in the recent *Airgas* case, the Delaware court upheld the board's maintenance of the company's poison pill in the face of an unfriendly cash tender offer that the board determined was inadequate, the decision did not validate the ability of boards to "just say never." The board's determination is still subject to judicial review under an enhanced scrutiny standard without the deference afforded by the business judgment rule. *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 54 (Del. Ch. 2011). In that case, the Airgas board was able to meet this higher standard, but another board might not. Therefore, targets are more likely to prefer an antitakeover device that does not automatically trigger the enhanced standard of review.

86. See Bebchuk et al., *supra* note 63 (claiming that there was not even one case between 1996 and 2000 of a hostile bidder taking over a company with a staggered board provision).

87. R.J. Guo, Timothy A. Kruse & Tom Nohel, *Activism and the Shift to Annual Director Elections*, 14 J. ACCT. & FIN. 83, 83 (2014). Just between 2011 and 2014, the Shareholder Rights Project (SRP), a clinical program directed by Professor Lucian Bebchuk, assisted institutional investors in bringing about declassification at roughly one hundred S&P 500 and Fortune 500 companies. For a review of the work done by the SRP, see Lucian Bebchuk, Scott Hirst & June Rhee, *Towards the*

This illustrates that even the most stringent traditional antitakeover provision can be lifted by the engagement of shareholders.

Even if shareholders adopt a resolution that forces the board of a target firm to delist the stock from a foreign exchange or change the country of incorporation, in many cases this material change may have significant financial ramifications on the company. These could include reduced liquidity and diversification, or the need to relocate the corporate headquarters and hire new workers in the case of a change in the corporate residency.[88] These ramifications come with high costs. Additionally, the tax law implications may also complicate the decision to shift the location of incorporation. Even if the original inversion of the firm was solely based on regulatory considerations and not on tax arbitrage considerations, the reincorporation of the firm may have significant adverse tax consequences. The inversion may be treated as realization of income for the firm, generating a tax liability.[89]

For all of the above reasons, the process of eliminating a GAD might be complex and costly due to the inherent involvement of third parties (the exchange and foreign regulators) and the broad financial and legal implications of that decision.

II. Locating GADs in the Wider Theoretical Context

The analytical framework we introduce in this Article also makes a contribution to the growing literature on cross-listing. In this Part, we present the major hypotheses raised in the literature as to why firms choose to cross-list their stock on a foreign exchange. We then aim to expand the cross-listing taxonomy by presenting our "insulation hypothesis" and by locating it in the wider theoretical context.

The first theories on cross-listing, arising in the early 1990s, focus on the business motivations of foreign firms to cross-list on a large exchange, such as one of the U.S. or U.K. exchanges.[90] These business motivations included the willingness to increase the liquidity of the firm's stock, reduce the firm's costs of raising capital, expand its potential shareholder base, and enhance its visibility in various markets.[91] Cross-listing on a large and liquid exchange increases the

Declassification of S&P 500 Boards, 3 HARV. BUS. L. REV. 157 (2013). Additional information on successful precatory proposals can be found at the Shareholder Rights Project website. *Proposals Going to a Vote*, SHAREHOLDER RIGHTS PROJECT (2017), http://srp.law.harvard.edu/companies-voting-on-proposals.shtml [https://perma.cc/NF92-TD5N].

88. This is the case for most jurisdictions other than the United States, in which "corporate residency" is defined by the location of "central management and control" and not according to the jurisdiction of incorporation. *See* ROBERT COUZIN, CORPORATE RESIDENCE AND INTERNATIONAL TAXATION 25 (2002); Talley, *supra* note 2, at 1661.

89. *See* Mihir A. Desai & James R. Hines Jr., *Expectations and Expatriations: Tracing the Causes and Consequences of Corporate Inversions*, 55 NAT'L TAX J. 409, 421 (2002).

90. See Licht, *supra* note 34, at 143-45.

91. *Id.*

volume and frequency of the firm's stock trades, and greater liquidity, in turn, will increase the firm's value.[92]

By the late 1990s, non-business motivations for cross-listing were introduced, focusing on the governance motivations for cross-listing. Two main theories that dominate this discourse are the "legal bonding" and "avoidance" hypotheses. These theories focused mostly on explaining the conventional phenomenon of foreign firms cross-listing in large exchanges, and in particular the popularity of the NYSE and NASDAQ with foreign companies. They did not attempt to explain the opposite—and more recent—practice of U.S. firms, or firms from other developed countries, cross-listing on exchanges in developing countries with relatively low liquidity or weak investor protections, such as China or India ("reverse cross-listing").[93]

Recent academic research that sheds light on the growing phenomenon suggests that reverse cross-listing could be motivated by firms' desire to enhance their commercial presence in the foreign market: the "commercial bonding" hypothesis. Our "insulation hypothesis" provides an additional explanation for both cross-listing of foreign firms on U.S. exchanges and reverse cross-listing. As we show, these actions could also be motivated by management's desire to insulate themselves from hostile takeovers and activist intervention.

A. The Legal Bonding Hypothesis

In a well-known article, John Coffee argues that the primary motivation for foreign firms to cross-list their stock abroad is different from traditional commercial explanations and is grounded in what he terms the "bonding hypothesis." According to Coffee, by cross-listing in the United States, a foreign firm can credibly commit to a regime of enhanced disclosure and greater exposure in a shareholder-protective legal regime, including effective tools for remedies such as class actions and derivative actions.[94] In addition, entrance into the U.S. market exposes the foreign issuer to the scrutiny of reputational intermediaries, including U.S. underwriters, auditors, debt rating agencies, and securities analysts.[95] These reputational intermediaries reinforce the firm's commitment to full disclosure.[96] And this commitment mechanism, in turn, reduces the foreign firm's cost of capital by increasing investor confidence.

Coffee supports his bonding hypothesis by showing that foreign firms with U.S.-listed American Depositary Receipts (ADRs) receive more outside financing than comparable foreign firms not listed in the United States and that

92. *Id.*

93. For a description of this trend, see Nicholas Calcina Howson & Vikramaditya S. Khanna, *Reverse Cross-Listings—The Coming Race to List in Emerging Markets and an Enhanced Understanding of Classical Bonding*, 47 CORNELL INT'L L.J. 607, 608-11 (2014).

94. Coffee, *supra* note 34, at 1780.

95. *Id.* at 1781.

96. *Id.*

subsequent equity issuances of firms from certain countries, typically emerging economies, do not take place in the United States but rather in their origin county.[97] If the central benefit for cross-listing is access to a liquid U.S. exchange with strong investor protections, then one would expect future stock issuances to take place mostly in the U.S. exchange. According to Coffee, the bonding effect can explain this phenomenon. The benefit an issuer derives from enhanced disclosure and strong shareholder protections increases not only the demand for its stock in the U.S. exchange but also demand in the foreign exchange.

B. The Avoidance Hypothesis

Amir Licht presents an alternative explanation for cross-listing: the "avoidance" hypothesis.[98] Licht's analysis uses a regulatory prism while pointing to the exchange's regulatory standards as an additional motive behind managerial decisions whether or not to cross-list.[99] However, in contrast to the bonding hypothesis, the avoidance hypothesis proposes that a decision to cross-list in a foreign exchange and the choice of the particular destination markets are motivated by managerial interests. Therefore, "stringent corporate governance requirements in destination markets actually deter insiders and may drive them to avoid cross-listing on these markets."[100] When managers opt to cross-list, they may do so in order to decrease, rather than to enhance, corporate governance requirements and disclosure liabilities.[101]

Although the United States is perceived to have high regulatory standards of disclosure for listed firms, cross-listing not only has not increased disclosure but even have helped decrease it for these firms.[102] Foreign firms listed on U.S. exchanges have to file different annual disclosure forms, which have a more limited scope compared to the statements filed by U.S. firms.[103] For instance, foreign issuers are not required to disclose the individual compensation packages

97. *Id.* at 1791-94. *See also* William A. Reese Jr. & Michael S. Weisbach, *Protection of Minority Shareholder Interests, Cross-Listing in the United States and Subsequent Equity Offerings*, 66 J. FIN. ECON. 65, 95-101 (2002).

98. *See* Licht, *supra* note 34; *see also* Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT'L L. 195 (2004); Amir N. Licht, *Managerial Opportunism and Foreign Listing: Some Direct Evidence*, 22 U. PA. J. INT'L ECON. L. 325 (2001); Amir N. Licht, *Genie in a Bottle? Assessing Managerial Opportunism in International Securities Transactions*, 2000 COLUM. BUS. L. REV. 51 (2000).

99. In Licht's view, "the dominant factors in the choice of cross-listing destination markets are access to cheaper finance and enhancing the issuer's visibility. Corporate governance is a second-order consideration . . . ." Licht, *supra* note 34, at 142-43.

100. Licht, *Legal Plug-Ins*, *supra* note 98, at 197-98.

101. *See* Licht, *supra* note 34, at 148-49.

102. *See id.* at 150-54.

103. Regular U.S. firms have to complete the 10-K form annually, while foreign firms have to complete Form 20-F. Regarding disclosure requirements of American public companies, see the Securities Exchange Act of 1934, §§ 13 and 15(d), 17 U.S.C. §§ 78m, 78o(d) (2018). Regarding lenient disclosure requirements of foreign companies, see 17 C.F.R. § 240.3a12-3(b) (2018).

of its top executives but only the total compensation of all executives.[104] They are also not required to disclose related party transactions[105] or the identities of shareholders with over five percent of the company's equity capital.[106] Moreover, in some countries, dual-listed firms are exempt from certain disclosure requirements of the foreign exchange. Thus, by cross-listing on a U.S. exchange, these companies manage to lower the overall regulatory standards that govern their disclosure requirements.[107]

The gap between U.S. firms and foreign firms is also reflected in the level of enforcement. While the U.S. is mostly known as a jurisdiction with aggressive enforcement of securities law, this strict enforcement applies to U.S. firms and not foreign firms. Indeed, until 2004, there had been no enforcement measures taken against firms from emerging markets.[108] Moreover, private interviews with lawyers in the field have reinforced the hypothesis that the SEC abstains from opening enforcement measures against firms from emerging markets.[109]

C. The Commercial Bonding Hypothesis

Both the legal bonding and the avoidance hypotheses focus on explaining the traditional form of cross-listing—a firm from an exchange with limited liquidity or weak shareholder protections listing on a large exchange with strong shareholder protections. Their theories, however, do not intuitively explain why U.S. or U.K. firms would reverse cross-list. Reverse cross-listing in a jurisdiction with weak corporate governance and disclosure standards might send a negative signal to investors and is unlikely to serve as a bonding mechanism.[110] Also, as long as a U.S. or U.K. firm remains listed on its domestic exchange, it is hard to see how the decision to cross-list would alleviate that firm's regulatory burden.[111]

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104. *See* FORM 20-F, SEC. & EXCHANGE COMM'N (Sept. 2017), https://www.sec.gov/about/forms/form20-f.pdf [https://perma.cc/UM2V-B23Y].

105. Regarding lenient disclosure requirements of foreign companies, compare 17 C.F.R. § 240.3a12-3(b) (2018) with 17 C.F.R. § 229.404 (2018).

106. FORM 20-F, *supra* note 104.

107. Even though Licht illustrates his theory by focusing on the case of Israeli firms that are listed on NASDAQ, his findings could be relevant to other foreign jurisdictions. Licht, *Managerial Opportunism*, *supra* note 98, at 331-36. Moreover, Israel has the second-most listings on NASDAQ outside North America, with 94 firms listed. *See Companies by Region*, NASDAQ (2018), http://www.nasdaq.com/screening/regions.aspx.

108. Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?*, 75 J. FIN. ECON. 319, 321 (2004).

109. *Id.*

110. *See* Howson & Khanna, *supra* note 93, at 628.

111. If a company's securities are registered under the Exchange Act (regardless of whether the company is cross-listed on another exchange), that company must comply with detailed disclosure requirements and the applicable exchange listing standard. *See Mergers and Acquisitions 2016*, *supra* note 46. A U.S. firm could subject itself to different disclosure and corporate law rules by reincorporating in a different jurisdiction, but as long as the cross-listed firm remains listed and incorporated in the United States, it will be subject to the stringent U.S. disclosure requirements.

Recently, Nicholas Howson and Vikramaditya Khanna have suggested that the phenomenon of reverse cross-listing may be largely motivated by what is termed "consumer-commercial market bonding." According to Howson and Khanna, firms' desire to enhance their presence in the foreign market motivates these firms to utilize foreign listing as a form of advertising—to intensify their local identity and to signal long-term commitment to the local market.[112] "[F]or some firms at least, these potential benefits could be enough to outweigh the potential costs for listing in a market with lesser perceived investor protectors as originally suggested by the 'legal bonding' hypothesis."[113]

D. GADs: The Insulation Hypothesis

The analysis presented in this Article shows how cross-listing and foreign incorporation can be used by corporate insiders as a mechanism that insulates them from hostile takeovers and activist intervention. The utilization of cross-listing as an antitakeover mechanism builds on the common denominator of scholarly work stating that cross-listing is not only motivated by liquidity concerns but also by regulatory considerations. In contrast to the legal bonding analysis, which explains cross-listing as being motivated by enhancing shareholder interests, our analysis parallels the avoidance hypothesis, which notes that cross-listing may be motivated by managerial interests. However, instead of a managerial desire to lower disclosure requirements and to avoid stringent corporate governance standards such as insider trading rules,[114] we focus on the interests of managers in using cross-listing as an entrenchment device against takeovers and activist intervention.

More importantly, our theoretical framework suggests that almost *any* cross-listing or foreign incorporation, even one that involves two jurisdictions with similar disclosure or governance rules, could become a defensive mechanism. Such actions have the potential to complicate and increase the uncertainty of a hostile bid or activist intervention based on even minute regulatory differences. In some situations, target firms may even have an interest to cross-list in jurisdictions with more robust disclosure requirements or governance standards as long as these enhanced listing requirements could serve as useful entry barriers for potential bidders or activist investors.

Our analysis also addresses the growing phenomenon of reverse cross-listing, a possibility that the legal bonding and avoidance theories do not account

112. Howson & Khanna, *supra* note 93, at 625.

113. *Id.* at 609.

114. *See, e.g.*, Licht, *supra* note 34, at 150-54, 162; Licht, *Managerial Opportunism and Foreign Listing*, *supra* note 98, at 331-46; Licht, *Legal Plug-Ins*, *supra* note 98, at 225-30. Licht does note, although very briefly, the self-interests of a public firm's management to cross-list on a foreign exchange with more management-friendly rules regulating takeover bids. *See* Licht, *Genie in a Bottle?*, *supra* note 98, at 93-94. Our detailed analysis of foreign listing as antitakeover device is broader than this, as it views the mere action of foreign listing as an insulation mechanism, even without regard to the substantive body of antitakeover law that exists in a given jurisdiction.

for. The explanation of the phenomenon provided in this Article supplements the commercial bonding framework. While commercial bonding focuses on the financial advantages of reverse cross-listing, our analysis explains how this phenomenon could also be motivated by managerial interests to insulate itself from the market for corporate control and from external monitoring.[115]

Interestingly, the stock value of firms that reverse cross-list has not consistently increased.[116] This important finding is in tension with the commercial bonding hypothesis that reverse cross-listing has commercial value and should increase a firm's share value. While the benefits gained by reverse cross-listing may not be reflected in current prices, the insulation theory could better explain this empirical finding: reverse cross-listing may not necessarily contribute to the value of the stock because the firms may be motivated by managerial interests.

The following table summarizes the relationship between the explanation for cross-listing in this Article and the alternative dominant explanations in the legal scholarship.

Table 1: Cross-Listing Theories

	Traditional Business Explanations	Legal Bonding (Coffee)	Avoidance (Licht)	Commercial Bonding (Howson & Khanna)	GAD (Kastiel & Libson)
Stock-value Motivation	yes	yes	no	yes	no
Managerial Motivation	no	no	yes	no	yes
Cross-listing	yes	yes	yes	no	yes
Reverse Cross-listing	no	no	no	yes	yes

115. Howson and Khanna admit that in some cases the listing on the "weaker" exchange may surprisingly increase corporate governance regulatory norms. Hypothetically, the India's National Stock Exchange listing rules can adopt a requirement that all the directors on the board will be independent directors under, and the Chinese Securities Regulations Commission did adopt a rule that a third of the directors should be independent. *See Guidelines for Introducing Independent Directors to Directors of Listed Companies*, CHINA SEC. REG. COMM'N (2001), http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/200708/t20070810_69191.html [https://perma.cc/2XKK-EHUV]; *see also* Howson & Khanna, *supra* note 93, at 624. Howson & Khanna do not attribute much importance to this dynamic; nor do they consider the possibility that such forms of protections might actually attract foreign firms. *Id.*

116. *See id.* at 626-27.

To be clear, these different theories are not mutually exclusive. For instance, a decision to cross-list could be motivated by many considerations, including both commercial bonding and managerial interests. Similarly, even if the dominant factors in the decision to cross-list are business related, such as the access to cheap financing or enhancing issuer liquidity, the final implication of that decision is that management will have increased insulation from external interventions.

III. The Economic Significance of GADs

This Part discusses the potential incidence of GADs. Section III.A presents data on the growing activity of cross-listing and global M&A activities, suggesting that GADs are more prevalent in the U.S. market than initially presumed. Section III.B will show how the impact of GADs might extend well beyond the corporate control market, as it could insulate target firms not only from takeover activity but also from activist interventions by hedge funds.

A. The Rise of Global M&A and Cross-Listing

Cross-border M&A transactions are on the rise, which in turn raises the importance of GADs. Cross-border M&A transactions in the last quarter of 2015 reached $597.4 billion in value, a record high.[117] In the first quarter of 2016, cross-border M&A transactions comprised a majority of total global deal value (53%) for the first time.[118] The Baker & McKenzie Cross Border Index, an index that combines the volume and value of cross border deals, also reached a new high in the last quarter of 2015.[119] This upward trend is not expected to weaken, but rather to continue. According to a survey conducted in late 2015 among businesses that were pursuing M&A deals, 88% of respondents reported that they were planning a cross-border deal, and 41% claimed that they expected to do multiple cross-border deals in the near future.[120]

117. *Cross-Border M&A Index, Q4 2015*, BAKER & MCKENZIE (2015), http://s3-eu-west-1.amazonaws.com/papillon-local/uploads/6/11/Baker%20McKenzie_Global%20M&A%20Index_Q4%202015.pdf [https://perma.cc/KKM7-P6PZ].

118. *Cross Border M&A Index, Q1 2016*, BAKER & MCKENZIE (2016), http://s3-eu-west-1.amazonaws.com/papillon-local/uploads/6/11/baker_mckenzie_global_m_a_index_q1_2016_final.pdf [https://perma.cc/QU33-AABU].

119. *Megadeals Push Cross-Border M&A Index to Record High*, BAKER & MCKENZIE (2015), https://www.bakermckenzie.co.jp/wp/wp-content/uploads/2015_Q4_CrossBorderMAIndex_Infographic_E.pdf [https://perma.cc/DR5R-SVTE]. The score of the index combines the volume and value of cross border deals and attributes greater weight to cross-region deals than within-region deals. *Id.* The baseline figure of 100 represents cross-border activity in 2009. *Id.*

120. *Beyond Borders: The Future of Dealmaking*, HERBERT SMITH FREEHILLS (2016), https://www.herbertsmithfreehills.com/latest-thinking/beyond-borders-the-future-of-dealmaking [https://perma.cc/C6JV-HVW3]. The survey was conducted in late 2015 and updated in 2016. *Id.*

In 2015, half of the largest M&A deals of over $50 billion, which are likely to involve some stock elements, were cross-border transactions.[121] A few prominent examples are the merger of Anheuser-Busch, a U.S. company, with SABMiller, a U.K. company,[122] and the acquisition of the U.K. company, BG group, by Royal Dutch Shell, whose headquarters are located in the Netherlands.[123] China broke its full-year record for annual outbound mergers and acquisitions less than five months into 2016, reaching a volume of $110 billion, surpassing the 2015 record of $106.8 billion.[124]

This tremendous increase in global M&A activity suggests that GADs may already be prevalent in the marketplace. A global M&A transaction would generate an antitakeover mechanism if, after the consummation of the merger, the combined entity becomes dual-listed or has different incorporation and listing locations. Since foreign exchanges and jurisdictions have their own regulatory standards for listed or incorporated firms, any potential acquirer will have to comply with these additional foreign regulatory requirements.

Obviously, not every global M&A transaction leads to a change in listing or place of incorporation. When it does, however, the merged entity may end up with an effective GAD. A review of the publicly traded companies on American exchanges supports this hypothesis. Many foreign firms seek to list their stock on a U.S. exchange in addition to, or instead of, listing on the exchange of their domicile country, and this phenomenon seems to be growing.

As demonstrated in Table 2, there are 791 foreign firms listed on U.S. exchanges, with a total market capitalization exceeding $7.8 trillion. Of these firms, 718 are dual-listed both on the U.S. and another foreign exchange. Foreign cross-listed companies thus constitute 15.8% of all 4,537 companies listed on U.S. exchanges as of October 2016.[125] In other words, almost one of every six companies listed on American exchanges has a potential GAD in place that subjects any hostile bid to the rules of the foreign jurisdiction, and often to the rules of the foreign exchange as well.

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121. Andy Kiersz, *For the First Year Ever, Global M&A Deals Surpassed $5 Trillion*, BUS. INSIDER (Dec. 28, 2015, 5:35 PM), http://www.businessinsider.com/ten-biggest-ma-deals-of-2015-2015-12 [https://perma.cc/2Q2E-29VV].

122. *Id.*

123. *Id.* The percentage of global deals increases if counting deals that have been amounted in 2014 but concluded in 2015, a category including the acquisition of Allergan, a U.S. company, by Actavis, an Irish company based in Dublin. *See* Richard Summerfield, *Actavis Agrees to Acquire Allergan in $66bn Mega Deal*, FINANCIER WORLDWIDE MAG. (Jan. 2015), https://www.financierworldwide.com/actavis-agrees-to-acquire-allergan-in-66bn-mega-deal/#.WJ2KTW996M8 [https://perma.cc/CX5A-2E57].

124. Janice Chow, *$110.8bn: China Outbound Eclipses Previous Record*, DEALOGIC (May 10, 2016), http://www.dealogic.com/insights/china-outbound-ma-surpasses-annual-levels [https://perma.cc/F4C5-RH9A].

125. Data on all listed companies in the United States is taken from CRSP/Compustat. From the total number of 4,973 companies, we removed 436 firms that are traded index funds.

Table 2: Foreign Ownership and Cross-listing by Jurisdiction

Country of Incorporation	No. of Foreign Companies	No. of Cross-listed Companies	Market Cap ($, millions)
Bermuda	60	54	195,870
Brazil	17	17	194,145
British Virgin Islands	16	13	2,882
Canada	79	172	1,176,483
Cayman Islands	101	80	274,370
Ireland	27	22	406,235
Israel	80	70	107,965
Marshall Islands	46	43	18,956
Netherlands	31	31	429,340
United Kingdom	45	43	1,471,358
Other Countries	189	173	3,557,149
Total	**791**	**718**	**7,834,753**

Source: The universe of companies is the CRSP/Compustat Merged database in 2015, retrieved on October 17, 2016; cross-listing data from Thompson Reuters Datastream, retrieved on October 21, 2016.[126]

While a typical cross-listing involves a firm from a developing country that cross-lists on an exchange in a developed country, this is not necessarily the case. There are also reverse cross-listings, which are traditionally thought to increase the firm's visibility in the foreign financial and product markets.[127] Indeed, there is growing interest from U.S. firms and firms in other developed countries, such as the U.K., in listing on exchanges in developing countries such as India and China.[128] For instance, by the end of 2010, there were 157 U.S. companies which had an IPO abroad.[129] Fifty U.S. companies are also traded in the Euronext.[130]

126. This data includes only non-ADR issuers. We further supported our results by matching with the data published on NYSE and NADSAQ regarding foreign ownership in these exchanges. There are 323 foreign companies on the NYSE out of roughly 2,800 companies total. *See Current List of All Non-U.S. Issuers*, NYSE (Aug. 2018), https://www.nyse.com/publicdocs/nyse/data/CurListofallStocks.pdf [https://perma.cc/QK7U-3LDE]. 104 out of roughly 3,100 of the firms listed on the NASDAQ stock market are foreign firms. *See Non US Companies*, NASDAQ (2018), http://www.nasdaq.com/screening/companies-by-industry.aspx?exchange=NASDAQ&market=ADR.

127. *See* Howson & Khanna, *supra* note 93, at 625-27.

128. The central example of a foreign firm from an advanced country listed in the Indian Stock Exchange is the British Banking Firm Standard Chartered Bank. *Id.* at 608. Regarding other firms that have expressed interest in listing in the Indian exchange, such as Vodafone, HSBC, and Citibank, see *id.* at 616.

129. *See* Felix Salmon, *Chart of the Day: When U.S. Companies IPO Abroad*, REUTERS (May 27, 2011), http://blogs.reuters.com/felix-salmon/2011/05/27/chart-of-the-day-when-us-companies-ipo-abroad [https://perma.cc/8JY3-QPAP] (providing more data on U.S. companies with foreign IPOs).

130. Julius Melnitzer, *Euronext Cross-Listing Offers Benefits to U.S. Companies*, LAW.COM (May 1, 2010), https://www.law.com/almID/4dcafb60160ba0ad57001d85/ [https://perma.cc/C582-W9P5].

Reverse cross-listing on exchanges of developing countries may also be attractive for firms with financial hardships that encounter difficulties raising capital in well-developed markets. They may instead be better able to raise capital in a less-developed exchange trying to attract foreign firms. For example, there are approximately ten U.S. companies that cross-listed their stock on the TASE, even though it is a relatively small, liquidity-constrained market.[131]

In sum, the potential effect of GADs is far from negligible given the percentage of dual-listed firms and foreign firms listed on U.S. exchanges. Each of these firms is subject to foreign corporate law or the listing rules of a foreign exchange and thus is less likely to experience a hostile bid. In the next Section, we demonstrate that the economic effect of foreign listing or incorporation may extend well beyond the hostile takeover context, as these foreign or dual-listed firms may also be immune from certain forms of hedge fund activism.

B. GADs as an Anti-Activist Device

In the last decade, activist hedge funds have become critical players in the corporate governance arena.[132] These funds often accumulate large, but non-controlling, stakes in allegedly underperforming target companies to bring about change in the target companies' strategic, operational, or financial activity. They might propose, for example, divesting assets, changing investment or payout levels, altering the capital structure, or replacing the CEO, often while threatening to nominate their representatives to the board if target companies are inattentive to their demands.[133]

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131. *List of Dual-Listed Firms*, TEL-AVIV STOCK EXCHANGE, http://www.tase.co.il/eng/marketdata/stocks/marketdata/pages/marketdata.aspx?action=2. In addition to Perrigo and Mylan, mentioned above, there are other firms from various sectors: Celsion Ltd. from the biotech industry, Liveperson Ltd. from the technology industry, and Opko Health Ltd. from the health industry. *Id.* The central reason these firms might raise more capital in a small exchange is their inclusion on the exchange's major indexes, such as the TASE 100 index, which tracks the largest 100 firms listed on the exchange. Due to its size in comparison to TASE firms, even a relatively small U.S. firm will find itself in the major indexes. Reverse cross-listing could be especially relevant in the case of fast-growing start-up firms. These firms may have exhausted the private venture capital markets, but the high costs of raising capital in U.S. markets could motivate them to raise capital in foreign markets. *See* Graham Bowley, *Fleeing to Foreign Shores*, N.Y. TIMES (June 7, 2011), http://www.nytimes.com/2011/06/08/business/global/08exchange.html [https://perma.cc/P4KZ-Y3HF].

132. Up until a decade ago, the general view among corporate law scholars was that public shareholders are generally passive and suffer from a collective action problem and are therefore unable to effectively monitor management or controlling shareholders. *See, e.g.*, WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 204-08 (3d ed. 2009). Institutional investors, who for a short period emerged as the new hope, also failed to deliver on their promise to provide more disciplined monitoring of management, as they suffer from inadequate incentives, conflicts of interest, and regulatory constraints. *See, e.g.*, Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1048-57 (2007).

133. For the main characteristics of hedge funds, see Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1734-36 (2008); for discussion of the range of operational or financial changes sought by activists, see *id.*, at 1741-45.

Many scholars consider the emergence of activist hedge funds a major, groundbreaking shift in the corporate governance of public firms. They explain that activist hedge funds can now fill the monitoring gap created by rationally apathetic shareholders by providing a closer check on management action.[134] Consistent with this claim, numerous studies on hedge fund activism find a correlation between the announcement of interventions by activist hedge funds and positive stock market reactions.[135] Moreover, a study by Lucian Bebchuk, Alon Brav, and Wei Jiang shows that improved operating performance follows activist interventions not only in the short term, but also in the long term.[136] Finally, a recent survey of sixty-seven studies on shareholder activism concludes that hedge fund activism is associated with improvements in share values and firm operations, and has become more value-increasing over time.[137]

However, not everyone sees hedge fund activism as a positive development. Critics of hedge fund activism claim that hedge fund interventions are value-decreasing in the long term, and that activists tend to use their power to force management to disgorge cash in lieu of investing in long-term growth.[138] Other scholars find that the empirical evidence with respect to long-term gains is mixed and any conclusion that hedge fund activism is efficiency-enhancing is still premature.[139]

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134. Frank Partnoy & Randall Thomas, *Gap Filling, Hedge Funds, and Financial Innovation*, *in* NEW FINANCIAL INSTRUMENTS AND INSTITUTIONS: OPPORTUNITIES AND POLICY CHALLENGES 101 (Yasuyuki Fuchita & Robert E. Litan eds., 2007) (observing that activist hedge funds "have shaken up boardrooms and forced radical changes at many publicly-traded firm"). Jonathan Macey, for instance, claimed that hedge funds "are the newest big thing in corporate governance" and that they "actually deliver on their promise to provide more disciplined monitoring of management." JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 241, 272 (2008). Marcel Kahan and Ed Rock expressed hope that activist hedge funds "may act 'like real owners' and provide a check on management discretion." Kahan & Rock, *supra* note 132, at 1047.

135. *See, e.g.*, Brav et al., *Hedge Fund Activism*, *supra* note 133, at 1755-57; Christopher P. Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists,* 14 J. CORP. FIN. 323, 328-333 (2008); April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. FIN., 187, 207-211, 225-226 (2009); *see also* Robin Greenwood & Michael Schor, *Investor Activism and Takeovers,* 92 J. FIN. ECON., 362-75 (2009) (finding that hedge funds specializing in forcing mismanaged target firms into mergers generate significantly positive returns).

136. Lucian Bebchuk, Alon Brav, & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism* 114 COLUM. L. REV. 1087, 1101-1121 (2015).

137. Matthew Denes, Jonathan M. Karpoff & Victoria McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research*, 44 J. CORP. FIN. 405 (2017).

138. For studies invoked by critics of hedge fund activism, see Martin Lipton, *Is 2015, Like 1985, an Inflection Year?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 8, 2015), http://corpgov.law.harvard.edu/2015/12/08/is-2015-like-1985-an-inflection-year/ [https://perma.cc/M8ET-ENP6]; *see also* Ira M. Millstein, *Re-examining Board Priorities in an Era of Activism,* N.Y. TIMES (Mar. 8, 2013, 3:52 PM), https://dealbook.nytimes.com/2013/03/08/re-examining-board-priorities-in-an-era-of-activism/ [https://perma.cc/6EVY-JV2Q]; Martin Lipton, *Bite the Apple; Poison the Apple; Paralyze the Company; Wreck the Economy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 23, 2013), https://corpgov.law.harvard.edu/2013/02/26/bite-the-apple-poison-the-apple-paralyze-the-company-wreck-the-economy/ [https://perma.cc/U7XQ-9KTW].

139. *See* John C. Coffee Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 576, 586-587 (2016).

This Article does not take a position on the value of hedge fund activism. Regardless of which side of the debate one supports, one thing is clear: activist hedge funds are important players in the corporate governance arena. The importance of activist funds is also reflected by the dramatic increase in their activity over the past fifteen years. Assets managed by activist hedge funds were worth $23 billion in 2002[140] and grew to $126 billion in 2017.[141] Moreover, between 2013 to 2017 alone, 1,151 directors nominated by activist hedge funds gained board seats across corporate America.[142]

The disciplinary effect of hedge fund activism, however, extends well beyond those hundreds of publicly reported proxy battles. Hedge fund activism is likely to impact additional companies that are not subject to an engagement as they operate in the "shadow" of activism, and the mere threat of intervention induces these potential targets to take measures to improve firm performance or to distribute cash back to shareholders.

Not surprisingly, public companies and their advisors have been extremely concerned by hedge fund activism. Prominent lawyers have published memoranda on the topic, advising their clients on how to protect themselves from a potential activist attack.[143] Leading investment banking firms have established special groups that advise public companies how to get ready for a "rainy day" and have a response for an activist intervention prepared.[144]

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140. *See* Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 56-58 (2011) (discussing the move of hedge funds to the center stage).

141. *See* REVIEW AND ANALYSIS OF 2017 U.S. SHAREHOLDER ACTIVISM, SULLIVAN & CROMWELL LLP 7 (Mar. 23, 2018), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Review_and_Analysis_of_2017_US_Shareholder_Activism.pdf [https://perma.cc/2U7H-YKG9].

142. *Id.* at 12.; *see also* Lucian A. Bebchuk, Alon Brav, Wei Jiang & Thomas Keuschd, *Dancing with Activists*, 1, 6-14, 20-28 (Harvard Law and Econ. Discussion Paper No. 906, 2017) (providing data on activists' settlements, their determinants, and subsequent changes to board composition).

143. *See, e.g.*, Martin Lipton, *Succeeding in the New Paradigm for Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 15, 2016), https://corpgov.law.harvard.edu/2016/03/15/succeeding-in-the-new-paradigm-for-corporate-governance/ [https://perma.cc/K4RE-DSPC]; Martin Lipton, *Dealing with Activist Hedge Funds*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jun. 2, 2015), https://corpgov.law.harvard.edu/2015/06/02/dealing-with-activist-hedge-funds-4/ [https://perma.cc/QZL7-MLX9]; *see also* Ethan A. Klingsberg & Elizabeth Bieber, *Activism in 2018*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 29, 2018), https://corpgov.law.harvard.edu/2018/01/29/activism-in-2018/ [https://perma.cc/6M22-4RLM]; Kai Haakon E. Liekefett, *Think Twice Before Settling with an Activist*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 22, 2016), https://corpgov.law.harvard.edu/2016/12/22/think-twice-before-settling-with-an-activist/ [https://perma.cc/TWX4-NJPY].

144. Merritt Moran, *Ten Strategic Building Blocks for Shareholder Activism Preparedness*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 20, 2016), https://corpgov.law.harvard.edu/2016/12/20/ten-strategic-building-blocks-for-shareholder-activism-preparedness/ [https://perma.cc/UVY7-KPRX]; Jim Rossman, *Review of Shareholder Activism—1H 2017*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jul. 25, 2017), https://corpgov.law.harvard.edu/2017/07/25/review-of-shareholder-activism-1h-2017 [https://perma.cc/UKC4-P3JE]; Gregory Taxin & Betsy Atkins, *Activism's New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sep. 28, 2017), https://corpgov.law.harvard.edu/2017/09/28/activisms-new-paradigm/ [https://perma.cc/2V8P-5WLZ].

Despite the increasing importance of activism, relatively little attention has been paid in the academic literature to the impact of activists on foreign companies listed in the U.S. exchanges. Our initial hypothesis is that, all else being equal, foreign listing and incorporation are likely to reduce the likelihood of hedge fund activism for three main reasons.

First, exposure to foreign law could generate significant uncertainty and litigation risks on the activist's side. The activist will have to hire local counsel, become familiar with the foreign law requirements and may face a risk of adjudication in foreign courts. The outcome of litigation in a foreign forum may also be more difficult to predict than in Delaware courts. This increased uncertainty and the potential exposure to litigation in foreign courts, as well as the time delay it may cause, could cause activists to be reluctant to engage with a target that is subject to the corporate and securities regulation of a foreign jurisdiction.

Second, foreign incorporation or listing forces the activist hedge fund to comply with the corporate law or the listing requirements of the foreign jurisdiction or exchange, with all its legal and financial consequences. When foreign corporate law or listing standards include certain limitations on shareholder rights, such as the ability to launch a proxy fight, to call a special meeting, or to file a claim, it could diminish activists' bargaining power vis-à-vis the target's management.[145] This reduced bargaining power, in turn, decreases the ex ante incentives of activists to engage with foreign or dual-listed targets.

Third, foreign listing standards may have different disclosure requirements. To the extent the foreign jurisdiction or exchange imposes stricter disclosure requirements on the accumulation of a non-negligible ownership stake in target companies, the costs of engagement with the target increases. This is because the disclosure rules would impose stronger limitations on the ability of activists to secretly accumulate a significant block before disclosing it to the market.

To be clear, we do not suggest that these additional costs necessarily preclude any activist engagements in the first place. An activist player will still choose to engage with a foreign target if the expected benefits from an engagement are high enough to outweigh the additional engagement costs with the foreign target.[146] However, foreign incorporation is likely to reduce activists' ex ante incentives to launch a campaign against a foreign target.

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145. *See* Marco Becht, Julian R. Franks, Jeremy Grant & Hannes F. Wagner, *The Returns to Hedge Fund Activism: An International Study*, 30 REV. FIN. STUD. 2933, 2945 (2017) ("For example, the anti-director rights index in Djankov et al. (2008) has as one of its components whether shareholders have the right to call a special meeting and propose candidates for election to the board. Across countries, shareholders may require as little as a 5% or as much as a 20% ownership stake to exercise this right (the United States/Delaware being an exception, where shareholders generally cannot call an EGM, but can launch a proxy fight).").

146. For a comprehensive analysis as to when shareholder activism is a rational strategy, see Cheffins & Armour, *supra* note 140, at 61-68.

It is also important to recognize that foreign jurisdictions do not always provide weaker protection to public shareholders than in the United States. To the contrary, there are certain jurisdictions in which public shareholders are allowed to appoint their own directors or have the ability to veto certain related-party transactions. These enhanced shareholder protections, in turn, enhance (rather than decrease) the potential bargaining power of the activists, and thus on balance could increase the likelihood of an engagement.

For example, in 2007, Italy passed a regulation that allowed minority shareholders to appoint their own directors via proportional voting.[147] Research shows that hedge funds have actively intervened in half of the elections in Italian-listed companies that are subject to the 2007 regulation.[148] In Germany, activist hedge funds have begun to take advantage of certain provisions of the German Stock Corporation Law, which provides public holders with the right to challenge the appropriateness of the consideration paid to them when being squeezed out pursuant to a domination agreement with a buyer who holds at least seventy-five percent of the share capital of a target. Evidence shows that in recent years, this right served as an important channel of activism for hedge funds, including U.S.-based funds such as Elliott Management.[149]

Thus, when a foreign jurisdiction affords strong protections to public shareholders, it could offset, or even outweigh, some of the additional costs associated with activist engagement in a foreign jurisdiction. But, in the absence of special shareholder protections, the general hypothesis suggests that an incorporation in a foreign jurisdiction should make a company less attractive targets for activists than domestic companies.[150] When engagement costs increase, an activist intervention in a foreign jurisdiction is likely to be less profitable.

Indeed, a recent comprehensive comparative study by Marco Becht, Julian Franks, Jeremy Grant, and Hannes Wagner provides empirical support for the

147. Matteo Erede, *Governing Corporations with Concentrated Ownership Structure: An Empirical Analysis of Hedge Fund Activism in Italy and Germany, and Its Evolution*, 10 EUR. COMPANY & FIN. L. REV. 328 (2013).

148. *See id.* at 356-59; *see also* Massimo Belcredi & Luca Enriques, *Institutional Investor Activism in a Context of Concentrated Ownership and High Private Benefits of Control: The Case of Italy* 14-15 (Eur. Corp. Governance Inst., Working Paper No. 225/2013, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325421 [https://perma.cc/3A96-Q8NU] (observing 369 hedge fund transactions with Italian public companies between 2001 to 2013).

149. *See* Dirk Besse, *Shareholder Activism in Germany*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 7, 2014), http://blogs.law.harvard.edu/corpgov/2014/06/07/shareholder-activism-in-germany/ [https://perma.cc/3APD-H6AE].

150. As noted, the expected benefit from an activist intervention is a function of both the probability of success and the increase in the target share price as a result of the intervention. In theory, one could argue that since certain controlled companies enjoy strong insulation from market mechanisms, they are, on average, more likely to underperform, and therefore the higher expected returns from an activist engagement with these companies may compensate, at least partially, for the lower success rate. However, an activist will prefer to engage with widely held firm if (i) target past performance is held equal or (ii) if the activist estimates the success probability of a campaign against a controlled company to be close to zero.

hypothesis that foreign incorporation or listing could deter or diminish the level of activism. Their study covers nearly 1,800 engagements by activist hedge funds in twenty-three countries.[151] First, it shows that the vast majority of these engagements (seventy-six percent) are purely domestic, mostly in the United States.[152] Second, the authors compare the performance of U.S. activists at home against their performance overseas and against their foreign peers, who themselves engage with both domestic and foreign targets. They find that domestic activism outperforms foreign activism, and this result is similar for both U.S. and non-U.S. activists.[153] The authors also compare the probability of achieving outcomes in foreign engagements to the probability of achieving outcomes in domestic engagements. They "find a strong negative correlation between both probabilities for the sample of 24 hedge funds, suggesting that success domestically does not translate into success overseas, and vice versa."[154]

Finally, the authors also find that "activists are more likely to target firms in countries where the rule of law is strong."[155] Country characteristics, according to them, matter for the decision of activists to engage a target, and for whether an outcome is achieved.[156] Along the same lines, another study finds that "at the entry stage of an activist campaign, activist hedge funds tend to target companies incorporated in countries with stronger disclosure and shareholder regimes."[157]

To further explore the potential impact of foreign incorporation on incidence of shareholder activism, we collected data on "Proxy Fights" and "Other Stockholder Campaigns" conducted by activist shareholders for the period from January 2006 through December 2015.[158] The Securities and Exchange Commission ("SEC") requires an investor to file a disclosure statement on Schedule 13D within ten days after acquiring five percent of a

151. *See* Becht et al., *supra* note 145 (researching interventions between 2000-2010).

152. *See id.* at 2943.

153. *See id.* at 2936.

154. *Id.* at 2961.

155. *Id.* at 2968. However, conditional on observing an engagement, country characteristics do not correlate with measures of financial *performance*, such as initial disclosure returns and outcome disclosure returns.

156. *See id.*

157. Dionysia Katelouzou, *Worldwide Hedge Fund Activism: Dimensions and Legal Determinants*, 17 U. PA. J. BUS. L. 789, 797, 836-39 (2015).

158. SharkWatch, the corporate activism database of SharkRepellent, defines a "Proxy Fight" as a campaign under which a shareholder or group of shareholders (the "dissident") solicits the proxy or written consent of fellow shareholders in support of a resolution it is advancing. This usually involves the election of dissident nominees to the company's Board of Directors in opposition to the company's director nominees but may also involve campaigns to approve a shareholder proposal or to vote against a management proposal (including approving a merger). SharkWatch defines "Other Stockholder Campaign" as "corporate activism made public by activist investors, including hedge funds, and most commonly involve a dissident agitating for changes with the goal of maximizing shareholder value or enhancing corporate governance practices . . . . These campaigns usually take the form of making communications and letters sent to management at the targeted companies public via 13D filings and press releases." *See* Glossary to the SharkWatch database, available at Factset Research Systems, Inc., Sharkrepellent.Net, https://www.sharkrepellent.net [https://perma.cc/KQC2-7UHM].

target's outstanding shares,[159] and those are monitored by SharkWatch, the corporate activism database of SharkRepellent.[160] We merged our data on firms subject to activism with information obtained from the Center for Research in Security Prices (CRSP) on the jurisdiction of incorporation of all companies listed on U.S. exchanges and separated them into domestic and foreign firms.[161] Table 3 below summarizes the results of our examination.

Table 3: Activism with U.S. and Foreign Companies

	Foreign Incorporated			US Incorporated		
Year	Firms subject to Activism	Number of companies in CRSP	Ratio	Firms subject to Activism	Number of companies in CRSP	Ratio
2006	6	816	0.01	280	4848	0.06
2007	17	773	0.02	322	4742	0.07
2008	15	738	0.02	336	4456	0.08
2009	9	708	0.01	207	4233	0.05
2010	2	716	0.00	211	4097	0.05
2011	2	737	0.00	224	3989	0.06
2012	5	751	0.01	244	3933	0.06
2013	13	770	0.02	239	3999	0.06
2014	28	802	0.03	331	4142	0.08
2015	31	728	0.04	321	3749	0.09
Average	**12**	**760**	**0.02**	**271.5**	**4218.8**	**0.06**

As shown, companies incorporated outside the United States are less likely to be subject to activist intervention, although they are not fully insulated from it. On average, only two percent of the foreign companies faced at least one activist event during the sample period compared to six percent of the companies incorporated in the United States.[162] This suggests that a domestic firm is three times more likely than a foreign corporation to be subject to an activist event.

159. *See* 15 U.S.C. § 78m(d) (2018); 17 C.F.R. § 240.13d-1 (2018) (requiring beneficial owners of more than five percent of a voting class of a registered company's equity to file a Schedule 13D within ten days, reporting the acquisition and other information such as the identity and background of the acquirer and the purpose of the purchase).

160. *See* SharkRepellent database, Factset Research Systems, Inc., SHARKREPELLENT.NET, https://www.sharkrepellent.net [https://perma.cc/KQC2-7UHM]. The data on activism from SharkWatch also contains information on events conducted by fifty significant activist investors even if these activists do not cross the five-percent threshold, and thus are not subject to reporting requirements. Excluded from the data are "exempt solicitations," which are mostly employed by institutional investors and not hedge funds. Those solicitations, which are exempt from disclosure rules pursuant to Rule 14a-2(b)(1) of the Securities Exchange Act of 1934, usually involve dissident communications to shareholders to persuade them to vote for or against a resolution.

161. The universe of companies is the CRSP/Compustat Merged database between 2006-2015.

162. This finding is also in line with a recent study of activist interventions in different jurisdictions around the world. *See* Becht et al., *supra* note 145, at 2938 (finding that hedge fund activism is more prevalent in the United States than in other countries around the world).

We receive substantially similar results when limiting the sample to events conducted only by the fifty largest activist investors.[163]

These results are further corroborated by running linear logit regressions, where U.S. incorporation is the independent variable (0 = foreign incorporation; 1 = U.S. incorporation) and the likelihood of an activist event is the dependent variable. We found that U.S. incorporation produces a positive and statistically significant effect on the probability that an activist event occurs (Column 1), and the result remains the same even after controlling for the target firms' market value, performance at the announcement of the engagement (as measured by industry-adjusted Tobin Q), and year of the activist event. In particular, we found that after controlling for above-mentioned factors, a U.S.-incorporated firm is 3.6 times more likely to be subject to an activist event than a target incorporated in a foreign jurisdiction.[164] Foreign ownership is, therefore, a successful mechanism for providing target with additional insulation from activism.

Table 4: Results of Regressions

	(1)	(2)	(3)	(4)	(5)
U.S. Corporation	1.352***	1.297***	1.345***	1.288***	1.296***
ln(Market Cap)		-0.0472***	-0.0516***	-0.0440***	-0.0511***
Industry Adjusted Q				-0.0676***	-0.0640***
Industry	N	N	Y	N	N
Year					0.0510***
Constant	-4.308***	-3.969***	-4.058***	-4.018***	-106.6***
Observations	55490	55423	55307	55333	55333
Pseudo R^2	0.014	0.015	0.032	0.018	0.021

This Table reports coefficients of linear probability regressions where the independent variable is "U.S. Incorporation," a binary variable equal to 1 if target was incorporated in the United States. Control variables include company industry and "ln(Market Cap)," defined as the logarithm of a firm's market capitalization when an engagement starts, firm's performance, as measured by Industry Adjusted Tobin Q, and year. Finally, *, **, and *** indicate statistical

163. When focusing just on firms that have been the target of an activist campaign by one of the fifty largest activist investors, we find that the chances of a firm incorporated in the United States being subject to an activist event are two times higher than those of a foreign corporation. We examined this subset of firms separately as SharkWatch coverage of activist events by these investors is generally broader.

164. Data on odds ratios are on file with the authors. Our results stay substantially similar even if instead of simple linear logit regressions we run rare event logit regressions, as our sample includes only 128 events with targets that are incorporated outside the United States.

significance of the coefficients at the ninety percent, ninety-five percent, and ninety-nine percent confidence levels, respectively.

Finally, to further estimate the overall disciplinary effect of hedge fund activism on foreign firms, we also examine the success rate of proxy fights launched against U.S. and foreign firms, as well as the implementation of activists' demands by target firms.[165]

Table 5: Success Rate[166]

	U.S. Companies	Foreign Companies
Success Rate of Proxy Fights	53.1%	48.4%
Success Rate of Other Solicitations	36.4%	27.3%

As reflected in Table 4, the implementation rate of activists' demands is higher for American firms than it is for foreign corporations. This disparity suggests that foreign incorporation has a chilling effect not only on the likelihood of a target being subject to activism, but also on the likelihood that the activist demands will be accepted by the target.

Before proceeding, three comments should be made. First, the CRSP database does not include accurate data regarding the ownership percentage of controlling shareholders. Thus, there is no control in the regression for ownership structure. A possible explanation for our results might be that it is more typical for foreign companies to have a controlling shareholder relative to U.S. companies. And since activism is more prevalent in companies without a controlling shareholder, the ownership structure variable (rather the foreign ownership variable) drives our result.[167]

In order to verify that differences in ownership structure are not driving the disparity between foreign companies and U.S. companies, we have reviewed

165. A proxy fight is considered successful if the dissident wins at least one board seat or if the target agrees to settle with the activist. Other public solicitation is considered successful if at least one of the activist's demands is implemented by the target.

166. An event is counted as successful when at least one of the activist's demands is accepted.

167. *See* Kobi Kastiel, *Against All Odds: Hedge Fund Activism in Controlled Companies*, 16 COLUM. BUS. L. REV. 101, 149-54 (2016) (showing that when activism is conducted against majority-controlled companies, when the activists have no ability to elect minority directors, the likelihood of activism reduces dramatically).

Bloomberg data regarding the ownership structure of foreign companies listed in the U.S. in 2016. We have examined how many of these foreign companies have a controlling shareholder. We found that out of the 791 foreign firms, only 112 have some form of a controlling shareholder, constituting approximately 14% of the firms above.[168] The percentage of foreign firms with a controlling shareholder for the year examined does not seem to exceed the percentage of firms with controlling shareholders reported in other studies.[169] It could be inferred that ownership structure does not seem to be driving our findings regarding the gap between foreign firms in comparison to firms in general. To completely rebut this hypothesis would require more systematic analysis of the ownership structure of sampled firms in all examined year.

Second, our research does not control for the legal characteristics of specific countries related to activist engagements due to sample size issues. However, the study by Becht et al. does so. Their results show that "activists are more likely to target firms in countries where the rule of law is strong; consistent with this, activism is rare in emerging markets."[170] They also find that "activism is more frequent in those developed countries (e.g., France, Germany, and Italy) in which minimum regulatory disclosure thresholds for blockholders are low."[171] An interesting avenue for future research could focus on the potential impact of the specific legal characteristics of a jurisdiction on the level and success rate of activism.

Third, some activist funds could be repeat players that specialize in engagements in foreign jurisdictions.[172] In the case of these repeat players, one would expect that the costs of activism abroad would decrease over time due their accumulated knowledge and experience in the foreign jurisdiction. Another interesting avenue for future research would be to explore the potential impact of activists' experience in a foreign jurisdiction on the level and success rate of activism.

In sum, the data presented in this Section provides preliminary evidence that foreign corporations could enjoy additional insulation from activist hedge funds. This view is also supported both by recent empirical research on shareholder activism around the world as well as by some preliminary evidence

168. *Top 20 Holders Public Filings*, BLOOMBERG L.P. (2017) (for dual-listed firms of 2016) (retrieved on December 20, 2017). Initially we found that out of the 791 foreign firms, only 99 of them have a controlling shareholder holding 30% or more of the firm's outstanding shares. To get the full picture of the number of firms with a controlling shareholder, we also examined firms that are controlled through a dual-stock structure. Thirty-three of the firms examined have such a structure, from which only one in thirteen firms there is a controlling shareholder.

169. *See, e.g.*, Kastiel, *supra* note 167, at 125-26 (finding that in the Russell 3000, there are 529 companies with shareholders holding 30% of the votes, which constitute 17% of the companies on the index).

170. Becht et al., *supra* note 145, at 2968.

171. *Id.*

172. *See supra* note 149 (providing the example of Elliott Management, which engaged with multiple German targets).

presented in this Section. We also highlight a number of interesting avenues for future research on hedge fund activism with foreign companies.

IV. Implications

A. Implications for Competition Between Exchanges

The globalization of financial markets has a great impact not only on issuers but also on regulators and exchanges. The mobility of corporations in a global world enables them to "mix and match" regulatory arrangements, which in turn affects regulators and exchanges that compete to attract corporations. This global regulatory competition framework has been applied to various fields, such as environmental regulation,[173] tax,[174] and, of course, corporate and securities regulation.[175]

In a corporate regulatory setting, the corporation can mix and match elements from different jurisdictions and form its own regulatory package.[176] The possibility of listing stock in a different jurisdiction than the jurisdiction of incorporation or corporate residence is a key factor that enables a corporation to tailor regulations to their benefit. Most of the scholars that apply the framework of regulatory competition in the realm of securities regulation have viewed its basic dynamic as eliminating excess regulation and lowering regulatory standards. Some scholars have suggested an "issuer choice" approach, under which a firm could select its securities regulator from a list of American and foreign jurisdictions.[177] Other scholars who object to regulatory competition in the realm of securities regulation foresee it generating a race to the bottom, in which the willingness to attract foreign companies might cause exchanges to relax their listing standards.[178]

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173. *See, e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

174. *See, e.g.*, John D. Wilson, *Theories of Tax Competition*, 52 NAT'L TAX J. 269 (1999).

175. *See, e.g.*, Gillian Hadfield & Eric Talley, *On Public Versus Private Provision of Corporate Law*, 22 J. L. ECON. & ORG. 414, 419-20 (2006).

176. Regarding the possibility to mix-and-match in the tax context, see Tsilly Dagan, *Pay as You Wish: Globalization, Forum Shopping, and Distributive Justice* (June 10, 2014) (unpublished manuscript), http://ssrn.com/abstract=2457212 [https://perma.cc/MC6J-QRH3].

177. Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2427 (1998); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387 (2001). For a similar view, see Stephen Choi & Andrew Gozman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 922-24 (1997). An additional advantage of regulatory competition is its ability to decrease systematic risk in fields such as financial regulation. *See* Roberta Romano, *For Diversity in the International Regulation of Financial Institutions: Critiquing and Recalibrating the Basel Architecture*, 31 YALE J. ON REG. 1 (2014).

178. *See* Merritt Fox, *The Issuer Choice Debate*, 2 THEORETICAL INQUIRIES L. 563 (2001); *see generally* Lucian A. Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168 (1999).

The analysis in this Article further complicates this taxonomy. In particular, the proliferation of inversions and cross-listings could lead to a change in the dynamic of inter-exchange competition in two central aspects. To begin, since GADs provide a motivation for listing on an exchange other than liquidity concerns, it opens up the possibility that a large firm will choose to list at least some of its shares in a small exchange even when the small exchange does not have sufficient liquidity to satisfy the large firm's needs. A large firm could list the vast majority of its equity capital on a large exchange to satisfy its liquidity needs and the rest of its stock on a small exchange in order to obtain an effective GAD. While small exchanges will not be able to attract large firms as the locus of the firm's primary listing, they may be able to acquire portions of these firms by shifting the listing location of a small, but still sizable, amount of stock [179]

Furthermore, issuers' demand for GADs could incentivize foreign exchanges and regulators to supply these devices. There are several ways in which exchanges and regulators could induce cross-listing by offering a legal framework that enhances the operation of GADs. First, regulators of foreign jurisdictions could adopt entrenchment mechanisms such as the *stichting* mechanism used in the Netherlands, which provides firms that decide to re-incorporate in a foreign jurisdiction with powerful protections against hostile bids.[180]

Second, foreign regulators could eliminate or minimize the exemption for filing a prospectus in a foreign jurisdiction[181] so that a hostile bidder will be forced to make a public offering to holders of shares traded in the foreign exchange even if they hold an extremely small fraction of the firm's equity capital. At the extreme, foreign regulators could also state that any open offer of shares to its citizens would be considered as a public offering and would be subject to the disclosure requirements of the foreign jurisdiction.[182]

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179. If large firms are more likely to list a fraction of their equity capital in smaller exchanges, then domestic investors who invest through foreign large exchanges may reinvest through the local small exchange for diversification. This potential change in the behavior of investors could affect the liquidity in each type of the exchanges: increasing the liquidity in small ones and decreasing the liquidity in large ones.

180. Recently, the *stichting* has become a tool of choice for multinational corporations to protect against a hostile takeover. *See supra* notes 55-57 and accompanying text.

181. In the United States, for instance, if a target is a foreign private issuer and U.S. security holders hold ten percent or less of the class of securities sought in the offer, the bidder is not required to comply with the specific disclosure provisions of the U.S. tender offer rules. *See Cross-Border Business Combination Transactions*, *supra* note 37, at 2. Other jurisdictions can have more restrictive arrangements in place. For instance, the principle of equal treatments of target's shareholders, provided for by the EU Takeover Directive, severely limits the ability of a bidder to exclude foreign shareholders. *See* Mucciarelli, *supra* note 37, at 13-15.

182. This could lead to an absurd requirement that a large share of the most significant mergers and acquisitions in the United States will require a prospectus in a third country because a few shareholders of the target firm are residents of that third country. For example, in the Merger of Bank of America and Merrill Lynch, Bank of America sent a letter to the Israel Securities Authority to inquire whether it would need to publicize a prospectus in Israel. *See Response of Securities Authority to Bank of America's Inquiry from Oct. 12, 2008*, ISR. SEC. AUTH. (Oct. 12, 2008), http://www.isa.gov.il/Download/IsaFile_4177.pdf [https://perma.cc/SWG3-MW82]. Bank of America

Third, regulators and exchanges could complicate, or even enhance, disclosure requirements in order to provide potential targets with protections from hostile bidders or activist shareholders. For instance, regulators could adopt early disclosure requirements for accumulation of ownership stake, and thereby imposing significant costs on future potential activist shareholders.

Finally, different exchanges could have regulations that would attract different types of target firms interested in GADs. For example, in the Perrigo-Mylan case noted above, one of the hurdles Mylan faced was that it had a poison pill and two separate classes of securities.[183] Since Israeli law prohibited the use of dual-class stock, and there was ambiguity as to whether that law also applies to poison pills, that prohibition hindered Mylan's ability to smoothly list its shares on the TASE.[184] Therefore, exchanges that ban firms with antitakeover provisions will be attractive to targets that are anticipating hostile bids from firms that do have such provisions. Thus, the market for GADs could be fragmented according to the various features of the potential targets and the potential bidders.[185]

B. Policy Implications

In this Part, we will point to three central measures that regulators and investors who are interested in limiting the antitakeover effect of GADs could take.

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offered Merrill Lynch shareholders shares of its stock as part of the merger. *See* Matther Karnitschnig, Carrick Mollenkamp & Dan Fitzpatrick, *Bank of America, Merrill Lynch in Merger Talks*, WALL ST. J. (Sept. 14, 2008 8:01 AM), https://www.wsj.com/articles/SB122142278543033525 [https://perma.cc/H9S4-YVQY]. The Israeli Securities Law defines *any* offer made to more than 35 of its residents as a public offer that requires a prospectus. *See* Securities Law, §15(a), *supra* note 18. This raised a question as to whether this merger would require a prospectus in Israel. The Securities Authority published a decision that exempted firms from this requirement when the firm making the offer has no special relationship to the state and no special marketing efforts were exerted in relation to Israeli shareholders. *See Decision in the Corporate Domain no. 2008-0: When Does an Offering of Rights, Barter Acquisition Offer or Stock Tracing as Part of a Merger by a Foreign Firm, Will Not Count as a Public Offer According to the Securities Law*, ISRAEL SEC. AUTH. (Oct. 22, 2008), http://www.isa.gov.il/sites/mt/Download/IsaFile_3333.pdf. While in this case no requirement for a prospectus was imposed, it demonstrates the reach of a foreign securities law and how it could be utilized even as it relates to firms that have no direct connection to the state.

183. CC (TA) 40274-09-15 Perrigo Co. v. Mylan N.V. (Takdin), at 21 (2015) (Isr.).

184. *Id.*

185. Even given these limitations, the scope of the protection is wider than what it seems. Protecting from potential acquirers that have an antitakeover measure covers a large array of the potential threats for the target. Empirical findings indicated that firms with antitakeover provisions are more likely to be a bidder. *See* Jarrad Harford et al., *The Sources of Value Destruction in Acquisitions by Entrenched Managers*, 106 J. FIN. ECON. 247, 248 (2012). Furthermore, even if such protections do not cover all takeover threats, they tend to distinguish between the "bad bidders" that will not add value to the firm and "good bidders" who may add value. *See* Mark L. Mitchel & Kenneth Lehn, *Do Bad Bidders Become Good Targets*, 98 J. POL. ECON. 372 (1990); David Offenberg, *Firm Size and the Effectiveness of the Market for Corporate Control*, 15 J. CORP. FIN. 66 (2009). Thus, by enabling only firms without antitakeover measures to takeover listed firms, the exchanges make sure that the disciplinary mechanism of taking over the bidder will be effective.

1. Alerting Market Participants

The antitakeover and anti-activist element that GAD generates is not immediately apparent.[186] This is in contrast to traditional antitakeover measures such as poison pills and staggered boards.[187] As a result, investors, advisory firms, and regulators do not exert pressure against a firm's decision to cross-list even when they strongly object to other antitakeover and anti-activist measures.[188] Moreover, they mostly view cross-listing decisions positively due to their advantages for shareholders.[189]

The fact that the antitakeover and anti-activist dimension of cross-listing and inversions is widely ignored is reflected in the questionnaires advisory firms use to rank the quality of firms' corporate governance. In a typical questionnaire section regarding takeover defenses, there is no reference to cross-listing or foreign incorporation.[190] A World Bank affiliate's report on corporate governance scorecards overlooks cross-listing or foreign incorporation in its analysis of antitakeover measures.[191] As noted above, academic corporate governance indexes such as the Entrenchment Index and G-Index also ignore the effect cross-listing or foreign corporate residence may have on the antitakeover or anti-activist defense level of the firm.[192]

One major goal of this Article is, therefore, to increase the awareness of market participants of the use of cross-listing and foreign incorporation as an antitakeover and anti-activist measure. Advisory firms' questionnaires should determine whether the company is cross-listed and in what exchange. They should also inquire regarding the exposure of the firm to foreign legal norms and their potential effect on takeovers and activist engagement. In advising shareholders regarding a vote for hiring or laying off a director, they should take into account his or her role in a decision of a GAD-suspicious cross-listing.

Academic governance indexes should also analyze and track GADs' potential effects, as these indexes have a pivotal role in influencing parameters of advisory firms. As academic studies find more evidence of the defensive impact of cross-listing and exposure to foreign legal systems, advisory firms will

186. *See supra* Section I.D.1.

187. *See id.*

188. *See infra* notes 190-192.

189. *See supra* notes 90-92.

190. *See* INSTITUTIONAL SHAREHOLDER SERVICES, ISS QUALITYSCORE: OVERVIEW AND UPDATES, NOVEMBER 2016, at 47-70 (2016), https://www.isscorporatesolutions.com/file/documents/QualityScore%20Techdoc%20Nov2016.pdf [https://perma.cc/6QT2-4BG6] (including seven relevant factors, none of which implicate GADs).

191. CORPORATE GOVERNANCE SCORECARDS: ASSESSING AND PROMOTING THE IMPLEMENTATION OF CODES OF CORPORATE GOVERNANCE, INT'L FIN. CORP. 64 (2014) (failing to mention cross-listing or corporate residence on the Vietnamese scorecard).

192. *See supra* notes 78-79.

have a greater tendency to incorporate this dimension in their recommendation and governance metrics, and vice versa.

2. Global Cooperation

Cross-listing and inversions motivated by GAD considerations could be curtailed by international cooperation of exchanges or jurisdictions. Regulators and exchanges could agree to streamline the process of extending offerings to shareholders in another jurisdiction. This could be done through standardization of lower disclosure and other governance requirements for extending an offer to shareholders on other exchanges. For example, the Euronext only requires a U.S. cross-listed firm to file the firm's annual 10-K or 20-F U.S. form together with a minimal prospectus summary, which can use the U.S. GAAP accounting standard as opposed to IFRS.[193] It could also be done by a multilateral arrangement, as with the United States and Canada stipulating a waiver from soliciting the votes in two different exchanges if the percentage of shares held in the secondary listing place falls below a certain threshold.[194]

An international standard for exchanges is a network product. Participation in a network confers significant benefits on actors within the network, increasing their compatibility with other users.[195] By deviating from the accepted standard, the actor will be isolated from the network and lose the benefits that stem from participation in the network. A similar effect is found in the tax context: even though the interests of developing countries and developed countries regarding international taxation are different, developing countries still adopt the international taxation standards developed countries prefer in the treaties they sign.[196] This is mainly because they want to be part of the network to which the developing countries belong. The same can be true for exchanges and jurisdictions that may benefit from supplying GADs: the cost of deviating from the common standards of the network of exchanges may be greater than the benefits.

3. Selective Application of the Enhanced Business Judgment Rule

An additional venue for addressing GADs is the application of judicial review. As mentioned above, one of the main features of GADs is that they are unlikely to be exposed to judicial review through the application of the enhanced

193. *Fast Path*, EURONEXT, https://www.euronext.com/nl/listings/international-listings/fast-path [https://perma.cc/DT7X-YBDS].

194. 17 C.F.R. § 240.13e-4(g) (2018).

195. Michael L. Katz & Carl Shapiro, *Network Externalities, Competition & Compatibility*, 75 AM. ECON. REV. 424 (1984).

196. For example, the BEPS agreement for the sharing of information between jurisdictions regarding taxpayers serves the interests of developed countries but does not serve the interests of developing countries. *See* Tsilly Dagan, *Tax Treaties as a Network Product*, 41 BROOK. J. INT'L L. 5 (2016).

business judgment rule (EBJR).[197] This is in contrast to the adoption of conventional antitakeover and anti-activist mechanisms, which are covered by the EBJR.[198] Although it would be problematic to apply the EBJR to all cross-listings and corporate inversions, it may be possible to apply it to certain suspicious cross-listings and inversions, in which circumstances clearly point to an anti-activist motive behind the firm's actions. Certain jurisdictions may "specialize" in providing a GAD mechanism, especially when they have nothing else substantial to offer firms, such as significant liquidity or increased visibility.[199] The SEC can identify such jurisdictions, and the EBJR could be extended to cover decisions to list or perform a conversion in such jurisdictions.

This expansion of judicial review strikes a balance between the desire to tighten regulation on the potential utilization of GADs without imposing stricter judicial review on all decisions to cross-list. However, the efficacy of such a measure depends on whether it is possible to identify jurisdictions in which the cross-listing or inversion activity is "GAD-driven."

V. Conclusions

This Article explores a "hidden" mechanism that provides management with additional insulation from market disciplinary forces: the global antitakeover device. The potential economic impact of GADs is significant, as a surprisingly large percentage of firms traded on U.S. exchanges are incorporated outside the U.S. or are dual-listed. Therefore, any hostile engagement with these firms is also subject to foreign law and creates complexity, time delay and uncertainty. Moreover, the impact of these global devices might extend beyond the corporate control market, as GADs could also create a partial insulation from the most important disciplinary force in the U.S. capital market: activist hedge funds. Nonetheless, its defensive impact has flown under the radar of academics, courts, investors, and advisors.

Our analysis also raises an important policy question for future research: what measures should regulators and investors, who object to the use of antitakeover mechanisms, take in order to mitigate the impact of GADs? We have offered three type of solutions: increased awareness of the potential impact of GADs by market participants and academics; enhanced judicial scrutiny of cross-listing and foreign incorporation decisions; and international cooperation. In future work, we hope to analyze more closely how each of these solutions, particularly international cooperation, should be tailored in order to address GADs.

197. *See supra* notes 81-85.
198. *See supra* note 81.
199. *See supra* notes 184-185 and accompanying text.