

## Delaware's Place in the World

**Author :** Verity Winship

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William J. Moon, *Delaware's Global Competitiveness* (Jan. 30, 2021), available at [SSRN](#).

Post-election headlines that Delaware is finally “[on the map](#)” after “[centuries of obscurity](#)” are anathema to corporate law scholars. Delaware has long been at the center of US corporate law. US corporations may choose where they organize, untethered to their physical location. This creates the tantalizing – and much-studied – possibility of a market for corporate law. In many accounts Delaware dominates that market, with the majority of Fortune 500 companies organized in the state. But the market for corporate charters is not just a domestic US market. It is also a global market. And in the context of that market, Delaware is not doing so well. In *Delaware's Global Competitiveness*, Professor William Moon studies the place of Delaware corporate law in the world.

Moon steps into a crowded field, against the backdrop of decades of articles about the reasons for Delaware's dominance, debunking or promoting or explaining the market for corporate law. But *Delaware's Global Competitiveness* and Moon's recent companion article [Delaware's New Competition](#) fill a key gap. As Moon points out, the discussion of Delaware's corporate dominance has almost entirely neglected the global scope.

Delaware itself has sought worldwide reach. The Delaware Division of Corporations has a globe as its [icon](#). Its [page](#) answering “Why Incorporate In Delaware?” gives users the ability to “choose their language” from among “???????, Deutsch, Español, Français, ?????, Nederlands, ???, Português, [and] ??.” Moon suggests that these efforts have been unsuccessful.

Moon provides data to support his claims about Delaware's growing “international unpopularity.” He examined all publicly traded foreign companies listed on American stock markets from 1985 to 2018, focusing on companies organized outside of their home country. While 30% of these companies were organized in Delaware in 1985, this percentage steadily decreased until it reached 11% in 2018.

Moon then digs deeper into the underlying documents about Chinese corporations listed on American Stock Markets. Interestingly, most are incorporated outside of China; they “actively shop for corporate law.” (P. 24.) And Delaware's law is no longer a common choice. Whereas 40% were incorporated in Delaware in 1985, these numbers have dropped to single digits. In 2018, less than 5% incorporated there.

In digging, Moon uncovers the key fun fact of the article: More Chinese companies listed on American Stock Markets are incorporated in Nevada than in Delaware. Fun fact, at least, for followers of corporate law, who think immediately of Nevada's special claim to being a “[liability-free jurisdiction](#),” attracting all sorts.

Why is Delaware unpopular globally? Moon makes the plausible point that Delaware's prohibitions on self-dealing transactions are an awkward fit with Chinese companies, which are set up as a tangle of entities that routinely engage in intra-group transactions. (P. 44.) The content of Delaware corporate law is the problem. One size does not fit all, and “good” corporate law may not be absolute.

Moon also addresses some of the other possible explanations for Delaware's international unpopularity. There are two chief contenders. The first is a tax story. Moon's data reveals the popularity of incorporating in well-known tax havens: Cayman Islands (62% of the Chinese companies studied in 2018) and the British Virgin Islands (13%). The Nevada incorporations come with US taxation, which complicates the tax story, but it is difficult to rebut fully. Likewise, the

possibility that prized “foreign issuer” status drives incorporation choice is difficult to refute. Moon’s response is creative: he relies in part on the Nevada incorporations, but also draws on hand-collected information showing that these companies do not adopt Delaware-like corporate governance provisions.

One of the pleasures of this article is the questions that it raises. For example, which companies are shopping? And how has this changed over the thirty or so years in Moon’s study? An increased pool of corporations is “eligible to shop for Delaware law” as a “number of major foreign nations have relaxed legal restrictions that forced corporations to be bound by local corporate law.” (P. 18.) Brazil, Canada, China, India, Israel, Japan, the U.K. and the US all allow corporations with operations there to incorporate elsewhere. (P. 19.) Although Chinese companies are Moon’s focus, he also includes an intriguing mention of other companies and countries – for example the “Amazon’ of Africa” was organized in Germany. (n. 17.) There is space, in other words, for interesting future study that builds on this article’s many strengths.

The modern story of Delaware corporate law – like other legal areas – is partially about the role of the United States in a global marketplace. By identifying shifts in the corporate law market, Moon’s work creatively and thoughtfully pushes the reader to consider corporate law’s global scope.

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