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> [S]tudies have found that when a U.S. issuer lists abroad on a foreign exchange, its shares exhibit negative abnormal returns. This negative movement may be because the market expects that the foreign listing will facilitate undetectable insider trading on the foreign exchange or other conduct impermissible in the United States.[1]

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1. John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 Nw. U. L. Rev 641, 674–5 (1999) [hereinafter *Future as History*].

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Introduction

India has already seen the first listing by a foreign-domiciled issuer on the National Stock Exchange of India (NSE), via Standard Chartered Bank PLC's Indian Depositary Receipt (IDR) initial public offering in May of 2010.[2] In the People's Republic of China (PRC or China), the China Securities Regulatory Commission (CSRC) and the Shanghai Stock Exchange seem poised to establish an "international board," allowing non-PRC[3]-domiciled issuers to conduct initial public offerings (IPO) into the purely domestic Chinese equity markets.

These proposed and accomplished listings by foreign firms in India, China, and some other emerging markets may seem surprising. Indeed, much of the discussion of cross-listing— the practice of firms from one country listing in another country—has focused on listing by non-United States and non-U.K. firms on U.S. and U.K. exchanges. Cross-listing in the latter direction may be motivated by a number of considerations, but one that seems to have captured a great deal of attention is the desire of foreign firms to be subject to the corporate and securities laws and enforcement of the U.S. and the U.K., which may be perceived as being stronger than those in their own country. This theoretically allows such firms to signal that they can meet these higher standards, which in turn may attract some investors who are willing to pay a higher price.[4] This account—commonly known as the "legal bonding" hypothesis—does not intuitively suggest that U.S. or U.K. firms would want to list in jurisdictions in the opposite direction, such as in India or China. Listing in a country perceived to have weaker investor protections might send a correspondingly negative signal. Yet the world has already seen these listings in the opposite direction, and we anticipate such transactions will only increase in the future.[5] Accordingly, these types of cross-listings (which we call "reverse cross-listings") may present something of a puzzle for analysts and theorists alike.

In this brief Article we ponder what reverse cross-listing may mean for (i) a more nuanced view of what drives the traditional "legal bonding" account, and (ii) a more complete picture of the motivations of those issuers seeking to raise capital in a foreign venue. Indeed, our analysis here reminds us that there are likely to be multiple important determinants of

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2. Press Release: Standard Chartered PLC Sets Indian Depository Receipt Price Band, Standard Chartered (May 23, 2010) (on file with author), *available at* https://www.sc.com/in/news-media/pdf/2010_25_may_standard_chartered_plc.pdf.

3. As will be readily understood in the context of this article, we do not include the Hong Kong Special Administrative Region (Hong Kong) within the defined term "PRC" or "China", even though Hong Kong became an integral part of the sovereign PRC after July 1, 1997. Under the promise of "One Country-Two Systems" and the PRC Hong Kong Basic Law, the Hong Kong legal system, foreign exchange system and capital markets remain largely separate from the equivalent systems and markets of the rest of the PRC (what many people in Hong Kong refer to as the "mainland" or "mainland China").

4. *See* Marcelo Bianconi & Liang Tang, *Cross-listing Premiums in the US and UK Destination*, INT'L REV. OF ECON. & FIN., 244, 248 (2010).

5. *See* Felix Salmon, *Chart of the Day: When U.S. Companies IPO Abroad*, REUTERS BLOG (May 27, 2011), http://blogs.reuters.com/felix-salmon/2011/05/27/chart-of-the-day-when-us-companies-ipo-abroad/.

an issuer's choice of where to list in our truly global capital markets. These include (i) the simple quest for capital from any available capital market; (ii) the possibility of obtaining higher initial valuations in capital controls-segmented markets, with the promise of higher secondary market trading values upon achieving enhanced global liquidity; (iii) the desire for capital in local currency (especially where the local currency is not fully convertible and the foreign issuer has significant investments and operations in the country); (iv) attempts to list in a market with a less burdensome regulatory environment; and (v) what we call "consumer-commercial markets bonding."

Here we explore the concept of consumer-commercial markets bonding in greater depth, as it may play a critical role in understanding the likelihood of reverse cross-listing in India, China, and other similar markets. Our notion of this kind of consumer-commercial markets bonding includes (i) the advertisement of products, services and corporate identity; (ii) identification of the issuer as a global firm with a local identity and ownership; (iii) demonstrated commitment to key products markets as well as customers and regulators in those markets; (iv) a "tipping of the hat" to the sovereign and legal-regulatory establishment governing the receiving market; and (v) an appeal to the receiving market's regulators for the provision of franchising or licensing benefits.[6] It is indeed conceivable that, for 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.

We should note that we are cognizant of how problematic terms like "developing" and "developed," "emerging" and "mature," and "well-regulated" and "un-" or "badly-regulated" are when applied to national jurisdictions, their legal and regulatory systems, and political economies.[7] Accordingly, we prefer to distinguish countries with "better or stronger *perceived investor protections*" from those with "weaker *perceived investor protections*." We are referring, of course, to more than the formal laws and regulations related to investor protection. Specifically, we are trying to capture differences in the common perceptions of how corporate governance and market regulation systems are implemented, enforced, and followed.[8] Thus, we will include the U.S. and the U.K. under the category of jurisdictions with better investor protections, and India and China under the category of nations with weaker investor protections—evaluations captured in

6. *See generally Capital Markets in 2025: The Future of Equity Capital Markets*, PwC IPO Centre (Oct. 17, 2011), at 2, *available at* http://www.pwc.com/capitalmarkets2025 (predicting future growth in Asia as companies look to benefit from the "associated profile" listing there may provide).

7. *See Rethinking the "Third World": Seeing the World Differently*, The Economist (June 12, 2010), *available at* http://www.economist.com/node/16329442.

8. This could also include evidence of general transparency; legislative/regulatory design competence; predictability, consistency, fairness, technical competence, and efficiency in application; general conformity with rule of law principles; independence from political considerations; robust and unbiased enforcement against bad market actors of whatever political or economic background; and levels of corruption.

broadly-accepted indices.[9]

However, we are aware of how many of these perceptions may not be fully accurate, or are exaggerated. For example, it is not the case that the U.S. and the U.K. have been immune from scandals and market manipulations; the experience of the last 13 years clearly belies such a belief. Moreover, the ease with which investors can seek redress before the judicial system or regulatory agencies of the United States appears to be diminishing if one takes into account recent decisions by the United States Supreme Court such as *Stoneridge*[10] and *Morrison*.[11] Conversely, both of us have written on the ways in which India's and China's developing markets, for example, are better governed than is commonly assumed and have been taking steps to enhance effective investor protection.[12] Notwithstanding these developments, a great deal of the discourse in this area is predicated on those commonly-held perceptions.[13] Accordingly, we will use these terms to identify the jurisdictions we invoke and analyze.

Finally, we want to be clear about what we do *not* address in this Article. First, we do not rehearse the many reasons why weaker perceived investor protection markets like India and the PRC have a strong desire for direct listings by issuers from jurisdictions with greater investor protections. Second, we discuss only issuers domiciled and truly headquartered in stronger perceived investor protection jurisdictions who engage in reverse cross-listing. Thus, we do not discuss situations where, for instance, Russian firms might cross-list into India or China[14] (because Russia is perceived to have weaker investor protection than the U.S. or U.K.)[15], or where firms with business primarily in India or China, but officially domiciled in a stronger perceived jurisdiction (e.g., Hong Kong or Bermuda), cross-list in India or China,[16] or where issuers from stronger perceived jurisdictions list in, for example, Hong Kong[17] (which is associated with stronger investor protections). Third, we do not rehearse the discourse in the United States as to why cross-border capital raising appears

9. *See, e.g.*, *Protecting Investors*, World Bank Group (June 2013), http://www.doingbusiness.org/data/exploretopics/protecting-investors.

10. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc. 552 U.S. 148 (2008).

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

12. *See infra* note 68 and accompanying text.

13. *See, e.g.* World Bank, *supra* note 9.

14. For example, the 2010 US $2.6 billion IPO and listing on the Hong Kong Stock Exchange (HKSE) of Russia's United Company RUSAL. Andreea Papuc, ed., *Rusal Raises $2.24 Billion in Hong Kong IP (Update 1)*, Bloomberg (Jan. 25, 2010), http://www.forbes.com/2010/01/21/rusal-ipo-deripaska-markets-equities-hong-kong.html.

15. World Bank, *supra* note 9.

16. For example, the Shanghai Stock Exchange IPOs of several foreign domiciled PRC-controlled "Red Chips," like China Mobile.

17. For example, Standard Chartered Bank's longtime listing on the HKSE, or Prada's US$ 2.14 billion IPO and listing on the HKSE in 2011. Bettina Wassener, *Prada's I.P.O. Debuts in Hong Kong Amid Investor Jitters*, N.Y. Times (June 23, 2011), http://dealbook.nytimes.com/2011/06/23/pradas-i-p-o-debuts-in-hong-kong-amid-investor-jitters/?_r=0.

to have turned away from the U.S.,[18] or why some foreign private issuers have sought to de-list from U.S. exchanges.[19] It is often asserted, somewhat ironically in the context of this article, that this is the result of the burdens of over-regulation in the United States.[20] Instead, our narrow focus here is on issuers, originating from jurisdictions that are perceived to have stronger investor protections, seeking to raise capital and have their equity publicly-listed in jurisdictions with weaker perceived investor protection. This might be viewed as consistent with an emphasis on an "issuer choice" analysis[21] as well as being responsive to the assumed directional vector of the "legal bonding" hypothesis (i.e., rest-of-world issuers listing on U.S. or U.K. exchanges).

I. The "Legal Bonding" Hypothesis

The "legal bonding" hypothesis has a long and distinguished history. Over two decades of theoretical and empirical work across countries has led to accretions, alterations, and refinements of the hypothesis.[22] Indeed, judging from the recent literature grappling with the concept,[23] the "legal bonding" hypothesis continues to have real force and relevance. For the purposes of this article, it is instructive to go back to the earliest theoretical articulations of what the "legal bonding" motivation/effect was supposed to be in the 1990s – the heyday of cross listings to the U.S. In his seminal

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18. *See, e.g.*, MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP 12 (2007).

19. *Id.* at 50.

20. *See, e.g.*, *Interim Report of the Committee on Capital Markets Regulation*, COMMITTEE ON CAPITAL MARKETS REGULATION (2006), *available at* http://capmktsreg.org/app/uploads/2014/08/Committees-November-2006-Interim-Report.pdf; BLOOMBERG & SCHUMER, *supra* note 18, at 15.

21. "Issuer choice" analysis is the idea that capital formation operates most efficiently when issuers are allowed to choose the (national) regulatory regime applicable to them, rather than being subject to exclusive regulation applied pursuant to territorial-based jurisdiction. *See* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity, Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 921 (1997-1998).

22. *See* Gordon Alexander et al., *Asset Pricing and Dual Listing on Foreign Capital Markets: A Note,* 42 J. FIN. 151 (1987); Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA J. INT'L. L. 563 (1998); Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675 (2002); 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 (2002) [hereinafter *Racing to the Top*]; Amir N. Licht, *Cross-listing and Corporate Governance: Bonding or Avoiding*, 4 CHI. J. INT'L. L. 141 (2003); Craig Doidge et al., *Why Are Foreign Firms Listed in the U.S. Worth More?*, 71 J. OF FIN. ECON. 205 (2004); Amir N. Licht, Li Xi & Jordan I. Siegel, *What Makes Bonding Stick? A Natural Experiment Involving the Supreme Court and Cross-listed Firms*, Harvard Business School Working Paper 11-072 (2011).

23. *See* John Ammer, Sara B. Holland, David C. Smith & Francis E. Warnock, *Why Do U.S. Cross-Listings Matter?*, Bd. of Governors of the Fed. Reserve Sys., Int'l Fin. Discussion Papers No. 930 (May 2008); Licht, Li & Siegel 2011, *supra* note 22; Steven S. Crawford, *The Role of Market Forces and Legal Institutions in Bonding Cross-listed Firms* (Rice University, Working Paper, 2011).

1999 article, John Coffee tried to counter anxiety about a potential transnational "race to the bottom" in both the corporate governance and securities regulation spheres with the introduction of a "legal bonding" hypothesis, which he summarized as follows:

> Large firms can choose the stock exchange or exchanges on which they are listed, and in so doing can opt into governance systems, disclosure standards, and accounting rules that may be more rigorous than those required or prevailing in their jurisdiction of incorporation. This process of migration may over time prove to be as important as the standard American interjurisdictional competition for corporate charters. In theory, migration should give rise to a form of regulatory arbitrage, under which firms seek to play one legal regime against another by threatening to migrate to less "regulatory" jurisdictions. *Yet, the most visible contemporary form of migration seems motivated by the opposite impulse: namely, to opt into higher regulatory or disclosure standards and thus to implement a form of "bonding" under which firms commit to governance standards more exacting than that of their home countries.*[24] [emphasis added]

Professor Coffee further speculated on the reasons why foreign firms, even those that have never offered or issued securities in the U.S., might make the very costly election to list on a U.S. stock exchange. These reasons may include (i) gaining liquidity (especially for issuers confined to smaller markets); (ii) the pursuit of international recognition and/or prestige; (iii) raising additional capital; (iv) increasing share value; and (v) the creation of currency (U.S.-listed stock) for U.S.-focused acquisitions.[25]

Professor Coffee then suggested that the "bonding" effect may play a critical role:[26]

> But greater motivation probably lies in the finding, repeatedly observed by financial economists, that the announcement of a dual listing on a U.S. exchange by a foreign firm typically increases the firm's share value . . . .One explanation . . . is that such a listing represents a bonding mechanism: the foreign issuer is increasing the share value of its public shares by agreeing to comply with the generally higher disclosure standards that prevail in the United States. Some evidence supports this interpretation, as opposed to the explanation that dual markets simply increase the demand for stock, because other studies have found that when a U.S. issuer lists abroad on a foreign exchange, the opposite occurs: its shares exhibit negative abnormal returns. This negative movement may be because the market expects that the foreign [i.e., non-U.S.] listing will facilitate undetectable insider trading on the foreign exchange or other conduct impermissible in the United States.[27]

Finally, Coffee speculated on a final reason for this apparent "race to the top" style of regulatory arbitrage, at least for newer firms: the issuer's home

24. Future as History, *supra* note 1, at 651–52.
25. *Id.* at 673–74.
26. Per Coffee, coined by economists Michael Jensen and William Meckling in a seminal 1976 article. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 325 (1976).
27. Future as History, *supra* note 1, at 674–75.

market evidences a relative lack of legal protections for minority shareholders, making it difficult for such companies to win the trust and confidence of investors (whereas older companies are asserted to have higher reputational capital, a substitute for the weakness in legal protections).[28] Subsequently, Professor Coffee developed his views to focus on how and why firms with concentrated, rather than dispersed, ownership structures act across global capital markets.[29]

The mature form of the "legal bonding hypothesis" can thus be summarized as follows:

- Cross-listing on a U.S. exchange commits the foreign issuer to respect minority rights and to provide for fuller disclosure.[30] This is because:
  - The foreign issuer becomes subject to the enforcement powers of the United States Securities and Exchange Commission (SEC);[31]
  - Investors acquire the power to exercise effective and low-cost legal remedies, such as class actions and derivative actions,[32] that may not be available in the issuer's home jurisdiction;[33]
  - Entry into the markets of the United States commits the firm to provide fuller financial information per SEC requirements and to reconcile financial statements to the generally accepted accounting principles (GAAP) followed in the United States;[34]
- Foreign issuers become subject to the scrutiny of U.S. reputational intermediaries or gatekeepers,[35] including underwriters, accountants,

28. *Id.* at 678–79.

29. To predict that "those firms that decline to migrate to "high disclosure" exchanges will be disproportionately those with controlling shareholders who prefer to maximize their receipt of the private benefits of control rather than to maximize the share price of their firms' publicly-held minority shares." *See Racing to the Top*, *supra* note 22, at 1765. In our view, there is an unstated corollary to the prediction: that even some issuers from concentrated ownership jurisdictions will be willing to bear the costs, liability risks and regulatory risks of a U.S. listing if the other benefits (reputational, liquidity enhancing and price effects) are substantial enough. This is certainly what occurred with the initial listings by PRC corporatized state-owned enterprises like Shanghai Petrochemical (via a Hong Kong Stock Exchange listing backed into a U.S.-listed ADR program) and then Shandong Huaneng Power Development (direct IPO and listing on the NYSE) in 1992–1994. *See generally* Mark S. Bergman, Richard S. Borisoff, & Nicholas C. Howson, *First Direct Listing for Chinese Company in New York*, 13 INT'L. FIN. L. REV. 41 (1994).

30. *Racing to the Top*, *supra* note 22, at 1780.

31. *See id.*

32. Although listing in the U.S. by a non-U.S. issuer may subject the firm to the risk of U.S. securities fraud class actions, it is not clear to us how a U.S. listing by a non-U.S. issuer incorporated in a jurisdiction that does not have a corporate derivative action can subject the board of directors of that company to a derivative action authorized and available under U.S. state law.

33. *See generally* Donald Clarke & Nicholas Calcina Howson, *Pathway to Minority Shareholders' Protection - Derivative Actions in the People's Republic of China*, and Vikramaditya Khanna & Umakanth Varottil, *The Rarity of Derivative Actions in India: Reasons and Consequences*, *in* THE DERIVATIVE ACTION IN ASIA 243, 369 (Dan W. Puchniak et al. eds., 2012).

34. *See generally Mergers & Acquisitions - a Snapshot*, PwC (Apr. 7, 2014), *available at* http://www.pwc.com/en_US/us/cfodirect/assets/pdf/ma-snapshot-cross-border-navigating-sec-reporting.pdf

35. Coffee was of course writing before Enron, WorldCom, the Global Financial Crisis of 2008, or the very strict 2014 SEC enforcement action against global but U.S. or

credit rating agencies and securities analysts;[36] and

- Foreign issuers will become subject to U.S. exchange-imposed[37] corporate governance-related requirements.[38]

It is the insights and the style of thinking implicit in this theory, even as subsequently critiqued,[39] that we use to inform our initial analysis of the potential coming trend in transnational securities offerings. That trend will see issuances and listings in non-U.S. jurisdictions move in precisely the opposite direction—public capital raising transactions by issuers going from perceived stronger investor protection jurisdictions to weaker perceived investor protections—in India and the PRC.

U.K.-headquartered accountancy firms in connection with their flawed audits (and refusal to give up work papers) regarding a number of indirect offerings tied to PRC assets. For the last event, see the SEC administrative law judge decision, *available at* http://sec.gov/alj/aljdec/2014/id553ce.pdf.

36. *See The Dodd-Frank Act and Foreign Private Issuers: U.S. Financial Reform Creates New Risks and Obligations for Foreign Businesses Listed in the United States or Otherwise Subject to SEC Reporting Requirements*, MINTZ LEVIN SECURITIES ADVISORY (Jan. 18, 2011), *available at* http://www.mintz.com/newsletter/2011/Advisories/0856-0111-NAT-SEC/web.htm.

37. Coffee was also writing before the passage of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (SOX), and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1376 (Dodd-Frank), and the rise of what some critics have called "quack corporate governance," or corporate governance-related mandates imposed via securities regulation. *See*, for example: Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1 (2002); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too,* 22 GA. ST. U. L. REV. 251 (2005); Larry E. Ribstein, *Sarbanes-Oxley After Three Years*, 3 N.Z. L. REV. 365 (2005); and Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1781 (2010 – 2011). The critique is not unanimous or entirely despairing, however; *see, e.g.,* Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise is the Received Wisdom?*, 95 GEO. L.J. 1845 (2006-7) (contesting the Romano critique of SOX point by point); John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1022-26 (2012) (dubbing the "quack corporate governance" complainants a "'Tea Party Caucus' of corporate and securities law professors"); Mark J. Roe, *Delaware's Competition*, 117 HARV. L.REV. 588, 601-607 (2003); and Clark, *supra*, at 290 (asserting that Delaware is quite up to the challenge presented by encroaching federal securities regulation).

38. *See Racing to the Top*, *supra* note 22, at 1779–83.

39. *See*, for example, Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L 141, 142 (Spring 2003) ("Based on a comprehensive review of the literature, I argue that the [bonding role of cross-listing] has been greatly overstated. A large body of evidence, using various research methodologies, indicates that the bonding theory is unfounded. Indeed, the evidence supports an alternative theory, which may be called the "avoiding hypothesis." To the extent that corporate governance issues play a role in the cross-listing decision, it is a negative role. 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 whose effect is either to deter issuers from accessing better-regulated markets or to induce securities regulators to allow foreign issuers to avoid some of the more exacting domestic regulations.").

II. Issuers from Stronger Perceived Investor Protection Jurisdictions IPO in India

Since 2000, Indian law has allowed foreign issuers to raise capital in India via the Indian Depository Receipt (IDR) program.[40] Moreover, a number of regulatory changes that facilitated IDRs were made between 2000 and 2009 by the various regulators (i.e., the Ministry of Company Affairs (MCA), Securities and Exchange Board of India (SEBI) and the Reserve Bank of India (RBI)).[41]

A foreign issuer may use the IDR program if it meets the requirements for a domestic issuer along with the following key requirements: (i) a track record of distributable profits for a minimum of three of the previous five years, (ii) a continuous trading history for the three immediately preceding years on its home country exchange, (iii) net tangible assets of at least Rs. 3 crore (approximately USD 500,000 at current exchange rates; a crore is 10 million rupees) in each of the three preceding years (they must be full years), (iv) net worth of at least Rs. 1 crore in each of the three preceding years (they must be full years), (v) no prohibition against the issuance of securities by any regulatory body, and (vi) a track record of compliance with securities regulation requirements in its home country.[42]

When engaging in an IDR offering, a minimum of 50% of the issue is to be allotted to qualified institutional buyers (QIBs), 30% to retail individual investors, and the remainder to non-institutional investors and employees.[43] IDRs can be converted into equity shares in the foreign issuer after one year from the issuing of the IDR, but this is subject to other Indian laws—e.g., foreign exchange laws—that may hamper the IDR's fungibility.[44] Conversion from equity shares into IDRs is also available.[45]

As noted at the start of this article, only one firm has thus far under-

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40. *See* Section 605A, Companies Act 1956, Act No. 1 of 1956; Section 390, Companies Act 2013, *available at* http://indiacode.nic.in/acts-in-pdf/182013.pdf. We thank Yash Ashar, Partner, Amarchand Mangaldas & Suresh Shroff, Mumbai for helpful conversations on the process through which the Standard Chartered IDR occurred. Mr. Ashar was one of the lead attorneys on the behalf of Standard Chartered for the IDR.

41. *See* Companies (Issue of Indian Depository Receipts) Rules 2004; SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, Chapter VIA; SEBI Circular No. CFD/DIL/IDR/1/2006/3/4 (Model Listing Agreement for IDRs) [and update in 2009 and 2013]; Sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999; Issue of Indian Depository Receipts (http://rbidocs.rbi.org.in/rdocs/Notification/PDFs/APDIR5220709.pdf), Reserve Bank of India, July 22, 2009 [hereinafter *RBI Issue of IDR Rules*].

42. *See* Clause 26, Chapter III (Provisions as to public issue), SEBI (Issue of Capital and Disclosure Requirements) Regulations, Aug. 2009 (http://www.sebi.gov.in/Index.jsp?contentDisp=SubSection&sec_id=5_sec_id=5) Securities and Exchange Board of India (SEBI), Aug. 26, 2009.

43. *See* Reg. 2(1) of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

44. *See SEBI Unveils IDR Conversion Norms*, The Hindu, Mar. 2, 2013, http://www.thehindu.com/business/markets/sebi-unveils-idr-conversion-norms/article4466062.ece.

45. *See id.*

taken an IDR issuance—Standard Chartered Bank in 2010.[46] Its quite explicit motivation was not legal bonding, but instead something that more closely conforms to the thrust of this article: a signaling of its commitment to the Indian subcontinent and an effort to boost its foreign market visibility.[47] However, it should be noted that the Standard Chartered IDR was largely subscribed by Foreign Institutional Investors (who made up at least 85% of investors). Therefore, and perhaps contrary to appearances, the IDR did not succeed in creating a large base of *Indian* investors who owned Standard Chartered.[48]

Since then, there have been reports of other foreign firms considering an IDR (e.g., Vodafone, HSBC, Citibank), but they have not proceeded further at this stage. The lack of interest in further IDRs seems related to questions about fungibility,[49] tax uncertainty, and the requirements for allocating 50% of the IDR issuance to certain types of investors.[50] At present, IDRs are not automatically convertible into the underlying shares; SEBI now permits shareholders to convert IDRs into equity shares (and vice versa),[51] but conversion is only allowed upon RBI approval. In contrast, persons resident in India are allowed to hold the shares in order to sell within 30 days of the conversion.[52]

Recently, the Government of India has begun consideration of an expert committee report that suggests revamping the IDR program—including a new name of "Bharat Depository Receipts"—and opening up the possibility of more foreign firms cross-listing in India, amongst other changes.[53] The Government of India appears interested in promoting

46. *See id.*; *see* Shikhar Balwani, *A Slow Start for Standard Chartered IDR*, Wall Street J., June 11, 2010, http://blogs.wsj.com/indiarealtime/2010/06/11/a-slow-start-for-standard-chartered-idr/.

47. See *IDR Listing to Enhance StanChart's Commitment to India: CEO,* Business Standard, Mumbai Nov. 12, 2009, *available at* (http://www.business-standard.com/india/news/idr-listing-to-enhance-stancharts-commitment-to-india-ceo/13/37/78171/on).

48. *See* Standard Chartered Plc, Distribution Of Idr Holdings As On Quarter Ended December 31, 2013, (2013).

49. *See India Said to Limit Depository Receipt Swap at $5 bn*, Business Standard, July 5, 2012, *available at* http://www.business-standard.com/article/markets/india-said-to-limit-depository-receipt-swap-at-5-bn-112070500083_1.html.

50. *See SEBI*, *supra* note 41, Ch. 5 Clause 98 Conditions for Issue of IDR.

51. *See id.* Ch. 5 Clause 100 Fungibility.

52. *See* Procedure for Transfer and Redemption of IDRs, Reserve Bank of India, July 22, 2009.

53. *See Finance Ministry Panel Proposes New Class of Securities 'Bharat Depository Receipts'*, The Economic Times, June 26, 2014, http://articles.economictimes.indiatimes.com/2014-06-26/news/50884742_1_idrs-indian-depository-receipts-foreign-securities [hereinafter *BhDRs*]; *Sahoo Panel Moots Bharat Depository Receipts Framework to Reboot IDRs*, The Economic Times, June 27, 2014, http://articles.economictimes.indiatimes.com/2014-06-27/news/50912268_1_indian-investors-framework-company-secretaries [hereinafter *Reboot BhDRs*]. The reports referred to in the newspaper articles are: Ministry Of Finance, Government Of India, Report Of The Committee To Review The Fccbs And Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 (Nov. 2013) [hereinafter Sahoo_I], *available at* http://www.finmin.nic.in/reports/Sahoo_Committee_Report.pdf and then Ministry Of Finance, Government Of India, Report Of The Committee To Review The Framework Of Access To Domestic And

India as an international financial center and increasing options for Indian investors.[54] With these changes, it is quite likely that the stalled interest in IDRs/Bharat Depository Receipts would move into higher gear.

III. Issuers from Stronger Perceived Investor Protection Jurisdictions Raising Capital in the People's Republic of China

As of this writing, the PRC has seen nothing like the 2010 Standard Chartered Bank IDR IPO and listing on the NSE described immediately above. However, there has been a very rich discussion—for more than a decade—about the real possibility of establishing (i) a China Depositary Receipts (CDR) program pursuant to which non-PRC issuers would issue non-Renminbi yuan (RMB) -denominated China Depositary Shares to back CDRs listed on a Chinese exchange; these CDRs would be held and traded in RMB by PRC citizens, resident investors, or PRC-domiciled institutions (and of course Qualified Foreign Institutional Investors (QFIIs) permitted entry into the A share[55] markets); and (ii) an "international board" whereby non-PRC issuers might accomplish an IPO and listing on the Shanghai Stock Exchange of A shares.[56]

OVERSEAS CAPITAL MARKETS (PHASE II, PART I: INDIAN DEPOSITORY RECEIPTS) (June 2014) [hereinafter Sahoo_II], available at http://www.finmin.nic.in/reports/idr_report_2014 0609.pdf; THE CONSTITUTION OF INDIA Nov. 1949, Part 1, art. 1, *available at* http://law min.nic.in/olwing/coi/coi-english/coi-indexenglish.ht.

54. *See BhDRs, supra* note 53; *Reboot BhDRs, supra* note 53; *Sahoo_I, supra* note 53; *Sahoo_II, supra* note 53.

55. Without delving too deeply into the alphabet soup comprising PRC equity securities designations, "A shares" are RMB-denominated equity securities, issued by PRC-domiciled firms to PRC resident natural persons and PRC-domiciled legal persons (and foreign-domiciled QFIIs who participate in the RMB markets up to a given quota of exchange capital investment), and traded in RMB. They can be contrasted with what are known as "B shares," RMB-denominated equity securities issued by PRC-domiciled firms to foreign persons, foreign-domiciled legal persons, and, since February 2001, PRC natural and legal persons with authorized access to foreign exchange. Because of size and volume constraints imposed by foreign exchange capital account restrictions and a radical lack of liquidity, the B share markets have long been considered moribund, especially when compared to the A share markets. Finally, "H shares" (a market idiom used to describe all of the original "H" (or Hong Kong-listed) and "N" (New York-listed), "L" (London-listed), "S" (Singapore-listed), etc. shares) are equity shares listed by PRC-domiciled issuers on foreign (including Hong Kong) exchanges and traded in foreign currencies. The initiatives discussed in this article center on the opening up of the A share markets for *foreign-domiciled issuers*, matching in a sense what the QFII initiative did for the A share markets on the *foreign-domiciled investor* side, and to be distinguished on the *PRC-domiciled issuer* side from the dual A share/H share listings by major corporatized PRC state-owned enterprises.

56. For Shanghai listings by foreign-domiciled issuers, *see* Enoch Yiu, *Shanghai Bourse Studies Listing of Multinationals*, SOUTH CHINA MORNING POST (Nov. 19, 2007), http://www.scmp.com/article/616267/shanghai-bourse-studies-listing-multinationals; Stephanie Tong, *Whole Bank, Not Just HSBC China, for Shanghai Listing*, THE STANDARD (Dec. 15, 2007); Sundeep Tucker & Justine Lau, *Beijing Set to Encourage Foreign Listings*, FIN. TIMES (Jan. 18, 2008), http://www.ft.com/intl/cms/s/0/7954771a-c51b-11dc-811a-0000779fd2ac.html#axzz3F7AZFL5a; *NYSE Set to List on Shanghai Exchange*, SOUTH CHINA MORNING POST (April 15, 2008); *see* Li-Gang Liu, *How an International Board will Free up China's Stock Market*, CHINA DAILY (last updated Jan. 4, 2013), http://www .chinadaily.com.cn/bizchina/2013-01/07/content_16091877.htm; David Barboza,

While this was frequently in the news almost a decade ago, official and popular Chinese interest in a CDR program has recently faded.[57] That is because the long-standing PRC domestic investor appetite for the equities of non-PRC domiciled or listed but PRC-controlled issuers[58] was largely sated by two developments: (i) the increased repatriation of the PRC's corporatized state-owned enterprise issuers and their dual "H" and "A" share listings;[59] and (ii) the establishment of a PRC Qualified Domestic Institutional Investor (QDII) program in April 2006.[60] That appetite will only be further met with the imminent mutual recognition of investment funds between the PRC and Hong Kong, which will allow mutual funds domiciled in Hong Kong to sell interests directly to PRC investors (and, less importantly in the context of this writing, *vice versa*).[61] In short, fast moving regulatory developments providing a robust channel for PRC-domiciled

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Shanghai Exchange Finalizing Plans for Foreign Listings, N.Y. TIMES (Apr. 15, 2010), http://www.nytimes.com/2010/04/16/business/global/16exchange.html?_r=0; *Shanghai Mayor Says Timing Not Right for Exchange's International Board*, BLOOMBERG NEWS (Jan. 16, 2012), *available at* http://www.bloomberg.com/news/2012-01-16/shanghai-mayor-says-timing-not-right-for-international-board.html. For CDRs, *see* Zhang Jiwei, *CDR Zoufeng [CDR Whirlwind]*, 39 CAIJING MAGAZINE 58–60 (June 2001); Michael Wei & Jason Subler, *Reuters Summit - BNY Mellon Sees First China Depositary Receipt Listings Next Year*, REUTERS FIN. REGULATORY FORUM (Sept. 2, 2009), http://blogs.reuters.com/financial-regulatory-forum/2009/09/02/reuters-summit-bny-mellon-sees-first-china-depository-receipt-listings-next-year/.

57. *See Shanghai Mayor Says Timing Not Right*, *supra* note 56.

58. So-called "Red Chips" and/or indirect PRC issuers, organized and established under Hong Kong or foreign law, and/or only listed in Hong Kong or overseas which are really or primarily China businesses. *See generally* HONG KONG IPO GUIDE 2013 63 (LexisNexis 2013).

59. Contrast the transaction histories of China Mobile Limited, a Hong Kong-domiciled and Hong Kong Stock Exchange-listed (with ADRs on the NYSE) issuer, which issues shares that cannot be purchased on the PRC's domestic capital markets, and the Industrial and Commercial Bank of China, a PRC-domiciled issuer which effected simultaneous IPOs of H shares on the Hong Kong Stock Exchange and A shares on the Shanghai Stock Exchange.

60. *See* Y. Nancy Ni, *China's Capital Flow Regulations: The Qualified Foreign Institutional Investor and the Qualified Domestic Institutional Investor Programs*, 28 REV. BANKING AND FIN. L. 299, 316 (2009). In mid-2013, after reviewing the State Administration of Foreign Exchange (SAFE) website, one law firm reported that as of the end of June 2013, there were 112 PRC QDIIs holding over US$85 billion in overseas investments, with those QDIIs including 29 commercial banks, 47 securities companies and fund managers, 28 insurance companies and 8 trust companies. *See* Richard Mazzochi, Minny Siu & Hayden Finn, *KWM Connect: QDII - An Offshore Perspective*, KING AND WOOD MALLESONS, *available at*: www.kwm.com/hong-kong/documents/KWM_Connect_Jul_13_v4_LR.pdf.

61. Following on the heels of another pilot program started in September 2013, a Qualified Domestic Limited Partner (QDLP) program, whereby six foreign hedge funds were allowed to raise up to US$50 million in RMB yuan from PRC institutions slated for foreign investments. *See* David S. Wang, Yi Lu, Jenny Sheng & Coral Yu, *Hong Kong Based Funds May be Open to Investments from PRC Investors*, Paul Hastings LLP (January 8, 2014), *available at* www.paulhastings.com/Resources/Upload/Publications/China-Matters-Alert-on-Mutual-Recognition-Program.pdf. For the near-certain future path in this area, *see* Alexa Lam, Deputy Chief Executive Officer of the Hong Kong Stock and Futures Commission, Keynote Speech at the 7th Hong Kong Investment Funds Association Annual Conference (December 4, 2013), *available at* www.sfc.hk/web/files/ER/PDF/Speeches/Alexa_20131204.pdf.

retail and institutional investment in foreign equities and funds have overtaken, and will continue to overtake, the original need for a CDR program. The original CDR goals now appear too narrowly focused on individual foreign-issued equities for China's investment population.

Ambitions for a Shanghai "international board" are, conversely, still very much front and center in China's specialist and popular discourse. This attention is perhaps only increased by the PRC central government's acknowledged desire to make Shanghai into an "international financial center" by 2020 (as with India's recent reform proposals in a similar direction).[62] Indeed, the late 2013 announcement about the establishment of a new "China (Shanghai) Free Trade Zone" led to a frenzy in China and abroad about that Zone being approved as the venue for the Shanghai "international board."[63] The CSRC was forced to issue a categorical denial of any preparations or approvals regarding the establishment of the "international board" in or through the Zone through a Chinese social networking website, Weibo.

While it is true that there are abundant issues connected with the establishment of a viable "international board" at or under the Shanghai Stock Exchange,[64] perhaps the biggest difficulty stems from the continued constraints on convertibility of the RMB on the capital account. These restraints have operated since the very start of China's reform and opening to the outside world policy, and it appears that China is moving inexorably towards the final elimination of those constraints.[65] If and when those blocks are removed, there will be no significant obstacle to the implementation of an international board on the Shanghai Stock Exchange, nor on IPOs by specific non-PRC domiciled issuers directed towards the citizenry of China.

62. *State Council: Making Shanghai a New Global Financial Center*, People's Daily Online, March 26, 2009, http://english.peopledaily.com.cn/90001/90778/90857/90862/6623230.html.

63. *See*, *e.g.*, Shangjiaosuo Jiang Zai Zimaoqu Jiedao Tuichu Guojiban – Gushi Yingxiang Jiexi [Shanghai Stock Exchange Will Borrow the Free Trade Zone to Roll Out an International Board – Analyzing Effect on the Equity Markets], Hexun Net, Oct. 10, 2013, http://stock.hexun.com/2013-10-10/158598505.html.

64. *See generally* Qi Bin, Chen Yimin & Jiang Xinghui, *Jingwai Qiye Jingnei Shangshi De Zhanlue Sikao* [*Study on the Domestic Listings of Foreign Enterprises Strategy*], CSRC (May 2008), *available at* http://www.csrc.gov.cn/pub/newsite/yjzx/zbscycx/yjbg/200908/p020090806674870622611 (detailing the reasons for the initiative, the conditions already in place for it, issues that remain to be solved, and specific proposals designed to bring the idea to fruition).

65. See Mark Kruger, *Reform and Risk in the Chinese Financial System*, 2 China Inst. Occasional Paper Series 8 (May 2013), *available at* http://www.china.ualberta.ca/Research%20and%20Publications/~/media/China%20Institute/Documents/Publication/Occasional%20Paper/ChinaInstituteOccassionalPaper2-MarkKruger.pdf (alluding to a February 2012 People's Bank of China (PBOC) published report authored by the Director General of the PBOC Statistics Department entitled "The Time Is Right to Open the Capital Account.").

IV. Additional Transnational Capital-raising Hypotheses

A. Introduction

Given the contemporary developments sketched out above, and with the central tenets of the legal bonding hypothesis in mind, it is useful to consider some of the many reasons why foreign—and in particular widely-held—issuers from stronger perceived investor protection markets like the United States or the U.K. would seek an IPO and listing on a Chinese, Indian, or similar nation's exchange. This inquiry is useful for a more nuanced understanding of the legal bonding hypothesis in two ways. First, it may alter our perceptions about whether the primary reason for cross-listing is that securities issuers are opting into *higher* regulatory or disclosure standards (than their home countries) to implement a form of legal bonding.[66] Second, it may also dilute the force of a long-standing negative intuition of the bonding hypothesis—when issuers engage in reverse cross-listing, their shares exhibit negative abnormal returns as the result of market expectations that the foreign listing will facilitate conduct that would be impermissible in the home market.[67] Through this analysis, we may come to a better understanding of the ways in which issuer choice in the global capital markets operates.

What, then, are some of the theories or justifications for why issuers engage in reverse cross-listing? Here, we offer some initial ideas before discussing what we will call consumer-commercial markets bonding.

B. "Bonding" into Perceived *Weaker* Investor Protection Jurisdictions?

First we ask the perhaps counter-intuitive question urged upon us by the "legal bonding" hypothesis: do India and China have *superior* corporate governance and market regulation, or at least the appearance of such regulation, which delivers on the "legal bonding" promise for the foreign issuers who access their markets? While both of us, and others, have explored the complexities of India's and China's evolving corporate governance and market regulation regimes[68] and often found encouraging developments,

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66. *See* Future as History, *supra* note 1, at 651–52.

67. *See id.* at 674–75.

68. On India: *see* Vikramaditya Khanna, *Corporate Governance in India: Past, Present & Future?*, 1 JINDAL GLOBAL L. REV. 171 (2009); Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21 NAT'L LAW SCHOOL OF INDIA REV. 1 (2009), *available at* http://ssrn.com/abstract=1331581; N. Balasubramaniam, Bernard S. Black & Vikramaditya Khanna, *The Relation Between Firm-Level Corporate Governance and Market Value: A Case Study of India,* 11 EMERGING MARKETS REV. 319–40 (2010), *available at* www.elsevier.com/locate/emr; Khanna & Varottil, *supra* note 33; Dhammika Dharmapala & Vikramaditya Khanna, *Corporate Governance, Enforcement, and Firm Value: Evidence from India*, 29 J. L. ECON. & ORG. 1056–84 (2013); Rajesh Chakrabarti, *Corporate Governance in India - Evolution and Challenges* (January 17, 2005), *available at* http://ssrn.com/abstract=649857; Franklin Allen, Rajesh Chakrabarti, Sankar De, Jun Qian & Meijun Qian, *Financing Firms in India* (World Bank Policy Research Paper No. 3975, 2006), *available at* http://ssrn.com/abstract=923282; Afra Afsharipour, *A Brief Overview of Corporate Governance Reforms in India* (UC Davis Legal Studies Research Paper No. 258, 2011) [hereinafter Afsharipour, *Overview*], *available at* http://ssrn.com/abstract=1729422; Afra Afsharipour, *The Promise and Challenges of India's Corporate*

common perceptions of their investor protections has not yet shifted to "strong." Indeed, the perception seems to be that their legal systems and institutions are quite opaque, corrupt, inconsistent, poorly administered, inefficient, and riddled with sub-standard public and private enforcement.[69] If the legal bonding hypothesis seems unlikely as an explanation, then why else would a foreign issuer (e.g., from the United States or U.K.) seek an IPO and listing in India or China?

C. The Simple Quest for Capital; and the Quest for Unconvertible Currency

One potential explanation may be that India and China are both countries with many actual and potential investors who have limited domestic investment options, and both countries have a high demand for offerings. Accordingly, a listing for a foreign issuer might offer the prospect of increased investor liquidity and price benefits in the future, even if these benefits are not presently available because of capital controls and resulting market segmentation.[70] In addition, an IPO in these jurisdictions is an

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Governance Reforms, 1 Indian J. of L. & Econ. 33 (2010) [hereinafter Afsharipour, *Promise and Challenges*], *available at* http://ssrn.com/abstract=1640249; Bernard S. Black & Vikramaditya Khanna, *Can Corporate Governance Reforms Increase Firm Value? Event Study Evidence from India*, 4 J. Empirical Legal Studies 749, 759 (2007). On the PRC: *see* Nicholas C. Howson, *The Doctrine That Dared Not Speak Its Name - Anglo-American Fiduciary Duties in China's 2005 Company Law and Case Law Intimations of Prior Convergence*, *in* Transforming Corporate Governance in East Asia 193 (Hideki Kanda, Kon-Sik Kim & Curtis Milhaupt eds., 2008); Nicholas C. Howson, *China's Restructured Commercial Banks: Nomenklatura Accountability Serving Corporate Governance Reform?*, *in* China's Emerging Financial Markets: Challenges and Global Impact 123 (Martha Avery, Cai Jinqing & Zhu Min eds., 2009); Nicholas C. Howson, *Corporate Law in the Shanghai People's Courts, 1992-2008: Judicial Autonomy in a Contemporary Authoritarian State*, 5 E.Asia L.Rev. 303 (2010) [hereinafter Howson, *Corporate Law*]; Nicholas Calcina Howson, *Enforcement Without Foundation? - Insider Trading and China's Administrative Law Crisis*, 60 Am. J. Comp. L. 955 (2012); Clarke & Howson, *supra* note 33; Nicholas Calcina Howson, *Punishing Possession - China's All-Embracing Insider Trading Enforcement Regime*, *in* Insider Trading Research Handbook 327 (Stephen P. Bainbridge, ed., 2013); Nicholas Calcina Howson, *'Quack Corporate Governance' as Traditional Chinese Medicine - The Securities Regulation Cannibalization of China's Corporate Law and a State Regulator's Battle Against Party State Political Economic Power,* 37 Seattle U. L. Rev. 667 (2014). On both India and the PRC, *see* Nicholas Calcina Howson & Vikramaditya S. Khanna, *The Development of Modern Corporate Governance in China and India*, *in* China, India and the International Economic Order 513, 527–31 (Muthucumaraswamy, Sornarajah & Wang Jiangyu eds., 2010).

69. *See* Afsharipour, *Promise and Challenges*, *supra* note 68, at 34, 54, 59; *see* Howson, *Corporate Law*, *supra* note 68, at 321–25, 417–19.

70. *See Just in Case: Capital Controls Are Back as Part of Many Countries' Financial Armoury*, The Economist, Oct. 12, 2013, *available at* http://www.economist.com/news/special-report/21587383-capital-controls-are-back-part-many-countries-financial-armoury-just-case (discussing the lack of liquidity due to capital control's and China's motivation for such controls); *See also* Y. Nancy Ni, *supra* note 60, at 299. At the same time, initial market segmentation resulting from capital controls, positioned alongside relative scarcity, may also produce a positive price differential for issuers, as between the perceived weaker investor protections capital markets-traded stock and the rest-of-world traded stock. The great natural experiment/expression of this phenomenon is the very significant price differential between A share and H shares (including shares listed in London and New York) listed by PRC-domiciled issuers on the Shanghai Stock Exchange

excellent way to raise local currency, especially when capital account controls are in effect. These funds can then be used for local investments and/or business operations, rather than converting hard currency into local currency with the attendant exchange rate, remittance, and taxation risks.[71] This rationale might hold true for a wide range of foreign businesses, from products manufacturers seeking to capitalize or operate productive facilities, to financial institutions keen to transact and lend in the local currency. This dynamic is visible in the push for a Shanghai Stock Exchange international board, and was additionally evidenced in 2010 by the use of so-called "Dim Sum Bonds" by non-PRC foreign multinational McDonalds Corporation. McDonalds used these instruments to directly raise RMB yuan, the PRC's only partially-convertible currency, for its in-country operations.[72]

D. The Race to the Less-costly Middle; Rule 10b-5 and the *Morrison* Effect; Pre-bonded Issuers

Public securities issuances, especially in the U.S. markets, are very expensive in absolute terms—they require the involvement of underwriters, lawyers, and accountants. Expenses continue indefinitely with the burdens of continuing disclosure, which require the continued involvement of lawyers and accountants.[73] Foreign markets, especially those with perceived weaker investor protections, must appear *ex ante* to be comparatively cheaper both on the primary transaction side and with respect to continuing disclosure.

One specific "cost" that issuers from stronger perceived investor protection nations, particularly non-U.S. firms, may be interested in avoiding are the costs associated with Rule 10b-5 class action litigation by private attorneys.[74] Here, issuers from stronger perceived investor jurisdictions

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and the Hong Kong Stock Exchange (or London, New York, etc.) respectively. The Hong Kong equivalent of the Dow Jones or S&P indices, The Hang Seng Index, even goes so far as to track this differential via a separate index, the "Hang Seng China AH Premium Index." This differential will remain as long as PRC capital account controls remain in place, and there is no significant opportunity for arbitrage between A and H share holdings. *See Shanghai-Hong Kong Valuation Gap Narrows on Stock Arbitrage Bets*, BLOOMBERG, July 28, 2014, *available at* http://www.bloomberg.com/news/2014-07-28/china-s-stock-index-futures-rise-after-industrial-profits-climb.html (indicating that the differential between A and H shares has narrowed recently due to increased arbitrage opportunities arising from the relaxing of capital controls on the capital markets).

71. *See McDonalds Considers Dim Sum Bonds as Fundraising Option*, BLOOMBERG, Feb. 27, 2012, [hereinafter *McDonalds*], *available at* http://www.bloomberg.com/news/2012-02-28/mcdonald-s-considers-dim-sum-bonds-as-fundraising-option.html (noting that financing expansion in this manner is being considered by McDonalds); *Xinhua Insight: Global Investors Hunger for Dim Sum Bonds*, XINHUA NET, July 7, 2014, *available at* http://news.xinhuanet.com/english/indepth/2014-07/07/c_133466707.htm.

72. *See McDonalds, supra* note 71 (reporting that McDonalds will consider a second issuance of RMB bonds in Hong Kong after its RMB 200 million yuan 3% three year notes issued in 2010).

73. *Considering an IPO? The Costs of Going and Being Public May Surprise You*, PwC's Deals Practice, Sept. 12, 2012.

74. For a general discussion see *Racing Towards the Top*, *supra* note 22; Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173 (2012); Beit-

may share the perceptions of fellow issuers from weaker perceived investor protection jurisdictions that have run into the teeth of the orthodox legal bonding promise.[75] For issuers from relatively stronger perceived investor protection market issuers, avoidance of 10b-5 class actions can be achieved not only by refusing to enter the U.S. capital markets, but also by affirmatively entering another national market which 10b-5 cannot reach. This is where the change signaled by Justice Scalia's opinion in the 2010 U.S. Supreme Court case *Morrison v. Nat'l Austl. Bank Ltd.* becomes highly relevant. In *Morrison*, the Court laid aside the long-standing "conduct" and "effects" tests used by the lower federal courts for application of U.S. federal securities anti-fraud laws, stating that civil liability under such laws would attach only to transactions in securities listed on a U.S. stock exchange and to securities transactions taking place in the U.S.[76] Accordingly, the opinion provided a solid rationale for any non-U.S. issuer's election to list on non-U.S. exchanges (and prohibit any ADR program on their non-U.S.-listed shares).

Even U.S.-domiciled or headquartered firms might take advantage of *Morrison* by having their non-U.S.-domiciled subsidiaries achieve listings on non-U.S. exchanges (especially if they keep the proceeds outside of the U.S.), which might include weaker perceived investor protection markets, thereby neatly avoiding the threat of 10b-5 class action lawsuits (and perhaps even SEC enforcement under the "conduct" or "effects" tests). Of course, any such U.S. issuer would have to calculate the degree to which such a strategy might be noted inside the United States and the resulting costs of being perceived as "off-shoring."[77]

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ing Cheng, Suraj Srinivasan, and Gwen Yu, *Securities Litigation Risk for Foreign Companies Listed in the U.S.* (June 2014), *available at* SSRN: http://ssrn.com/abstract=2163864 or http://dx.doi.org/10.2139/ssrn.2163864; Rene Stulz, *Globalization, Corporate Finance, and the Cost of Capital*, 12 J. of Applied Corporate Fin. 8 (1999); W. Reese and Michael Weisbach, *Protection of Minority Shareholder Interests, Cross-Listings in the United States, and Subsequent Equity Offerings*, 66 J. of Fin. Econ. 65 (2002).

75. For example, *see Plaintiffs Lawyers Continue to Target U.S. Listed Chinese Companies*, D&O Diary, Sept. 25, 2013, *available at* http://www.dandodiary.com/2013/09/articles/securities-litigation/more-about-stories-were-following-libor-scandal-firrea-chinese-company-securities-suits; Kevin LaCroix, *U.S. Listed Chinese Companies Attracting Scrutiny, Securities Suits*, D&O Diary, Nov. 16, 2010, *available at* http://www.dandodiary.com/2010/11/articles/subprime-litigation/u-s-listed-chinese-companies-attracting-scrutiny-securities-suits.

76. "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." *See Morrison*, 561 U.S. at 2888. Dodd-Frank, at Section 929P(b) amending 1934 Act Section 27, restored federal court jurisdiction for just SEC enforcement actions under 10b-5 based on the previously in effect conduct and effects tests.

77. Conversely, some strong investor protection jurisdiction issuers might not find home jurisdiction listing too costly, but may simply be unable to access the public capital markets in their home jurisdiction—for instance, where underwriters will not underwrite, and mutual funds are not interested in, small cap, development stage firms. For these issuers, after the private or venture capital markets have been exhausted, a foreign listing, even in a weaker perceived investor protections market, may be the only way forward. *See* Graham Bowley, *Fleeing to Foreign Shores - Fast-Growing Companies Look*

There may also be issuers from stronger perceived investor protection markets who can both benefit from traditional "legal bonding" and also access capital in weaker perceived investor protection markets. These issuers include firms with established listings in stronger perceived protections markets, which then do a follow-on IPO and listing in a less well-perceived market. Standard Chartered Bank is an excellent example of this phenomenon, as it is listed on the London Stock Exchange and the Hong Kong Stock Exchange, and now has an IDR listing on India's NSE. According to the legal bonding hypothesis, Standard Chartered is already "bonded" to the apparently better norms associated with its primary listing jurisdiction. A listing in an apparently weaker jurisdiction does not disturb that valuation support.

There are other potential costs for such issuers arising from this kind of secondary listing, however. For example, what if India's NSE listing requirements, securities law, or corporate law mandated that any issuer listing stock on the NSE have a board of directors that is entirely independent? Or what if an issuer from a perceived stronger investor protections market completes an IPO on a future international board of the Shanghai Stock Exchange, where CSRC regulations and now PRC law require that one-third of the board directors be independent directors as understood under Chinese law? In short, an issuer from a perceived stronger investor protections jurisdiction with a dual-listing in both a well-regarded market and a weaker perceived venue might thereby subject itself to even more onerous corporate governance norms, with limited benefit from legal bonding.

Whatever the true effect such dual listings have on the value of these firms, we suspect that in the short term it is precisely these kinds of stronger investor protection jurisdiction issuers that are likely to engage in IPOs in weaker perceived investor protection markets. Those firms will seek such listings for the "consumer-commercial markets bonding" that we discuss immediately below. Thus, we may expect to see established multinational firms with longtime listings in environments perceived to have stronger investor protection accessing capital through entry points like India's IDR program or Shanghai's future international board.[78]

E. "Consumer-commercial Markets Bonding"

There is, however, another factor that we think is thrown into prominence by our consideration of the coming reverse listing traffic, which is infrequently discussed even under the traditional legal bonding hypothesis.

Abroad for Investors, N.Y. Times, Jun. 8, 2011, at B1 (focusing on start-up companies' migration to foreign exchanges even for IPOs).

78. Only when we see a non-U.S. or non-U.K.-listed issuer IPO directly and exclusively in India or China—for instance, if Prada had listed immediately and only on the Shanghai Stock Exchange (instead of the Hong Kong Stock Exchange), or a U.S. or European pharmaceutical company completes an IDR IPO on the NSE without a prior IPO in the U.S. or U.K.—will the world have a suitable "control" for the theoretically negative value effects of entanglement with a weaker perceived investor protections jurisdiction, or indeed no effect whatsoever.

This factor is the desire of issuers to effect a kind of broad advertising-commitment bonding into the receiving markets, distinct from the reputational punch of perceived better governance/regulation at the heart of the legal bonding hypothesis.

This broad consumer-commercial markets bonding consists of several components: (i) a straight advertising-type appeal to the receiving jurisdiction's products and services markets and the consumers who participate in such markets; (ii) reputational enhancement as a global firm with a local identity (and presumably local understanding); (iii) the signaling of long-term commitment by the issuing firm to that specific market, as well as the prospect of products/services market consumer ownership; (iv) acknowledgment of the sovereign legal-regulatory establishment of the nation in which the issuer is listing; and (v) an appeal to the receiving market's regulators for the provision of franchise or licensing benefits.

To illustrate how these motivations and effects may operate, consider the following example. Let us assume that J.P. Morgan Chase conducts an IPO on a future Shanghai international board. It can be credibly assumed that the transaction would: (i) aid that U.S. bank in advertising its financial products and services in the Chinese domestic markets, while comparing favorably against the less nimble PRC state-owned banks and relatively unknown foreign banks; (ii) establish in the minds of Chinese investors and government officials that Chinese retail investors and institutions have ownership of one of the world's most important financial institutions; (iii) signal a deep long-term commitment to China above and beyond profiting off of business operations in China and favorable wage rates; (iv) display formal recognition of and submission to the Chinese legal and regulatory system and its institutions; and (v) aid the U.S. bank in obtaining operational, investment, or organizational preferences under China's post-World Trade Organization (WTO)-accession regulation of foreign commercial banking and/or investment banking operations inside the PRC.[79] Indeed, this example of strategic aims conceived for a hypothetical J.P. Morgan Chase listing on the coming Shanghai international board may have informed the actual Standard Chartered Bank IDR IPO on India's NSE.[80] It is important to note the significance of the Standard Chartered Bank listing in India due to the bank's history in the sub-continent.[81] Perhaps a future Hong Kong Shanghai Bank Corporation or AIG IPO on the Shanghai international board may have greater significance than the entry of J.P. Morgan

79. *See* Liping He & Xiaohang Fan, *Foreign Banks in Post-WTO China: An Intermediate Assessment*, 12 China & World Economy 3, 4-10 (2004) (describing developments in foreign bank entry in China since China's accession to the WTO).

80. *See, e.g.*, *Standard Chartered's Indian Share Offering Opens*, BBC Business News, May 25, 2010, *available at* http://www.bbc.co.uk/news/10151924.

81. *See Our History*, Standard Chartered Bank, www.sc.com/en/about-us/our-history.html (last visited Oct. 20, 2014) (explaining Standard Chartered Bank's historical foundation in India); *see also India Sustainable Review 2012*, Standard Chartered, 2012, at 18 (providing an example of Standard Chartered Bank's charitable involvement in India and the Asia sub-continent).

in the Chinese context.[82]

Although these benefits may matter a great deal for industries where developing the trust of local customers is of great importance (*e.g.*, in India – IDR interest by Vodafone (cell phone services), HSBC and Citigroup (banking and financial services)), they may also be beneficial in other industries. Indeed, examples focusing on large multinational consumer products firms like Proctor & Gamble, Unilever, Carrefour, McDonalds, or large carmakers, where local consumers only interact more broadly with the foreign issuer's consumer products, would underline the benefits to be won by an Indian or Chinese IPO for those firms.

We want to emphasize that these aims almost certainly also informed non-U.S. issuers' decisions to cross-list into the United States—the traditional focus of the legal bonding hypothesis—even though the theoretical literature on traditional legal bonding rarely addresses this. Thus, aside from the legal and reputational benefits offered and the access to the "deepest, most liquid" pool of capital in the world, many developing world non-U.S./U.K. issuers cross listed in the United States as part of an advertising strategy focused on the products and services that they hoped to offer, or the developed market companies that they hoped to acquire and control. One need only think of Tata Motors Limited and Lenovo in this regard. The same can also be said for developed markets issuers listing in the U.S. markets, like Daimler (*i.e.*, before its purchase of Chrysler), Deutsche Telecom, Vodaphone, etc.

F. Measuring Success

The difficulty with evaluating this notion of consumer-commercial markets bonding is that it potentially delivers very long-term benefits for the issuer, which may not manifest so directly in the price effects on the less investor-protective jurisdiction's IPO stock. Prior research on the legal bonding hypothesis has focused, quite appropriately, on the pricing value apparently delivered by entanglement with more stringent corporate governance and market regulation in the listing firm's home country (e.g., the price effect, on the Brazilian Stock Exchange, of a Brazilian firm's cross listing in the United States). If, as we theorize here, the motivating benefits for a reverse cross-listing are longer-term, highly dependent, and relate largely to the enhancement of business operations and product development in the receiving jurisdiction, then it would seem that tracking the price effects would present some empirical challenges; as an example, it

82. Just as Standard Chartered Bank has a strong history in India, Hong Kong Shanghai Bank Corporation and American International Group have roots in Shanghai, China. *See HSBC's History*, HSBC, http://www.hsbc.com.hk/1/2/about/home/hsbc-s-history (last visited Oct. 20, 2014) ("The HSBC Group is named after its founding member, The Hongkong and Shanghai Banking Corporation Limited, which was established in 1865 in Hong Kong and Shanghai to finance the growing trade between China and Europe."); *see also Our 90 Year History*, AIG, http://www.aig.com/our-90-year-history_3171_437854.html (last updated Sept. 4, 2014) ("AIG traces its roots to 1919, when American Cornelius Vander Starr established a general insurance agency, American Asiatic Underwriters, in Shanghai, China.").

would be problematic to try to estimate the price effect on the IPO price in Shanghai of a NYSE-listed U.S. firm cross-listing in Shanghai based on these longer-term benefits.[83] Indeed, the price effect of greatest interest is likely to be the impact on the price of the issuer's stock in its home jurisdiction (i.e., the NYSE in the above example) after a cross-listing transaction. This may present its own challenges.[84]

G. What Kinds of Foreign Issuers?

If the above is true, we can speculate about the kinds of issuers that may seek to be listed on the perceived weaker investor protection markets. This may also help us understand the relative importance of the sub-strains within what we have identified as a general theory of consumer-commercial markets bonding[85] as against the other motivations we highlight here, such as capital availability[86] or the negative implication of the traditional legal bonding hypothesis that foreign listings by U.S. companies conjure negative price abnormalities.[87]

As a starting point, it seems that firms in businesses depending on high levels of customer or supplier trust would benefit from consumer-commercial markets bonding more than others. Sectors such as banking and financial services, personal services, and technology-related services (e.g., cell phones) seem particularly suited to explore reverse cross-listing. Firms representing these sectors appear to have expressed interest in reverse cross-listing, at least in India.[88] In addition, and as we note above, foreign firms that have a significant appetite for local currency, especially a non-convertible or partially convertible currency, should also be very interested in cross-listing.[89] However, sectors in which this level of trust is not so necessary—for example, where there is no need for local currency

83. *See generally* Nicola Cetorelli & Stavros Peristiani, *Firm Value and Cross-Listings: The Impact of Stock Market Prestige*, *in* FEDERAL RESERVE BANK OF NEW YORK STAFF REPORTS, No. 474 (Sept. 2010), http://www.newyorkfed.org/research/staff_reports/sr474.pdf (finding a variable in the "future evolution of the destination market").

84. *See* Jun Chen, Cinder Zhang & Yun Guan, *Sweet Home? An Empirical Study on Reverse Cross-Listing* 3, 17 (23rd Australasian Finance and Banking Conference 2010 Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663391 (suggesting an analysis called "rented reputation," where firms take advantage of investors' relative lack of market knowledge by reverse cross-listing in a market with weaker corporate governance and still signaling to investors that a bonding effect will take place).

85. *See id.* at 2 (speculating on the kinds of issuers that may be attracted to reverse-listing); *see* Mike W. Peng & Dane P. Blevins, *Why Do Chinese Firms Cross-List in The United States?*, *in* THE CONVERGENCE OF CORPORATE GOVERNANCE: PROMISES AND PROSPECTS 257 (Abdul A. Rasheed & Toru Yoshikawa eds., 2012) (discussing the reputational benefit of "global status").

86. Chen et al., *supra* note 84, at 2.

87. Future as History, *supra* note 1, at 674–75.

88. *See India Said to Limit Depository Receipt Swap at $5 bn*, BUSINESS STANDARD, July 5, 2012, *available at* http://www.business-standard.com/article/markets/india-said-to-limit-depository-receipt-swap-at-5-bn-112070500083_1.html.

89. *See* John F. Zhang, The Long-run Effect of Cross-listing on Firms: Evidence from China (2014) (unpublished M.S. dissertation, Auckland University of Technology), *available at* https://aut.researchgateway.ac.nz/bitstream/handle/10292/7432/FanZ.pdf?sequence=6.

financing, or where there is a mystique to remaining overtly foreign—are the ones where the value of this kind of bonding is less, making reverse cross-listing less likely. For example, if high-end luxury producers of goods such as Louis Vuitton bags or high-end Belgian Chocolates felt that caché arose from their "otherness" or "foreignness," they would probably prefer to avoid any contrary association implicated by reverse cross-listing. Issuers connected to such "snob effect" goods or services would be ones that might find it counter-productive to do a reverse cross-listing.[90] This kind of industry/sector breakdown may be helpful in forming a base from which to explore the potentially differential effects of reverse cross-listings.

Conclusion

In our increasingly global capital markets, the development of reverse cross-listing seems, at first cut, to be slightly counter-intuitive. Prior scholarship indicates that one of the most common reasons for firms to cross-list in the United States or the U.K. is to obtain the benefits associated with being listed in a jurisdiction perceived to be more protective of investors than the firm's home country— the legal bonding hypothesis. This added level of perceived protection may make the firm a more appealing investment opportunity and cause investors to value the issuer more highly. However, reverse cross-listing runs in the opposite direction—firms from stronger perceived investor protection regimes, such as the United States or the U.K., may still list in weaker perceived investor protection regimes, such as India or China. This article provides an initial exploration into why reverse cross-listing might arise with respect to specific product markets, and what the practice may tell us about the decision to cross-list generally, regardless of the listing direction.

Our analysis is necessarily preliminary because the level of real reverse cross-listing has been minimal or clearly triggered by very specific circumstances (*e.g.*, corporatized PRC state-owned enterprises domiciled offshore, or "Red Chips," seeking domestic listings) in both India and China. However, the fact that it happens at all, that important jurisdictions like India and China seem keen for more of it to happen, that firms from the more developed markets appear quite interested in engaging in more reverse cross-listing into India and China, and that there is some disenchantment with capital formation in the highly-regulated United States, all suggest that reverse cross-listing is something that will grow. We explore a number of potential explanations for reverse cross-listing that pertain to two radically different political economies (*e.g.*, tapping Indian or Chinese investors' interest, raising capital in currency-controlled countries for expenditure therein, avoiding expensive U.S. securities enforcement), but argue that the strongest explanation lies in our notion of consumer-commercial markets bonding. This involves the developed world listing firm's

90. *See generally* Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1388–89 (2005) (describing the "snob effect" in fashion goods).

substantial advertising into, or substantial commitment to, the receiving country's market and regulatory establishment.

This explanation for reverse cross-listing leads to predictions on which types of firms may find reverse cross-listing an attractive option to pursue. In particular, firms in sectors in which high levels of customer or supplier trust are valuable, such as banking and financial services, or in which there is an urgent need to raise local currency finance where that currency is non- or partially-convertible, such as in manufacturing or in restaurant services, might find reverse cross-listing attractive. Conversely, sectors where customers value the "foreignness" of an issuer's product, such as in the foreign-branded luxury goods industry, are less likely to follow this approach. These predictions can then be tested as more instances of reverse cross-listing arise.

This approach may also, conversely, provide deeper insights into why some non-U.S. or non-U.K. firms may decide to list in the United States or the U.K. on the transaction vector that originally triggered the legal bonding discussion. It may not always be entirely about legal bonding and anticipated positive valuation effects, but also about obtaining other commercial advantages. Such a multi-factor analysis may aid in better understanding the effects of cross-listing generally on share prices. Sometimes the increase in share price may reflect in part legal bonding, but may also reflect some of these other benefits highlighted here. At times it may reflect an offsetting of legal bonding and other effects. The newly-emphasized dynamic highlighted by our initial consideration of reverse cross-listing allows us to develop a more nuanced understanding of the cross-listing phenomena generally as it develops in the future, and regardless of its direction—orthodox or "reverse."